

# **The Excuse of State Necessity And Its Implications on the Cyprus Conflict**

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## **Introduction**

Despite the de facto disappearance of the bi-communal legal government of the 1960 Republic of Cyprus (ROC) following the events of December 1963, the international community believes that this legal entity and its government continue to exist. This approach has been based on two main documents: 1) decision of the Greek-Cypriot Supreme Court titled 'The Attorney General of the Republic v. Mustafa Ibrahim and Others' in 1964 (the Ibrahim Case); 2) UN Security Council Resolution of 4 March 1964. Notwithstanding the 'withdrawal' or 'ejection' of Turkish-Cypriot citizens of the ROC from public service, the Greek-Cypriot court stated that the main concern must be the continuity of the state itself and created an opportunity for the erosion of the bi-communal structure guaranteed by the 1960 Constitution and international agreements, by means of a reference to the UN Security Council Resolution and the concept of 'state necessity'. Thus, the political will of the international community, which favoured the approval of the Greek-Cypriot government as the single legitimate government in the Island, was justified by a 'legal' argument.

The doctrine of state necessity was referred to initially in 1964 and thereafter it was used in Nigeria, Rhodesia, Pakistan and elsewhere. Necessity was also applied during the Gabcíkovo case between Hungary and Slovakia before the International Court of Justice (ICJ) in 1997, but this time as a basis precluding state responsibility. The Greek-Cypriot Supreme Court has recently discussed this doctrine as well. A Turkish-Cypriot living in south Cyprus has argued that the Greek-Cypriot government had failed to protect the electoral rights of members of

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both Communities (Turkish-Cypriot and Greek-Cypriot Communities). This issue has been brought before the European Court of Human Rights (ECHR) and found admissible by the said Court. This article analyses the conditions for the existence of the legitimate government of the 1960 ROC with regards to the doctrine of necessity under the rules of domestic and international law.

## 1. Distinct Characteristics of the 1960 Republic of Cyprus <sup>1</sup>

Documents regarding the establishment of the ROC were initialled at a summit meeting between Greek and Turkish Premiers at Zurich on 11th February 1959. The Zurich Agreement included the Draft Treaty of Guarantee, the Draft Basic Structure of the ROC and the Draft Treaty of Alliance. Cypriot representatives, Archbishop Makarios and Dr. Fazil Kucuk, were later invited to participate in the London Conference on 17th February 1959 with representatives from Greece, Turkey and the UK. On 19th February, all participants agreed to establish the Cypriot State and accepted documents and declarations called 'The Agreed Foundation for the Final Settlement of the Problem of Cyprus'.<sup>2</sup> These documents and declarations are referred to as the London Agreements. Following the Zurich-London Agreements, three different committees were established to complete the required legal process. On 16th August 1960, with the completion of the constitution and the following elections held in Cyprus, the Zurich-London Agreements entered into force, became legally binding and the ROC was established by the signatures of the relevant parties in Nicosia and order-in-council under the 'Cyprus Act of 1960'.<sup>3</sup>

The Basic Structure of the ROC contains 27 paragraphs and formulated checks and balances between the two Communities. The basic principles for legislative, executive and judicial organs of the ROC are set forth carefully. Paragraph 27 provides 'all the above points shall be considered to be basic articles of the Constitution of Cyprus'. According to Paragraph 21 a treaty of guarantee and a treaty of alliance shall be concluded and these two instruments shall have constitutional force. It is also stated that this last paragraph shall be inserted in the constitution as a basic article.<sup>4</sup>

By the Treaty of Alliance, Turkey, Greece and the ROC agreed to

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<sup>1</sup>For more details about distinct feature of the 1960 Republic of Cyprus see K. Özersay, 'Legal Foundations: The Validity and Scope of the 1959-1960 Cyprus Treaties', in Resat Arim (ed.), *Cyprus and International Law* (2002), 11-60.

<sup>2</sup>Conference on Cyprus, Documents signed and initialed at Lancaster House on February 19, 1959, Cmnd. 679, London, Her Majesty's Stationery Office, 1.

<sup>3</sup>M. L. Evriviades, 'The Legal Dimension of the Cyprus Conflict', (1975) 10 *Texas International Law Journal*, 227, at 237-238. Treaties signed in Nicosia contain the completed versions of the Treaty of Alliance, the Treaty of Guarantee and the Treaty of Establishment. We would use '1959-1960 Cyprus Treaties' to indicate all these documents, instead of using 'Zurich-London Agreements' or 'Nicosia Agreements'. For full text of the Nicosia Agreements see 1960 *Nicosia Agreements*, 387 UNTS, 3-287.

<sup>4</sup>See note 2, *supra*.

co-operate for their common defence and to resist any attack or aggression directed against the independence or the territorial integrity of the ROC (Articles I and II). A tripartite military headquarters was established comprising 950 Greek troops and 650 Turkish troops to achieve the aims of this Treaty.<sup>5</sup>

By the Treaty of Guarantee 'independence, territorial integrity and security of the Republic of Cyprus, as established and regulated by the Basic Articles of its Constitution' are defined as the common interest of the ROC and the three guarantor powers.<sup>6</sup> The ROC is obliged to ensure not only the maintenance of its independence, territorial integrity and security, but also respect for its Constitution. This structure and 'the state of affairs established by the Basic Articles of its Constitution' are recognised and guaranteed by Greece, Turkey and the UK. They also undertake to prohibit activities aimed at the union of Cyprus with any other state or partition of the Island. This obligation is also true for the ROC, since it 'undertakes not to participate in whole or in part, in any political or economic union with any state whatsoever'. The ROC, Greece and Turkey guarantee the rights of the UK concerning the two sovereign British Bases retained in accordance with the Treaty of Establishment.<sup>7</sup> Article IV of the Treaty of Guarantee provides:

In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the UK undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions.

In so far as common or concerted action may not prove possible, each of the three guaranteeing Powers reserves the right to take action with the sole aim of re-establishing the state of affairs created by the present Treaty.

Under the articles of the Treaty of Establishment, the UK retained sovereignty over two military bases situated in Akrotiri and Dhekelia. And with the exception of these areas, the territory of the ROC is defined as comprising 'the Island of Cyprus, together with the Islands lying off its coasts...'<sup>8</sup> Possible problems concerning the succession of the ROC to the responsibilities, rights and benefits of the UK on the Island, are also regulated by the Treaty of Establishment.<sup>9</sup> Rights of the UK and the status of its forces in the Island are contained in a detailed form within the Annexes of this Treaty and it is provided in Article II that these Annexes shall have force as integral parts of the main document.

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<sup>5</sup>Arts. III and IV; Additional Protocol, No 1, Para. 1.

<sup>6</sup> Preamble, Para. 1.

<sup>7</sup>Arts. I/1; II/1; II/2; I/2; III.

<sup>8</sup>Art. 1.

<sup>9</sup>Arts. 6-10.

The 1960 Cyprus Constitution was a unique internationalised legal document.<sup>10</sup> The 1959-1960 Cyprus Treaties set forth the Basic Articles of the Constitution. Article 182 provides that the basic articles of this Constitution, which were incorporated from the Zurich Agreement 'cannot, in any way, be amended, whether by way of variation, addition or repeal' (Article 182 (1)).<sup>11</sup> These articles are attached to the Constitution as an Annex. As a result of these references in the Constitution, provisions of an international treaty become part of the national legal system and the content of this treaty is guaranteed by the Constitution. Article 185 creates a further guarantee for the constitutive structure of the ROC by providing 'the Republic is one and indivisible' and the 'integral or partial union of Cyprus with any other state or the separatist independence is excluded' (Article 185 (1 & 2)). In addition to this internal guarantee, there is another guarantee at international level for these basic articles. The Basic Articles, including Article 182, which set forth the unamendable character, are recognised and guaranteed by the UK, Greece and Turkey through the Treaty of Guarantee (Article II (1)). As a party to the Treaty of Guarantee, the ROC itself undertakes to respect its constitutional order established on the basis of Basic Articles. The source of this international obligation is referred in the Constitution. According to Article 181 of the Constitution, the Treaty of Guarantee has a constitutional force and is attached to the Constitution as an Annex. Another reference to the Cyprus Treaties within the Constitution is embodied in Article 149. It is provided by this Article that in case of ambiguity the Supreme Constitutional Court is under obligation to interpret the Constitution by taking into consideration the Zurich-London Agreements (Article 149 (b)).<sup>12</sup>

The unamendable Basic Articles of the Cypriot Constitution reflect the idea that the will of the state can occur only if there exists a combination of the wills of two separate Communities. In many areas within the jurisdiction of the ROC, decisions of the state organs should be based upon the consent of both Communities. This legal structure brings about the conclusion that the international legal personality of the ROC necessitates the existence of a representative government for both Greek and Turkish-Cypriot Communities. This formulation prohibits the imposition of one of these wills to be treated as the will of the ROC.

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<sup>10</sup>This idea has been supported by Lauterpacht. See, E. Lauterpacht, 'Turkish Republic of Northern Cyprus-The Status of Two Communities in Cyprus', (1990) Attachment to the Letter Dated 7 August 1990 from the Permanent Representative of Turkey to the United Nations Addressed to the Secretary-General, A/44/968, S/21463, English, at 6 and 7. The ROC was also defined as an 'international state' by Tamkoc. See M. Tamkoç, Turkish-Cypriot State, The Embodiment of the Right of Self-determination (1988), 63 and 68.

<sup>11</sup>But it is provided by the Paragraphs 2 and 3 of this Article that articles other than the basic ones can be amended subject to a special process.

<sup>12</sup>This rule applies to the determination of any conflict between two texts of the Constitution as well (Art. 149/a).

Despite the description that the ROC is ‘an independent and sovereign republic with a presidential regime...’ set forth in Article 1 of the Constitution, it is not possible to find any evidence supporting the idea that this sovereignty is derived from the ‘Cypriot People’. This instrument however does not even include this term. The ROC is based on an understanding of bi-communality and on the division of the population into two communities, namely Greek-Cypriots and Turkish-Cypriots. It further recognises the existence of some religious groups.<sup>13</sup> Article 2 provides that each religious group is under a constitutional obligation to choose adherence to one or the other of the two communities (Paragraph 3).

The bi-communal character of the ROC was integrated in the structure and functioning of the legislative, executive and judicial organs. The judicial structure has crucial importance for our study. There was a Supreme Constitutional Court composed of one Greek, one Turk and a neutral president who may not be a Cypriot, British, Greek or Turkish citizen (Articles. 133 (1) and 133 (3)). The High Court of Justice, composed of two Greeks, one Turk and one neutral member (having two votes) was the highest appellate court of the ROC. It was accepted by Article 155 that the High Court would have the jurisdiction to hear and determine all appeals from any court, other than the Supreme Constitutional Court. In cases where the plaintiff and the defendant belonged to the same community, the lower court exercising civil jurisdiction would be composed only of a judge or judges belonging to that community (Article 159/1).<sup>14</sup> But where the parties belonged to different communities, the court would be composed of a judge or judges belonging to both communities, who would be determined by the High Court (Article 159 (3&4)).

## **2. Doctrine of State Necessity in Domestic Law**

It is obvious that national courts refer to necessity, and, some decisions are taken by relying upon this concept at the present-day. Initially the required criteria and the definition of the doctrine must be clarified. Necessity is a common law providing a justification for illegal government conduct in cases of public emergency. It bridges the significant gap between the actual powers of government and the government’s actual response to an emergency.<sup>15</sup> Possible illegal acts of government would no doubt destroy rights and obligations of various individuals and organs, and, at the same time could secure society in general and the existence of state in particular. So reliance upon state necessity brings about a necessity of

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<sup>13</sup> Such as Latins, Maronites and Armenians.

