

Article

State of Necessity as a Justification for Internationally Wrongful Conduct

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I. INTRODUCTION

1 In 1995, 50,000 Rwandan refugees and local Burundis fled to the border of Tanzania seeking safety, after gunmen attacked a refugee camp in northern Burundi. According to the Office of the U.N. High Commissioner for Refugees: "What happened next was unprecedented. Rather than welcoming them as the country had regularly done in the past, Dar as Salaam [Tanzania] deployed the army, closed its border and effectively told the refugees to stay away."¹ Strained by the local and environmental pressures of hosting the 500,000 Rwandan refugees that had arrived in 1994,² Tanzania explained its change in policy: "Protecting and assisting refugees has brought new risks to national security, exacerbated tensions between states and caused extensive damage to the environment . . ."³

2 In effect, Tanzania had invoked the concept of "state of necessity" as an excuse for a border-closure that may have violated its duties under international law. Other states, including Jordan and, most recently, Macedonia, have also sought to justify border closures on necessity grounds.⁴ These kinds of border-closures, exposing asylum-seekers to

1. Augustine Mahiga, *A Change of Direction for Tanzania*, REFUGEES, Winter 1997, 14, 14.

2. *Id.* at 15 ("Law and order in refugee camps and the surrounding countryside deteriorated precipitously. The local population was outnumbered 3-to-1 by refugees. They watched with increasing frustration as large tracts of forest, rivers and arable land were destroyed.")

3. *Id.* at 14 (quoting statement by Tanzania's Deputy Home Affairs Minister E. Mwambulukutu).

4. Recently, Macedonia twice closed its borders to persons seeking refuge from violence in their homeland. In 1997, the border was closed to refugees fleeing the civil unrest in Albania. See, e.g., Julia Strauss & Robert Fox, *Thousand Try to Flee Growing*

the risk of persecution that drove them from their homes in the first place, violate the internationally prescribed duty of *non-refoulement*.⁵ They not only facilitate the continuation of human rights abuse but also undermine the system of asylum that has been the cornerstone of protection for people whose rights could no longer be safeguarded in their own countries.

In this Article I examine the concept of necessity as an excuse or justification for a State's breach of an international legal obligation from a practical and theoretical perspective. I will show that while the concept of a state of necessity as understood by the International Law Commission (ILC) and the International Court of Justice (ICJ) may be applicable in respect of non-fulfilment by States of human rights obligations, the balancing test in the provisionally-adopted text of article 33 of the ILC's Draft Articles on State Responsibility⁶ is designed to weigh inconsistent interests of two States rather than interests of a State against interests of a community of States and is thus ill-suited for the context of *erga omnes* and multilateral obligations that human rights norms entail. As a consequence, necessity, as expressed in the current text of article 33, could too easily allow a State to excuse its non-compliance with international human rights obligations in situations of threat to an essential interest of the State. That is to say, by way of a practical example, that a State could close its borders to a large-scale influx of asylum-seekers and excuse its non-compliance with its international duty not to expose asylum-seekers to the risk of persecution by asserting that the influx would threaten an essential State interest, such as the preservation of internal order and security.

In Part II, I trace the development of the necessity excuse from its seventeenth-century manifestation to its current codification in article

Chaos in Tirana, DAILY TELEGRAPH, Mar. 14, 1997, at 15. Two years later, Macedonia closed its borders to keep out those driven from Yugoslavia's Kosovo province by Serbian atrocities and NATO air raids. See, e.g., Michael R. Gordon, *Weather Breaking, and Allies Seek to Intensify Bombing*, N.Y. TIMES, Apr. 5, 1999, at A1, A6. In 1998, when tension was rising between Iraq and the Security Council over the weapons inspection regime, Crown Prince Hassan explained why Jordan would have to close its borders to asylum-seekers from Iraq: "We are talking about the possibility of hundreds of thousands of refugees moving in the direction of the borders of Iraq's neighbors. Of course that is a position that has compelled us to say we would be forced to close the border; we simply cannot absorb further hundreds of thousands of refugees." Jay Bushinsky, *US Dismisses Latest Iraqi Proposal*, JERUSALEM POST, Feb. 12, 1998, at 1. For discussion of other instances of border closures to prevent a mass influx of asylum-seekers, see James C. Hathaway & R. Alexander Neve, *Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection*, 10 HARV. HUM. RTS. J. 115, 124–25 (1997).

5. For a discussion of the duty of *non-refoulement*, see *infra* Section IV(A).

6. See *Report of the International Law Commission on the Work of its Twenty-Seventh Session*, U.N. Doc. A/10010/Rev.1 (1975), reprinted in [1975] 2 Y.B. INT'L L. COMM'N 47, 51–59, U.N. Doc. A/CN.4/SER.A/1975/Add.1 (reviewing the historical development of the articles); *Report of the International Law Commission on the Work of its Thirty-Second Session*, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. INT'L L. COMM'N pt. 2, 1, 26–34, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 2) (adopting the text of articles 1 through 35) [hereinafter *ILC Draft Article*].

33 of the ILC's Draft Articles of State Responsibility. I then set forth, in Part III, the constituent elements of necessity as embodied in draft article 33, drawing on the ICJ's interpretation of it in the recent *Gabčíkovo-Nagymaros* decision,⁷ in which draft article 33 was recognized to "reflect[] customary international law."⁸ To aid in the analysis and to demonstrate that necessity must not be dismissed as a stale legal construct, but rather that it should be appreciated as a matter of vital importance to human rights protection, I then apply, in Part IV, the concept of necessity expressed in draft article 33 as a justification for a State's border-closure to prevent a large-scale influx of asylum-seekers. I choose the border-closure scenario because of its periodic recurrence in the practice of States and because of its corrosive effects on human rights protection of large numbers of people.

By conclusion, I urge a reconception of the current necessity balancing test that, rather than weighing only the specific inconsistent interests of two States, would take into account the interests of the *community of States* in situations where *erga omnes* and multilateral human rights obligations are at stake. Such a construction would prohibit, or at least severely restrict, the use of the necessity justification in situations where human rights were involved. Importantly, this change was proposed to the International Law Commission in 1999. It is uncertain, however, that the ILC will ultimately adopt this change in its final draft articles on state responsibility. Failure to do so would lead to perverse outcomes in international human rights law and to wider human rights abuse by States in abdication of their international responsibilities.

II. HISTORICAL DEVELOPMENT OF THE CONCEPT OF NECESSITY: FROM "SELF-PRESERVATION" TO "ESSENTIAL INTEREST"

A. *The Early Doctrine of Necessity: A State's Right to Self-Preservation*

Necessity, it seems, was from long ago coupled with the notion of self-preservation. That is to say, when a threat to self-preservation arose, it was considered justified to take any steps necessary to preserve one's existence, even if such steps would have been unlawful had they been taken in the absence of a threat to self-preservation. Writing in the seventeenth century, Hugo Grotius observed that many nations recognized the right to self-preservation in their internal law: "The Jewish law . . . , no less than the Roman, acting upon the same principle of tenderness forbids us to kill anyone, who has taken our goods, unless for the preservation of our own lives."⁹ For Grotius, widely

7. Case Concerning the *Gabčíkovo-Nagymaros* Project (Hung. v. Slov.), 1997 I.C.J. 92 (Sept. 25) [hereinafter *Gabčíkovo-Nagymaros* Project].

8. *Id.* para. 52.

9. HUGO GROTIUS, *DE JURE BELLI AC PACIS*, LIBRI TRES bk. II, ch. I, para. XII, cl. 3

considered the “father of international law,” this principle was equally applicable to inter-state relations. In the context of war, for example, he wrote that when the exigencies of war make it necessary for one power to occupy neutral soil, such as when the enemy’s occupation of that territory would pose a threat to its power, it may occupy the territory in the exercise of a right of necessity.¹⁰

Grotius did not, however, leave the exercise of the right of necessity unencumbered.¹¹ He emphasized the narrowness of the circumstances in which a state would be justified in invoking a right of necessity to undertake otherwise unlawful acts. When writing about the rights of neutral powers during a war, for example, he stressed that “nothing short of *extreme exigency* can give one power a right over what belongs to another no way involved in the war.”¹² At the same time, “even where the emergency can be plainly proved, nothing can justify . . . taking or applying the property of [the neutral power], beyond the *immediate* demands of that emergency.”¹³ Moreover, “no emergency can justify any one in taking and applying to his own use what the owner stands in equal need of himself.”¹⁴ And, finally, when the exigency passes, the property must be returned to the neutral state¹⁵ and “full value should be paid” for the difference in condition or amount of the returned property.¹⁶ From these and similar passages, Rodick identified the following conditions inherent in the Grotian concept of necessity:

1. There must be an absence of *mens rea* on the part of one who exercises the alleged right [of necessity].
2. There must be a real and vital danger, either to life, or to property.
3. The danger must be imminent in point of time.
4. In seizing the property of neutrals the amount seized should be no greater than is necessary for the particular object in view.
5. Consideration must be given to the equities involved
6. The person who has exercised the right [of necessity] is

(A.C. Campbell trans., 1901).

10. *See id.* at bk. II, ch. II, para. X.

11. *See* BURLEIGH CUSHING RODICK, *THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW* 5–6 (1928).

12. GROTIUS, *supra* note 9, at bk. III, ch. VII, para. I (emphasis added).

13. *Id.* (emphasis added).

14. *Id.*

15. *Id.* at bk. II, ch. II, para. X.

16. *Id.* at bk. III, ch. VII, para. I.

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bound whenever possible to make restitution or give an equivalent to the owner.¹⁷

8 The Grotian understanding of necessity as a right resonated in the thinking of nineteenth century scholars who propounded the notion that States possess certain fundamental rights, including the right to existence and the attendant right to self-preservation.¹⁸ Typical of the time are the writings of Travers Twiss, who wrote: “Of the Primary and Absolute Rights of a nation the most essential, and as it were the Cardinal Right, upon which all others hinge, is that of Self-Preservation. This Right necessarily involves, as subordinate Rights, all other Rights which are essential as means to secure this principal end.”¹⁹ The assumption that existence and self-preservation were rights of States led to the notion that when a State’s existence was threatened, the State could, as a matter of right, take action aimed at preserving itself, even if that action was incongruent with its international obligations.²⁰ Thus, Hershey wrote that “[i]n order to protect and preserve this right [to self-preservation], [a State] may in extreme cases of necessity commit what would ordinarily be an infraction of the Law of Nations and violate the territorial sovereignty or international right of another State”²¹

9 Yet, conceptualizing self-preservation as a right introduces a serious practical difficulty when a decisionmaker has to decide which of two rights of two States is of more weight—the right of a State to have its international rights honored or the right of another State to breach those rights in the exercise of its right of self-preservation. Charles Fenwick captured the attendant quagmire well when he wrote that “[t]he conflict of international rights thus resulting is governed by a few general principles of law, which are, however, so vague as to leave it an open question in many cases whether the right of one has justified a breach of the right of the other.”²² Contemporary international law has

17. RODICK, *supra* note 11, at 6 (citations omitted).

18. See *Addendum to the Eighth Report on State Responsibility*, by Mr. Roberto Ago, U.N. Doc. A/CN.4/318/ADD.5-7, reprinted in 1980 Y.B. INT’L L. COMM’N vol. II, pt. 1, 13, 16, para. 7, U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1) [hereinafter *Ago Report*]; see also AMOS S. HERSHEY, THE ESSENTIALS OF INTERNATIONAL PUBLIC LAW AND ORGANIZATION 231 (1927) (“The most important of these fundamental rights of States is that of existence, which involves the rights of self-preservation and defense.”).

19. TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES 179 (2d ed. 1884); see also I WHEATON’S ELEMENTS OF INTERNATIONAL LAW 150–51 (A. Berriedale Keith ed., 6th ed. 1929); CHARLES G. FENWICK, INTERNATIONAL LAW 142–43 (1924) (“The right of existence, or of self-preservation, is recognized by international law as the primary right of states, being the necessary postulate of the possession of all other rights.”).

20. See *Ago Report*, *supra* note 18, at 16, para. 7.

21. HERSHEY, *supra* note 18, at 232.

22. FENWICK, *supra* note 19, at 142–43. Fenwick went on to observe that the consequence of this clash of two rights of States in “the absence of an international authority competent to give effective sanction to international law, [is that] the right of

partly responded to this problem by dispensing with the notion of necessity as a “right,” in favor of a notion that self-preservation and other “essential interests” may be used to “excuse” internationally wrongful conduct under certain limited circumstances.

B. *The Modern Necessity Doctrine: A State’s Excuse in the Name of an “Essential Interest”*

At the request of the ILC, Professor Roberto Ago, who was subsequently appointed as judge of the International Court of Justice, prepared a comprehensive study in the 1970s on the concept of necessity in international law. His seminal study lends insight into the modern necessity doctrine upon which the drafters of article 33 relied. Importantly, Ago rejects the notion of self-preservation and necessity as rights of States.²³ Instead, he marshals doctrinal support from international tribunals for the claim that necessity is not a right emanating from the right of self-preservation, but rather an excuse to breach a State’s international obligation when necessary to protect an essential interest.²⁴ The “excuse” conception of necessity provides a partial way out of Fenwick’s quagmire: in invoking necessity, a State does not assert a right in defense of its violation of the right of another

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existence on part of small states has been at times precarious; and on occasion . . . it has been no more than a legal fiction.” *Id.* at 143.

