
**ESCAPING STATE RESPONSIBILITY
UNDER INTERNATIONAL LAW DURING
THE COVID-19 PANDEMIC**

Naomi Hart and Mubarak Waseem

A. INTRODUCTION

1. The COVID-19 pandemic, and the levels of global State intervention it has elicited, are unprecedented. There is no doubt that severe disruption has been caused, and will continue to be caused, to individuals, businesses and States. It is likely that there has been action (or inaction) which conflicts with pre-existing obligations owed by States to others (whether States or foreign nationals). The question this note addresses is whether States will be able to raise any “defences” as a result of the pandemic.
2. This note addresses two avenues by which States may escape international responsibility for conduct that is *prima facie* incompatible with their international obligations. First, it explores the termination and suspension of treaties under the Vienna Convention on the Law of Treaties (“VCLT”) ([section B](#) below).¹ Secondly, it explores the possibilities of relying on circumstances which preclude the wrongfulness of a State’s acts (or omissions) under customary international law, as reflected in the Articles on the Responsibility of States for Internationally Wrongful Acts promulgated by the International Law Commission (“ILC”, and “ILC Articles”) ([section C](#) below).²

¹ On the customary status of the relevant rules in the VCLT, see the International Court of Justice (“ICJ”) in the *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1992) ICJ Rep. 7 (Judgment) (“*Gabčíkovo-Nagymaros*”) at [46]: “[The ICJ] has several times had occasion to hold that some of the rules laid down in [the VCLT] might be considered as a codification of existing customary law. The Court takes the view that in many respects this applies to the provisions of the [VCLT] concerning the termination and suspension of the operations of treaties, set forth in Articles 60 to 62”.

² On the customary status of the circumstances precluding wrongfulness identified in the ILC Articles, see International Law Commission, ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (2001) YBILC, vol II(2), 30 (“**ILC ARSIWA Commentary**”), 72 (which claims that the ILC Articles “set[] out the circumstances precluding wrongfulness presently recognized under general international law”).

B. THE TERMINATION AND SUSPENSION OF TREATIES UNDER THE VCLT

3. At the outset, it bears noting that Articles 54(a) and 57(a) of the VCLT recognise that the operation of a treaty may be terminated or suspended “[i]n conformity with the provisions of the treaty”. Individual treaties may have express terms for the suspension or termination of certain obligations on given grounds, such as an entitlement on the part of States parties to suspend or derogate from certain (or all) obligations under the treaty in order to promote public health. While this note focuses on terms of the VCLT applicable to all treaties, it is important to establish whether there are any specific suspension or termination clauses of individual treaties which may be applicable.
4. Ordinarily, the termination or suspension under the VCLT can come into effect only after three months, although the notification period may be shorter “in cases of special urgency” (Article 65(2)). The result is that Articles 61 and 62 cannot be used retrospectively to excuse the breach of a treaty obligation prior to the expiry of the notification period.
5. This section assesses the potential applicability to the COVID-19 pandemic of supervening impossibility of performance (**sub-section 1** below) and fundamental change of circumstances (**sub-section 2** below). Both provisions are strictly regulated and States must establish exceptional grounds in order to rely on either of them.

(1) Article 61 – Supervening impossibility of performance

6. Article 61 VCLT provides:

Supervening impossibility of performance

1. *A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.*
2. *Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.*

7. Given the narrow language used, it is perhaps unsurprising that Article 61 has proven “*extraordinarily difficult for States to invoke*”.³ If, as it is presently hoped, the actions required to deal with the COVID-19 pandemic are temporary, it seems more likely that a treaty will be suspended rather than terminated. However, in light of the present uncertainty, it is also conceivable that the pandemic will prevent States from performing their treaty obligations for a sufficiently prolonged period that it may give rise to termination pursuant to the first sentence of Article 61(1).
8. The invocation of Article 61(1) as a ground for suspending the operation of treaties depends on two cumulative criteria. First, the treaty must be ‘impossible to perform’. Secondly, the impossibility must result from the temporary disappearance or destruction of an object indispensable for the execution of the treaty.⁴ Both of these criteria are exacting, and impose thresholds which will be difficult to meet even in the present challenging circumstances.
9. As to the first criterion, the difficulty in defining “*impossibility*” is well recognised.⁵ It is possible to imagine various grounds on which a State may claim that the COVID-19 pandemic has made it impossible for it to satisfy a treaty obligation. However, “*impossibility*” is a high threshold. For example:
 - a. That performance of a treaty obligation has become more burdensome will not be sufficient.⁶
 - b. Financial difficulties, which are a likely consequence of the COVID-19 pandemic, do not rise to the threshold of impossibility. In *Gabčíkovo-Nagymaros* the ICJ discussed (at [102]) the negotiating history of Article 61 VCLT and the specific exclusion from its scope of financial difficulties.

