

Debts and State of Necessity

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I INTRODUCTION

EACH ERA CONSIDERS that its pressing problems are unique and that they require new solutions. A glimpse at history demonstrates, however, that often this is not the case. The phenomenon of sovereign insolvency is not a new one,¹ nor are various attempts trying to cope with it.² Likewise the possible negative effects of sovereign debts for the economic and social rights of a state's population are well known.³ This contribution will show that also the idea of justifying the non-performance of a state's obligations by invoking state of necessity, *force majeure* or related legal concepts is not totally new. It will do so by initially answering in the affirmative the preliminary question whether there is a state of necessity defence available for economic emergencies.

Subsequently, it will turn to one of the main practical issues concerning the application of the necessity defence for modern debtor states, the question whether this state responsibility concept developed by international jurisprudence as a rule of customary international law (see only the ICJ's characterisation in the *Gabčíkovo-Nagymaros*⁴ case as well as in the *Wall* opinion⁵) and codified by the ILC in its Articles on State Responsibility (ILC

¹ See S Szodrich, *Staateninsolvenz und private Gläubiger-Rechtsprobleme des Private Sector Involvement bei staatlichen Finanzkrisen im 21. Jahrhundert* (Berlin, Bwv Berliner-Wissenschaft, 2008); M Waibel, *Sovereign Debt before International Courts and Tribunals* (Cambridge, Cambridge University Press, 2011).

² See K Rogoff and J Zettelmeyer, 'Bankruptcy Procedures for Sovereigns: A History of Ideas, 1976–2001' (2002) *IMF Staff Papers* No 3; K Berensmann and A Herzberg, 'Sovereign Insolvency Procedures – A Comparative Look at Selected Proposals' (2009) 23 *Journal of Economic Surveys* 856; RP Buckley, 'The Bankruptcy of Nations: An Idea Whose Time Has Come' (2009) 43 *International Lawyer* 1189; S Hagan, 'Designing a Legal Framework to Restructure Sovereign Debt' (2005) 36 *Georgetown Journal of International Law* 299.

³ See eg S Michalowski, 'Sovereign Debt and Social Rights – Legal Reflections on a Difficult Relationship' (2008) 34 *Human Rights Law Review* 1; see also the Open Letter by the Chairperson of the UN Committee on Economic, Social and Cultural Rights to the States Parties to the Covenant on Economic Social and Cultural Rights in relation to the protection of Covenant rights in the context of the economic and financial crisis of 16 May 2012, available at www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf, accessed 2 September 2013; Sharp, Ch 4 in this volume; NG Villavoram, 'Debt Servicing and its Adverse Impact on Economic, Social and Cultural Rights in Developing Countries' (2010) 9 *Journal of Human Rights* 487.

⁴ See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, 7, para 51: 'The Court considers . . . that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation'. See also *M/V Saiga (No 2) Case*, International Tribunal for the Law of the Sea, 1 July 1999 (1999) 38 *ILM* 1323, para 134.

⁵ In its Advisory Opinion the Court spoke of 'a state of necessity as recognized in customary international law'. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ, Advisory Opinion, 9 July 2004 (2004) 43 *ILM* 1009, para 140.

Articles)⁶ can also be invoked vis-à-vis non-state actors, ie private creditors.

It will then address the main prerequisites needed to successfully invoke necessity and analyse in particular whether human rights considerations play a role in this regard.

Finally, it will assess to what extent the necessity defence is a useful tool for indebted states to alleviate their debt burden.

II IS THERE A STATE OF NECESSITY DEFENCE AVAILABLE FOR ECONOMIC EMERGENCIES?

When we speak of sovereign insolvency or states on the brink of insolvency, our associations are with Argentina in the wake of its financial crisis 2001/2002, the European victims of the financial crisis since 2008 like Greece, Portugal, Spain or Cyprus and possibly other casualties. In fact, however, states or more often their sovereign rulers have become bankrupt throughout history and it is no surprise that on various occasions they have tried to excuse their inability to perform their financial obligations by invoking circumstances beyond their control.

What we now consider relatively neatly described as state of necessity in Article 25 of the ILC Articles,⁷ has in fact been invoked under various guises, such as *force majeure* or the like, in order to justify the non-performance of a state's financial obligations. While in the wording of today's Article 25 it is not clear whether the concept encompasses the notion of financial necessity, past practice demonstrates that it may indeed be possible to successfully invoke the necessity defence also for situations of extreme economic emergencies.

In fact, the state of financial necessity is probably one of the oldest forms of the state of necessity defence recognised in international jurisprudence. The *locus classicus* is the *Russian Indemnity* case or Ottoman debt arbitration in which the Ottoman Empire unsuccessfully invoked *force majeure* in order to justify its refusal to honour outstanding debts vis-à-vis Czarist Russia.⁸ However, the arbitral tribunal called upon to adjudicate the Russian repayment claim did not reject the availability of the defence as such. Rather, it found that the situation of the Ottoman Empire did not amount to such an extreme form of financial emergency that it would amount to a state of necessity. Though the tribunal used the terminology of *force majeure*, it in effect developed criteria for state of necessity,⁹ when it held 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'.¹⁰ Thus, the Ottoman debt arbitration is an important precedent confirming that states can in fact rely on situations of extreme economic hardship in order to justify their non-performance of financial obligations.

This outcome was affirmed in a number of cases throughout the twentieth century. In

⁶ *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, adopted by the International Law Commission at its fifty-third session (2001), Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No 10 (A/56/10)*, chp.IV.E.2 (in the following: ILC Commentary).

⁷ See n 37 below for the text of Art 25.

⁸ *Affaire de l'Indemnité Russe (Russian Indemnity Case)* (1912) XI UNRIAA 431.

⁹ The ILC Commentary rightly characterises what the tribunal refers to as *force majeure* as an incident of necessity. ILC Commentary (no 6) 197.

¹⁰ 'l'obligation pour un Etat d'exécuter les traités peut fléchir "si l'existence même de l'Etat vient à être en danger, si l'observation du devoir international est [...] self destructive.'" (*Russian Indemnity Case* (n 8) 443).

the *Serbian Loans* case the PCIJ only briefly touched upon the issue under the heading of *force majeure*.¹¹ The same Court did not explicitly address the issue in the *Socobel* case,¹² but it appeared that the parties recognised economic necessity.¹³ Finally, in the *Oscar Chinn* case,¹⁴ Judge Anzilotti reflected upon the possibility to invoke the economic dislocations after World War I as a justification for the non-performance of international obligations.¹⁵ However, it was not until the recent Argentine crisis that international tribunals had the opportunity to reaffirm the availability of the state of necessity defence in situations of economic turmoil.

