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On Necessity as a Legal Basis in Counter-Terrorism Operations

ABSTRACT

It is often argued that if use of force against a non-state actor or against a territorial state violated Article 2(4) of the UN Charter, the illegality of the measure would effectively be precluded by invoking necessity as a circumstance precluding wrongfulness. Consequently States may invoke the state of necessity during their “war on terrorism” to preclude the wrongfulness of violating the territorial integrity of the State on which the non-state actor is located, as it would satisfy the conditions of Article 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts and would therefore preclude the violation of Article 2(4) of the UN Charter. This article will challenge this view in five steps. First, it briefly introduces the theories supporting the applicability of the plea of necessity in a use of force context. Second, it elaborates on the legal nature of necessity as a circumstance precluding wrongfulness. Third, the article enumerates the reasons for which the doctrine of necessity is inapplicable in *jus contra bellum* situations. Finally, the doctrinal relationship between necessity and self-defence will be addressed and some conclusions are offered.

KEYWORDS: necessity, self-defence, state-responsibility, jus cogens, primary rules, secondary rules

I. INTRODUCTION

After the terrorist attacks against the United States on 11 September 2001, a scholarly view (re)emerged that States may use force lawfully against a non-state actor and the territorial state in the case of necessity, even in cases that fall outside the traditional scope of self-defence.¹ It is argued that if use of force against a purely non-state actor or against a territorial state violated Article 2(4) of the UN Charter, the illegality of the measure would effectively be precluded by invoking necessity as a circumstance

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¹ For more on the topicality and importance of this problem, see R. D. Sloane, On the Use and Abuse of Necessity in the Law of State Responsibility, (2012) 106 *AJIL*, 447–508. <https://doi.org/10.5305/amerjintelaw.106.3.0447>

precluding wrongfulness. According to this group of scholars, States may invoke the state of necessity during their “war on terrorism” to preclude the wrongfulness of violating the territorial integrity of the State on which the non-state actor is located, as it would satisfy the conditions of Article 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA) and would therefore preclude the violation of Article 2(4) of the UN Charter.

This article will challenge this view. The analysis will proceed in five main parts. First, it briefly introduces the theories supporting the applicability of the plea of necessity in a use of force context. Second, it elaborates on the legal nature of necessity as a circumstance precluding wrongfulness. Third, the article enumerates the reasons for which the doctrine of necessity is inapplicable in *jus contra bellum* situations. Finally, the doctrinal relationship between necessity and self-defence will be addressed and some conclusions are offered.

II. THEORIES SUPPORTING THE APPLICABILITY OF THE PLEA OF NECESSITY IN A USE OF FORCE CONTEXT

Necessity as a basis for deploying force lawfully is invoked extremely rarely in state practice; in fact it has been relied on only twice since 1945. Belgium invoked a state of necessity in 1960 during its intervention in Congo,² and in 1999, during its intervention in Kosovo.³ The United States did not invoke a state of necessity either in bombing targets in Afghanistan and Sudan in 1999 or after 9/11, as the US each time reported its actions to the Security Council under Article 51.⁴ Thus, in the context of *jus contra bellum*, there is a marked absence of States’ *opinio juris* with regard to precluding the wrongfulness of using force directly against terrorists on the basis of necessity even with regard to the US, let alone the rest of the international community.

However, some authors argue in favour of invoking the plea of necessity in cases of otherwise unlawful use of force that would violate Article 2(4) UN Charter. For instance, John-Alex Romano argues in favour of using force unilaterally against non-state actors, stressing the unprecedented threat posed by weapons of mass destruction.

² SC res. 873, 13 July 1960, S/PV. 873 (1960) para 196.

³ Belgium Oral Pleadings, CR 99/15, Public sitting held on Monday 10 May 1999, at 3 p.m., at the Peace Palace. 7. Yugoslavia, in addition to the absence of certain elements of necessity, drew the Court’s attention to the fact that Article 25 could not be applied in the event of a violation of *jus cogens*, which was undoubtedly the case in violation of Article 2(4). *Yugoslavia Oral Pleadings*, Public sitting held on Monday 10 May 1999, at 10.00 a.m., at the Peace Palace, CR 1999/14. 46–47.

⁴ S/2001/946 (7 October 2001). See also S. Murphy, Contemporary Practice of the United States Relating to International Law, (1999) 93 *AJIL*, 164–165. <https://doi.org/10.2307/2997960>

Similarly, Ian Johnstone supports invoking necessity in the case of humanitarian intervention.⁵ Both authors justify their positions with reference to the work of the International Law Commission (ILC), which in 1980⁶ refrained from deeming the general prohibition of the use of force to be of a *jus cogens* nature.⁷ The wording of that report indeed was ambiguous as to whether the prohibition of use of force had a *jus cogens* character, or only the prohibition of aggression reached such a quality. Such a view, in their opinion, allows invoking the plea of necessity in cases where the use of force does not reach the threshold of an act of aggression.