23. Regarding the right of a state to self preservation, Ago argues that “[t]he theory of ‘fundamental rights’ of States . . . was the product of pure abstract speculation with no basis in international legal reality, and has since become outdated; in particular, the idea of a right of ‘self-preservation’ has been completely abandoned.” *Ago Report, supra* note 18, at 17, para. 7. Similarly, “the idea of a subjective right of necessity, which may have been marginally acceptable in times when the science of law had not yet refined its concepts, is absolute nonsense today.” *Id.* at 16, para. 9. Of course, Ago is not alone in criticizing the view of necessity and self-preservation as rights. *See, e.g.,* DEREK W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 10 (1958) (“That view, by which the whole of the duties of states are subordinated to the ‘right’ of self-preservation or the ‘right’ of necessity, is destructive of the entire legal order.”) (citations omitted); Georg Schwarzenberger, *The Fundamental Principles of International Law*, 87 *RECUEIL DES COURS* 344 (I/1955) (“If self-preservation were an absolute and overriding right, the rest of international law would become optional, and its observance would depend on a self-denying ordinance, revocable at will by each State, not to invoke this formidable super-right.”).

24. The difference between these two positions is that in invoking necessity as an excuse, the acting State merely seeks to excuse its denial of another State’s legitimate legal claim against it, whereas if necessity were understood to be a right, the acting State’s reliance on it would amount to a legal claim against the other State. *See Ago Report, supra* note 18, para. 15.

In support of Ago’s position that necessity is not a right but an excuse, *see, for example,* Schwarzenberger, *supra* note 23, at 343 (“Sufficient evidence exists to permit the statement that, in international law, necessity may excuse non-observance of international obligations. . . . [N]ecessity does not give any right, but may provide a good excuse.”); BOWETT, *supra* note 23, at 10 (acknowledging the limited role of necessity as a concept “justifying conduct which, though not lawful (and therefore distinct from self-defence) is yet excusable . . .”).

State, but rather asserts that, under the circumstances, international law should excuse its conduct.²⁵

¹¹ The practice of international adjudicative bodies, as surveyed by Ago²⁶ and Bin Cheng,²⁷ demonstrates the recognition in international law of necessity as an excuse for a State's nonperformance of an international obligation. One early instructive case is that of *The Neptune*,²⁸ an American vessel laden with foodstuffs bound for France, a nation then at war with Britain. Captured by a British warship, *The Neptune* was taken to a British port where its cargo was seized pursuant to an order extending to neutral vessels bound for enemy ports.²⁹ The British Government took the cargo, paying the invoice price plus a ten percent profit.³⁰ Claiming the difference between the amount paid and the amount they would have received had the cargo reached its intended destination,³¹ the owners of the American vessel brought a claim against the British government to an arbitral commission established under the Jay Treaty.³² The Commission upheld the shipowners' claim and granted the requested relief.³³ In so doing, it summarily rejected Britain's argument that its action was justified by necessity—that is, that the seizure of cargo was justified by the alleged scarcity of foodstuffs in Britain at the time.³⁴

¹² Two of the arbitral commissioners, applying the concept of necessity to the facts of the case, found that the facts did not justify a legitimate reliance on necessity. Mr. Pinkney wrote in his opinion:

I shall not deny that *extreme necessity* may justify such a measure [seizure of foodstuffs]. It is only important to ascertain whether that *extreme necessity* existed on this occasion and upon what terms the right it communicated might be carried into exercise.

We are told by Grotius that the necessity must not be imaginary, that it must be real and pressing, and that even then it does not give a right of appropriating the goods of others until all other means of relief consistent with the necessity have

25. See *Ago Report*, *supra* note 18, at 20, para. 15.

26. See *id.* at 21, paras. 19 *et seq.*

27. See BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 69–77 (1953).

28. *The Neptune*, reprinted in IV INTERNATIONAL ADJUDICATIONS: MODERN SERIES 372 (John Bassett Moore ed., 1931) (decided in 1797). For accounts of the case, see BIN CHENG, *supra* note 27, at 70–71, and *Ago Report*, *supra* note 18, para. 48.

29. See *The Neptune*, *supra* note 28, at 372.

30. See *id.*

31. See *id.* at 372.

32. See *id.*

33. See *id.* at 441.

34. See *id.* at 398.

been tried and found inadequate.³⁵

Mr. Trumbull expressed a similar understanding of the limits of necessity.³⁶

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Although both commissioners, writing in the eighteenth century, viewed necessity as a right, Bin Cheng draws out several aspects of *The Neptune* decision that are common to decisions of international tribunals going into the twentieth century:

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1. When the existence of a State is in peril, the necessity of self-preservation may be a good defence for certain acts which would otherwise be unlawful.
2. This necessity “supersedes all laws,” “dissolves the distinctions of property and rights” and justifies the “seizure and application to our own use of that which belongs to others.”
3. This necessity must be “absolute” in that the very existence of the State is in peril.
4. This necessity must be “irresistible” in that all legitimate means of self-preservation have been exhausted and proved to be of no avail.
5. This necessity must be actual and not merely apprehended.
6. Whether or not the above conditions are fulfilled in a given case, is a proper subject of judicial inquiry. If they are not, the act will be regarded as unlawful and damages will be assessed in accordance with principles governing reparation for unlawful acts.³⁷

These six features bear a strong resemblance to the Grotian view of necessity. The only significant differences between the Grotian-influenced conception of necessity in *The Neptune* decision and necessity as sketched out in the opinions of modern adjudicative bodies

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35. *Id.* at 398–99 (opinion of Mr. Pinkney) (emphases in original).

36. Mr. Trumbull writes:

The necessity which can be admitted to supersede all laws and to dissolve the distinctions of property and right must be absolute and irresistible, and we cannot, until all other means of self-preservation shall have been exhausted, justify by the plea of necessity the seizure and application to our own use of that which belongs to others.

Id. at 433 (opinion of Mr. Trumbull).

37. See BIN CHENG, *supra* note 27, at 71.

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are that necessity is no longer considered to be a right³⁸ and that its legitimate use is not anymore dependent on the existence of a link with self-preservation, meaning preservation of the very existence of the State.³⁹

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Although a link between preservation of a State's very existence and the plea of necessity as an excuse for noncompliance with an international obligation of the State has been intimated in several cases,⁴⁰ the predominant trend in more recent practice is to expand the notion of necessity to cover "essential interests" other than threats to a State's very existence.⁴¹ Illustrative in this regard is the ILC's characterization of *The Torrey Canyon* incident. In 1967, *The Torrey Canyon*, a Liberian tanker carrying 117,000 tons of crude oil, ran aground off the coast of Cornwall, but outside British territorial waters.⁴² The oil began to leak into the sea through a hole in the hull of the vessel, posing a threat to the English coast and its population.⁴³ As *The Torrey Canyon* began to break apart, the British government was faced with the risk that the entire cargo of oil would spill out into the

38. See *supra* note 23 and accompanying text.

39. On this point Ago observed that the predominant opinion today holds that "the concept of state of necessity can be invoked above all to preclude wrongfulness of conduct adopted in certain conditions in order to protect an essential interest of the State, *without its existence being in any way threatened.*" *Ago Report, supra* note 18, para. 8 (citation omitted) (emphasis added).

40. See, e.g., *Ago Report, supra* note 18, para. 22 (pointing to the *Russian Indemnity Case*, in which the Permanent Court of Arbitration rejected the Ottoman government's claim of necessity to justify its failure to pay its debt to Russia, as evidence that the Court recognized the necessity defense as international law, "but only within very strict limits: "compliance with an international obligation must be 'self-destructive' "); para. 26 (discussing the *French Company of Venezuela Railroads Case*, in which the French/Venezuelan Mixed Claims Commission accepted Venezuela's argument that it had been forced to annul the concessions it granted to the French company because Colombia's claim on much of the area granted posed "the real danger of war").

41. See *Ago Report, supra* note 18, para. 23 (discussing the *Forests of Central Rhodope Case*, and concluding that the resolution reached by Greece and Bulgaria before the Council of the League of Nations showed that "the two Governments seem to have clearly recognized that a situation of *necessity* such as one consisting of *very serious financial difficulties* could justify, if not the repudiation by a state of an international debt, at least recourse to means of fulfilling the obligation other than that actually envisaged by in the obligation"); para. 32 (discussing the *Properties of Bulgarian Minorities in Greece Case*, in which the League of Nations Committee of Enquiry accepted Greece's plea of necessity based on the claim that it violated the Treaty of Sèvres vis-à-vis Bulgaria in order to "safeguard an interest which it deemed essential, namely, the provision of immediate shelter for its nationals who were pouring into its territory in search of refuge"); para. 42 (discussing the *Rights of Nationals of the United States of America in Morocco Case*, a case before the International Court of Justice in which France defended its breach of its treaty obligations to the United States on the ground that non-compliance was necessary to its "fundamental economic balance").

42. See *Ago Report, supra* note 18, para. 35 (describing the incident); see also *Report of the International Law Commission on the Work of its Thirty-Second Session*, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2 Y.B. INT'L L. COMM'N pt. 2, 1, 26-34, U.N. Doc.A/CN.4/SER.A/1980/Add.1 (Part 2), para. 15 [hereinafter *Commentary*].

43. *Id.*

sea.⁴⁴ After various attempts at averting the impending disaster failed, the British bombed the vessel in order to burn off the oil remaining on board.⁴⁵ In this case, it is clear that the danger of the oil spill did not pose a threat to the very existence of Great Britain. Rather, the spill threatened one of the state's interests, namely, the protection of the marine and coastal environment. In its commentary on draft article 33 (*Commentary*),⁴⁶ the ILC referred to the British Government's destruction of *The Torrey Canyon*, stating:

Whatever other possible justifications there may have been for the British Government's action, it seems to the Commission that, even if the shipowner had not abandoned the wreck and even if he had tried to oppose its destruction, the action taken by the British Government would have had to be recognized as internationally lawful because of a state of necessity.⁴⁷

The ILC's response to Britain's action in *The Torrey Canyon* incident—recognizing, in effect, an excuse of *environmental necessity*—demonstrates the view that necessity is not inextricably linked to preserving the very existence of the State, but that it may be legitimately relied upon in a broader set of circumstances; namely, when one of the State's essential interests is threatened.⁴⁸

In 1997, in the *Gabčíkovo-Nagymaros Case*,⁴⁹ the International Court of Justice strongly reaffirmed this emphasis on “essential interest” rather than existence in the modern doctrine of the state of necessity. The case arose out of a project undertaken by Hungary and Czechoslovakia (and later Slovakia) to develop a system of dams and locks on the Danube River to generate electricity, improve navigation, and protect against flooding.⁵⁰ Twelve years into the vast project, which had been consummated by a treaty ratified by the respective States, Hungary first suspended and then abandoned its treaty obligations, claiming that the project posed grave risks to the environment in the

44. *Id.*

45. *Id.*

46. See *Commentary*, *supra* note 42.

47. *Id.* at 39, para. 15.

48. For a discussion of the ILC's conception of what constitutes an essential interest for the purposes of necessity, see *infra* Section III(A).

49. See *Gabčíkovo-Nagymaros Project*, *supra* note 7, paras. 49–58. For an analysis of this case see, for example, Colleen P. Graffy, *Water, Water, Everywhere, Nor Any Drop to Drink: The Urgency of Transnational Solutions to International Riparian Disputes*, 10 GEO. INT'L ENV'TL. L. REV. 399, 431–440 (1998); Johan G. Lammers, *The Gabčíkovo-Nagymaros Case Seen in Particular From the Perspective of the Law of International Watercourses and the Protection of the Environment*, 11 LEIDEN J. INT'L L. 287 (1998), and René Lefeber, *The Gabčíkovo-Nagymaros Project and the Law of State Responsibility*, 11 LEIDEN J. INT'L L. 609 (1998).

50. See *Gabčíkovo-Nagymaros Project*, *supra* note 7, paras. 15–20 (describing the project).

region and to the water supply of Budapest.⁵¹ Czechoslovakia brought suit before the International Court of Justice to seek redress. In justification of its breach of the treaty terms, Hungary largely relied on the existence of a state of *ecological necessity*.⁵² Significantly, although the ICJ ultimately held that Hungary had not met its burden of establishing a state of necessity,⁵³ the Court proceeded on the assumption that the threat of an ecological catastrophe could establish a state of necessity, and that such necessity could provide a valid excuse for a State's conduct in violation of its international obligations.

19 This brief overview of the development of the concept of necessity in international law provides context for the ILC's attempt to codify the concept of necessity over the past fifty years. Taking into account the evolution of necessity through doctrine and practice, the ILC's work culminated in the provisional adoption of article 33 of the ILC's Draft Articles of State Responsibility.

III. THE CONCEPT OF NECESSITY EMBODIED IN ARTICLE 33 OF THE ILC'S DRAFT ARTICLES OF STATE RESPONSIBILITY

20 In 1980, twenty-five years into its efforts to codify State practice with respect to the concept of necessity, the International Law Commission provisionally adopted the text of article 33 of the Draft Articles of State Responsibility [hereinafter draft article 33].⁵⁴ The significance of adoption by the ILC of a draft text bears remarking on. The U.N. Charter empowers the U.N. General Assembly to "initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification."⁵⁵ To discharge its responsibility in this regard, the General Assembly created the ILC in 1947.⁵⁶ The ILC is made up of thirty-four experts elected by the General Assembly in their individual capacity.⁵⁷ Since beginning its work in 1949, the ILC has established itself as the preeminent authority on codification of international law.⁵⁸ At the direction of the General Assembly, it has studied key topics of international law and prepared texts that were the bases of such

51. See *id.* paras. 22–40 (describing the Hungarian claim of state of ecological necessity in justification of abandoning the project).

