The Notion of State Survival in International Law

by Marcelo G. Kohen

"[L]aw through its long history has been respectful of power (...) law simply does not deal with such questions of ultimate power -power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life. No law can destroy the state creating the law. The survival of states is not a matter of law".¹

Former Secretary of State Dean Acheson could not have imagined that 33 years after his remarks concerning the legality of the US "quarantine" against Cuba, the reasoning of the ICJ would lead to the same result: an endorsement of the supremacy of power over the law. The Court would achieve this end by raising the notion of State survival to the rank not only of a legal rule, but further, to that consecrating a "fundamental right".²

Indeed, the Court put the notion of State survival at the core of the issue raised by the General Assembly concerning the Legality of the threat or use of nuclear weapons, for having held in its Advisory Opinion of 8 July 1996³ that such threat or use would generally be contrary to the rules of ius in bello, it went on to state in paragraph 2 E of the dispositif:

"However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".⁴

As the Court itself admitted, it was unable to reach a definitive conclusion on the question it faced. Nonetheless, it took for granted that the survival of a State is a particular situation deserving a special legal treatment. Unfortunately, the Court did not go further, refraining from an analysis of the concept of State survival. Thus, the advisory opinion leaves open different options as to the role of the notion of State survival in international law. Is it a fundamental right of States, in the sense of an inherent right open neither to renunciation nor limitation ? A general principle of law ? A particular and qualified circumstance of self-defence allowing States to depart from humanitarian law ? A case of a state of necessity ? A new kind of circumstance precluding wrongfulness ?

¹ ASIL, Proceedings 57 (1963), 14.
² 1996 ICJ Reports, p. [33], para. 96.
³ Hereinafter referred to as "the Advisory Opinion".
⁴ Ibid., p.[36]
To answer these questions, it is useful first to define the idea of State survival, before proceeding to an overview of State practice and the way the matter has been dealt with in different fields of international law. It is hoped that it will then be possible to state what international law does in fact guarantee to States in their international relations.\(^5\)

I. The Notion of State Survival and the Court's Approach

The notion of survival is closely related to the idea of the existence or the preservation of the State. In its ordinary meaning, survival denotes the existence of a danger to life, and implies the ability to remain alive in spite of that threat. Related to States, it refers to the will of State to make any endeavour in order to avoid its destruction and thus to guarantee its continued existence. As a matter of fact, one can consider that the paramount interest of a State is its own existence; since only by guaranteeing it, can that State invoke other interests and rights. Survival thus constitutes a State priority. As a matter of law however, it will be seen that this does not necessarily mean that State survival has been recognised or granted the status of a legal right.

The idea of preservation, or self-preservation, is as old as the science of international law itself, whereas State survival, as a term of art, had never been used in case law before the Advisory Opinion. This led Judge Koroma to point out that State survival is "a concept invented by the Court".\(^6\) Although previous references to this concept have been made in the literature, in particular when dealing with the problem of self-defence,\(^7\) it has either been used in its ordinary meaning and not as a legal category,\(^8\) or -as was the case with former Secretary of State Acheson- in order to put it beyond the reach of international law.

For its part, the Court's use of the notion of survival is rather obscure. On one hand, it seems to adopt the ordinary meaning of survival in paragraph 97 and paragraph 2 E of the conclusions, by presenting it as an extreme circumstance of self-defence. On the other hand, in paragraph 96, the Court raised survival to the rank of a "fundamental right" of States and...
considered it equally as a ground for self-defence.\(^9\) As far as the latter is concerned, it is to be noted that the survival of a State can be at stake in a particular situation of self-defence, but not necessarily in any such circumstance. In other words, not all situations in which a State can resort to self-defence imply that its existence is endangered. Moreover, a threat to the very existence of the State can be present for reasons other than the threat or use of force by other States, such as in cases of civil strife, political unrest or actions of secessionist movements. It is well established that the legal basis for action in self-defence is the existence of an armed attack and the need to deter it. It is not a threat to the survival of the State.

Before dealing with the legal scope of State survival, consideration will be given to its use in international instruments as well as in State practice.

II. International Instruments and State Practice

It is not easy to find references to State survival in conventional law. Neither the Covenant of the League of Nations nor the Charter of the United Nations refer to it, although some regional instruments allude to it. The Convention on the Rights and Duties of States adopted by the Seventh Conference of American States held at Montevideo on 23 December, 1933 specified in article 3 that "the State has the right (...) to provide for its conservation", but added that the exercise of inter alia this right "has no other limitation than the exercise of the rights of other States according to international law".\(^10\) Article 12 of the OAS Charter reproduces, with minor changes, this provision.\(^11\) Another candidate is article 3 of the OAU Charter, which mentions among the principles of the Organisation the "[r]espect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence".\(^12\) It can be argued however that the inalienable right that this provision protects is independence and not the mere existence of the State.