Furthermore, Andreas Laursen argues that post 9/11, when new forms of terrorism emerged, leading to a heightened use of weapons of mass destruction, the general prohibition of force cannot be deemed a *jus cogens* norm, hence there is again no doctrinal obstacle to the useful invocation of necessity.⁸

Maria Agius also does not dispute that a plea of necessity cannot be invoked in the event of a breach of a *jus cogens* norm.⁹ Even though the author acknowledges that the International Court of Justice in *Nicaragua* has ruled that Article 2(4) qualifies as *jus cogens*,¹⁰ Agius also refers to the 1980 ILC report in order to narrow down the *jus cogens* quality to cases of aggression, i.e. to more serious violations of the general prohibition of the use of force.¹¹

The author justifies the application of necessity in the *jus contra bellum* context by arguing that the Court, in its Wall Advisory Opinion, considered the issue of necessity on the merits.¹² However, Israel itself did not deem building its security wall as a use of force measure.¹³ Agius also argues that claims regarding necessity in cases of targeted and limited operations of protecting citizens abroad are lawful under international law.¹⁴ In the context of terrorism, the author also recognises that the application of

⁵ I. Johnstone, The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-terrorism, (2004–2005) 43 (2) *Colum. J. Transnat’l L.*, 337–388., 378.

⁶ Yearbook of the International Law Commission 1980, Volume II Part Two, A/CN.4/SER.A/1980/Add.I (Part 2).

⁷ I. Johnstone, The Plea of “Necessity”, 345–346.

⁸ A. Laursen, The Use of Force and (the State of) Necessity, (2004) 37 (2) *Vand. J. Transnat’l L.*, 485–526., 524.

⁹ M. Agius, The Invocation of Necessity in International Law, (2009) 56 (02) *NILR*, 95–135. <http://dx.doi.org/10.1017/S0165070X09000953>

¹⁰ The International Court of Justice has referred to and applied the general rule of non-use of force as a *jus cogens* norm or “fundamental or cardinal principle” in the *Nicaragua* case. *Nicaragua and Military and Paramilitary Activities against Nicaragua (Nicaragua v. United States)*, Judgment on the Merits, ICJ Reports 1986, p. 14, para 190.

¹¹ Agius, The Invocation of Necessity in International Law, 107.

¹² *Ibid.* 123.

¹³ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, paras 122–137 and 140–142.

¹⁴ *Ibid.* 128.

necessity confuses primary and secondary norms of *jus contra bellum*,¹⁵ but does not consider this as fatal to preclude the wrongfulness of rescuing citizens abroad.

III. NECESSITY AS A CIRCUMSTANCE PRECLUDING WRONGFULNESS

The International Law Commission's Articles on State responsibility¹⁶ regulate the circumstances precluding wrongfulness in Articles 22–27, by setting out secondary rules of international law that generally exclude the wrongfulness of otherwise illegal acts of States. The International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA)¹⁷ summarises the rules of necessity in Article 25 as follows:

1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
 - (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
 - (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
 - (a) the international obligation in question excludes the possibility of invoking necessity; or
 - (b) the State has contributed to the situation of necessity.

Article 25 reflects customary international law¹⁸ and starts off by excluding the plea of necessity (“Necessity may not be invoked”). The International Court of Justice has confirmed in the *Gabcikovo* case that the plea of necessity, although it exists under customary law, to be applied in exceptional cases only.¹⁹ According to the ILC, the invocation of necessity is not a right in and of itself, but an excuse, a very narrow and strictly defined exception.²⁰ International (arbitral) courts accept such a defence in

¹⁵ Ibid. 124.

¹⁶ Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), in *Yearbook of the International Law Commission*, (2001) vol. II, Part Two.

¹⁷ See V. Lowe, Precluding Wrongfulness or Responsibility: A Plea for Excuses, (1999) 10 (2) *EJIL*, 405–411. <https://doi.org/10.1093/ejil/10.2.405>

¹⁸ *The Gabcikovo-Nagymaros Project Case (Hungary/Slovakia)*, ICJ Reports 1997, 7, para 51; Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, para 140.

¹⁹ *Gabcikovo-Nagymaros case*, 1997, para 51.

