From Carl Schmitt, “The Turn to the Discriminating Concept of War (1937)” in Carl Schmitt Writings on War 30 (Timothy Nunan, ed. trans. 2011).

Notes on the Text

The Turn to the Discriminating Concept of War was originally presented as a lecture on Friday, October 29, 1937, at the 4th annual conference of the Academy for German Law (Akademie für Deutsches Recht) on the theme “The Law of Reich and Volk,” a week-long conference at the Ludwig-Maximilians-University in Munich. The conference had begun on Saturday, October 23, 1937, with speeches by the Academy’s President, Hans Frank, and Constantin von Neurath, the German Foreign Minister […]. Schmitt himself was presenting his lecture to the Division for Legal Research. The Turn to the Discriminating Concept of War was originally intended to be published along with Carl Bilfinger’s The Law of the League of Nations Against International Law and a contribution by the jurist Viktor Bruns. However, because Bruns failed to provide his text for the compilation on time, the project fell through and Schmitt’s text was eventually published as a stand-alone volume. […]

Introduction

For several years now, bloody struggles have been carried out in the varied regions of the earth – struggles to which a more or less common under-[31]standing warily avoids attaching the term “war.” It may be all too easy to scoff at this observation. In truth, however, it has become all too clear that old orders are unraveling just as no new ones come to replace them. Indeed, the problems surrounding the concept of war reflect the disquietude of the current international situation. What has always been true reveals itself: the history of international law is a history of the concept of war. International law is, after all, a “right of war and of peace,” jus belli ac pacis, and will remain as such as long as it remains a law between independent peoples organized into states – so long, in other words, as war is a war between states and not an international civil war. Every dissolution of the old orders and every attempt at new bonds raises this problem. Within one and the same order of international law, there may just as little exist two contradicting concepts of war as there may exist two mutually exclusive conceptions of neutrality. The concept of war today has, therefore, become a problem. A realistic debate on the subject can only part the haze of illusory fictions that plague current thinking about international law and allow the real state of current international law to be recognized.

The world powers today have good reason to search for provisional terms and concepts between open war and genuine peace. The facts that are implied by the phrase “total war” may make such provisional terms particularly advisable. These provisional concepts are, however, only deferrals and postponements through which the recent problem of the concept of war can in no way be solved. What is decisive here is that the justice of a war is, more than anything else, fundamental to its totality. Without the claim to justice, every claim to totality would be but an empty pretension, just as, conversely, the grand-scale just war of today is in itself a total war.
The problem of the discriminating concept of war entered the history of modern international law with President Wilson’s declaration of war on April 2, 1917, under which he led his country into the world war against Germany. With it, the question of the just war raised itself in a completely different way than had been thought of by scholastic theologians or Hugo Grotius. For nations of a certain relativistic or agnostic mentality, today there are no more holy wars, even if the experiences of the world war against Germany have shown that wartime propaganda in no way dispenses with the moral convictions that are normally only acquired from a Crusade. But the modern disposition requires the procedures of legal or ethical “positivization” for a just war. The Geneva League of Nations, if it is anything appreciable at all, is fundamentally a system of legalization, a system that monopolizes judgment on the just war. More than that, it bestows the momentous decision on the justice [32] or injustice of a war – a decision tied with the turn to the discriminating concept of war – upon certain powers. As long as it exists in its current form, the Geneva League of Nations is only a means to the preparation of a war that is in the fullest sense “total:” namely, a war backed by trans-state and trans-national claims to justice.

The following analysis should, combined with a report on a few notable publications from the foreign literature on international law, give a picture of the latest developments in the field since 1932-3. What is noteworthy about this recent stage of the development of international law is that the union of today’s Geneva League of Nations with a universal ecumenical world order – and in particular the achievement of a distinction between just wars and unjust wars – has led to such a crisis (as shown by the events in East Asia, Africa, and Spain) that it is now impossible to distinguish between not only the just and unjust war, but also between “war” and “not-war” – that is, whether war can even be said to exist. Only this crisis could force the champions of a union between the international law of the Geneva League of Nations and universalistic international law to consider a clearer shape for their idea, be it in the form of an institutional-federal or judicial-ethical institution. And yet just as the thoughts behind the Geneva League of Nations have led to a manifest crisis, the Geneva League is at the same time forced through a kind of dialectical necessity into an escalation and deepening of aggression in war. Either there ought to be a hierarchy of concrete institutions and authorities of international law, or the discriminating concept of war ought to be accepted. Institutionalization gives the many programs of a “constructive pacifism” just that which one could dub a legal “positivization.” It accords, not only in principle but also in practice, the worth of a real, concrete order to the community bound to international law through the Geneva League of Nations. The Geneva League of Nations and the entire “communauté internationale” bound therein receives either a true “constitution,” through which institutional and constitutional possibilities of an effective “collective” action are guaranteed, or the Geneva League has at least some meaning by representing the “moral” conviction of an authority that decides on the justness or unjustness of a war for the world. […] [33] The debate today centers, more now than ever, around the question of the just war.

