UNIVERSITY OF NAIROBI

The State of Necessity as a Contractual Defence in Investment Disputes between States and Individuals: An Evaluation

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DECLARATION

I, **JOB MWANGI THIGA**, do hereby declare that this thesis is my original work and that it has not been submitted for examination for the award of a Degree at any other University.

DATED AT NAIROBI this day of 2019

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This Thesis has been submitted for examination with my approval as University Supervisor

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DEDICATION

This work is dedicated to my family, Rosa, Matthew, Neema and Michael. You are all my inspiration.

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CHAPTER 1 INTRODUCTION AND STATEMENT OF RESEARCH PROBLEM

1.0 Background

The plea of necessity straddles two principles *viz* the principle that a state is bound to perform those contracts it voluntarily enters into and the other principle that a party must not be coerced to carry out its contractual obligations if doing so would endanger life or health or violate human dignity or result to inhumane distress.

While the plea of necessity was invoked by states against other states in the public international law sphere, and was accepted in principle or at least not rejected, its invocation and or application in the economic realm and particularly in contracts between states and foreign individuals is surrounded with uncertainty. This, it is submitted, is even more so in light of the concept of *Pacta sunt servanda* and the attendant sovereign character of the state.

Foreign investment protection for individuals of one nationality investing in another (the host state) will be by way of diplomatic protection by their own state under customary international law or, invariably, be provided for under bilateral investment agreements signed by their own country and the host country in which they have invested. Investor-State conflicts arising where the host country has breached such protections have brought to the fore the question whether necessity is available to the host state as a defence excusing such breach.

While it is not a case study, the economic crisis that Argentina encountered in the early 2000s and the ensuing investor-state disputes arising there from largely form the focus of this work.

Towards the end of 2001, Argentina experienced its worst economic crisis fueled by a collapsed *peso*[1] and sky rocketing inflation. The bulk of Argentina's population fell below the poverty level by the end of 2002. The economic chaos then extended to the political realm, leading to President Fernando de la Rua's resignation and collapse of his administration on 20th December 2001.

In response to the crisis, the new Argentine President Eduardo Duhalde adopted a number of measures, chief among them being a substantial reduction in value of the *peso* which had been pegged to the American dollar, the "pesification"[2] of all financial and monetary transactions and the effective seizure of all bank accounts by use of a number of measures (known as the *Corralito),* in order to steady the economy and restore political confidence.

These measures, though offering the prospect of reverting economic and political stability in the long-term, also seriously prejudiced all participants, including foreign ones, in the Argentine economy. Affected foreign investors sought recourse under the several bilateral investment agreements (BITs), which signed by Argentina in the 1980s and 1990s[3]. Some of the legal protections these foreign investors sought to avail themselves of included the internationalization of contractual breaches, national treatment, and most-favored nation protections. Additionally, most of these treaties also afforded investors direct recourse to the International Center for Settlement of Investment Disputes for investor-state arbitration.

[1]This the name by which the Argentine currency is known.
[2] This denotes the denomination of all financial transactions in the Argentine currency of the *Peso.*
[3]For example the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment of 14th November 1991, [1992] 31 *ILM* 124.

In the years following, foreign investors prejudiced by actions taken by Argentina in reaction to the economic meltdown challenged these governmental measures arguing, mostly, that they were both expropriation and a violation of fair and equitable treatment.

Not unexpectedly, Argentina subsequently became the subject of a multitude of arbitral proceedings before ICSID tribunals by investors contesting that Argentina's reaction to the meltdown amounted to expropriation and or seriously prejudiced investments protected by various BITs.[4]

On its part, Argentina has, among others, consistently anchored its defense against all the claims on the plea of necessity. A number of the arbitral cases illustrate this.

The case of *CMS Gas Transmission Company* involved a US based energy firm that had partly acquired shares in an Argentine gas transportation company. In 2003, CMS lodged a dispute at the ICSID tribunal alleging Argentina's violation of terms of the US-Argentina BIT. Argentina argued at the arbitral proceedings that it had acted out of a state of emergency or a state of necessity during its financial crisis, thus precluding the country's liability for breach of the US-Argentina BIT's provisions. In an award given on 12th May 2005[5] on liability, the tribunal rejected this defense holding that Argentina had not met the stringent tests imposed by customary

[4]For the cases currently pending, seehttps://icsid.worldbank.org/en/pages/cases/pendingCases.aspx?status=p. For concluded cases see https://icsid.worldbank.org/en/Pages/cases/ConcludedCases.aspx?status=c.
[5]*CMS Gas Transportation Company vs The Argentine Republic*; ICSID Case No. ARB/01/8. Available online at http://www.worldbank.org/icsid/cases/CMS_Award.pdf

international law, nor was it excused from liability under the terms of Article XI[6] of the US-Argentina BIT.

In *Sempra Energy International vs The Argentine Republic*[7], the Claimant held shares in two Argentinian companies that had gas supply licences which were issued during a favourable legal and regulatory regime introduced in 1991. However, following the economic meltdown in 2001, Argentina undertook measures which Sempra felt were a repudiation of the rights under the licences and referred the matter for arbitration at ICSID.

During arbitration, Argentina argued its liability was excluded by the defence of necessity under Article XI of the BIT between Argentina and United States. The arbitral tribunal held, in its award on the merits, that Article XI of the BIT did not deal with the elements necessary for raising the defence of necessity. The tribunal then proceeded to apply the criteria under customary international law under Article 25 of the ILC Draft Articles and which criteria the tribunal held Argentina failed to meet.

This award was, however, annulled[8] on Argentina's application, with the Annulment Committee finding that, within the terms of the ICSID Convention, the tribunal had clearly overstepped its powers by failing to apply the law. It faulted the tribunal for adopting Article 25 as the primary law rather than Article XI of the BIT.

[6] This sets out several exceptions available to state-parties to the agreement including that the treaty would not "preclude the application by either party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."
[7]ICSID Case No. ARB/02/16; Tribunal Award dated 28th September, 2007
[8]ICSIDCase No. ARB/02/16; Annulment Decision dated 29th June, 2010

In *LG & E*[9], (where three US corporations[10] had stakes in a number Argentinean gas transportation companies) Argentina pleaded a "state of necessity" defense, available under Argentine domestic law, Articles XI and IV(3) of the BIT between the US and Argentina as well as customary international law.

In a decision on liability given on 3rd October 2006, the tribunal made an analysis firstly applying the BIT, second, and to the extent necessary, the general international law and third, the domestic law of Argentine. The tribunal concluded that the provision of Article XI is not one for the state to self-judge; that Argentina's condition during the period from 1st December 2001 till 26th April 2003 were such as to excuse Argentina's liability for the complained breach of the BIT owing to the actions it took in response; and that the pre-requisites for invocation of the situation of necessity were also met under international law. The tribunal found that Article XI provided a necessity defense that was distinct from customary international law.

On 22nd May 2007 a tribunal in the case of *Enron Corp. Ponderosa Asset, L.P. vs Argentine Republic*,[11] however found on the same factual background that the provisions of Article 25 of the ILC Draft Articles were not satisfied in particular because the measures adopted by Argentina were not the only way available to Argentina to achieve the result and because Argentina had itself contributed to the state of necessity.[12]

[9]*LG&E Energy Corp. & 2 Others vs Argentine Republic*; ICSID Case No. ARB/02/1. Available online at http://www.worldbank.org/icsid/cases/pdf/09_LGE_Liability_e.pdf
[10] LG&E Energy Corp; LG&E Capital Corp; and LG&E International Inc. See *Infra* note 50 at para [1]
[11]ICSID Case No. ARB/01/3. Available online at http://www.ita.law.uvic.ca/documents/Enron-Award.pdf
[12]*Id* para [304] – [312]

The case of *Continental Casualty vs Argentine Republic*[13] involved an ancillary of a US financial services company that had ownership and control of one of Argentina's insurers for workers compensation. In excusing Argentina's actions in respect of the measures complained of by the claimants, the tribunal stated as follows;

> "The Tribunal is thus faced with the task of determining the content of the concept of necessity in Article XI …. Since the text of Art. XI derives from the parallel model clause of the US FCN treaties and these treaties in turn reflect the formulation of Art. XX of GATT 1947, the Tribunal finds it more appropriate to refer to the GATT and WTO case law which has extensively dealt with the concepts and requirements of necessity…., rather than to refer to the requirement of necessity under customary international law."[14]

In an award given on 21st June 2011 in *Impregilo S.p.A*[15] in a claim arising from a Bilateral Investment Treaty signed between Argentina and Italy, another ICSID Tribunal declined Argentina's invocation of the plea of necessity even though the tribunal accepted "that there was a grave and imminent peril to the 'essential interests' of Argentina's economic and social stability within the meaning of paragraph 1(a) of Article 25 of ILC Draft Articles".[16] The tribunal found moot the question whether the actions taken by Argentina in response to the dire situation it faced were the only way to secure its essential interests since it was satisfied that Argentina had contributed significantly to the "situation of necessity" in terms of the meaning in paragraph 2(a) thereby failing to meet the criterion under that paragraph.[17]

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[13]ICSID Case No. ARB/03/9; Award dated 5th September, 2008
[14]*Id* para [192]
[15]*Impregilo S.p.A vs Argentine Republic*; ICSID Case No. ARB/07/17. Available online at https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2171_En&caseId=C109
[16]*Id* at para [350]
[17]*Id* at para [358]

In *National Grid PLC vs Argentina*[18], a UNCITRAL tribunal declined to uphold Argentina's pleas of necessity under customary international law. The tribunal, however, took the dire economic situation into account in its consideration of the fair and equitable treatment standard under the investment treaty between UK-Argentina applicable in the case – the BIT did not have a clause comparable to Article XI in the US-Argentina treaty hence consideration of the necessity pleas under customary international law.

A couple of municipal decisions also help in highlighting the uncertainty in this area of law. In *Republic of Argentina vs BG Group PLC*[19], Argentina filed a petition to the United States District Court for the District of Columbia seeking to set aside or modify a UNCITRAL arbitral award dated 24th December 2007 in favor of BG Group PLC in the sum of $185,285,485.85. The factual background to the arbitration was similar to that in the foregoing cases save that the BIT in issue was signed between the United Kingdom of Great Britain and Northern Ireland and the Republic of Argentina on 11th December 1990. The arbitration was conducted in New York and Washington DC under the UNICTRAL Arbitration Rules with Guillermo Aguilar Alvarez, Albert Jan van den Berg and Alejandro M. Garro constituting the Arbitral Tribunal.

In a decision delivered on 7th June 2010[20], the court (District Judge Reggie B. Walton) rejected, on all grounds, Argentina's appeal to set aside or modify the arbitral award. In addition to concurring with the arbitral tribunal's view that "a country cannot invoke the 'state of necessity'

[18]UNCITRAL Case 1:09-cv-00248-RBW; Award dated 3rd November, 2008
[19]USDC Civil Action No. 08-485 –(RBW). District Court filing and Tribunal Award available online at http://ita.law.uvic.ca/documents/BGvArgentina.pdf
[20]Available online at http://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2008cv0485-45. Also available online at http://doc.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008cv00485/130293/45/

doctrine without being subject to 'very restrictive conditions' to ensure the country does not abuse the doctrine …", the judge added that:

> "[I]t is far from certain that the doctrine is 'clearly applicable' in this case"[21]

This decision was appealed against to the Court of Appeal[22] (which vacated the Arbitral award for the reason that BG Group PLC was required to have waited for a period of 18 months after, and only after, submitting the dispute before Argentina's courts before commencing arbitral proceedings)[23]and the Supreme Court[24](which overturned the findings of the Court of Appeal upholding the determinations by the Arbitral Panel on its jurisdiction even without BG Group's exhaustion of local remedies)[25].

