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Humanitarian Intervention and the Law of State Responsibility

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Abstract

The primary rules of international law do not permit states to resort to force for humanitarian purposes. Some scholars have thus attempted to rely on the secondary rules of state responsibility to find a legal basis for forcible humanitarian intervention. In particular, three claims can be identified: that humanitarian intervention is justified; that the state intervening for humanitarian purposes is excused; and that the consequences arising from the intervention for the state acting for humanitarian purposes ought to be mitigated. All three arguments rely either on the defence of necessity, cast as a justification or as an excuse, or on necessity-like reasoning, as the basis for mitigation. This article takes these three claims and draws out the implications of each both within and beyond the law of responsibility. In so doing, this article shows how each of the three arguments is more problematic and less straightforward than it appears at first and that, ultimately, none can provide an adequate legal basis for humanitarian intervention. The legality of humanitarian intervention must be found in the primary rules regulating the use of force in international relations and not in the secondary rules of state responsibility.

1 Introduction

Scholars who contend that there is a moral (or political) case for forcible humanitarian intervention ('humanitarian intervention' in what follows) have struggled to identify a legal basis for such uses of force. Many scholars have attempted to ground resort to humanitarian intervention in positive law,[1] though it remains controversial whether

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[1] For arguments about the permissibility of humanitarian intervention under customary law, see Reisman and McDougal, 'Humanitarian Intervention to Protect the Ibos', in R.B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973) 167, at 167ff; R. Higgins, *Problems and Process: International Law*

there is currently a legal basis for a right to humanitarian intervention in either the Charter of the United Nations (UN Charter) or customary international law.[2]

Scholars addressing humanitarian intervention – whether they are writing favourably or critically about the issue – have often framed the question as a dilemma between, on the one hand, strict adherence to the prohibition of force and, on the other, the protection of civilian populations from their own governments.[3] Given the lack of clarity as to the existence in positive law of a specific right to humanitarian intervention that could resolve the dilemma in favour of intervention, several scholars have turned to the secondary rules of international law in an attempt to provide some legal basis or grounding to humanitarian intervention. Scholars following this line of reasoning have thus relied on concepts of the law of responsibility – either already recognized in international law or drawn by analogy with domestic legal systems. For the

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and How We Use It (1994), at 254–248; Brenfors and Petersen, 'The Legality of Unilateral Humanitarian Intervention: A Defence', 69 *Nordic Journal of International Law* (*NJIL*) (2000) 449, at 484–498; Greenwood, 'International Law and the NATO Intervention in Kosovo: Memorandum Submitted to the Foreign Affairs Committee of the House of Commons', 49 *International and Comparative Law Quarterly* (*ICLQ*) (2000) 926, 931; Koh, 'Remarks by Harold Hongju Koh', 111 *Proceedings of the American Society of International Law* (2017) 114, at 115. For arguments about the permissibility of humanitarian intervention under Article 2(4) of the UN Charter, see Reisman and McDougal, *ibid*, at 177; Brenfors and Petersen, *ibid*, at 466–468. Occasionally, scholars have attempted to find a basis for humanitarian intervention in Article 51 of the UN Charter. See Ohlin, 'The Doctrine of Legitimate Defense', 91 *International Law Studies* (2015) 119, at 140–147.

2 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI. Amendments to Articles 23, 27 and 61, 557 UNTS 143, adopted by GA Resolutions 1991A and B (XVIII) of 17 December 1963, entered into force on 31August 1965 for all Members; Amendment to Article 109, 638 UNTS 308, adopted by GA Res. 2101 (XX) of 20 December 1965, entered into force on 12 June 1968 for all Members; Amendment to Article 61, 892 UNTS 119, adopted by GA Res. 2847 (XXVI) of 20 December 1971, entered into force on 24 September 1973 for all Members. For a critical review and refutation of various arguments in this regard, see Kevin Jon Heller's article in this symposium. Heller, 'The Illegality of "Genuine" Unilateral Humanitarian Intervention', in this issue, XXX, at XXX. See further Brownlie and Apperley, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', 49 *ICLQ* (2000) 878, at 884–894 (and references cited therein); Corten, 'Human Rights and Collective Security: Is There an Emerging Right of Humanitarian Intervention?', in P. Alston and E. Macdonald (eds), *Human Rights, Intervention, and the Use of Force* (2008) 87. For more nuanced analyses, highlighting the difficulties in interpreting past practice and suggesting the existence of a legal 'grey area' in this regard, see Tams, 'Prospects for Humanitarian Uses of Force', in A. Cassese (ed.), *Realizing Utopia: The Future of International Law* (2012) 360, at 369; Kreß, 'The State Conduct Element', in C. Kreß and S. Barriga (eds), *The Crime of Aggression: A Commentary* (2016) 412, at 489–502.

3 See, e.g., Brownlie, 'Thoughts on Kind-Hearted Gunmen', in R.B. Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973) 146 (drawing an analogy with moral dilemmas in domestic law, like euthanasia); Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* (*EJIL*) (1999) 1; Roberts, 'Legality vs. Legitimacy: Can Uses of Force Be Illegal but Justified?', in P. Alston and E. MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (2008) 179, at 180ff. However, many more dilemmas are revealed in situations of humanitarian intervention, see, e.g., Krisch, 'Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo: Review Essay', 13 *EJIL* (2002) 323; MacDonald and Alston, 'Sovereignty, Human Rights, Security: Armed Intervention and the Foundational Problems of International Law', in P. Alston and E. MacDonald (eds), *Human Rights, Intervention, and the Use of Force* (2008) 1; Bilder, 'The Implications of Kosovo for International Human Rights Law', in Alston and MacDonald, *ibid.*, 139.

most part, they have tended to rely on the defence of necessity, codified in Article 25 of the International Law Commission's (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),[4] or on necessity-like concepts and reasoning,[5] like the defence of distress,[6] as these often follow dilemmatic-style formulations.[7] But they have disagreed on the legal characterization of the eventual use of force, whether it should be qualified as lawful or unlawful, and the argumentative path leading to that legal characterization. The language used in articulating these arguments is not always clear, and at least three different claims can be identified: (i) that necessity operates to justify the use of force in humanitarian intervention; (ii) that necessity operates to excuse the state(s) that used force in humanitarian intervention; and (iii) that the 'extreme necessity' of the situation must be taken into account to mitigate the 'sanctioning' of the state(s) acting in humanitarian intervention.

This article reviews the arguments in support of humanitarian intervention based on the law of state responsibility. Section 2 will begin by reviewing the language used in the legal literature on humanitarian intervention and identify the type of claim that this language generates. It will then analyse the three main claims about the legal basis of forcible humanitarian intervention – justification in Section 3, excuse in Section 4 and mitigation in Section 5 – before providing some general conclusions in Section 6. Some caveats are necessary before proceeding. First, this article is not intended as an exhaustive review of the literature on this topic. Rather, it seeks to give a flavour of the main types of claims made in this literature on the basis of the law of state responsibility. Second, a terminological precision is necessary. For clarity and

[4] International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (ARSIWA), UN Doc A/56/83, 10 August 2001.

[5] See, e.g., Verwey, 'Humanitarian Intervention under International Law', 32 *Netherlands International Law Review* (*NILR*) (1985) 357, at 414–417; Verwey, 'Humanitarian Intervention', in A. Cassese (ed.), *The Current Legal Regulation of the Use of Force* (1986) 74; Walker, 'Principles for Collective Humanitarian Intervention to Succor Other Countries' Imperiled Indigenous Nationals', 35 *American University International Law Review* (2002) 18; Spiermann, 'Humanitarian Intervention as a Necessity and the Threat or Use of Jus Cogens', 71 *NJIL* (2002) 523; Johnstone, 'The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism', 43 *Columbia Journal of Transnational Law* (2005) 337; Marchesi, 'Stato di necessità e intervento umanitario. Brevi considerazioni', in M. Spinedi *et al.* (eds), *La codificazione della responsabilità internazionale degli Stati alla prova dei fatti* (2006) 181; J. Kratochvíl, 'Humanitarian Intervention and State Responsibility', *Human Rights Law Commentary* (2006), available at www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2006/humanitarianintervention.pdf; D. Guilfoyle, 'Humanitarian Intervention: Neither Right, Nor Responsibility, But Necessity', *EJIL:Talk!*, 5 May 2009, available at www.ejiltalk.org/humanitarian-intervention-neither-right-nor-responsibility-but-necessity/; Koh, 'The War Powers and Humanitarian Intervention', 53 *Houston Law Review* (2016) 971, at 1010–1015; Vidmar, 'The Use of Force as a Plea of Necessity', 111 *American Journal of International Law Unbound* (2017) 302; J. Vidmar, 'Excusing Illegal Use of Force: From Illegal but Legitimate to Legal Because It Is Legitimate?', *EJIL:Talk!*, 14 April 2017, available at www.ejiltalk.org/excusing-illegal-use-of-force-from-illegal-but-legitimate-to-legal-because-it-is-legitimate/.

[6] In reliance of which, as will be noted later, the United Kingdom (UK) argued that states would be permitted to engage in 'humanitarian action'. See subpart 2.C.

[7] What Sarah Heathcote has called the 'necessity of predicament'. S. Heathcote, 'State of Necessity and International Law' (2005) (PhD thesis on file at the Graduate Institute of International and Development Studies), at 35–78.

simplicity, the state(s) resorting to forcible humanitarian intervention will be referred to as the 'humanitarian state(s)' and the state that is the target of the intervention will be referred as the 'target state'.[8] The article will proceed with a basic scenario in mind: that of a target state that engages in massive human rights violations against its own population and a humanitarian state (or states) that uses force to stop such violations unilaterally – that is, without authorization by the United Nations Security Council (UNSC) pursuant to the UN Charter's collective security system, where such force is more than a 'mere frontier' incident.[9] Third, the article is intended as a purely doctrinal exploration of this question. Of course, in practice, things may (and often do) go rather differently as a result of diplomatic and other political efforts as well as due to contingencies such as the relevant states involved in the situation. Nevertheless, a clear understanding of how the rules on the law of state responsibility work (or do not work) in these cases remains an important issue, as this understanding may assist in clarifying the legal position of all the parties involved.

2 Deciphering the Language

States, as is well known, have been (and remain) reticent in articulating a doctrine of humanitarian intervention to legally ground their resort to military force against other states. For example, with respect to the North Atlantic Treaty Organization's (NATO) campaign during the Kosovo crisis in 1999, only the United Kingdom (UK) and Belgium expressly relied on humanitarian intervention as the legal basis for their actions. Most other states, and NATO itself, were much less clear about the legal basis of their forcible measures. Furthermore, even those states relying on the doctrine of humanitarian intervention did not do so unambiguously. Thus, Belgium's claim was combined with an argument based on the defence of necessity.[10] More

[8] The term 'humanitarian state' is here used merely descriptively. I appreciate that it can be seen as biased, and, indeed, one of the reviewers of this article suggested the use of the label 'intervening state'. To be sure, neither expression is value neutral. The choice of 'humanitarian state' over 'intervening state' responds to two reasons. First, 'intervening state' may imply that the use of force for humanitarian purposes is not genuine (in the sense discussed by Heller, *supra* note 2). While it has often been the case in practice that humanitarian interventions are not genuine, the label 'intervening state' may distract from the legal arguments presented in this article: the arguments addressed here do not depend on the humanitarian action being genuine or not. The term 'humanitarian state' makes it clear that the situation considered here is one in which the state appeals to humanitarian purposes for its intervention (and not, for example, on the host state's request or invitation). Second, it leaves open the possibility that, in certain circumstances, humanitarian intervention may be the morally right thing to do. In any event, while the term 'humanitarian state' is certainly not value neutral, the overall critical tenor of my argument towards such interventions should dispel any perception of bias, implicit or explicit as it may be.

