

THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 12

FEBRUARY 1945

NUMBER 2

THE CONCEPTION OF WAR AS A LEGAL REMEDY

GERHART HUSSERL*

PRELIMINARY OBSERVATIONS

I

WAR is the exercise of the international right of action, to which, from the nature of the thing and the absence of any common superior tribunal, nations are compelled to have recourse, in order to assert and vindicate their rights."¹

"War, as a legal form of international action, consists in the use of military forces . . . in order to settle a controversy involving international law."²

"Actual war has been well described as 'the litigation of nations.'"³

"War is the last step and the most complete use of remedial force which is open to states."⁴

"The time has not yet arrived (but is approaching) when an international tribunal of law will have full jurisdiction. Until that time arrives War will remain the ultimate mode of self-redress."⁵

"Indeed, war, in the past, has been the last resort by which a nation could settle its disputes, defend its rights, or remedy its wrongs."⁶

* Professor of Law, National University, Washington, D.C.

¹ 3 Phillimore, Commentaries upon International Law 77 (3d ed. 1885).

² Fiore, International Law Codified 533 (English translation of the 5th ed. by Borchard, 1918). We remember here the definition of war by Mr. Justice Johnson in *Harcourt v. Gailard*, 12 Wheat. (U.S.) 523, 528, 6 L. Ed. 716, 717 (1827): "War is a suit prosecuted by the sword. . . ."

³ Holland, *Jurisprudence* 404 (13th ed. 1924).

⁴ Stowell, *International Law* 489 (1931).

⁵ Wigmore, *A Guide to American International Law and Practice* 77 (1943).

⁶ Commission to Study the Organization of Peace. Third Report—The United Nations and the Organization of Peace, International Conciliation No. 389, 210 (1943).

These and similar statements reflect a juridical approach to war. Since the formative era of International Law the idea of war as some kind of legal action has never wholly lost its hold on the mind of international lawyers. This idea of war originated with the scholastic doctrine of the just war. It has undergone considerable changes during the last two hundred years. In one respect there has been no change. As evidenced by the statements quoted above (which easily might be augmented), the notion that war is in the nature of an extraordinary legal remedy of last resort has been kept alive down to our days.

Some modern writers on International Law⁷ have stressed the fact that the concept of war as a legal action is not applicable to all kinds of war: that there may be, and actually have been, wars which cannot be described in terms of a litigation concerning existing rights under the Law of Nations. Yet the same authors concede that numerous wars in the past have been undertaken with a view to seeking relief from violation of legal duties imposed by International Law.

If, and in so far as, war is conceived as some sort of a legal action the question arises as to the legal grounds and also the object of this action.

The matter has been widely discussed, and in considerable detail, by early writers on the Law of War. Some of these discussions are well worth remembering. Writers of the nineteenth and twentieth centuries, on the other hand, have not much to say in the matter. What are the factual conditions that will justify recourse to armed force by one nation against another under a system of International Law which recognizes war as a legal institution? What are the final results which the nation or state desires to achieve by availing itself of the remedy of war? In that respect we shall gain little information from the reading of modern authors on International Law.

This much is clear from the outset. Under any legal system recourse to force by one member of the community against another can be permitted only in exceptional circumstances.⁸ The person who takes the law in his own hands must have a special privilege so to act. Regarding this point there is no basic difference between measures of self-redress by individuals on the one hand, and acts of violence among sovereign states on the other. But what about the practical results that may be attained

⁷ 2 De Louter, *Droit International Public Positif* 215 et seq. (1920); 2 Oppenheim, *International Law* §§ 52g, 54 (6th ed. by Lauterpacht, 1940).

⁸ Thus Samuel Rachel speaks of "the subsidiary and extra-natural remedy of war" (*subsidiarium, idque praeternaturale, remedium belli*). Rachel, *De Jure Naturae et Gentium, Dissertatio Altera de Jure Gentium* § XL (1676). The text of 1676 is reprinted in *Classics of International Law* (1916). See *id.* 271; English translation by Bate, at 183.

through the medium of physical force on the domestic scene and the international scene respectively?

Under modern municipal laws acts of violence on the part of individuals not clothed with public authority are classified as lawful if, and only if, they fall within the category of legitimate acts of self-help, paramount among them acts of self-defense. As regards its legal grounds, its modes of execution and its scope, recourse to force in the domestic sphere is regulated by law. When faced with the actual question as to whether he should resort to force, the individual, in most cases, has very little time for deliberation. Yet it is for him, and him alone, to pass judgment on the legality of his own action.

From this it does not follow that his judgment in the matter will be conclusive and final. The truth is that the individual when taking the law in his own hands does so at his peril. He who avails himself of the extraordinary remedy of self-help must stand ready to justify his action in the competent tribunal of justice.⁹ The results which may be reached through measures of self-redress on the domestic scene are provisional in their nature; their legal validity may be contested in subsequent court proceedings.¹⁰

As concerns war, its decision and its legal effects, this is not so. International Law knows of no judicial proceedings in which, after termination of the war, the right of state A (the victorious party) to use armed force against state B (the defeated party) may be tested, and be finally adjudicated. State A when resorting to war against B seeks a solution of a final and not of a provisional nature—a solution, that is, of the controversy which precedes the outbreak of hostilities between the two. A takes up arms with the intention to bring about, through the medium of force, a settlement which will satisfy (at least) its pre-war demands upon B, and which cannot be subsequently modified or set aside by judicial decree.

A's intention may not materialize. That depends on the outcome of the war. The fact remains that a state or nation, when availing itself of the remedy of war, tries to accomplish something which, in the domestic field, is wholly beyond the reach of individuals.

Physical force as a means to solve disputes involving questions of right or wrong is unavailable to individuals under the rule of municipal laws. This was not always so, but it has become so in the course of legal evolution. In no case can acts of self-help serve the purpose of establishing the

⁹ See the observations by Vallimaresco, *Justice Privée en Droit Moderne* 14 et seq. (1926).

¹⁰ Lauterpacht, *The Function of Law in the International Community* 179, 393 (1933).

validity of a right of one individual who asserts it against another individual who disputes it. Extreme as the urgency of the situation may be which gives rise to the privilege of self-redress, acts of private persons can never supersede the jurisdiction of the tribunals of justice that have authority over them.

No similar jurisdiction, compulsory in its nature, has been vested in international tribunals, to rule with final authority in all controversies between all sovereign states and nations. It is "the absence of any common superior tribunal"¹¹ which causes nations to take the law in their own hands by resorting to armed force. This point has been stressed by virtually all writers who are thinking of war in terms of a remedial device.

The philosophy of war that underlies the discussions in which a juridical conception of war prevails appears to be this. War operates as a crude substitute for the official action which, in similar conditions, is taken on the domestic scene by the law-enforcing agencies of the particular community. The nation whose rights have been invaded resorts to war to secure legal redress to which she is entitled (so the nation claims) under the Law of Nations. Total inaction in the matter on the part of the international community compels the injured nation to seek relief through her own efforts. The warring nation thus undertakes to produce results which, under the rule of municipal law, are attainable only through operation of the judicial machinery.

In view of this, the characterization of war as a measure of self-help is somewhat misleading. International law recognizes war as a legal institution. In so doing, it places in the hands of sovereign states a weapon which has been wrested from the hands of individuals a long time ago. In that, and in so far as, the remedy of war has been made available to them, states and nations are granted the power to settle their disputes without judicial interference: to make and enforce their own decisions.

Hugo Grotius tells us that "wars which are undertaken by public authority have certain legal effects as do judicial decisions."¹² There is strength in the analogy drawn by the author. We must not overlook, however, the fact that the atmosphere which prevails among individuals in their mutual intercourse is widely different from that which we find present on the international scene. There states and nations are the

¹¹ Phillimore, *op. cit. supra*, note 1, at 77.