In the *Argentine Bondholder Case*[26], the German Constitutional Court delivered a ruling on 8th May 2007[27] on the following question submitted to it by the Frankfurt civil courts from several actions filed against Argentina by German investors:

> "whether the state necessity declared by the defendant (Argentina) with respect to the inability to pay entitles the defendant by force of a rule of international law to temporarily refuse to meet due payment claims, and if appropriate whether this is a general rule of international law which, pursuant to Article 25 of the (German) Basic Law, is an element

[21] *Id* at 43 at page 19, 20
[22] USCA Case No. 11-7021
[23] Decision available at https://www.italaw.com/sites/default/files/case-documents/ita0085.pdf (last accessed on 1st April, 2019)
[24] USSC Case No. 12 – 138
[25] Decision available at https://www.italaw.com/sites/default/files/case-documents/italaw3115.pdf (last accessed on 1st April, 2019)
[26] 2 BvM 1-5/03, 1, 2/06
[27] English translation available at:
http://www.bundesverfassungsgericht.de/en/decions/ms20070508_2bvm000103en.html

of federal law which directly gives rise to rights and obligations for the individual, in this instance the Parties."[28]

The claims by the German investors shared largely the same factual background with the claims of *CMS*, *LG&E*, *Enron*, *Sempra*, *Impreglio* and *BG* herein above. What, however, gave rise to these claims was the emergency measure of suspension of foreign debt service which adversely affected sovereign bond holders such as the Plaintiffs in this case.

Argentina sought to place reliance on a defense of economic necessity against the claims of private individuals before the German Federal Constitutional Court. It argued that the ILC Draft Articles on State Responsibility did not expressly rule out their extension to private law relationships and consequently such a defense could be raised to counter claims by private persons before the local German courts. Argentina, further argued that insofar as diplomatic protection elevated financial obligations owed to private individuals to the international legal terrain, then such obligations were said to become international obligations.[29]

The Constitutional court's majority held, largely in line with the conclusions of the expert witness, that while there is recognition in customary international law of the raising of the plea of necessity in inter-state relationships that are exclusively subject to international law, the same cannot be said of similar invocation in private law contractual engagements involving private creditors. The court concurred there was, as yet, "no evidence for a state practice based on the necessary legal conviction (*opinio juris sive necessitatis*) to extend the legal justification for the

[28] *Id* at para [8] of the Ruling
[29] *Id* at para [20]

invocation (of the defense)."[30]The court distinguished the two cases of *CMS Gas* and *LG & E* from the case before it and noted that while the former concerned a dispute arising under a BIT under which states sorely owe obligations to other states, the latter case involved private contracts between investors and a state.

In her dissenting opinion, Judge Lubbe Wolff, *inter alia*, was of the view that the majority court posed and addressed a question different from that submitted by the lower court and even then was wrong in its findings on the substantive legal position thereof.[31] After highlighting the International Law Commission's documented state practice of Denmark and South Africa and delving into background international case-law on the plea of necessity, she found as recognized, the principle that "certain elementary tasks and obligations of the state above all those upon which the life and health of its citizens directly depend, as a rule take precedence over punctual service of creditors' interests – in so far as no equally essential interests are also at stake for the opposing side."[32]

1.1 Statement of the Problem

Commentary (1) on Article 25 of the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts[33] states that the term "necessity":

> "denote(s) those exceptional cases where the only way a state can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency".

[30] *Id*, para [36]
[31] *Id*, paras [82] – [83]
[32] *Id*, para[89]
[33] UN Doc. A/RES/56/83 (2001) *Available at*http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. (last accessed on 1st April, 2019)

This plea of necessity straddles two principles *viz* the principle that a state is bound to perform those contracts it voluntarily enters into and the other principle that a party must not be coerced to carry out its contractual obligations if doing so would endanger life or health or violate human dignity or result to inhumane distress.[34] We shall be contending that an obligation arising in a contract executed by or involving a state and an individual is an international obligation under the International Law Commission's Article 25 of the Draft Articles aforesaid.[35]

While the necessity plea has been invoked by states against other states within the public international law realm, and has been generally admitted or its basic application not denied, its invocation and or application in the economic realm and particularly in contracts between states and foreign individuals is surrounded with uncertainty. This, it is submitted, is even more so in light of the principle of *Pacta sunt servanda* and the attendant sovereign character of the state.

It is therefore proposed to inquire into this question in light of recent decisions of ICSID tribunals, the German Constitutional Court and American courts in following the dire financial situation in Argentine. Even though most of the decisions relevant to this study relate to Argentina, this, however, is not a single case study of the country.

1.2 Justification of the Study

This study was prompted by the uncertainty emerging from recent conflicting arbitral tribunal and municipal courts' decisions in investor – state disputes regarding the circumstances allowing

[34]Kunibert Raffer, "Risks of Lending and Liability of Lenders" (2007) 21 *Ethics & International Affairs,* 85, 93.
[35] See *Barcelona Traction, Light and Power Company Limited: Second Phase, February 5 1970 (Belgium vs Spain)* [1970] ICJ Reports, paragraph 33 as quoted in Jorge E Vinuales, 'State of Necessity and Peremptory Norms in International Investment Law'(2008) 14(1) *Law & Business Review of the Americas* 79, 81.

invocation of the defence of necessity by states in such disputes. While there is recognition in customary international law of the raising of a plea of necessity in inter-state relationships, which are sole subjects of international law, the said recent pronouncements have brought to the fore the debate whether necessity as a defence extends to contractual relationships involving state parties and private foreign parties.

1.3 Statement of Objective

The main objective and purpose of this study is to undertake an inquiry regarding circumstances for raising and or applying the plea of necessity in the international economic realm and particularly in contractual relationships between States and individuals. This inquiry takes sharper focus in light of recent determinations by ICSID tribunals as well as some domestic courts in the wake of the Argentine financial meltdown. In this quest, we seek to examine and investigate the following specific issues;

(i) Whether contractual relationships involving state parties on the one part and foreign individuals on the other entail or raise international obligations on the part of the state parties;

(ii) If they do, whether the principle of state sovereignty has any bearing on these relationships; and

(iii) What, if any, would be the effect of the principle *pacta sunt servanda* on these relationships when the state is unable or unwilling to perform its obligations flowing there from?

1.4Research Questions

1.4.1 Do contractual relationships or engagements by or between states and foreign individuals entail or raise international obligations for the state parties?

1.4.2 Whether a State may apply the defence of necessity in order to avoid its contractual obligations to individuals?

1.4.3 If so, is availability of this defence of necessity (to a State so as to excuse or evade its contractual obligations to non-state parties) affected by the concepts of sovereignty and *pacta sunt servanda*?

1.5 Theoretical Framework

There are three main theories of international relations. Liberalism encourages international unity for the mutual gain and advancement of everyone particularly through the work of international institutions. It proposes that increased interdependence among international actors coupled with the spread of democracy will lead to increased prosperity and reduced conflict. Under this theory, the internal or domestic elements or characteristics of the state determine how the state projects itself on the international plane particularly in the setting up of international institutions that would thereafter impact or interact with local institutions. Liberal theorists such as Emmanuel Kant and Joseph Schumpeter propounded that absence of war or a reduced state of conflict and entrenchment of a peaceful international order would be conducive for expansion of democracy and free trade among liberal states.[36] On the other hand neo-liberals such as Robert Axelrod do not pay too much premium to peace and accept that states may still pursue their interests even amidst conflict.[37]

As a theory, constructivism posits that international relations are deliberately structured rather than being the organic result of human nature and interactions. Thus human interactions and

[36] Scott Burchill, et al., *Theories of International Relation*, 3rd Edition, Palgrave MacMillan, New York, 2005, page 58 ff
[37] *Id* at 190

social engagements determine important aspects of international relations. Thus, how a state is perceived by friendly or enemy states, its perceived levels of fairness and justice, are some of the important determinants of that state's behavior on the international plane. Indeed, for constructivists such as Alexander Wendt, international interests of states or even of individuals are largely shaped by, or based upon, their social identities.[38]

Realism, as a theory of international relations, emphasizes the role of the state. It looks at international relations from the general assumption that sovereign states are autonomous of each other and are the main actors on this plane and are principally motivated by national or self interests. In pursuit of their interests in this anarchic system, states have as their primary goal the maintenance of their security and survival – in a word, sovereignty. This 'selfishness' of the state (what Keohane[39] calls "state-centrism") is a primary feature or core premise of realism. State self-interest, then, is a constraint on international relations in that states will only be moved either by coercion (force) or of their own will (consent). The goal of survival presupposes that states are rational actors which seek, as much as possible, to ensure their likelihood of continuing to exist.

Both liberalism and constructivism are not well suited to offer a theoretical basis on which to explore the rather complex interplay in the contractual relations between states and individuals. This study, therefore, takes place within the realism framework of international relations theory to examine why a state would adopt an international legal norm that it will then (deliberately or

[38] *Id* at 197
[39] Keohane, R.O., 'Theory of World Politics: Structural Realism and Beyond' in Keohane R.O. (ed), Neo-Realism and its Critics (New York, 1986) at page 164 – 165.

otherwise) violate to its own advantage where the opposite party is an individual and whether it should be allowed to do so.

1.6 Methodology

The planned study involves an analysis of the emerging divergent views and positions on the question of the availability of the necessity defence to a state in a contractual relationship with an individual particularly from recent jurisprudence of arbitral tribunals. The study will be qualitative research mainly involving desk top review of such decisions.

The main source of data for this study comprises of the primary sources if international law being treaties and conventions, international customary law, general principles of law, a number of recent ICSID Arbitral Awards as well as a few municipal court decisions. Some secondary sources will also be resorted to such as books, publications and journal articles to illustrate the divergent positions taken on this topic.

1.7 Literature Review

A review of a number of decisions and awards of some ICSID Tribunals, some municipal courts' decisions and various journal articles has revealed there is enough material to successfully undertake this research project.

Although it is not in contest that necessity as a contractual protection is available in inter-state relations under customary international law, the same cannot be said with certainty with regard to the availability of this defence in contractual relations between investor and state, either under

customary international law or under a relevant bilateral investment agreement. As we have seen in the background to this study above, the availability of this defence in the latter relationships under either of the two legal frameworks remains unsettled and has somehow been clouded further by ICSID Arbitral Tribunal decisions.

While ICSID Arbitral Tribunals and the municipal courts in these cases also had to consider other legal issues,[40] the "necessity defence" raised by Argentina was a particularly recurring feature in all of the cases. The Tribunals and some Annulment Committees were inconsistent in the manner in which they approached, and the conclusions they made as to the applicability of, the defence of necessity as advanced by Argentina either under the relevant Bilateral Investment Treaty or by virtue of customary international law.

A highlight of the following five questions that some ICSID Arbitral Tribunals decided on in different ways will help to illustrate the necessity for this study.

(a) Is the "essential security" provision within a Bilateral Investment Treaty equal to or the same as the necessity defence grounded in Customary International Law?

The tribunals in *CMS Gas*[41], *Enron*[42] and *Sempra*[43] arbitrations found that the two were the same. However, the tribunal in *Continental Casualty*[44]and the Committees in *CMS Gas*

[40] Such as jurisdictional and substantive questions of what constituted an investment under the bilateral investment treaty in issue; compliance with Article 25 of the ILC Draft Articles, discriminatory treatment, Most Favoured Nation Clauses and forum selection.
[41]ICSID Case No. ARB/01/8; Tribunal Award dated 12thMay, 2005
[42]ICSID Case No. ARB/01/3; Tribunal Award dated 22nd May, 2007
[43]ICSID Case No. ARB/02/16; Tribunal Award dated 28th September, 2007
[44]ICSID Case No. ARB/03/9; Tribunal Award dated 5th September, 2008

Annulment[45] and *Sempra* Annulment[46] found that the two defences were distinct. On the other hand, the Committee in the *Enron* Annulment[47] held that it was not an error to treat the Argentina-US BIT Article XI[48] defence as the equivalent of the CIL defence.

(b) Does the necessity plea grounded on customary international law apply where a Bilateral Investment Agreement is silent on this defence?

On this question, the tribunal in *BG*[49] was equivocal holding that it may be applicable. However, the UNCITRAL tribunal in *National Grid*[50] was unequivocal that the CIL defence so applies.

(c) Assuming that the necessity defence under Customary International Law is applicable where a Bilateral Investment Treaty is silent on this defence, what proof does that Customary International Law necessity defence require for it to be successfully invoked?

The tribunals in *CMS, Sempra, Enron, BG* and *National Grid* all found that such factors are those set out in Article 25 of the ILC Draft Articles while that in *LG & E*[51] was unclear in its findings.

