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IN PRINCIPLE BUT NOT IN PRACTICE: THE EXPANSION OF ESSENTIAL STATE INTERESTS IN THE DOCTRINE OF NECESSITY UNDER CUSTOMARY INTERNATIONAL LAW

*Jonathan Bellish**

I. INTRODUCTION

Suppose that two sailors, A and B, are shipwrecked in the middle of the ocean. Both sailors simultaneously notice a floating plank, but it is only big enough to support one of the two men. Exhausted, Sailor A swims to the plank first, but Sailor B, facing certain death, decides to push A off of the plank and A drowns. Does B have a legally valid defense for his actions? Around 155 B.C., the Greek philosopher Carneades set forth this hypothetical situation, known today as "the plank of Carneades," to posit that strict necessity could serve as a valid defense for an otherwise unlawful action.[1] Indeed, the concept of necessity in law is as old as Western society itself.

Over the years, the doctrine of necessity has moved beyond the municipal realm, and now plays an integral role in the law of nations. Regardless of whether the defense of necessity is a stated exception to the laws of war or a *post facto* excuse for a breach of international obligations, essential state interests are at the heart of the doctrine's invocation and application. Until the late twentieth century, a state's "essential interests" were limited to those necessary to maintaining the existence of a state in the face of foreign or domestic violence of a military nature. This paper explores the expansion of the concept of essential state interests during the late twentieth century, as it grew to include both ecological and economic interests. Surprisingly, this nominal expansion did little in the way of expanding the applicability of the doctrine of necessity as a whole.

Part II tracks the historical development of the doctrine of necessity under customary international law from a mere diplomatic pronouncement to a formally recognized doctrine capable of overriding express treaty obligations. Part III expounds upon the role of essential state interests in the modern application of the doctrine of necessity, showing that their primary function is to limit the use of the doctrine. Part IV shows that the initial expansion of essential state interests to include ecological interests, as seen in the *Case Concerning the Gabčíkovo* -

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1. *See, e.g.*, Khalid Ghanayim, *Excused Necessity in Western Legal Philosophy*, 19 CAN. J. L. JURIS. 1 (2006), *available at* http://ssrn.com/abstract=995343.

Nagymaros Project, will not likely lead to a near term increase in the successful use of the doctrine to protect such interests. Part V moves from ecological interests to economic ones, and seeks to explain the dichotomy in the International Centre for the Settlement of Investment Dispute's ("ICSID") holdings in *CMS v. Argentina* and *LG&E v. Argentina*; the former ruled that the Argentine financial crisis of the late 1990's created a state of necessity while the latter ruled that it did not. Part VI suggests that ICSID jurisprudence following the *CMS* and *LG&E* is proof that economic interests, despite their characterization as "essential state interests" in *LG&E v. Argentina*, will not lead to an expansion of the successful use of the doctrine. Part VII discusses the future of the doctrine of necessity as it relates to ecological and economic necessity. Part VIII concludes.

II. THE DEVELOPMENT OF THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW

The first case to mention the concept of necessity in the context of international law was in fact not a case at all. Rather, it was a diplomatic dispute between Great Britain and the United States of America. Nevertheless, "[i]t was in the *Caroline Case* that self-defence was changed from a political excuse to a legal doctrine."[2] Accordingly, the modern doctrine of necessity under customary international law can be traced directly to the end of the Canadian Rebellion of 1837.[3]

After the Canadian insurgents had been largely defeated, two rebels, McKenzie and Rolfe, travelled to Buffalo, New York where they assembled a force of several hundred men to carry out a rebellion.[4] The group, made up primarily of American citizens, openly invaded and took control of Navy Island, a possession of the British, and held the island for seventeen days.[5] During the siege, the insurgents used an American steamship, "The Caroline," to make trips between Navy Island and Fort Schlosser, an American military base in Buffalo, to supply the rebels with weapons and ammunition.[6] On the seventeenth night of the siege, a British Colonel boarded "The Caroline" with approximately seventy-five men and set the vessel on fire, sending it over Niagara Falls and killing two Americans in the process.[7]

Initially, the British acted as if there would be no repercussions for their taking of "The Caroline," but when the Americans arrested Alexander McLeod and charged him with murder and arson in connection with the taking, it became a serious diplomatic incident.[8] The British raised three defenses in response to the charges against them, namely, (1) the piratical character of "The Caroline," (2) that the ordinary laws of the United States were not being enforced, and (3) the defense

2. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82 (1938).
3. *Id.*
4. *Id.*
5. *Id.* at 83.
6. *Id.*
7. *Id.* at 84.
8. *Id.* at 85.

of self-preservation.[9] During negotiations between Mr. Webster, the American Secretary of State, and Mr. Fox, the British Minister at Washington D.C., the British quickly dropped the first two defenses and only spoke of self-preservation in vague terms.[10] However, during the course of the diplomatic negotiations, Secretary of State Webster sent the British a now-famous note clarifying the concept of self-preservation as a defense. According to Webster, the necessity of self-defense must be "instant, overwhelming, leaving no choice of means, and no moment for deliberation."[11] Furthermore, it must be shown that the moment of necessity authorized the Canadian officials to enter the territory of the United States, that once inside United States territory the Canadian officials did nothing unreasonable or unnecessary, and that all other options were either unpractical or would be unavailing.[12]

In response, Lord Ashburton was able to fit the facts of the taking of "The Caroline" into the framework provided by Webster.[13] As a preliminary matter, the taking of "The Caroline" was necessary because the insurgent forces were assembled in America and the American government was either unwilling or unable to stop them.[14] Additionally, when the British went looking for "The Caroline" they expected her to be moored off of Navy Island, and it was not until the last minute that they realized that she was moored in American territory leaving them no time for deliberation.[15] Finally, Lord Ashburton justified the measures taken as being reasonable, necessary, and narrowly tailored to the exigencies of the situation. He claimed that the British forces attacked at night in order to minimize casualties, set the ship on fire because they feared that the current alone would not be strong enough to carry the ship away, and brought the ship to the middle of the river to prevent injuries to persons or properties on the bank.[16]

Although Lord Ashburton's response could be seen as an "ingenuous attribution of altruistic motives to acts of a doubtful character,"[17] Daniel Webster accepted the apology with which Lord Ashburton closed his letter.[18] In the end, the two governments agreed on the principle of non-intervention and recognized the narrowness of its exceptions.[19]

This chain of events is important to the development of the doctrine of necessity under customary international law in that it moved away from a loosely defined natural-rights conception of a state's primordial right to self-preservation