<sup>14</sup> This rule also applies to criminal cases where the accused and the person injured belonged to the same community (Article 159 (2))

<sup>15</sup> M. M. Stavsky, ‘The Doctrine of State Necessity in Pakistan’, (1983) 16 *Cornell Int’l L.J.* 341, at 342

choice between competing values (individual rights and values versus public rights and values of the state itself) and it includes 'a choice of the lesser evil' as described by Williams.<sup>16</sup> In fact there is no agreement among writers on the existence and meaning of the doctrine. For some writers, because of the distinct character of law, judges have always exercised their vested powers of developing the law, and, concept 'law' includes the doctrine of necessity. According to them, defence of necessity is an implied exception to various rules of law. However some other writers fear the misuse of defence necessity, as in the case of *Gregson v. Gilbert* (1783), where 150 slaves were pushed overboard because water was running short. According to them, 'necessity is the plea for every infringement of human freedom and it is the argument of tyrants.'<sup>17</sup> Again recently in Pakistan the learned council Wasim Sajjad argued that 'the law of necessity was a dead doctrine'.<sup>18</sup>

### 2.1. Some Examples from Experiences of Different States

The likely abuse of the doctrine has not impeded national courts in relying upon it and to establish jurisprudence confirming the doctrine. The doctrine has been referred to, in particular, in the US court decisions and gradually has become an established legal principle subject to the fulfilment of certain criteria. Nevertheless, since the 1950's, the national courts of several newly independent states have abused the doctrine by ignoring the implementation of the established criteria, by a mere reference to previous court decisions in the West. This misinterpretation departing from the doctrine was seen in Cyprus, Nigeria, Rhodesia, Pakistan and elsewhere.

Following the two military coups in Nigeria in 1966, the military government suspended certain provisions of the Constitution and argued that it had the power to issue decrees on any matter whatsoever. On different occasions, the Supreme Court of Nigeria was faced with the question of the character of the military regime.<sup>19</sup> The Court applied the defence of necessity to retain its constitutional power of judicial review in *Lakanmi v. Attorney-General* (1970) and intended to legalise the existence of military rule by a reference to this concept. The court held that, necessity in Nigeria dictated such a partial suspension of the Constitution and argued that extra-constitutional acts of a military regime could be validated on the ground of necessity. It validated the new regime while basing its decision on the constitution. This attempt could not be prevented from issuing a

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<sup>16</sup> G. Williams, 'The Defence of Necessity', (1953) *Current Legal Problems* 216, at 224.

<sup>17</sup> *Ibid.*, at 224 and 225.

<sup>18</sup> Text of Supreme Court Judgment on Review Petitions, (7 February 2001) Supreme Court of Pakistan, <http://www.law-firm.org.pk/Military-Review.htm>, Para. 4.

<sup>19</sup> T. Mahmud, 'Jurisprudence of Successful Treason: Coup D'etat & Common Law', (1994) 27 *Cornell Int'l L.J.* 49, at 69-70.

degree annulling the court's said decision. According to Stavsky, the Lakanmi decision shows the ineffectiveness of attempting to control an illegal regime by legitimising it.<sup>20</sup>

The General Division of the High Court of Southern Rhodesia used the same approach in 1968 without expressly referring to the phrase 'state necessity'. A new constitution was granted to the colony of Southern Rhodesia in 1961 by Her Majesty the Queen and in 1965 a coup, led by Ian Smith took place. Prime Minister Smith declared Southern Rhodesia a sovereign independent state and intended to enact a new constitution by disregarding majority rule, which was the constitutional guarantee for black citizens. Following these events, the Governor of Southern Rhodesia announced that Ian Smith no longer held office. All legislative powers were transferred back to the United Kingdom, even though Rhodesia remained under the effective control of Ian Smith.<sup>21</sup>

In 1968, the Rhodesian High Court had the opportunity to analyse the legality of the declaration of independence and 1965 Constitution in the case *Madzimbamuto v. Lardner-Burke*. The unconstitutional actions of the Smith regime were supported by one judge on the basis of the doctrine of state necessity, and, by another on the basis of the doctrine of public policy.<sup>22</sup> The Court ruled that the revolutionary government was the lawful government; but it also announced that as opposed to the 1965 constitution, the 1961 Constitution was still valid and constituted the grundnorm of Rhodesia. The Court relied upon Kelsen's revolutionary theory, which was very similar to the doctrine of state necessity, in order to legalise the acts of the extra-constitutional regime. According to the court, however, the Smith government had not yet become 'effective' as required in Kelsen's approach. It also determined that if an illegal regime is in de facto control of the government, national courts are under an obligation to confirm some of its actions.<sup>23</sup>

Reference to the defence of necessity departing from the real meaning and criteria was frequently made in Pakistan and an expansive application of the doctrine created a legal basis for regime changes. The Federal High Court of Pakistan relied upon the theories of Kelsen and Grotius instead of a clear necessity in the cases *State v. Dosso* and *Asma Jilani v. Government of the Punjab*. In the *Governor-General's Case* the Court obviously based its arguments on the doctrine of necessity in order to validate the regime and its actions.<sup>24</sup> But the most important case was the *Bhutto v. Chief of Army Staff*. Following the 1977

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<sup>20</sup> See Stavsky, *supra* note 14, at 359-360.

<sup>21</sup> R. S. Welsh, 'The Constitutional Case in Southern Rhodesia', (1967) 83 *The Law Quarterly Review* 64, at 64-65.

<sup>22</sup> See Mahmud, *supra* note 18, at 61.

<sup>23</sup> See Stavsky, *supra* note 14, at 360-363.

<sup>24</sup> *Ibid.*, at 364.

elections, widespread civil violence occurred in Pakistan. A proclamation of a state of emergency by Bhutto was ineffective and these events were the main reason for General Zia's coup in July 1977. Bhutto and his cabinet members were arrested and Parliament was dissolved by the military regime. General Zia was appointed as the chief martial law administrator. According to the military regime, the Constitution had not been abrogated, but operation of certain parts of it had been suspended. In addition to other changes, Zia suspended the power of the High Court for judicial review.

Notwithstanding the purported suspension, the High Court examined the legitimacy of the new government in the Case *Bhutto v. Chief of Army Staff* in 1977, when the detention of the prime minister under martial law was challenged. The Court decided that the new regime was lawful. It also concluded that the coup d'état had been dictated by the highest consideration of state necessity and welfare of the people. According to the Court, the constitution was still in force but deviations from it were justified under the doctrine of necessity except the purported suspension of judicial review by the new regime.<sup>25</sup> This constitutional deviation (or partial suspension) period lasted over eight years and martial law was terminated in 1985. Not surprisingly, in 1981 the military regime promulgated a provisional constitutional order, whereby the authority of judicial review of the Supreme Court and High Court was abolished.<sup>26</sup>

In addition to the above-mentioned deviations, the Greek-Cypriot court also erroneously utilised the doctrine of necessity. In 1964, in the *Ibrahim Case*, the doctrine of necessity was completely and arbitrarily reformulated. The *Ibrahim Case* will be examined separately below and its international law dimension which distinguishes it from the cases in Nigeria, Rhodesia and Pakistan will be indicated.

## **2.2. Principles and Criteria of the Doctrine Derived From Experiences of Different States**

What is the common factor in the cases mentioned above? One can say that all these events were incompatible with the constitutions in force and intended to legalise regime changes (whether civil or military) by a reference to the doctrine. At this stage, conditions for its application, the proper application of its criteria, the main principles and exceptions must be clarified.

In common law systems, national courts invoke various theoretical

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<sup>25</sup> *Ibid.*, at 377-379.

<sup>26</sup> See Mahmud, *supra* note 18, at 81.

approaches in order to examine the legality of abnormal situations emanating from an illegal usurpation of power by an organ of state (mainly the executive organ). If this amounts to a change of government because of a threat or use of force against the incumbent regime, this can be called a coup d'état. Nevertheless, we must distinguish a coup d'état from a revolution. A revolution transforms the existing structure of a society and its sociopolitical institutions. On the contrary, a coup d'état 'is a limited political manoeuvre aimed at changing the existing rulers'.<sup>27</sup> In most of the common law countries, the source of validity and legitimacy of the power of an extra-constitutional regime was based on Hans Kelsen's theory of revolutionary legality by national courts. Some courts emphasised Kelsen's efficacy argument, but others referred to the 'doctrine of state necessity' 'implied mandate' and/or 'public policy'. There is no uniformity among these court decisions.<sup>28</sup>

According to Kelsen, an efficacious revolution is a lawful revolution. Change of a regime is considered efficacious if that society acts in conformity with the rules of the new revolutionary order. The principle of efficacy is known as a norm of international law which invites other states not to recognise the new government if it does not have effective control of law and order of that country in case of an extra-constitutional change in government. Kelsen reformulated this norm for coups d'état and revolutions.<sup>29</sup> In practice, the efficacy theory was referred to in various ways by national courts. In 1958, in the *State v. Dosso* case the Supreme Court of Pakistan described an efficacious revolution as a 'law-creating legitimate event'. In 1966, the High Court of Uganda cited the *Dosso* Case as a precedent and tried to legitimize the new regime in Uganda by treating efficacy as a lawful criterion.<sup>30</sup> The Court referred to 'a large number of affidavits, sworn to by a large number of officials...' as an element supporting popular obedience.<sup>31</sup> Nevertheless, in 1972, in the *Jilani* Case the Supreme Court of Pakistan examined Kelsen's efficacy theory and overruled the *Dosso* decision on the ground that the said theory was applied incorrectly. In the view of the judges, an extra-constitutional regime is valid not because of the successful assumption of power, but because of 'habitual obedience by the citizens'. The Court also pointed out the international law origin of the efficacy principle and considered it irrelevant for domestic courts.<sup>32</sup>

The Greek-Cypriot Court followed this approach of extending the efficacy

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<sup>27</sup>A. Khan, 'A Legal Theory of Revolutions', (1987) 5 B.U.Int'l L.J. 2, at 4.

<sup>28</sup>See Mahmud, *supra* note 18, at 51.

<sup>29</sup>See Khan, *supra* note 26, at 12.

<sup>30</sup>*Ibid.*, at 12-13.

<sup>31</sup>See Mahmud, *supra* note 18, at 59.

<sup>32</sup>*Ibid.*, at 73-74.

concept in 1975. In the *Liasi v. Attorney General* Case the Court invoked two basic tests which provide legality for a coup d`etat. The first one was popular acceptance of the change, even if it is a tacit one. And the second one was recognition of the acts of extra-constitutional regime by the succeeding lawful government. According to the Court, the Sampson regime failed to meet these criteria. First of all, Greek-Cypriot society did not respect and obey the rules of the new regime, and moreover a special law was enacted by the Greek-Cypriot parliament refuting any legal basis for the coup d`etat government.<sup>33</sup>

In 1981, in the *Valbhaji Case (Seychelles)* the Attorney General of the state relied upon Kelsen and the *Dosso Case* and tried to produce legality for the new regime. But the president of the Court raised the important question in the decision: 'How is [consent] to be ascertained?' According to him, there is a consensus that the criterion is related with a strong and irrevocable control of the new regime, regardless of words preferred, such as 'success', 'submission', 'consent', 'acceptance', 'efficacy' or 'obedience'.<sup>34</sup> In 1988, in the *Case of Mokotso* the High Court of Lesotho described efficient and lawful government as having an effective administration 'in that the people, by and large, have acquiesced in and are behaving in conformity with its mandates'.<sup>35</sup> Again in 1988, the High Court of Transkei emphasised 'the existence of civil disobedience and rejection by the people', for the determination of efficacy.<sup>36</sup> Recently, the Supreme Court of Pakistan relied on the 'implied consent of the governed' by referring to the absence of protests against the army take-over and/or its continuance.<sup>37</sup>

The usual application of the doctrine of necessity includes emergency situations such as wars, earthquakes, floods, epidemics or the collapse of civil government. Emergency is something that does not permit a single definition.<sup>38</sup> When the doctrine is relied upon, violation of laws or the constitution occurs because of an act of the legal organs of the state concerned, and, a court established in accordance with the constitution must carry out an examination of the case. Normally, in the case of emergencies, an organ of a state or branch of a government, set up under the provisions of the constitution, usurps the power of the other. Generally the executive usurps the authority of the legislative.<sup>39</sup> Even in the above-mentioned wrongful applications of the doctrine in Rhodesia, Nigeria and Pakistan, national courts, which have reviewed cases, were established under the constitution or laws, and hold the title of 'legitimate state authority'.