³ Malgosia Fitzmaurice, “Exceptional Circumstances and Treaty Commitments” in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (2012 OUP) (“**M. Fitzmaurice**”), p.606.

⁴ Despite the fact that the text does not make clear that the second sentence is also subject to the ‘disappearance or destruction’ proviso, the same is confirmed by the ILC’s commentaries to its 1966 draft of what was then Article 58: ‘Draft Articles on the Law of Treaties with commentaries (1966) YBILC, vol II, 187 (“**ILC VCLT Commentary**”), p.255.

⁵ M. Fitzmaurice, pp.607–609.

⁶ Gerald Fitzmaurice, ‘Second Report on the Law of Treaties’ (1957) YBILC, vol II, 50, §98: “*impossibility in the present context does not mean mere difficulty, or metaphorical impossibility*”.

Although this comment was made in the context of the first sentence of Article 61(1) (termination of a treaty), the ICJ's comments make it clear that financial difficulties are also excluded in relation to suspension of a treaty.⁷

10. One can envisage situations arising as a direct result of COVID-19 where a State claims that it is impossible to comply with its treaty obligations for reasons other than financial burden. For example, as a result of measures taken to prevent contagion, the State may have directed the closure of a business or restricted international travel, for example, by preventing a foreign-registered civil aircraft to land within its territory, or, due to a lack of non-essential workers either due to sickness or social distancing measures, is unable to provide full protection and security to a foreign investor or process applications for refugee status. As noted above, given that "impossibility" is not defined, whether this first criterion is satisfied will depend on the obligation in question and the factual basis for the asserted impossibility.
11. The second criterion (that the impossibility results from the temporary disappearance or destruction of an object indispensable for the execution of the treaty) is highly restrictive. Although it is clear that Article 61(1) captures the disappearance of a physical object (the ILC VCLT Commentary refers to the submergence of an island and the drying up of a river as examples), "*object*" may also cover a legal regime which disappears or is destroyed. In *Gabčíkovo-Nagymaros*, the ICJ refrained from deciding the point, noting that, even if an "*object*" for the purposes of Article 61(1) could include a legal regime, the regime in this case had not ceased to exist because the relevant treaty provided a mechanism for renegotiation and readjustment (at [103]).

(2) Article 62 – Fundamental change of circumstances

12. Article 62 VCLT provides:

Fundamental change of circumstances

⁷ At [102]: "During the conference, a proposal was made to extend the scope of the article by including in it cases such as the impossibility to make certain payments because of serious financial difficulties [...] the participating States were not prepared to consider such situations to be a ground for terminating or suspending a treaty, and preferred to limit themselves to a narrower concept" (emphasis added). As an alternative, States may wish to rely on circumstances precluding wrongfulness, which the ICJ recognised at [102] may continue to operate where supervening impossibility does not (see [section C](#) below).

1. *A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:*
 - (a) *the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and*
 - (b) *The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.*
 2. *A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:*
 - (a) *if the treaty establishes a boundary; or*
 - (b) *if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any international obligation owed to any other party to the treaty.*
 3. *If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.*
13. The text of Article 62, the negative formulation of the *chapeau* (“*may not be invoked [...] unless*”) and the consequences of the successful invocation of a fundamental change of circumstances (i.e. termination of or withdrawal from a treaty) demonstrate the high hurdle that must be cleared before a treaty can be invalidated on the ground of a fundamental change of circumstances. In *Gabčíkovo-Nagymaros*, the ICJ stated that “*the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases*” ([104]).
14. The treaty text outlines a number of cumulative requirements that must be met before a plea of fundamental change of circumstances will succeed. In practice, the most important of those will be whether the continued existence of the circumstances constituted an essential basis of consent, and whether the effect of the change is radically to transform the obligations still to be performed.⁸

Essential basis of consent

15. The term “*essential basis of the [parties’] consent*” has been equated with the object and purpose of the treaty in question.⁹ In *Gabčíkovo-Nagymaros*, Hungary argued that

⁸ On the issue of (un)foreseeability, it is worth noting that States do have contingency plans for a pandemic and so there may be an argument as to whether a global pandemic could be said to be entirely unforeseen.

