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INTERNATIONAL LAW AND PRACTICE

Stability and Change in Times of Fragmentation: The Limits of *Pacta Sunt Servanda* Revisited

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Abstract

Stability versus change is one of the fundamental debates of the law of treaties. The limits of *pacta sunt servanda* – under which conditions a state may derogate from treaty obligations when circumstances change – appears as a constant throughout the history of international law. This article examines the limits of *pacta sunt servanda* in times of fragmentation. It first discusses the mechanisms of general international law – supervening impossibility of performance and fundamental change of circumstances (Articles 61 and 62 VCLT) in the law of treaties and *force majeure* and the state of necessity (Articles 23 and 25 of the ILC Articles on State Responsibility) in the law of state responsibility. It is argued that they provide only insufficient means to accommodate change. Against that background, derogation is examined in specific treaty regimes, including international human rights law, the law of the sea, and international investment law. Treaty-based termination/withdrawal clauses and emergency exceptions are analysed accordingly. Especially the latter are formulated in a regime-specific way, adapting derogation from treaty obligations to the requirements of the respective treaty regimes. On the basis of an empirical analysis of relevant state practice it is argued that this regime-specificity – a sign of fragmentation – is especially important since there is an increased need for temporary derogation in contemporary international law.

Key words

fragmentation; law of treaties; necessity plea; *rebus sic stantibus*/fundamental change of circumstances; treaty-based emergency exceptions

1. Introduction

The debate on stability and change – or the limits of *pacta sunt servanda* – has marked the history of international law. The question under which conditions a state may derogate from treaty obligations in case of changed circumstances seems a constant.[1] It is exacerbated by the inherent characteristic of treaties to 'freeze' law at

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1 See, e.g., the ILC's 2008 inclusion of 'treaties over time' in its programme of work. The General Assembly took note of the decision in Resolution 63/123 of 11 December 2008 (UN Doc. A/RES/63/123 (2008)).

the moment of adoption, thus fixing it at a certain point in time.[2] This distinguishes treaties from international customary law, which – based on state practice and *opinio juris* – follows reality, in Dupuy's words, in degrees of mimicry.[3] Contrary to the latter, treaties are in permanent tension with the passing of time and changing circumstances.

Stability and change have been discussed at different times with varying focus. The most intensive debate surrounding these structural elements of the law of treaties seems to have taken place in the interwar period, in the context of peaceful change: Article 19 of the Covenant of the League of Nations adopted an institutionalized solution, conferring the competence to the Assembly of the League of Nations to suggest treaties that have become inapplicable for revision when these endangered the peace of the world. After its failure,[4] the mechanisms developed after 1945 focused rather on action taken by the treaty partner(s). Articles 61 and 62 of the Vienna Convention on the Law of Treaties (VCLT) respectively allow for treaty termination or suspension in cases of supervening impossibility of performance and fundamental changes of circumstances. Recently, the incorporated *force majeure* defence and the 'legalization' of the necessity defence in the work of the International Law Commission (ILC) on the 2001 Articles on State Responsibility[5] (ILC Articles; Articles 23 and 25) have provided for (temporary) derogation from treaty obligations in extraordinary situations. Further possibilities to react to subsequent changes are exit clauses and emergency exceptions as enshrined in specific treaty regimes.

The variety of options to derogate from treaty obligations calls for closer scrutiny. This in particular in times of fragmentation, where the 'rise of specialized systems' has also been regarded 'as an example of international law's capacity to adapt to the increasingly complex transnational problems in several functional areas'.[6] Are the mechanisms of general international law still sufficient and adequate to provide for flexibility without endangering treaty stability? Have – and if so how – treaty-based

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2 See, e.g., G. Hafner, Panel 'Große Kodifikationen – Eingefrorenes Recht oder weiterhin tauglich?', in G. Nolte and P. Hilpold (eds.), *Auslandsinvestitionen – Entwicklung großer Kodifikationen – Fragmentierung des Völkerrechts – Status des Kosovo: Beiträge zum 31. Österreichischen Völkerrechtstag 2006 in München* (2008), 94.

3 P. M. Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy', in E. Cannizzaro (ed.), *The Law of Treaties beyond the Vienna Convention* (2011), 123 at 124.

4 Böhmert refers to three potential cases of application out of which only one materialized. V. Böhmert, *Der Art. 19 der Völkerbundsatzung* (1934), at 232 et seq. See also H. Owada, 'Peaceful Change', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (last updated 2007), available online at www.mpepil.com, at paras. 8 et seq.

5 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the ILC in its 53rd Session (2001), and submitted to the General Assembly as a part of the Commission's report covering the work of that Session, UN Doc. A/56/10 (2001), UN Doc. A/RES/56/83 (2001) (hereinafter ILC Articles). Arts. 23 and 25 of the ILC Articles are generally considered as general principle of law and as codification of customary international law respectively. (See *infra* notes 51 and 42.)

6 T. Gazzini, W. G. Werner, and I. F. Dekker, 'Necessity across International Law: Introduction', (2010) 41 NYBIL 3, at 5. See also the Study Group on Fragmentation under the chairmanship of Koskenniemi: 'New types of specialized law do not emerge accidentally but seek to respond to new technical and functional requirements. . . . "Trade law" develops as an instrument to regulate international economic relations. "Human rights law" aims to protect the interests of individuals . . . Each rule-complex or "regime" comes with its own principles, its own form of expertise and its own "ethos" . . . In order for the new law to be efficient, it often includes new types of treaty clauses or practices that may not be compatible with old general law'. M. Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006), at 13).

termination/withdrawal provisions and emergency exceptions changed in times of fragmentation? And does state practice reveal at all a need for permanent as compared to temporary derogation when circumstances change?

Doubtless, flexibility and non-performance may be warranted in certain situations by considerations of justice towards the treaty party which has been struck by change, in the interest of a treaty's legitimacy and the prevention of breach. Still, derogation always has to be balanced against the requirement of treaty stability and the *pacta sunt servanda* rule. Any non-performance is thus to be kept to the strict minimum; it has to allow for legal certainty and predictability and as far as possible protect the legitimate expectations of the treaty partners (*Vertrauensschutz*). The focus on treaty stability likewise implies that the changes have to amount to a certain degree of seriousness for derogation to be permissible. These considerations will provide the analytical framework of the following investigation on stability and change in times of fragmentation.

At the outset, treaties and changed circumstances are discussed from the perspective of general international law: section 2 delineates the contours of fundamental change of circumstances and supervening impossibility of performance (Articles 62 and 61 VCLT) as the *pacta sunt servanda* rule's main antagonists under the law of treaties. Section 3 analyses the necessity defence and *force majeure* (Articles 25 and 23 of the ILC Articles) as possible mechanisms under the law of state responsibility. It is argued that general international law provides only insufficient means to accommodate change in times of fragmentation. Against that background, derogation is dealt with in selected treaty regimes, namely in international human rights law, the law of the sea, international economic law and the international law of investment: section 4 examines treaty-specific termination/withdrawal clauses, while section 5 focuses on temporary non-performance and the respective treaties' emergency exceptions. It is argued that especially the latter depart from general international law, allowing for a 'system-adequate' derogation in line with the requirements of the respective regime. This is important since there is an increased need for temporary non-performance in today's international law of co-operation.[7] Section 6 concludes.

2. Mechanisms of the general law of treaties to accommodate change

The general law of treaties provides for two main 'exit' options when circumstances change. While Article 62 VCLT (fundamental change of circumstances) is the 'classic' solution in such cases, exceptionally, treaty parties may also rely on supervening impossibility of performance (Article 61 VCLT) to leave a treaty in cases of change.[8]

7 As to the evolution of international law from a law of coexistence and co-ordination to a law of co-operation see generally W. Friedman, *The Changing Structure of International Law* (1964). As to the changing legal structure of international treaties see also J. H. H. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', (2004) 64 ZaöRV 547; C. Tietje, 'The Changing Legal Structure of International Treaties as an Aspect of an Emerging Global Governance Architecture', (1999) 42 GYBIL 26.

8 Arts. 61 and 62 VCLT are generally considered to codify customary international law. See for many M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), at 761 and 780.

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2.1. Fundamental change of circumstances and supervening impossibility of performance (Articles 62 and 61 VCLT)

The major antagonist to the *pacta sunt servanda* rule (Article 26 VCLT) is Article 62 VCLT (fundamental change of circumstances). In view of its apparent danger to stable treaty relations, the ILC attempted to frame the *rebus sic stantibus* doctrine as restrictively as possible.[9] Article 62 VCLT is termed as double negative – 'may not be invoked . . . unless' – and thus allows for denunciation only in the most exceptional situations.[10] It requires that the change of circumstances was not foreseen by the parties; that the circumstances constituted an essential basis for the parties' consent to be bound by the treaty; and that the obligations still to be performed have been radically transformed by the change. In addition, states may not rely on Article 62 VCLT in cases of boundary treaties or when the fundamental change results from the invoking party's breach of the treaty or of an international obligation.

Article 61 VCLT is termed most restrictively as well. A state may denunciate a treaty in accordance with Article 61 VCLT[11] when compliance with treaty obligations is rendered impossible because of the destruction or permanent disappearance of an object which is indispensable for the execution of the treaty.[12] In addition, a breach of international law (of the treaty or any other international obligation) excludes the invocation of supervening impossibility of performance in accordance with Article 61(2) VCLT by the state which has committed the breach.

2.2. State practice and jurisprudence

The provisions' focus on treaty stability is reflected in the scant state practice and jurisprudence.[13] At first, states have rarely relied on the *rebus sic stantibus* doctrine

9 For a documentation of the *travaux préparatoires* see R. G. Wetzel and D. Rauschning, *The Vienna Convention on the Law of Treaties:* Travaux Preparatoires. *Die Wiener Vertragsrechtskonvention: Materialien zur Entstehung der einzelnen Vorschriften* (1978), at 420 et seq.

10 Art. 62 VCLT: '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 other 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.'