In a number of investment cases brought against Argentina, tribunals were faced with the Argentine argument that various emergency measures it adopted were in fact justified by a state of necessity as codified in the ILC Articles. Though individual arbitral panels disagreed over whether the situation prevailing in Argentina during the financial crisis was severe enough to amount to such a state of necessity, they were unanimous in holding that, as a matter of principle, economic emergencies may amount to a state of necessity.¹⁶

III DOES THE STATE OF NECESSITY OPERATE ONLY ON THE INTER-STATE LEVEL OR CAN IT ALSO BE INVOKED VIS-À-VIS PRIVATE CREDITORS?

On a practical level, it appears important to look at the current structure of external debt incurred by states in order to assess the potential relevance of the necessity defence. There has been a remarkable shift from inter-state loans to financing through private banks and

¹¹ '*Force majeure*. – It cannot be maintained that the war itself, despite its grave economic consequences, affected the legal obligations of the contracts between the Serbian Government and the French bondholders. The economic dislocations caused by the war did not release the debtor State . . .' (*Serbian Loans*, 1929, PCIJ, Series A, No 20, 39/40).

¹² *Société Commerciale de Belgique*, 1939, PCIJ Series A/B, No 78.

¹³ 'Doctrine recognizes in this matter that the duty of a Government to ensure the proper functioning of its essential public services outweighs that of paying its debts.' Pleadings of the Greek representative before the PCIJ, cited according to Ago Report (Addendum to Eighth Report on State Responsibility by Mr Roberto Ago, UN Doc A/CN.4/318/ADD.5-7, in [1980] YBILC vol II, part one, 25).

¹⁴ '[T]he economic depression was an important or even decisive factor . . .' *Oscar Chinn (UK v Belgium)* 1934, PCIJ, Series A/B, No 63, 65, 113 (Separate Opinion Judge Anzilotti).

¹⁵ All these cases have been regarded by the ILC and its Special Rapporteur Roberto Ago as confirming that also economic difficulties may give rise to a state of necessity. Ago Report (n 13) 24–25.

¹⁶ See eg *CMS v Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, para 214; *LG&E v Argentine Republic*, ICSID Case No ARB/02/1, Decision on Liability, 2 October 2006, paras 226 ff; *Sempra v Argentine Republic*, ICSID Case No ARB/02/16, Award, 28 September 2007, para 374; *Enron v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, para 339; *Suez v Argentine Republic*, ICSID Case No ARB/03/17, Decision on Liability, 30 July 2010, paras 236 ff; *Continental Casualty Company v Argentine Republic*, ICSID Case No ARB/03/9, Award, 5 September 2008, para 173; *Impregilo SpA v Argentine Republic*, ICSID Case No ARB/07/17, Award, 21 June 2011, 75 ff; *El Paso Energy International Company v Argentina*, ICSID Case No ARB/03/15, Award, 31 October 2011, 203 ff. The *Enron* and *Sempra* awards were subsequently annulled. *Enron Creditors Recovery Corp v Argentina*, ICSID Case No ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010; *Sempra Energy International v Argentina*, ICSID Case No ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010. For further literature on the initial ICSID 'necessity' cases also see inter alia A Reinisch, 'Necessity in International Investment Arbitration – An Unnecessary Split of Opinion in Recent ICSID Cases? Comments on CMS and LG&E' (2007) 8 *Journal of World Investment and Trade* 191; M Waibel, 'Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E' (2007) 20 *Leiden Journal of International Law* 637; C Binder, 'Changed Circumstances in Investment Law: Interfaces between the Law of Treaties and the Law of State Responsibility with a Special Focus on the Argentine Crisis' in C Binder et al (eds), *International Investment Law for the 21st Century. Essays in Honour of Christoph Schreuer* (Oxford, Oxford University Press, 2009) 608. See also Section IV for further reference.

increasingly through bond issuances over the last decades.¹⁷ This implied that, for instance, in the Argentine case most of the external debt was incurred vis-à-vis private bondholders. When Argentina announced its inability to repay its debt, a number of these bondholders sued according to the terms of the bond issuances before German and Italian courts. The Italian Supreme Court of Cassation cut off these cases on a preliminary issue; it held that the Argentine emergency measures were of a *iure imperii* character and thus prevented any lawsuit for the redemption of the bonds,¹⁸ disregarding the fact that the initial bond issuance was not only generally considered to be a *iure gestionis* or commercial activity¹⁹ but also ignoring the express waivers of immunity in the bond issuance conditions.²⁰ German bondholders were more successful; German courts did not permit the state immunity defence raised by Argentina. However, on the merits of the German bondholder claims some courts had doubts whether the Argentine defence of state of necessity would justify non-performance. They thus availed themselves of a procedural device open to them: they made a reference to the Constitutional Court in order to ascertain whether a norm of customary international law existed which permitted the invocation of a state of necessity in case of economic emergencies. Though ample evidence of such a rule was presented to the Karlsruhe Court by one co-author of this contribution,²¹ the Court basically avoided the issue by adopting a very narrow reading of the availability of the customary necessity defence in principle. The Court's majority held that a state of necessity could only be invoked on the inter-state level and not vis-à-vis private bondholders.²² This ruling was widely criticised, not only by an outspoken dissenter on the Court itself,²³ but also by many commentators.²⁴

¹⁷ Compare Figure 3.7 'Bank Holdings of Government Debt in Selected Economies' from the latest IMF World Economic Outlook (April 2013), available at www.imf.org/external/pubs/ft/gfsr/2013/01/pdf/text.pdf, accessed 2 September 2013.

¹⁸ Corte di Cassazione, order of 27 May 2005, n 11225, *Borri v Republic of Argentina*. See F Bassan, *The Law of Sovereign Wealth Funds* (Cheltenham, Edward Elgar Publishing, 2011) 96 for further reference.