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<sup>33</sup>Ibid., at 77.

<sup>34</sup>Ibid., at 83.

<sup>35</sup>Ibid., at 91-92.

<sup>36</sup>Ibid., at 96.

<sup>37</sup><http://www.lawfirm.org.pk/Military-Review.htm>, at 12.

<sup>38</sup>See Stavsky, *supra* note 14, at 343.

<sup>39</sup>Ibid., at 345.

The existence of a 'lawful regime' or 'lawful state organ criterion' for the application of the doctrine of state necessity is supported by court decisions. For example in Pakistan, before the Dosso Case, this doctrine contributed to the positions of common law courts when they validated 'extra-constitutional acts of lawful regimes'. It was also confirmed in the Governor-General's Case that the doctrine of necessity was confined to acts 'taken by the existing lawful sovereign'.<sup>40</sup> Again in the Mokotso Case in Lesotho, the High Court of Lesotho examined the application of doctrine of state necessity and Kelsen. In view of the court, in order to avoid a legal vacuum and chaos and preserve the fabric of society, the necessity doctrine can be considered 'appropriate to the case of a national emergency during the administration of a lawful government.' The court emphasised that the doctrine was applied to 'the unconstitutional assumption of power by a constitutional authority' in order to maintain, not to destroy, the old legal order.<sup>41</sup>

As clearly mentioned by Tayyap Mahmud, only the lawful sovereign may invoke the doctrine of state necessity. He observes that,

Some cases rely upon the doctrine of state necessity to validate and legitimise coups d'état, but such reliance is doctrinally inappropriate - the doctrine cannot be used to validate a coup d'état. It was only by stretching the doctrine out of shape that it was turned into an instrument that validated usurpation - its use is best limited to extra-constitutional actions by a lawful government taken in response to emergencies and designed to protect rather than subvert the constitutional order.<sup>42</sup>

Formation of the principles of application and criteria of the doctrine started to evolve from the 18th century. According to Williams, several criteria were specified in the R.V.Stratton Case in 1779. As mentioned by Lord Mansfield during this Case, there has to be imminent and extreme necessity; there must be no other remedy to apply to for the redress and the appropriate authority must apply the necessity with a view of preserving society. Besides, the harm that tried to be avoided should be an imminent and physical kind and indirect social dangers do not fall within the doctrine. Again, as suggested by Bacon, necessity cannot be invoked where the emergency was caused by the fault of the demanding authority.<sup>43</sup> Some

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<sup>40</sup>See Mahmud, *supra* note 18, at 56-57. (emphasis added).

<sup>41</sup>*Ibid.*, at 91. (emphasis added).

<sup>42</sup>See Mahmud, *supra* note 18, at 116-117.

<sup>43</sup>See Williams, *supra* note 15, at 230-231 and 227.

judges have approved this important principle for the application of the doctrine as well. For example, in 1968 in the Madzimbamuto Case the Rhodesian High Court judge Beadle refused to apply the doctrine of necessity on the grounds that nobody may take advantage of a necessity of his own making.<sup>44</sup> Tayyap Mahmud defined these words as ‘the fundamental principle of the doctrine of necessity.’<sup>45</sup>

Again, as a general principle, application of the doctrine of necessity must be carried out in good faith. This was approved by the Supreme Court of Pakistan: ‘The concept of the law of necessity would arise only if an act which would otherwise be illegal becomes legal if it is done bona fide, in view of state necessity, with a view to preserving the state or society from destruction’.<sup>46</sup> It is obvious that in the above-mentioned erroneous applications of the necessity doctrine in Cyprus, Nigeria, Rhodesia and Pakistan, courts were aware of the criteria for reliance upon the doctrine. For instance, in the Ibrahim Case, Judge Vassiliades mentioned several criteria while explaining the doctrine. The prerequisite as laid down in the Ibrahim Case, which was also referred to in the Bhutto v. Chief of Army Staff are:<sup>47</sup>

1. An imperative and inevitable necessity or exceptional circumstances should exist;
2. There should be no other remedy to apply;
3. The measure taken must be proportionate to the necessity; and
4. It must be of a temporary character limited to the duration of the exceptional circumstances.

Nevertheless the High Court of Pakistan applied only the first criterion and determined that it had been met by the government. As will be seen below, in the same way as the High Court of Pakistan, the Greek-Cypriot High Court refrained from applying the criteria although it was aware of the obligatory character of such requirements.

Some of these principles were also endorsed by authors. The need for exceptional circumstances and the temporary character of the doctrine were emphasised by Victor Lal. He also indicates the proportionality criterion: ‘the doctrine of necessity requires that the old constitutional order be respected as far as

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<sup>44</sup>Madzimbamuto v. Lardner-Burke (1968) 2 South African Law Reports 284, at 330.

<sup>45</sup>See Mahmud, supra note 18, at 118.

<sup>46</sup>Text of Supreme Court Judgment on Review Petitions, (7 February 2001) Supreme Court of Pakistan, <http://www.lawfirm.org.pk/Military-Review.htm>, Para. 5.

<sup>47</sup>See Stavsky, supra note 18, at 383.

possible, with only minimum deviations from it necessary for the exigencies of the situation being permitted'.<sup>48</sup>

### **3. Doctrine of Necessity under the Rules of International Law**

#### **3.1. Doctrine, State-practice and Jurisprudence**

The doctrine of necessity is considered as grounds for precluding the responsibility of states and international organisations under the rules of international law. The existence of such an emergency and necessity makes it impossible for these subjects of law to observe their obligations. Defence necessity emanates particularly from the customary rules of international law. Thus logic and conditions of the doctrine can be clarified by determining *consue tudo* and *opinio juris* relating to the subject. Secondary sources of international law must also be utilised for this purpose. This kind of analysis has been made by the International Law Commission (ILC).

The ILC inserted a provision on the 'state of necessity' within the Draft Articles on State Responsibility in 1980. The Commission explains meaning and substance of the doctrine in subsequent commentary to the draft article 33 by taking into consideration the judicial decisions, doctrine (teachings of the most highly qualified publicists) and state practice.<sup>49</sup> Significance of this ILC report comes from a reference made to it by the International Court of Justice in 1997. The ICJ pointed out the customary rule character of the doctrine of necessity during the case *Gabcikovo* between Slovakia and Hungary by referring to the ILC's draft article 33 and its commentary. The ICJ was of the opinion that, The state of necessity is a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation ... such ground for precluding wrongfulness can only be accepted on an exceptional basis.<sup>50</sup>

The idea of necessity was obviously accepted by classical writers of international law, such as Ayala, Gentili, Grotius, Pufendorf, Wolff and de Vattel, in a very limited manner. At the same time there appeared an opposition group of writers to the pretext of necessity, but arguments made by the opponents did not reach the level of rejection of the idea of necessity as an exceptional justification.<sup>51</sup> The Commission concludes that the opponents were ultimately prepared to grant the

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<sup>48</sup>V. Lal, 'Fiji: The Relevance of 'Doctrine of State Necessity'', Asia-Pacific Network, 3 June 2000. See <http://www.asiapac.org.fj/cafepacific/resources/aspac/fijilal.html>

<sup>49</sup>1980 YILC, Vol. 34 II (Part Two), at 34-52.

<sup>50</sup>Case Concerning the *Gabcikovo-Nagymaros* Project (Hungary v. Slovakia), Judgment of 25 September 1997, Para. 51

<sup>51</sup>See *supra* note 48, at 47, Para. 29.

necessity 'a limited function in certain specific areas of international law less sensitive than those in which the deplored abuses usually occur'.<sup>52</sup>

The position in state practice and jurisprudence is similar to the doctrine. Doctrine of necessity has been utilised several times by states and international courts in the past, regardless of the term preferred.<sup>53</sup> Within this context, there occurred an example connected with the Ottoman Empire. For the justification of its delay in paying its debt to the Russian Government, the Ottoman Government invoked its extremely difficult financial situation as a force majeure, but the ILC is of the opinion that it was much more like a defence of necessity. The Permanent Court of Arbitration stated on 11 November 1912 that in this particular case, the conditions of application were not satisfied. Nevertheless the Court recognised the existence of an excuse of necessity in international law.<sup>54</sup>

Another example supporting the existence of necessity was the Case of *Société Commerciale de Belgique* between Greece and Belgium in 1938. In this case there had been two arbitral awards requiring the Greek Government to pay a sum of money to the Belgian company. The Greek Government did not contest the existence of the obligations, but argued that its failure to comply with the arbitral awards was because of the country's serious budgetary and monetary situation. Belgium brought the issue before the Permanent Court of International Justice and asked a formal declaration instituting Greek violation. In its defence, the Greek Government argued that it had been under an 'imperative necessity' and continued to maintain that,

A state has a duty to do so if public order and social tranquility, which it is responsible for protecting, might be disturbed as a result of the carrying out of the award, or if the normal functioning of public services might thereby be jeopardised or seriously hindered.<sup>55</sup>

The Belgian Government too stated that there was no doubt so far as the principle of necessity was concerned. In the end, the Court implicitly accepted the basic principle on which the two parties were in agreement; but decided that it did not possess a mandate to make a declaration as requested by the Belgian Government.<sup>56</sup>

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<sup>52</sup> *Ibid.*, at 48, Para. 30.

<sup>53</sup> Like force majeure or self-defence.

<sup>54</sup> See *supra* note 48, at 36, Para. 7.

<sup>55</sup> *Ibid.*, at 37-38, Paras. 10-12.

<sup>56</sup> *Ibid.*, at 37-38, Paras. 10-12.

Constructive state practice enhancing the occurrence of the doctrine has been observed since the 19th Century. For example in the Fur Seal Fisheries off the Russian Coast Case, the Russian Government, in order to protect the seals, issued a decree prohibiting sealing in an area that was outside its jurisdiction and part of the high seas. Russian defence in 1893, which was submitted to British officials revealed numerous conditions that must be fulfilled by a state invoking the grounds of necessity:

The absolutely exceptional nature of the alleged situation, the imminent character of the danger threatening a major interest of the state, the impossibility of averting such a danger by other means, and the necessarily temporary nature of this 'justification.

Another example was the Torrey Canyon incident which took place in 1967. Throughout this case a further condition was recognised by the states concerned: a measure based on necessity can be taken only after all other means employed have failed.<sup>57</sup>

In the Anglo-Portuguese dispute in 1832, the meaning and conditions of its application were also approved by state practice. The Portuguese Government argued that a kind of emergency justified its appropriation of property owned by British subjects, resident in Portugal. Throughout the dispute, British officials stated that the extent of necessity must depend upon the circumstances of the particular case, but it has to be 'imminent' and 'urgent'. British and Portuguese officials were agreed on the validity of the plea of necessity. The Oscar Chinn Case in 1934, in particular the individual opinion of Judge Anzilotti and attitudes of the parties (Italy and France) during the Wimbledon Case reflect other additional proofs supporting the existence of the plea of necessity.<sup>58</sup>

With the support of doctrine, judicial decisions and state practice on the existence of the plea of necessity, the ILC has been satisfied and it has formulated the conditions of its application and exceptions. In the Draft Articles on State Responsibility, Article 33 provides that;

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

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<sup>57</sup> Ibid., at 39, Paras. 14 and 15.

<sup>58</sup> Ibid., at 41-42, Paras. 19 and 21.

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

(a) if the international obligation with which the act of the State is not inconformity arises out of a peremptory norm of general international law; or

(b) if the international obligation with which the act of the State is not inconformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or

(c) if the state in question has contributed to the occurrence of the state of necessity.