[9] In the sense explained by the International Court of Justice (ICJ) in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits Judgment, 27 June 1986, ICJ Reports (1986) 14, para. 194.

[10] For this and other responses to the North Atlantic Treaty Organization's (NATO) campaign in Kosovo, see Franchini and Tzanakopoulos, 'The Kosovo Crisis-1999', in T. Ruys and O. Corten (eds), *The Use of Force in International Law: A Case-based Approach* (2018) 594, at 598–608.

recently, in relation to the US strikes in Syria in 2018, only the UK expressly relied on the doctrine of humanitarian intervention.[11]

Legal scholars have done much of the work in articulating a legal basis for humanitarian intervention based on the law of state responsibility. However, the arguments put forward in the scholarly literature are not always clear, primarily as a result of the language employed. Thus, forcible humanitarian intervention has been described as 'illegal but justified',[12] 'illegal but legitimate'[13] and 'excusable'.[14] In particular, when it comes to secondary rules-based arguments, it is not often clear what concepts or doctrines scholars are relying upon. For example, George Walker has explained that in contemporary international law 'intervention in some contexts may be less lawful than it was before 1945', though in some instances like in Kosovo it was 'legitimate'.[15] For Ole Spiermann, 'while often contrary to the primary rule, and wrongful in that sense, if compelled by necessity the act is not wrongful in the sense that it entails the international responsibility of the acting state'.[16] But legality (or illegality) does not come in degrees or in opposite states by reference to the same rule: either the intervention is illegal by reference to the prohibition of force or it is not. And, if it is, it is illegal as a whole and not by degrees.[17]

Other scholars appeal to non-legal concepts, bringing into the debate salient moral considerations but, nonetheless, leaving unclear what the legal appreciation of the conduct ought to be. Thomas Franck and Nigel Rodley thus spoke of a situation in

[11] See the UK policy paper on Prime Minister's Office, 'Syria Action: UK Government Legal Position', 14 April 2018, available at www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position. On reactions to the strikes, see M. Milanovic, 'The Syria Strikes: Still Clearly Illegal', *EJIL:Talk!*, 15 April 2018, available at www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/.

[12] See, e.g., T. Franck, Recourse to Force: State Action Against Threats and Armed Attacks (2002), at 184.

[13] See, e.g., Independent International Commission on Kosovo, The Kosovo Report, 12 October 2000, at 4, available at www.kosovocommission.org; Gross, 'Applying the Extra-Legal Measures Model to Humanitarian Interventions: A Reply to Devon Whittle', 26 *EJIL* (2015) 699, at 707.

[14] Stromseth, 'Rethinking Humanitarian Intervention: The Case for Incremental Change', in J. Holzgrefe and R. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 243. It is not clear what this author means by 'excusable'. On the one hand, she explains that her use of this term 'differs somewhat from criminal law concepts of "excuse" and may be closer, though not completely analogous, to justification defenses as understood in criminal law'. On the other hand, however, she notes that the term 'excusable breach' is intended to emphasize that 'under this view, the intervention violates the legal norms contained in the UN Charter but that the intervenor should not be sanctioned for doing so' (at 243, n. 38) – that is, the conduct is unlawful but the actor should not bear the consequences of its wrongful act. This is precisely what excuses do.

[15] Walker, *supra* note 5, at 160.

[16] Spiermann, *supra* note 5, at 526.

[17] Legality/illegality are binary deontic operators. This is not to say that other deontic categories may not exist, such as the categories of 'non-prohibition and toleration' suggested by Judge Simma in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Reports (2010) 403, paras 8–9, Declaration of Judge Simma. The latter categories would, however, operate with respect to conduct that was not explicitly prohibited or permitted by the rules of the legal order, as is the case with the use of force that is specifically prohibited as well as, in certain circumstances, specifically permitted. In this case, a use of force is either illegal, as it contravenes the prohibition, or legal, as it falls within one of the permitted exceptions. There is, furthermore, no accepted doctrine of aggravated responsibility in international law – at least with respect to the wrongdoing state. Serious breaches of peremptory norms, as will be discussed later, give rise to additional consequences for all other states in the international community, but to the same consequences as the breach of an 'ordinary' norm of the legal order for the wrongdoing state. See ARSIWA, *supra* note 4, Art. 41.

which 'the unilateral use of force to overthrow injustice begins to seem less wrong than to turn aside … however this sense of superior "necessity" belongs in the realm not of law, but of moral choice, which nations like individuals must sometimes make'.[18] Wil Verwey, in turn, explained that the principle of necessity, as recognized in ARSIWA, should only be invoked, and humanitarian intervention resorted to, when 'a number of conditions are fulfilled which relevant UN organs could apply as an informal quasi-legality standard'.[19] In many of these works, moreover, the wrongfulness of the intervention, when it is acknowledged at all, is usually downplayed: humanitarian intervention is 'technically', or 'formally', or 'exceptionally'[20] wrongful – as if this type of wrongfulness were different from a 'standard' type of wrongfulness.[21]

In support of their characterization of humanitarian intervention as 'illegal but …', scholars have relied, either expressly or implicitly, on concepts of the law of responsibility. Three basic ideas can be gleaned from these works:

- a claim of justification: forcible humanitarian intervention is, all things considered, permissible (it is 'illegal but justified');
- a claim of excuse: forcible humanitarian intervention is illegal, but the wrongdoing state(s) are shielded from the consequences of their wrongful act (it is 'excusable conduct')[22] and
- a claim of mitigation: forcible humanitarian intervention is illegal, but the consequences of this illegality for the wrongdoing state(s) should be tempered (it is 'illegal but legitimate').

These three concepts – justification, excuse and mitigation – have not all been accepted into the law of state responsibility in international law. Indeed, the ILC made no distinction between justification and excuse in relation to the defences in Chapter V of Part One of ARSIWA, opting instead to leave the matter open for subsequent development.[23] The idea of attenuating or extenuating circumstances was at one point considered by the ILC during the drafting of ARSIWA,[24] but, save for the case of contributory fault,[25] ARSIWA do not provide for any rules (principles or frameworks) of

[18] Franck and Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', 67 *American Journal of International Law* (*AJIL*) (1973) 275, at 304.

[19] Verwey, 'Humanitarian Intervention', *supra* note 5, at 74.

[20] Byers and Chesterman, 'Changing the Rules about Rules? Unilateral Humanitarian Intervention and the Future of International Law', in J. Holzgrefe and R. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 177, at 198ff.

[21] Not to mention the implication of these adjectives, casting the prohibition of force as a mere technical rule rather than a fundamental rule of the international legal order. See Roberts, *supra* note 3, at 184–186.

[22] Technically, as will be seen later, conduct is justified and actors are excused. For ease of reference, however, this article will refer to 'excusable conduct' as shorthand for 'conduct for which the actor can be excused'.

[23] See F.I. Paddeu, *Justification and Excuse in International Law: Concept and Theory of General Defences* (2018), at 49–52.

[24] E.g. Special Rapporteur Francisco García-Amador, 'First Report on International Responsibility', 2(2) *ILC Yearbook* (1956) 173, at 208–209; Special Rapporteur Francisco García-Amador, 'Third Report on International Responsibility', 2(2) *ILC Yearbook* (1958) 47, at 50–55.

[25] ARSIWA, *supra* note 4, Art. 39. On which, see M. Jarrett, Contributory Fault and Investor Misconduct in Investment Arbitration (2019).

mitigation. These are, nevertheless, concepts that (would) belong to the secondary rules of international law insofar as they concern the determination and extent of a state's responsibility.[26] Doubts as to the recognition of at least some of these concepts in international law itself diminishes the weight and viability of the arguments presented. As will be seen, however, even when taken on their own terms, these arguments are ineffective, and, what is more, they carry with them some undesirable (and unintended) consequences.

As noted earlier, these three claims often rely in their analysis on the dilemma at the heart of humanitarian intervention. This dilemmatic framing of the question usually invites reasoning along the lines of the defence of necessity. The defence of necessity is a defence that concerns precisely dilemmatic situations – at least in its justification variant.[27] Some scholars put the defence of necessity at the centre of their argument and draw the implications for the legal characterization of the use of force from this defence. Others, instead, avoid relying on necessity as a legal concept, employing instead necessity-style reasoning in the application of other legal concepts (for example, mitigation) and even on necessity as a moral imperative. It should be noted that these arguments do not always employ language and concepts of the theory and law of responsibility consistently and, sometimes, even do so inaccurately. So these three positions are not often stated as such in the writings of scholars. I have here attempted to capture their claims and employed what I think are the state responsibility concepts and language that best articulate them.

3 A Claim of Justification

Forcible humanitarian intervention, some have said, is 'illegal but justified'. One way of understanding this claim is to rely on the concept of justification or, in the language of ARSIWA, the concept of 'circumstances precluding wrongfulness'.[28] In broad terms, justifications are defences that arise from properties or characteristics of acts and have the effect of rendering those acts lawful, despite their being incompatible with a rule of the legal order.[29] The focus of justifications on acts, rather than actors, is not exclusive, but it is predominant. That is to say, justifications do not ignore certain features of the actor, such as the actor being attacked or having engaged in the justified conduct for the right reasons. But the central question that justifications ask is 'is this act permissible'?

[26] Secondary rules are defined – in a loose and practical sense – in ARSIWA as: 'the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom'. ARSIWA, *supra* note 4, General Commentary, para. 1.

[27] This is Heathcote's 'necessity of predicament', mentioned earlier. Heathcote, *supra* note 7, at 35–78.

[28] ARSIWA, *supra* note 4, Part One, Ch V.

[29] The definition is adapted from Husak, 'Justifications and the Criminal Liability of Accessories', 80 *Journal of Criminal Law and Criminology* (1989–1990) 491, at 496. This definition, as stated by Husak, encapsulates the doctrinal consensus on the concept of justification. Of course, many disagreements remain about particular aspects and applications of this concept. For an overview, see Ferzan, 'Justification and Excuse', in J. Deigh and D. Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (2011) 239.

Justified conduct is lawful conduct (rather than unlawful).[30] But it is plausible that the 'illegal but justified' claim is an attempt to convey the idea that, even though the conduct is lawful, it is still wrong in some moral or other normative sense. Humanitarian intervention, on this view, would be seen as a justified wrong. The view that certain conduct is permissible and lawful but, nevertheless, a wrong is captured by the concept of *pro tanto* wrongs. In moral and legal philosophy, *pro tanto* wrongs are understood as behaviours that are permissible, all things considered, but that nevertheless constitute a wrong. John Gardner, for example, explains that a *pro tanto* wrong (or a *prima facie* wrong, as he calls it) is 'an actual wrong, not just an apparent or putative wrong', albeit one that was justified.[31] This concept is premised on the understanding of offences and defences through the prism of practical rationality.[32] Offences give reasons against action, whereas defences provide countervailing reasons that can override the reasons against action.

