The State of Necessity in International Law

by

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The state of necessity, under certain conditions, precludes the illegal character of an act in international law, too. This is admitted in several arbitral awards. In international law the state of necessity plays an important part as a general principle of law recognized by civilised nations. The problem of the state of necessity must be solved in international law on the basis of those principles which are operative in municipal civil and criminal law regarding the state of extreme need: it is possible to refer to the state of necessity in defence of all interests protected by law; the protected interests must be more important than the interests injured; the danger must be immediate and otherwise not avertable; it is necessary that those who avert the danger, shall not be guilty in provoking it.

Subject of an act of necessity is, in the first place, everybody whose interests protected by law are imperilled. Others can, however, be subjects of such an act, too. Diplomatic missions may accord their protection to those whose life and corporal integrity are threatened by an immediate and otherwise not avertable danger in consequence of the ceasing of public order and security. The action taken by somebody who helps another person being in necessity, may not be regarded as illegal.

The state of necessity must be distinguished also in international law from the related phenomena: from the legitimate self-defence and self-help. The state of necessity means different things in politics and in international law. It may occur that the two notions are very near to each other. This was the situation in 1939 in the case of the war between Finland and the Soviet Union. There is no special military necessity or necessity of war.

I. The question of the state of necessity is not quite elucidated in international law. Its concept and legal nature are uncertain.

There are some authors who deny that there exists the concept of the state of necessity in international law.

This is the opinion of the French *P. Fauchille*,[1] of the Belgian *Ch. de Visscher*,[2] of the Italian *Borsi*[3] and *A. Cavaglieri*.[4] *Rodick*[5] discussing the question in a special monograph, concedes that the state of necessity precludes in international law, too, the unlawfulness of an act, but he admits its legal effect only under very restricted conditions. As he expounds, the first of these

[1] P. FAUCHILLE, *Traité de droit international public*. Huitième édition. Tome I. 1ère partie. Paris, 1922. Rousseau. p. 418 et seqq.

[2] CH. DE VISSCHER, *Les lois de la guerre et la théorie de la nécessité*. Revue générale de droit international public. 1917.

[3] BORSI, *Ragione di guerra e stato di necessità nel diritto internazionale*. Rivista di diritto internazionale 1916.

[4] A. CAVAGLIERI, *Lo stato di necessità nel diritto internationale*. Roma, 1918.

[5] RODICK, *The Doctrine of Necessity in International Law*. Columbia University Press, New York 1928.

conditions is that, in the strictest sense of the word, there may not be made references in which its application was in advance admitted by the law.[6] This opinion excludes the state of necessity, taken in the proper sense of the term, from the domain of international law and recognizes it only as an analogy of the exceptional emergency case in public law regulated in advance by the municipal law.

The overwhelming majority of international jurists, however, are of the opinion that the state of necessity — under specified conditions — quashes the unlawful character of the act.

To be sure, the question whether the sate of necessity is or is not recognized by international law, may not be decided by the opinion of the international jurists. It may only be decided on the ground of the positive international law, that is to say, of the rules of law based on the collective will of the States.

We must examine what the practice of the States in the matter of the state of necessity shows. At this point one must be very careful. When a State refers in order to excuse or justify its conduct to the state of necessity and the necessity is not acknowledged by the other State, such a reference does not prove anything. Only the common attitude of the opposed States or the decision of an international Court, respectively, may be regarded here as an adequate test. It must also be carefully examined here whether the negative attitude of a State applies only to the special circumstances of the case or whether it is of a general importance as regards the problem.

There is no international judicial decision which would state, in principle, that the state of necessity is unknown in international law. There cannot be found such an agreement in bilateral or multilateral conventions either. On the contrary, there are international arbitral awards which take position in a positive sense as to the question of the state of necessity. Such is *the case of the American vessel Neptun*. This vessel was captured in April 1795 by a British cruiser on the high seas, on the ground of instructions received from the British Government to the effect that every vessel carrying foodstuffs destined wholly or partly to a French port should be stopped and captured. The Neptun was carrying rice. The case was submitted, by the terms of the Anglo—American agreement of 1794 known under the name Jay Treaty, to a Mixed Commission. Great Britain invoked before the Commission the state of necessity and pointed out that the population of Great Britain was starving. The majority of the Commission admitted that the state of necessity could justify such measures, in the concrete case, however, it dismissed the British defence. Without examining whether Great Britain had serious reasons at this moment to fear famine, the Commission pronounced that Great Britain would have been capable of

[6] *Op. cit.* p. 119.

doing away the shortage of food by offering higher prices. It established that Great Britain, after the publication and carrying out of the instructions mentioned above, promised a bonus for the import of the commodities she was short of. The consequence was that the neutrals glutted the market with the goods demanded. The decision of the Mixed Commission deserves to be taken into consideration because it not only admits the general possibility to refer to the state of necessity, but also determines those conditions under which reference to the state of necessity may be resorted to. The arbitrator of second instance agreed with the standpoint of the Mixed Commission.[7]

There are cases also in the international law of the Sea in which the arbitrator allowed the reference to the state of necessity. Thus, in 1809 Sir William Scott declared in the case of *Eleanor* that the actual and imperative need was a sufficient title for the application of the laws of humanity. In the *Susannah Case* the Commission established by the agreement of March 3, 1849 concluded between the United States and Mexico, had to decide the question whether the Mexican authorities were entitled to inflict a punishment on the captain of the American steamer on the ground that the ship carried contraband. The Commission stated expressly that the vessel, owing to the damage suffered by her, was obliged to sail into Mexican port and this fact precluded the culpability of the captain. The goods carried by the vessel into the Mexican port could not be considered as contraband because they were not introduced into the port for commercial purposes, but in the need to forestall the imminent loss of the vessel. An analogous decision was passed also in the *Erie Case* on the ground of an agreement concluded in 1849 between the United States and Brasil, and in the *Case of Rebecca* in 1884 between the United States and Mexico.[8]

Consequently, there can be no doubt that the state of necessity is known in international law. Nevertheless, we must clear up the legal ground of the state of necessity and its accurate criteria because States often make groundless references to the state of necessity, and in this case, naturally, the ruling out of their defence does not mean a position taken up in principle against the admission of the state of necessity.

II. *The state of necessity often appears in the law of nations as a right of necessity (droit de nécessité), and, as such, it is generally discussed in relation to the fundamental rights of the State and sometimes between these fundamental rights themselves.*

This relation between the state of necessity and the fundamental rights of the State reflects the opinion according to which reference to the state of necessity is admissible only in the case of an imminent threat to the funda-

[7] A. DE LAPRADELLE et POLITIS, *Recueil des arbitrages internationaux*, vol. I. p. 137 et seqq. A. VERDROSS, *Les principes généraux dans la jurisprudence internationale.* Académie de Droit International. Recueil des cours. 1935. vol. ii. (52) p. 208. et seqq.