### **3.2. A Case study: Case Concerning the Gabčíkovo-Nagymaros Project**

The Case of Gabčíkovo can be seen as an important contribution to the existence of the doctrine of necessity as a customary rule of international law and the conditions of its application. Summarised below are the events relating to the Case and proceedings of the ICJ with regard to necessity.

The Case of Gabčíkovo is related to a bi-lateral treaty concluded in 1977 between Hungary and Czechoslovakia. States Parties committed themselves to construct and operate a System of Locks as a 'joint investment'. Thus there would be a broad utilisation of the natural resources of the Bratislava-Budapest section of the Danube River for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the Contracting Parties. The joint investment was aimed at the production of hydroelectricity, the improvement of navigation of the Danube and the protection of certain areas against flooding.<sup>59</sup>

There would have been built two series of locks, one at Gabčíkovo (in Czechoslovakia) and the other at Nagymaros (in Hungary), to constitute 'a single and indivisible operational system of works' under Article 1, paragraph 1 of the

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<sup>59</sup> See supra note 49, Para. 15.

1977 Treaty.<sup>60</sup> Mostly because of the criticism caused by the Project in Hungary, the Hungarian Government decided on 13 May 1989 to suspend the works at Nagymaros. Later on these activities were postponed two more times. Accordingly on 27th October 1989 all works were completely suspended within this area.<sup>61</sup> Following futile negotiations between the Parties, the Hungarian Government terminated the Treaty of 1977 on 19th May 1992 by means of a Note Verbal transmitted to the Czechoslovak Government.<sup>62</sup> On 2nd July 1993, the Parties concluded a Special Agreement and brought the dispute before the ICJ. The main issue in front of the Court was the operation and purported termination of the 1977 Treaty. They requested the Court to decide, 'Whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the Treaty attributed responsibility to the Republic of Hungary'.<sup>63</sup> In order to justify its suspension or abandonment of certain works, the Hungarian Government relied mainly upon the 'state of ecological necessity'. In the view of the Hungarian authorities, the quality of water would have been seriously damaged and the fauna and flora of the area would have been destroyed. It was also argued by Hungary that changes to the quality of water would have impaired the health of its citizens.<sup>64</sup>

On two points, ICJ's Gabčíkovo decision, which was taken on 25th September 1997, has substantial importance for the doctrine of necessity. First of all, the Court expressly stated that the defence of necessity is 'a ground recognised by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation'. Thus the Court, as a secondary source of international law, ascertained the existence of a customary rule. Besides, the Court emphasised the exceptional character of necessity under the rules of international law.

Secondly, the Gabčíkovo decision contains weight with regard to the meaning and substance of the defence of necessity. Following the enumeration of conditions and criteria included in draft Article 33, the Court emphasised that 'those conditions reflect customary international law'.<sup>65</sup> Then it applied these conditions to the events of Gabčíkovo Decision and declined the 'state of ecological necessity' invoked by Hungary on the ground that Hungary had not exhausted all other means to respond to the peril, and, the raised 'grave' and 'imminent' peril had not been

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<sup>60</sup> Ibid., Para. 18.

<sup>61</sup> Ibid., Para. 22.

<sup>62</sup> Ibid., Para. 23.

<sup>63</sup> Ibid., Para. 2.

<sup>64</sup> Ibid., Para. 40.

<sup>65</sup> Ibid., Para. 52.

sufficiently established.<sup>66</sup> Consequently, the Court found Hungary responsible on the basis that it had violated the articles of the 1977 Treaty without invoking a ground precluding wrongfulness. We will come back to the details of these conditions throughout our evaluation on the Ibrahim Case.

#### **4. The Application of the Doctrine of Necessity in Cyprus**

##### **4.1. The Case of the Attorney-General of the Republic v. Mustafa Ibrahim and Others**

###### **4.1.1. Summary of Events and Arguments Asserted by the Parties**

The 1960 bi-communal ROC continued until December 1963. Legal government, consisting of Greek-Cypriots and Turkish-Cypriots, was destroyed as a result of bi-communal fighting. Main organs and institutions of the government were fully controlled by the Greek-Cypriot authorities.<sup>67</sup>

On 25th April 1964, four young Turkish-Cypriot men were caught and arrested in Kyrenia on the basis that they were carrying guns and bullets. They were released on bail by order of the District Courts of Kyrenia, Paphos and Limassol pending their trial by the Assize Court. Accordingly, Mr. Tornaritis, Attorney-General at that time, appealed against the order of these district courts by referring to particular articles of the Criminal Code and conditions prevailing in the ROC at that time.<sup>68</sup>

During the proceedings before the new Supreme Court of Cyprus, composed of three Greek-Cypriot judges only, respondents argued that this new Court had no jurisdiction to hear the appeal because the law establishing the Court was contrary to the 1960 Cyprus Constitution. It was also argued that the said Law was not duly promulgated and published in accordance with the provisions of the Constitution. The Court took its decision on the preliminary objections maintained by the respondents on 8th October 1964. In the view of the Court, even though the said Law and existence of the new Supreme Court of Cyprus were contrary to the written Constitution, as a consequence of the abnormal situation in the Island and state of necessity, they were justified. The Court allowed the appeal of the Attorney-General and set aside the order of the District Courts for bail.<sup>69</sup>

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<sup>66</sup> Ibid., Para. 57.

<sup>67</sup> See generally Z. M. Nedjatigil, *The Cyprus Question and the Turkish Position in International Law* (1990).

<sup>68</sup> *The Attorney-General of the Republic v. Mustafa Ibrahim and Others* (1964) Cyprus Law Reports 195, at 199 and 201.

<sup>69</sup> Ibid., at 196-198.

Mr. Berberoglu, acting on behalf of the respondents, maintained that the Administration of Justice (Miscellaneous Provisions) Law 33/1964 (Law 33/1964) purporting to establish the new Supreme Court was unconstitutional 'in matters going to its roots and is, therefore, a complete nullity'. He founded his arguments on Articles 133.1, 153.1 and 179.1. Article 133.1 provides for the establishment of 'a Supreme Constitutional Court of the Republic, composed of a Greek, a Turkish and a neutral judge'. According to Article 153.1, there would have been 'a High Court of Justice composed of two Greek judges, one Turkish judge and a neutral judge'. Besides, Article 179.1 stipulates, 'this Constitution shall be the supreme law of the Republic'. According to Mr. Berberoglu, Law 33/64 was contrary to Articles 133.1 and 153.1, and consequently it had to be considered as a violation of Article 179.1, since the said Law purported to merge the Supreme Constitutional Court and the High Court of Justice.<sup>70</sup> Additionally, according to the 1960 Constitution a specific court composed of judges belonging to both the Greek and the Turkish Communities would have heard civil cases where the plaintiff and the defendant belong to different Communities and criminal cases in which the accused and the injured party belong to different Communities.<sup>71</sup> Nevertheless, despite the fact that the case before the Court was concerned with four Turkish-Cypriots, the Attorney-General was a Greek-Cypriot and the Court was sitting as a Quorum of three Greek-Cypriot judges only.

In the view of the respondents side, Law 33/64 was not duly promulgated and published in accordance with the provisions of the Constitution, because Article 47 obliges the President (Greek-Cypriot) and the Vice-President (Turkish-Cypriot) conjointly to promulgate 'by publication in the official Gazette of the Republic of any law or decision passed by the House of Representatives [...]'. Again, Article 52 of the Constitution describes time limits and other limitations on the said obligation.<sup>72</sup> Nevertheless, procedural process of the said law did not fulfil these constitutional requirements. It was also emphasised that the said law had not been published in Turkish in the Official Gazette of the Republic, contrary to the provisions of Article 3.1 and 3.2 of the Constitution. Thus, according to the respondent's side, Law 33/64 had not come into force.<sup>73</sup>

Mr. Berberoglu also claimed that even if it is assumed that Law 33/64 is

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<sup>70</sup>Ibid., at 206-207.

<sup>71</sup>1960 Constitution of the ROC, Art. 155 (3).

<sup>72</sup>Art. 52 provides 'The President and the Vice-President of the Republic shall, within fifteen days of the transmission to their respective offices of any law or decision of the House of Representatives, promulgate by publication in the official Gazette of the Republic such law or decision unless in the meantime they exercise, separately or conjointly, as the case may be, their right of veto as in Art. 50 provided or their right of return as in Art. 51 provided or their right of reference to the Supreme Constitutional Court as in Articles 140 and 141 provided or in the case of the Budget their right of recourse to the Supreme Constitutional Court as in Art. 138 provided.'

<sup>73</sup>See supra note 66, at 196. It was stipulated by Art. 3.1 that the official languages of the Republic are Turkish and Greek. Furthermore, Art. 3.2 provides 'Legislative, executive and administrative acts and documents shall be drawn up in both official languages and shall, where under the express provisions of this Constitution promulgation is required, be promulgated by publication in the official Gazette of the Republic in both official languages.'

valid and there exists a new Supreme Court, this Court of Appeal has no power under the said Law to deal with the matter in hand. Because the said Law provides that the jurisdiction and powers of the High Court and Supreme Constitutional Court shall be exercised by the 'full court', consisting of five judges not by a quorum of three judges. It was argued that there was no provision even in the new Law authorising the full court to appoint three of its judges to hear such questions of constitutionality.<sup>74</sup>

The Court delivered its judgment on 10th November 1964, containing arguments and reasons in favour of the approaches submitted by the Greek-Cypriot Attorney-General. Three Greek-Cypriot judges, namely Vassiliades, Josephides and Triantafyllides wrote in detail their arguments and their explained reasons for the judgment. In a few words, at the centre of these clarifications, the doctrine of state necessity constituted a significant place. At the outset, the Court described the conditions which existed within the territory of the ROC at that time. The Court was of the opinion that there was an unlawful armed rebellion and insurrection against the established government by Turkish-Cypriots on an organised basis, which could be described as a 'state of revolt'; armed clashes between organised groups and state forces caused loss of life, damage to property and interruption of communication and affected life in general; insurgents controlled physically some of the areas of state territory; the UN Security Council authorised UN Peace-Keeping forces in the Island for the purpose of preventing armed clashes between combatants in order to maintain peace and prevent bloodshed.<sup>75</sup>

Following its overall explanation on the situation in Cyprus at that time, the Court pointed out that the 1960 Supreme Constitutional Court, as from August 1963 and the High Court of Justice, as from June, 1964, ceased to function. Judge Vassiliades claimed that the reasons for such a situation did not matter, because the fact remained and the system of administration of justice was in danger of collapse. According to Judge Josephides, Law 33, 1964 was enacted following the resignation of the President of the Supreme Constitutional Court, Prof. Forsthoff, and the outbreak of fighting in Cyprus. It was also indicated that the Supreme Constitutional Court had been unable to function and cases awaiting trial for a period of 14 months exceeded 400, at the time Law 33 was enacted.<sup>76</sup> It was also stated that the vacancies in the posts of Presidents of the High Court and the

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<sup>74</sup>Ibid., at 205.

<sup>75</sup>Ibid., at 246, 201-202 and 223.

<sup>76</sup>Ibid., at 207 and 249.