²⁰ ILC Report, 1980. vol. II., 4–21.

very exceptional cases.²¹ Although the ILC has recognised the potential dangers of the doctrine, it nevertheless included it among the circumstances precluding wrongfulness, as it is so “deeply rooted in legal consciousness”²² that if it cannot be eliminated. To guard against misuse, the ILC deemed it worthwhile to delimit its scope as far as possible. Thus, necessity was formulated as a very narrow, exceptional excuse, which functions as a kind of safety valve²³ to ensure that the law, when taken too far, does not lead to the greatest injustice (*summum jus summa injuria*).²⁴

In customary international law, necessity is applied to address exceptional situations where an irreconcilable conflict arises between a State’s international obligation and its essential interest. Therefore, necessity refers to a narrowly defined situation: it allows the exclusion of certain consequences of a breach,²⁵ if the essential interest of the State outweighs both the abstract interest of the international community held in respecting the obligation, as well as the concrete interest of the individual State or the international community.²⁶ Moreover, the 1980 Report of the ILC also stated as a matter of principle that the interest sacrificed on the altar of necessity must be clearly less important than the interest so protected.²⁷

Necessity has extremely strict *conjunctive* conditions, which are the following:²⁸

- be the only available means of the invoking State;
- in order to protect an essential interest;
- from a grave and imminent peril;
- its invocation does not seriously undermine the vital interests of others (states, international community);
- if the state has not been involved in the creation of the triggering peril;
- the international obligation (based on a treaty, or rooted in customary law) does not explicitly or implicitly exclude its application;
- and, importantly, it can never excuse behaviour that violates a *jus cogens* norm.

²¹ ILC Report, 1980. vol. II., 4–21.

²² ILC Report, 1980. vol. II., para 30.

²³ ILC Report, 1980. vol. II., para 31.

²⁴ ILC Report, 1980. vol. II., 29–32.

²⁵ According to Article 27 of ARSIWA: “The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question.” In *The Gabcikovo-Nagymaros Project Case*, the International Court of Justice pointed out that the Republic of Hungary expressly recognised that the existence of a state of emergency does not exempt it from compensation. *The Gabcikovo-Nagymaros Project Case*, para 48. See also *ARSIWA Commentary*, Article 27, para 5.

²⁶ See *ARSIWA Commentary*, Article 25, para 2.

²⁷ ILC Report, 1980. vol. II., para 35.

²⁸ *The Gabcikovo-Nagymaros Project Case*, para 51. The conjunctive conditions are explained by the ICJ in paragraph 52 of the judgment, based on the ILC Articles.

From the wording of Article 26 ARSIWA (Compliance with peremptory norms), it is clear that none of the circumstances precluding wrongfulness apply in the event of a breach of a *jus cogens* norm.²⁹ Therefore, those commentators who argue for necessity to establish the lawfulness of counter-terrorism actions implicitly also question the *jus cogens* nature of the general prohibition of the use of force, as Article 2(4) as a *jus cogens* norm³⁰ would not allow the invocation of necessity to justify use of force.

IV. THE INAPPLICABILITY OF NECESSITY IN *JUS CONTRA BELLUM* SITUATIONS

As a starting point of this analysis, it is worth recalling the exact language of Article 2(4) of the UN Charter: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

The UN Charter recognises only two exceptions to the general prohibition of the use of force in Article 2(4), the right of individual or collective self-defence under Article 51 of the Charter³¹ and the authorisation of the Security Council under Chapter VII of the Charter (in particular Articles 39–42).³²

Regardless of whether any of the conditions of Article 25 is met,³³ it is clear that a plea of necessity cannot preclude the unlawfulness of acts in breach of Article 2(4) for the following three reasons:

- the plea is inapplicable to acts that are contrary to a *jus cogens* norm;
- the system of the Charter, and in particular its rules on the *jus contra bellum*, implicitly exclude the applicability of necessity;

²⁹ “Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”

³⁰ J. Crawford, J. Peel, and S. Olleson, The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading, (2001) 12 (5) *EJIL*, 963–991., 978. <https://doi.org/10.1093/ejil/12.5.963>

³¹ “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 the measures necessary to maintain international peace and security.” UN Charter, Article 51.

³² “Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.” Article 42 of the UN Charter.

³³ Countering terrorism through the use of force is often not the only way for states to address the problem. The imminent threat is also rarely met, because the attack has most often already occurred, the severity of which also raises questions in many cases. Also, the action often seriously undermines the interests of other states and the international community as a whole.

– a secondary norm cannot affect doctrinal questions on the level of primary norms (i.e. the legality of self-defence or humanitarian intervention).