[8] C. BALDONI, *Les navires de guerre dans les eaux territoriales étrangères.* Académie de Droit International. Recueil des cours. 1938. III. (65) p. 237 et seqq.

mental rights of the State. This view concerns the extent of the state of necessity, too. According to this view, the presence of a state of necessity may not be established in the case of a threat to any kind of interests protected by law, even if the threat is immediate and otherwise not avertable. It relieves the State from the prejudicial legal effects of its otherwise unlawful conduct only if the fundamental rights of the State are directly threatened by a danger which cannot be averted in any other way.

In so far as the so-called fundamental rights are concerned, there cannot be question of these rights being in international law as if they were innate human rights proclaimed by the law of nature, that is to say, rights independent of the will of the legislator, and as if they obliged the States even without their consent. The fundamental rights of the State are constituted of those general legal principles upon which the system of international law is based. These principles express the will of the States as members of the international community with regard to the principles of mutual relations. They are not static, they also belong to the superstructure and in keeping with the alteration of their basis they change themselves as well.

As to the enumeration of the fundamental rights, there is no unanimity in the literature of international law. Previously, as a rule, five fundamental rights had been discerned: 1. the right of independence, 2. of self-preservation, 3. of equality, 4. of dignity, 5. of international relations.[9]

P. Fauchille discerns only two fundamental rights: the right of self-preservation (droit de conservation) and the right of freedom (droit de liberté); he reduces both to a single ancient fundamental right: to the right to existence (droit à l'existence).[10] Within the two fundamental rights he points out several special rights, so he considers, for instance, the rights of equality and of international relations as the expression of the right of freedom. *Verdross* speaks of four international fundamental rights and duties: 1. right and duty of political independence, 2. of territorial supremacy, 3. the right and duty to respect the dignity of other States, 4. the right and duty of international relations.[11]

E. Wolgast points out that a fundamental right may often be regarded as the effect of another fundamental right by which the lack of precision in the doctrine of fundamental rights is further complicated.[12]

[9] A. Verdross, *Völkerrecht*. Dritte neubearbeitete und erweiterte Auflage. Springer, Wien 1955. p. 165.

[10] *Op. cit.* p. 407 et seqq.

[11] A. Verdross, *op. cit.* pp. 166—178. Verdross in the first edition of his Law of Nations (A. Verdross, *Völkerrecht*. Springer, Berlin 1937. pp. 199—205) distinguishes the following fundamental rights: 1. the fundamental right of respect, and within this *a)* the right of respect of the territorial supremacy, *b)* of the internal order of the State, *c)* of the honour of the State; 2. the fundamental right of self-help. This also shows what uncertainty prevails with respect to the enumeration and systematization of the fundamental rights.

[12] E. Wolgast, *Völkerrecht*. Georg Stilke, Berlin 1934. p. 749.

The Assembly of the United Nations in 1947 requested the International Law Commission to prepare a Draft of a declaration containing the rights and duties of States. The Commission completed the Draft at the closing of its first session, on June 9, 1949, which listed four rights and ten duties of the States. The four rights are as follows : 1. the right of independence according to which the State may exercise its jurisdiction in every respect, free from being subjected to the will of other States, including the free choice of its government, 2. the right to exercise its jurisdiction over its territory and over all persons residing in it and things to be found there, 3. the right to equal rights with other States, 4. the right of individual or collective defence against every armed attack. The ten duties which the Draft enumerates not separated from the rights but included in them, clearly show : firstly that the fundamental rights and duties of the States are closely connected with one another, secondly, how arbitrarily these rights and duties are listed, and, finally, that these rights and duties are often overlapping.

The position concerning the fundamental rights of the States is the same as that in municipal law with regard to the rights of freedom of the individual. Individual freedom is not the totality of different rights enumerated one by one, but a legal status, the state of exemption from the intervention of others. Individuals are entitled to do everything that is not forbidden by law, that is to say, State organs or individuals have no right to intervene.

The same applies to the fundamental rights of the State ; international law ensures to the States within the international community a legal position and compels them to respect each others' legal status. Since this legal position is shaped by the general principles which are reflected in the rules of the law of nations, it is nearly impossible to enumerate the fundamental rights and duties of the States one by one. The State is entitled to demand from other States the respect of its international legal status. It depends on the positive law to determine when this demand appears in the form of an international subjective right.

The international legal status of the States must be shaped so that the States should not be legally prevented in fulfilling effectively their external and internal functions.

The international legal status is based upon two principles : the equality and the sovereignty of the States. Each so-called fundamental right is the consequence of one of these. The respect of the two fundamental rights ensures that the State should not be prevented by legal obstacles in successfully accomplishing its duties.

It is in no way right to connect the question of the state of necessity with the fundamental rights of the State. In the first place, it is not correct to limit the possibility of the reference to the state of necessity exclusively to cases in which the so-called fundamental rights of the State are threatened by an

immediate and otherwise non avertable danger. Secondly, since the question of the fundamental rights — as we have seen — is not adequately elucidated in international law, a great uncertainty prevails with regard to the concept of the fundamental rights, and especially to the enumeration of these rights. It would be a very arbitrary step to connect the concept of the state of necessity with such an uncertain notion. Some States could easily allege that they are in a state of necessity as a consequence of a direct and otherwise not avertable danger which threatens their supposed fundamental rights. Occasionally, they could enforce their standpoint with their greater military and political power and they could resort to the concept of the state of necessity by way of a brutal intervention executed in their own interest.

It seems rather attractive to reduce the reference to the state of necessity to the fundamental right of the "droit de conservation", and to admit it only if this fundamental right of the State, *i.e.* its existence, its self-preservation is directly and in an otherwise not avoidable way endangered. This opinion takes as a starting point the extraordinary narrow concept of the emergency, of the extreme need in penal law which does not grant protection for the person but in the interest of saving his own life or his relatives' life. The concept of extreme need has a much wider notion in modern penal law and so it would be entirely unjustified to make use of this obsolate concept in international law. But there is another danger, too. There is no doubt that the State is entitled to commit in the interest of its self-preservation and existence even acts which otherwise would be infringements of international law. The "droit de conservation", however, is generally not limited to the preservation of the mere existence of the State, but the notion of this right is enlargened in an unjustifiable way. The authors include in it the right of the State to develop the constituents of its economy, to increase its economic power,[13] to ensure, in general, its development in every direction. The American Society of International Law having passed in 1916 a resolution relating to the rights and duties of nations, explicitly ensures the right of free development, and this was ensured also by the Declaration adopted in November 11, 1919 concerning the Rights and Duties of the Nations by the Union Juridique Internationale.[14] Also *E. Wolgast* interprets in an unequivocal way the right to self-preservation in this sense.[15]

There is no doubt that the right of free development of the State exceeds all that what for men, taken individually, the protection of life means. The freedom of economic success is not judged, even in capitalist States, from the

[13] So P. FAUCHILLE, *op. cit.* p. 110 et seqq.

[14] Both Declarations are published by P. FAUCHILLE, *op. cit.* p. 400 et seqq.