¹⁹ See eg the US Supreme Court in *Republic of Argentina v Weltover Inc*, 504 US 607 (1992); But as PJ Power shows, even before *Weltover*, courts generally held that sovereign borrowing constituted a commercial activity: *e Shapiro v Republic of Bolivia*, 930 F.2d 1013, 1018–19 (2d Cir 1991); *Carl Marks & Co v Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir), cert denied, 487 U.S. 1219 (1988); *West v Multibanco Comermerx*, 807 F.2d 820, 825–26 (9th Cir), cert denied, 482 U.S. 906 (1987); *Callejo v Bancomer*, 764 F.2d 1101, 1109 (5th Cir. 1985); *Wolf v Banco Nacional de Mexico*, 739 F.2d 1458, 1460 (9th Cir 1984); *Schmidt v Polish People's Republic*, 579 F. Supp. 23, 26 (S.D.N.Y. 1984); *Allied Bank Int'l v Banco Credito Agricola de Cartago*, 566 F. Supp. 1440, 1443 (S.D.N.Y. 1983), aff'd, 733 F.2d 23 (2d Cir. 1984), vacated and rev'd on other grounds, 757 F.2d 516 (2d Cir), cert dismissed, 473 U.S. 934 (1985). See also his further discussion on the matter: PJ Power, 'Sovereign Debt: The Rise of the Secondary Market and its Implication for Future Restructurings' (1996) 64 *Fordham Law Review* 2701, 2730 ff.

²⁰ See for a critical assessment of this case BI Bonafé, 'State Immunity and the Protection of Private Investors: The Argentine Bonds Case before Italian Courts' (2006) 16 *Italian Yearbook of International Law* 165; S Dorigo, 'The Italian Jurisprudence Facing Argentina's Financial Crisis: Some Critical Remarks from the Perspective of International Law', in S Wittich and A Reinisch/A Gattini (eds), *Kosovo – Staatsschulden – Notstand – EU-Reformvertrag – Humanitätsrecht. Beiträge zum 33. Österreichischen Völkerrechtstag in Conegliano* (Frankfurt am Main, Peter Lang, 2009) 51.

²¹ A Reinisch, 'Sachverständigen Gutachten zur Frage des Bestehens und der Wirkung des völkerrechtlichen Rechtfertigungsgrundes "Staatsnotstand"' (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 3.

²² German Federal Constitutional Court, Decision of 8 May 2007, 2 BvM 1-5/03; NJW 2007, 2610. While the Court accepted that necessity was recognised as a circumstance precluding the wrongfulness of a breach of international law, it held that 'currently no rule of general international law can be ascertained entitling a State, vis-à-vis private individuals, to suspend the performance of due obligations for payment arising under private law by invoking necessity based on an inability to pay.' (ibid, author's translation).

²³ Judge Lübke-Wolff, ibid, paras 75–95.

²⁴ See eg SW Schill, 'Der völkerrechtliche Staatsnotstand in der Entscheidung des BVerfG zu Argentinischen Staatsanleihen – Anachronismus oder Avantgarde?' (2008) 68 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 45, 45.

Indeed, it is hard to understand why the German Constitutional Court adopted such a narrow reading which cast serious doubt on the practical viability of the necessity defence. The ILC Articles on State Responsibility have certainly been drafted mainly with inter-state relations in mind, however they do not exclude that their grounds precluding wrongfulness be invoked vis-à-vis private parties.²⁵ It seems in fact difficult to conceive why a state would not be allowed to suspend the fulfilment of its payment obligations to the extent necessary to protect elementary concerns of the *bien commun*, such as the protection of the life and health of its citizens, also towards investors.²⁶ This view is also shared by the ILA Committee on International Monetary Law, which affirms the availability of the defence in its 1988 Report along similar lines.²⁷ The availability of the defence in such cases corresponds to the growing importance of the individual in contemporary international law. This change of paradigms is most visible in sub-regimes such as international human rights law and international criminal law but also in ICJ findings concerning diplomatic protection.²⁸ Likewise doctrine supports the availability of the necessity defence against private persons, inter alia investors.²⁹

The possible availability of the defence in private–state relationships is furthermore confirmed in jurisprudence, as already in the *Serbian Loans*³⁰ and *French Company of Venezuela Railroads* cases.³¹ Although these are inter-state cases brought in the exercise of the individuals'/companies' home states' diplomatic protection, they clearly indicate a possible relevance of necessity (*force majeure*) towards private persons as in effect it is their rights that are at stake.³² It was also amply demonstrated by the Argentine cases before numerous investment tribunals. For them, the fact that the claimants were private investors did not play any role. They generally proceeded to a discussion of the fulfilment

²⁵ For instance, the fact that the ILC Commentary clearly states that '[the Articles on State Responsibility] apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole', supports the conclusion that rights and interests of individuals may have to be balanced against the interests of the state taking necessity measures. See for further reference Reinisch (n 16) 201.

²⁶ In this sense, eg, Reinisch (n 21) 27.

²⁷ ILA Committee on International Monetary Law, 'The International Law of External Debt Management. Some Current Aspects', *ILA-Report*, 1988, 418. The ILA Committee also states that 'it would be surprising if an individual or institution were to receive a higher degree of protection than a state. In general, aliens will enjoy only a minimum standard of protection, whereas the rules on the relationship between States reflect the principle of sovereign equality' (ibid, 432). More recently, Schill supports the availability of the necessity defence also towards investors in his discussion of a judgment of the German Constitutional Court (n 24) 45.

²⁸ See eg ICJ, *Case concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)*, Judgment, 24 May 2004, paras 49–96. See also Schill (n 24) 55–56. Such approach finds support in a generally accepted line of jurisprudence that states are entitled to unilaterally modify or terminate contracts with private investors in the public interest, provided that they pay adequate compensation. (See ibid, 60 ff for further reference).

²⁹ Paparinskis for instance affirms: 'those circumstances precluding wrongfulness that do not require an anterior breach (like necessity, distress and *force majeure*) can in principle also apply to obligations owed to investors. Consequently, the application of law of necessity to obligations owed under US–Argentina BIT is in principle uncontroversial: the protection of essential interests of the State is a circumstance that could preclude wrongfulness of an obligation owed also to individuals' (M Paparinskis, 'Investment Arbitration and the Law of Countermeasures' (2009) 79 *British Yearbook of International Law* 264, 342).

³⁰ *Serbian Loans* (n 11) 39–40.

³¹ *French Company of Venezuelan Railroads Case*, 31 July 1905, X RIAA 285, 353–54.

³² See also the *Russian Indemnity* case where the Permanent Court of Arbitration stated explicitly that *force majeure* was available in international as well as in private law. 'L'exception de la *force majeure* . . . est opposable en droit international public aussi bien qu'en droit privé . . .' (*Russian Indemnity Case* (n 8) 443).

of the criteria demanded by Article 25 of the ILC Articles on State Responsibility without pausing to assess whether the nature of the claimants permitted such invocation.³³

IV WHAT ARE THE CRITERIA FOR A SUCCESSFUL INVOCATION OF THE NECESSITY DEFENCE? IS THERE ANY ROOM FOR HUMAN RIGHTS CONSIDERATIONS?

