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Defensive Warfare, Prevention and Hegemony:
The Justifications for the Franco-Spanish War of 1635

Randall Lesaffer
Tilburg University/Catholic University of Leuven

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Directors: Benedict Kingsbury and Martti Koskenniemi

Institute for International Law and Justice

New York University School of Law
40 Washington Square South, VH 314
New York, NY 10012
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DEFENSIVE WARFARE, PREVENTION AND HEGEMONY:
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FRANCO-SPANISH WAR OF 1635

by Randall Lesaffer*
(Tilburg University/Catholic University of Leuven)

ABSTRACT

On 19 May 1635, a French herald formally declared war upon Spain at Brussels, the capital of the Spanish Netherlands. The ensuing war lasted 24 years and changed the balance of power in Europe, opening the way for France's bid for European hegemony under Louis XIV in the second half of the 17th century.

In this article, the official justifications for war advanced by the two great belligerent powers are analyzed. The paper uses the analysis of this material to establish contemporary understandings of what the law of nations said about the *ius ad bellum* (here meaning the body of law that regulates the right to wage war). This sheds some light on the justice or legality of the two belligerents' positions in terms of the then existing *ius ad bellum*, although no attempt is made to reach a conclusion on this.

In their official declarations and justifications of war, the two belligerents each distinguished between the legality (under the positive law of nations) and the justice (under natural law) of the war. Each party provided succinct arguments under positive law against the disputed the legality of their opponent's actions. But their main emphasis was the justice of their own causes and war goals. These arguments centered on their own interpretations of classical just war doctrine. Whereas jurists and scholars in general tended to concentrate on just cause, the authors of the declarations and justifications of 1635 focused on the justice of their goals and the necessity of the war to attain these goals. Thus they did not offer judgments on the offensive or defensive character of the war at the military-operational level, but rather at the political-strategic level. This allowed both parties to characterize their resort to war as defensive. Each justified the war as being necessary to defend its position as a great power and to uphold the ordering of Christian Europe. Each thus identified the common interest of all princes and republics with either its own hegemonic position (in the case of Spain) or its supposedly rightful ambitions (in the case of France).

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* The author (°Bruges, 1968) is Professor of Legal History at Tilburg University (The Netherlands) and teaches Cultural History at the Law School of the Catholic University of Leuven (Belgium) and International Law at the Belgian Royal Defense College. I thank Professor Peter Haggemacher (Graduate Institute of International Studies, Geneva), Dr. Anuschka Tischer (Marburg) and Ignacio Rodriguez Alvarez (Intervict, Tilburg) for their useful comments. I am indebted to Hildegard Penn (Tilburg) for her invaluable help with the editing of this text.

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I. SATURDAY, MAY 19, 1635

On Saturday May 19, 1635, around 9 o'clock a.m., Jean Gratiollet d'Aubas, herald of France under the name of Alençon, carrying the insignia of his office, had himself announced by his trumpeter, Gratien Elissavide, at the Hallegate of Brussels in the Spanish Netherlands (roughly present-day Belgium).¹ His assignment was as serious as it was to prove tedious. The King of France, Louis XIII (1610-1643), had issued orders for him to go to the Spanish Netherlands and present himself to Don Fernando of Spain (1609-1641), commonly known as the Cardinal-Infante, who ruled the Spanish Netherlands for his brother King Philip IV of Spain (1621-1665), and to declare war upon Spain. In case the Cardinal-Infante, who had received an ultimatum from the French King earlier² and could not be mistaken about the reasons for the

¹ On Jean Gratiollet d'Aubas, see C.L. D'AUBAS DE GRATIOLLET, NOTES SUR LA FAMILLE D'AUBAS DE GRATIOLLET 3-6 (1854).

² By the representative of the French king in Brussels, Gabriel d'Amontot, by order of the king of April 21, 1635. DENIS-LOUIS-MARTIAL AVENEL, LETTRES, INSTRUCTIONS DIPLOMATIQUES ET PAPIERS D'ETAT DU CARDINAL DE RICHELIEU vol. 4, 762 (Collection des documents inédits sur l'histoire de France No. 55, 1861). For the reply of the

visit, refused to see the herald, Gratiollet was instructed to present the declaration to one of the courtiers of Don Fernando. If that did not work either, Gratiollet was instructed, as a last resort, to nail the declaration to a border post before reentering France.³

This contingency plan would not prove superfluous. Some days later, in their report to the King, Gratiollet and Elissavide recounted their misadventures that day in Brussels. After the first commotion had subsided, the sergent-major in charge of the Hallegate, together with the first king of arms of the Spanish Netherlands under the name of 'Toison d'Or', came out and invited the French herald into the town, relaying the promise that the Cardinal-Infante would grant him an audience. Thereby, under the customs and rules of chivalry and heraldry, his immunity as a herald was assured.⁴ The sergent-major and the king of arms requested Gratiollet to lay down the symbols of his office, which he refused fearing this to be a ruse aimed at invalidating his future actions. Gratiollet was taken to the house of the sergent-major at the Place de Sablon, where reassurance was given once again that the Cardinal-Infante would receive the herald later that day.⁵ At 2 o'clock p.m., the officer returned only to offer new excuses for more delay. During the day, several more officials came to see the French herald, among whom two other

Cardinal-Infante, see Letter of Richard-Pauli Stravius to Francesco Barberini of May 5, 1635, in CORRESPONDANCE DE RICHARD-PAULI STRAVIUS (1634-1642) 63 (Wilfrid Brulez ed., Analecta Vaticano-Belgica No. 2.10, 1955).

³ Issued on May 12, 1635 at Saint-Quentin; published in AVENEL, *supra* note 2, vol. 4, 760.

⁴ P. ADAM EVEN, *Les fonctions militaires des hérauts d'armes*, 71 ARCHIVES HERALDIQUES SUISSES 2 (1957).