52. See *id.* para. 40. Hungary also advanced arguments founded on other grounds, including "the impossibility of performance of the [underlying] Treaty; . . . the occurrence of a fundamental change of circumstances; . . . the material breach of the [underlying] Treaty by Czechoslovakia; and . . . the development of new norms of international environmental law." Graffy, *supra* note 49, at 434.

53. See Gabčíkovo-Nagymaros Project, *supra* note 7, para. 57.

54. See *ILC Draft Article*, *supra* note 6.

55. U.N. CHARTER art. 13(1)(a).

56. See G.A. Res. 174 (II), Nov. 21, 1947.

57. See Carl-August Fleischhauer, *Article 13*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 265, 268–69 (Bruno Simma ed., 1995).

58. See, e.g., Paul Szasz, *General Law-Making Process*, in 1 *UNITED NATIONS LEGAL ORDER* 35, 45, 78 (Oscar Schachter & Christopher C. Joyner eds., 1995).

landmark treaties as the Vienna Convention on the Law of Treaties, the Vienna Conventions on Diplomatic and Consular Relations, and the Geneva Conventions on the Law of the Sea.⁵⁹

The topic of State responsibility has been on the ILC's agenda since its first session in 1949. Following the General Assembly's request that the Commission codify international law on the subject, the Commission undertook the challenge, appointing a Special Rapporteur on State Responsibility in 1955. Draft article 33 is part of that ongoing project.⁶⁰ Importantly, in turning to the ILC's *Commentary* on draft article 33 in the *Gabčíkovo-Nagymaros Case*, the International Court of Justice concluded that draft article 33 "reflect[s] customary law."⁶¹ The ILC's work on necessity thus clearly represents an authoritative statement on the topic.⁶²

The draft article reflects the understanding of Professor Ago,⁶³ ILC member and Special Rapporteur on State Responsibility from 1963 to 1979, that necessity is a circumstance excusing the wrongfulness of a breach of an international obligation, not a right to be exercised at the discretion of the State acting in self-preservation.⁶⁴ Entitled "State of Necessity," draft article 33 provides in paragraph 1:

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 interest of the State against a grave and imminent peril; and

59. See Fleischhauer, *supra* note 57, at 270.

60. See *Report of the International Law Commission on the Work of Its Fifty-First Session, 3 May–23 July 1999*, U.N. GAOR 54th Sess., Supp. No. 10, para. 49 (1999) [hereinafter *1999 ILC Report*]. The draft article 33 discussed here is in the form the ILC provisionally adopted upon its *first reading*. The ILC's provisional adoption of a text upon a first reading comes only after a topic is placed on the agenda of the ILC, a rapporteur is appointed to study and prepare a report on the topic, and that report is reviewed, discussed, and, if necessary, revised by the Commission. Once the Commission agrees on the draft text, it formally adopts it and presents it to States for comments. After States have had an opportunity to comment, the ILC resumes its work. In a process known as the *second reading*, it takes account of the various comments and prepares a final draft of the text that it then conveys to the General Assembly with recommendations for the form of its adoption. See Fleischhauer, *supra* note 57, at 269.

61. See *Gabčíkovo-Nagymaros Project*, *supra* note 7, para. 52. Recently, the ILC noted that "[a]rticle 33 was referred to by both parties in the *Gabčíkovo-Nagymaros Project* case, and [that] the Court expressly endorsed it as a statement of general international law." *1999 ILC Report*, *supra* note 60, para. 374.

62. Lammers even argues that the ICJ not only considered the concept of necessity "but also the description of its criteria by the [ILC] . . . as part and parcel of existing customary international law." Lammers, *supra* note 49, at 299.

63. See *Commentary*, *supra* note 42, paras. 1, 4.

64. See *Ago Report*, *supra* note 18, para. 77.

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- (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.⁶⁵

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The remainder of article 33 prescribes further limitations on the use of necessity, which is consistent with Ago's view and the current doctrine that the excuse of necessity "is absolutely of an exceptional nature."⁶⁶ Thus, the second paragraph stipulates:

- 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 the 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.⁶⁷

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Based on draft article 33, then, two sets of questions must be addressed in determining whether a State may validly invoke the necessity excuse. The first set, pursuant to draft article 33(1), includes: (i) whether an "*essential interest*" is at stake; (ii) whether the threat to such an interest rises to the level of "*grave and imminent peril*"; (iii) whether the State had *other means* of safeguarding the interest; and, finally, (iv) the *balance of interests* involved. The second set of questions, referred to in draft article 33(2), entails exceptions to the availability of the necessity defense under special circumstances. Thus, even when the first set of questions is resolved in favor of the violating State, the necessity defense will be unavailable where: (i) a *peremptory norm* of general international law is involved; (ii) *nonderogation clauses* in the relevant treaty exclude the possibility of invoking the necessity defense; or (iii) the State in question has *contributed* to the state of necessity. While the latter questions will be addressed in Part IV, I now turn to consider the first set of questions in some detail.

65. *ILC Draft Article, supra* note 6, art. 33(1).

66. *Ago Report, supra* note 18, para. 12.

67. *ILC Draft Article, supra* note 6, art. 33(2).

A. *The Meaning of “Essential Interest” in the Context of Article 33*

The first thing that may be noticed about draft article 33 is that it speaks about “safeguarding an *essential interest*” of the State, not its very existence.⁶⁸ In its *Commentary*, the ILC expressly referred to this distinction, stating that the “essential interest” requirement “does not mean that the Commission considered the interest in question to be solely a matter of the ‘existence’ of the State.”⁶⁹ Ago made the same point.⁷⁰ He emphasized that, given that a successful necessity defense effectively allows an interest of a State to defeat a right of another State, the defense must be of an exceptional nature.⁷¹ But, he is careful to note that the class of interests on which a plea of necessity may be based is not limited to interests in preserving the existence of the State.⁷²

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Following Ago’s model,⁷³ the ILC declined to enumerate “essential interests” of a State for purposes of article 33, noting that the extent to which a given interest is essential to a State depends on the circumstances of the case at hand.⁷⁴ Importantly, however, Ago gives examples of the *sort* of interests that would satisfy article 33, including a State’s “political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, [and] the preservation of the environment of its territory or a part thereof.”⁷⁵

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In the *Gabčíkovo-Nagymaros Case*, the ICJ made clear that a State’s protection of its environment, even when limited to a particular region rather than the whole of the State’s territory, constitutes an essential interest of the State within the meaning of article 33 of the ILC Draft.⁷⁶ It is thus no longer open to question whether various interests of a State going well beyond preservation of its very existence constitute essential interests for the purposes of a legitimate plea of necessity as an excuse for internationally unlawful conduct.⁷⁷

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68. See *ILC Draft Article*, *supra* note 6, art. 33(1)(a) (emphasis added).

69. *Commentary*, *supra* note 42, at 49, para. 32.

70. See *supra* note 23 and accompanying text.

71. See *Ago Report*, *supra* note 18, para. 12.

72. See *id.*

73. See *id.*

74. See *Commentary*, *supra* note 42, para. 3.

75. See *Ago Report*, *supra* note 18, para. 2.

76. The ICJ states: “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.” *Gabčíkovo-Nagymaros* Project, *supra* note 7, para. 53.

77. Schachter has argued, for example, that terrorist acts, whether threatened or actually carried out, may give rise to a legitimate reliance on necessity on the part of the target State, provided that the terrorist acts would “take lives, disrupt internal order or interfere with essential services,” or otherwise threaten an essential interest of the target State. See OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 171 (1991);

B. *The Meaning of “Grave and Imminent Peril” in the Context of Article 33*

28 As reflected in draft article 33, however, international law requires not only that the threat be to a State’s essential interest, but also that the threat rise to the level of “*grave and imminent peril*” before steps taken to protect the interest may be justified on grounds of necessity. Neither the ILC Commentary nor Ago’s Report specify criteria by which to measure “gravity” to determine whether the “peril” falls within the meaning of article 33. Rather, both Ago and the ILC resort to the more general notion that the danger to the essential interest of the State must be “extremely grave,”⁷⁸ a vestige of the Grotian qualification of necessity that “nothing short of *extreme exigency*” can serve to justify otherwise unlawful conduct.⁷⁹

29 In regard to the imminence prong, the ILC rather vaguely refers to “imminent peril” as “a threat to the interest at the actual time.”⁸⁰ Similarly, Ago writes that “imminent peril” is “a present danger to the threatened interest.”⁸¹ In its opinion in the *Gabčíkovo-Nagymaros Case*, the ICJ sought to further draw out the meaning of the term.⁸² As to the “imminence” of the peril, the Court observed that “‘imminence’ is synonymous with ‘immediacy’ or ‘proximity’ and goes far beyond the concept of ‘possibility.’”⁸³ The Court interpreted “peril” as referring to danger in as much as it “evokes the idea of ‘risk’” rather than “material damage.”⁸⁴ The Court concluded that Hungary’s necessity claim failed to satisfy the “imminence” prong, reasoning that the dangers to the environment allegedly inherent in the project were not sufficiently established at the time of the breach.⁸⁵

C. *The Requirement that the Act be the “Only Means” Available to the State to Safeguard its Interest*

30 Consistent with the view that necessity justifies otherwise unlawful conduct only in the most exceptional circumstances, international law

see also Oscar Schachter, *The Lawful Use of Force by a State against Terrorists in Another Country*, 1989 ISR. Y.B. HUM. RTS. 209, 225–30.

78. See *Commentary*, *supra* note 42, at 49, para. 33; *Ago Report*, *supra* note 18, para. 13.

79. See GROTIUS, *supra* note 9, at bk. III, ch. VII, para. I (emphasis added). This is also one of the conditions identified by Rodick from the writings of Grotius. See *supra* text accompanying note 17 (the second point).

80. *Commentary*, *supra* note 42, para. 33.

81. *Ago Report*, *supra* note 18, para. 13.

82. See *Gabčíkovo-Nagymaros Project*, *supra* note 7, paras. 54–57.

83. *Id.* para. 54. The Court further states that “a state of necessity could not exist without a ‘peril’ duly established at the relevant point in time; the mere apprehension of a possible ‘peril’ could not suffice in that respect.” *Id.*

84. *Id.*

85. See *id.* paras. 55–57.

requires that the acting State had no alternative but to engage in the unlawful conduct in order to protect its essential interest.⁸⁶ Thus, article 33 of the ILC Draft Articles of State Responsibility conditions invocation of a state of necessity by stipulating that the otherwise unlawful act of the State must be “*the only means*” of safeguarding an essential interest.⁸⁷ In its *Commentary*, the ILC stressed its strict understanding that “the only means” test implies that “the peril must not have been escapable by any other means, *even a more costly one*, that could be adopted in compliance with international obligations.”⁸⁸

The ICJ adopted the ILC’s view of the “only means” requirement in the *Gabčíkovo-Nagymaros Case*. In denying Hungary’s claim of the existence of a state of necessity, the Court relied in part on its finding that means other than breaching international obligations were available to Hungary to safeguard its interest in protecting the environment in the region as well as the supply of drinking water to Budapest.⁸⁹ In particular, the Court stated that the cost of the possible alternatives to internationally unlawful conduct is not a determinative factor in evaluating whether the unlawful conduct was the only means open to the State to protect its interests.⁹⁰ Presumably, if an alternative

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86. Bin Cheng, for example, identified in international practice the requirement that all other alternatives must be exhausted before a State can invoke necessity to justify internationally unlawful conduct. See *supra* text accompanying note 37, particularly point 4. Bin Cheng wrote on this point: “If, after every conceivable legal means of self-preservation has been first exhausted, the very existence of the State is still in danger, and if there exists only one single means of escaping from such danger, the State is justified in having recourse to that means in self-preservation, even though it may otherwise be unlawful.” BIN CHENG, *supra* note 27, at 74 (emphases added); see also *Ago Report, supra* note 18, paras. 41, 48 (demonstrating the presence of this requirement in the *Oscar Chinn Case*, 1931, and the *Neptune Case*, 1797, respectively). From a doctrinal point of view, Ago opined that:

The adoption by a State of conduct not in conformity with an international obligation towards another State must truly be the only means available to it for averting the extremely grave and imminent peril which it fears; in other words, it must be impossible for the peril to be averted by any other means, even one which is much more onerous but which can be adopted without a breach of international obligations.

Ago Report, supra note 18, para. 14 (citation omitted).

87. See *ILC Draft Article, supra* note 6, art. 33(1)(a) (emphasis added).

88. *Commentary, supra* note 42, at 49, para. 33 (emphasis added).

89. See *Gabčíkovo-Nagymaros Project, supra* note 7, paras. 55–57 (“The Court moreover considers that Hungary could . . . have resorted to other means in order to respond to the dangers that it apprehended.”).