Other texts which one would think could make reference to State survival do not do so. Thus, the Draft Declaration on Rights and Duties of States elaborated by the International Law Commission in 1949 (historically, the first draft articles adopted by the ILC) is silent on the issue of State survival.\(^13\) Indeed, the ILC decided not to include article 1 of the draft presented

\(^9\) "Furthermore, the Court cannot lose sight of the fundamental right of every State to survival, and thus its right to resort to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake". Ibid. at [33]


\(^12\) Article 3, para. 3.

\(^13\) ILC Yearbook (1949), 287.
by Panama—which was used as a basis of discussion, which stated that every State has the right to exist and to preserve its existence.

As far as the *Institut de droit international* is concerned, it discussed the subject of rights and duties of "nations" in the first decades of this century, but has never adopted any resolution on the matter. Nor does the "Friendly Relations" Declaration adopted by the General Assembly in Resolution 2625 (XXV) refer whatsoever to State survival.

In fact, the international instruments which could be considered as taking into account the issue of State survival are those relating to the protection of human rights, notably the provisions they contain allowing derogation in situations of emergency. Thus Article 4 of the International Covenant on Civil and Political Rights allows for derogation from certain Articles, but only under strict conditions; notably "[i]n time of public emergency which threatens the life of the nation".

Interestingly, this article refers to the life of the *Nation*, not of the *State*. It is true that in other conventional instruments, notably the United Nations Charter, both terms are used synonymously. One can wonder however whether it is also the case here. It appears that the wording of Article 4 lays stress more on the components of a State, than the State itself. For the European Court of Human Rights "(...) the natural and customary meaning of the words "other public emergency threatening the life of the nation" is sufficiently clear; (...) they refer to an exceptional situation of crisis or emergency which affect the whole population and constitutes a threat to the organised life of the community of which the State is composed".

14 Interestingly, the draft prepared by Professor De La Pradelle stated in article 3 that no State "n'est en droit, même pour sauver sa propre existence, de rien entreprendre contre celle d'un autre qui ne le menace pas" (*Annuaire de l'Institut de droit international* (1925), 239. The discussion at the Institut was prompted by a Declaration of Rights and Duties of Nations adopted by the American Institute of International Law, Article 1 of which stated: "Toute Nation a droit d'exister, de protéger et de conserver son existence, mais ce droit n'implique pas le fait, par un Etat, de commettre, pour se protéger ou conserver son existence, des actes injustes envers d'autres Etats qui ne font aucun mal". (Ibid. (1921), 208).

15 As a matter of course, there exist other fields of conventional law in which States reserve themselves the right to suspend certain obligations they assume in the case of threat to their security or for other imperative reasons (see for instance the Schengen Agreement). In the context of integration agreements, unanimity is often required in voting for circumstances which the essential interests of members States are at stake (i.e. the "Luxembourg compromise" in the practice of the European Communities, granting a right of veto to members States).

16 Emphasis added. This provision finds its origin in art. 15 of the 1950 European Convention of Human Rights, which contains the same description, adding however that the time of war is one form of "public emergency threatening the life of the nation" (*UNTS* 213, 222). For its part, art. 27 of the 1969 Inter-American Convention of Human Rights provides for the suspension of guarantees "[i]n time of war, public danger, or other emergency that threatens the independence or security of a State Party" (*OAS Treaty Series* 36, 1).

17 "Lawless" Case (Merits), Judgment of 1st July 1961, 56, para. 28.
Moreover, the existence of a threat to the nation is a necessary but insufficient condition for the application of Article 4 of the ICCPR. Other conditions are: the official proclamation of the state of emergency, proportionality, duty to notify the other Parties, conformity with other obligations under international law and non-discrimination. Thus, the threat to the life of a "nation" does not justify per se any conduct of the State. Furthermore, even if all other conditions are met, such a threat does not authorise departure from the respect of fundamental human rights, which do not admit derogation in any circumstance.18

Of those States which addressed the Court orally or in writing in Nuclear Weapons the proceedings, only the United Kingdom referred to State survival. It did so in order to show that the condition of proportionality in the exercise of self-defence can be respected when nuclear weapons are used, if such use is essential to the survival of the State under attack.19

Previously, in its first request for provisional measures in the Genocide Convention Case, Bosnia and Herzegovina sought to see SC Resolution 713 (1991) - imposing a weapons embargo upon the former Yugoslavia - interpreted as not impairing its inherent right to self-defence. Among the legal rights advanced for protection through the indication of such measures were "(a) the right of the citizens of Bosnia and Herzegovina physically to survive as a People and as a State [and] (f) the basic right of sovereign existence for the People and State of Bosnia and Herzegovina".20 The Court did not deal with these considerations, since it confined itself to the indication of measures falling within the scope of the Genocide Convention.21

This brief overview shows that the matter of State survival can arise in a legal context. The question, however, is whether State survival deserves particular treatment by law and, if so, under which circumstances and to what extent.

