THE CONCEPTION OF WAR AS A LEGAL REMEDY*

GERHART HUSSERL

TOPIC B: THE OBJECT OF LEGAL ACTIONS AND THE ENDS OF WAR

I

THE RELIEF SOUGHT BY THE PLAINTIFF IN A LAWSUIT

I. Every legal action is brought for the purpose of obtaining some particular result, which is the relief sought by the plaintiff.75 The petition for (some) relief is an essential part of the plaintiff’s action. The plaintiff when bringing his suit must do more than just tell the court what has happened in the past and has caused him to take the matter into court. He will be required to make suggestions as to how the court should act with a view to remedying the injury which the plaintiff has (allegedly) suffered.

Ordinarily, these suggestions will take the form of a specific demand upon the court. The plaintiff will define his desire for a particular relief by suing for the recovery of damages, cancellation of a deed, decree of divorce, etc. No general statement can be made as to how specific the plaintiff’s prayer for judicial relief must be. In that respect legal requirements vary according to time and place.

Under formulary systems of civil procedure as we find them prevailing in early laws, the prayer for relief by the complainant is controlled by rigid rules.76 It must be precise, and it is immutable. Modern systems of procedural law take a more liberal attitude in the matter, and increasingly so in recent years. The plaintiff may have the privilege of asking for alternative relief (injunction or damages), or cumulative relief (injunction plus damages), as the case may be. He also enjoys considerable free-

* Second instalment of an article, the first of which appeared in Vol. 12, No. 2.
† Professor of Law, National University, Washington, D.C.
75 Pomeroy, Code Remedies § 347 (5th ed. 1929).
76 We remember here the rigidity with which the ancient Roman law of procedure handled the plus petilio in actiones certae. Gaius, Inst. § 53 et seq.; English translation by Poste, 517 (3d ed. 1890). Thus where the plaintiff sues for 100, but can prove only 90, his suit will be dismissed. In the post-Diocletian period of Roman law the strict provisions against plus petilio were relaxed, and subsequent amendments in the complaint permitted. Wenger, op. cit. supra, note 63, at 277.
dom regarding amendments to his original petition. In suits in equity the courts may be satisfied with a prayer for “general relief,” and retain jurisdiction to grant complete relief. The municipal courts of justice, operating under modern codes of procedure, have wide discretionary power to attune relief to need.77

Yet, as heretofore, the courts are in no position to ignore the relief specified by the complainant in his petition and to substitute for it some other relief which has not been asked for. Just as the court cannot render a valid judgment outside the cause of action stated in the complaint,78 so a judicial decree granting the plaintiff a relief entirely different from the one he has prayed for would be invalid.

Among the primary ends to be obtained through judicial intervention is legal certainty. It may be the sole relief sought by the petitioner. Such will be the case where the petition is for a declaratory judgment. But this is exceptional. Material as the establishment of legal certainty between the parties is in any kind of legal action, the final result which the plaintiff desires to attain lies, as a rule, beyond that goal. Not satisfied with having validated his cause of action, the plaintiff wants certain additional measures to be taken; he wants the past wrong to be righted in a practical way. With this in mind he may pray for a court decree that will secure him full money compensation for the loss incurred through the defendant’s unlawful conduct.

2. Some observations may be added concerning the relation between “cause of action” and the “relief sought” in a legal action.

The breach of duty, as it has occurred in the past and constitutes a cause of action for the plaintiff, may be called a cause of action also in the sense that it causes the injured person to bring the particular action. Suppose suit is brought for the recovery of damages. The plaintiff goes into court to obtain a money judgment in his favor. The judgment, to the extent money can do that, will restore him to the position in which he would find himself had there been no breach of duty by the defendant. May the relief desired by the plaintiff not also be described as a cause of, or better, perhaps, for, his action?

77 Thus Rule 54(c) of the Federal Rules of Civil Procedure provides that “every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.” See Liquid Carbonic Corp. v. Goodyear Tire and Rubber Co., 38 F. Supp. 520, 525 (1941); Kansas City St. L. and C.R. Co. v. Alton R. Co., 124 F. 2d 780, 783 (1941); Reconstruction Finance Corp. v. Goldberg, 143 F. 2d 752, 756 (1944). 3 Moore’s Federal Practice, 1944 Supp., at 216. See also Borchard, Declaratory Judgments 426 (2d ed. 1941).

78 See Restatement, Judgments, § 8, Comm. c (1942).
Pomeroy has warned us against confusing the two concepts "cause of action" and "relief sought." Says the learned author:79

Every action is brought in order to obtain some particular result which we term the remedy, which the code calls "relief". . . . This result is not the "cause of action." . . . It is true that this final result, or rather the decree of obtaining it, is the primary motive which acts upon the will of the plaintiff and impels him to commence the proceeding, and in the metaphysical sense it can properly be called the cause of his action, but it is certainly not so in the legal sense of the phrase. The final result is the "object of the action" as that term is frequently used.