9. *Id.*
10. *Id.* at 86.
11. *Id.* at 89.
12. *Id.*
13. *Id.*
14. *Id.* at 90.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 91.
19. *Id.*

and replaced it with more concrete principles. Through Daniel Webster's framework for self-preservation and Lord Ashburton's acquiescence to that framework, the parties defined the limits of self-preservation, sought to establish some substantive content to fill the framework, and subjected self-preservation in violation of international customary law to the limiting condition of strict necessity. It took almost one hundred years for the principles established in *The Caroline Case* to enter a judicial opinion.[20] As is so often the case, they appeared for the first time in a dissent.[21]

The Case of the S.S. Wimbledon involved an English steamship chartered by a French company shortly after World War I.[22] The ship, carrying 4,200 tons of munitions, was headed for the Polish Naval Base at Danzig when, on the morning of March 21, 1921, it approached the Kiel Canal in Germany.[23] At that point, the *S.S. Wimbledon* was denied passage through the canal because Germany had declared itself a neutral in the ongoing Russo-Polish War and had issued Neutrality Orders on July 25, 1920 stating that no ships carrying munitions destined for Poland or Russia would be allowed to pass through the Canal.[24] The delay cost the ship thirteen days.[25]

On its face, the denial of passage on the part of the German government directly contradicted Article 380 of the Peace Treaty of Versailles, a treaty that Germany signed and ratified at the end of the First World War, which read, "[t]he Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."[26] The Permanent Court of International Justice agreed that this provision was binding notwithstanding German neutrality.[27]

According to the majority, the effect of Article 380 was that the Kiel Canal ceased to be an internal waterway under the sovereign control of the riparian power and instead became an international waterway intended to provide universally available access to the Baltic Sea.[28] The only condition affecting the provision was that the nation seeking passage be at peace with Germany.[29] The *S.S. Wimbledon*, "belonging to a nation at that moment at peace with Germany, was entitled to free passage,"[30] and no claims of neutrality or sovereignty could override the international obligations created by the treaty provision in question.[31]

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20. S.S. Wimbledon (U.K. v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 36 (Aug. 17).
21. *Id.*
22. *Id.* at 16.
23. *Id.* at 19.
24. *Id.*
25. *Id.*
26. Treaty of Versailles art. 380, June 28, 1919, 3 U.S.T. 3714.
27. S.S. Wimbledon (U.K. v. Ger.), 1923 P.C.I.J. (ser. A) No. 1, at 39 (Aug. 17).
28. *Id.* at 22.
29. *Id.*
30. *Id.*
31. *Id.* at 29.

Accordingly, the Permanent Court of International Justice held that Germany was required to pay all costs associated with the delay, with interest.[32]

In a dissent, Judges Anzilotti and Huber articulated for the first time that the notion of necessity could allow a nation to abrogate its treaty obligations.[33]

> If, as the result of a war, a neutral or belligerent State is faced with the necessity of taking extraordinary measures temporarily affecting the application [of a treaty] in order to protect its neutrality or for the purposes of national defence, it is entitled to do so even if no express reservations are made in the convention.[34]

The dissenters went on to state that "[t]he right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it."[35] Thus, the dissent concluded that a state of necessity overrode Article 380 and allowed Germany to protect its interests as a neutral power.[36]

Anzilotti's and Huber's dissent in *The Case of the S.S. Wimbledon* advanced the doctrine of necessity under customary international law in two important ways. First, it announced that a state of necessity could excuse a nation from its treaty obligations. In *The Caroline Case*, necessity was used as an exception to uncodified custom, and it is unclear whether such a defense would have been valid if the actions taken in *The Caroline Case* contradicted an express treaty obligation. Second, the dissent in *The Case of the S.S. Wimbledon* advanced the notion that the protection of essential state interests was the underlying rationale for invoking necessity in abrogating international obligations. In this case, Germany's interest in maintaining its security and integrity was seen as essential enough to merit a defense of necessity.[37] Indeed, until the late twentieth century, national security was seen as the only state interest essential enough to merit a valid necessity defense.[38] However, it took considerably less time for the doctrine of necessity—at least as it relates to existential interests and express treaty obligations—to move from the dissent to the majority.

The Lawless Case was the first of its kind in two important respects. In addition to being the first opinion delivered by the European Court of Human Rights, it was the first successful necessity defense raised by a country found to have violated express treaty provisions.[39] In 1939, the Parliament of the Republic of Ireland passed the Offenses Against the State Act in response to violent acts

32. *Id.* at 31.
33. *Id.* at 36.
34. *Id.*
35. *Id.* at 37.
36. *Id.* at 40.
37. *Id.*
38. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 68 (Sept. 25).
39. *See* Lawless v. Ireland (No. 3), Eur. Ct. H.R. (ser. A) at 34 (1961).

perpetrated by the Irish Republican Army ("IRA").[40] This act outlawed membership in any "unlawful organization" and allowed for the arrest and detention, without warrant, of any person suspected of carrying out or conspiring to carry out violent acts on behalf of an unlawful organization.[41] On June 23, 1939, nine days after the Offenses Against the State Act entered into force, the IRA was declared an unlawful organization under the meaning of the Act.[42] Many arrests and detentions were made but were subsequently declared unconstitutional by the High Court.[43] As a result, Parliament passed an amended version of the Act in 1940 which allowed for detention without trial "if and whenever and so often as the Government makes and publishes a proclamation declaring that the Powers conferred by this part of this Act are necessary to secure the preservation of the public peace and order."[44]

From 1940 through the early 1950's, there was little IRA activity, but in 1954, an outbreak of IRA violence led to the destruction of railway bridges, attacks on police barracks, sabotage of telephone wires, and robberies of munitions stores.[45] In response to the attacks, the Irish government activated the power of arrest and detention from Section 3, Subsection 2 of the 1940 Act and published its proclamation in the Official Gazette on July 5, 1957.[46]

On July 11, 1957, G.R. Lawless, a known member of the IRA, was arrested for being a member of an unlawful organization while he was about to embark on a ship to England.[47] Though he was supposed to be held for only forty-eight hours, he was instead transferred to a military prison in the Currah, County Kildare, known as "The Glass House."[48] He was subsequently transferred to a nearby internment camp where he was detained for five months without formal charges or a trial.[49] After exhausting his domestic appeals with no avail, Lawless introduced an application to the newly formed European Court of Human Rights seeking his immediate release from detention, payment of compensation and damages for his detention, and payment of all legal costs incurred.[50] Though he was released shortly after his appeal was filed, Lawless continued to pursue his claim against the government for compensation, damages, and reimbursement in the European Court of Human Rights.[51]

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40. *Id.* at 5.