¹² Grotius, *De Jure Belli ac Pacis* II, 1, 1, 3 (1625). English translation by Kelsey and others in *Classics of International Law* at 170 (1925).

actors. In many if not all cases of friction and dispute nations are acting under the direction of Mars rather than Minerva.

How much common ground is there between the settlement of international controversies through recourse to war on the one hand, and court decrees arrived at by means of juridical reasoning in domestic litigations on the other?

Detailed consideration of the fundamental problems raised by this question transcends the scope of this article. We will have to say a word about that later.¹³ Our present concern is with the following question: What can be said, in legal terms, about the remedy that may be used between states and nations to produce, through the medium of acts of utmost violence, practical results which, if certainly not identical with, yet appear to be similar to the legal consequences flowing from a final judgment in court proceedings? In that respect much confusion pervades the writings of international lawyers who have analyzed war in a juridical fashion. The confusion is due in part to ambiguity of the terms employed.

II

Legal remedies are provided by the particular system of law for definite purposes. Legal remedies are used by individuals as means to an end. Each legal action has its specific object.

When inquiring into the object of a human action we turn our attention toward the future. We want to know about the results which the action will produce, if and when successfully consummated. The author of the act may be able to reach his objective through his own efforts. In other instances he will need the cooperation of others. In a legal action—which is not an act of self-help—assistance on the part of the community of law is required. The community of law will be represented by its courts of justice or other law-enforcing agencies.

He who goes into court demands of the court some kind of relief which he will specify in his petition. In that the relief prayed for is granted him by judicial decree, the plaintiff attains the object of his legal action. There must be valid reasons why the court should act as the plaintiff wants it to act. The plaintiff will have to show that under the law that has authority over him he is entitled to the relief which he seeks in his action. The object of a lawsuit, i.e. the relief sought by the plaintiff, is always redress from something. When inquiring about this "something," we turn away from the object of the action, which belongs to the future, toward the cause of the action, which belongs to the past.

¹³ See Topic B, II, 3, in the next installment.

Every action, be it undertaken by an individual or a corporate person (acting through the medium of individuals), has its roots in the past. Let us assume that X wants to bring legal action against Y. What is it that causes X to consider such action? X desires to bring about, with judicial assistance, a change in the present relationship of X and Y which he, X, regards as unsatisfactory. What has caused the state of affairs, which X desires to alter, to become an unsatisfactory one? It may have become so in consequence of past events beyond the control of Y, or through acts of Y which are not classified as unlawful by the applicable law. In that case, X's desire to establish a new, altered state of affairs as between X and Y will, as a rule, have no support on the part of the law community of which the two are members.

In order to gain such support X, it would seem, must show that the present unfavorable situation has been created by acts of Y violative of a legal duty owed by Y to X; that those past acts on Y's part have produced a change in the prior relationship between the two against X's will; and that harm to X has resulted from that unlawful change.¹⁴ If the facts on which X bases his action are of this general nature, he will have "a right to judicial interference in his behalf":¹⁵ he will have a just cause of action and, consequently, be entitled to relief from the injury he has sustained through Y's unlawful act.

Two questions may be asked in regard to any legal action, be it one with or without judicial assistance. One concerns the cause of the action, and the other its object. These two questions are fundamental. By answering them we determine the legal nature of the particular action.

There is the third question as to the form of the action. The question refers to the remedy elected. The word "remedy" is understood here in a strictly procedural sense. Remedy in this sense "is no part of the cause of action. It is the procedure by which relief is obtained."¹⁶

The remedy of war as "a procedure by which relief is obtained"

¹⁴ "There must be a juncture of wrong and damage to give rise to a cause of action. This general rule . . . is elementary and fundamental." *City of Newport v. Rawlings*, 289 Ky. 203, 206, 158 S.W. 2d 12, 14 (1941).

¹⁵ *Billing v. Gilmer*, 60 Fed. 332, 334 (1894). See *Stark v. Wickard*, 321 U.S. 288, 304, 64 Sup. Ct. 559, 568, 88 L. Ed. 510, 519, 520 (1944); *Marbury v. Madison*, 1 Cranch (U.S.) 137, 166, 2 L. Ed. 60, 70 (1803); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125, 60 Sup. Ct. 869, 876, 84 L. Ed. 1108, 1114 (1940). See also *Nance v. Mayflower Tavern*, 150 P. 2d 773, 776 (Utah 1944).

¹⁶ *Felt City Townsite Co. v. Felt Investment Co.*, 50 Utah 364, 373, 167 Pac. 835, 839 (1917); see *American Nat. Ins. Co. v. Warnock*, 143 S.W. 2d 624, 628 (Texas Civ. App. 1940); *Frost v. Witter*, 132 Cal. 421, 426, 64 Pac. 705, 707 (1901); *Dennison v. Payne*, 293 Fed. 333, 344 (1923).

(through the medium of force) is controlled by the laws and customs of war and also the rules of International Law concerning commencement and termination of war.

Matters relating to the *form* of action are outside the scope of our present discussions.

TOPIC A: CAUSE OF ACTION AND RIGHT OF ACTION

I

CAUSE OF ACTION AND RIGHT OF ACTION IN MUNICIPAL SYSTEMS OF LAW

I. CAUSE OF ACTION

a) "Cause of action" is a technical legal concept¹⁷ within the juridical framework of the Anglo-American system of municipal law. In this country it has given rise to many discussions in court decisions as well as writings on procedural law.¹⁸

The term "cause of action" has various shades of meaning according to whether it is used in this or that particular situation,¹⁹ or for this or that specific purpose.²⁰ No definition has been framed thus far which takes full account of the several shades of meaning inherent in the manifold use of the term. Yet there seems to be substantial agreement as to the constituent elements of the concept.

In that respect, Pomeroy's analysis²¹ has proved most helpful; as evidenced by numerous recent decisions it has met with wide judicial ap-

¹⁷ The term has been borrowed from Roman Law. "Cause of action" and *causa actionis* do not mean quite the same thing. The difference of meaning is clearly brought out in *Patterson v. Patterson*, 59 N.Y. 574, 578 (1875), although the Roman term is not specifically mentioned. As to the Roman conception of *causa actionis*, see the recent observations by Buckland, *Cause of Action: English and Roman*, 1 Seminar (Annual Extraordinary Number of *The Jurist*) 3 (1943).

¹⁸ Clark, *Code Pleading* 77 (1928); Clark, *The Code Cause of Action*, 33 *Yale L. J.* 817 (1924); Gavit, *The Code Cause of Action: Joinder and Counterclaims*, 30 *Col. L. Rev.* 802 (1930); McCaskill, *Actions and Causes of Action*, 34 *Yale L. J.* 614 (1925); McCaskill, *The Elusive Cause of Action*, 4 *Un. of Chi. L. Rev.* 281 (1937); see the discussion carried on by Gavit and Clark, 82 *Un. of Pa. L. Rev.* 129, 354, 605 (1933-34); further references may be found in 1 *Moore's Federal Practice* 145 n. 14 (1938).

¹⁹ *Restatement, Judgments*, Introductory Note preceding § 61 (1942); Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 *Col. L. Rev.* 330, 347 (1944).

²⁰ *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 68, 53 *Sup. Ct.* 278, 280, 77 *L. Ed.* 619, 623 (1933); cf. Arnold, *The Code 'Cause of Action' Clarified by the United States Supreme Court*, 19 *A.B.A.J.* 215 (1933).

²¹ Pomeroy, *Code Remedies* § 347 (5th ed. 1929).

proval.²² Using the language of the case of *Dennison v. Payne*²³ we may summarize Mr. Pomeroy's views in the matter as follows: "A cause of action comprehends the primary right possessed by the plaintiff, and the corresponding primary duty resting upon the defendant, and the delict or wrong done by the defendant in breach of such primary right and duty."

