

# **Dying a Thousand Deaths: Recurring Emergencies and Exceptional Measures in International Law**

Maria Agius\*

## Table of Contents

Abstract .....	220
A. Introduction .....	220
B. Two Perspectives on Exceptional Measures in International Law .....	222
C. International Incidents Pertaining to Exceptional Measures .....	226
I. Iceland 2008: The Icesave Incident.....	226
1. Facts and Relevant Norms .....	226
2. Reactions and Responses .....	228
3. Analysis .....	231
II. Influenza 2009: Swine Flu A (H1N1).....	233
1. Facts and Relevant Norms .....	233
2. Reactions and Responses .....	236
3. Analysis .....	238
D. Conclusions .....	239

\* LL.D. Candidate in International Law; LL.M; University of Uppsala. I am grateful to panel chair Jörn Müller and the participants of the workshop on Strategies for Solving Global Crises (Göttingen, October 2009) for their helpful suggestions. Further, I want to extend my gratitude to LL.D. Candidate Magnus Gulliksson for an inspiring discussion that tremendously contributed to improving an early draft of this paper; to Associate Professor Daniel Stattin for reassuring commentary; and to LL.D. Candidate Cyril Holm for some interesting suggestions for literature.

## Abstract

Crises, while unforeseen and exceptional, appear with some regularity. Crisis management is not exceptional, but a recurring task. This paper studies the impact of international law on how international crises are handled and the room allowed for emergency measures within international legal discourses. It outlines the relationship between an extra-legal exceptionalist perspective, where law is considered an obstacle to emergency measures, and a more constitutionalist one, where exceptional measures are included within the legal paradigms. Examples are drawn from two contemporary crises: the global financial crisis, with particular reference to Iceland and the Icesave dispute, and the treatment of global epidemics and its effect on trade, with particular reference to the pandemic swine influenza A (H1N1). It is suggested that many factors seem to influence the choice of perspective: *inter alia* previous deviations in similar situations and the institutional solidity of the legal environment of the rule in question. The role for international law in crisis may increase through soft law guidance and persuasive advice from credible organisations that may assess the gravity of the situation and suggest alternative courses of action within the ambit of law.

## A. Introduction

The title of this paper suggests that crises, while exceptional, are regular. In order to accept that claim, the reader needs only to consider the blows dealt to this world over the past decade, in the form of global climate change, several looming pandemics, and a global financial meltdown. All these events qualify as crises for the purposes of this paper.

It is characteristic of events activating international law that they are dramatic, pertaining to e.g., war, international peace and security, claims for territory, commitments to global environment or third world development. Closer scrutiny, it is submitted, reveals that these subjects in fact carry actuality every day. Therefore, I suggest using as a basic assumption for the arguments presented, that normalcy is constantly on the brink of the extraordinary, and that there is indeed a fine line between these two stages, which may influence each other in different ways.<sup>1</sup>

<sup>1</sup> O. Gross, ‘Chaos and Rules: Should Responses to Violent Crises Always be Constitutional?’, 112 *Yale Law Journal* (2002-2003) 5, 1011, 1089.

Norms are inherently aimed at maintaining normalcy. Exceptionalism disrupts that situation. If exceptional measures – by definition existing beyond what was envisaged by the norm – are facts of life, deviations from international law must be addressed and recognised as recurring events. Such deviations from international law can be regarded from different angles. In this paper, I shall explore two perspectives on derogations from international commitments in times of emergency. One is more constitutionalist, regarding exceptional measures as included within the legal system and the legal paradigm. This is represented here by exceptional measures clauses or exceptions, and legal justification or excuse doctrines such as necessity or other circumstances precluding wrongfulness in the international law of state responsibility. The other is represented in an extra-legal paradigm. Law is perceived to be ill-equipped to tackle the problem and consequently irrelevant as regulator of the situation. This is essentially a state of exception. The basic theoretical framework in this regard draws on the work of Giorgio Agamben,<sup>2</sup> set in relation to my own previous and ongoing work on the state of necessity.<sup>3</sup>

Exceptional measures and states of emergency are traditionally associated with violent situations, evident from its close ties to martial law and states of siege.<sup>4</sup> Equally dramatic, but less explored from this angle, are the contemporary problems of global financial meltdown or raging epidemics. In fact, such internationally ‘contagious’ problems may turn the very crisis international, and may be impossible to combat without engaging the international community and its frameworks.

This article explores what impact international law has on international crises and what room it provides for emergency measures. The ambition is to shed light on what good international law can do to resolve international crises, and where it poses an obstacle to suitable responsive action. This is illustrated with responses to a selection of events that may be labelled as ‘crises’: firstly, the contemporary international ramifications of the financial crisis in Iceland 2008; secondly, the swine influenza pandemic, and its international legal implications.

There is a general absence of judicial practice in these fields for empirical support. The events are highly contemporary and no court decisions have been issued to date. Further, some issues may be inherently extra-legal

<sup>2</sup> G. Agamben, *State of Exception* (2005).

<sup>3</sup> M. Agius, ‘The Invocation of Necessity in International Law’, 56 *Netherlands International Law Review* (2009) 2, 95-135.

<sup>4</sup> Agamben, *supra* note 2, 11-22.

and will not be settled in any court. Only a fraction of international political and diplomatic life is in fact subject to judicial determination. However, absence of court judgments in a field does not necessarily mean that there are no legitimate normative expectations on the behaviour of international actors. One way to gain insight in what those expectations are is to study international incidents and make structured inferences from the responses of key actors to a critical event.<sup>5</sup> For the empirical sections, I will therefore largely adopt the methodology for incident studies proposed by Reisman & Willard.<sup>6</sup>

## B. Two Perspectives on Exceptional Measures in International Law

Adherence to international law is influenced by relations of power inherent in international politics. However, faith also plays a vital part in the mechanisms of treaty observance and reinforces the sense of community.<sup>7</sup> Compliance with international commitments is more than *pacta sunt servanda*; it is the foundation on which a cooperative world order can be built. Still, international agreements cannot foresee every possible turn of events, and states may eventually find themselves in situations where they no longer find it reasonable to live up to the bargain they entered into. Arguably, international law must therefore have contingency for exceptional events within its regulatory framework, lest states be tempted to reject the applicability of international law to the situation altogether. Without some leeway within which the state may manoeuvre, international law risks not being seen as sufficiently credible, fair, and balanced a vehicle for the management of international relations.

States by no means always comply with international law and their policies are presumably influenced by many factors. Still, the weight of international law may be measured by the use of legal language to justify their actions. That an act even requires justification indicates the presence of

<sup>5</sup> W. M. Reisman, 'International Incidents: Introduction to a New Genre in the Study of International Law', in: W. M. Reisman & A. R. Willard (eds), *International Incidents – The Law that Counts in World Politics* (1988), 34.

<sup>6</sup> See in particular the research sequence and methodology suggested by A. R. Willard, 'Incidents: An Essay in Method', in: Reisman & Willard, *supra* note 5, 25-39.

<sup>7</sup> J. Bodin, *Les Six Livres de la Republique* (1564), 189: "Faith is the only foundation and support for justice, quoted in J. Haslem, *No Virtue Like Necessity: Realist Thought in International Relations since Machiavelli* (2002), 43.

law.<sup>8</sup> The choice of a legal justification for a course of action implies that the violation is considered an instance subject to law.

