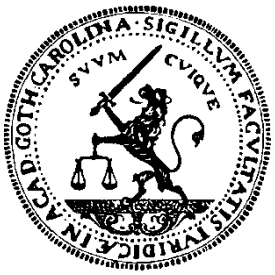

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Justifying or *Excusing* Humanitarian Intervention?

An Examination of Whether the Law of State Responsibility Can Accommodate the Domestic Justification-Excuse Distinction

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Summary

In defense of humanitarian intervention, it has been claimed to be 'illegal but justified' and 'illegal but excused'. One way of understanding such claims is that humanitarian intervention is illegal since existing primary rules of international law prohibit such intervention. While international law prohibits humanitarian intervention, the act is not 'legally wrongful'; it is justified. Correspondingly, while international law prohibits humanitarian intervention, the State engaging in such action is not 'responsible'; it is excused.

From this prism, claims of 'illegal but justified' and 'illegal but excused' attempt to reconcile law and morality. On the one hand, the approaches confirm that current international law prohibits humanitarian intervention, including fundamental principles such as the prohibition of the use of force, the UN Charter, and customary international law. On the other hand, the approaches recognize that it may be morally required (justified) to engage in intervention or that the State is not morally 'responsible' (excused) for engaging in intervention. If justified, a State is justified since the act is not 'legally wrongful', even though it apparently violates the law. If excused, a State is excused since it is not morally 'responsible' for the act, even though it violates the law.

Justifications and excuses are different types of defenses existing in domestic legal systems; however, such defenses are not recognized in international law. The law of State responsibility does not divide defenses into justifications or excuses. Instead, the defenses appear as 'circumstances precluding wrongfulness'. Nevertheless, the law of State responsibility can accommodate a justification-excuse distinction insofar as it is built upon a conceptual distinction between 'circumstances precluding wrongfulness' (justified) and 'circumstances precluding responsibility' (excused). Such accommodation is based on analogous reasoning with the domestic concept of justifications and excuses. However, analogies with domestic law need to be used with caution since domestic and international law are fundamentally separate legal systems. In contrast to domestic law, States are not only subjects of the law but also lawmakers. States' violations of the law can change the law if there is sufficient State practice and *opinio juris*. 'Justifying' or 'excusing' humanitarian intervention could thus result in a change of the primary rules in international law, in which humanitarian intervention would be considered legal.

In conclusion, the law of State responsibility can accommodate a domestic justification-excuse distinction. By accommodating the distinction, the law of State responsibility could provide a legal basis for humanitarian intervention. However, humanitarian intervention should not be justified or excused insofar as the claims 'illegal but justified' and 'illegal but excused' hold the view that such intervention should remain illegal.

Sammanfattning

Till försvar för humanitär intervention har det hävdats att dessa är ’olagliga men rättfärdigade’ och ’olagliga men ursäktade’. Ett sätt att förstå yttrandena är att humanitär intervention är olagligt eftersom det är förbjudet enligt folkrättens primära regler. Trots att folkrätten förbjuder humanitär intervention är agerandet inte ’rättsligt felaktigt’, det är rättfärdigat. Motsvarande, trots att folkrätten förbjuder humanitär intervention är den humanitära staten inte ’ansvarig’, staten är ursäktad.

Från detta perspektiv kan yttrandena ’olagligt men rättfärdigat’ och ’olagligt men ursäktat’ ses som försök att förena lagen med moralen. Å ena sidan, är humanitär intervention förbjudet enligt gällande rätt, grundläggande folkrättsliga principer så som våldsförbudet, FN-stadgan och internationell sedvanerätt. Å andra sidan, kan det vara moraliskt efterfrågat (rättfärdigat) att skydda individer från kränkningar av mänskliga rättigheter, eller så kan en stat inte hållas moraliskt ansvarig (ursäktad) för att ha deltagit i interventionen. Om rättfärdigat, är en stat rättfärdigad för att humanitär intervention inte är ’rättsligt felaktigt’ trots att agerandet till synes bryter mot lagen. Om ursäktat, är en stat ursäktad eftersom staten inte anses moraliskt ’ansvarig’ trots att agerandet bryter mot lagen.

Rättfärdigande och ursäktande omständigheter är olika sorters försvar i inhemska rättsordningar men sådana försvar är inte erkända i folkrätten. Försvar i lagen om statsansvar delas inte upp i rättfärdigande och ursäktande omständigheter, i stället utgör försvaren ‘omständigheter som utesluter felaktighet’. Trots detta kan statsansvarsreglerna rymma en distinktion mellan rättfärdigande och ursäktande omständigheter i den mån reglerna bygger på en begreppsmässig distinktion mellan ’omständigheter som utesluter felaktighet’ (rättfärdigat) och ’omständigheter som utesluter ansvar’ (ursäktat). Ett sådant tillgodogörande bygger på analoga resonemang med det inhemska konceptet rättfärdigat och ursäktat. Analogier med inhemsk rätt måste dock användas varsamt då inhemsk rätt och folkrätt är fundamentalt olika rättsområden. Till skillnad från inhemsk rätt är stater inte endast rättssubjekt utan också lagstiftare. Om en stat bryter mot lagen kan lagen ändras om det finns tillräcklig statspraxis och *opinio juris*. Att ’rättfärdiga’ eller ’ursäkta’ en humanitär intervention skulle alltså kunna leda till en ändring av folkrätten, där humanitär intervention anses vara lagligt.

Sammanfattningsvis kan lagen om statsansvar rymma en inhemsk distinktion mellan rättfärdigande och ursäktande omständigheter. Genom tillgodogörandet skulle statsansvarsreglerna kunna utgöra en rättslig grund för humanitär intervention. Dock bör inte en humanitär intervention rättfärdigas eller ursäktas om yttrandena ’olagligt men rättfärdigat’ och ’olagligt men ursäktat’ hävdar att sådana interventioner fortfarande ska vara olagliga.

Abbreviations

ARS	Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)
ARS Commentary	Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001)
FRD	Friendly Relations Declaration (1970)
ICISS	International Commission on Intervention and State Sovereignty
ICJ; Court	International Court of Justice
ICJ Statute	Statute of the International Court of Justice (1946)
ILC	International Law Commission
MPC	Model Penal Code: Official Draft and Explanatory Notes (1985)
MPC Commentaries; Commentaries	Model Penal Code and Commentaries (Official Draft and Revised Comments) (1985)
NATO	North Atlantic Treaty Organization
R2P	Responsibility to Protect
UDHR	Universal Declaration of Human Rights (1948)
UN	United Nations
UN Charter	Charter of the United Nations (1945)
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
VCLT	Vienna Convention on the Law of Treaties (1969)

1 Introduction

1.1 Background

On the 24th of February 2022, Russia invaded Ukraine. Whether the military assault is described with the Russian euphemism 'special military operation' or, in more correct terms, 'aggression', the invasion not only sent shock waves across the world but once again set *jus ad bellum*[1] on the agenda.[2] Russia explained its *prima facie* breach of the prohibition of the use of force, stipulated in Article 2(4) of the Charter of the United Nations (1945) (UN Charter), by referring to the right of self-defense in Article 51 UN Charter[3] and reasoning similar to that of humanitarian intervention.[4,5]

The Russian claims reveal and exemplify essential questions of international law: what constitutes a legal defense, and is humanitarian intervention such a defense?[6] Whether humanitarian intervention can serve as a valid legal defense for States' uses of force is highly controversial. The controversy reflects a power struggle between safeguarding the prohibition of the use of force and protecting human rights, essentially law and morality.[7] In an attempt to reconcile the opposing views, legal scholars have turned to the secondary rules of international law, here the law of State responsibility,[8] to provide a legal basis for humanitarian intervention.[9] Scholars relying upon the law of State responsibility commonly refer to domestic law.[10]

[1] The law of international armed conflict is regulated by *jus ad bellum*, the right to war, and *jus in bello*, the rules of war. *Jus ad bellum* regulates the legality of inter-State force, see Dinstein, 5.

[2] Green et al., at 4-5.

[3] Observe the words of President Putin "… we are acting to defend ourselves […]" "… in accordance with Article 51 (Chapter VII) of the UN Charter […]", see Putin (under 'Electronic Resources'). The claim was formalized in a letter to the Secretary-General, see UN Security Council (UNSC), UNSC Doc. 154 (2022).

[4] "The purpose of this operation is to protect people […]", see Putin (under 'Electronic Resources'). Putin implies using force to protect non-nationals from human rights violations within another State's territory. Mind that Russia has been an avid opponent of humanitarian intervention since Kosovo, see UNSC Doc. 3988.

[5] Nonetheless, the Russian invasion did not qualify as a humanitarian intervention, see Green et al., at 25–27.

[6] Cf. Green et al., at 8.

[7] It remains arguable whether the primary rules of international law, the substantive rules that stipulate obligations, provide a legal basis for humanitarian intervention. For a view that existing international law does not allow humanitarian intervention, see, e.g., Randelzhofer & Dörr, Lowe & Tzanakopoulos, and Byers & Chesterman, and Paddeu (2021). For the opposing view, see, e.g., Franck (2003).

[8] As codified in the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ARS). The ARS contains the defenses in international law.

[9] E.g., Franck (2003), at 214–216, and Stromseth, at 241–245.

[10] E.g., Johnstone and Kratochvíl.

To understand why scholars have turned to the law of State responsibility and domestic terminology, one must understand that humanitarian intervention is one of the greatest dividing concepts in international law.[11] On the one hand, opponents of humanitarian intervention take a positivist approach, arguing that such intervention is not a legal exception to the prohibition of the use of force.[12] Keeping the prohibition intact prevents inter-State interventions, thus protecting States' territorial sovereignty.[13] On the other hand, proponents argue a moral and/or political case, principally that the international community must avert grave human rights violations. Some proponents appeal to non-legal concepts,[14] and others controversially claim a legal basis in the UN Charter or customary international law.[15]

The debate on humanitarian intervention is thus two-folded; controversy has arisen when such action has been taken but also when it has not.[16] The debate culminated with the bombing campaign in Kosovo in 1999.[17] In the case of Kosovo, States were reluctant to rely explicitly on humanitarian intervention as a legal basis for their use of force but still used humanitarian intervention-like reasoning to explain their actions.[18] The general conclusion from Kosovo was that the intervention was incompatible with existing law but morally justified[19] – 'illegal but legitimate'.[20]

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[11] See, e.g., Holzgrefe & Keohane.

[12] E.g., Randelzhofer & Dörr, see 3.2 below.

[13] The prohibition of the use of force protects States' territorial sovereignty via the principle of non-intervention. However, it also limits State sovereignty in terms of action of freedom, see 2.2 below.

[14] E.g., Simma argues that in certain cases such as Kosovo, "[…] political and moral considerations leave no choice but to act outside the law […]", see Simma, at 1.

[15] E.g., Tesón and Bannon. See 3.2 and 3.3 below.

[16] E.g., the intervention in Kosovo has been criticized, but so has the lack of intervention in Rwanda in 1994. The Rwandan genocide is one of the greatest failures of the international community, see International Commission on Intervention and State Sovereignty (ICISS), 1.

[17] Roberts, at 179. The North Atlantic Treaty Organization (NATO) used missile and air strikes without express authorization from the UN Security Council. Such an authorization would have been vetoed by Russia, see Independent International Commission, 4.

[18] Only Belgium and the United Kingdom out of the nine countries involved in the campaign explicitly stated humanitarian intervention as the legal basis for the intervention, see Blair (under 'Electronic Resources') and the International Court of Justice (ICJ), *Legality of Use of Force*. In contrast, the US Secretary of State Albright spoke of NATO's action as operating "… within what we believe are legitimate parameters", see Albright (under 'Electronic Resources'). Albright's argument insinuates a humanitarian intervention, but the Clinton administration rejected an explicit use of such intervention as a legal basis. The administration's rejection was based on the risk that the action would create a precedent, which could be used by others to justify interventions of detriment to US interests and create an expectation for similar US action in other crises, see Wheeler, at 42. However, some States have and continue to defend their actions through humanitarian intervention, see 3 below.

[19] Many western lawyers concurred, see, e.g., Franck (2003), at 226. Nevertheless, the Non-Aligned Movement and, e.g., Russia and China rejected the intervention's legality. Most States neither declared NATO's action legal nor illegal, see Roberts, at 189–190.

[20] "[…] The Commission's answer has been that the intervention was legitimate but not legal, given existing international law […]", see Independent International Commission, 289.

In a scholarly pursuit of a unified doctrine that merges law and morality,[21] the defense of humanitarian intervention has taken many shapes. These include 'illegal but justified'[22] and 'illegal but excused'.[23] In principle, the doctrines affirm that humanitarian interventions are illegal according to existing international law, but only 'technically'[24] or 'formally'[25] so. Such arguments point to the qualitative differences of legality, which is consistent with how justifications and excuses operate in domestic law.[26]

Justifications and excuses are well-developed concepts in domestic law, as in the American legal system. The US Model Penal Code: Official Draft and Explanatory Notes (1985) (MPC)[27] divides defenses into justifications and excuses, where justifications but not excuses are a way out of illegality.[28] However, the international law of State responsibility does not apply a justification-excuse distinction.[29] Descriptions of humanitarian intervention as 'illegal but justified' and 'illegal but excused' are thus based on domestic notions. However, scholarly arguments that humanitarian intervention is 'illegal but…' seldom specify what concepts or domestic notions are relied upon to substantiate their claim that such intervention may be justified or excused. This has resulted in scholars disagreeing on the legal consequences and the legal characterization of excusing or justifying humanitarian intervention.[30]

Nevertheless, the defenses of humanitarian intervention appear to be based on the same valid question: if an individual can be excused for using force to protect others, or if such an act can be justified, why should not the same apply to a State's humanitarian intervention?

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[21] In most cases, following the law is the right thing to do. However, there may be instances where the law and morality conflict. In these situations, if the law prohibits humanitarian intervention but such interventions are considered morally right, it may be necessary to change the law, cf. Fletcher & Ohlin, 133.

[22] E.g., Franck (2002), 184. Franck claims that humanitarian intervention is 'illegal but justified' under the doctrine of mitigation. However, mitigation only affects the consequences of responsibility and not responsibility itself, whereas justifications affect responsibility, cf. Roberts, at 194.

[23] E.g., Stromseth, at 243 and Vidmar (2017).

[24] See Franck (2002), 184.

[25] Slaughter (under 'Electronic Resources'), *passim*.

[26] According to a general account of justifications and excuses, a justified act is not 'legally wrongful', even though it apparently violates the law. An excused actor commits a 'legally wrongful' act, but he is not considered blameworthy or responsible due to the specific circumstances in the case, see 4.2 below.

[27] Generally known as the 'American Criminal Code', see 4.3 below.

[28] Defenses of justifications and excuses both exclude responsibility. However, only justifications are not 'legally wrongful' and, as such, a way out of illegality, see 4.2 below.

[29] The ARS does not explicitly divide defenses into justifications and excuses, see ARS, Chapter V *e contrario*. Also, see 5.2 below.

[30] As portrayed in Roberts's article. Roberts criticizes the notion of uses of force being 'illegal but justified' following various scholarly arguments that rely upon unspecified doctrines, see Roberts. Also, Paddeu confirms that the lack of specifying the underlying doctrines reveals unclear arguments, see Paddeu (2021), at 653–654.

1.2 Purpose and Question of Research

The study is based on a premise or a working hypothesis that, in general, domestic law can be used as a tool to explain elements of international law and that, in particular, the justification-excuse distinction can provide a legal basis for humanitarian intervention. The hypothesis presumes the feasibility and usefulness of applying domestic law concepts in international law.[31]

The purpose of the thesis is to examine whether international law, specifically the law of State responsibility, can draw any lessons or implications from the well-known concept of justification and excuse developed in domestic law. If the law of State responsibility can accommodate the justification-excuse distinction, the secondary rules of international law could provide a legal basis for humanitarian intervention by justifying or excusing such intervention.

The thesis's research question is:

Can the law of State responsibility accommodate the domestic justification-excuse distinction and thus provide a legal basis for humanitarian intervention?

To answer the research question, humanitarian intervention, the domestic concept of justification and excuse, and the conjunction of the two notions are examined within the scope of the law of State responsibility.

1.3 Delimitations and Terminology

The thesis examines the justification-excuse distinction through the international law of State responsibility as drawn by domestic analogy. Nevertheless, the scope needs further clarification through delimitations and explaining the applied terminology. The necessary caveats regard: (i) humanitarian intervention, (ii) the law of State responsibility, (iii) the justification-excuse distinction, and (iv) domestic law.

Firstly, the study is delimited to forcible unilateral humanitarian interventions, interventions without consent from the UN[32] or the intervened State.[33] The thesis continues with the following scenario in mind: a target State commits grave human rights violations against its population, and a humanitarian State uses unauthorized force to end the violations as a last resort.

[31] Note that the same or similar premise has been observed by several scholars, turning to the law of State responsibility to explain humanitarian intervention, see 1.6 below.

[32] More precisely, authorization by the UN Security Council under Article 42 UN Charter.

[33] A State can request another State's assistance, also known as 'intervention by invitation', see Kunig, para. 29.

Consequently, the 'target State' is the intervened State targeted by the humanitarian intervention, and the 'humanitarian State' is the one intervening.[34]

Secondly, the thesis is delimited to the law of State responsibility and does not consider individual criminal responsibility under international law. The focus is the general defenses recognized in customary law, applicable across all international legal relations. As such, bilateral treaty exceptions are excluded. Also, the law of State responsibility is explored through a theoretical account, excluding the reasonable likelihood of a justification-excuse distinction in international law. In practice, the diplomatic and political efforts of States need to be considered. Still, a theoretical account may assist in clarifying the possible legal positions of the involved parties.