[45]ICSID Case No. ARB/01/8; Annulment Decision dated 25th September, 2007
[46]ICSIDCase No. ARB/02/16; Annulment Decision dated 29th June, 2010
[47]ICSID Case No. ARB/01/3; Annulment Decision dated 30th July, 2010
[48]This Article provides as follows; "This treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligation with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests."
[49] *Supra* note 19
[50] Case 1:09-cv-00248-RBW; Tribunal Award dated 3rd November, 2008
[51]ICSID Case No. ARB/02/1; IIC 152 (2006); Tribunal Award dated 3rd October, 2006

(d) Assuming that Article XI of the BIT between the US and Argentina raises a defence distinct from that of necessity under CIL, what proof is necessary for it to be successfully invoked?

While the *LG & E* tribunal held such proof was similar to that in customary international law (concluding Argentina was discharged from its obligations by virtue of Article XI provisions in the US-Argentina bilateral agreement), the Committees in *CMS* Annulment and *Sempra* Annulment held to the contrary – such proof was different from that in customary international law but left this undefined. Interestingly, *Continental Casualty's* tribunal (in upholding the plea by Argentina of necessity under the provisions of the bilateral agreement) held that such proof was the same as that required under GATT Article XX. This conflation of the international investment regime with international trade jurisprudence was, perhaps, due to the fact that the arbitral tribunal's chair had previously served on the WTO's Appellate Body.

(e) What is the consequence or effect of successfully raising an Article XI defence in the US – Argentina bilateral agreement?

The tribunals in *CMS*, *Enron* and *Sempra* held that while establishment or confirmation of "necessity" rules out wrongfulness, it would not negate any duty to requite affected investors. In contrast, the tribunals in *LG & E*'s Decision on Liability[52] and *Continental Casualty*'s Award[53] and the Committees in *CMS* Annulment and *Sempra* Annulment held that Argentina's liability to pay compensation was thereby discharged for any breach of obligations under the BIT arising during its emergency period.

[52]Dated 3rd October, 2006
[53]Dated 5th September, 2008

This unsettled legal position surrounding the necessity defence marked by conflicting Arbitral, annulment and municipal decisions has, not unexpectedly, generated some scholarly commentary.

Gus Van Harten argues that arbitrations carried out under investment treaties vary from international commercial arbitrations – those that involve disputes between states and private individuals. For him, the state is assumed to be operating on a private (commercial) level in international commercial arbitrations whereas in arbitrations undertaken under investment treaties, the state's sovereign character is involved in the form of its regulatory or administrative relations with the foreign investors.[54]

Van Harten comes close to unraveling this conundrum when he posits that the recent emergence of an investment treaty regime presents a major reform of public international law in allowing individuals the ability or right, even, to bring international claims for damages arising from the wrongful sovereign acts of states. Customary international law, he notes, provided no such right or opportunity to individuals.[55]Thus while State responsibility to a foreign investor is established by treaty and contract, raising a defence of necessity anchored in customary international law apparently is where the problem arises.

[54] Gus Van Harten, "The Public – Private Distinction in the International Arbitration of Individual Claims against The State", ((2007) 56 *International & Comparative Law Quarterly*, 371 at 372
[55] *Id*, at 377

Jurgen Kurtz notes that the arbitral decisions emanating from the Argentine crisis have revealed a new legal phenomenon within the network of international investment treaties "with the serious potential to constrain State autonomy in mitigating adverse effects of such crises."[56]

Jose Alvarez and Tegan Brink[57] argue that the decisions in *CMS Gas*, *Sempra* and *Enron* arbitrations (equating the necessity defence in Article XI of the BIT signed between the US and Argentina with that under international customary law) as the correct one based on an appreciation of the text, context, object and purpose of that BIT.

Alan Sykes notes the controversies stoked by the conflicting arbitral decisions arising from Argentina's economic woes but his probe focuses on some interesting questions chief among them being whether the application of the defence of necessity by which states may be afforded leeway to depart from their international commitments will create an undesirable moral danger in administrative decision-making as well as whether the defence of necessity is the best policy instrument to address economic emergency circumstances.[58]

A number of other legal scholars[59] have written on the inconsistencies on the treatment of the necessity defence in the arbitral decisions arising from the Argentine financial crisis but there is

[56] Jurgen Kurtz, "Adjudging the Exceptional at International Investment Law: Security, Public Order and Financial Crisis (2010) 59(2) *International and Comparative Law Quarterly* 325 at 326

[57]Jose E. Alvarez and Tegan Brink, "Revisiting the Necessity Defence: Continental Casualty v Argentina" (2012) 9 Transnational Dispute Management, 319

[58] Alan O. Sykes, 'Economic "Necessity" in International Law' (2015) 109 *American Journal of International Law* 296

[59] See August Reinisch, 'Necessity in International Arbitration – An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS vs Argentina and LG & E vs Argentina' (2007) 8(2) *Journal of World Investment & Trade* 191; Stephen W Schill, 'International Investment Law and the Host State's Power to Handle Economic Crises – Comment on the ICSID Decision in LG & E vs Argentina' (2007) 24(3) *Journal of International Arbitration* 265; Michael Waibel, "Two Worlds of Necessity in ICSID Arbitration: CMS and LG & E" (2007) 20 *Leiden Journal of International Law* 637; Sarah F Hill, 'The "Necessity Defence" and the Emerging Arbitral Conflict in its

a dearth of scholarly work on the application of this necessity defence vis-à-vis the *pacta sunt servanda* precept in the international economic realm involving states and non-state players.

Could the inconsistencies resulting from the use of the necessity defence in contracts between states and individuals be resolved by an appreciation of the central position of the *pacta sunt servanda* principle as well as the attendant character of the state as a sovereign?

1.8 Limitations

The study is limited in scope to the extent that it does not extend to the broader area of abrogation or alteration by the state of a contract between it and a private individual. This work, therefore, does not broaden or widen to cover legal questions arising out of termination, amendment or rescission of contracts by a state on the basis of state immunity or upon a change of constitutional order of the state, where the contracting parties are states and individuals.

1.9 Hypothesis

1.9.1 A contractual relationship involving a state party on the one part and a private foreign party on the other gives rise to international obligations for the state party.

1.9.2 A state party to a contract with a private foreign party is thereby bound to perform such contract that it has voluntarily entered into (*pacta sunt servanda)*.

1.9.3 A State party invoking necessity (so as not to fulfill the contract if that leads to inhumane distress, endangers life or health or violates human dignity) will effectively have given

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Application to the US – Argentina Bilateral Investment Treaty' (2007) 13 *Law & Business Review of the Americas* 547; Eric David Kasenetz, 'Desperate Times Call for Desperate Measures: The Aftermath of Argentina's State of Necessity and the Current Fight in the ICSID' (2009 – 2010) 41 *George Washington International Law Review* 709; Kelly Chubb, 'The "State of Necessity Defense": A Burden, not a Blessing to the International Investment Arbitration System' (2013) 14 *Cardozo Journal of Conflict Resolution* 531.

priority to its own vital or essential interests, and sacrificed the rights of another party, and, in the process, the principle of *pacta sunt servanda* will have been violated.

1.10 Chapter Breakdown

This paper consists of five chapters. The breakdown of each is as follows:

Chapter One is the introductory chapter. It comprises the background to the research, the problem statement, the research questions, the theoretical framework and methodology employed. In this Chapter, we have also reviewed the available literature including some arbitral decisions arising from the Argentine crisis.

Chapter Two considers the question of necessity within customary international law. In this chapter, we look at State Responsibility as well as the importance of the definition of "international obligation" in the concept of state responsibility. We also look at the evolution of the necessity doctrine in customary international law and the pre-requisites for its invocation under customary international law.

Chapter Three explores the *Pacta Sunt Servanda* principle and considers whether it applies to contracts between states and individuals as it does between states *inter se*. We also look at the concept of State Sovereignty and the balance required to be made between it and the *pacta sunt servanda* principle in State Contracts with individuals.

In Chapter Four, and flowing from Chapter Three, we analyze the interplay between the necessity defence and those norms from which no derogation is permitted - peremptory norms. Here, we look at what constitutes peremptory norms (or *jus cogens*), and see that scenarios where a foreign investor could claim before an arbitral tribunal that the host State has offended a *jus cogens* norm or, conversely, where a host State could plead necessity in reliance on a *jus cogens* norm to breach its obligations under a Bilateral Investment Treaty, are not too far-fetched.

Chapter Five contains a summary of the findings, conclusions and possible recommendations arrived at. It draws from the findings as contained in the previous chapters. The hypotheses are also revisited with a view to discern whether the same are proven or otherwise.

CHAPTER 2 STATE OF NECESSITY

2.0 Introduction

In the discourse on the defence of necessity in contracts between states and individuals, as well as to provide context thereto, there is need to briefly examine the concept of state responsibility and establish if such legal relationships (contracts between states and individuals) are, directly or indirectly encompassed within it. Necessity, as we shall see, has a role, within the rubric of international law, as a shield to state responsibility. Thereafter, we shall look at the concept of necessity under customary international law in greater detail, tracing its early conception and end with a look at efforts to codify it under the rubric of the legal principles of state responsibility and its possible extension to contracts between states and non-state parties.

2.1 State Responsibility

It is perhaps useful, in delving into this concept that has generated much debate, to start by looking at the closest conceptualization of what state responsibility entails. This is included in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts prepared by the International Law Commission.[60] These Draft Articles were approved by the United Nations General Assembly in 2001 by "commending" them to the attention of governments "without prejudice to the question of their future adoption"[61]. Ian Johnstone posits that even though these Draft Articles are unlikely to be converted into a treaty any time soon, they should nonetheless be seen as subsidiary evidence of the law as provided in Article 38(1)(d) of the ICJ Statute.[62]

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[60] U.N. Doc. A/56/49 (Vol. 1)/Corr.4, (Dec. 12, 2001) Available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf

[61] GA Res. 56/83, U.N. GOAR, 56th Sess., U.N. Doc. A/RES/56/83 (2001)

[62] Ian Johnstone, 'The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism' (2005) 43 *Columbia Journal of Transnational Law* 337 at 341

Commentary (1) to Article 1 of the ILC Articles provides that:

> " ... a breach of international law by a state entails the international responsibility of that state. ....The term 'international responsibility' covers the new legal relations which arise under international law by reason of the internationally wrongful act of a state."

It has been posited that the term "state responsibility" has traditionally had both a narrower and a broader scope than the ILC Articles on State Responsibility – in its narrower scope, it refers only to responsibility for injury to aliens while in its broader scope it refers to the primary duties and obligations of states.[63]

In addressing the question who can claim in respect of an infringement of state responsibility, the text of the these Articles on State Responsibility limits such invocation to states.[64] However, the introductory commentary to Chapter 1 of the ILC Articles (under which Article 42 falls) observes that the "rights that other persons or entities may have arising from a breach of an international obligation are preserved by Article 33(2)"

This savings clause on its part provides that part 2 (which articulates the consequences of internationally wrongful acts) "..... is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State."[65]

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[63] Daniel B and John RC "Symposium: The ILC's State Responsibility Articles; Introduction and Overview" 96 *American Journal of International Law* 773 at 776; For the traditional focus, see Edwin MB "'Responsibility of States' at the Hague Codification Conference" (1930)24 *American Journal of International Law* 517. For a historical background to the consolidation of the international law on state responsibility, see Dupuy P "A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility" (2002) 13 *EJIL*, 1053

[64] Article 42

[65] Article 33(2) provides as follows;

It therefore, albeit indirectly, acknowledges states potentially could owe secondary obligations to such non-state parties as foreign private individuals and or international organizations and further that breach of such obligations could be a basis for invoking state responsibility. Article 48, which is to the effect that breaches of some international obligations could affect the entire international community, further buttresses this conclusion. This is also a reflection of the observations made by the ICJ in the *Barcelona Traction* case[66] that where a state allowed foreign investments into its territory, it was bound to extend to them certain legal protections and also assumed certain obligations as to the treatment to be given thereby.

In the wider international human rights law arena (mainly comprising documents such as the Universal Declaration of Human Rights (UDHR) as codified in the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols[67] and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[68]; the Convention on Elimination of All Forms of Racial Discrimination (CERD)[69]; the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[70]; the Convention on the Rights of the Child (CRC)[71] and the Convention against Torture, Cruel, Inhuman and Degrading Treatment or Punishment (CAT)[72], it is undeniable that individuals there under derive guaranteed rights while

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"2. This part is without prejudice to any right, arising from the international responsibility of a State, which may accrue directly to any person or entity other than a State"

[66] *Barcelona Traction, Light and Power Company Limited: Second Phase, February 5 1970 (Belgium vs Spain)*, ICJ Reports, 1970, paragraph 33

[67] United Nations, Treaty Series, vol. 999, p. 171

[68] United Nations, Treaty Series, vol. 993, p. 3

[69] United Nations, Treaty Series, vol. 660, p. 195

[70] United Nations, Treaty Series, vol. 1249, p. 13

[71] United Nations, Treaty Series, vol. 1577, p. 3

[72] United Nations, Treaty Series, vol. 1465, p. 85

states have concomitant and corresponding obligations (including "*obligationes omnium et ergaomnes*" – owed to the entire international community) flowing there from.