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19 Written Statement of the Government of the United Kingdom, June 1995, para 3.71 at 54. Oral statement of Sir Nicholas Lyell of 15 November 1995, CR 95/34 at 39, where he stated: "To assume that any defensive use of nuclear weapons must be disproportionate, no matter how serious the threat to the safety and the very survival of the State resorting to such use, is wholly unfounded. Similarly at 48-49: "Where what is at stake is the difference between national survival and subjection to conquest which may be of the most brutal and enslaving character, it is dangerously wrong to say that the use of nuclear weapon could never meet the criterion of proportionality". As far as neutrality is concerned, Sir Nicholas went on to say: "The whole purpose of the law of neutrality has always been to achieve a balance between the interests of the neutral State and the needs of the belligerents. The needs of a State forced to fight for survival in the face of massive aggression must weigh very heavily in that balance" (ibid.)
20 (Emphasis added) Order of 8 April, 1993 ICJ Reports, 20, para. 36.
III. Possible Ways in which International Law may apprehend the Notion of State Survival

The idea of State survival can be introduced into international law in different ways. First, one could try to introduce it as a right of States, or even a "fundamental" one, as the Court did in its Advisory Opinion. Another possibility is to consider it from the perspective of State responsibility as a circumstance precluding wrongfulness, either on the basis of customary law or general principles of law. In this case, different options are open. Finally, this notion can be introduced into the law of armed conflicts, associated with the concept of "necessities of war". These different possibilities will now be examined.

1. A Fundamental Right of States

As discussed above, the Court came back to the notion of fundamental rights of States, considering survival as one of them. The Advisory Opinion did not formally assimilate the "fundamental right of every State to survival" to a fundamental principle of international law, such as the prohibition on the use of force or the right to self-determination. However, President Bedjaoui in his Declaration seems to raise this "right" to the rank of a fundamental principle, when he states that "[i]n certain circumstances (...) a relentless opposition can arise, a head-on collision of fundamental principles, neither one of which can be reduced to the other". This assertion deserves a short comment. On the one hand, it has already been seen that it is impossible to find anywhere such a "fundamental principle". Not only do no international instruments refer to it, but it is also absent in contemporary literature on fundamental principles of international law. On the other hand, the assumption of President Bedjaoui according to which there can be fundamental principles that can proscribe opposite conducts seems extremely dangerous for the very existence of the international legal system. It is tantamount to holding that international law is unable to solve a legal dispute.

22 Supra , (footnote 9).
23 In the words of President Bedjaoui: "A state's right to survival is also a fundamental law, similar in many respects to a 'natural' law" (1996 ICJ Reports, [5], para. 22).
24 Ibid.
The doctrine of the fundamental rights of States finds its origin in the works of Hobbes.\textsuperscript{26} However, it was only systematised at the end of the XIXth and the beginning of the XXth centuries, notably by the authors who belonged to the school of natural law. According to this doctrine, States have two different kinds of rights, one group of rights are inherent to States by the mere fact of their existence, another group of rights stemming from the consent of States. The former exists irrespective of any condition or recognition and is open neither to modification nor alienation. The latter is the product of the consent or the activity of States and is regulated by the legal system.\textsuperscript{27}

Those who embraced the doctrine of fundamental rights of States often listed among of them, the right to self-preservation, from which are derived self-defence, self-help and necessity. These were all considered justifications for the violations of the rights of other subjects. The notion of self-preservation can be found in the early works of international law, in a period in which States had a great freedom to resort to war. Self-preservation was then the explanation used to justify the right of States to have recourse of arms.

As for the "inherent" character of these rights, it is worth noting that the ICJ interpreted the reference made by article 51 of the UN Charter to the "inherent right" ("droit naturel" in French, "derecho inmanente" in Spanish) of self-defence, as simply meaning the recognition by States of its customary nature.\textsuperscript{28}

The wording "fundamental rights of States" was abandoned in the legal literature not only because of its close identification with natural law - in the sense of a law different from positive law-, but also, and especially, because of its possible interpretation as a body of absolute rights, not subject to any kind of legal regulation or control.\textsuperscript{29} Concerning this latter aspect, it must be emphasised that even the authors who adhered to the doctrine of the


\textsuperscript{28} Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, 1986 \textit{ICJ Reports}, 94, para. 176.

\textsuperscript{29} In his addendum to the eighth report on State responsibility, Professor Ago wrote that "[t]he theory of 'fundamental rights' of States (...) was the product of pure abstract speculations with no basis in international legal reality, and has since become outdated; in particular the idea of a right of 'self-preservation' has been completely abandoned". \textit{ILC Yearbook} (1980), vol. II, part I, 16.
fundamental rights of States subordinated them to the respect of the rights of other States. In the same vein, it is worth noting that the expression "self-preservation" was also abandoned because of its use as an attempt to justify clear and grave violations of international law. The example all scholars give is the invasion of Belgium by Germany at the outset of the First World War.

