DIANE A. DESIERTO, *NECESSITY AND NATIONAL EMERGENCY CLAUSES: SOVEREIGNTY IN MODERN TREATY INTERPRETATION*, LEIDEN, MARTINUS NIJHOFF, 2012

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Diane Desierto's book *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation*[1] is based on her J.S.D. dissertation as part of her doctoral studies at Yale University (New Haven, United States). The author explores the notion of necessity in international law departing from the thesis that States have turned necessity into a "doctrinal basis" to justify treaty non-compliance. Although, supported by the International Law Commission's (ILC) narrow views on this matter and its record of codification processes, the scope and usage of the principle of necessity stumbles upon ideological differences, divided jurisprudence, and inconsistent literature. According to Desierto, this doctrinal confusion causes a series of problems as to how necessity clauses in modern treaty law should be interpreted. The author aims at analyzing the key issues surrounding these problems and proposes "a joint inquiry into substance and methodology in the interpretation of necessity clauses"[2].

The book is divided in eight chapters. The first chapter – "Necessity and Treaty Obligations" – identifies the key theoretical aspects of treaty interpretation in relation to the doctrine of necessity. Despite the existence of interpretive foundations, such as article 31 of the *Vienna Convention on the Law of Treaties*[3] that provides the basis for treaty interpretation, Desierto argues that necessity has been "erroneously advocated" as legal justification in international legal scholarship and practice. The author submits that treaty interpretation does not solely belong to judicial bodies and that should not be done *ex post facto*. On the contrary, "law-appliers" are tasked with interpreting the various treaty regimes – specialized or not – while ensuring their ongoing implementation. The role of the "law-appliers" becomes crucial in situations of national emergencies since the structure of a State is fragile, which in turn threatens the State's compliance with its international obligations.

The second chapter – "The Doctrine of Necessity in Municipal and International Legal Orders" – discusses the notion of necessity in both municipal and international law. Desierto argues that the lack of a centralized form of government or enforcement system plays a pivotal role as to the vagueness and incoherent meaning of the doctrine of necessity in international law. On the other hand, in municipal law,

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1 Diane A. Desierto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation*, Boston, Martinus Nijhoff Publishers, 2012 [Desierto].

2 *Ibid*, at XIV.

3 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331, art. 31, Can TS 1980 No 37 (entered into force 27 January 1980).

the definition of necessity becomes much more unambiguous due to the "institutional interactions among governmental branches"[4]. The checks and balances within such constitutional order provide for a more uniform body of State practice. This allows "law-appliers" to offset any particular measures adopted by the Executive Branch that might jeopardize the State's conformity with its international obligations. The author, by contrasting the usage of necessity in these two legal orders, manages to provide fundamental conceptual clarifications.

In chapter three – "The Historical Genesis of Necessity Doctrine: A Conceptual Descriptive" – the author presents the historical roots of the necessity doctrine, found in the Medieval Christianity and Islam. It also shows that since Westphalia and the emergence of the nation-states, the necessity doctrine was mainly expressed through the State's right to self-preservation. Desierto, then, moves in time to evaluate to what extent the modern approaches to the doctrine have been influenced by its origins. ILC's codification processes and their outcomes serve as an example.

Chapter four, "Substantive and Methodological Issues in Interpreting Necessity Clauses in Treaties: A Proposal", offers Desierto's "proposed analytical paradigm [in interpreting] necessity clauses in treaties"[5]. The author submits that common policy objectives dictate to States what form the necessity clauses in specialized treaties will take. She argues that a State invoking a necessity clause should still consider the "expectations, goals, and interests"[6] of all States parties to the treaty. Further, she maintains that when a State invokes necessity to legally justify its actions, "law-appliers" must interpret necessity clauses based on substantive and methodological issues. According to Desierto, substantive issues include "the field of application, the semantic content, and the compliance consequences"[7] whereas methodological issues are the "reviewability and [the] selection of interpretive sources"[8].

