Diane A Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Martinus Nijhoff, 2012), ISBN 978-90-04-21852-9, 411 pages

REVIEWED BY ZELIE HEGER*

There is no 'one-size-fits-all' definition of the doctrine of necessity under international law. Its meaning and application under a particular treaty regime depend upon the text of the treaty and its underlying object or purpose. In simplified terms, this is the thesis of Diane A Desierto.

To those regularly engaged in the interpretation of domestic legislation, it may be somewhat surprising that this thesis need be argued for. At least in Australia, it is a fundamental rule of interpretation that the words of a statute should not be read in isolation. Regard is to be had to the context in which they are found and the purpose underlying the statute. At the international level, this rule is, of course, reflected in art 31 of the *Vienna Convention on the Law of Treaties*[1] ('*Vienna Convention*'): 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.' However, according to Desierto, there have been attempts to formulate a singular definition of 'necessity' under international law (in particular, art 25 of the International Law Commission's *Articles on State Responsibility* ('ILCASR')) and to transpose this definition into specialised treaty regimes: both in shaping the interpretation of existing necessity clauses and in supplying a defence of necessity where none is otherwise available.

In ch 1, Desierto introduces her argument and methodology. In chs 2 and 3, she outlines the 'vast ubiquity of necessity usages' (p 350) in political theory and international relations theory, constitutional and criminal legal orders, and municipal and international orders. These chapters climax in the following conclusions: art 25 of ILCASR does not represent a consensus on the doctrine; codification is a futile exercise; and the doctrine should be permitted to take on different shades of meaning depending on the context in which it is found.

Chapter 4 is where Desierto's thesis is fleshed out. She asserts there are five 'issues' law-appliers should consider when applying art 31 of the *Vienna Convention* to necessity clauses, consideration of which will assist them in navigating the 'ubiquity of necessity usages', and

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1 Opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

help them arrive at an interpretation 'most consistent with the intention and expressed will of the States Parties to the treaty concerned' (p 350):

1. *Field of application*: whether the necessity clause applies to the facts in question;
2. *Semantic content*: how the treaty defines a situation of emergency or necessity; the range of state measures that may be taken in response; and the treaty's intended effect of such measures on the invoking state's treaty obligations. Desierto submits that law-appliers should carefully scrutinise and reconcile the text of the necessity clause alongside the text of the treaty, the treaty's purpose and context and (in the case of ambiguity) the treaty's *travaux préparatoires*;
3. *Compliance consequences*: the effect that a particular interpretation will have on the institutional implementation of the treaty (while an overly generous interpretation of a necessity clause could institutionalise substantive rule-breaking, an overly rigid interpretation could deter states from joining the treaty regime or incentivise parties to leave the regime altogether);
4. *Reviewability*: whether the interpretation of the clause is so broad as to put a state's invocation of necessity beyond reproach; and
5. *Interpretative sources*: the justification for referring to particular interpretative sources, such as 'relevant rules of international law' under *Vienna Convention* art 31(3)(c).

In ch 5, Desierto applies this framework to the interpretation of necessity clauses in international investment agreements and international trade law. She submits that the distinct functions of necessity clauses in each regime make it impossible to imply a common applicability and semantic content between them.

Chapter 6 applies the framework to derogation clauses under international human rights treaties. Desierto contends that derogation clauses should be interpreted independently of the doctrine of necessity unless the clause expressly refers to the doctrine or the *travaux* show that the doctrine had significance in drafting the treaty. Where treaties do not contain such clauses, law-appliers should consider the treaty's text, context, structure and drafting history to ascertain if a necessity plea should be admitted.

Chapter 7 considers attempts to transpose the doctrine of necessity into international humanitarian law, in particular as a justification for humanitarian intervention and certain violations of the *Geneva Conventions*. Desierto argues that utilising the doctrine in this manner would jeopardise the limited legal criteria adopted under the highly specialised norms of international humanitarian law.

In ch 8, Desierto concludes with some thoughts on the interaction between necessity and state sovereignty. In particular, she concludes that necessity should not be interpreted to reinforce or authorise outmoded views of state unilateralism and expose the international legal system to critiques arising from 'adjudicator-arbitrariness, rule-instability and institutional countermajoritarianism' (p 355).

While Desierto's argument is compelling, what becomes apparent in these last four chapters is that attempts to transpose a homogenised doctrine of necessity into specialised treaty regimes may not be as pervasive as Desierto contends. Chapter 6, for example, proposes to analyse how the doctrine of necessity has influenced the interpretation of derogation clauses in human rights treaties. However, Desierto provides no instances in which law-appliers have used the doctrine to distort the intended meaning of such clauses. Instead, she posits, 'it cannot be ruled out that some law-appliers might consider the doctrine of necessity in international law as a material source for interpretation' (p 260).

An impression is left that, in this respect, Desierto is addressing an imagined problem, as opposed to a real one. The same may be said of ch 7, where Desierto proposes to address attempts to invoke the doctrine of necessity for state violations of international humanitarian law. The first half of the chapter focuses on Ian Johnstone's proposal that necessity should operate to excuse or mitigate state responsibility arising from the unilateral use of force in humanitarian crises. However, the second half focuses on Gabriella Blum's proposal that necessity should provide a defence to individual criminal responsibility. Desierto attempts to make Blum's argument relevant by asserting:

> It does not require much imagination to see that, should individuals be permitted to raise this defence in international criminal proceedings, States would also raise the same defence to preclude their international responsibility arising from the attributed conduct of individuals (pp 342–3).

Again, Desierto appears to be highlighting a problem more imagined than real.

This, however, should not detract from the fact that Desierto's thesis is impressive in its structure, clarity, and breadth and depth of research. The reader is left with little doubt that the interpretation of necessity clauses should involve a close reading of the text of the treaty in light of its object and purpose. As Desierto concludes, this approach is a surer guide to the intention of the States Parties and to the attainment of the policy objectives they set out to promote.