However, since to what extent other entities besides states may invoke responsibility was not elaborated on by the ILC Committee, it has been pointed out that an article could have made express provision for the right or entitlement of individuals and non-state entities to cite the responsibility of a state for infringement of obligations owed to them or where this is so provided under the terms of an international agreement or expressed in another principal rule of international law.[73]

Perhaps a definition of the term 'international obligation' which was not defined in the ILC Draft Articles might also have helped to shed a little more light on this. Professor Dominice, however, offers the following definition of the term "multilateral obligation" (breach of which he notes shares largely the same aspects as any violation of an international obligation);

> "A multilateral obligation is a legal duty whose bearer – a state – is answerable before the entire international community."[74]

The International Court of Justice has itself said that;

> "It is clear that refusal to fulfill treaty obligation involves international responsibility."[75]

[73] Edith BW "Invoking State Responsibility in the Twenty-First Century"(2002)96*American Journal of International Law* 798 at 816
[74]Dominice, C "The International Responsibility of States for Breach of Multilateral Obligations" (1999) 10 *European Journal of International Law* 353 at 354
[75]*Peace Treaties (second phase)* (1950) ICJ Rep 221, 228

One of the defining, though by no means exclusive, characteristics of classical state or international responsibility[76] is the consequential element of compensation or reparation. It is in this respect that the ICJ expressed itself thus in the *Iran Hostages* dispute;

> "The government of the Islamic Republic of Iran is under an obligation to make reparation to the government of the United States of America for the injury caused to the latter by the events of 4th November, 1979 and what followed from these events."[77]

Moreover, echoing the principle of *restitution in integrum*, the Permanent Court of International Justice in the *Chorzow Factory* dispute concluded that, to all feasible extents, all the effects of the wrongful act must be cancelled out and the *status quo ante* the wrongful act complained of restored. The Court said as follows;

> "It is a principle if international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention.[78]

It is now generally accepted that any contract or binding agreement must be set within a legal system of law or order which prescribes for the parties to the contract, rights and obligations. Contracts between states are obviously rooted within the international law system or legal order. On the other hand, categorization of a contract between a state and a private individual is not so straightforward. It is however generally agreed that such a contract will be governed by international law where parties have expressly said so; where the contract provides that general

[76] As to a discussion of the possible evolution of the theory of international responsibility, see Pierre-Marie Dupuy, "The International Law of State Responsibility: Revolution or Evolution?" (1989) 11 *Michigan Journal of International Law* 105

[77] *United States Diplomatic and Consular Staff in Tehran (U.S. v Iran)* (1980) ICJ Rep3, at 45

[78] *Factory at Chorzow (Germany vs. Poland)* (1927) PCIJ (ser. A) Nos. 8 and 9, 21

principles recognized by civilized states apply to it; or where it is governed by an international commercial treaty law or incorporates a stabilization clause.[79]

Regardless, and going by the prevailing view above that individuals under customary international law can be owed obligations by states on the international level, then there ought to be the concomitant right to the individual to invoke state responsibility in the event of violation of such obligation. And if that be the case, then conversely the state may also avail itself of such legal defenses as are appropriate under customary international law.

We now turn to look at one such defense of necessity in customary international law amid such uncertainty on the question of state responsibility vis-a-viz individuals.

2.2 Necessity under Customary International Law

Article 25 of the ILC Draft Articles on State Responsibility provides that;

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

[79] Booysen H *Principles of International Trade Law as a Monistic System* Interlegal Pretoria (2003) p. 488ff

precluding wrongfulness if:

(a)the international obligation in question excludes the possibility of invoking necessity; or

(b) the State has contributed to the situation of necessity."

The Commentary to this Article 25 terms 'necessity' as denoting "… those exceptional cases where the only way a State can safeguard an essential interest threatened by a grave and imminent peril is, for the time being, not to perform some other international obligation of lesser weight or urgency." A scenario aptly demonstrating the basis for the deployment of the necessity defence can be found in South Africa's submission to the 1930 League of Nations Conference on the Codification of International Law that;

> "If, through adverse circumstances beyond its control, a State is actually placed in such a position that it cannot meet all its liabilities and obligations, it is virtually in a position of distress. It will then have to rank its obligations and make provisions for those which are of a more vital interest first. A State cannot, for example, be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money wherewith to meet its moneylenders, foreign or national. There are limits to what it may be reasonably expected of a State in the same manner as with an individual."[80]

[80] Roberto Ago (Special Rapporteur), Addendum to the Eighth Report on State Responsibility (1980) 2Y.B Intl L. Commn, pt. 1 at 13, 24 quoted in Alan Sykes, 'Economic "Necessity" in International Law' (2015) 109 *American Journal of International Law*, 296 at 309

Under conditions narrowly defined in Article 25, such a plea is admitted as a factor ruling out wrongfulness.[81] Necessity is thus a defence that will be applied very sparingly.

There is substantial historical authority supporting the existence of necessity as a circumstance precluding wrongfulness[82] which includes such cases as "*Anglo-Portuguese*" dispute of 1832[83], the "*Caroline*" incident of 1837[84], the *Russian Indemnity*" case[85] and the "*Gabcikovo-Nagymaros Project*" case[86]. However, the earliest conception of necessity can be traced to Hugo Grotius from whose writings on the right of self-preservation, necessity as a separate but constrained right was conceived and or derived. It was constrained in the sense that "…. strictly speaking, it was not a full and perfect right …. but a kind of permission, arising out of a case of necessity."[87] Necessity for Grotius and other early writers such as Samuel Pufendorf, was a right tracing its foundations or roots to natural law.

In the "*Anglo-Portuguese*" dispute, Portugal was allowed by Britain to violate a treaty as it was deemed necessary for the Portuguese state's survival. The Portuguese government urgently needed to provide subsistence for some of its troops. Despite the existence of a treaty between the

[81] Supra note 60
[82] See Boed R "State Necessity as a Justification for Internationally Wrongful Conduct (2000) 3 *Yale Human Rights and Development Law Journal* 1 pp. 4 -12 for a historical overview of the concept of necessity from a state's right to self-preservation to a state's excuse in the name of an essential interest
[83] A.D McNair (ed), International Law Opinions, volume II, 232 (1956) *as quoted in* International Law Commission's Draft Articles on the Responsibility of States for Internationally wrongful Acts with Commentaries
[84] See Bassett MJ andWharton F, et al, *A Digest of International Law*, Volume 2, United States Government Printing Office (1906)
[85]*Russian Indemnity (Russia vs Turkey) Case* UNRIAA vol. XI, 431 (1912). Award of the Arbitral Tribunal of 11th November 1912 also available at (1913) 7 *AJIL* 178
[86]*Gabcikovo-Nagymaros (Hungary vs Slovakia)* 1997 ICJ 7 (25th September 1997) available online at www.icj-cij.org/docket/files/92/7375.pdf
[87] Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, vol. II, (translation by Francis Kelsey first published 1625, Clarendon 1925) as cited in Hersch Lauterpacht (1946) 23 *BYIL*, 1; James Salter (2005) 26 *History of Political Thought*, 284

two countries providing to the contrary, the Portuguese government confiscated the property of British nationals within its territory in order to meet its pressing needs. The British government accepted the legal opinion it had sought that recognized that the terms of the treaty were not too rigid that they denied the Portuguese government the right to use any means deemed absolutely necessary to meet its exigent needs.

The *Caroline Incident* involved some settlers in Canada who in 1837, being unhappy with British policies, rebelled against the government set up by the British. Though the American government maintained a neutral stance to the rebellion, a large number of American citizens sympathized with the Canadian rebels, providing them with fighters and supplies all which were transported using the vessel *Caroline*. In response, the British invaded American territory and set the *Caroline* on fire. This series of events severely tested US-Canadian relations but was finally resolved by US Secretary of State Daniel Webster and Alexander Baring, 1st Baron Ashburton leading to the conclusion of the Webster-Ashburton Treaty of 1842. While Secretary Webster conceded that the recourse to force was justifiable by the necessity of self-defence, he denied there existed such conditions of necessity. On his part Baron Ashburton apologized for the invasion of US territory but maintained that the circumstances were such as to excuse the actions taken.[88]

In the *"Russian Indemnity"* dispute (where the Ottoman Government cited the fact that it had been in a dire financial position to justify its delayed debt repayment to the Russian Government), the Arbitral Tribunal accepted the plea of necessity (which the Russian Government described as *force majeure*) in principle and observed that;

[88]See Bassett MJ and Wharton F, et al, *A Digest of International Law*, Volume 2, United States Government Printing Office (1906), at p. 25, 409 & 410

"The Imperial Russian Government expressly admits ..... that the obligation for a state to execute treaties may be weakened 'if the very existence of the state is endangered, if observation of the international duty is .....self destructive'".[89]

In the "*Gabcikovo-Nagymaros Project*" dispute,[90] the International Court of Justice found that both Hungary and Slovakia had breached their obligations under a bilateral treaty[91] for the construction and joint running of a large waterworks project involving several structures and building works on the river Danube connecting the territories of the two countries. Hungary had on its part, relied on five grounds in support of its termination of the treaty, being (a) the occurrence of a situation of ecological necessity; (b) the infeasibility of fulfilment of the treaty with Czechoslovakia; (c) the occurrence of a major change of circumstances; (d) the substantial breach of the agreement by Czechoslovakia; and (e) the emergence of new precepts of international environmental law. On necessity, the ICJ held that a treaty could not be terminated for the reason that a situation of necessity existed. Such a situation could only be relied on by a state to excuse it from its responsibilities and obligations where the state has failed to implement the treaty.

[89] *Russian Indemnity (Russia vs Turkey) Case* UNRIAA vol. XI, 431 (1912) at 443. Award of the Arbitral Tribunal of 11th November 1912 also available at (1913) 7 *AJIL* 178

[90] (1997) ICJ Rep 7

[91] Treaty on the Construction and Operation of the Gabcikovo – Nagymaros System of Locks signed on 16th September 1977. It was originally signed between Hungary and Czechoslovakia but Slovakia succeeded the latter upon its split to the Czech Republic and Slovakia in 1993

This historical authority serves to show that the concept of necessity to a large extent is rooted in the older doctrine or right of self-preservation of the state where its security in the sense of existence was threatened.[92]

Part of the foregoing historical authority is set out in the Commentary to Article 25 of the Draft Articles on State Responsibility.[93]

And even though the ILC Articles on State Responsibility have not yet been codified into an international convention, it is nonetheless now widely accepted that this Article 25 sufficiently represents the state of customary international law on the question of necessity.[94]

As regards the legal binding nature of the rest of the Articles, it has been said that the acceptance on 12th December 2001 of the Draft by the General Assembly of the United Nations could be presumed as an indication of the legal conviction necessary for the establishment of customary law.[95] This, off-course, is debatable since the legal conviction ingredient necessary to form customary international law must be accompanied by widely or well known and frequently observed practice. Nonetheless, James Crawford, the Special Rapporteur responsible for the Second Reading of the Draft Articles does note that while the "ultimate tests of acceptance" are yet to be met, the ILC Draft Articles "have already been referred to in argument before

[92] For a discussion on treaties and national security exceptions, see Susan Ackerman & Benjamin Billa, "Treaties and National Security" (2008) 40 *International Law and Politics* 437
[93] *Supra*, note 60
[94] Para [315] of the Tribunal Award in *CMS Gas Transmission Company vs The Argentine Republic,* Case No. ARB/01/8. Available online at http://www.worldbank.org/icsid/cases/CMS_Award.pdf
[95] Senate Ruling of the German Federal Constitutional Court in *The German Bond Holders Cases* (2 BvM 1-5/03, 1, 2/06) given on 8th May 2007, at para 39. English translation available online at http://www.bundesverfassungsgericht.de/en/decisions/ms2007008_2bvm000103en.html

international tribunals, in arbitral decisions, in state practice, and in separate opinions of the International Court of Justice."[96]

Admittedly, existence of a necessity defence is not unanimously accepted as demonstrated by the arbitral case of the *Rainbow Warrior*.[97] The dispute was triggered by the sinking in July 1985 of the *Rainbow Warrior*, a vessel owned by Greenpeace International, by French agents while lying in a New Zealand harbor. Two French agents involved were arrested, charged and jailed over the incident. France made a demand for release of these agents while New Zealand claimed recompense in respect of damage arising. Pursuant to mediation undertaken by the UN Secretary General, France and New Zealand concluded an Agreement under which the two French agents were to be sent by way of transfer to a French military base in the Pacific island of Hao to be held there for three years and were to be repatriated therefrom only upon mutual agreement and consent of the two governments. Contrary to this agreement, the two agents were repatriated to France (one on account of ill health and the other on account of pregnancy and the urgent need to visit her father who had been diagnosed with cancer) before the end of the agreed period and without the consent of New Zealand.