Under certain stringent conditions, the state may invoke the defence of necessity to excuse its non-observance and be relieved of liability.<sup>9</sup> Necessity must not be confused with a legal exception, i.e., a norm on a similar normative level as the rule to which it is an exception, but given primacy as a *lex specialis*. Necessity only operates at secondary norm level.<sup>10</sup> It excuses behaviour, rather than authorising it. It does not as such suspend the primary norm, the law. What it does is that it in dire circumstances suspends the consequences of breaching the primary norm; it thus suspends the application of secondary norms on state responsibility.<sup>11</sup>

The suspension of law is a common feature of the state of necessity and its shadow image, the state of exception. The basis of the state of necessity, the ancient maxim that necessity knows no law, has however been qualified. Necessity now indeed has law, in that the heavily circumscribed doctrine of necessity may be applicable. This form of incorporation of emergency powers into the legal system in a sense introduces a constitutional model in relation to response to emergencies, by placing restraints on action that formerly was nothing more than an expression of the anarchical nature of international law.<sup>12</sup> Although necessity finds itself at the border between politics and law – and closely connects with exceptionalism – recourse to exceptional measures under a legal exception or in a state of necessity is legitimised by law. Justification is offered with reference to a legal norm, and temporary suspension of the responsibility is the result of an application of a legal norm.<sup>13</sup>

<sup>8</sup> J. Haslem, *No Virtue Like Necessity: Realist Thought in International Relations since Machiavelli* (2002), 20: “Unchallenged orthodoxy does not require justification”.

<sup>9</sup> Art. 25, Articles on the Responsibility of States for Internationally Wrongful Acts (ASR), annexed to the GA Res. 56/83 (2002), 12 December 2001. See further, Agius, *supra* note 3, with references.

<sup>10</sup> Cf. H. L. A. Hart, *The Concept of Law* (1994), 79-99.

<sup>11</sup> See Agius, *supra* note 3; cf. the argument against confluence of legal exceptions and the necessity doctrine in J. Kurtz, ‘Adjudging the Exceptional at International Law: Security, Public Order and Financial Crisis’, Jean Monnet Working Paper 06/08, available at <http://centers.law.nyu.edu/jeanmonnet/papers/08/080601.html> (last visited 03 December 2009).

<sup>12</sup> O. Gross & F. Ni Aolain, ‘Emergency, War and International Law – Another Perspective’, 70 *Nordic Journal of International Law* (2001), 1/2, 29, 31.

<sup>13</sup> Art 27(a) ASR; cf. *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Reports 1997, 7; discussed in Agius, *supra* note 3, in particular at 113-117.

The state of exception on the other hand provides an example of an exit from the realms of law. This contrasting perspective places derogation from international commitments in times of crisis outside the legal paradigm. This institution has been compared to a ‘standstill of the law’.<sup>14</sup> Emergency is perceived as a justification for suspending international obligation altogether. This perspective has it that law is simply irrelevant in extreme circumstances, as it is incapable of accounting for the political or factual situation. Human rights advocates have cautioned against such emerging exceptionalism rhetoric, where the suspension of human rights is considered a reasonable reaction to the dangers facing our societies and liberals are forced to rebut claims that present conditions are unique.<sup>15</sup>

Agamben’s exploration of this phenomenon traces its operation to the authority of the Roman Senate. This authority – being “more than advice and less than command, an advice which one may not safely ignore”<sup>16</sup> – is a force ratifying the socially recognisable or military power that the popular legislative assemblies or magistrates possessed.<sup>17</sup> In this capacity, authority has the competence to suspend that power. Authority, however a force that can suspend and reactivate legislative power as well as its derivative law, is notably not itself a power derived by law. Hence, exceptionalism appears as a power that is not in itself legal, but that has the power to decide on whether law should or should not be considered relevant.<sup>18</sup> The state of exception in fact implies the “suspension of the entire existing juridical order”<sup>19</sup>, subtract[ing] itself from any consideration of law [and hence] it cannot take a juridical form<sup>20</sup>. There is no legal norm that operates to qualify the situation as a state of exception, nor to prescribe any rules to govern the situation once it has arisen.

However, law is not abrogated or deleted; nor is it a state of anarchy. Rather, it is a controlled state where the force of law loses its legal element.

<sup>14</sup> Agamben, *supra* note 2, 41.

<sup>15</sup> L. Lazarus & B. J. Goold, ‘Security and Human Rights: The Search for a Language of Reconciliation’ in: Goold & Lazarus (eds), *Security and Human Rights* (2007), 1, 4; T. Murphy & N. Witty, ‘Is Human Rights Prepared? Risks, Rights and Public Health Emergencies’, 17 *Medical Law Review* (2009), 2, 219, 230-231.

<sup>16</sup> T. Mommsen, as cited in H. Arendt, ‘What is Authority?’, in: H. Arendt, *Between Past and Future: Eight Exercises in Political Thought* (1968), 123.

<sup>17</sup> Agamben, *supra* note 2, 77-78.

<sup>18</sup> Agamben, *supra* note 2, 79.

<sup>19</sup> Translation into English by G. Schwab, *Political Theology* (1985), 12, C. Schmitt, *Politische Theologie*, 1922, 13.

<sup>20</sup> C. Schmitt, *Die Diktatur* (1921), 137. as cited in Agamben, *supra* note 2, 32-3.

What remains is merely the force of the executive to take necessary measures. Law becomes irrelevant to this paradigm, due to the extreme circumstances that brought it into operation. The norm that is applied to the normal situation can be suspended without annulling the juridical order because this authority represents a sovereign decision deriving its prerogative not from law, but immediately from life itself, from the facts of life.<sup>21</sup> When law and life are no longer closely tied together, as they arguably are not, in a state of exception, Agamben argues that there opens a space between law and life for human action and for politics. The question that follows upon such a position is what use one may make of law when the connection between law and life has been deactivated.<sup>22</sup>

The following two incidents serve as practical examples of how these perspectives are present in international events. Neither of these incidents is exclusively legal in nature, but yet contains markedly legal elements and implications. The aim of these sections is to provide factual materials that illustrate the presence of either or both of the perspectives accounted for above. Thus, they may be fitted into a grander narrative of the rhetoric employed by states when describing to their peers events of international relevance that they face and when classifying these events as internal or external to law.

<sup>21</sup> Agamben, *supra* note 2, 85. Oren Gross argues that in states of emergency, one can resort to extra-legal measures, coupled with *ex post* ratification, where one accepts being subjected to the scrutiny of the public when the emergency is over. However, that model still appears to employ a legal benchmarking, but postponed; when translated to international law circumstances it seems to align more closely to a state of necessity rather than a state of emergency as this is described by Agamben. The extra-legal act is consciously “disobedient”, see e.g., O. Gross & F. Ni Aolain, *Law in Times of Crisis: Emergency Powers in Theory and Practice* (2006), 134-142; that is, law would still seem to matter for the determination of the legitimacy of the action. Arguably, in a state of exception, it does not.

<sup>22</sup> Agamben, *supra* note 2, 88.

