**Headnote**

**to the Order of the Second Senate of 8 May 2007**

– 2 BvM 1/03 -

- 2 BvM 2/03 -

- 2 BvM 3/03 -

- 2 BvM 4/03 -

- 2 BvM 5/03 -

- 2 BvM 2/06 –

**No general rule of international law is ascertainable which entitles a state to temporarily refuse to meet private-law payment claims due towards private individuals by invoking state necessity declared because of inability to pay.**

FEDERAL CONSTITUTIONAL COURT

– 2 BvM 1-5/03, 1, 2/06 –

**IN THE NAME OF THE PEOPLE**

In the proceedings
on
the constitutional review of the question of

whether the state necessity declared by the defendant with respect to the inability to pay entitles the defendant by force of a rule of international law to temporarily refuse to meet due payment claims, and if appropriate whether this is a general rule of international law, which pursuant to Article 25 of the Basic Law (*Grundgesetz*), is an element of federal law which directly gives rise to rights and obligations for the individual, in this instance the Parties,

I. a) submission order of the Frankfurt am Main Local Court (*Amtsgericht*) of 10 March 2003 in its amended version of 2 July 2003 – 31 C 2966/02 – 83 –,

b) submission order of the Frankfurt am Main Local Court of 10 March 2003 in its amended version of 4 July 2003 – 31 C 3476/02 – 83 –,

c) submission order of the Frankfurt am Main Local Court of 10 March 2003 in its amended version of 3 July 2003 – 31 C 3474/02 – 83 –,

d) submission order of the Frankfurt am Main Local Court of 21 March 2003 in its amended version of 24 November 2003 – 31 C 3475/02 – 83 –,

e) submission order of the Frankfurt am Main Local Court of 21 March 2003 in its amended version of 9 December 2003 – 31 C 150/03 – 83 –,

plaintiff of the initial proceedings: K(…),

defendant of the initial proceedings: Republic of Argentina, represented by the President Néstor Kirchner,

– authorised representatives: lawyers (…),

– 2 BvM 1-5/03 –,

II. submission order of the Frankfurt am Main Local Court of 16 May 2006 – 31 C 883/04 – 83 –,

plaintiff of the initial proceedings: Q(…),

defendant of the initial proceedings: Republic of Argentina, represented by the President Néstor Kirchner,

– authorised representatives: lawyers (…),

– 2 BvM 1/06 –,

III. submission order of the Frankfurt am Main Local Court of 19 May 2006 – 30 C 1236/05 – 24 –,

plaintiff of the initial proceedings: K(…),

defendant of the initial proceedings: Republic of Argentina, represented by the President Néstor Kirchner

– authorised representatives: lawyers(…),

– 2 BvM 2/06 –.

the Federal Constitutional Court – Second Senate –

with the participation of Justices:

Vice-President Hassemer,

Broß,

Osterloh,

Di Fabio,

Mellinghoff,

Lübbe-Wolff,

Gerhardt

Landau

held on 8 May 2007:

**The proceedings are combined for a joint ruling.**

**No general rule of international law is ascertainable which entitles a state to temporarily refuse to meet private-law payment claims due towards private individuals by invoking state necessity declared because of inability to pay.**

**REASONS :**

The Republic of Argentina has been confronted since 1999 with considerable economic problems, which at least temporarily expanded to become a state financial crisis. In connection with the financial crisis, Argentina made considerable use of the tool of government bonds abroad in order to cover the need for currency and for capital. Such bonds were also issued on the German capital market and subscribed to by German creditors. 1

In 2000, the Republic of Argentina received a loan of 39.7 billion US Dollars from the International Monetary Fund (IMF). In order to comply with the conditions attached to disbursement, the Republic of Argentina initiated drastic budgetary cuts, which in turn led to a grave loss of confidence in the Argentinean currency. The consequence was that Argentina had to pay higher interest on the capital markets, which against the background of the existing economic problems ultimately led to the declaration, by Act no. 25,561 on Public Emergency and the Reform of the Exchange Rate System of 6 January 2002, of the “public emergency in social, economic, administrative, financial and monetary policy”. On the basis of Decree no. 256/2002 of 6 February 2002 on the Restructuring of Obligations and Debt Payment of the Argentinean Government issued thereupon, foreign debt service was suspended by the Argentinean government fin order to restructure the foreign debt service. The Act on Public Emergency has been extended annually, most recently until 31 December 2007. 2

After a decision to this effect pronounced on 15 December 2005, the Republic of Argentina has now repaid, ahead of schedule, its complete obligations to the IMF amounting to 9.6 billion US Dollars. 3

**II.**

1. Several actions entered by German investors are pending against the Republic of Argentina before the Frankfurt civil courts. By orders of 10 March 2003 and 21 March 2003, the Local Court initially submitted the question as to 4

whether rules of international law stand in the way of convicting the defendant. 5

2. By orders of 2 July 2003, 3 July 2003, 4 July 2003, 24 November 2003 and 9 December 2003, the Local Court re-formulated the submission orders, and now submitted the question 6

whether the state necessity declared by the defendant with respect to the inability to pay entitles the defendant by force of a rule of international law to temporarily refuse to meet due payment claims, and if appropriate whether this is a general rule of international law which, pursuant to Article 25 of the Basic Law, is an element of federal law which directly gives rise to rights and obligations for the individual, in this instance the Parties. 7

The Local Court specifically explained that the submitted question was material to the ruling for the respective proceedings because the actions were admissible and 8

well-founded as to the main claims, and the claims could only be dismissed based on the application of the principle of international law proposed by the defendant which purportedly justifies the defendant's refusal to pay due to state necessity. The court handing down the judgment presumed the existence of state necessity, and was of the view that it was unable to judge on the factual circumstances of such state necessity itself. Serious doubts as to the existence of a general rule of international law on the use of state necessity as a plea were said to emerge from the fact that there was a principle of state necessity under international law, which in principle could also justify the non-fulfilment of an international obligation, but that there were no unambiguous rulings by international courts on the legal consequences of the inability to pay, in particular in the case of due claims by private third parties.

3. By orders of 16 May 2006 and 19 May 2006, the Local Court submitted two more sets of proceedings relating to the same question. 9

**III.**

1. The German *Bundestag*, the *Bundesrat* and the Federal Government were afforded the opportunity to make a statement pursuant to § 83.2 of the Federal Constitutional Court Act (*Bundesverfassungsgerichtsgesetz – BVerfGG*). 10

The Federal Ministry of Justice made a statement for the Federal Government by letter of 30 December 2003 on the impact of state necessity under international law. In its statement, the Ministry of Justice asserted that regulations on the lack of actionability of claims pursuant to Article VIII section 2 (b) of the Articles of Agreement of the International Monetary Fund in its version of 30 April 1976 (*Bundesgesetzblatt* (Federal Law Gazette – *BGBl*) 1978 II pp. 13 et seq.) did not contradict the materiality of the submitted question to the ruling. In the view of the Federal Government, there was no general rule of international law within the meaning of Article 25 of the Basic Law permitting a state to suspend payment obligations under private-law contracts unilaterally by invoking state necessity. There were said to be sufficient indications that state necessity had gained a foothold in customary international law. This, however, was said to apply only in the context of the strict preconditions of Article 25 of the Articles on State Responsibility of the United Nations International Law Commission, in other words only for the justification of the violation of international obligations. Additionally, the state may not have caused the occurrence of the peril itself. 11

There were, however, said to be considerable doubts when it came to transferring these principles to a case in which a state does not meet its payment obligations because of overindebtedness. Moreover, there were said to be only individual precedents which did not allow for the recognition of any unambiguous legal conclusions. The general principles of state necessity were also said not to have been lent concrete form in the sense of their being directly applicable to cases of inability to pay and a resulting justification of a breach of contract. A rule under customary law would have not only to entail a justification, but over and above this would have to order the applicability of the contractual relationship under international law also in the sphere 12

of private law. This was said to be conditional on an obligation of the forum state to protect the debtor state against its creditors. Such an obligation was, however, said not to be ascertainable. Arguments contained in literature on international law according to which a private creditor should not be placed on a better footing than a state creditor were said not to apply in the case at hand. There could be no question of a better position applying across the board since, as a rule, state immunity would be invoked towards private creditors in the enforcement proceedings at the latest. A declared waiver of immunity was however said not to be allowed to be circumvented de facto by invoking the applicability of an exception under international law with regard to private-law contracts.