[15] E. WOLGAST, *op. cit.* p. 754. "Eine andere Seite des Rechts auf Selbsterhaltung besteht darin, dass ein Staat nicht nur ein Recht auf Selbsterhaltung, sondern ein Recht auf Selbstentfaltung besitzt. Denn das Völkerrecht rechnet mit dem Dasein der Staaten nach deren vollem Wesen."

same standpoints as the right relating to the safeguarding of life. If it were permitted in municipal law for the individuals that in order to avert the danger hindering their economic prosperity, they could be entitled to make inroads upon the rights of others, this would amount to the fact that force would occupy the place of the rule of law. The same would apply, even to an increased extent, to international law, too. This opinion would justify the nearly unlimited enforcement of the imperialist aspirations.

III. *The state of necessity is acknowledged in international law as a general principle recognized by civilised nations.* It is known that Article 38 of the Statute of the International Court of Justice enumerates these general principles among the sources to be applied by the Court and considers them as an auxiliary source of international law. The opinion holding that these general principles mean the general principles of the law of nations, is wrong. The general principles of international law constitute an integral part of the positive law of nations, they are expressed either in the written law established by treaties or in the rules of the international customary law, and in addition to these, they cannot be considered as a third separate source. The plain truth is that the general principles playing a part in municipal law are shifted, by way of analogy, into the domain of international law on the ground that when the interested States have settled a certain question on the basis of certain principles, it is probable that they would have applied the same principles in the case if they had regulated the same question in the domain o international law.

The Statute of the International Court of Justice speaks of general principles recognized by civilised nations. The text is not quite correct. It expresses an idea which is contrary to the principle of equality of the States, albeit this is a fundamental principle of international law. The matter is not about whether the principle in question is known by the civilised nations, but whether it is known in the system of law of the interested States. The principles incorporated in the municipal law of civilised States cannot extend their effect on the "non-civilised States". That would be manifestly contrary to the principle of sovereignty. It results from the principle of sovereignty that no State is bound by a principle or rule of law which it did not accept as obligatory for itself. If the State has accepted in its municipal law the principle in question, we accept it as obligatory in the domain of international law, too, on the ground of its *presumed* will.

It is a general legal principle in municipal law that the state of necessity removes in the concrete case the disadvantageous legal effects of an otherwise illegal act, and this legal principle is shifted into the domain of international law.

This legal principle is in general recognized in the form of the extreme need by the municipal penal law. The positive municipal penal laws vary

only with regard to the limits of the legally protected interests, and the interests which must be jeopardised in order to justify the admission of the extreme need, are not everywhere the same.

The concept of extreme need is known in municipal law not only in penal law, but also in the civil law. In both branches of the legal system the same legal principle applies : the state of necessity removes the legal effects of an otherwise illegal conduct. The liability for damages is not affected by the existence of a state of necessity, partly because nobody may use the things of others without the consent of the latters, and partly because the liability for damages is not a necessary legal effect of an illegal act.

In some positive legal systems the penal and civil concepts of the extreme need are not identical ; this, however, is irrelevant, because every positive legal system knows the state of necessity as a legal principle eliminating the legal consequences of an unlawful act.

According to the concept of extreme need, the danger must be immediate and otherwise not avertable. It is also necessary that the interest injured by the illegal act shall not be more important than the one in the interest of which the act of necessity was committed.

The penal and civil extreme need are legal states precluding the otherwise unlawful character of the action taken. The penal and civil extreme need are not subjective rights : the aim envisaged is the protection of personal and property rights, but, as such, they are not subjective rights, the act committed in extreme need is a legally admitted action.

The act of necessity is a phenomenon contrary to the misuse of rights (abus de droit). In the case of a misuse of rights, an action complying with the formal provisions of the law becomes unlawful as a consequence of the conditions inherent in the concrete case. On the other hand, the act performed in a state of necessity is losing its otherwise unlawful character and becomes lawful as a result of the circumstances prevailing in the given case.

The case of necessity is well-known in public law, too. The state of necessity in public law, however, differs essentially from the extreme need in penal and civil law. Here, in a certain given case, the rules of organization and of procedure relative to the exercise of the State power are modified, and the applicable substantial rules may be incidentally modified as well.

That is the position also with regard to the rules relating to the case of war or menace of war. War or menace of war create a state of necessity and the coming into force of the relative special legal rules is the consequence of the state of necessity. In the case of penal or civil extreme need, legally protected rights clash, a struggle evolves between the persons interested and this struggle is decided by the same persons without the intervention of the State power. It is not so in the case of a state of necessity in public law. Here, the State is acting through its organs and in the case of necessity only the state

organs and those procedural and possibly substantial legal rules are changed which come to be applied.

As to the legal rules applicable in the case of war or menace of war, the criteria of the state of necessity are well-determined, in the case of war beyond any dispute. War breaks out when, according to international law, the state of war sets in. On the other hand, the existence of a danger of war already requires a certain political consideration.

In the case of extreme need in penal and civil law, the person interested decides himself whether the state of extreme need exists, and he also decides the attitude to be adopted in order to avert the extreme need.

In the case of necessity in public law, the act to be committed consists in the putting into execution special legal rules, but the very action taken by the State in compliance with these special legal rules, does not amount to an act of necessity proper.

It may also happen that a State organ referring to the state of necessity proceeds without legal authority : transgresses his competence or disregards the procedural and substantial legal rules otherwise obligatory for him. Such acts of "necessity" remain outside the domain of law, they do not belong to the category of acts of necessity in the legal sense of the term, they are the consequence of a state of necessity taken in a political sense, their appreciation is based on political considerations.

IV. *The question of the state of necessity must be decided in international law on the basis of the same principles which are applied in the municipal penal and civil laws of the various States in the case of extreme need.*

It is possible to refer to the state of necessity in international law, too, *in the defence of every legally protected right.* The interest in question must not be specially important from an absolute point of view, for instance, it is not necessary that the existence of the State should be threatened ; the importance of the interests called in question is of a relative nature here, too, the protected right must be more important than the interest injured.

The interest must be in any case a *legally recognized* right. Acting in a state of necessity, the subject by means of his individual action gives effect to the protection of his interests, that would be otherwise the duty of the legal order. The unlawful act perpetrated in the defence of legally not recognized interests is not exempted from the unfavourable legal consequences, even in the case of a reference to the state of necessity.

There are three groups of interests recognized by international law : 1. the private interests of the single individuals, 2. the special interests of the various States, 3. international general interests. These groups do not mean a difference in degrees, and we cannot maintain that the interests belonging to a certain group would necessarily be more important than those belonging to another group.