## C. International Incidents Pertaining to Exceptional Measures

### I. Iceland 2008: The Icesave Incident

#### 1. Facts and Relevant Norms

It will hardly have escaped anyone that the world in 2008 experienced a severe international financial crisis, rapidly spreading across the globe. One state that dramatically fell victim to the financial turmoil was Iceland, which in autumn of 2008 experienced a devastating collapse of its banking system. Icelandic banks had engaged in expansive activities abroad, incurring huge global liabilities, leaving the country very vulnerable.<sup>23</sup> In September/October 2008, Iceland nationalised its three major banks Glitnir, Landsbanki and Kaupthing.<sup>24</sup>

As the Icelandic banking system was collapsing, particular focus came to fall on Icesave, a UK branch of Landsbanki catering to about 300,000 UK savers.<sup>25</sup> Because of the way it was registered, it was not covered by the UK financial regulator's compensation scheme. Instead, the first €20,000 was to be covered by the Icelandic regulator, in accordance with the Depositor Guarantee Directive,<sup>26</sup> which has been incorporated into the legislation of the European Economic Area, and therefore applies to Iceland in the same way as to EU Member States.<sup>27</sup>

<sup>23</sup> Approx. eleven times the size of Iceland's GDP, A. Evans-Pritchard, 'Britain's 'gunboat' diplomacy still angers Iceland', *The Daily Telegraph* (22 July 2009) available at <http://www.telegraph.co.uk/finance/financetopics/financialcrisis/5889325/Britains-gunboat-diplomacy-still-angers-Iceland.html> (last visited 11 February 2010).

<sup>24</sup> T. Braithwaite *et al.*, 'UK and Iceland clash on crisis', *The Financial Times* (10 October 2008) available at [http://www.ft.com/cms/s/0/32ccebde-9666-11dd-9dce-000077b07658.html?nclick\\_check=1](http://www.ft.com/cms/s/0/32ccebde-9666-11dd-9dce-000077b07658.html?nclick_check=1) (last visited 4 December 2009).

<sup>25</sup> R. Mason, 'Letters reveal UK's battles with Iceland over bank crisis', *The Daily Telegraph* (11 July 2009) available at <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/5804421/Letters-reveal-UKs-battles-with-Iceland-over-bank-crisis.html> (last visited 4 December 2009) (Mason, Letters).

<sup>26</sup> Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on Deposit-Guarantee Schemes, OJ No L 135/5.

<sup>27</sup> An interpretation that Iceland concurred with, see statement on the website of the Icelandic Prime Minister's Office (16 November 2008) available at <http://eng.forsaetisraduneyti.is/news-and-articles/nr/3229> (last visited 4 December

When Landsbanki collapsed in early October 2008, the Icelandic government initially reneged on its Directive obligation to compensate depositors of Icesave. The British Chancellor of the Exchequer was quoted saying: “The Icelandic government, believe it or not, have told me ... they have no intention of honouring their obligations”.<sup>28</sup> Iceland tried to explain its dilemma: according to a letter to the UK Government from the then Icelandic Foreign Minister, Ingibjörg Sólrún Gisladottir, the “total possible liabilities, if pushed to their maximum, could impose on Iceland reparations on a similar economic scale to the Treaty of Versailles”, wherefore it claimed to be incapable of reimbursing British customers.<sup>29</sup>

In order to secure funds in case Iceland made real its refusal, the UK Treasury issued a freezing order on the assets of Landsbanki on 8 October 2008, invoking the Anti-terrorism, Crime and Security Act of 2001.<sup>30</sup> The Icelandic Government responded: “The Government of Iceland reiterates its steadfast conviction that the [freezing of bank assets] by the UK authorities was wrongful and unjustified, and has made a formal request to the UK authorities that the Freezing Order be cancelled”.<sup>31</sup> It blamed the UK for triggering the intensified crisis that would follow over the course of October, holding that the freezing of Landsbanki assets had caused a run on its banks and was part of the cause for the suspension of the Icelandic currency.<sup>32</sup>

2009). See Art. 36 Agreement on the European Economic Area, OJ No. L 1, 3.1.1994, 3, and Annex IX, Financial Services, Art. 19(a).

<sup>28</sup> P. Wakeford, ‘UK Government to Sue Iceland Over Savings Dispute’ (8 October 2008) available at <http://www.money.co.uk/article/1001628-iuk-government-to-sue-iceland-over-savings-dispute.htm> (last visited 4 December 2009); see also ‘Iceland and UK in diplomatic dispute over financial crisis’ on NGO news service *Formae Mentis* (11 October 2008) available at <http://formaementis.wordpress.com/2008/10/11/iceland-and-uk-in-diplomatic-dispute-over-financial-crisis/> (last visited 4 December 2009).

<sup>29</sup> R. Mason, ‘UK freezing of Landsbanki assets as ’damaging to Iceland as Treaty of Versailles’, *The Daily Telegraph*, (6 July 2009) available at <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/5761176/UK-freezing-of-Landsbanki-assets-as-damaging-to-Iceland-as-Treaty-of-Versailles.html> (last visited 4 December 2009), (Mason, Freezing).

<sup>30</sup> The Landsbanki Freezing Order 2008, 8 October 2008, Statutory Instrument No. 2668, SI 2008/2668; R. Mason, ‘Iceland to sue the UK over anti-terror legislation’, *The Daily Telegraph* (6 January 2009) available at <http://www.telegraph.co.uk/finance/financetopics/financialcrisis/4142088/Iceland-to-sue-the-UK-over-anti-terror-legislation.html> (last visited 4 December 2009)(Mason, Sue).

<sup>31</sup> Mason, ‘Sue’, *supra* note 30.

<sup>32</sup> Mason, ‘Sue’ *supra* note 30.

British depositors confusing the Icelandic banks with each other was the reason offered by Icelandic Prime Minister Geir Haarde and the executive chairman of the Kaupthing bank, Sigurdur Einarsson, for the collapse and takeover of Kaupthing.<sup>33</sup> When its UK subsidiary Kaupthing Singer & Friedlander was placed into administration in the UK, Einarsson, expressed the belief “that really high up in the [UK] hierarchy there was the decision to close down everything Icelandic”.<sup>34</sup> The assets of the UK division were transferred to the Dutch bank ING on 8 October 2008.<sup>35</sup>

## 2. Reactions and Responses

The UK held Iceland liable to compensate British savers in the amount prescribed by the Deposit Guarantee Directive.<sup>36</sup> It held the behaviour of the Icelandic authorities to be “completely unacceptable” and expressed frustration over the lack of information from Reykjavik.<sup>37</sup> The British Government declared its intention to “tak[e] legal action against the Icelandic authorities [...] showing by [its] action that [the UK would] stand by people who save”.<sup>38</sup> Particular concern was for institutional depositors. Matters concerning individual and retail savers were solved within a matter of days of the diplomatic dispute unfolding.<sup>39</sup> However, accounts owned by governmental, corporate or charitable entities stood to lose up to £800m.<sup>40</sup>

Iceland strongly objected to the use of the Anti-Terrorism Act, arguing that it made “no sense to see an Icelandic company listed next to the Al-Qaeda and the Taliban on the Treasury website.”<sup>41</sup> The UK threatened to seize assets of Icelandic companies in an attempt to recoup the £800m de-

<sup>33</sup> R. Mason, ‘Iceland and UK agree on deal to rescue savers’, *The Daily Telegraph* (11 October 2008) available at <http://www.telegraph.co.uk/finance/personalfinance/savings/3180765/Iceland-and-UK-agree-on-deal-to-rescue-savers.html> (last visited 4 December 2009) (Mason, Deal); Braithwaite *et al.*, *supra* note 24.