2. Furthermore, the Federal Court of Justice (*Bundesgerichtshof*) was afforded the opportunity to make a statement. The President of the Federal Court of Justice referred by letter of 5 December 2003 to a statement from the Chairpersons of the IX and IXa Civil Senates. In this statement, the Chairpersons stated that at that time two legal complaints had been pending for which the dates of their ruling could not yet be estimated. Moreover, the named Civil Senates had not yet dealt with the legal issues raised in the submission proceedings. 13

3. The parties to the initial proceedings were afforded the opportunity to make a statement pursuant to § 82.3 and § 84 of the Federal Constitutional Court Act. 14

a) The plaintiffs of the initial proceedings essentially alleged that the Republic of Argentina had no longer been in a position of state necessity as early as 2003, and that such state necessity was certainly its own responsibility, so that invocation of such a situation had to be ruled out. By way of documentation, they referred to statistics and considerable data on positive economic development in Argentina, as well as to foreign court judgments in which state necessity had not been recognised as an obstacle for a conviction and the enforcement of due payment claims benefiting private creditors. 15

b) The Republic of Argentina submitted a statement by virtue of its written pleading of 4 February 2004 on the proceedings submitted in 2003, and submitted a joint expert report by Prof. Dr. Michael Bothe and Prof. Dr. Gerhard Hafner which it had commissioned. By written statement of 10 October 2006, the Republic of Argentina furthermore made a statement on the submissions from 2006 in which it confirmed its view that it could also invoke state necessity as a justifiable plea in the proceedings before the German courts towards private creditors. 16

In the view of the Republic of Argentina, the justification of state necessity is a rule of customary international law. State responsibility had allegedly not yet been codified, so that rules on reasoning of responsibility, as well as on the justification of conduct which per se was wrongful, must belong to customary law. Recognition of state necessity as a reason for justification under customary law was said to emerge from the work of the International Law Commission, the rulings of the International Court of Justice and the relevant literature on international law. 17

Necessity was said to apply if major state interests were at risk. It was not possible to objectively define these interests in a manner that would be universally valid, but it was not necessary for the existence of the state itself to be at stake in order to justify necessity. State insolvency was said to be a vital interest that was worthy of protection. If a state was insolvent, the ability to perform all state purposes was said to be impaired. It was said to follow from international jurisprudence and doctrine that a state could also invoke state necessity if it were in dire economic and financial straits. Moreover, the act resulting from necessity must be the only possibility to avert peril, and must stand up to a weighing of interests. Both criteria were said to have been met here. It was in fact not possible to invoke state necessity if a state had caused the occurrence of the peril itself, but the judgment of economic policy assessments was said not to be amenable to court review and to be restricted to a mere review for arbitrariness. In the case of a financial crisis, it was furthermore not possible to prove the causality of specific conduct because of the dependence of the national economy on global economic contexts. 18

As to the transferability of the rules on necessity under international law to private-law relationships, the Republic of Argentina states that economic necessity could be pleaded towards private individuals before the courts of the Federal Republic of Germany. The Articles on State Responsibility are said certainly not to be contrary to extending [such rules] also to private-law relationships. Were one to interpret Article 25 of the Articles on State Responsibility such that it were restricted to international obligations, Article 56 explicitly referred to the supplementation of the Articles through further customary international law. International jurisprudence was said to comprise a number of cases in which necessity was permitted to justify refusal to pay. Furthermore, with regard to private individuals, financial obligations were said to become international obligations insofar as they were raised to the level of international law by means of diplomatic protection. 19

**IV.**

The Senate handing down the judgment commissioned Prof. Dr. August Reinisch to draft an expert report on the question of the validity and impact of state necessity under international law. The expert report was in particular to contain statements on whether state necessity is embedded as a justification in customary international law, what the state practice on the recognition of state necessity in international legal transactions is, and what practical impact the financial necessity of a state has on proceedings before foreign national courts. 20

On the basis of a discussion of relevant international-law practice, the expert witness reached the conclusion that there is no rule of international law embedded in customary law stating that state necessity as a justification under international law may also be used in private-law relationships towards private individuals before national courts. The ruling practice of international courts and tribunals was said not to provide any clear indications that state necessity as a justification under international 21

law also affected debt contracts under private law. Legal literature was also said to give virtually no indications of a decision on the relevance of necessity in relationships between a state and private individuals on the basis of loans that were subject to national law. Whilst there were various statements in favour of equal treatment of international-law and private-law relationships, the lack of relevant proceedings nonetheless disfavoured imposing an obligation on national courts to recognise state necessity as a justification for non-compliance. However, a consideration [of state necessity] on the basis of domestic law was not out of the question. Yet the practice of national courts was said to have so far not displayed any uniform trend with regard to the transferability of the rules of necessity under international law. The case-law was said in many cases not to deal with the argument of state necessity at all, but to have the admissibility of proceedings fail because of the matter of state immunity.

**B.**

The submissions are admissible. 22

1. The questions submitted are to be presented in greater detail in that the question which is material to the ruling relates to the possible application of state necessity as an objection towards private individuals and in relation to payment claims due under private law. It emerges from the reasoning of the orders in conjunction with the circumstances of the proceedings that private-law payment claims of private creditors towards a foreign state are at issue in the matter, and that the Local Court doubts whether there is a general rule of international law which recognises invoking necessity in this specific constellation. 23

2. A submission by a non-constitutional court to the Federal Constitutional Court (*Bundesverfassungsgericht*) is admissible pursuant to Article 100.2 of the Basic Law if the existence or scope of a general rule of international law is called into doubt in a legal dispute (see Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts* – BVerfGE) 15, 25 (31); 16, 27 (32); 46, 342 (358); 75, 1 (11-12)). What is more, the submitting court must adequately explain materiality to the ruling (see BVerfGE 4, 319 (321); 15, 25 (30); 16, 27 (32-33); 75, 1 (12); Order of the Second Senate of the Federal Constitutional Court of 6 December 2006 – 2 BvM 9/03 –, *Deutsches Verwaltungsblatt – DVBl* 2007, pp. 242 et seq.). These prerequisites are met. 24

Serious doubts can already be assumed because the Local Court has explained that there is no relevant highest-court case-law on the submitted questions, and that the jurisprudence of international courts has not, for the questions submitted, taken a decisive position on the transferability of state necessity as a justification [for non-payment] to the relationship with private individuals. 25

The Local Court adequately explained in its submission orders that the constitutional-court ruling on the existence of a general rule of international law is of prior importance to the non-constitutional proceedings. According to the statement 26

made by the Local Court, the initial proceedings are essentially concerned with the impact of state necessity as a possible general rule of international law. In principle, a state which undertakes private economic transactions abroad and agrees to the application of the rules of the civil-law system and jurisdiction of the forum state subjects itself fully to this national order and to its rules. The special relevance of international law, and coupled therewith the materiality of the submitted questions to the ruling, however emerges from the fact that in individual cases, on the basis of the sovereignty of states under international law, exceptions exist to private individuals being placed on an equal footing with a state. This also applies if a state undertakes private economic transactions, for instance if the non-constitutional courts must rule on execution against assets of a state used for sovereign purposes (see also BVerfGE 46, 342 et seq.; Order of the Second Senate of the Federal Constitutional Court of 6 December 2006 – 2 BvM 9/03 –, loc. cit.).

The presumption of the submitting court that state necessity continues to the present day is certainly not unjustifiable with regard to the fact that the Republic of Argentina has extended the Act on the Public Emergency until 31 December 2007 (Act 26,204 of 13 December 2006 extending Act 25,561). 27

If there is a general rule of international law permitting the Republic of Argentina to invoke necessity under international law as justification for refusal to pay also in private-law relationships towards its creditors, a judgment could certainly not be declared executable as long as this objection applies. If the international-law proceedings, by contrast, reveal that the Republic of Argentina may not invoke state necessity towards the creditors, the submitting court is not prevented from taking its decision without allowing for the objection of inability to pay on the basis of the applicable federal statutes. 28

**C.**

A general rule of international law which entitles a state to temporarily refuse to meet private-law payment claims due towards private individuals by invoking state necessity declared because of inability to pay cannot be currently ascertained. 29

A rule of international law is “general” within the meaning of Article 25 of the Basic Law if it is recognised by the vast majority of states (see BVerfGE 15, 25 (34)). The general nature of the rule relates to its application, not to its content, recognition by all states not being necessary. It is equally not necessary for the Federal Republic of Germany in particular to have recognised the rule. 30

General rules of international law are rules of universally applicable customary international law, supplemented by the traditional general legal principles of national legal orders (see BVerfGE 15, 25 (32 et seq.); 16, 27 (33); 23, 288 (317); 94, 315 (328); 96, 68 (86)). Whether a rule is one of customary international law, or whether it is a general legal principle, emerges from international law itself, which provides the criteria for the sources of international law. According to the unanimous view, Article 25 of the 31

Basic Law, by comparison, does not relate to provisions that are contained in international agreements. Treaties under international law are to be applied and interpreted by the non-constitutional courts themselves (see BVerfGE 15, 25 (32-33, 34-35); 16, 27 (33); 18, 441 (450); 59, 63 (89); 99, 145 (160); Order of the 4th Chamber of the Second Senate of the Federal Constitutional Court of 12 December 2000 – 2 BvR 1290/99 –, *Juristenzeitung – JZ* 2001, p. 975; established case-law). Stringent requirements are to be made as to the establishment of a general rule of international law because of the fundamental obligation of all states which it expresses.