41. Offences Against the State Act, 1939 (Act No. 13/1939) § 30(1) (Ir.), *available at* http://acts.oireachtas.ie/en.act.1939.0013.1.html.

42. Lawless v. Ireland (No. 3), Eur. Ct. H.R. (ser. A) at 7 (1961).

43. *Id.*

44. Offences Against the State (Amendment) Act, 1940 (Act No. 2/1940) § 3(2) (Ir.), *available at* http://www.irishstatutebook.ie/1940/en/act/pub/0002/index.html.

45. Lawless v. Ireland (No. 3), Eur. Ct. H.R. (ser. A) at 8 (1961).

46. *Id.* at 9.

47. *Id.* at 12.

48. *Id.*

49. *Id.*

50. *Id.* at 14.

51. *Id.*

As a preliminary matter, the European Court of Human Rights held that Lawless' detention violated Article 5 of the European Convention on Human Rights, which states that "[e]veryone has the right to liberty and security of person,"[52] and that no person shall be deprived of that liberty unless "the lawful arrest or detention of a person [is] effected for the purpose of bringing him before a competent legal authority."[53] Additionally, Article 5 provides that "[e]veryone arrested or detained . . . shall be brought promptly before a judge . . . and shall be entitled to trial within a reasonable time or to release pending trial."[54] Because Lawless was not arrested for the purposes of bringing him before a judge and was not, in fact, brought before a judge within a reasonable time, the court found that Government of the Republic of Ireland violated Article 5 (1)(c) and 5(3).[55]

However, Article 15 of the European Convention on Human Rights provides for a necessity defense, and the European Court of Human Rights found that Ireland acted within the bounds of Article 15.[56] Section 1 of Article 15 states that:

> [i]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.[57]

According to the Court, the three prongs of a necessity defense under Article 15—the existence of an emergency threatening the life of a nation, the measures taken being strictly required by the state of necessity, and the measures taken not being in violation of any other obligations under international law—were all met by the Republic of Ireland.[58]

First, the Court found that the existence of a secret army carrying out unconstitutional acts and operating both within and outside of the territory of Ireland constituted a state of emergency that threatened the existence of Ireland under the meaning of Article 15.[59] Second, alternative measures—such as the application of ordinary criminal law, the institution of special criminal courts or military tribunals, or the sealing of the border between the Republic of Ireland and Northern Ireland—would not have been effective in mitigating IRA violence.[60] These alternative measures would not have worked, according to the Court, because of the difficulty in amassing evidence against the IRA due to its secret nature and the fear it instilled among the general population.[61] Sealing the border

52. European Convention on Human Rights art. 5(1), Nov. 4, 1950, 213 U.N.T.S. 221.
53. *Id.* art. 5(1)(c).
54. *Id.* art. 5(3).
55. Lawless v. Ireland (No. 3), Eur. Ct. H.R. (ser. A) at 7 (1961).
56. *Id.* at 27.
57. European Convention on Human Rights, *supra* note 52, art. 15(1).
58. Lawless v. Ireland (No. 3), Eur. Ct. H.R. (Ser. A) at 34 (1961).
59. *Id.* at 27.
60. *Id.* at 29.
61. *Id.*

would have burdened the general population beyond the extent required.[62] Finally, the Court found no evidence suggesting that the acts carried out by the Republic of Ireland violated other obligations under international law.[63] As a result, the Court unanimously held that there was no violation due to a successful necessity defense under Article 15 of the European Convention on Human Rights.[64]

The Lawless Case continued in the vein of the dissenting opinion in *The Case of the S.S. Wimbledon* by basing a necessity defense on the protection of an essential state interest—in this case described as "the life of the nation."[65] It also followed *The Case of the S.S. Wimbledon* in holding that a state of necessity can allow a nation to abrogate an express treaty provision. It differs markedly, however, from both *The Case of the S.S. Wimbledon* and *The Caroline Case* in that *The Lawless Case* relied on an express provision in the European Convention on Human Rights rather than an excuse under customary international law. Nonetheless, Article 15 of the European Convention on Human Rights likely crystallized the already-existing custom of necessity as a defense; it certainly did not announce the custom itself. Thus, the doctrine of necessity is available to states as an express exception in positive law and as an implied custom of the law of nations. Regardless of the form the defense takes, essential state interests remain at the heart of the doctrine of necessity.

III. THE ROLE OF ESSENTIAL STATE INTERESTS IN THE DOCTRINE OF NECESSITY

As already alluded to, essential state interests play a central role in the doctrine of necessity. Simply put, the primary function of the concept of essential state interests is to limit a state's ability to invoke the doctrine. Article 25 of the International Law Committee's Articles on the Responsibility of States for Intentionally Wrongful Acts illustrates the importance of essential state interests. Section 1(a) of Article 25 says that the state attempting to invoke the doctrine (the invoking state) can only do so if it is protecting an essential interest. Similarly, Section 1(b) says that the invoking state can only invoke the doctrine if it does not impair an essential interest of the state against whom the doctrine is being invoked (the victim state) or of the international community as a whole.[66] Thus, whether an interest is characterized as "essential" by an international tribunal is dispositive in deciding whether the doctrine of necessity can be invoked. Only if the invoking state is protecting an essential interest *and* is not infringing on the essential interests of the victim state or the international community as a whole may the doctrine be successfully employed.

At the outer bounds of the doctrine lie peremptory norms. Peremptory norms are defined as "a norm accepted and recognized by the international community of

62. *Id.*

63. *Id.*

64. *Id.* at 34.

65. European Convention on Human Rights, *supra* note 52, art. 15(1).

66. Articles on the Responsibility of States for Intentionally Wrongful Acts, G.A. Res. 56/83, art. 25, U.N. Doc. A/56/49 (Dec. 12, 2001) [hereinafter Draft Articles on State Responsibility].

