

**Oppenheim, L. *International Law. A Treatise. Vol. II (War and Neutrality).* Second Edition. London, 1912.**

War no illegality

As within the boundaries of the modern State an armed contention between two or more citizens is illegal, public opinion has become convinced that armed contests between citizens are inconsistent with Municipal Law. Influenced by this fact, impatient pacifists, as well as those innumerable individuals who cannot grasp the idea of a law between Sovereign States, frequently consider war and law inconsistent. They quote the fact that wars are frequently waged by States as a proof against the very existence of an International Law. It is not difficult to show the absurdity of this opinion. As States are Sovereign, and as consequently no central authority can exist above them able to enforce compliance with its demands, war cannot, under the existing conditions and circumstances of the Family of Nations, always be avoided. International Law recognises this fact, but at the same time provides regulations with which belligerents have to comply. Although with the outbreak of war peaceable relations between the belligerents cease, there remain certain mutual legal obligations and duties.

Thus war is not inconsistent with, but a condition regulated by, International Law. The latter at present cannot and does not object to States which are in conflict waging war upon each other instead of peaceably settling their difference. But if they choose to go to war they have to comply with the rules laid down by International Law regarding the conduct of war and the relations between belligerents and neutral States. That International Law, if it could forbid war altogether, would be a more perfect law than it is at present there is no doubt. Yet eternal peace is an impossibility in the conditions and circumstances under which mankind at present live and will have to live for a long time to come, although eternal peace is certainly an ideal of civilisation which will slowly and gradually be realised.

Conception of War

War is the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases. War is a fact recognised, and with regard to many points regulated, but not established, by International Law. Those writers who define war as the legal remedy of self-help to obtain satisfaction for a wrong sustained from another State, forget that wars have often been waged by both parties engaged for political reasons only; they confound a possible but not at all necessary cause of war with the conception of war. A State may be driven into war because it cannot otherwise get reparation for an international delinquency, and such State may then maintain that it exercises by war nothing else than legally recognised self-help. But when States are driven into or deliberately wage war for political reasons, no legally recognised act of self-help is in such case performed by the war. And the same laws of war are valid, whether wars are waged on account of legal or of political differences.

## Rules of Warfare independent of Causes of War

Whatever may be the cause of a war that has broken out, and whether or no the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, may be done, and must be done by the belligerents themselves in making war against each other, and as between the belligerents and neutral States. This being the case, the question as to the causes of war is of minor importance for the Law of Nations, although not for international ethics. The matter need not be discussed at all in a treatise on International Law were it not for the fact that many writers maintain that there are rules of International Law in existence which determine and define just causes of war. It must, however, be emphasised that this is by no means the case. All such rules laid down by writers on International Law as recognise certain causes as just and others as unjust are rules of writers, but not rules of International Law based on international custom or international treaties.

## Causes of War

The causes of war are innumerable. [...] [In particular,] jealous rivalry between two or more States, the awakening of national ambition, the craving for rich colonies, the desire of a land-locked State for a sea coast, the endeavour of a hitherto minor State to become a world-Power, the ambition of dynasties or of great politicians to extend and enlarge their influence beyond the boundaries of their own State, and innumerable other factors, have been at work ever since history was first recorded in creating causes of war, and these factors likewise play their part in our own times. Although one must hope that the time will come when war will entirely disappear, there is no possibility of seeing this hope realised in the near future.

## Just Causes of War

However this may be, it often depends largely upon the standpoint from which they are viewed whether or no causes of war are to be called just causes. A war may be just or unjust from the standpoint of both belligerents, or just from the standpoint of one and utterly unjust from the standpoint of the other. The assertion that whereas all wars waged for political causes are unjust, all wars waged for international delinquencies are just, if there be no other way of getting reparation and satisfaction, is certainly incorrect because too sweeping. The evils of war are so great that, even when caused by an international delinquency, war cannot be justified if the delinquency be comparatively unimportant and trifling.

And, on the other hand, under certain circumstances and conditions many political causes of war may correctly be called just causes. Only such individuals as lack insight into history and human nature can, for instance, defend the opinion that a war is unjust which has been caused by the desire for national unity or by the desire to maintain the balance of power which under the present conditions and circumstances is the basis of all International Law. Necessity for a war implies its justification, whatever may be the cause. In the past many wars have undoubtedly been waged which were unjust from whatever standpoint they may be viewed. Yet the number of wars diminishes gradually every year, and the majority of the European wars since the downfall of Napoleon I. were wars that were, from the standpoint of at any rate one of the belligerents, necessary and therefore just wars.

## Region of War in contradistinction to Theatre of War

Region of war is that part of the surface of the earth in which the belligerents may prepare and execute hostilities against each other. In this meaning region of war [*válečná oblast*] ought to be distinguished from theatre of war [*oblast válečných operací*]. The latter is that part of a territory or the Open Sea on which hostilities actually take place. Legally no part of the earth which is not region of war may be made the theatre of war, but not every section of the whole region of war is necessarily theatre of war. Thus, in the war between Great Britain and the two South African Republics the whole of the territory of the British Empire and the Open Sea, as well as the territory of the Republics, was the region of war, but the theatre of war was in South Africa only. On the other hand, in a war between Great Britain and another great naval Power it might well happen that the region of war is in many of its sections made the theatre of war.

## Qualification to become a Belligerent (*facultas bellandi*)

As the Law of Nations recognises the status of war and its effects as regards rights and duties between the two or more belligerents on the one hand, and, on the other, between the belligerents and neutral States, the question arises what kind of States are legally qualified to make war and to become thereby belligerents. Publicists who discuss this question at all speak mostly of a *right* of States to make war, a *jus belli*. But if this so-called right is examined, it turns out to be no right at all, as there is no corresponding duty in those against whom the right is said to exist.[108] A State which makes war against another exercises one of its natural functions, and the only question is whether such State is or is not legally qualified to exercise such function. Now, according to the Law of Nations full-Sovereign States alone possess the legal qualification to become belligerents; half-and part-Sovereign States are not legally qualified to become belligerents. Since neutralised States, as Switzerland, Belgium, and Luxemburg, are full-Sovereign States, they are legally qualified to become belligerents, although their neutralisation binds them not to make use of their qualification except for defence. If they become belligerents because they are attacked, they do not lose their character as neutralised States, but if they become belligerents for offensive purposes they *ipso facto* lose this character.

[...]

[Nevertheless,] whenever a case arises in which a State lacking the legal qualification to make war nevertheless actually makes war, such State is a belligerent, the contention is real war and all the rules of International Law respecting warfare apply to it.

## Otázky k textu:

1. Porovnejte Oppenheimův přístup k válce s oběma přístupy, které jsme prozatím identifikovali, tj. s morálním přístupem (Augustin) a právním přístupem (Fulgosius). Pokuste se najít vždy alespoň jeden shodný a jeden rozdílný znak ve vztahu k oběma těmto přístupům.
2. Vyberte si kterýkoliv z vámi uvedených znaků a pokuste se vysvětlit, v čem je Oppenheimovo pojetí války lepší/horší, než byla pojetí jeho předchůdců (Augustin, Fulgosius, Ayala).