Supreme Constitutional Court were not filled, because the Vice-President had ceased to participate in the government.<sup>77</sup> The constitution stipulates that the presidents of these courts shall be appointed jointly by the President and the Vice-President of the ROC.<sup>78</sup> Therefore, effective preservation of rule of law, public order and administration of justice became impossible. Again, in the view of the Court, since 21st December 1963, 'neither the Turkish Vice-President nor the Turkish Ministers or Members of the House of Representatives have participated in the affairs of the government'. And, Turkish-Cypriot civil servants have not returned to their duties in the Ministries and offices.<sup>79</sup>

The Court also dealt with the argument of unconstitutionality originating from Articles 179.1, 153.1 and 133.1 of the Constitution, raised by the respondent side. Considerations and arguments of the Court on this issue can be summarised as follows:

1- It is true that according to Article 179, this Constitution shall be the supreme law of the ROC and no law or decision of the House of Representatives shall, in any way, be repugnant to, or inconsistent with, any of the provisions of the Constitution. Nevertheless, the problem of inconsistency of Law 33, 1964 must 'be resolved not in abstracto, on the basis only of generalities of principles, but within the concrete framework of Cyprus state realities.'<sup>80</sup> The Constitution has to be interpreted in the light of present-day values and the said Law, merging the previous courts, must be evaluated within this context.<sup>81</sup>

2- By taking into consideration all these events and particularly the collapse of administration of justice in the Island, Law 33/1964 has to be dealt with within the framework of the doctrine of state necessity. The Attorney-General Tornaritis has supported the validity of the said Law by accurately basing his arguments on the doctrine of necessity. He has referred to this principle for the preservation of fundamental services, especially the administration of justice, in the state. With this doctrine, it was aimed at protecting supreme public interest for the salvation of state and its people.<sup>82</sup>

3- Doctrine of necessity is a well-established principle in the decisions of domestic courts in the USA, the United Kingdom, Italy, France and Greece. One of the main sources of the Doctrine is the case of *Marbury v. Madison* decided in 1803

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<sup>77</sup> Ibid., at 224 and 250.

<sup>78</sup> Art. 133 (1) and (2) and Art. 153 (1) and (2).

<sup>79</sup> See supra note 66, at 225 and 249.

<sup>80</sup> Ibid., at 219.

<sup>81</sup> Ibid., at 233.

<sup>82</sup> Ibid., at 208 and 23-231.

by the US Supreme Court. As formulated by Chief Justice Marshall, written constitution reflects the exercise of the 'original right' of the people to choose their own happiness. But it is always possible, even after the entry into force of the constitution, to exercise this original right again and this is why plenty of amendments have been made to the American Constitution. The supreme law concept embodied in Article 179 of the Cypriot Constitution should be understood and interpreted within this framework.<sup>83</sup>

4- The respondent side raised the argument that in the absence of a proclamation of emergency under Article 183 of the Constitution, a state of emergency cannot exist in Cyprus and therefore defence of necessity cannot justify departure from the Constitution. Such an approach may be academically right, but the text of Article 183 obviously proves the inadequacy of it to meet the present emergency. The present emergency is one, which could not be met within the provisions of the constitution including Article 183. Under this Article, only the articles concerning rights and liberties could be suspended for the period of such emergency. And there is no provision regarding the administration of justice and the future of unworkable courts.<sup>84</sup>

5- Despite the continuing emergency and constitutional deadlock in Cyprus, there is no question about the existence of the ROC as a state and about its government. Because the existence of a state does not depend on the operation of its constitution; instead it is a matter determined by the rules of international law and particularly related with the principle of recognition by other states. As long as a state and its government continues to exist, 'the responsibility for the maintenance and restoration of law and order remains within the competence of that government. This responsibility was confirmed by Resolution 186 of the UN Security Council on 4th March 1964.'<sup>85</sup>

6- As a subsidiary argument the Court also evaluated the method of conclusion of the 1960 Constitution and the Zurich-London Agreements. According to the Court, this Constitution does not represent the expression of the sovereign will of the people of Cyprus, simply because it was not made by a constituent assembly and it is the result of the Zurich-London Agreements. Moreover, Article 182 provides that certain basic articles of the constitution 'cannot, in any way, be amended, whether by way of variation, addition or repeal.' Any other provisions may be amended 'by a law passed by a majority vote

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<sup>83</sup> Ibid., at 231 and 220-221.

<sup>84</sup> Ibid., at 215, 225 and 257.

<sup>85</sup> Ibid., at 226-227, 248 and 267.

comprising at least two-thirds of the total number of the Representatives belonging to the Greek Community and at least two-thirds of the total number of the Representatives belonging to the Turkish Community.’ Thus, even if all the Greek-Cypriot and Turkish-Cypriot representatives agree on the necessity for an amendment of one of the basic articles, it is impossible for them to do it which is inconsistent with the sovereignty of an independent and sovereign republic stipulated in Article 1 of the said Constitution.<sup>86</sup> Consequently, ‘the less a constitution represents in fact the exercise of the original right of the people the more the Legislature ought to be treated as free to meet necessities.’<sup>87</sup>

The Court also pointed out that Law 33/1964 was of a temporary nature and it was valid until normal conditions existed on the Island. It was also concluded that promulgation of the said Law in accordance with the Constitution was impossible, since the Vice-President has ceased to participate in the government and since his office in the Turkish quarter of Nicosia was inaccessible to Greek-Cypriot officials. Regarding the non-publication of the said Law in Turkish, the Court stated that it was impossible to translate and print the Law in Turkish at the Printing Office of the Republic because there were no Turkish-Cypriot public officers attending their offices.<sup>88</sup>

#### 4.1.2. Assessment of the Case

A brief analysis of the Ibrahim Case reveals that the Greek-Cypriot Supreme Court was aware of the conditions and criteria required by law for the application of the necessity principle, but refrained from inquiring their satisfaction for actual events before it. This statement can be clarified as follows:

Judge Josephides stated that ‘the following prerequisites must be satisfied before this doctrine may become applicable’ and indicated the occurrence of exceptional circumstances, proportionality and temporary character of the measures taken and non-existence of other remedies to apply.<sup>89</sup> Nevertheless, the Court questioned only the existence of the first criterion, but omitted the others. The Greek-Cypriot judges emphasised prevailing armed conflict and disorder in the Island, and concluded that there was imperative and exceptional circumstances for the satisfaction of the first criterion. Despite the decision of the Court not to apply the other conditions and criteria, details of the events between 1963 and 1964 prove that their fulfilment was lacking.

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<sup>86</sup>Ibid., at 233-234, 254 and 257.

<sup>87</sup>Ibid., at 234.

<sup>88</sup>Ibid., at 237 and 270.

<sup>89</sup>Ibid., at 265.

As mentioned earlier, in order to correctly apply the doctrine of necessity, exhaustion of all other means of response to the abnormal situation is needed. Regarding this criterion, it is obvious that the Ibrahim Case contains certain deficiencies. First of all, the Court ignored the power of the Council of Ministers to issue a proclamation of emergency, in case of war or other dangers threatening the life of the ROC. The Court made use of the extent of this power as an excuse for disregarding the attitudes of the Greek-Cypriot officials on the subject of emergency and argued that it cannot meet the emergency at that time. Article 183 confines the power of the Council of Ministers by specifying certain articles as articles which can be suspended. It is true that these articles were related with rights and liberties only, not with the unworkable courts. Nevertheless, regardless of the degree of its positive impact for the elimination of the abnormal situation on the Island, omission of this available remedy, namely Article 183 of the Constitution, should be considered as a deficiency. Secondly, as emphasised by Stavsky, under the rules of necessity the Court was under a duty to inquire, 'whether any reasonable efforts were made to persuade' the Vice-President to participate and to understand the nature of his recalcitrance. The Court did not consider this crucial point during the Ibrahim Case.<sup>90</sup> Moreover, the Court did not provide any reason for the failure to appoint non-Cypriot judges for the Supreme Constitutional Court and High Court of Justice, except the 'uncooperativeness' of the Turkish-Cypriot Vice-President.<sup>91</sup> Nevertheless, even if it is accepted that there was a lack of cooperation on the part of Mr. Fazil Küçük, it must have been accepted that he held a legal right to take such a position. Article 183 provides that the Vice-President has a right of veto against a decision of the Council of Ministers on the proclamation of emergency in Cyprus.

In connection with this criterion, another point, originating from the ICJ's *Gabcíkovo Case*, must be added. The ICJ considered the continuing negotiations as 'other means' that should be exhausted before the application of defence necessity.<sup>92</sup> However, the Greek-Cypriot Supreme Court ignored the omission of the Greek-Cypriot state officials to conduct negotiations with the Guarantor States for changes in the Constitution, which was an obvious international legal obligation for the ROC, simply because of the unamendable character of the Basic Articles and their legal position of being the 'object and purpose' of the Treaty of Guarantee.

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<sup>90</sup> See Stavsky, *supra* note 14, at 358, footnote 75.

<sup>91</sup> *Ibid.* Besides, Mr. Küçük never officially resigned his office. However, the Greek-Cypriot officials had stated that they no longer recognise Mr. Küçük in his capacity as Vice-President and articles of the Constitution relating to the Vice-President is inapplicable in practice. See UN Doc. S/6569 (29 July 1965), Para. 10.

<sup>92</sup> See *supra* note 49, Para. 57. 'What is more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it. The Court infers from this that the respect by Hungary, in 1989, of its obligations under the terms of the 1977 Treaty would not have resulted in a situation 'characterised so aptly by the maxim *summum jus summa injuria*'.

Articles 133.1 and 153.1 of the Constitution as regards the 1960 Supreme Constitutional Court and the High Court of Justice, are originally included in the Basic Articles and ‘cannot in any way be amended, whether by way of variation, addition or repeal’ under Article 182 of the Constitution. Moreover, Article 2 of the Treaty of Guarantee stipulates that the Guarantor States ‘recognise and guarantee the independence, territorial integrity and security of the Republic of Cyprus, and also the state of affairs established by the Basic Articles of its Constitution.’ Therefore, the maintenance of the Basic Articles and their unamendable character form legal undertakings on the part of the ROC in relation to the three Guarantor States. It might be appropriate to apply the criteria of state necessity developed in international law, for the acts of the Greek-Cypriot administration with regards to these Basic Articles. Nevertheless, Archbishop Makarios described the purpose of his declaration to the Guarantor States on the proposed 13 constitutional amendments as an ‘informing act’ and maintained that he had not expected a positive or negative reply from them. Additionally, he raised the excuse of ‘internal affairs’ and abstained from negotiations with the Turkish-Cypriot officials and Guarantor Powers.<sup>93</sup> Although the Greek-Cypriot administration and the High Court did not mention these international legal obligations of the ROC, it must be assumed that defence of necessity is implicitly referred to for legalising violations of the Basic Articles in the Constitution. As explained above, criteria for the application of state necessity in domestic law and international law are very similar. Acts of the Greek-Cypriot administration regarding the Basic Articles, which are contrary to these criteria, would create a violation of rules of international law by the ROC. As mentioned earlier, another important criterion regarding the application of the doctrine is related to the position of the authority invoking the doctrine. If the state or authority in question contributes to the occurrence of the state of necessity, the doctrine cannot be invoked as grounds for precluding wrongfulness or legalising an unlawful act. However, the Greek-Cypriot Supreme Court maintained that the causes of the abnormal situation in the Island did not matter and the crucial point was the danger facing the administration of justice and the state itself. The Court also refrained from inquiring about the reasons for the Turkish-Cypriot state officials’ withdrawal/ejection from their offices. Nevertheless, evaluation of the reports submitted by the UN Secretary-General to the Security Council brings us to the conclusion that Greek-Cypriot officials contributed to the occurrence or at least the continuity of the situation, by excluding the re-employment of Turkish-Cypriot civil servants.