90. In this regard the Court wrote:

The Court would stress, however, that, even supposing, as Hungary maintained, that the construction and operation of the dam would have created serious risks, Hungary had means available to it, other than the suspension and abandonment of the works, of responding to that situation. It could for example have proceeded regularly to discharge gravel into the river downstream of the dam. It could likewise, if necessary, have supplied Budapest with drinking water by processing the river water in an appropriate manner. The two Parties expressly recognized that that possibility remained open even

to the unlawful conduct existed, the State would be expected to resort to it, even though in doing so it would incur additional expenses. The ICJ did not define the limits of the proposition that cost is not a determinative factor, but the Court's reasoning in evaluating Hungary's necessity claim, would justify limiting the proposition to situations when the additional cost of the alternative is not of such magnitude as to render resort to it a threat to an essential interest of the State in itself.

D. *The "Balancing" Requirement*

32 The final element of a valid claim of state of necessity as an excuse for internationally wrongful conduct is that "the act did not seriously impair an essential interest of the State towards which the obligation existed."⁹¹ This requirement involves the balancing of the competing interests of two States: on the one hand, the interest in the name of which the defending State invokes necessity and, on the other, the harm done to the interest of the State claiming a breach of international law.⁹² A plea of necessity is valid only if the scales tip in favor of the essential interest of the State that has acted unlawfully: "[T]he interest sacrificed on the altar of 'necessity' must obviously be *less important* than the interest it is thereby sought to save."⁹³

33 In his analysis of international practice with respect to necessity, Bin Cheng concludes that the balancing test plays a central role in the determination of whether a State may defend its violation of international law on the ground of necessity. Explaining the purpose behind balancing, he writes:

The law of necessity is a means of preserving social values. It is

though—and *this is not determinative of the state of necessity*—the purification of the river water, like the other measures envisaged, *clearly would have been a more costly technique.*

Id. para. 55 (emphasis added).

91. *ILC Draft Article*, *supra* note 6, art. 33(1)(b). While the Court in the *Gabčíkovo-Nagymaros Case* did not have the occasion to balance the interests of Hungary and Czechoslovakia on the facts presented in the case (because the other preconditions to applying necessity had not been met), the Court clearly indicated that the balancing test is a part of the concept of necessity in international law. See *Gabčíkovo-Nagymaros Project*, *supra* note 7, para. 58.

92. Although the language of draft article 33 does not explicitly prescribe a balancing test, balancing of the competing interests has been an element of the concept of necessity at least since the time of Grotius. See GROTIUS, *supra* note 9, bk. III, ch. VII, para. ("[N]o emergency can justify any one taking and applying to his own use what the owner stands in equal need of himself.").

93. *Commentary*, *supra* note 42, para. 35 (emphasis added); see also *Ago Report*, *supra* note 18, para. 15. ("The interest protected by the subjective right vested in the foreign State, which is to be sacrificed for the sake of an 'essential interest' of the obligated State, must obviously be inferior to that other interest [T]he interest in question cannot be one which is comparable and equally essential to the foreign State concerned.").

the great disparity in the importance of the interests actually in conflict that alone justifies a reversal of the legal protection normally accorded to these interests, so that a socially important interest shall not perish for the sake of respect for an objectively minor right. *In every case, a comparison of the conflicting interests appears to be indispensable.*⁹⁴

To state that the balancing requirement serves to preserve social values, however, begs the question of what the content of “social values” is. The ILC’s formulation of the balancing test defines the relevant “social values” in terms of the interests of the two States. The necessity balancing test set out in article 33 presumes that the plea of necessity arises only in bilateral contexts, that is, in situations where the interests of two States are directly in conflict⁹⁵

Although a bilateral paradigm for necessity may have been sufficient in the time of Grotius, it is too simplistic for the present: the paradigm fails to account for the advent of human rights law from the middle of the twentieth century and the resulting creation of *erga omnes* obligations. The inadequacy of the ILC’s balancing test is brought into sharp relief by an evaluation of how a claim of state of necessity would fare as a justification for a State’s closing of its borders to an influx of asylum-seekers.

IV. APPLICATION OF THE CONCEPT OF NECESSITY TO JUSTIFY A STATE’S CLOSURE OF ITS BORDERS TO PREVENT A LARGE-SCALE INFLUX OF ASYLUM-SEEKERS

The question of invoking state of necessity in defense of a border closure arises only if international law imposes an obligation on States not to reject asylum-seekers from their frontiers. I address that question below, concluding that several widely-accepted multilateral treaties, as well as customary international law, impose such an obligation. Having concluded that international law proscribes exposing asylum-seekers to persecution, including by rejection from frontiers and closure of borders (even in cases of a potentially large-scale influx), I turn to the question of whether a State could justify such action by raising the claim of necessity. Finding that draft article 33, as currently written, could indeed be used to excuse a breach of the duty not to return or expose people to persecution, I argue that the concept of necessity should be reformulated to better take into account the community interest in safeguarding human rights protections.

94. BIN CHENG, *supra* note 27, at 74 (emphasis added).

95. The language of article 33 itself states this in as much as it sets out the balancing test to be between interests of two States. See *ILC Draft Article*, *supra* note 6, art. 33(1)(a), (b).

A. *International Obligations of the State of Asylum in the Face of a Mass Influx of Asylum-Seekers*⁹⁶

37 Several international instruments prohibit *refoulement*, that is, returning or exposing individuals to the imminent risk of persecution elsewhere. The duty of *non-refoulement* is expressed in binding and non-binding international and regional instruments and is accepted in the municipal law of many States. The 1951 Convention Relating to the Status of Refugees, for example, provides: “No Contracting State shall expel or return (*refouler*) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened”⁹⁷ A similar norm is embodied in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment: “No State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.”⁹⁸

38 Neither the Convention Against Torture nor the Refugee Convention explicitly states that the duty of *non-refoulement* entails the duty not to reject asylum-seekers *at a State’s borders*. Nor do these Conventions explicitly limit the scope of the duty of *non-refoulement* to refugees already present in the territory of the State of asylum.⁹⁹ Scholars have argued convincingly that at the time of drafting, States intended the *non-refoulement* provision of the Refugee Convention to be

96. My discussion here draws on my previous work on the status of the principle of *non-refoulement* in international law. See Roman Boed, *The State of the Right of Asylum in International Law*, 5 DUKE J. COMP. & INT’L L. 1, 16–31 (1994).

97. Convention Relating to the Status of Refugees, July 28, 1951, art. 33(1), 189 U.N.T.S. 150, 176 [hereinafter Refugee Convention].

98. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 3(1), 1465 U.N.T.S. 113, 114 [hereinafter Convention Against Torture]. Other instruments that prohibit *refoulement* include: OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, art. II(3), 1001 U.N.T.S. 46, 48 [hereinafter OAU Refugee Convention]; Principles Concerning Treatment of Refugees, 1966, art. III(3), *reprinted in* UNHCR, COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 201, 203 (1990); American Convention on Human Rights, Nov. 22, 1969, art. 22(8), O.A.S.T.S. No. 36, *reprinted in* 9 I. L. M. 673 (1970).

While the International Covenant on Civil and Political Rights does not contain a specific *non-refoulement* provision, its article 7 prohibits torture. See International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 7, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, 175 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The U.N. Human Rights Committee said that pursuant to that prohibition, States parties “must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or *refoulement*.” General Comment 20, U.N. GAOR Hum. Rts. Comm., 47th Sess., Supp. No. 40, para. 9, U.N. Doc.A/47/40 (1992), Apr. 3, 1992 [hereinafter General Comment 20].

99. See Refugee Convention, *supra* note 97, arts. 31–32, 189 U.N.T.S. at 175. In contrast, articles 31 and 32 explicitly limit their application to refugees present in the territory of the asylum State. See *id.*

applicable only to refugees already present in the asylum State.¹⁰⁰ Since 1951, however, the UNHCR and many academic commentators have asserted that the duty of *non-refoulement* applies at a State's borders as well as within them.¹⁰¹ Christian Tomuschat, for example, makes a cogent argument based on the purposes of the Convention Against Torture that its *non-refoulement* provision prohibits States from rejecting asylum-seekers at their borders:

Since the paramount objective is protection from torture, one will have to conclude here that *refoulement* is to be interpreted in a broad sense as comprehending any form of State action, *including rejection at the border*. Article 3 [of the Convention Against Torture] proceeds from the assumption that governmental authorities surrendering a person to the authorities of another State that habitually practices torture would themselves become accomplices of the crime of torture. In that perspective, the subtle legal distinction between returning someone who has already put his foot on the territory of the desired host State, and preventing another person from performing that symbolic act becomes immaterial.¹⁰²

In addition to interpreting *non-refoulement* provisions in treaties as encompassing non-rejection at the border, academic commentators have made the claim that such an interpretation has attained the status of international customary law.¹⁰³ The UNHCR, reflecting the views held

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100. See GUY S. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 122 (2d ed. 1996) ("States were not prepared to include in the [Refugee] Convention any article on admission of refugees; *non-refoulement* in the sense of even a limited obligation to allow entry may well have been seen as coming too close to the unwished-for duty to grant asylum."); ATLE GRAHL-MADSEN, *TERRITORIAL ASYLUM* 40 (1980) ("Article 33 only prohibits the expulsion or return (*refoulement*) of refugees where they are likely to suffer persecution; it does not obligate the Contracting State to admit any person who has not already set foot in its territory . . ."). Weiss's commentary on the *travaux préparatoires* of the Refugee Convention, however, indicates that article 33's use of the words "in any manner whatsoever" "would seem to indicate" that the Convention's *non-refoulement* provision "applied to non-admittance at the frontier." *THE REFUGEE CONVENTION, 1951: THE TRAVAUX PRÉPARATOIRES ANALYSED, WITH A COMMENTARY BY THE LATE DR. PAUL WEISS* 341 (1995).

101. Both the UNHCR and scholars denounced the U.S. Supreme Court's holding that article 33 of the Refugee Convention does not reach asylum-seekers who have not yet arrived in the territory of the asylum State in *Sale v. Haitian Centers Council*, 509 U.S. 155, 180–83 (1993). See UNHCR, *The Haitian Refoulement Case 1993 Brief Amicus Curiae*, 6 INT'L J. REFUGEE L. 85 (1994) [hereinafter *UNHCR Amicus Brief*]; GOODWIN-GILL, *supra* note 100, at 143; Development, *US Supreme Court Takes Aim at International Law—Again*, 5 INT'L J. REFUGEE L. 461 (1993); Elwin Griffith, *Problems of Interpretation in Asylum and Withholding of Deportation Proceedings under the Immigration and Nationality Act*, 18 LOY. L.A. INT'L & COMP. L.J. 255, 270–81 (1996).

102. Christian Tomuschat, *A Right to Asylum in Europe*, 13 HUM. RTS. L.J. 257, 259 (1992) (emphasis added).

103. See, e.g., GOODWIN-GILL, *supra* note 100, at 196 ("The principle of *non-refoulement* has developed to include non-rejection at the frontier, thus promoting

by the large number of States making up its Executive Committee (and thus bearing upon the customary international law claim), maintains that position as well.¹⁰⁴ The Executive Committee of the UNHCR has on several occasions addressed the issue of rejection at the frontier as a form of *refoulement* in its authoritative statements.¹⁰⁵ In 1977, for example, it asserted “the fundamental importance of the observance of the principle of non-refoulement—both *at the border* and within the territory of a State of persons who may be subjected to persecution if returned to their country of origin *irrespective of whether or not they have been formally recognized as refugees.*”¹⁰⁶

admission . . .”); David A. Martin, *Refugees and Migration*, in 1 UNITED NATIONS LEGAL ORDER 391, 411 (Oscar Schachter & Christopher C. Joyner eds., 1995) (“[I]n light of state practice since 1951, a strong case can be made that *non-refoulement* now includes non-rejection at the frontiers, and further, that *non-refoulement* of refugees has crystallized as a rule of customary international law binding on all states.”).

104. See, e.g., *UNHCR Amicus Brief*, *supra* note 101, at 94–97.

105. On the status of the Conclusions in international law, see generally Sztucki, *supra* note 104. For a description of the authority and function of the Executive Committee, see GOODWIN-GILL, *supra* note 100, at 215. The Executive Committee had 50 States as members at its last session, in October 1998. See Executive Committee of the High Commissioner’s Programme, Forty-Ninth Session, Provisional List of Participants, U.N. Doc. A/AC.96/907 (1998), available at <www.unhcr.ch/refworld/unhcr/excom/reports/907.html>.

106. UNHCR Executive Comm., *Executive Committee Conclusion No. 6 (XXVIII)–1977–Non-Refoulement*, para. c (visited Dec. 2, 1999) <www.unhcr.ch/refworld/unhcr/excom/xcon/excom6.htm> (emphases added). In his analysis of the Conclusions of the Executive Committee, Sztucki identified the 1977 statement as an example of an interpretative statement having regulatory or normative content, rather than a provision on progressive development of the law. See Jerzy Sztucki, *The Conclusions on the International Protection of Refugees Adopted by the Executive Committee of the UNHCR Programme*, 1 INT’L J. REFUGEE L. 285, 300 (1989). See also UNHCR, *Note on International Protection*, Executive Comm. 49th Sess., para. 10, U.N. Doc. A/AC.96/898 (1998) (visited Nov. 30, 1999) <www.unhcr.ch/refworld/unhcr/excom/reports/898e.htm> (“The right to seek asylum requires that persons fleeing persecution or danger be admitted, at least on a temporary basis, somewhere. One essential component of the institution of asylum is the principle of *non-refoulement* *Refoulement* can take a number of forms, including *non-admission at the frontier* and interdiction at sea.”) (emphasis added) [hereinafter *1998 Note*]; UNHCR Executive Comm., *Executive Committee Conclusion No. 22 (XXXII)–1981–Protection of Asylum-Seekers in Situations of Large-Scale Influx*, para. II.A.2 (visited Nov. 30, 1999) <www.unhcr.ch/refworld/unhcr/excom/xcon/excom22.htm> (“In all cases the fundamental principle of non-refoulement including *non-rejection at the frontier* must be scrupulously observed.”) (emphasis added) [hereinafter *EXCOM Conclusion No. 22*].