With this, we agree. The term "cause" should be used only to denote facts which have occurred before the action caused by those facts is undertaken—or, where the term is used in the procedural sense, to denote the statement of those facts.

In this connection we must remember that all human acts are caused by facts and events which precede in time the particular act. In order to grasp the true meaning and nature of an act (any act), we must consider not only the cause, or causes of the act; we must, moreover, take into account its objective: the end which the author of the act desires to achieve by so acting.

When planning to do a specific act, the individual anticipates in his mind the happening of certain things as a result of his act, if and when successfully completed. The anticipation of things to occur in the future—as e.g., judgment in favor of the person who plans to take legal action—creates a desire in the person which impels him to act. It is the anticipation of the desired result which we call the motive of an act. Correspondingly, the practical result, which the author of the act contemplates as something to be attained through his own initiative (although the cooperation of others may be required), constitutes the object (objective) or end of the act.

It should be noted that in the daily life of individuals the motives which prompt them to act are often rather obscure; that the objects of many acts are not clearly conceived. Moreover, where the particular act is a complex one, and is continuing in its nature, it may easily happen that while the action progresses a gradual change in the object as originally contemplated is taking place. At a later stage of his activity some result may appear desirable to the author of the act, which differs widely from what he had in mind when commencing the action.

This will not happen in a legal action which is brought in a national

THE CONCEPTION OF WAR AS A LEGAL REMEDY

I
court of justice. There the author of the act, i.e., the plaintiff, is required to state at the outset, and to define with reasonable certainty, the object of his action, the relief sought by him. And he will not be permitted to change at will his original objective, although he may be authorized to make later amendments to his petition. In the eyes of the law, the legal action has one end and one motive, which persists throughout the court proceedings until final decision is reached.

This being so, legal actions although progressing in time through various procedural phases are of a peculiarly static nature. The status quo idea prevails in judicial proceedings. This must be so in an action where the complainant seeks redress from a wrong that has been done to him in the past. He desires to be restored, through judicial decree, as nearly as possible to the position in which he found himself before the duty owed him by the defendant was breached. Suits in equity seem less static than actions at law. The difference is one of degree rather than in kind.

The question to be answered by the court in its final decree is always the same: is the plaintiff entitled to the particular relief for which he has asked in the proper fashion and at the proper time? No vagueness in regard to the plaintiff’s motive, and no shifting from one motive (and the corresponding object of the action) to another can or will be tolerated in judicial proceedings.

II

THE ENDS OF WAR IN THE LIGHT OF THE CLASSICAL DOCTRINE

OF THE JUST WAR

1. Hugo Grotius, who in that respect expresses the views of earlier writers, tells us that there can be “no other just cause for undertaking

unica est et sola causa justa inferendi bellum, injuria accepta (There is a single and only just cause for commencing a war, namely, an injury sustained): Victoria, De Jure Belli (see supra, note 67) No. 13; English translation in Classics of International Law 170. Victoria so holds upon the authority of Augustine, In Pentat. VI, 10 (34 Migne, Patrologia Latina 781), and Thomas Aquinas, Secunda Secundae qu. 40, art. 1. The same views have been expressed by Franciscus Suarez, De Bello, Sect. I, 7; Sect. IV, 1. Suarez, De Bello, being part of De Triplici Virtute Theologica (De Charitate, Disp. XIII), was first published in 1621, four years after the author’s death. Photographic reproduction of the 1621 ed. in Classics of International Law: Suarez, Selections from Three Works, 797 (1944); English translation by Williams and others, id. 800, at 805, 816 (1944). See also Robert Bellarmine, De Laicis sive Saecularibus (being part of De Controversiis Christinae Fidei, 1586); English translation by Kathleen E. Murphy ch. 15, p. 71 (1928).

There exists a large modern literature on the classical doctrine of the just war. See the recent discussion by Husserl, supra, note 67, at 584 et seq. where further references may be found. In this connection, the reader will also find helpful the recent publication Vitoria et Suarez: Contribution des Théologiens au Droit International Moderne (Paris, 1939). The book contains, in systematic arrangement, many abstracts from the writings of Victoria and Suarez, in the original Latin and in French translation.
war than injury [sustained], and, on the next page, he states that "authorities generally assign to wars three just causes, defense, recovery of property, and punishment (defensio, recuperatio rerum, et punitio)." The latter statement immediately follows a paragraph in which the author observes that "the sources from which wars arise are as numerous as those from which lawsuits (actiones forenses) spring; for where judicial settlement fails, war begins (ubi judicia deficiunt, incipit bellum). Actions, furthermore, lie either for wrongs not yet committed, or for wrongs already done.

Here, clearly, Grotius is concerned with "cause of war" in its juridical sense. He thinks of the just cause of war as a substantive right which, under the Law of Nations, entitles the injured nation to resort to war against the wrongdoing nation.

Grotius does not confine himself, however, to using the term causa in this one sense. The same word serves him to denote the object, or ends of the just war. But this is not all. Taking into consideration other statements by the same author concerning the causes of war, we shall find that, in fact, the term is used in a variety of meanings.