In his report of September 1964, the Secretary-General stated that the

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<sup>93</sup>14 Keesing’s Contemporary Archives, (1963-1964) at 20113.

negotiations on the possible re-employment of Turkish-Cypriot civil servants in Nicosia and their subsequent financial compensation ended in deadlock, because it was considered by Greek-Cypriot officials 'to be a highly political matter linked closely with the final settlement of the Cyprus question'.<sup>94</sup>

Likewise, Greek-Cypriot officials rejected the opportunity, which included a possibility to put an end to the imperative emergency situation in the Island. This was related with the demands of Turkish-Cypriot MP's to return to the House of Representatives. As summarised by the UN Secretary-General, the Turkish-Cypriot members asked from the UNFICYP (UN Force in Cyprus) to enable them to receive information and arrange the necessary facilities to attend meetings of the House in safety. It was also emphasised by the Turkish-Cypriot members that in case of an official invitation and notification on matters to be considered at the House, they would be ready to attend the sessions. The special representative of the UN brought this demand to the President of the House at that time, namely to Mr. Clerides. The Greek-Cypriot reply was a kind of 'conditional acceptance' for the demand of the Turkish members to attend the sessions. According to Mr. Clerides, for the attendance of the Turkish-Cypriot members, agreements were needed in advance on certain points. There were two crucial conditions. First of all, it was demanded that Turkish-Cypriot members accept the laws enacted by the House and their application to Turkish areas by the 'Government' (Greek-Cypriot officials). Nevertheless, most of these laws were enacted in the absence of the Turkish-Cypriot members and contrary to the provisions of the 1960 Constitution. Secondly, Mr. Clerides claimed, 'unless agreement was reached the provision in Article 78 of the Constitution concerning separate majorities had been abolished and every member of the House would have one vote for all decisions'. Consequently Mr. Clerides declared that it would be meaningless to provide copies of the pending bills to the Turkish-Cypriot members, if they reject the conditions set by him.<sup>95</sup>

On 22 July 1965, the Turkish-Cypriot members visited Mr. Clerides, but he upheld his position and declared that unless agreement was reached on these matters, he would not permit the Turkish-Cypriot members to attend the House and they had no legal standing any more in the House. Furthermore, he claimed that the constitutional provisions on the promulgation of laws by the President and Vice-President were no longer applicable.<sup>96</sup> Such an approach must be considered as an obvious rejection of the termination of the imperative situation occurred in the

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<sup>94</sup> It was also stated within the same report that the Turkish-Cypriot political leaders wished to solve the problem on a global basis and did not want to accept a gradual solution. However, since the doctrine of state necessity was invoked by Greek-Cypriot officials and not by the Turkish-Cypriot ones, this attitude does not constitute an important event to be evaluated for the application of the doctrine. See UN Doc. S/5950 (10 September 1964), Para.106.

<sup>95</sup> See UN Doc. S/6569 (29 July 1965), Paras. 7, 8/b-d and 9.

<sup>96</sup> *Ibid.*, Paras. 10 and 11.

Island. As a result, it should be accepted that there was a contribution of the Greek-Cypriot state officials to the occurrence and maintenance of the state of necessity in the Island and thus, under these conditions rules of international and domestic law precludes the possibility of invocation of the defence necessity.

As indicated above, another criterion is connected with the requirement of 'legitimate state authority'. The doctrine of necessity must be invoked by a legitimate state authority established under the provisions of constitution or laws. However, in the Ibrahim Case this established rule was violated by the Greek-Cypriot Supreme Court judges. Because, in the said Case even the Court itself was not established compliant with the Constitution and it did not hold the title of 'legitimate state authority'. Nevertheless, in all other cases referred to within the Ibrahim Case as examples supporting the existence of the doctrine, competent authority or court that had invoked and applied the doctrine was established properly under the rules of relevant constitution and their legal status was not doubtful. This is why the Greek-Cypriot Supreme Court had to confirm the conformity of Law 33/1964 with the Constitution. If it had rejected the application of the doctrine and declared the unconstitutionality of the said Law, it would have been a statement accepting the illegal status of the Court itself. Such a situation would have deprived the Greek-Cypriot judges of their jobs.<sup>97</sup> It was also obvious that the dilemma for the Court compelled it into a biased position and prejudiced its impartiality. Consequently, application of the defence necessity in the Ibrahim Case has in essence breached accepted rules in this field.

Another important issue regarding the Ibrahim Case is related to the House of Representatives that enacted Law 33/1964. Despite its inconsistency with the Constitution, the Greek-Cypriot Supreme Court concluded that the said Law is legal under the defence of necessity. But the Court refrained from analysing the character of the House and its voting procedure at that time. As mentioned earlier, according to Article 182.1 of the Constitution, a bill can be enacted only by a simple separate majority of all those Greeks and Turks present. Nevertheless, revision of the judicial structure of the Country requires separate majorities of two-thirds of the total number of Greeks and Turks respectively. There was no legal legislative organ of the ROC functioning in accordance with the Constitution and the violation committed by Greek-Cypriot members and by the Court exceeded the limits of doctrine necessity. Stavsky evidently emphasised this point.<sup>98</sup>

In Ibrahim, the court misapplied the necessity doctrine to the issues before

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<sup>97</sup> See Nedjatigil, *supra* note 66, at 56.

<sup>98</sup> See Stavsky, *supra* note 14, at 358, footnote 75.

it. ... at the very least, the government must show that the country's legislative body passed the extra-constitutional measures. Since only the Greek members of the legislature passed the judicial reform bill, the government cannot make even this threshold claim. A measure passed by a Turkish or Greek majority acting alone does not constitute legislative action.

Criticisms regarding the 1970 Lakanmi Case of Nigeria are also meaningful for the acts and position of the Greek-Cypriot House of Representatives. The Nigerian Supreme Court recognised that the extra-constitutional acts of a regime could be validated on the ground of necessity. But here again there were illegal acts of unconstitutional bodies, not the extra-constitutional acts of constitutional ones. Critics to Lakanmi by Ojo would reflect on the inappropriate application of necessity in Cyprus: 'In the absence of the Prime-Minister or of a duly appointed acting Prime-Minister, there was no one competent under the constitution to call a valid meeting of the Cabinet ... [it] was not the Cabinet, as recognised by the 1963 Constitution'.<sup>99</sup> In the absence of the Turkish-Cypriot representatives, there was no one competent under the 1960 Constitution to enact such law (Law 33/1964), and that the assembly consisting of only Greek-Cypriot members, was not the House of Representatives as recognised by the 1960 Constitution and guaranteed by the rules of international law shaped in the Treaty of Guarantee.

As mentioned earlier, according to the Greek-Cypriot Supreme Court the 1960 Constitution was a document limiting the right to self-determination of the 'people' and excluding the original will. It invoked the doctrine of necessity by indicating that the said Constitution couldn't be amended even in case of concurring wills of the two Communities and it was imposed by international agreements, namely the Treaty of Guarantee and Alliance. The Court described certain provisions of the constitution as a disadvantage, which were originally designed to prevent the domination of one Community on the other and to compel cooperation between Turkish and Greek-Cypriots. It utilised this description as an excuse to lift the limitations on the right to self-determination of the 'people' and to reapply the said right in favour of the Greek-Cypriot Community. Nevertheless, there were certain significant deficiencies in such an approach. First of all, it is generally accepted in international law that the international obligations of states do not impair their independence and right to self-determination. This position was supported by the various decisions of the Permanent Court of International Justice.<sup>100</sup> States are free to conclude international agreements and limit their

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<sup>99</sup>A. Ojo, 'The Search for a Grundnorm in Nigeria; the Lakanmi Case', (1971) 20 Int'l and Comp. L.Q. 117, 120-21.

<sup>100</sup>J. Crawford, 'The Criteria of statehood in international law', (1976-1977) BYIL, at 124.

independence or terminate it completely for their own benefit and with their consent.<sup>101</sup>

Secondly, while 'lifting' the restrictions on the right to self-determination and 'reapplying' it, the Court abused the 1960 system in favour of the Greek-Cypriot Community, and, ignored the confined international legal status of the Republic and the obligation to exercise the right to self-determination conjointly by the two Communities within a single state, namely the ROC. Subsequent Greek-Cypriot modifications to the laws of the ROC by referring to the Ibrahim Case amounted to the creation of a new state.<sup>102</sup>

The third point is related to the concept of 'Cypriot People'. The Greek-Cypriot Supreme Court made use of the phrase 'Cypriot People'.<sup>103</sup> Nevertheless, the 1960 Constitution does not even contain this phrase and it is based on Cypriot citizenship. Moreover, according to Article 2 of the 1960 Constitution, all citizens should choose to belong to either the Greek or the Turkish Community as individuals or as a religious group. As mentioned earlier, the doctrine of necessity is a legitimate excuse, which can be utilised only for the purpose of preserving society in general, not individuals or any other groups on a discriminatory basis. In the Ibrahim Case the Court emphasised phrases 'People of Cyprus', 'society' or 'whole people', in order to hide its attitude aiming at securing the interests of the Greek-Cypriot Community alone. Reference to the defence necessity in the Ibrahim Case deviated from the normal application of this doctrine and amounted to a level of destruction of the bi-communal republic in support of the benefit of the Greek-Cypriots.

Another interesting point is related to the UN Security Council Resolution 186 taken on 4 March 1964, which was referred to by the Greek-Cypriot Supreme Court in support of its ruling in the Ibrahim Case. As pointed out by the Court, in paragraph 2 of the said resolution 'the Government of Cyprus' was described as a government 'which has the responsibility for the maintenance and restoration of law and order' in the Island.<sup>104</sup> Nevertheless, the said Resolution contains contrasting phrases and concepts. On the one hand it refers to the responsibility of the government, but on the other the Security Council 'calls upon the communities and their leaders to act with the utmost restraint.'<sup>105</sup> There is another reference to

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<sup>101</sup> This idea was raised in the Individual Opinion by M. Anzilotti to the decision of PCIJ in The Custom Regimes Between Germany and Austria Case, See PCIJ, Series A/B, Judgements and Advisory Opinions, 1931, no: 41, Para 3.

<sup>102</sup> N. M. Ertekün, 'Violations to the 1960 Constitution', in A. Gazioglu and M. Moran (ed.), *Past-Masters of Illegality* (2000).

<sup>103</sup> See supra note 66, at 211 and 221.

<sup>104</sup> UN Doc. S/5575 (4 March 1964), Para. 2.

<sup>105</sup> *Ibid.*, Para. 3.

‘the representatives of the communities’ in paragraph 7. The wording of the Resolution does not assign one of the Communities the title of ‘the government of Cyprus’. However, political considerations in the Security Council at that time and legal requirement to obtain the consent of the relevant state’s government prior to the deployment of the UN peace-keeping force produced a practical but in essence an unjust solution to the conflict. Consequently, the international community treated the Greek-Cypriot Community as the legal government of the bi-communal ROC by referring to the Ibrahim Case and the Security Council Resolution<sup>106</sup>

As correctly stated by Talmon, the fact that the Turkish-Cypriot Community had not been represented in the Cypriot government as envisaged by the 1960 Constitution was known to the UN, but was treated as an internal matter.<sup>107</sup> However, representation of the two Communities in an internationally formulated style of government was not an internal matter of the Republic, but an international obligation for the ROC itself and for the Guarantor States. Moreover, the Turkish-Cypriot Community has consistently protested such an approach. On 7 March 1964, Vice-President of the ROC, as being the leader of the Turkish-Cypriots, sent a telegram to the President of the UN Security Council and complained the acceptance of the Greek-Cypriot representative as the legal representative of the ROC at the UN.<sup>108</sup> As pointed out by Stavsky, the Court’s decision to uphold the constitutionality of the ‘legislative act’ enabled ‘the Greek-Cypriot Community to function effectively, without Turkish-Cypriot cooperation’.<sup>109</sup>

In the Ibrahim Case, Judge Triantafyllides stated, ‘this judgment should not be considered as having indirectly resolved any problems other than those calling for a decision in these cases.’ According to him, every single problem originating from the abnormal situation at that time would have had to be faced by the Greek-Cypriot Supreme Court ‘only as and when it is raised before it.’<sup>110</sup> Nevertheless, since 1964, the Greek-Cypriot authorities, acting illegally on behalf of the ROC, have been referring to the Ibrahim Case decision in order to justify their constitutional deviations and this approach gave rise to the construction of a new state (a Greek-Cypriot state) built on the ruins of the bi-communal ROC.<sup>111</sup>

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<sup>106</sup> S. Talmon, ‘Impediments to Peacekeeping: The Case of Cyprus’, in H. Langhols, B. Kondoch, A. Wells (ed.), *International Peacekeeping: The Yearbook of International Peace Operations* (2002), 31 at 38.

<sup>107</sup> *Ibid.*

<sup>108</sup> UN Doc. S/5583 (9 March 1964), letter from the representative of Turkey to the Security Council transmitting the Vice-President Kucuk’s telegram.

<sup>109</sup> See Stavsky, *supra* note 14, at 358.