11 Art. 61 VCLT: '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.'

12 If the impossibility is temporary, Art. 61 VCLT may be invoked only as a ground for suspending the operation of the treaty (Art. 61(1) VCLT).

13 For space constraints this overview is necessarily limited. For additional cases see M. N. Shaw and C. Fournet, 'Article 62: Fundamental Change of Circumstances', in O. Corten and P. Klein (eds.), *The Vienna Conventions on the Law of Treaties: A Commentary* (2011), Vol. 2, 1411; P. Bodeau-Lvince and J. Morgan-Foster, 'Article 61 VCLT', in ibid., 1382.

as enshrined in Article 62 VCLT; and if they have, reliance has mostly been rejected. In the *Fisheries Jurisdiction* case, Iceland submitted that 'because of vital interests of the nation and owing to changed circumstances the Notes concerning fishery limits exchanged in 1961 [were] no longer applicable'.[14] The ICJ, however, saw no radical transformation of the extent of the obligations still to be performed. Moreover, the dispute was of exactly the character anticipated in the compromissary clause in the exchange of notes.[15] Likewise, the ICJ rejected Hungary's attempt to rely on Article 62 VCLT to derogate from its treaty obligations with Slovakia concerning the Gabčíkovo-Nagymaros dam project.[16] The ICJ based its rejection on the fact that the political and economic changes after the end of the Soviet Union and the progress in environmental knowledge brought forward by Hungary[17] were not sufficiently linked to the object and purpose of the 1977 treaty, and that the treaty provided for mechanisms to take account of subsequent developments in environmental law.[18]

In fact, the invocation of a fundamental change of circumstances only seems to have been accepted once by an international tribunal. In the *Racke* case, the European Community relied on a fundamental change of circumstances to justify suspending the co-operation agreement with the former Yugoslavia because of the war there, a decision subsequently upheld by the ECJ. The ECJ, however, adopted a low level of scrutiny and merely stated that the Council had not made a 'manifest error of assessment' when suspending the agreement.[19] In state practice, The Netherlands relied on a fundamental change of circumstances in 1982 to suspend a treaty on development co-operation with Suriname because of human rights violations following a *coup d'état*.[20]

Given its demanding conditions, not astonishingly, reliance on Article 61 VCLT also has been limited. As of January 2012, supervening impossibility of performance as enshrined in Article 61 VCLT had only twice been dealt with by an international tribunal and had never been accepted. In *LAFICO* v. *Burundi*, Burundi argued – after the severance of diplomatic relations and its expulsion of a holding company's senior managers – that implementation of the 1975 Agreement between Libya and Burundi (which inter alia provided for the establishment and functioning of the holding company) had become impossible.[21] In the *Gabčíkovo-Nagymaros* case, Hungary held that the essential object of the 1977 treaty with Slovakia, an economic joint venture consistent with environmental considerations, had permanently disappeared, and that it was therefore impossible to perform the 1977 treaty. Both the arbitral tribunal

14 *Fisheries Jurisdiction (United Kingdom v. Iceland)*, Jurisdiction, Judgment of 2 February 1973, [1973] ICJ Rep. 3, at para. 38.
15 Ibid., at paras. 40 and 43.
16 See G*abčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment of 25 September 1997, [1997] ICJ Rep. 7, at paras. 95 and 104.
17 Ibid.
18 Ibid., at para.104.
19 Case 162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, [1998] ECR I-3655, at paras. 55–5.
20 Dutch Government, Note Verbale of 16 December 1982, [1983] *Tractatenblad* No 6, reprinted in H. H. Lindemann, 'Die Auswirkungen der Menschenrechtsverletzungen in Surinam auf die Vertragsbeziehungen zwischen den Niederlanden und Surinam', (1984) 44 ZaöRV 64, at 81.
21 Libyan Arab Foreign Investment Company (LAFICO) and the Republic of Burundi of 4 March 1991, 96 ILR 279, at 317–18.

and the ICJ rejected the claims because Article 61(2) VCLT prohibited reliance on an impossibility of performance that resulted from the respective states' breach of treaty obligations.[22]

2.3. Procedures (Articles 65 et seq. VCLT) and legal consequences of reliance (Articles 70 and 72 VCLT)

The procedures governing reliance on Articles 61 and 62 VCLT are complex and long. They are laid down in Articles 65–8 VCLT as well as in an Annex to the VCLT.[23] Any invocation has to be notified to the other treaty parties in written form.[24] Objections can be filed, except in cases of special urgency, within three months of the denunciation notification.[25] In such cases, a solution must be sought through the means of peaceful dispute settlement (e.g., negotiations, third-party mediation).[26] If no solution is found within a year of notification of the objection, treaty parties may set in motion the procedure of the Annex[27] and request the establishment of a Conciliation Commission, which then has another 12 months to submit its (non-binding) recommendations.

Despite their complexity, the VCLT's procedures only marginally protect the interests of the other treaty parties and their trust in due performance of treaty obligations. Dispute settlement and the reconciliation of opposing views are in the forefront[28] and time periods are short, especially when the treaty parties do not intend to object to the denunciation or suspension. This leaves them little time to prepare for the lapse of the treaty. What is more, it is doubtful whether even these limited procedural obligations constitute customary international law.[29]

Also, the legal consequences in case of a successful reliance on Articles 61 or 62 VCLT appear rudimentary and deficient. Article 70 VCLT deals with the consequences of a treaty's termination; Article 72 VCLT with the consequences of its suspension.[30] The VCLT thus only establishes a binary system – termination/suspension or continuance in force. Renegotiation or the treaty's adaptation to the changes by an independent third body are not foreseen. Even though

22 Ibid.; G*abčíkovo-Nagymaros* case, *supra* note 16, at para.103.
23 The Annex to the VCLT deals with the establishment of the Conciliation Commission.
24 Arts. 65(1) and 67 VCLT.
25 Art. 65(2) VCLT.
26 Art. 65(3) VCLT refers to Art. 33 of the UN Charter.
27 Art. 66 VCLT.
28 See generally Villiger, *supra* note 8, at 815; G. Gaja, '*Jus Cogens* Beyond the Vienna Convention', 172 RdC (1981-III), 285.
29 See for instance the ICJ's cryptical statement in the *Gabčíkovo-Nagymaros* case: '[The parties agreed] that Articles 65 to 67 of the Vienna Convention on the Law of Treaties, if not codifying customary international law, at least generally [reflected] customary international law.' *Gabčíkovo-Nagymaros* case, *supra* note 16, at para. 109. See generally Villiger, *supra* note 8, at 813–14.
30 Art. 62(3) VCLT establishes the suspension of the treaty as an alternative right left at the disposal of the party which is relying on the fundamental change of circumstances. Art. 61(1) VCLT provides that a treaty party may only suspend a treaty if the impossibility is temporary. See *supra* notes 10 and 11. Both Art. 70 and Art. 72 VCLT are generally considered to codify customary international law. See, e.g., S. Wittich, 'Article 70', in O. Dörr and K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties* (2011), 1195 at para. 38; S. Wittich, 'Article 72', in ibid., 1227 at para. 23.

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non-inclusion of these options was done for good reasons,[31] this merely leaves little room for mitigation. Moreover, the effects of termination (or suspension) look forward and end/suspend the treaty relationship *ex nunc*, i.e., *pro futuro*. Article 70 VCLT,[32] for instance, merely states that termination releases the parties from their obligation to further perform the treaty.[33] It does not deal with compensation or other forms of adjustment of the treaty parties' positions in case of denunciation,[34] and thus fails to address possible inequalities caused by a partial performance of one party prior to termination.[35]

2.4. Résumé

The general law of treaties – the VCLT's termination/suspension regime – offers only limited and very general solutions for the accommodation of change. Most importantly, Articles' 61 and 62 VCLT substantive criteria of application are most restrictive. While this acknowledges the crucial importance of treaty stability for the functioning of international relations, termination/suspension and according reactions to change are only most rarely possible. What is more, the broad and subjective elements of Article 62 VCLT give rise to legal insecurity, though this is mitigated through the provision's negative wording. Its vague and ambiguous terms, '*fundamental* change of circumstances' whose existence constituted an '*essential* basis of the consent of the parties to be bound by the treaty' and whose effect is to '*radically* transform the extent of obligations still to be performed under the treaty' – were criticized accordingly.[36] Problems of interpretation likewise arise from subjective elements such as the requirement that the change 'was not foreseen by the parties'. Lissitzyn, for instance, states that Article 62 VCLT 'results in a piling up of subjectivities rather than their diminution' and criticizes that 'an allegedly "objective" rule of law may be cast in such general and vague terms that it leaves room for wide difference in subjective appreciation of their meaning. . . .'[37] The margin of appreciation left for interpretation seems especially problematic given the lacking institutionalized mechanism or compulsory body with the competence to decide

31 According to Special Rapporteur Waldock, renegotiation was an 'imperfect' right because 'if the other party is unwilling to accept a modification of the treaty, the "right" is somewhat illusory.' H. Waldock, Fifth Report on the Law of Treaties, 1966 YILC, Vol. 2, at 28, para. 5. The adaptation of the treaty by an international tribunal was considered as transgressing its judicial function. See P. Reuter, *Introduction to the Law of Treaties* (1995), at 149.

32 Art. 70 VCLT: '1.Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: (a) releases the parties from any obligation further to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. . . .'

33 The ILC, in its discussions, pointed to the diversity of possible circumstances and left it to the treaty parties to find a solution in good faith. ILC, Law of Treaties, 1966 YILC, Vol. 2, at 266, para. 4.

34 See for further reference Villiger, *supra* note 8, at 873–4.

35 To remedy such inequalities, one must thus draw on other concepts, such as considerations of unjust enrichment. See C. Binder and C. Schreuer, 'Unjust Enrichment', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, (last updated 2008) available online at www.mpepil.com for further reference.

36 See E. Schwelb, 'Fundamental Change of Circumstances: Notice on Art. 59 of the Draft Convention on the Law of Treaties as Recommended for Adoption to the U.N. Conference on the Law of Treaties by Its Committee of the Whole in 1968', (1969) 29 ZaöRV 48.