Looked at from this prism, the prohibition of force would provide a reason against resort to military force. Humanitarian intervention, in turn, would be a countervailing reason because it gives a reason for contradictory action; it gives a reason for the use of military force for humanitarian purposes. In this conflict of reasons, the reason for (the defence) overrides the reason against (the rule). The resulting humanitarian military intervention is, all things considered, permissible, but it is still a wrong for it is incompatible with an existing reason against it. As Gardner explains, this is because the reason against action has not been cancelled; it has been overridden. Even though the reasons against action have been defeated, it 'does not mean [that] they dropped out of the picture. That a reason is defeated doesn't mean that it is undermined or cancelled. It still continues to exert its rational appeal'.[33] In short, the reason against force continues to exist, even though it is defeated by the reason for using force for humanitarian purposes. Humanitarian intervention is, all things considered, permissible (it is justified), but since it is incompatible with the reason against force, it is still a wrong.

[30] Or at the very least, permissible. Whether the conduct is lawful or some other category is debated. See, e.g., the views in de Hoogh, 'The Compelling Law of *Jus Cogens* and Exceptions to Peremptory Norms: To Derogate or Not to Derogate, That Is the Question!', in L. Bartels and F.I. Paddeu (eds), *Exceptions in International Law* (2020) 127; Paddeu, 'Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law', in Bartels and Paddeu, *ibid.*, 203.

[31] Gardner, 'Justifications and Reasons', in J. Gardner, *Offences and Defences* (2007) 96. Note that Gardner uses the term *prima facie* wrong in a different sense to the use of the same expression in international law. In international law, '*prima facie* breach' is often used in a procedural sense: to describe a step in the reasoning of decision-makers. The classic example is the ICJ's description of its approach to assessing the claims and (potential) defences of applicant and respondent respectively. See *Nicaragua*, *supra* note 9. In this case, the Court states: 'In so far as acts of the Respondent *may appear to constitute violations* of the relevant rules of law, the Court will then have to determine whether there are present any circumstances excluding unlawfulness, or whether any such acts may be justified upon any other ground' (para. 226; emphasis added). Then, once the Court (preliminarily) concluded that 'the activities of the United States in relation to the activities of the contras in Nicaragua constitute *prima facie acts of intervention*', it then moved on to 'consider whether they may nevertheless be justified on some legal ground' (at para. 246). The Court's *prima facie* breach is only apparent.

[32] First proposed by Campbell, 'Offence and Defence', in I.H. Dennis (ed.), *Criminal Law and Justice* (1987) 73.

[33] Gardner, *supra* note 31, at 96.

There is some appeal to this approach. It allows the conclusion that humanitarian intervention is permissible if not lawful. At the same time, it reminds the states involved, and all other states, that this is an undesirable turn of events. As such, this approach may not negatively impact the normative pull of the prohibition of force: while permitting the exception, this approach reminds states that the reason against force articulated in the prohibition 'continues to exert its rational appeal', to use Gardner's words.[34] The approach also demands that humanitarian states offer justifications for their behaviour. According to Gardner, 'justification is called for only when one also has some reason *not* to act, believe, etc. as one does'.[35] Humanitarian states thus need to offer explanations and justifications for why the reason against their action, articulated in the prohibition of force, ought to be defeated in the specific circumstances. Absent their justification, the action would be legally wrongful, and this is particularly important in a horizontal legal order, in which there is no institution with mandatory jurisdiction to assess the legality of claims of humanitarian intervention. The availability of legal justifications and explanations on the part of humanitarian states is crucial to assist other states in their assessment of the legality of the action.

The most commonly invoked ground of defence in this regard is the plea of necessity,[36] codified in Article 25 of ARSIWA. This provision states:

> 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.

There are at least three obstacles to the invocation of a justification of necessity in cases of forcible humanitarian intervention. From the more general to the more specific, these include (i) the prohibition of force has peremptory status; (ii) the Charter

[34] *Ibid.*

[35] Gardner, *supra* note 31, at 95 (emphasis in original).

[36] Note that, despite the ICJ's assertion that the plea of necessity was part of customary international law in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, 25 September 1997, ICJ Reports (1997) 7, para. 51, there remain some doubts as to whether the practice and *opinio juris* of states have met the required generality, consistency and uniformity. See, e.g., Yamada, 'State of Necessity in International Law: A Study of International Judicial Cases', 34 *Kobe Gakuin Law Journal* (2005) 107; Yamada, 'Traditional Non-Acceptance of the General Emergency Exception in International Law', 45 *Kobe-Gaukin Law and Politics Review* (2015) 1; Heathcote, 'Est-ce que l'état de nécessité est un principe de droit international coutumier?', 1 *Revue Belge du droit international* (2007) 53; Paddeu, *supra* note 23, at 414.

excludes reliance on the plea of necessity in relation to the use of force; and (iii) the plea of necessity is unavailable as a justification for forcible humanitarian intervention.

A *Justifications for the Use of Force and Peremptory Rules*

Article 26 of ARSIWA states that justifications cannot be invoked with respect to the breach of peremptory rules of international law: 'Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.' According to the accepted definition of peremptory rules, codified in Article 53 of the Vienna Convention on the Law of Treaties (VCLT),[37] these are rules from which 'no derogation is permitted'. Article 53 of the VCLT refers only to derogation by means of a treaty between two or more states. But this is not the only way to derogate from peremptory rules. As explained by Judge Higgins, '"[d]erogation" is generally understood as a power relied on by one party not to apply, for a fixed period of time, the terms of a particular clause'.[38] Thus, derogation involves 'external'[39] challenges to a peremptory rule.[40] These external challenges can take the form of a treaty, but they could also take the form of a customary rule. Furthermore, since peremptory rules cannot be set aside by agreement between two or more states, it seems reasonable to infer that they may not be set aside unilaterally either.[41] Peremptory rules may therefore not be set aside by justifications. After all, a justification is a claim to override the reasons against action derived from another rule of the legal order. Peremptory rules, it might be said, provide reasons that cannot be defeated.[42]

If the prohibition of force is considered to be a rule of *jus cogens*, then a forcible humanitarian intervention, whatever its gravity and scale,[43] cannot be justified on the grounds of necessity: Article 26 of ARSIWA would exclude reliance on this defence. The situation might be different if only the prohibition of aggression (rather than force), or the 'core' of the prohibition,[44] were peremptory. In this case, the availability

[37] Vienna Convention on the Law of Treaties (VCLT) 1969, 1155 UNTS 331.

[38] *Oil Platforms (Islamic Republic of Iran v. United States of America)* Judgment, 6 November 2003, ICJ Reports (2003) 161, at 226, para. 4, Separate Opinion of Judge Higgins.

[39] Exception facts built into the peremptory rule itself would be 'internal' challenges. This is how the International Law Commission (ILC) conceptualizes self-defence and consent in relation to the use of force: they are negative rule elements of the prohibition of force. See ARSIWA, *supra* note 4, Commentary to Art. 21, para. 1; Commentary to Art. 26, para. 6. I have addressed these arguments critically elsewhere, see: Paddeu, 'Military Assistance on Request and General Reasons Against Force: Consent as a Defence to the Use of Force', 7 *Journal of the Use of Force in International Law* (2020) 227.

[40] Hayim, *Le concept d'inderogeabilité en droit international: Une analyse fonctionelle* (2012) (PhD thesis on file at the Graduate Institute of International and Development Studies), at 22.

[41] See also Report of the ILC on the Work of Its Seventieth Session, UN Doc. A/73/10, (30 April – 1 June and 2 July – 10 August 2018), para. 135.

[42] On which, see de Hoogh, *supra* note 30, at 127.

[43] I leave aside, for the moment, the question of whether *de minimis* force amounts to a violation of Article 2(4) of the UN Charter. The basic scenario addressed in this article assumes that the humanitarian state's action is above the threshold of a 'mere frontier incident' in the sense of *Nicaragua*, *supra* note 9. On *de minimis* force, see Ruys, 'The Meaning of "Force" and the Boundaries of the *Jus ad Bellum*: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?', 108 *AJIL* (2014) 159.

[44] That is, whatever is left of the prohibition after all the exceptions to it are excluded from its scope. For an argument on the identification of the *jus cogens* part of the prohibition of force along these lines, see Johnston, 'Identifying the *Jus Cogens* Norm in the *Jus ad Bellum*', 70 *ICLQ* (2021) 29.

of a plea of necessity would depend on whether the specific forcible humanitarian intervention amounted to aggression. If forcible humanitarian intervention did not amount to aggression, but involved a lesser form of the use of force,[45] states would be able to rely on the plea of necessity. If it did, then the plea would be excluded. The question whether it is the prohibition of force or the prohibition of aggression that is peremptory has been the subject of debate.[46] For the ILC, for example, it is the (narrower) prohibition of aggression that is peremptory.[47] But scholars have argued, on the basis of reviews of the practice and *opinio juris* of states, that it is the broader prohibition of force that has peremptory character.[48]

Be that as it may, as will be argued in the next sub-section, the law on the use of force codified in the UN Charter itself poses a bar to the invocation of necessity in cases of humanitarian intervention: situations of necessity have already been covered in these rules, thus constituting them as a *lex specialis* in relation to the plea of necessity.

B *The UN Charter System and the Justification of Necessity*

While the defences in the law of state responsibility are, in principle, applicable in respect to all rules in international law, regardless of their content and source (Article 12 of ARSIWA), these rules may be excluded by application of the *lex specialis* principle in Article 55 of ARSIWA. What is more, when it comes to the plea of necessity,

[45] Potentially, it could amount to an armed attack while still not constituting aggression. For the present purposes, it is not necessary to address, let alone resolve, the debate as to the relationship between the concepts of 'armed attack' and 'aggression'. This is a threshold issue, which does not affect the point of principle described in the text. On the relationship between armed attack and aggression, see T. Ruys, *'Armed Attack' and Article 51 of the UN Charter* (2010), at 127–139 and the references cited therein.

[46] See, e.g., Linderfalk, 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think about the Consequences?', 18 *EJIL* (2007) 853; Green, 'Questioning the Peremptory Status of the Prohibition of the Use of Force', 32 *Michigan Journal of International Law* (2011) 215; Helmersen, 'The Prohibition of the Use of Force as *Jus Cogens*: Explaining Apparent Derogations', 61 *NILR* (2014) 167; de Hoogh, '*Jus Cogens* and the Use of Armed Force', in M. Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (2015) 1161.

[47] ARSIWA, *supra* note 4, Commentary to Art. 26, para. 5. More recently, there is the special rapporteur's fourth report on peremptory norms of general international law (*jus cogens*). D. Tladi, Fourth Report, UN Doc. A/CN.4/727, 31 January 2019, 27ff. Tladi's classification of the prohibition of aggression (only) as peremptory received mixed support in the United Nations General Assumbly's (UNGA) Sixth Committee, at least among the few states that commented on it. For those states in agreement with the rapporteur's classification, see Nicaragua: Sixth Committee, Summary Record of the 23rd Meeting, UN Doc. A/C.6/74/SR.23, 28 October 2019, para. 71; Sierra Leone: Sixth Committee, Summary Record of the 27th Meeting, UN Doc. A/C.6/74/SR.27, 31 October 2019, para. 9; Spain: Sixth Committee, Summary Record of the 26th Meeting, UN Doc. A/C.6/74/SR.26, 31 October 2019, para. 13. For those states critical of this classification, see Austria: Sixth Committee, Summary Record of the 23rd Meeting, UN Doc. A/C.6/74/SR.23, 28 October 2019, para. 64; Brazil: Sixth Committee, Summary Record of the 24th Meeting, UN Doc. A/C.6/74/SR.24, 29 October 2019, para. 92; Croatia: Sixth Committee, Summary Record of the 23rd Meeting, UN Doc. A/C.6/74/SR.23, 28 October 2019, para. 86; Czech Republic: Sixth Committee, Summary Record of the 23rd Meeting, UN Doc. A/C.6/74/SR.23, 28 October 2019, para. 112. Most other states commented on the desirability of including a non-exhaustive list of peremptory rules in the work of the ILC.

