MILITARY NECESSITY: A MISNOMER

by GEORG SCHWARZENBERGER
Professor of International Law in the University of London

The contents of the laws of war are determined essentially by two formative principles: the standard of civilisation and the necessities of war. In some cases, as, for instance, the prohibition of acts of cruelty against prisoners of war, the standard of civilisation has free play; for it does not conflict in any way with the requirements of the necessities of war. In others, rules may represent a clear victory for the standard of civilisation. The prohibition of the use of poison and poisoned weapons belongs to this category. In others again, rules may constitute a compromise between these two conditioning factors. The Hague Convention of 1954 on the Protection of Cultural Property in the Event of Armed Conflict offers illustrations of this type of law. Finally, there are rules of a purely admonitory character, for instance, those with «as far as possible» reservations. They embody merely formal compromises between the standard of civilisation and war requirements.

By themselves, both the standard of civilisation and the necessities of war are no more than powerful factors in shaping the rules of warfare. Yet, whether, and how far, the standard of civilisation or the necessities of war condition any particular rule of warfare can be decided only by reference to the same evidence as is required in relation to any other rule of international law. It must be shown that the rule in question is one of treaty law, international customary law or expressive of a general principle of law recognised by civilised nations [1].

In this paper, it is proposed to concentrate on one of these two formative factors, that is to say, the necessities of war, sometimes also described as military necessity, *Kriegsraison*, violence necessary for military purposes, or considerations relating to the proper conduct of military operations. Whatever the terminology employed, in each case it means the same thing: freedom from legal restraints. Thus, the chief proposition put forward in this paper is that the necessities of war or any of their synonyms are nothing more, nor less, than the assertion of wartime sovereignty.

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1. See further *Functions and Foundations of the Laws of War*, 44, Archiv für Rechts-und Sozialphilosophie (1958), p. 351 *et seq.*

That this is the real meaning of this variegated terminology becomes apparent, for instance, from the formulation chosen in the Preambles to the Hague Conventions on Land Warfare of 1899 and 1907. In the Convention of 1907 it is explained that these provisions have been «inspired by the desire to diminish the evils of war, as far as military requirements permit». In the corresponding passage of the Convention of 1899 «military requirements» had been called «military necessities».

The necessities of war have in common, as much, or as little, as any other aspect of sovereignty, with necessity as a defence against the allegation of the commission of an international tort. All they share is the element of absence of legal responsibility. The reasons for this common negative feature are, however, entirely different. In the case of necessity as a defence, the act or omission in question is covered *prima facie* by a prohibitory rule of international law. It is not, however, attributable to a particular tortfeasor. In the cases of necessities of war and sovereignty at large, however, prohibitory rules of international law are lacking altogether.

It is, therefore, essential to distinguish clearly in relation to rules of warfare between the necessities of war and necessity in the technical sense. Whether, in relation to the rules of warfare, necessities of war come into the picture at all, whether they are overruled by other considerations or whether they themselves are overriding is a question of interpreting the individual rule at issue. Whether, and how far, the defence of necessity is admissible depends on the character of individual rules of warfare as *jus strictum* or *jus æquum*.

Like other rules of international law, the rules of warfare are either *juris stricti* or *juris æqui*. Thus, for instance, the Geneva Red Cross Conventions of 1949 offer illustrations of both *jus strictum* and *jus æquum* on a treaty basis. In Article 1 of each of these four Conventions, it is provided that the Contracting Parties undertake to respect and to ensure respect for the Convention «in all circumstances»[2]. This is

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2. The «in all circumstances» clause is also contained in Paragraph 4 of Article 49 of Convention I and the corresponding Articles of the three other Geneva Conventions (II : Article 50 ; III : Article 129, and IV : Article 146). See also Article 7 of Conventions I - III, Article 8 of Convention IV and Article 97 of Convention III.