<sup>34</sup> Braithwaite *et al.*, *supra* note 24.

<sup>35</sup> Kaupthing Singer & Friedlander Limited Transfer of Certain Rights and Liabilities Order 2008, Statutory Instrument 2008 No. 2674, SI 2008/2674.

<sup>36</sup> K. Donaldson, ‘U.K. officials travel to Iceland over bank dispute’, *Bloomberg* (10 October 2008) available at <http://www.bloomberg.com/apps/news?pid=20670001&sid=aAmGvUyklnMQ> (last visited 4 December 2009).

<sup>37</sup> Braithwaite *et al.*, *supra* note 24.

<sup>38</sup> Wakeford, *supra* note 28.

<sup>39</sup> Mason, ‘Deal’, *supra* note 33.

<sup>40</sup> Braithwaite *et al.*, *supra* note 24.

<sup>41</sup> Mason, ‘Freezing’, *supra* note 29.

posited by local councils in Icelandic bank accounts.<sup>42</sup> In addition, Kaupthing announced plans to sue the UK in a claim ranging in billions of pounds, holding the Transfer Order of 8 October 2008 to be unlawful as it did not fall within the Banking (Special Provisions) Act 2008.<sup>43</sup>

In January 2009, Iceland held it would use “any and all possibilities” to seek redress for damage caused to the country.<sup>44</sup> The UK Treasury sternly defended its position and explained its unwillingness to lift the freezing order while the terms of compensation were still under dispute, rejecting the Icelandic compensation plans. In its view, too many of Landsbanki’s assets had been placed in a new bank only for domestic customers, which left UK savers with fewer assets to cover their claims.<sup>45</sup>

After a change of government, Iceland signalled a new pragmatism in February 2009, declaring that it was no longer willing to go to court over the issue. Instead it would focus on rebuilding the financial system and restore government finances.<sup>46</sup> In June 2009, an agreement was finally reached between the two states and the Netherlands, who also had interests in Icesave.<sup>47</sup> The Icesave deal implies that Iceland agrees to pay compensation to some 200,000 British and 120,000 Dutch Icesave depositors, taking on a €3.9bn guarantee. Britain and the Netherlands finance this by providing loans to Iceland in the same amount at 5.5 percent interest, payable within fifteen years with a seven-year grace period. UK Treasury announced at the same time that the Landsbanki UK assets would be released on 15 June 2009, adding that “[t]he Government welcome[d] Iceland’s commitment to recognise its obligations under the EC Deposit Guarantee Scheme to repay

<sup>42</sup> M. Cavazza, ‘Kaupthing announces plans to sue Treasury over asset raid’, *The Daily Mail* (16 October 2008) available at <http://www.dailymail.co.uk/money/article-1078314/Kaupthing-announces-plans-sue-Treasury-asset-raid.html> (last visited 4 December 2009). Cf. Donaldson, *supra* note 36.

<sup>43</sup> Cavazza, *supra* note 42.

<sup>44</sup> Mason, ‘Sue’, *supra* note 30.

<sup>45</sup> Mason, ‘Freezing’, *supra* note 29.

<sup>46</sup> ‘Iceland drops EU court action against UK over use of anti-terror laws to freeze assets’, *The Daily Telegraph* (25 February 2009) available at <http://www.telegraph.co.uk/news/worldnews/europe/iceland/4803353/Iceland-drops-EU-court-action-against-UK-over-use-of-anit-terror-laws-to-freeze-assets.html> (last visited 4 December 2009).

<sup>47</sup> R. Anderson, ‘Iceland reaches Icesave deal with UK’, *The Financial Times* (7 June 2009) available at <http://www.ft.com/cms/s/20d16f28-5384-11de-be08-00144feabdc0.html> (last visited 4 December 2009).

depositors in Icesave".<sup>48</sup> This statement, with its legal references (although the solution bears marks of politics and pragmatism) illustrates how short the UK's tolerance was for anything but a quick return to normalcy, despite the dire circumstances Iceland was in.

Although the immediate inter-state dispute seems to have been averted, the application of British anti-terrorism laws to Icelandic companies seems however to have caused a lasting feeling of resentment in Iceland. Despite the more reconciling tone, the new finance minister Steingrímur Sigfússon held that “[t]o apply anti-terrorist laws to freeze Icelandic assets is a long way beyond what is acceptable and it has left a lot of bad feelings”, adding that “[s]omehow we have to solve this problem in a civilised manner but the Icesave agreement is very unpopular. People feel that this imposes a terrible burden.”<sup>49</sup>

The Icesave bill, ratifying the deal, nevertheless was passed by the Icelandic parliament in August 2009, after an amendment making various limitations on the payments. The Icelandic Prime Minister Jóhanna Sigurdardottir expressed hopes for understanding and fairness from its two creditors, after the bill was passed.<sup>50</sup> The two states however protested against the amendment that payments would expire in 2024, resulting in a renegotiation of the deal, to the effect that there will be extensions of the repayment guarantee as it expires.<sup>51</sup> The Icelandic President Olafur Grimsson however refused to sign the bill regardless of the international pressure and the Icelandic parliament authorised the Government to hold a referendum on 6 March 2010 in order to get the view of the public. In the pre-polls, up to sixty percent of the population are expected to vote no, which will revive the rejected deal from the bill in August 2009 and is likely to incite further international dispute on the issue.<sup>52</sup>

<sup>48</sup> R. Tyler, ‘Iceland agrees to repay Icesave compensation’, *The Daily Telegraph* (6 June 2009) available at <http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/5462138/Iceland-agrees-to-repay-Icesave-compensation.html> (last visited 4 December 2009). Cf. Evans-Pritchard, *supra* note 23.

<sup>49</sup> Evans-Pritchard, *supra* note 23.

<sup>50</sup> ‘Iceland to pay back Icesave cash’, *BBC News* (28 August 2009) available at <http://news.bbc.co.uk/2/hi/business/8226717.stm> (last visited 4 December 2009).

<sup>51</sup> O. Valdimarsson, ‘New Icesave deal with UK, Holland’, *Reuters UK* (18 October 2009) available at <http://uk.reuters.com/article/idUKTRE59H1IM20091018> (last visited 4 December 2009).

<sup>52</sup> H. Kristin, ‘Icelandic voters remain split on Icesave deal’, *The Guardian* (6 January 2010) available at <http://www.guardian.co.uk/business/2010/jan/06/icesave-iceland-voters-split> (last visited 11 February 2010); ‘Most plan to vote against Icesave deal’,

### 3. Analysis

The following analysis will focus on Iceland's compliance with international commitments. However, an interesting point to note initially in the Icesave dispute is how emergency measures can converge: the UK responding to a financial threat by making use of legislation enacted primarily in response to global terrorism.<sup>53</sup> This substantiates some of the points to be made towards the end of this paper.