[48] See, e.g., O. Corten, *Le droit contre la guerre* (2nd edn, 2014), at 345–349.

paragraph (2)(b) of Article 25 of ARSIWA states that 'necessity may not be invoked by a State as a ground for precluding wrongfulness if … the international obligation in question excludes the possibility of invoking necessity'. The Commentary, in elaborating this point, indicates that:

> certain humanitarian conventions applicable to armed conflict expressly exclude reliance on military necessity. Others while not explicitly excluding necessity are intended to apply in abnormal situations of peril for the responsible State and plainly engage its essential interests. In such a case the non-availability of the plea of necessity emerges clearly from the object and the purpose of the rule.[49]

In short, if the relevant primary rule already caters to a situation of necessity, then the general plea of necessity will be excluded. The same reasoning that the ILC Commentary applies to the *jus in bello* can be applied to the *jus ad bellum*. Indeed, the law on the use of force codified in the UN Charter already caters to situations of necessity through the two exceptions recognized in the UN Charter: self-defence and collective security. Both of these exceptions to the prohibition of force are premised on the notion of necessity.[50] With respect to the right of self-defence, as Olivier Corten has noted, this right is triggered, and is limited, by necessity. The right of self-defence is what Sarah Heathcote would refer to as a rule in 'necessity's image'[51] and is thus aptly described by Corten as 'a particular expression of the concept of necessity'.[52] To be sure, Article 51 does not itself mention necessity, but this condition of the right of self-defence is recognized by customary law.[53] In turn, Chapter VII empowers the UNSC to take measures 'necessary to maintain or restore international peace and security'.[54]

Justifying humanitarian intervention on the plea of necessity, therefore, seems excluded by the UN Charter system of collective security itself. But even if this were not the case, the use of force for humanitarian purposes would still fall outside the scope of the plea of necessity, as argued next.

C *The Justification of Necessity and Humanitarian Intervention*

It may be queried whether the plea of necessity can provide a basis for the use of force for humanitarian purposes at all or whether the use of force is excluded from its scope. The question was considered by the ILC during the drafting of Article 25 of ARSIWA. The Commission ultimately did not settle the issue: its members agreed that necessity could not justify an act of aggression, but it left open the question whether the plea of necessity could be invoked to justify uses of force short of aggression.[55] The plea

[49] ARSIWA, *supra* note 4, Commentary to Art. 25, para. 19.

[50] On which, see generally Corten, 'La nécessité et le *jus ad bellum*', in T. Christakis (ed.), *La nécessité en droit international* (2007) 127.

[51] Heathcote, *supra* note 7, at 131–132.

[52] Corten, 'Necessity', in M. Weller (ed.), *Oxford Handbook of the Use of Force in International Law* (2015) 865.

[53] See, e.g., *Nicaragua*, *supra* note 9, para. 176.

[54] UN Charter, Art. 42.

[55] ILC, 'Report of the Commission on the Work of Its Thirty-second Session', 2(2) *ILC Yearbook* (1980) 1, at 42–43, paras 22–23.

of necessity could be excluded expressly by the specific rule, the ILC said, but also implicitly. Whether the UN Charter had implicitly excluded reliance on the plea was a question requiring the interpretation of the Charter, and that was beyond the scope of the Commission's task.[56] The issue of the plea of necessity and humanitarian intervention was reprised during the second reading of ARSIWA (in 1999, right after the NATO intervention in Kosovo), following a suggestion by the UK that ARSIWA make provision for emergency humanitarian action in the context of the plea of distress.[57] Special Rapporteur James Crawford considered that the question, if at all, should be assessed in the context of the plea of necessity rather than distress.[58] For Crawford, however, whether humanitarian intervention was permissible was a question of the law of the UN Charter:

> For present purposes it seems enough to say that either modern State practice and *opinio juris* license humanitarian action abroad in certain limited circumstances, or they do not. If they do, then such action would appear to be lawful in those circumstances, and cannot be considered as violating the peremptory norm reflected in Article 2, paragraph 4, of the Charter of the United Nations. If they do not, there is no reason to treat them differently than any other aspect of the rules relating to the use of force. In either case, it seems that the question of humanitarian intervention abroad is not one which is regulated, primarily or at all, by article 33.[59]

Members of the ILC and several states in the Sixth Committee endorsed Crawford's position,[60] which was ultimately reflected in the Commentary to Article 25 of ARSIWA as finally adopted. The current Commentary to Article 25 of ARSIWA thus states that '[t]he question whether measures of forcible humanitarian intervention, not sanctioned pursuant to Chapters VII or VIII of the Charter of the United Nations, may be lawful under modern international law is not covered by article 25'.[61] The conclusion reached by the ILC on this matter is surely correct: whether humanitarian intervention is permitted is a question of the primary rules of international law. However, the argumentative path towards this conclusion is not entirely clear. The point of justifications in the law of responsibility is to provide permissions to do (or not to do) things mandated or prohibited by other rules in the international legal order. The justifications included in ARSIWA, as noted earlier, are, in principle, applicable to all rules of international law.[62] If international law prohibits the use of force, then it is fair to ask whether force used for a humanitarian purpose may be justified by one of the defences in the law of responsibility – just as one could ask whether state of necessity may justify a state's failure to comply with the (treaty-based) rule mandating states to afford fair and equitable treatment to foreign investors or the rule prohibiting interference

[56] *Ibid.*, at 44, para. 24.

[57] 'Comments by Governments on All the Draft Articles, UN Doc. A/CN.4/488 and Add.1-3, UN Doc. A/CN.4/488 and Add.1-3', 2(2) *ILC Yearbook* (1998) 81, at 134.

[58] Crawford, 'Second Report on State Responsibility', 2(1) *ILC Yearbook* (1999) 3, para. 274.

[59] *Ibid.*, para. 289.

[60] For a review of the discussions in the ILC and in the Sixth Committee, see Corten, *supra* note 48, at 364–368.

[61] ARSIWA, *supra* note 4, Commentary to Art. 25, para. 21.

[62] Save for the case of *lex specialis*, as reflected in ARSIWA, *supra* note 4, Art. 55.

with the diplomatic premises of another state. Simply to say that 'there is no reason to treat [situations of humanitarian intervention] differently from any other aspects of the rules relating to the use of force' is an assertion: it assumes that there is something about the rules on the use of force that excludes reliance on the defences as such. And while this is ultimately the correct conclusion, this assertion requires explanation. One explanation is based on its peremptory character, as already noted: Article 25 could not cover situations of humanitarian intervention as Article 26 would expressly exclude it. Another explanation is that the defence of necessity itself limits its applicability to the prohibition of force.[63]

The language of Article 25 of ARSIWA, in itself, does not exclude the use of force from the scope of the defence. That said, states rarely invoke the plea of necessity as a justification for forcible humanitarian intervention (or, for that matter, in relation to their uses of force more generally). In the last 25 years, only Belgium has explicitly relied on the plea of necessity to justify NATO's campaign in Kosovo.[64] The UK, for its part, broadly suggested expanding the defence of distress so as to include humanitarian action.[65] There is also what might be termed *opinio non juris*: several states, during the drafting of Article 25, expressly rejected that the plea of necessity might offer a justification for forcible humanitarian intervention.[66] It is thus plausible to argue that the practice and *opinio juris* of states exclude reliance on this defence in relation to the use of force.

Even if the plea were applicable, its invocation to justify humanitarian intervention is unlikely to be successful. The state of necessity is a strict and narrowly confined defence, as is well known.[67] Whether any given situation of forcible humanitarian intervention meets the elements of the defence is a question that cannot be assessed in the abstract. Taking the basic scenario outlined in the introduction as the starting point, the plea is, in any event, likely to fail on at least three grounds. First, the humanitarian state would be acting to protect an interest of the international community ('public necessity') and not one of its own interests ('private necessity').[68] The language of Article 25 of ARSIWA includes situations of public necessity: it speaks of the protection of 'an essential interest' and not of the protection of 'an essential interest of the invoking State'.[69] This notwithstanding, state practice has so far concerned only

[63] Other defences in the law of responsibility contain limitations or exclusions in respect of the prohibition of force. For example, ARSIWA, *supra* note 4, Art. 21, limits the effect of the right of self-defences to obligations other than those of 'total restraint' (see Commentary to Art. 21, paras 3–4). Likewise, ARSIWA, *supra* note 4, Art. 50(1)(a) prohibits forcible countermeasures.

[64] *Legality of Use of Force (FRY v. Belgium)*, ICJ public sitting, CR 1999/15, 10 May 1999, 13. Even then, not as an exclusive legal basis but in combination with other two arguments: the existence of a nascent right to humanitarian intervention and permission under United Nations Security Council (UNSC) resolutions. On this, see Franchini and Tzanakopoulos, *supra* note 10, at 599–600.

[65] 'Comments by Governments on all the Draft Articles', *supra* note 57, at 134.

[66] On both these points, see the evidence provided in Corten, *supra* note 48, at 364–368.

[67] ARSIWA, *supra* note 4, Commentary to Art. 25, para. 1.

[68] See ARSIWA, *supra* note 4, paras 15–17 and also the discussion below.

[69] On which, see Gaja, 'La possibilité d'invoquer l'état de nécessité pour protéger les intérêts de la communauté internationale', in O. Corten *et al.* (eds), *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (2007) 417.

situations of private necessity: there is no evidence of any claim of any state to be acting in public necessity. So the humanitarian state would need to prove that customary law allowed reliance on necessity in these circumstances. To be sure, public necessity is morally less reproachable than private necessity, but this does not alter the fact that it is not currently supported by the practice of states.

Second, the humanitarian state would need to demonstrate that no essential interests of the other party (or of the international community of states as a whole) was seriously impaired by the forcible humanitarian intervention. There is no definition of 'essential interests' in the Commentary to Article 25, which states that whether an interest is essential is a matter to be assessed by reference to the specific circumstances of the case.[70] Whether an interest is essential is a relative question, and its assessment must take into account both qualitative (the subject matter of the interests involved) and quantitative criteria (the extent of the injury to either interest involved). Situations of humanitarian intervention pitch the following two interests against each other: on the one hand, the well-being of the civilian population – an interest that has been accepted, in very different contexts, as an essential interest[71] – and, on the other hand, the interest of states in the non-use of force, which is an interest of the international community as a whole, and the territorial state's sovereignty and territorial integrity.[72] The balance between the interest(s) protected and the interest(s) infringed is not clearly in favour of the former.

Third, it will be difficult to prove that the use of force is the only way to protect the local civilian population from its government.[73] The requirement that the measure adopted in necessity be the 'only way' to deal with the threat is a deliberately strict one. Indeed, the experience of states in the International Court of Justice and in investment treaty arbitration has shown that necessity pleas are likely to fail on this requirement.[74] Moreover, diplomatic or political solutions, or even enforcement action by the

[70] ARSIWA, *supra* note 4, Commentary to Art. 25, paras 15–17.

[71] As recognized, in a very different context, by investment tribunals. See, e.g., ICSID, *Sempra Energy International v. Argentine Republic – Award*, 29 September 2007, ICSID Case no. ARB/02/16, para. 326; UNCITRAL, *BG Group Plc v. Argentine Republic – Award*, 24 December 2007, para. 393; UNCITRAL, *National Grid Plc v. Argentine Republic – Award*, 3 November 2008, para. 245.