1. International law contains neither a uniform nor a codified insolvency law of states (see Ohler, *Der Staatsbankrott*, *Juristenzeitung* 2005, p. 590 (592); Baars/Böckel, *Argentinische Auslandsanleihen vor deutschen und argentinischen Gerichten*, *Zeitschrift für Bankrecht und Bankwirtschaft – ZBB* 2004, p. 445 (458)). Individual international agreements do contain general necessity clauses; whether these relate to economic emergencies, however, requires interpretation in individual cases, as do the detailed preconditions for invoking necessity in legal relationships under international and private law in the event of insolvency. The rules on the legal consequences of a state's insolvency are hence fragmentary and, if the corresponding establishment of these rules can be documented using the criteria of international law, can only belong to customary international law or to general legal principles. 32

2. Invocation of state necessity is recognised in customary international law in those legal relationships which are exclusively subject to international law; by contrast, there is no evidence for a state practice based on the necessary legal conviction (*opinio juris sive necessitatis*) to extend the legal justification for the invocation of state necessity to relationships under private law involving private creditors. 33

a) The principle that conduct which does not comply with the respective legal order can be justified under certain circumstances is inherent in both the national legal orders and in international law. In very general terms, national legal orders see both criminal-law and civil-law necessity as a justification for conduct otherwise regarded as wrongful, even though the concrete manifestation of the preconditions for assuming the justification may differ. Von Liszt stated in his international-law manual already in 1898 that the terms "necessary defence" and "necessity", as recognised in criminal and private law, can also preclude the wrongfulness of the violation committed in the arena of international law (von Liszt, *Das Völkerrecht*, 1898, pp. 128-129). 34

b) In connection with the recognition and impact of state necessity under international law and as evidence of its applicability under customary law, reference is made first and foremost to the work on state responsibility and its reception in the judicature of international courts and tribunals done by the United Nations International Law Commission (ILC). After several years of debates and several drafts, the International Law Commission submitted to the United Nations General Assembly in 2001 a draft convention on the topic of Responsibility of States for Internationally Wrongful Acts, the so-called Articles on State Responsibility (Annex to the Resolution of the United Na- 35

tions General Assembly A/RES/56/83; hereinafter: ILC Articles on State Responsibility).

The ILC Articles on State Responsibility are largely concerned with questions of accountability for and consequences of state violations of obligations under international law. This codification draft also covers state necessity under international law (Article 25) as a justification. The draft has not yet led to the conclusion of an international agreement. The document was accepted by the United Nations General Assembly on 12 December 2001. This, however, leads neither *eo ipso* to customary-law application, nor to legally binding application for another reason, but may serve as an indication of a legal conviction as is necessary to form customary law. Ultimately, it is now generally recognised in legal literature and in the view of international courts and tribunals that Article 25 of the ILC Articles on State Responsibility constitutes applicable customary international law. The commentaries of the International Law Commission during the codification process document for this provision the declared objective of identifying and reflecting in the codification the content and scope of the application of the concept under customary law by an evaluation of state practice and of the rulings of international courts, as well as an evaluation of the writings of recognised international-law researchers (International Law Commission, State Responsibility, Yearbook of the International Law Commission 1980, Vol. II, et al. marginal nos. 55 and 78). 36

Article 25 the ILC Articles on State Responsibility reads as follows: 37

> 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: 38
>
> a) Is the only way for the State to safeguard an essential interest against a grave and imminent peril; and 39
>
> 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. 40
>
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if: 41
>
> a) The international obligation in question excludes the possibility of invoking necessity; or 42
>
> b) The State has contributed to the situation of necessity. 43

According to the language of the text, necessity is a justification in a relationship to which international law applies pursuant to Article 25 of the ILC Articles on State Responsibility. If the preconditions apply, necessity only precludes the wrongfulness of an act not in conformity with an international obligation. 44

c) In a landmark ruling favouring invocation of state necessity in relations between two states, the International Court of Justice (ICJ) ruled in the Gabčikovo-Nagymaros case that the state of necessity was recognised by customary international law as a ground for precluding the wrongfulness of an act which was otherwise not in conformity with international law (Judgment of the International Court of Justice of 25 September 1997, Gabčikovo-Nagymaros Project (Hungary/Slovakia), I.C.J. Reports 1997, pp. 7 et seq. marginal no. 51). With regard to the preconditions for necessity, the International Court of Justice refers to the restrictive preconditions of the then Article 33 of the draft of the ILC Articles on State Responsibility, which is largely identical to today's Article 25, and reaches the conclusion that these preconditions also reflect customary law. 45

The Advisory Opinion of the International Court of Justice from 2004 regarding the construction by Israel of a restrictive barrier confirms the view of the court as to the recognition of necessity under customary law (Advisory Opinion of the International Court of Justice of 9 July 2004, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 43 International Legal Materials 2004, pp. 1009 et seq., marginal no. 140). 46

The same conclusion was also reached by the International Tribunal for the Law of the Sea in its ruling of 1 July 1999 (The M/V Saiga (No. 2) Case, 38 International Legal Materials 1999, pp. 1323 et seq., marginal no. 134) regarding the seizure of a ship off the coast of Guinea. In these proceedings, the invocation of state necessity was, in fact, ultimately rejected; however, the court explained this rejection by noting that the preconditions had not applied in the specific case for lack of a serious impairment of a vital state interest. The recognition of state necessity under customary law as a justification for the refusal of an international obligation between states was, by contrast, explicitly accepted. 47

3. The relevant case-law of international and national courts together with the views expressed in scholarly literature on international law do not permit the positive ascertainment of a general rule of international law, according to which, over and above the area of application of Article 25 of the ILC Articles on State Responsibility, restricted as it is to international-law relations, a state would also be entitled to temporarily refuse to meet payment claims due in private-law relationships towards private creditors after declaring state necessity because of inability to pay. There is no uniform state practice recognising such a justification by force of international law. In the context of international-law proceedings, the Federal Constitutional Court is not entitled to expand an existing general rule of international law in terms of its elements. 48

a) The practice of international courts does not constitute an adequate basis for the recognition of an objection of state necessity towards private individuals. The rulings of international courts are, as a rule, major indications that certain rules of international law are anchored in customary law because – frequently in contrast to rulings of national courts – they deal with the qualification and application of specific norms un- 49

der international law. Further, the rulings of international tribunals have always been used as indicators of the existence of customary international law. Whilst courts such as the International Court of Justice or the International Tribunal for the Law of the Sea are, as a rule, restricted by their charters to settling those international-law matters which relate to relations between two or more states or other subjects of international law, international tribunals may also deal with cases which relate to economic disputes between states and private individuals.

aa) The International Centre for Settlement of Investment Disputes (ICSID), which acts as a tribunal and is part of the World Bank organisation, has already reviewed states' invocation of necessity as a justification several times. Some of the claimants in these proceedings were legal entities subject to private law. Nonetheless, these cases do not provide any indications of the transferability of a plea of state necessity to private-law relations. 50

A distinction should be made in this respect as to whether the violation of an obligation complained of and its justification through a plea of necessity relate to the bilateral investment treaty applicable under international law, or to a private-law contract between the investor and the state. Both are, in principle, possible in connection with the competences of the International Centre for Settlement of Investment Disputes. Yet the relevant proceedings on state necessity related to the complaint of the breach of an obligation under bilateral investment treaties concluded between states, which are to be qualified as international agreements, and not the direct claims of the investor under private law. From an international-law point of view, the specific feature of the arbitration of disputes before the International Centre for Settlement of Investment Disputes is that private individuals are able to complain as claimants of the violation of an international agreement concluded between states. In terms of content, therefore, the violation of an obligation is complained of which is owed not directly to the private applicant, but to his or her home state, although the protective purpose of the agreement targets the interests of private investors. Rights and obligations of the opposing state emerge in such case constellations from an international agreement which as a rule contain a separate necessity clause; thus, such rights and obligations emerge from a relationship governed by international law. 51

The ruling of the ICSID Tribunal of 12 May 2005 in the case of CMS Gas Transmission Company v. The Argentine Republic (ICSID Case No. ARB/01/8), which is regularly quoted in connection with Argentinean state necessity, related to the legal evaluation of the violation of the underlying international agreement between the United States of America and the Republic of Argentina, and not to a plea of state necessity in relations under private law. 52

The ICSID Tribunal ruled on 3 October 2006 in the case of LG&E Energy Corp v. The Argentine Republic that the Republic of Argentina could invoke a state of necessity for the period between 2001 and 2003 as justification for the violation of its obligations under the bilateral agreement with the United States of America (ICSID Case 53

No. ARB/02/1 (Decision on Liability), marginal no. 267). This first recognition of Argentinean state necessity as justification for temporary refusal to pay in an investment protection dispute by the ICSID is unhelpful when it comes to the question of the possibility to apply necessity as an objection in private-law relationships. Here too, the objection of necessity was restricted to the international obligations between the states as parties to an investment protection agreement under international law. The ruling says nothing as to the question of whether state necessity could be invoked directly towards a private individual.

bb) In its statement on the submissions, the Republic of Argentina attaches particular importance to the ruling in the so-called Serbian Loans Case of the Permanent International Court of Justice, the predecessor of today's International Court of Justice established by the League of Nations (Ruling of the Permanent International Court of Justice of 12 July 1929, Case Concerning the Payment of Various Serbian Loans issued in France, Publications of the Permanent Court of International Justice, Series A, nos. 20/21 (1929), Judgment no. 14, pp. 5 et seq.). 54