37 O. Lissitzyn, 'Treaties and Changed Circumstances (Rebus sic Stantibus)', (1967) 61 AJIL 895, at 915.

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upon the application of Article 62 VCLT with binding force.[38] It is further aggravated through the broadly termed legal consequences of termination (suspension) under general international law. While this generality is understandable in view of the provisions' necessary applicability to a variety of situations, it seems at odds with legal certainty and predictability which, being essential for stable treaty relations, should govern any derogation from treaty obligations.

3. Mechanisms of the law of state responsibility to accommodate change

Further – limited – means to derogate from treaty obligations when circumstances change are offered by the law of state responsibility: state of necessity and *force majeure* (Articles 25 and 23 of the ILC Articles) allow for the (temporary) non-performance of international-law obligations in exceptional situations.

3.1. State of necessity and *force majeure* (Articles 25 and 23 of the ILC Articles)

The most often employed possibility to derogate from treaty obligations under the law of state responsibility is the necessity defence. The availability of the necessity defence to temporarily derogate from treaty obligations without it posing a danger to treaty stability is rather recent. In traditional international law, the dictum 'necessity knows no law' seemed of some truth. Necessity was viewed as inherent in the 'right to self-preservation of a state', especially in older state practice. Its conditions for application – given the fundamental nature of state interests at stake – were considered to be necessarily broad.[39] Obviously, such a liberally understood necessity concept presented a danger to the *pacta sunt servanda* rule. Only the 2001 ILC Articles on State Responsibility[40] achieved a welcome legalization and 'domestication' of the necessity defence. The ILC incorporated 'necessity' as Article 25 (former Article 33)[41] in Chapter V (Circumstances Precluding Wrongfulness) and subjected it to such stringent conditions that the defence would be only exceptionally available. Necessity, as codified in Article 25 of the ILC Articles, is generally considered to be a rule of customary international law.[42]

38 See A. Verdross and B. Simma, *Universelles Völkerrecht* (1984), at 533.

39 See, e.g., R. Ago, Addendum to the Eighth Report on State Responsibility, UN Doc. A/CN.4/318/ADD.5–7, 1980 YILC, Vol. 2/1, 13, at 17–18; see also J. Barboza, 'Necessity (Revisited) in International Law', in J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs* (1984), 27 at 28.

40 See *supra* note 5.

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

42 Different tribunals have accepted the customary-law character of the necessity defence: the ICJ in the *Gabčíkovo-Nagymaros* case, *supra* note 16, at para. 51; the International Tribunal for the Law of the Sea (ITLOS) in *M/V Saiga No. 2 (St. Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999, available online at www.itlos.org, at para. 134 (both tribunals refer to the then Art. 33); see also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, [2004] ICJ Rep. 136, at 195; *CMS Gas Transmission Company v. The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, (2005) 44 *ILM* 1205, at paras. 315 and 317; *LG&E Energy Corp, LG&E Capital Corp, LG&E International Inc v. The Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, (2007) 46 ILM 36, at para. 245.

Article 25 of the ILC Articles imposes stringent requirements.[43] A state may preclude the wrongfulness of non-performance of its treaty obligations only under condition that reliance on necessity is necessary to safeguard an *essential* interest against a *grave and imminent* peril. The ILC Commentary explains that the likelihood of danger must be objectively established and more certain than merely possible.[44] Reliance on necessity will be precluded if other (lawful) means are available, even if more costly or less convenient.[45] Any measures beyond strict necessity are not covered.[46] Furthermore, in accordance with Article 25(1)(b) of the ILC Articles, the conduct in question must not seriously impair the interest of the state(s) to which the obligation is owed or of the international community as a whole. The ILC Commentary states that 'the interest relied on must outweigh all other considerations, not only from the point of view of the acting state but on a reasonable assessment of the competing interests.'[47] Article 25(2) further limits reliance on necessity when the international obligation in question excludes (explicitly or implicitly) the invocation of necessity, or when the state has (substantially) contributed to the situation of necessity.[48] Finally, necessity can never justify derogation from peremptory norms.[49]

Also the plea of *force majeure*, the law of state responsibility's second option to react to subsequent changes, is only available most exceptionally.[50] In accordance with Article 23 of the ILC Articles, the wrongfulness of a non-performance of treaty obligations is precluded where an irresistible force or an unforeseen event beyond the control of the state makes the performance materially impossible.[51] The conduct of the state must be involuntary or at least not involve an element of free choice.[52] Likewise, Article 23 does not cover situations where the performance of the

43 Art. 25 of the ILC Articles: '1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act: (*a*) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and (*b*) Does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole. 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: (*a*) The international obligation in question excludes the possibility of invoking necessity; or (*b*) The State has contributed to the situation of necessity.' See for further reference S. Heathcote, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Necessity', in J. Crawford, A. Pellet, and S. Olleson (eds.), *The Law of International Responsibility* (2010), 491.

44 Commentaries to the draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its 53rd session (2001), Official Records of the General Assembly, 56th Session, Supplement No. 10, UN Doc. A/56/10, at 202–3 (hereinafter ILC Commentary).

45 Ibid.

46 Ibid.

47 Ibid., at 203–4.

48 Ibid., at 204–5.

49 Art. 26 of the ILC Articles.

50 See for further reference S. Szurek, 'Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: *Force Majeure*', in Crawford, Pellet, and Olleson, *supra* note 43, 475.

51 Art. 23 of the ILC Articles: '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 of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation. 2. Paragraph 1 does not apply if: (*a*) The situation of *force majeure* is due, either alone or in combination with other factors, to the conduct of the State invoking it; or (*b*) The State has assumed the risk of that situation occurring.' *Force majeure* is generally considered a general principle of law. See, e.g., ILC Commentary, *supra* note 44, at 186.

52 Ibid., at 183.

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obligation has merely become more burdensome.[53] In addition, the state invoking *force majeure* may not rely on the doctrine when it has created the instigating situation[54] or when it has assumed the situation's occurrence.[55] Situations brought about by the neglect or default of the implicated state are thus not covered by Article 23, even if the resulting breach (of treaty) was accidental or unintended.[56]

3.2. State practice and jurisprudence

Given the provisions' restrictive criteria of application, it comes as no surprise that reliance on the state of necessity as well as on *force majeure* has been scarce. In the *Gabčíkovo-Nagymaros* case, Hungary invoked the necessity defence, arguing mainly ecological imperatives and the threat that the dam project posed to the health of the population as it endangered Budapest's supply of drinking water.[57] The ICJ rejected Hungary's reliance on the defence, however, largely on the basis that there was no grave and imminent peril as the consequences were long-term and insecure,[58] and that Hungary had other means to supply Budapest's population with drinking water, even though possibly more expensive.[59] The necessity defence was also rejected by arbitral tribunals in the *Rainbow Warrior*[60] and *LAFICO* cases,[61] by the International Tribunal for the Law of the Sea in the *M/V Saiga* case,[62] and by the ICJ in its Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.[63]

The most comprehensive application of the necessity defence so far was in the context of Argentina's financial and economic crisis in the late 1990s and early 2000s in which the Argentine government, in order to address the crisis, derogated from certain obligations it had undertaken vis-à-vis foreign investors. Following the crisis, approximately 40 cases have been brought against Argentina.[64] Out of these, 12 cases – 10 ICSID (*CMS*,[65] *LG&E*,[66] *Enron*,[67] *Sempra*,[68] *Continental Casualty*

53 Ibid., at 184.
54 Art. 23(2)(a) of the ILC Articles. See, e.g., *LAFICO v. Burundi*, *supra* note 21, at 318.
55 Art. 23(2)(b) of the ILC Articles. ILC Commentary, *supra* note 44, at 188.
56 Ibid., at 184.
57 *Gabčíkovo-Nagymaros* case, *supra* note 16, at paras. 48–59.
58 This concerned Hungary's reliance on ecological necessity; ibid., at para. 56.
59 Ibid., at para. 55.
60 *Rainbow Warrior of 30 April 1990 (New Zealand v. France)*, XX RIAA 215, at 254.
61 *LAFICO v. Burundi*, *supra* note 21, at 317.
62 *Saiga*, *supra* note 42, at para. 134.
63 *Legal Consequences of the Construction of a Wall*, *supra* note 42, at para. 140.
64 See ICSID available online at http://icsid.worldbank.org/ICSID/Index.jsp; Investment Treaty Arbitration available online at http://ita.law.uvic.ca.
65 *CMS*, *supra* note 42.
66 *LG&E*, *supra* note 42.
67 *Enron Corporation Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, available online at http://ita.law.uvic.ca/documents/Enron-Award.pdf.
68 *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Award, 28 September 2007, available online at http://ita.law.uvic.ca/documents/SempraAward.pdf.

Company,[69] *Metalpar SA and Buen Aire SA*,[70] *Suez*,[71] *Total*,[72] *Impregilo*[73] and *El Paso*[74]) and two UNCITRAL (*BG*[75] and *National Grid*[76]) – had been decided as of January 2012.[77] All tribunals addressed the impact of an economic emergency on host-state obligations at length.[78] Still, only the *LG&E* and the *Continental Casualty* tribunals accepted Argentina's reliance on the necessity defence,[79] whereas the other tribunals rejected Argentina's claim.

Situations allowing for the *force majeure* defence (Article 23 of the ILC Articles) have hardly ever been recognized by international tribunals. The *Rainbow Warrior* tribunal rejected France's reliance to justify the removal of its officers from Hao for health purposes[80] with the argument that situations which make performance merely more burdensome were not covered by *force majeure*.[81] In *LAFICO v. Burundi*, the Arbitral Tribunal declined the plea of *force majeure* because Burundi had induced the situation in question.[82] So did the ICSID tribunal in *Aucoven v. Venezuela*.[83] Venezuela had argued *force majeure* to justify non-compliance with its obligations under a concession agreement – they had increased the toll rates for the operation of a motorway – on the ground of public opposition to the increase in the tolls and related civil unrest.[84] This was denied on the basis that the civil unrest had not been completely unforeseeable due to similar occurrences in 1989 after a rise in the petrol

69 *Continental Casualty Company v. Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, available online at http://ita.law.uvic.ca/documents/ContinentalCasualtyAward.pdf.