⁵ In reality, the Cardinal-Infante left Brussels after he had heard of the herald's arrival and traveled to Leuven to prepare for the coming campaign; Letter of the Cardinal-Infante to Olivares of May 23, 1635: BRUSSELS, *General Royal Archive, Secrétairerie d'Etat et de Guerre* No. 334, 239; MICHEL HUISMAN, JEAN DHONDT, AND LUCIENNE VAN MEERBEECK eds., *LES RELATIONS MILITAIRES DES ANNEES 1634 ET 1635, REDIGEES PAR JEAN-ANTOINE VINCART, SECRETAIRE DES AVIS SECRETS DE GUERRE AU PAYS-BAS* 124 (1958).

heralds from the Netherlands.⁶ Finally, between 6 and 7 o'clock p.m., Gratiollet offered the document of the declaration of war to one of the gentlemen of the Cardinal-Infante, who upon seeing it took flight. Gratiollet then left the house at the Sablon accompanied by two of the Cardinal-Infante's heralds. After having mounted his horse, he threw the declaration of war on the ground among the angry crowd, while the heralds cried not to touch the paper. Gratiollet and Elissavide then batted their retreat and rode back to France. When they reached the border in the morning of Monday May 21, the French herald attached two copies of the declaration to a post and informed the mayor of the nearby village thereof.⁷ The declaration read:

The herald of arms of France under the title of Alençon lets it be known to all concerned that he came to the Netherlands to find there the Cardinal-Infante of Spain on behalf of his master the King, his sole and sovereign Lord, to state that, as he [the Cardinal-Infante] has refused to restore the Archbishop of Trier, Elector of the Empire, to liberty, who has been placed under the King's protection in the impossibility of the Emperor or any other prince to bestow their protection onto him, and as he holds a sovereign prince prisoner who was not at war with him, against the dignity of the Empire and against the law of

⁶ The heralds of Hainaut and Gueldres.

⁷ Jean Gratiollet d'Aubas, *Procez verbal du héraut envoyé par le Roy au Cardinal-Infante lui dénoncer la guerre*, 72 GAZETTE DE FRANCE 285 (1635); Jean Gratiollet d'Aubas and Gratien Elissavide, *Relation au roi*, in NOTES SUR LA FAMILLE D'AUBAS DE GRATIOLLET 14-8. See also Luc Duerlo, *1635: Hoe een oorlog begon*, in TIENEN 1635: GESCHIEDENIS VAN EEN BRABANTSE STAD IN DE ZEVENTIENDE EEUW 111-13 (1985).

nations, His Majesty declares that he will get redress for this offense through the use of arms, as this is an offense against the interests of all princes of Christianity.⁸

By the time Gratiollet had succeeded in delivering his message, the hostilities between the French and Spanish armies had begun. Even before Gratiollet and his trumpeter first entered the Spanish Netherlands, a French army of 26,000 men had crossed into the Duchy of Luxemburg, one of the Spanish fiefs in the Netherlands.⁹ On Sunday May 20, they met with a small Spanish corps under Prince Thomas of Savoy (1596-1656) near Les Avins and crushed it.¹⁰ Thus the war, that would last for almost a quarter of a century (up to 1659) and change the balance of power in Europe, started before it had been declared officially.

The medieval-style declaration of war to the Cardinal-Infante by herald was one of the last of its kind.¹¹ By 1635, declaration by herald had fallen into disuse. As the sixteenth century moved on, wars were increasingly declared through an ambassador and announced to the world

⁸ *Sommatation envoyée de la part du Roy par un Héraut au Cardinal-Infante*, 67 GAZETTE DE FRANCE 272 (1635); Gratiollet, *supra* note 7, at 288; D'Aubas and Elissavide, *supra* note 7, at 17 (my transl.). A copy of the declaration can be found in BRUSSELS, *General Royal Archive, Papiers de l'Etat et de l'Audience* No. 212.

⁹ Letter of Hugo Grotius to the Rhinegrave Otto of May 17, 1635, in BRIEFWISSELING VAN HUGO GROTIUS vol. 5 at 487-9 (B.L. Meulenbroek ed., 1966).

¹⁰ RELATION DE CE QUI S'EST PASSE EN BATAILLE GAGNEE PAR L'ARMEE DU ROI CONTRE CELLE D'ESPAGNE, COMMANDEE PAR LE PRINCE THOMAS (1635).

¹¹ The last one was the Swedish declaration against Denmark in 1657; ERNEST NYS, LE DROIT DE LA GUERRE ET LES PRÉCURSEURS DE GROTIUS 111-12 (1882); TRAVERS TWISS, THE LAW OF NATIONS CONSIDERED AS INDEPENDENT POLITICAL COMMUNITIES vol. 2, 59 (1863); VOLTAIRE's claim that the 1635 declaration was the last of its kind remains, however, widely accepted in literature. Voltaire, *Le Siècle de Louis XIV* in ŒUVRES HISTORIQUES 632 (René Pomeau ed., 1957).

through the publication of manifestos.¹² More and more wars were not declared in any formal way.¹³

The French declaration of May 19, 1635 served three purposes. First, France wanted to reassure its allies that France had finally broken with Spain. Second, by declaring war on Spain only, the French refrained from breaking with Spain's main ally, the Habsburg Emperor of the Holy Roman Empire. Third, by addressing the declaration not the Spanish King himself but to his representative in the Netherlands, France left the door ajar later to deny that it had declared war on Philip IV and Spain. Apart from the desire to prove chivalrous and the nice reminiscences it made to the days of the wars between the Emperor Charles V (1519-1558) and the French King Francis I (1515-1547), the desire to draw attention to this threefold message offers at least part of the explanation for the return to bygone formalities.