It is not the place here to embark upon a discussion on natural law. Irrespective of the school of thought to which authors do (or do not) adhere, there is a common understanding that to every purported right of a State there corresponds an obligation incumbent upon another or other States. This is the key to the determination of the existence of rights. Hence, the question is whether a State can invoke a right of survival entailing an obligation upon others to respect it. As Verdross clearly pointed out with reference to the "fundamental right of self-preservation", "tout Etat, il est vrai, est libre juridiquement de veiller à sa conservation, en tant qu'il ne viole pas les règles du droit des gens. Mais à cette liberté ne correspond aucun devoir de la part des autres Etats. Ceux-ci ne sont nullement obligés de faire et de tolérer tout ce qui est nécessaire à la conservation des autres nations".

The theory of self-preservation has been severely criticised by different authors, since it leads to the negation of the legal system, or its subordination to the entire appreciation of its subjects, who would feel free not to abide by their obligations when their existence is threatened.

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32 See J. Westlake, *International Law*, pp. 308-12. G. Schwarzenberger pointed out clearly: "If self-preservation were an absolute and overriding right, the rest of international law would become optional, and its observance would depend on a self-denying ordinance, revocable at will by each State, not to invoke this formidable superright. No evidence exists that State practice, as distinct from naturalist writers and authors with a flair for the ideological uses of international law, subscribes to such a doctrine of a droit de convenance. If self-preservation were a relative right, it would be still harder to see why, in addition to self-defence, self-help or necessity, such a notion was required". 'The Fundamental Principles of International Law', *Recueil des Cours*, 87 (1955), 344. It has also been stated that "Such a doctrine would destroy the imperative character of any system of law in which it is applied, for it makes all obligation to obey the law merely conditional; and there is hardly an act of international lawlessness which it might not be claimed to excuse". J.L. Brierly, *The Law of Nations*, 6th ed. by Sir Humphrey Waldock (Oxford, Clarendon Press, 1963), p. 404. Analysing the link between "self-preservation" and state of necessity, Roberto Ago was also unambiguous: "The idea of self-preservation -which in fact has no basis in any 'subjective right', or at least in any principle for which there is room in the field of law- can therefore be decisively dismissed from our present context, being worthless for the purpose of a definition of the 'legal' concept of 'state of necessity'. *ILC Yearbook* (1980), vol. II, part I, 17.
Understood in the sense of self-preservation, State survival can be the subject of the same criticism. Moreover, if it is an "inherent right", the one -and the only- that could justify the legality of the use of nuclear weapons, how then can some States renounce it or impose upon themselves serious limitations to it? Judge Shahabudeen is right in pointing out that if the use of nuclear weapons would be legitimated in the case of a circumstance of self-defence in which the survival of the State is at stake, then it is difficult to see how the non-nuclear weapons States which are parties to the NPT "could have wished to part with so crucially important a part of their inherent right of self-defence".

Assume now that State survival is a different notion from self-preservation. In spite of the difficulties apparent in accepting the existence of self-preservation as a State right, the term's meaning and scope are clear: the State's purported right to protect itself from destruction. As discussed above, survival implies something more: the ability to keep the State "alive". Taken in this ordinary meaning, it is beyond doubt that international law does not recognise or grant a right of survival to States. Quite simply, this is because the law can ensure neither the survival of a State nor that of a individual, even if it the latter has a right to life. No one could claim that the extinction of the German Democratic Republic, the USSR, Czechoslovakia, the Socialist Federative Republic of Yugoslavia and all the numerous States which no longer exist would be contrary to a fundamental right recognised to them by the international society. Certainly, the existence of States is not only a question of effectiveness in contemporary international law. International law can prevent the extinction of a State, when this is a product of a violation of international law. The example of Kuwait is striking in this context. Kuwait's continued legal existence during Iraqi occupation was not due to the existence of a purported "fundamental right" to its survival. Like all other States, Kuwait's rights to political independence and territorial integrity are recognised by the fundamental principles of international law. Iraq's annexation was a clear and grave breach of international obligations. On the other hand, it is evident that international law could do nothing to prevent the extinction of the GDR, the USSR, the FSRY or Czechoslovakia. And it is difficult to imagine that in these situations the use of nuclear weapons (or any other conduct) would have been justified merely because of State "survival" needs.

2. A Circumstance Precluding Wrongfulness

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33 *1996 ICJ Reports* [29]
Another way to approach State survival is by considering it as a circumstance excluding the wrongful character of an act, which is otherwise illegal or, to use the wording of the ILC, a "circumstance precluding wrongfulness". Assuming that the ILC's draft articles on State responsibility "codify" all these circumstances, then the only heads relevant to this subject are self-defence and the state of necessity. However, for the purposes of this paper, it will also be seen whether another circumstance exists, be it called "State survival" or otherwise.

A. Self-defence

As seen, State survival cannot be considered the ground for self-defence. In this context one can contrast the views of some XIXth century authors who, in considering self-preservation as a fundamental right of every State, referred to it in the sense of self-defence.