⁹ Wolff Heintschel von Heinegg, ‘Treaties, Fundamental Change of Circumstances’, in Rüdiger Wolfrum, *Max Planck Encyclopaedia of Public International Law* (“**Heinegg**”) (2006), §38, suggests that it is “*necessary to*

it was entitled to terminate a 1977 treaty for fundamental change of circumstances, including “*profound changes of a political nature*”. The ICJ rejected the argument (at [104]):

The prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty. But the Court will recall that the treaty provided for a joint investment programme for the production of energy, the control of floods and the improvement of navigation on the Danube. In the Court’s view, the prevalent political conditions were thus not so closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties [...].

16. In the *Racke* case,¹⁰ the Court of Justice of the European Union (“**CJEU**”) considered both the preambular clauses and the articles of a treaty which expressly stated its object and purpose in order to determine the essential basis of consent ([54]–[55]). In that case, the CJEU determined the legality of an EC Regulation providing for the suspension of trade concessions provided for in a Cooperation Agreement between the EU and the Socialist Federal Republic of Yugoslavia after the outbreak of hostilities. The CJEU determined that the EU was able to suspend the Cooperation Agreement as a result of the outbreak of hostilities.
17. Though this is a high threshold to cross, it is not impossible to imagine such treaties where circumstances changed by the pandemic were an essential basis of the parties’ consent to a treaty. For example, a treaty concerning cooperation in the field of healthcare could conceivably be said to have the safe transmission of medical personnel or equipment across borders as a circumstance fundamental to the parties’ consent. A treaty concerning free movement of persons between signatory States may similarly have been premised on each State’s nationals not posing a health risk to the other State’s population, or the availability of a sufficient labour force to carry out basic border checks—both of which may be altered by the pandemic.

Radical transformation of the extent of the obligations

establish a close link between those [unchanged] circumstances on the one hand and the object and purpose of the treaty on the other hand”. Whilst not using the phrase ‘object and purpose’, Malcolm N Shaw and Caroline Fournet state that the change must relate to “*a factual situation or to a state of things which existed at the time the treaty was concluded and which provided to be a decisive factor prompting the parties to enter the treaty*”: ‘Article 62’, in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties* (2011 OUP) (“**Shaw and Fournet**”), §27.

¹⁰ *A Racke GmbH & Company v Hauptzollamt Mainz*, Case C-162/96, [1998] ECR I-3655 (Judgment) (“**Racke**”).

18. The effect of the change of circumstances must be “*radically to transform the extent of the obligations still to be performed*”. Unlike supervening impossibility of performance, a ‘radical transformation’ of the obligations need not render them impossible to perform. As the ICJ held in the *Fisheries Jurisdiction* case (at [43]):

The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken.

19. The ICJ’s judgment in the *Fisheries Jurisdiction* case was cited in *Racke*, where the CJEU considered that there had been a fundamental change of circumstances notwithstanding the fact that “*a certain volume of trade had to continue with Yugoslavia and [...] the Community could have continued to grant tariff concessions*” ([57]). The CJEU continued that: “*customary international law [...] does not require an impossibility to perform obligations*” and that there was “*no point in continuing to grant preferences, with a view to stimulating trade, in circumstances where Yugoslavia was breaking up*” ([57]).
20. Thus, in contrast to Article 61, the doctrine of fundamental change of circumstances does not require impossibility. However, it does require the State to show that as a result of COVID-19, performance was so burdensome that compliance had become something essentially different from that to which it had originally agreed.

C. CIRCUMSTANCES PRECLUDING WRONGFULNESS UNDER CUSTOMARY INTERNATIONAL LAW

21. Under the customary international legal rules of State responsibility, a State is responsible for every breach of an international obligation.¹¹ However, the ILC Articles identify six circumstances which preclude the wrongfulness of an act or omission. These consequences are without prejudice to a State’s duty to resume compliance with the primary obligation “*if and to the extent that the circumstance precluding wrongfulness no longer exists*” (Article 27(a)), a restriction that may become pertinent as States grapple with how long the pandemic continues to justify conduct incompatible with international obligations.

¹¹ ILC Articles, Article 1.

22. There are three potentially relevant circumstances precluding wrongfulness: *force majeure*, contained in Article 23 of the ILC Articles ([sub-section 1](#) below); distress, contained in Article 24 of the ILC Articles ([sub-section 2](#) below); and necessity, contained in Article 25 of the ILC Articles ([sub-section 3](#) below).