Thus, in the twenty-second chapter of the second book Grotius discusses the two concepts of "justifiable causes" and "persuasive causes." He informs us that the first to observe this distinction was Polybius, who in this connection uses the terms "cause" and "pretext" respective-
ly. For the purpose of making clear to his readers the different meanings of the two expressions, Grotius gives several illustrations which he takes from Ancient History. In none of these illustrations has the word "cause" (causa) the legal meaning of a just or unjust cause of action.

In all cases included in his list the author uses the terms cause and pretext to differentiate the true motives which have prompted the nation to go to war in the particular instance, from mere pretexts for her recourse to force. In each case, the true motive (which is called causa) behind the war is one to which no legitimate object of war corresponds. Thus it may be desire for glory, for national aggrandizement, etc.

But the author goes beyond that. In one case—it concerns the Second Punic War—Grotius describes as cause of war the "indignation of the Carthaginians at the agreements which the Romans had extorted from them." Here the word "cause" is used to denote a nation's pre-war state of mind, which has not even crystallized into a specific motive of action.

In a theory of war which is founded on the distinction between just and unjust causes of war, a more precise use of the term "cause" might be expected. But perhaps we should not press the illustrious author too hard on that particular point. The discussion of justifiable and persuasive causes of war takes place in the chapter of Grotius' opus which deals specifically with the unjust causes of war. There, the author feels justified in including in his discussion, under the heading of unjust causes, all kinds of improper motives, and of an aggressive state of mind of a nation, which may have some bearing upon her decision to go to war.

Let us concentrate then on Grotius' observations which occur in the course of his general discussion of the causes, i.e., the just causes of war. These observations reflect a state of ambiguity in regard to the use of the phrase "cause of war," which pervades the writings on this subject throughout the formative era of the Law of Nations.

Virtually all writers on war during that period use the word causa in a dual sense.

a) In its first meaning the term causa denotes specific—real—facts of the past which, in the eyes of International Law, constitute a wrong. 

87 In the Greek original the words employed are αἰτία (cause) and πρότερος (pretext). Grotius himself uses the Greek expressions interchangeably with the Latin words causa and praetextum.

88 Grotius, De Jure Bello ac Pacis, II, i, 1, 4; 2, 2.

89 In this connection the observations by Alberico Gentili concerning the distinction between the beginnings (principia) and causes of war are worth remembering. Causes, he says, precede consideration and deliberation; they cause us to make the particular decision (efficiunt,
This concept of cause of war is identical with the "cause of action" (and the variants of the phrase in other languages) under municipal laws of procedure.

b) In its second meaning causa means the just cause for which the particular war is fought: the causa finalis of war. This "cause" is in fact the object, or end, of the just war. As pointed out before, to most of the classical authors the object of the just war appears to be a threefold one. No war ought to be undertaken except for the purposes of defense, recovery of one's own, punishment of the wrongdoer.

It certainly does not promote clarity, if the same word causa is used to denote something that is anticipated by the belligerent state as the desired result of its action by force (if and when successfully terminated), and then again, to denote certain facts which have preceded the war: the international wrong done by the other state.

Writers of the eighteenth century have removed this terminological ambiguity. They will speak of the object or purpose of war and distinguish it from the cause of war. Thus Vattel tells us that "the nation alone has a right to make war to which an injury has been done or is about to be done." He then continues: "From the same principles we likewise deduce the purpose or lawful object of every war, which is to avenge or prevent an injury." Similarly, Bynkershook describes "the defense or recovery of one's own" as one, if not the sole, object of war.

__ut ita judicemus__. Beginnings, on the other hand, are the first acts of men in matters which have already been the subject of consideration and deliberation. Gentili, De Jure Belli, I c. 20 (1598). Photographic reproduction of the 1612 ed. in Classics of International Law 152; English translation by Rolle, 94 (1933). We find the same thoughts expressed by Polybius, The Histories, III, 6, 5, 6, to whom Gentili refers.

William Matthaei, Libellus de Bello Justo et Licto (1512), as quoted by Regout, La Doctrine de la Guerre Juste 130 n. 4 (1935), says this: \textit{Causa justa et pro qua juste moveri bellum potest . . . est triplex, scil., defensio, correctio, recuperatio.}

Gentili, in the chapter on the Causes of War, discusses the matter along the lines of the Aristotelian distinction between efficient, formal, material, and final causes. The author identifies the final cause of war with the ultimate goal of war (\textit{finis bellii}), which is peace. Gentili, supra, note 89, I c. 7, III c. 1; Classics of International Law 55, 470, translation 35, 289.

Vattel, Le Droit des Gens III § 27 § 28 (1758); English translation in Classics of International Law 244 (by Fenwick, 1916). In the French original Vattel speaks of \textit{le but, ou la fin légitime de toute Guerre}. Cf. United States v. The Active, Fed. Cas. No. 14, 420 (184), quoting Vattel.