In its Advisory Opinion, the Court on the one hand, insisted that the use of nuclear weapons should comply with the requirements of self-defence, notably necessity and proportionality. On the other hand, it disclosed its incapacity to conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an "extreme circumstance of self-defence, in which the very survival of a State would be at stake". The first impression one has in comparing paragraphs C and E is that they are difficult to reconcile. Either the use of nuclear weapons meets all the requirements of self-defence, in which case the reference to State's survival is superfluous, or the second sentence of paragraph E envisages a situation different from "normal" self-defence in which one State is victim of an armed attack which does not put its existence at stake. This "qualified" self-defence would authorise the State victim of such a massive armed attack, to do everything in order to avoid its extinction. A second way to explain the Court's statements is by interpreting the hypothesis of the second sentence of paragraph 2E as the conclusion of the syllogism: the use of nuclear weapons in this particular circumstance will always satisfy all the requirements of self-defence.

With respect to the option which considers State survival as "qualified" self-defence, the only State to which survival would be granted by law would be the victim. In other words, the aggressor would not have the right to invoke its own "fundamental right of survival". This

36 Paras. 40-1 and point C of the dispositif.
interpretation precludes the unfortunate consequence that international law would recognise
one State's right of survival, the exercise of which would in turn enable another to invoke the
same right. This hypothesis had already been considered and rejected by authors such as
Pufendorf and Vattel.\textsuperscript{38} The problem is that the Court considered survival as a "fundamental
right of every State".\textsuperscript{39}

The difficulty with the hypothesis of "qualified" self-defence is that it leads one to hold this
circumstance as one upon which the law places no limits on action, provided that the
condition of survival is present. The second, alternative, reading of the second sentence of
paragraph 2E (the conclusion of the syllogism) leads in fact to the same result: it is
tantamount to conceding that when a State is the victim of an armed attack which puts it in an
extreme circumstance in which its survival is at stake, any victim's conduct would be
necessary and proportionate to the risk of the loss of its existence. The Court did not assert
this sort of presumption \textit{iuris et de iure}. Consequently, it could be that in the second sentence
of paragraph 2E, the Court had envisaged the mere possibility that a use of nuclear weapons
could comply with the requirements of self-defence. But this requires an \textit{ex post facto}
analysis. Indeed, to interpret the enigmatic Court's assertion as a presumption of the kind
referred to above would operate simply as the negation of the applicability of the conditions
of necessity and proportionality in these circumstances and thus the admission of a new
circumstance in which the use of force is admitted by international law. Yet it is clear that this
kind of presumption does not exist in general international law.\textsuperscript{40}

\textsuperscript{37} Thus the Declaration of Judge Herczegh.
\textsuperscript{38} S. Pufendorf; \textit{De Jure Naturae et Gentium Libri Octo} (1688), book II, chap. V, §XIX: "(...) he who refuses to
make satisfaction, and resists one who asks for restitution, piles one injury upon another". Trans. by C.H.
Barbeyrac's translation: "Si donc l'Agresseur, après avoir refusé la juste satisfaction qu'on lui demandait, se
defend contre la personne offensee qui l'attaque à son tour pour se faire raison de l'injure, il entasse offense sur
offense". \textit{Le droit de la nature & des gens ou systeme general des Principes les plus importants de la Morale, de
des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des Nations et de Souverains}
la justice de son côté, on n'est point en droit de lui opposer la force, et la défensive alors est injuste; (...) c'est une
injustice que de résister à celui qui use de son droit". In the same vein can be quoted a decision of an American
Military Tribunal in Nurenberg, for which "there can be no self-defense against self-defense" (U.S.A. v. von
Weizsaecker et al., \textit{N.M.T.} 14 (1949), 329).

\textsuperscript{39} Para. 96 (emphasis added).

\textsuperscript{40} It is not excluded that States introduce legal presumptions by way of treaties (see J.-M. Grossen; \textit{Les
présomptions en droit international public} (Neuchâtel and Paris, Delachaux and Niestlé, 1954), p. 163 and the
arbitral award in the \textit{Island of Palmas (Miangas)} case, \textit{UNRIAIA}, vol. II, 864). It is difficult to foresee, however,
the establishment of a presumption \textit{iure et de iure} for a case concerning an exception to the prohibition of the use
of force.
Besides, the fact that the second sentence of paragraph 2E follows the assertion that the use of nuclear weapons would generally be contrary to the rules of humanitarian law, shows that the Court wanted to go much further than the mere consideration of the *ius ad bellum*. It suggests that this "extreme circumstance" should justify even that conducts contrary to the *ius in bello*. The question then arises why one should refer only to self-defence and not to conducts other than the use of force, undertaken in order to assure a State's survival. Thus, a State's survival should be a circumstance precluding wrongfulness broader than self-defence, in the sense that it can legalise acts other than the use of force. This point requires consideration of the state of necessity and finally of a particular circumstance distinct from both self-defence and necessity.

**B. State of Necessity**

It is well known that in its draft articles on State responsibility, the ILC provisionally adopted article 33, which admits the existence of state of necessity as a circumstance precluding wrongfulness. Leaving aside the very controversial question of the existence of this institution, it will be assumed, for the purpose of this analysis, that the state of necessity does exist in international law, subject to the conditions enumerated by the ILC.