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."[67] Where the doctrine of necessity is concerned, peremptory norms are essential state interests that are inviolable except by subsequent peremptory norms. Accordingly, Article 33 of the International Law Commission's Draft Articles on the International Responsibility of States say that under no circumstances may the doctrine of necessity be invoked if the breached international obligation is considered a peremptory norm. [68]

At bottom, customary international law imposes five distinct requirements on the successful invocation of the doctrine of necessity. First, the doctrine must be invoked to protect an essential state interest.[69] Second, the essential state interest in question must be threatened by "grave and imminent peril."[70] Third, the act being challenged must be the only means of safeguarding the essential state interest.[71] Fourth, the act must not seriously impair the essential state interest of the state towards which the breached obligation existed.[72] Fifth, the state invoking the doctrine of necessity must not have contributed to the occurrence of the state of necessity.[73]

Until quite recently, states only invoked the doctrine of necessity in the face of existential threats resulting from physical violence. Whether responding to the exigencies of formally declared war,[74] domestic terrorism,[75] or informal

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67. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

68. *Report of the Commission to the General Assembly on the Work of its 32nd Session*, [1980] 2.Y.B. Int'l L. Comm'n 1, 34, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) [hereinafter *Report of the Commission*]:

> 1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:
>
> a. the act was the only means of safeguarding an essential state interest of the State against grave and imminent peril; and
>
> b. the act did not seriously impair an essential interest of the State towards which the obligation existed.
>
> 2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:
>
> a. if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
>
> b. if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking a state of necessity with respect to that obligation; or
>
> c. if the State in question has contributed to the occurrence of the state of necessity.

69. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 40 (Sept. 25).

70. *Id.* at 41.

71. *Id.*

72. *Id.*

73. *Id.*

74. *See generally* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004 I.C.J. 136 (July 9).

75. *See generally* Lawless v. Ireland (No. 3), Eur. Ct. H.R. (ser. A) at 4-5 (1961) ("On several occasions since the foundation of the Irish Free State, armed groups, calling themselves the 'Irish

insurgency,[76] the threat leading to the invocation of the doctrine of necessity had always been primarily military in nature.[77] However, in 1997, the International Court of Justice considered expanding the concept of essential state interests for the first time in the *Case Concerning the Gabčíkovo-Nagymaros Project.*[78] Though the International Court of Justice ("ICJ") declined to find that the doctrine of necessity was successfully invoked, in holding that a state's ecological interests can be considered essential for the purpose of invoking the doctrine of necessity,[79] the ICJ signaled to many that the concept of essential state interestswas being extended beyond military use.

IV. THE EXPANSION OF ESSENTIAL STATE INTERESTS IN THE *CASE CONCERNING THE GABČÍKOVO-NAGYMAROS* PROJECT WAS AN EXPANSION IN PRINCIPLE BUT NOT IN PRACTICE

The *Case Concerning the Gabčíkovo-Nagymaros Project* arose out of a treaty signed in 1977 between the governments of Hungary and Czechoslovakia ("the 1977 Treaty").[80] The 1977 Treaty provided for the construction of a system of locks in Gabčíkovo, Czechoslovakia and Nagymaros, Hungary aiming to generate hydroelectricity and improve navigation on the River Danube.[81] The project, which commenced in 1978, was to be jointly and equally financed, constructed, and operated by both contracting parties.[82] In the late 1980's, however, the project came under intense scrutiny from the people of Hungary who feared the ecological impact of the project.[83] As a result of this criticism, Hungary terminated its work on the locks and Czechoslovakia petitioned the ICJ to issue an opinion on the matter.[84]

When the case came before the International Court of Justice, both parties stipulated that the 1977 Treaty was fully in force when Hungary terminated its work and that the 1977 Treaty did not allow for unilateral suspension or abandonment of the project.[85] To justify its conduct, Hungary relied on a "state of ecological necessity."[86] This state of necessity was based on fears concerning reduced groundwater levels, the contamination of groundwater coming from an increase of silt, the extinction of flora and fauna relying on silt-free water supply, threats to aquatic ecosystems stemming from the irregular flow of water coming

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Republican Army' ("IRA"), have been formed, for the avowed purpose of carrying out acts of violence to put an end to British sovereignty in Northern Ireland.").

76. *See, e.g.*, R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 82-83 (1938) (explaining that the Caroline case was the result of a rebel uprising).

77. *Id.* at 91.

78. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 36 (Sept. 25).

79. *Id.* at 41-42.

80. *Id.* at 17.

81. *Id.* at 17-18.

82. *Id.* at 24.

83. *Id.* at 25, 31.

84. *Id.* at 27.

85. *Id.* at 35.

86. *Id.*

from the dams, erosion of downstream riverbeds, and a limitation and contamination of Budapest's water supply.[87] Compounding this state of ecological necessity, Hungary argued, was Czechoslovakia's unwillingness to examine the ecological impact of the project in light of scientific findings suggesting that the impact would be more severe than expected.[88]

The Court began its necessity analysis by stating that it would apply the doctrine of necessity as characterized by the International Law Commission in Article 33 of the Draft Articles on the Responsibility of States and the international customs reflected therein.[89] It went on to unequivocally expand the concept of essential state interests:

> The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission.[90]

The International Court of Justice echoed the International Law Commission in holding that essential state interests should not be reduced to interests concerning the existence of a state, reiterating the fact that, between 1960 and 1980, "safeguarding the ecological balance has come to be considered an 'essential interest' of all States."[91]

However, the International Court of Justice held that Hungary did not successfully invoke the doctrine of necessity, despite the invocation's basis in a now-recognized essential state interest, because Hungary could not prove that there existed the "grave and imminent peril" necessary to invoke the doctrine.[92] According to the Court, apprehension of possible peril does not suffice to invoke the doctrine of necessity.[93] Even if the ecological effects of the project constituted a grave peril, such effects were not imminent since the completion of the project was too remote, the ecological effects would only be realized over the long term, and the specific nature of the ecological effects remained uncertain.[94]

In barring Hungary's defense of ecological necessity based on the notion that the ecological effects of the dam would only be realized over the long term and that the full extent of these effects remained uncertain, the Court expanded the concept of essential state interests to include ecological interests in principle but not in practice.

With very few exceptions, ecological threats will only materialize over the long term, and it is specifically because of their long-term nature that the full

87. *Id.* at 36.
88. *Id.*
89. *Id.* at 40-41.
90. *Id.* at 41.
91. *Id.*
92. Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 42 (Sept. 25).
93. *Id.*
94. *Id.* at 43.

extent of ecological damage will be uncertain until that damage takes place.[95] It is difficult to imagine a scenario in which a governmental or scientific organization could state with certainty the exact extent of the ecological damage resulting from a project before such damage reaches full fruition, or at least begins to cause the damage sought to be avoided. It is even more difficult to imagine adverse ecological impacts that would immediately be felt upon the completion of such a project.