But France was not to retrace its steps and deny being at war with Spain. In the weeks following Gratiollet's visit to Brussels, further steps were taken to make the state of war official. On June 6, 1635, Louis XIII issued a lengthy *Declaration du Roy*, announcing the state of war and offering abundant justification for it. It was duly registered by the Parliament of Paris on June 18 and subsequently published, on June 20, in the *Gazette de France*.¹⁴ Early July, another

¹² Anuschka Tischer, *Der Wandel politischer Kommunikation im Kriegsfall: Formen, Inhalte und Funktionen von Kriegsbegründungen der Kaiser Maximilian I. und Karl V.*, 9 MILITÄR UND GESELLSCHAFT IN DER FRÜHEN NEUZEIT 7 (2005).

¹³ ANDREAS STEINLEIN, DIE FORM DER KRIEGSERKLÄRUNG. EINE VÖLKERRECHTLICHE UNTERSUCHUNG 31-3 (1917); JOHANN WOLFGANG TEXTOR, SYNOPSIS IURIS GENTIUM 17.50 (John Pawley Bate transl., Carnegie 1916) (1680).

¹⁴ DECLARATION DU ROY SUR L'OUVERTURE DE LA GUERRE CONTRE LE ROY D'ESPAGNE (1635). Also published in 85 GAZETTE DE FRANCE 335 (1635).

text explaining the reasons for the war was released.¹⁵ While the first text was first and foremost, if not exclusively,¹⁶ directed at the King's officials throughout the realm in order to inform them of the state of war and the measures against Spanish subjects and their property that went along with it, the second text was a manifesto addressed to the public at large. Although it was primarily aimed at a French audience, its readers could also include foreigners.¹⁷

¹⁵ MANIFESTE DU ROY CONTENANT LES JUSTES CAUSES QUE SA MAJESTE A EUÈS DE DECLARER LA GUERRE AU ROY D'ESPAGNE (1635). It was published by Ribot (Paris), Roussin (Lyon), and Cramoisy (Paris). Also published in 20 MERCURE FRANÇAIS 949 (1635). There are several translations in Spanish, e.g. MADRID, *Biblioteca Nacional*, Ms. 2366, 204, Ms. 18192, 191, Ms. 10.713, and Ms. 18.195, 51, and in Italian, Ms. 11.000, 19 and Ms. 8.247. A transcription from Ms. 2366 was published in JOSÉ MARIA JOVER, 1635. HISTORIA DE UNA POLEMICA Y SEMBLANZA DE UNA GENERACION vol. 2, 469 (1949). The French King sent the text to one of his officials on June 9, 1635: LETTRE DU ROY ESCRITE A MONSEIGNEUR LE DUC DE MONBAZON, PAIR & GRAND VENEUR DE FRANCE, GOUVERNEUR & LIEUTENANT GENERAL POUR LE ROY, DE PARIS & ISLE DE FRANCE. CONTENANT LES JUSTES CAUSES QUE SA MAJESTE A EUÈS DE DECLARER LA GUERRE AU ROY D'ESPAGNE (1635), also published in JEAN DU MONT, CORPS UNIVERSEL DIPLOMATIQUE DU DROIT DES GENS vol. 6-1, 105 (1726). There was also a Dutch translation published in 1635: MANIFESTE EN VERKLARINGE DES KONINGS VAN VRANCKRIJCK, GESCHREVEN AEN DEN HERTOGHE VAN MONT-BAZON ... (1635).

¹⁶ It certainly helped convince Hugo Grotius, then ambassador of the Swedish Queen in Paris, that the French were serious about their rupture with Spain. He wrote: 'Het manifest bij den coninck wtgegeven ende het parlement geverifieert houde ik voor een volcommon rupture, soo veel die met woorden kan werden gedaen' [The manifesto issued by the king and verified in Parliament constitutes, in my view, a perfect rupture, as far as this can be done by mere words] (my transl.); Letter of July 2, 1635 to Nicholas Reigersberch, *supra* note 9, vol. 6, 62-3 (1967).

¹⁷ Hermann Weber, *Zur Legitimation der französischen Kriegserklärung von 1635*, 108 HISTORISCHES JAHRBUCH 90, 104 (1988).

On June 24, 1635, the Cardinal-Infante retaliated by having his own declaration issued.¹⁸ In it, he offered his arguments for the justice of the Spanish cause. At the end of the text, the Cardinal-Infante, in the name of his brother, formally declared war upon France and listed the measures taken against French subjects and their property. As the French and their ally, the Dutch Republic, had incited the population of the Spanish Netherlands to revolt against the Spanish upon their joint invasion, the Cardinal-Infante's declaration was primarily targeted at the citizens of the Spanish Netherlands.¹⁹ Moreover, the Cardinal-Infante's declaration was spread throughout the Spanish empire, at least in official circles.²⁰ In Madrid, Olivares had an extensive justification prepared to be issued by Philip IV. It dates, at the earliest, from the end of July 1635.²¹ It was, however, never published.

¹⁸ DECLARATION DE SON ALTEZE TOUCHANT LA GUERRE CONTRE LA COURONNE DE FRANCE (1635). Published in the *Plakkaten van Brabant* on 24 June 1635, see HET TWEDE DEEL VAN DE PLACCAETEN ENDE ORDONNANTIEN VANDE HERTOGHEN VAN BRABANDT PRINCEN VAN DESE NEDERLANDEN 354-6 (1635).

¹⁹ A Dutch translation was soon made: VERKLARINGHE VAN SIJNE HOOGHEYDT AANGAENDE DEN OORLOGHE TEGHEN DE KROONE VAN VRANCKRYCK (1635).