In short, the cause of action may be defined then as "the legal wrong committed against the plaintiff by the defendant."²⁴

Accepting this definition as correct,²⁵ but looking at the matter from the point of view of the injured person—the plaintiff—we may say that "cause of action" is the injury sustained by the plaintiff.²⁶

It is precisely in this way that the classical doctrine of the just war defines the just cause of war.²⁷

Some courts, and also some writers on this subject, have insisted that "a cause of action does not consist of facts but of the unlawful violation of a right which the facts show,"²⁸ that "the thing . . . which in contemplation of law, as its cause, becomes a ground for action, is not the group of facts alleged in the declaration . . . , but the result of these in a legal wrong."²⁹

²² *Vinson v. Graham*, 44 F. 2d 772, 776 (1930); *Village of La Grange Park v. Jarecki*, 243 Ill. App. 290, 295 (1927); *Eklund v. Evans*, 211 Minn. 164, 300 N. W. 617, 618 (1941); *Payne v. N.Y.S. and W.R.R. Co.*, 201 N.Y. 436, 440, 95 N.E. 19, 21 (1911); *Stine v. Atkinson*, 69 Ohio App. 529, 44 N.E. 2d 372, 374 (1942). Many more cases might be added.

²³ 293 Fed. 333, 343 (1923).

²⁴ *Porter v. Mullins*, 198 S.C. 325, 17 S.E. 2d 684, 687 (1941); or, as *Keeffe v. Walsh*, [1903] 2 I.R. 681, 718 puts it, "'Cause of action' means . . . the substantial subject-matter or grievance on which the action is founded"; see *The Koursk*, [1924] P. 140, 145 (C.A.).

²⁵ The definition of the cause of action as a legal wrong has been subject to recent criticism by Professor Borchard, *Declaratory Judgments* 5, 16 (2d ed. 1941). That much is true. For the purpose of defining the cause of action the term "wrong" must be used in a broader sense than when the same word is used in the law of contracts and torts. The "wrong" constituting a cause of action may be a mere denial or dispute of the plaintiff's right, and also the assertion of unfounded claims by the defendant.

²⁶ Where there is one injury, there is but one cause of action, which may be protected, however, by several legal remedies. Bliss, *Code Pleading* § 113 (3d ed. 1894); *McCaskill*, *The Elusive Cause of Action*, 4 U. of Chi. L. Rev. 281, 283 (1937); Borchard, *op. cit.* 17. Regarding the situation where the same wrongful act causes several harms or invades a number of different interests, see *Restatement, Judgments* § 62, *Comm. e* (1942); but also *Brunsdon v. Humphrey*, 14 Q.B.D. 141 (1884).

²⁷ See note 80, *infra*.

²⁸ *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321, 47 Sup. Ct. 600, 602, 71 L. Ed. 1069, 1072 (1927).

²⁹ *Sibley*, *Right to and Cause for Action* 48 (1902); *Chobanian v. Washburn Wire Co.*, 33 R.I. 289, 302, 80 Atl. 394, 400 (1911); see *RCA Mfg. Co. v. Columbia Recording Corp.*, 36 F. Suppl. 247 (1940).

It is quite true that the past facts as alleged by the plaintiff in support of his action cannot, by their own force, produce a cause of action. The same set of historic facts may give rise to a plurality of causes of actions. The acts of the defendant which have caused, or threaten to cause, harm to the plaintiff, must be shown to constitute a breach of a legal duty under the applicable law. In order to gain the stature of a legal wrong, the past acts must be removed from the sphere of extra-legal historic facts and be brought within the scope of operation of specific rules of substantive law.

As Professor Gavit puts it,³⁰ "facts alone . . . never did and never can create or constitute a 'cause of action.' The facts (which the plaintiff must plead) plus a rule of law (which the plaintiff must not plead) create a substantive right upon which the plaintiff relies and for which he seeks judicial recognition. The facts plus the law constitute . . . this substantive right, or 'cause of action.'"

How does the plaintiff know that the facts on which he bases his action constitute a legal wrong?

Obviously, it is for the court to rule on the question of whether the plaintiff has a valid cause of action, and is, in consequence, entitled to legal relief.

When we speak of the cause of action as entitling the injured person to judicial interference in his favor, we are thinking in terms of substantive law. We ignore then the legal uncertainty that is inherent in any legal action before the court has rendered final judgment. Thus conceived, the cause of action has its place on a level of legal thinking along the lines of substantive law. It is a substantive right.³¹ The plaintiff *has* a cause of action irrespective of what his chances may be to win his case in actual litigation, by meeting the procedural requirements concerning jurisdiction, pleading, matters of proof.³²

b) There is also a procedural aspect to the cause of action.

In that the plaintiff introduces his cause of action into the actual controversy, the attitude of certitude regarding the validity of his cause is superseded by a state of uncertainty as it characterizes the procedural level of legal thought. It is the same cause of action which arose from the unlawful act by the defendant prior to prosecution of the action by the

³⁰ Gavit, *The Code Cause of Action: Joinder and Counterclaims*, 30 Col. L. Rev. 802, 816 (1930).

³¹ *Douglas v. Daniels Bros. Coal Co.*, 135 Ohio St. 641, 22 N.E. 2d 195, 198 (1939).

³² This point has been strongly emphasized by French writers on the subject. See Glasson et Tissier, *Traité de Procédure Civile*, vol. I, No. 172 (1925).

plaintiff. Yet for the purposes of being litigated and, in the end, being adjudicated upon, the cause of action undergoes certain formal changes which are dictated by the nature and scope of the particular litigation.

When, thinking along the lines of substantive law, we speak of "contract," we mean a valid contract; by "marriage" we mean a valid marriage. Similarly, when describing the particular cause of action as giving rise to an action of assumpsit, a tort action, an action in rem, etc. we have in mind a *valid* cause of action. But if we look at it from the procedural point of view—as we must do when bringing and prosecuting an action based on this cause—then the same cause of action presents itself to us as one the validity of which is in actual doubt: a cause of disputed validity.³³

In this connection we should like to add the following observations.

When we make the statement that X has a cause of action, i.e., a legally valid cause of action, we proceed on the theory that the facts constituting a wrong and, consequently, a cause of action in X's favor have actually occurred in the past. The cause of action as a substantive right is based on *real* facts.

Now suppose X, the injured person, takes the matter into court. The past facts on which the plaintiff bases his demand for judicial redress must be brought to the attention of the court and also of the defendant. This can be done only by the use of words.

Legal proceedings do not concern themselves with real facts. They concern themselves with facts which have been translated into words, in accordance with the procedural rules of pleading. X, when bringing action, must transform the real facts constituting the injury he has sustained prior to the action into stated—alleged—facts.

Alleged facts are statements about facts that are *claimed* to be real. These statements have no existence outside the legal controversy in which they are made. Alleged facts have their place and function within the procedural scheme of the particular action. Real facts, on the other hand, have happened then and there in social reality outside the court proceedings. This does not mean that these facts, being real facts, are a matter wholly independent of human judgment. We call them real from the point of view of a neutral observer who on the basis of complete and unbiased factual information has reached the conclusion that the facts have actually occurred in the past. Facts are real in so far as they can be made the subject of the true judgment: these are real facts.

³³ See Husserl, *The Foreign Fact Element in Conflict of Laws*, 26 Va. L. Rev. 243, 453, 472 (1940).

No particular act of judging, even if performed by persons clothed with judicial authority, can make past "facts" real which in truth have never happened, or, conversely, deprive of reality facts which have actually happened. What do we mean then when we say that certain facts have or have not been established in a lawsuit?

Where the facts on which the plaintiff bases his action are disputed by the defendant we have two conflicting statements concerning the same set of facts. Both parties pass judgment in regard to certain occurrences in the past, one—the plaintiff—asserting that they have actually happened as stated, and the other—the defendant—denying the reality of these facts. Of the two contradictory statements only one can be true.

The facts which the plaintiff (X) pleads in support of his action are established where X's allegations concerning these facts have been found to be true.