Thirdly, the definition of the justification-excuse distinction provides a general, and not an exhaustive, account of the distinction. The distinction may have moral implications, but such considerations are generally disregarded. This thesis is not a moral exploration of the justification-excuse distinction but a legal one. Nonetheless, moral considerations have heavily influenced the distinction. The law is a normative framework that appears to appeal to the community's morals. As such, it is sometimes necessary to emphasize moral elements. A convincing notion of humanitarian intervention needs to appeal to moral sensibilities and the existing legal framework. For such a notion to arise, there needs to be conceptual clarity, and this thesis aims to create greater clarity.[35]

Lastly, the thesis's references to 'domestic law' commonly entail the US Model Penal Code. However, there are also references to domestic law in general. From the context, the reader will be able to make this distinction. In terms of the MPC, elements of criminal law are only mentioned as far as they are relevant to international law.[36] The thesis is delimited to examine the notions of necessity, self-defense, and duress since these defenses could be relevant in the context of humanitarian intervention. The MPC classifies the defenses as justifications and excuses, and this classification is applied analogously to international law.

[34] Observe that the chosen terminology is not value neutral. However, this choice has been made against the backdrop of recent debates on genuine humanitarian interventions, see Heller and Trahan. By labeling the 'intervening State' as 'humanitarian', I want to emphasize that the thesis examines humanitarian interventions with a genuine purpose of saving human lives. If the humanitarian intervention is genuine, this may very well be the morally right thing to do in certain circumstances. Nonetheless, any positive bias toward humanitarian intervention due to the terminology will likely be neutralized by analyzing such intervention's legality, see 3 below. This reasoning follows Paddeu's approach, see Paddeu (2021), at 652.

[35] Cf. Fletcher & Ohlin, 135–136.

[36] The law of State responsibility is neither criminal nor civil, but like domestic criminal law, both are built upon the notion of 'responsibility', cf. Paddeu (2018), 19.

1.4 Methodology and Materials

This thesis works on the premise that the international law of State responsibility can draw lessons from domestic law, particularly from the concept of justification and excuse. If the law of State responsibility can accommodate the distinction, this could provide humanitarian intervention with a legal basis – drawn by analogy with domestic law. Moreover, the research question raises several methodological questions.[37] The questions are as follows: (i) how are humanitarian intervention and the law of State responsibility examined, (ii) how is the domestic justification-excuse distinction defined and how are the defenses classified, and (iii) how is the analogy conducted?

First, humanitarian intervention and the law of State responsibility are examined through the dogmatic legal method. The method is suitable since the purpose is to scrutinize humanitarian intervention and the law of State responsibility *de lege lata*.[38] The analysis provides an interpretation of current law by examining the sources of international law, such as international conventions,[39] international custom,[40] and the general principles of law.[41,42] Moreover, judicial decisions and the work of qualified publicists are used as subsidiary means to interpret the sources of law and determine the rules of law.[43]

Second, the thesis examines the distinction between justification and excuse by drawing upon the American legal philosopher Douglas Husak's definition. This definition is considered to have a near consensus among scholars.[44]

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[37] Cf. Kleineman, at 31.

[38] Kleineman., at 21.

[39] Concerning humanitarian intervention, the UN Charter is examined. For the law of State responsibility, the ARS is the subject of scrutiny.

[40] International custom is the general practice accepted as law, following the Statute of the International Court of Justice (1946) (ICJ Statute), Article 38(1)(b), see *infra* note 149. Through ICJ's judicial decisions and the framework Responsibility to Protect (R2P), it is examined whether a rule of customary international law allowing humanitarian intervention has arisen, see 3.3–3.4 below. In terms of the law of State responsibility, customary international law is not explored. For such an examination, see Paddeu (2018).

[41] The principles of sovereignty and non-intervention, along with the prohibition of the use of force, constitute the general framework of this thesis, see 2 below.

[42] In accordance with the ICJ Statute, Article 38(1)(a–c). Also, see Kleineman, at 21–22.

[43] Cf. ICJ Statute, Article 38(1)(d). Doctrine provided by, e.g., the Max Planck Encyclopedia of International Law is applied in this context. As another subsidiary means of interpretation, the UN Charter *travaux préparatoires* is used to understand the reasoning behind the provisions. This is done in accordance with the Vienna Convention on the Law of Treaties (1969) (VCLT), which states that an interpretation shall be conducted in good faith following the ordinary meaning of the provision in its context and in the light of its object and purpose. Supplementary means, such as preparatory work, can be used when the meaning of a provision is, e.g., ambiguous, see VCLT, Articles 31 and 32. Observe that the ARS is not a treaty, as such, the Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001) (ARS Commentary) is not limited as a subsidiary means of interpretation.

[44] See Paddeu on Husak, Paddeu (2018), 30.

As to the definition's implications, these draw upon Professor George Fletcher's ideas.[45] Thus, forming a general theoretical account of justifications and excuses found in domestic legal theory.

However, the definition does not explain how different defenses are supposed to be divided into justifications or excuses. While many domestic legal systems have applied a distinction between the two categories, this thesis divides justifications and excuses as they appear in the US Model Penal Code. The MPC is supposed to represent domestic law in general.[46] The specific defenses and their classification as justifications or excuses exemplify how the distinction is applied in domestic law. As such, the MPC is applied as a 'model' of domestic analogies rather than a specific 'code'. Additionally, the reasoning behind the MPC's classification of defenses as justifications and excuses is presumed to have normative value. Even courts in non-MPC jurisdictions have referred to the MPC to explain unsettled issues, even if they might have rejected the MPC's proposed solution.[47]

Moreover, the dogmatic legal method is applied to examine the MPC and the Model Penal Code and Commentaries (Official Draft and Revised Comments) (1985) (MPC Commentaries; Commentaries) but not case law.[48] Excluding case law from the examination scope is a deviation from the method. Generally, the method focuses on descriptive rather than applied law, which is a weakness when interpreting *de lege lata*. Nevertheless, the weakness can be avoided if the provisions are critically examined.[49] The normative basis, as to classifying a specific defense as a justification or an excuse, is critically examined through the MPC Commentaries. As such, the analysis reviews the applicable defenses' formulations and their rationales. If the MPC's defenses share the same or similar rationales as their counterparts in international law, this indicates that a defense should belong to either justifications or excuses. It may also imply that a justification-excuse distinction is feasible or even useful in the law of State responsibility.

[45] Fletcher is greatly accredited for the distinction, see, Dressler, at 1, and Duff, at 829. Additionally, Douglas Husak's definition largely builds upon Fletcher's ideas.

[46] An alternative method would be to compare different countries' domestic legal systems and, from there, conclude whether they constitute justifications or excuses. However, for space reasons, I have chosen American domestic law to represent general domestic law.

[47] The MPC also invites to comparative analysis that is usually complicated by the division between common and civil law, see Dubber, 6.

[48] The sources of domestic law are comparable to international law. Both domestic and international law have specific regulations, preparatory frameworks, and case law. Individuals are subjected to domestic law. Similarly, States are subjects under international law, bearers of rights and duties. However, States are not only subjects under international law, they are also lawmakers. The greatest difference between domestic and international law is that States, unlike their citizens, are not only subjected to the law but also create it. In domestic law, individuals can never change the law by, e.g., violating the law, but States can if there is State practice and *opinio juris* on the matter, cf. Linderfalk (2012), 25–32.

[49] Kleineman, at 24.

Third, the research question asks whether the law of State responsibility can accommodate the domestic justification-excuse distinction and thus provide a legal basis for humanitarian intervention. Principally, a question of *de lege lata*. The verb 'can' aims at the ability of international law to accommodate a domestic concept. As an independent area of law, justifications and excuses will ultimately have the relevance that the international legal order assigns to them. As such, whether the law of State responsibility 'can' accommodate the domestic distinction becomes a question of whether it should do so and if such accommodation is appropriate in international law. In other words, the research question plays on a field between *de lege lata* and *de lege ferenda*.

A two-folded method is required to answer the research question and fulfill the thesis's purpose. Initially, the dogmatic legal method examines the reasoning behind the defenses in the MPC and the law of State responsibility. Subsequently, the method of analogy is applied to compare the regulations' normative rationales. If the MPC and the law of State responsibility share the same or similar rationales, international law perhaps could and should classify its defenses according to the domestic justification-excuse distinction.

The thesis applies a top-down perspective,[50] starting with the MPC's classification of defenses as justifications or excuses. The MPC has classified necessity and self-defense as justifications and duress as an excuse. As such, the defenses' rationales are explained by examining the MPC Commentaries. The defenses counterparts in international law, necessity, self-defense, and distress, follow the MPC's justification-excuse classification. The analogy is conducted by comparing the defenses' rationales in domestic and international law. Conducting an analogy does not entail a transposition or transplantation of domestic law to international law.[51] Instead, examining the defenses in the MPC and the justification-excuse rationale may serve as guidance in devising the equivalent rationale for the international law of State responsibility. The rationales' possible similarities and differences highlight where conceptual unity does or does not exist. Regardless of whether such unity exists, the thesis aims to provide a greater theoretical awareness of the justification-excuse distinction.

The analogy is primarily a doctrinal examination since no justification-excuse distinction explicitly exists in international law. Since doctrine is a secondary source of law, it is the logic of the analysis that makes doctrine a relevant means of interpretation.[52,53]

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[50] The main critique of such an approach is that "[…] our understanding of particular defenses will ultimately be hostage to the theorist's underlying theory …" see Ferzan, at 225.

[51] Generally, a legal transplant or transposition is taking the idea, that is, legal rule, out of its context and applying it elsewhere, see Ellis, at 963. However, such an approach is inconsistent with the thesis's hypothesis and purpose, see 1.2 above.

[52] Kleineman, at 33–34. See 1.6 below.

[53] Observe that all electronic sources in this thesis have been accessed on 2 January 2023.

1.5 Theory of Analogy

Neither law nor international law exists in a vacuum. The law is a normative framework, and international law stipulates the rules of States. Understanding what international law is and what it does or should do is based on theoretical assumptions and presuppositions.[54] Identifying these assumptions and presuppositions is essential to "…better comprehend the nature of our understanding of international law, and the biases that may accompany our own or others' vision of it […]".[55] One theoretical premise has already been disclosed by identifying the hypothesis in Sub-Chapter 1.2. In turn, the hypothesis is based on the applied theory of analogy.

The definition of the relationship between international and domestic law relates to the general notion of law, the structure of the international legal order, and the foundations and sources of international law. Nonetheless, how international law and domestic law interact with one another remains unclear.[56] Despite the ambiguity, it is common that concepts of domestic law appear within international fields, primarily as models of general principles.[57] Analogies from domestic to international law are particularly common since international law lacks the density of norms of national legal orders, and its development is area-related. A domestic analogy models a legal rule or concept in domestic law and applies it to a similar case in international law. The rationale of an analogy is to close normative gaps between similar cases.[58] Domestic analogies are thus a resource to explain and resolve legal issues, which can even lead to developing international law.[59,60]

However, caution should be taken when proceeding with a domestic analogy since there are fundamental differences between the international and domestic legal systems.[61] Despite the differences, analogies can be a valuable tool if certain preconditions exist within a legal order.

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[54] Scobbie, at 51–53.

[55] Bianchi, 1.

[56] Dupuy, para. 1. For more on the theoretical issue of whether international law and domestic law are parts of one legal order or separate independent legal orders, see Dupuy.

[57] Dupuy., para. 27; Bordin, at 25.

[58] Vöneky, paras. 1–2. An analogy is "…the application of a rule which covers a particular case to another case which is similar to the first but itself not regulated by the rule […]".

[59] Roberts, at 188–189. E.g., the ICJ explicitly used reasoning by analogy when assessing the immediate effect of withdrawal from ICJ's jurisdiction. Concluding that such withdrawal must be conducted in accordance with the principle of good faith by analogy to the law of treaties, see ICJ, *Nicaragua, Jurisdiction and Admissibility*, para. 63.

[60] However, note that some scholars argue against the validity of analogy. In cases such as *Nicaragua* described above, e.g., Heintschel von Heinegg argues that the Court applies customary international law and not analogous reasoning, see Heintschel von Heinegg, at 245. For a critique of such views, see Vöneky, para. 9.

[61] Roberts, 189. E.g., domestic but not international courts have compulsory jurisdiction, meaning that domestic courts will determine more disputes than their international counterparts. Also, breaches of the law have different meanings in domestic and international law.

First, the creation of legal rules may not be exclusively subjected to specific sources of law.[62] International law is not limited to the defined legal sources listed in Article 38 of the Statute of the International Court of Justice (1946) (ICJ Statute).[63] Additionally, analogies with domestic law have historically been crucial for the development of international law.[64] Second, similar cases must be legally treated in the same way since this is the underlying rationale of analogous reasoning. In a just legal system, coherence and the rule of law are fundamental, which presupposes that similar cases are treated similarly.[65] All systems that subscribe to the rule of law share the need to reason analogically to fill gaps in the law.[66] The principle of treating similar cases alike also underlies international law, which is why analogies can be seen as a general principle of international law.[67,68]

Besides the two general conditions, there must be a lacuna in the law to draw an analogy. A gap exists when the existing rules do not cover a particular case.[69] There exists a lacuna in the law of State responsibility regarding the justification-excuse distinction since this is not covered by any rule or general principle of international law. The Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ARS) does not divide defenses into justifications and excuses, and even an extensive interpretation of the ARS could not lead to such a distinction.[70]

Moreover, an analogy must be appropriate for it to be valid; the compared cases must be similar in a relevant way for their legal evaluation. The validity is thus decided case-by-case, comparing the regulated and unregulated cases.

International law is often developed through violations of existing law, possibly creating a new custom, while domestic law meets breaches with punishment.

[62] Vöneky, paras. 4. If international law had to stem from particular sources of law, this would not create any room for analogous reasoning, see para. 12.

[63] Article 38 ICJ Statute is not exhaustive. Bordin even states that reasoning by domestic analogy is reflected in Article 38(1)(c) ICJ Statute, providing a safety net in situations where an existing rule of international law does not apply, see Bordin, at 27.

[64] Bordin, at 26. E.g., the law of responsibility has been influenced by the law of torts.

[65] Vöneky., paras. 4, 13 and 17.

[66] Weinreb, 135 and 146; cf. Bordin, at 25.

[67] See, e.g., Bordin at 28. The conclusion follows an approach where justice is considered an integral part of international law. A coherent and just interpretation of international law supposes that similar cases are treated alike, alongside arguments of State consensus or States' freedom of action. However, some scholars still disregard the validity of analogies in international law. The opponents of analogous reasoning claim that if the law does not regulate a certain case, the State can act as it wishes. For more, see Vöneky, paras. 13–16.

[68] The debate on the validity of analogy is related to the general debate on whether the law is the law because it is just or because of the power of those who create the law, see Weinreb, 146; Bordin, at 33–34. However, there is no legal evidence that international law is limited to the will of States. E.g., customary international law can create legal obligations for States without their consent, see Vöneky, para. 24.

[69] Vöneky, para. 4.

[70] Cf. Vöneky, para. 16. The ARS is not a treaty, and its interpretation is not limited to the Articles. Nonetheless, even the preparatory work of the ARS is not sufficient to support a current justification-excuse distinction in the ARS. Cf. 5.2 below.

If the comparison determines that the similarities between the cases are relevant for their legal evaluation and their differences are irrelevant, then the specific analogy is justified.[71]

Regarding the justification-excuse distinction, domestic law contains the regulated cases, and international law contains the unregulated cases. In the MPC, necessity and self-defense are justifications, while duress is an excuse. The defenses' counterparts in the ARS are necessity, self-defense, and distress, none of which are classified according to the justification-excuse distinction.[72] It is necessary to identify the rationales of the two cases to conclude whether they are similar enough and their differences irrelevant to justify their equal treatment.[73] Firstly, identifying the bases of the defenses in the MPC is done by examining the Code and its Commentaries. Secondly, identifying the grounds of the defenses in the ARS is mainly done by scrutinizing the provisions and the Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries (2001) (ARS Commentary). However, there are some difficulties with concluding the rationales of the ARS. The ARS is not a treaty between States; instead, the International Law Commission (ILC) has greatly codified customary international law as Draft Articles. The drafting history of the ARS involves several Special Rapporteurs who have examined State practice, judicial precedents, and scholarly opinions to assert existing law.[74] As such, many factors are involved in examining the lawmakers' intent. The objective is to find the underlying rationales of the defenses in the ARS, and the thesis focuses on exploring the ARS Commentary and not State practice.[75] Extracting the rules' objects or purposes also entails drawing upon scholars' reasonings.[76]

At first glance, domestic and international law are similar in that they have identified similar defenses between individuals and States. Nonetheless, the legal orders regulate different actors. The initial observation of the similarities is a sufficient reason to conduct an analogy, but whether the analogy is feasible and useful is discussed in Chapters 5 and 6.

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[71] Vöneky, paras. 5 and 17.

[72] See 4.3 and 5.2 below.

[73] Vöneky, para. 23.

[74] See 4.3, 5.3, and 5.4 below. Drafting history is a subsidiary means of treaty interpretation, see VCLT, Article 32. However, since the ARS is not a treaty drafting history may be of even greater importance.

[75] State practice is not examined due to the limited scope of the thesis, meaning that the examination is not all-encompassing. Nonetheless, State practice carries importance since the ARS generally reflects customary international law. The risk of not including State practice in examining the ARS rationales is somewhat mitigated by the ILC considering such practice in its drafting process. Also, only a few States have expressed their stance on the justification-excuse distinction; existing State practice is thus insufficient to assert that the distinction exists in international law, see Paddeu (2018), 35–36. For a thorough analysis of State practice, see Paddeu (2018).

[76] See 4.3, 5.3, and 5.4 below.