With respect to the Gabčíkovo-Nagymaros Project, the Court seemed to hold that for Hungary to have successfully invoked the doctrine of necessity based on ecological interests, it would have had to complete the project despite its reservations and wait for the ecological effects to sufficiently materialize. At that point, it could tear down the dam it had created, thereby breaching the 1977 Treaty. Only then could a successful invocation of the doctrine of necessity take place. This result would be both economically inefficient and ecologically disastrous.

On one hand, this course of action would force Hungary to expend economic resources to finish construction of a project that it no longer sees as being in its self-interest only to expend more resources undoing the damage done. In such a case, an efficient breach of contract would be in the economic interest of any party faced with the false choice of breaching this contract and the duplicitous expenditure of resources followed by an uncertain ruling in an international tribunal. Additionally, it is clear that ecological damage, once done, is difficult and often impossible to undo. With riverbeds permanently changed, species of plants and animals permanently extinct, and water supplies severely contaminated, it would take decades to return to the pre-project status quo.[96]

The *Case Concerning the Gabčíkovo-Nagymaros Project* appears to present a scenario perfectly tailored to the invocation of the doctrine of necessity. A state faced with two options—ecological damage and breach of contract—chose the latter in hopes of invoking customary international law frequently applied in cases of existential necessity. At first blush, it would appear that the expansion of essential state interests to include ecological interests would be the highest hurdle between Hungary and a successful invocation of the doctrine. However, by barring the invocation of the doctrine of necessity in the face of ecological dangers that are not perfectly scientifically predictable or that would unfold over the long term, the Court effectively excludes all ecological dangers readily imaginable. It expands essential state interests to include ecological interests in principle, but left the doctrine unavailable for these purposes in practice.

95. *Id.* at 43-44.
96. *Id.* at 35-36.

V. MIXED MESSAGES IN *CME V. ARGENTINA* AND *LG&E V. ARGENTINA* REGARDING THE EXPANSION OF ESSENTIAL STATE INTERESTS TO INCLUDE ECONOMIC INTERESTS

In the late 1980's the Argentine Republic experienced a financial crisis characterized by extreme price inflation accompanied by a deep economic recession.[97] As a result, the Argentine Government passed the State Reform Law,[98] the purpose of which was to privatize government-owned monopolies in order to stimulate the economy.[99] One of the monopolies broken up was *Gas del Estado S.E.*, a company that controlled Argentina's natural gas resources.[100] In addition to the State Reform Law, the Argentine government passed the Convertibility Law and the *Ley de Gas* in 1991 and 1992, respectively.[101] The former of these laws pegged the *austral* (the precursor to the Argentine Peso) to the U.S. Dollar, while the latter created a regulatory structure for the newly privatized natural gas industry.[102]

Though this private structure worked well for both Argentine government and investors for almost a decade, as the 1990s came to a close, Argentina was hit by another economic crisis.[103] This economic predicament proved to be even more serious than that of the late 1980's, causing panic among consumers, creditors, and government officials alike.[104] As a result of this second crisis, the government of Argentina breached the Bilateral Investment Treaty ("BIT") it had signed with the United States of America.[105] In response, two companies that had been investing in Argentina's private natural gas market, CMS Gas Transmission Company ("CMS") and LG&E Energy Corp. ("LG&E"), filed suit at the International Centre for Settlement of Investment Disputes ("ICSID") in Washington, D.C.[106] Although these cases were nearly identical from a factual and legal standpoint, their results were completely divergent. The government of Argentina invoked the doctrine of necessity in both instances and was successful in its dispute with LG&E. It was unsuccessful, however, in its dispute with CMS.[107] This divergence stems from the stark difference in the characterization of the facts in *CMS v. Argentina* and *LG&E v. Argentina*.

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97. LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 35 (Oct. 3, 2006), 21 ICSID Rev.-FILJ 203 (2006).

98. Law No. 23.696, Aug. 18, 1989, B.O. (Arg.).

99. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 35.

100. *Id.* ¶ 37.

101. *Id.* ¶¶ 36, 38.

102. *Id.*

103. *Id.* ¶ 54.

104. *See Argentina's Collapse: A Decline without Parallel*, THE ECONOMIST, Feb. 28, 2002, *available at* http://www.economist.com/node/1010911.

105. Steven Smith et al., *International Commercial Dispute Resolution*, 42 INT'L LAW. 363, 394-95 (2008).

106. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, Annulment Proceeding, ¶¶ 1-2 (Sept. 25, 2007), https://icsid.worldbank.org/ICSID/FrontServlet; LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶¶ 1-3.

107. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 163.

CMS v. Argentina and *LG&E v. Argentina* are virtually identical with respect to the nature of the parties, the parties' claim against Argentina, the jurisdiction of the disputes, and the legal arguments presented. Both CMS and LG&E are groups whose investors had ownership interests in the remnants of *Gas del Estado*. CMS had a 29.42% interest in Transportadora de Gas del Norte ("TGN"),[108] and LG&E owned 45.9% of Centro, 14.4% of Cuyana, and 19.6% of GasBan,[109] all of which were newly privatized Argentine natural gas companies.[110] Additionally, both parties had identical causes of action against the government of Argentina. Both CMS and LG&E claimed that Argentina violated two provisions of a bilateral treaty which stipulated that gas tariffs would be calculated in U.S. Dollars and that tariffs would be re-adjusted every six months in accordance with the United States Products Price Index ("US-PPI").[111] They argued that Argentina breached these obligations through the passage of the Public Emergency and Foreign Exchange System Reform Law as well as through subsequent executive orders. The net effect of which was the "pesafication" of the Argentine economy and forced renegotiation of all public and private contracts.[112]

The government of Argentina presented the same legal argument during both arbitrations. The Argentine government argued that it had not breached the bilateral treaty, and, if the tribunal found that it had breached the treaty, the government of Argentina invoked the doctrine of necessity under Article XI of the U.S.-Argentina BIT and under customary international law, thereby excusing them from the breach.[113]

The ICSID took these similar sets of facts and, through a highly divergent characterization of such facts, reached completely different conclusions. The tribunal in *CMS v. Argentina* found that the government of Argentina was precluded from using the doctrine of necessity under both Article XI of the BIT and customary international law.[114] Conversely, in *LG&E v. Argentina*, the tribunal held that the doctrine of necessity was indeed properly invoked under both the BIT and customary international law.[115]

In *CMS v. Argentina*, the tribunal's characterization of the facts surrounding Argentina's breach was done on a purely historical level. The tribunal offered a description of the privatization process, the structure of CMS, the stipulations

108. *Id.* ¶ 33.

109. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 52.

110. *Id.* ¶ 44.

111. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 34; LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 60.

112. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 156; LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 64.

113. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 139; LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶¶ 260-61.

114. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 105.

115. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶¶ 264-66.

created by the parties, and the financial crisis that precipitated Argentina's breach.[116]

In applying the facts to the Draft Articles on the Responsibility of States, the tribunal found that the invocation of the doctrine of necessity was improper.[117] Under Article 25 of the Draft Articles on the Responsibility of States, the doctrine of necessity may only be invoked if it is the "only way for the State to safeguard an essential interest against a grave and imminent peril" and "does not impair the essential interests of the State towards which the obligation exists, or the international community as a whole."[118] Furthermore, a state cannot invoke necessity under Article 25 if the state has contributed to the situation of necessity.[119]

In the end, the tribunal concluded that economic interests do not constitute an essential interest of a State, that Argentina did not face grave or imminent peril, that the measures taken were not the only choice offered to Argentina,[120] and that the government's "shortcomings significantly contributed to the crisis."[121] The tribunal awarded CMS damages in the amount of $133.2 million, plus interest, along with all of Argentina's shares in TGN.[122]

Conversely, the tribunal took a more expansive approach to factual considerations in *LG&E v. Argentina.*[123] Rather than merely stating as a matter of historical fact that the Argentine financial crisis of the late 1990s took place, the tribunal in *LG&E* examined the economic and social implications of the crisis.[124] For example, the tribunal noted that as a result of the financial crisis of the late 1990's, Argentina's gross domestic product ("GDP") fell markedly, which led to a decrease in domestic prices, widespread price deflation, and a devaluation of Argentine assets across the board.[125] This, in turn, led to a drastic increase in Argentina's country risk premium, which excluded Argentina from the international credit market.[126] As the crisis deepened in 2001, the Argentine public made a run on the banks, forcing the government to pass a law limiting bank withdrawals.[127] The passage of the law limiting withdrawals led to massive civil and political unrest, culminating in deadly riots and a rapid succession of five different presidents within a matter of weeks.[128]

116. *See* CMS Gas Transmission Co., ICSID Case No. ARB/01/8.
117. *Id.* ¶¶ 101-02, 107.
118. Draft Articles on State Responsibility, *supra* note 66, art. XV.
119. *Id.* art. XV, ¶ 2(b).
120. CMS Gas Transmission Co., ICSID Case No. ARB/01/8, ¶ 103.
121. *Id.* ¶ 106.
122. *Id.* ¶¶ 38-39.
123. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶¶ 33-38.
124. *Id.* ¶ 55.
125. *Id.*
126. *Id.* ¶ 232.
127. *Id.* ¶ 63.
128. *Id.* ¶¶ 235-36.

This characterization of the Argentine financial crisis was reflected in the tribunal's necessity analysis. The tribunal in *LG&E* analyzed necessity through Article XI of the BIT between the United States and Argentina, which stipulates that the BIT does not preclude either Party from fulfilling its obligations to international peace and security or its own essential state interests.[129]

In deciding to allow Argentina to invoke the doctrine of necessity, the tribunal characterized the Emergency Law as a "stop-gap measure"[130] and a "swift, unilateral action against the economic crisis that was necessary at the time."[131] The tribunal went on to say that the Emergency Law was necessary to maintain public order and to protect Argentina's essential security interests.[132] As an offer of evidence that an essential interest was threatened, the tribunal cited a massive 10-15% increase in GDP decline,[133] a 60% drop in the Merval Index, which serves as a metric for monitoring the Argentine stock market,[134] a 40% drop in the liquid reserves of the Central Bank of Argentina,[135] almost half of the population living below the poverty line,[136] an extreme shortage in healthcare supplies and affordable food,[137] and deadly looting and rioting in the streets.[138] The tribunal concluded, "[w]hen a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion."[139] Accordingly, the Republic of Argentina was excused from all damages accrued between December 1, 2001 and April 26, 2003.[140]

Taken alone, these two decisions provide little guidance regarding whether or not economic interests should be considered "essential" for the purposes of the doctrine of necessity. Further examination of ICSID decisions considering breaches of bilateral investment treaties in the face of the Argentine financial crisis shows that the expansion of essential state interests in *LG&E v. Argentina* did not survive subsequent ICSID jurisprudence. Accordingly, it was a temporary expansion in principle that never materialized as a matter of practice.

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129. Treaty Between United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Arg., art. XI, Nov. 14, 1991, 31 I.L.M. 124, http:// www.unctad.org/sections/dite/iia/docs/bits/argentina_us.pdf.

130. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 241.

131. *Id.* ¶ 240.

132. *Id.* ¶ 226.

133. *Id.* ¶ 232.

134. *Id.*

135. *Id.* ¶ 233.

136. *Id.* ¶ 234.

137. *Id.*

138. *Id.* ¶ 235.

139. *Id.* ¶ 238.

140. *Id.* ¶ 266.

VI. THE EXPANSION OF ESSENTIAL STATE INTERESTS IN *LG&E V. ARGENTINA* WAS AN EXPANSION IN PRINCIPLE BUT NOT IN PRACTICE

Subsequent ICSID decisions concerning Argentina's breaches of BITs as the result of its financial crisis have taken the approach used in *CMS v. Argentina*, holding that Argentina was not in a state of necessity at the time of the breach and suggesting that economic interests are not "essential" within the meaning of the doctrine of necessity. In *Sempra Energy International v. Argentine Republic*, the ICSID held that a defense of necessity was inapplicable in the situation at hand.[141] The ICSID went further in *Enron Corp. and Ponderosa Assets v. Argentina* when it stated that "[t]he argument that [a domestic financial crisis] compromised the very existence of the State and its independence so as to qualify as involving an essential interest of the State is not convincing."[142] In categorically rejecting economic interests as "essential state interests," the ICSID underestimated the severity of Argentina's financial crisis and did a disservice to the doctrine of necessity as a whole.

By the end of 2001, every aspect of Argentine society was reeling from the financial crisis. Inflation was skyrocketing, over a quarter of the country was unemployed, personal income shrunk by half, and every bank in the country was on the verge of collapse.[143] People were rioting in the streets.[144] The social consequences of the Argentine economic crisis are among the most severe imaginable. There are currently forty-eight cases filed against Argentina before the ICSID,[145] and if the current trend in ICSID jurisprudence continues—and there is no reason to think that it will not—the Argentine Republic is slated to lose more than USD $8 billion in judgments against it, a sum far larger than its entire financial reserve.[146]

At the heart of the doctrine of necessity is the notion that "[t]he right of a State to adopt the course which it considers best suited to the exigencies of its security and to the maintenance of its integrity, is so essential a right that, in case of doubt, treaty stipulations cannot be interpreted as limiting it."[147] As developing countries continue to liberalize their economies and attract foreign investment, the

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141. Sempra Energy Int'l v. Arg. Republic, ICSID Case No. ARB/02/16, Award, ¶ 388 (Sept. 28, 2007), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC694_En&caseId=C8.