[…] [34] Today, however, the horizon is constantly changing and expanding. Most relevantly, the constantly pressing problematic of the international law of the League of Nations associated with the attempts at sanctions against Italy since October 1935 has revealed one fact: this is a debate not about new norms, but rather about new
orders – orders whose concrete character international powers struggle with. In this sense, one may say that international legal thought, as manifested in the texts that this report concerns, finds its foil in the collective political [35] situation of world powers such as England, France, and the United States of America. It is not a coincidence that this brand of thought has shifted the gaze of the world not to Vienna, but to London and Paris.

[...] At stake here is the question of how the new system of international law should be constructed, and how the “big questions” are to be disposed of. [...] From Carl Schmitt, The Nomos of the Earth in the International Law of the Jus Publicum Europaeum (G.L. Ulmen, trans., 2006).

[268] [...] President Wilson believed in the doctrine of just war. But the legal conclusions that he drew from this belief are not easy to determine. Even with respect to the question of moral war guilt, his standpoint is based not simply on criminal law. For example, in an October 26, 1916 speech, he said: “No single fact started the war, but in the last analysis the whole European system bears the deeper guilt of the war – its combination of alliances and agreements, a developed web of intrigue and espionage, which assurance drew the whole family of nations into its web.”

[...] Here, too, as in numerous attributions of guilt in the discussions concerning reparations, the question was raised as to whether or not a total transformation in the meaning of war was evident. Had the transition from the political concept of war between states in European international law to a discriminatory concept of war with one side just and the other unjust already occurred? And could the word aggression in this context be seen as a precedent for the complete criminalization of aggressive war? If it were a question of Germany’s guilt, and if this guilt were to be found in aggression, then, generally speaking, it was completely conceivable that guilt in a criminal sense was meant and that the facts of the case constituted a crime in the criminal sense. But, concretely, only reparations were at issue: it was only a matter of Germany’s economic and financial obligations, not of real punishment, as stated in Part VII of the Versailles Treaty. At Versailles, in no sense was anyone predisposed to create a new crime in international law. They did not want to destroy a concept of war that had been recognized for two hundred years, and that had determined the legal structure of traditional European international law as a whole, with all its legal procedures for pursuing war and protecting neutrality.

[...] [277] Any jurist can understand how the precise definition of aggression is separated absolutely and intentionally from the question of a just war. [...] However, the great problem of war concerns not only jurists, but also wide circles of concerned citizens who, by and large, view the juridical abstraction of justa causa as an artificial formalism or even as a sophistic diversion from the essential task. Such an abstraction is almost as difficult to prove as is the idea that [278] a justus hostis, i.e., an enemy, possibly has right on his side. Nevertheless, it presupposes an authentic international administration of justice that did not exist previously, and that provides a quick victory for the just cause, also with respect to the provisional protection of property. Without immediate and equilateral construction of an impartial international court of justice, the old maxim that “the best defense is a [good] offense” would be reversed, and the new maxim would be “the best defense can be the best and most effective aggression.” [...] [279] The general
(at least in Europe, the dominant) impression of any formal efforts of the League Covenant was expressed in the well-known principle that such a formal definition of aggression and the aggressor would be “a trap for the innocent and a guide for the guilty.” The deep dilemma between juridical efforts to obtain a legal prohibition of aggression and moral demands for an immediate abolition of war was expressed succinctly in this figure of speech.

The Geneva Protocol failed because it did not answer the substantive circumstances of the question of just war, and did not even attempt to. The impression that this failure made on European governments and peoples [...] prevented any European conviction that a new international crime had been or could be established. However, American proponents of outlawing war were not dissuaded by this failure, and in 1928, in the Kellogg Pact, succeeded in making a formal condemnation, an abolition of war, a means of national policy.

The Kellogg Pact changed the global aspect of international law. That is more important than any single detail of the norms or formulations of this pact, more important than the interpretation of its condemnation of [280] war, more important even than the interpretation of the numerous explicit and implicit provisos that it contained. The Western Hemisphere now took its place, and determined further development of the transformation of the meaning of war. All attempts to bring the condemnation of war expressed in the Kellogg Pact into accord with the League Covenant and the Geneva Protocol were unsuccessful. At the same time, however, from the East, the Soviet Union interjected itself into determination of the transformation. Already in the 1932-34 Disarmament Conference and in the July 1933 London Convention, the Soviet Union took the lead when it came to definitions of aggression and aggressor. Thus, the axis of power that had created the concept of war in European international law became unhinged, as power in the East and in the West came to dominate European states no longer certain of themselves. For a moment, in the London Statute of August 8, 1945, East and West finally came together and agreed. Criminalization now took its course.