It is obviously a state of necessity when an aircraft as a result of an engine trouble executes a forced landing on a part of the territory of a foreign State declared, according to the rules of international law, as being a prohibited area. The pilot of the aircraft has violated the law of nations, but the unlawful character of his action is offset by the otherwise not avertable danger which threatened his and the passengers' lives. Here private interest is in collision with the special interest of the State in question. The right of the individual to his life is a fundamental human right expressly recognized by international law. To this right is opposed the right of the State, originating from its sovereignty, on the ground of which it can close at its discretion, certain areas on its territory from air communication. The State interest is, in principle, more important than the private interest of the individuals, but in this concrete case the individuals are threatened by a greater danger than the State and, consequently, the forced landing may be qualified as an act of necessity.

On the high seas the freedom of navigation is of an international general interest, and so it is of general interest, too, that the ships should be allowed to sail into the territorial waters, but if there is a state of civil war in the port, the maintenance of the public order may require the complete closing of the port; should this be the case, it is legally admitted to stop the entry of foreign ships as well. The special interest of the State connected with the maintenance of the public order is more important in the given case than the international general interest attached, in the territorial waters, to the freedom of navigation.

The freedom of navigation is, naturally, such a public interest to which always a private interest is attached as well. This proves that neither in international law is it possible to separate distinctly public and private interests. The three groups of interests mentioned above are closely interconnected.

Since the state of necessity appears in international law as a general principle borrowed from the municipal law, here it is essential, too, that the *danger* which brought about the state of necessity *shall be immediate and not otherwise avertable.*

Viewing formally, there are two separate conditions, but the two are closely connected with each other. In most cases, the direct, the immediate character of the danger makes in the concrete case impossible to avert the danger by other means.

What does the direct character of the danger precisely mean? That disaster must follow in the next moment? Or the danger is direct, too, when it would ensue without the perpetration of the act of necessity, if not in the next moment, but without doubt in any case? The danger is direct even in this last contingency as well. The law does not require waiting for the last moment; this would be wanton. It is important that the danger should be real and should not exist only in the imagination of the threatened person. If the disaster can only be prevented by perpetrating an act of necessity, in my opinion, the state

of necessity is present. The fact that the danger cannot be averted, implies to a certain extent its direct character as well. This rule has a special importance in public international law. Within the State the danger may often be averted by the intervention of the State power and this may render unnecessary the resort to an act of necessity, but in international law, there is no public power on the intervention of which one could rely.

The state of necessity only exists in international law when *the State which averts the danger is not guilty in provoking the danger.* The State which caused itself the emergence of the danger by its intentional or negligent conduct is not exempted from the unfavourable legal consequences of its illegal act in international law either. It is especially important to stress this in international law. Otherwise it could happen that the State intentionally provokes a danger in order to commit a wrong by intervening in matters which are essentially within the domestic jurisdiction of another State.

In so far as the legal nature and the position occupied by the state of necessity in the legal system are concerned, there is no doubt that in international law we cannot speak of a right of necessity either. Law cannot allow a subjective right for the perpetration of an illegal act. The state of necessity precludes also in international law the illegality of an act. In penal law it may be controversial whether the extreme need precludes the unlawful character or culpability for the action taken ; in international law, however, there is no doubt that no penalty can be inflicted upon the State. At best, only measures for security may be taken against the State, which are destined to prevent the future repetition of the illegal act.

The acts of necessity are committed in the domain of international law, too, by natural persons but it is always the State which is responsible for an act of necessity as an illegal act, whether the act is perpetrated by State organs or by private persons under the jurisdiction of the State.

Who may be the subject of an act of necessity in international law?

Firstly, he whose legally protected interests are threatened by a direct and otherwise not avertable danger. But just as in municipal law, in international law there are other subjects as well. In the law of nations, the question at issue whether in addition to the directly interested persons also others may be subjects of acts of necessity, must be examined from two aspects : 1. the relation of private persons and the State, 2. the relation of the States between each other.

If the interests of the nationals residing abroad are endangered and the State which would be obliged to protect them, cannot or does not wish to avert the danger, the State may intervene in order to protect the interests of its own nationals, and the nationals themselves may do the same in the defence of the interests of their country, albeit it follows, as a matter of course, that in this contingency the possibility is seldom at hand for the nationals to perform it.

Diplomatic missions protect those whose life and corporal integrity on the territory of the receiving State is threatened by a direct and otherwise not avertable danger in consequence of upheaval of public order and security. Universal international law — in contradistinction to the regional international law of the Latin-American States — is unaware of diplomatic asylum. It would be a breach of international law if a diplomatic mission wanted to exempt somebody from the jurisdiction of the receiving State's authorities. This would be an intervention in matters which are within the domestic jurisdiction of the receiving State and would injure its sovereignty. The case is different when a state of necessity exists: the receiving State is not able to protect the life and corporal integrity of the person against the irresponsible attacks of the crowd. But asylum may be granted only in a state of necessity and as long as the state of necessity endures. The asylum has to be suspended on the request of the competent authority of the receiving State.

In a state of necessity asylum may be granted to foreign nationals and even to the subjects of the receiving State as well. The right to life and corporal integrity are fundamental human rights recognized by the law of nations. If these rights are threatened by a direct and otherwise not avertable danger, the asylum may be granted, to be sure, for the time only as long as the state of necessity prevails.

In the relation between States the problem is more complicated. In principle, the attitude by which one State averts from the other a direct and otherwise not avertable danger, may not be regarded as being illegal. It may happen, however, that the protection becomes in the concrete case illegal and not only in relation to a third State affected by the state of necessity, but possibly to the State, too, the protection of which is envisaged. It can constitute an illegal intervention in the domestic affairs of the State concerned, serving the interests of the intervening State. In international law there is no authority which would be entitled to state with binding force the emergency character of the action taken and to decide whether the protection was bona fide granted or it was only a pretext for a prohibited action.

Of course, we can only speak of an act of necessity if the act is aimed at averting the immediate danger, if the action comes to an end when the danger is over, and if it does not create a lasting situation at variance with the sovereignty of the State.

V. *The state of necessity must be distinguished, also in international law, from certain related phenomena.* In the first place, from the *self-defence.* Essentially, an action committed in self-defence belongs to the category of the acts of necessity, construed in a broad sense of the term. It precludes the unfavourable legal consequences of such otherwise illegal acts which are necessary to avert an illegal attack or a threat with such an attack.

The illegal attack is a constituent element of the notion of self-defence. If the state of necessity is brought about by the illegal act of another person, it is not the state of necessity, but the state of self-defence which prevails.

In international law the two notions are often intermingled. The "droit de nécessité" is resorted when self-defence is present.[16] Reference is also made to the state of necessity when not even the criteria of self-defence can be ascertained and neither the concept of the state of necessity nor that of the self-defence can be applied in the case.

When the Mexican general Villa during the civil war waged against general Caranza in 1916, invaded the territory of the United States, occupied Columbus City and killed several American subjects, the United State sent troops into Mexico in order to punish general Villa for his illegal agression. This action was not an act of necessity because it was preceded by an illegal agression, but it could not be regarded as taken in self-defence either, because it did not tend to repel an illegal and direct attack. *Fauchille*[17] stands, in my opinion erroneously, for self-defence in this case. These measures, from the point of view of their legal nature, resemble the penalties in municipal law, although they correspond to a more primitive stage of development when the injured person applied himself reprisals by means of self-help.