Quaestiones Juris Publici I c. 1 (1737); Classics of International Law 2 (1930); English translation by Frank, 15. The passage reads as follows: "In other words, the only correct ground for war (\textit{sola belli ratio}) is the defense or recovery of one's own. However, I do not hold this to be the sole object of war (\textit{belli finem esse}). It is the accepted view that a nation which injures another is, together with its realm, forfeited to the injured nation; and if the injured nation so desires it may make the confiscation the object of the war. Certainly the war does not and ought not to end upon reparation of the injury suffered. . . ."
2. The notion of the final object or end of war is by no means alien to early writers on the Law of War. In fact, since the days of Augustine, discussions have never ceased concerning the end (finis) of a just war, toward which the intention of the prince who engages in war ought to be directed. Augustine declares the lawful end of war to be peace: Wars are waged to attain peace (bellum geritur ut pax acquiratur).93 The doctrine that peace is the sole end of a just war has been universally accepted by scholastic and post-scholastic writers on War.94

The question arises as to how this doctrine is related to and may be harmonized with the statements by the same authors regarding the three “causes” for which the just war may be fought.

a) Much depends here upon our proper understanding of what is meant by peace.

The wrong committed by the (allegedly) guilty nation, B—the breach of a duty owed to the other nation (A)—constitutes a disturbance of the peaceful relations between the two nations. If thereupon A takes action by force against B, A may be said to be working toward restoration of the relationship of peace. The final settlement of the particular dispute through the medium of war (in which A’s just cause has prevailed) is intended to restore the status of justice on the international scene, so far as the relations of A and B are concerned.

If peace is the final goal of the war which is based on a just cause, peace, it would seem, must be identical with the relief sought and obtained by the injured nation—which relief may include certain measures to be taken by the victorious party after termination of the war, so as to guarantee compliance with the terms of the peace settlement.

The chief concern of scholastic writers on War is the offensive war. Says Victoria:95 “Since there can be no doubt that in a defensive war force may be employed to repel force (Dig., 1, 1, 3), this is also proved with regard to an offensive war, that is, a war in which we are not only defending ourselves or seeking to recover property, but where we are trying to avenge ourselves for some wrong done to us (ubi petitur vindicta

93 Augustine, Epist. 180 ad Bonif. 6 (33 Migne, Patrologia Latina 856). A similar statement is to be found in Cicero, De Officiiis, I c. 23 § 80: War ought to be entered upon in such a way that its aim should seem to be nothing else than peace (Ira bellum suscipiatur, ut nihil aliud nisi pax quaestio videatur); cf. id. c. 11 § 35.

94 See Victoria, De Jure Belli (supra, note 67), Prob. 6; Suarez, De Bello, VII, 5; Pierino Belli, De Re Militari et Bello Tractatus II, 1, 3 (1563), photographic reproduction in Classics of International Law 28, translation by Nutting, 59 (1936); Bellarmine, De Laicis (supra, note 80) c. 15 p. 73.

95 De Jure Belli, Probl. 4 (Classics, 166, 274). See Suarez, op. cit. supra, note 80, Sect. I, 5, 6 (Classics 798; translation 803).
The just, offensive war is regarded as an act of retributive justice (*actus justitiae vindicativae*), its primary objective being the punishment of the wrongdoer, the guilty nation.\(^9\)

The prince who engages in war for a just cause acts as a representative of international justice. He fulfills his task, which is compared to that of a judge who proceeds against the individual wrongdoer,\(^9\) by meting out punishment to the guilty prince (and state), and securing indemnity for the injury sustained.

Successful termination of the just war reestablishes the status of international justice in a lawful way. The injured nation has obtained the desired relief. The wrong perpetrated upon her prior to the war has been atoned. Since justice and peace belong together inseparably,\(^9\) restoration of justice and restoration of peace would seem to be the same thing.

Why is it then that throughout the discussions concerning the just causes of war, *peace* is specifically mentioned as the final goal of the just war?

There is another aspect to the proceedings of extreme violence which we call war. The concept of war as a legal action for the purpose of restoring justice must not blind us to the fact that war, from whatever cause it may originate, constitutes in itself the most serious disturbance of the peaceful relations among nations. While it is true that nation A, by breach of her obligations toward nation B, violates the state of equality and justice between the two, it is equally true that the latter (B), by resorting to war with a view to righting the wrong done to her, brings about an open rupture of the relationship of peace between A and B.