Another type of clause which is intended to create *jus cogens*, but which does not necessarily create *jus strictum*, as distinct from *jus æquum*, is exemplified by Article 51 of Convention I and the corresponding Articles of the three other Geneva Red Gross Conventions (II : Article 52 ; III : Article 131, and IV : Article 148). It prevents parties absolving themselves or others by *inter se* treaties from their own international responsibility for grave breaches of the Convention. Similarly,

clearly meant to be a rule *juris stricti* [3]. Conversely, Article 83 of the Prisoners of War Convention of 1949 is intended to be applied in a spirit congenial to *jus æquum* and even verges on the type of rule which is of a purely admonitory character : «In deciding whether proceedings in respect of an offence alleged to have been committed by a prisoner of war shall be judicial or disciplinary, the Detaining Powers shall ensure that the competent authorities exercise the greatest leniency and adopt wherever possible disciplinary rather than judicial measures» [4].

In the absence of convincing authority to the contrary, it is hard to see why, within the very narrow and strict limits of necessity as a possible excuse — but not justification — in the international law of tort, this defence should not apply also to tortious acts involving the breach of rules of warfare [5]. It cannot, however, be emphasised too strongly how narrow these limits are, and how often the very character as *jus æquum* of individual rules of warfare is likely to defeat this defence [6].

All that is feasible within the compass of this essay is to test this analysis of the necessities of war in the light of some of the available material. If a choice has to be made, the evidence offered by international Courts and tribunals must claim priority over any other.

PICTET'S *Commentaries on the Geneva Conventions*, Vols. I (1952), p. 373, and IV (1956), p. 645.

3. Cf. PICTET'S, *Commentaries*, Vols. I (1952), p. 27 and IV (1956), p. 22 *et seq.*

4. See also Paragraph 2 of Article 87 of Convention III and Paragraph I of Article 118 of Convention IV.

5. In fact, if not in name, the distinction between the pleas of personal and subjective necessity (GREENSPAN, *The Modern Law of Land Warfare*, 1959, pp. 278 and 313), on the one hand, and military necessity, on the other hand, is also drawn in the British *Manual of Military Law*, Part III, 1958, Paras. 630 and 633. In the United States Army Field Manual on *The Law of Land Warfare*, 1956, the plea of personal necessity is accepted by implication. It is not enumerated among the defences excluded (cf. Paras. 509-511. See also *ibid.*, Paras. 3).

As, subject to the operation of the standard of civilisation and treaty obligations limiting the discretion of belligerents, a belligerent is free to impose the death penalty for any war crime, it is entirely within his discretion whether he is prepared to accept the defence of subjective necessity, and for which purposes, *e.g.*, merely in mitigation of sentence. On the practice in this respect of the war crimes tribunals established after the Second World War, cf. Dunbar, 29 B.Y.I.L. (1952), p. 442 *et seq.*, and 67 Juridical Review (1955), p. 201 et seq., and the perceptive discussion in GREENSPAN, *l. cit.*, above, p. 496 *et seq.* For further recent literature on military necessity, cf. the writer's *Manual of International Law*, 1960 (Part Two, Chapter 7, Study Outline 5).

6. See further the writer's *International Law*, Vol. I, 1957, pp. 538, 642 and 644-645.

Yet, in a paper in memory of the late Professor Séfériadès, concentration on this material is also intended as a tribute to an outstanding Greek international lawyer, who, in the post-1919 period, was himself actively connected with the work of international judicial institutions.

In the nature of things, these problems normally arise only in arbitrations between belligerent and neutral Powers. In the relations between former enemy States, the typical situation is that either peace treaties contain general amnesty clauses which preclude further inquiries into relevant situations or, irrespective of the position in international customary law, the dice is heavily loaded against the defeated side [7].