The following analysis will address each of these reasons separately in turn.

1. Necessity in the case of *jus cogens* violations

Chapter V of ARSIWA, which regulates the circumstances precluding unlawfulness, does not in any case give the power to States to derogate from *jus cogens* norms. The examples in the commentary show that States cannot respond to genocide by committing genocide themselves, nor can they invoke necessity in the event of a breach of a peremptory norm.³⁴ Article 26 of ARSIWA stipulates that: “Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.”

The much-cited 1980 ILC report clearly excluded the applicability of Article 25 in the case of a *jus cogens* prohibition of aggression.³⁵ However, in the case of low-intensity use of force, the report was ambiguous. Although it uses the prohibition of aggression as an example, it states repeatedly that any act using force that violates the territorial integrity of another State is contrary to a *jus cogens* norm.³⁶ Moreover, the report qualified both the general prohibition of the use of force and the right of self-defence as *jus cogens*.³⁷

The ILC commentary to the ARSIWA also does not support the applicability of the state of necessity. Although the Commentary to Article 26 does not refer to a source for the *jus cogens* nature of the prohibition of aggression, the interpretative part of Article 40³⁸ does.³⁹ Strangely enough, even though the main text adopted by the ILC

³⁴ See *ARSIWA Commentary*, Article 26, paras 3–5.

³⁵ ILC Report, 1980, para 22.

³⁶ “The question whether the obligation breached for reasons of necessity was peremptory or not will have to be settled, in each particular case, by reference to the general international law in force at the time the question arises. The only point which the Commission feels it appropriate to make in this commentary is that one obligation whose peremptory character is beyond doubt in all events is the obligation of a State to refrain from any forcible violation of the territorial integrity or political independence of another State. The Commission wishes to emphasize this most strongly, since the fears generated by the idea of recognizing the notion of state of necessity in international law have very often been due to past attempts by States to rely on a state of necessity as justification for acts of aggression, conquest and forcible annexation.” Report of the Int’l L. Commission on the Work and Its Thirty-Second Session, in *Yearbook of the International Law Commission*, (1980) Volume II, 1981, A/CN.4/SER.A/1980/Add.1 (Part 2) 50.; *ARSIWA Commentary*, Article 33, para 37.

³⁷ ILC Report, 1980, 58, *ARSIWA Commentary*, Article 34, para 12.

³⁸ According to Article 40(1) “This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.”

³⁹ *ARSIWA Commentary*, Article 40, para 4, footnotes 644, 645.

acknowledges the *jus cogens* quality of the prohibition of aggression, the two references cited by the report for that statement both support that, in fact, the prohibition of the use of force, namely Article 2(4) UN Charter, reached such a status.

First, the report refers to the declarations made by States at the Vienna Conference during the drafting of the Convention on the Law of Treaties. Second, to the interpretation of the International Court of Justice in *Nicaragua*, where the Court, in full agreement with both Nicaragua and the US, invoked Article 2(4) *as a jus cogens*, and not aggression.⁴⁰ Whatever were the reasons for the ILC's choice of words in the commentary, the sources cited by the text itself support the *jus cogens* nature of Article 2(4). Since the concept of use of force is broader than that of aggression, this naturally implies the *jus cogens* nature of the prohibition of aggression, whereas the reverse is not true.⁴¹

2. Implicit exclusion of the applicability of the state of necessity

The Charter, and in particular its rules on *jus contra bellum*, implicitly excludes the applicability of necessity. Article 25(2)(a) makes it clear that an obligation under international law may exclude the invocation of necessity. According to the ILC commentary, such an exclusion may be both explicit and implicit. While some international humanitarian law conventions expressly provide for the exclusion of any reference to a state of necessity, for other conventions or customary rules this may be inferred from the object and purpose of the norm.⁴²

The ILC report and Robert Ago had already in 1980 narrowed the question to whether the system established by Article 2(4) and Article 51 precluded the invocation of necessity. It concluded that the rules of humanitarian law and necessity are incompatible. The only exception that humanitarian laws allow is military necessity, which is deliberately built into the primary norm.⁴³ According to the ILC, the question whether a treaty implicitly excludes the applicability of necessity is to be decided on the basis of a textual, systemic, logical and historical interpretation of the treaty in question. If, for example, a treaty obligation is also – or even more so – applicable in the event of a threat, and the treaty does not specifically address the question of necessity, this would imply an implicit prohibition of the applicability of Article 25. However, a definitive

⁴⁰ *Nicaragua* case, para 190.