Thus may be qualified the case of the so-called Chinese "Boxer Revolt" in 1900, too, as it led to the intervention of the Great Powers. Here neither the state of necessity, nor self-defence were present because direct danger was over. The aim of the military intervention was retaliation of a punitive character.

Related to these phenomena is the case when the State in its territorial waters makes use of legally otherwise non admitted means against a foreign vessel which disregards the provisions of the port regulations and does not care about the signals of the port authorities. Here, essentially it is about police measures and the problem to be decided is what kind of means can be justified by the policing aim. The problem is the same as the question of the legal use of arms in municipal law.

These cases concern the application of *self-help*. Self-help is known by the municipal law, too, but here it can only be made effective within very narrow limits as the State power cares for the exercise and safeguarding of rights. Self-help can only take place within the restrictions provided for by the legal power. In international law the case is different. Here the exercise and safeguarding of rights is made effective in the first place by self-help as there is no organized international public power which could fulfil this function. The otherwise illegal act committed in self-help is not an act of necessity. Its illegality in the concrete case is not removed by the state of necessity. The legal acts

[16] P. FAUCHILLE, *op. cit.* pp. 421—422.
[17] *Op. cit.* p. 421.

recognized by international law and destined to replace the acts of the lacking international public power are similar to the action taken by the State organs which are authorized to secure the exercise and safeguarding of rights in municipal law.

Reprisals are means of self-help. It follows that the acts committed as reprisals are not acts of necessity, it is not the state of necessity by which in the concrete case the otherwise illegal conduct is rendered legally permissible.

Retorsion is a legal but unfriendly act in retaliation against acts of the same character. It only becomes recognized in international law when it appears in the form of retaliation of an abuse of rights by means of such a conduct which could be an abuse of rights otherwise.

When retorsion does not amount to the retaliation of an abuse of rights by the same means, it does not constitute an act of necessity because it is not destined to shield interests protected by international law, yet it is an essential constituent element of the concept of the act of necessity.

It results from the concept of the state of necessity that *the act of necessity can never be destined to create legal rules.* The act of necessity is aimed at averting a direct danger. The danger must be concrete and direct, in framing a legal rule, however, — if it is destined at all to avert a danger — only a future danger can be envisaged. In this case one can only speak of a state of necessity in a political and not in a legal sense.

VI. *Rodick* has pointed out[18] that *the state of necessity is different in politics and in international law.* From the point of view of the foreign policy the State may be in a state of necessity without the international legal criteria of a state of necessity being present.

If a State in order to normalize its economy needs a foreign loan and the loan is granted under conditions jeopardizing its independence, the State may be politically in a state of necessity because without the foreign loan its whole economy would possibly break down, the criteria of the state of necessity taken in a legal sense, however, are not given : the danger is not direct and otherwise not avertable. The claim of Norway that all its fjords should belong to its territorial waters constituting its territory was a political necessity.[19] At best there was a state of political necessity present in the case of controversy relating to the Bering Sea.[20] The United States of America, on the initiative of the Alaska Commercial Company, which hired certain islands for the purpose of seal fishing, took unilateral measures concerning the seal fishing in the area beyond the territorial waters. It was of a great consequence to the United States to prevent the extermination of the seal stock near its terri-

[18] Rodick, *op. cit.* pp. 44 and 90.

[19] Rodick, *op. cit.* p. 28. The International Court of Justice recognized this claim of Norway in the British—Norwegian Fishery Case.

[20] Pitt Cobbett, *Leading cases in International Law.* 4th ed. vol. I. London 1922. pp. 127—136.

torial waters, a state of necessity in the legal sense, however, which would have removed the unlawful character of the unilateral regulating, did not exist. Great Britain has protested against these measures taken by the United States and the case was submitted in 1893 to arbitration. The Court did not admit the claims of the United States. The two States settled by common agreement the question of seal fishing in the Bering Sea on the basis of the regulations prepared by the Court of Arbitration.

The question whether the state of necessity in a political sense exists has to be decided on the ground of the circumstances of the concrete case. This decision is not easy and always contestable. If there is a political state of necessity, this justifies the illegal act only politically, but does not remove the unlawful character of the action. In international life this state of necessity taken in a political sense is similar to the phenomenon which may occur in the internal affairs of the State when the State organ commits an act contrary to law without authority previously obtained. In this case, at best, a state of necessity taken in a political sense may only be established which can and has only to be appreciated politically.

There are cases in which the political necessity is close to the state of necessity taken in a legal sense and may be considered, from the standpoint of international law, as almost a state of necessity taken in a broader sense. That was the situation in 1939 in the case of the war between the Soviet Union and Finland.

The Paris Peace Conference after World War I pushed back to a considerable extent the Russian frontier eastward and submitted on the West frontier of the Soviet Union old Russian territories to the domination of powers which threatened the security of the Soviet Union to a large extent. Leningrad was situated to 32 kilometers from the Finnish frontier and Moscow was not very far from the frontier either.

The Soviet Union concluded mutual assistance pacts in the interests of its security with the Baltic States.[21] The Soviet Government tried to conclude a similar pact with Finland as well. Finland submitted later the case to the League of Nations and the League published officially the material presented to it by the Finnish Government.[22]

This material does not permit any doubt with regard to the following: The Soviet Government, as it was expressly pointed out by the note of October 14, 1939, tried to settle in the course of the negotiations with Finland two questions: 1. to ensure the security of Leningrad, 2. to make sure of the fact that Finland will keep up constant friendly relations with the Soviet Union. For this purpose, the Soviet Union considered necessary that it should be en-

[21] The text of the conventions is published in *The Bulletin of International News* Vol. XVI. 1939. pp. 1042—1043 and 1129—1130.

[22] *Appel du gouvernement finlandais à la Société des Nations selon la documentation officielle.* — Supplément spécial au Resumé Mansuel des travaux de la S. d. N. Décembre. 1939.

titled to close the Gulf of Finland before the enemy vessels and to prevent the occupation of the islands situated in the Gulf of Finland. The Soviet Government also saw it necessary that the Finnish—Soviet frontier on the Carelian peninsula should be marked out more distant from Leningrad.

The Soviet Government proposed that the harbour town and the immediate environs of Hangő should be let on lease for 30 years to the Soviet Union in order to establish there bases of naval operation and that certain islands in the Gulf of Finland and East Carelia should be ceded to the Soviet Union in exchange for other territories. In the interest of making more effective the non-agression pact signed by the two States, the High Contracting Parties should oblige themselves not to adhere to a group of States or alliance hostile to one of them.