In the *Shattuck* Claim (*Compromis* 1868) between Mexico and the United States of America, the issue was whether Mexico had to indemnify the claimant, a neutral citizen, for the damage inflicted on his farm by Mexican troops during the Franco-Mexican War in the sixties of last century. The Umpire established that, at different times, both French and Mexican troops had been in the area and that, for a period, a Mexican army had been encamped close to the farm. He held that, in these circumstances, it would have been « next to impossible for the general-in-chief of any army to have prevented encroachments upon private property », and that this was a « misfortune to which natives were exposed as much as foreigners, with the additional disadvantage that the former were generally forced to take up arms ». The Umpire, therefore, treated the damage suffered by the claimant as a « result of the inevitable accidents of a state of war » rather than as « wanton destruction of property by Mexican authorities » [8].

The rule applied by the Arbitrator in the *Shattuck* Claim is formulated more stringently in Article 23 (g) of the Hague Regulations of 1899 and 1907. Unless « imperatively demanded by the necessities of war », the seizure or destruction of enemy property is expressly prohibited. Yet, it is doubtful whether the rule as incorporated in the Hague Regulations imposes any more severe obligations on belligerent States than as applied in the *Shattuck* Claim.

The real character of the necessities of war emerges perhaps most clearly from the Award on the *Hardman* Claim (1913). In this case, the British-United States Arbitral Tribunal had to adjudicate on the destruction in 1898 of neutral, in this case British, property in the

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7. See, for instance, the Peace Treaties with Italy of 1947 (Articles 76 and 80 - Cmd. 7481 (1948), pp. 36 and 43) and with Japan of 1951 (Articles 14 and 19 - Cmd. 8601 (1952), pp. 8 and 11).

8. Moore, 4 *International Arbitrations*, p. 3668.

course of the Spanish-American War. The United States army had then occupied Siboney, a town in Cuba. Following illness among United States troops, and from fear of an outbreak of yellow fever, United States forces set fire to, and destroyed, a number of houses, including one which contained furniture and personal property belonging to Hardman.

The United States denied liability on the ground that they had been conducting an active campaign in Cuba and had the right, in time of war, to destroy private property for the protection of the health of their armed forces. It was argued on their behalf that such destruction was either an act of war or an act of military necessity and did not give rise to any legal obligations towards Great Britain. The British Government did not maintain that, as a neutral citizen, Hardman was entitled to any privileged treatment. It admitted that necessary war losses did not give rise to any legal right of compensation [9], but disputed that the destruction of the claimant's property had been a necessity of war. It had been merely in the interest of the health and comfort of the United States forces at Siboney.

The Tribunal defined an act of war as an «act of defence or attack against the enemy» and a necessity of war as an «act which is made necessary by the defence or attack and assumes the character of *vis major*». It held that the occupation of Siboney had been a necessity of war and, on the medical evidence before the Tribunal, the destruction of the houses and their contents advisable and necessary. It, therefore, was a prophylactic measure against further outbreaks of yellow fever and itself a military necessity. At most, there was a case for an *ex gratia* payment on the ground of a «moral duty which cannot be covered by law ... each nation being its own judge in that respect» [10].

Conversely, the same Tribunal found in the *Zafiro* case (1925) [11] that, in cases of looting when no possible necessities of war could be pleaded, the ordinary rules of international responsibility applied. It, then, is necessary to distinguish between, on the one hand, military units under the command of officers and, on the other, straggling and marauding soldiers or sailors [12]. In the former case, the belligerent State

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9. In the Russian Indemnity case (1912) between Russia and Turkey, the Permanent Court of Arbitration also had observed that the «indemnification by Turkey of the Russian victims of war was not compulsory in the common law of nations» (Scott, *Hague Court Reports*, Vol. I, p. 297, at p. 319), but was either a moral duty or rested on the voluntary assumption of liability by way of treaty.

10. 6 R.I.A.A., p. 25, at p. 26.

11. Also known as D. Earnshaw Claim, *ibid.*, p. 160, at pp. 163-64.

12. The Tribunal fortified itself by a whole string of earlier case-law : Hayden's

is responsible. In the latter, it is not. Yet, the test is not simply the physical presence of officers. Their very absence may indicate lack of adequate control. The test is a feasible standard of reasonable control of bodies of men who are armed for purposes normally associated with State activities [13].