70 *Metalpar SA and Buen Aire SA v. Argentine Republic*, ICSID Case No. ARB/03/5, Award, 6 June 2008, available online at http://ita.law.uvic.ca/documents/Metalpar-awardsp.pdf.

71 *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, 30 July 2010.

72 *Total S.A. v. Argentine Republic*, ICSID Case No. ARB/04/1, Decision on Liability, 27 December 2010.

73 *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011.

74 *El Paso Energy International Company v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011.

75 UNCITRAL, *Group Plc. v. Republic of Argentina*, Final Award, 24 December 2007, available online at http://ita.law.uvic.ca/documents/BG-award_000.pdf.

76 UNCITRAL, *National Grid Plc v. Argentine Republic*, Award, 3 November 2008, available online at http://ita.law.uvic.ca/documents/NGvArgentina.pdf.

77 The *Enron* and *Sempra* decisions were subsequently annulled. *Enron Creditors Recovery Corp. Ponderosa Assets LP v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic, 30 July 2010; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award, 29 June 2010.

78 See for further reference, e.g., A. Bjorklund, 'Emergency Exceptions: State of Necessity and *Force Majeure*', in P. Muchlinski, F. Ortino, and C. Schreuer (eds.), *Oxford Handbook of International Investment Law* (2008), 459; A. Reinisch, 'Necessity in International Investment Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases?', (2007) 8 *Journal of World Investment and Trade* 191; C. Binder, 'Changed Circumstances in Investment Law: The Argentine Crisis before ICSID Tribunals', in C. Binder et al. (eds.), *International Investment Law in the 21st Century. Essays in Honour of Christoph Schreuer* (2009), 608.

79 While both tribunals accepted the applicability of the BIT's emergency exception (Art. XI of the US–Argentina BIT), in their interpretation of Art. XI, they drew heavily on the elements of the customary law based necessity defence. See, e.g., *Continental Casualty*, *supra* note 69, at paras. 160–236.

80 France had also failed to return the officers to Hao following medical treatment.

81 *Rainbow Warrior*, *supra* note 60, at 253.

82 *LAFICO v. Burundi*, *supra* note 21, at 318.

83 *Autopista Concesionada de Venezuela CA v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/00/5, Award, 23 September 2003. Although the claim was brought on the basis of a breach of Venezuela's contractual obligations under the Concession Agreement, the ICSID tribunal had nonetheless regard to international law when dealing with *force majeure*.

84 Ibid, at para. 106.

price.[85] Opposite decisions in comparison with the overwhelming rejection of the defence can only be found in the jurisprudence of the Iran–US Claims Tribunal, which regularly accepted *force majeure* conditions with respect to the revolutionary situation in Iran between December 1978 and February 1979.[86]

3.3. 'Procedure' and legal consequences of reliance (Article 27 of the ILC Articles)

The ILC Articles do not establish any explicit procedures governing reliance on necessity or *force majeure*. The circumstances precluding wrongfulness function, with Crawford, 'as a shield rather than as a sword'[87] and may be relied upon by a state to protect itself against allegations of otherwise unlawful conduct.[88] Reliance is thus more flexible than under the law of treaties, with the circumstances precluding wrongfulness enabling faster and more expedient reactions to subsequent change. At the same time, their procedural informality leaves the other treaty parties little to no time to prepare for a party's derogation in reliance on necessity or *force majeure*. The ensuing legal insecurity may prove detrimental to the stability of treaty relations.

Also the legal consequences of a successful reliance on Articles 23 or 25 of the ILC Articles differ as compared with those of the law of treaties. A successful invocation of *force majeure* or necessity does not permanently affect the treaty relationship but only temporarily excuses non-performance while the circumstance in question subsists.[89] The issue of compensation is left open: Article 27 of the ILC Articles, which generally deals with the legal consequences of invoking circumstances precluding wrongfulness, is formulated as a 'no prejudice clause', inter alia as regards compensation.[90] However, international practice points toward a duty to compensate[91] and the overwhelming majority of doctrine argues in favour of compensation in case of a successful reliance on the necessity defence.[92] The extent of compensation depends on the circumstances of the case but is still narrower than the concept of 'damage' in instances of breaches of an international obligation.[93]

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85 Ibid, at paras. 117–119.

86 For further reference see G. H. Aldrich, *The Jurisprudence of the Iran–United States Claims Tribunal* (1996), at 306–7.

87 ILC Commentary, *supra* note 44, at 170.

88 Notifying the treaty partner(s) as soon as possible after the knowledge of the *force majeure*/necessity situation will, however, be a necessary good-faith requirement. See generally on good faith J. F. O'Connor, *Good Faith in International Law* (1991).

89 Art. 27(7)(a) of the ILC Articles. See also ILC Commentary, *supra* note 44, at 209–10. Note, however, that also suspension in accordance with Arts. 61(1) or 62(3) VCLT does not permanently affect the underlying obligation.

90 Art. 27 of the ILC Articles: 'Consequences of invoking a circumstance precluding wrongfulness. The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: . . . *(b)* The question of compensation for any material loss caused by the act in question.'

91 See *Gabčíkovo-Nagymoros*, *supra* note 16, at para. 48, where the ICJ refers to Hungary's acknowledgement that it would still compensate its partner. See also ILC Commentary, *supra* note 44, at 211. More generally, see T. Christakis, '"Nécessité n'a pas de loi?" La nécessité en droit international', in *Colloque de Grenoble: La nécessité en droit international* (2007), 11 at 45 et seq.

92 See ibid.; see also R. Dolzer and C. Schreuer, *Principles of International Investment Law* (2008), at 170.

93 As affirmed in the ILC Commentary: 'The reference to "material loss" is narrower than the concept of damage elsewhere in the articles: article 27 concerns only the adjustment of losses that may occur when a party relies on a circumstance covered by chapter V.' ILC Commentary, *supra* note 44, at 210–11.

In cases of a successful reliance on *force majeure*, at times, *ex gratia* compensations are awarded.[94] Especially this possible adjustment of the treaty parties' positions by means of compensation goes further than the law of treaties. In the long term, it may give raise to a – cautious – flexibilization in the application of the necessity defence.

3.4. Résumé

Doubtless, the different functioning of the circumstances precluding wrongfulness as regards procedures and legal consequences of reliance increases the range of options at the disposal of states to react to subsequent changes.[95] This notwithstanding, necessity and *force majeure* only most exceptionally allow for the accommodation of change. The defences' restrictive wording makes them limited means of last resort. While this – positively – serves treaty stability, it leaves states little room for reactions to change. What is more, in particular the investment tribunals' contradictory decisions in the context of the Argentine crisis highlight the problematic elements of the necessity defence, the primary 'flexibility device' of the law of state responsibility in extreme situations. At first, the 'contribution' element – requiring that a state must not have (substantially) contributed to a crisis for reliance to be permissible – poses difficulties, especially when applied to internal situations, such as economic emergencies or civil unrest. Since a state frequently contributes to such crisis situations (e.g., through its economic policy), the 'contribution' element regularly prevents derogation from treaty obligations and hinders the adoption of measures against the crisis.[96] Likewise, the 'only-means' criterion is problematic, since its traditionally strict understanding implies that the mere existence of several ways out of a crisis prevents reliance on Article 25 of the ILC Articles.[97] As, especially in more complex situations, such as financial/economic emergencies or civil unrest, different remedies may usually be taken against a crisis, an according derogation from treaty obligations seems de facto excluded.[98] Thus, reliance on the mechanisms of general international law may be problematic for a variety of reasons. It is only exceptionally possible, even in extreme situations of change. Which warrants a turn to specific treaty regimes.

4. Treaty termination as means to accommodate change in times of fragmentation

Denunciation provisions in treaties are a first, treaty-specific, means for the accommodation of change since they allow for exit when subsequent changes of

94 See, e.g., T. Christakis, 'Les "circonstances excluant l'illicéité": une illusion optique?', in O. Corten (ed.), *Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon* (2007), 223 at 256 et seq.

95 For details, see C. Binder, 'Does the Difference Make a Difference? A Comparison between the Mechanisms of the Law of Treaties and of State Responsibility as Means to Derogate from Treaty Obligations in Cases of Subsequent Changes of Circumstances', in M. Szabo (ed.), *State Responsibility and the Law of Treaties* (2010), 1.

96 See, e.g., *CMS*, *supra* note 42, at para. 329.

97 Ibid., at para. 323.

98 For criticism see for instance A. Reinisch, 'Necessity in International Investment Arbitration: An Unnecessary Split of Opinions in Recent ICSID Cases? Comments on CMS v. Argentina and LG&E v. Argentina', (2006) 3 *Transnational Dispute Management*, at Section III.B.

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circumstances get too pressing. A study of all treaties registered with the UN Secretariat between 1967 and 1971 showed that merely around 250 out of 2,400 treaties did not contain a provision on termination, duration, or withdrawal.[99] Also the treaty regimes examined here – the GATT/WTO regime, international investment law, human rights treaties and the law of the sea – generally provide for exit.

4.1. Termination/withdrawal clauses in selected treaty regimes

The most important treaties in the GATT/WTO regime allow for denunciation. Article XV of the Agreement establishing the WTO (WTO Agreement) provides for withdrawal which is to take effect six months after the notice of withdrawal is submitted. Though the General Agreement on Tariffs and Trade (GATT) as part of the WTO Agreement cannot be separately denounced any more and its withdrawal provisions have therefore become redundant, Article XXXI GATT contains a similar exit clause with the denunciation becoming effective after six months.[100] Neither the GATT nor the WTO Agreement establish substantive criteria as preconditions for withdrawal.