The Permanent International Court of Justice ruled in this set of proceedings that the bonds at dispute, which were held by French private individuals, were subject to private law since each agreement which was not to be qualified as an agreement between states in their function as subjects of international law must be subject to the national law of a state (see ruling of the Permanent International Court of Justice of 12 July 1929, loc. cit., pp. 41 et seq.). The obligation of the Serbian State to pay applied towards private individuals, as also in the initial proceedings of the submissions pending here. 55

The complaint before the Permanent International Court of Justice, however, related not to the breach of private-law obligations to pay, but to a violation of international legislation relating to aliens. This complaint was made by the home state of the private creditors by means of diplomatic protection before the court for a ruling on a violation of an international obligation. This is connected with the jurisdiction of the Permanent Court, which is restricted to disputes between states. The question of whether it is a legal dispute between states or between a state and private individuals was discussed in detail by the Permanent Court, which ruled in favour of an international dispute. 56

The Permanent International Court of Justice explained that the dispute between the two states was identical in terms of its content to the underlying dispute between the Kingdom of Serbia and the French creditors, but that a legal distinction should be made because it related to the assertion of the protective obligations of a state in favour of its nationals towards another state (see Ruling of the Permanent International Court of Justice of 12 July 1929, loc. cit., p. 18). In this sense, the exclusively intergovernmental-defined standards of this decision, in connection with which necessity is also discussed within the context of *force majeure*, also differ from those on which the ruling on the submitted question is to be based. Rather, the ruling distin- 57

guishes between international agreements on one hand and bonds between states and private individuals on the other (see Ruling of the Permanent International Court of Justice of 12 July 1929, loc. cit., p. 40), and does not provide an indication of a rule of customary law according to which the invocation of necessity is also possible in relations governed by private law.

The same applies to the ruling of a tribunal, the Mixed Claims Commission France-Venezuela, which considered the case of the French Company of Venezuelan Railroads (Ruling of the Mixed Claims Commission France-Venezuela of 31 July 1905, United Nations Reports of International Arbitral Awards – UNRIAA, Vol. X, 1962, pp. 285 et seq.). The dispute appears to be based on an action of a French legal entity under private law against the state of Venezuela, since a ruling was to be handed down on Venezuelan responsibility for ruining a private French company. The fact, however, that this related in essence to a dispute between states in which France intervened for its nationals on the basis of legislation relating to aliens emerges from the fact that the dispute was arbitrated on the basis of an agreement concluded between states, i.e. by the allotment of a payment of money to a private individual which had, however, been claimed by France (ruling of the Mixed Claims Commission France-Venezuela of 31 July 1905, loc. cit., pp. 285-286). 58

This ruling, as well as that in the Serbian Loans case, comes from a period in which direct judicial disputes between states and private individuals were virtually ruled out because the principle of the absolute state immunity still largely applied in national court proceedings, and private individuals could not petition international courts. Assertion of claims could only be pursued via the home state with the aid of diplomatic protection. In such disputes, the ruling was consequently based on the international-law relationship between two states. These purely international proceedings cannot be used as indicia in the assessment of state practice concerning the direct defence of state necessity vis-à-vis private persons for the direct disputes in front of national courts that are customary today. 59

The circumstance that it is a dispute between two states as to the repayment of debts, and not a private-law relationship between a state and a private individual, means that it is not possible to draw conclusions from the proceedings relating to the Russian damages from 1912 as to the transferability of necessity in international law to private-law relations (Ruling of 11 November 1912, *Affaire de l'indemnité Russe*, UNRIAA, Vol. XI, 1962, pp. 421 et seq.). The tribunal explicitly found in its judgment that necessity is a concept equally applicable in international law as in private law (see Ruling of 11 November 1912, loc. cit., p. 443). This was, however, a dispute between Russia and Turkey in which the Russian government explicitly asserted state responsibility for outstanding service of monetary debts (see Ruling of 11 November 1912, loc. cit., p. 438). It emerges from this context of a purely international dispute that referring to the application of the concept of necessity in private law was only intended to make this concept also useable for the justification of necessity under international law. In this sense, the tribunal found that international law must adapt to polit- 60

ical necessities (see ruling of 11 November 1912, loc. cit., p. 443).

b) An inspection of national case-law on the question of state necessity also fails for lack of agreement to suggest that the recognition of state necessity impacting on private-law relationships is established in customary law. The relevant rulings either only comment on the actual existence of a state of necessity, but not to its legal impact, or they shift the problem to the level of immunity and resulting obstacles to execution. The expert report of Prof. Dr. August Reinisch therefore finds, after evaluating the practice of national courts, that no authoritative conclusions can be drawn from this to justify state inability to pay by pleading state necessity (marginal no. 126). 61

c) In view of the fundamental existence of necessity as a justification in international legal relations, scholarly literature takes the view, in agreement with international and national case-law, that necessity is recognised by customary law (see Baars/Böckel, loc. cit., p. 459 with further references). The relevant literature also distinguishes, however, between recognition in relations between states on the one hand and recognition as a legal justification in relations with private individuals on the other. The views expressed in scholarly literature on the transferability of international-law necessity to relations under private law differ significantly from one another (see on this Baars/Böckel, loc. cit., pp. 461 et seq. with further references). Scholarly articles indicate that it is desirable in terms of legal policy to recognise state necessity as a plea towards private individuals (see Dolzer, *Staatliche Zahlungsunfähigkeit: Zum Begriff und zu den Rechtsfolgen im Völkerrecht*, in: Jekewitz (ed.), *Des Menschen Recht zwischen Freiheit und Verantwortung: Festschrift für Karl Josef Partsch zum 75. Geburtstag* (1989), p. 550), but the lack of state practice prevents one from reaching the conclusion that customary law is already in force (see Hahn, *Das Völkerrecht der Auslandsschuldenregelungen, Kreditwesen* (1989), p. 314 (318)). The transferability of a legal obligation resulting from a general principle of showing consideration is also discussed in legal literature, but it too is rejected for lack of supporting documentation from state practice (see Ohler, loc. cit., pp. 594-595). 62

Insofar as the scholarly literature indicates that there are, allegedly, domestic legal principles which are common to all legal systems and which thus demand recognition under international law, this can be maintained as to the fundamental principle of compensation between debtors and creditors. This approach is not, however, helpful for a ruling on the submitted question. Were there a general legal principle according to which a debtor state could use the objection of state bankruptcy towards private creditors, state bankruptcy would have to be identifiable in examples from state practice; one would hence have to be able to recognise at least a certain congruency in the various legal systems vis-à-vis the recognition of this principle. This is, however, not the case, as the evaluation of state practice undertaken to verify customary law has revealed. A general legal principle cannot be verified absent a corresponding embodiment in actual legal practice. One may not derive solely from a principle of compensation which is also inherent to the German law of obligations and to the safeguarding of the conflicting interests under procedural law an international rule 63

determining that a state creditor should be placed in a different position than a private individual, and hence could invoke state necessity.

4. The question as to recognition, under customary law, particularly of economic or financial state necessity, and as to its preconditions concerning the degree of peril of vital state interests, can remain unresolved here. Because, in any event, an economically or financially defined state of necessity can also not be pled by a state vis-à-vis private individuals so long as there is no rule under international customary law which recognises the transferability of the defence of necessity from relationships under international law to relationships under private law. 64

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**Dissenting opinion of Judge Lübbe-Wolff on the Order of the Second Senate of 8 May 2007 – 2 BvM 1-5/03, 1, 2/06 –**

"Foreigners lending money to a particular State can hardly expect not to be prejudicially affected under any circumstances by the vicissitudes of the State in question. ... A State cannot, for example, be expected to close its schools and universities and its courts, to disband its police force and to neglect its public services to such an extent as to expose its community to chaos and anarchy merely to provide the money wherewith to meet its moneylenders, foreign or national." This statement, submitted by the government of South Africa to the Preparatory Committee of the 1930 Hague Conference for the Codification of International Law, is among the material from state practice on which the International Law Commission (ILC) based its conviction that a plea of state necessity could be entered under customary law (Addendum to the eighth report on State responsibility, in: Yearbook of the International Law Commission 1980, Vol. II, pp. 13 et seq., marginal no. 25). The statement illustrates what the question concerning the existence and scope of this plea is about. 65

The Senate reaches the conclusion that there is no general rule of international law entitling a state to assert the legal conviction that the maintenance of elementary state functions takes priority over the immediate satisfaction of creditors' interests against private-law claims of private individuals. It hands down this ruling, which is significant to the further development of international law, using judges' submissions the admissibility of which would be denied according to the standards of the case-law of the Federal Constitutional Court to date (1.). It proceeds in doing so on the basis of an inadmissible interpretation of the submitted question (2.), and reaches a result which in my opinion is incorrect (3.). 66