One should not ignore the political pragmatism and pressure that may have influenced the Icelandic position and the diplomatic will to reach a settlement of the dispute. Icelandic officials testified to the uncompromising ways of the UK Government, holding that Britain had employed “18<sup>th</sup> century gunboat diplomacy at every stage”.<sup>54</sup> It is likely that Iceland's compliance was informed by tactical considerations relating to its EU bid. To nobody's surprise, the Netherlands asserted that arriving at the deal of June 2009 was “absolutely necessary” for any success with an Icelandic EU membership.<sup>55</sup> Even after the swift formal acceptance of the Icelandic EU application, the Dutch Government conditioned that Iceland must repay €1.3bn to it before the EU bid goes ahead any further.<sup>56</sup>

Nevertheless, the positions of the parties are not devoid of legal argumentation. Repeated reference was made to the legal obligations of Iceland as an EEA country. The parties principally agreed that under normal circumstances Iceland was under obligation to compensate savers. In response to the Icelandic desire to balance its commitment to the Deposit Guarantee Directive against general considerations of fairness and reasonableness, there was a firm expectation from Britain and the Netherlands that this obli-

<sup>53</sup> *Reuters UK* (9 January 2010) available at <http://uk.reuters.com/article/idUKTRE60816M20100109> (last visited 11 February 2010); ‘Critics ramp up opposition to Icesave deal ahead of referendum’, *Associated Press* (10 February 2010) available at [http://www.canadianbusiness.com/markets/market\\_news/article.jsp?content=D9DPEUM80](http://www.canadianbusiness.com/markets/market_news/article.jsp?content=D9DPEUM80) (last visited 11 February 2010).

<sup>54</sup> See G. Lennon & C. Walker, ‘Hot Money in a Cold Climate’, *Public Law* (2009) 37, arguing that this use of the legislation was legal, but normatively undesirable.

<sup>55</sup> Cf. Evans-Pritchard, *supra* note 23.

<sup>56</sup> *BBC News*, *supra* note 50.

<sup>56</sup> A. Rettman, ‘EU wary of diplomatic fallout from Iceland move’, *EU Observer* (28 July 2009) available at <http://euobserver.com/15/28501> (last visited 4 December 2009).

gation should continue to apply even in more dire circumstances such as those experienced by Iceland.<sup>57</sup>

This is particularly interesting in relation to the diverging outcomes of the investment law cases on the Argentine financial crisis in 2001-2003, scrutinised in a series of investor-state arbitrations. Two tribunals saw the non-compliance with, foremost, the fair and equitable treatment standard required by the US-Argentina bilateral investment treaty as excusable, because Argentina was in a state of necessity.<sup>58</sup> Therefore, the actions, while illegal, should not give rise to liability or compensation to the investors. The financial recovery plan launched by Argentina was considered a necessary measure to which there was no viable alternative. Interestingly enough, three other tribunals came to the opposite conclusion and held Argentina responsible for breach of the fair and equitable treatment of investors.<sup>59</sup> International investment treaties however often contain clauses explicitly allowing flexibility for exceptional measures in times of crisis.<sup>60</sup>

Such flexibility does not appear to have been present in the Icesave incident. Iceland was expected by future EU partners to live up to its commitment, even at very high costs. This probably relates to the institutional solidity of the EC/EEA legal scheme and the sense of community it encompasses. Further, the Icesave incident involves an explicitly interwoven global system. Contracting parties may then be less lenient, as laxness could result in ‘catching the disease’ and risk the soundness of one’s own finances. The normalcy paradigm thus had to override the exceptionalist, and

<sup>57</sup> Although Directive 94/19/EC, see *supra* note 26, is arguably envisaged for a situation where an individual bank fails, not a situation where an entire national banking system collapse, *cf.* the preamble of the Directive, speaking e.g., of the need to protect depositors in the event of ‘the closure of an insolvent credit institution’, para. 7.

<sup>58</sup> *LG&E Energy Corp et al v. Argentina*, Decision on Liability, 3 October 2006, ICSID Case No. ARB/02/1; *Continental Casualty Company v. Argentina*, 5 September 2008, ICSID Case No. ARB/03/9.

<sup>59</sup> *CMS Gas Transmission Company v. Argentina*, Award of the Tribunal, 12 May 2005, ICSID Case No. ARB/01/8; *Enron Corp v. Argentina*, Award of the Tribunal, 22 May 2007, ICSID Case No. ARB/01/3; *Sempra Energy International v. Argentina*, Award of the Tribunal, 28 September 2007, ICSID Case No. ARB/02/16.

<sup>60</sup> Also, possibly as a result of a learning experience in international litigation, many states have chosen to make such flexibility clauses self-judging. A. Van Aaken, ‘International Investment Law Between Commitment and Flexibility: A Contract Theory Analysis’, 12 *Journal of International Economic Law* (2009) 2, 507, 523-527.

Iceland could not be allowed to transfer the issue to a discourse where ‘facts of life’ rule the legitimacy of the behaviour, rather than law.<sup>61</sup>

Despite the unpopularity of the Icesave deal, one could however – given that the dispute appears to have been fully contained within the legal paradigm, leaving little room for any divergences into the realms of the extraordinary – interpret the very fact that Iceland managed to secure a loan at this difficult time as a partial win.<sup>62</sup>

## II. Influenza 2009: Swine Flu A (H1N1)

### 1. Facts and Relevant Norms

The financial crisis has affected some countries gravely. However, the ongoing pandemic of the swine influenza A (H1N1) has come to affect most countries. The outbreak of disease can easily become a transnational public health issue. Pandemics in particular are characterised by their very rapid spread to all parts of the world and they reoccur with intervals of one to five decades, an average of three pandemics per century.<sup>63</sup> They have severe ramifications: increased medical needs; widespread employee absenteeism; interruption of public services; or loss of faith in government for not re-

<sup>61</sup> See *supra* at note 28 and 29 and accompanying text, the statements and exchanged letters, in particular during the autumn of 2008.

<sup>62</sup> I am grateful to Jörn Müller at Göttingen University for pointing this out to me. In fact, diverging from the expectations of peers has on more than one occasion been a successful strategy for vigorously getting an issue on the agenda. For instance: when Indonesia in 2007 declared that it would no longer share avian flu virus samples with the WHO because of fears that these samples were exploited and turned into expensive vaccines that would not come to benefit poorer countries, it received a fair amount of support for these apprehensions and the issue of equitable access to vaccines in case of global outbreaks was more visibly added to the agenda of the WHO, D. P. Fidler, ‘Indonesia’s Decision to Withhold Influenza Virus Samples from the World Health Organization: Implications for International Law’, *American Society of International Law, ASIL Insights* (28 February 2007) available at <http://www.asil.org/insights070227.cfm> (last visited 4 December 2009).