⁴¹ In the early 1970s and early 1980s, it seems that the status of Article 2(4) was indeed not yet entirely clear. The *jus cogens* quality of the prohibition of aggression was clear, as was the special significance of Article 2(4). It seems that in the ILC commentary the old expression remains, but with appropriate sources.

⁴² *ARSIWA Commentary*, Article 25, para 19.

⁴³ *ARSIWA Commentary*, Article 25, para 28.

answer can only be reached by examining the object and purpose of the rule in question and analysing the circumstances in which it was adopted.⁴⁴

3. Relationship of the necessity-plea to the relevant primary rules

A further objection to invoking necessity to preclude the wrongfulness of a use of force measure lies in the fact that it is not the task of a secondary norm – in this case, rules on necessity – to settle the issues to be clarified on the level of primary norms. Article 25, as a general rule, does not seek by definition to cover conduct that is governed by primary rules of international law.⁴⁵ According to the ILC, Article 25 does not apply to situations where the primary rules themselves regulate extraordinary circumstances and consequences. The commentary explicitly cites the rules on the use of force as an example of this.⁴⁶ It makes the point that, in principle, although considerations similar to those of necessity may arise in the event of humanitarian intervention, military necessity and similar cases, these are taken into account at the level of primary norms. According to the ILC commentary, Article 25 does not therefore apply to such cases by definition, since considerations of an emergency are part of the primary rule.⁴⁷

This was also confirmed by the International Court of Justice in its Wall Advisory Opinion.⁴⁸ The Court examined the merits of necessity in relation to the security wall because it was not a use of force measure in the first place.⁴⁹ The Court did not, in the end, enter into a complex analysis of the relationship between primary and secondary norms, but found that building the security wall was not the only means by which Israel could protect its interests, thus ruling out the possibility of a state of necessity.⁵⁰

Authors attribute particular relevance to the answer provided by James Crawford, the Special Rapporteur of the ARSIWA, to the question of the representative

⁴⁴ *ARSIWA Commentary*, Article 25, para 38.

⁴⁵ *ARSIWA Commentary*, Article 25, para 21.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ “The Court has, however, considered whether Israel could rely on a state of necessity, which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see paragraphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged.” Advisory Opinion on the Legal Consequences of the Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, para 140.

⁴⁹ *Ibid.* para 138.

⁵⁰ *Ibid.* paras 141–142.

of the Netherlands.⁵¹ While Crawford's answer was evasive as this was not within the remit of the ILC, he merely referred the question back to the general rules of necessity. Both Laursen⁵² and Johnstone⁵³ interpreted this answer as not excluding the possibility of humanitarian intervention. However, Crawford was clearer in 1999, when he explained in his second report the reason that the commentary did not comment on the plea of necessity. He stated that doing so would in fact be a response to whether the Charter explicitly or implicitly excluded the possibility to invoke necessity in cases of violating the territorial integrity of a State, and it was not for the ILC to comment on the provisions of the Charter on the use of force.⁵⁴ This explains why, two years later, Crawford must have felt it sufficient to refer only to the general rules of necessity in his answer to the above question.

Crawford also made some remarkable comments relevant to the issue at hand. Joining Robert Ago, he pointed out that, with the exception of the Belgian case of 1960, states did not invoke necessity in matters of *jus contra bellum*.⁵⁵ He also referred to the *jus cogens* nature of Article 2(4). Crawford also pointed out that "The commentary seems to suggest" that it distinguishes between serious and less serious violations of the general prohibition of the use of force, suggesting that humanitarian intervention may be justified under Article 25 in certain circumstances.⁵⁶ Crawford clearly rejects such a view by explaining that contemporary state practice and *opinio juris* (at the level of primary norms) either support the legitimacy of humanitarian intervention or do not. In the former case, being a lawful act, there is no violation of Article 2(4), and in the latter case there is no reason to treat them in isolation from other issues of *jus contra bellum*. Crawford gives a clear answer to those in doubt: "In either case, it seems that the

⁵¹ "There should be a new provision on humanitarian intervention as an exceptional circumstance excluding wrongfulness." (Netherlands); James Crawford: "Chapter V does not deal with the substantive primary rules relating to the use of force, or indeed generally with the international law of humanitarian assistance. Cases not otherwise provided for may be dealt with in accordance with the criteria in article 26 (necessity)." J. Crawford, Fourth report on State responsibility, in *International Law Commission Fifty-third session*, (Geneva, 2001) A/CN.4/517/Add.1, 4.

⁵² Laursen, The Use of Force and (the State of) Necessity, 512–514.

⁵³ Johnstone, The Plea of "Necessity" in International Legal Discourse, 347–348.