²⁰ There were Spanish and Italian versions: DECLARACIÓN DE SU ALTEZA ... DEL SEÑOR ... CARDENAL-INFANTE ACERCA DE LA GUERRE CONTRA LA CORONA DE FRANCIA: MADRID, *Biblioteca Nacional*, Ms. 3-16.627 and 1.635. A Spanish version was also published by Martin Goblet from Madrid as DECLARACIÓN DE SU ALTEZA EL SERENISSIMO INFANTE CARDENAL TOCANTE À LA GUERRA CONTRA LA CORONA DE FRANCIA (1635). See also JOVER, *supra* note 15, vol. 1, 257-8.

²¹ DECLARACION DE DON FELIPE CUARTO, REY DE LAS ESPAÑAS, AL ROMPIMIENTO DE LA GUERRA QUE SIN DENUNCIARLA HA HECHO LUY, REY DE FRANCIA: MADRID, *Biblioteca Nacional*, Ms. 290, 103-41, partly published in JOVER, *supra* note 15, vol. 2, 505-11. In 1636, Emperor Ferdinand II (1619-1637) declared war on France too and followed it up by a manifesto as well. This is not considered in this article. It is published in VICTORINE HARTMANN, LES PAPIERS DE RICHELIEU, SECTION POLITIQUE EXTERIEURE, CORRESPONDANCE ET PAPIERS D'ETAT, EMPIRE ALLEMAND vol. 3, 9 (1999).

II. DECLARATIONS OF WAR AND THE APPLICABLE LAW OF NATIONS

Whereas a declaration of war by herald had become extremely rare by the early seventeenth century and was hardly repeated after 1635, the official issuing of lengthy public declarations and manifestos offering justifications for the war was anything but rare. During the Early-Modern Age, almost all important wars were accompanied by a stream of such manifestos.²² Also, many scholarly treatises and manifestos, written by private persons, saw the light of day. Many of the authors of such treatises had close connections with their governments. This was certainly the case in 1635. In France, Spain and the Spanish Netherlands, several authors sat down at their desks to defend their sovereign's cause and refute the enemy's claims.²³

In this article, the legal justifications of the Franco-Spanish war of 1635 offered by the French and Spanish governments are analyzed. The discussion is limited to the four official declarations and manifestos mentioned above: the two French, the one issued by the Cardinal-Infante and the one prepared for Philip IV.

²² Konrad Repgen, *Kriegslegitimationen in Alteuropa. Entwurf einer historischen Typologie*, 241 *HISTORISCHE ZEITSCHRIFT* 27, 32 (1985). Anuschka Tischer (Marburg) is currently working on early-modern war declarations as a source for diplomatic history; see Anuschka Tischer, *Offizielle Kriegsbegründungen in der frühen Neuzeit – Funktionen, Formen, Inhalte*, 8 *MILITÄR UND GESELLSCHAFT IN DER FRÜHEN NEUZEIT* 48 (2004).

²³ For a survey and discussion of these private manifestos and treatises, see JOVER, *supra* note 15, and Tienen in *de eindfase van de Tachtigjarige oorlog 1621-1648, in TIENEN 1635: GESCHIEDENIS VAN EEN BRABANTSE STAD IN DE ZEVENTIENDE EEUW* 13, notes 97-9 (1985). Seven Spanish manifestos can be found in MADRID, *Biblioteca Nacional*, Ms. 2366.

It cannot be the primary and sole purpose of analyzing these official statements to reach a verdict on the justice or legality of the two belligerents' positions in terms of the then existing *ius ad bellum*, a term used here to denote the body of law that regulates the right to wage war. Rather, it is to try to establish what the law of nations said about the *ius ad bellum* at the time. After all, it is not so clear what the law of nations in general and the *ius ad bellum* in particular were in the early seventeenth century. Only when we have a clearer view on the *ius ad bellum* as it stood, we can reach a verdict on the rights and wrongs of the parties involved.

First, no codification of the relevant rules existed in whatever form. Second, the law of nations was in full transition. Since the early sixteenth century, Christian Europe had been in deep turmoil. The Reformation had shaken the very foundations of the medieval legal order of the Latin West, the *respublica christiana*. The religious wars between Catholic and Protestant powers, the internal strifes in several countries such as the Holy Roman Empire and France, and the struggle for the hegemony over Europe between the French kings and the Habsburg rulers of Spain and the Empire had aggravated the crisis. The Age of Discoveries had opened up new worlds to the Latin-Christian West that were neither Latin nor Christian. This challenged the old political and juridical conceptions about the world and international relations. All this had caused the old legal order of the Latin West to crumble. And with it went the old law of nations, the medieval *ius gentium*.

Between the twelfth and the fifteenth centuries, many scholastic thinkers – theologians, Roman lawyers as well as canon lawyers – addressed questions relating to the law of nations (*ius gentium*). The medieval *ius gentium* was not an autonomous discipline; it was an inextricable part of theology and of the *ius commune*. The *ius commune* was the late-medieval legal doctrine that was common to the whole Latin West and that was based on the study and interpretation of

Roman and canon law. The scholastic theologians, and civil and canon lawyers also elaborated on the right to wage war. One of the products of their endeavors, especially of those of the theologians, was the doctrine of the just war.²⁴ Founded upon authoritative texts such as the Bible, the Church Fathers, the *Digest* of Justinian, and the medieval collections of canon law, the ideas of the medieval theologians and lawyers on the *ius gentium* and on the right to wage war had authoritative value. And while there may have been as many opinions about a problem of the *ius gentium* as there were minds turned to it, a kind of simplified and vulgar *communis opinio* emerged that gained wide acceptance. At least those rules of the *ius gentium* that had a foothold in canon law could be upheld by the ecclesiastical courts, in particular by the highest of those, the papal court. The Christian faith, the canon law, and the authority of the Church formed the common basis for the *ius gentium* as a binding and enforceable law.²⁵

The Reformation and the turmoil of the sixteenth and early seventeenth centuries changed all that. Religion, which had been a measure of unity, now became a measure of disruption. The canon law and the ecclesiastical courts lost their authority in the Protestant parts of Europe. As a

²⁴ On the various contributions of theologians, and canon and civil lawyers to the question of the right to wage war, see PETER HAGGENMACHER, *GROTIUS ET LA DOCTRINE DE LA GUERRE JUSTE* (1983).