The matter was eventually referred to an arbitral tribunal where France argued that even though its actions breached the agreement between it and New Zealand, its international responsibility was not engaged because its actions were exonerated by notions of *force majeure* and distress which were recognized by the international law with respect to state responsibility. While

[96] James Crawford, "The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A Retrospect" (2002) 96 (4) *American Journal of International Law* 874, at 889
[97] Rainbow Warrior (New Zealand vs France) (1990) XX UNRIAA 215 available online at http://legal.un.org/riaa/cases/vol_XX/215-284.pdf

considering possible applicable situations ruling out France's wrongfulness, the arbitral tribunal recognized the controversial nature of the necessity defence and noted that it had been stated in this connection (in the *Manual of Public International Law (Sorensen (ed.) page 543*) that;

> "(there is) no general principle allowing the defence of necessity. There are particular rules of international law making allowance for varying degrees of necessity, but these cases have a meaning and a scope entirely outside the traditional doctrine of state of necessity. Thus, for instance, vessels in distress are allowed to seek refuge in a foreign port, even if it is closed……; in the case of famine in a country, a foreign ship proceeding to another port may be detained and its cargo expropriated… In these cases – in which adequate compensation must be paid – it is not the doctrine of the state of necessity which provides the foundation of the particular rules, but humanitarian considerations, which do not apply to the state as a body politic but are designed to protect essential rights of human beings in a situation of distress."[98]

Indeed it is even claimed in some quarters that, as a precept, necessity operates outside, and supersedes, international law because it is triggered when vital interests of a state are threatened. According to Hans Kelsen, these vital interests correspond to some fundamental rights which, being stipulated neither by custom nor treaty, find root in the very nature of the state and the international community.[99] This notion of necessity is best exemplified in the statement by the German Chancellor to the Reichstag, at the start of World War 1 on 4th August, 1914, that "(w)e are now in a state of necessity and necessity knows no law".[100] While this is a clear case of abuse

[98] *Id*, at 254
[99] Alexander J. Poblador, "The Defence of Necessity in International Law" (1982) 57 *Philippine Law Journal*, 332 at 335
[100] *Id* at 332

of the doctrine of necessity, it is not hard to see why there might be a school of thought that looks at necessity as permitting a state invoking it to act outside or beyond international law.

Nonetheless, it seems at the very least that for the necessity defense to be available for a state under customary international law, it must fulfill the elements of necessity set out in Article 25 of the ILC Draft Articles aforesaid. These elements are that the act not in compliance with the state's international obligation (a) must be the only way in which the state can safeguard its essential interest against a severe and imminent danger, and (b) must not significantly harm the essential interest of the state or states to which the duty applies, or that of the entire international community. Even when these elements are in place, two provisos must additionally be satisfied – (a) the international obligation at play must not rule out the possibility of pleading necessity; and (b) the state must not have been involved in bringing about the situation of necessity.

It is self-evident that necessity was meant to regulate the interplay between the binding nature of international obligations and the severe effects of requiring strict observance of those obligations.

As noted above[101], the ILC by Article 33(2) of the Draft Articles seemed to acknowledge that entities other than states could accrue rights following violation, by a state, of its international obligations. However, lack of elaboration or detail on this issue led Weiss Brown to remark that the Draft Articles "should have done more to recognize the expanded universe of participants in the international system entitled to invoke state responsibility."[102] However, James Crawford, the Special Rapporteur responsible for the Second Reading of the Draft Articles, while accusing

[101] *Supra*, note 65
[102] *Supra*, note 73, at 809

Weiss Brown of underrating the significance of Article 33(2), explains that breach of international obligations (under Article 33(1)) creates secondary legal relationships and that Article 33(2) emphasizes the variety and subtlety of the possible resultant relationships between states as legislators and actors on the one hand and non-state actors as beneficiaries and claimants on the other.[103]

Could this reasoning be extended to mean, within the context of Article 25 above, that a state could conversely be entitled to raise the defense of necessity for infringement of an international obligation under a contract with an individual? This, to us seems a logical conclusion which then raises some questions - does a contract concluded between a state on the one hand and an individual on the other generate international obligations for the state party?

Are contracts signed by or concluded between states and individuals elevated in status to treaties such that the *pacta sunt servanda* principle would thereby be applicable? If that be the case, would a necessity defence raised by a state to preclude wrongfulness of acts of the state thereunder be assessed under considerations of customary international law or those of treaty interpretation?

2.3 Conclusion

In the brief study we have made of the concept of necessity, we have seen that it is one of the defences to state responsibility within customary international law in addition to the fact that this latter concept of state responsibility encompasses both responsibility for harm to aliens in the narrower sense as well as duties and obligations (international obligations) of states in the wider

[103] *Id*, at 887

sense. We also saw that the International Law Commission, in its effort to codify the law of state responsibility, missed the opportunity to affirm positively that individuals may invoke or assert a violation of a state's international obligation.

We also saw that necessity, as a defence rooted in the older natural law right of self-preservation, was widely taken as a circumstance precluding responsibility of state for internationally wrongful conduct and that the text of Article 25 of the ILC Draft Articles now sufficiently represents the position of customary international law on the question of necessity.

Since necessity is intended to bring a balance between the binding essence of international obligations on the one hand and the onerous consequences of requiring strict observance of such obligations on the other, this then calls for an examination (in the next Chapter of this work) of state contracts with individuals, state sovereignty and the legal concept of *pacta sunt servanda*, which is central to the issue of contracts involving states.

CHAPTER 3 *PACTA SUNT SERVANDA*, STATE SOVEREIGNTY AND STATE CONTRACTS WITH INDIVIDUALS

3.0 Introduction

In this Chapter, we shall look at the principle of sanctity of contracts, its role in international law where it governs contracts between states that are deemed equals on the international plane and whether it extends to contracts between unequals such as those between states and individuals and how it would impact the legal positions of parties to such latter contracts. One such legal aspect that comes into play is the sovereignty of a contracting state. We shall then see the interplay between sovereignty and uninhibited economic activities and the place of *pacta sunt servanda* in this mix.

We shall conclude by raising some inevitable questions on the legal consequences of either on the one hand upholding state sovereignty and thus allow a state's infringement of its (international) contractual obligations or on the other hand requiring the state's strict observance of *pacta sunt servanda* where the state party is faced by a dire circumstance or emergency.

3.1 *Pacta Sunt Servanda*

The principle that a state is bound to perform those contracts it voluntarily enters into is a premise of both general and customary international law. It was codified in Article 26 of the 1969 Vienna Convention on the Law of Treaties according to which "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". This is the principle of sanctity of contracts encapsulated in the maxim *pacta sunt servanda.*

17th Century German jurist Samuel Pufendorf looked at the sanctity of contracts "as one of the inviolable rules of natural law that each man must keep his word without breaking it. The latter expressed the opinion that, without the principle of good faith and that of the binding force of contracts, international law would be entirely destroyed."[104] Perhaps this explains Kelsen's view of *pacta sunt servanda* as the foundational norm (grundnorm) on which the entire rubric of international law rests.[105]

In conventional law, the precept of *pacta sunt servanda* is best illustrated by Sellers J. in the English case of *Nicolene Limited vs Simmonds*[106] where he opined;

> "……. it does not matter whether the failure to fulfill a contract by the seller is because he is indifferent or willfully negligent or just unfortunate. It does not matter what the reason is. What matters is the fact of performance. Has he performed or not?"

In international law, notwithstanding the controversy as to whether the norm of *pacta sunt servanda* merely affirms that "treaties are binding" or whether only "valid treaties are binding"[107] it is safe to conclude that the norm provides the legal reason for the obligatory force of treaties.[108]Booysen terms the content of this norm as the "law of contract" in the private law sphere or the "law of treaties" in public international law.[109]

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[104]Hans W "Pacta Sunt Servanda" (1959) 53 *American Journal of International Law* 775 at 779
[105] Hans Kelsen, Principles of International Law (1967), p. 447
[106] (1952) 2 Lloyd's Rep. 419 at 425
[107] See Josef LK "The Meaning and the Range of the Norm Pacta Sunt Servanda" 1945 (39.2) *American Journal of International Law* 180
[108]*Id*, at 181
[109]Booysen H, *Principles of International Trade Law as a Monistic System* (Interlegal, 2003), p. 288

To be sure, the ICJ in the "*Gabcikovo-Nagymaros Project*" case,[110] was of the opinion that while it had noted that both Hungary and Slovakia had failed to fulfill or comply with their commitments and obligations under the 1997 treaty, this mutually negligent conduct did not put an end to the treaty or excuse its termination. The Court found that a succession of states (after the breakup of Czechoslovakia) did not affect the 1977 Treaty nor could such succession change the rights and obligations established by the Treaty over the areas of the Danube to which it related.

Hans Wehberg, in demonstrating the integral position *of pacta sunt servanda*, states that;

> "The newer theory of international law, whether it is regarded as positivist or not, adheres to the phrase *pacta sunt servanda*. This is hardly surprising as, since any other view would amount to denying the existence of international law in general. However, the law of nations is built less upon customary law than upon contracts essentially. If a contract, validly concluded, were not binding, then international law would be deprived of a decisive foundation and a society of states would not longer be possible".[111]

This appreciation of the principle brings out, in the words of Yackee, a meaning of "an unduly rigid and formalistic principle under which states must, in any and all circumstances, strictly obey to the letter promises they make to investors no matter what the content of those promises, no

[110] *Gabcikovo-Nagymaros (Hungary vs Slovakia)* 1997 ICJ 7 (25th September 1997) available online at www.icj-cij.org/docket/files/92/7375.pdf
[111] Supra note 104, at 782

matter how severely circumstances have changed, or no matter what dire effects obeisance might have on the state's operations or existence."[112]

To be sure, there are exceptions to the *pacta sunt servanda* principle such as *clausula rebus sic stantibus* (contract inapplicability due to fundamental change in circumstances) but they are not of concern in this work. What is of relevance is the legal character of the rule within the context of the debate on the defence of necessity.

In light of the central role of the *pacta sunt servanda* principle in international law, does it play any role in or impact the status of contracts signed by or concluded between states and private individuals or companies where the relationship is one between unequals? Wehberg has no qualms answering this question in the affirmative. He opines that;

> "The principle *(pacta sunt servanda)* is valid exactly in the same manner, whether it is in respect of contracts between States or in respect of contracts between States and private companies. … The principle of sanctity of contracts must always be applied."[113]

On the other extreme, the tribunal in the case of *Amoco International Finance Corporation vs the Government of the Islamic Republic of Iran & Others (Iran-US Claims Tribunal),* held unequivocally as follows;

> "The quoted rule, however, must not be equated with the principle *pacta sunt servanda* often invoked by claimants in international arbitrations. To do so would suggest that Sovereign States are bound by contracts with private parties exactly as they are bound by

[112] Jason WY "*Pacta Sunt Servanda* And State Promises to Foreign Investors Before Bilateral Investment Treaties; Myth And Reality"(2009) 32 *Fordham International Law Journal* 1550 at 1570
[113] *Supra* note 104, at 786

> treaties with other sovereign States. This would be completely devoid of any foundation in law or equity and would go much further than any state has ever permitted in its own domestic law. In no system of law are private interests permitted to prevail over duly established public interest, making impossible actions required for the public good. Rather, private parties who contract with a government are only entitled to fair compensation when measures of public policy are implemented at the expense of their contract rights. No justification exists for a different treatment of foreign private interests. To insist on complete immunity from the requirements of economic policy of the government concerned would be the most certain way to cause the repudiation of the quoted rule."[114]

The rule referred to by the *Iran – US Claims Tribunal* in the quoted text above is the one contained in Declaration 8 of the 1962 United Nations General Assembly Resolution on Permanent Sovereignty over Natural Resources that stated (in part) that;

> "Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; ….."[115]

Pacta sunt servanda, then, speaks to stability of the contractual relationship obtaining between the parties while necessity on the other hand, as seen in preceding Chapters, points at change in such relations.