If, aided by favorable testimony, the plaintiff sustains the burden of proof regarding the operative facts of the case, he therewith proves that his own judgment in the matter is a true judgment. At the same time, the contradictory thesis of Y, the defendant, falls to the ground. With a decision reached in X's favor, the facts alleged by X have ceased to be disputed facts. So far as the relationship of the litigants is concerned the facts forming the basis of X's cause of action must be regarded as real—now that there has been a final ruling for X on that issue. The facts have been made the subject of the true judgment: these are real (past) facts. As between X and Y the judgment is true, since Y is no longer in the position to contest its truth.

X, by proving his case, has silenced Y's voice of opposition. X has attained this result with judicial assistance. Through successful prosecution of his action in the competent tribunal of law the plaintiff has validated his cause of action. Being subject to the court's authority the defendant has been compelled to abandon his counter-thesis concerning the reality of the facts stated in X's complaint: Y has been forced to acknowledge the truth of X's statements about those facts, and, in consequence, the validity of the plaintiff's cause of action.

The foregoing observations have application to other controversies which are *not* in the nature of court proceedings. As regards the interplay of action and counter-action by the two litigants, the basic procedural scheme is always the same.

In any dispute the question presents itself as to how to make one's own thesis prevail over that of the opponent: how to make him relinquish

his contradictory position regarding the matter at issue. For that purpose different means and ways may be used.

(1) Take the case of an extra-legal dispute between two individuals, X and Y. The truth of a scientific proposition (a) is in issue. X claims that (a) is true. Y rejects X's thesis and takes the position that (a) is not true. Here each party must rely solely on the force of reason. In order to win his case X must convince Y that his (X's) thesis is true and, correspondingly, Y's counter-thesis untrue. It is the power of truth which silences the voice of the erring party and forces him to abandon his erroneous position.

(2) In a legal action which is brought in a court of justice operating under a modern system of procedural rules, both parties are appealing to the legal wisdom and the sense of justice of the men who represent the law community in the particular litigation. When relinquishing the position held by him while the action was pending, but now invalidated by the court's adverse ruling, the losing party yields to public—judicial—authority.

(3) In a dispute between sovereign states which is carried on without judicial interference, and where all efforts to reach an amicable solution have failed, an *appeal to force* is made by each party to the ensuing war. Again the purpose is to silence the adversary's voice of opposition. The state which goes to war seeks to validate its cause of action by means of physical force.

To what extent does the means chosen (which is force) affect the object of the action thus undertaken? This remains to be seen.

c) From the preceding discussions it appears that the term "cause of action" may be used in a strictly procedural sense. It is this use of the term (within the province of Anglo-American municipal law) that Judge Phillips has in mind when defining the cause of action as "a formal statement of the operative facts."³⁴

To Phillips' definition objections have been raised. Thus Judge Clark maintains that "the author has fallen into a slight error. It is the facts

³⁴ Phillips, Code Pleading § 189 (2d ed. 1932). In commenting on Phillips' views in the matter, McCaskill, *Actions and Causes of Action*, 34 *Yale L. J.* 614, 617 (1925), says this: "The unstated facts give a 'right of action,' but the stated facts give a 'cause of action.'" Similarly, the cause of action has been defined as "the subject matter of the controversy, and that is for all the purposes of the suit whatever the plaintiff declares it to be in his pleadings." *Louisville and Nashville R.R. Co. v. Ide*, 114 U.S. 52, 56, 29 L. Ed. 63, 65 (1885); see *Chesapeake and Ohio Ry. Co. v. Dixon*, 179 U.S. 131, 138, 21 Sup. Ct. 67, 70, 45 L. Ed. 121, 125 (1900); *Bradford v. Southern Ry. Co.*, 195 U.S. 243, 248, 25 Sup. Ct. 55, 57, 49 L. Ed. 178, 180 (1904).

themselves, not the statement of them, which constitute the cause."³⁵ Clark fails to appreciate the changes which the cause, conceived as a substantive right, undergoes when it is introduced into actual litigation. The two authors speak of the same thing. But they do so from different standpoints, which reveal to them different aspects or phases of the cause of action. Each of the two statements is a true statement so far as it goes.

We may have good reason to use the phrase "cause of action" in a procedural sense. All we may want to know is whether the plaintiff has *stated* a cause of action: whether the facts alleged by the plaintiff in his complaint constitute, if true, a valid cause of action.

In every legal action the question of whether or not the plaintiff has a cause of action—in the procedural sense—is a matter of primary concern to the court. At the initial stage of many litigations legal discussions will turn upon this very question. The issue may have been raised by the defendant who demurs, or moves to dismiss the action, because the complaint does not state facts sufficient to constitute a cause of action.

If his complaint fails to state a cause of action, no judicial relief can be granted to the plaintiff; he cannot recover.³⁶ In that event, the question for the court to decide is not whether the plaintiff has a valid cause of action: whether his statement of operative facts is true. The facts alleged by the plaintiff are not of such a kind that they may be validated by convincing proof.³⁷ This being so, the court without hearing evidence will rule that the plaintiff has no cause of action.

If, on the other hand, the plaintiff has—procedurally speaking—a cause of action and, in addition, his complaint satisfies the procedural require-

³⁵ Clark, *The Code Cause of Action*, 33 *Yale L. J.* 817, 828 (1924).

³⁶ Cf. *Vaughan v. St. Louis and S.F.R. Co.*, 177 *Mo. App.* 155, 164 *S.W.* 144, 150 (1914). Rule 12 (b) (6) of the Federal Rules of Civil Procedure speaks of the "failure to state a claim upon which relief can be granted." See *Continental Collieries v. Shober*, 130 *F. 2d* 631, 635 (1942); *People v. McCloskey*, 150 *P. 2d* 861, 863 (Colo. 1944) and cases cited there.

The plaintiff may have failed to state a cause of action upon which relief can be granted, yet he has stated what is called a "probable cause." *Murdock v. Gerth*, 150 *P. 2d* 489, 493 (Calif. Dist. Ct. of App., 1944); *Black v. Knight*, 44 *Cal. App.* 756, 769, 187 *Pac.* 89, 93 (1919). The two cases concern actions for malicious prosecution.

Where war is conceived as a legal remedy we may draw a parallel between the use of force without probable cause in the international sphere on the one hand, and malicious prosecution of an action in the domestic field on the other. The nation which commences "a causeless action" (the phrase is used in *Black v. Knight*, *supra*), by resorting to war without stating even a probable cause, characterizes herself as a willful aggressor. See pp. 135-36, *infra*.

³⁷ In *Bradford v. Southern Ry. Co.*, *supra*, note 34, it is said that the cause of action "comprises every fact a plaintiff is obliged to prove in order to obtain judgment." The statement refers to "cause of action" in the procedural sense.

ments concerning jurisdiction, capacity to sue, etc., then the plaintiff will be entitled to judicial consideration of the validity of his cause.

Yet the final decision may be for the defendant. The plaintiff may not be able to validate his cause of action. He may fail to convince the court that the facts alleged by him are true facts. And there is also the possibility that the defendant, while conceding the truth of the facts stated by the plaintiff in support of his action, successfully pleads a defense which defeats the plaintiff's cause of action, such as the defense of payment, of fraud, of contributory negligence.

He who has a valid cause of action based on real facts is entitled to redress for the injury he has suffered. He has "a claim for relief."³⁸ Using the language of the case of *Douglas v. Forrest*³⁹ we may say: "Cause of action is the right to prosecute an action with effect."

2. RIGHT OF ACTION

From the fact that X has a cause of action it does not follow that X when bringing suit against Y has a right to the particular relief sought by him. Prior to the action (we assume) the rights of X have been invaded by Y, who is guilty of breach of a legal duty owed to X. This fact, constituting a valid cause of action, entitles X "to a judicial remedy of *some sort* against the other for the redress of a wrong."⁴⁰

In order to obtain judgment according to his petition, it will not suffice that X alleges and proves the facts on which his action is founded. "To entitle a plaintiff to judgment, something more than a legal cause of action must exist."⁴¹

The plaintiff must have not only a cause of action. In addition, he must have the *right* of action.