Reasoning by analogy is a way of understanding the similarities and differences between domestic and international law cases. Nevertheless, such inter-systemic analogies have specific limitations. Some scholars emphasize the will of States, arguing that there are special limitations in international treaty law[77] and customary international law.[78] While States' intentions and consensus are aspects to consider when conducting an analogy, they are not decisive.[79] Nonetheless, there are limitations to analogous reasoning in the form of the substantive rules of the international legal order. Analogies are prohibited if the application would lead to a result prohibited by a specific rule in international law or a *jus cogens* provision.[80]

Analogous reasoning can develop international law coherently if conducted correctly.[81] Even with this, an analogy can only provide a partial justification for a legal proposition since an analogy is not a strict logical deduction.[82] Every analogy starts with discovering that two separate cases are similar and that a rule can be taken from its traditional context and applied to a new one. Whether the cases are relevantly similar is confirmed by the rationales underpinning the cases and the characteristics of the legal order.[83] An inter-systemic analogy projects the existing logic of domestic law to international law;[84] nonetheless, international law has its own systematicity.[85] An analogy is thus only justified if the cases' rationales are similar and if the analogy is considered appropriate in the international legal order. Accordingly, the value of an analogy is not to provide a conclusive answer on the law *de lege lata* but to make legal propositions in gray areas of international law. Regardless of the proposition's validity, exploring the similarities and differences of cases results in a better understanding of the law as we know it.[86]

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[77] E.g., Heintschel von Heinegg argues that analogous reasoning is impossible in treaty law since the result of an analogy does not necessarily align with the intentions or consensus of States, see Heintschel von Heinegg, at 245–246.

[78] Essentially, that analogies do not apply to the rules of customary international law since this would lack State consensus, see Heintschel von Heinegg, at 245–246.

[79] Regarding treaty law, every analogy examines the underlying rationale of a rule, interpreting the treaty and its object and purpose, which will lead to an analogy coherent with State consensus. Concerning customary international law, such law also binds States which have not consented to a rule, see Vöneky, paras. 19–20.

[80] Vöneky, para. 21. However, observe that a *jus cogens* norm can be replaced with another *jus cogens* norm, see *infra* note 153.

[81] Vöneky, para. 6.

[82] Vöneky, para. 17. However, analogies are not logically flawed, see Weinreb, 9. An analogy applies the following reasoning: rule X applies to case A, and because case A is relevantly similar to case B, rule X must also apply to case B, see Bordin, at 25.

[83] Bordin, at 36. The discovery entails a scholar's leap of imagination, which is why an analogy is not a strict logical deduction. A discovery's validity depends on the cases' underpinning rationales and the analogy's appropriateness.

[84] Cf. Bordin, at 34.

[85] Koskenniemi, 13. The international legal order has a logic distinct from domestic law, e.g., the *jus cogens* limitation.

[86] Cf. Bordin, at 36–37. Analogies can always be tested and contested. Especially if practice and precedent are sparse, a topic may not be ready for codification.

1.6 Previous Research

The notion of justification and excuse is underexplored in international law, notwithstanding its flourishing literature in domestic law.[87] Several domestic legal orders apply a justification-excuse distinction, and the distinction has been analyzed extensively in domestic law theory. In contrast, existing international law does not divide defenses into justifications and excuses. Nonetheless, there is a debate on whether the typology could be valuable to humanitarian interventions, implicitly or explicitly, relying upon the law of State responsibility.

Scholars have mainly relied on the defense of necessity or distress, both as a justification and as an excuse for humanitarian intervention. However, the references to the law of State responsibility are mostly superficial. Generally, the arguments differ concerning the legal characterization of the use of force, whether the force is lawful or unlawful.[88] Nonetheless, particularly three scholars have contributed to developing this field in international law, Anthea Roberts, Jure Vidmar, and Federica Paddeu.

Firstly, Professor Anthea Roberts discusses the defense of humanitarian intervention through the legal/legitimate dichotomy. In 'Legality vs Legitimacy: Can Uses of Force be Illegal but Justified?',[89] Roberts states that the 'illegal but justified' approach seems like a way of reconciling law and morality.[90] She identifies that the defense of humanitarian intervention will differ depending on its perceived legality. If seen as a legal exception to the non-use of force, primarily legal justifications will be used. Alternatively, if seen as an action outside the law, primarily moral and political arguments will be used.[91] Despite the various arguments following the 'illegal but justified' approach, Roberts states that none are sustainable.[92] If States' illegal use of force is tolerated (justified), and States act on it accordingly, this would turn an initial claim of legitimacy into one of legality.[93] Ultimately, illegal force cannot be justified due to States' lawmaking role in international law.[94]

[87] Paddeu (2018), 11–12; Duarte, at 179.

[88] See, e.g., Johnstone, Kratochvíl, or Guilfoyle.

[89] Roberts.

[90] Roberts, at 179 and 212.

[91] Roberts, at 202. Whether such justification is legally or morally based, Roberts means that all 'justifications' modify the use of force prohibition by subsequent State practice. However, it remains unclear what definition of justifications and excuses Roberts relies upon.

[92] Roberts, at 185–200. From both a legal and moral perspective, Roberts criticizes arguments of, e.g., mitigation, excuse, and domestic law analogy.

[93] Roberts, at 189–198. Although, e.g., Kosovo was presented as *sui generis*, without precedential value, it could, nonetheless, be invoked as a precedent.

[94] Roberts, at 212–213. The approach relies too heavily on legitimacy, which risks undermining the relevance of law and increasing States' uses of self-serving force.

Secondly, Professor Jure Vidmar draws upon Roberts's work in his article 'The Use of Force and Defences in the Law of State Responsibility'.[95] As a way out of the problem identified by Roberts, that States' actions have effects on lawmaking and interpretation of provisions,[96] Vidmar suggests separating justifications from excuses in the law of State responsibility. Vidmar argues that justifications act on a primary level, such as self-defense in Article 51 UN Charter, which precludes the wrongfulness of an act. In contrast, excuses are wrongful acts, but due to the circumstances, an excused act is the choice of the lesser evil.[97] Here Vidmar seems to conflate the definition of excuse with a theory of excuse, the choice of lesser evils.[98]

Vidmar concludes that all defenses in the law of State responsibility operate on a secondary level, precluding or mitigating the responsibility of wrongfulness.[99] As such, Vidmar means that the problem posed by Roberts is solved. On the one hand, 'illegal' entails an act not justified under the primary rules of international law. Essentially, the reading of the UN Charter remains orthodox. On the other hand, 'legitimate' means that an act has been excused, precluding only the responsibility for a wrongful act. Since excuses operate on a secondary level, States cannot rely on excuses to defend their wrongful actions, and no new customary rule can emerge.[100]

Thirdly, Dr. Federica Paddeu explores unchartered international waters in her book *Justification and Excuse in International Law*,[101] providing a conceptual and analytical explanation of defenses in international law. Paddeu specifies a method for distinguishing justifications from excuses: (i) examining the defenses' formulations through practice and rationales, (ii) exploring why a defense is lawful, identifying the underlying theory of each defense, and (iii) concluding each defense's most suitable exonerating effect, justified, or excused.[102]

Additionally, Paddeu does not engage in the transposition of domestic law. Instead, Paddeu refers to international law defenses through reviewing their equivalent notions in domestic law. The references are general, drawing upon theories of domestic law rather than a specific national legal order.[103]

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[95] Vidmar (2015).

[96] Vidmar (2015), 14.

[97] Vidmar (2015), 15–17. Vidmar comes to this conclusion by reviewing the ARS Special Rapporteurs' works. He also states that the ARS Commentary conflates justifications and excuses.

[98] Cf. Ferzan, at 241.

[99] Note that Vidmar seems to conflate 'mitigation' and 'excuses' since he states that excuses mitigate responsibility. Mitigation reduces the legal consequences, while an excuse absolves a person of responsibility.

[100] Vidmar (2015), 28–30. In his following work 'Excusing Illegal Use of Force: From Legitimate to Legal Because it is Legitimate', Vidmar argues similarly, see Vidmar (2017).

[101] Paddeu (2018).

[102] Paddeu (2018), 13–14.

[103] Paddeu (2018), 206. Paddeu applies a consequentialist and deontological perspective.

Ultimately, Paddeu argues that international law can and should accommodate a justification-excuse distinction due to the practical implications of the distinction.[104] Paddeu's work has contributed significantly to a theoretical and conceptual understanding of defenses and should be accredited accordingly.[105]

Paddeu has also applied her initial exploration of the justification-excuse distinction to the notion of humanitarian intervention. In 'Humanitarian Intervention and the Law of State Responsibility',[106] Paddeu analyzes the possibility of providing a legal basis for humanitarian intervention by justifying, excusing, or mitigating such intervention.[107] She explores the claims as defenses of necessity, drawing out implications within and beyond the law of State responsibility.[108] One issue that Paddeu emphasizes is that justifications or excuses are not available when a defense concerns a breach of a peremptory norm.[109]

In her conclusion, Paddeu argues that none of the claims can provide a sufficient basis for humanitarian intervention. The legality of humanitarian intervention is an essential aspect of the non-use of force regime and should only be addressed by the primary rules of international law. Thus, the law of State responsibility, rules operating on a secondary level, cannot ground the legality of claims of humanitarian intervention.[110]

Consequently, examining whether international law can accommodate the justification-excuse distinction is not a novel idea "[…] [b]ut much remains to be done […]" to use Paddeu's words.[111] To my knowledge, there is no previous research justifying or excusing humanitarian intervention by analogy with the US Model Penal Code. Therefore, the thesis provides a new account of the justification-excuse distinction applied to humanitarian intervention.

[104] Paddeu (2018), 63. Such as reparations, the responsibility of accessories, and the normative pull-on rules.

[105] Anderson, at 239 and 241.

[106] Paddeu (2021).

[107] More specifically, "[…] that humanitarian intervention is justified; that the state intervening for humanitarian purposes is excused; and that the consequences arising from the intervention for the state acting for humanitarian purposes ought to be mitigated […]". See Paddeu (2021), at 649.

[108] Paddeu (2021), at 651.

[109] Paddeu (2021), at 658–659.

[110] Paddeu (2021), at 677–678. Paddeu states that it is not possible to justify any breach of *jus cogens* since Article 26 ARS requires compliance with peremptory norms, at 664.

[111] Paddeu (2018), 475.

1.7 Outline

The second Chapter introduces the fundamental principles of international law connected to humanitarian intervention, that is, the general law of the use of force. The principles of sovereignty and non-intervention, the non-use of force regime, and the exceptions to the regime constitute the general framework of this thesis. Following the introduction, Chapter 3 depicts the stance of humanitarian intervention in current international law. Humanitarian intervention is examined from three perspectives: the UN Charter, customary international law, and the Responsibility to Protect (R2P) doctrine. After reviewing international law, the thesis turns to domestic law. Chapter 4 starts with identifying the justification-excuse distinction according to the general account. Then the Chapter introduces the applicable domestic law, the US Model Penal Code, and examines its justifications and excuses. Thus far, the Chapters are conducted through the dogmatic legal method to examine *de lege lata in* terms of the general principles of international law, humanitarian intervention, and domestic law.

Chapter 5 examines whether the law of State responsibility can accommodate a domestic justification-excuse distinction. Firstly, the Chapter introduces the law of State responsibility through the dogmatic legal method. Secondly, the law of State responsibility is drawn by analogy with domestic law and domestic legal theory to conclude whether international law can accommodate the distinction. Thirdly, following the domestic analogy, the justification-excuse distinction is applied to humanitarian intervention. In conclusion, the final Chapter confirms whether the law of State responsibility can accommodate the justification-excuse or not and, as such, provide a legal basis for humanitarian intervention. This analysis contains an aspect of *de lege ferenda* argumentation.

2 The International Law of the Use of Force

2.1 General Remarks

This Chapter introduces the general principles of international law governing humanitarian intervention. Sub-Chapter 2.2 presents the principles of sovereignty and non-intervention, constituting the basis of international law. Sub-Chapter 2.3 explains the non-use of force regime, as stipulated in Article 2(4) UN Charter. While international law prohibits States' uses of force, the UN Charter stipulates exceptions to the prohibition. The exceptions are explored in Sub-Chapter 2.4: authorization to use force by the UN Security Council (Article 42 UN Charter) and self-defense (Article 51 UN Charter). The Sub-Chapter on exceptions also confirms that humanitarian intervention does not fit within the scope of the two exceptions to the prohibition of the use of force.

2.2 The Principles of Sovereignty and Non-Intervention

The principle of sovereignty is a founding and fundamental principle of international law.[112] This legal notion also includes a political element of defining and thus limiting the powers of the entity claiming to be sovereign. Sovereignty becomes most evident in times of crisis, from political crises to full-scale wars, where sovereignty is as often claimed as it is rejected.[113]

The principle of sovereignty is codified in Article 2(1) UN Charter, establishing the sovereign equality of all States.[114] The term 'sovereign equality' was deliberately adopted to precede equality over sovereignty. By regulating 'sovereignty' as an adjective modifying 'equality', sovereignty excludes legal superiority between States but not the superiority of the international community over its members, the States. The purpose of the wording was to find a suitable balance between the interests of individual States and the interests of humankind, as represented by the international community.[115]

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[112] Besson, paras. 1–3.

[113] Fassbender, para. 1, at 135. But if there is no higher authority than a sovereign State, how could a State be considered bound by the law? See *infra* note 121.

[114] UN Charter, Article 2(1). Note that the Friendly Relations Declaration (1970) (FRD) specifies the detailed rights included in the principle of sovereignty. The FRD can be relied upon almost like a text with binding force due to the adoption by consensus, see Fassbender, para. 31, at 148 and ICJ, *Nicaragua*, para. 203.

[115] Fassbender, para. 47, at 153–154.

The codification follows the move of international society and law from a law of co-existence to a law of cooperation.[116] According to the law of co-existence, sovereignty gives States the right to use their powers as they like, principally without any concern for the public good. However, later States acknowledged the need to cooperate to promote joint community goals. Modern international law is based on the idea that sovereign States not only co-exist but also must cooperate. As such, States must consider the valid interests of other States when exercising their sovereignty.[117] Following the increased cooperation and interdependence of States, international law gradually applied to areas that previously belonged to domestic law, such as international human rights. New norms, such as *jus cogens*,[118] have emerged from this development, displaying that non-derogable norms can bind States without their consent.[119] There are two dimensions to sovereignty, internal and external. Internally, a State is autonomous in making decisions within its territory, the law is thus supreme and ultimate. Externally, a State is independent in its relationships with other States and does not obey any other authority. The external claim of sovereignty is directed against other States, and this is the basis of sovereignty in international law and the independence of States.[120]

States are primary subjects under international law and gain external and internal sovereignty through the international legal order.[121] Sovereignty is the legal status of a State as defined[122] both protected and limited by international law.[123] On the one hand, sovereignty is protected by the general principles of law and customary international law, as confirmed by the International Court of Justice (ICJ) in the *Nicaragua* case.[124] On the other hand, sovereignty is inherently limited by established principles of international law, such as those protecting human rights and the non-use of force regime.[125] Consequently, the existence of sovereignty does not provide a right for States to act in contradiction with principles governing the international community of States.[126]

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[116] Friedmann, 62. The duty of States to cooperate is also stipulated in the FRD.

[117] Fassbender, para. 13, at 139–140; Besson, paras. 42–43.

[118] See *infra* notes 149 and 153.

[119] Besson, para. 44.

[120] Fassbender, paras. 3 and 6, at 136–137; Besson, paras. 96 and 114.

[121] Besson, paras. 31 and 96. Traditionally, self-limitation through State consent was considered necessary for international law to be legally binding. However, since the establishment of the Charter, the inherent legality of sovereignty has been recognized, see para. 91.

[122] Fassbender, para. 49, at 155.

[123] Note that for international law to arise, there need to be sovereign States consenting to such regulation. Sovereignty implies the existence of the international legal order since it is both a principle and a source of international law, see Besson, paras. 31 and 85.

[124] Besson, paras. 85–87; ICJ, *Nicaragua*, para. 288. Sovereignty could even be a *jus cogens* norm, in accordance with Article 53 VCLT, see Besson, para. 89.

[125] Dixon, 161. International law thus limits State sovereignty without requiring consent, as in the case of *jus cogens* norms, see Besson, para. 45. See *infra* notes 149 and 153.

[126] This has been an established principle since the beginning of the UN, State sovereignty is subjected to the supremacy of international law, see UN General Assembly (UNGA) Res. 375(IV), Article 14.

As subjects under international law, States have rights and obligations. A State is independent and subordinated to international law, but not any other State or entity.[127] Sovereignty denotes States' rights and duties under international law, constituting sovereignty.[128] Essentially, a State exercises full jurisdiction over its territory and the people within the territory. Every sovereign State has constitutional autonomy, the right to freely make political, social, and economic decisions according to the principle of self-determination.[129] Since States are of equal sovereign rank,[130] all States have a correlating obligation to respect other States' sovereignty by neither interfering nor intervening with another's internal affairs. Non-intervention is a central aspect of international law, recognized as customary international law.[131] The principle of non-intervention is implicitly drawn as the corresponding duty to the principle of sovereignty in Article 2(1) UN Charter. Non-intervention is necessary to protect State sovereignty[132] since the impermeability of the State, its internal integrity, protects the domestic legal order.[133]

Following the development of international society as a system of cooperation and interdependence, relatively few matters are purely domestic. Traditionally, the choice of a political, social, and economic system solely belonged to the domestic sphere, but international treaties and customary international law have reduced this sphere.[134] There are fundamental rights that every State is obliged to protect, some of which are stipulated in the Universal Declaration of Human Rights (1948) (UDHR).[135,136] Nonetheless, an intervention is prohibited if conducted through forcible means.[137] If a State intervenes in another State through force, violating the principle of sovereignty, the intervention constitutes an act of aggression.[138] Accordingly, sovereignty is as limited by the principle of non-intervention as it is protected by it.

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[127] States are obliged to abide by international law and to cooperate with other subjects of international law, see UN Charter, Article 2(2).

[128] Fassbender, para. 49, at 154–155.

[129] Besson, paras. 118–121; Dixon, 161. Also confirmed by the FRD.

[130] UN Charter, Article 2(1); Besson, para. 2.

[131] ICJ, *Nicaragua*, paras. 202–205. If a State has not consented to another State's presence on its territory, then all direct or indirect intervention is forbidden.

[132] Kunig, para. 9; cf. UN Charter, Article 2(1). All States are also obliged to solve their disputes by peaceful means, see UN Charter, Article 2(3).

[133] Fassbender, para. 11, at 139. The UN shall also not intervene in matters that are essentially within a State's domestic jurisdiction, except for enforcement measures under Chapter VII, see UN Charter, Article 2(7).