142. Enron Corp. and Ponderosa Assets, L.P. v. Arg. Republic, ICSID Case No. ARB/01/3, Award, ¶ 306 (May 22, 2007), http://arbitrationlaw.com/files/free_pdfs/Enron%20v%20Argentina%20-%20Award.pdf.

143. *See Argentina's Collapse: A Decline without Parallel*, *supra* note 104, *available at* http://www.economist.com/node/1010911.

144. *Id.*

145. *See* List of Pending Cases, Int'l Ctr. For Settlement of Inv. Disputes, http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListPending (last updated Sept. 24, 2012) (including at least forty-eight cases at the ICSID filed against Argentina).

146. William W. Burke-White, *The Argentine Financial Crisis: State Liability Under BITs and the Legitimacy of the ICSID System*, 3 ASIAN J. WTO & INT'L HEALTH L. & POL'Y 199, 204 (2008).

147. *S.S. Wimbledon*, 1923 P.C.I.J. (ser. A) No. 1, at 37.

state must retain the power to act as a stabilizing force. An economic crisis as severe as the one experienced by Argentina at the turn of the twenty-first century poses a clear and imminent threat to both the security and the integrity of the state. Thus, the reasoning employed in *LG&E v. Argentina* is highly preferable to that employed in *CMS v. Argentina*.

Unfortunately, the ICSID has chosen a path that provides insufficient protection for the interests of developing nations despite the presence of the doctrine of necessity at customary international law, a device that has developed over the last two and a half centuries specifically to protect the interests of a sovereign state facing an existential threat. In choosing such a course, the ICSID ignores the fact that "[w]hen a State's economic foundation is under siege, the severity of the problem can equal that of any military invasion."[148] In the end, an initial expansion of essential state interests to include economic interests in *LG&E v. Argentina* has proven to be an anomaly in the face of subsequent ICSID decisions. It was a temporary expansion in principle but not in practice.

VII. THE FUTURE OF ECOLOGICAL AND ECONOMIC NECESSITY

The Case Concerning the Gabčíkovo-Nagymaros Project and the line of cases stemming from *CMS v. Argentina* and *LG&E v. Argentina* leave the future of the doctrine of necessity as it relates to ecological and economic interests unclear. In both instances, international adjudicatory bodies have held the respective state interests at issue to be essential for the purposes of the doctrine, but in neither instance was the doctrine held to be fully applicable. While there are several commonalities between the respective futures of ecological and economic necessity, in the end, ecological necessity is more likely to survive as a viable application of the doctrine than its economic counterpart.

Several things are clear regarding the future of both ecological and economic necessity. Most basically, the International Law Committee's interpretation of the doctrine of necessity in Article 33 of the Articles on the Responsibility of States for Internationally Wrongful Acts will continue to provide the basic framework for the invocation and application of the doctrine of necessity. As such, there will continue to be five inherent limitations to the doctrine. First, the doctrine will only be useful in guarding an essential state interest in the face of grave and imminent peril.[149] Second, the doctrine cannot be invoked if invocation impairs the essential state interests of the country against whom the doctrine is being used or those of the international community as a whole.[150] Third, the doctrine will not be available if its invocation impairs a peremptory norm.[151] Fourth, binding treaty language can expressly state that the doctrine will not be available.[152] Fifth, the doctrine will

148. LG&E Energy Corp., ICSID Case No. ARB/02/1, ¶ 238.
149. *Report of the Commission*, *supra* note 68, art. 33.
150. *Id.*
151. *Id.*
152. *Id.*

not be available to a state that contributed to its own state of necessity.[153] As customary international law develops in this area, it will do so against the backdrop of Article 33, whose inherent limits to the invocation of the doctrine will remain intact.

Similarly, whether a specific ecological or economic crisis suffices in creating the state of necessity required to invoke the doctrine will continue to be a question of fact, or a mixed question of law and fact, to be characterized and applied by international judges and arbitrators. Successful invocation of the doctrine will therefore inevitably rest on the shoulders of the judges and arbitrators themselves. The inherent factual nature underlying essential state interests as they relate to the doctrine of necessity has both its advantages and disadvantages. As can be seen in the dichotomy between *LG&E v. Argentina* and *CMS v. Argentina*, the possibility of two sets of judges looking at the same set of facts and reaching divergent conclusions based on their interpretation of such facts leads to uncertainty in customary international law, hindering the eventual crystallization of the custom. On the other hand, the factual nature of the concept of essential state interests allows for the interpretation of such interests to expand as the judicial perception of such interests changes. As the human rights regime of international law continues to develop, ecological and economic interests will play a more prominent role in the years to come.

Finally, there are three types of conflicts that can give rise to assertions of ecological and economic necessity: (1) good faith mistakes by sovereign states, (2) good faith business transactions that go awry, and (3) cases of exploitation by multinational corporations over developing nations. While these three classifications are treated slightly differently in the realms of ecological and economic necessity, they play an important role in both arenas. Keeping in mind the Article 33 framework, the inherent factual nature of ecological and economic interests, and the three classes of conflict that may give rise to invocation of the doctrine illuminates, to a certain extent, the future of the doctrines of ecological and economic necessity.

The biggest barrier facing the successful invocation of ecological necessity is the requirement in Article 33(1)(a) that the threat to a nation's ecology be both "grave" and "imminent."[154] As discussed, the scale and time frame in which ecological disasters take place does not lend itself to concrete predictions. Nonetheless, as humanity's understanding of the science used to model and predict ecological change improves, scientists—and the legal advocates who rely on their findings—will be able to predict the gravity and imminence of actions affecting the environment with much more accuracy. In the end, the expansion of the doctrine of ecological necessity seems as inevitable as scientific progress itself.

In the case of a good faith mistake on the part of a sovereign nation, a situation similar to the one faced in *The Case Concerning the Gabčíkovo-*

153. *Id.*
154. *Id.* at 34.