1. a) Submissions pursuant to Article 100.2 of the Basic Law, just as submissions pursuant to Article 100.1 of the Basic Law, are only admissible if the rule of international law that is to be verified, and the question as to whether it is a component of federal law, are material to the ruling in the initial proceedings (see BVerfGE 4, 319 (321); 15, 25 (30); 16, 276 (279); 100, 209 (211-212); established case-law). This is only the case if answering the submitted question is vital to the ruling on the initial legal dispute (see BVerfGE 50, 108 (113) re Article 100.1 of the Basic Law), which means, in other words, if the submitting court cannot avoid it (see BVerfGE 15, 25 (31)). The question of materiality to the ruling is a matter of the legal view taken by the submitting court; this is, however, only the case if its legal view is not obviously untenable (see BVerfGE 100, 209 (212); established case-law). The submitting court must furthermore substantiate in detail the materiality to the issues of the case. The submission order must make it sufficiently clear that the submitting court would reach another result in the event of the validity of the provision in question than in the event of its invalidity, and how the court would reason this result (see for the submission procedure pursuant to Article 101.1 of the Basic Law BVerfGE 92, 277 (312 et seq.); 105, 61 (67); established case-law). According to §§ 84 and 80.2 of the Federal Constitutional Court Act, the submitting court must also state in the proceedings pursuant to 67

Article 100.2 of the Basic Law to what degree its ruling depends on the rule of the international law in question, and must deal with the legal views taken up in this respect in the case-law and applicable legal literature (see BVerfGE 100, 209 (212)). In order to meet the requirements placed on the substantiation of the submission, the court must also soundly evaluate the previous treatment of the legal questions which are relevant to materiality to the ruling, and must present the degree to which its legal view concurs with or differs from those that were put forward in the applicable legal literature and case-law (see BVerfGE 100, 209 (214)).

The materiality of the submitted question substantiated in this manner must continue to exist at the time of the Federal Constitutional Court's decision and not only at the time of the question's submission (see BVerfGE 14, 140 (142); 24, 63 (67); 85, 191 (203); 108, 186 (209)); this is established practice under Art. 100.1 of the Basic Law which, in view of identically worded statutory admissibility requirements (see § 84 in conjunction with § 80.2 sentence 1 of the Federal Constitutional Court Act), has also regularly been adopted for submissions made under Art. 100.2 of the Basic Law. If the materiality of the submitted question becomes doubtful in the course of the proceedings on the constitutionality of a statute as a result of circumstances which arose subsequently, the submitting court must eliminate the uncertainty which has come about within a suitable period; if this does not take place, the submission becomes inadmissible (see BVerfGE 51, 161 (163)). 68

b) The Senate has not reviewed whether the submission is admissible according to these standards. It is possible to ask whether these requirements go too far in certain parts, and in particular do not adequately consider certain peculiarities of the international-law proceedings pursuant to Article 100.2 of the Basic Law (see, for instance, as regards the requirement of a well-founded response to case-law and applicable legal literature in all questions relevant to the materiality of the submitted question, Schorkopf, in: Umbach/Clemens/Dollinger (eds.), *BVerfGG*, 2nd ed. 2005, marginal no. 22 re §§ 83, 84 of the Federal Constitutional Court Act). Established admissibility requirements cannot, however, be ignored on a case-by-case basis just because this is seen fit without, where appropriate, the required explicit correction of the previous case-law. A more detailed review was also not superfluous here just because the admissibility of the submission should have been taken for granted according to the above standards. Apart from the fact that these standards are too complex to be taken for granted in a positive sense, even a cursory inspection of the submission orders raises questions concerning admissibility that are in need of clarification. 69

aa) As to the question of the submitted questions' materiality, the Local Court states that the court presumes "the existence of state necessity" and did not "attempt to judge for itself" whether a corresponding direct, serious peril existed for the state of Argentina and for the functioning of its organs and its administration. The judge handing down the judgment took the view that – over and above manifest abuse, of which nothing was known to the court and also nothing had been submitted – because of a lack of knowledge of local circumstances, and because of the permissible latitude, an 70

evaluation of the preconditions of necessity could only be carried out by the organs of the respondent state Argentina. It is not completely clear whether this is the presentation of a legal standpoint or only – as the wording that the court did not “attempt to judge for itself …” might suggest – the explanation of a declaration of intention which cannot be used from the outset to substantiate the materiality to the ruling of the submitted question. Even if these are legal statements, they certainly do not meet the above requirements of the present case-law (see above all BVerfGE 100, 209 (212 et seq.)) as to the substantiation of the materiality of the submitted question to the ruling, since they do not deal at all with the relevant case-law and scholarly literature.

bb) These substantiation requirements are not to be lowered or set aside because other legal reasons than those rooted in international law are neither named nor evident for the restriction of its jurisdiction to review presumed by the Local Court, and hence the legal question which should have been dealt with in greater detail is itself of an international-law nature. The purpose of the submission proceedings pursuant to Article 100.2 of the Basic Law is not to relieve the non-constitutional courts of the burden of dealing with questions of international law. Rather, the purpose is to bring about legal certainty and to guarantee respect for international law (see BVerfGE 46, 342 (363); 64, 1 (14); 109, 13 (23)). The admissibility of submissions, along with non-constitutional courts’ obligation to submit, thus depends on there being serious objective doubts as to the existence or scope of a general rule of international law (see BVerfGE 23, 288 (316); 64, 1 (13 et seq.); 92, 277 (316)). If there are no such doubts, if the legal situation is hence evident, the courts are indeed entitled, as well as obliged, to review and rule unrestrictedly for themselves in issues related to international law (see Order of the First Chamber of the Second Senate of the Federal Constitutional Court of 17 July 1985 – 2 BvR 1190/84 –, *Neue Juristische Wochenschrift – NJW* 1986, p. 1427 (1427)). As a result, they are not relieved of the burden of the required detailed substantiation of materiality to the ruling, even where this depends on the application of general rules of international law, insofar as the legal situation is evident in this respect. 71

As regards the Local Court’s jurisdiction to rule on the requirements for the intervention of the plea of state necessity in the case of the applicability of a provision of international law which provides the plea of state necessity to the defendants of the initial legal dispute, the legal situation is clear. . There is evidently no rule of international law which, over and above any obligation to allow for asserted necessity in substantive terms, would prohibit the submitting court from reviewing the element-related preconditions for entitlement to this plea. 72

The justifiable operation of state necessity can only be considered under strict preconditions. This includes, among others, that an essential interest of the state in question is gravely threatened, as for instance the cessation or threat of cessation of essential state functions in the area of security and public welfare, and the peril must be direct and present (see only ILC, loc. cit., marginal nos. 12 et seq.). This undisputed, particular strictness of the preconditions for the plea of necessity already prohibits 73

allowing broad latitude in this respect to the state that invokes necessity, since substantive strictness would thereby be qualified at the procedural level. Case-law also does not provide a justification for restriction of this kind; it shows, on the contrary, that the power of court review was claimed very much as a matter of course. This also applies to proceedings in which states have invoked necessity in connection with refused or delayed debt payment. Already in the *Russian Compensation* case, in which the Turkish government tried to justify its failure to make due payments to the Russian government on the facts by invoking necessity (deviating from today's usage in the categorisation as *force majeure* ILC, loc. cit., marginal no. 22), the Permanent Court declared this justification to be applicable, but did not consider it to be decisive in the specific case on the basis of a detailed review of the facts – considering, among other reasons, the fact that Turkey had been allegedly able to conclude loan agreements at favourable interest rates, to re-organise other credits and ultimately to re-pay a significant part of its state debt (Ruling of 11 November 1912, UNRIAA, vol. XI, p. 431 (443)). Since the International Court of Justice also explicitly negates a right of the state which invokes necessity to make its own evaluation, and has presumed for itself an entitlement to review meticulously the application of the preconditions for the plea of necessity, there is no longer any doubt as to this question (Case Concerning the Gabčikovo-Nagymaros Project, ICJ Reports 1997, pp. 7 et seq., marginal no. 51; see also earlier Nicaragua v. United States of America, ICJ Reports 1986, pp. 14 et seq., marginal no. 282; see also Pfeiffer, *Zeitschrift für Vergleichende Rechtswissenschaft – ZVglRWiss*, 2003, pp. 141 et seq. (157: "*selbstverständlich*" (self-evident)); Tietje, *Die Argentinien-Krise aus rechtlicher Sicht: Staatsanleihen und Staateninsolvenz, Beiträge zum Transnationalen Wirtschaftsrecht*, vol. 37, p. 13; Schantz, *Verbraucher und Recht – VuR* 2006, pp. 210 (210-211); Bjorklund, Emergency Exceptions to International Obligations in the Realm of Foreign Investment: The State of Necessity as a Circumstance precluding Wrongfulness, www, pp. 24-25). Accordingly, in the case of *CMS Gas Transmission*, in which the question arose whether a violation of investors' rights presumed by the court under the Bilateral Investment Treaty (BIT) concluded between Argentina and the USA was at least partially justified by the plea of necessity recognised under customary international law and the BIT clause (Article IX), whose content was at least partially parallel, an ICSID tribunal accepted that it had jurisdiction to review the element-related preconditions of necessity pursuant to Article 25 of the ILC Articles on State Responsibility, and reached the conclusion that the crisis invoked by Argentina did not meet these preconditions (see CMS Gas Transmission Company vs. The Argentine Republic, of 12 May 2005, no. ARB/01/8, marginal nos. 304 et seq. (315 et seq.) – www; critical on this Schill, *Zeitschrift für Schiedsverfahren – SchiedsVZ* 2005, p. 285 (291); van Aaken, *Zeitschrift für Vergleichende Rechtswissenschaft* 2006, p. 544 (559 et seq.)). A further ICSID tribunal on the question of whether Argentina may invoke necessity initially analysed whether the Argentinean measures in question, as asserted by Argentina, were necessary within the meaning of the relevant BIT clause to maintain domestic order and to protect its vital security interests, and explicitly affirmed its ju-