<sup>110</sup> See *supra* note 66, at 242.

<sup>111</sup> For an attempt to justify certain constitutional deviations see C. G. Tornaritis, *Cyprus and Its Constitutional and Other Legal Problems* (1977), 74-76.

It is not theoretically appropriate to apply the doctrine of necessity to the situation that occurred in Cyprus following the year 1963. Such comprehensive changes in the legal structure of the bi-communal state and transformation of the legitimate government into a Greek-Cypriot government might have been based on the application of the `successful revolution` approach. This Kelsenian principle was also proposed by the High Court of Lesotho, when the court found itself in a position to analyze actions of legitimacy of the new unconstitutionally formed government, instead of unconstitutional assumption of power by a constitutional authority. The Court emphasised:

In brief the question for the court ... as far as the doctrine of necessity is concerned, is not whether to validate [unconstitutional] assumption of power, for in truth it cannot do so on the basis of necessity, but whether to validate the subsequent invalid but necessary actions of the power-assuming authority, in order to preserve the fabric of society ... Thus to speak of the doctrine operating to validate a new regime, rather than its actions is in essence to apply the doctrine of successful revolution.<sup>112</sup>

These words are also relevant for the case of Cyprus. Legally the doctrine of necessity was not sufficient enough for such drastic modifications in power sharing and legal structure, and, only Kelsen's legal theory of revolution might have created legitimacy for the new and Greek-Cypriot dominated regime. Nevertheless, even the criteria for successful revolution were not satisfied by the usurper Greek-Cypriot leaders. At the outset, although there is no consensus on the exact meaning of the 'efficacy' criterion, it was clear that the Greek-Cypriot administration was not efficient in legal sense.

Internationally, the UN Security Council Resolution (186) was a kind of evidence providing the inefficiency. On 4 March 1964, the Security Council took a decision for the deployment of the UN peace-keeping forces to the Island. First of all, there was no clear acceptance of the Greek-Cypriot coup d'etat government as the 'legitimate government of Cyprus'. Moreover, it called upon 'the communities in Cyprus and their leaders to act with the utmost restraint'.<sup>113</sup> It is true that the Resolution indicates that the responsibility for the maintenance and restoration of law and order in the Island belongs to the Government of Cyprus. But it also defined the function of the peace-keeping force: 'as necessary, to contribute to the maintenance and restoration of law and order and a return to normal conditions'.<sup>114</sup>

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<sup>112</sup> See Mahmud, *supra* note 18, at 91. (emphasis added)

<sup>113</sup> Para. 3.

<sup>114</sup> Para. 5.

Such wording reflects the confirmation by the Security Council of the existence of an abnormal situation and the inability (inefficacy) of the coup d'état government formed only by the Greek-Cypriot Community, to maintain and restore law and order on the Island. Actually, even the deployment of the UN forces on the Island alone was enough to come to such a conclusion.

It is true that following Resolution 186, the international community recognised the Greek-Cypriot administration as the government of Cyprus implicitly. But it is arguable whether such recognition is adequate for a regime to be accepted as legitimate. According to the Theory of Social Approval, external attitudes cannot be considered as a factor in determining the legitimacy of a revolutionary regime. Because each society is free to determine its social and political system.<sup>115</sup> As stated by the President of the Court of Appeals of Grenada in 1986, recognition by many states could not per se confer de jure status on the revolutionary regime and could not validate its laws.<sup>116</sup> Mahmud supports this approach:

One line of reasoning adopted by some of the courts to validate usurpation through coup d'état is to refer to the principles of state recognition in international law and find municipal courts obligated to follow dictates of international law. This line of reasoning implies an uncritical adoption of the extreme monistic view of the primacy of international law expounded by Kelsen. This view of Kelsen is logically independent from his analysis of domestic legal systems, and involves the proposition that all norms of a domestic legal system are subordinate to those of international law ... There are numerous problems with using this proposition as a rule of decision. Irrespective of its merits, it is a theory of law and the interrelationship between systems of law, and not a principle of law that could serve as a ratio decidendi. The theory is extreme because it is possible to uphold the primacy of international law in a general sense without obligating domestic courts to validate usurpation of state power. The theory is morally repugnant because it equates might with right.<sup>117</sup>

If we take the internal dimension of the Kelsenian efficacy approach, the above-mentioned 'popular support' criterion cannot be satisfied for the legitimacy

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<sup>115</sup>See Khan, *supra* note 26, at 5.

<sup>116</sup>See Mahmud, *supra* note 18, at 88.

<sup>117</sup>*Ibid.*, 118-119.

of the Greek-Cypriot administration. None of the Turkish-Cypriot civil servants abided by the coup d'état government and the regime was protested by the elected vice-president Dr. Küçük, who was the Turkish-Cypriot leader at that time. Not only Turkish-Cypriots in the executive body, but also Turkish-Cypriot members of the House of Representative refused to accept the Greek-Cypriot government as the legitimate government of Cyprus. Turkish-Cypriot judges continued to take part in the judiciary, but this was an exceptional case. It was maintained that the Turkish-Cypriot judges had resumed their functions in 1964, stayed in office until 1966 and abided by the Greek-Cypriot Supreme Court judgments in their own decisions. According to the Greek-Cypriot authorities, such an attitude reflects the recognition of the 'lawful existence and functioning of the Government'.<sup>118</sup> Nevertheless, it is understood from the statements of the Turkish-Cypriot judges that they attended the courts because of their expectation that the violations of constitutional provisions would be eliminated and the abnormal situation would be ended.<sup>119</sup> Moreover, on 2 June 1966, they were stopped at the checkpoint, prevented from attending the courts and one of them 'was removed from his chambers at gun point and taken back to the checkpoint'.<sup>120</sup> It should also be emphasised that during the period 1963-1966, despite the participation of the Turkish-Cypriot judges, some cases related to Turkish-Cypriot citizens were brought before Greek-Cypriot judges in violation of the 1960 Constitution.<sup>121</sup> Violations existed, because the presence of Turkish-Cypriot judges is mandatory for cases involving a Turkish-Cypriot as a plaintiff or a defendant.<sup>122</sup>

This event proves the absence of 'popular Cypriot support' for the Greek-Cypriot government and demonstrates the reluctance of the Greek-Cypriot leaders to put an end to the abnormal situation on the Island, which was invoked as an excuse to apply the doctrine of necessity. They refused to give a chance to acts aiming at the application of constitutional provisions.

As stated by Ali Khan, the Principle of Social Approval recognises that 'a society may be composed of diverse racial, cultural and religious groups. If succession rules are designed to secure the approval of only a particular group in the society, there will exist only partial social approval'.<sup>123</sup> In Cyprus, an important distinction must be made when trying to discover the popular support for a possible revolutionary regime. As described above, the 1960 Republic was a bi-communal

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<sup>118</sup> European Commission on Human Rights, Decisions and Reports-2 (1975), 132 and C. H. Dodd, *The Cyprus Imbroglio* (1998), 77.

<sup>119</sup> *Ibid.*

<sup>120</sup> See Nedjatigil, *supra* note 66, at 57. These words are taken from the statement of Mr. Ulfet Emin, one of the Turkish-Cypriot judges at that time, *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> See Section 1 *supra*.

<sup>123</sup> See Khan, *supra* note 26, at 7.

one. All administrative, legislative and judicial powers of the regime were established based on the different 'constituent communities', namely the Turkish-Cypriot Community and the Greek-Cypriot Community. Though obedience of the society to a Cypriot government can only occur as long as it contains support from both communities. Thus the population of the Turkish-Cypriot Community does not matter for the determination of a 'popular support' criterion. This legal status must bring us to the conclusion that consent and support of the Turkish-Cypriot Community forms 50% of the 'popular Cypriot support' to the new government. It was obvious that following December 1963, the Turkish-Cypriot Community did not respect and obey the rules of the new regime. To the contrary, civil disobedience existed within the Turkish-Cypriot Community and they rejected the new regime. It must also be added that the relationship between efficacy and validity is elusive. According to Kelsen, there is no direct cause and effect relationship between the two and efficacy is only one of the conditions of validity, not validity itself.<sup>124</sup> Law must be more than mere force. It must reflect the values of a society. Thus, even if it is considered that the Greek-Cypriot government was 'efficient', this did not automatically make it lawful.

## **4.2. The Case of Ibrahim Aziz**

### **4.2.1. Summary of Events Since 1964**

From 1964 until 1974, the Turkish-Cypriot community continued its life outside the governmental institutions, and regardless of the reasons behind that situation, it was the Greek-Cypriot authorities who controlled 97% of the Island geographically. On 15th July 1974 a coup d'état was conducted against the Greek-Cypriot leader Makarios. This was supported by the military regime in Athens. On 20th July 1974, Turkey intervened militarily and controlled roughly 37 % of the Island. On 30th July, the Guarantor Powers, U.K., Greece and Turkey, agreed on the Geneva Declaration, indicating the existence of two autonomous administrations (Turkish-Cypriot and Greek-Cypriot) and the need to return to the constitutional order on the Island, as well as other commitments. The Greek side considered the Turkish military operation as an illegal invasion and refused to recognise the validity of the said Declaration, while the Turkish side argued that it was a legal operation under the provisions of the Treaty of Guarantee "to re-establish the state of affairs created by" that Treaty.<sup>125</sup>

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<sup>124</sup> See Mahmud, *supra* note 18, at 113.

<sup>125</sup> See David Wippman, 'International Law and Ethnic Conflict on Cyprus,' (1996) 31 *Texas International Law Journal*, at 141-181 and R. ST. J. Macdonald, 'International Law and the Conflict in Cyprus', (1981) *The Canadian Yearbook of International Law* at 3-49.

Bi-communal negotiations resumed between the two sides under the auspices of the UN Secretary-General's good offices mission as provided in the Geneva Declaration to establish a bi-communal and bi-zonal federal republic. Since then, this aim has not been achieved. The Turkish military operation, which was conducted on the basis of the unilateral right to intervene militarily under the Treaty of Guarantee, contributed to the completion of de facto bi-zonality in the Island which occurred after 1963 with the collapse of the partnership republic. The Turkish-Cypriot side proclaimed the "Turkish Federated State of Cyprus" on 13th February 1975. This entity was transformed into an independent state with the proclamation of the "Turkish Republic of Northern Cyprus" (TRNC) on 15th November 1983. Only Turkey recognised the TRNC and the UN Security Council Resolution 541 of November 18, 1983 labelled the TRNC "legally invalid" and called upon states "not to recognise any Cypriot State other than the Republic of Cyprus".<sup>126</sup>

Since the 1974 Turkish military operation, the Greek-Cypriot side has been blaming Turkey solely for the occurrence and continuation of the abnormal situation in Cyprus. Moreover, the Turkish-Cypriot side has been accused of refusing to return to normal conditions. This approach and the perception have been supported by the international community as well. Therefore, until recently, the Greek-Cypriot "necessity" argument for the maintenance of a "legal government" consisting only of Greek-Cypriots and its unconstitutional acts has been tolerated.

#### **4.2.2. Ibrahim Aziz, Greek-Cypriot Supreme Court and the ECHR**

Ibrahim Aziz is a Turkish-Cypriot living in south Cyprus and carrying Cypriot citizenship. He applied to the Ministry of Interior of the Greek-Cypriot Administration and requested to be registered in the electoral roll in order to exercise his right to vote in the parliamentary elections in May 2001. His request was refused by the said ministry on the grounds that members of the Turkish-Cypriot Community could not be registered in the Greek-Cypriot electoral roll because of Article 63 of the 1960 Constitution. On 27 April 2001, he appealed to the Greek-Cypriot Supreme Court against this decision and argued that the Greek-Cypriot government had failed to protect the electoral rights of members of both Communities. On 23 May 2001 the Court dismissed his application.<sup>127</sup> It is very important to mention the reasons and evaluations of the Court for the application of the doctrine of necessity in Cyprus.

<sup>126</sup> Security Council Resolution 541, Para. 7.