In chapter five – "Economic and National Security Emergencies: Necessity Clauses in International Investment Law and International Trade Law" – the author uses her proposed framework (see chapter four) to examine whether it is plausible to invoke necessity as a legal justification in interpreting specific investment treaties (e.g. *Argentina−United States Bilateral Investment Treaty*[9]). The author finds "that treaty *applicability* is the default situation that States parties expect"[10] and concludes that where the wording of the necessity clause is precise and detailed on its effect on investment treaty obligations, "economic emergencies do not have to result in a visceral clash of interests between host States and capital-exporting States"[11].

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4 *Ibid* at 30.
5 *Ibid* at 31.
6 *Ibid* at 121.
7 *Ibid* at 133.
8 *Ibid* at 139.
9 *Treaty Concerning the Reciprocal Encouragement and Protection of Investment*, Argentina and United States, 14 November 1991, 31 ILM 124 (entered into force 20 October 1994).
10 Desierto, *supra* note 1 at 236.
11 *Ibid*.

The issue of emergency clauses in international human rights treaties is dealt with in chapter six "States of Emergency in International Human Rights Treaties". The author's previously proposed framework is now applied to the issue of derogable rights in emergency situations. States invoke the derogation clauses to "limit or qualify their compliance with substantive obligation in international human rights treaties"[12]. The author finds that "the particular history, design, and structure"[13] of emergency clauses in treaties, e.g. the *International Covenant on Civil and Political Rights*[14], does not provide for an interpretation of necessity as a legal justification. Desierto, in her analysis, demonstrates that a State could still be held responsible under international law, even when it acts in conformity with its constitutional mandate in emergency situations.

Chapter seven – "Misapplying Necessity: Recent Proposals in *Jus ad Bellum* and *Jus in Bello*" – addresses the recent attempts by international law scholars to transpose the necessity doctrine to other international legal doctrines such as the use of force with respect to the "responsibility to protect". The author submits that this is a misapplication of the necessity doctrine in the law of international responsibility and finds that such proposals of humanitarian necessity constitute *de lege ferenda* innovations. She argues that "[a]ccepting a 'necessity defence' would only undermine the purposely limited legal criteria set by the treaty norms governing *jus ad bellum* and *jus in bello*" [15].

In the final chapter "Necessity, Sovereignty, and Treaty Interpretation", the author emphasizes on the existence of "[a larger] thematic dialectic on how to maintain and adjust a State's sovereign space in modern interpretation law"[16]. She submits that States have opted for the "legalization" of necessity in modern treaties and warns of a possible open-ended interpretation of necessity clauses in specialized treaty cases. Lastly, Desierto concludes that necessity does not constitute a means for today's sovereigns to avoid responsibility and in no way "immunizes" them since the concept of "extra-legality" has been firmly rejected.

This volume offers a very comprehensive analysis of the necessity doctrine and national emergency clauses in relation to treaty compliance. Desierto's insights should form a baseline for future analysis of the interpretation of the necessity doctrine in international law. This work is undoubtedly a step forward, and an original contribution as it provides interpretive answers to treaty controversies related to the doctrine of necessity. As the book's abstract provides:

> *Necessity and National Emergency Clauses* is the first to trace the doctrine's genealogy from medieval Christian and Islamic religious history to post-Westphalian practices, the International Law Commission's codifications, and modern treaty formulations.

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12 *Ibid* at 237-238.
13 *Ibid* at 32.
14 *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 47, 6 ILM 368 (entered into force 23 March 1976).
15 Desierto, *supra* note 1 at 283.
16 *Ibid* at 350.

Clearly, Diane Desierto invested a lot of research and time in the preparation of the book. However, the text of the book is often hard to follow for a reader with little or no grounding with the concepts and terminology involved. Heavy technical references – although hard to avoid when writing about international law – are often present. Thus, even though the author states that the book is intended for law students among others, this volume is, in my opinion, intended more for legal scholars, judges, and practitioners. Nonetheless, as an invaluable source of reference for legal scholars, readers interested in the doctrine of necessity in international law will benefit from this excellent study.