In the international law of investment, given the absence of a multilateral investment agreement, the termination provisions of more than 2,800 bilateral investment treaties (BITs) are at stake.[101] Various model BITs facilitate the complex task of comparing these provisions. BITs are generally concluded for a certain time – mostly 10 to 20 years – with a prolongation for indeterminate duration afterwards (see, e.g., the model BITs of France (2006), Germany (2008), Colombia (2007), India (2003), Norway (2007), and the United States (2012).[102] After the end of the minimum duration, termination is usually possible and frequently takes effect after one year. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), whose effective dispute settlement mechanism 'complements' the BITs, allows for withdrawal to take effect after six months.[103] No further substantive criteria are provided for, neither in the model BITs nor in the ICSID Convention.

Withdrawal from international human rights treaties is resolved differently depending on the treaty. While some human rights treaties allow for denunciation, such as the 1965 Convention on the Elimination of All Forms of Racial Discrimination (CERD), the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 1990 Convention on the Rights of the Child (CRC), the 1950 European Convention on Human Rights (ECHR), or the 1969 American Convention on Human Rights

99 See K. Widdows, 'The Unilateral Denunciation of Treaties Containing no Denunciation Clause', (1982) 53 BYBIL 83, at 95.

100 See also Arts. XVIII(2), XXIII(2), and XXX(2) GATT.

101 See UNCTAD, *World Investment Report 2011*, available online at www.unctad-docs.org/files/UNCTAD-WIR2011-Full-en.pdf, at 100.

102 See Investment Treaty Arbitration, available online at http://ita.law.uvic.ca/investmenttreaties.htm; several model BITs are also reprinted in Dolzer and Schreuer, *supra* note 92, at 360 et seq.

103 Art. 71 ICSID Convention.

(ACHR),[104] others, such as the 1966 International Covenant on Civil and Political Rights (CCPR), do not.[105] If permissible, withdrawal is subject to minimum time periods to take effect. The most recurrent period is one year (see, e.g., Articles 21 CERD, 31 CAT and 52 CRC). All the optional protocols (OPs) which establish the admissibility of individual communications with respect to some of the conventions (e.g., CCPR, CESCR, CEDAW or CRPD) permit denunciation as well, this generally with shorter time periods or no time period.[106]

In the international law of the sea, two different groups of treaties may be distinguished. While the four 1958 Geneva Conventions on the Law of the Sea[107] do not contain withdrawal provisions, the 1982 UN Convention on the Law of the Sea (LOSC) and its related agreements[108] generally allow for denunciation. Article 317 LOSC establishes that withdrawal is to take effect within one year of receipt of the notification. Reasons may, but do not have to, be given.

4.2. Regime-specificity in times of fragmentation?

Most of the treaties of the GATT/WTO regime, the international law of investment, international human rights law, and the law of the sea subject termination/withdrawal merely to procedural obligations and periods of notice. While there are thus no specific characteristics as regards denunciation conditions and procedures, the legal consequences of termination are framed in a more 'regime-specific' way.

Withdrawal provisions in human rights treaties – if included – usually reiterate and detail Article 70 VCLT for the human rights context. They establish that denunciation does not release a treaty party from its obligations incurred before the withdrawal takes effect.[109] Likewise, denunciation does not affect communications which are pending at the moment of withdrawal, thus avoiding event-driven

104 Also the 2003 International Convention on the Protection of All Migrant Workers and Members of Their Families (MWC) and the 2006 Convention on the Rights of Persons with Disabilities (CRPD) allow for denunciation.

105 Likewise the 1966 International Covenant on Economic, Social and Cultural Rights (CESCR), the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the 2006 Convention on the Protection of All Persons from Enforced Disappearance (CPED), and the 1981 African (Banjul) Charter on Human and Peoples' Rights do not provide for withdrawal.

106 Art. 12 of the OP to the CCPR provides for three months; Art. 19 of the OP to the CEDAW does not contain a time period for denunciation to take effect. Six months are foreseen in Art. 20 of the OP to the CESCR, 12 months in Art. 16 of the OP to the CRPD.

107 The 1958 Geneva Conventions on the Law of the Sea, have lost most of their practical relevance since Art. 311(1) LOSC establishes that the widely ratified LOSC prevails over the Geneva Conventions as between the treaty parties.

108 These agreements are the 1995 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, the 1997 Agreement on the Privileges and Immunities of the International Tribunal for the Law of the Sea, and the 1998 Protocol on the Privileges and Immunities of the International Seabed Authority.

109 See, e.g., Art. 58(2) ECHR: 'Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.' See furthermore Art. 78(2) ACHR or Art. 89(3) MWC.

denunciations.[110] Also in the law of the sea, the LOSC reiterates that withdrawal does not affect the financial and contractual obligations incurred.[111] Even more regime-specific are the legal consequences of denunciation as established in international investment law. BITs generally provide for a prolonged protection of investors, usually 10 to 20 years after termination (so called 'sunset-clauses').[112] This differs from the *ex nunc* release from treaty obligations established in general international law (Article 70 VCLT). Such extended protection of investors may be explained by the cost intensity of investments and the need for a stable legal framework to ensure a favourable investment climate. Another 'regime-specificity' is foreseen in the GATT/WTO regime: Article XV of the WTO Agreement states that withdrawal from the WTO Agreement automatically implies withdrawal from the Multilateral Trade Agreements included in Annexes 1, 2 and 3 of the Agreement.[113] Thus preventing the denunciation of merely one of the agreements, Article XV of the WTO Agreement reflects – in accordance with the single-undertaking approach – the interdependency and close interrelation of the agreements concluded in the WTO context. More generally, it is expression of the closely interwoven state obligations in international economic law which is one of *the* examples of the international law of co-operation.[114]

4.3. States' denunciation practice in times of fragmentation

An analysis of state practice in the different treaty regimes shows that states have only very rarely relied on denunciation provisions. Even less frequently has termination or withdrawal served as means for the accommodation of change.

At first, states have only most exceptionally permanently left human rights treaties. The only withdrawal from the ECHR has so far been Greece after denunciation in 1969 in relation to human rights violations of its military junta.[115] Trinidad and Tobago are the sole state to denounce the ACHR (in 1998) against the background of the incompatibility of its procedures concerning the death penalty with the Convention.[116] The only cases of withdrawal from universal human rights treaties

110 See, e.g., Art. 12(2) OP to the CCPR: 'Denunciation shall be without prejudice to the continued application of the provisions of the present Protocol to any communication submitted under article 2 before the effective date of denunciation.'

111 Art. 317 LOSC: '2. A State shall not be discharged by reason of the denunciation from the financial and contractual obligations which accrued while it was a Party to this Convention, nor shall the denunciation affect any right, obligation or legal situation of that State created through the execution of this Convention prior to its termination for that State.'

112 See e.g., Art. 13 of the 2008 German Model BIT: '3. In respect of investments made prior to the date of termination of this Treaty, the provisions of the above Articles shall continue to be effective for a further period of twenty years from the date of termination of this Treaty.'

113 Art. XV of the WTO Agreement: 'Withdrawal. 1. Any Member may withdraw from this Agreement. Such withdrawal shall apply both to this agreement and the Multilateral Trade Agreements'.

114 See Tietje, *supra* note 7; and Weiler, *supra* note 7 for further reference.

115 Denunciation of the European Convention and of the First Protocol, Letter of the Director of Legal Affairs of the Secretary General of the Council of Europe to the Ministers of Foreign Affairs of the Council of Europe, J/Dir 3280, Strasbourg, 24 June 1970, YB of the ECHR (1970), 4. After the end of the military dictatorship Greece reacceded to the ECHR on 28 November 1974. CoE, Greece, Human Rights, available online at http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?PO=GRE&MA=44&SI=2&DF=&CM=3&CL=ENGl.

116 Notification of withdrawal by the Ministerio de Relaciones Exteriores de Trinidad y Tobago to the OAS Secretary General, 26 May 1998, available online at www.oas.org/juridico/spanish/firmas/b-32.html;

are Jamaica, Trinidad and Tobago, and Guyana, which denounced the Optional Protocol to the CCPR in 1997, 1998, and 1999 respectively. While the latter two acceded again with a reservation immediately afterwards,[117] Trinidad and Tobago withdrew for a second time in 2000. Likewise, North Korea in 1997 attempted to denounce the CCPR in reaction to criticism of its human rights violations, notwithstanding the fact that the CCPR does not provide for exit.[118] No other withdrawals from major international human rights treaties are recorded.[119] The exceptional nature of denunciations becomes particularly evident when contrasted to most human rights treaties' high ratification figures.[120] Furthermore, rather than as means for the accommodation of change, states seem to leave human rights treaties especially in connection with criticism of their human rights practice.

Likewise in the law of the sea denunciations are the rarest exception. So far, only Senegal in the 1970s seems to have withdrawn from three of the four 1958 Geneva Conventions although they do not provide for withdrawal.[121] No withdrawal appears to have taken place under the LOSC and related agreements, notwithstanding the generally high ratification numbers.[122] Accordingly, in the law of the sea as well it seems safe to conclude that while the LOSC and related agreements generally contain withdrawal clauses, states have not used this possibility.

Also in the GATT/WTO regime, permanent withdrawal does not seem to be an option. No state ever appears to have withdrawn from the WTO Agreement; nor does such denunciation seem likely, given its important repercussions: as stated, withdrawal from the WTO Agreement automatically implies the denunciation of the other multilateral trade agreements.[123] Only four states (China, Lebanon, Syria, and Liberia) have left the GATT, all in the early 1950s.[124]

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see also S. García Ramírez, 'The Inter-American Court of Human Rights and the Death Penalty', *Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas del UNAM* (2009), available online at http://info8.juridicas.unam.mx/pdf/mlawrns/cont/5/nte/nte5.pdf.

117 With their reservations, Guyana and Trinidad and Tobago sought to restrict the right to file communications relating to prisoners who had been sentenced to death.

118 The denunciation was not accepted by the Human Rights Committee. North Korea seems to ultimately have accepted the Committee's position since it submitted a state report in 2000. See for further reference J. Crawford, 'The UN Human Rights Treaty System: A System in Crisis?', in P. Alston and J. Crawford (eds.), *The Future of Human Rights Treaty Monitoring* (2000), 1 at 10.