In the *Luzon Sugar Refining Company Claim* (1925), the British-United States Arbitral Tribunal applied the same rules to the analogous case of the suppression of an internal insurrection. During the Philippine rising of 1889, insurgents were entrenched about fifty yards on each side of the claimant's pumping station and, during the operation of driving them out, the plant was damaged by shell fire. The Tribunal held that the damage inflicted was an «incident» of military operations directed against the insurgents. The United States had to conduct these operations where the enemy could be found, and it had not even been alleged on behalf of the claimant that the United States forces had got out of hand or did anything «beyond what the operations necessarily involved». The claim was therefore rejected [14].

In *Report III* (1924) on the British Claims in Spanish Morocco, the Rapporteur had reached similar conclusions. He applied analogies of international war to the revolutionary situations before him [15]. Judge Huber drew attention to Article 3 of Hague Convention IV of 1907, which confirms the general responsibility of a belligerent State for «all acts committed by persons forming part of its armed forces». At the same time, he emphasised that the Hague Regulations on Land Warfare offered «very big scope to military necessity». In his view, decision on the requirements of military necessity in concrete cases had to be largely, though not exclusively, left with the individuals who had to take action in these difficult situations and with their military superiors. Civil authorities and, even more so, international bodies ought to interfere only in the case of a «manifest abuse» of this freedom

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case (1851 – United States Domestic Commission under the Act of 1849 relating to Claims against Mexico, Moore, 3 *International Arbitrations*, p. 2995 ; the case of Terry and Angus (1851) before the same Commission, *ibid.*, p. 2993 ; *Mexican Claims* : John Denis v. Mexico and other Cases (Mexican - United States Mixed Claims Commission (1868), *ibid.*, pp. 2996-7 ; Jeanneaud's case (French - United States Claims Commission — 1880, *ibid.*, pp. 3000-3001) ; Donougho's case (1876 – Mexican - United States Mixed Claims Commission, *ibid.*, pp. 3012-3014), and Rosario and Carmen Mining Company Claim before the same Commission, *ibid.*, pp. 3015-3016. See also *loc. cit.*, in note 6 above, p. 613 *et seq.*

13. 6 R.I.A.A., at p. 164.

14. 6 R.I.A.A., p. 165.

15. On circumstances in which war and revolution may be considered as force majeure, cf. *loc. cit.*, in note 6 above, p. 644 *et seq.*

of assessing the requirements of military necessity [16]. In reporting on the *Karrish-Rzini* Claim (1924), the same Rapporteur defined military necessity as tactical necessity [17]. It is possible, but improbable, that the Rapporteur meant to contrast tactical necessity with strategic necessity so as to exclude the latter from the purview of military necessity. It is more likely that he meant to contrast tactical necessity with sheer arbitrariness, and understood by it any functional necessity *sub specie belli*. The term would then bear a sense similar to that attached to it by the British-United States Arbitral Tribunal in the *Hardman* case [18].

For the sake of completeness, the case of *Gagalis* v. *Germany* (1930), decided by the German-Greek Mixed Arbitral Tribunal, must be mentioned. In this case, the Tribunal was confronted with the claim of a Greek citizen whose farm in Rumania had suffered damage in the course of severe fighting in that area during the First World War. German troops had occupied the farm and dug trenches across the fields.

The Tribunal admitted that much of the damage had been due to acts of war for which Germany was not responsible. Nevertheless, it held that the occupation of the farm and the use of the fields for purposes of war without compensation amounted to an «act committed» in the meaning of the Peace Treaty of Versailles of 1919, that is to say, an illegal interference with the property of a neutral citizen [19]. It is hard to square this decision either with common sense or the otherwise fairly consistent practice of international tribunals. It is probably explicable only on the basis of unstated major premises on a more general German liability for the consequences of aggressive war.