Nation B may have a valid cause, and the right to take offensive action

---


\(^9\) Victoria, *De Jure Belli*, No. 17; Suarez, *De Bello*, II, 1; IV, 5-7 (Classics 799, 805; translation 805, 818). See Scott, *The Catholic Conception of International Law* 41 (1934); Rommen, *Staatslehre des Franz Suarez, S.J.*, 295 (1926). This is not the place to discuss the doctrine according to which the prince who engages in a just war combines the functions of interested party, prosecutor, judge, and sheriff, all in one. This doctrine has its roots in Thomistic philosophy. See Thomas Aquinas, *Summa II, II, qu. 67, art. 1*; and to this Beaufort, 62 et seq. Assignment to the prince of the function to rule with judicial authority on the justness of his own cause has been severely criticized by Gabriel Vasquez, Commentaria in I, II S. Thomae, I, Disp. 64, c. 3, nos. 14, 15 (1598). See Regout, 233 n. 1. Regout’s own observations in the matter, id. 233 et seq., are hardly convincing.

\(^9\) “There is no peace apart from justice.” *Belli*, op. cit. supra, note 94, II, 1, 3 (Classics of International Law 28, 59).
against A. Yet B—with the cooperation of A who responds by force—creates a state of affairs which is just the opposite of peace.

Absence of war, to be sure, is not identical with a genuine peace among men, which is defined by Augustine as *ordinata concordia*. But certainly the presence of armed hostilities and peace are mutually exclusive. In order to secure a true and lasting peace, a nation may be compelled to forego temporarily the state of peace; she may have to fight, and to fight hard and long, for her ideal of a just international life. That this should be done only for the most cogent reasons, and after careful examination of the validity of the cause of war, is uniformly stressed by writers on the subject. If then the particular nation commences hostilities, how can she be sure that, by winning the war and restoring the state of justice impaired by her adversary, she will also gain a genuine peace that will endure?

War, the inexorable antagonist of peaceful life, does not seem very conducive to creating a state of international affairs where there will be no more reason for resorting to war. If early recurrence of hostilities, which even if resorted to for a just cause would seem to belie the idea of peace, is to be avoided, war must accomplish something more than reparation of a wrong that has been committed in the past.

Where this line of reasoning is adopted, we are concerned with the post-war consequences rather than with the immediate object of the war as it was anticipated by the nation who takes up arms to remedy an injury sustained. We are looking beyond the termination of the contest by arms toward something which is expected to materialize, if and when justice has been restored: a state of international affairs that begins its continuing existence when the war is over.

The expectation of an enduring peace may be disappointed notwithstanding the fact that the war (which was supported by a just cause) has been brought to a victorious end. A nation may win the war but lose the peace.

If war is a bilateral transaction, so is peace. In order that peace be re-established and be set on firm ground, faithful cooperation of the victorious and the defeated nation is required. It is for this reason that termination of the war by way of compromise may be better sometimes than all-out victory by one party over the other.

b) These and similar facts of international reality are on the minds of early writers on the Law of War when they speak of peace as the end of

---

the just war, in addition to and beyond the goal of righting a past wrong. In so doing they take war out of the narrow confines of juridical thought, and place it within the larger context of historic reality as experienced by states and nations in the particular era.

The two views—one, the narrower, conceiving of war as a legal action without judicial interference, and the other, the broader, visualizing war as an essential part of the totality of international life as we have known it to these days—do not contradict one another. Rather the two aspects of war complement and to a certain extent correct each other. In fact, for a full understanding of the intrinsic nature and the scope of war, it would seem necessary to combine the two views. What do we find?

Let us assume that nation A has recourse to war against nation B, and that A’s war is supported by a just cause of action. A has been impelled to act by a dual motive. The first objective of A’s action is the relief sought by A through the medium of warlike force: redress of the injury that has been inflicted upon A by B prior to the war, and also reparation of the harm caused to A by B’s unjust war. The first objective is the end of the war as a legal action: under the scholastic theory of war, primarily a punitive action.

Facing in their mind the second objective, the rulers of nation A envisage the situation in which A will find herself when victory is won; they contemplate the further steps which ought to be taken in order to secure a lasting peace between the two nations. The second objective of the war may be called the war aims of the particular nation.

The relation of the two objectives (objects) and of the corresponding motives, of the war undertaken by one nation against another, is one of subordination rather than coordination. With reference to the second objective (the war aims) the first objective—the object of war as a legal action—is the near end of war; the former is the final or ultimate goal of the war.

We shall find that whenever the object or (near) end of a human action is subordinated to some ulterior goal, such subordination will materially affect the nature of the near end. Looked at from the point of view of the final goal, the near end of the action, and all activity that leads up to it, are reduced to a means through which the final result (which the author of the act anticipates in the second objective of his undertaking) is to be achieved. Where this is so, the motive behind the action as directed

---

100 See Victoria, De Jure Belli, Nos. 16–19; Suarez, De Bello, VII, 7 (Classics 814, 840).

101 Propter hoc maxime licet bellum, ut sit quasi via ad honestam pacem (this is the chief reason why war is permitted: that it be the path, as it were, toward an honest peace). Suarez, De Bello, VII, 20 (Classics 819–21).
toward the near end will lose much of its power as an independent motive. It may become wholly subservient to the second motive. This may not have been the case when the action was commenced. Rather, it may be the effect of a gradual process, in the course of which both motives are affected and changed.\(^3\)

In that the interest of the warring nation shifts, as war progresses, to the post-war state of affairs which she hopes to establish through final settlement of the war, the focus of attention is turned away from the object of war as a legal remedy. As the concept of war as a means by which to obtain relief from an injury suffered loses its hold on the mind of the author of the war, the vision of a just cause of action becomes blurred. The post-war status of peace which nation A visualizes while fighting her war is not the status quo. Rather is A looking forward toward the establishment of a new, a better world, that will emerge, it is hoped, from the war, if and when won by A—a world of national and international peace and tranquillity.