Although the *pacta sunt servanda* principle is beneficial to both parties who have contracted for their mutual benefit, it is not hard to see that in a contract signed by or concluded between an

[114] (1988) 27 *ILM*, 1314
[115] United Nations General Assembly Resolution 1803 (XVII) of 14th December, 1962

individual and a state, this principle would work more in favour of the individual and against the interests of the contracting state that has a higher bargaining position as a sovereign.

3.2 State Sovereignty and State Contracts with Individuals

Sovereignty, being one of the attendant political and legal features of statehood is in a way, a basic ingredient of international law as states are the preponderant players and actors on the international stage. Modern concepts of both international law and sovereignty, it is safe to say, arose with the emergence of states though in early feudal society sovereignty was linked with the person of the monarch. From the realist theory perspective, international law depends on the agreement of sovereign states while respect for legal and political independence of states is at the heart of international relations and is reiterated in most international documents. The two, thus, presuppose each other.

The sovereignty of a contracting state is brought into sharp focus by some resolutions of the General Assembly of the United Nations on this point. Article 3 of the 1962 General Assembly Resolution on Permanent Sovereignty over Natural Resources stated that "[i]n cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources."[116]

[116] *Id*

Article 2(1) of the Charter on Economic Rights and Duties of States[117](adopted by the United Nations General Assembly twelve years later in 1974) on its part provides that "[e]very State has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities." This resolution by inclusion of "wealth" and "economic activities", it has been argued, extended the concept of sovereignty beyond the exclusive realm of natural resources to include other economic undertakings by foreign investors in diverse economic sectors.[118] Guzman also posits that the Charter on Economic Rights and Duties of States[119] lays emphasis on sovereignty of a state in its relations with foreign investors and "puts the host country government in full control and places the investor at the mercy of that government."[120]

Luckily, state sovereignty has limitations in order to aid in economic progress. For instance, the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations[121] places a duty on states to work together in order to, among others, promote international economic stability and progress.

Even without an in-depth analysis it is rather clear that sovereignty and free unhindered economic relations are two strange bed-fellows wont to pull in different directions. If one is asserted, the other must yield. Thus, it has been said that the unreliability of the state (perhaps as a consequence of failure in achieving balance between the two) is the main reason contracts

[117] Adopted by the General Assembly of the United Nations by Resolution 3281 (XXIX)
[118] *Supra* note 112 at 1563 - 1564
[119] United Nations General Assembly of 17 December, 1974, A/RES/39/163
[120] Andrew T. Guzman, "Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties" (1998) 38 *Virginia Journal of International Law*, 639 at 650-651
[121] Adopted by the General Assembly of the United Nations on 24th October 1970 by Resolution 2625 (XXV)

between individuals and foreign states are internationalized.[122] In this regard, Booysen further makes the argument that such internationalization through use of stabilization clauses helps to protect such contracts from voluntary breach by the state in an attempt to compel the state to adhere to the precept of *pacta sunt servanda*.[123]

In the concluding last two paragraphs to his article, Hans Wehberg argues that economic engagements between states and foreign corporations cannot occur without the rule of *pacta sunt servanda* and that this rule (*pacta sunt servanda*) is applicable whether as regards contracts between states inter se or as regards contracts between states and private firms. He further avers that the smooth running or working of the international community is based in no small measure not only on relations between states *inter se*, but also, to a large extent, on relations between states and foreigners with the best proof of this being seen in the long held suggestion that disputes between states and foreign firms (or foreign individuals) should be adjudicated upon on the international level.[124]

Perhaps this is the reason that Yackee argues that there is "a long and consistent body of international jurisprudence supporting the idea that state promises to investors are *presumptively* enforceable."[125]

And in his 1962 study on "Government Guarantees to Foreign Investors", Fatouros says that for a lot of investors;

[122]Booysen, *op. cit.*, *supra* note 109 at p. 492
[123]*Id*, p. 493
[124] Hans W, *supra* note 104, at p. 786
[125]Supra note 112, at 1569 ff

> "some assurance as to the future is needed. The investor must be made to believe that there is little or no possibility that an unfavorable legal situation will be created at a later date … Thus arise the need for legal guarantees to be given by the state or states concerned to foreign investors. The guaranteeing states have to commit themselves as to the future, to promise that certain measures are not going to be taken, that certain others will continue to be taken, or that the investor will be compensated for any loss due to changes in such measures."[126]

Booysen, supported by ample authority, also states that it is beyond question that this rule of *pacta sunt servanda* applies to state contractual commitments with individuals.[127] While we acknowledge there are noted difficulties in placing individuals on the same level as states,[128]we find the foregoing line of argument very persuasive.

Moreover, the relevance of the rule of *pacta sunt servanda* to contracts between states and individuals is further seen in the General Assembly Resolution on Permanent Sovereignty over Natural Resources of 1962 cited above.[129]

However, in accepting that the rule of *pacta sunt servanda* applies to contracts between states and individuals can it be inferred that a state party to such a contract was limiting its capacity to handle emergencies and other similar occurrences that may imperil its existence or the health and

[126] A.A. Fatouros; *Government Guarantees to Foreign Investors*, 63 (1962)
[127]Booysen, *op. cit.*, supra note 109, at pp. 498ff
[128] See for instance as noted by Nagla N "Internationalization of State Contracts: ICSID, The Last Citadel"(1997) 14.3 *Journal of International Arbitration* 185 at 194ff
[129] Supra note 115

security of its subjects? In other words, is such a scenario contrary to the concept of state sovereignty?[130]

And would a State invoking necessity not then effectively prioritised its own critical or vital interests, and compromised the rights of another State (or in this case, the rights of the other contracting non-state party), thereby running counter the rule of *pacta sunt servanda*?[131]

Bouchez captures this difficult legal terrain succinctly in the following words;

> "Therefore it is to be submitted that acceptance of the aforesaid clauses (intangibility and stabilization clauses) in contracts may result in a deadlock situation between the State invoking its public interest and its freedom of action relating thereto on the one hand and the foreign enterprise referring to its legitimate expectations and the principle of *pacta sunt servanda* on the other hand."[132]

This balance of interests is also brought into sharp relief by the oft-cited *obiter dictum* of the Court in the *Barcelona Traction Case* where it was stated that;

> "When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should

[130] See a discussion on this by Leo JB "The prospects for International Arbitration: Disputes between States and Private Enterprises" (1991) 8 *Journal of International Arbitration* 81
[131] Booysen, *op. cit, supra* note 109
[132] *Supra* note 130, at 87

> be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection.[133]

The tightrope that a state caught in such a scenario can go through has been amply demonstrated by the situation of Argentina following its gigantic economic meltdown in the years 2001/2002 which formed the scope of the first Chapter in this work.

3.3 Conclusion

As seen above, it is generally accepted that the rule of *pacta sunt servanda* applies to contracts between states and non-state actors who are increasingly participating on the international stage and that in its effect of binding a state to its contractual obligations and commitments to such non-state actors, this principle acts as a constraint on state sovereignty.

Invariably, the question then must be asked whether the capacity of states, as sovereigns, to alleviate the effects of financial or other severe crises is inhibited at the altar of contractual commitments to individuals. If an affirmative answer is given to this question, then further questions will arise - will such contractual commitments have been elevated to the position of peremptory norms? Will state responsibility be excused for breaches of such contractual commitments only where *jus cogens* commitments of the state are involved? We now turn our attention to this in the next Chapter.

[133] *Barcelona Traction, Light and Power Company Limited: Second Phase, February 5 1970 (Belgium vs Spain)*, ICJ Reports, 1970, paragraph 33 as quoted in Jorge E V "State of Necessity and Peremptory Norms in International Investment Law" 2008 (14.1) *Law & Business Review of the Americas* 79

CHAPTER 4 INTERPLAY BETWEEN NECESSITY AND PEREMPTORY NORMS

4.0 Introduction

As we have seen, necessity is a mechanism of the law of state responsibility that allows states to derogate from their treaty obligations. In Article 25 of the ILC Articles on State Responsibility,[134] derogation from treaty obligation is only allowed when serious and imminent danger threatens an essential state interest.

In this Chapter, we shall evaluate necessity's interplay with those international obligations where no derogation is allowed – peremptory norms or *jus cogens* obligations. We shall inquire into the question whether a foreign investor can claim before an arbitral tribunal that a State receiving him has contravened a *jus cogens* norm or, conversely, whether a host State can plead necessity in reliance on a norm of *jus cogens* to breach its obligations under a Bilateral Investment Treaty.

4.1 Peremptory Norms/*Jus Cogens*

The term *jus cogens* is Latin for 'compelling law' although as a concept its "precise nature, contours and consequences" are far from clear or universally agreed as posited by Vadi.[135] Indeed, at its sixty-sixth session in 2014, the International Law Commission agreed to place the topic *"jus cogens"* in its work calendar and tasked a Rapporteur to submit reports on the concept for consideration by the Commission. According to the ILC's Special Rapporteur, historically the concept and underpinnings of *jus cogens* as an idea of non-derogable laws is traceable to Roman

[134] Report of the International Law Commission on the Work of its Fifty -third Session, (2001) 2 *Y.B. Int'l Law Commission*, 80

[135] Valentina Vadi, "*Jus Cogens* in International Investment Law and Arbitration" (2015) 46 *Netherlands Yearbook of International Law*, 357 at 359

Law and *jus cogens* as a term was first seen in some 19th Century studies on the *Digest* of Justinian.[136]

While traditionally states were bound only by international law in those treaties or customs to which they consented, the emergence and recognition of *jus cogens* rules or peremptory norms in the early 19th Century, however, appears to have circumvented the consent of States to be bound since they are binding on the entire international community without need for such consent. This is because the concept of *jus cogens* has a natural law root under which states were obliged to adhere to and uphold certain universally recognized fundamental principles central to the fabric of the international community.

Booysen posits that *jus cogens* rules or peremptory norms form part of what he calls the international *ordre public* or international public policy,[137] a concept which is controversial.[138] Indeed, as Vadi notes, some scholars take *jus cogens* rules and international *ordre public* as synonyms while others look at them as neighbouring concepts.[139]

Jus cogens connotes norms or rules of customary international law (although some might be positively anchored in treaties and conventions) but not all international law rules of a customary nature acquire the character of *jus cogens*. Equally, it is posited that all *jus cogens* rules involve

[136] First Report on Jus Cogens by Dire Tladi Special Rapporteur at page 9. Report available at https://undocs.org/A/CN.4/693 last accessed on 24.7.2019
[137] Hercules Booysen, *Principles of International Trade Law as a Monistic System* (2003) Interlegal, Pretoria at p. 211
[138] First Report on *Jus Cogens* by Dire Tladi, Special Rapporteur, *supra* note 136 at page 17
[139] Vadi, *supra* note 135 at 366

ergaomnes obligations but not all *ergaomnes* obligations arise from *jus cogens* rules.[140] Nonetheless, the International Law Commission notes in its Draft Articles that affirmation of the notion of obligations owing to the entire international community (*ergaomnes*) and recognition of the theory of peremptory norms of international law in the Vienna Convention on the Law of Treaties were closely related developments.[141] *Ergaomnes* obligations were demonstrated by the Court in *Barcelona Traction Case* as follows;

> "When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *ergaomnes*."[142]

Traditionally, *jus cogens* (now more particularly referred to as 'peremptory norm') is construed by reference to Article 53 of the Vienna Convention on the Law of Treaties which defines a peremptory norm of general international law as "…. a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the

[140] Karl Zemanek, "New Trends in the Enforcement of Erga Omnes Obligations" (2000) 2 *Max Planck UNYB,* 1 at 6.
[141] *Supra* note 134 at page 111; paras (2) – (4) of the Commentary to Part Two, Chap. III
[142] *Barcelona Traction, Light and Power Company Limited: Second Phase, February 5 1970 (Belgium vs Spain),* ICJ Reports, 1970, paragraph 33

same character."[143] Under this Article, a *jus cogens* norm is one that (a) is a rule of conventional international law; (b) is recognized by the whole international community of states; (c) cannot be derogated from; and (d) can only be modified by a new rule of equal status.