⁵⁴ Second report on State responsibility, by Mr. James Crawford, Special Rapporteur, A/CN.4/498 and Add.1–4, 1999, para 281.

⁵⁵ "The commentary declines to pronounce on the question whether the invocation of necessity to justify a violation of territorial integrity could be justified under modern international law: this comes down to asking whether the Charter expressly or by implication (e.g., by Article 51) has excluded reliance on necessity as a justification or excuse. But it is not the function of the Commission authoritatively to interpret the Charter provisions on the use of force. The commentary notes, however, that in modern cases of humanitarian intervention, the excuse of necessity has hardly ever been relied on." Crawford, *Second report on State responsibility*, para 281.

⁵⁶ Crawford, *Second report on State responsibility*, para 286.

question of humanitarian intervention abroad is not one which is regulated, primarily or at all, by article 33.”⁵⁷

Crawford’s statement above is fully consistent with the treatment of self-defence as a ground under Article 21 of ARSIWA. Recalling that Article 21 does not establish the exceptional nature of the right of self-defence, but precludes the unlawfulness of otherwise unlawful acts committed in a lawful (necessary and proportionate) situation of self-defence, Crawford analogously reiterates his earlier statement here:

In the Special Rapporteur’s opinion, it is neither necessary nor desirable to resolve underlying questions about the scope of self-defence in modern international law—even if it were possible to do so in the draft articles, which having regard to Article 103 of the Charter it is not. It is not the function of the draft articles to specify the content of the primary rules, including that referred to in Article 51.⁵⁸

Based on the above, the following partial conclusions can be drawn:

- If there is a derogation mechanism in a treaty, this derogation applies.
- If there is no *lex specialis* derogation, and it is not explicitly or implicitly prohibited by the applicable rule, Article 25 of ARSIWA can be applied if the conjunctive conditions are fulfilled.
 - If the primary source of obligation in question excludes the possibility of a derogation, Article 25 may still be applicable in very justified cases, but here it must also be taken into account that derogation was excluded at the level of primary norms.
 - Therefore, the subject matter and purpose of primary norms should be taken into account. A plea of necessity cannot be invoked where the State would not be temporarily relieved of the obligation concerned, but where the obligation would be discharged in substance.
 - In relation to a breach of *jus cogens* norms, the applicability of Article 25 is always excluded.
 - Neither can it be invoked where peremptory primary obligations collide. For instance, genocide cannot be a response to a genocide, or genocide cannot be countered by using armed force without SC authorization.⁵⁹
 - Self-preservation of a State is the most elementary interest that could ever be at stake in the event of a serious and imminent threat against a State, which may induce having recourse to use of force, in breach of *jus cogens* norms. This conflict between

⁵⁷ Ibid. para 289.

⁵⁸ Ibid. para 303.

⁵⁹ An example would be humanitarian intervention, the legality of which cannot be justified in this way.

substantive obligations is also to be decided at the level of primary norms: it is either a case of self-defence,⁶⁰ or, in some narrow cases, may qualify as a preventive self-defence.⁶¹

V. NECESSITY AND THE RIGHT TO SELF-DEFENCE

Any use of force between States violates Article 2(4) of the Charter.⁶² In the absence of a Security Council authorisation, to use force against non-state actors, the state of necessity would be required as a ground of unlawfulness, because the act would not be rendered lawful by Article 51.⁶³ As the relationship between Article 2(4) and Articles 42 and 51 shows, the obligation-exception relationship is primarily decided at the level of primary norms. It is only in this context that it is to be decided whether a State has violated the general prohibition on the use of force or not.

The grammatical, taxonomic, historical, and teleological interpretation of the Charter and, more specifically, of Article 2(4), all support the view that the *raison d'être* of the norm of a general prohibition of the use of force is to prohibit acts of even the slightest inter-state violence.⁶⁴ The purpose of the provision is, thus, to prevent inter-State conflicts, and not only to reduce their intensity. Since a state of necessity temporarily shields a state, the fundamental interests of which are threatened, from the consequences of a violation,⁶⁵ in the case of Article 2(4), doing so would be tantamount to hollowing out the *jus cogens* norm itself. The state of necessity and the general prohibition of the use of force are therefore also incompatible at a systemic level.

States ought not to use force as a last resort in a state of necessity. Whereas necessity is a reaction to an existing threat, which, moreover, does not necessarily involve the State against which the use of force ultimately occurs, in the case of self-defence, force may be used in the event of an armed attack that has already taken place, and only against the State that has committed the attack.⁶⁶ The only situation recognised

⁶⁰ “[A]n extreme circumstance of self-defence, in which the very survival of a State would be at stake.” Nuclear Advisory Opinion, 1996, 266.