(1) *Force majeure*

23. Article 23(1) of the ILC Articles states:

1. *The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the act is due to force majeure, that is the occurrence of an irresistible force or unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation.*

24. The ILC's commentary makes clear that Article 23 performs a different function to Article 61 of the VCLT (dealing with supervening impossibility of performance: see [above](#)). It states that while the same facts may be relevant to satisfying both tests, "*the two are distinct*" in that:

Force majeure justifies non-performance of the obligation for so long as the circumstance exists; supervening impossibility justifies the termination of the treaty or its suspension in accordance with the conditions laid down in article 61. The former operates in respect of the particular obligation, the latter with respect to the treaty which is the source of that obligation. Just as the scope of application of the two doctrines is different, so is their mode of application. Force majeure excuses non-performance for the time being, but a treaty is not automatically terminated by supervening impossibility: at least one of the parties must decide to terminate it.¹²

25. According to Article 23, the wrongfulness of an act will be precluded if: (i) there is an "*occurrence of an irresistible force or unforeseen event*"; (ii) that force or event is "*beyond the control of the State*"; and (iii) that force or event makes it "*materially impossible in the circumstances to perform the obligation*" in question.

26. As to the first criterion, the State would either have to show that the COVID-19 pandemic is either an "*irresistible force*" or "*unforeseen event*".

27. Given the likely enduring nature of the pandemic, "*irresistible force*" is most likely to be apt. The ILC has explained that a force will be "*irresistible*" if it poses "*a constraint which the State was unable to avoid or oppose by its own means*" and if "*the State*

¹² ILC ARSIWA Commentary, p.71.

concerned has no real possibility of escaping its effects".¹³ The prolific spread of the novel coronavirus across State borders would provide a sound starting point for raising such an argument.

28. Alternatively, it might be argued that the COVID-19 pandemic is an unforeseen event. This raises a timing issue; i.e. was the relevant treaty obligation assumed prior to the COVID-19 pandemic becoming an "*unforeseen event*"? Where the obligation was assumed prior to the initial cases of the novel coronavirus were first reported in China in December 2019, it will obviously be easier to show that the COVID-19 pandemic was an unforeseen event. Thereafter, it becomes harder to establish when it was first appreciated that a global pandemic is likely and geographical location of the State may have some bearing on this question. However, the WHO's declaration that the outbreak constituted a Public Health Emergency of International Concern on 30 January 2020 is likely to be a key date.
29. The second criterion is that the force or event must have been "*beyond the control of the State*" seeking to evade international responsibility. Ultimately, given the speed and geographical transmission of COVID-19, there is a good basis for arguing that it is a force or event beyond the control of State. While a counter-party may seek to raise arguments about the State's preparedness and ability to control the pandemic, the reality is that those States which have been most effective to date in controlling the pandemic within their State borders have adopted some of the most restrictive measures.
30. The third criterion is that the force or event must have made it "*materially impossible in the circumstances to perform the obligation*" in question. The ILC has indicated that *force majeure* can arise only where the State's conduct is "*involuntary or at least involves no element of free choice*", and is not made out merely because "*performance of an obligation has become more difficult*".¹⁴ Although the ILC has stated that "[t]he degree of difficulty associated with *force majeure* as a circumstance precluding wrongfulness, though considerable, is less than is required by article 61 for termination

¹³ ILC ARSIWA Commentary, p.76.

¹⁴ ILC ARSIWA Commentary, p.76.

of a treaty on grounds of supervening impossibility”,¹⁵ these two defences have in common that the legitimacy of their invocation will depend heavily on the character of the obligation in question and the facts supporting the invocation. Action or inaction required in order to safeguard public health as a result of the COVID-19 pandemic could well reach this threshold because it arises not just out of, for example, a desire to avoid an increased financial burden, but a public need. For example, a State which defaulted on an obligation to, say, provide free medical treatment to another State’s nationals under a reciprocal healthcare arrangement may be on firmer ground in escaping responsibility for failing to provide treatments unrelated to COVID-19 if it could establish that its hospitals were unable to administer the treatment in question due to the unprecedented demands of the pandemic. However, more difficult questions may arise in relation to, for example, a State accused of failing to provide a stable business environment as required by the fair and equitable treatment standard in a bilateral investment treaty. While it does not appear to be disputed that social distancing is required in order to manage the COVID-19 pandemic, there are likely to be difficult policy questions emerging as to what businesses are mandated closed by government legislation or otherwise. In particular, States are now starting to consider how to relax restrictions and the order and speed in which this is done. This is likely to be an ongoing concern, not least because the indications are that until a vaccine can be produced and mass manufactured there may need to be some form of social restrictions. It may be that some of these measures could be deemed to be voluntary and fall short of the standard for *force majeure*.