Finland did not consent to the proposition, though, in principle, it did not contest the legal ground of the Soviet claims. Hereupon, the Soviet Union in its note of October 23 has reduced its original propositions. But in spite of this fact an agreement could not be concluded and the military operations began. It is well-known how they came to an end. The peace treaty was signed in Moscow on March 12, 1940.[23] In the Peace Treaty the Soviet Union did not go beyond its original objectives although on the basis of the military situation it could possibly have done it. It acquired the territories which were necessary in the interest of the security of Leningrad. It took on lease Hangő for 8 million Finnish marks for 30 years, the Peace Treaty therefore contained a provision also on this point in conformity with the original objective. The Soviet Union did not claim reparations at all, which also proved that it was led by the point of view of its own security. *Molotov* expressly stressed this in his speech held on March 29 in the Supreme Council. He also pointed out that the war with Finland did not mean the armed clash with the Finnish troops, the Soviet army had to fight against the united force of the imperialists of several States, among them of Great Britain and France. It was not the protection of a small nation and of a member of the League of Nations which was the objective leading Great Britain and France but the fact that Finland was a ready base of military operations for an agression against the Soviet Union.[24]

On June 22, 1941, Nazi Germany attacked the Soviet Union. The western frontier of the latter having been rectified in good time, this rendered to a great extent more difficult the activities of the agressor and the attack broke down in face of the resistance put up by the powerful Red Army.

There is no doubt that the Soviet Union was in a state of necessity. The breaking out of the war threatened its security and this danger could not be averted but by means of a military action against Finland. This was entirely

[23] The text of the Peace Treaty is published in *The Bulletin of International News*, Vol. XVII. 1940. pp. 342—343.

[24] *Op. cit.* pp. 418—419.

justified by the events. The question at issue is whether the criteria of the necessity were existent? There is no doubt that the security and territorial integrity of the Soviet Union, and, consequently, its interests protected by international law were endangered. It is equally undoubted that the danger under the given conditions could not be otherwise averted. The Soviet Union tried to settle the question by negotiations, but these negotiations were unsuccessful as a consequence of the conduct of Finland. Thus the only possibility left for the Soviet Union was to take up arms. It is questionable, however, whether the danger was direct in the sense as it is required by the legal notion of the state of necessity. I mentioned already that in international relations the direct character of the danger does not always mean precisely the same that it means in municipal law. Within the State there are different official and social means to avert the danger and there is always a possibility to avert by these means the threatening danger at the last moment. In international relations law took only recently measures in this regard.

The question arises whether it would not be justified to define the notion of the state of necessity in international law in a broader sense than in municipal law? The concept of the state of necessity came into the law of nations as a general principle, consequently, its meaning cannot be wider than the one being determined by the general legal principle mentioned above. This notion could only acquire a broader meaning in international law on the basis of the respective legislative will of the States.

It must be taken into consideration, too, that the possibility of the state of necessity taken in a political sense has diminished in international relations as a consequence of the recent provisions of international law, at least with regard to the security and territorial integrity of the State. The Charter of the United Nations contains comprehensive provisions in order to prevent and to avert the danger threatening the peace and security of the States. These provisions are destined to avert the danger of an aggression. Aggression is an illegal act against which justifiable self-defense may be applied. Self-defense, however, is justified only against a direct attack. If the attack is indirect, if it is only a menace, self-defense is not justified. Here the illegal act may only be excused by the state of necessity but a state of necessity exists only if the danger cannot be averted otherwise. It is precisely the Charter of the United Nations that renders possible to avert the danger otherwise. Consequently, in the case of a danger threatening the security and territorial integrity of the State, the existence of the state of necessity, in the international legal construction, can hardly be to-day recognized when international public power organized in the United Nations takes measures to avert the threatening danger.

The Security Council is competent to consider disputes and situations which threaten international peace and security. One can also imagine such a situation which does not threaten international peace and security but

threatens the integrity protected by international law of the State concerned. That is the case of a state of necessity taken in a political meaning which politically justifies the action of the State, even if it is contrary to international law. Such a political state of necessity may assume the character of a legal state of necessity if the danger is direct, otherwise not avertable and there is no possibility for the intervention of the United Nations.

Rodick[25] pointed out that two authors having two opposite opinions and starting from two different standpoints like *Machiavelli* and *Hugo Grotius* stress the same two principles as criteria of the state of necessity : 1. the existence and the possession of the State must really be threatened, 2. the force employed shall not be superior to the one being necessary for the protection of the threatened right. Both authors had in view the political state of necessity and both expressed their opinion at a time when the maintenance of the security by means of the organized force of the community was still unknown.

VII. *What form does the state of necessity assume in war? Does a special military state of necessity exist in war? Huber*[26] makes a distinction between State necessity (Staatsnotwendigkeit), war necessity (Kriegsnotwendigkeit) and military necessity (Militärische Notwendigkeit). The first concerns, in his opinion, the protection of the vital interests, of the dignity and independence of the State. The second means the accomplishment of the military objective, the third means the securing of the success of the different military operations, a situation rendering the illegal act unavoidable. According to him, in addition to these, the extreme need taken in a stricter sense of the term may also occur in war when the illegal act is committed in order to save the life of one or more persons, when, for instance, as a consequence of a lack of food, the prisoners of war are left to their fate but not killed.

In opposing the extreme need taken in a narrower sense to the three cases of necessity distinguished by him, *Huber* tries to make use in international law of a certain notion of the extreme need applied in penal law, namely of the very narrow notion which only admits the existence of the extreme need in the case of a threat against life and corporal integrity. I have pointed out above that the necessity can only be applicable as a general legal principle of the different municipal laws and not as a positive rule contained in the penal code of one or another State.

What *Huber* said concerning the extreme need taken in a stricter sense of the term, is very near to the state of necessity taken in a political sense.

What could in war justify the special character of the state of necessity? There is in no way a question of the violation of the provisions of international law concerning war. As far as the notion of the state of necessity is concerned,

[25] Rodick, *op. cit.* pp. 9—10.

[26] M. Huber, *Die kriegsrechtlichen Verträge und die Kriegsraison.* Zeitschrift für Völkerrecht. Vol. VII. (1913) p. 351 et seqq., especially p. 356.

it is always the character of the interest protected by law what is important and not the character of the illegal act committed in the defence of the threatened interest.

There can be no question neither of a state of necessity in war, nor of a military necessity because neither the crushing of the military force of the other State which would justify the state of necessity in war, nor the success of the various military operations which would justify the military necessity, are not interests protected by international law. International law does not grant a special protection to neither party against the enemy. It does not protect for any of them either the crushing of the force of the enemy or the success of the military operations.

The legal rules of warfare are of a procedural character. They often establish prohibitions not in the form of provisions relating to concrete questions but in the form of general principles. They do not entitle the belligerents to certain acts with legal effects, but they leave belligerents free to do everything what is not forbidden by international law. This possibility is ensured for both parties in an identical way. In the course of the war termed as a procedure, there are no special interests on the part of the belligerents which would be protected by international law and would create a state of necessity in case they are threatened. If one of the belligerents infringes a prohibition provided for by international law, the other party is entitled to apply reprisals against him, but his action does not amount to an act of necessity.