Jus cogens obligations thus are those obligations from which no deviation or detraction is allowed. In constricting the actions of a State, *Jus cogens* would clearly directly impact on a State's sovereign capacity and immunity. A state's sovereign powers are curtailed in the sense that, not only is the concurrence or assent of the state to be bound thereby circumvented, but the State has no room to manoeuvre where *jus cogens* obligations are involved while its sovereign immunities are no guard against interventions by the international community when the State violates a rule of *jus cogens* by committing such acts as aggression or genocide. However, the ICJ has held that there is no possible clash between the rules on State immunity and those of *jus cojens.* In a judgment dated 3rd February, 2012 in the case of *Jurisdictional Immunities of the State (Germany vs Italy)*, the Court pronounced itself thus;

> "This argument therefore depends upon the existence of a conflict between a rule, or rules, of *jus cogens*, and the rule of customary law, which requires one State to accord immunity to another. In the opinion of the Court, however, no such conflict exists. Assuming for this purpose that the (relevant) rules … are rules of *jus cogens*, there is no conflict between those and the rules on State immunity. The two sets of rules address different matters. The rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State.

[143] Vienna Convention, 8 *ILM*, 679

They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful."[144]

4.2 Necessity and Peremptory Norms

In its early conception, necessity was taken as part of the power to ensure self-preservation of the State and was as such not subject to limitations. In the 1905 Venezuela Railroads arbitration, France's claims against Venezuela over debts owed by Venezuela to a French company were overruled by an umpire on the basis that Venezuela's "first duty was to itself. Its own preservation was paramount."[145] The preservation of the existence of the State is therefore not too far removed from the discussion of necessity particularly when it is remembered that territorial integrity and functional government are definitive requirements of statehood, itself one of the fundamental foundational segments of international law.

A scenario then is possible where a state's reaction to a dire situation involves consideration of the two diametrically opposite elements – should a state take action that might infringe a peremptory norm and justify it on the defence of necessity to safe guard its existence and/or stability?

This question brings us to the Commentary to ILC Article 26 to the effect that "(w)here there is an apparent conflict between primary obligations, one of which arises for a State directly under a peremptory norm of general international law, it is evident that such an obligation must prevail. The process of interpretation and application should resolve such questions without any need to

[144] *Jurisdictional Immunities of the State (Germany vs Italy)*; (2012) ICJ Rep, 99 at 140; Also available at https://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf last visited on 6th August, 2019
[145] *French Company of Venezuela Railroads (France vs Venezuela)* (1905) X RIAA 285 at 353

resort to the secondary rules of State responsibility. In theory one might envisage a conflict arising on a subsequent occasion between a treaty obligation, apparently lawful on its face and innocent in its purpose, and a peremptory norm. If such a case were to arise, it would be too much to invalidate the treaty as a whole merely because its application in the given case was not foreseen. But in practice such situations seem not to have occurred. Even if they were to arise, peremptory norms of general international law generate strong interpretative principles which will resolve all or most apparent conflicts."[146]

Evidently, the idea of peremptory norms connotes a ranking of international legal norms – the non-derogable norms having a higher status than others. Equally, necessity implies a similar hierarchical structure – necessity will be admitted to excuse wrongfulness of action of a state where such action is geared at protecting a critical interest of the state which ranks higher than the one breached. Similarly, necessity will not be available where the impugned action seriously harms the vital interests of the entire international community in which event such vital interests of the wider international community override the right to the impugned sate action.

4.3Peremptory Norms Applied by Tribunals

There is, currently, no catalogue of peremptory norms but the most commonly cited peremptory norms are such as those prohibiting the use of force, the prohibitions on genocide and crimes against humanity and those in respect of environmental and ecological protection as well as on self-determination with the proscription against the use of force providing the more common platform for the regular interplay with necessity.

[146]*Supra* note 134 page 85, at paragraph 3 of the Commentaries to the ILC Articles

The International Law Commission agonized over, but did not conclude one way or the other, whether necessity can be invoked to rule out wrongfulness of the use of force.[147] A case that involved elements of use of force which the Commission discussed in its Commentaries is the *Caroline Incident* which involved some settlers in Canada who in 1837, being unhappy with British policies, rebelled against the government set up by the British. Though the American government maintained a neutral stance to the rebellion, a large number of American citizens sympathized with the Canadian rebels, providing them with fighters and supplies all which were transported using the vessel *Caroline*. In response, the British invaded American territory and set the *Caroline* on fire. This series of events severely tested US-Canadian relations but was finally resolved by United States Secretary of State Daniel Webster and Alexander Baring, 1st Baron Ashburton leading to the conclusion of the Webster-Ashburton Treaty of 1842. While Secretary Webster conceded that the recourse to force was justifiable by the necessity of self-defence, he denied there existed such conditions of necessity. On his part Baron Ashburton apologized for the invasion of US territory but maintained that the circumstances were such as to excuse the actions taken.[148]

In its 3rd February, 2006 judgment in the *Congo vs Rwanda Case*,[149] the ICJ affirmed that the rules prohibiting genocide belong to the list of norms falling under *jus cogens*. The Court restated this recognition the following year in its judgment in the *Genocide Case*[150] where it noted that the norm arose from both the Genocide Convention[151] and customary international law.

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[147] *Supra* note 134 at page 84

[148] See Bassett MJ and Wharton F, et al, *A Digest of International Law*, Volume 2, United States Government Printing Office (1906), at p. 25, 409 & 410

[149] *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (D.R. Congo v Rwanda)*; (2006) ICJ Rep 6 at 32; para 64

[150] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*; (2007) ICJ Rep 43 at ; at para 161

[151] United Nations, Treaty Series, vol. 78, p. 277

The interplay of necessity with peremptory norms in the area of environmental and ecological concern can be seen in the 1967 *Torrey Canyon case* where the British government eventually bombed a Liberian-flagged supertanker stranded in the high seas off the English coast and which was spilling oil and causing a great deal of oil pollution after salvage operations only made the situation worse. Neither Liberia nor the international community protested the action by the British Government which was premised on necessity.[152]

The ICJ in the *Barcelona Traction case,* noting the importance of the rights therein involved, held that prohibitions on genocide, slavery and racial discrimination should be conferred with *ergaomnes* status.[153] Although he did not state which international environmental rules may have achieved *jus cogens* status in his dissenting opinion in the ICJ's *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Judge Weeramantry noted that environmental obligations of states "may range from obligations *ergaomnes*, through obligations which are in the nature of *jus cogens*, all the way up to the level of international crime."[154]

In the *South West Africa Cases* Ethiopia and Liberia, though unsuccessful, tried to have South Africa's mandate over Namibia (then known as South West Africa) terminated for breach of the *jus cogens* norm of self-determination. The ICJ, in what amounted to entrenching the right of a State to intervene to ensure compliance with a *jus cojens* norm, agreed that both Ethiopia and Liberia had the individual duty and right as members of the international community that gave

[152] *Supra* note 134 at page 82
[153] *Supra* note 142
[154] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, (1966) *ICJ Rep*, 266 at para 142

them the necessary *locus standi* to make such intervention.[155] It was in response to this judgment of the ICJ that the United Nations General Assembly adopted Resolution 2145 (XXI) re-affirming the "inalienable right to self-determination" of Namibia and that South Africa had breached this right.[156]

An interesting angle in regard to *jus cogens* is its relationship with human rights. Bianchi argues that there is an "almost intrinsic relationship" between *jus cojens* and human rights noting that most of the case law where the concept has been relied on invariably raised human rights issues.[157] Indeed Bianchi notes that the peremptory norms encapsulated in the prohibitions on genocide and slavery are a recognition and embodiment of human rights obligations.[158] This argument, we must admit, is very persuasive when one considers the natural law roots of the principle of *jus cogens*.

In *Suez, Sociedad General de Aguas de Barcelona vs Argentina*[159] the arbitral tribunal was in a confronted with the interplay between necessity and peremptory norms (in the form of human rights). In allowing *amicus curiae* in the case, the tribunal observed that it might, among others, be required to resolve "complex public and international law questions, including human rights considerations."[160] In response to the arguments advanced by the amicus curiae that the

[155] *South West Africa Cases (Ethiopia vs South Africa; Liberia vs South Africa)*; Decision on Preliminary Objection; (1962) ICJ Reports, 319 at 336
[156] Un General Assembly Resolution 2145 (XXI) of 27th October, 1966
[157] Andrea Bianchi, "Human Rights and the Magic of Jus Cojens" (2008) 19 *European Journal of International Law*, 491
[158] *Id* at 492
[159] ICSID Case No. ARB/03/19; Decision on Liability dated 30th July, 2010
[160] *Id*, Order of 12 February, 2007 in Response to a Petition by Five Non-Governmental Organizations for Permission to Make amicus curiae Submission, at para [18]

challenged governmental action was necessary for the protection of the right to water that in turn was an integral component of the right to life, health and housing, the tribunal stated that;

> "Argentina is subject to both international obligations, *i.e.* human rights and treaty obligations, and must respect both of them equally. Under the circumstances of this case, Argentina's human rights obligations and its investment treaty obligations are not inconsistent, contradictory or mutually exclusive."[161]

Although the *Suez* tribunal declined to uphold the human rights arguments as urged before it by amicus, it is possible, as argued by Karamanian, for a state to successfully deploy the *jus cogens* principle (on the back of human rights observance) in the form of a defence to a claim by an investor even though this would be contrary to the investment protection provisions of the BIT.[162] This was expressly acknowledged by the tribunal in *Phoenix Action Limited vs Czech Republic* in stating, without equivocation, that "nobody would suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs."[163]

4.4Peremptory Norms Relied on by States or Investors

Reliance on *jus cogens* by a state is best exemplified by South Africa's submission to the 1930 League of Nations Conference on the Codification of International Law where it argued that;

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[161] *Id,* Decision on Liability at para [262]
[162] Susan L. Karamanian, "The Place of Human Rights in Investor-State Arbitration" (2013) 17.2 *Lewis & Clerk Law Review*, 423 at 436-437
[163] ICSID Case No. ARB/06/05; Award dated 15th April, 2009, at para [78]; Available online at https://www.italaw.com/sites/default/files/case-documents/ita0668.pdf

> "If, through adverse circumstances beyond its control, a State is actually placed in such a position that it cannot meet all its liabilities and obligations, it is virtually in a position of distress. It will then have to rank its obligations and make provisions for those which are of a more vital interest first. A State cannot, for example, be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money wherewith to meet its moneylenders, foreign or national. There are limits to what it may be reasonably expected of a State in the same manner as with an individual."[164]

Argentina's arguments in *Azurix vs Argentina*[165] and *Siemens vs Argentina*[166] to the effect that there was a conflict or incompatibility between its human rights obligations to its public and protection of investors under BITs were held by the respective tribunals to be either not fully argued or not fully developed. These tribunals appear to have shied away from making a determination on this, obvious, interplay between *jus cogens* and necessity.

But some arbitral tribunals have, to an extent, accepted that action geared at countering existential threats to the state would be justified on considerations of essential interests. In this respect, in its decision on liability, the *LG&E vs Argentina* Tribunal pronounced itself thus while considering the applicability of the necessity defence in the claim against Argentina;

[164] Roberto Ago (Special Rapporteur), Addendum to the Eighth Report on State Responsibility (1980) 2Y.B Intl L. Commn, pt. 1 at 13, 24 quoted in Alan Sykes, 'Economic "Necessity" in International Law' (2015) 109 *American Journal of International Law*, 296 at 309
[165] *AzurixCorp. vs The Argentine Republic*; ICSID Case No. ARB/01/12 at para [261]
[166] *Siemens A.G. vs Argentine Republic*; ICSID Case No. ARB/02/8 at para [79]

> "As evidence demonstrates, economic, financial or those interests related to the protection of the State against any danger seriously compromising its internal or external situation, are also considered essential interests."[167]

Additionally and as previously[168] seen in respect of the question whether the "essential security" clause in a Bilateral Investment Treaty is equal to or the same as the necessity defence in Customary International Law, the tribunals in *CMS Gas*[169], *Enron*[170] and *Sempra*[171] arbitrations found that the two were the same. Moreover, in respect of the question what would be the effect of a successful invocation of an Argentina-US BIT Article XI (essential security clause) defence, the tribunals in *LG & E* (in its Decision on Liability) and *Continental Casualty* (in its Award)[172] and the Committees in *CMS* Annulment[173] and *Sempra* Annulment[174] held that Argentina's liability to pay compensation was thereby excused for any infringement of BIT obligations occurring during its emergency period.