[134] Kunig, para. 3. As is the case for human rights law.

[135] Fassbender, para. 51, at 155. The UDHR contains several rights and freedoms that are part of customary international law, e.g., arbitrary killing, see Dupuy, para. 116.

[136] Observe the element of modern sovereignty. Sovereignty is often described as absolute, entailing unlimited and undivided authority. However, the modern account of sovereignty is based on popular sovereignty. The latter claims that the people of a State transfer the exercise of their sovereignty to the State, see Besson, paras. 67–68, 75, and 81.

[137] Kunig, para. 5. Intervention that aims to impose certain conduct of consequence on a State, including an element of coercion amounting to at least the threat of force, is prohibited.

[138] UNGA Res. 3314 (XXIX) (1974).

Moreover, perhaps the most prominent limitation imposed on States is the constraint on *jus ad bellum*.[139] The right to go to war has been claimed by States long before the concept of sovereignty ever emerged.[140] The use of any inter-State force is under the control of the UN Security Council. The exceptions to the posed limitation are legitimate interventions in Chapters VI and VII UN Charter. Authorized interventions and self-defense are thus exempted from the prohibition, but possibly, although highly debatable, also humanitarian interventions.[141]

2.3 The Prohibition of the Use of Force

The prohibition of the threat or use of force is a cornerstone of the international legal order.[142] The prohibition is regulated in Article 2(4) UN Charter:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[143]

The notion of 'force' intends armed force, and the provision covers all inter-State use of force.[144] Economic and political pressure, or other forms of non-military force, are thus not covered by the prohibition.[145] Nevertheless, armed force is to be interpreted extensively to capture all severe forms of force and fulfill the UN's purposes.[146] The extensive interpretation also regards territorial integrity or political independence, which does not restrict the scope of the prohibition. According to the *travaux préparatoires*, the reference to territorial integrity and political independence was introduced to emphasize two particularly grave forms of force.[147] Moreover, the critical feature characterizing Article 2(4) of the UN Charter is the armed force as a means of coercion.

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[139] Fassbender, para. 50, at 155.

[140] Fassbender, para. 9, at 138.

[141] Besson, paras. 122 and 136. Chapter VI regards the peaceful settlement of disputes, and Chapter VII contains provisions using force, action with respect to threats or breaches of the peace. Note that there is no explicit basis for a right to humanitarian intervention in the UN Charter.

[142] E.g., ICJ, *Armed Activities*, para. 148.

[143] UN Charter, Article 2(4).

[144] Dörr, paras. 11, 13 and 21. Cf. UN Charter, preamble paragraph 7 and Article 44. The *travaux préparatoires* of the UN Charter supports the same narrow interpretation.

[145] However, such coercion can be in violation of the principle of non-intervention, see Dörr, para. 12.

[146] Dörr, para. 13. Article 2(4) UN Charter strongly correlates to the purposes of the UN, which is to maintain international peace and security see UN Charter, Article 1(1).

[147] Dörr, para. 14. D'Amato, 57–73 and 79–80.

Since no gravity threshold can be read into the prohibition, the hostile intent displayed by using armed force is crucial.[148]

The prohibition of the use of force is a norm of customary international law. It is binding upon all States, established through general, constant, and uniform State practice and *opinio juris*. *Opinio juris* is a sense on behalf of the State that it is bound by the law in question.[149,150] The content of the prohibition in treaty and customary law are considered, at least in general, identical.[151] Additionally, the prohibition is recognized as *jus cogens*,[152] a peremptory norm of international law. *Jus cogens* is a norm from which no derogation is permitted, and such norms can only be modified by a subsequent *jus cogens* norm.[153]

The categorization of the prohibition of the use of force as *jus cogens* expresses its fundamental importance in international law, accepted by the international community.[154] The non-use of force is equally politically important, a core value of the international community.[155] In terms of State responsibility, *jus cogens* carry particular importance. A violation of a peremptory norm is considered a serious breach "… if it involves a gross or systematic failure by the responsible State to fulfill the obligation".[156] All States are obliged to cooperate to bring such serious breaches to an end and not to recognize prohibited use of force as lawful.[157] The ICJ has confirmed the duty of non-recognition as a corollary of the prohibition of the use of force.[158]

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[148] Dörr, paras. 18–19. The hostile intent, and not the intrusion of another State's sovereignty nor the element of coercion as such, is at the core of the prohibition.

[149] For customary international law to arise, sufficient State practice and *opinio juris* are required, see Linderfalk (2012), 28–30. The requirement of *opinio juris* is reflected in the ICJ Statute, Article 38(1)(b).

[150] ICJ, *Nicaragua*, para. 188–189.

[151] Dörr, para. 10. Dinstein, 285–286.

[152] *Jus cogens* norms are thus compulsory norms, see VCLT, Article 53.

[153] ICJ, *Nicaragua*, para. 190. The ICJ states that the International Law Commission has expressed the view that the prohibition has the character of *jus cogens*. Also confirmed and emphasized by, e.g., Judge Singh, see ICJ, *Nicaragua*, *Separate Opinion of Judge Singh*, 153.

[154] Randelzhofer & Dörr, para. 67, at 231; Heintschel von Heinegg, at 59; ARS, *Commentary*, Article 40, footnote 641. Even though non-use of force is perceived as the least controversial *jus cogens* norm, the general content of peremptory norms is contested in international law, see Linderfalk (2007), at 859. It is also debated whether it is the non-use of force's core or its entirety that is *jus cogens*, see Dinstein, 110.

[155] Dörr, para. 1.

[156] ARS, Article 40. The use of 'peremptory norm' follows Article 53 VCLT. A serious breach signifies that the violation must be of a certain magnitude, organized and deliberate (systematic) and of a certain intensity (gross), see ARS, *Commentary*, Article 40, paras. 7–8.

[157] ARS, Article 41(1–2). This obligation includes all States, thus also the responsible State, see ARS, *Commentary*, Article 41, para. 9.

[158] The ICJ stated that non-recognition is a corollary of the non-use of force provision, which is why any territorial acquisition resulting from a threat or use of force is illegal. Thus, States must treat such action as illegal, see ICJ, *Construction of a Wall*, para. 87.

There is, however, a discrepancy between the prohibition's status and States' actions. States inevitably use force, but this does not mean that the legal prohibition is obsolete or lacks *opinio juris*. When using force, States regularly claim that one of the exceptions to the prohibition applies, claiming, for example, self-defense, rather than denying the rule.[159] As the ICJ stated in *Nicaragua*, "[…] the significance of that attitude [relying on the exceptions] is to confirm rather than to weaken the rule".[160] The unanimous recognition of the non-use of force's status shows that the general norm is not questioned, but that the scope and the exceptions to the prohibition are still debated.[161]

The legal effect of using prohibited use of force is a violation of international law unless there is an applicable exception rendering the force legal.[162] The consequence of such a violation is that the aggressor State is responsible to take countermeasures and make reparation under customary international law.[163] A State that aids or assists another in commissioning a prohibited use of force is also responsible if the State was aware of the prohibition.[164]

2.4 Exceptions to the Prohibition of the Use of Force

State use of force against another State constitutes a *prima facie* violation of the prohibition of the use of force. If the aggressor State can show, carrying the burden of proof, that the use of force falls within one of the established exceptions to the prohibition, the norm will not be considered violated.[165] There are two exceptions established in the UN Charter: authorization by the UN Security Council[166] and the right of self-defense.[167] These exceptions limit the scope of the prohibition and should not be mistaken for forbidden deviations from the *jus cogens* norm. The exceptions constitute the scope of the use of force, while deviations violate Article 2(4) of the UN Charter.[168]

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[159] E.g., Russia argued self-defense for intervening in Ukraine 2022, cf. *supra* note 3.

[160] ICJ, *Nicaragua*, para. 186.

[161] Dörr, paras. 2–3.

[162] Dörr, para. 30. Most commonly, Articles 42 and 51 UN Charter.

[163] See ARS, Articles 31–39 and 49–54. See *infra* note 306 concerning the stance of the ARS as customary international law.

[164] See ARS, Article 16. Since it can be presumed that States are aware of the prohibition of the use of force, the States aiding or assisting such force are generally responsible.

[165] Dörr, para. 36. Observe that the shift of the burden of proof has a protective function on the prohibition, see Randelzhofer & Dörr, para. 44, at 218–219.

[166] UN Charter, Article 42.

[167] UN Charter, Article 51.

[168] Cf. Dinstein, 110–111. Note that a *jus cogens* norm can only be replaced with another *jus cogens* norm. However, self-defense is not necessarily recognized as *jus cogens*, but it is a legal exception to the prohibition, see Vidmar (2015), 18.

Drawing upon the legal exceptions, some scholars controversially claim that these provide a legal basis for humanitarian intervention.[169]

The first exception allows a State to use force against another if acting under a resolution of the UN Security Council, adopted under Chapter VII of the UN Charter.[170] The Council is primarily responsible for maintaining international peace and security.[171] As such, if the Council determines the existence of a threat or breach of the peace or an act of aggression,[172] it can authorize the use of force necessary to maintain or restore international peace and security.[173] Every threat or use of force involves at least a threat to the peace, which is why the Council can respond to any such breaches by authorizing force.[174] To take action under Article 42 UN Charter, the Council must grant authorization with an explicit and sufficiently clear mandate. The mandate must envisage the "[…] forcible course of events in a sufficiently concrete manner".[175] The requirement of explicit authorization is a consequence of the fundamental nature of the non-use of force regime.[176] When authorization is granted, the Members States are obliged to carry out the decision.[177]

The UN Security Council has authorized several armed interventions for humanitarian purposes or at least authorized interventions that have been labeled as 'humanitarian' by lawyers.[178] Authorization by the Security Council constitutes a collective enforcement action, legal under the UN Charter and international law as a recognized exception to the non-use of force regime. As such, an authorization under Article 42 UN Charter does not give States' a right to engage in humanitarian intervention. In sum, forcible unilateral humanitarian intervention does not fall within the scope of authorizations by the Security Council.[179]

[169] E.g., Tesón and Bannon.

[170] UN Charter, Article 42; Dörr, para. 42.

[171] UN Charter, Articles 24 and 12.

[172] UN Charter, Article 39.

[173] Provided that the peaceful measures in Article 41 UN Charter have been exhausted. These include the interruption of economic relations and the severance of diplomatic relations.

[174] See e.g., Randelzhofer & Dörr, para. 46, at 220 or Wengler, 23.

[175] Dörr, para. 44.

[176] Randelzhofer & Dörr, para. 48, at 220–221. In other words, if the use of force, despite the prohibition's peremptory character, is to be authorized, the authorization must be specific.

[177] UN Charter, Article 48; Randelzhofer & Dörr, para. 46, at 220.

[178] E.g., in Somalia, see UNSC Res. 794 (1992) or in Rwanda, see UNSC Res. 929 (1994).

[179] However, note that the issue has been complicated by different *ex post* claims, arguing that the mere absence of condemnation can serve as an implicit or retrospective authorization. Even following such claims, it is debated whether an authorization would constitute collective enforcement, as a legal exception under international law, or a justified unilateral humanitarian intervention, see Lowe & Tzanakopoulos, paras. 16–22.

The second exception of the right to self-defense is recognized in Article 51 UN Charter and is a part of customary international law.[180] Self-defense is a pivotal point in discussing the lawfulness of States' uses of force.[181] However, Article 51 does not exactly correspond to Article 2(4) UN Charter. Every use of force in contradiction to the prohibition cannot be met with self-defense.[182] The prohibition regards the 'threat or use of force', but the right of self-defense only enters if an 'armed attack' against a State has occurred. Consequently, only if an armed attack occurs can a State use forcible self-defense.[183]

Additionally, self-defense is limited by the principles of necessity and proportionality[184] and may only be directed against the State responsible for the attack.[185] Also, the State practicing self-defense must, independent of the defense's legality, report the measures to the Council.[186] When the Council decides on appropriate measures, the self-defense must discontinue.[187] Moreover, the State subjected to an armed attack has the burden of proof concerning the existence of an armed attack.[188]

In terms of humanitarian intervention, self-defense is generally not viable due to the 'armed attack' requirement. It is questionable whether even widespread human rights violations will reach the threshold, but even if reached, no armed attack will be directed against a State. At most, the armed attack will be directed against the population of the State. If there is no armed attack against a State, self-defense cannot be claimed as a basis for humanitarian intervention.[189]

[180] Dörr, para. 40; Randelzhofer & Nolte, para. 63, at 1427–1428. The ICJ states that the customary right to self-defense almost completely corresponds to the content and the scope of Article 51 UN Charter, see ICJ, *Nicaragua*, para. 193.

[181] Randelzhofer & Nolte, para. 3, at 1399–1400.

[182] Randelzhofer & Nolte, para. 6, at 1401.

[183] Dinstein, 197; ICJ, *Nicaragua*, paras. 195 and 211; ICJ, *Oil Platforms*, para. 51. In other words, an 'armed attack' requires more force than stipulated in Article 2(4) UN Charter.

[184] ICJ, *Nicaragua*, paras. 194 and 237; ICJ, *Nuclear Weapons*, para. 41.

[185] ICJ, *Oil Platforms*, para. 51; ICJ, *Armed Activities*, para. 146.

[186] UN Charter, Articles 24(1) and 51.

[187] UN Charter, Article 51; Randelzhofer & Nolte, para. 6, at 1401; Henriksen, 278.

[188] ICJ, *Oil Platforms*, para. 57. For more on self-defense, see Randelzhofer & Nolte.

[189] See Lowe & Tzanakopoulos, paras. 23–25. Even if the human rights violations do not reach the threshold of an 'armed attack', UN practice has shown that widespread internal violations may constitute a 'threat to the peace', see Lowe & Tzanakopoulos, para. 7.

3 Humanitarian Intervention in International Law

3.1 General Remarks

Humanitarian intervention is one of the most debatable subjects in international law and international relations. The central question is "… when, if ever, it is appropriate for states to take coercive … action against another state for the purpose of protecting people at risk in that other state […]".[190] There has been an extensive scholarly effort to provide a definite answer and unify the different stances on humanitarian intervention. Despite the effort, humanitarian intervention remains a gray area of international law.[191]

A State's use of force against another State constitutes a *prima facie* violation of the prohibition of the use of force, Article 2(4) UN Charter. That is, regardless of any claims that such intervention is based on humanitarian purposes. Consequently, humanitarian reasoning does not prevent a *prima facie* violation from turning into an actual violation. Instead, it must, in principle, be shown that such use of force is not contrary to the prohibition or that it falls within one of the two established exceptions. If that is not the case, the legality of humanitarian intervention will depend on the emergence of a new customary norm that modifies the effect of Article 2(4) UN Charter.[192]

This Chapter examines humanitarian intervention from three different perspectives. First, as an additional exception to the prohibition of the use of force. Second, as a new norm of customary international law. Third, as a norm that should emerge according to the R2P doctrine. Ultimately, the examination displays that none of the arguments provide a sufficient legal basis for humanitarian intervention.[193] Despite the legitimate purpose of humanitarian intervention, existing law does not make such an exception, but following the R2P doctrine, it should.

[190] International Commission on Intervention and State Sovereignty, VII.

[191] Nonetheless, among lawyers and scholars, the predominant view appears to be that such intervention lacks a legal basis, cf. 1.1 above.

[192] Lowe & Tzanakopoulos, para. 11. Even though it can and has been claimed that humanitarian intervention falls under Article 51 UN Charter, this remains debatable. The controversy provides sufficient reasons for further examination of humanitarian intervention, see 2.4 above.

[193] Observe that as a general rule, exceptions in international law, especially to *jus cogens* norms, are to be interpreted narrowly, see Malanczuk, 312. The arguments in 3.2 below draw upon an extensive interpretation of Article 2(4) UN Charter.

3.2 As an Exception to the Prohibition of the Use of Force

Scholars have claimed humanitarian intervention as a third exception to the non-use of force through an extensive interpretation of the UN Charter.[194]

Article 2(4) UN Charter prohibits threat or force against any State's territorial integrity or political independence inconsistent with the UN's purposes. Since humanitarian intervention is not directed at any State's integrity or independence, some claim that such action is aligned with the prohibition.[195] However, as previously stated, 'territorial integrity' and 'political independence' are examples of particularly grave forms of force. The provision covers all transfrontier use of armed force, including humanitarian interventions.

Some scholars continue their claim that the prohibition does not apply to humanitarian intervention since it is consistent with the purposes of the UN.[196] And the principal purpose of the UN is to maintain international peace and security.[197] Nevertheless, such argumentation is inconsistent with the *travaux préparatoires*.[198] Following the UN's purpose, the use of force is only lawful under the explicit exceptions stated in the UN Charter.[199] An adjacent argument is that Article 2(4) only prohibits humanitarian intervention under the condition that the UN fulfills its purposes.[200] The argument is not convincing since the UN Charter does not condition the validity of the prohibition on the effectiveness of its mechanisms.[201]

Proponents of humanitarian interventions also argue the need to recognize its legality in extreme situations. In these extreme situations, there is a need to balance opposite goals, and as such, minimizing conflict and protecting human rights should prevail. While protecting human rights is a core value of the international community, so is the prohibition of the use of force. The prohibition upholds a core value of the community, but foremost it safeguards peace by depriving States of using force as an instrument of their international policy. The balancing of interests does not adequately consider the fundamental role of the non-use of force regime.[202] Therefore, a right to humanitarian intervention cannot be deduced from the UN Charter.

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[194] E.g., Tesón, as described in Randelzhofer & Dörr, para. 52, at 222.

[195] Tesón, 150–151.

[196] Tesón, 151–152.

[197] UN Charter, Articles 2(4) and 1(1). "[…] armed force shall not be used, save in the common interest […]", see UN Charter, Preamble, para. 7. Also, see Rodley, at 778–779.

[198] Brownlie, 265–268.

[199] See Randelzhofer & Dörr, para. 38, at 216.

[200] Tesón, 157–158.

[201] Randelzhofer & Dörr, para. 53, at 222–223.

[202] Dörr, para. 48; Randelzhofer & Dörr, para. 54, at 223.