²⁵ On the significance of canon law for the medieval *ius gentium*, see Dominique Bauer, *The Importance of Medieval Canon Law and the Scholastic Tradition for the Emergence of the Early Modern International Legal Order*, in *PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE* 198 (Randall Lesaffer ed., 2004); Randall Lesaffer, *The Medieval Canon Law of Contract and Early Modern Treaty Law*, 2 *JOURNAL OF THE HISTORY OF INTERNATIONAL LAW* 178 (2000); idem, *Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription*, 16 *EUROPEAN J. INT'L L.* 25, 34-7 (2005); James Muldoon, *The Contribution of the Medieval Canon Lawyers to the Formation of International Law*, 28 *TRADITIO* 483 (1972); idem, *Medieval Canon Law and the Formation of International Law*, 81 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, KAN. ABT.* 64 (1995).

consequence, their usefulness for the relations between Catholic powers gradually eroded too. By the second half of the sixteenth century, the Pope and the ecclesiastical courts all but ceased to be appealed to as guarantors of peace treaties, something which had been a common practice before. As the canon law had formed the backbone of the authoritative doctrines pertaining to the *ius gentium*, these doctrines lost the strongest foundation of their authority. This does not imply that the old doctrines, such as the just war doctrine, were all of a sudden rejected. To the contrary, many writers, theologians as well as Roman lawyers, tried to save what they could, but opinions started to differ and new ideas took shape.²⁶ By the early seventeenth century, many writers from different religions and intellectual backgrounds had amended the just war doctrine to allow the sovereign princes and republics of Europe more freedom of action.

The crisis of the Latin West and the Church's loss of authority had made the sovereign princes and republics of Europe all of sudden truly external sovereigns, in the sense that they were free from any – even theoretical – higher authority in secular affairs. The medieval order of the *respublica christiana*, where all political entities stood in a hierarchical relation to one another and all had to recognize the ultimate if highly theoretical legal and political authority of the Emperor (until the thirteenth century), the Pope (until the sixteenth century), and their respective laws (Roman and canon law), had collapsed by about 1540-1550. The many international and internal wars of the period between 1540 and the Peace Treaties of Westphalia (1648), which ended the Thirty Years' War (1618-1648), prevented the swift emerging of a new

²⁶ As David Kennedy has indicated, the early-modern writers of international law (or primitive writers, in his terminology) continued to base their argument on the authority of the classical texts; David Kennedy, *Primitive Legal Scholarship*, 27 HARVARD INT'L L. J. 1, 5-6 (1986). But they did so with ever more flexibility in interpreting them, started to become critical about the authenticity of their sources (under the influence of humanism), and started to take into account in more explicit ways contemporary problems and ideas.

legal order and a new law of nations. In fact, this new order – the ‘Westphalian’ system of sovereign states – and its law – the modern law of nations or the *ius publicum Europaeum* – were only formed *after* Westphalia, sometime between 1660 and the Peace of Utrecht (1713). As such, the period between 1550 and 1660 was an age of transition from the medieval to the modern law of nations.²⁷

The years around 1600 saw an increasing interest in the law of nations. Writers such as Balthazar de Ayala (1548-1584), Albericus Gentilis (1552-1608), and, above all, the Dutch humanist Hugo Grotius (1583-1645), laid the foundations for an autonomous literature and doctrine of the law of nations. They and their immediate successors emancipated the law of nations from theology and from the writings of the learned law at large, Roman and canon law. While their contribution was far from a *creatio ex nihilo* and while they adopted a lot of the medieval inheritance, new ideas and practices crept in. From 1600 onwards, writers would increasingly recognize that apart from the doctrinal traditions, they also had to take into account

²⁷ I prefer the term modern law of nations to the more frequently used ‘classical’ law of nations for the law of nations of the era running from Westphalia to World War I, because it coincides with the meaning of ‘modern’ in the sense of general history, the ‘Modern Age.’ On the collapse of the medieval system, the period of transition, the significance of Westphalia and the formation of the modern law of nations after 1660, see Randall Lesaffer, *The Grotian Tradition Revisited: Change and Continuity in the History of International Law*, 73 BRITISH YEARBOOK INT’L L. 103 (2002); idem, *Peace Treaties from Lodi to Westphalia*, in PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE 9 (Randall Lesaffer ed., 2004). On Westphalia and the formation of the modern law of nations, see STEPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW: THE WORD *SOVEREIGNTY* IN BODIN AND VATTTEL AND THE MYTH OF *WESTPHALIA* (2004).

the practices of states and rulers, be they historical or contemporary.²⁸ In doing so, they responded to the realities of their times. The collapse of the old system of the *respublica christiana* and the disappearance of a common, authoritative doctrine had thrown the sovereigns of Europe back on their own devices to find out what the law of nations was, or to create it themselves. Treaties and customs were becoming the primary sources of the law of nations.

This does not allow us to regard the doctrinal writings of the Early-Modern Age as trustworthy statements of the applicable law of nations. Under the medieval scholastic tradition, doctrine was authoritative and idealistic; it was the expression of an almost sacred ideal of what the law said or, better, ought to say. This conception of the role of the ‘learned law’ outlived the medieval tradition of the *ius gentium*. Ayala, Gentilis, and Grotius all incorporated references to state practice, without however leaving the traditional idealistic pretences of doctrine totally aside.