Compared with the formulation in the Hague Regulations of 1899 and 1907, which permitted seizure or destruction of enemy property only if this was «imperatively» demanded by the necessities of war, more lenient tests were applied in the London Charter of the International Military Tribunal of Nuremberg. In the enumeration of war crimes under international customary law, the relevant war crimes were defined as «wanton destruction of cities, towns or villages, or devasta-

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16. 2 R.I.A.A., p. 615, at p. 645.

17. *Claim No. 16*, *ibid.*, p. 680, at p. 682.

18. In this connection, an earlier study by the Rapporteur on *Die kriegsrechtlichen Verträge und die Kriegsräson* (7 Zeitschrift für Völkerrecht (1913), p. 351, at p. 354 *et seq.*) is instructive. There, too, Judge Huber distinguished between strategic and tactical necessities of war (Kriegsnotwendigkeit and militärische Notwendigkeit), but certainly did not mean to exclude strategic necessities from the necessities of war.

19. III, 2 *Zeitschrift für a.ö.R. und V.R.* (1933), p. 120, at p. 122.

tion not justified by military necessity» [20]. Although this list was not meant to be exhaustive, the Nuremberg Tribunal contented itself with applying these relaxed standards of responsibility. Even so, the Tribunal could not help finding in its Judgment that the armed forces of the Third *Reich* had «wantonly destroyed without military justification or necessity» cities, towns and villages in the countries they had illegally invaded [21].

It appears that the whole weight of this judicial material assumes the unrestrained freedom, in principle, of belligerent States in the actual conduct of hostilities, but for this purpose only. The explanation is that if civilised nations exchange a state of peace for one of war or intermediacy between both, they still intend to act as civilised nations. In other words, they are prepared to continue to apply *sub modo* the standard of civilisation even towards enemy States and enemy populations. By common consent, however, they resume their freedom of action to the extent to which this is required for purposes of a functional application of force.

This is the meaning of the necessities of war. Yet, the proof that they are but a positive circumscription of a lack of legal restraints is that, in the second of the four types of the rules of warfare mentioned above, the standard of civilisation overrides even the necessities of war. Then, as the standard of civilisation advances, the field which is left to the necessities of war correspondingly shrinks.

If the necessities of war were a particular type of necessity in the technical sense, this constant give and take in the relations between the standard of civilisation and the necessities of war would be hard to explain. If, however, the necessities of war are recognised as a synonym of sovereignty at large, the mystery vanishes. It becomes apparent that they comprise any situation in which the application of force for purposes of the prosecution of the war is not limited by relevant rules of warfare. As, however, the standard of civilisation continues to govern even relations between enemy States in fields in which the application of force does not promote the objects of war, any such use of wartime sovereignty amounts to an abuse of this freedom and constitutes an illegal act.

In this view of the issue, doctrinal difficulties arising from a more conventional treatment of the topic begin to vanish. It becomes apparent that the maxim *Kriegsraison geht vor Kriegsmanier* [22] is nothing

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20. Article 6 (b) – Cmd. 6668 (1946), p. 5.

21. Cmd. 6964 (1946), p. 45.

22. To judge by the comprehensive collection of Articles of War in *Corpus Juris Militaris* (1724), this maxim is of more recent vintage than its apparently archaic

less than the assertion of the priority of a primordial concept of sovereignty over duties incumbent on a belligerent under international customary law or treaty obligations. Similarly, the view that military necessity exonerates belligerents from the observance of the laws of war is but an attenuated form of the same anarchist fallacy [23]. It is a more specialised application of another doctrine which is as destructive of international law as it is untenable [24] : the doctrine of an all-overriding right of self-preservation.

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language suggests. On this doctrine, cf. also, for instance, GARNER, *International Law and the World War*, Vol. II, 1921, p. 195 *et seq.*, and STONE, *Legal Controls of International Conflict*, 1959, p. 351 *et seq.*

23. The only legitimate form in which the priority of the necessities of war over international obligations can be secured is by way of reservation in the text of the rule itself. Then, the rule in question is reduced to one of a primarily admonitory, and largely illusory, character.

24. See further 87 Hague Recueil (1955), p. 343 *et seq.*