The justice and durability of the peace to follow the war between A and B would seem to have no direct relation to the justice of the cause of A’s war. Where war is thought of in terms of a forceful means to bring about basic changes in the preexisting relationship of the belligerent states, how can such changes be properly measured by the nature and gravity of the injury (allegedly) inflicted upon nation A prior to the war? If the desire to validate through war her cause of action has ceased to be the controlling motive of A’s war, there seems to be no reason why a just cause for the war of A against B should be required at all.

The dangers inherent in this trend of thought are obvious. Forgetfulness about the idea of war as a means to restore the status quo impaired by an international wrong, opens the way to abuse of the device of war for the purposes of national aggrandizement and conquest. Total eclipse of the near objective of war—which has been wholly obscured, and is virtually absorbed, by the second objective: to secure a permanent peace—is indicative of a state of mind in which nations no longer care about the justice of the causes of their wars.

Nation A, dissatisfied with things as they are on the international scene, may feel justified to resort to war against her neighbor B for the purpose of creating a better, a more just world—as A sees it from the standpoint of her own national interests. A is put to fight for her concept of a better world because B has different views as to what constitutes a state of genuine peace between the two. In that event, nation A, what-

\(^3\) See p. 260, supra.
ever she may have to say about the ultimate object of her action, uses war as an instrument of national policy. A wages an offensive war to bring about a change in the relationship between A and B, a change deemed desirable by the former, but resisted as undesirable by the latter.

c) This would be a war fundamentally different from the just war which the authors adhering to the scholastic doctrine have in mind. As they see it, restoration of justice by way of "defense, recovery of property, and punishment" is an end in itself (although, as a rule, they do not call it by this name). Yet, there is another, the final objective of the war: the just peace.

The relation of the two objectives has never been made quite clear. In some way the former must be affected by the latter. It would seem that the sincere desire for a durable peace will have a mitigating effect as concerns the retributive measures which may be taken by the victorious nation against the defeated nation.

Bellarmine (as others have done before him) emphasizes the importance of a good intention of the prince who resorts to war. Good intention is one of the conditions of a just war. It is directed toward the end (finis) of war, which is "peace and public tranquillity." He who has authority and a just cause (the author says), and yet makes war from a love of revenge or the desire of increasing his domain sins seriously; he acts against charity and is a "wicked soldier."

---

102 See text to note 83, supra.

104 Bellarmine (supra, note 60) tells us that those who treat of such matters usually enumerate four conditions of a just war, lawful authority, a just cause, a good intention, a suitable method. Previously, the famous Italian jurist Baldus (1327-1400) had maintained that for a just war five things are required: persona, res, causa, animus, et auctoritas. Still other authors have recognized only three conditions, viz., person, cause, and intent. See the discussion of the matter in Belli, De Re Militari et Bello Tractatus, note 94, supra, II, 2 (1563). Belli himself suggests reduction of the conditions of the just war to two: person and cause. For the former (he says) includes intent and authority, and the latter, matter and cause. Belli, Classics of International Law 28 (translation 59).

105 Malus miles. Belli, on the authority of Johannes Calderinus (Bolognese canonist who died in 1365) whom he quotes, maintains that "even when war is declared on just grounds (ex justa causa), if it is waged ruthlessly and with a view to vengeance (si tamen geratur ex rancore, et ulioniis intuitu), it thereby becomes unlawful, so that things captured may not rightly be retained." Belli, id. II, 1, 5 (Classics, 28, 60). According to Calderinus and Belli, lack of good intention on the part of the warring nation (A) vitiates her whole war. A's evil intention as evidenced by ruthless warfare invalidates the justice of her cause of war. In other words, when A resorts to war against nation B, not only must it have a valid cause of action (justa causa belli), and the right of action—the right to war: auctoritas—but, moreover, the final objective of A's war, her war aim, must be just.

Bellarmine, op. cit. supra, note 80, English translation, at 74, takes a different, less radical, position in the matter: If, and only if, a prince resorts to war without authority or without a just cause, "he sins against justice, and he is not so much a soldier as a robber." This is not so in the event that the prince (and his state) has a just cause of war, and the right to war, but has recourse to force to attain an evil end (propter finem malum bellat). See our text preceding this footnote.
“Good intention” may be said to operate as a check upon excessive demands on the part of the author of the war when victory is won. The second objective (the war aims) will, if properly conceived, confine the right to obtain relief from the injury sustained within the limits set by the requirements of a just and lasting peace. The near object of war, on the other hand, circumscribes the legitimate aims of war, in so far as recourse to force can be justified only by a just cause of action: the international wrong committed by the other party prior to the war.