All this one needs to keep in mind when one addresses the question: What was the law of nations, or the *ius ad bellum*, in 1635? International legal historians, when faced with such a question, tend to refer to doctrine and limit their research to the writings of some of the famous ‘classics of international law.’²⁹ Doctrine is such convenient shorthand that any concern about its relation to the then applicable law is easily passed over.³⁰ While this is a dangerous approach for

²⁸ On this process of emancipation during the decades around 1600, see Randall Lesaffer, *An Early Treatise on Peace Treaties: Petrus Gudelinus between Roman Law and Modern Practice*, 23 J. LEGAL HISTORY 223, 224-5 (2003).

²⁹ WILHELM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* 2-3 (2000).

³⁰ Or, at best, one tries to establish which doctrine was most influential in practice. For an example in relation to the *ius ad bellum*, see Partel Piirimäe, *Just War in Theory and Practice: The Legitimation of Swedish Intervention in the Thirty Years War*, 45 THE HISTORICAL JOURNAL 499 (2002).

all periods of history, this is particular irresponsible for the early seventeenth century. As stated above, the broad consent about the old doctrines had dissipated. The many publications on the law of nations that saw the light offer, more than anything else, an indication of the abundance and diversity of opinions that filled the vacuum left by the collapse of the old certainties. Many of these new publications combined old, if amended, doctrinal opinions with descriptions and analyses of state practice. As of 1635, there was no common opinion about almost any subject in the law of nations. No single work or author had such authority that his opinion can be equated with the then applicable law of nations.

This is as much true for Hugo Grotius and his *De Jure Belli ac Pacis libri tres*, first published in Paris in 1625, as it is for any other author. Grotius certainly was wellknown, and had become *an* authority in France and in some Protestant countries by 1635. His major treatise on the law of nations was already widely distributed over Europe by 1635.³¹ There can be no doubt that the drafters of the French declarations and manifestos knew Grotius' book and have taken some of his ideas into account.³² Grotius had dedicated his book to the King of France and,

³¹ According to an often quoted story, the Swedish King Gustav Adolph (1611-1632) had Grotius' treatise under his pillow during his campaigns in the Empire (1630-1632); J.L. DE BURIGNY, *VIE DE GROTIUS, AVEC L'HISTOIRE DE SES OUVRAGES, ET DES NÉGOCIATIONS AUXQUELLES IL FUT EMPLOYÉ* 135-6 (1752). By 1635, the treatise had been published, apart from the first edition from Paris of 1625 in Frankfurt (1626) and Amsterdam (1631 and 1632); JACOB TER MEULEN AND P.J.J. DIERMANSE, *BIBLIOGRAPHIE DES ECRITS IMPRIMÉES DE HUGO GROTIUS* 227-31 (1950).

³² Grotius was, however, not directly involved in the drafting of the *Declaration*. On July 2, 1635, in a letter to his brother Willem he wrote that he had seen the *Declaration* of June 6, implying that he had read it for the first time; *supra* note 9, vol. 6, 61.

as the Swedish ambassador in France,³³ moved in French court circles at the time. But it is certainly not to be assumed that Spanish officials were aware of his work when drafting their declarations. In fact, to the Cardinal-Infante Grotius was as good as an unknown quantity in 1635. In a letter to his brother Philip IV, dated May 15, 1635, Don Fernando passed on the news that Sweden had engaged as its new agent in Paris a certain ‘Huberto Groncio’ from Holland, of whom the Cardinal-Infante knew that he was a man of letters the Dutch detested because he had sided with Johan of Oldenbarneveldt.³⁴

In order to determine what the law of nations stated on a certain subject in the early seventeenth century in particular or in the Early-Modern Era in general, one should look both to state practice and to doctrine. For the *ius ad bellum*, apart from alliance treaties, official war declarations and manifestos are the most important and instructive sources.

This article proposes a case study of the public declarations and manifestos of one of the most important wars of the Early-Modern Age. The aim is to clarify what the *ius ad bellum* of the period was. This is not to say that the opinions and practices of two powers in one single case necessarily reflect the applicable law – even if it concerns the leading powers of the day. Even in a system where treaties and customary law are the dominant source of the law of nations, the actions of the greatest powers may as well constitute infringements of the law as they may

³³ Grotius was officially accepted as Swedish ambassador to the King of France on March 2, 1635, *supra* note 9, vol. 6, ix. On Grotius’ role as a diplomat, see C.G. Roelofsen, *Grotius and the International Politics of the Seventeenth Century*, in GROTIVS AND INTERNATIONAL RELATIONS 95, 121-31 (Hedley Bull, Benedict Kingsbury and Adam Roberts eds., 1990).

³⁴ ‘... de haver llegado a Paris de parte de la corona de Suecia embiado por Oxenstierna Huberto Groncio holandés y persona de buenas letras que desterraron por amigo de Bernavelt’ ; BRUSSELS, *General Royal Archive*, *Secrétairerie d’Etat et de Guerre* No. 212, 507.

constitute the law. This being said, explicit justifications of war as the ones we encounter here referred to a framework of opinions and rules in relation to which the actions of the belligerent were justified and of which the authors thought that they were commonly accepted. By consequence, justifications of war offer an indication of what powers considered (*opinio juris sive necessitatis* – to use a modern term) acceptable practice (*usus*) under the law of nations, in other words of what they considered to be customary law.

As a case study, the Franco-Spanish war has a lot to say for itself. First, it is one of the most important wars of the Early-Modern Age. Second, the belligerents went to great lengths in order to justify their actions. Third, the war is well documented. Many diplomatic sources have been published by modern scholarship. Even the declarations and manifestos have been studied by diplomatic and political historians. Their concern was, however, greatly different from the present one in that they were only looking to explain the political motives for the war whereas this article will be focussed on the legal aspects. But their work has laid the basis for a case study such as this.