There are cases in which the prohibition established by international law is not absolute. Several articles of the Hague Convention on the Laws and Customs of War on Land (Articles 48, 51 and 52) expressly contain the clause "in so far as it is possible". Here the binding force of the rule depends on the circumstances of the concrete case. The party concerned decides himself whether the rule is applicable to the concrete case. Of course, he may not settle the legal question unilaterally. The question remains open whether his action was legal or illegal in the concrete case. Article 54 of the Hague Convention does not admit the seizure or destruction of submarine cables, except in absolute need. Here a state of necessity proper does not exist. The state of necessity as an existing state of affairs is a condition of the application of the provisions of the Convention. Consequently, the state of necessity does not excuse the non-observance of a rule of international law but, on the contrary, it renders legitimate its application.

The same applies to several provisions of the Conventions of Geneva of August 12, 1949. Thus, by the terms of Article 42 of the Convention relating to the protection of the civilian population in wartime, the internment and the assignement of a compulsory residence to the protected persons may only be ordered when the security of the State in the power of which they are to be found makes it absolutely necessary. By the terms of Article 57, the occupy-

ing power may not requisition civilian hospitals but temporarily and only in the case of urgent need. In the Geneva Conventions we find more than once the expressions military necessity, urgent military necessity and imperative military necessity, and the Conventions make repeatedly the effect of their provisions depend on the condition that the military requirements admit it. (So, for instance, Articles 30 and 33 of the Convention regarding the improvement of the situation of the wounded and sick soldiers of the armies in the field, Article 126 of the Convention concerning the treatment of prisoners of war, Articles 16, 18 and 53 regarding the protection of the civilian population in time of war.)

In these cases, there is no question of a state of necessity taken in legal sense but of such an actual situation which is the condition of the application of the legal provision.

War is for both belligerents a permanently dangerous situation. The constant state of danger goes hand in hand with the war. Here it is not possible to refer to the state of necessity, as well as in municipal law no reference may be made to the extreme need by the person who is obliged to assume the responsibility for the danger concomitant with his profession or occupation.

According to international law now in force, the same rules are obligatory for the party making an illegal war as for the one resorting to a war of sanction. The question may arise with regard to the prohibitions concerning the military operations whether it would not be necessary to make a distinction between the belligerent on the part of which the war must be qualified as an illegal act, and the belligerent on the part of which the war must be considered as being the fulfilment of a public function destined to put an end to the unlawful conduct of the other party?

Consequently, a special state of necessity of war or a military state of necessity does not exist. This, however, does not mean that the possibility of the state of necessity is excluded, in principle, in the case of war. The act of necessity cannot consist of a direct military action and it cannot be destined to ensure for one of the parties a more favourable situation. Thus, the Hague Regulations concerning the Laws and Customs of War on Land ensure the inviolability of private property. It is, however, without any doubt that in order to prevent the spread of contagious diseases, the belligerents may destroy movables or such buildings which are focuses of the contagion and in which disinfection is not possible. They may do this even in the case when the rules of municipal law do not contain any explicit provision in this respect.

Fundamental human rights as interests protected by international law play also here an important role in bringing about a state of necessity.

In war it often happens that the belligerents refer in order to justify the illegality of an act committed by them to a state of necessity, or that they support their opinion by such theoretical considerations.

In the literature of international law the question of the violation by Germany of the permanent neutrality of Belgium and Luxemburg during World War I was much discussed. Especially at the beginning the discussion was not exempt from political bias. The German authors were, without exception, of the opinion that the invasion of Belgium by German troops was not illegal from the point of view of the international law, because if it was true that Germany violated the Convention concerning the permanent neutrality of Belgium, this was executed in legitimate self-defence, considering the fact that Germany, as the note addressed by the German Government on August 2, 1914 to Belgium pointed out, had reliable informations to the effect that France had the intention to attack Germany through Belgian territory.[27]

Bethmann-Hollweg, the Chancellor of the Reich alluded, too, to self-defence (Notwehr) at the meeting of the Reichstag on August 4, 1914,[28] but his justification was rather peculiar. He expressed the opinion that "Not kennt kein Gebot". It is true, he said, that France declared to respect the neutrality of Belgium as long as it is respected by the enemy. But France can wait and Germany cannot. Since the French invasion on the lower Rhine could have been fatal, catastrophic for Germany, Germany was obliged to disregard the joint protest of the Belgian and Luxemburgian Governments. The illegality committed by the Germans will be repaired as soon as their military objective will be achieved. Everybody who is in such a dangerous situation as the Germans, and who has to fight for his life, must cut his way through at all costs.

In this Declaration the reference to self-defence falls already into the background and rather the state of necessity is emphasized but even in this respect, there is no question how to settle the issue on a legal ground. The Declaration is based on the idea that the rules of international law may be set aside in the interest to attain the objectives of the war.[29]

Let us examine the question of the state of necessity in connection with the international legal rules concerning neutrality. The state of necessity is most frequently connected with the state of self-defence : the belligerent defends himself against an illegal attack of the enemy which is launched from the territory of a neutral State and which, as such, should be prevented by the latter, but the neutral State is not capable to defend its neutrality. In this event without doubt, the state of self-defence may be established with respect

[27] J. KOHLER, *Notwehr und Neutralität.* Zeitschrift für Völkerrecht. vol. VIII. 1914. pp. 576—580. K. STRUPP, *Die Vorgeschichte und der Ausbruch des Kriegs.* op. cit. pp. 655—744. DR. OTTO NELTE, *Die belgische Frage.* op. cit. pp. 745—754. K. STRUPP, *Das internationale Landkriegsrecht.* Frankfurt 1914. p. 133. F. LISZT, *Völkerrecht.* 10. Auflage. 1915. p. 202. *The study of* K. STRUPP published in the Zeitschrift für Völkerrecht publishes also the documents relating to the case.

[28] This *Declaration* is published by DR. OTTO NELTE, *op. cit.* pp. 747—748.

[29] The question of the violation of the permanent neutrality of Belgium is discussed in detail by CH. DE VISCHER, *op. cit.* pp. 74—108.

both against the aggressor and the neutral State as well because the legal ground of the action taken by the State attacked consists in the illegal failure of the neutral State. The conduct of the neutral State is contrary to the law of war as well, its illegal conduct, however, may not be regarded as an intentional act opposed to the law, but only as the actual incapability of the neutral State to perform its duty determined by law. The aggressor by attacking the other belligerent through the territory of the neutral State commits an illegal act not only against the State attacked but against the neutral State as well. Consequently, the neutral State is in the state of legitimate self-defence, too. The neutral State, however, is not only entitled to defend itself, but also obliged to do it according to international law: it is entitled to prevent the action violating its neutrality against one of the belligerents, and it is bound to do it towards the other as well.

If the belligerent can only prevent the illegal act committed against him through the neutral State by violating the neutrality of the latter, he is in a state of necessity with regard to the neutral State. His act may be considered as legally permitted in consequence of the connection existing between the states of self-defence and of necessity.