<sup>63</sup> Chan, Margaret, World Now at the Start of 2009 Influenza Pandemic (11 June 2009) available at [http://www.who.int/mediacentre/news/statements/2009/h1n1\\_pandemic\\_phase6\\_20090611/en/index.html](http://www.who.int/mediacentre/news/statements/2009/h1n1_pandemic_phase6_20090611/en/index.html) (last visited 4 December 2009). WHO, Ethical Considerations in Developing a Public Health Response to Pandemic Influenza (2007) available at [http://www.who.int/csr/resources/publications/WHO\\_CDS\\_EPR\\_GIP\\_2007\\_2c.pdf](http://www.who.int/csr/resources/publications/WHO_CDS_EPR_GIP_2007_2c.pdf) (last visited 4 December 2009). The pandemics of the last century were the Asian flu in 1957 and the Hong Kong flu in 1968.

sponding well to the crisis. Since they occur simultaneously in many countries, there are few opportunities for inter-state aid and assistance.<sup>64</sup>

The swine influenza A (H1N1), a new form of influenza virus, broke out in Mexico and North America in spring 2009. As of 1 November 2009 there had been over 480,000 cases and 6,000 deaths, affecting almost 200 countries.<sup>65</sup> In early June 2009, the swine influenza was alerted as Phase 6 (pandemic), making it the first pandemic of this century.<sup>66</sup> Influenza pandemics are particularly problematic, as there is almost universal susceptibility to infection.<sup>67</sup> In the case of this influenza, the risk of society shutdown is particularly worrying, as young, healthy populations have been particularly struck, just as in the influenza pandemic of 1918.<sup>68</sup>

The control of infectious disease is regulated in the International Health Regulations (IHR).<sup>69</sup> This is the only binding multilateral agreement on communicable diseases, and it is adopted by 194 states.<sup>70</sup> The IHR in its current formulation, following revisions in 2005, apply generally to infectious diseases.<sup>71</sup> With the revisions, the WHO Director-General was given the mandate to alert the international community of a public health situation that threatens neighbouring countries or international health.<sup>72</sup> This was in

<sup>64</sup> N. Khouri, ‘Bird Flu, TRIPS and the Customary International Law Doctrine of Necessity’, 5 *New Zealand Yearbook of International Law* (2007-2008), 37-38, with references; Murphy & Witty, *supra* note 15, 221.

<sup>65</sup> ‘Pandemic (H1N1) 2009 – update 73’, available at WHO web site [http://www.who.int/csr/don/2009\\_11\\_06/en/](http://www.who.int/csr/don/2009_11_06/en/) (last visited 4 December 2009).

<sup>66</sup> “We are all in this together, and we will all get through this, together”, ‘World Now at the Start of 2009 Influenza Pandemic’, *supra* note 63.

<sup>67</sup> Chan, *supra* note 63.

<sup>68</sup> D. P. Fidler, ‘The Swine Flu Outbreak and International Law’, *American Society of International Law, ASIL Insights* (27 April 2009) available at <http://www.asil.org/insights090427.cfm> (last visited 4 December 2009).

<sup>69</sup> *International Health Regulations*, 2nd ed. (2005), WHA Res. 58.3 (23 May 2005), in force 15 June 2007.

<sup>70</sup> D. P. Fidler, ‘SARS and International Law’, *American Society of International Law, ASIL Insights* (April 2003) available at <http://www.asil.org/insigh101.cfm> (last visited 4 December 2009).

<sup>71</sup> The regulations in force prior to IHR 2005 only applied to cholera, plague and yellow fever, see Art. 1 in the 1969 International Health Regulations from 1969, D. P. Fidler, ‘Global Outbreak of Avian Influenza A (H5N1) and International Law’, *American Society of International Law, ASIL Insights* (January 2004) available at <http://www.asil.org/insigh125.cfm> (last visited 4 December 2009).

<sup>72</sup> Art. 12 IHR; Cf. D. P. Fidler, ‘Developments involving SARS, International Law, and Infectious Disease Control at the Fifty-Sixth Meeting of the World Health Assembly’,

fact formal recognition of a power the WHO had already practised, the ground of which had been unclear, and an important political statement, increasing the organisation's political persuasiveness as well as importance.<sup>73</sup> Use was made of this power in April 2009, when the outbreak of swine flu was declared a “public health emergency of international concern”.<sup>74</sup> Thereby, the epidemic is considered an “extraordinary event which [...] constitute[s] a public health risk to other States through the international spread of disease and [...] potentially require[s] a coordinated international response”.<sup>75</sup>

States parties are obliged to identify and address public health emergencies of international concern.<sup>76</sup> When an international health threat is identified, the WHO can issue temporary recommendations advising restrictions on trade, based on scientific evidence, risk assessments, and the advice of the Emergency Committee. Such recommendations can also advise the issue of travel warnings or the screening and medical examination of travellers.<sup>77</sup> The IHR however purports “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”<sup>78</sup> This must be considered when making recommendations, and states that wish to implement more strict health protection measures must demonstrate that these are not more invasive or intrusive to persons than reasonably available alternatives that would achieve the appropriate level of health protection.<sup>79</sup>

<sup>73</sup> American Society of International Law, *ASIL Insights* (June 2003) available at <http://www.asil.org/insigh108.cfm> (last visited 4 December 2009).

<sup>74</sup> *Id.* For instance, alerts were raised in relation to the outbreak of SARS. Fidler compares this power of the WHO D-G to that of the UN Security Council under Ch. VII of the UN Charter, House of Lords Select Committee on Intergovernmental Organisations, Diseases Know No Frontiers: How effective are Intergovernmental Organisations in controlling their spread?, Vol II: Evidence, HL Paper 143-II, available at <http://www.publications.parliament.uk/pa/ld200708/ldselect/ldintergov/143/143ii.pdf> (last visited 11 February 2010), 392.

<sup>75</sup> Fidler, ‘Swine Flu’, *supra* note 68.

<sup>76</sup> Art. 1 IHR.

<sup>77</sup> D. P. Fidler, ‘Influenza Vaccine Supply and International Law’, *American Society of International Law, ASIL Insights* (October 2004) available at <http://www.asil.org/in sight041020.cfm> (last visited 4 December 2009)

<sup>78</sup> Arts. 17-18 IHR; Fidler, ‘Swine Flu’, *supra* note 68.

<sup>79</sup> Art. 2 IHR, cf. Fidler, ‘SARS’, *supra* note 70.

<sup>79</sup> Arts. 17(d) and 43(1) IHR.

The IHR in fact applies a similar test for trade restrictions to that applied under WTO law, notably the GATT and the SPS Agreement.<sup>80</sup> The purpose of the demand for scientific evidence in both these regimes is obviously to counter protectionist or discriminatory trade restrictions that are merely disguised as public health measures.

## 2. Reactions and Responses

The pandemic has prompted several countries to issue states of emergency and exercise exceptional powers of various sorts.<sup>81</sup> Some twenty states (*inter alia* China, Croatia, Ecuador, Philippines, Russia, Serbia, Switzerland, Thailand) placed bans on pork imports from prominently Mexico, the United States and Canada.<sup>82</sup> This was so despite repeated information from the WHO, the WTO and other organisations that there was no scientific evidence of swine flu being transmitted through pork products and hence no reason to impose trade bans.<sup>83</sup> It has been argued that the bans on pork products could be in violation of the IHR.<sup>84</sup>

<sup>80</sup> Fidler, ‘SARS’, *supra* note 70; cf. GATT Art. XX(b) and the SPS Agreement Arts. 2(2), 2(3) and 5(6); Fidler, ‘Global Outbreak’, *supra* note 71.

<sup>81</sup> See e.g., the list of declarations by some states compiled by the Centers for Law & the Public’s Health, Johns Hopkins and Georgetown Universities, available at <http://www.publichealthlaw.net/Projects/swinefluphl.php> (last visited 4 December 2009).