We see here before us a peculiar system of checks and balances. There is a good deal of truth and wisdom in this system. It can operate if, and as long as, there is an international community which subscribes to these two axioms: (1) that a distinction can be made, ought to be made, and is actually made, between just and unjust causes of war; and (2) that to war is assigned the function—not the only, yet the material function—in the life of nations and states to serve as a legal remedy to vindicate, through the medium of armed force, international justice.

Where the conception of war as a legal remedy prevails, stress will be laid on the first objective, the near end of war. But since war is always and of necessity more than a legal action, the second motive will also be present. Wars have never been waged for the sole purpose of restoring the state of affairs prior to the war.

The war which is fought for a just cause is actuated, then, by a duality of motives. Both of them look toward the future, as all motives do. The one, however, which corresponds to the near end of the war operates as a conservative force, working for preservation of the status quo. The other motive, to which the notion of a just peace corresponds, is set in motion by, and gains momentum through, the spiritual forces of progress.

No realistic approach to war can ignore the ultimate goal of war, which is peace. Rather the question is as to how to reconcile the two motives and objects of war. This dilemma makes apparent the limitations of the juridical approach to war.

1. Of the two motives only the first lends itself to definition under the Law of Nations. There is no denial of the fact that many wars of the past

---

106 Suarez, De Bello, Sect. VII, 5 (Classics of International Law 814, 839), points out that the victorious prince whose war was supported by a just cause is entitled to recover all things unlawfully withheld by the enemy; in addition, he has the right to compensation for the expenses of war and all harm caused by the other’s wrong. Moreover, since war is not merely a matter of justitia commutativa—as defined by Aristotle, Nic. Eth. p. 1131a (The Loeb Classical Library, English translation by Rackham, 266, 1934), but also a matter of justitia vindicativa (retributive or criminal justice), the author of the just war may exact punishment from the defeated enemy. At the same time, Suarez reminds us that the primary end of war is the establishment of a lasting peace (hic est finis praecipuus belli, pacem statuere in futurum). In view of this, the victorious prince may demand of his adversary all that appears necessary for the maintenance of peace in the future. Cf. Victoria, De Jure Belli § 19.
have been undertaken to solve international disputes. So far as its near object is concerned, war has often served as a crude substitute for judicial action. The actual controversy that gave rise to the particular war has been settled through force and a subsequent peace treaty between the nations concerned. Many people will be reluctant to admit that there is such an aspect of war, and that it is a legitimate aspect—so far as it goes. But a thing is what it is whether we like it or not.

Nations have taken up arms to free the soil of their homeland from the yoke of the invader, to regain territories previously taken from them through aggressive force, to aid an ally who had become the victim of unprovoked aggression. Is there anyone to tell us that, in 1939, Poland when resisting Germany’s ruthless attack, and England and France when subsequently declaring war upon Germany, had no just cause of war under the Law of Nations?

2. As to the second motive, all attempts to reduce it—and the corresponding final goal of war—to a legal concept must prove futile.

When we speak of war as an institution of International Law we do not refer to war as a means to secure a genuine peace. War as an instrument of peace (an instrument ill-fitted for that purpose) is beyond the reach of any system of International Law. To attain the ultimate goal of war—this must be left to the wisdom and imagination of the rulers of the nations concerned. In that respect, the real task lies ahead when hostilities are terminated.

3. Similar problems do not arise in legal actions before national or international courts of justice. The applicable procedural laws do not allow for subordination of the complainant’s motive, which is defined in his petition for a particular relief, to some ulterior motive.

It is true that the plaintiff, or the public prosecutor in a criminal action, is always impelled by some motive that looks beyond termination of the litigation. Thus where X sues for divorce he wants dissolution of his marriage by judicial decree (near motive of his action). But, in addition, the divorce decree will serve him as a means to secure a peaceful life which was denied him during his unhappy marriage; or he may seek divorce because he wants to marry someone else (secondary or final motive). Similarly, in a criminal case, the prosecutor wants conviction of the accused person. In his action, the prosecutor may be further motivated by the desire of ridding society of the particular criminal, and also by anticipation of the deterring effect that the sentence ought to have upon other wrongdoers.

In the eyes of the law, all such secondary motives and ends lie outside
the range of the legal action, which has but one end: the relief sought and granted in the action. The idea of finality of the decision reached in compliance with the controlling rules of procedure is essential to any judicial action. This idea is not inconsistent with the requirement that the parties to the action specifically subject themselves to, and promise to carry out the terms of, the judicial decree—as we know it to be the case in early laws, and may also be the case in modern arbitration proceedings. In that the litigation is terminated, with or without cooperation of the litigants, the final word is spoken in regard to the issues on which the action has turned.