Interestingly, the Court, in its Advisory Opinion, did not refer at all to the state of necessity as a cause of justification of a threat or use of nuclear weapons.

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41 See the arbitral award of 30 April 1990 between France and New Zealand, *UNRIAA* XX, 254, para. 78. See also the leading article of J. Salmon, "Faut-il codifier l'état de nécessité en droit international ?", *Essays in International Law in Honour of Judge Manfred Lachs* (The Hague, M. Nijhoff, 1984), 235-70. Answering this question in the affirmative, see J. Barboza, "Necessity (Revisited) in International Law", ibid., 27-42.

41bis This paper was written before the ICJ rendered its judgment in the *Gabcikovo-Nagymaros Project* case on 25 September 1997. In its judgment, the ICJ considered "that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis". It is worth noting that for the Court, "the State concerned is not the sole judge of whether those conditions [the cumulative conditions mentioned by the ILC] have been met" (para. 51).

42 Article 33 reads as follows: "1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless: (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and (b) the act did not seriously impair an essential interest of the State towards which the obligation existed. 2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness: (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or (b) if the international obligation with which the act if the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or (c) if the State in question has contributed to the occurrence of the state of necessity". It is worth noting the negative wording of this article, to lay stress in the exceptional nature of this hypothetical circumstance of exoneration of responsibility. It must be equally emphasised that the conditions set up by the ILC's draft articles are cumulative.
It is beyond any doubt that survival can constitute an "essential interest" of the State. According to the then Special Rapporteur, the late Judge Ago, when States invoke the state of necessity in order to justify their conduct, "the alleged situation of extreme peril (...) represents a grave danger to the existence of the State itself, its political or economic survival, the continued functioning of its essential services, the maintenance of internal peace, the survival of a sector of its population, the preservation of the environment of its territory or a part thereof, etc". In differentiating between state of necessity and self-defence, it was asserted that the former does not presuppose a wrongful act on the part of the other State, whereas the latter is a reaction against a particular offence: an armed attack. Moreover, the then Special Rapporteur Ago clearly maintained that necessity is not a right, but an excuse that opposes an essential interest of one State against a right of another. In order to exonerate the responsibility of the State invoking necessity, the interest it seeks to protect must be superior to the interest protected by the subjective right of the other State. Thus, an act performed in order to protect the survival of one State cannot be legally invoked if it leads in turn to the negation of a similar or more important "essential" interest of another. Thus, the survival of one State opposed to the survival of another, mutually cancel one another out.

Indeed, what is more important, is the fact that necessity cannot be invoked as a circumstance precluding the wrongfulness of conduct not in conformity with a rule of *ius cogens*. Here one can probably find the reason why the Court did not want to pronounce on the peremptory nature of the relevant principles and rules of humanitarian law.

Having merely quoted the conditions required by the ILC in order to accept the excuse of necessity, it becomes clear why the Advisory Opinion does not refer whatsoever to the state of necessity for the consideration of the legality of the threat or use of nuclear weapons. Assuming this justification exists in international law, the requirements disclosed by the ILC would hardly been fulfilled in the "extreme circumstance" depicted by the Court. Furthermore, it would have been contradictory to raise State survival to the rank of a *fundamental right* and then to invoke this extreme circumstance as *a mere case of state of necessity*.

Another way of dealing with the concept of survival as a case of state of necessity is to consider that acts implying the use of force which cannot be justified on the grounds of self-defence (i.e. because at least one of its conditions are not fulfilled), can nevertheless find their

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44 Ibid., 18-20.
justification in the situation of necessity. The problem is that this assertion purports to admit that the use of force is permitted outside the circumstance of self-defence, something which is tantamount to condemning article 2, paragraph 4, of the Charter of the United Nations.

To sum up, assuming that survival is an essential interest of the State, the requirements of the state of necessity leave little room to justify the use of nuclear weapons thereunder.

If one follows the Court reasoning, one is led to come to the conclusion that the ILC has "forgotten" to include in its draft articles on State responsibility another circumstance precluding wrongfulness, probably a mix of both self-defence and state of necessity.

C) A New Circumstance Precluding Wrongfulness?

It could be that the Court had in mind the circumstance depicted in ILC draft article 32 as "distress", but applicable to the survival of the State itself and not to the individuals under the care of its agent. In other words, no State conduct is illegal if it is the only way of saving its existence. This seem to be the opinion of Judges Guillaume, Fleischhauer and Schwebel. In the Separate Opinions of the first two, it is also alleged that all legal systems recognise the legality of a course of conduct which constitutes the ultimate way to guarantee one's survival.

For Judge Guillaume this is a kind of "ground for absolution" (excuse absolutoire), whereas for Judge Fleischhauer "the general principles of law recognised in all legal systems, contains a principle to the effect that no legal system is entitled to demand the self-abandonment, the suicide, of one of its subjects".