(2) Distress

31. Article 24(1) of the ILC Articles states:

1. *The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author’s life or the lives of other persons entrusted to the author’s care.*

32. Paragraph 2(b) provides an exception, stating that paragraph 1 does not apply if “*the act in question is likely to create a comparable or greater peril*”.

¹⁵ ILC ARSIWA Commentary, p.77.

33. For these purposes, the relevant “*authors*” are government officials who are not primarily acting to save their own lives but rather the lives of those within its borders or under its jurisdiction (although there have been plenty of [salutary reminders](#) that even national leaders are susceptible to COVID-19). Accordingly, the elements of distress are that: (i) the relevant persons (namely, a State’s population or part thereof) has been “*entrusted to the author’s care*”; (ii) the author must have acted to save the lives of those persons; (iii) there must have been no other reasonable way for the author to save those lives; and (iv) the author’s conduct must not have “*create[d] a comparable or greater peril*”.
34. While this ground of defence appears superficially attractive, as to the first requirement, the ILC has stated that there must exist “*a special relationship between the State organ or agent and the persons in danger*”.¹⁶ Most cases of distress have involved aircraft or ships entering a foreign State’s territory in a situation of peril.¹⁷ In that context, the special relationship between the lives of passengers and crew and the captain of a vessel or aircraft is easily established because the lives of the former depend on the latter. This suggests that a State may encounter difficulties in establishing that it has a special relationship with its general population. It is perhaps for this reason that the ILC has stated that “*more general cases of emergency*” do not satisfy the test for a “*special relationship*” and instead should be dealt with under the doctrine of necessity (see **subsection 3** below).¹⁸
35. It may be possible to draw a distinction between the general population and specific categories of the population who are specifically protected persons for the purposes of COVID-19; i.e. those over 70 and/or who have relevant underlying medical conditions. However, this is an untested point.
36. The second requirement, according to the text of Article 24(1), is that the State must have acted to save the lives of the relevant persons. In the context of the COVID-19 pandemic, this criterion would appear to be easily satisfied, whether or not a threat to

¹⁶ ILC ARSIWA Commentary, p.80.

¹⁷ ILC ARSIWA Commentary, p.78.

¹⁸ ILC ARSIWA Commentary, p.80.

life is strictly required. In the *Rainbow Warrior* arbitration, the tribunal suggested that distress may be engaged whenever there is “*a case of extreme urgency involving elementary humanitarian considerations*”.¹⁹ The ILC has expressed its view that the doctrine is limited to when there is a threat to human life but has further stated that “*there should [...] be a certain degree of flexibility in the assessment of the conditions of distress*”.²⁰

37. The third requirement is that there must have been “*no other reasonable way*” for the State to save lives. According to the ILC, this criterion “*seeks to strike a balance between the desire to provide some flexibility regarding the choices of action by the agent in saving lives and the need to confine the scope of the plea having regard to its exceptional character*”.²¹ Whether any individual measure satisfied this criterion would need to be assessed against the relevant factual matrix, but it is clear that the overriding object and consequence of the State’s conduct must have been to preserve human life.
38. The fourth requirement is that the conduct in question must not have “*create[d] a comparable or greater peril*” than that averted by the State’s non-compliant conduct. The ILC has explained that these words “*must be assessed in the context of the overall purpose of saving lives*” and that the defence cannot successfully be invoked if the conduct “*endangers more lives than it saves*”.²² Again, this criterion could only be assessed against the full factual background of a given impugned act. One example that might fall foul of this requirement is [some States’ decisions](#) to refuse cruise ships entry to their ports in order to prevent potentially virus-ridden passengers and crew members from transmitting the disease onshore. Depending on the precise circumstances, a State’s conduct in protecting the lives of those onshore (especially if the extra strain on the State’s quarantine and health systems by admitting a ship would be marginal) may not outweigh the increased risk to those onboard who are unable to access proper

¹⁹ *Case concerning the difference between New Zealand and France concerning the interpretation or application of two agreements concluded on 9 July 1986 between the two States and which related to the problems arising from the Rainbow Warrior affair* (1990) 20 RIAA 215, [79].

²⁰ ILC ARSIWA Commentary, pp.79–80.

²¹ ILC ARSIWA Commentary, p.80.

²² ILC ARSIWA Commentary, p.80.

medical care, especially if the infection of crew members jeopardises the safe operation of the ship.