risdiction to review in this respect (see LG&E Energy Corp. vs. Argentine Republic, of 3 October 2006, no. ARB/02/1, marginal nos. 207 et seq. – www); furthermore, it also reviewed the legal situation according to general international law using Articles 25 et seq. of the ILC Articles on State Responsibility (loc. cit., marginal nos. 246 et seq.), and reached the conclusion that necessity existed in Argentina (exclusively) for the period from 1 December 2001 until 26 April 2003 (loc. cit., marginal no. 267 d.). As a further example, in its judgment of 13 June 2006, the Frankfurt am Main Higher Regional Court (*Oberlandesgericht*) affirmed its own jurisdiction to review [the applicability of state necessity] and negated the existence of the preconditions for state necessity at the time of the ruling (Frankfurt am Main Higher Regional Court, *Neue Juristische Wochenschrift* 2006, p. 2931 (2932); concurring Schroeter, *Entscheidungen zum Wirtschaftsrecht – EWiR* 2006, p. 557 (558); Schantz, loc. cit., p. 310 (310 et seq.)).

74 Apart from the lack of sufficient substantiation, according to everything set out above, the presumption that the preconditions for the application of necessity – this side of the boundary of evident abuse – can only be judged by the state invoking necessity, is also evidently untenable in the sense of the requirements for the authority of the submitting court's findings on the materiality of the submitted question to the ruling (see BVerfGE 94, 315 (323); 100, 209 (212)). Whether the statements of the submitting court are nonetheless sufficient with regard to this point – also taking into account the obligation to offer supplements where circumstances change (see BVerfGE 51, 161 (163)) –, should have been examined and any break from the strict standards of the above case-law should have been shown openly.

75 cc) It should also be pointed out in this respect that interest claims are not at dispute in all sets of initial proceedings. Insofar as only repayment obligations are, or remain to be, claimed, the question of materiality to the ruling emerges with particular severity. Regardless of all questions which may be doubtful as to the range of a general plea of necessity under international law, there is namely no doubt that this plea certainly does not have the effect of quashing the main claim as to payment obligations, but only suspends it; this already emerges from the fact that the effect of justification of state necessity is limited to that which is necessary to defend against necessity (see Article 25.1 lit. (a) of the ILC Articles on State Responsibility; see also, on the mere suspensive effect, CMS Gas Transmission Company vs. The Argentine Republic of 12 May 2005, no. ARB/01/8, marginal nos. 379 et seq.; LG&E Energy Corp. vs. Argentine Republic, of 3 October 2006, Nr. ARB/02/1, marginal no. 261; ILC, loc. cit., marginal no. 14; Ermrich, *Die Zahlungsunfähigkeit von Staaten*, 2007, pp. 150 and 156-157; van Aaken, loc. cit., p. 564; Kleinlein, *Archiv des Völkerrechts – AVR* 2006, pp. 405 (414-415); Ohler, loc. cit., p. 594; Kämmerer, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht – ZaöRV* 2005, p. 651 (658); Pfeiffer, loc. cit., p. 158). As to the main claim, it is thus, in the initial proceedings, solely a matter of whether the alleged necessity continues to exist at the time of the ruling (see Frankfurt am Main Higher Regional Court, *Neue Juristische Wochenschrift* 2006, pp. 2931

(2932)). This fact makes any abstract questions submitted inapplicable to the materiality to the ruling if it is evident within the meaning of the above preconditions for submission that the strict preconditions for necessity (see at 1. b) bb)) currently no longer apply in Argentina. In light of the above-recited case-law and the recent development in Argentinean economic and financial figures – growth rates in recent years of more than 8 per cent and, as shown on the International Monetary Fund's website, currency reserves of almost 34 billion U.S. dollars – it appears that this is true (see also on the question of materiality to the ruling of questions submitted on the scope of state necessity the Order of the Second Senate of the Federal Constitutional Court of 8 March 2007 – 2 BvM 6/03 et al. –).

2. In the operative provisions of the ruling, the Senate answers in the negative the question of whether a general rule of international law exists which entitles a state to temporarily refuse to meet private-law payment claims due towards private individuals by invoking state necessity declared because of inability to pay. This question was put to the Federal Constitutional Court in three submission orders from the Frankfurt am Main Higher Regional Court. There is no basis for dealing with this since the Higher Regional Court rescinded the orders in question because they were no longer material to the ruling, and the Federal Constitutional Court declared the proceedings to have been concluded (BVerfG, loc. cit.). The Local Court did not submit *this* question to the Senate in the present proceedings. The latter was therefore not permitted to answer it. 76

In the proceedings, pursuant to Article 100.2 of the Basic Law, and in consideration of the function of the international-law proceedings as a guarantee of adherence to and recognition of international law, the Federal Constitutional Court is entitled – and in my view in fact obliged – to rephrase the submitted question, if necessary, in a manner that serves the proceedings' function (see BVerfGE 15, 25 (31-32); 16, 27 (32); see also Sieckmann, in: v. Mangoldt/Klein/Starck, *GG*, 5th ed. 2005, *Article 100*, marginal no. 77; Rühmann, in: Umbach/Clemens (eds.), *BVerfGG*, 1st ed. 1992, *§ 83*, marginal no. 19). This can, however, only go so far that the Federal Constitutional Court translates the question which the submitting court would like to have answered into a form which is suited to the requirement to clarify the matter under international law and the possibilities to rule in the proceedings on the constitutionality of a statute. It is not permitted for the Federal Constitutional Court, by contrast, to produce a reformulated submission question which the submitting court evidently or indeed explicitly did not wish to make the subject-matter of the proceedings. The re-interpretation of a submission order may not run counter to the legal standpoint of the submitting court (see BVerfGE 23, 146 (151)). This finding made in submission proceedings pursuant to Article 100.1 of the Basic Law undoubtedly also applies to submission proceedings conducted pursuant to Article 100.2 of the Basic Law. The purpose of these proceedings does not require any further freedoms. Procuring one's own submission questions is alone inadmissible as a result of the restrictions placed on judicial power by the principle of the separation of powers. 77

The submitting court explicitly did not ask the question which was reviewed and answered by the Senate as to whether the objection of necessity may also be invoked by a state against the private-law claims of private individuals. Rather, it stated that it presumed that there is a principle of state necessity under international law. The doubts which the court formulated as to the scope of this principle, and because of which it approaches the Federal Constitutional Court, refer solely to the question of whether the recognised objection of state necessity also covers the case of asserted inability to pay. Insofar as it relates to the question of covering private-law claims of private individuals, the court by contrast takes a clear point of view in its submission orders with no indication of doubt whatever: “The existence of necessity can in principle justify not meeting an international obligation if this is necessary to guarantee vital state interests and these interests outweigh the interests of the impaired state. … This should apply all the more to the obligations of a subject of international law towards a private individual.” That the Senate considers this legal standpoint to be incorrect does not entitle it to invent a submission question on which it can make a corresponding statement. 78

3. The substantive legal situation is, in my view, not the one which the Senate found in response to the question it posed for itself. 79

a) In addition to customary law, the recognised general principles of law – in particular the principles which can be found as common features in national legal orders – are independent sources of international law (see Article 38.1 lit. c of the ICJ Statute). They too belong among the general rules of international law within the meaning of Article 25.2 of the Basic Law (see also BVerfGE 23, 288 (317); 109, 13 (27); Order of the Second Senate of the Federal Constitutional Court of 6 December 2006 – 2 BvM 9/03 –, *Deutsches Verwaltungsblatt* 2007, p. 242 (243); established case-law). The claim of such principles to apply under international law, including the scope of such principles’ content, is not dependent on their simultaneously constituting customary international law, i.e. that these principles are verifiable according to the relevant criteria for the finding of international customary law on the basis of universal state practice (for more detail, instead of many other sources, see Weiss, *Archiv des Völkerrechts* 2001, p. 394 (403 et seq.), with further references). 80