3.3 As a Part of Customary International Law

Previous to the adoption of the UN Charter, there was no established State practice justifying the use of force through a right of humanitarian intervention. Nevertheless, then, as now, some scholars argue in favor of such intervention.[203]

An argument in favor of humanitarian intervention draws upon the ICJ's conclusion in the *Nicaragua* case,[204] "… the use of force could not be the appropriate method to monitor or ensure…respect [for human rights] […]".[205] However, this is not to be read as the ICJ endorsing an exception to the use of force. Reading the conclusion in the context of the judgment, prohibiting the use of force for humanitarian purposes is a question of principle.[206]

To support the argument that a new rule of customary international law has arisen, there must be sufficient State practice and *opinio juris*.[207] In other words, States must have made claims that their actions were lawful under the doctrine of humanitarian intervention, as a rule of customary international law.[208] In terms of both State practice and *opinio juris*, humanitarian intervention is not firmly established as an exception to the use of force.[209] Nevertheless, some instances may suggest the development of customary international law. Such instances include, but are not limited to, interventions by India in East Pakistan in 1971,[210] Vietnam in Cambodia in 1971,[211] Tanzania in Uganda in 1979,[212] and the no-fly zones in Northern Iraq in 1991.[213]

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[203] Lowe & Tzanakopoulos, para. 5; Rodley, at 780.

[204] Nicaragua argued that the US was responsible for illegal military and paramilitary assistance, supporting the *Contras*, while the US argued that the support was humanitarian assistance. ICJ stated that the US had violated the law, see ICJ, Nicaragua, paras. 15, 97, 174, 179, and 190. From the conclusion, e.g., Tesón argues that the US action was solely condemned on disproportionality in the case, see Tesón, 308–312. Also, see Rodley at 795.

[205] See ICJ, *Nicaragua*, para. 268.

[206] As such, it is not a question of scale and effects or, as Tesón stated, 'disproportionality' in the particular case. See Randelzhofer & Dörr, para. 54, at 223.

[207] ICJ Statute, Article 38(1)(b). See *supra* notes 149 and 153.

[208] Lowe & Tzanakopoulos, para. 29. States are free to ascribe their own legal views, cf. ICJ, *Nicaragua*, para. 207.

[209] Randelzhofer & Dörr, para. 55, at 224; Lowe & Tzanakopolous, paras. 26–35. Nonetheless, for an opposite conclusion, see Rodley, at 784, 780–788.

[210] India primarily based its defense on the right of self-determination. India also invoked the humanitarian situation, but this was not stated as a clear legal claim, see Rodley, at 781.

[211] The principal justification for the invasions invoked by Vietnam was self-defense, see Rodley, at 782.

[212] Tanzania argued a case of self-defense, see Rodley, at 782.

[213] The use of force in Iraq to establish no-fly zones was argued to be in 'support of' UNSC Res. 688 (1991) and, as such, implicitly authorized. The US argued self-defense, France argued implicit authorization combined with a claim to be responding to violations of UNSC Res. 687 (1991), and the UK initially claimed a right of humanitarian intervention but later combined the right with a right to self-defense, see Lowe & Tzanakopoulos, para. 30.

The intervening States claimed self-defense and several other justifications for their actions. As such, an *opinio juris* could not be established on the vague references to humanitarian purposes for using force. Also, the response from the international community ranged from condemnation to silence.[214]

Furthermore, the potential for abuse of humanitarian purposes and the risks of accepting humanitarian intervention as a legal justification became evident through Indonesia's intervention in East Timor in 1975. What started as an action justified on a humanitarian basis later developed into annexing the invaded territory.[215] Additionally, the North Atlantic Treaty Organization's (NATO's) intervention in Kosovo, addressed to end the atrocities against the Albanian population in Kosovo, might have set a precedent in favor of humanitarian intervention. Nonetheless, it could not change the law, among others, since States such as Russia and China challenged the operation's lawfulness.[216] In summary, customary international law does not provide a legal basis for humanitarian intervention.

3.4 As a Responsibility to Protect

Since there is no right of humanitarian intervention in current international law, proponents of the notion argue that there should be such a right.[217] If humanitarian intervention is based on a right *de lege ferenda*, what criteria should allow such use of force, and in what manner should it be determined that the criteria are met?[218]

It is commonly argued that the criteria must include: (i) a humanitarian emergency due to human rights violations, (ii) the inability or unwillingness of the territorial State to address the situation, (iii) the exhaustion of remedies, (iv) limitations of the time and scope, and (v) limitations to proportionality. Some have suggested that the Security Council's determination of a threat to international peace and security could entail the existence of a humanitarian emergency. However, this solution only addresses the first criterion and merely shifts the question of authorization under Article 42 UN Charter to a determination of a threat to peace and security under Article 39 UN Charter. Therefore, the States that would have blocked such a decision under Article 42 UN Charter could instead block the relevant determination.[219]

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[214] Randelzhofer & Dörr, para. 55, at 223; Lowe & Tzanakopoulos, para. 29.

[215] Clark, at 212–213; Randelzhofer & Dörr, para. 55, at 223.

[216] See, e.g., Randelzhofer & Dörr, para. 55, at 223; Lowe & Tzanakopoulos, para. 32; Simma, at 1–22. For an argument where Kosovo is seen on the 'borderline' of creating a new norm of customary international law, see Rodley, at 787–788.

[217] E.g., Bannon, at 1158.

[218] Lowe & Tzanakopolous, para. 38.

[219] Lowe & Tzanakopolous, paras. 39–42; cf. Rodley, at 788–794.

The most developed idea of humanitarian intervention as a right *de lege ferenda* is the doctrine of R2P.[220] The humanitarian catastrophes in the 1990's revealed the international community's failures and the need to create international consensus on how the community should respond to mass atrocities.[221] The R2P concept proposes a reconceptualization of sovereignty to protect civilians from grave human rights violations while preserving the use of force framework. Sovereignty is generally perceived as a right of the States, but the R2P doctrine frames sovereignty as a primary responsibility of States. The State's primary responsibility is to protect its population. Following this, if a State fails to protect, the international community has a secondary responsibility of protection.[222] Later, the 2005 World Summit Outcome Document confirmed the reconceptualization of sovereignty.[223] Since then, the UN Security Council has invoked the R2P, for example in a Resolution on Libya[224] and in a Draft Resolution on Syria.[225]

As to the legal nature of R2P, there are differing views.[226] However, at this stage, R2P lacks the quality of a specific legal norm.[227] The doctrine endorses current international law but does not go beyond it. Insofar as it goes beyond a mere political concept, it seems to be based on the Security Council's use of its competence under Chapter VII UN Charter.[228] In other words, the R2P may have a normative pull-on international law in terms of *de lege ferenda*. Nevertheless, as the law stands present, the doctrine does not provide a legal basis for humanitarian intervention.[229]

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[220] A Canadian-led initiative established the International Commission on Intervention and State Sovereignty (ICISS), issuing the report on 'Responsibility to Protect', see ICISS.

[221] ICISS, 1–2 and 81; Vashakmadze, para. 1, at 1202; Lowe & Tzanakopoulos, para. 45.

[222] ICISS, 12–13; Vashakmadze, para. 1, at 1202; Walter, para. 32, at 1490.

[223] See UNGA Res. 60/1 (2005), paras. 138–139. The Resolution is regarded as the most authoritative statement of R2P, retaining the fundamental parts of ICISS's report, see Vashakmadze, para. 1, at 1203. Note that Summit did not generate binding legal consequences for States, see Vashakmadze, para. 54, at 1222.

[224] UNSC, Res. 1973 (2011). Observe that the adopted Resolution authorized the member States to take all measures necessary under Chapter VII UN Charter.

[225] UNSC, Res. 612 (2011). Observe that the Draft Resolution does not contain any measures under Chapter VII. The permanent members did not come to a joint conclusion, resulting in a political deadlock, see UNSC Doc. 6711.

[226] Some, e.g., Stahn, emphasize the R2P as a political concept based on existing norms, while others, e.g., Peters, conclude that the R2P is an emerging role, see Stahn, at 120 and Peters (2011), at 12. Some even state that the R2P is a rule of customary international law, but there is no consistent State practice or *opinio juris* to substantiate such a claim, see Vashakmadze, para. 53, at 1222, and paras. 65–66, at 1228–1229.

[227] The complex concept remains uneven regarding legal obligations related to its elements and goals. R2P aims to create new international commitments, but the procedural aspects remain unclear. These aspects regard what triggers the responsibility, how it is implemented, and what follows if the international community fails its obligations, see Vashakmadze, para. 55, at 1222 and para. 63, at 1227.

[228] The UNSC adopted the Resolution on Libya, which was authorized under Chapter VII, but not Syria, see *supra* notes 224–225. Randelzhofer & Dörr, para. 56, at 225.

[229] Randelzhofer & Dörr, paras. 56–57, at 225–226; Lowe & Tzanakopolous, para. 47; Vashakmadze, para. 65, at 1228–1229. For more, see Vashakmadze.

4 Justification and Excuse in Domestic Law

4.1 General Remarks

The previous Chapters display that existing international law does not allow States to use force for humanitarian purposes. Humanitarian intervention does not fit within the scope of the recognized exceptions to the prohibition of the use of force. Additionally, humanitarian intervention is not a third exception to the prohibition, a part of customary international law, nor a legal Responsibility to Protect according to the primary rules of international law.

This Chapter turns to domestic law, which forms the basis of the claims that humanitarian intervention is 'illegal but justified' and 'illegal but excused'. To understand these international law claims, Chapter 4 contextualizes how justifications and excuses operate in domestic law. In domestic legal settings, a justification and an excuse exempt the individual from criminal responsibility.

Sub-Chapter 4.2 introduces the justification-excuse distinction existing in domestic legal theory. In this thesis, the general account of justifications and excuses draws upon Douglas Husak's definition of the distinction and the implications provided by George Fletcher. Sub-Chapter 4.3 then exemplifies how the distinction has been incorporated in the US Model Penal Code. After introducing the MPC's structure for establishing criminal liability, Sub-Chapter 4.3 examines the justifications of necessity and self-defense and the excuse of duress. Additionally, the defenses' rationales are studied, including why a defense is considered a justification or an excuse based on the theories of justifications and the theory of excuse.

Domestic law contains the regulated cases in terms of the justification-excuse distinction, and this Chapter constitutes the foundation of the analogy presented in Chapter 5. The distinction's general account is later applied to the context of States and the international law of State responsibility. Similarly, the US Model Penal Code's classification of defenses as either justifications or excuses is applied to humanitarian intervention and the 'illegal but…' claims.

4.2 The Justification-Excuse Distinction

The justification-excuse distinction is recognized in law, philosophy, and everyday life.[230] Essentially all legal systems in the world distinguish justifications from excuses,[231] and particularly Anglo-American criminal law scholars have developed the distinction in domestic legal theory.[232]

Criminal law distinguishes offenses from defenses, often in correlation with moral convictions. A *prima facie* offense, satisfying the specific *actus reus* and *mens rea*, is not considered a crime if the defendant has a recognized defense. Such defense, a justification or an excuse, seeks to exempt from criminal responsibility beyond the elements provided in the offense.[233] Justifications and excuses affect the scope of criminal responsibility in that:

> Justifications are defenses that arise from properties or characteristics of acts; excuses are defenses that arise from properties or characteristics of actors. A defendant is justified when his *conduct* is not legally wrongful, even though it apparently violates a criminal law. A defendant is excused when *he* is not blameworthy or responsible for his conduct, even though it … violates a criminal law.[234,235]

The definition provides a general account of justifications and excuses in domestic law. It combines legal terminology, such as 'responsibility', with more morally inclined terms, such as 'blameworthy'.[236] This definition of the justification-excuse distinction is recognized to be of moral value and carries moral implications.[237] Nevertheless, the definition carries practical implications, [238] including individual responsibility, the rights of action and reaction,

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[230] Baron, at 387.

[231] However, e.g., English law formally abolished the distinction in 1828, see Smith, 7.

[232] Fletcher (1975); Robinson (1975). Other Anglo-American scholars discussing the subject includes Marcia Baron, Mitchell Berman, Joshua Dressler, Markus Dubber, R.A. Duff, Kimberly Kessler Ferzan, Kent Greenawalt, Douglas Husak, Andrew Simester, and Joseph Carman Smith. Note that the German lawyer Albin Eser and the German legal tradition have paid particular attention to the distinction.

[233] Simester (2012), at 95.

[234] Husak (1989), at 496. Observe that the quotation is modified. According to a widely held view, excuses presume the existence of a wrongful act. Hence, Husak's 'apparently' is removed from the last sentence, cf. Paddeu (2018), 30.

[235] The definition has achieved near consensus, Paddeu (2018), 30. The consensus mainly concerns the distinction's importance, but its contents are still debated. The general ambiguities regard classifying the defenses, see Duff, at 830, the objective/subjective debate, see Eser, at 624–628, the action/actor classification, see Baron, at 391–392, and third-party implications, see Dressler, at 13–14. According to Greenawalt, the lack of unity follows from mixing 'justification' and 'excuse' in ordinary language and including moral judgments on criminal conduct in legal rules, see Greenawalt, at 1898. For a justification-excuse distinction without any connection to wrongfulness and moral implications, see Berman.

[236] In this thesis, 'blameworthy' is considered equal to 'morally responsible'.

[237] Concurring, e.g., Husak (1989), Fletcher (1975) and (2000), Robinson (1975).

[238] Observe that this remains debated, cf. Paddeu (2018), 31.

and the normative pull-on rules.[239] Furthermore, justifications appear to accept the 'responsibility' of an act but deny that it was legally wrongful. In contrast, excuses appear to admit that the act was legally wrongful but deny full or any 'responsibility'.[240] In both cases, the successful invocation of either defense results in an acquittal verdict.[241]

Moreover, justifications are general concerning the quality of an act, whereas excuses are personal regarding the actor's responsibility.[242] In the individual case, justifications and excuses affect other legal relationships differently. On the one hand, justifications regard acts that are not legally wrongful. Accordingly, any third party has the right to act for the same justificatory purpose as the actor. Correspondingly, a victim of the act has no right to resist the justified act.[243] On the other hand, excuses concern legally wrongful acts personal to the actor, which do not affect the rights of others. The actor's lack of responsibility for the wrongful act cannot extend to accessories, and the victim or a third party has the right to resist an excused act.[244]

Justifications and excuses also carry implications beyond the individual case; justifications amend the law, but excuses do not. Justifications tell individuals that they may engage in certain conduct, even though it apparently violates the law. A court's determination of a justified act means that every other actor in the same situation should be able to invoke the same justification successfully. Thus, justifications are action-guiding and amend the law by creating precedents. In contrast, an excuse has the opposite meaning. The actor is excused on individual circumstances, but the conduct remains wrongful.[245]

[239] Paddeu (2018), 12. However, these implications are merely potentially relevant in practice. Ultimately, such consequences are determined in domestic courts.

[240] Essentially, under a justification, A admits that he did X, but A argues that X was legally permissible. A admits X, but since X is legally permissible, A is not responsible. While under an excuse, B 'did' X, but B did X due to the specific circumstances, perhaps under someone's influence or under duress. B did X but only because of the circumstances. B's act is legally wrongful, but B is not responsible, cf. Ferzan, at 239.

[241] Paddeu (2018), 29.

[242] Fletcher (2000), 761–763.

[243] Fletcher (2000), 761–763. E.g., if B aids A solely to stop a violent attack launched by C, neither B nor A will be responsible since both engaged in legally permissible behavior. Since A and B engaged in permissible behavior, C cannot resist such action, see Paddeu (2018), 32. The only responsibility that this may entail for A and B is that they admit engaging in the conduct, cf. *supra* note 240.

[244] Fletcher (2000), 761–763. E.g., if B is coerced by A to harm C, and B harms C, B can be excused due to duress by A. A can, however, not benefit from B's excuse. C can resist the harm by B, and another person, D, can help C to resist such action, see Paddeu (2018), 32.

[245] Fletcher (2000), 810–813. A justified act is 'right', while an excused actor is 'wrong'.

4.3 The US Model Penal Code

The Model Penal Code, also known as the 'American Criminal Code', was established in 1962.[246] The MPC is a penal and correctional regulation consisting of substantive criminal law and process treatment and correction.[247] The primary purpose of the MPC is to forbid and prevent unjustifiable and inexcusable conduct, with the objective of preventing offenses. If the prevention fails, the MPC provides correctional measures.[248]

Rather than applying a particular theory of punishment, the Code has adopted an approach of principled pragmatism.[249] The MPC's drafters based the Code on existing law and sacrificed some theoretical consistency for pragmatic reasons.[250] The first part of the MPC contains general principles, which provide the Code's complete scheme of criminal responsibility.[251]

> A person is criminally responsible if he engages in (1) conduct that (a) inflicts or threatens (b) substantial harm to individual or public interests (2) without justification and (3) without excuse.[252]

The three parts form the structure for establishing criminal responsibility.[253] The first question is whether the actor's conduct constitutes a crime. If the MPC has defined such an offense, the conduct constitutes a crime. The second question is whether there are any reasons for which the conduct should not be deemed wrongful, despite the conduct constituting a crime. Wrongful conduct can be justified through the defenses in Article 3 of the MPC. A justification acknowledges but excludes the violation of a prohibitory norm by offering a countervailing justificatory norm. The third question is whether the actor is blameworthy, despite the unjustified conduct constituting a crime. Unjustified conduct can be excused in cases of duress, as provided in Article 2 of the MPC. Excuses are based on the presumption that an actor who is not sufficiently blameworthy due to the actor's character or certain external circumstances should not be condemned with a criminal conviction.[254]

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[246] After the introduction of the MPC, several US states underwent significant reforms. However, the Code has not been adopted as a whole in any jurisdiction, see Robinson & Dubber, at 320 and 340.

[247] Model Penal Code., p. xiii–xxv.

[248] Model Penal Code, § 1.02, p. 3.

[249] Packer, at 594.

[250] Robinson & Dubber, at 325. The Code arose as a critique of positive law, see, at 334.