The view that rejection at the frontier is prohibited under the general rubric of the principle of *non-refoulement* is also supported by several regional instruments and declarations. For example, the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa contains an express duty of non-rejection from frontiers for its States parties. See OAU Refugee Convention, *supra* note 98, art. II(3). This duty applies with respect to any person falling within its generous “refugee” definition, see *id.* art. I, who, if rejected, would be compelled to “return to or remain in a territory where his life, physical integrity or liberty would be threatened,” *id.* art. II(3). Similarly, the non-binding Latin American Cartagena Declaration on Refugees adopted in 1984 states that the principle of *non-refoulement* includes the prohibition of rejection at the frontier: Article 5 “reiterate[s] the importance and meaning of the principle of *non-refoulement* (including the prohibition of rejection at the frontier) as a corner-stone of the international protection

The Committee has applied that conception of *non-refoulement* to closure of borders, indicating that border closures that prevent asylum-seekers from finding safety may amount to *refoulement* in breach of international law.¹⁰⁷ Indeed, this could hardly be otherwise. If the principle of *non-refoulement* prohibits rejection at the border, then the principle must prohibit closure of the border as well. This is because the effect of either act on the asylum-seeker is the same. In both instances the target asylum State's act denies the asylum-seeker admission to safety from persecution. State practice with respect to the duty of *non-refoulement*, including non-rejection at the frontier and non-closure of borders, is not absolutely uniform, but border closures and like measures seem to be the exception rather than the norm.¹⁰⁸ While

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of refugees. Full text of the Declaration is available at <www.unhcr.ch/refworld/legal/instrume/asylum/cart_eng.htm>.

The prohibition of rejection at the frontier is also contained in the Principles Concerning Treatment of Refugees adopted by the Asian-African Legal Consultative Committee. See Principles Concerning Treatment of Refugees, *supra* note 109, art. III(3). Finally, the Committee of Ministers of the Council of Europe stated in a 1984 recommendation:

[B]earing in mind the prohibition of torture found in article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, States should ensure that the principle according to which no person should be subjected to *refusal of admission at the frontier, rejection . . . or any other measure which would have the result of compelling him to return to, or remain in, a territory where he has a well-founded fear of persecution . . .* shall be applied regardless of whether this person has been recognised as a refugee under the [Refugee Convention].

Recommendation No. R (84) 1 adopted by the Committee of Ministers of the Council of Europe on Jan. 25, 1984 (emphasis added); see also Council of Europe Resolution 14 (1967) on Asylum to Persons in Danger of Persecution, *reprinted in* UNHCR, *supra* note 98, at 305 (providing in art. 2 that "no one shall be subjected to *refusal of admission at the frontier, rejection . . . or any other measure which would have the result of compelling him to return to, or remain in, a territory where he would be in danger of persecution*") (emphasis added).

107. See UNHCR, *Note on International Protection*, Executive Comm., 48th Sess. pt. II, U.N. Doc. A/AC.96/882 (1997) (visited Nov. 30, 1999) <www.unhcr.ch/refworld/unhcr/notes/882.htm> [hereinafter *1997 Note*].

108. In its annual *Note on International Protection* presented to the Executive Committee, the UNHCR has generally noted that most States abide by their obligations to offer refuge to asylum-seekers. See, e.g., *1997 Note*, *supra* note 107; *1998 Note*, *supra* note 106. Goodwin-Gill in this regard observed:

Over the last forty-five or so years, the broader interpretation of *non-refoulement* has established itself. States have allowed large numbers of asylum seekers not only to cross their frontiers, for example, in Africa, Europe and South East Asia, but also to remain pending a solution.

GOODWIN-GILL, *supra* note 100, at 123.

That, of course, is not to minimize the instances of State non-compliance with the principle of *non-refoulement* that unfortunately do occur. See, e.g., *1997 Note*, *supra* note 107, at 2 ("The past year has seen numerous incidents of *refoulement*, and serious abuses of refugee rights. Refugees and asylum-seekers have been expelled, in some cases even after their acceptance for resettlement in third countries, rejected at borders, interdicted on the high seas and otherwise involuntarily returned, whether through armed force or pursuant to bilateral agreements between States. As a result, refugees and asylum-

individual refugee status determination may not be practicable in a situation of a sudden large-scale influx of asylum-seekers, nothing in international refugee law, as the UNHCR and the States members of its Executive Committee see it, divests the target asylum State of its *non-refoulement* duty in such a situation. The Executive Committee has expressly addressed this point in one of its *Conclusions*:

1. in situations of large-scale influx, asylum seekers should be admitted to the State in which they first seek refuge and if that State is unable to admit them on a durable basis, it should always admit them at least on a temporary basis and provide them with protection according to the principles set out below.

. . . .

2. in all cases the fundamental principle of non-refoulement including non-rejection at the frontier must be scrupulously observed.¹⁰⁹

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Commentators caution, however, that some distinction must be drawn between cases of mass influx of asylum-seekers and cases of individual arrivals.¹¹⁰ While States have at times voiced their reservation to the applicability of the *non-refoulement* principle in cases of mass influx,¹¹¹ State practice in respect of people fleeing the very

seekers have been exposed to grave, and in some cases life-threatening, danger.”). See *supra* note 4 and accompanying text (noting border closure instances).

109. *EXCOM Conclusion No. 22*, *supra* note 106, pt. II(A).

110. See, e.g., GOODWIN-GILL, *supra* note 100, at 133; Kay Hailbronner, Non-Refoulement and “Humanitarian” Refugees: Customary International Law or Wishful Legal Thinking?, in THE NEW ASYLUM-SEEKERS: REFUGEE LAW IN THE 1980S, at 123, 128 (David A. Martin ed., 1988).

111. For example, the non-binding 1967 Declaration on Territorial Asylum provides a mass-influx exception to the recognition of a general duty of States not to reject asylum-seekers at the frontiers. See Declaration on Territorial Asylum, art. 3(2), G.A. Res. 2312 (XXII) (1967), reprinted in UNHCR, *supra* note 98, at 57. The Declaration specifically provides:

1. No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier
2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of a mass influx of persons.
3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting to the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

Id. art. 3.

This indicates that in 1967 States considered mass influx to present an exceptional situation that may fall outside the prohibition of rejection. Yet even in that exceptional circumstance, the States recognized that solutions other than rejection were to be

recent conflict in Kosovo confirms that States generally do not refuse to provide refuge from a genuine humanitarian crisis despite the fact that asylum-seekers present themselves at their borders *en masse*.¹¹²

It may thus be correct to conclude, as does Goodwin-Gill, that the principle of *non-refoulement* secures admission with a presumption that some local durable solution, such as asylum, will follow, but that this is so only in the case of individual arrivals, not in cases of mass influx.¹¹³ *Non-refoulement* as a principle of non-rejection, however, applies equally to cases of mass influx and individual cases.¹¹⁴ It is only what happens with the asylum-seekers after their admission into the State of refuge that may differ based on the fact that they were part of a mass-influx. In the following necessity analysis, I will therefore consider that international law proscribes *refoulement*, including rejection at the frontier and closure of borders, irrespective of the fact that the asylum State is faced with a large-scale influx of asylum-seekers.

B. *Draft Article 33 as a Defense to Border Closure*

Given that border closure in the face of an influx of asylum-seekers would amount to *refoulement* in breach of the duty of States not to return or expose people to persecution, the question is whether a State could properly invoke necessity to excuse its breach under the ILC's draft article 33. As laid out above, the answer depends on whether the influx jeopardizes an "essential interest" of the State, places it in "grave and imminent peril," the State has no other means available to it to protect its essential interest, and the balance of interests tips in favor of the State's asserted interest.¹¹⁵ Even if all four elements are established, the State's claim will nonetheless fail if the case falls within one of draft article 33's three exceptions. I address each of these elements in turn.

considered. *See id.* art. 3(3). Helton observed that article 3 of the Declaration evinces "a governmental concern with potential threats to stability as well as an awareness of the need for a pragmatic approach which addresses the protection needs of individual asylum seekers." Arthur C. Helton, *Legal Dimensions of Responses to Complex Humanitarian Emergencies*, 10 INT'L J. REFUGEE L. 533, 536 (1998).

112. As of April 19, 1999, a total of 603,300 persons fleeing the conflict in Kosovo sought and received protection in neighboring States, including 365,000 in Albania, 132,500 in Macedonia, and 32,300 in Bosnia-Herzegovina. Updated information is available at <www.unhcr.ch/news/media/kosovo.htm>. It should also be noted that the vast majority of these people flooded into the neighboring States in a span of a few weeks, certainly suddenly and *en masse*.

113. *See* GOODWIN-GILL, *supra* note 100, at 202.

114. *See supra* note 109 and accompanying text (quoting an UNHCR *Executive Conclusion* on this point).

115. *See supra* Part III.

1. *Essential Interest*

44 The threshold question in necessity analysis is whether the State engaged in internationally unlawful conduct in order to safeguard an essential interest.¹¹⁶ Contemporary international law does not require that the interest in question go to the very existence of the State. Rather, as Ago has pointed out, it suffices that the interest relate to such essential matters as, among others, “the continued function of its essential services, the maintenance of internal peace, . . . [and] the preservation of the environment of its territory or a part thereof.”¹¹⁷ Clearly, a sudden large-scale influx of asylum-seekers into the territory of a State impacts significant interests.

45 Firstly, the maintenance of internal order in a host State may be put in jeopardy by a mass influx of asylum-seekers. In many countries, the arrival of asylum-seekers has the potential to upset delicate ethnic or political balances.¹¹⁸ The arrival, for example, of a large number of people of an ethnicity that represents a minority in the asylum State has the potential to disturb a fragile ethnic, social, or political balance.¹¹⁹ Sudden increases in the size of the minority could fuel a desire for increased autonomy or political power that, in turn, could destabilize the asylum State.¹²⁰ A State’s ability to maintain internal stability is critical if the State is to provide its people with the security and services that are its *raison-de-etre*.

46 Additionally, in terms of essential services, reception of a large number of people into a State may place substantial burdens on the administrative structure as authorities attempt to register arriving individuals and provide for their immediate needs. Food and shelter may need to be provided quickly, medical and social care may need to be offered, and personal security and sanitation needs to be ensured. For many countries that are potential hosts of a large number of asylum-seekers arriving *en masse*, the burden of coping with such an influx may strain the public services sector, threatening the welfare of the State’s

116. See *ILC Draft Article*, *supra* note 6, art. 33(1)(a).

117. See *Ago Report*, *supra* note 18, para. 2.

118. See, e.g., Bushinsky, *supra* note 4, at 4. In two instances, similar concerns have been voiced with respect to ethnic Albanians arriving in Macedonia, which has a substantial Albanian minority. In 1997, internal unrest in Albania threatened to send large numbers of Albanians into Macedonia. See, e.g., Straus & Fox, *supra* note 4. Even more recently, many Albanians from Kosovo looked to Albania for refuge during the NATO bombings of Serbia. See, e.g., Barton Gellman, *West’s Strategy: Halt Kosovo War with Neither Side Victorious*, INT’L HERALD TRIB., Mar. 24, 1999, at 6 (reciting NATO fears that “the flood of guns and refugees across Kosovo’s borders will ignite ethnic Albanian populations in neighboring Macedonia”).

119. See, e.g., Amitav Acharya & David B. Dewitt, *Fiscal Burden Sharing*, in RECONCEIVING INTERNATIONAL REFUGEE LAW 111, 120, 123 (James C. Hathaway ed., 1997) (“[R]efugees aggravate countries of first asylum, challenging their capacities to ensure social cohesion and economic and political management in the face of such intrusion.”).

120. See *supra* notes 2–3 and accompanying text.

inhabitants.¹²¹

The local environment of the host State may also be significantly impacted by the sudden presence of large numbers of people, as trees are used for firewood, fields and meadows for camping, and rivers for washing and sewage disposal. The UNHCR highlighted the potentially significant impact of a mass refugee presence on the environment of the host State in the following account:

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When hundreds of thousands of Rwandan refugees flooded into [Virunga National Park, Africa's oldest game sanctuary] in 1994, an ecological disaster of grand proportions appeared imminent. The gorillas came under threat from local gunmen, poachers and refugees. Long columns of men, women and children began to hack out hundreds of tons of rare woods daily to heat their cooking pots. Within two years they had cut down millions of trees covering more than 113 square kilometers of virgin forest.