The plea of state necessity is not only generally recognised by force of customary international law, as the Senate has presumed. It is also a general legal principle behind which generally recognised convictions lie that concern the boundaries of the enforceability of claims and the precedence of elementary common-good interests – in particular with regard to the protection of life and health (see the report of the Committee on International Monetary Law of the International Law Association, in: International Law Association (ILA), Report of the Sixty-Third Conference, Warsaw 1988, pp. 418 et seq., marginal no. 21; Dolzer, in: *Des Menschen Recht zwischen Freiheit und Verantwortung, Festschrift für Partsch*, 1989, p. 531 (545 et seq.); Pfeiffer, loc. cit., pp. 149 et seq.; Tietje, loc. cit., p. 18). 81

aa) Evidence from state practice, from which the plea of necessity's validity under customary law follows, also expresses clearly its fundamental character. The statement made by Denmark in the context of the Hague Conference for the Codification of International Law, which stands at the beginning of the analysis of the material for the International Law Commission that has already been quoted several times, stated that "Self-defence and necessity should as *a matter of principle* be an admissible plea in international law; but, *as in* private law, they should be subject to certain limitations which have not yet been fixed with sufficient clearness", ILC, loc. cit., marginal no. 20). In the *Russian Compensation* case, in which the plea of necessity, was still included under the title of "*force majeure*," as was previously common, the Permanent Court of Arbitration also referred to the origin of this plea as coming from the national legal orders: "L'exception de la force majeure … est opposable en droit international public aussi bien qu'en droit privé; le droit international doit s'adapter aux nécessités publiques"; *Affaire de l´indemnité Russe*, UNRIAA, Vol. XI, p. 431 (443)). The expert report of Prof. Dr. August Reinisch, on which the Senate bases its ruling, correctly finds that this statement appears to suggest that this justification is to be regarded as a general legal principle anchored in various private-law systems and, hence, also as a principle of international law (p. 27 of the expert report; see also Reinisch, *Anm. zu LG Frankfurt am Main*, Judgment of 14 March 2003, *Juristenzeitung* 2003, p. 1013 (1014); the writer criticises here, referring to the passage from the Russian compensation ruling quoted above, the doubts stated by the Regional Court *obiter dictum* as to the applicability of the plea of necessity towards private individuals). The statement made by South Africa to the Hague Conference for the Codification of International Law, which was already quoted at the outset, also bases the entitlement to the plea of necessity for states on parallels with what applies at national level to individuals. Necessity is presented as a situation in which the state cannot meet all its obligations, and hence must allow those which are of more vital significance to take precedence. As the passage quoted at the outset is meant to illustrate, they are the obligations of the state to maintain its elementary security and public welfare services. According to the statement, "There are limits to what may be reasonably expected of a State in the same manner as with an individual" (ILC, loc. cit., marginal no. 25). 82

The plea of state necessity has also been reasoned and formulated for many years in cases in which no explicit reference was made to private-law systems, as an expression of a fundamental, general legal conviction. In the case of the *French Company of Venezuelan Railroads*, the arbitrator of the French-Venezuelan Mixed Claims Commission, in a manner reminiscent of South Africa's argumentation, based Venezuela's right to plead state necessity on the thought that not only was a paramount right involved but, indeed, an obligation owed to paramount interests. ("Its first duty was to itself. Its own preservation was paramount. Its revenues were properly devoted to that end", French Company of Venezuelan Railroads Case, UNRIAA, Vol. X, p. 285 (353)). The same legal conviction and its basis is expressed even more clearly in the case of the Société Commerciale de Belgique, in which Greece had invoked, amongst other things, necessity towards payment obligations from other arbi- 83

tration rulings. In this case, which was dealt with before the Permanent International Court in 1938/39, Greece's legal counsel, Jean Youpis, pleaded that the state could end up in a situation in which it was no longer able to comply with its obligations both towards its creditors and towards its own citizens, so that the question then arose as to which of the two obligations had to take second place in such cases. This was said to have been a legal matter that had been frequently discussed in the past twenty years, in particular also in cases in which states had ceased paying their creditors. The academic opinion was said to recognise here that the obligation of a government to ensure the functioning of its essential public services took precedence over an obligation to pay its debts. The reference materials put forward in support of this position point out, among other things, that the obligations imposed on states cannot be greater than those imposed on an insolvent or financially ruined private individual. Legal counsel for the opposing Belgian side countered that the Belgian government certainly concurred with the principle according to which a state is not obliged to pay its debts if this would imperil its essential public services; it merely contested that the application of this principle led here to justification of the Greek refusal to pay, and stated that the Belgian government – in the event that a legal finding favourable to Belgium were handed down by the court – would take into consideration the Greek government's ability to pay (see Permanent Court of International Justice (PCIJ), Series C, no. 87 (1938-1939), 187 et seq. (205 et seq.); 234 (236, 271)). After an amendment to the original prayer for relief, the question as to whether the actual preconditions of necessity applied to Greece no longer lay in the jurisdiction of the court. The court hence found that it could not rule on the Greek plea, but that it could make a record of the declaration that Belgium would take account of Greece's ability to pay (see PCIJ, Series A/B, nos. 78 (1939), 171-172 and 178). The decision is hence regarded as confirmation of the recognised principle agreed to by the parties that the obligation of a state towards its creditors does not take precedence over the obligation to carry out its essential domestic tasks (see ILC, loc. cit., marginal no. 31: "… the Court showed that it implicitly accepted the basic principle on which the parties were in agreement").

84 That the international case-law regarded a state's payment moratorium, which as a rule also affects private creditors, particularly early as a typical case of application of the necessity plea is – in addition to the plea of the Greek legal counsel in the case of *Société Commerciale de Belgique* – also shown in the arbitration ruling of the General Claims Commission Mexico/U.S.A. in the case of *Dickson Car Wheel Company (U.S.A.) v. United Mexican States* from 1931. This case related to non-payment of receivables owed by the Mexican Railways to a US company for the delivery of wheels, as a result of a necessity-related seizure of the railways by the Mexican government. The tribunal listed in its ruling, in which it recognised the necessity that had been invoked as a justification, that payment moratoria in particular were examples of necessity-related measures which could be taken by states without being responsible for the damage thereby caused to third parties (see UNRIAA, Bd. IV, pp. 669 et seq. (681-682)).

bb) Against this background, the presumption that the sphere of application of the plea of state necessity was restricted by the ILC Articles on State Responsibility to the legal relationship between states is not suggested. With this plea, insofar as it is a matter of financial obligations of the state, the principle is recognised that certain elementary tasks and obligations of the state, above all those on which the life and health of its citizens directly depend, as a rule take precedence over punctual service of creditors' interests – insofar as no equally essential interests are also at stake for the opposing side. This principle cannot be restricted in the asserted manner without becoming self-contradictory. 85

The submitting court refers to the contradiction that would be connected with the presumption of such a restriction by assuming that the objection of state necessity certainly must also be applicable in relations with private creditors insofar as it could be claimed towards another state. Apart from the fact that the range of the principle in question here cannot be restricted as to its content in the manner presumed by the Senate, it is also in line with the prevalent view that the rights of private creditors in relation to a debtor state may not go further than those of other states. With this finding, amongst other things the International Law Association at its 63rd Conference in Warsaw took the view in a Resolution on the basis of a report of its Committee on International Monetary Law that states may also invoke state necessity to justify temporary non-service of debts towards private individuals (The International Law Association (ILA), Report of the Sixty-Third Conference, Warsaw 1988, S. 20 et seq., marginal nos. 7 et seq. (10); see also Pfeiffer, loc. cit., pp. 155 et seq.; van Aaken, loc. cit., pp. 560 et seq.; Dolzer, loc. cit., p. 550; also ultimately Tietje, loc. cit., pp. 17 et seq.). The underlying final report indicates in this connection not only general principles of international law regarding the legal status of states and private individuals, but also stresses that the purpose and meaning of the legal principle of necessity do not suggest that it offers less protection to the debtor state as against a private, foreign creditor than against a foreign country (see Committee on International Monetary Law, Committee Report, in: ILA, loc. cit., pp. 418 et seq., marginal no. 23; see also Dolzer, loc. cit., p. 550; Pfeiffer, loc. cit., p. 155). 86

The prioritisation of creditors which is central to the legal principle of necessity is also underpinned today by the *ius cogens* of human rights. This aspect was also referred to by the Committee on International Monetary Law in its report on which the Resolution of the *International Law Association* was based (see Committee on International Monetary Law, loc. cit., marginal no. 21; see also van Aaken, loc. cit., p. 560; Kämmerer, loc. cit., p. 657; Dolzer, loc. cit., p. 547). An enforcement of state payment obligations vis-à-vis foreign creditors that would risk an interruption of elementary state functions caused, increased or extended by such enforcement would be violative of human rights – insofar as no equally essential interests were also at stake on the creditor side. 87

Even the authors which the Senate quotes in support of its view strive to document that, in order to protect a state's essential interests affected by necessity, it is *not at all* 88

*necessary* for the plea of necessity to apply in private-law disputes before national courts, or at least that it does not have to be already applicable in the actual proceedings. They hence do not dispute on the merits the comprehensive application of the prioritisation of the legal obligations embodied in the legal principle of state necessity, but take the view that this prioritisation is not at all affected by rulings of national courts in private-law disputes – or at least by a judgment on the ruling (see for the level of the actual proceedings Baars/Böckel, loc. cit., p. 461; in more general terms Ohler, loc. cit., pp. 594 et seq.). To put it more precisely, this does not negate the application of the plea of necessity, but denies that its preconditions apply to this field.

b) In that the Senate presumes that the plea of necessity is only relevant by force of international law where the ILC Articles on State Responsibility apply, in other words in relations between states, this does not fit with ICSID tribunals having treated this plea as applicable in proceedings in which private individuals also appear as plaintiffs in their own right (see above 1. b) bb); see also Wälde, in: Weiler (ed.), International Investment Law and Arbitration, 2005, p. 383 (417-418)). According to the explanation above, however, even the more cautious presumption that the plea applies only in genuinely international legal relationships, and that the plea therefore does not apply in private disputes between states and private individuals, is based on false assumptions concerning the separability of these areas of application in the question which is of interest here. 89