[72] See O'Meara, 'Should International Law Recognize a Right of Humanitarian Intervention?', 66 *ICLQ* (2017) 441, at 462–463.

[73] Vaughan Lowe is quoted as having stated 'that forceful action cannot be necessary before diplomacy has been exhausted'. See D. Guilfoyle, 'Humanitarian Intervention: Neither Right, Nor Responsibility, But Necessity?', *EJIL:Talk!*, 5 May 2009, available at www.ejiltalk.org/humanitarian-intervention-neither-right-nor-responsibility-but-necessity/.

[74] See, e.g., *Gabčíkovo-Nagymaros*, supra note 36, para. 55; *ITLOS, M/V Saiga (No. 2) (St Vincent and the Grenadines v. Guinea)* – Judgment, 1 July 1999, para. 135; ICSID, *Suez Sociedad General de Aguas de Barcelona S.A. and InterAgua Servicios Integrales del Agua S.A. v. Argentine Republic* – Decision on Liability, 30 July 2010, ICSID Case no. ARB/03/17, para. 238; ICSID, *Suez Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. Argentine Republic* – Decision on Liability, 30 July 2010, ICSID Case no. ARB/03/19, paras 260, 265; ICSID, *Total S.A. v. Argentine Republic* – Decision on Liability, 27 December 2010, ICSID Case no. ARB/04/1, para. 223; ICSID, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic* – Award, 11 June 2012, ICSID Case no. ARB/03/23, paras 1171–1172.

UNSC, will also be available. Whether these mechanisms have been fully exhausted ultimately may be a question of political judgment and assessment. But Article 25 requires an objective assessment: the action in necessity must be the only way and not the only way as judged by the invoking state.[75]

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A justification of necessity may thus not be available, as a matter of principle, as a defence for the use of force in humanitarian intervention. Insofar as the prohibition of force is a peremptory rule of international law, Article 26 of ARSIWA excludes the operation of the state of necessity (or any other justifications) to justify a breach of *jus cogens*. But, even if only the prohibition of aggression were peremptory, the availability of the plea of necessity would be excluded by the UN Charter and, arguably, by the scope of the defence itself. At any rate, even if it were available, the strict requirements of the plea are unlikely to be met in circumstances involving the use of force.

4 A Claim of Excuse

It is possibly because of the above difficulties that an alternative argument has been made in the literature: that of excusing humanitarian intervention on the basis of the plea of necessity.[76] In recent years, Harold Koh[77] and Jure Vidmar[78] have argued that humanitarian intervention should be excused. The argument is appealing because it manages to bridge the gap between the illegality of the use of force and its perceived legitimacy. Unlike the 'illegal but justified' argument, the 'illegal but excusable' argument gives a clear basis to the wrongness of humanitarian intervention: it is wrong because it is a breach of international law. At the same time, though, it channels the legitimacy of the action by seemingly removing the negative consequences of the action for the humanitarian states. Authors who hold this view do not often elaborate on the effect of the excuse for the humanitarian states, but it seems safe to assume that on a legal plane the excuse would remove all the consequences arising within the law of responsibility for that state.[79] This solution, while appealing for this reason,

[75] This is not to say that the assessment is to be performed from the standpoint of the adjudicator. The vantage point is still that of the invoking state, where objectivity requires the application of a standard of reasonableness in the assessment. That is, the analysis must focus on whether the measure was the 'only way' by reference to the information that was reasonably available to the state at the time of adopting it.

[76] See, e.g., Johnstone, *supra* note 5, at 357–366.

[77] Koh, *supra* note 5, at 1010–1015.

[78] Vidmar, 'Use of Force', *supra* note 5, at 302; Vidmar, 'Excusing Illegal Use of Force', *supra* note 5.

[79] Another option would be for the excuse to act as a partial excuse – that is, remove some, but not all, of the consequences of wrongfulness. For example, it may exclude the obligation of reparation, but not that of cessation. Partial excuses are different from the claim of mitigation discussed below as it would still operate within the bounds of the law of state responsibility – after all, it would rely on a defence in the law of state responsibility. The notion of partial excuses is underdeveloped in international law. In any event, a claim of partial excuse would fare no better as it would raise the same difficulties as claims of complete excuse discussed in this section.

nevertheless leads to paradoxical and undesirable consequences that undermine its persuasiveness.

There are a number of difficulties with this argument. To begin with, it is not clear that excuses are recognized in international law. If they were recognized, it is questionable whether they could or should apply in relation to *jus cogens* norms. Indeed, while the excuse may preclude the responsibility of the humanitarian states, peremptory rules give rise to consequences for all other states as well that are not precluded by the excuse. Furthermore, excuses could only preclude the consequences within the law of state responsibility. They could not preclude consequences arising in other areas of international law, including the right of self-defence. Each of these difficulties will be addressed in turn.

A *Excuses in International Law*

Excuses are defences that arise from properties or characteristics of actors that, while having no effect on the illegality of the act, shield that actor from responsibility for his or her (illegal) actions.[80] Excuses focus predominantly on the actor but do not ignore features of the act. For example, an excuse may require the act to be proportionate to the harm caused. The key question that excuses address, however, is: 'can this person be held responsible for this act'?[81] Given their focus on actors, excuses are individualized defences, and they are personal to the actor.[82] In this way, they differ from justifications that, by rendering the act lawful, may have universalizing tendencies – that is, justifications may reach beyond the actor and display their effect also with respect to other secondary participants in the act. After all, the latter will have participated in the commission of a lawful act.

Does international law recognize this type of defence? It is difficult to say.[83] 'Excuse' is a legal concept (not a rule) so it is not, as such, susceptible to recognition by means of state practice and *opinio juris*. States have rarely expressed their views in the abstract about this notion. A few states, including Burkina Faso,[84] France,[85]

[80] Husak, *supra* note 29, at 494. Again, this is the common core of agreement among scholars on the concept of excuses. There remain disagreements about many aspects of excuses, on which, see generally Ferzan, *supra* note 29, at 239ff.

[81] The phrasing of this question, it should be said, is not neutral in that it takes a position in regard to the theory of excuses – in particular, that excuses are about the responsibility of actors. There are other theories of excuses, such as theories focusing on the actor's character, though they may not be workable for states. On this, see Paddeu, *supra* note 23, at 120–126.

[82] See, e.g., Fletcher, 'The Individualization of Excusing Conditions', 47 *Southern California Law Review* (1973–1974) 1269.

[83] See Paddeu, *supra* note 23, at 35–37.

[84] Sixth Committee, Summary Record of the 26th Meeting, UN Doc. A/C.6/54/SR.26, 4 November 1999, para. 43; see also Sixth Committee, Summary Record of the 24th Meeting, UN Doc. A/C.6/55/SR.24, 2 November 1999, para. 54.

[85] Sixth Committee, Summary Record of the 11th Meeting, UN Doc. A/C.6/56/SR.11, 9 November 2001, para. 70. Ultimately, however, France was happy to accept Chapter V as finally approved. 'Comments and Observations Received from Governments', Doc. A/CN.4/515 and Add.1-3, 2(1) *ILC Yearbook* (2001) 54.

India,[86] Japan,[87] Mexico,[88] Morocco,[89] Russia,[90] Slovakia,[91] Switzerland[92] and the UK,[93] expressed support for excuses during the ILC's work on state responsibility. Moreover, there is sufficient variation in domestic legal orders to prevent the conclusion that excuses constitute a general principle of law: while they are generally recognized in civil law jurisdictions, common law jurisdictions rarely do so (at least formally).[94]

Perhaps a better way to test the recognition of excuses is to query whether specific defences have been classified as excuses by states and whether tribunals have applied them as such. Of the defences in ARSIWA, it is the plea of necessity that tends to be seen as an excuse, but this is predominantly a doctrinal view.[95] Indeed, only a few states have favoured a classification of necessity as an excuse. On the whole, states have treated this defence as a justification. For example, this is how Argentina,[96]

[86] Sixth Committee, Summary Record of the 23rd Meeting, UN Doc. A/C.6/54/SR.23, 2 November 1999, para. 33.

[87] 'Comments and Observations Received from Governments', Doc. A/CN.4/492, 2(1) *ILC Yearbook* (1999) 107 (a distinction must be drawn between circumstances that 'precluded wrongfulness' and circumstances that did 'not preclude wrongfulness but render[ed] it non-existent').

[88] Summary Record of the 23rd Meeting, *supra* note 86, para. 11.

[89] Sixth Committee, Summary Record of the 48th Meeting, UN Doc. A/C.6/34/SR.48, 22 November 1979, para. 31.

[90] Sixth Committee, Summary Record of the 18th Meeting, UN Doc. A/C.6/55/SR.18, 27 October 2000, para. 53.

[91] Sixth Committee, Summary Record of the 22nd Meeting, UN Doc. A/C.6/54/SR.22, 1 November 1999, para. 54.

[92] Ibid., para. 76.

[93] 'Comments by Governments on all the Draft Articles', *supra* note 57, at 130.

[94] For example, it is not clear that English criminal law recognizes excuses. Yet certain decisions have been rationalized on this basis. See, e.g., the English case of *Bourne*, (1952) 36 Cr App R 125, in which D had been coerced by her husband S to have sexual intercourse with a dog. S was convicted even though it was clear D would have been acquitted on the basis of coercion had she been charged. The decision has been explained on the basis that coercion was an excusatory defence. See D. Ormerod and K. Laird, *Smith, Hogan and Ormerod's Criminal Law* (15th edn, 2018), at 222–223; A. Simester *et al*., *Simester and Sullivan's Criminal Law* (7th edn, 2019), at 268.

[95] See, e.g., Higgins, *supra* note 1, at 40; Johnstone, *supra* note 5, at 352–356; Orrego-Vicuña, 'Softening Necessity', in M. Arsanjani (ed.), *Looking to the Future: Essays on International Law in Honour of W Michael Reisman* (2010) 742; Ryngaert, 'State Responsibility, Necessity and Human Rights', 41 *Netherlands Yearbook of International Law* (*NYIL*) (2010) 79, at 96–97; Tsagourias, 'Necessity and the Use of Force: A Special Regime', 41 *NYIL* (2010) 11.