The picture was similar in Tanzania where as many as 600,000 refugees from Rwanda and Burundi were housed in the Kagera region in the northwest of the country. They consumed more than 1,200 tons of firewood each day; more than 570 square kilometers of forest were affected.¹²²

As the foregoing illustrates, a sudden large-scale influx of asylum-seekers has a strong potential for impacting significant interests of the host State. In practice, the determination of whether a State's threatened interest is essential depends on the specific circumstances of

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121. In 1995, the Office of the UNHCR observed that "[m]any low-income developing countries whose resources are already strained face destabilizing social and economic effects from a sudden, mass influx of refugees." UNHCR, *Note on International Protection: International Protection in Mass Influx*, para. 18, U.N. Doc. A/AC.96/850 (Sept. 1, 1995) <www.unhcr.ch/refworld/unhcr/excom/reports/850.htm>. The *Note* cautioned that "the security implications of mass flows for host States must be acknowledged," *id.* at para. 15, and observed that mass influx of asylum-seekers in particular affect "security, water, sanitation, the environment, health, and law enforcement," *id.* Acharya and Dewitt also noted the impact of a mass influx of people into a country:

Migration impacts upon the carrying capacities of the local environments, the management of resource extraction and consumption, the reallocation of scarce commodities, the regulation of labour, land, and capital, the relations between host and transient populations, and the stability of the governing regime, and therefore upon the security interests of individuals, of communities, of institutions, of countries, and of regions. In the most profound sense, refugees—as a specific subset of migration—challenge both the notion of 'human security' as well as the broader and more traditionally understood concepts of common, comprehensive, and cooperative security.

Acharya & Dewitt, *supra* note 119, at 123 (internal citations omitted).

122. Craig Sanders, *Where Have All the Pretty Flowers Gone . . . and the Trees . . . and the Gorillas?*, REFUGEES, Winter 1997, at 26, 28.

the case.¹²³ When the circumstances are such that the mass influx threatens the host State's ability to maintain a stable and secure environment for its population, the influx could well be deemed to threaten the essential interests of the State.

2. *Grave and Imminent Peril*

49 The next step in the necessity analysis is to determine whether the threat to the State's essential interest rises to the level of a grave and imminent peril.¹²⁴ Ago and the ILC adopt the Grotian view that the peril to the State's essential interest must be extremely grave, without, however, offering a measure of the gravity of the peril.¹²⁵ I would suggest that any threat likely to destroy the possibility of realizing an essential State interest constitutes "grave peril." Returning to the situation of mass influx, if the influx threatens to render it impossible for the State to maintain a secure and stable environment, it should be considered grave.

50 As for the imminency of the peril, the ICJ in the *Gabčíkovo-Nagymaros* decision expressed the understanding that imminence "goes far beyond the concept of 'possibility.'"¹²⁶ The inquiry is into the immediacy or proximity of the peril.¹²⁷ This requirement would seem easily satisfied in a situation where, for example, a mass-influx of asylum-seekers is already underway or is soon to take place, there being little possibility that it would stop short of entering the target asylum State were it not for the border closure.

51 Like the "essential interest" inquiry, the determination of the gravity and imminence of the peril is fact-specific, and must be determined on a case-by-case basis. As a general matter, however, a large-scale influx of asylum-seekers could well threaten a grave and imminent peril to an essential interest of the target asylum State.

3. *No Alternative*

52 Even if a mass influx places a State in grave and imminent peril by threatening an essential interest, a necessity claim will nonetheless fail unless the State had no lawful alternative available to protect the essential interest.¹²⁸ The ILC's *Commentary* makes clear that a State bears a substantial burden in making the claim that it had "no alternative": "[T]he peril must not have been escapable by any other means, even a more costly one, that could be adopted in compliance

123. See *supra* text accompanying note 74.

124. See *ILC Draft Article, supra* note 6, art. 33(1)(a).

125. See *supra* text accompanying notes 78–79.

126. *Gabčíkovo-Nagymaros Project, supra* note 7, para. 54.

127. See *id.*

128. See *ILC Draft Article, supra* note 6, art. 33(1)(a).

with international obligations.”¹²⁹ The ICJ relied on this understanding in the *Gabčíkovo-Nagymaros* case.¹³⁰

To be sure, border closure is a drastic way to defend against a threat posed to a State by a mass influx of asylum-seekers. Certainly, there are situations in which a State would have other means of dealing with such a threat. For example, if the perceived threat is destabilization, the State could set up camps for the asylum-seekers away from large population centers where the new arrivals could exacerbate internal tensions. The asylum State could also seek the assistance of the international community in providing the necessary care and materials for the asylum-seekers and in securing durable solutions, such as resettlement in third States.

Even as I acknowledge the possibility of alternatives to border closure, it cannot be excluded out of hand that there could be situations when the closing of borders may be the only means available to a State to safeguard an essential interest. In light of the ICJ’s view that the additional cost of alternatives is not a determinative factor in evaluating whether the unlawful conduct was the only means open to the State to protect its interests,¹³¹ it will be a rare situation when border closure would be sanctioned as a permissible response to a large-scale influx of asylum-seekers. Notwithstanding, at least thus far in the analysis of draft article 33 as applied to the case of a mass influx, nothing *per se* precludes a valid claim of necessity in defense of border closure.

4. *Balancing of Interests*

Finally, draft article 33 requires a balancing of the interest of the State that closed its borders in violation of its international obligations, against the harm done by this breach to the interest of the State to which the obligation had been owed. A plea of necessity can succeed only if the former outweighs the latter.¹³² Nonetheless, while it is relatively easy to identify the interest of the target asylum State,¹³³ the interest to be placed on the other side of the scales eludes clear identification.

The principle of *non-refoulement*, including the prohibition against rejection from the frontiers and border closures, is part of international conventional and customary law.¹³⁴ If the State that closes its borders to an influx of asylum-seekers is a party to a treaty that prohibits *refoulement*, such as the Refugee Convention¹³⁵ or the Convention

129. *Commentary*, *supra* note 42, para. 33.

130. *Gabčíkovo-Nagymaros* Project, *supra* note 7, paras. 55–57.

131. *Id.*

132. *See supra* note 93 and accompanying text.

133. *See supra* Subsection IV(B)(1).

134. *See supra* Section IV(A).

135. *See* Refugee Convention, *supra* note 97, art. 33.

Against Torture,¹³⁶ the State would be in breach of its international obligation under the treaty with respect to all other States parties.¹³⁷ All parties to a human rights treaty have an interest in seeing that the rights provided therein are respected, and the parties are entitled to pursue remedies against the violating State, whether or not they suffer an injury as a result of the breach.¹³⁸ Thus, in the treaty context, the interest to be weighed in the necessity analysis against the target asylum State's interest is the interest of the other States parties in ensuring that the duty of *non-refoulement* is not violated.

Ascertaining the competing interest is more complicated if the accusation against the target-asylum State is based on customary international law. If the duty of *non-refoulement* were deemed among the obligations *erga omnes* of international law, then *refoulement* through border closure would engage the interests of all States.¹³⁹ The ICJ, in frequently-cited *dictum* of the *Barcelona Traction Case*, discussed the nature of obligations *erga omnes*, stating that they derive:

from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection

136. See Convention Against Torture, *supra* note 98, art. 3.

137. The *Restatement of the Foreign Relations Law of the United States* makes clear that, "[l]ike international agreements generally, international human rights agreements create legal obligations between the states parties, although the agreements are for the benefit of individuals . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 701 cmt. c (1987) [hereinafter RESTATEMENT]; see also SCHACHTER, *supra* note 77, at 209–10 ("In a multilateral treaty the obligations as a rule run to all parties . . .").

138. Section 703(1) of the *Restatement* in this respect provides: "A state party to an international human rights agreement has, as against any other state party violating the agreement, the remedies generally available for violation of an international agreement, as well as any remedies provided by the agreement." RESTATEMENT, *supra* note 137, § 703(1). The *Restatement* explains "[u]nless the human rights agreement provides or clearly implies otherwise, the ordinary remedies are available to any state party against a state party violating the agreement, even if the violation did not affect nationals of the claimant state or any other particular interest of that state." *Id.* § 703(1) cmt. a; see also SCHACHTER, *supra* note 77, at 209–10.

139. Annacker identified an *erga omnes* obligation as one having a "non-bilateralizable structure." Claudia Annacker, *The Legal Regime of Erga Omnes Obligations in International Law*, 46 AUSTRIAN J. PUB. INT'L L. 131, 136 (1994). That is to say, an *erga omnes* obligation "can only be fulfilled or breached *vis-a-vis* all States belonging to a community . . . of States which are bound by a norm of treaty or customary international law . . ." *Id.* Clearly, human rights obligations have this character. If a State breaches human rights protected by custom, that State breaches its implied promise to protect those rights *vis-a-vis* all the other States that are similarly bound. The injury resulting from the breach thus reaches all States in the community. See LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 282 (1988) (identifying basic human rights obligations as ones owed to the community of States); see also RESTATEMENT, *supra* note 137, para. 702, cmt. o (1987) (noting that violations of certain customary human rights obligations "are violations of obligations to all other states . . .").

have entered into the body of general international law
 [O]thers are conferred by international instruments of a
 universal or quasi-universal character.¹⁴⁰

The duty of *non-refoulement* is not among the obligations in the *Barcelona Traction* dictum. Similarly, the *Restatement* does not include *refoulement* in its enumeration of acts that constitute violations of *erga omnes* obligations in international customary law.¹⁴¹ The *Restatement* does, however, recognize the prohibition of torture as a customary, *erga omnes* obligation of States.¹⁴² Accordingly, if it is fairly certain that *refoulement* through border closure will lead to torture, an argument could be made that the target asylum State breached its *erga omnes* obligation to prevent repeated or notorious acts of torture.¹⁴³ The same could be said for any of the other acts recognized as prohibited in customary law and carrying an *erga omnes* obligation, such as genocide. In such cases, like those in which conventional prohibitions of *refoulement* are applicable, all States would have a legal interest in ensuring the observation of the duty of *non-refoulement*. The balancing test of the necessity analysis, thus, would involve the interest of the target-asylum State in closing its borders against the interest of any given State in securing respect for the customary norm prohibiting torture.

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The interest of other States with respect to maintaining the prohibition of *refoulement* outside the treaty context is, as we saw, not easy to establish. But even where it can be shown, such as between the States parties to a convention that has a *non-refoulement* provision, the individualized interest of those States will seem inferior to the interest of the target asylum State. This is because the target asylum State acts in order to protect an *essential* interest of the State from grave and imminent peril, whereas another State can only place on the scales of the balancing test an interest in seeing that a treaty or a customary *erga omnes* human rights obligation is honored. Applying the draft article 33 balancing test to determine whether a state of necessity may be invoked in justification of a breach of an international obligation, thus, in effect, requires a calculus between two States, one facing an imminent harm to an essential interest and the other facing no direct

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140. *Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 3, para. 34 (Feb. 5).

141. See RESTATEMENT, *supra* note 137, § 702 (deeming the prohibition of certain human rights violations customary international law); *id.* at § 702 cmt. o (“Violations of the rules stated in this section are violations of obligations to all other states and any state may invoke the ordinary remedies available to a state when its rights under customary law are violated.”). On the other hand, the *Restatement* expressly notes that its list of human rights recognized in customary law “is not necessarily complete, and is not closed” *Id.* § 702 cmt. a.

142. See *id.* § 702(d).

143. Or to another of the acts indubitably recognized as prohibited in customary law and carrying an *erga omnes* obligation. See *id.* § 702 (listing such acts).

injury from the breach. Surely, the target asylum State's clear interest would tip the scale in favor of applying necessity.

60 It may thus be posited that the closure of borders to stem an influx of asylum-seekers, while presumably a wrongful act on the international plane, is an act that, under the provisionally adopted ILC draft article 33, could be justified on grounds of necessity. I will discuss below what consequences may flow from such justification, but first it needs to be explored whether one of the exceptions to the application of the necessity excuse could apply to the case of border closure.

C. *Exceptions to the Application of Necessity*

61 Even if all the preconditions for relying on necessity to excuse an internationally unlawful act are satisfied, a State cannot prevail on its necessity claim if one of the three exceptions of draft article 33 applies.¹⁴⁴ That is, if: (1) the relevant obligation arises from a peremptory norm of international law; (2) the act in question violates a treaty provision that excludes necessity as an excuse of breach; or (3) the State invoking the defense contributed to the state of necessity.¹⁴⁵

1. *Peremptory Norm*

62 Under draft article 33, a state of necessity may not be invoked "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."¹⁴⁶ The ILC's *Commentary* explains that "peremptory norm" refers to *jus cogens*, that is "norms accepted and recognized by the international community of States as a whole as norms from which no derogation is permitted and which can be modified only by subsequent norms of general international law having the same character."¹⁴⁷ The ILC did not provide a list of international norms of peremptory character beyond noting, as possessed of such character, the prohibition on the use of force against the territorial integrity or political independence of another State, genocide, and the killing of prisoners of

144. See *Ago Report*, *supra* note 18, paras. 16–17; *Commentary*, *supra* note 42, para. 37.

145. See *ILC Draft Article*, *supra* note 6, art. 33(2); *supra* text accompanying note 67 (setting out ILC Draft Article 33(2)).

146. *ILC Draft Article*, *supra* note 6, art. 33(2)(a).

147. *Commentary*, *supra* note 42, para. 37. According to the ILC, the rationale for precluding reliance on a state of necessity in the case of breach of peremptory rules is that peremptory rules are so essential for the life of the international community as to make it all the more inconceivable that a State should be entitled to decide unilaterally, however acute the state of necessity which overtakes it, that it may commit a breach of the obligations which these rules impose on it.