At this point, it may be pertinent to warn against a misconstruction of historical reality that threatens from the study of current international law. It has been stated and repeated that the Briand-Kellogg Pact (1928) and the UN Charter (1945) outlawed war and laid down a *ius contra bellum*.³⁵ By opposition, the old *ius ad bellum* has often been perceived to be just that: an absolute right of sovereign states to wage war.³⁶ Whereas this approaches reality for the nineteenth century, it becomes a distortion when it is applied to the previous three centuries.

³⁵ YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 78 (3rd edn, 2001); Michael Howard, *Temperamenta Belli: Can War Be Controlled?*, in RESTRAINTS ON WAR 1, 11 (Michael Howard ed., 1979).

³⁶ THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 9-10 (2002).

During the Early-Modern Age, there were rules – either of positive or natural law – that laid down restrictive conditions for states to resort to warfare. Of course, there was no international institution to enforce these rules and sovereigns refused to attach legal consequences to statements about the legality or justice of war. War, as well as peace, became non-discriminatory. Regardless of the justice or legality of a war, the laws of war were applied to all belligerents. In peace treaties, the signatories refrained from attributing blame for the war to one another.³⁷ This dominance of might over right was reflected in doctrine.³⁸ But the rules on the justice and legality of war as such existed, both in doctrine and in international customary law. At least until the end of the eighteenth century, states went a long way in justifying their actions in terms of these rules, both in declarations of war and in alliance treaties.³⁹ Their use and effects

³⁷ In not one peace treaty between sovereigns of the sixteenth to the nineteenth centuries, judgment was rendered on the legality or justice of war; JÖRG FISCH, *KRIEG UND FRIEDEN IM FRIEDENSVERTRAG. EINE UNIVERSAL-GESCHICHTLICHE STUDIE ÜBER GRUNDLAGEN UND FORMELEMENTE DES FRIEDENSSCHLUSSES* 92-123 (1979); RANDALL LESAFFER, *EUROPA: EEN ZOEKTOCHT NAAR VREDE? (1453-1763/1945-1997)* 248-57 and 470-5 (1999).

³⁸ The Swiss Emer de Vattel (1714-1767) is often quoted in this respect. But even he did not preclude the rendering of a judgment on war between sovereigns completely; EMER DE VATTEL, *LE DROIT DES GENS OU PRINCIPES DE LA LOI NATURELLE* 3.3.40 (Charles G. Fenwick transl., Carnegie 1916) (1758). On the transition to a non-discriminatory concept of war, see FRITZ DICKMANN, *FRIEDENSRECHT UND FRIEDENSSICHERUNG* 127-9 (1971); Wilhelm G. Grewe, *Was ist klassisches, was ist modernes Völkerrecht?*, in *IDEE UND REALITÄT DES RECHTS IN DER ENTWICKLUNG DER INTERNATIONALER BEZIEHUNGEN. FESTSCHRIFT FÜR WOLFGANG PREISER* 119 (1983); Otto Kimminich, *Das Problem des Friedenssicherung im Völkerrecht des 20. Jahrhunderts*, in *FRIEDEN UND VÖLKERRECHT* 298 (G. Picht and I. Eisebart eds., 1973); CARL SCHMITT, *DER NOMOS DER ERDE IM VÖLKERRECHT DER JUS PUBLICUM EUROPAEUM* 25 (1950).

³⁹ In alliance treaties, planned or ongoing wars were almost always justified in terms of defense, with some notorious exceptions. LESAFFER, *supra* note 37, at 216-26 and 443-52.

were political and not legal, but their substance was at least partially legal.⁴⁰ The texts of 1928 and 1945 may be revolutionary, but they drew on a long tradition. Therefore, the study of the history of the modern *ius ad bellum* can still be of service for understanding where we stand today.

Before the texts of 1635 are studied, some preparatory work must be done. First, the political events leading up to the war of 1635 and the political motivations for that war are explained (Section 3). Second, the doctrine of the just war as it stood in the early seventeenth century is covered (Section 4). This will be of help in discerning the legal opinions underlying the declarations of war. Next, the four declarations and manifestos are analyzed (Section 5) and the *ius ad bellum* that underlay these texts is explained (Section 6).

III. THE STRUGGLE FOR HEGEMONY IN EUROPE

The outbreak of the war between France and Spain in 1635 initiated the last phases of two other major wars: the Thirty Years' War in the Holy Roman Empire (1618-1648) and the Eighty Years' War between Spain and the rebellious Republic of the United Provinces in the Northern Netherlands (1568-1648, with the Twelve Years' Truce between 1609 and 1621). The rupture with France dashed all hopes for a Habsburg victory in these wars and would ultimately lead to the compromise Peace Treaties of Westphalia between the Empire, Sweden, and France (24 October 1648) and the final recognition of the Republic by Spain at Münster (30 January 1648). When the Franco-Spanish war began, Spain could still claim to be the leading power in

⁴⁰ And partially moral.

Europe. When it ended with the Peace Treaty of the Pyrenees in 1659, Spain had lost that position. France was now well placed to make its bid for hegemony in Europe. The wars fought between 1618 and 1659 also marked the final stages of the crisis of the *respublica christiana* which had begun with the Reformation. The Peace Treaties of Westphalia (1648) and the Pyrenees (1659) could not guarantee peace, but gave the great powers of Europe enough stability for a new international legal order to emerge in the decades to follow.⁴¹

At the beginning of the Thirty Years' War, Spain was still the leading power in Europe. The Spanish-Habsburg dynasty not only ruled Spain, Portugal, and the overseas territories of these kingdoms in America and Asia, but also Sardinia, Sicily, Naples, the Duchy of Milan, and the Spanish Netherlands, including the County of Burgundy to the east of France. Since the late 1590s, Spain's grand strategy had been basically defensive, at least in its own eyes. Its primary goal was to keep the empire intact and to withstand or prevent any attempt at dismemberment. Spain's main concern was to defend the status quo and its existing hegemony, the *Pax Hispanica*. As the leading power of the day, Spain tended to identify the status quo and the order of Christian Europe, for which it considered itself the ultimate guarantor, with its own interest and vice versa. Any attempt against that order was likely to be perceived as a threat against Spain.

