The Defence of Necessity as Customary International Law: The Fisheries Jurisdiction Case (Spain v. Canada) Re-examined

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Introduction

The question as to whether “the defence of necessity” may be invoked by a State as a ground for justifying its otherwise internationally wrongful act has long been in controversy. Quite a few eminent writers have been opposed to or sceptical about the defence of necessity. This is mainly because of the potential for its abuse as it being a pretext for wrongful conduct. Given the lack of enforceability of international legal norms, particularly within the boundaries of a sovereign State, this concern is understandable.

However, an objection can be raised against this opposition. It may sound paradoxical, but the defence of necessity is expected to operate to ensure the rule of law in case of emergency. Without the defence of necessity in international law, States in emergencies may, especially from the realist point of view,
choose inevitably to make light of or ignore international legal rules which prohibit dealing with appropriate situations. In such cases, there is a danger that the maxim "Necessitas non habet legem" will turn into reality. Given this concern, quite a few scholars believe that an international rule of necessity is needed to ensure that States remain willing to adhere to rules of international law, even when in the midst of an emergency.²

As Professor Ryuichi Ida postulated, the normativity of international law in its broader sense depends on its effectiveness, that is, the degree to which States actually comply with international law.³ He also argues that, for certain norms to be effective, compliance consciousness is extremely important. Combining these principles, Professor Ida would argue that a rule of necessity defence may actually contribute to the preservation of the purpose of international law, by incentivising States to comply, even during an emergency.

A recent and remarkable example of the development of the necessity defence is Article 25 of the Articles on State Responsibility adopted by the United Nations International Law Commission (ILC) in 2001.⁴ Article 25 states:

Art. 25 Necessity

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.

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² Sarah Cassella asserts as follows: '[L]a souplesse premise par l'état de nécessité constitue l'un des éléments essentiels rendant possible le fonctionnement normal du système juridique international. … Non seulement l'état de nécessité a une place en droit international, mais il y occupe même une place centrale. …L’absence de législateur en droit international rend indispensable le recours à des mécanismes intersubjectifs afin d’éviter un coût social excessif issu de l’application du droit. …[L]’effectivité des normes dépend de grande partie de mécanismes tels que l’état de nécessité, qui est adapté aux rapports intersubjectifs. …Bien que l’effectivité ne constitue pas une condition de validité de la norme—une certaine inef-fectivité étant présente dans tout ordre juridique—les risques d’inapplication du droit international sont particulièrement élevés'. Sarah Cassella, La nécessité en droit international: De l’état de nécessité aux situations de nécessité (Martinus Nijhoff Publishers, 2011), pp. 515–516.