<sup>127</sup> The original decision is in Greek. But this part was translated and cited by the ECHR. See *Aziz v. Cyprus, Greece, Turkey and the UK*, Admissibility Decision of 23 May 2001, ECHR, Paras. 1-5.

One of the grounds of Mr. Aziz's appeal was based on the law of necessity. It was argued that there is a necessity for his inclusion in the electoral list which derives from the inability to compile an electoral list for members of the Turkish-Cypriot Community. It was also raised that the inclusion of the applicant in the electoral list of electors of the Greek-Cypriot Community is justified by the fact that the applicant resided in the areas controlled by the Greek-Cypriot government, which is recognised by all the international community, except Turkey. Consequently the applicant claimed that he should have the same rights and obligations as all other citizens.

In response to the applicant, the Greek-Cypriot Supreme Court pointed out a very important principle regarding the application of necessity:

The ideal of democracy, one person one vote in the person's place of residence, does not provide any grounds for the Court to assume the power to reform the Constitution. Such competence is not vested upon us, nor can the judicial authorities claim such power. This would be against the principle of the separation of powers on which the Constitution is based...

The ascertainment of the law of necessity invoked by the applicant and the establishment of measures to deal with it ... is a duty that falls upon the legislator. The competence of the judiciary is limited, provided the matter is submitted before or arises in a case brought before it, to ascertain the constitutionality of the law ... It is not for the judiciary to ascertain the need to fill in gaps in the function of the constitutional statutes nor to establish measures to tackle them, which is basically what the applicant pursues with his application.<sup>128</sup>

The Court evidently accepts the principle that the judiciary cannot invoke the necessity argument and it is within the jurisdiction of the legislator. As can be seen from the Ibrahim Case, even though there was no House of Representatives functioning in accordance with the provisions of the constitution at that time, the same Greek-Cypriot Supreme Court developed the arguments of the Attorney-General (a Greek-Cypriot), applied the doctrine of necessity and transformed the bi-communal Cypriot Republic into a unitary Greek-Cypriot state. Although it was accepted by the Court in 2001 that 'it is not for the judiciary to ascertain the need to fill in gaps in the function of the constitution', the same Court destroyed all the distinctive features of the 1960 Constitution in 1964 and amended its provisions, not in theory, but in practice.

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<sup>128</sup> Aziz v. Cyprus, Greece, Turkey and the UK, Admissibility Decision of 23 May 2001, ECHR, Para. 6. (emphasis added).

On 25 May 2001, Mr. Ibrahim Aziz applied to the ECHR against Cyprus, Greece, Turkey and the UK. He complained that he was prevented from exercising his voting rights on the grounds of national origin. He also argued that under Article 6/1 of the European Convention on Human Rights, the above-mentioned judgment of the Greek-Cypriot Supreme Court was not reasonable and this Court cannot be considered 'a court established by law'. Additionally he has submitted that the Greek-Cypriot Supreme Court did not apply the law of necessity in his case, as it has done in many other similar instances, 'because the applicant is a Turkish-Cypriot'.<sup>129</sup> He has claimed that he was deprived of his rights because of the actions and/or omissions of the Guarantor States. But the ECHR has rejected his complaint directed against Greece, Turkey and the UK on the ground that it is incompatible with *ratione personae*.<sup>130</sup>

The applicant's allegation in the Case of Aziz regarding the status of the Greek-Cypriot Supreme Court was similar to the arguments developed by the respondent side in the Ibrahim Case in 1964. It has argued that this Court was illegally established by Law 33/1964, contrary to the provisions of the Constitution.<sup>131</sup> Nevertheless, the ECHR has not accepted the arguments of the applicant:

As regards the second branch of the complaint, the Court cannot follow the applicant's arguments. The Court notes that the Supreme Constitutional Court of Cyprus has ceased to function due to the anomalous situation in Cyprus and that the Supreme Court of Cyprus took over the competence of that court by virtue of a law declared valid and constitutional by the Supreme Court, at a time when it was composed of both Greek-Cypriot and Turkish-Cypriot judges (the case of the Attorney-General of the Republic v. Ibrahim (1964, CLR 195). The Supreme Court of Cyprus may therefore be deemed to be a tribunal within the meaning of Article 6 § 1 of the Convention.<sup>132</sup>

The ECHR did not analyse the Ibrahim Case properly and omitted legal deficiencies of the transformation of the Supreme Constitutional Court to the 'Supreme Court of Cyprus'. As mentioned earlier, despite the fact that Turkish-Cypriot judges were attending the said court at the time of the Ibrahim Case, this Case was related with four Turkish-Cypriots, but the Attorney-General was a Greek-Cypriot and the Court was sitting as Quorum of three Greek-Cypriot

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<sup>129</sup> Ibid., Paras. 10, 11 and 19.

<sup>130</sup> Ibid., Paras. 13-14

<sup>131</sup> Ibid., Para. 22.

<sup>132</sup> Ibid., Para. 24.

judges only. And this was a violation of the 1960 Constitution. Moreover, if the existence of Turkish-Cypriot judges is accepted as a legalising criterion, the ECHR should have taken into consideration the withdrawal of them from their office and from the court after 1967. Otherwise, a chance would have been given to the Greek-Cypriot administration to 'legalise' the said court, rather than force out the Turkish-Cypriots and consequently abuse their bona fide attitude to continue to perform judicial functions especially for the sake of their Community and in general for their country.

Mr. Ibrahim Aziz brought a separate application to the ECHR on 8 April 2001, but this time against the 'ROC'. He established his arguments on the same basis of the approach explained above. The Court considered that the complaint raised serious issues of fact and law and declared the application as admissible.<sup>133</sup> The defence of necessity had been referred to by the applicant and the defendant (The Greek-Cypriot administration) during the proceedings of the Case. Aziz claimed that he had been deprived of his right to vote on grounds of national origin and/or association with a national minority. The Court in its decision on 22 June 2004 referred to "the anomalous situation that began in 1963" and accepted it as a reason to suspend the participation of the Turkish-Cypriot members of parliament. It also maintained that the relevant articles of the constitution for the participation of Turkish-Cypriots became impossible to implement in practice.<sup>134</sup> Therefore, the Court did not question the conditions of application of the doctrine of necessity and took its rightness as granted in favour of the Greek-Cypriot administration. In this sense the case of Aziz did not contribute to the real discussion. However, the Court underlined that "despite the fact that the relevant constitutional provisions have been rendered ineffective, there is a manifest lack of legislation resolving the ensuing problems." And it concluded that there had been a violation of the right of Ibrahim Aziz to vote.<sup>135</sup> In light of the above, one could conclude that the opportunity to test the fulfilment of the actual criteria of the doctrine of necessity was missed and the case of Aziz produced merely a practical solution.

#### **4.3. The "Annan Plan" and Its Implications on the 'State of Necessity'"**

Between 1999 and 2003 an intensified effort was made to reach a comprehensive settlement of the Cyprus problem under the auspices of the UN Secretary-General. The reunification and accession of Cyprus to the European Union before 1<sup>st</sup> of May was the aim. This process included proximity and direct talks. Nevertheless, the parties were not able to reach an agreement and the

<sup>133</sup> Aziz v. Cyprus, Decision of 8 April 2003, ECHR, at 7.

<sup>134</sup> ECHR, The Case of Aziz v. Cyprus, 22.06.2004, No:69949/01, para. 26.

<sup>135</sup> Ibid., para. 28 and 30.

Secretary-General submitted a comprehensive settlement proposal on 11 November 2002, a first revision on 10 December 2002 and a second revision on 26 February 2003. The plan required a referendum before 16 April 2003 to approve it and reunify Cyprus. At the end of the summit meeting in The Hague, the parties could not achieve agreement to conduct the referendum and the UN attempt at reconciliation failed.<sup>136</sup>

Greek-Cypriot and Turkish-Cypriot leaders were invited to New York by the Secretary-General on 10 February to resume negotiations. Following intensive talks, the parties agreed on 13 February to resume negotiations on the basis of the Annan Plan, to achieve a comprehensive settlement through separate and simultaneous referenda before 1 May 2004. They made a commitment to seek agreement on changes and to complete the Plan so as to produce a finalised text. They further agreed that in the absence of such an agreement, the Secretary-General would convene a meeting of the two sides, with the participation of Greece and Turkey, in order to finalise the text by 29 March. Finally, in the event of a deadlock, the parties invited the Secretary-General to use his discretion to finalise the text to be submitted to separate and simultaneous referenda. Despite negotiations lasting until the end of March 2004, no agreement was achieved and on 31 March 2004, the UN Secretary-General finalised the text of the "Comprehensive Settlement of the Cyprus Problem".<sup>137</sup>

Not only the Greek-Cypriot government, but also almost all political parties and leaders in south Cyprus called on the Greek-Cypriot community to vote against the Plan during the propaganda period of the referenda. Under the provisions of the Plan, acceptance in both referenda was a prerequisite to give effect to its provisions and to establish a new state of affairs in Cyprus. This point was clearly emphasised in the Secretary-General's letter to both sides in Bürgenstock, Switzerland:

Should the Foundation Agreement not be approved at the separate simultaneous referenda, or any guarantor fail to sign the Treaty on matters related to the new state of affairs in Cyprus no later than 29 April 2004, it shall be null and void ab initio, and the commitments undertaken, as well as the submission to referenda, shall have no legal effect.<sup>138</sup>

Therefore, Greek-Cypriots and Turkish-Cypriots were aware that rejection of the Plan by one side would make it null and void and the status quo ante

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<sup>136</sup> Report of the Secretary-General on his mission of good offices in Cyprus, UN Security Council, S/2003/398, 1 April 2003.

<sup>137</sup> Report of the Secretary-General on Cyprus, UN Security Council, S/2004/302, 16 April 2004, Paras 3-6.

<sup>138</sup> Letter of the UN Secretary-General to prime-minister and deputy prime-minister of the TRNC on 31 March 2004

(abnormal situation) in the Island would continue. Separate, simultaneous referenda were held on 24 April 2004. The Turkish Cypriots voted in favour of a solution, with 64.9% yes votes in the referendum. The Greek-Cypriots voted against the Plan, with 75.8% no votes.<sup>139</sup> Thus, Turkish-Cypriots gave their consent and proved their readiness to form a "legal government" within a new federal state, which was proposed and fully supported by the international community as a whole. Moreover, Turkey, who has been criticised for keeping troops in the Island and preventing the establishment of normal constitutional conditions, committed herself to accept and recognise the result of the referenda and sign the Treaty as part of the UN Comprehensive Settlement, which included the withdrawal of armed forces, the establishment of a new federal state and a legal government.

Consequently, the results of the referenda proved and made it obvious, that the Greek-Cypriot administration and its community have prevented the return to normal conditions in the Island. The Greek-Cypriot's "state of necessity" argument has become highly questionable, since it is an internationally accepted principle that an institution cannot refer to this argument if it contributes to the continuation of the abnormal situation. With the refusal of the Greek Cypriot people as well as the Greek Cypriot Administration to accept the Plan, they have prevented the establishment of a new state of affairs in the Island and the termination of the abnormal situation.

## 5. Conclusion

The doctrine of necessity has been erroneously applied in Cyprus since 1964. Not only in 1964 when Turkish-Cypriot MP's tried to assume their responsibilities at the House of Representatives of the ROC, but also during the recent referenda process under the UN Plan, it was the Greek-Cypriot administration who prevented the return to normal conditions on the Island and this government cannot use the doctrine of state necessity as an excuse to be accepted as the legal government of the 1960 ROC any more. Moreover, other accepted criteria of Necessity have also been violated. Therefore, the international community should "think twice", before regarding the Greek-Cypriot government as the legal government of the 1960 ROC, also representing the Turkish-Cypriot people. Continuing references to the said doctrine in Cyprus would create new legal inconsistencies and unfair situations for Turkish-Cypriots in Europe and this will produce contradictory situations in the European legal system.

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<sup>139</sup>Cyprus Mail, 25 April 2004.