<sup>82</sup> N. Adomaitis, ‘20 countries ban pork import on flu fears’, *The Toronto Star* (4 May 2009) available at <http://www.thestar.com/News/World/article/628615> (last visited 4 December 2009); J. Lynn, ‘Swine flu alerts prompts pork import bans’, *Reuters* (27 April 2009) available at <http://www.reuters.com/article/idUSN27533817> (last visited 4 December 2009).

<sup>83</sup> WHO, Joint FAO/WHO/OIE/WTO Statement on influenza A (H1N1) and the safety of pork (2 May 2009) available at [http://www.who.int/mediacentre/news/statements/2009/h1n1\\_20090502/en](http://www.who.int/mediacentre/news/statements/2009/h1n1_20090502/en) (last visited 4 December 2009): “To date there is no evidence that the virus is transmitted by food. There is currently therefore no justification [...] for the imposition of trade measures on the importation of pigs or their products.” See also WHO, Joint FAO/WHO/OIE Statement on influenza A (H1N1) and the safety of pork (7 May 2009) available at [http://www.who.int/mediacentre/news/statements/2009/h1n1\\_20090430/en/](http://www.who.int/mediacentre/news/statements/2009/h1n1_20090430/en/) (last visited 4 December 2009), reiterating: “Influenza viruses are not known to be transmissible to people through eating processed pork or other food products derived from pigs [...] Pork and pork products, handled in accordance with good hygienic practices [...] will not be a source of infection.”

<sup>84</sup> Fidler, ‘Swine Flu’, *supra* note 68.

Five countries (Albania, China, Ecuador, Jordan and Ukraine) made a formal notification of trade measures under the SPS Agreement.<sup>85</sup> Exporting countries (Canada, Mexico, Japan, the US, New Zealand, the EU, Brazil, Paraguay, Australia and the Dominican Republic) complained at the meeting of the SPS Committee 23-24 June 2009 that such measures were unjustified.<sup>86</sup> Canada has been reported to be considering formal WTO action over China's ban<sup>87</sup> and the Canadian trade minister, Day, called on governments to "make decisions that are scientifically based", adding that he "would expect those countries, which have gone ahead with the ban or were thinking about it, would stop and have a look at scientific guidelines and would recognise that the meat itself is not a problem".<sup>88</sup>

Some states, *inter alia* India, have claimed to indeed have the required evidence.<sup>89</sup> Others have not, and several of the formal restrictions reported to the WTO were lifted over the course of summer and autumn 2009, reportedly after more careful review of the available evidence.<sup>90</sup> The develop-

<sup>85</sup> See e.g. the following notifications of emergency measures: China (Mexico and US) 5 June 2009, WTO Doc. G/SPS/N/CHN/116; Ecuador (Canada) 15 May 2009, WTO Doc. G/SPS/N/ECU/82; Jordan (all trading partners) 25 May 2009, WTO Doc. G/SPS/N/JOR/20; Ukraine (Canada, Mexico, New Zealand and US) 1 May 2009. Notification is required under Annex B to the Agreement on the Application of Sanitary and Phytosanitary Measures.

<sup>86</sup> See e.g., communication from Mexico to the SPS Committee expressing concern over bans adopted without base in scientific evidence and some states using the outbreak as pretext to issue bans on other products as well, WTO Doc. G/SPS/GEN/921. Cf. 'EU, US complain against India on import curbs on pigs, pork', *Business Standard* (26 June 2009) available at <http://www.business-standard.com/india/news/eu-us-complain-against-indiaimport-curbspigs-pork/65759/on> (last visited 4 December 2009).

<sup>87</sup> The Economic Times/India Times (5 May 2009) available at <http://economictimes.indiatimes.com/News/International-Business/Canada-threatens-WTO-complaint-for-China-pork-ban/articleshow/4486495.cms> (last visited 4 December 2009).

<sup>88</sup> Adomaitis, *supra* note 82.

<sup>89</sup> See *Business Standard*, *supra* note 86.

<sup>90</sup> J. T. Areddy, 'US and China Ease a Range of Trade Restrictions', *The Wall Street Journal* (30 October 2009), available at <http://online.wsj.com/article/SB125680121414515403.html> (last visited 4 December 2009). China has at the time of writing not formally notified withdrawal of its emergency notification to the SPS Committee. Albania, Jordan, and Ukraine have all done so, see, respectively, WTO Docs. G/SPS/N/ALB/116/Add.1, 28 September 2009; G/SPS/N/JOR/20/Add.1, 18 August 2009; and G/SPS/N/UKR/2/Add.1, 13 July 2009. However, as regards the Ukraine, the state shortly after notified that inspections would take place in relation to most kinds of imported animals and animal products "due to the complex epizootic situation in the world", WTO Doc. G/SPS/N/UKR/3, plus Rev.1 and Rev.2, 29 July, 3 Au-

ing disputes may largely have been averted: the allegedly wrongful behaviour has ceased, and according to business news reports, pork sales were only mildly affected by the period of restrictions. However, it still appears *prima facie* to be a divergence from international trade obligations, with little more than the severity and emergency of the situation as basis for it.

### 3. Analysis

When stakes are particularly high, as they are when human life is at stake, there is a higher risk of excessive apprehensions, also in relation to statistically more improbable events.<sup>91</sup> It would appear that the situation on trade restrictions for pork will trigger the legal mechanisms intended to contain overly excessive responses to public health threats. Also in this situation the solution is to some extent a negotiated, political one: for instance, in exchange for removal of the Chinese pork trade ban, the US agreed to remove its restrictions on Chinese poultry, introduced following the avian flu.<sup>92</sup> The situation is nevertheless conducive to legal arguments, as the legal justification builds on standards of scientific evidence, a point on which there is room for divergent opinions.

The framework thus contains plenty of room for flexibility in itself. Further, public health law provides a legal obligation representing an opposing interest to that of free trade in a situation where disease actually can be transferred through the trade in goods. A regime for threats to public health by something as uncontrollable as a virus must probably allow for contingency measures above and beyond normalcy. However, epidemics, even of a global circulation, are rather frequent. The regulations must therefore arrive at a balance between exceptionalism and normalcy, precisely because human health is such a central and existential matter. The possibility of law to evade obligations to respect e.g., free trade requires that there is a framework in place to prevent excessive measures that cause great harm to exporting countries and their industries.

Diseases have the potential of plunging people into panic, tempting them to disregard something as mundane as legal regulation. If the early reports are right, that indeed there is no tangible evidence of swine influenza

<sup>91</sup> gust and 1 Oct 2009. The EC and other in October 2009 raised this as a specific trade concern to be addressed within the SPS Committee of the WTO, holding that there is no justification for such comprehensive inspections and asking assurance that trade will not be unnecessarily disrupted.

<sup>92</sup> Gross, ‘Chaos and Rules’, *supra* note 1, 1040.