Id.

war.¹⁴⁸

It is apparent that the ILC envisions a rather high threshold for a norm of international law to be considered “peremptory” for the purposes of article 33. This is illustrated, for example, by the ILC’s explanation of the prohibition of the use of force against another State. The ILC draws a distinction between, on the one hand, “acts of aggression, conquest and forcible annexation,”¹⁴⁹ and, on the other, lesser forcible acts that, “although infringing the territorial sovereignty of a State, need not necessarily be considered as act[s] of aggression, or not, in any case, as breach[es] of an international obligation of *jus cogens*.”¹⁵⁰ The latter acts may include the rescue of nationals and other limited forcible actions undertaken to eliminate a source of a threat to the State.¹⁵¹ Although such acts violate the prohibition on the use of force against the territorial integrity of a State, they do not amount to a breach of a *jus cogens* norm and, consequently, they may be excused by the plea of necessity.¹⁵²

Because of this high threshold, it is unlikely that the customary prohibition of *refoulement* could be considered to be on the level of a peremptory norm in the view of the ILC. While *non-refoulement* has been said to be a peremptory norm,¹⁵³ this does not mean that it has

148. *See id.*

149. *Id.*

150. *Id.* at para. 23. *See* Schachter, *supra* note 77, at 227–28; *see also* HANNIKAINEN, *supra* note 139, at 337 (distinguishing between the threat or use of force with an aggressive purpose and use of force without such intent and noting that only aggressive force falls into the sphere of *jus cogens*).

151. The ILC specifically referred to the following actions:

incursions into foreign territory to forestall harmful operations by an armed group which was preparing to attack the territory of the State, or [those] in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their base in that foreign territory, or [actions] to protect the lives of nationals or other persons attacked or detained by hostile forces or groups not under the authority and control of the State, or to eliminate or neutralize a source of troubles which threatened to occur or to spread across the frontier.

Commentary, supra note 42, para. 23. For an application of the plea of necessity to the situation of rescue of nationals in foreign territory, *see, for example, Jean Raby, The State of Necessity and the Use of Force to Protect Nationals*, 1988 CAN. Y.B. INT’L L. 253.

152. *See* Schachter, *supra* note 77, at 228.

153. *See* GOODWIN-GILL, *supra* note 100, at 202; Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L & COMP. L. REV. 411, 435–36 (1989) (arguing that the prohibition against *refoulement* is a *jus cogens* norm). Goodwin-Gill, however, recognizes that although the principle of *non-refoulement* is well-established in international law, it is not an absolute principle but rather one that allows exceptions for national security and public order reasons. *See* GOODWIN-GILL, *supra* note 100, at 139–41. These exceptions may be particularly relevant in the case of a mass influx of asylum-seekers. Goodwin-Gill in this regard wrote:

It can be argued that a mass influx is not itself sufficient to justify *refoulement*, given the likelihood of an international response to offset any potential threat to national security.

. . . .

Nevertheless, it must be admitted that the prospect of a massive

risen to that level under the ILC's construction of the term. Indeed, it is hard to see why *non-refoulement* should be considered to be a peremptory norm for the purposes of necessity, while internationally unlawful, albeit limited, use of force against another State is not so considered. It is thus unlikely that the peremptory norm exception to the application of necessity could disable reliance on necessity to excuse border closure.

2. *Treaty Provision*

65 The second exception to the application of necessity arises when a treaty provision "explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to [the breached] obligation."¹⁵⁴ When a treaty contains a specific non-derogation provision, for example, it is clear that the drafters intended to preclude the availability of the necessity excuse for breach of the obligations enumerated in the provision. Thus, while article 4(1) of the ICCPR permits limited derogation from obligations assumed in the Covenant under extraordinary circumstances,¹⁵⁵ article 4(2) explicitly proscribes derogation from certain enumerated obligations, including the article 7 prohibition of torture and cruel, inhuman or degrading treatment. The non-derogation provision thus rules out reliance on necessity as a justification for breach of article 7's prohibition of torture.¹⁵⁶

66 Whether border closures constitute a violation of the ICCPR's prohibition of torture, however, is an open question. In support of such a conclusion, *General Comment 20* of the U.N. Human Rights Committee notes that States parties "must not expose individuals to the

influx of refugees and asylum-seekers exposes the limits of the State's obligation otherwise not to return or refuse admission to refugees.

Id. at 141. Other commentators criticize the view that holds out *non-refoulement* as a peremptory norm. See, e.g., Hailbronner, *supra* note 110, at 129–32.

154. *ILC Draft Article*, *supra* note 6, art. 33(2)(b).

155. ICCPR, *supra* note 98, art. 4(1) ("In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. . ."). Note, however, that Article 4(1) permits derogations only to the extent that they would not be inconsistent with the States parties' other obligations under international law. See *id.* See generally MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 72–93 (1993) (discussing the scope of article 4); ANNA-LENA SVENSON-McCARTHY, THE INTERNATIONAL LAW OF HUMAN RIGHTS AND STATES OF EXCEPTION 380–450 (1998) (same).

156. See *Ago Report*, *supra* note 18, at 46 n.150 (noting that "necessity is ruled out as a ground for non-compliance" with respect to the non-derogable obligations under the ICCPR); *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, para. 58, U.N. Doc. E/CN.4/1985/4 (1984), at Annex (listing freedom from torture among ICCPR rights "not derogable under any conditions even for the asserted purpose of preserving the life of the nation"); THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 218 (1989) ("The language of the Covenant prohibits any derogation not explicitly permitted by Article 4, thus excluding invocation of the customary law exception of state of necessity.").

danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*.”¹⁵⁷ Making that argument, however, requires showing that the border closure amounted to *refoulement* and exposed the asylum-seekers to torture.

It is even less clear that the Convention Against Torture precludes the availability of the necessity justification to excuse a border closure. Like the ICCPR, the Convention Against Torture makes the right to be free from torture non-derogable.¹⁵⁸ Yet, unlike the ICCPR, it also contains a provision proscribing *refoulement*,¹⁵⁹ to which no non-derogation clause attaches. In another context, Ago concludes that “the fact that necessity has been explicitly ruled out as a ground for deviating from an obligation specially singled out must lead *a contrario* to the conclusion that necessity can still be invoked when the obligations called in question by the conduct of the State are other than the one in respect of which it has been ruled out.”¹⁶⁰ To diffuse such an argument, one might distinguish between general and specialized treaties. Ago applied the above reasoning to derogability under the ICCPR,¹⁶¹ a multifaceted human rights convention that prescribes non-derogation in respect of only some of its provisions. The Convention Against Torture, it might be argued, is distinguished in that it, in essence, focuses on only a single right, the right to be free from torture. As such, the preclusion of derogation from the obligation to prevent torture may extend to the attendant prohibition of *refoulement*. Within the wording of draft article 33, this might be said to reflect an instance of a treaty provision that “*implicitly*” excludes the possibility of invoking the state of necessity with respect to [the breached] obligation.”¹⁶² In any event, it is not obvious that the Convention precludes an assertion of the state of necessity in defense of a violation of the *non-refoulement* provision.

In the case of a treaty that attaches no explicit non-derogation clause to any of its provisions, draft article 33’s second exception is not conclusively disabled. As the ILC has cautioned, “silence on the part of the treaty should not be automatically construed as allowing the possibility of invoking the state of necessity.”¹⁶³ Rather, the determination of whether a treaty implicitly precludes reliance on the state of necessity requires an inquiry into the object and purpose of the

157. General Comment 20, *supra* note 98, para. 9.

158. See Convention Against Torture, *supra* note 98, art. 2(2) (“No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.”).

159. See *id.* art. 3(1). As discussed above, border closure may run afoul of this provision. See *supra* text accompanying note 102.

160. Ago Report, *supra* note 18, at 46.

161. See *id.* at 46 n.150.

162. ILC Draft Article, *supra* note 6, art. 33(2)(b) (emphasis added).

163. See Commentary, *supra* note 42, para. 38.

rule in question.¹⁶⁴ Meron cautions, however, that the absence of a non-derogation provision may well lead to the inference that the treaty allows for the use of necessity as a justification for derogating from the obligations it enshrines.¹⁶⁵

69 Significantly, the Refugee Convention is not merely silent about non-derogation; it specifically provides that the principle of *non-refoulement* is not absolute:

The benefit of the [*non-refoulement*] provision may not . . . be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.¹⁶⁶

70 Commentators have observed that “[n]ational security’ and ‘public order,’ for example, have long been recognized as potential justifications for derogation” from the Convention’s *non-refoulement* provision.¹⁶⁷ Given that the Refugee Convention explicitly allows for derogation from the prohibition of *refoulement* in some circumstances and the fact that the Convention does not include a non-derogation provision, it is unlikely that it had as its object and purpose the elimination of reliance on necessity with respect to the principle of *non-refoulement*.

71 In sum, none of the existing treaty provisions addressing or relevant to *non-refoulement* is likely to prevent a State from defending border closures on necessity grounds in the face of a mass influx of asylum-seekers.

3. *Contribution to the State of Necessity*

72 The final exception to the application of necessity arises “if the State in question has contributed to the occurrence of the state of necessity.”¹⁶⁸ The ILC explains that it “intended [the exception] to refer to the case in which the State invoking the state of necessity has, in one way or another, intentionally or by negligence, contributed to creating the situation it wishes to invoke as justification for its non-fulfilment of an international obligation.”¹⁶⁹ Whether this exception would apply to an instance of border closure to avert a mass-influx of asylum-seekers is fact-specific and cannot be answered *in abstracto*. Suffice it to say that

164. *See id.*

165. MERON, *supra* note 156, at 218–19.

166. Refugee Convention, *supra* note 97, art. 33(2); *see also* GOODWIN-GILL, *supra* note 100, at 139 (“The Convention refugee definition is not an absolute guarantee of protection, and *non-refoulement* is not an absolute principle.”).

167. GOODWIN-GILL, *supra* note 100, at 139.

168. *ILC Draft Article*, *supra* note 6, art. 33(2)(c).

169. *Commentary*, *supra* note 42, para. 41.

it is not difficult to envision a situation falling within the exception. A State, for example, might incite and promote a secession of a part of the territory and population of a neighboring State. When the second State's drive to suppress the secessionist movement sparks a mass flow of people in the direction of the first State, the first State might close its borders to the arriving asylum-seekers. In such a case, the first State may well have contributed to the occurrence of the state of necessity and, if so, it could not rely on necessity to excuse its failure to adhere to its *non-refoulement* obligation. On the other hand, it is equally conceivable to imagine an asylum State that did not in any way contribute to the state of necessity.

Given the foregoing analysis, there is a significant possibility that none of the three exceptions that preclude a necessity defense would apply to a particular border closure case.

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D. *Consequences of the Application of Necessity*

It is thus apparent that, under certain circumstances, a State could successfully invoke necessity in justification of its closure of borders to a mass flow of asylum-seekers. The conditions for justifiable reliance on necessity are stringent, but not impossible to satisfy. When a State can show that the influx of asylum-seekers would threaten one or more of its "essential interests," that the threat to the essential interest is "grave and imminent," that it has "no alternative means" of safeguarding the interest, that the "balance of interests" favors it, and that none of the exceptions set out in draft article 33(2) applies, the State may, according to draft article 33, close its borders to stem a mass flow of people seeking asylum from persecution in its territory.

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Though such an act directly breaches international obligations to which many, if not all, States are bound, and exposes countless persons to grave risks of persecution, the successful invocation of a state of necessity precludes the wrongfulness of the internationally unlawful act. In the view of the ILC, "the existence of a genuine state of necessity . . . has the effect of totally ridding the conduct of the acting State of its wrongfulness . . ." ¹⁷⁰

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The necessity defense does not, however, necessarily preclude the State "from being asked to make compensation for the injurious consequences of its action . . ." ¹⁷¹ Surveying international practice, Ago

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170. *Id.* at para. 39.

171. *Id.*; see also Schwarzenberger, *supra* note 23, at 343 (noting that if the excuse of necessity is valid, it excludes international responsibility, but as "it is a contrivance of *jus aequum*, it may involve a duty of compensation").

ILC Draft Article 35 adopted in 1996 provides that "[p]reclusion of wrongfulness of an act of a state by virtue of the provisions of article . . . 33 does not prejudice any question that may arise in regard to compensation for damage caused by that act." *Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May-26 July 1996*, U.N. Doc. A/51/10, at 125, reprinted in 37 I.L.M. 440 (1998). Note that the notion of

notes examples where States exonerated from culpability on necessity grounds for injuries caused by their unlawful actions were nevertheless obliged to pay compensation for the consequences of their acts.¹⁷² In this respect, the ICJ in the *Gabčíkovo-Nagymaros Case* noted that Hungary, claiming necessity as an excuse for breach of its international treaty obligations, “expressly acknowledged that, in any event, such a state of necessity would not exempt it from its duty to compensate [the party injured by its non-compliance with a treaty obligation].”¹⁷³

77 With regard to our present *refoulement* hypothetical case, two categories of claimants may be eligible for compensation for injuries resulting from a border closure excused on necessity grounds. First, States faced with a larger influx of asylum-seekers as a result of another State’s border closure might seek compensation.¹⁷⁴ Second, asylum-seekers who suffer injury as a result of the border closure might also seek indemnification for their losses. Where large numbers of persons suffer quantifiable losses, an international tribunal or compensation commission might be established to award compensation.¹⁷⁵

78 In reality, however, it may be excluded that a State would have to

compensation was present in the concept of necessity already in the time of Grotius. See *supra* note 16 and accompanying text; see also Sompong Sucharitkul, *State Responsibility and International Liability under International Law*, 18 LOY. L.A. INT’L & COMP. L.J. 821, 833 (1996) (noting that the “absence of wrongfulness does not preclude the application of some aspects of the secondary rules, which impose an obligation to compensate for the suffered loss, damage or harm”). Sucharitkul observed that while State responsibility arises from a breach of an international obligation of the State (which may be excused by necessity), “[i]nternational liability arises out of injurious consequences which, according to the natural law of causation, must result from activities over which the State has or should have direct or indirect control or that lie within its jurisdiction.” *Id.* at 835 (emphasis added). Sucharitkul argues that it is irrelevant for the purposes of determining liability whether or not the State conduct that gave rise to the liability was internationally wrongful (such as when justified by necessity). See *id.* at 833–35.