Having confirmed the general availability of the necessity defence for economic emergencies and also vis-à-vis private investors, a closer scrutiny of the main requirements for successfully invoking necessity – and in particular whether human rights considerations play a role in this regard – seems warranted.

A The Elements of the Necessity Defence According to Article 25 of the ILC Articles

The obvious starting point for any inquiry into the criteria governing a reliance on necessity is Article 25 (former Article 33³⁴) of the ILC Articles on State Responsibility which was recognised as the defence's authoritative codification of customary law in literature³⁵ and jurisprudence.³⁶ Article 25 of the ILC Articles subjects reliance on necessity to strict limitations.³⁷ Numerous detailed and narrowly defined conditions must be cumulatively satisfied for reliance on necessity to be permissible. Non-performance of international (here: treaty) obligations is only justifiable when the non-performance is the *only way* for the state to safeguard an *essential* interest against a *grave* and *imminent* peril. The ILC's Commentary explicates that the danger must be objectively established and not merely apprehended as possible,³⁸ that reliance on necessity is precluded if there are other (lawful) means available, even if they are more costly or less convenient,³⁹ and that any measures going beyond the strictly necessary will not be covered.⁴⁰ In addition, in accordance with Article 25(1.b) of the ILC Articles, the conduct in question must not seriously impair

³³ See eg *CMS* (n 16); *LG&E* (n 16); The *BG* tribunal avoided taking a clear position on the availability of the defence. See *BG Group Plc v Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, paras 408 ff.

³⁴ Art 33 was adopted by the ILC in the first reading. Art 25 differs slightly from Art 33 as it omits the qualifying addendum 'of the State' after 'essential interest' and denies reliance on necessity when interests of the 'international community as a whole' would be impaired.

³⁵ See eg C Tietje, 'Die Argentinienkrise aus rechtlicher Sicht: Staatsanleihen und Staateninsolvenz' (2005) 37 *Beiträge zum Transnationalen Wirtschaftsrecht* 17; T Christakis, 'Nécessité n'a pas de loi?' in Société Française pour le Droit International (ed), *Colloque de Grenoble. La nécessité en droit international* (Paris, Pedone, 2007) 11, 34 ff; see also S Heathcote, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity' in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford, Oxford University Press, 2010) 491, 494.

³⁶ See above nn 4 and 5.

³⁷ Art 25 of the ILC Articles: '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (b) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (a) The international obligation in question excludes the possibility of invoking necessity; or (b) The State has contributed to the situation of necessity.'

³⁸ ILC Commentary (n 6) 'Article 25', para 15 (Crawford, 183–84).

³⁹ *ibid.*

⁴⁰ *ibid.*

the interest of the state(s) to which the obligation is owed or of the international community as a whole. According to the ILC Commentary ‘the interest relied on must outweigh all other considerations, not only from the point of view of the acting State but on a reasonable assessment of the competing interests’.⁴¹ Respectively, and although not explicitly stated in Article 25(1.b), weighty arguments support the view that the balancing test should also take the interests of individual(s) (investors) into account.⁴² Two additional general limits are likewise imposed by Article 25: reliance on necessity is prevented, even if the above-mentioned conditions are fulfilled, when the international obligation in question excludes (explicitly or implicitly) the invocation of necessity, or when the state has contributed to the situation of necessity.

B The Criteria for a Successful Invocation of Necessity in International Jurisprudence

As argued, economic emergencies are generally considered a permissible ground for reliance on the necessity defence.⁴³ So are serious threats to a state’s population, although some, including Special Rapporteur Ago, put the threshold for invocation as high as the ‘survival of a sector of a population’.⁴⁴ Other examples given were the breakdown of a state’s infrastructure, of its administration, its schools or the police.⁴⁵ These examples touch upon human rights considerations (and more particularly upon compliance with economic and social rights) in the context of economic crisis situations. However, states rarely explicitly referred to human rights as justification for reliance on necessity; even less was the issue addressed in the jurisprudence of international tribunals.

The cases brought against Argentina in the context of the country’s economic crisis in the early 2000s are most instructive, since Argentina also referred to the human rights of its population to support its reliance on the necessity defence. In *CMS*, Argentina held that ‘as the economic and social crisis that affected the country compromised basic human rights, no investment treaty could prevail as it would be in violation of such constitutionally recognized rights’.⁴⁶ Likewise in *National Grid*, Argentina invoked

⁴¹ *ibid*, para 17 (Crawford, 184).

⁴² See eg the ILC’s reference to individual interests in the *Barcelona Traction* case where the ICJ speaks of ‘obligations concerning the treatment to be afforded’ to ‘foreign investments or foreign nationals’ and distinguishes between ‘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’ (ICJ, *Barcelona Traction Light and Power Company Limited, Second Phase (Belgium v Spain)* 5 February 1970, ICJ Rep 1970, 3, para 33). See furthermore A Reinisch: ‘Also the fact that the ILC Commentary clearly states that “[the Articles on State Responsibility] apply to the whole field of the international obligations of States, whether the obligation is owed to one or several States, to an individual or group, or to the international community as a whole”, supports the conclusion that rights and interests of individuals may have to be balanced against the interests of the state taking necessity measures’ (Reinisch (n 16) 201).

⁴³ See Section II above.

⁴⁴ Ago Report (n 13) 13, 14 (para 2).

⁴⁵ ‘No state is required to execute, or to execute in full, its pecuniary obligation if this jeopardizes the functioning of its public services and has the effect of disorganizing the administration of the country.’ (*ibid*, 25 (para 28)). See also the statement of the South African government: ‘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’ (*ibid*, 24 (para 25)).