⁶¹ See also N. Lubell, *Extraterritorial Use of Force Against Non-State Actors*, (Oxford, 2010) 71–72. <https://doi.org/10.1093/acprof:oso/9780199584840.001.0001>

⁶² *Corfu Channel Case (UK v Albania)*, 34–35.

⁶³ In the absence of consent, there would be no armed attack, which is a *sine qua non* of the right to self-defence. *Nicaragua case (Nicaragua v. United States)*, paras 193–195, 210–211, 237.

⁶⁴ R. Higgins, *Problems and Process: International Law and How We Use It*, (OUP, 1994) 240.; C. Gray, *International Law and the Use of Force*, (OUP, 2008) 32.; R. Y. Jennings and A. Watts (eds), *Oppenheim's International Law*, (Vol I. Longman, 1992) 154.

⁶⁵ *ARSIWA Commentary*, Chapter V, 71.

⁶⁶ “By contrast, the State against which another State acts in self-defence is itself the cause of the threat to that other State. It was the first State which created the danger, and created it by conduct which is not only wrongful in international law but also constitutes the especially serious specific international offence of recourse to armed force in breach of the existing general prohibition on such recourse.

by the UN Charter in which the essential interests of the injured State permit the use of force without significantly impairing the essential interests of other States or of the international community is when another State uses force against it on a large scale.

Consequently, the only quasi-necessity situation of our time in which force may be used exceptionally (to a limited extent, in a limited manner, for a limited purpose and for a limited period of time) is self-defence, and the conduct that justifies this is an armed attack. The structure and language of the UN Charter is clear: in the system of collective security, all other forms of self-help involving use of force are excluded⁶⁷ and there is no excuse for their commission. Such a rule may only be modified by proper state practice, which, given the *jus cogens* nature of the norms involved,⁶⁸ must reach an extremely high threshold which has clearly not been the case with necessity.

Self-defence measures are not a necessity, because they do not breach Article 2(4) in the first place and, are therefore, not unlawful.⁶⁹ While self-defence is a *legal right*, a *necessity* does not even justify the original wrongdoing, but at best creates a possible excuse for it.⁷⁰

In a situation of self-defence, it may nevertheless be necessary to assess the circumstance precluding wrongfulness, since, in such a situation, Article 2(4) is not the only rule which is possibly being violated. Article 21 of ARSIWA is intended to deal with these cases by excluding the unlawfulness of any act that is a legitimate (proportionate, necessary) corollary of a self-defence situation.⁷¹ This includes, for example, breaches of environmental, economic and commercial, or even humanitarian and human rights standards.⁷² Article 21 does not, however, apply to cases that are explicitly or implicitly covered by other norms of a treaty or customary law (such as non-derogable human rights, and certain rules of international humanitarian law).⁷³ In other words, Article 21 does not exclude the unlawfulness of self-defence, but of any necessary incidental act of self-defence lawfully exercised, provided that no other primary rule of international law

Acting in self-defence means responding by force to wrongful forcible action carried out by another. In other words, for action of the State involving recourse to the use of armed force to be characterized as action taken in self-defence, the first and essential condition is that it must have been preceded by a specific kind of internationally wrongful act, involving wrongful recourse to the use of armed force, by the subject against which the action is taken." Report of the ILC on the Work and Its Thirty-Second Session, in *ILC Yearbook 1980*, 52–53.

⁶⁷ S/RES/188, 9 April 1964. See A. E. Hindmarsh, Self-help in time of peace, (1932) 26 (2) *AJIL*, 315–326. <https://doi.org/10.2307/2189351>

⁶⁸ VCLT Art. 53.

⁶⁹ *ARSIWA Commentary*, Article 21(1).

⁷⁰ G. Schwarzenberger, *International Law as applied by International Courts and Tribunals*, (Stevens & Sons, London, 1976) 30–31. See also J. L. Kunz, Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, (1947) 41 (4) *American Journal of International Law*, 872–879., 875., <https://doi.org/10.2307/2193095>

⁷¹ *ARSIWA Commentary*, Article 21(2).