The tribunal in the *Sempra* arbitration did acknowledge that the circumstances in which Argentina found itself raised "the complex relationship between investment treaties, emergency and the human rights of both citizens and property owners" but upon weighing the facts found that innate structure and continued existence of the Argentine State was not imperiled by the meltdown and was not on the verge of collapse.[175]

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[167] *LG&E Energy Corp. & 2 Others vs Argentine Republic*; ICSID Case No. ARB/02/1 at para [251]
[168] Text at foot note 38, Chapter 1
[169] ICSID Case No. ARB/01/8; Tribunal Award dated 12th May, 2005
[170] ICSID Case No. ARB/01/3; Tribunal Award dated 22nd May, 2007
[171] ICSID Case No. ARB/02/16; Tribunal Award dated 28th September, 2007
[172] Dated 5th September, 2008
[173] ICSID Case No. ARB/01/8; Annulment Decision dated 25th September, 2007
[174] ICSIDCase No. ARB/02/16; Annulment Decision dated 29th June, 2010
[175] Supra note 171, at para [332]

Invocation of *jus cogens* by investors can be seen in *Methanex vs United States of America*[176], where Methanex, a Canadian investor, made an arbitral claim after the California State banned the sale and use of its gasoline additive in the USA in what it claimed amounted to expropriation through lack of due legal process, breach of the minimum treatment standards and discrimination all in contravention of *jus cogens* norms. On the facts before it, the UNCITRAL tribunal determined that there was no expropriation or violation of *jus cogens* but nonetheless acknowledged that it had a duty to apply *jus cogens* norms to a dispute before it and not to uphold the rules of law chosen by the parties and which might conflict with such norms.

In the earlier case of *Biloune vs Ghana*[177], Biloune who was a Syrian national was deported from Ghana after being held without charge for almost a fortnight. He went to arbitration claiming compensation for violation of his human rights including actions of torture perpetrated on him. While the UNCITRAL arbitral tribunal found that foreign investors have rights to minimum treatment standards as well as inviolable human rights under customary international law, it nonetheless held that it was devoid of competence to determine a claim relating to human rights violations as a distinct cause of action.

From the foregoing cases and particularly those generated by the Argentine crisis, it is apparent that the issue at play is the balance that a state has to make between peremptory norms and other international legal obligations under bilateral investment treaties or contracts with foreigners. The question that confronts a state in such a situation is whether the state should take action that is

[176]*Methanex vs United States of America* , (2005) 44 ILM, 1345
[177]*Biloune and Marine Drive Complex Limited vs Ghana Investments Centre and Government of Ghana*, (1989) 95 ILR, 184

imperative to avoid an imminent infringement of a peremptory norm even if it leads to breach or non-compliance by the state with its other international legal commitments or whether the state should take the action in question leading to a breach of a peremptory norm but with an intention of complying with its other international legal obligations.

Although the good faith principles of interpretation of treaties require that BITs be interpreted in compatibility with international law (including peremptory norms), it will be seen that where such other "international legal obligations" of the state involve considerations of "essential interests" then a clash is bound to occur between peremptory norms and the plea of necessity. The ILC Commission explained in Commentary 2 to Article 25 of the ILC Draft Articles that "necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger to either the *essential interests of the State or of the international community as a whole*. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other"[178]Vinuales wades into this arena with his argument that the values encapsulated within peremptory norms are definitively seen as the "essential interests of all states" though he does concede that what amounts to essential or vital interests is not precisely similar to the values in peremptory norms.[179]

In the circumstances, while necessity has not risen to the level where it can be considered a peremptory norm, perhaps it is time that it is so considered in view of its excusing nature where "essential interests" are involved since, as Johnstone argues, "the implication is that one need not allege particular harm to invoke necessity if a widely shared international interest or value is at

[178]*Supra* note 134 at page 80
[179] Jorge E. Vinuales, "State of Necessity and Peremptory Norms in International Investment Law" (2008) 14*Law & Business Review of the Americas*, 79 at 88

stake."[180] Clearly in such a scenario, the relationship between the "essential interest" sought to be safeguarded and the peremptory norm thereby breached is one between two considerations of almost equal legal weight or importance.

4.5 Conclusion

We have, in this Chapter, looked briefly at what constitutes norms of *jus cogens* or peremptory norms and seen that they connote a hierarchy of international norms at the apex of which they sit. Equally, we have seen that the necessity defence connotes a hierarchy of norms where it also sits at the top. Even though the ICJ has held that there is no clash between the rules of state immunity and those of *jus cogens*, it is undeniable that the latter directly constrain a state's sovereign power and immunity as demonstrated in the determinations of various tribunals in matters touching on military necessity, genocide, environmental and ecological concern, human rights as well as self-determination.

Indeed, the clash between the two can clearly be seen in a scenario where a state's "essential interests" (particularly those involving the elements of statehood) are threatened by a serious and present danger forcing the state to take action that would lead to a contravention of a peremptory norm. This is compounded when persuasive arguments are made to the effect that the values attendant to peremptory norms are accepted as "essential interests of all states."While arbitral tribunals, exemplified by those presiding over the cases spawned by the Argentine crisis, have appeared reluctant to allow invocation of necessity when the state is faced with existential threats, it does appear at any rate, that peremptory norms will play an increasing role in international

[180] Ian Johnstone, "The Plea of 'Necessity' in International Legal Discourse: Humanitarian Intervention and Counter-terrorism" (2005) 43 *Columbia Journal of Transnational Law*, 337 at 343

investment law and shape the contractual relations between States and foreign nationals in greater ways in the future.

CHAPTER 5 SUMMARY AND CONCLUSION

5.0 Summary

The purpose of this study was to undertake an evaluation as to the invocation and or application of the plea of necessity in the economic realm and particularly in contracts between states and individuals in light of recent decisions of ICSID tribunals in the wake of the Argentine financial crisis.

This evaluation took place from the perspective that a contract between a State and an individual (primarily under the auspices of a BIT) spawns international obligations on the State, one of which is that the State is bound to observe and perform the contract in keeping with the rule of *pacta sunt servanda*. We also looked at areas where necessity has been invoked and the increasing interplay it has with peremptory norms. In between, we considered related aspects of state responsibility and state sovereignty.

5.1Findings and Conclusion

In this study, we set out to investigate two research questions on the back of three hypotheses.

On our first hypothesis, we have seen in Chapter Two that a contractual relationship involving a state party on the one part and a private foreign party on the other does generate international obligations in respect of the state party. This is so even though the International Law Commission has not conjured an express legal description or definition of the term “international obligation” in

its attempt to codify Articles on the Responsibility of States for Internationally Wrongful Acts or in treaty.

Accordingly, the answer to our first and second research question are both in the affirmative – a contract signed by or executed between a state and a foreign individual does give rise to international obligations and a state may, indeed, apply the defence of necessity to avoid its contractual obligations to such individuals.

In respect of our second and third hypotheses, we came to the conclusion in Chapter Three that it is generally accepted that the precept of *pacta sunt servanda* applies to contracts between states and non-state actors who are increasingly participating on the international stage and that in its effect of binding a state to its contractual obligations and commitments to such non-state actors, this principle acts as a constraint on state sovereignty.

Pacta sunt servanda acts as a constraint in the sense thata state is torn between honoring all contracts entered into with individuals and retaining some measure of authority or power, as a sovereign, to maneuver and address public emergencies. Navigating this tightrope is not an easy thing as the experience of the Republic of Argentina attests.

Additionally and evidently, it can be seen that, to some extent, BIT's also can, and, do actually complicate the *pacta sunt servanda* principle by interfering with or overriding contract-based dispute settlement procedures.[181]

[181] Yuval S "Contract Claims vs Treaty Claims: Mapping Conflicts Between ICSID Decisions on Multisourced Investment Claims" (2005) 99 *American Journal of International Law* 835 at 848

In Chapter Four, we saw the possibility of further complication of the contractual relation involving a state and an individual where the state has pleaded the defence of necessity by the introduction of *jus cogens* arguments.

From the foregoing, we are able to answer the third research question also in the affirmative –the availability of the defence of necessity is affected by the principles of state sovereignty and *pacta sunt servanda*. However, the divergent application of the necessity defense and the inconsistent treaty interpretation by the various tribunals and annulment committees has, undeniably, put the viability of the ICSID treaty arbitration regime into sharp focus.[182] Municipal courts have also added into the fray with the few decisions available on this area of international law.

Nonetheless, as can be deduced from the foregoing, the threshold that states are required to meet or satisfy in order to avail themselves of the necessity defense, is evidently very high and particularly so in the area of foreign investment.

We may hazard a guess that perhaps the reason why there has been such varied interpretations by arbitral and other domestic tribunals as well as by various scholars may be found from the less than clear interplay between principles of state sovereignty and immunity on the one hand and the effect or applicability of *pacta sunt servanda* on the other in contractual relations between states and individuals as it will be in the interplay between necessity on the one hand and peremptory norms on the other . The various ICSID tribunal awards[183] and the German Constitutional

[182] Michael W; Stephen WS and August R (Chapter 1, footnote 59)
[183] Text at foot notes 5 – 15 and 40 – 53 in Chapter 1and 165 – 175 In Chapter 4

Court[184]decision aforesaid have definitely served to provide a rich forum on which legal discourse aimed at clarifying the law in this area may be grounded.

Lastly, while ours is admittedly and clearly not the last word on the issue, we do conclude on balance, that necessity as a contractual defense is available in contracts between states and individuals as much as it is available in interstate contracts. If it were not so, then as noted by Judge Lubbe-Wolff,[185] a state contracting with an individual would have less contractual protection than if it were contracting with another state, a situation that is legally odd.

5.2 Recommendations

In order to ensure that, as a contractual defence, necessity is unambiguously available to individuals who contract with a state, we have a number of recommendations addressing this.

Firstly, as noted in Chapter Two, the International Law Commission missed the chance to positively assert that individuals could invoke or claim a contravention or infringement of an international commitment or obligation by a state when it developed the Draft Articles on State Responsibility. While Article 33 of the Draft Articles does seem to acknowledge that rights could accrue to entities other than states where such a contravention or infringement of an international commitment happens, this is clearly inadequate. Thus at the very least, we recommend that the Draft Articles be amended or redrafted to provide expressly that individuals could invoke or claim in respect of a breach of an international obligation owed to them under contractual arrangements

[184] Text at foot notes 26 – 32 in Chapter 1
[185] Text at footnote 31

by state actors. While at it, the ILC could also clearly acknowledge that state contracts with individuals do give rise to international obligations.

Secondly, and flowing from the discourse in Chapter Three of this work, the ILC Draft Articles also need to be relooked into with a view to addressing the apparent uncertainty obtaining in the interplay between the principle of *pacta sunt servanda* and that of state sovereignty so that a proper balance between the two ostensibly diametrically opposed legal principles can be identified in actual real-life situations arising.

Thirdly, in spite of the ICJ decision in the *Germany vs Italy* case[186] holding that there is no apparent conflict between the rules of state immunity and those of *jus cogens*, there does appear to be an undeniable conflict between them since a state has no room to manoeuvre where it has violated such rules of *jus cogens*. We therefore recommend that the ICJ takes the earliest opportunity to re-address this area of law since it has potential impacts on contracts between states and individuals. Additionally, the ILC Articles need to expand either Article 26 or the Commentary to this Article to fully clarify on this area.

Fourthly and very significantly, the exercise of codification of the updated Articles of Responsibility needs to be re-visited expeditiously in order to give the additional normative force beyond those aspects that have acquired customary international law force and particularly so as to bring more certainty in the legal relations for individuals contracting with states.

[186]*Supra* foot note 144

Finally, as noted in Chapter Four, arbitral tribunals are increasingly being confronted with the task of weighing between investor human rights considerations and State essential interests which task they have so far appeared to engage with much reluctance. Going forward, and in light of the prevalence of these scenarios, arbitral tribunals will need to take a more definitive stand on these competing interests that are at the centre of the international investment law regime.

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