⁴⁶ *CMS* (n 16) para 114.

social and economic rights as a matter of constitutional law.⁴⁷ In *Impregilo*, Argentina maintained more generally that ‘the regulatory actions taken by the Province and Argentina were lawful and proportionate. In this case, the regulatory powers of the State were particularly important in order to guarantee its inhabitants the human right to water’.⁴⁸ Also in *Suez*, Argentina argued with the human right to water of its population and asserted that, given the fundamental role of water in sustaining life and health, it should be granted a broader margin of discretion than in cases involving other commodities and services.⁴⁹

However, the investment tribunals avoided dealing in detail with the necessity defence’s preconditions and limits in cases of threats to the human rights of Argentina’s population. The *Suez* tribunal was most explicit when stating that BIT obligations and human rights obligations had to be fulfilled. But also the *Suez* tribunal stopped short there, since it held that on the facts of the case, Argentina had failed to show its inability to discharge both obligations at the time of the 2001/02 crisis.⁵⁰ Thus, jurisprudence is inconclusive on the role of human rights considerations for reliance on necessity.⁵¹

What is more, the cases brought against Argentina evidence the problems relating to reliance and application of the necessity defence in economic emergencies. Notwithstanding the largely identical fact situations and the frequently similar applicable law – many of the cases were brought under the US-Argentina BIT⁵² – the tribunals reached fundamentally different conclusions. The *LG&E* and *Continental Casualty*⁵³ tribunals accepted Argentina’s reliance on necessity and found that the economic crisis constituted a state of necessity precluding the wrongfulness of BIT violations.⁵⁴ *CMS*⁵⁵ and, later, *Enron*,⁵⁶ *Sempra*,⁵⁷ *BG Group*,⁵⁸ *National Grid*,⁵⁹ *Suez*,⁶⁰ *Impregilo*⁶¹ and *El Paso*⁶² oppositely concluded that the

⁴⁷ *National Grid PLC v Argentina*, Award of 3 November 2008, UNCITRAL para 78; see also paras 89 and 90.

⁴⁸ *Impregilo* (n 16) para 228; see also Argentina’s reference to the fact ‘that human life was endangered in the crisis’ in *Enron* (n 16) para 315.

⁴⁹ *Suez* (n 16) para 232.

⁵⁰ *ibid.*, para 238. See for further reference, D Desierto, ‘Calibrating Human Rights and Investment in Economic Emergencies: Prospects of Treaty and Valuation Defenses’ (2012) 9 *Manchester Journal of International Economic Law* 162, 165.

⁵¹ More generally, Reiner and Schreuer found that ‘[w]hen states have used human rights as defenses to investment claims, arbitral tribunals have preferred to ‘dismiss the issues raised on a procedural basis rather than dealing with the substantive arguments themselves’. See C Reiner and C Schreuer, ‘Human Rights and International Investment Arbitration’ in P-M Dupuy, F Francioni and E-U Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (Oxford, Oxford University Press, 2009) 82, 89–90.

⁵² *Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investments*, signed on 14 November 1991, entered into force on 20 October 1994. Two of the cases (*BG* and *National Grid*) were brought under the 1990 Argentina–UK BIT; *Metalpar* was brought under the 1995 Argentina–Chile BIT (*Metalpar SA and Buen Aire SA v Argentina*, ICSID Case No ARB/03/5, Award, 6 June 2008); *Suez* and *Total* under the 1991 Argentina–France BIT (1728 UNTS 298) and *Impregilo* under the 1988 Argentina–Italy BIT.

⁵³ *Continental Casualty* (n 16).

⁵⁴ To be precise, both tribunals accepted the applicability of the BIT’s emergency exception (Art XI of the US–Argentina BIT), but drew heavily, in their interpretation of Art XI, on the elements of the customary law necessity defence; see *eg ibid.*, paras 160–236.

⁵⁵ *CMS* (n 16).

⁵⁶ *Enron* (n 16).

⁵⁷ *Sempra* (n 16).

⁵⁸ *BG* (n 33).

⁵⁹ *National Grid* (n 47).

⁶⁰ *Suez* (n 16).

⁶¹ *Impregilo* (n 16).

⁶² *El Paso* (n 16).

Argentine situation could not justify the abrogation of investment obligations under the applicable BIT.⁶³ Again another approach was adopted by the *Total* tribunal,⁶⁴ which took account of Argentina's economic emergency in its examination of the respective BIT provisions. As it did not find a violation of the 'fair and equitable treatment' standard of Article 3 of the 1991 France–Argentina BIT during the core times of the crisis,⁶⁵ the examination of Article 25 of the ILC Articles became to a large extent unnecessary.

The tribunals' divergent approaches presented a particularly problematic issue: given the various methods of addressing economic emergencies, it proved difficult to assess whether Argentina's measures to handle the economic crisis were the 'only way' of safeguarding the interest of the state in the meaning of Article 25(1.a) of the ILC Articles. The *CMS* tribunal held that Argentina had a choice of measures and declared that '[t]he necessity plea is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient'.⁶⁶ The *Sempra* and *Enron* tribunals followed the same approach.⁶⁷ The *LG&E* tribunal, to the contrary, stated that an economic response was needed and that 'an economic recovery package was the only means to respond to the crisis'.⁶⁸ As such, the tribunal implied that even if the measures adopted were wholly inadequate to respond to the crisis, it still would have exempted Argentina from its responsibility vis-à-vis the foreign investors. The *Continental Casualty* tribunal chose a different approach again by maintaining that even another economic policy would not have put the claimant in a better position.⁶⁹ The tribunals' diverging reasons evidence the challenges presented in determining whether the measures employed were the 'only way' of dealing with the crisis.

Likewise, the limitations introduced by Article 25(2) of the ILC Articles, which exclude reliance on the necessity defence, pose difficulties in times of economic emergencies. The jurisprudence of the investment tribunals points to problems especially regarding the defence's 'contribution' element by which a state invoking necessity must not have contributed to the situation of necessity (Article 25(2.b) of the ILC Articles). While all tribunals concurred that a state's contribution to a state of necessity excluded the possibility of invoking it, they disagreed considerably on the level of state contribution needed to bar reliance on the necessity defence. The *CMS* tribunal stated that 'government policies and their shortcomings significantly contributed to the crisis and the emergency and while exogenous factors did fuel additional difficulties they do not exempt the Respondent from its responsibility in the matter'.⁷⁰ The *Enron* and *Sempra* tribunals closely followed this approach,⁷¹ and the *National Grid* tribunal rejected Argentina's reliance on necessity largely because Argentina's contribution to the crisis had been substantial.⁷² So did the

⁶³ In *Metalpar*, the tribunal did not consider it necessary to examine the elements of Argentina's necessity defence more closely because the claimants could not prove in any case that their investments were negatively affected by Argentina's measures (*Metalpar*, n 52, para 211).

⁶⁴ *Total SA v Argentina*, ICSID Case No ARB/04/1, Decision on Liability, 27 December 2010.

⁶⁵ *ibid.*, para 184.

⁶⁶ *CMS* (n 16) para 323.

⁶⁷ *Enron* (n 16) para 309; *Sempra* (n 16) para 350.

⁶⁸ *LG&E* (n 16) para 257.