Such a state of necessity existed at the beginning of World War II (February 1940) in the *Altmark* case. Altmark was a German armed merchant vessel and as such she should have been qualified as a man-of-war. She joined in the attack launched in the southern parts of the Atlantic by the German warship Graf Spee, and after the successful attack, she took on board about 300 British prisoners of war and tried to sail into a German port through the territorial waters of Norway. Discovered by British warships, she took shelter in the Joessing Fjord. The British Admiralty, in concert with the Government, gave order to the British ships to sail into the Norwegian waters, to visit and search the Altmark and to set free the prisoners of war found on board. The British ships encountered at the entrance of the Fjord two Norwegian gunboats. The British commander proposed to place the Altmark under a joint British and Norwegian surveillance and to escort her to Bergen for being searched. The commander declared that the Altmark was not armed that she was searched the previous day in Bergen and that she got permission to continue her voyage in Norwegian territorial waters to Germany. The British ships withdrew and on the ground of new instructions given by the Admiralty, a British destroyer penetrated into the Fjord, broke the resistance of the Altmark, set free and took on board the British prisoners of war found there. The Norwegian and the German Governments have protested most forcefully against this action on the ground that it violated the neutrality of Norway.[30]

By the terms of Convention XII concluded at the Second Hague Peace Conference in 1907, the innocent passage of the warships of the belligerents

[30] *The Bulletin of International News*. Vol. XVII. 1940. pp. 225—231 and 291—293

in the territorial waters is not contrary to neutrality (Article 10), and as a consequence, Norway was entitled to permit in its territorial waters the passage of German man-of-war without violating its neutrality. The Altmark, however, had on board British prisoners of war. The question was whether the shipping of prisoners of war could be qualified according to the Hague Convention as an innocent passage. Germany itself did not consider its action as legally incontestable, what is proved by the fact that it denied the shipping of prisoners and protested expressly against the searching. The capture of prisoners of war amounts, beyond doubt, to an operation of war. To transport prisoners and to put them in a safe place is a complementary part of this operation and consequently, a man-of-war transporting in neutral territorial waters prisoners of war may not be considered as performing a mere innocent passage. Her action belongs to the military operations and must be qualified as a violation of neutrality. Accordingly, the Altmark infringed the rules of international law. The belligerent State is entitled to liberate its prisoners of war being in the power of the enemy, even if they are on the territory of a neutral State because the belligerents have no right to keep prisoners of war in their own power on the territory of neutral States. Norway would have been obliged to take the British prisoners into its own custody. From the standpoint of the law of nations, the proceeding of Great Britain was all the less reprehensible, since according to British informations the prisoners of war were placed on board in an inhuman way and, therefore, their liberation rendered the act of necessity permitted on account of the direct danger threatening their life.

VIII. It is an important task incumbent upon the science of international law to elucidate the problem of the state of necessity. The state of necessity, under certain conditions, removes the unlawful character of an otherwise illegal act. This implies a very serious danger in international law. In municipal law the acts of necessity are under the control of the courts. In international law, however, there is no organ which could establish with binding force whether in the concrete case the criteria of the state of necessity actually existed. The law of nations does not preclude the arbitrary action of the States and so it can easily happen that the imperialist States, on the ground of a false reference to the state of necessity, commit illegal acts and intervene into the affaires of other States and oblige them to serve their own interests. The international law by establishing the notion and the criteria of the state of necessity renders more difficult these aspirations and so contributes to giving effect to the principle of sovereignty for great and small powers alike.

Чрезвычайное положение в международном праве

Л. БУЗА

Чрезвычайное положение исключает противоправность действия при определенных условиях также в международном праве. Этот принцип установлен рядом решений международных третейских судов. В международном праве чрезвычайное положение занимает место общего правового принципа, признанного всеми цивилизованными народами. Вопрос о чрезвычайном положении подлежит разрешению в международном праве на основании принципов, касающихся института принуждения по уголовному и гражданскому правам внутри государства: ссылка на принуждение допускается для защиты всякого интереса, защита которого закреплена в законодательном порядке; интерес, который защищается, должен быть более важным по сравнению с интересом, который нарушается; опасность должна быть непосредственной и иначе не отвратимой; далее, необходимо, чтобы в причинении опасности не был виновным тот, кто предотвращает ее.

Субъектом принудительного действия является прежде всего тот, законному интересу которого угрожает опасность. Однако субъектом такого действия могут быть и другие лица. Дипломатические представительства вправе оказать защиту лицам, жизни или здоровью которых угрожает непосредственная и другими средствами не отвратимая опасность вследствие разложения общественного порядка и безопасности. Поведение, заключающееся в том, что одно из государств оказывает помощь другому в чрезвычайном положении, также не считается противоправным поведением.

Чрезвычайное положение подлежит также в международном праве различению от явлений, имеющих сходство с ним, т. е. от необходимой обороны и самопомощи. Чрезвычайное положение в политической жизни отличается от чрезвычайного положения в международном праве. Бывают случаи, когда оба вида принуждения стоят близко друг к другу. Таким было, например, положение в случае советско-финской войны 1939 г. Особого военного чрезвычайного положения нет.

L'état de nécessité en droit international

par

L. Buza

Sous certains conditions, en droit international aussi, la nécessité exclut l'illégalité des actes — ce qui est d'ailleurs reconnu par plusieurs sentences arbitrales internationales. L'état de nécessité est du nombre des règles de droit international que les nations civilisées ont reconnu être un des principes généraux de droit. La question de l'existence de l'état de nécessité doit être décidée en droit international selon les mêmes principes qui la régissent généralement dans les juridictions pénales et civiles internes des Etats. On peut en effet invoquer l'état de nécessité pour sauvegarder n'importe quel intérêt protégé par la loi, à condition que celui-ci soit plus important que celui qui est violé, que le péril soit imminent et qu'on ne puisse y parer autrement et enfin que le péril en question n'ait pas été provoqué par celui qui veut s'en défendre.

Le sujet des droits découlant de l'état de nécessité est en premier lieu celui dont les intérêts légitimes se trouvent menacés; mais d'autres peuvent l'être aussi. Ainsi, les représentations diplomatiques peuvent accorder protection à tous ceux dont la vie ou l'intégrité physique sont menacés par suite de l'effondrement de l'ordre et de la sécurité publique qui ne sont pas obviables par d'autres moyens. Le comportement d'un État prêtant assistance à un autre qui se trouve en état de nécessité, ne peut non plus être qualifié comme contraire au droit.

En droit international aussi, il faut distinguer entre l'état de nécessité et les phénomènes analogues, tels la légitime défense et l'acte personnel de justice. L'état de nécessité dans la vie politique diffère de l'état de nécessité défini par le droit international. Il peut cependant arriver que les deux soient fort semblables. Ce fut le cas en 1939, lors de la guerre entre l'U. R. S. S. et la Finlande. Un état particulier de nécessité n'exist pas en situation stratégique ou militaire.