119 Denunciation practice was analysed with respect to the human rights treaties registered in the UNTC database (UN Treaty Collection (UNTC), Status of ratifications, 27 January 2012, available online at http://treaties.un.org/) as well as the ECHR, the ACHR, and the African Charter on Human and Peoples' Rights (Banjul Charter).

120 To exemplify, as of January 2012, 175 states were parties to the CERD, 160 to the CESCR, 167 to the CCPR, 186 to the CEDAW; 147 to the CAT, and 193 to the CRC. (See UNTC database, ibid.)

121 Senegal's withdrawals from 9 June 1971 and 1 March 1976 were registered by the UN Secretary General (Nos. 7477 and 8164, 781 UNTS 332; No. 7302, 997 UNTS 486). See C. Fulda, *Demokratie und Pacta Sunt Servanda* (2002), at 158–9, for further reference.

122 As of January 2012, 162 states were parties to the LOSC (UNTC database, *supra* note 119).

123 In this sense also A. Steinmann, 'Article XV WTO Agreement: Withdrawal', in R. Wolfrum, P. T. Stoll, and K. Kaiser (eds.), *WTO: Institutions and Dispute Settlement* (2006), 165 at 169.

124 See Guide to GATT Law and Practice (1994), at 937. See also M. Footer, 'Article XXXI: Withdrawal', in R. Wolfrum, P. T. Stoll, and H. Hestermayer (eds.), *WTO – Trade in Goods* (2011), 746 at para. 10.

In the international law of investment, termination (or non-prolongation) of BITs seems to be the exception, too;[125] especially if one considers the more than 2,800 BITs which have been concluded and the 157 states parties to the ICSID Convention.[126] So far, denunciation appears limited to two sets of constellations. On the one hand, there is a growing opposition of certain Latin American states (Ecuador, Bolivia, Venezuela, Nicaragua, and Cuba) to investment protection. A specific change of circumstances, i.e., the changing political position of states, seems to have motivated Venezuela in 2008 not to renew its BIT with The Netherlands,[127] and to have motivated Bolivia, Ecuador, and Venezuela to withdraw from the ICSID Convention in May 2007, July 2009, and January 2012 respectively.[128] The second set of terminations concerns intra-EU BITs where the European Commission takes the position that these BITs contravene EU law.[129] Against that background, some EU states have (consensually) terminated BITs (see, e.g., the Czech–Italian BIT).[130]

4.4. Résumé

Most of the above-mentioned treaty regimes allow for comparatively simple denunciation – merely linked to periods of notice – and therewith avoid the legal insecurity inherent in substantive denunciation conditions.[131] Still, the rare instances of termination/withdrawal evidence the states' general reluctance to permanently leave treaty regimes. In times of international co-operation definite denunciation does not seem to be an option. But what about temporary derogation?

5. Temporary derogation from treaty obligations to accommodate change in times of fragmentation

All treaty regimes examined here – international human rights law, the law of the sea, the GATT/WTO regime and the international law of investment – contain treaty-based emergency exceptions.

125 Note, however, that it is difficult to comprehensively gather relevant data because of the lacking unification of databases. (The data stem partly from expert interviews with Christoph Schreuer (conducted in Vienna in January 2012) and Stephan Schill (conducted in Heidelberg in June 2011).)

126 See *supra* note 101; see also the ICSID website at http://icsid.worldbank.org/ICSID/Index.jsp.

127 L. E. Peterson, 'Venezuela Surprises the Netherlands with Termination Notice for BIT; Treaty has been Used by Many Investors to "Route" Investments into Venezuela', *Investment Arbitration Reporter*, 16 May 2008, available online at www.iareporter.com/articles/20091001_93.

128 ICSID website, *supra* note 126.

129 See, e.g., C. von Krause, 'The European Commission's Opposition on Intra-EU BITs and Its Impact on Investment Arbitration', 28 September 2010, available online at http://kluwerarbitrationblog.com/blog/2010/09/28/the-european-commissions-opposition-to-intra-eu-bits-and-its-impact-on-investment-arbitration. See also C. Tietje, 'Innereuropäische Investitionsschutzverträge zwischen EU Mitgliedstaaten (Intra EU BITs) als Herausforderung im Mehrebenensystem des Rechts', (2011) 104 *Beiträge zum Transnationalen Wirtschaftsrecht*, available online at www.telc.uni-halle.de/sites/default/files/altbestand/Heft_104.pdf, at 6.

130 See, e.g., S. Jorgensen, 'Italy–Czech Investment Treaty Terminated', available online at www.smedjorgensen.com/en/italy-czech-bilateral-investment-treaty-terminated.

131 In fact, only some older treaties of commerce provide for substantive termination criteria. For details see R. Y. Jennings and A. Watts, *Oppenheim's International Law*, Vol. 1 (1992), at 1306. Likewise in treaties on disarmament and arms control, the occurrence of fundamental changes threatening essential state interests are made an explicit exit condition. See, e.g., Art. XVI of the Chemical Weapons Convention, Art. XV of the ABM Treaty or Art. X(1) of the Treaty on the Non-Proliferation of Nuclear Weapons.

5.1. Treaty-based emergency exceptions in selected treaty regimes

In international human rights law, especially treaties on civil and political rights incorporate exceptions which allow for derogation from (certain) human rights obligations in emergency situations:[132] this is the case for the CCPR, the ECHR, and the ACHR. Measures taken in accordance with these exceptions are lawful within the treaty regime.[133] In the following, Article 4 CCPR will be dealt with by way of example. Still, it is illustrative of the human rights regime more generally, as the emergency exceptions of Articles 15 ECHR and 27 ACHR are formulated in a rather similar way.[134] Article 4 CCPR evidences the high threshold to legitimately derogate from human rights obligations: a state of emergency has to threaten the life of the nation and must be officially proclaimed.[135] In addition, derogation from treaty obligations is only allowed to 'the extent strictly required by the exigencies of the situation'.[136] Derogation may thus be admissible only in regions which are directly struck by the calamity. Furthermore, a list of non-derogable rights, such as the prohibition of torture, is included in Article 4(2) CCPR: non-compliance with these rights is entirely prohibited. The duty to inform the assembly of states parties of any derogation as provided for in Article 4(3) CCPR facilitates international supervision and control of the emergency measures adopted by a state.[137] On the other hand, international human rights treaties do not contain the 'contribution' element of Article 25(2)(b) of the ILC Articles. Put differently, a contribution by the state to the

132 This may be explained by the fact that state obligations are formulated more stringently in these treaties than in treaties on economic, social, and cultural rights (see, e.g., the weakly framed Art. 2 CESCR). The Banjul Charter does not contain an emergency exception but leaves states generally a large margin of appreciation as regards implementation.

133 See, e.g., the findings of the European Court of Human Rights in *Lawless v. Ireland*: 'The Court, unanimously . . . (iv) States that the detention of G. R. Lawless . . . was *founded on the right of derogation* duly exercised by the Irish Government in pursuance of Article 15 (art. 15) of the Convention in July 1957; . . . Decides, accordingly, that in the present case the *facts found do not disclose a breach* by the Irish Government of their obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms'. *Case of Lawless v. Ireland (No 3)*, Judgment (Merits), 1 July 1961, at para. 48, emphasis added. The wording chosen by the Court indicates that in case of lawful derogations there is no breach of treaty obligations.

134 Differences concern the list of non-derogable rights, the CCPR's requirement that the state of emergency is to be officially proclaimed, and the ACHR's failure to establish that the life of the nation has to be threatened. The most extensive list of non-derogable rights is contained in Art. 27(2) ACHR. See M. Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2005), at 83; as regards the ECHR, see C. Ashauer, 'Die Menschenrechte im Notstand. Eine Untersuchung zu den Voraussetzungen der Derogation nach Art. 15 EMRK unter besonderer Berücksichtigung der Figur des überpositiven Notstandes', (2007) 45 *Archiv des Völkerrechts* 400.

135 Art. 4 CCPR: '1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision. 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.'

136 Ibid.

137 While it is the other states parties and not the Human Rights Committee which are notified, the Committee has asserted its competence to consider whether derogations are consistent with the CCPR. See Nowak, *supra* note 134, at 86–7 and 101.

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emergency situation – conceivable, for instance, in cases of civil unrest – does not automatically prevent reliance on necessity and impede a corresponding derogation from its obligations. This is confirmed in the jurisprudence of the human rights supervisory organs. Cyprus, for example, had argued in a state complaint against Turkey that Turkey could not rely on Article 15 ECHR as it had contributed to the emergency. The then European Commission of Human Rights, however, disregarded Cyprus's argument.[138]

In the law of the sea, in particular the 1969 International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties (1969 Intervention Convention)[139] and Article 221 of the LOSC,[140] establish the conditions and modalities for possible reliance on necessity in the law of the sea. They not only concretize the elements of the necessity defence based on customary law, but in addition provide for a *right* to intervene, as opposed to Article 25 of the ILC Articles, which is framed as a circumstance precluding wrongfulness.[141] The 1969 Intervention Convention thus stipulates the right of the coastal state to act when its coast or related interests are threatened because of oil pollution casualties.[142] At the same time, this right of intervention is subject to detailed procedural rules which provide for obligatory consultations with the concerned states (in particular the flag state) and – if feasible – the involvement of independent experts; a dispute settlement mechanism is also established.[143] These rules seek to limit damages, especially for the flag state, whereas the question of compensation is clarified in favour of the intervening state. As long as a state intervenes in accordance with the Convention, no duty of compensation arises.[144] Article 221 LOSC refers to the conventional and customary right of a state to avert danger from its coast or related interests (and therefore implicitly to the 1969 Intervention Convention). It is worded more broadly and in more positive terms than Article 25 of the ILC Articles. In addition to referring to a *right* to intervention, Article 221 LOSC omits the criteria of 'grave and imminent peril', the 'contribution' element and the requirement that the measures

138 *Cyprus v. Turkey*, Report of the European Commission of Human Rights, 10 July 1976, available online at www.cyprus-dispute.org/materials/echr/index.html, at para. 512. See for further reference E. Wyler, *L'illicité et la condition des personnes privées: La responsabilité internationale en droit coutumier et dans la convention européenne des droits de l'homme* (1995), at 215.