The two terms have often been used interchangeably.⁴²

It makes for clarity and will help to avoid a good deal of confusion if

³⁸ Federal Rules of Civil Procedure, Rule 8 (a). "The new rules have adopted the words 'claim' or 'claim for relief' in place of the term 'cause of action,' which shows an attempt to avoid the concept of that term," *White v. Holland Furnace Co.*, 31 F. Suppl. 32, 34 (1939); see Blume, *The Scope of a Civil Action*, 42 Mich. L. Rev. 257, 261 (1943).

³⁹ 4 Bing. 686, 704, 130 E.R. 933, 940 (1828); see *Jacobus v. Colgate*, 217 N.Y. 235, 241, 111 N.E. 837, 839 (1916); *Belo Corp. v. Blanton*, 133 Texas 391, 396, 129 S.W. 2d 619, 621 (1939); *Condor Petroleum Co. v. Greene*, 164 S.W. 2d 713, 718 (Texas Civ. App. 1942).

⁴⁰ *Chestnut v. Mertz*, 144 S.W. 2d 194, 196 (Mo. Ct. of App. 1940). Italics supplied.

⁴¹ *United States v. Smelser*, 87 F. 2d 799, 801 (1937).

⁴² *Clark*, Code Pleading 78 (1928). See e.g. *Walters v. City of Ottawa*, 240 Ill. 259, 263, 88 N.E. 651, 653 (1909); *Lewis v. Hyams*, 26 Nev. 68, 81, 63 Pac. 126, 127 (1900); *Openbrier v. General Mills*, 340 Pa. 167, 169, 16 A. 2d 379, 380 (1940). In many cases, the terms "cause of action" and "right of action" have been held synonymous in judicial interpretation of local statutes.

the phrases "cause of action" and "right of action" are used to convey different legal meanings. This has been done by various writers on the subject, and also by the courts in numerous cases.

The right of action has been described as a "remedial right" which springs from the legal cause of action.⁴³ In *Elliott v. Chicago M. and St. P. Ry. Co.*⁴⁴ the court points out that "'Right of action' is one thing; 'cause of action' is another. Right of action pertains to the remedy and relief through judicial procedure. Cause of action is based on the substantive law of legal liability."

What legal consequences will flow from the fact that the plaintiff has (or has not) a right of action?

Where the plaintiff states a good cause of action and has also the right of action, and subsequently succeeds in establishing his cause, the court will grant him the relief for which he has prayed. "Right of action" is the right to sue in the competent tribunal for the particular relief—successfully if the plaintiff makes convincing proof of the operative facts of his action.⁴⁵

The right of action must not be confused with the "right" of free access to the courts. The latter is a public right, a political liberty, which, in modern society, is enjoyed by every individual.⁴⁶ He who approaches the court in proper fashion (as specified by law) has a right to judicial response to his action, even though his petition shows on its face that the petitioner has no case: his complaint "states a claim based upon a wrong for which there is clearly no remedy, or a claim . . . for which no relief could possibly be granted to him."⁴⁷

As we understand the term, the right of action arises only where there is a cause of action.⁴⁸ But the converse is not true. The plaintiff may have a valid cause of action, and hence be entitled to (some) legal redress, and yet he lacks the right of action that would entitle him to the specific relief sought by him.

Thus, where a breach of contract constitutes his cause of action, the

⁴³ Pomeroy, *Code Remedies* § 347 (5th ed. 1929); see id. § 419.

⁴⁴ 35 S.D. 57, 63, 150 N.W. 777, 779 (1915); see *Mercer v. Richmond*, 152 Va. 736, 744, 148 S.E. 803, 805 (1929).

⁴⁵ See *Whalen v. Strong*, 246 N.Y.S. 40, 46 (1930); *Norwood v. McDonald*, 142 Ohio St. 299, 303, 52 N.E. 2d 67, 72 (1943).

⁴⁶ See the observations by Glasson et Tossier, *op. cit. supra*, note 32, § 169; Borchard, *Declaratory Judgments* 17 n. 39 (2d ed. 1941).

⁴⁷ *Leimer v. State Mut. Life Assur. Co.*, 108 F. 2d 302, 305 (1940).

⁴⁸ *East Side Mill and Lumber Co. v. Southeast Portland Lumber Co.*, 155 Or. 367, 374, 64 P. 2d 625, 628 (1937).

plaintiff has a right to money compensation for the injury sustained (damages), but failing to show that the remedy at law is inadequate he is not entitled to equitable relief, such as specific performance of the contract. The situation may also be that the plaintiff although he has stated a case proper for equitable relief, will still be denied the relief asked for: he has not met the requirement in a suit in equity that the complainant must come into court with clean hands.⁴⁹

Or take the case in which "the right of action has been taken away" by the running of the statute of limitations.⁵⁰ Where the statute of limitations is viewed—as it is in this country and in England—as pertaining to the remedy only,⁵¹ the running of the statutory period does not destroy the cause of action; it deprives the plaintiff of the right to sue on that cause of action. This will not preclude use of the same cause "as a shield or defense . . . even though the statutory period has run against its use for affirmative relief at the time of the filing of the action in which it is used."⁵²

Then there are the cases in which the plaintiff has no right of action because he lacks legal capacity to sue. "For illustration, a minor or a person of unsound mind has not the right to institute in his own name a suit upon a cause of action in his favor which has already accrued."⁵³ Similarly, a foreign executor or administrator may have no right to bring suit outside the state of his qualification or appointment.⁵⁴

An alien enemy cannot enforce his civil rights and cannot sue or proceed in the civil courts of the realm.⁵⁵ War suspends the right of enemy plaintiffs to sue in our courts.⁵⁶

⁴⁹ See *Tutt v. Van Voast*, 36 Cal. App. 2d 282, 286, 97 P. 2d 869, 871 (1939).

⁵⁰ *East Side Mill and Lumber Co. v. Southeast Portland Lumber Co.* (supra, note 48).

⁵¹ Restatement, Conflict of Laws § 603 § 604 (1934); Goodrich, Conflict of Laws 201 (2d ed. 1938). As to English Law, see Cheshire, Private International Law 638 (2d ed. 1938).

⁵² *Eagle Savings and Loan Ass'n. v. West*, 71 Ohio App. 485, 496, 50 N.E. 2d 352, 357, 358 (1942); *Peterson v. Feyereisen*, 203 Wis. 294, 234 N.W. 496, 73 A.L.R. 571 (1931).

⁵³ *Elmo v. James*, 282 S.W. 835, 839 (Texas Civ. App. 1926); cf. *Jones v. R. Young Bros. Lumber Co.*, 45 N.Y.S. 2d 308 (1943).

⁵⁴ See *Connor v. New York, N.H. and H.R. Co.*, 28 R.I. 560, 68 Atl. 481 (1908); Clark, Code Pleading 122 (1928).

⁵⁵ *Porter v. Freudenberg*, [1915] 1 K.B. 857.

⁵⁶ *Ex parte Colonna*, 314 U.S. 510, 62 Sup. Ct. 373, 86 L. Ed. 379 (1942). The court so rules in application of Section 7(b) of the Trading with the Enemy Act. The act does not apply where the plaintiff is a resident alien enemy. The latter has the right of action in American courts. *Ex parte Kumezo Kawato*, 317 U.S. 69, 63 Sup. Ct. 115, 87 L. Ed. 58 (1942). See Rylee, Enemy Aliens as Litigants, 12 George Wash. L. Rev. 55 (1943). Cf. Puttkammer, Alien Enemies and Alien Friends, in *War and the Law* 38, at 54 (ed. by Puttkammer, 1944).