When it comes to legal relationships in which states and private individuals are involved, the final and exclusive attribution either to national or to international law frequently leads to difficulties (see, instead of many, Böckstiegel, *Der Staat als Vertragspartner ausländischer Privatunternehmen*, 1971, pp. 76 et seq. and passim). In addition, insofar as the spheres of national and international law are, according to their legal nature, clearly distinguishable, and must indeed be distinguished, the prevailing connections between their content certainly prohibit the fragmentation of their substantive legal content. This is the case at hand. If a general rule of international law exists according to which the prioritisation of fundamental responsibilities towards a state's own citizens permits a state to temporarily refuse to make payments to other states in a period of necessity, and if a debtor state invokes this rule of international law in a private-law dispute before the courts of another state, the debtor state is asserting its right under international law against the forum state (and thereby in a relationship under international law) to prioritise, in a state of necessity, the maintenance or restoration of its ability to function domestically. If the forum state does not respect this claim, this violation of rights can in turn become the subject-matter of a genuine legal dispute under international law. The nature and manner in which state courts deal in private-law disputes with the plea of state necessity entered by a state hence also falls within the sphere of international law's application, just as does the plea of necessity claimed directly by a state before an international court. Consequently, the plea of necessity under international law demands the same substantive legal situation from the relationship between a state and a private individual as from the relation- 90

ship between one state and another. This necessary identity of the substantive content of the claim was articulated by the International Court of Justice in the case of the *Serbian Loans* (one of the precedence cases for the recognition of the plea of necessity under international law) when the court determined that a dispute between a debtor state and that state's foreign bond creditors was "fundamentally identical" to the dispute related thereto between the debtor state and the home state availing itself of its diplomatic protection, albeit with the difference that the latter case refers to a dispute between states and, pursuant to Article 34 of its Statutes, the International Court of Justice can only deal with this variety of dispute (see PCIJ, Series A, no. 20/21 (1929), p. 18).

c) The Senate is wrong to presume that the case-law of national courts also points against the existence of a general rule of international law according to which a state can also assert the plea of state necessity before national courts (see above at 3 a) on the documentation requirements applicable in this respect to general legal principles). 91

The *Corte Suprema di Cassazione* in Italy ruled in April 2005 that the legal acts with which Argentina had declared state necessity and ordered cessation of debt service were expressions of sovereign state power, and ruled that the absolute precedence of the interests of the state-organised community, which was to be protected by these legal acts, ruled out their evaluation as any possible violation of rights according to the regime of private law applicable to commercial activities; rather, the immunity of the state for *acta iure imperii* was said to apply here (*Corte Suprema di Cassazione, Ordinanza* of 27 May 2005, R.G.N. 6532/04, www). With this ruling of the supreme organ of ordinary Italian jurisdiction, the obligation flowing from international law in the case of state necessity to respect, also in the context of private-law disputes, the precedence of the right of the state in question to avert this necessity is not negated, but, on the contrary, is actually recognised. That the court recognises this at the stage of the immunity question changes nothing in this respect. 92

As to the case-law in the United States of America, which is regarded by some authors as constituting proof of a lack of general recognition of the plea of necessity in private-law relations (see Baars/Böckel, loc. cit., p. 461; Ohler, loc. cit., p. 594 et seq.; see also the expert report of Prof. Dr. August Reinisch on which the Senate's ruling is based, marginal nos. 117 et seq., 125-126), it is in fact true that dispositive importance is not attached to a declared state of necessity *per se*. The opportunity to suspend the proceedings for a limited period of time is, however, used to avert endangering the debt restructuring process of foreign states which are experiencing payment crises (see United States Court of Appeals for the Second Circuit in the cases of *Pravin Banker Associates, Ltd., v. Banco Popular del Peru and the Republic of Peru*, of 25 March 1997, no. 96-713, with reference to the fact that a long-observed practice of recognition of foreign insolvency proceedings by the federal courts was followed therewith, and *EM Ltd. et al. v. Republic of Argentina*, of 13 May 2005, no. 05-1525-cv, with reference to the vital significance of the debt restructuring process 93

for the economic health of a nation). Over and above this, foreign states in general enjoy far-reaching protection against execution measures in the USA. Even if there has been a comprehensive waiver of immunity, the Foreign Sovereign Immunities Act only permits access to assets situated in the U.S.A. which are used for commercial purposes (28 U.S.C. § 1610 (a) (1); concerning this and concerning the interpretation of this provision using its purpose of avoiding a disturbance of public activity of foreign states, see the ruling of the United States Court of Appeals for the Fifth Circuit in the case of *Af-Cap Inc. vs. The Republic of Congo*, of 17 September 2004, no. 03-50506). The funds of foreign central banks are separately protected (28 U.S.C. § 1611 (b) (1)). Accordingly, the United States Court of Appeals for the Second Circuit recently declared impermissible the seizure of monies of the Argentinean Central Bank in accounts held at the Federal Reserve Bank of New York which were wanted by the Argentinean government for payments to the International Monetary Fund, although Argentina had waived its immunity towards the creditors in question to the greatest degree possible under national law: The Foreign Sovereign Immunities Act was said to provide immunity for the funds of foreign central banks against execution and seizure; even if, in the case at hand, these were not funds of the Central Bank, but of the Republic of Argentina, seizure would only have been possible if the funds in question had been used for a commercial purpose, which was said not to be the case (see United States Court of Appeals for the Second Circuit, *EM Ltd. v. Republic of Argentina* and *NML Capital Ltd. v. Republic of Argentina*, of 5 January 2007, nos. 06-0403-cv, 06-0405-cv, 06-0406-cv). Thus, protection against enforcement from the more general point of view of immunity according to US law goes beyond the standard of what is required under international law, which is relevant to German law in this respect (see BVerfGE 46, 342 (388-389); 64, 1 (40); Order of the Second Senate of the Federal Constitutional Court of 6 December 2006 – 2 BvM 9/03 –, *Deutsches Verwaltungsblatt* 2007, pp. 242 et seq.); it aims not to impair the performance of sovereign tasks of a foreign state even if, in the context of commercial activities, the latter had divested itself of its immunity under international law.

d) In view of the principle applying under international law that a state, in the event of necessity, is entitled to prioritise the performance of its fundamental domestic tasks over the punctual service of foreign creditors, the question can, in fact, only be whether this right is such that it stands in the way of a judgment against the state claiming necessity at the trial or appellate level, or whether sufficient allowances can be made for it at the enforcement level. The treatment of the plea of necessity by international courts before which states have directly asserted this plea naturally does not answer this question. The correct answer depends heavily on an assessment of factual consequences, namely on whether tangible negative consequences for the efforts of the debtor state to remedy or avert the critical situation are to be feared if the plea of necessity were not to be accounted for before the level of execution (see the affirming view by Kleinlein, *Archiv des Völkerrechts* 2006, pp. 405 (413); Bothe/Hafner, *Die völkerrechtliche Begründung staatlicher Leistungsverweigerungsrechte aus dem Gesichtspunkt des Notstands, Rechtsgutachten*, January 2004, pp. 45-46.; 94

Pfeiffer, loc. cit., pp. 165-166; a different view is held by the Frankfurt am Main Regional Court, *Juristenzeitung* 2003, pp. 1010 (1011-1012); Grothe, *Urteilsanmerkung*, *WuB I H 4 Währungs- und Devisenrecht*; over and above this, there is a need to clarify the question of the removal of interest claims – where appropriate to be taken into account in the proceedings – for the period of necessity, see from the point of view of compensation the ICSID decision on liability *LG&E Energy Corp. vs. Argentine Republic*, of 3 October 2006, no. ARB/02/1, marginal nos. 261, 264 and 267e, www).

95 The ruling of the Senate, by contrast, means that the plea of state necessity under international law, since it is not to be applicable in private-law disputes before national courts, can play a role neither in judgment nor in enforcement proceedings. Accordingly, private creditors – including those who knowingly purchased government bonds with unfavourable risk assessments and correspondingly favourable interest prospects as a speculative investment (in demonstration of this see Frankfurt am Main Higher Regional Court, *Zeitschrift für Versicherungsrecht – VersR* 2005, pp. 797-798; Koblenz Higher Regional Court, *NJW-Rechtsprechungs-Report – NJW-RR* 2004, pp. 1689-1690; Münster Regional Court, *Zeitschrift für Bank- und Kapitalmarktrecht – BKR* 2003, pp. 762 et seq. and pp. 764 et seq.) – can from now on, even in the face of catastrophic domestic breakdowns in the debtor state, not only have their demands recognised in Germany, but can also enforce those demands by way of execution against assets of the debtor state which are intended for sovereign purposes if the corresponding waiver of immunity is present in the loan terms. The US legal situation is much closer to international law.

Lübbe-Wolff

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**ECLI** ECLI:DE:BVerfG:2007:ms20070508.2bvm000103