139 The 1969 International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, 970 UNTS 211. Eighty-seven states had ratified the 1969 International Convention as of 31 January 2012; available online at www.imo.org/About/Conventions/StatusOfConventions/Pages/Default.aspx.

140 Art. 221 LOSC (Measures to avoid pollution arising from maritime casualties): '1. Nothing in this part shall prejudice the right of states, pursuant to international law, both customary and conventional, to take and enforce measures beyond the territorial sea proportionate to the actual or threatened damage to protect their coastline and related interests including fishing, from pollution or threat of pollution following upon a maritime casualty or acts relating to such a casualty which may reasonably be expected to result in major harmful consequences'.

141 See generally 'Article 221', in M. Nordquist, S. Rosenne and A. Yankov (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. 4 (1991), at 303 et seq.; R. R. Churchill and A. V. Lowe, *The Law of the Sea* (1999), at 355.

142 The scope of the 1969 Intervention Convention was subsequently extended to other substances. See, e.g., the 1973 Protocol and the amendments of 1991, 1996 and 2002; available online at http://www.imo.org/Conventions/contents.asp?topic_id=258&doc_id=680.

143 See Arts. III and VIII of the 1969 Intervention Convention providing for, inter alia, obligatory conciliation proceedings if negotiations fail.

144 Art. V of the 1969 Intervention Convention; see also Art. 232 LOSC.

taken have to be the 'only way' to safeguard the respective interest. At the same time, the interests for the protection of which states are allowed to take measures (coastline and related interests, including fishing) are exhaustively enumerated.[145]

The GATT/WTO, regime establishes a sophisticated system of possible derogations from treaty obligations in 'necessity-like' situations. Article XIX GATT[146] provides for situations of 'economic necessity' which are caused by an increased and unforeseen influx of certain products to a point of seriously threatening branches of national industry. Likewise, balance-of-payment difficulties may be a reason for exceptions to liberalization requirements (Articles XII, XVIII GATT). Article XX GATT establishes 'general exceptions' for the protection of recognized public interests such as public morals; human, animal, or plant life or health; and the conservation of exhaustible natural resources.[147] Derogations for political crisis situations, such as war, serious international tensions, or severe political unrest, are possible in accordance with Article XXI GATT ('security exceptions').[148] With Articles XX and XXI GATT comparable provisions are likewise inserted in the GATS[149] and also numerous other agreements contain similar 'emergency exceptions'.[150] Moreover, some of these exceptions are further detailed in specific agreements. The conditions and procedural modalities for the application of Article XIX GATT are specified and supplemented in the Safeguards Agreement;[151] and health and sanitary standards are provided for in the SPS Agreement.[152] Measures taken in accordance with these norms do not constitute violations of treaty obligations.

In international investment law, from the more than 2,500 BITs in existence in 2006, at least 200 provided for emergency exceptions ('non-precluded

145 See *supra* note 140.

146 Art. XIX(1)(a) GATT: 'If as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, . . . any product is being imported . . . in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part'.

147 Art. XX GATT: 'General Exceptions. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: (*a*) necessary to protect public morals; (*b*) necessary to protect human, animal or plant life or health; . . . (*g*) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'.

148 Art. XXI GATT: 'Security Exceptions. Nothing in this Agreement shall be construed . . . (*b*) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations'.

149 Arts. XIV and XIV*bis* GATS. Art. XIV(a) GATS, unlike Art. XX GATT, also establishes 'public order' as a possible exception.

150 See for instance Arts. 8, 27(2) and 39(3) TRIPS and Arts. (2)(2), (2)(5) and (5)(1)(2) of the WTO Agreement on Technical Barriers to Trade (TBT); see generally H. Ruiz-Fabri, 'La nécessité devant le juge de l'OMC', in Société française pour le droit international (ed.), *Colloque de Grenoble: La nécessité en droit international* (2007) 189.

151 The Appellate Body applies Art. XIX and the Safeguards Agreement jointly. The Safeguards Agreement establishes, for instance, an obligation to notify and consult with the concerned parties, the maximal duration and necessary review of measures and possible duties to compensate. For further reference see M. Matsushita, T. Schoenbaum and P. Mavroidis, *The World Trade Organization. Law, Practice and Policy* (2006), at 437 et seq.

152 WTO Agreement on Sanitary and Phyto-Sanitary Measures, especially Arts. 2 and 3.2.

measures provisions').[153] Similarly structured, emergency exceptions in BITs are mostly framed in less restrictive terms than the necessity defence under customary international law. They usually establish a list of permissible measures in pursuing certain objectives (essential security interests, public morals, public health); the list varies in detail in the different BITs.[154] Measures to attain these objectives are 'non-precluded' and thus not considered violations of the respective BIT obligations. The required link between the measure and the objective to be achieved – the so-called 'nexus element' – may range from a relatively narrow nexus (e.g., 'necessary for') to broader formulations such as 'in the interest of' or 'aiming at'. Several of the more recent BITs contain emergency exceptions which are modelled after Articles XX and XXI GATT.[155]

5.2. Regime-specificity in times of fragmentation?

The different treaty-based emergency exceptions vary considerably, adapting derogation in cases of change to the requirements of the respective treaty regime. Derogation clauses in international human rights treaties mirror the vertical structure of these treaties, which aim at the protection of individuals. They subject a state's derogation from its human rights obligations to strict rules and also establish a monitoring system with a regular international control of derogations through human rights treaty bodies.[156] The features of emergency exceptions in human rights treaties thus reflect the importance of interests involved (human rights) which require a detailed and sophisticated derogation regime. With respect to particularly essential/core rights, such as the prohibitions of slavery or torture, derogation is entirely prohibited (so-called 'non-derogable rights'). The monitoring system provides for international control in an area where states do not necessarily have a reciprocal interest in mutual compliance with treaty obligations.

The GATT/WTO regime establishes an elaborate system of exceptions for states to counter threats which arise primarily out of trade liberalization itself.[157] Reliance on the central provisions, Articles XX and XXI GATT, is generally subject to less stringent requirements than is reliance on the necessity defence under general international law. Both provisions are framed more broadly. The positive wording of Article XX GATT – 'nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures' – contrasts with the negative formulation of Article 25 of the ILC Articles. Article XXI GATT leaves, as a 'self-judging clause', a very large margin to member states concerning possible

153 W. Burke-White and A. von Staden, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties', (2007–08) 48 *Virginia Law Journal* 307, at 313.

154 See, e.g., the 2004 Canadian Model BIT, which contains a very detailed list of permissible exceptions. Canadian 2004 Model Foreign Investment Protection and Promotion Agreement (FIPA), Art. 10, available online at www.dfait–maeci.gc.ca/tna–nac/documents/2004–FIPA–model–en.pdf.

155 See Arts. 24 and 26 of the Norwegian Model BIT for the Promotion and Protection of Investments, Draft version of 19 December 2007, available online at http://ita.law.uvic.ca/investmenttreaties.htm.

156 This control by human rights monitoring organs has become standard practice although it is not explicitly provided for in the human rights treaties. See *supra* note 137; see also Art. 15(3) ECHR.

157 This with the exception of Art. XXI GATT.

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derogations from treaty obligations in international crisis situations. While until recently it was disputed whether judicial review of measures taken under Article XXI was at all possible, the prevailing view today accepts good-faith review.[158] The distinct functioning of the trade regime, where certain dangers are caused by the very deregulation of the market (see, e.g., Articles XIX, XX GATT), is one of the explanations for the open formulation of the provisions. Likewise, the large margin of appreciation left to states – in particular as regards the 'self-judging clause', Article XXI GATT – reflects the comparatively low value of interests (trade liberalization) at stake.[159]

In international investment law, the emergency exceptions included in BITs reflect the tension between the necessary protection of investor interests and legitimate state measures in emergency or crisis situations. They are formulated more openly and are not as narrow as the necessity defence under customary law. The 'only-means' criterion and the 'contribution' element of Article 25 of the ILC Articles are generally omitted. In principle, this enables states to adopt measures also when they contributed to an emergency or when several means exist to deal with a crisis. In particular, recent US BIT practice tends to broaden the margin of appreciation of states concerning the adoption of emergency measures: the exception in the 2012 US Model BIT is formulated as a self-judging clause and limits the possibility of judicial review.[160] These self-judging emergency exceptions are expression of states' attempts to safeguard national sovereignty and to maintain regulatory power in emergency situations to the greatest possible extent vis-à-vis foreign investors.

The more traditional structure of the law of the sea, conversely, likewise shows in the regime's derogation provisions. The structural differences between the 1969 Intervention Convention/Article 221 LOSC and Article 25 of the ILC Articles are minor. The law of the sea's provisions concerning necessity detail the necessity defence of general international law, adapting it to 'typical' emergency situations on the high seas. They do not substantially alter its criteria. This is understandable as the law of the sea may be considered as part of the corpus of 'classic international law' which is based on inter-state relations where states have a reciprocal interest in compliance. In fact, emergency situations on the high seas have significantly contributed to the formation of the necessity defence under customary international law.[161]

158 See, e.g., D. Akande and S. Williams, 'International Adjudication on National Security Issues: What Role for the WTO?', (2003) 43 VJIL 365. The dispute settlement bodies have so far not taken a position on the implications of the self-judging character of Art. XXI GATT. See *infra* note 174.

159 Joanna Gomula-Crawford, Cambridge, interview of 6 June 2008.

160 Art. 18 of the 2012 US Model BIT: 'Essential Security. Nothing in this Treaty shall be construed: . . . 2. to preclude a Party from applying measures that it considers necessary for . . . the protection of its own essential security interests.'