[251] Criminal law often speaks of 'liability'. A criminally liable person is held responsible for breaking the law. However, 'responsibility' is the applied terminology since both international and domestic law are built upon this notion, see *supra* note 36.

[252] Cf. Model Penal Code, § 1.02(a); cf. Dubber, 24.

[253] Observe that this Chapter does not discuss civil responsibility. It is sufficient to state that excluding criminal responsibility through both justifications and excuses does not necessarily exclude civil responsibility, cf. Model Penal Code, §§ 2.01 and 3.01.

[254] Robinson & Dubber, at 331.

4.3.1 Justifications

This Sub-Chapter answers the second question, exploring the reasons for justifying a wrongful act. A justification excludes the violation of a prohibition by excluding its wrongfulness, but this does not mean that the violation never occurred or that the offense disappears. A justified action recognizes the offense committed but also that there are values beyond the harm or evil caused, which is why the action is not considered legally wrongful.[255]

4.3.1.1 Justification Generally: Choice of Evils

Necessity is the general principle underlying all claims of justifications, known as the choice of evils. The justification of necessity arises from:

> (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:
> (a) the harm or evil sought to be avoided by such conduct *is* greater than that sought to be prevented by the law defining the offense charged […].[256]

Necessity establishes a general balancing act of lesser evils, balancing the costs and benefits.[257] The three principal limitations of necessity concern: the actor's belief that his conduct is necessary to avoid evils, the necessity arise from an actor's attempt to avoid harm or evil greater than the harm or evil prohibited, and what constitutes greater harm will be decided at trial.[258]

In contrast, imminence does not constitute a limitation to necessity. A situation of necessity arises when there is no option to avoid both evils, which often coincides with imminent evil or harm. But there may be situations where an otherwise illegal act is necessary to avoid future evil.[259] As such, the actor's belief in necessity, and sometimes imminence, is sufficient to meet the requirements of necessity. A mistaken belief in the necessity to act does not preclude the defense, but a mistaken choice of evils does.[260]

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[255] Fletcher (2019), 163–164.

[256] Model Penal Code, § 3.02(1)(a) [emphasis added]. Justification is not applicable if: the situation is regulated, a legislative purpose of excluding the justification appears, or if the actor was reckless or negligent in bringing the situation, see §§ 3.02(1)(b–c) and 3.02(2). Generally, necessity provides a justification for all types of offenses.

[257] Dubber, 147. Balancing interest underlies all defenses of justification.

[258] Commentaries (Model Penal Code and Commentaries (Official Draft and Revised Comments) (1985), § 3.02, 11–13. Necessity forms a special situation, calling for an exception to the prohibition that the legislature could not reasonably have intended to exclude.

[259] Commentaries, § 3.02, 17. If B learns that A plans to kill B at the end of their month-long stay at a remote mountain location, B would be justified in escaping with A's car.

[260] Dubber, 150–151. Commentaries, § 3.02, 12. This follows from the objective element in § 3.02, see *supra* note 256 and the added emphasis.

The generality of the principle leaves room for disagreement on what is evil and which evil is greater. More specific legislation is, however, not desirable since this would result in an overly constricted regulation. Also, the offense is already limited according to the defined crime. Some disagreements are bound to exist over moral issues, such as the extent to which values are absolute or relative. Regarding the MPC's perception of harm or evil, the Code recognizes that life is of the highest value and that every life is equal. As such, taking a life may promote the objective sought to be protected by the law of homicide. If an actor is faced with the choice of saving one or more persons, the numerical preponderance establishes the legal justification.[261]

The rationale of necessity, as a choice of evils, seems to be consequentialist. The actor creates harm, but this is done to prevent greater harm; what is good or bad essentially depends on its outcome. Only when an act is the choice of lesser evil will the conduct be justified.[262] Justifying instances of necessity thus reflects the rationality and justice of criminal law.[263]

4.3.1.2 Use of Force in Self-Protection and for the Protection of Other Persons

The justification of self-defense arises from the general standard:

> [T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion […].[264]

Firstly, the actor must actually believe that the circumstances create the necessity of using protective force.[265] Secondly, the self-defense must be necessary; the actor must believe that the situation requires the use of protective force and that the amount of force is essential to relieve the threat.[266]

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[261] Commentaries, § 3.02, 14–17.

[262] Ferzan, at 244 and 253.

[263] Commentaries, § 3.02, 9–10. E.g., under necessity, a speed limit may be violated to pursue a criminal. A developed legal system must be able to deal with such problems in other ways than merely referring to the letter of the prohibition, hence the justification.

[264] Model Penal Code, § 3.04(1). Subsection (2) provides several limitations, and the most important one is the limitation on the use of deadly force, see § 3.04(2)(b).

[265] Commentaries, § 3.04, 32. If the actor's belief is mistaken and recklessly or negligently formed, self-defense remains a viable justification for offenses that require purpose or knowledge, e.g., murder. If the mistaken belief is neither reckless nor negligent, this does not hinder a justification for the use of force, see Dubber, 154.

[266] Commentaries, § 3.04, 35. The requirement of 'necessary' is similar to that of necessity. Self-defense does not explicitly require a balancing of evils. In the case of homicide, necessity balances the lives saved against the lives sacrificed. However, self-defense can justify a situation where more persons are killed than saved. The lives of those engaged in unlawful conduct are not weighted as heavily as those who do not, see Dubber, 155.

Thirdly, the actor must believe that his self-defense is immediately necessary[267] and that the unlawful force against the actor will be used on the present occasion. Thus, the danger does not need to be imminent but immediate. The limitation to immediate necessity excludes preventing strikes under the scope of self-defense.[268] Fourthly, it is sufficient that the actor believes that the force used against him is unlawful, but the conduct does not need to be unlawful.[269]

In terms of using force to protect any other person,[270] the rules are the same as those that govern self-defense.[271] As such, an actor will be justified in defending a victim against a third person if, placing the actor in the victim's position, the actor would have been justified in defending himself against that third person.[272]

Moreover, the Code distinguishes between self-defense that involves deadly force and those that do not. The use of deadly force against attacks on the actor or another is based on the same general standard as self-defense, including the general conditions. Additionally, for an actor to use deadly force, the actor must not merely believe that such force is necessary but "[…] that such force is necessary to protect *himself* against death, serious bodily injury, kidnapping or sexual intercourse compelled by force or threat […]".[273] As such, the nature of the threat determines the nature of the justified response, and the response needs to be proportional but not equivalent.[274]

The MPC limits the use of deadly force further. For example, there is no right to use deadly force against anyone who, with the purpose of causing death or serious bodily harm, also provoked the use of force against himself.[275] Also, deadly force is not justifiable if the actor can avoid the necessity of using force by abstaining from action that he is not obliged by law to take.[276]

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[267] The actor must believe that his conduct is immediately necessary for his own protection, but this does not need to constitute the sole motivation of the conduct. The existence of other motives does not detract from the reason why self-defense is justified, see Commentaries, § 3.04, 39.

[268] Commentaries, § 3.04, 39.

[269] Commentaries, § 3.04, 40. Unlawful force is regulated in § 3.11.

[270] The provision is not limited by personal scope, cf. Commentaries, § 3.05, 63.

[271] Model Penal Code, § 3.05. "… [F]orce is justified if (a) the actor would be justified under Section 3.04 in using such force to protect himself against the injury he believes to be threatened to the other person; (b) under the circumstances as the actor believes them to be, the other person would be justified in using protective force; and (c) the actor believes that his intervention is necessary for the protection of the other person", see Commentaries, § 3.05, 61.

[272] Dubber, 159.

[273] Model Penal Code, § 3.04(2)(b) [emphasis added]. Observe that 'himself' is interchangeable with 'a third person'.

[274] Dubber, 164. Deadly force can be used to prevent death but also lesser harms, such as serious bodily harm, see Commentaries, § 3.04, 48.

[275] Model Penal Code, § 3.04(2)(b)(i).

[276] Model Penal Code, § 3.04(2)(b)(ii).

The provision on self-defense provides relatively precise guidelines for when force can be used, combining an adequate warning with values of fairness and consistency. While terms like 'necessary'[277] and 'serious bodily harm' are somewhat open-ended, the guidelines still elaborate on the typical situations in which force is allowed. Since the law providing self-defense can influence behavior and moral perspectives, it is essential that people can understand when the use of force is allowed. The regulation of self-defense thus aims to encourage people not to use force when their immediate emotions might support it, "[…] but enlightened morality would reject it".[278]

The essential rationale of all justifications in the Code is that an actor that engages in justified conduct did not act improperly.[279] To say that the conduct is justified ordinarily means that the conduct is right.[280] However, compared to necessity it is more difficult to explain self-defense in strictly consequentialist terms. It is not always clear whether taking one life over another prevents more harm or evil than it causes.[281] Nonetheless, self-defense does not explicitly require the balancing of evils.[282] Self-defense is a personal response to another's attack, while necessity is an impersonal balancing of interests.[283] The personal response is built upon notions of immediacy and necessity, and when a situation of immediate necessity appears an actor must be permitted to protect himself or another.[284]

Consequently, the use of force may be used in self-defense or for the protection of others because it is 'right' conduct.[285] On the one hand, the self-defense provision must be specific enough so that the community members understand that such force is prohibited. On the other hand, if the use of force is immediately necessary for the protection against another's unlawful force, it must be justified. Alternatively, as formulated in the MPC Commentaries, self-defense is an acceptable reason for the use of force "[…] both because it is often desirable that people defend their lives and because it is thought that people will "naturally" defend themselves if they believe that their lives are in danger […]".[286]

[277] Observe that the necessity requirement underlies all defensive force in the Code. The actor must believe that his actions are 'necessary' to be justified, and this requirement is evident in all justifications, see Commentaries, § 3.05, 64.
[278] Commentaries, § 3.04, 34.
[279] Commentaries, § 3.01, 6.
[280] Commentaries, § 3, 3.
[281] Ferzan, at 253.
[282] Cf. Model Penal Code, §§ 3.04–3.05.
[283] Ferzan, at 253.
[284] Cf. Model Penal Code, §§ 3.04–3.05.
[285] Commentaries, § 3, 3.
[286] Commentaries, § 3, 3.

4.3.2 Excuses

Reaching the last step of establishing criminal responsibility, this Sub-Chapter examines the excuse of duress. A valid excuse removes the actor's criminal responsibility, given the actor's characteristics and affecting external factors, but not the wrongfulness. In other words, the offense and norm remain intact.[287] The Code's implementation of excuses includes values of justice and morality in the law, reflecting the MPC's construction of criminal law as more than a system of punishment.[288]

Duress

Duress is a universal defense; if coerced by another person, the actor can be excused under duress to prevent harm to themselves and others.[289] The MPC classifies duress as:

> (1) An affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, *that a person of reasonable firmness in his situation would have been unable to resist* […].[290]

Accordingly, an actor will be excused for his inability to resist coercion if a person of reasonable firmness would have succumbed to the pressure. The objective requirement of 'a person of reasonable firmness' includes a variety of factors, such as strength, size, age, or health but not temperament or lack of fortitude.[291] The actor's situation, as perceived by the actor, can also be considered.[292] Such consideration presupposes that the actor was not reckless or negligent in placing himself in a situation where duress was probable.[293]

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[287] The norm stays intact, but excuses modify the factual background of subsequent excuses, see Fletcher (2000), 812. The intactness of the norm is related to the fact that excuses do not generate precedents. Excuses supply rules of adjudication, while justifications serve as guidance of conduct, see Simester (2012), at 108.

[288] Dubber, 179–180; cf. Model Penal Code, § 1.02.

[289] Commentaries, § 2.09, 378–379. The limitation follows from the reference to 'unlawfulness' and the general justification in § 3.02, the choice of evils, includes natural causes. As such, duress excludes circumstantial duress, see Dubber, 183–184.

[290] Model Penal Code, § 2.09(1). Note that such defense is unavailable in certain situations of recklessness and negligence, see § 2.09(2).

[291] Commentaries, § 2.09, 374.

[292] Dubber, 187.

[293] Commentaries, § 2.09, 375–376 and 379. Observe that there is no limitation about the threat's characteristics, neither being one of death, serious bodily harm, or imminence. Such factors are included and given evidential weight in applying the 'person of reasonable firmness' standard.

The central question of duress occurs when an actor is coerced into conduct involving a choice of equal or greater harm than is threatened.[294] In such situations, the actor can argue that he was so intimidated by a threat that he could not choose otherwise. The argument is essentially based on the concept of involuntariness, which follows from the actor's lack of psychological capacity to make another decision.[295] Arguments of involuntariness are, however, rejected by the MPC. Responsibility should not be dependent on the fortitude of an actor to make a moral decision and neither on variables such as intelligence nor clarity of judgment. In other words, legal norms do not depend on the individual's capacity to follow the proscribed standard. For a legal standard to be effective, it must be unconditional.[296]

An actor's conduct may be involuntary, but even when faced with the most coercive threat of death, the actor chooses between death or committing a crime.[297] Nonetheless, the choice is severely constrained, and it would be Draconian to punish an actor for avoiding grave harm.[298] The law should not apply a standard that its judges are not prepared to conform to when facing the same dilemmatic choice as the actor. Condemnation would not only be ineffective but unjust in that it lacks any moral foundation.[299] Allowing duress shows that criminal law does not require perfection, but it does require more than conduct that merely demonstrates a failure of virtue. The essence of excusing duress is that it would be irrational to impose conviction when not even a person of reasonable firmness could have avoided acting under the duressor's pressure.[300] Ultimately, duress is an excuse since the conduct is undesirable, but for some reason, the actor should not be blamed for it.[301]

[294] Commentaries, § 2.09, 373. In such a situation, necessity § 3.02 is not available.

[295] Commentaries, § 2.09, 373. For involuntary conduct by physical coercion, see § 2.01(1).

[296] Commentaries, § 2.09, 374.

[297] Simester et al., 772.

[298] Simester et al., 759. The sentiment follows the just desert theory.

[299] Commentaries, § 2.09, 374–375.

[300] Simester et al., 772–773. Fletcher means that determining this threshold is a matter of moral judgment, see Fletcher (2000), 804.

[301] Commentaries, § 3, 3.

5 Justification and Excuse in the Law of State Responsibility as Drawn by Analogy with Domestic Law

5.1 General Remarks

Existing international law, substantive customary, and conventional law do not permit States' uses of force for humanitarian purposes.[302] However, while the primary rules of international law do not allow humanitarian interventions, it seems morally desirable that the law would identify the need to defend human rights, especially when there is a need to save a population from its government. Scholars, who still aspire to stay within the ambit of law, have turned to the secondary rules of international law to find a legal basis for humanitarian intervention.[303] These scholars have framed the defense of humanitarian intervention as 'illegal but justified' and 'illegal but excused'. Since the notion of justifications and excuses only exist in the sphere of domestic law, the question is whether the law of State responsibility can accommodate a domestic justification-excuse distinction.

This Chapter starts with a general introduction to the law of State responsibility, followed by an exploration of whether international law can accommodate the distinction. After concluding that the law of State responsibility is capable of accommodating the distinction, the discussion moves to the sphere of humanitarian intervention. Sub-Chapter 5.3 explores humanitarian intervention as 'illegal but justified' and concludes that accommodating a domestic concept of justifications provides a legal basis for humanitarian intervention. Since the definition of justification does not specify what defenses are justifications, the MPC's classification is applied analogously in Sub-Chapters 5.3.2 and 5.3.3. Here, the defenses' rationales are examined to determine whether the rationales are similar enough to offer equal treatment.

Moreover, Sub-Chapter 5.4 explores humanitarian intervention under the 'illegal but excused' claim and concludes that an accommodation of excuses provides a legal basis for humanitarian intervention. Sub-Chapter 5.4.2 applies the same approach as 5.3.2 and 5.3.3.

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[302] See 3 above.

[303] E.g., Vidmar argues that humanitarian intervention should be excused. By excusing humanitarian intervention, the reading of the UN Charter remains orthodox, see Vidmar (2015) and Vidmar (2017).

5.2 The Law of State Responsibility

5.2.1 Background

The ILC's ARS is the product of 40 years of effort to codify State responsibility in international law.[304] The ILC examined State practice, judicial precedents, and scholarly opinions to form the most plausible version of existing law, with occasional propositions *de lege ferenda*. This method formed a basis for dialogue with States, resulting in the adoption of codified non-binding articles that have become very influential. Moreover, the ILC has been influenced by, for example, the Vienna Convention on the Law of Treaties (1969) (VCLT) in the ARS's drafting, applying reasoning by analogy.[305] The ARS has codified customary international law to a great extent, and at least the essential Articles are considered customary law. As such, the ARS is authoritative in the law of State responsibility despite not being legally binding.[306]

The ARS specifies the secondary rules of State responsibility; the rules apply when a primary rule of international law, such as the prohibition of force, has been breached. Thus, regulating the general conditions under which a State is responsible for its wrongful action or omission and its legal consequences.[307] As stated in Article 1 ARS, "[e]very internationally wrongful act of a State entails the international responsibility of that State", given that the conduct is attributable to the State and constitutes a breach of an international obligation.[308] Chapter V Part One ARS contains the circumstances that preclude wrongfulness. The relevant circumstances in the case of humanitarian intervention are self-defense (Article 21 ARS), distress (Article 24 ARS), and necessity (Article 25 ARS).[309] The circumstances function like defenses, providing a shield against a *prima facie* breach of an international obligation.[310] Such defense is, however, invalid if contradictory to a peremptory norm of international law.[311]

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[304] Dupuy, para. 38. The UNGA took note of ARS, see UNGA Res. 56/83 (2002).

[305] Bordin, at 30–31. E.g., in Article 42 ARS, the invocation of responsibility by an injured State is modeled on Article 60 VCLT, termination or suspension of a treaty because of its breach.

[306] Linderfalk (2012), 108–109. E.g., circumstances precluding wrongfulness are recognized under general international law, see ARS, *Commentary*, Part One, Chapter V, para. 9.

[307] ARS, *General Commentary*, para. 1. If a State's compliance with a primary obligation is questioned, the following issues arise: the attribution of the conduct to the State, specifying the time of a breach, determining the circumstances of responsibility, and in what circumstances the wrongfulness may be precluded, see para. 3.