[96] *Sempra*, *supra* note 72, para. 333 (a 'concept precluding wrongfulness'); ICSID, *Enron Corporation and Ponderosa Assets L.P. v. Argentine Republic – Award*, 22 May 2007, ICSID Case no. ARB/01/3, para. 294 (a 'concept precluding wrongfulness'); ICSID, *Continental Casualty Company v. Argentine Republic – Award*, 5 September 2008, ICSID Case no. ARB/03/9, para. 160 (actions 'entirely lawful'); ICSID, *Metalpar S.A. and Buen Aire S.A. v. Argentine Republic – Award*, 6 June 2008, ICSID Case no. ARB/03/5, para. 137 ('justification … under international law'); *National Grid*, *supra* note 72, para. 205 (conduct is 'licit'); *EDF*, *supra* note 71, para. 1163 (conduct is 'justified'); ICSID, *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic – Decision on Annulment*, 5 February 2016, ICSID Case no. ARB/03/23, para. 317 (plea invoked in case of finding of a '*prima facie* breach of the BIT'); ICSID, *Total S.A. v. Argentine Republic – Decision on Annulment*, 1 February 2016, ICSID Case no. ARB/04/1, para. 229 (plea invoked as a 'circumstance that precludes the wrongfulness of an act contrary to the obligation allegedly violated'). The pleadings of Argentina are not public, so the following list of examples relies on the tribunal's own summary of the Argentine argument. It would seem reasonable to assume that Argentina's position on the plea of necessity under customary law was consistent throughout the

Egypt[97] and Zimbabwe[98] have pleaded it in investment treaty arbitration. For the most part, tribunals addressing the necessity defence have tended to do so along the lines of the parties' arguments: indeed, only a handful of tribunals have endorsed (though not applied) the characterization of this plea as an excuse.[99] Moreover, the practice of states and tribunals in this regard is compatible with the current formulation of the plea in Article 25 of ARSIWA. In its current formulation, Article 25 allows a defence on the basis of a lesser-evils rationale: the state can invoke the defence when it adopts conduct that is incompatible with one of its obligations because this conduct preserves an essential interest of that state or an essential interest of the international community. The lesser-evils rationale is a consequentialist theory of justification pursuant to which conduct that causes the lesser of two evils is lawful or, at the very least, permissible. Or, to put it in opposite terms, conduct that produces a net benefit is lawful. To say that a defence of lesser evils provides an excuse, as some have,[100] is to misunderstand the logic of this type of defence: the lesser-evils defence is about the result achieved (or better, foreseen) by the conduct (so it arises from properties or characteristics of the act) and not about the pressure on a state's freedom of choice by the circumstances (which would be a defence arising from properties or characteristics of the actor). This is not to say that all justifications must respond to a lesser-evils logic

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various disputes brought against it. Nevertheless, tribunals have used inconsistent and equivocal language in their description of Argentina's argument, sometimes using the language of justification and other times the language of excuse. Troublingly, they have often done so within the same award.

97 ICSID, *Unión Fenosa Gas S.A. v. Arab Republic of Egypt – Award*, 31 August 2018, ICSID Case no. ARB/14/4, para. 8.21 ('the state of necessity caused by the revolution that erupted in Egypt and whose after-effects persist to this day precludes any wrongfulness of the conduct alleged to constitute a violation of the Spain-Egypt BIT').

98 ICSID, *von Pezold et al v. Republic of Zimbabwe – Award*, 28 July 2015, ICSID Case no. ARB/10/15, para. 616.

99 This was most clearly articulated in the decision of the Annulment Committee in ICSID, *CMS Gas Transmission Company v. Argentine Republic – Decision on Annulment*, 25 September 2007, ICSID Case no. ARB/01/8, para. 134. This approach was unambiguously endorsed in *Continental Casualty*, *supra* note 97, n. 236. The position of other tribunals is less clear. For example, it is not clear whether the Annulment Committee in ICSID, *Sempra Energy International v. Argentine Republic – Decision on Annulment*, 29 June 2010, ICSID Case no. ARB/02/16, was in agreement with the *CMS (Annulment)* decision. On the one hand, the *Sempra* committee explained that 'Article 25 is concerned with the invocation by a State Party of necessity "as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State". Article 25 presupposes that an act has been committed that is incompatible with the State's international obligations and is therefore "wrongful"' (para. 200). But, on the other hand, it stated that 'Article 25 deals with a situation where a State Party is in breach of a Treaty obligation and seeks to justify its breach by a plea of necessity' (para. 203). So whereas the substance of the committee's description (Art. 25 applies when there is a breach/wrongful act) suggests necessity is an excuse, its use of language (Art. 25 is a 'circumstance for precluding wrongfulness', which 'justifies') suggests the opposite. The same can be queried of the *El Paso* award. There, the tribunal expressly quotes, and endorses, the *CMS (Annulment)* approach (of the plea as an excuse), and yet it refers to state of necessity as a 'circumstance precluding wrongfulness' and describes its operation as the 'setting aside' of the illegality of the conduct. See ICSID, *El Paso Energy International Company v. Argentine Republic – Award*, 31 October 2011, ICSID Case no. ARB/03/15, paras 553–554.

100 Arguing that the lesser-evils defence amounts to an excuse, see Vidmar, 'Use of Force', *supra* note 5; Vidmar, 'Excusing Illegal Use of Force', *supra* note 5.

but, rather, that the lesser-evils defence is one of the theories of justification – indeed, the 'paradigmatic' theory[101] – and that, whenever a defence is formulated along these lines, it will be a justification.[102]

While currently formulated as a justification, the plea of necessity can be formulated as an excuse, and, indeed, many domestic legal systems classify it as such.[103] Defences are not inherently justifications or excuses and can be formulated in either terms (most of them at least). The choice between one or the other formulation may depend on policy, moral or other normative considerations relevant in the specific legal order.[104] An excuse of necessity in international law, for example, could focus on the constraints on the state's freedom of choice caused by the situation of necessity, such that the state acts under compulsion.[105] However, the very reformulation of the defence as an excuse would involve precluding its invocation in situations of humanitarian intervention. Excuses are individualized defences that focus on the constraints of the actor's freedom of choice by circumstances external to it. This is the situation where, for example, a fire in State A's territory is closing in on a nuclear reactor in that state's territory, threatening the population of State B's capital city, located along the border and close to the nuclear reactor. If State A were unable to reach the fire quickly, State B may be forced or constrained by the circumstances to enter State A's territory to put out the fire before it reached the reactor. State B plausibly acts under compulsion in this situation. But it is difficult to see how threats to the population of another state could similarly constrain the will of the humanitarian state, such that its intervention may be said to be compelled by the circumstances. This is all the more so since the ILC noted, when discussing humanitarian intervention in the context of the plea of distress, that there is no 'special relationship' between the humanitarian state and the population of the target state.[106] If there is no such relationship between them, how could the humanitarian state claim to have been compelled to act in those circumstances?

In determining the existence of compulsion for the excuse of necessity, it does not matter if the interest sought to be protected was an individual interest of the acting state or an interest of the international community as a whole (say, the protection of human rights or from international crimes).[107] After all, excuses are not about the

[101] Alexander, 'Lesser Evils: A Closer Look at the Paradigmatic Justification', 24 *Law and Philosophy* (2005) 611.

[102] J. Dressler, *Understanding Criminal Law* (1987), at 180. See Alexander, *supra* note 101, for a review of other theories of justification.

[103] In Canada, see *Perka v. The Queen*, [1984] 2 SCR 232; Germany recognizes a justification and an excuse of necessity in its Criminal Code, ss. 34 and 35 respectively. For the text of these provisions, see Bernsmann, 'Private Self-Defence and Necessity in German Penal Law and in the Penal Law Proposal – Some Remarks', 30 *Israel Law Review* (1996) 171, at 180, 184. Bohlander refers to excusing necessity in section 35 as 'duress' in his English translation of the German Criminal Code. M. Bohlander, *The German Criminal Code: A Modern English Translation* (2008), at 44–45.

[104] For an illuminating and rare consideration of the classification of necessity as a justification or an excuse in a judicial setting, see the *Perka* case of the Supreme Court of Canada. *Perka*, *supra* note 103.

[105] See Paddeu, *supra* note 23, at 414–430.

[106] As implied by Crawford as special rapporteur in his Second Report, *supra* note 58, at 68, para. 274.

[107] Though applicability of excuses can be limited by such essential interests. For example, the plea of necessity may not harm an essential interest of another state or an essential collective interest of the international community, and the plea of distress is only available to protect life.

protection of this or that interest: they are about determining whether, given circumstances that involve threats or harms to individual or collective interests that are considered to be essential, the state was free to act differently from the way it does or, to put it another way, whether it had options or choice as to what to do. There was little more that State B could have done in the fire situation: it would not have been able to evacuate the population of the whole capital city, or erect protections, or wait for State B to handle the situation. By contrast, it does not seem that a humanitarian state's freedom of choice is equally constrained in the circumstances: they can engage in diplomacy, they can impose sanctions, they could even resort to countermeasures in the collective interest if the underlying violation involved an obligation *erga omnes*. While the state may feel morally compelled to use force, so long as it has some choice as to how to act, the plea of necessity will be excluded: Article 25(1)(a) of ARSIWA requires that the invoking state had no other choice but to act as it did – that it was, in the language of this provision, 'the only way' to safeguard the interest in question.

B *Excuses and Peremptory Rules*

Assuming for the sake of argument that necessity were an excuse, there remains doubt as to its applicability to peremptory rules. Article 26 of ARSIWA excludes the applicability of the defences in Chapter V of Part One whenever the breach of a peremptory rule is in issue. Is Article 26 limited to justifications or does it extend also to excuses? This provision speaks of the 'preclusion of wrongfulness' rather than the preclusion of responsibility. But if it is possible to interpret the use of the expression 'circumstance precluding wrongfulness' in Chapter V of Part One of ARSIWA as a catch-all expression (and so not limited to justifications), such that we can argue that some of the defences listed there are excuses,[108] then it seems reasonable to understand the use of this expression in Article 26 in the same sense. Thus, Article 26 would apply to all defences, whether they are justifications or excuses.

The question nevertheless arises whether, in substance, this understanding is correct. The rationale for excluding the applicability of justifications to breaches of peremptory rules is that justifications constitute an external challenge to the peremptory rule in question: they are a form of unilateral derogation.[109] Excuses, however, do not operate in the same way. Excuses are not intended to guide behaviour, and, as such, they do not give reasons for action. Unlike justifications, they are secondary rules, or, better still, decision rules, in the sense that they are to be applied by decision makers at the point of deciding whether to blame the actor or hold him or her responsible for the unlawful act.[110] A claim of excuse is not a claim about being permitted to engage in

[108] Paddeu, *supra* note 23, at 50–51.

[109] See Section 3A.

[110] For example, George Fletcher has explained that excuses 'govern the evaluative decisions of courts. They are not designed as levers for channeling conduct in particular directions'. Fletcher, 'Rights and Excuses', 3 *Criminal Justice Ethics* (1984) 17. Similarly, according to Joachim Hruschka, excuses, as decision rules, '[tell] one who judges what to do when the law has been violated. Namely, [they tell] us when not to impute blame to an individual who has failed to follow the rules of conduct imposed upon him'. Hruschka, 'On the History of Justification and Excuse in Cases of Necessity', in S. Byrd and J. Hruschka (eds), *Kant and Law* (2006) 335. See further Robinson, 'Rules of Conduct and Principles of Adjudication', 57 *University of Chicago Law Review* 729 (1990) 729, at 741–742.

behaviour and, therefore, to derogate or set aside the relevant rule. Excuses, since they do not themselves give reasons for action, cannot defeat reasons against action. Indeed, a claim of excuse does not deny that the obligation has been breached and that there is, therefore, an unlawful act. The excuse concerns only the content of responsibility (that is, the obligations of cessation and reparation), and these obligations, even when they arise from the breach of a peremptory rule, are not themselves peremptory.[111] It follows that excuses could be invoked with respect to the breach of a peremptory rule.

It would thus be plausible to argue that forcible humanitarian intervention can be excused by necessity, provided, of course, that the requirements of the defence are met. But it is not clear that this should be the case for at least two reasons: first, because the breach of peremptory rules carries consequences for every state in the international community, not just for the wrongdoing state and, second, because excuses preclude the consequences that the law of responsibility attaches to wrongful acts, but they do not preclude other legal consequences that the legal order may attach to wrongful acts. These two issues are considered next.