(3) Necessity

39. Article 25(1) of the ILC Articles casts the defence of necessity in negative terms, stating:

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 obligations exists, or of the international community as a whole.*

40. The ILC has set out the “*exceptional*” character of the plea of necessity as follows:

Unlike force majeure (art. 23), it does not involve conduct which is involuntary or coerced. Unlike distress (art. 24), necessity consists not in danger to the lives of individuals in the charge of a State official but in a grave danger either to the essential interests of the State or of the international community as a whole. It arises where there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other. These special features mean that necessity will only rarely be available to excuse non-performance of an obligation and that it is subject to strict limitations to safeguard against possible abuse.²³

41. The four requirements of the defence of necessity are that: (i) the State in question must face a threat to an “*essential interest*” (although it is not specified that the interest must be of the State invoking the defence); (ii) that threat must amount to a “*grave and imminent peril*” to the interest; (iii) the State has acted in “*the only way*” possible to safeguard the interest; and (iv) the act taken in purported necessity must not seriously impair an essential interest of another State, other States or the international community as a whole.

42. As for the first requirement, the ILC’s commentary makes clear that the plea of necessity is available to protect interests including “*preserving the very existence of the State and its people in time of public emergency, or ensuring the safety of a civilian*

²³ ILC ARSIWA Commentary, p.80.

population”.²⁴ It appears likely that containing or mitigating the spread of the COVID-19 pandemic would be capable of meeting this description.

43. The second requirement is the existence of a “grave and imminent peril”. The ILC has stressed that this requirement must be “objectively established”,²⁵ and in *Gabčíkovo-Nagymaros* the ICJ similarly held that the State concerned “is not the sole judge” of whether this criterion has been met.²⁶ Given conflicting scientific and medical advice about the gravity of the consequences of the COVID-19 pandemic, it may be considered that there is not a sufficiently objective basis for claiming a “grave and imminent peril”. However, the ILC has recognised that “there will often be issues of scientific uncertainty and different views may be taken by informed experts on whether there is a peril [and] how grave or imminent it is” and that “a measure of uncertainty about the future does not necessarily disqualify a State from invoking necessity, if the peril is clearly established on the basis of the evidence reasonably available at the time”.²⁷
44. The third requirement—that the conduct in question was “the only way” to safeguard the State’s essential interest—may well pose a significant hurdle for a State seeking to plead necessity, as another State (or other actor) may well point to other steps a State could have taken to contain the virus without defaulting on a particular obligation. This requirement is subject to the same qualifications regarding scientific uncertainty as the second criterion,²⁸ but clearly a State’s claim to have adopted the only possible response to the pandemic will be subject to close scrutiny.
45. The final requirement makes clear that “the interest relied on [by the State pleading necessity] must outweigh all other considerations, not merely from the point of view of the acting State but on a reasonable assessment of the competing interests, whether these are individual or collective”.²⁹ Like the other requirements, any assessment of this criterion can be carried out only in light of all relevant factual circumstances. At a

²⁴ ILC ARSIWA Commentary, p.83.

²⁵ ILC ARSIWA Commentary, p.83.

²⁶ *Gabčíkovo-Nagymaros*, [51].

²⁷ ILC ARSIWA Commentary, p.83.

²⁸ ILC ARSIWA Commentary, p.83.

²⁹ ILC ARSIWA Commentary, p.84.

high level of generality, an act that will significantly protect a State's population from the pandemic while posing only trivial inconvenience for other States is more likely to pass muster than a measure with only negligible public health benefits for the State invoking necessity but which, for example, imposes a significant humanitarian burden on other States.

D. CONCLUSION

46. The rules of customary international law and those otherwise contained in the VCLT canvassed in this note do not enable States to escape international responsibility for non-compliance with their legal obligations lightly. Each of the possible defences explored in this note impose high thresholds. However, in the unprecedented circumstances presented by the COVID-19 pandemic, it is foreseeable that there will be exceptional justifications for States' failure to abide by their obligations which will require rigorous scrutiny based on the relevant factual circumstances and their international legal background.

NAOMI HART
MUBARAK WASEEM
ESSEX COURT CHAMBERS

22 April 2020

The information and any commentary contained in this article is provided free of charge for information purposes only and is drafted by an individual member of Essex Court Chambers. No responsibility for the accuracy and correctness of such contents, or for any consequences of anyone relying upon any of it, is assumed, and it may not reflect the views of other members of chambers. If you have a legal dispute or matter, you are strongly advised to obtain advice about your specific case or matter.