The foregoing list of illustrations to which others might be added shows the practical value of the distinction between "cause of action" and "right of action."

II

THE TWO CONCEPTS AS APPLIED TO WAR

The discussions concerning the meaning and the use of the terms "cause of action" and "right of action" have brought to our attention some fundamentals of procedural law, the scope of which transcends the sphere of municipal laws. Problems quite similar in their nature may arise in disputes between sovereign states and nations.

1. Our concern is with international controversies that are carried on by the use of armed force.

According to the classical doctrine of the just war the nation (A) which resorts to armed force against another nation (B) has a valid *cause* of action if she has a just cause of war. A has the *right* of action if the remedy of war is available to her under the Law of Nations.

The just cause of war and the right to war are bound up with one another in a similar fashion as are cause of action and right of action under domestic laws of procedure. Nation A has no right to make war upon nation B unless A's war is supported by a just cause.⁵⁷

But is it not true—International Law being what it is (and always has been)—that a sovereign state or nation *can* make war for *any* reason?

In this connection we must bear in mind the following.

a) War is a bilateral transaction. If state A has the right to war, this right cannot be exercised without cooperation of the state against whom A's war is directed.

We are not unmindful of the fact that a state of war between A and B may be created by unilateral declaration of war on the part of A, or B, as the case may be. The establishment of a state of war without subsequent military action on either side, will have some important legal consequences as regards the two states concerned, and also with respect to third, non-belligerent states. War may be described as a legal status. It has been so defined many times since the days of Hugo Grotius.⁵⁸

⁵⁷ See Topic B, sec. II, in the next installment.

⁵⁸ This is what Grotius has to say in the matter. "Cicero has defined war as a contending by force (*certatio per vim*). A usage has gained currency, however, which designates by the word not a contest but a condition (*non actio, sed status*); thus war is the condition of those contending by force, viewed as such (*Bellum status per vim certantium, qua tales sunt*)." Grotius, *De Jure Belli ac Pacis* I, 1, 2, 1 (1625); see translation in *Classics of International Law* 33 (1925). In his later discussions concerning the causes of war (as we shall see), the author himself thinks of war in terms of an action or contest rather than a status.

The definition reflects a partial aspect of war. War in the full meaning of the word is something more than a mere state of belligerency.⁵⁹

In the domestic field, we shall obtain very meager information concerning the nature and the effects of a legal action, if we confine our study to actions which have never progressed beyond the point of filing the complaint; actions in which no pleadings have been made, no hearing has taken place, no evidence heard, no judicial decision rendered. Similarly, war reveals its true nature as a military, political, and juridical entity, if, and only if, it grows into the proportions of a war where there is hostile action on both sides.

War is a matter of mutual violence.⁶⁰ Each party to the war applies utmost force for the purpose of breaking down the will of the opponent and making his own will prevail in the relation between the two. There can be no war of A against B unless there is also war by B against A.

An element of *consensus* is inherent in any war. Be it supposed that nation A takes the first step toward breaking up the peaceful relations between herself and nation B. Prior to the war, there has been friction and discord between the two nations. A's dissatisfaction with the existing state of affairs has crystallized into certain demands upon B which may or may not be justified. With a view to enforcing these demands A decides to take action by force against the recalcitrant B.

A's position is that she has a right to use (unilateral) force against B;

⁵⁹ See, here, the critical remarks by Lawrence, *Principles of International Law* 309 (7th ed. by Winfield, 1929).

⁶⁰ From this it does not follow that whenever acts of mutual violence occur, there is war between the states concerned. Intent of the parties has a decisive bearing upon the question as to whether their relationship is changed from one of peace to one of war. See the text which follows this note.

The intention to wage war, *animus belligerandi*, or the absence of such intention (as the case may be), must not be confused with statements which the parties may make concerning the nature of their relationship. How the parties themselves define their relationship, whether they choose to call it "war" or something else— this is no valid answer to the question of whether war exists between the two states. Recent international developments, paramount among them, the "Corfu episode" between Greece and Italy (1923), "the Manchurian incident" (1931), and the Italo-Ethiopian War (1935), have caused considerable discussion (within and without the League of Nations) regarding the legal meaning of the terms, *war*, *resort to war*, *acts of war*, *belligerency*. See McNair, *The Legal Meaning of War, and the Relation of War to Reprisals*, 11 *Transactions of the Grotius Society* 29 (1926); Wright, *When Does War Exist?* 26 *Am. J. Int. L.* 362 (1932); Eagleton, *The Attempt to Define War*, *International Conciliation* No. 291, 269 (1933); Eagleton, *Acts of War*, 35 *Am. J. Int. L.* 321 (1941); Oppenheim (*supra*, note 7) § 52a; Briggs, *The Law of Nations* 718 (1938), and the writings and documents therein referred to. And see, regarding the distinction between "war in the constitutional sense" and lesser uses of force in international relations, *The President and Peace Forces: Letter to the New York Times* by Davis and others, reprinted from the *New York Times*, November 5, 1944, in *International Conciliation* No. 406, 795 (1944).

Consideration of these questions is outside the scope of our present discussions.

that B has no valid cause for resisting A's action. Yet, B does resist. Response by force on the part of state B has, at least temporarily, frustrated A's efforts to impose her will upon B through unilateral action. The relationship of peace between the two states is superseded by the relationship of war, and therewith exercise of force becomes a matter of mutuality.

We may assume that A did not want war. She cannot, however, deny B the power to transform, by resorting to force herself, their relationship of peace into one of war. In anticipation of an adverse (forceful) reaction on B's part A may issue a declaration of war or an ultimatum with conditional declaration of war. Even then it rests with B to decide as to whether there shall be war, in the full sense of a hostile relationship in which utmost force will be used by each party.

The fact of the matter is that in the establishment of the relationship of war both parties must cooperate, each in his own way. Consensus in regard to the fact that there shall be war between the belligerent states is an indispensable element in the creation of the complex action by mutual force which we call war.

Nation B consents to enter into the relationship of war by taking up arms against A. In so doing B most violently rejects the claim of nation A that hers is a just cause to exercise (unilateral) force against B. Nation B takes the position that the threatened or actual use of force on the part of A is wholly unjustified, and that, consequently, B, and not A, is the one who has a valid cause to resort to force, for the purpose of warding off an act of unlawful aggression.

This is the way things appear from the point of view of a theory of war which conceives of war as a legal action. This theory has its roots in the scholastic doctrine of the just war. It is based on the distinction between just and unjust causes of war.

While it is true that the doctrine of the just war loosened its hold on the mind of men during the nineteenth and twentieth centuries, it has never been wholly abandoned.⁶¹ As pointed out before, the juridical approach to war is still very much alive in present day writings on International Law, although the conception of war as an extraordinary remedy of last resort has remained somewhat obscure as concerns its legal outline and scope.

It is for us here to test the possibilities, and the inherent limitations of the juridical approach to war.

⁶¹ This the author will try to show in greater detail in another article scheduled to appear in the near future.

From the foregoing observations it appears that a state or nation⁶² cannot make war unilaterally upon another state or nation: A cannot, by unilateral act, be it verbal declaration or exercise of physical force, subject its adversary B to the jurisdiction of "the tribunal of war." A's "right to war" is no sufficient basis of jurisdiction. B must consent to be sued in the "war tribunal": she must subject herself to its jurisdiction.⁶³ B does so by resorting to force in response to A's warlike action. B's reaction by force may or may not be preceded by declaration of war on her part.

b) Under municipal laws of procedure the parties to a lawsuit are assigned definite roles, and they have to play the game accordingly. We speak of "plaintiff" and "defendant" respectively.

⁶² There is a difference, of course, between "states" and "nations." A state may or may not be a nation. While every nation must have a legal status, and is, hence, a state, not every state has grown into the stature of nationhood. Husserl, *The Political Community vs. The Nation*, 49 *Ethics* 127, 142 (1939). Within the scope of our present discussions the distinction between states and nations is immaterial. Unless otherwise indicated the two words are used interchangeably.