Nagymaros Project, the doctrine of ecological necessity is highly likely to expand as our ability to measure and predict environmental impact improves. When two sovereigns begin a project in good faith and one wants to abandon the project for ecological reasons, international courts have failed to apply Article 33(2)(c), which says that a state cannot invoke the doctrine of necessity if it has contributed to its own state of necessity. Leaving the door open to the invocation of ecological necessity, in this instance, allows governments to exercise greater control over their economic resources. This is especially important in light of the fact that, as our understanding of the environment improves, projects can be started under the assumption that they will be ecologically benign. If this assumption proves to be false in light of improved information, reevaluation of the environmental implications of any project after it has begun will be necessary. Additionally, while this expansion might appear to increase the moral hazard involved in ecological assessment, if a state is found to have been careless in its initial consideration of the project, 33(2)(c) would undoubtedly bar the invocation of the doctrine. Thus, at least in this context, the doctrine is highly likely to expand with the global community's understanding of ecological impact, and this is an unmitigated good.

The second class of conflict, a good faith business transaction that happens to lead to a state of ecological necessity, will be rare. Multinational corporations are profit-maximizing entities who seek to minimize the degree to which they must pay for the externalities they create. As such, many transactions are carried out abroad precisely *because* of lower environmental standards. In any event, 33(2)(c) comes squarely into play in the case of a good faith business transaction that leads to a state of ecological necessity. It would be difficult to argue that a state, in pursuing its perceived economic interests, did not contribute to the state of necessity resulting directly from that transaction. Ecological necessity is unlikely to expand in this arena, but there is little reason to believe that a lack of expansion in this context will have much of an impact on international custom overall.

Applying the doctrine of ecological necessity to cases in which a multinational corporation exploits a developing nation for the use of its natural resources, and this exploitation leads to a state of ecological necessity, amounts to an unconscionability doctrine at customary international law. The creation of such a doctrine would have several positive policy implications. It would serve to protect natural resources, punish exploitative multinational corporations and protect developing nations. It would also allow international tribunals to police international trade, as it becomes an increasingly important part of the global economy. On the other hand, expansion of the doctrine in this context would have the negative effects of decreasing foreign investment by limiting the protection corporations receive abroad. Furthermore, allowing developing nations the opportunity to breach contracts into which they freely entered offends the traditional notion of freedom of contract. On balance, proving bad faith on the part of a multinational corporation will be difficult, but if a state can prove bad faith, there is no reason the doctrine of ecological necessity should remain unavailable provided that the other criteria are met.

When it comes to economic necessity, the future is less clear. There is no doubt that the global understanding of markets and economic crises is in flux. From the United States' housing crisis and resulting global asset meltdown to the European sovereign debt crisis, economists all over the world are taking a fresh look at the security and stability of markets. It is unclear, however, where public opinion will rest or what effect it will have on the doctrine of economic necessity. As such, the ICSID's treatment of Argentina in the line of cases already discussed will play a large role in the continued limited applicability of the doctrine of economic necessity.

While the three classes of conflict that could give rise to economic necessity are the same as those giving rise to ecological necessity, it makes sense to subsume the second two classes into one analysis. Thus, the future of economic necessity should be thought of in terms of public versus private debt instead of the three classes of conflicts mentioned above.

Simply put, sovereign debt crises lie outside the scope of the doctrine of necessity. Sovereign states can already default on their sovereign debt or simply print money to cover their outstanding debt. These actions are governed by the Bank for International Settlements, the International Monetary Fund, and the sovereign bond market itself. States are already highly incentivized not to default on their public debts, and the doctrine of necessity will do little to change that fact.

Due to the inherent nature of economic crises, it makes little sense to differentiate between good faith dealings between multinational corporations and developing nations and exploitation of the latter by the former. Unlike a state of ecological necessity, economic necessity can rarely be traced to one single deal. In the case of economic necessity, a combination of macro- and microeconomic factors leads to a state of necessity. If the underlying state of necessity is present, the nature of the specific deals leading to such a state will be irrelevant.

Because the facts necessary to invoke a state of economic necessity will be rare, the custom developed in *CMS v. Argentina* and its progeny suggest that the doctrine of necessity will remain unavailable to states despite the superiority of the *LG&E* decision. The main difference between the ICSID's opinions in *LG&E* and *CMS* is that the ICSID endeavored to characterize the social consequences of Argentina's economic collapse in the former and wholly overlooked such consequences in the latter. Nonetheless, the rationale employed in *CMS* carried the day and developed a custom which suggests that economic interests are unavailable for protection as essential state interests under the meaning of Article 33. Moreover, even if such interests were theoretically available, 33(2)(c) bars a state from successfully invoking them. The custom developed in *CMS* and its progeny effectively shuts the door to the future invocation of the doctrine of necessity to protect economic interests.

In sum, the doctrine of ecological necessity is likely to expand as the science behind ecological impacts improves. The scientific community's increased ability to predict and quantify environmental impacts will surely result in an increase of the availability of the doctrine of ecological necessity. However, the ICSID's

jurisprudence in *CMS v. Argentina* and its progeny is likely to close the door on the availability of the doctrine of economic necessity.

VIII. CONCLUSION

The history of the doctrine of necessity has seen three types of interests qualify as "essential state interests": territorial interests, ecological interests, and economic interests. Of these three sets of interests, only one, territorial interests in the face of a military or quasi-military attack, has yielded a successful invocation of the doctrine. Textually speaking, it would appear that once an interest has been deemed "essential" for the purposes of the doctrine, a grave threat to such interests would easily lead to a successful invocation of the doctrine, but that clearly is not the case.

In holding that an ecological interest can only lead to a successful invocation of the doctrine of necessity if the ecological disaster will occur immediately and with certainty, the International Court of Justice woefully ignores the inherent nature of environmental degradation, thereby effectively barring the invocation of the doctrine despite the presence of a threat to an essential state interest. Similarly, after declaring economic interests to be essential, the ICSID reneged on that declaration by refusing to apply the doctrine of necessity in the face of the gravest and most imminent threat to a nation's economy imaginable. As our understanding of the science behind environmental degradation improves, ecological necessity will become a viable doctrine. However, the door to economic necessity appears to be shut for the foreseeable future.

The development of customary international law is, by its very nature, a slow process. Declaring that ecological and economic interests are "essential" within the meaning of the doctrine of necessity is an important step towards the liberalization of the use of the doctrine of necessity. However, if customary international law seeks to keep pace with modern realities, it would do well to recognize the long term and uncertain nature of ecological considerations and the existential threat posed by the collapse of a nation's economy. Once this recognition takes place, these realities should be incorporated into the doctrine of necessity at customary international law.

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