⁶⁹ *Continental Casualty* (n 16) para 230. The *BG* tribunal does not deal in detail with the different elements of Art 25 of the ILC Articles including the contribution element, arguing inter alia that the restrictive elements of the defence impeded reliance in any case; *BG* (n 33) paras 407–12.

⁷⁰ *CMS* (n 16) para 329.

⁷¹ *Enron* (n 16) paras 311–12; *Sempra* (n 16) paras 353–54.

⁷² *National Grid* (n 47) para 262.

Impregilo and the *El Paso* tribunals.⁷³ The *LG&E* tribunal, on the other hand, concluded that there was ‘no serious evidence in the record that Argentina contributed to the crisis resulting in the state of necessity’.⁷⁴ However, the *LG&E* tribunal arrived at this conclusion only by relying on a doubtful burden of proof rule that shifted the burden of proof to the claimant. Likewise rejecting the claimant’s contribution argument, the *Continental Casualty* tribunal held that Argentina had not contributed to the emergency in a way which would bar it from relying on the necessity defence, arguing that Argentina’s economic policy had been praised by outside experts and previously benefited the country.⁷⁵

Consequently, numerous problems relate to the defence’s substantive criteria for application notwithstanding the general availability of the defence in economic crisis situations. What is more, and as will be shown next, even a successful reliance on necessity merely grants limited relief.

V WHAT IS THE EFFECT OF A SUCCESSFUL INVOCATION OF THE NECESSITY DEFENCE?

While past experience has demonstrated that a state of necessity may form a potential defence available to debtor states unable to service their debts, it remains questionable whether its successful invocation presents a useful tool for states.

The ILC Articles, codifying custom,⁷⁶ are explicit in stating the consequences of a state of necessity. A state of necessity brings temporary relief in the form of a suspension of the wrongfulness of non-payment, but not cancellation or partial cancellation of the original obligation.⁷⁷ Also international tribunals corroborate the defence’s temporary nature which was, for instance, prominently affirmed by the ICJ in the *Gabčíkovo-Nagymaros* case. When considering Hungary’s argument that the wrongfulness of its conduct in discontinuing the work on the project was precluded by a state of necessity, the Court stated that ‘[a]s soon as the state of necessity ceases to exist, the duty to comply

⁷³ *Impregilo* (n 16) para 358; *El Paso* (n 16) para 665.

⁷⁴ *LG&E* (n 16) para 257.

⁷⁵ *Continental Casualty* (n 16) paras 234–36. The *BG* tribunal did not examine the issue in detail.

⁷⁶ The consequences flowing from the reliance on a circumstance precluding wrongfulness are dealt with – in a ‘one fits all approach’ – in Art 27 of the ILC Articles (Consequences of invoking a circumstance precluding wrongfulness). Especially jurisprudence provides ample evidence that Art 27 codifies customary international law: for instance, Art 27 is referred to by the *CMS* tribunal as establishing ‘the appropriate rule on the issue’ (*CMS* (no 16) para 390). See also *LG&E* (no 16) paras 225, 260, 264; *Patrick Mitchell v Democratic Republic of the Congo*, ICSID ARB/99/7, Decision on the Application for Annulment of the Award, 1 November 2006, para 57.

⁷⁷ Art 27 of the ILC Articles outlines the temporary functioning of the circumstances precluding wrongfulness as follows: ‘The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: (a) Compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; . . .’. The ILC Commentary confirms the temporary effect: ‘Paragraph (a) of article 27 addresses the question of what happens when a condition preventing compliance with an obligation no longer exists or gradually ceases to operate. It makes clear that Chapter V has merely preclusive effect. When and to the extent that a circumstance precluding wrongfulness ceases . . . The obligation in question (assuming it is still in force) will again have to be complied with . . .’ (ILC Commentary, n 6, ‘Article 27’, para 2 (Crawford, 189)). See also Szurek: ‘These circumstances [precluding wrongfulness] authorize the temporary non-observance of the rule or non-performance of obligations, but the non-observance or non-performance is no longer acceptable once the reasons which justified it cease to exist’ (S Szurek, ‘The Notion of Circumstances Precluding Wrongfulness’ in J Crawford, A Pellet and S Olleson (eds), *The Law of International Responsibility* (Oxford, Oxford University Press, 2010) 427, 434).

with treaty obligations revives'.⁷⁸ Likewise, investment tribunals have referred to the temporary nature of the defence. In the context of the Argentine crisis the investment tribunals agreed that reliance on necessity had to be temporary, ie only as long as the emergency situation persisted. The CMS tribunal held, in the form of an *obiter dictum*, that '[e]ven if the plea of necessity were accepted, compliance with the obligation would re-emerge as soon as the circumstance precluding wrongfulness no longer existed, which is the case at present'.⁷⁹ Similarly, the *LG&E* tribunal affirmed that Argentina's obligations under the BIT would revive after the end of the state of necessity.⁸⁰

In view of this merely temporary relief from obligations, reliance on necessity may thus be of limited value for debtor states seeking to return to economic viability. Still, what about other means of debt reduction, like currency devaluation or bondholder haircuts in reliance on necessity? Could a state invoke necessity vis-à-vis investors in these situations to escape liability for alleged expropriations or violations of the fair and equitable treatment standard?

This ultimately depends on whether there is a state obligation to compensate foreign investors for measures taken in (successful) reliance on necessity after the emergency's end. The ILC Articles do not resolve the question. Formulated as 'non-prejudice clause', Article 27 of the ILC Articles deliberately avoids a final determination as to whether compensation is to be paid.⁸¹ The ILC's open approach may be explained, inter alia, by the fact that Article 27 applies to circumstances precluding wrongfulness as diverse as self-defence, countermeasures or necessity.⁸² Still, certain arguments militate in favour of compensation in cases of necessity. Arguments for such a duty may first be derived from drafting history.⁸³ Also the current ILC Commentary affirms that the burden of reliance on necessity should not be shifted to an innocent third state and approvingly refers to Hungary's willingness to compensate Slovakia in the *Gabčíkovo-Nagymaros* case.⁸⁴ Doctrine favours a duty of compensation in case of necessity as well.⁸⁵

⁷⁸ *Gabčíkovo-Nagymaros* (n 4) 63 (para 101). See also *Rainbow Warrior (New Zealand v France)* 30 April 1990, 20 RIAA 217, 254.

⁷⁹ CMS (n 16) para 382.

⁸⁰ *LG&E* (n 16) para 263.