[308] See ARS, Articles 1 and 2. In the case of humanitarian intervention, such intervention is attributable to the State conducting the intervention, cf. ARS, Article 4, and the *prima facie* breach is of the prohibition of the use of force, cf. ARS, Articles 12–14.

[309] ARS, Part One, Chapter V.

[310] ARS, *Commentary*, Part One, Chapter V, paras. 1 and 7.

[311] ARS, Article 26.

Part Two of the ARS regulates the responsibility of a State. If a State is responsible for a wrongful act, it still has a duty to perform the obligation that was breached.[312] Moreover, the responsible State must cease the act and offer assurances and guarantees of non-repetition if the circumstances require it.[313] As to the injury caused by the responsible State's wrongful act, the State must make reparations, including restitution, compensation, and satisfaction.[314] Additionally, particular consequences arise from a serious breach of a peremptory norm in international law. Such consequences include a duty of non-recognition for all States, no State shall recognize the act as lawful.[315]

However, the ARS does not explain how the defenses and their exonerating effect operate.[316] There also appears to be a mixing of elements that preclude wrongfulness with others that operate more like defenses or pleas in mitigation.[317] Some have even suggested that the defenses work like optical illusions, sometimes you see wrongfulness and responsibility and other times you do not.[318] The lack of coherence in the ILC's approach seems to follow from the various 'grab bag'[319] of defenses in Chapter V ARS.[320]

The lack of explanation on how the defenses operate and the lack of coherence regarding their exonerating effects create the need to conduct an analogy. The objective of an analogy with domestic law is to clarify and systematize the law of State responsibility. In domestic legal orders, scholars have elaborated taxonomies to systematize many different defenses. Justification and excuse are the most common and well-known concepts used in this regard. As such, the following Sub-Chapters aim to provide an explanatory theoretical account of the law of State responsibility, as drawn by analogy with the general account of justifications and excuses. The defenses are then analogously divided into justifications or excuses according to the MPC's classification.

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[312] Cf. ARS, Article 29.

[313] ARS, Articles 28–31. Observe that the responsible States cannot rely on the provisions of its domestic law to justify its failures to comply with the obligations, see Article 32.

[314] Full reparation of an injury caused by an internationally wrongful act shall take the form of restitution (Article 35 ARS), compensation (Article 36 ARS), and satisfaction (Article 37 ARS), either separately or in combination, see ARS, Article 34.

[315] A breach of a peremptory norm is serious if it involves a gross or systematic failure by the responsible State to fulfill the obligation, see ARS, Article 40. As to the consequences, these are stipulated in Article 41 ARS. Besides the duty of non-recognition, States must cooperate to bring an end, by lawful means, to any serious breach.

[316] See the ARS and the ARS Commentary *e contrario*. Paddeu (2018), 6.

[317] Rosenstock, at 794. E.g., Article 23 ARS on self-defense is a typical defense in domestic law. While Article 24 ARS on distress or Article 25 ARS on necessity share similar characteristics with mitigation, minimizing the degree of loss or harm.

[318] Christakis, at 223; Paddeu (2018), 6.

[319] Rosenstock, at 794.

[320] The ARS precludes wrongfulness in circumstances of self-defense (Article 21) and, in the case of, e.g., *force majeure* (Article 23). However, the ARS's pragmatic reasoning seems to generally produce the correct answers in real-life situations, see Rosenstock, at 794.

5.2.2 As Drawn by Analogy with Domestic Law

Since the law of State responsibility does not divide defenses into justifications and excuses,[321] the question is whether international law can accommodate a domestic justification-excuse distinction. If the domestic distinction is accommodated analogously, the defenses in the ARS would be divided into 'circumstances that preclude wrongfulness' (justifications) and 'circumstances that preclude responsibility' (excuses).[322]

Mainly two concerns have been raised about whether the ARS can accommodate a distinction between justifications and excuses. The first concern is whether the ILC has ruled out the possibility of making this distinction. The second concern is that the ARS belongs to the secondary rules of international law and that this prevents the distinction.[323]

Firstly, while the distinction does not appear in Chapter V ARS, the ARS did acknowledge the justification-excuse distinction. The Special Rapporteurs drafting the ARS contemplated including such a distinction in the law of State responsibility. The opinions varied from only accepting justifications or excuses to possibly accepting both.[324] Also, even though Chapter V ARS only speaks of the preclusion of wrongfulness, its Commentary has described the circumstances in terms of justification, excuse, and defense and seems to use this terminology purposefully.[325]

According to the ARS Commentary, the circumstances that preclude wrongfulness "…do not annul or terminate the obligation; rather they provide a justification or excuse for non-performance while the circumstance in question subsists".[326] The Commentary further explains that the circumstances are distinguished from other arguments that provide the avoidance of State responsibility. The circumstances are said to function like defenses or excuses in domestic law but have been developed independently from such law.[327]

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[321] See ARS, Part One, Chapter V *e contrario*.

[322] Cf. 4.2 above.

[323] Paddeu (2018), 35.

[324] Francisco García-Amador only recognized excuses, see García-Amador, at 50–51. Roberto Ago only recognized justifications, see Ago (1970) at 193–194. And James Crawford was open to the distinction between the two, see Crawford, at 60. For a detailed analysis of their reasonings, see Paddeu (2018), 38–49.

[325] See Paddeu (2018), 49–52. At least, it is not a case of confusion as to the meaning of the justification-excuse terminology, cf. *supra* note 22.

[326] ARS, *Commentary*, Part One, Chapter V, para. 2. The ICJ also confirmed that necessity could not permit the conclusion that the State had acted in accordance with the obligations or that those had ceased to be binding but that under the circumstances, the State would not incur responsibility for its actions. Even if the State is found justified due to necessity, this does not terminate a treaty, see ICJ, *Gabčíkovo-Nagymaros Project*, paras. 48 and 101.

[327] ARS, *Commentary*, Part One, Chapter V, para. 7. Chapter V does not deal with jurisdiction or admissibility since those elements are specified by the obligation.

Moreover, the ILC's Report on the work of its thirty-first session provides a suggestion on how to interpret the statements appearing in the Commentary:

> Throughout the drafting of the articles, the Commission has made clear its conviction that a distinction must be drawn between the idea of 'wrongfulness', indicating the fact that certain conduct by a State conflicts with an obligation imposed on that State by a 'primary' rule of international law, and the idea of 'responsibility', indicating the legal consequences which another ('secondary') rule of international law attaches to the act of the State constituted by such conduct.[328]

The premises of ILC's work, upon which the ARS is built, imply that the defenses are based on a distinction between precluding wrongfulness and responsibility. If the premise is accepted, there may be defenses that preclude the wrongfulness of an act and defenses that preclude the responsibility of a wrongful act. Additionally, the differing opinions of the Special Rapporteurs reflect that the question of accommodating the distinction is open to interpretation. Ultimately, the ILC did not take a firm stance on including or excluding the distinction in its preparatory work.[329]

In sum, if the defenses in Chapter V ARS, although labeled as 'circumstances precluding wrongfulness', are based on a conceptual distinction between precluding wrongfulness and responsibility, the ARS can accommodate a justification-excuse distinction. Justifications and excuses, as they appear in the general account, are based on the notions 'legally wrongful' and 'responsibility'. As such, justifications can be accommodated to entail 'circumstances that preclude wrongfulness', and excuses can be accommodated to entail 'circumstances that preclude responsibility'.[330]

Secondly, there is concern that the distinction is prevented due to the characteristics of the law of State responsibility.[331] The ARS is said to belong to the secondary rules of international law,[332] while justifications seem to be primary in character. According to the general account, justifications are action-guiding and amend the law by creating precedent.[333] Insofar as justifications guide behavior and stipulate obligations, they may be primary rules.[334]

Additionally, neither issues of evidence nor burden of proof are discussed. However, if conduct attributable to a State is in contradiction with an international obligation and the State seeks to avoid responsibility, the State will carry the burden to "[…] justify or excuse its conduct […]", see para. 8.

[328] ILC Yearbook (1979), 107. Also, it would be incorrect to regard the expressions 'circumstances precluding responsibility' and 'circumstances precluding wrongfulness' as mere synonyms.

[329] For an extensive analysis, see Paddeu (2018), 37–52.

[330] Cf. 4.2 above.

[331] Paddeu (2018), 35.

[332] As confirmed by the ICJ, see ICJ, *Gabčíkovo-Nagymaros Project,* para. 47.

[333] Cf. *supra* note 245. Also, see Paddeu (2018), 55.

[334] Observe that this is an assumption.

The concern is thus that the ARS, belonging to the secondary rules, cannot accommodate a primary justification.[335]

Following standard definitions, primary rules are substantive, they determine the obligations. In contrast, secondary rules refer to the conditions of a breach of a primary rule and its legal consequences.[336] This distinction is important since it organizes ideas of thinking about the law of responsibility.[337] Special Rapporteur Roberto Ago formulated the distinction accordingly:

> […] the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed 'primary' as opposed to the other rules – precisely those covering the field of responsibility – which may be termed 'secondary', inasmuch as they are concerned with determining the consequences or failure to fulfil obligations established by the primary rules.[338]

Besides Ago's definition, the ILC did not clarify the distinction or the boundaries between primary and secondary rules.[339] The ILC roughly defines that the primary rules establish obligations, while secondary rules concern the legal consequences of a breach of a primary rule.[340] A problem that arises from this general definition is that some rules of the law of State responsibility can be characterized as primary. For example, the rules on reparations[341] impose obligations upon States, guiding State conduct. Despite the ARS's secondary character, it appears to contain rules of primary character.[342]

However, the ILC applied the distinction for pragmatic reasons rather than conceptual ones.[343] The distinction between primary and secondary norms served to delimit the scope of ILC's work. The ILC acknowledged that the distinction is not absolute and approached the distinction pragmatically rather than dogmatically.[344]

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[335] Note that this issue does not concern excuses. Excuses are not action-guiding. An actor is excused due to the circumstances in the case. The actor still commits a legally wrongful act (a breach of a primary norm that stipulates an obligation), and it is only the obligation of responsibility that is precluded. Cf. 4.2 above.

[336] See Linderfalk (2009), at 55.

[337] Paddeu (2018), 53.

[338] See Ago (1970), at 179.

[339] Paddeu (2018), 54.

[340] Following Ago's definition, see ARS, *General Commentary*, para. 2

[341] The responsible State is under an obligation to make full reparations for the injury of a wrongful act, see ARS, Article 31–37. However, the obligation arises from an injury caused by an internationally wrongful act. As such, it is also a consequence of a breach.

[342] Paddeu (2018), 55.

[343] See Nollkaemper & Jacobs, at 408–410.

[344] ILC Yearbook (1979), 88. The distinction between primary and secondary rules rests on unclear jurisprudential value, see Dugard, at 101. Also, see Paddeu (2018), 55.

Therefore, it is not necessarily the ARS's secondary character that defines its scope but perhaps its generality. The ARS could be interpreted to represent the areas where the ILC could reach a consensus on general provisions, which can be applied across the entire range of international law. This more flexible approach to the distinction between primary and secondary norms overcomes the inconsistency in the ARS, appearing to include both primary and secondary norms. Also, the approach leads to the conclusion that even if justifications are primary,[345] they can still be accommodated by the law of State responsibility.[346]

Consequently, the ILC did not seem to rule out the possibility of including a distinction between justifications and excuses. Also, the law of State responsibility appears to be systematically capable of accommodating the distinction. The law of State responsibility can thus accommodate a domestic justification-excuse distinction insofar as the ARS is based on a conceptual distinction between the notions of 'wrongful' and 'responsibility'. Analogously, justifications are defenses concerning the wrongfulness of an act, and excuses are defenses concerning the actor's responsibility.[347]

Since the ARS can accommodate the distinction, the question that remains is whether the distinction can provide a legal basis for humanitarian intervention. As such, the defenses must be classified as justifications or excuses. Analogously to the MPC, necessity and self-defense are justifications that preclude the wrongfulness of an act. In comparison, distress, duress's counterpart in international law, is an excuse that precludes the actor's responsibility. In the coming Chapters, the notions of humanitarian intervention as 'illegal but justified' and 'illegal but excused' are explored.

[345] Whether, in fact, justifications are primary norms is a question that legal theorists have dwelled on. However, "… it is not the primary or secondary character of a defense which determines its classification as a justification or an excuse, but the other way around: it is the classification of a defense as a justification or an excuse which determines its character as a primary or secondary rule […]", see Paddeu (2018), 60. As such, defenses in the ARS can be either justifications or excuses, and their character can be either primary or secondary, at 61.

[346] Bodansky & Crook, at 780–781; Paddeu (2018), 56.

[347] Paddeu (2018), 27.

5.3 Humanitarian Intervention as a Justification

5.3.1 'Illegal but Justified'

Scholars have claimed that humanitarian intervention is 'illegal but justified'.[348] One way of understanding this claim is to rely on the law of State responsibility and the notion of 'circumstances precluding wrongfulness', accommodated by the domestic concept of justification.[349] If the concept is accommodated, the circumstances that preclude wrongfulness in international law function like justifications in domestic law.[350]

The 'illegal but justified' claim attempts to convey that even though humanitarian intervention is 'illegal' according to the primary rules of international law, it can be 'justified' through the law of State responsibility. Essentially, the humanitarian intervention would be legal,[351] according to the primary rules of international law, and the morally right thing to do, according to the domestic concept of justification.[352] From this perspective, the prohibition in Article 2(4) UN Charter stipulates an obligation not to use force. In turn, a State's humanitarian purposes give reason to use force. The reason for the defense thus overrides the prohibition. This does not mean that the reason against force is canceled, but the humanitarian intervention merely *prima facie* violated the law.[353]

This approach appears to have some appeal. It would allow a humanitarian State to use force to save a population from its government's human rights violations, conditioned that the State can offer sufficient reasons for using force in the specific case. Absent justified humanitarian purposes, the use of force would remain illegal.[354] Beyond the initial appeal; justifications carry implications, justifications affect responsibility, the rights of action and reaction, and the normative pull-on rules.[355]

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[348] E.g., Franck (2002). However, observe that this claim is supposed to represent a general claim of 'illegal but justified' where the scholar has not specified what concepts or doctrines are relied upon.

[349] For another way of viewing the 'illegal but justified' claim, see Paddeu (2021), at 656

[350] Cf. 4.2 and 5.2.2 above.

[351] Analogously to the domestic notion of justifications, if an act is not legally wrongful, it is legally permissible, legal. If an act's wrongfulness is precluded, the act is permissible and thus legal. Cf. 4.2 and 5.2.2 above.

[352] Cf. 3 and see 4.2 above.

[353] Cf. Paddeu (2021), at 656. Cf. Gardner, 96.

[354] Cf. Paddeu (2021), at 657. Cf. 4.2 above.

[355] See *supra* note 239.

In terms of responsibility, a State engaging in humanitarian intervention will not be responsible for cessation or reparation other than satisfaction.[356] In domestic law, a justified actor accepts that he did the act but denies that it was legally wrongful.[357] Equivalently, a State engaging in humanitarian intervention would thus acknowledge the breach but deny that it was legally wrongful.[358]

Regarding the rights of action and reaction, if the humanitarian State has acted for justificatory humanitarian purposes, any third State could participate in the intervention. In contrast, the target State would not be justified to respond with force.[359] However, justifications carry implications beyond the specific case. They affect the normative pull of rules. When decided in domestic courts, justifications create precedents and thus amend the law.[360] While international courts do not have compulsory jurisdiction,[361] States' actions create precedents. If sufficient State practice and *opinio juris* exist, States' actions can create a new norm of customary international law.[362] In other words, States' violations of the law can create new legal rules which permit the violation.[363]

While the implications are theoretically plausible and perhaps even desirable, they are only potentially relevant in practice.[364] However, a practical issue is whether a justified humanitarian intervention is consistent with the structure of international law.[365] The use of force prohibition is a peremptory norm of international law,[366] and Article 26 ARS states that justifications cannot be invoked for a breach of peremptory rules. The ARS Commentary specifies that when there is a conflict between primary obligations, one of which is a peremptory norm, the peremptory obligation prevails.[367] Additionally, the Commentary emphasizes the *opinio juris* element, a peremptory norm must be recognized to be of peremptory character by the entire international community.[368] Nevertheless, a peremptory norm can be replaced with another peremptory norm.[369] If State practice is general, constant, uniform, and States engage in humanitarian interventions since they consider such intervention to be of peremptory status, humanitarian intervention could be justified.

[356] Cf. *supra* note 240. See ARS, Articles 30, 34, and 37.
[357] See *supra* note 240.
[358] Cf. ARS, Article 37.
[359] Cf. *supra* note 243.
[360] See *supra* note 245.
[361] See *supra* note 61. Meaning that an instance of justified intervention will perhaps not be determined in court.
[362] See *supra* note 149.
[363] See *supra* note 61.
[364] See *supra* note 239.
[365] Paddeu (2021), at 658.
[366] See supra notes 152–153.
[367] ARS, *Commentary*, Article 26, para. 3. Also, cf. ARS, Articles 40–41.
[368] ARS, *Commentary*, Article 26, para. 5.
[369] See *supra* note 153.

However, this would entail that the use of force prohibition is no longer a peremptory norm of international law.[370] In sum, it appears that an initial claim of 'illegal but justified' has become a claim of 'legal because it is justified'. The law of State responsibility can thus, theoretically, provide a legal basis for humanitarian intervention by accommodating the domestic concept of justification. Nevertheless, the question that remains is on what basis humanitarian intervention could be justified.

5.3.2 Necessity

Article 25 ARS states that:

> 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.[371]

At first glance, necessity in the ARS is similar to necessity in the MPC. The MPC states that necessity is a choice of evils, and the act will only be justified if an actor chooses the lesser evil.[372] Equivalently, the defense of necessity in the ARS may only be invoked when this is the only way for the State to safeguard an essential interest from harm. But what is the lesser evil, and what is an essential interest in situations concerning humanitarian intervention?