We come here to one of the classical theoretical discussions also found in criminal law. For centuries the leading (and purely hypothetical) case was known as the "plank of Carneades case". A shipwrecked man, finding himself in the same life threatening situation as another,

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45 1996 ICJ Reports, [29], para. 83. See the critics of the Dissenting Opinion of Judge Koroma, [p. 13].
46 In the sense of the admission of the state of necessity in order to justify some limited uses of force in cases other than self-defence, see C. Gutiérrez Espada, El estado de necesidad y el uso de la fuerza en el derecho internacional (Madrid, Tecnos, 1987), 139p.
47 In the view of Professor Ago, the situation called preventive self-defence should be dealt in the context of self-defence and not under the situation of state of necessity. ILC Yearbook (1980), vol. II, part I, 16.
48 Article 32 reads as follows: "1. The wrongfulness of an act of a State not in conformity with an international obligation of the State is precluded if the author of the conduct which constitutes the act of that State had no other means, in a situation of extreme distress, of saving his life or that of persons entrusted to his care. 2. Paragraph 1 shall not apply if the State in question has contributed to the concurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril".
49 "(...) no system of law, whatever it may be, could deprive one of its subjects of the right to defend its own existence and safeguard its vital interests. Accordingly, international law cannot deprive a State of the right to resort to nuclear weapons if such action constitutes the ultimate means by which it can guarantee its survival". 1996 ICJ Reports, para 8 at [3].
50 Ibid., [3]. For Judge Schwebel's Dissenting Opinion, see p. [9].
pushes the latter off the plank in order to save himself. In order to deal with this extreme situation, it must not be forgotten that criminal law distinguishes between justification and excuse. The former is a cause excluding the unlawfulness of the conduct otherwise illegal, the latter simply means that a wrongful act shall not be punished. Brierly had already pointed out that municipal courts had found cases analogous to the plank of Carneades situation as being murders without justification. A comparison shows that what international law considers "circumstances precluding wrongfulness" are the causes of justification of criminal law. Indeed, there is nothing in international law comparable to the category of excuse absolutoire. In international law any wrongful act generates international responsibility. Furthermore, no State pleading before the ICJ invoked, or even envisaged, the possibility of the use of nuclear weapons being a wrongful act, exempting the State from responsibility if its survival is at stake.

Thus, any attempt to use the analogy of municipal law in order to raise survival to a general principle of law is not convincing. Nor is the attempt to invoke a customary rule consecrating a new circumstance precluding wrongfulness.

E) "Necessities of War"

Finally, another possible interpretation of the second sentence of paragraph 2E is that the "survival situation" implies a derogation from the rules of humanitarian law. Judge Guillaume mentioned the link between ius ad bellum and ius in bello, in the sense that the former can provide a clarification of the rules of the latter. In other words, according to this view, when resort to self-defence is done in the "extreme circumstance" of State survival, then what one would normally consider to be "unnecessary suffering", is no longer so. Equally, what one would normally consider to be "excessive incidental damage to the civilian

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53 As Judge Higgins rightly stressed: "Through this formula of non-pronouncement the Court necessarily leaves open the possibility that a use of nuclear weapons contrary to humanitarian law might nonetheless be lawful". 1996 ICJ Reports, [6], § 29.

population” is no longer so. Finally, what is not ordinarily a legitimate military target becomes one. This idea assumes that all means leading to deter aggression respond to a legitimate military goal, something which is tantamount to affirming that acting in conformity with *ius ad bellum* automatically implies conformity with *ius in bello*. This view is not a novelty in international relations: the extreme versions of it are the *Kriegsraison* and the *übergesetzlicher Notstand* theories, invoked in an attempt to justify grave violations of the laws of war.

No discussion shall be made here of the notions of necessity, collateral damage or legitimate target in *ius in bello*, and in particular the delicate relationship between military necessities and the principle of humanity. It is enough to insist on the fact that it is not possible to sacrifice the whole construct of humanitarian law to the altar of State survival. For as G.P.A. François pointed out sixty years ago: "Le droit de la guerre est basé sur le consentement des Etats de s'abstenir de certains actes en cas de guerre, c'est-à-dire quand les intérêts vitaux des Etats sont en cause. En adoptant ce droit, l'Etat renonce à invoquer la détresse où il se trouve pour se dégager de ses obligations".

Certainly, a political leader can face the alternative to comply with international humanitarian law or to be defeated in an armed conflict, whether the survival of its State is at stake or not. In such a difficult situation, she or he can decide to violate international law in order to avoid defeat. This is a political choice, and one can morally or politically justify it or not. From a legal point of view however, the maxim *Not kennt kein Gebot* finds no place in *ius in bello*, nor in any legal system.

**IV. Survival: a Value Protected by Law?**

There is no need to dwell here upon the role of States in the international society and the elaboration of the rules that govern it. But the idea that States can do everything to ensure their survival, because it is inherent in the notion of sovereignty itself requires a short comment. The assumption that sovereign States are not subordinated to any higher power

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55 See in particular the effort of Judges Guillaume and Higgins to show that the use of nuclear weapons in a “survival situation” should not be in contradiction with the prescriptions of humanitarian law. Ibid, [2-3], §5-7 and [2-5], § 10-24.