⁶³ Jurisdiction based on consent is a familiar feature of early municipal laws. We easily forget that the notion of compulsory jurisdiction to which the individual must submit whether he likes it or not is a recent growth in legal history. Everywhere the judge has originated as an arbitrator, who derives his power to intervene in disputes between individual members of the community from an agreement between the parties to submit their case to his jurisdiction. Jurisdictional authority derived from consent of the litigants does not, at the beginning, include the power of final adjudication. At this early stage of procedural law the primary function of the court consists in supervising the formal conduct of hostilities between the litigants, i.e., the various acts and counteracts of which the procedure is composed. The court finds itself then in the position of a referee who advises the parties, upon their request, as to what acts to perform as the action progresses. The whole procedure is dominated by the will of the parties. There may be phases of the litigation in which the court does not take part at all.

This stage of evolution reflects an even earlier stage of development on the domestic scene, when disputes between individuals concerning questions of right or wrong could be settled in a legally recognized way without intervention of law-enforcing agencies. See, as to very early Germanic laws, von Schwerin, *Deutsche Rechtsgeschichte* 175 (2d ed. 1915). In the court proceedings of early days each party is fighting for his cause with a view to silencing his opponent's voice of opposition—be it through the medium of formalized acts of violence (judicial battle), or the legal devices of oath (with or without the assistance of oath-helpers) or ordeal. The action is terminated and peace restored by conclusion of a final "peace treaty" between the litigants, a formal agreement containing solemn acts of renunciation, and of promise not to renew the old argument.

This primitive stage of procedural law can clearly be discerned in ancient Babylonian law, Greek law, old Teutonic laws; distinct traces appear even in Roman civil procedure of the classical period of Roman law. The problems involved here have been widely discussed in recent years. See the writings listed in Wenger, *Roman Law of Civil Procedure* § 19 n. 12 (English translation by Fisk, 1940). Add Goebel, *Felony and Misdemeanor* (Part I) 25 et seq. (1937), concerning the Frankish period of German law; Beyerle, *Entwicklungsproblem im germanischen Rechtsgang* 117 et seq. (1915).

No comparable fixed positions are held under International Law by the opposing parties in war.⁶⁴

In a lawsuit, the plaintiff is the one who takes offensive action. In extrajudicial actions to which states and nations are the parties we speak of offensive and defensive wars. The two categories of war are not easily defined. For our present purposes the distinction has only a limited value.

Let us assume that state A is the one who takes the initiative in changing the relationship of peace between A and B into a relationship of war. Stating a good cause of action, i.e., a cause of war which is recognized as just by the Law of Nations,⁶⁵ A resorts to force against B. The latter state resists by force.

The ensuing war of A against B is in the nature of an offensive war. A uses warlike force to validate its cause of action: to silence B's voice of opposition as manifested in its acts of armed resistance. Where this is so, the role played by A in the war may well be compared to that of the plaintiff, and the role played by B to that of the defendant, in an action pending in a national court of justice.

But what about the case where A resorts to force against B without previous warning: without even alleging facts which, if true, would constitute a just cause of war? The way in which A is acting, we assume, makes it evident to a neutral observer that A has "no case" under International Law. In the comparable situation on the domestic scene the defendant would be entitled to a motion to dismiss the action. Judicial action in response to the defendant's motion will be confined to consideration and final determination of the question as to whether the plaintiff has a cause of action in the procedural sense.

Obviously, failure of nation A to state a just cause of war can have no similar effect. The issue of war cannot be narrowed down to the question of whether the nation (A) who takes offensive action has a procedural cause of action. Her opponent (B) is in no position to "demur" on the ground that A has failed to specify a grievance that would entitle her to some kind of redress. There is no international agency with whom B might file such a plea. As between the parties themselves, there are no ways to confine the contest by arms to purely procedural issues. B's first

⁶⁴ In that respect, war shows similarity to certain early court proceedings in which the parties were not distinguished as plaintiff and defendant. We are referring to the type of action in ancient Greek law, which was called *diadikasia*. As to this, see Mitteis, *Reichsrecht und Volksrecht in den Oestlichen Provinzen des Römischen Kaiserreichs* 501 (1891).

⁶⁵ See Topic B, II *infra*, in the next installment.

reaction to the threat of force, or actual exercise of force on the part of A may be a vigorous protest. This will not prevent nation A from proceeding toward her ultimate goal, which is B's total submission to A's will.

Each sovereign state or nation would seem to enjoy "free access to the tribunal of war." This fact does not necessarily contradict the concept of war as a legal remedy. Legal remedies may be used, and have often been used, for unlawful purposes—nationally and internationally. It is hard to see how the "right" of free access to "the war tribunal" can ever be taken away from sovereign states, unless an International Law of the future abolishes the whole conception of war.

What will happen then if nation A has recourse to force, and A cannot, and in fact does not, claim a just cause of war—as was true for Japan when it attacked the United States on December 7, 1941? Where B, the attacked nation, resists by taking up arms herself, there will be war. Our question is as to the relative positions of the two nations engaged in this war.

A by acting as she does act, not caring what the Law of Nations may have to say about her action, characterizes herself as an aggressor. Nation A uses force for purely selfish reasons. We may assume that A has taken up arms in the expectation that B would yield to the force directed against her. So it happens that B does not yield, but instead she meets force by force. It is B's violent reaction which forces A into the relationship of war. Nation B does not confine herself to denying that A has a just cause of action. Being the victim of unjustified aggression, B claims a cause of action, and the right to war, for herself.⁶⁶

In that B takes this position, B assumes the role of one who seeks relief from the injury he has suffered (through A's act of aggression), by availing himself of the remedy of war. From a procedural point of view B is on the offensive, and A on the defensive. Where nation A has recourse to unilateral force and does not assert a claim for relief to be obtained through the medium of force, it is for B against whom A's act of force is directed to supply a cause of action for the war to follow.

The state which takes the first offensive action in the military sense is not necessarily the one who takes offensive action in the legal (procedural)

⁶⁶ In this connection the discussion between the envoys of Athens and Melos, preceding Athens' final attack upon the city of Melos in 416 B.C., is worth remembering, Thucydides V, 85 et seq.; The Loeb Classical Library, Thucydides III, English translation by Smith, 157 (1931). The cynical attitude taken by the Athenian envoys is on all fours with the Sophistic doctrine that by "the law of nature" might is right. To this, see Plato, Gorgias, 483, 488, The Loeb Classical Library, Plato V, English translation by Lamb, 382, 398 (1932); Plato, The Republic 357 et seq., id., English translation by Shorey, 108 (1937).

sense. Where the facts are as stated above, A holds the position of a defendant in the relationship of war between the two belligerent states. If, on the other hand, A starts an offensive war for the purpose of righting an antecedent wrong, and the war thus undertaken may be classified by International Law as a just war—as it will be, in certain conditions, under the classical doctrine of the just war—then nation A may be said to hold the position of a “plaintiff” in the subsequent contest by arms. War is a bilateral transaction also in the sense that the relative positions of the parties may be reversed according to the particular circumstances of the case.

2. Can it be that a state has a cause of action against another state, but has no right of action, i.e., no right to war? The answer is in the affirmative.