⁸¹ Art 27 of the ILC Articles states that '[t]he invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: . . . (b) The question of compensation for any material loss caused by the act in question'. In so doing, Art 27 is, in Christakis' words, a 'clause de non dire' with the only purpose of keeping the door open for possible compensation (T Christakis, 'Les "circonstances excluant l'illicéité": une illusion optique?' in *Droit du pouvoir, pouvoir du droit – Mélanges offerts à Jean Salmon* (Brussels, Bruylant, 2007) 223, 236).

⁸² The range of situations covered by Art 27 of the ILC Articles made it inappropriate to lay down a detailed compensation regime. See ILC Commentary, n 6, 'Article 27', para 6 (Crawford, 190).

⁸³ Whereas draft Art 35 of the first reading 1980 left open the possibility of compensation for consent, *force majeure*, necessity and distress, no such possibility was foreseen for self-defence or countermeasures. In his draft proposal for the second reading, Special Rapporteur Crawford limited the possibility of compensation to necessity and distress. Among the reasons given for this limitation were, amongst other things, the element of free choice of the state relying on necessity (or distress) and the need to balance the positions of the state acting in a situation of necessity and that of the other state(s) whose rights were encroached upon (J Crawford, *Second Report on State Responsibility* (1999) A/CN.4/498/Add 2, para 356. See also the Special Rapporteur's comments on draft Art 35 (Report of the ILC on the Work of its 51st Session (1999) YBILC, vol II/2, 84–85 (paras 402 ff)).

⁸⁴ 'As the Court noted, "Hungary expressly acknowledged that, in any event, such a state of necessity would not exempt it from the duty to compensate its partner"' (ILC Commentary, no 6, 'Article 27', para 5 (Crawford, 190)). In this sense also V Lowe, 'Precluding Wrongfulness or Responsibility: a Plea for Excuses' (1999) 10 *European Journal of International Law* 405, 410 (Lowe refers to the comparable situation of distress).

⁸⁵ Christakis (n 35) 51 ff. According to Christakis: 'il y a un prix à payer pour l'Etat qui choisit de violer les droits d'un Etat tiers pour conjurer un danger qui menace ses propres intérêts. . . . Si, en revanche, l'Etat lésé est "innocent", le Juge peut, en fonction de la situation, décider de maintenir en partie une obligation de réparation

Such obligation is furthermore generally confirmed in jurisprudence. To exemplify, in 1905 the *Umpire* held in the *Company General of the Orinoco* case⁸⁶ that Venezuela might annul the concessions of a French company in order to avoid an armed conflict with Colombia; this, however, notwithstanding a duty of compensation.⁸⁷ Also some of the investment decisions rendered in the context of the Argentine crisis confirmed a duty of compensation. The CMS tribunal stated, by way of *obiter dictum*, that '[t]he plea of state of necessity may preclude the wrongfulness of an act, but it does not exclude the duty to compensate the owner of the right which had to be sacrificed'.⁸⁸ Overall, it seems safe to conclude that a state will generally have to compensate investors even in cases of a successful reliance on necessity.

True, the amount of compensation is reduced. Article 27 of the ILC Articles refers only to compensation for losses which have actually occurred.⁸⁹ The compensation in cases of a successful invocation of necessity is thus diminished as compared to the concept of damage in cases of breach, with the latter also including lost profit.⁹⁰ Special Rapporteur Crawford contrasts the concept of *actual losses* in cases of reliance on the circumstances precluding wrongfulness with that of *full reparation* as follows:

Rather [*draft Article 35*] is concerned with the question whether a State relying on a circumstance precluding wrongfulness should nonetheless be expected to make good any actual losses suffered by any State directly affected by that reliance. That is a perfectly proper condition, in principle, for allowing the former State to rely on a circumstance precluding wrongfulness. . . . Under the secondary rules of responsibility, which are the proper subject of the present draft articles, a State would normally be required to make full reparation to an injured State for conduct which . . . is not in compliance with its international obligations. If the draft articles define circumstances in which the putatively injured State is not so entitled, it is perfectly proper that they should do so subject to the proviso that any actual losses suffered by that State, and for which it is not itself responsible, should be met by the invoking State.⁹¹

ne retenant l'excuse de l'état de nécessité comme une simple *circonstance atténuante*' (ibid, 54). See also Szurek, n 77, 436. Generally in favour of compensation likewise R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford, Oxford University Press, 2008) 170; A Bjorklund, 'Emergency Exceptions: State of Necessity and *Force Majeure*' in P Muchlinski et al (eds), *Oxford Handbook of International Investment Law* (Oxford, Oxford University Press, 2008) 459, 510 ff.

⁸⁶ *Company General of the Orinoco Case*, 31 July 1905, X RIAA, 184. Although labelled '*force majeure*' the constitutive elements of the defence are rather those of necessity.

⁸⁷ 'It [the Government of Venezuela] considered the peril superior to the obligation and substituted therefore the duty of compensation' (ibid, 280). The ILC refers to it as follows: '[The *Umpire*] ruled that, in the exceptional circumstance of the case, it was lawful under international law . . . to rescind the concessions, although he agreed that the company was entitled to compensation for the consequences of an act which had been internationally lawful' (Report of the ILC, 32nd Session (1980) YBILC, vol II(2), 40, para 17). See also *Properties of Bulgarian Minorities in Greece case* (1926) SDN, JO, 7e année, No 2, February 1926, Annex 815 and the reference made in Ago Report (n 13) 26, para 32; (1979) YBILC, vol II/1, 53, para 115.

⁸⁸ CMS (n 16) para 388.

⁸⁹ In the words of the ILC Commentary: 'Article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by Chapter V' (ILC Commentary, n 6, 211 (para 4)).

⁹⁰ See the pertinent Art 36 of the ILC Articles: 'Compensation. 1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.'

⁹¹ Comments of Special Rapporteur Crawford on *draft Art 35*, n 83, 84–85).

What is more, the compensation is only due after the end of the economic emergency, and also the interests in case of default start to run only then.⁹² Thus, there are certain advantages for the state relying on necessity. These notwithstanding, even a successful reliance on necessity remains an incomplete means for a state in economic emergency given its merely temporary relief and the – albeit reduced – duty to compensation.

VI TOWARDS AN ORDERLY SOVEREIGN DEBT RESTRUCTURING?

