



ANU LAW STUDENTS' SOCIETY

LAWS2264

Advanced International Law 2nd Semester 2009

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Question 2

(Mark = 70)

FORCE MAJEURE

Force majeure, distress and necessity are all circumstances precluding wrongfulness for an otherwise internationally wrongful act. These CPWs render the act 'intrinsically lawful'. They are codified in the ILC's articles on State responsibility and sometimes supplemented by or in conflict with case law.

Force majeure is described in ILC article 23 as an occurrence of 'irresistible force or an unforeseen event, beyond the control of the State, making it materially impossible to perform the obligation'. [✓] [*stipulate that fortuitous event = mistake of fact*] The element of material impossibility is a very high standard that requires no element of choice whatsoever. Further, force majeure will not preclude wrongfulness where the invoking State has contributed to the event or assumed the risk of it occurring. Due to this high threshold, the only times that this will be made out is in situations of emergency such as shipwreck or plane crash. Another example is faulty navigational machinery resulting in the trespassing into another sovereign state. Arguably in this example the State has contributed to the event occurring by failing to effectively maintain its machinery. [✓]

Despite this incredibly high threshold, the existence of force majeure as a CPW is necessary. This is comparable to the exception under many domestic legal systems of 'an act of God'. Although rare, States will sometimes find themselves in situations of material impossibility in which they should not be held liable for breaches of their international obligations.

DISTRESS

The CPW of 'distress' has been slightly more controversial at the international level. Article 24 of the ILC articles characterizes distress as relative impossibility where there is no other way of saving life. [✓] This is not applicable if the distress is due to the conduct of the invoking State or the action is likely to cause comparable or greater peril, objectively discernable.

Although this is a situation of relative impossibility, implying some form of choice, whether to save one's life or die is only a 'choice' in theory. The ILC knew that they were creating a high threshold in this case to exclude States' avoiding their international responsibilities for trivial reasons. An example of this is the Rainbow Warrior Arbitration.

The Rainbow Warrior Arbitration involved the apprehension of two French agents who had bombed a Greenpeace vessel in NZ. An agreement had been struck between France and NZ to detain the French agents on an island. France claimed 'distress' as an excuse for sending home the male, who was sick, and the female, who was pregnant. The tribunal in this case allowed for the argument that the sick man was a sufficient level of distress to allow France to avoid its international responsibilities. Further, the tribunal failed to recognise the temporary

nature of all CPWs. They did not address the fact that the man should be sent back to the island once he felt better.

If any respect is to be maintained for international law and its obligations therein, the Rainbow Warrior Arbitration cannot be applied as good law. France managed to avoid a solid international obligation using what amounted to a weak excuse. The ILC articles acknowledge this and uphold a much higher threshold.

NECESSITY

The CPW of necessity holds an even more contentious position in the international plane. It is a dangerous notion that States could plead necessity in order to breach obligations and for this reason the legal rule has been very tightly confined.

Necessity 'may not be invoked unless' the State is faced with a grave and imminent peril' threatening an 'essential interest' and the act does not seriously impair the essential interest of other States (Article 23). [✓]

Essentially, this rule allows for trivial breaches of international obligations to safeguard essential national interests. This has been recognised as customary international law in many cases (Gabcikovo, Wall OPT, LG &E). However, it has never effectively been applied to a situation. [✓]

The strict requirements of a grave and imminent peril, the act being the sole means by which to safeguard the interest, the State not having contributed to the peril and proportionality of the response have resulted in an almost unworkable rule. [✓]

In Gabcikovo suspending the treaty was not the sole means by which ecological damage could be averted and Hungary had contributed to the problem. [✓] Similarly, necessity could not be used to avert payment of debt in the Argentinian financial crisis because this was not the sole means and Argentina had contributed. [✓] The Wall in the OPT AO came to a similar conclusion.

Perhaps the fact that necessity has never been made out in international law indicates that it is not a useful rule. The claim of necessity as a legal rule is merely trying to cloak an action in legality that is essentially unlawful. States, when protecting a national interest, should act to protect themselves within the law as far as possible. Failing this, States should simply admit that they are breaking the law for a purpose that they feel is necessary and take responsibility for this at an international level. [✓]

Political necessity has been invoked as an excuse throughout the last century for many arguably illegal acts. The invasion of Afghanistan by the US in 2001 was the US's response to an incredible shock and attack on its sovereignty. [✓] The US felt a political and moral imperative to retaliate and did so. Rather than attempting to cloak this action in legality as self-defence or necessity, we should recognise the act for what it is. [✓] Perhaps the fact that many States rallied to the US' position indicates that this is what the international community wants.

In summary, the CPWs discussed above are legal definitions of reasons why an act can be intrinsically lawful. While useful to have a definition and a body of law in this area, the CPWs

are not always workable or useful. Perhaps, rather than characterising acts as 'intrinsically lawful', States should accept that some acts are unlawful and accept the consequences. [v]