161 See the references to the *Russian Fur Seals* controversy (1893), the *Torrey Canyon* case (1967) and the *Fisheries Jurisdiction (Spain v. Canada)* case (1998) in the ILC Commentary to Art. 25. ILC Commentary, *supra* note 44, at 81–2, paras. 6, 9 and 12. See also Treves, who emphasizes the 'cross-fertilization effect' between general international law and the law of the sea. T. Treves, 'La nécessité en droit de la mer', in Société française pour le droit international, *supra* note 150, 237 at 246.

Consequently, the wording and structure of some of the treaty-based emergency exceptions differ substantially from the necessity defence under general international law.[162] Simplified, the extent of this difference depends on the degree of 'regime-specificity'. The derogation provisions of the more specific human rights regime vary to a larger extent than those of the rather traditionally conceived law of the sea.

5.3. States' temporary derogation practice in times of fragmentation

The 'regime-specificity' of treaty-based emergency exceptions seems important since state practice in international human rights law, the GATT/WTO regime, and the international law of investment reflects an increased need to temporarily derogate from treaty obligations.

In the international human rights regime, especially states' reliance on Article 4 CCPR shows the considerable importance of the provision.[163] Until January 2012, 32 states had at least once derogated from certain obligations under the CCPR in accordance with Article 4(3) CCPR: Algeria, Argentina, Armenia, Azerbaijan, Bahrain, Bolivia, Chile, Colombia, Ecuador, El Salvador, France, Georgia, Great Britain, Guatemala, Jamaica, Israel, Namibia, Nepal, Nicaragua, Panama, Paraguay, Peru, Poland, Russia, Sri Lanka, Sudan, Suriname, Trinidad and Tobago, Tunisia, Uruguay, Venezuela, and Yugoslavia.[164] The main reasons for such derogations were (civil) war or serious civil unrest.[165] Accordingly, derogations concerned primarily the rights to personal liberty and security, the right to privacy, and due-process rights, as well as the rights to political participation, freedom of expression, assembly, and association. In the context of the Council of Europe, Greece, Ireland, Turkey, Great Britain, Albania, and France have so far derogated from some of their obligations under the ECHR in accordance with Article 15 ECHR, with most of the cases concerning detentions and restrictions of due-process rights in criminal proceedings in connection with internal disturbances (Articles 5 and 6 ECHR).[166] The most recent derogation was that of Great Britain which relied on Article 15 ECHR in the aftermath of the terrorist attacks on the World Trade Center of 9/11.[167]

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162 A further critical distinction relates to their qualification as either primary or secondary rules. As the emergency exceptions have been incorporated at the level of primary norms, action taken on their basis does not constitute a treaty violation. The necessity defence of the law of state responsibility (Art. 25 of the ILC Articles), conversely, is generally qualified as a secondary norm, which merely precludes the wrongfulness of non-compliance with treaty obligations. See for further reference Binder, *supra* note 78, at 624 et seq.

163 Such explicit derogations are even more noteworthy in view of the margin of appreciation enjoyed by states as regards the implementation of their human rights obligations. See for margin of appreciation more generally Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', (2005) 16 EJIL 907.

164 Nowak, *supra* note 134, at 83 et seq. and 984 et seq. (Appendix listing notifications under Art. 4(3) CCPR until May 2004). Between May 2004 and January 2012 figures draw on notification statistics provided by the Austrian Foreign Ministry (Staatsnotariat). Notifications on file with the author.

165 Guatemala also argued the disastrous situation brought about by Hurricane Mitch (1998), Jamaica the emergency caused by Hurricane Dean (2007), and Venezuela the social unrest due to the country's economic crisis in 1989. Nowak, *supra* note 134, at 91 and 1038.

166 See for further reference C. Grabenwarter and K. Pabel, *Europäische Menschenrechtskonvention* (2012), at 11.

167 The UK terminated the derogation in March 2005. See ibid. for further reference.

Likewise state practice in international economic law evidences the considerable importance of especially Articles XIX and XX GATT, which enable states to temporarily derogate from their treaty obligations when essential state interests are at stake. After the Uruguay round, Article XIX GATT became a comparatively important exception, relied upon by states in cases of economic emergency.[168] The same holds true for Article XX GATT, which allows states to derogate from treaty obligations for the protection of recognized values in their domestic legal order. While the *US – Shrimp* case[169] is probably best known, Article XX GATT was also of relevance in the *Brazil – Measures Affecting Imports of Retreaded Tyres*,[170] *China – Audiovisual Services*,[171] and *EC – Asbestos*[172] cases.[173] Conversely, states have only infrequently invoked Article XXI GATT. Having so far never been subject to adjudication, Article XXI GATT seems to be of mainly theoretical importance.[174]

In international investment law, in particular the Argentine economic crisis of 2001–2 revealed the relevance of treaty-based emergency exceptions. Where available, Argentina invoked the respective BIT's emergency exception, most importantly Article XI of the US–Argentina BIT, in addition to its reliance on the customary-law-based necessity defence. Especially the cases brought under the US–Argentina BIT – *CMS*, *LG&E*, *Enron*, *Sempra*, *Continental Casualty*, and *El Paso* – thus highlight the importance of emergency exceptions in international investment law for states to keep some room for action in economic crisis situations.[175] At the same time, the contradictory decisions of the investment tribunals evidence the dangerous legal insecurity brought about by inconsistent jurisprudence. Calls for a more systematic interpretation were voiced accordingly.[176]

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168 The WTO Dispute Settlement Bodies have, however, interpreted the provision's elements restrictively and emphasized that reliance on Art. XIX GATT was admissible merely in exceptional situations. See e.g., Appellate Report Argentina: Safeguard Measures on Imports of Footwear, adopted 14 December 1999, WT/DS121/AB/R, at 28–34 and 53. For criticism as to the restrictive concretization see A. Sykes, 'The Safeguards Mess: A Critique of WTO Jurisprudence', (2003) 2 *World Trade Review* 261.

169 Appellate Report United States: Import Prohibition of Certain Shrimp and Shrimp Products, adopted 12 October 1998, WT/DS58/AB/R, at 39 et seq.

170 Appellate Report Brazil: Measures Affecting Imports of Retreaded Tyres, adopted 3 December 2007, WT/DS332/AB/R.

171 Appellate Report China: Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, adopted 21 December 2009, WT/DS363/AB/R.

172 Appellate Report European Communities: Measures Affecting Asbestos and Asbestos-Containing Products, adopted 12 March 2001, WT/DS135/AB/R.

173 See generally Ruiz Fabri, *supra* note 150; R. Wolfrum, 'Article XX: General Exceptions [Introduction]', in Wolfrum, Stoll, and Hestermeyer, *supra* note 124, 455. More specifically see N. Wenzel, 'Article XX: General Exceptions. (a) necessary to protect public morals'; in ibid., 479 at 480; P. T. Stoll and L. Strack, 'Article XX: General Exceptions. (b) necessary to protect human, animal or plant life or health', in ibid., 497; S. Reyes-Knoche and K. Arend, 'Article XX: General Exceptions. (d) necessary to secure compliance with laws and regulations. . .', in ibid., 527 at 528; N. Matz-Lück and R. Wolfrum, 'Article XX: General Exceptions. Art XX (g) relating to the conservation of exhaustible natural resouces. . .', in ibid., 544 at 545.

174 Art. XXI GATT was either excluded from the terms of reference of the panel or the dispute was concluded by friendly settlement. See H. P. Hestermeyer, 'Art XXI: Security Exceptions', in Wolfrum, Stoll, and Hestermeyer, *supra* note 124, 569 at para. 5.

175 The other BITs of relevance – the 1990 Argentina–UK BIT, the 1988 Argentina–Italy BIT and the 1991 France–Argentina BIT – do not contain emergency exceptions which would be comparable with Art. XI of the US–Argentina BIT.

176 See, e.g., Reinisch, *supra* note 78; Binder, *supra* note 78, at 629.

In the international law of the sea, conversely, temporary derogation from treaty obligations has been less frequent and seems to have taken place mainly in the context of ecological disasters following ship accidents. Examples include the *Torrey Canyon* accident where Great Britain sank a Liberian oil tanker in the high seas in order to prevent the oil pollution of its coast,[177] or the *Nachfolger* incident where France destroyed a wreck in front of its coastline (but also on the high seas).[178] Scarce state practice may be explained by, inter alia, the traditional conception of the law of the sea, which largely mirrors the classic international law of co-ordination: given the reduced density of state obligations, non-performance may be limited to exceptions and punctual situations such as oil-spilling accidents.

5.4. Résumé

Especially treaty-based emergency exceptions are framed in a regime-specific way. They allow for 'system-adequate' non-performance and further the legal certainty and predictability of derogations. This appears especially important given states' repeated reliance on treaty-based emergency exceptions and the undeniable need for temporary rather than permanent derogation, which seems to be the preferred option to accommodate change in times of international co-operation.

6. Concluding remarks

To revisit the limits of *pacta sunt servanda* in times of fragmentation reveals a move from general international law to subsystems. Increasingly, the tension between stability and change is dealt with in the respective treaty regimes. Most treaties contain termination/withdrawal clauses and also allow for temporary derogation on the basis of treaty-based emergency exceptions. Especially the latter are formulated in a 'regime-specific' way.[179] They adapt possible reactions to change to the requirements of the regime, and may thus be considered as an expression of the phenomenon of fragmentation. Such regime-specific framing seems particularly important, since temporary derogation from treaty obligations is comparatively frequent. The emergence of subsystems has thus diversified the debate on stability and change, but by no means made it lose relevance.

177 *The 'Torrey Canyon'*, Cmnd 3246 (London, Her Majesty's Stationery Office, 1967).

178 Conseil d'état, *Société Nachfolger Navigation Co. Ltd*, (1988) 104 *Revue de droit international public et de la science politique* 851. See also Heathcote, *supra* note 43, at 494.

179 For details on the necessity plea in specialized systems of international law see also the (2010) 41 NYBIL: 'Necessity across International Law'.