Writing in 1994, however, Tomuschat stated that “to date the notion of objective liability, which does not require as one of its constitutive elements a breach of an international obligation, has not yet been generally accepted in international law.” Christian Tomuschat, *State Responsibility and the Country of Origin*, in *THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES* 59, 79 (Vera Gowlland-Debbas ed., 1996).

172. See *Ago Report*, *supra* note 18, at 26 (discussing *Properties of Bulgarian Minorities in Greece*), 29–30 (discussing *Company General of the Orinoco*); see also BIN CHENG, *supra* note 27, at 75 (referring to *The Neptune* case in this regard).

173. *Gabčíkovo-Nagymaros Project*, *supra* note 7, para. 48 (Sept. 5).

174. I wish to stress here that only States that actually suffer injury as a result of the breach may properly seek compensation. Professor Dominicé clearly made this point: “The fact that all states are concerned by breach of multilateral obligations, and that they may have a legal interest in those obligations being respected, in no way implies that they should be treated as injured, if their own rights are not otherwise affected, since that would create obvious confusion.” Christian Dominicé, *The International Responsibility of States for Breach of Multilateral Obligations*, 10 EUR. J. INT’L L. 353, 362 (1999).

175. See, e.g., Luke T. Lee, *The Right to Compensation: Refugees and Countries of Asylum*, 80 AM. J. INT’L L. 532, 552 (1986) (noting that “there is no intrinsic reason why the General Assembly cannot create a special body to collect, process and distribute compensation funds due refugees worldwide, or assign this task to an existing body.”).

pay compensation for having prevented a large-scale influx of asylum-seekers from entering its borders. Effective access to compensatory regimes is foreclosed by the stark fact that, in the refugee arena, no such regimes currently exist: there are neither burden-sharing mechanisms for allocating responsibility for refugee protection among States¹⁷⁶ nor cost-charging machinery to force refugee-producing States to compensate States and individual victims of their unlawful actions.

From an empirical perspective, the countries of origin of asylum-seekers, the so-called refugee-producing countries, are not asked to compensate other States for the burden of caring for people whom they caused to flee their homes. Likewise, asylum-seekers do not claim compensation from their persecutors.¹⁷⁷ It could thus hardly be that asylum-seekers prevented from entering a State by border closure—or States that, as a result of border closure, receive more asylum-seekers—would seek compensation from the State that closed its borders, a State whose wrongful conduct, unlike that of the State of origin, is excused in international law.

In sum, while compensation for an “excused” breach of international law may be feasible in bilateral contexts involving discrete abuses—such as in *The Neptune* or *Torrey Canyon* cases—it cannot be said to exist for asylum-seekers who are prevented from entering a State by border closure. Neither is compensation available to States who, as a result of the border closure, receive more asylum-seekers. Accordingly, the consequence of successfully invoking necessity in justification for breaching the duty of *non-refoulement* through border closure is that both the closure and resulting *refoulement* are deemed to be “*not wrongful*” and no compensation is paid for any consequent injuries, damages, or liabilities.

176. See, e.g., Hathaway & Neve, *supra* note 4, at 117 (“[N]either the actual duty to admit refugees nor the real costs associated with their arrival are fairly apportioned among governments. There is a keen awareness that the states in which refugees arrive presently bear sole legal responsibility for what often amounts to indefinite protection.”); *id.* at 187 (“The present, loosely constructed system of international cooperation in refugee protection is characterized by vague promises of solidarity among governments, accompanied by often undependable funding.”). Hathaway & Neve propose a burden-sharing mechanism for refugee care. See *id.* at 143–51, 187–209; see also Boed, *supra* note 96, at 32–33 (urging that a global burden-sharing mechanism be devised and implemented). For a critique of the Hathaway & Neve proposal, see Deborah Anker, *Crisis and Cure: A Reply to Hathaway/Neve and Schuck*, 11 HARV. HUM. RTS. J. 295 (1998).

177. For an analysis of the responsibility of the country of origin to compensate refugees and countries of asylum, see Lee, *supra* note 175. For an analysis applying the law of State responsibility to asylum-seeker producing States, see Chaloka Beyani, *State Responsibility for the Prevention and Resolution of Forced Population Displacements in International Law*, 7 INT’L J. REFUGEE L. 130 (1995).

V. CONCLUSION: A REFLECTION ON THE PROPRIETY OF THE ILC DRAFT ARTICLE 33 BALANCING TEST

81 How is this result possible? Why is it that the doctrine of necessity allows a State to close its borders to asylum-seekers arriving *en masse*, apparently in breach of its duty of *non-refoulement*, with no adverse consequences for that State? The crux of the problem lies in the balancing test set out in article 33 of the ILC Draft Articles of State Responsibility because it does not take into consideration the *erga omnes* and multilateral treaty obligations that are the hallmark of human rights law.

82 The balancing test is central to the concept of necessity.¹⁷⁸ It is the very means through which necessity accounts for the disparity in the importance of interests between States and “justifies a reversal of the legal protection normally accorded to these interests, so that a socially important interest shall not perish for the sake of respect for an objectively minor right” or interest.¹⁷⁹ The test has traditionally been cast in the mold of a bilateral relationship, that is to say, it was meant for weighing the inconsistent interests of two States against each other.¹⁸⁰ Under this construction, interests of a *community of States*, whether States parties to a relevant human rights convention or all States of the international community when a customary *erga omnes* obligation is involved, are underrepresented. This is of prime importance in the field of international human rights law as multilateral human rights obligations and customary *erga omnes* obligations are, by definition, not only the interests of individual States, but are correctly understood as interests of the entire community.¹⁸¹ Individualizing these interests for the purposes of the balancing test misrepresents their multilateral or *erga omnes* character. Thus, because treating these interests as merely individual interests of the States of the community is erroneous, the necessity calculus built into the balancing test of the provisionally adopted draft article 33 yields erroneous results. Consequently, a community interest in a given human rights norm can be outweighed, as in the present example, by an essential interest of a State. Article 33 can thus excuse the State’s disregard for that norm.

83 To adjust the necessity calculus, the collective or community interest in seeing a particular human rights obligation honored, not the individualized State interest in seeing that this is done, should be

178. See *supra* Sections III(D) (discussing the balancing requirement) and IV.D (applying the balancing test to border closure).

179. BIN CHENG, *supra* note 27, at 74.

180. See *supra* notes 94–95 and accompanying text.

181. Recently, Dominicé wrote: “A multilateral obligation is a legal duty whose bearer—a state—is answerable before the entire international community. In other words, breach of this obligation . . . is something that concerns the international community as a whole, principally all states.” Dominicé, *supra* note 174, at 354.

placed opposite the essential interest of the acting State.¹⁸² That is, the test should not focus on obligations and interests as between two States only, but, where relevant, as in the case of multilateral or *erga omnes* obligations, the interests considered should be those of the entire community of States having a legal interest in the matter. The balancing test would thus locate the essential interest of the acting State on one side of the scale while, on the other, there would be the interest of *all States parties* to the given treaty or bound by a given customary *erga omnes* obligation. Applying the balancing test in this manner would more appropriately account for the interest of the international community in seeing human rights norms honored and could change the outcome of the test. The interest of the international community in having *non-refoulement* honored, then, could possibly outweigh the interest of a single State in closing its borders to protect an essential interest and, in consequence, necessity would not be available to justify a border closure in the face of an influx of asylum-seekers.

Accordingly, the necessity balancing test should be revised to allow for the proper consideration of interests of the entire community of States in cases involving not merely bilateral relations of States, but truly transnational interests, such as the protection of human rights. Without reconceiving the concept of necessity to account for non-bilateralizable interests of States, that is to say for community interests, necessity could subvert the developing framework of human rights protection, which, to a large measure, depends on the recognition of *erga omnes* or multilateral obligations for its effectiveness. My example of a mass-influx of asylum-seekers demonstrates this point—applying necessity to a breach of the international obligation of *non-refoulement* enables a State to disregard that fundamental principle of refugee protection.

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182. Judge Weeramantry called attention to this approach in connection with issues of environmental protection. In his separate opinion in the *Gabčíkovo-Nagymaros Case*, he wrote:

We have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. In addressing such problems, which transcend the individual rights and obligations of the litigating States, international law will need to look beyond procedural rules fashioned for purely *inter partes* litigation.

When we enter the arena of obligations which operate *erga omnes* rather than *inter partes*, rules based on individual fairness and procedural compliance may be inadequate. The great ecological questions now surfacing will call for thought upon this matter. *International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole.*

Gabčíkovo-Nagymaros Project, *supra* note 7 (separate opinion of Vice-President Weeramantry) (emphasis added).

85 Significantly, at its last session in the summer of 1999, forty-four years into its work on State responsibility, the ILC has begun consideration of an amendment to the provisionally adopted text of draft article 33 that would reformulate the necessity balancing test.¹⁸³ Under the guidance of Professor Crawford, the ILC's Special Rapporteur on State responsibility since 1997, a drafting committee of the ILC has provisionally recommended to the Commission as a whole that article 33 be amended to include sub-paragraph 1(b)(ii). The first paragraph of the amended article would, thus, read:

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:
 - (a) The act is the only means of safeguarding an essential interest of that State against a grave and imminent peril; and
 - (b) The act does not seriously impair:
 - (i) An essential interest of the State towards which the obligation existed; *or*
 - (ii) *If the obligation was established for the protection of some common or general interest, that interest.*¹⁸⁴

86 Crawford commented that the amendment would "make it clear that the balance to be struck in cases where the obligation is established in the general interest (e.g. as an obligation *erga omnes*) is that very interest, and not the particular interest of the state which happens to complain"¹⁸⁵

87 The ILC's latest report on its work notes that during debate on the proposed reformulation of the balancing test "support was expressed for the view that the criterion was not, in all cases, the individual interest of the complaining State but the general interest protected by the obligation."¹⁸⁶ It is, however, not settled that this view will prevail and that the ILC will adopt the proposed change.¹⁸⁷ So that States not be

183. See 1999 ILC Report, *supra* note 60, paras. 374–91.

184. *Id.* n.218 (emphasis added); see also James Crawford, *Revising the Draft Articles on State Responsibility*, 10 EUR. J. INT'L L. 435, 437 (1999).

185. Crawford, *supra* note 184, at 459.

186. 1999 ILC Report, *supra* note 60, para. 382.

187. Note that in his concluding remarks on article 33 to the ILC, Crawford "pointed to a clear consensus in the Commission in favour of providing the narrowest possible definition of necessity in terms of precluding wrongfulness and also *in favor of maintaining the article adopted on first reading.*" *Id.* para. 388 (emphasis added).

given to understand that they may justifiably protect their interests by disregarding legal obligations of interest to the entire international community, the ILC should adopt the proposed change. The Commission's work on necessity would then represent both a codification of international law and its progressive development,¹⁸⁸ and the concept of necessity would regain step with international law, which increasingly contains multilateral and *erga omnes* obligations.

Necessity exists as a concept of international law because it has a role to play as a "safety valve," as Ago has said, "to relieve the inevitably untoward consequences of a concern for adhering at all costs to the letter of the law."¹⁸⁹ To the extent that the entire community's interest is taken into account in the necessity calculus, as suggested here and as now proposed to the ILC, the entire community should also assist the affected State to comply with its international obligation and not suffer the adverse consequences to its essential interest that it fears. In the case of a State driven to close its borders in the face of a large-scale influx of asylum-seekers due to fear of grave and imminent peril to an essential State interest, the entire community of States should contribute to the care of the asylum-seekers in that "front-line" State and help ensure that the essential interest of that State is indeed not harmed. This entails implementing practical structural solutions in the way of burden-sharing mechanisms at the international level. It is to be emphasized that this concern is separate, but foundational, to the rebalancing of the necessity test. *Both* must be undertaken to ensure that, in crisis situations, individual human rights guarantees *and* the essential interests of third-party States are effectively protected.

In conclusion, I emphasize that the protection of human rights is a responsibility shared by all members of a civilized community and that, without sharing that responsibility, the community's humanitarian objectives can hardly be met. Reconceiving the necessity balancing test and cooperating to ensure protection of transnational interests is a step toward overcoming what Philip Allott identified as "[a]mong the clearest lessons of our collective experience, is that the concept of state necessity is the most persistent and formidable enemy of a truly human society."¹⁹⁰

188. This would be in line with the mission of the ILC and its role in international law. See *supra* notes 54–60 and accompanying text (discussing the mandate and function of the ILC).

189. *Ago Report*, *supra* note 18, at 51.

190. Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 17 (1988).