C *Effects of Excusing Humanitarian Intervention in the Law of Responsibility*

Under the law of responsibility, a state that commits an internationally wrongful act is bound by obligations of cessation[112] and reparation[113] towards the injured state. These obligations are the legal consequences of the internationally wrongful act (they constitute the content of international responsibility) and are the object of the exonerating effect of excuses: an excuse, as a circumstance precluding responsibility, shields the invoking state from these consequences.[114] The law of responsibility also recognizes that, when the internationally wrongful act amounts to a serious violation of a peremptory rule of international law,[115] additional consequences arise for all states in the international community. Thus, Article 41 of ARSIWA states that:

[111] As recognized by the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Reports (2012) 99, para. 94.

[112] ARSIWA, *supra* note 4, Art. 30 (cessation and non-repetition): 'The State responsible for the internationally wrongful act is under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.'

[113] ARSIWA, *supra* note 4, Art. 31 (reparation): '1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act. 2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.'

[114] I will leave aside the question of compensation for material loss in the event of the successful invocation of a defence, which is referred to in ARSIWA, *supra* note 4, Art. 27(b). It is not clear with respect to which defences such a duty to make compensation would arise or what the legal basis of such a duty would be. While some scholars have argued that the duty arises in the case of excuses but not of justifications, such a solution has been challenged by other scholars, including some who are supportive of the distinction between justifications and excuses. For the former view, see Johnstone, *supra* note 5, at 353–354; Christakis, 'Les "circonstances excluant l'illicéité": une illusion optique?', in O. Corten *et al.* (eds), *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (2007) 223, at 235–240. For the latter view, see J. Crawford, *State Responsibility: The General Part* (2013), at 319; Paddeu, *supra* note 23, at 77–94.

[115] ARSIWA, *supra* note 4, Art. 40 (application of this chapter): '1. This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law. 2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.'

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this Part and to such further consequences that a breach to which this chapter applies may entail under international law.

If it were accepted that excuses can be invoked against the breach of peremptory rules, the consequence of this would be that a violation of one such rule would carry no responsibility for its author. The humanitarian state, excused for its forcible intervention, would therefore not be bound by obligations of cessation and reparation towards the target state. But what would happen to the obligations arising under Article 41 for all other states in the international community? These states could not benefit from the excuse of the humanitarian state since excuses are individualized, and, therefore, strictly personal, defences.[116] It would be odd to reach the conclusion that the state who has violated a peremptory rule does not bear any consequences but that the other states nevertheless do. If State A were excused for its forcible humanitarian intervention in State B, then it would not be responsible towards State B. It would not owe State B obligations of cessation and reparation. And, yet, all other states of the international community would be required not to recognize the legal situation created by the breach of the peremptory norm. All other states would be required to cooperate to bring to an end humanitarian intervention of State A – that is, they would be required to make State A cease its conduct in circumstances in which it would have no obligation to cease it. Lastly, all other states would be required not to provide air or assistance to State A's humanitarian intervention, which, as can be appreciated, is a paradoxical

[116] *Cf.* Vidmar, 'The Use of Force and Defences in the Law of State Responsibility', Jean Monnet Working Paper no. 08/15 (2015), at 19–26, available at http://jeanmonnetprogram.org/wp-content/uploads/JMWP-08-Vidmar.pdf. Pointing to NATO's campaign in Kosovo, in which the obligations that arose for all other states following the unlawful, but allegedly excused, campaign were set aside by SC Res. 1244, 10 June 1999, is of little help. Vidmar suggests that this case would show that not only are the obligations of the humanitarian state set aside by the excuse but that so are the obligations of all other states under Article 41. This is not so, however. For, in the Kosovo example, the exclusion of the consequences for all other states was contingent upon the Council's action under Chapter VII, which, by combined operation of Articles 25 and 103 of the UN Charter, took precedence over any other obligations of member states, including those arising under the law of state responsibility. In other words, the exclusion would not have resulted from the application of the excuse: it is Chapter VII that is doing the work. It may be retorted that the UNSC excluded these obligations for all other states because the humanitarian state(s) was excused. But, even if this is so, the difficulty remains: but for the UNSC resolution, all other states of the international community would have been, by operation of the law of responsibility, under the obligations in Article 41. For the concept of excuse to be practicable in respect of humanitarian intervention, it needs to be able to do all the work by itself – namely, it needs to be able to exclude the consequences of responsibility of the illegal act for the acting state as well as all the states in the international community. The Kosovo example does not show this; it shows precisely the opposite: that something additional to the humanitarian states' excuse is necessary to exclude the consequences under Article 41 of ARSIWA.

situation. To avoid it, it must be accepted that excuses should not be available in relation to peremptory rules.[117]

D *Effects of Excusing Humanitarian Intervention beyond the Law of Responsibility*

There is a further reason why excusing forcible humanitarian intervention is not desirable, which is relevant regardless of the peremptory status of the prohibition of force. Wrongful acts have consequences beyond those in the law of responsibility. Examples of this are the invalidity of treaties as a result of a breach of the prohibition on the use of force,[118] the possibility to terminate or suspend a treaty as a result of material breach[119] and, arguably, the right to take countermeasures against the wrongful act.[120] However, these consequences are not included in the notion of responsibility,[121] and, as a result, they may not be precluded by excuses.[122] Of particular interest here is the right of self-defence, which arises in response to a violation of the prohibition of force in the form of an armed attack.[123] Self-defence is also a consequence of wrongfulness. Roberto Ago, in his role as special rapporteur on state responsibility, argued during the first reading of ARSIWA that self-defence was

[117] This difficulty could disappear if *jus cogens* status was limited to aggression or to the 'core' of the prohibition, as discussed above.

[118] VCLT, *supra* note 37, Art. 52 ('[a] treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations').

[119] *Ibid.*, Art. 60 (which states, in relevant part, '1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part').

[120] Whether the right to take countermeasures is a consequence of the law of responsibility is debated. For an overview, see Paddeu, *supra* note 23, at 72.

[121] Indeed, in many cases, this distinction is the consequence of the functional separation between the law of treaties and the law of responsibility, as explained by the ICJ in *Gabčíkovo-Nagymaros*, *supra* note 36, para. 47.

[122] The argument here assumes a conception of excuses that is concerned only with the exclusion of responsibility. This is the only conception of excuses that states have so far considered (as this was the notion of excuse that the ILC considered in its work during the ARSIWA).

[123] It should be noted that it is controversial whether self-defence requires that the armed attack be a violation of the prohibition of force, whether it requires that the armed attack be a violation of any other rule of international law or of some other specified rule or whether it does not require that the armed attack amount to violation of any other rule. See Kelsen, 'Collective Security and Collective Self-Defence under the Charter of the United Nations', 42 *AJIL* (1948) 783, at 784 (who argues that self-defence is triggered by an armed attack that violates the prohibition of force); Ago, 'Eighth Report on State Responsibility – Add.5-7', UN Doc. A/CN.4/318/Add.5-7, 2(1) *ILC Yearbook* (1980) 13, at 54, para. 89. D. Bowett, *Self-Defence in International Law* (1958), at 9 (arguing that self-defence can be triggered by an armed attack violating other rules of international law); R. van Steenberghe, *Légitime défense en droit international public* (2012), at 289–290. See Ruys, *supra* note 45, at 490 (arguing that Art. 51 neither prohibits armed attacks nor points to their illegality). Note, however, that the only way to ensure that there is no self-defence against self-defence is to require that the armed attack amount to a violation of the prohibition of force. De Hoogh, 'Restrictivist Reasoning on the *Ratione Personae* Dimension of Armed Attacks in the Post 9/11 World', 29 *Leiden Journal of International Law* (*LJIL*) (2016) 19, at 22; Paddeu, 'Use of Force against Non-State Actors and the Circumstance Precluding Wrongfulness of Self-Defence', 30 *LJIL* (2017) 93, at 115.

a consequence of wrongfulness encompassed by the notion of responsibility, but the ILC rejected this understanding in the second reading of ARSIWA.[124] This being the case, an excuse could not preclude this right from arising. The humanitarian state, while excused, is still engaging in an illegal use of force. Correlatively, the target state is the victim of a breach of the prohibition of force. If the humanitarian state's forcible action rose to the level of an armed attack, due to its gravity and scale, it would be liable to self-defensive force from the target state. A state excused for using force would nevertheless be an 'unjustified aggressor'.[125] Defensive force is generally thought to be permissible against unjustified aggressors. It follows that the target state would be permitted to use force in self-defence against the humanitarian state, which is, most certainly, an undesirable conclusion.

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Whether excuses are recognized in international law and, more particularly, whether the plea of necessity is recognized as an excuse are contentious issues. Assuming that the state of necessity was an excuse, the application of this concept in the context of humanitarian intervention is far from desirable. While an argument based on excuses may not run against the obstacle of the peremptory status of the prohibition of force, it would lead to paradoxical and undesirable results. Indeed, excusing a state for forcible humanitarian intervention could not preclude the consequences of the breach of peremptory rules that the law of responsibility assigns to all states in the international community, nor would it preclude consequences of wrongful acts beyond the law of state responsibility, including the right of self-defence of the target state against the humanitarian state.

5 A Claim of Mitigation

Last is the claim of mitigation. The argument has been supported by a number of scholars, even if it is not always couched in terms of 'mitigation'.[126] Daniel Bethlehem, for example, has noted that, while necessity (and distress) do not 'provide a basis for humanitarian intervention … they reflect an appreciation that the law will be cautious about condemning limited action in last resort that is aimed at addressing extreme humanitarian exigencies'.[127] This strand of argument, to clarify, does not rely

[124] Compare the commentary to draft Article 34, adopted on first reading in 1980, and the Commentary to Article 21 of ARSIWA, *supra* note 4, as finally adopted by the ILC. For the commentary to draft Article 34, see ILC, *supra* note 56, at 52ff.

[125] See, e.g., G. Fletcher and J.D. Ohlin, *Defending Humanity: When Force Is Justified and Why* (2013), ch. 5.

[126] See, e.g., Rogers, 'Humanitarian Intervention and International Law', 27 *Harvard Journal of Law and Public Policy* (2003) 725, at 735; Byers and Chesterman, *supra* note 20, at 200. For a critique, see Wheeler, 'Unilateral Humanitarian Intervention and International Law', 105 *Nação e Defesa* (2003) 198, at 207–208.