<sup>92</sup> Areddy, *supra* note 90.

being transmitted in pork products, the large number of states placing bans on imports of pork indicates that there is still a space that a state of exception may come to operate in, a space where legal argumentation or justification seems superfluous due to the severity of the situation. The number of states imposing a ban without claiming to have the required scientific evidence indicates a widening in the use of emergency exceptions in this field, possibly approximating the precautionary principle.<sup>93</sup>

## D. Conclusions

These incidents give an idea of the degree to which international law is employed and respected in times of crisis. The exceptionalism perspective is present, but fortunately not prominent, in either incident. Exceptionalism implies suspension of helpful law for all the ‘right’ reasons, in which case international law can do little to help resolve crisis.

International law can provide an obstacle as well as a solution in relation to international crises. Normative formulations of desired behaviour will undoubtedly induce thought before action, but it seems questionable whether the illegality of an act is really decisive for the choices of actors in emergency situations. However, there is a dual role to play for international law: on the one side making room for the exceptional within law, e.g. through the necessity doctrine under the law of state responsibility, and on the other, to contain irrational measures that are motivated by a prisoner’s dilemma type of reasoning, self-serving protectionism or panic-induced opportunism.

When conflicting interests, both given voice through international commitments, are contrasted, and commitments are evaded with reference to other obligations under international law, that represents a path for preserving adherence to law, while making room for the most pressing values underlying law. It contains the settlement of a difference in a paradigm of constitutionalism, rather than exceptionalism. Between a rock and a hard place, and given the chance to justify a breach with reference to a conflicting commitment, states give voice to their truest values and allegiances.

There is however a risk that pure opportunism or protectionism will be obscured by references to legal language if placed within law.<sup>94</sup> The merg-

<sup>93</sup> See *supra* at note 82, 85 and 87 and accompanying text.

<sup>94</sup> Cf the arguments offered by O. Gross in favour of his extra-legal measures model, see e.g. ‘Extra-Legality and the Ethic of Political Responsibility’, in: V. V. Ramraj, *Emergencies and the Limits of Legality* (2008), 60.

ing of exceptionalism into the legal framework, into normalcy, may in fact expand the normality that is expressed through the norm.<sup>95</sup> The norm itself is incapable of defining what the normalcy it maintains is.<sup>96</sup> The inclusion of exceptional measures seems to have a tendency to widen the boundaries of the norm, to increase the level of tolerance for deviation. As exceptionalism enters the scene, the perception of normality stretches, opening up within the law that familiar, yet dreaded space for politics characteristic of the state of exception. If the sense of normalcy stretches, it must be asked what the consequences are, if one accepts that crises are recurring and may even become entrenched. If one learns to live with fear and threat and that situation is normalised, the values that were embedded in the rule set aside will not be sufficiently considered.

Several factors are likely to influence how lightly one will discard an international commitment. The legitimacy of the norm may be a factor.<sup>97</sup> Here, the context of commitment seems influential: a community regime like the European Community exerts considerable compliance pull. It is simply imperative for maintaining a sufficient level of faith in the project that rules are adhered to. Firm expectations of compliance at all times may serve as a push towards a more comprehensive adherence to law.

The narrative of the EC project as a positivistic cooperative regime and the character of a ‘club’ may enhance the sense of an *opinio juris* with (presumptive) member states.<sup>98</sup> The strong institutional factor, however present in both examples, may also form part of the explanation: the goals of the regime are clearly represented in and interlinked with judicial activity in both areas; perhaps even more so in the EC.

History may also be a factor: trade rules have emerged as restrictions on the prerogatives of states to decide on their trade policies and are frequently broken and disputed. The EC in its current, elaborate form being a rather recent regime may benefit from not being as ‘broken down’ in terms of earlier non-compliances. The emergencies already faced are likely to shape expectations of future emergencies<sup>99</sup> and the same could be true for

<sup>95</sup> See here the use of anti-terrorism legislation to respond to the failure of the Icelandic financial market. Once rules are in place, it is tempting to put them to use, even against better judgment.

<sup>96</sup> Agamben, *supra* note 2, 40.

<sup>97</sup> T. Franck, *The Power of Legitimacy Among Nations* (1990), 24.

<sup>98</sup> T. Franck, *The Power of Legitimacy Among Nations* (1990), 38.

<sup>99</sup> Gross, ‘Chaos and Rules’, *supra* note 1, 1039.

the solutions to crises, including whether it is conceivable to stretch or break rules to respond to them.

Reflecting on the interface of trade law and public health law in the swine flu example, there may be problems in a time of fragmentation of international law. There is no guarantee that a similar or even identical wording in an exceptional measures clause will be understood in the same way when under scrutiny by bodies or actors affiliated with separate fields of international law.<sup>100</sup>

At the stages at which these incidents are reported, there has been no reason to invoke the necessity doctrine. No international responsibility has been established and it remains to be seen whether – should there be judicial settlement of any of the incidents – such a defence will be raised. Notably, however, Iceland for instance could not permanently rid itself of its obligations under the Deposit Guarantee Directive with reference to such a doctrine, since a necessity defence would only relieve of liability for the period during which the necessity situation persists.<sup>101</sup> Necessity could be more of interest to the trade restrictions example; however, it is a point of debate as to what degree general international law applies fully in the context of WTO law.<sup>102</sup>

The two incidents share the common feature that they are effects of a globalisation process, whereby the interaction between individuals from different corners of the world has increased.<sup>103</sup> In addition, both areas appear to be such that the future will only lead to further inter-state involvement, adding to the rapid international spread of problems as they occur. And as such, they are both areas where further international legal preparedness may be required.

The incidents under study illustrate some more progressive ways in which international law can mitigate crises in the global arena: as a channel

<sup>100</sup> A. Khrebtukova, ‘A Call to Freedom: Towards a Philosophy of International Law in an Era of Fragmentation’, 4 *Journal of International Law & International Relations* (2008), 1, see in particular at 71-78 when discussing regime-interaction in terms of incommensurability.

<sup>101</sup> See *supra* at note 10-11 and accompanying text.

<sup>102</sup> J. Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003), 218-36.

<sup>103</sup> “Planet Earth has never been as tiny as it is now. It shrunk – relatively speaking of course – due to the quickening pulse of both physical and verbal communication.” F. Karinthy, Chain-Links (1929), reprinted in: M. Newman *et al.* (eds), *The Structure and Dynamics of Networks* (2006), 21 arguing that everyone and everything are connected within six degrees of separation.

of communication to open up normative questions for debate<sup>104</sup> or as a format for developing guidelines by third-party organisations providing the least subjective available proof of scientific standards<sup>105</sup>. Such bodies serve as fora for discussion, research and risk assessment and are in a better position to get an overview of relevant values and interests and strike an appropriate balance in crises, *inter alia* in the format of WHO recommendations. It may not be conceivable to confer actual power to legislate, regulate or negotiate to international institutions, in particular when dealing with situations where the state is perceived to be under threat. But authority – being the force that arguably suspends law in a state of emergency – may also be the force that brings orderliness to chaos and crisis. The intellectual leadership, global credibility and persuasive force of international organisations can present alternatives to irrational, exceptional and non-transparent responses. Increasing in this way the political space for greater compliance with common goals rather than selfish ones in times of crisis may be a more realistic ambition than to attempt to create an international law for all seasons.

<sup>104</sup> Cf. *supra* notes 61 and 91 and accompanying text.

<sup>105</sup> E.g., the joint statement by the WTO, WHO, FAO and OIE with regards to the swine flu, see *supra* at note 83.