57 "Règles générales du droit de la paix". *Recueil des cours*, 66 (1938), 183.
does not entail the negation of the simple -but often neglected- idea that they are subordinated to international law. It is important not to lose sight of the fact that the existence of any society implies that its members do not have an absolute freedom to act, that their rights must be exercised within the rules they have adopted to regulate their relations. This is the main difference between society and the state of nature.

The rights and duties States decide to implement reflect the fundamental values of the international society at a given period. Even assuming that the existence of States is considered a basic value, this existence cannot be seen in an isolated way: the existence of one State cannot be considered more important than the existence of any other, and even less, than the existence of the whole international community. Moreover, as seen above, the existence of one State is one thing, its survival is another.

Secretary of State Acheson asserted that law cannot destroy "the State creating the law". The point is that law at the international level is not created by a single State, it is the product of the interaction of the different components of the international society. International Law has as its main social function not to ensure the continued existence of single States, but to guarantee the co-existence of States. Moreover, the extinction of one given State or another affects neither the existence of the international society nor the law regulating it.

**Concluding remarks**

As discussed, there is no "fundamental right" of States to survival. What international law does recognise is the right of States to the respect of their equal sovereignty, their political independence and their territorial integrity. "Self-preservation", "survival", "necessity" in its different forms, as well as absolute (self-)interpretations of self-defence have always been used as pleas in order to justify clear and grave breaches of international law.

If one tries to reconcile the vague reference to the survival of the State and the Court's other considerations concerning the applicable law, one could conclude that the Court's envisaged "extreme circumstance of self-defence in which the survival of the State is at stake" is one which implies both that the requirements of necessity and proportionality for self-defence are satisfied and that the military necessities which this particular situation involves are such that no violation of humanitarian law has been committed. But this conclusion clearly goes beyond what the Court said in paragraph 2E and leads in fact to the negation of the existence of these conditions, since they will be considered as always having been fulfilled in this circumstance,
without the need for any concrete analysis. In this sense, even if one considers that the use of nuclear weapons can respect in certain circumstances both *ius ad bellum* and *ius in bello*, as does for instance Judge Higgins, then it is completely unnecessary to have recourse to a new purported legal category such as State survival. Then, the notion of State survival describes at most a purely factual situation.

As it has been rightly pointed out, survival is an instinct, not a right. And when acting under instinctive pressure, States often violate international law. It is interesting to observe that scholars always raise the question why do States comply with international law, in order to be sure that international law is really law. They do not ask themselves, however, why States violate international law. The answer is very simple: because they consider in these situations - irrespective of their explanations - that their interests are higher or more important than compliance with international law. Of course, States try to conceal this choice with a legal screen: State survival is but one of the disguises at their disposal, just as self-preservation was another in the past.

In fact, the Court returned to the outdated idea of self-preservation. Knowing its complete abandon and rejection, the wording "survival of the State" was preferred. Understood in its radical form, the "right of the State to survival" is not a revival of the natural law doctrine, but rather the resurgence of the idea of the state of nature in its Hobbesian sense, in which individuals keep their absolute freedom. This view simply amounts to the negation of any form of law among States. In all societies governed by law, power is not absolute. One of the functions of any legal system is to place limits upon power. By necessary implication, international law is the limit to State power.

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58 Moreover, this would be an *a priori* assumption which requires demonstration.
59 In her Dissenting Opinion, Judge Higgins pointed out that "in [the] second sentence [of paragraph 2E] the Court is declining to answer a question that was in fact never put to it". ICJ Reports 1996, [1], para. 7. See also p. [6], para. 29.
61 As Judge Gaulliame indirectly referred (see ICJ Reports 1996, p.[3], para. 8). President Bedjaoui went further (see supra, footnote 23).
62 "The right of nature, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power as he will himself for the preservation of his own nature; that is to say, of his own life; and consequently, of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto". *Leviathan*, ch. XIV. R.M.Hutchins (ed.), vol. 23, p. 86. Compare also *De Cive* (1642), Section I, ch. I, § X (trad. by S. Sorbière (1649), Paris, Flammarion, 1982, p. 97-8).
63 Already more than three centuries ago, S. Pufendorf stated: "(...) we must, before anything else, distinguish as to whether he who defends himself is in a state of nature or in a civil state, since it is held within far narrower
Could it be that the notion of State survival will be used in international law in the same way as the *raison d'Etat* in municipal law,\textsuperscript{64} that is, to justify every action performed by the Government, even in violation of law, when "supreme" or "vital" interests are at stake? It is too early to say, but no doubt the reference made by the Court to survival is encouragement for the supporters of this conception. In the past, Brejnev's doctrine on "limited sovereignty" was justified on the basis of the "survival of the socialist system", just as Johnson's doctrine on "ideological frontiers" or Reagan's doctrine on "collective self-defence" responded to the need to preserve what they consider to be the "western way of life". The present author's comments are reactions to these postulates. For it is the survival of international law which is at stake.

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