[127] Bethlehem, 'Stepping Back a Moment: The Legal Basis in Favour of a Principle of Humanitarian Intervention', *EJIL:Talk!*, 12 September 2013, www.ejiltalk.org/stepping-back-a-moment-the-legal-basis-in-favour-of-a-principle-of-humanitarian-intervention/.

on necessity as a legal concept – either as a justification or as an excuse. It relies on necessity as an extralegal concept – as a moral imperative – surely when states act on these reasons, the law should treat them with lenience? The argument has such (moral) appeal that even scholars who take a 'restrictivist' approach to the use of force, like Ian Brownlie, have been sympathetic to it.[128]

The most developed version of this claim has been put forward by Thomas Franck, who elaborated on it across many of his writings.[129] I will thus rely on Franck's version of the argument in this analysis. The argument, in its essence, suggests that humanitarian intervention arises in situations of extreme necessity when states, under a moral imperative to act, use force against another state to protect a civilian population. This extreme necessity must be taken into account by states when 'sanctioning' the state that has taken forcible measures to alleviate humanitarian crises. Franck uses the term 'sanctioning' to denote 'the imposition of negative consequences ranging from resolutions deploring the transgressor's conduct, through diplomatic and economic embargoes, all the way to authorizing a remedial military response to the transgression'.[130] The conduct is illegal, but, in deciding the consequences that ought to be attached to that illegality for the humanitarian state, the 'jury' of states, acting institutionally through the United Nations (UN), must take into account the extreme necessity in mitigation. In this way, the concept of mitigation 'bridge[s] the gap between the law and a common sense of moral justice'.[131] Indeed, mitigation is not just an appeal to 'temper the law with considerations of moral legitimacy, but is also a reminder to consider the specific facts of a case before applying general normative principles'.[132]

There are a number of difficulties with this argument. To begin, as Simon Chesterman has noted:

> [a]lthough the jurisprudential distinction between mitigation and acceptance in the international legal order is indeed problematic, a more fundamental objection [to the concept of mitigation] may be ontological: in municipal law, such a discretion is exercised within an organized legal structure; in international law, it appears tantamount to abdicating responsibility for a particular class of cases.[133]

Franck's 'jury of states' is an attempt to overcome this challenge. The jury of states acts institutionally through the UN, and its political organs, but it is not the same as the UN itself. Indeed, the jury of states is not a euphemism for the UN as a legal person but, rather, a reference to the states that compose it: 'the core jurying function', says Franck, is performed by foreign ministries of states. The UN is simply the forum: it is where the states do the jurying. But the concept remains somewhat fuzzy and amorphous: do

[128] An analogous argument, drawing on a domestic law analogy, was made – if with some hesitation – also by Brownlie, *supra* note 3, 146.

[129] Franck and Rodley, *supra* note 17; Franck, 'Lessons from Kosovo', 93 *AJIL* (1999) 857; Franck, *supra* note 12, ch. 10; Franck, 'Interpretation and Change in the Law of Humanitarian Intervention', in J. Holzgrefe and R. Keohane (eds), *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* (2003) 204.

[130] Franck, 'Interpretation and Change', *supra* note 129, at 227, n. 80.

[131] Franck, *supra* note 12, at 184.

[132] *Ibid.*, at 185.

[133] S. Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (2002), at 226–227.

states in this jury act in an individual capacity or do they act collectively? This may seem irrelevant when considering the sanctioning – in Franck's understanding of this term – of the humanitarian state. But it becomes a crucial issue when the mitigation argument is looked at from the standpoint of the law of responsibility.

Franck's concept of 'sanctioning' does not involve the consequences of the law of state responsibility. Rather, this term denotes political consequences, such as condemnations and lawful retorsions, and enforcement action under Chapter VII of the UN Charter. These are certainly consequences of a state's wrongful act. But they do not exhaust the range of consequences that arise from wrongful acts across international law. Acting in mitigation, states may very well withhold political chastisement and even rule out enforcement action against the humanitarian state. Indeed, interventions perceived as humanitarian often obtain political support from other states and are rarely the object of UNSC enforcement action.[134] But mitigating these sanctions has no effect on the other legal consequences that arise from wrongful acts. Two broad categories of legal consequences arise from the wrongful act of the humanitarian state. First, within the law of responsibility, there are consequences for the wrongdoing state and consequences for all other states in the international community where there is a serious violation of a peremptory rule. Second, beyond the law of responsibility, there are consequences arising for the target state and consequences arising for all other states in the international community. In each case, it is not clear which consequences are to be mitigated and what mitigation might entail.

A *Effects of Mitigation within the Law of Responsibility*

With respect to the first set of consequences, the illegal force of the humanitarian state gives rise to consequences for the humanitarian state itself and for all other states of the international community. With respect to the humanitarian state, its illegal use of force will give rise to the normal consequences that the law of responsibility attaches to every wrongful act: the obligations of cessation and reparation.[135] These are the obligations that would be due by the humanitarian state towards the target state. The jury of states could not mitigate these obligations, as they are owed to the target state. Only the target state could waive these obligations.[136]

With respect to the obligations arising for all other states, the humanitarian state's violation of a (potentially) peremptory prohibition on the use of force would give rise to

[134] See, for example, the overview of reactions by states to the strikes led by the USA, the UK and France against three targets related to Syria's chemical weapons programme on 14 April 2018. Gurmendi Dunkelberg *et al.*, 'Mapping States' Reactions to the Syria Strikes of April 2018', *Just Security*, 22 April 2018, available at www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018/, and the follow-up by the same authors. Gurmendi Dunkelberg *et al.*, 'Mapping States' Reactions to the Syria Strikes of April 2018: A Comprehensive Guide', *Just Security*, 7 May 2018, available at www.justsecurity.org/55835/mapping-states-reactions-syria-strikes-april-2018-a-comprehensive-guide/. At least one of these three states, the UK, explicitly relied on humanitarian intervention as a justification for the strikes. See Prime Minister's Office, 'Syria Action: UK Government Legal Position', 14 April 2018, available at www.gov.uk/government/publications/syria-action-uk-government-legal-position/syria-action-uk-government-legal-position.

[135] ARSIWA, *supra* note 4, Arts 30, 31, quoted earlier.

[136] *Ibid.*, Art. 45(a).

additional consequences for all other states of the international community, as already noted. The obligations arising under Article 41 of ARSIWA are owed by all other states, but it is not clear to whom they are owed. Are they owed to each other state individually, to the target state or to the international community as a whole? Depending on the answer, the jury of states may or may not have the power legally to mitigate these consequences. Daniel Costelloe notes that they must be owed *erga omnes* to all other states and individually to the injured state.[137] To the extent that these obligations are owed to the injured state – in this case, the target state – then the jury of states does not have the power to mitigate them: this would be tantamount to a repudiation of their obligations towards the target state. To the extent that these obligations are owed to the international community of states as a whole, the jury of states would likewise not be in a position to mitigate them: they would be owed, once again, to a different legal person (the international community as a whole). In any event, even if they could mitigate the obligations owed by all other states, it is not clear in these circumstances what mitigation may involve. Could this mean foregoing the obligation of non-assistance, such that all other states could now aid and assist the humanitarian state? Or could this mean foregoing the obligation of non-recognition, such that all other states could now recognize the unlawful situation created by the humanitarian intervention?

B *Effects of Mitigation beyond the Law of Responsibility*

Beyond the law of responsibility, the unlawful use of force of the humanitarian state may give rise to additional consequences for the target state and for all other states in the international community. With respect to the target state, the humanitarian state's unlawful use of force may trigger the target state's right of self-defence, as discussed earlier. Once again, the jury of states are not the beneficiaries of this right, and, therefore, they could not mitigate against it. The target state would be entitled to use force in self-defence against the humanitarian state whenever the force used by the humanitarian state reached the threshold of an armed attack.

With respect to all other states, the humanitarian state's wrongful act could trigger the right of all other states in the international community to take countermeasures. Where the breach of international law concerns an *erga omnes* obligation, all other states in the international community are (arguably) entitled to take countermeasures against the wrongdoing state. These are the so-called third-party or collective countermeasures. If the humanitarian state's use of force is unlawful and violates an *erga omnes* obligation, as the obligation not to use force might be, then all other states in the international community may take countermeasures against it. To be sure, the legality of third-party countermeasures remains controversial. The text of ARSIWA itself does not take a position on this issue,[138] though the commentary to Article 54 is – at best – sceptical about the recognition of this right.[139] Subsequent analyses of the

[137] D. Costelloe, *Legal Consequences of Peremptory Norms in International Law* (2017), at 186–187.

[138] ARSIWA, *supra* note 4, Art. 54, is a savings clause.

[139] *Ibid.*, Commentary to Art. 54, para. 6 ('the current state of international law on countermeasures taken in the general or collective interest is uncertain. State practice is sparse and involves a limited number of States. At present, there appears to be no clearly recognized entitlement of States referred to in article 48 to take countermeasures in the collective interest').

practice of states have shown evidence of a considerable amount of practice, but this is rarely accompanied by *opinio juris*.[140] States, even when taking what may look like third-party countermeasures, do not justify the legality of their action on this basis. Assuming for the sake of argument that such countermeasures were possible, it is conceivable that the jury of states, who are the beneficiaries of the right to take third-party countermeasures, could choose not to exercise their right to take countermeasures or, even more strongly, waive this entitlement against the humanitarian state. The problem would nevertheless remain as to the power of the jury of states to exclude the right to take third-party countermeasures of all other states. Each member of the jury of states, of course, could forego their own right to take countermeasures. But can the jury of states do this on behalf of all other states, even those who disagree?

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The mitigation claim presents many of the same problems as the excuse claim. To be sure, it can preclude political condemnation, perhaps even UNSC action. But, from a legal standpoint, it leaves many issues unresolved. As it stands, the possibility to offer mitigation to the humanitarian state may only amount to the exclusion of the already dubious entitlement of all states to take collective countermeasures against it and, even then, potentially only patchily. But the argument for mitigation cannot exclude the humanitarian state's obligations of cessation and reparation towards the target state, the (potential) obligations arising for all other states of the international community from the breach of a peremptory rule and the target state's right to self-defence against the humanitarian state should its forcible action involve the gravity and scale necessary for the existence of an armed attack.

6 Conclusion

Given the uncertainties as to the existence of an entitlement to use force for humanitarian purposes in the primary rules of international law, scholars have turned to the law of responsibility in the search for a legal basis for the use of force for humanitarian purposes. These arguments can be distilled into three main claims: that forcible humanitarian intervention is justified, that the states using force for humanitarian purposes are excused or that these states must benefit from mitigating circumstances. In all three variants, the argument proceeds either from the defence of necessity, classified alternatively as a justification or an excuse, or from necessity-like reasoning, in the claim of mitigation. Each of these claims runs into obstacles: either within the law of responsibility (for example, the availability of justifications or excuses in respect of

[140] See, most recently, M. Dawidowicz, *Third-Party Countermeasures in International Law* (2017) (arguing that the *opinio juris* can be inferred from the practice, since this is a right conferring rule). For criticism of this argument, see Paddeu, 'Review of *Third-Party Countermeasures in International Law*. By Martin Dawidowicz', 77 *Cambridge Law Journal* (2018) 427; Lanovoy, 'Review of *Third-Party Countermeasures in International Law*. By Martin Dawidowicz', 113 *AJIL* (2019) 200.

breaches of peremptory rules and the reach of excuses to the consequences arising for all states from the breach of peremptory rules) or outside the law of responsibility (in particular, the availability of self-defence against an excused, but unjustified, actor). None is, therefore, ultimately successful. The law of state responsibility, as it stands at present, cannot provide a basis for the legality, or legitimacy, of humanitarian intervention.

Of course, the law of responsibility is not static, and it is subject to change: either in the practice of states or, potentially, if and when a treaty on state responsibility is negotiated. It seems unlikely that the law of responsibility could itself provide a satisfactory basis for humanitarian intervention. Even if the definition and scope of the plea of necessity were to change, so as to relax its requirements and include forcible humanitarian action, the problems posed by peremptory law and the UN Charter's exclusion, as a *lex specialis*, of the plea of necessity would remain. Likewise, even if the plea of necessity were cast as an excuse or taken as a basis of mitigation, the problems posed by the consequences for all other states of the breach of peremptory norms and the right of self-defence of the target state would remain. Given these difficulties, it seems that the permissibility of resort to force for humanitarian purposes must be found in the substantive rules of international law regulating the use of force by states. Humanitarian intervention, and the use of force more broadly, is a topic of such importance that its permissibility or impermissibility must be addressed directly by the primary or substantive rules of the international legal order and not, tangentially, by the rules governing the responsibility of states for internationally wrongful acts.