⁷² *Ibid.*

⁷³ *ARSIWA Commentary*, Article 21(3).

so provides. As a general rule, this applies only in the relationship between the attacking and the attacked State. The provision therefore does not affect the conditions of the right of self-defence, which are contained in the primary rules of *jus contra bellum*.⁷⁴

Table 1. Key differences between self-defence and necessity

	Self-defence	Necessity
The nature of the norm	primary norm	secondary norm
Status of the norm	<i>jus cogens</i> / part of a <i>jus cogens</i> norm / a substantive exception to a <i>jus cogens</i> norm	a regular (non-peremptory) rule, which cannot in any case exclude the unlawfulness of a <i>jus cogens</i> violation
Mechanism	functions as a right: on the basis of which one can act legally	it functions as an excuse: it can only be invoked after the fact
Balancing mechanism	there is no weighing of values: the weighing is resolved by the rule-exception relationship alone	ex-post and extraordinary balancing of values: the obligation of a state and the community interest in fulfilling it versus the “elementary” interest of a state
The safeguarded interest	it is not necessary that the existence of the state is at stake, only the requirement of a high intensity (armed) attack	“elementary interest” of the State: environmental, economic, migration, etc. interests of the State to be at risk
Condition (1)	a specific injury to a State’s right, i.e. an armed attack	a grave and imminent peril, no violation of any rights is necessary
Condition (2)	does not need to be an exceptional instrument, only necessary and proportionate	exceptional tool
Condition (3)	being a right, it does not inherently prejudice the interests of another state / the international community	not to harm the interests of other states / the international community
Cases when it cannot be applied (1)	no international obligation can exclude its exercise; doing so would be null and void	international legal obligations may exclude its invocation

⁷⁴ ARSIWA Commentary, Article 21(6).

	Self-defence	Necessity
Cases when it cannot be applied (2)	<i>a jus cogens</i> norm does not exclude its invocation	<i>jus cogens</i> always excludes its invocation
Cases when it cannot be applied (3)	State contribution is irrelevant in the emergence of a self-defence situation, as it has one objective criterion, namely an armed attack	when the State has contributed to the situation of necessity
Consequences (1)	<i>a "sword"</i> : the failure to comply with the main obligation is fully justified	<i>a "shield"</i> : the obligation remains, but the state's responsibility cannot be enforced (temporarily)
Consequences (2)	<i>per se</i> lawful conduct	there is a breach of the law, the unlawfulness of which is temporarily excused

VI. CONCLUSION

As the foregoing discussion argued, the plea of necessity is not capable of precluding the wrongfulness of an act contrary to Article 2(4) UN Charter, for the following reasons:

- The unlawful use of force is the most well-established *jus cogens* rule, and therefore the applicability of necessity is precluded by Article 26 ARSIWA.
- In the hypothetical situation where a general prohibition of the use of force would not be *jus cogens*, the issue would have to be resolved at the level of primary norms.
- There are only two exceptions to Article 2(4), the right of self-defence in Article 51 and the Security Council authorisation under Articles 39–42.
- The system of the Statute, in particular Article 103, excludes all other possibilities.
- The main rule and its two exceptions form an airtight system at the level of a primary norm of paramount status: the use of force is prohibited, with the only exception of a Security Council mandate and, in its absence, self-defence on a temporary basis.
- The applicability of the secondary norm of necessity in cases of interstate use of force is precluded, both by the scheme of the primary norm outlined above and Articles 21 and 25–26 of ARSIWA.

The plea of necessity is also incompatible with Article 2(4) at a systemic level. The application of Article 25 of ARSIWA would not only temporarily protect the wrongful State from responsibility but would completely exempt it from the general prohibition of the use of force.

The invocation of necessity in the *jus contra bellum* system is not only unlawful but also unnecessary. Lawful action can be taken against non-state actors and against the State controlling the territory they occupy without invoking the state of necessity. On the one hand, in the event of a sufficiently serious attack, the link between the entity committing the attack and the territorial State is often sufficiently close to allow for attribution.⁷⁵ On the other hand, even in the absence of attribution, the role of the territorial State in the attack can be still relevant if its territory was made available to the non-State actor for the commission of the attacks.⁷⁶ Thirdly, the collective security system, in which the Security Council plays a central role, has been set up to deal with non-state actors too. Since 1990 the SC has applied sanctions on numerous occasions by mandating forcible⁷⁷ and non-forcible measures,⁷⁸ against non-state actors and their supporting States.

⁷⁵ To do this, it must be shown that the state in question “sent” the attackers or had a “significant role”.

UN Doc. A/RES/3314, 14 December 1974, Article 3(g).

⁷⁶ UN Doc. A/RES/3314, 14 December 1974, Article 3(f).

⁷⁷ See e.g. S/RES/1386 (2001) or S/RES/1373 (2001).

⁷⁸ See e.g. S/RES/1267 (1999) or S/RES/1333 (2000).

HABILITATIO