It consequently appears warranted to look for alternatives. The most obvious – which is also frequently alluded to in literature⁹³ – is sovereign debt restructuring. Sovereign debt restructuring ultimately entails states' permanent relief. At the same time, if done in a fair and orderly way, also creditors have certain advantages: namely (relative) legal security, equity and the receipt of at least parts of their claims.⁹⁴

Not surprisingly, the *UNCTAD Principles on Promoting Sovereign Lending and Borrowing*⁹⁵ (UNCTAD Principles) put central emphasis on the possibility of debt restructuring when states are 'manifestly unable to service their debts':

Principle 7 – Debt Restructurings:

In circumstances where a sovereign is manifestly unable to service its debts, all lenders have a responsibility to behave in good faith and with cooperative spirit to reach a consensual rearrangement of those obligations. Creditors should seek a speedy and orderly resolution to the problem.

Principle 15 – Restructuring:

If a restructuring of sovereign debt obligations becomes unavoidable, it should be undertaken promptly, efficiently and fairly.⁹⁶

⁹² See Art 38 of the ILC Articles: 'Interest. . . 2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled'.

⁹³ See M Waibel, 'The Two Worlds of Necessity in ICSID Arbitration: CMS and LG&E' (2007) 20 *Leiden Journal of International Law* 637, 648. See also A von Bogdandy and M Goldmann, 'Sovereign Debt Restructurings as Exercise of International Public Authority: Towards a Decentralized Sovereign Insolvency Law', February 2013, available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089480, accessed 2 September 2013; A Krueger, 'Sovereign Debt Restructuring: Messy or Messier?' (2003) 93(2) *The American Economic Review* 70; B Eichengreen, 'Restructuring Sovereign Debt' (2003) 17(4) *The Journal of Economic Perspectives* 75; RK Rasmussen, 'Sovereign Debt Restructuring, Odious Debt, and the Politics of Debt Relief' (2007) 70(4) *Law and Contemporary Problems* 249.

⁹⁴ Sovereign debt restructuring is generally understood to mean 'an exchange of outstanding sovereign debt instruments, such as loans or bonds, for new debt instruments or cash through a legal process'; for this definition and a general overview of how such a restructuring mechanism should work and to what standards it should adhere, see US Das, MG Papaioannou and C Trebesch, 'Sovereign Debt Restructurings 1950–2010: Literature Survey, Data, and Stylized Facts', IMF Working Paper WP/12/203 (2012) 7.

⁹⁵ *UNCTAD Principles on Promoting Responsible Sovereign Lending and Borrowing*, 10 January 2012, available at: www.unctad.info/upload/Debt%20Portal/Principles%20drafts/Principles%20consolidated_jan%2010.pdf, accessed 2 September 2013. The Principles are the outcome of a joint initiative including experts from academia, civil society and international financial institutions, with additional input from governments and other stakeholders. They aim at building consensus on the rules to be applied to debt crises. For further reference see M Goldmann, 'Responsible Sovereign Lending and Borrowing: The View from Domestic Jurisdictions' (UNCTAD, MPI for Comparative Public Law and International Law, February 2012) 7.

⁹⁶ See also the explanation of Principles 7 and 15: 'Under current international law, in the absence of any formalized, legally binding restructuring mechanism, sovereign borrowers as well as sovereign lenders may opt for holdouts and prevent timely, efficient, equitable and sustainable restructurings. Collective action clauses are used in order to reduce the likelihood of lender holdouts. Market discipline should ideally prevent borrower

A comparative study on the *UNCTAD Principles*' reflection as general principles of law in domestic jurisdictions observes a wide recognition especially of the principles concerning debt restructuring:

Restructurings, Principles 7 and 15: Certain general principles of insolvency law seem to enjoy virtually universal acceptance. Those principles include the automatic stay of other proceedings, the equality of borrowers with respect to payments, the priority of creditors holding collateral or privileges which are in the public interest, and majority decision-making by creditors. These principles could also be applied to international negotiations about, and procedures for, the rescheduling of sovereign debt. The increasing use of Collective Action Clauses and the exclusion of sovereign debt in some recent BITs points towards a consolidation of sovereign debt restructuring mechanisms on an international level.⁹⁷

Thus, rather than placing too much emphasis on the necessity defence, it might be preferable for states to aim at sovereign debt restructuring as a durable – and not just temporary – solution. To achieve lasting debt relief should also be the best option for the economic and social rights of a country's population. *De lege ferenda*, for reasons of stability and predictability, the enactment of binding international rules for sovereign debt restructuring appears desirable.⁹⁸

holdouts, i.e. the refusal of governments to enter into negotiations about consolidation measures in exchange for restructurings or debt relief. Holdouts may also be less likely if restructurings are perceived as fair and equitable. In this respect, some of the items in the questionnaire aim at investigating whether it is appropriate to distil certain general principles of law from the practice of domestic legal orders' (Goldmann (n 95) 39).

⁹⁷ *ibid.*, 5. Conversely, economic emergencies rarely count as defence at domestic level. While an according Principle 9 was included in the *UNCTAD Principles* and reads as follows: 'A sovereign debt contract is a binding obligation and should be honored. Exceptional cases nonetheless can arise. A state of financial necessity can prevent the borrower's full and/or timely repayment. Also, a competent judicial authority may rule that circumstances giving rise to legal defense have occurred . . .', it is not met with widespread acceptance. See in this sense Goldmann: '*Defenses, Principle 9:* . . . economic deteriorations rarely count as a defense. Although there are some notable cases, mostly based on the *clausula rebus sic stantibus*, the materialization of economic risks usually does not count as a reason for the modification of contractual terms. This strict rule, however, is generally justified by the possibility to file for bankruptcy. Such filing usually requires the inability of a debtor to make due payments' (*ibid.*, 5).

⁹⁸ A number of different proposals regarding the introduction of binding international rules on sovereign defaults, ranging from suggestions of application of domestic bankruptcy proceedings (in particular based on 'Chapter 9' (K Raffer, 'International Debts: A Crisis for Whom?' in HW Singer and S Sharma (eds), *Economic Development and World Debt* (London, Macmillan Press, 1990) 52) or 'Chapter 11' (SL Schwarcz, 'Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach' (2000) 85 *Cornell Law Review* 980) of the US Bankruptcy Act) to statutory proposals (Krueger (n 93)) or its implementations by means of institutionalisation (CG Paulus and S Kargman, 'Reforming the Process of Sovereign Debt Restructuring: A Proposal for a Sovereign Debt Tribunal' (2008) *Workshop on Debt, Finance and Emerging Issues in Financial Integration*); also see on this issue von Bogdandy and Goldmann (n 93). Specifically on the virtues of a non-binding approach see A Gelper, 'Hard, Soft, and Embedded: Implementing Principles on Promoting Responsible Sovereign Lending and Borrowing', UNCTAD Working Paper, 2012.