In this sense, it may be said, every legal action leading up to judicial adjudication is a “last” action. So far as the relation between the two parties is concerned, termination of their legal dispute does not open up a new future; rather it bars future developments inconsistent with the rule of law which is embodied in the court’s final decree.

Each action in a national court of law is, at the same time, related in a peculiar way to earlier actions on similar issues. The doctrine of stare decisis may not be rigidly observed in the particular system of municipal law. Yet it is in the nature of things that the judge visualizes the case before him as the last link in the chain of prior cases in which legally equivalent problems were involved. Allowing for isolated instances where it may be otherwise, we can say truthfully that while every legal action under municipal laws is a “last” action, no legal action under municipal laws is a “first” action.

The same is not true for controversies between states and nations in which a solution is reached through the exercise of force. There are no binding precedents for the particular war between states A and B. An element of uniqueness is inherent in any war. Of no war can it be said that it is a last war, in the sense we have used the word “last” with refer-

147 See supra, note 63.

148 The same is true, to a lesser degree, for international disputes which have become subject to adjudication in an international tribunal of justice. Cf. art. 59 of the Statute of the Permanent Court of International Justice (Publications of the Court, Series D, No. 1).

The life of states and nations on the international scene is less static, and its patterns are less definite and uniform, than is the case in the life of individuals in the domestic sphere. It must also be remembered that the community of nations, ever since it was clearly conceived (by Victoria) in the sixteenth century, has always consisted of a limited number of member-nations, each of them known as this individual international person—Sweden, Spain, France, etc.—proud of, and eager to preserve, its individuality. States and nations cannot be brought down to the common denominator of “the reasonable man of ordinary prudence” around which the rules of municipal systems of law have been built. Husserl, Interpersonal and International Reality: Some Facts to Remember for the Remaking of International Law, 52 Ethics 127, 130 (1942).
ence to legal actions in national courts of justice. The finality characteristic of judicial decrees (from which there is no appeal) is never present in the settlement of an international dispute, which has been arrived at through the medium of war and a subsequent treaty of peace. Leading authorities on International Law have, however, taken the position that the conclusion of a final peace treaty precludes revival of the war by resuming hostilities for the original cause. We concede that there exists a rule of unwritten International Law to that effect. The procedural effect of a court’s final decree, which we call res judicata, has its analogue in the effect which the terms of a treaty of peace exert upon the preceding controversy between the belligerent states. In both cases, the decision reached in the particular dispute constitutes an estoppel to renew the contest—by arms in one case, by juridical reasoning in the other—between the same parties and upon the same cause. This is a far cry from saying that a final treaty of peace has of itself the power to establish a state of perpetual peace between the former enemies. Many peace treaties concluded at the end of long and bloody wars have solemnly proclaimed that the peace to follow shall be an eternal one. Other wars between the same nations and involving the same or similar issues have followed.

So far as the issues rendered res judicata are concerned, final adjudication of their dispute by court decree creates a state of permanent peace between the litigants. Under modern municipal laws, perpetuity of the peace thus established is guaranteed by the court’s authority over the parties. In the international field, on the other hand, the defeated nation (A) can subsequently renew the old dispute. In so doing A breaches the peace treaty which she was compelled to sign at the end of the lost war. Yet A has the power to start a second war for the original cause against B, the victorious party in the first war.

It is true that there can be no war unless nation B is willing to cooperate, and does cooperate by taking up arms herself. But A is in the position to force B into the relationship of a new war. Failure on B’s part to accept A’s challenge to a second contest by arms would be equivalent to a submission to A’s will; B would concede therewith to A the right to set aside, by unilateral act, the settlement reached in the first

109 Christian Wolff, Jus Gentium Methodo Scientifica Pertractatum § 987 (1749); Vattel, Le Droit des Gens IV § 19 (1758); Wheaton, Elements of International Law 368, § 3 (1st ed. 1836), § 544 (1866 ed. by Dana, reprinted in Classics of International Law), 2 Wheaton’s International Law 621 (7th English ed. by Keith, 1944).

110 Vattel, § 19; see Wheaton, at 369.
war. In any case—whether it has been responded to by force or not—recourse to armed force by nation A will upset the state of affairs as it was established between the two powers by their treaty of peace in termination of the prior war.

No system of International Law can undertake to guarantee an international structure of peace, which has its foundations in wars of the past, and may collapse under the impact of future wars. If the community of nations is to assume the role of a guarantor of peace, it will have to abolish first the institution of war.

As long as the remedy of war is available to independent states and nations, it remains the primary concern of the belligerents themselves—with the possible assistance of their friends and allies—to set their future relationship on the firm basis of a lasting peace. This goal, the ultimate object of war, has rarely been attained.

While it must be admitted that nations have sometimes succeeded in securing, through the medium of war, the relief sought in the particular action, it is equally true that in no case could there be any certainty as to how long the international status arrived at through war and subsequent peace treaty was going to last. This uncertainty is one of the primary reasons why war has proved such an unreliable, and in the long run ineffective, means of settling international disputes.