In domestic law, the MPC states that every life is of equal value. Since every life is of equal value, the numerical preponderance is the choice of the lesser evil.[373] Presumed that a humanitarian intervention would save more lives than it would take, which ought to be the humanitarian State's objective, the domestic notion of necessity could justify humanitarian interventions. In international law, the ARS Commentary explains that an essential interest depends on all the circumstances in the case and, as such, it cannot be prejudged.

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[370] Cf. *supra* note 149.
[371] ARS, Article 25.
[372] See *supra* note 256.
[373] See *supra* note 261.

Nevertheless, an essential interest extends to the particular interests of the State, its population, and also to the entire international community.[374] Furthermore, a state of necessity appears in exceptional situations where "… there is an irreconcilable conflict between an essential interest on the one hand and an obligation of the State invoking necessity on the other".[375]

Additionally, the Commentary clarifies that an essential interest must outweigh all other considerations based on a reasonable assessment of competing interests, both individual and collective interests. The protected interest must thus outweigh the infringed interests, the territorial sovereignty and integrity, of the target State.[376] State practice and judicial decisions confirm that necessity may only preclude wrongfulness under limited situations. For example, to ensure the safety of a civilian population. Nevertheless, the strict conditions in Article 25 must be fulfilled before a plea of necessity is allowed.[377] Such conditions include that the harm must be objectively established, and not merely conceivable.[378] Upon closer reading of the ARS, it seems to have been influenced by ideas of superior interests. Special Rapporteur Ago suggested a neutral and abstract formulation for the defense as a conflict of interest based on the superiority of the interests in the circumstances.[379] However, while the suggestion was not adopted, domestic and international law notions of necessity appear to be based on similar consequentialist reasoning.[380]

Accordingly, a necessity in domestic and international law appears to share similar rationales. Humanitarian purposes, or in domestic terms, saving lives, is the choice of lesser evil. In international law, humanitarian purposes are an essential interest of States, their populations, and the entire international community. However, these similarities may not be sufficient to offer equal treatment.[381] The fact that necessity is a justification in domestic law cannot be directly transplanted into international law, even though they share similar rationales.[382] Turning to the systematicity of international law, necessity could only justify humanitarian intervention insofar as humanitarian intervention develops into a peremptory norm. While theoretically possible, it would require extensive State practice. Particularly challenging would be to validate that States engage in humanitarian intervention because they believe that they are obliged to participate in such action since humanitarian intervention is a norm of peremptory status.[383]

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[374] ARS, *Commentary*, Article 25, para. 15.
[375] ARS, *Commentary*, Article 25, para. 2.
[376] Cf. ARS, *Commentary*, Article 25, para. 17. As portrayed in Article 25(1)(a).
[377] ARS, *Commentary*, Article 25, para. 14.
[378] ARS, *Commentary*, Article 25, para. 15.
[379] Ago (1980), at 51.
[380] Cf. 4.3.1. See *supra* note 262.
[381] See *supra* note 73.
[382] Cf. *supra* note 86.
[383] See 5.3.1 above, cf. 1.5 above.

5.3.3 Self-Defense

Self-defense is regulated by Article 21 ARS, and states that:

> The wrongfulness of an act of a State is precluded if the act constitutes a lawful measure of self-defence taken in conformity with the Charter of the United Nations.[384]

The ARS's definition of self-defense appears inherently different from the MPC's provision on self-defense. The MPC considers various factors, emphasizing the actor's perception that his use of force is immediately necessary to protect himself or another.[385] If the actor uses deadly force, this will only be justified if a threat or force puts the actor at risk of serious danger, such as death or serious bodily injury.[386] The rationale of justifying self-defense is that such defense is natural and desirable. An actor must be justified in using force to defend himself or another from unlawful force since he engages in 'right' conduct.[387]

In contrast, the ARS limits its scope of precluding the wrongfulness of self-defense in relation to the UN Charter. The ARS Commentary explains that Article 21 does not concern the relationship between the right of self-defense and the use of force prohibition. As such, the ARS does not provide a justification for acts violating Article 2(4) UN Charter.[388] Instead, the ARS looks to other obligations, such as non-intervention, that are potentially violated by a State's use of self-defense.[389] Thus, the ARS only justifies non-performance of certain obligations other than that under the prohibition of force.[390]

While it intuitively may seem plausible that an individual's use of force to protect another is similar to a State's use of force to protect another State's population from human rights infringements, self-defense in domestic and international law have separate meanings and implications. The MPC Commentaries refer to justified self-defense as proper conduct, while the ARS Commentary does not indicate how the rules are supposed to function normatively. Even if the ARS Commentary specified self-defense's rationale, Article 51 UN Charter contains the regulated cases justifying self-defense in international law. Since self-defense is regulated, a lacuna that would allow analogous reasoning does not exist.

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[384] ARS, Article 21.
[385] See *supra* notes 265–269.
[386] See *supra* notes 273–274.
[387] See *supra* notes 279 and 285.
[388] ARS, *Commentary*, Article 21, para. 1.
[389] ARS, *Commentary*, Article 21, para. 2.
[390] ARS, *Commentary*, Article 21, paras. 1–2.

5.4 Humanitarian Intervention as an Excuse

5.4.1 'Illegal but Excused'

Scholars have also claimed that humanitarian intervention is 'illegal but excused'.[391] If this claim is understood to rely on the law of State responsibility as accommodated by the domestic concept of excuse, the 'circumstances precluding responsibility' entails an excuse. Therefore, the circumstances that preclude responsibility should operate like excuses in domestic law.[392]

From this premise, the 'illegal but excused' claim confirms that humanitarian intervention is 'illegal' according to the primary rules of international law. Additionally, its illegality is acknowledged by the secondary rules of international law since the wrongfulness is not precluded. Nevertheless, a State engaging in humanitarian intervention is excused since a humanitarian State cannot be held 'morally responsible'. Simply, the State's responsibility, but not the wrongfulness of humanitarian intervention, is precluded.[393]

This claim is appealing since it reconciles the illegality of using force with the perceived legitimacy of humanitarian intervention. In contrast to the 'illegal but justified' approach, 'illegal but excused' gives a clear basis for the wrongfulness of humanitarian intervention. Humanitarian intervention is wrong since it constitutes a violation of international law. While the humanitarian State is 'wrong' to engage in the illegal use of force, the State's responsibility is removed due to its humanitarian purposes.[394] In other words, Article 2(4) UN Charter prohibits the use of force, but humanitarian purposes do not constitute a reason for a State to engage in humanitarian intervention. Nonetheless, if a humanitarian State uses force to save another State's population from mass suffering, the State cannot be held responsible and is thus excused.

Moreover, an excused humanitarian State has implications regarding responsibility, rights of action and reaction, and the normative pull-on rules.[395] Under the law of State responsibility, a humanitarian State would be shielded from the consequences, the responsibility, of cessation and reparations towards the target State.[396]

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[391] E.g., Vidmar (2017), Vidmar (2015), and Stromseth. Resting on the correspondent assumptions as in *supra* note 348.

[392] Cf. 4.2 and 5.2.2 above.

[393] Cf. 4.2 and 5.2.2 above.

[394] Cf. 4.2 and 5.2.2 above. Also, see Paddeu (2021), at 644.

[395] See *supra* notes 239 and 355.

[396] Cf. *supra* note 240. See ARS, Articles, 30, 34, and 37.

In terms of rights of action and reaction, the humanitarian State's excuse will not extend to any other State. As such, the target State and a third State could resist the humanitarian intervention by claiming, for example, individual or collective self-defense. This implication arises since a humanitarian State's responsibility has been precluded, and not the wrongfulness. Wrongful acts have consequences beyond those in the law of State responsibility.[397] As such, a right of self-defense can appear in relation to a wrongful humanitarian intervention if the intervention's force rises to the level of an armed attack.[398] In other words, self-defense is also a consequence of wrongfulness. While a humanitarian State is excused since it is not 'morally responsible', the State would still be an 'unjustified aggressor'. It follows that the target State could use self-defense against a humanitarian State, which is not a conclusion that reconciles the law and morality.[399]

As to the normative pull of excuses, a court's determination that an actor is excused does not create a precedent or change the law. An excused actor is still 'wrong' in his conduct, and other actors should avoid engaging in such conduct.[400] However, the domestic concept of excuses does not consider that the subjects of the law are also lawmakers in international law. Although wrongful, States' violations of the law can create new norms.[401] However, it has been argued that since excuses operate on a secondary level, precluding legal consequences, not even State practice can create precedents. Essentially, that excused State actors' actions do not have any bearing on the primary norm, Article 2(4) UN Charter.[402] It is correct that excuses in domestic law do not affect the primary obligation, but this follows from the domestic courts' determination that an excused actor still engaged in wrongful conduct.[403]

However, the ICJ does not have compulsory jurisdiction, meaning that instances of excused humanitarian interventions will not always be determined as wrongful.[404] Nevertheless, it is argued that voting behavior in the UN and the obligation of non-recognition would, at least implicitly, have a role in determining the act as wrongful.[405] While States are obligated under Article 41 ARS to recognize a breach of a peremptory norm,[406] practice displays another reality. In cases such as Kosovo, most States did not declare NATO's action legal or illegal. Also, the UN Security Council and the UN General Assembly are not required to pass judgment on all violations of peace and security.[407]

[397] Cf. *supra* notes 243 and 359. See Paddeu (2021), at 672.
[398] Cf. 2.4 above.
[399] See Fletcher & Ohlin, Chapter 5. Also, see Paddeu (2021), at 673.
[400] See *supra* note 245.
[401] See *supra* notes 61, 149, 362, and 363.
[402] Vidmar (2015), 29.
[403] See *supra* note 245.
[404] Cf. *supra* notes 61 and 361.
[405] See Vidmar (2015), at 21.
[406] See ARS, Articles 40 and 41.
[407] See *supra* notes 19 and 93. Also, see Roberts, at 189–190.

As such, the claim that a domestic court's compulsory jurisdiction is comparable to the UN organs is weak. It follows, like in the case of 'illegal but justified', that an initial claim of 'illegal but excused' appears to have developed into 'legal because it is excused'. The law of State responsibility can accommodate a domestic concept of excuses, which can, theoretically, provide a legal basis for humanitarian intervention.[408]

5.4.2 Distress

There is no specific Article regulating duress stipulated by ARS. However, Article 24 ARS regulates distress, following:

> 1. The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if the author of the act in question has no other reasonable way, in a situation of distress, of saving the author's life or the lives of other persons entrusted to the author's care.
> 2. Paragraph 1 does not apply if:
>   (a) the situation of distress is due, either alone or in combination with other factors, to the conduct of the State invoking it; or
>   (b) the act in question is likely to create a comparable or greater peril.[409]

The ARS's distress is similar to the MPC's duress in that both are based upon a lack of options in the particular situation.[410] Also, both provisions seem to carry the inherent logic of reasonableness. The MPC stipulates an objective criterium of a 'person of reasonable firmness'.[411] Equivalently, the ARS requires that the actor has no 'other reasonable way' to act than to engage in distress.[412]

In domestic law, the basic idea of duress revolves around the actor not being entirely free in his choice to commit a criminal offense due to a use or threat to use force. The actor nonetheless makes a choice and should not be held responsible if a person of reasonable firmness would not have been able to resist the same threat. In such situations, the actor's conduct is undesirable,

[408] Observe that the lack of compliance with a peremptory norm does not appear to be an obstacle since Article 26 only precludes wrongfulness and not responsibility, see ARS, Article 26.

[409] ARS, Article 24.

[410] ARS, *Commentary*, Article 24, para. 1. Cf. supra notes 297–298. Note the difference to necessity, a distressed State organ's conduct does not need to be the only way to save a life, but the only reasonable way.

[411] See *supra* note 290.

[412] This is also an objective criterium, see ARS, *Commentary*, Article 24, para. 10.

but he is not considered blameworthy or morally responsible due to the circumstances in the case.[413]

In international law, distress is a specific case where an individual, whose acts are attributable to the State, is in a situation of peril. Or if a person under the individual's care is in danger. The ARS Commentary also clarifies that the defense of distress is limited to situations where a threat to life exists. The protected interest is saving individuals' lives, regardless of their nationality.[414] Only if the protected interests clearly outweigh other interests in the circumstances may the actor be excused under distress. As such, distress is not applicable if the act is likely to create equal or greater harm. What constitutes equal or greater harm must be assessed in the context of the overall purpose of saving lives.[415]

In doctrine, it appears uncontroversial that the ILC formulated the defense of distress due to humanitarian considerations.[416] Distress implies that the conduct adopted by a distressed State is coerced,[417] as confirmed by the ARS Commentary.[418] The emphasis on humanitarian purposes, similar to that of duress, indicates that distress is supposed to operate as an excuse.[419] However, even if distress is an excuse based on coercion theory, this does not explain the limited scope of the defense. If distress is meant to excuse a State due to the lack of freedom of choice for its agent, it appears unclear why it should matter that the action was the choice of lesser harm.[420]

Despite limited choices, the choice must entail lesser harm for Article 24 ARS to be applicable. In other words, if humanitarian intervention could be excused under distress, it must save more lives than it takes and be the only reasonable way of saving a population. Thus far, it appears that distress and duress share similar rationales. However, it would be difficult to extend the excuse of distress to humanitarian intervention since there is no special relationship between the humanitarian State and the target State's population. Still, such reasoning is not a far stretch from the R2P doctrine, claiming that the international community has a secondary responsibility of protecting other States' populations. While unlikely that a humanitarian State could argue that it was compelled by a threat and had to act, it is nonetheless theoretically possible.[421]

[413] See 4.3.2 above.
[414] ARS, *Commentary*, Article 24, para. 1.
[415] ARS, *Commentary*, Article 24, para. 10.
[416] See Paddeu (2018), at 456–457.
[417] Ago (1980), at 14 and 42.
[418] ARS, *Commentary*, Article 24, para. 1.
[419] Paddeu (2018), 456.
[420] See Paddeu (2018), 459.
[421] Cf. Paddeu (2018), at 668.

6 Concluding Remarks

Humanitarian intervention is one of the most controversial areas of international law, and controversy has emerged when such action has been taken and when it has not. Opponents of humanitarian intervention argue that such intervention is not a legal exception to the non-use of force regime. Contrastingly, proponents argue that the international community must avert human rights violations. Given the uncertainties about whether a right of humanitarian intervention exists in the primary rules of international law, scholars have turned to the law of State responsibility to find a legal basis for such intervention. In attempt to reconcile law and morality, humanitarian intervention has been framed as 'illegal but justified' and 'illegal but excused'.

Since the law of State responsibility does not divide its defenses into justifications and excuses, it relies on the well-developed domestic distinction to accommodate the claims of 'illegal but justified' and 'illegal but excused'. The law of State responsibility can accommodate justifications as 'circumstances precluding wrongfulness' and excuses as 'circumstances precluding responsibility'. The question is whether the accommodation can provide a legal basis for humanitarian intervention.

Humanitarian intervention could be justified by the defense of necessity but not self-defense, and the defense of distress could excuse humanitarian intervention according to analogous reasoning with the US Model Penal Code. The issue in the case of self-defense is that Article 51 UN Charter precludes the wrongfulness of force in self-defense. As such, this regulated case does not allow analogous reasoning; there does not exist a lacuna in the law. As regards necessity and distress, both share similar rationales with their domestic counterparts. Necessity could thus justify humanitarian intervention, and distress could excuse a humanitarian State.

Beyond providing a legal basis for humanitarian intervention, the 'illegal but…' claims could start a shift in international law. Through States' actions, the 'illegal but…' claims could become 'legal because it is justified' or 'legal because it is excused'. If State practice and *opinio juris* existed on the matter, humanitarian intervention would become legal. Due to States' roles as lawmakers, the peremptory character of the prohibition of the use of force could be replaced with a *jus cogens* norm of humanitarian intervention. Even if a humanitarian State is merely excused, States' actions could override the domestic concept of excuses and amend international law. While such a shift is unlikely in practice, it is, most importantly, undesirable. The non-use of force regime upholds the structure of international law, including the fundamental principles of sovereignty and non-intervention. A change of the prohibition's status as *jus cogens* would profoundly alter the international legal order and the balance of power among States, opening the door to abuse and manipulation of humanitarian intervention for political and economic gain.

Additionally, the possible shift in international law reveals a core issue when balancing the law with morality. Basing a legal rule on what is morally right can result in unwarranted consequences. While genuine humanitarian interventions have the admirable purpose of saving human lives, allowing such interventions provides no guarantee of results aligned with the purposes. Practice confirms that even when States have intervened for humanitarian purposes, the outcome is seldom consistent with the objectives. Even as the law stands today, prohibiting the use of force for humanitarian purposes, States inevitably use humanitarian intervention-like reasoning to disguise their violations of international law.

Nevertheless, the issue that the lack of humanitarian interventions has resulted in humanitarian catastrophes remains. However, insofar as the 'illegal but justified' and 'illegal but excused' claims hold the view that humanitarian intervention should remain illegal, the solution to the controversy on humanitarian intervention does not appear to lay in justifying or excusing it.

Consequently, while an individual's use of force to protect another seems comparable to a State's humanitarian intervention, the situations operate in entirely different areas of law. Though possible to use a domestic analogy to justify or excuse humanitarian intervention, it is not necessarily the most suitable way of solving the question of such intervention's legality. However, domestic analogies may still be useful for developing international law. Justifications and excuses are abstract and doctrinally elaborated categories that organize domestic law, which explain and apply the law in a practical and logical sense in complicated situations. Applying the distinction to international law and humanitarian intervention has clarified that the elaborated categories result in some contrasting conclusions concerning such intervention, not always reconciling the law and morality. For this reason, analogies with domestic law must cautiously follow the structure of international law with particular attention to States' roles as lawmakers. Nevertheless, examining the domestic notion of justifications and excuses in the sphere of international law has highlighted some problems that have yet to be identified. While the implications of the domestic concept will only be potentially relevant in practice, exploring the qualitative differences in the law has resulted in the conclusion that the issue of humanitarian intervention is not solved by a top-down domestic analogy justifying or excusing such intervention.

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