If state A is not an international person, it lacks the capacity to be a party to the relationship of war in the international sense. The right to wage war (*jus bellandi*) is reserved to independent states recognized as such by the international community.⁶⁷

Take here the case of the several states of the United States. By becoming members of the Union and adopting the federal Constitution, they have abandoned their status as international persons. Yet the individual states are still regarded as “sovereign within their respective boundaries, save that portion of power which they have granted to the federal government.”⁶⁸

In a dispute between two states of the United States concerning title to a certain territory, it may well be that one party has a valid cause of action under International Law. But since neither party has the international right of action, no final settlement of their controversy may be reached through mutual recourse to force. So far as member-states of the United States are concerned, the right to war (*jus ad bellum*) has been superseded by the right of action in the Supreme Court of the United

⁶⁷ The great Spanish theologian Franciscus de Victoria (1480–1546) tells us that under the Law of Nations (*jus gentium*) every perfect state (*perfecta respublica*), and only the perfect state, has the right to declare and to make war. Victoria, *De Jure Belli* Nos. 5, 7, 8; see Husserl, *Global War and the Law of Nations*, 30 *Va. L. Rev.* 543, 579 (1944). The *Relectio de Jure Belli* is the second *Relectio* of Victoria's *De Indis et de Jure Belli Relectiones*. Victoria, who has rightly been called the founder of the modern Law of Nations, wrote these lectures in 1532. They were not published, however, until 1557, eleven years after the death of the author. A revised text of Victoria's *Relectiones* (ed. by H. F. Wright) has been reprinted in *Classics of International Law* (1917); see *id.* English translation by Bate, at 168.

⁶⁸ *Rhode Island v. Massachusetts*, 12 Pet. (U.S.) 657, 720, 9 L. Ed. 1233, 1259 (1838). See Scott, *Judicial Settlement of Controversies between States of the American Union: An Analysis of Cases decided in the Supreme Court of the United States* 118, 132 (1919).

States.⁶⁹ In lieu of the remedy of war which is no longer available to them, the states have been granted the right to legal redress in judicial proceedings; their disputes have become justiciable in the sense of being subject to judicial determination.⁷⁰

Similar, though by no means identical, situations may arise among independent states and nations. Being international persons they do not lack capacity to make war. Yet, by virtue of a binding international agreement between two or more states, the exercise of the right to war may be restricted;⁷¹ it may even be wholly relinquished so far as the relations of the contracting parties are concerned.⁷²

Thus nation A and nation B may enter into a treaty (or become parties to a multilateral international convention), under the terms of which certain types of disputes, as they may arise between them, shall be subject to arbitration, or judicial settlement, as the case may be.⁷³ The

⁶⁹ *Missouri v. Illinois*, 180 U.S. 208, 241, 21 Sup. Ct. 331, 344, 45 L. Ed. 497, 512 (1901); *Virginia v. West Virginia*, 246 U.S. 565, 599, 38 Sup. Ct. 400, 404, 405, 62 L. Ed. 883, 890 (1918); *North Dakota v. Minnesota*, 263 U.S. 365, 372, 373, 44 Sup. Ct. 138, 139, 68 L. Ed. 342, 345 (1923). In controversies between two or more states the Supreme Court of the United States has original jurisdiction. Fed. Constitution, Art. III, § 2. To this see Rottschaefer, *American Constitutional Law* §§ 105, 221 (1939).

⁷⁰ As Mr. Justice Baldwin, *supra*, note 68, p. 737, 1265, puts it, "they [the states] surrendered to Congress, and its appointed Court, the right and power of settling their mutual controversies; thus making them judicial questions . . ."; and again at 738, 1266, "political equity, to be adjudged by the parties themselves" has given way to "judicial equity, administered by the courts of justice." Cf. p. 725, 1261.

⁷¹ Thus states may agree that they will not resort to war while proceedings of conciliation, as provided by treaty, are pending. See e.g., Art. I of the Treaty of Conciliation between the United States and Germany, signed May 5, 1928 (U.S. Treaty Series No. 775); Treaty of Conciliation between the United States and Poland, signed August 16, 1928 (U.S. Treaty Series No. 806). As regards the many conciliation treaties providing for a "cooling-off" period, Bryan treaties and Kellogg conciliation treaties, see 1929 Proceedings of the Am. Society of Int. Law 144 et seq. (Professor Hyde and others).

⁷² See, here, the Argentine Anti-War Treaty of Non-Aggression and Conciliation, signed at Rio de Janeiro, October 10, 1933 (U.S. Treaty Series No. 906); Inter-American Juridical Committee, Reaffirmation of Fundamental Principles of International Law (June 2, 1942), 37 Am. J. Int. L., Official Documents 21, sub V (1943), and the international conventions therein referred to; also 5 Hackworth, *Digest of International Law* 462 (1943).

The General Treaty for the Renunciation of War ("Pact of Paris" or "Kellogg Pact"), signed at Paris, August 27, 1928, in spite of the exaggerated interpretations that have been given to this document, has certainly *not* abolished the institution of war for the signatories of the pact (virtually all states and nations). 2 Oppenheim, *International Law* § 52 j (6th ed. by Lauterpacht, 1940), where further references can be found. In view of what has happened since on the international scene it would seem that the Pact of Paris has had in fact no effect upon the legal position of war.

⁷³ In this connection we may mention the Hague Convention (I) for the Pacific Settlement of International Disputes (1907) Part IV; Art. 12 of the Covenant of the League of Nations; the General Treaty of Inter-American Arbitration, signed at Washington, January 5, 1929 (U.S. Treaty Series No. 886) Art. I, in which the parties agree to "submit to arbitration all differences of an international character which have arisen or may arise between them by virtue of a claim of right . . . and which are juridical in their nature by reason of being sus-

causes of action of each party are protected then by the legal remedies provided in the particular treaty rather than by the remedy of war. To that extent, the jurisdiction of "the tribunal of war" has been superseded by the jurisdiction of the tribunal of justice agreed upon by the contracting powers.

It should be noted, however, that the right to war has not been taken away from A and B by any act of superior authority. The parties themselves, by mutual consent, have restricted the right to make war upon one another. This being so, the limitations placed upon the exercise of force on the part of A against B, and B against A, can be removed again, if and when the parties so decide.

Under modern arbitration acts individuals may, by entering into an agreement to arbitrate certain disputes, deprive the courts of their original jurisdiction in the matter; the arbitration agreement may be specifically enforced by appropriate judicial action.⁷⁴

In the international field, arbitration agreements can have no such or similar effect. If, in violation of its obligations to arbitrate the particular dispute, nation A resorts to armed force against nation B, and the latter responds by force, there will be war. To be sure, B can refuse to enter into the relationship of war with A. But B must take then the serious consequences which threaten the state which, without offering resistance, submits to the acts of utmost force directed against it by another state. If, on the other hand, B decides to resist, and does resist, A's attack, B's hostile reaction must be construed as consent on its part that the dispute between the two states shall be settled through war.

The creation of a state of war between A and B restores the jurisdiction of the "war tribunal" to its original scope prior to the arbitration agreement. At the same time, the state which seeks to validate its cause of action in this war regains its right of action by force upon the particular cause.

[To be concluded]

ceptible of decision by the application of principles of law"; Treaty between the United States and France, signed February 6, 1928 (U.S. Treaty Series No. 785) Art. 2; Treaty of Arbitration between the United States and Poland, signed August 16, 1928 (U.S. Treaty Series No. 805); and similar arbitration treaties. For detailed information consult Habicht, *Post-War Treaties for the Pacific Settlement of International Disputes* (1931). And see Fenwick, *Coordination of Inter-American Peace Agreements*, 38 *Am. J. Int. L.* 4 (1944).

⁷⁴ *Gilbert v. Burnstine*, 255 N.Y. 348, 174 N.E. 706 (1931); see *Mulcahy v. Whitehill*, 48 F. Supp. 917 (1943); *Frey and Horgan Corp. v. Superior Court*, 5 Cal. 2d 401, 55 P. 2d 203 (1936); cf. *The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42, 64 Sup. Ct. 863, 88 L. Ed. 822 (1944), concerning United States Arbitration Act, §§ 4, 8 (1925), 9 U.S.C.A. §§ 4, 8. A comprehensive note on Arbitration Legislation in England and in this country is to be found in 1 Chafee and Simpson, *Cases on Equity* 552 (1934).