The dominant maxim of Spain's foreign policy was that not a single right, not a single scrap of land could be given up. First, this would damage the reputation of the King. Second, this would trigger more aggression from Spain's many enemies and lead to the collapse of Spain's empire (the domino theory). The two most strategic and threatened territories of Spain in Europe were the Duchy of Milan in Northern Italy and the Spanish Netherlands. Both were military and

⁴¹ I Lesaffer, *supra* note 27, at 128.

logistic centers from which Spain could intervene in Northern and Central Europe, particularly in the Holy Roman Empire. The possession of these territories allowed to threaten Spain's largest potential competitor, France. The weak link was the connection between Milan in Italy and the Netherlands: the Spanish Road. This land road through Germany was the lifeline of the Spanish empire. Its security was tightly interwoven with the peace and stability of the Holy Roman Empire and the security of the Catholic princes of the Empire through whose lands it ran. The security of the Spanish Road made it essential that the imperial crown was kept safely within the Viennese branch of the Habsburg-family and that the Austrian archdukes kept on to their hereditary lands, including their strategic territories in the Alps (Tirol) and the Alsace as well as the Kingdom of Bohemia, which guaranteed the narrow 4:3 Catholic majority among the electors of the Empire.⁴²

During the larger part of the reign of Philip III (1598-1621), Spain had adopted a defensive posture on the operational level and had sought to steer clear of major military adventures.⁴³ The final years of Philip III's reign saw a shift towards a more assertive foreign policy. In 1617, Philip III's longtime favorite, the Duke of Lerma (1552-1624), fell from grace and was replaced by a more hawkish group led by Balthazar de Zuñiga (1561-1622). After the latter died in 1622, Gaspar de Guzman, Count-Duke of Olivares (1587-1645) and favorite of the new King Philip IV, quickly emerged as the new all-powerful *valido*. These new leaders promoted an interventionist policy in Europe, without changing the fundamentally defensive goals of Spain's grand strategy. Zuñiga, Olivares, and their supporters felt that Lerma's peaceful

⁴² GEOFFREY PARKER, *THE ARMY OF FLANDERS AND THE SPANISH ROAD (1567-1659)* (1972); *IDEM*, *THE THIRTY YEARS' WAR* 34 (2nd edn, 1997).

⁴³ PAUL C. ALLEN, *PHILIP III AND THE PAX HISPANICA, 1598-1621* (2000); BERNARDO JOSÉ GARCÍA GARCÍA, *LA PAX HISPANICA. POLÍTICA EXTERIOR DEL DUQUE DE LERMA* (1996).

policies had damaged the reputation of the Spanish monarchy and had jeopardized the position of Spain and the *Casa de Austria*, including the Habsburg dynasty that also ruled in Vienna and held the imperial crown.

When in 1617 trouble stirred up for the Viennese Habsburgs, Zuñiga and his allies in Madrid decided to act. The new leaders in Spain realized that the chances for an extension of the Twelve Years' Truce with the Dutch after 1621 were slim and that war would soon resume in the Netherlands. Therefore, any attack on Habsburg interests in the Empire that could threaten the Spanish Road had to be withstood. In 1617, Madrid strengthened the ties with the Austrian Habsburgs and helped secure the imperial crown for the militantly Catholic Ferdinand II.⁴⁴ When the Bohemian rebellion broke loose and war between the Viennese Habsburgs and a coalition of Protestant powers erupted, Spain intervened. Whereas Spain's hope was to quickly squash the rebellion and restore stability within the Empire so that it could divert its energies to the impending war against the Dutch Republic, the war escalated and became a swamp that would suck at Spain's resources for the next thirty years. After the almost complete Habsburg-Catholic victory in 1625, the Danish Lutheran King Christian IV (1588-1648) intervened. After Christian dropped out of the war (1629), his place was – far more successfully – taken by the Swedish Lutheran King Gustav Adolph (1630).

In 1621, war had resumed between Spain and the Republic of the United Provinces. Zuñiga and Olivares had no hope for a complete victory and the re-conquest of the rebellious provinces. Their goal was an advantageous and lasting peace that would provide for the free

⁴⁴ ROBERT BIRELEY, *RELIGION AND POLITICS IN THE AGE OF THE CONTRAREFORMATION: EMPEROR FERDINAND II, W. LAMORMAINI AND THE FORMATION OF IMPERIAL POLICY* (1981); *IDEM, THE JESUITS AND THE THIRTY YEARS WAR: KINGS, COURT, AND CONFESSORS* (2003).

practice of the Catholic faith in the Republic and stop the Dutch attacks on the Spanish and Portuguese interests in America and Asia, two demands that had not been met by the expiring Truce of 1609. Throughout the 1620s, Madrid's hope was to beat the Dutch sufficiently to enforce such a peace upon them. But as it was felt that the road to military dominance went through Germany, Spain had itself increasingly been sucked into the German wars.⁴⁵

The coming to power of Armand du Plessis, Cardinal de Richelieu (1587-1642), as Prime Minister of France in 1624 marked the reemergence of that country as Spain's main competitor. During the minority of Louis XIII (born 1601), France had been subjected to internal strife. In 1615 an alliance with Spain was made, whereby both Louis XIII and the later Philip IV married princesses from the other house. In France, there was a strong faction, the *dévots*, that promoted the alliance with Catholic Spain and the internal and external fight against Protestantism over France's own possible aspirations as a great power, which would pit it against Spain.

The first goal of Richelieu's policy was to strengthen the authority of the King, and, through the King, of himself and his friends. He turned against the French Calvinists, the Huguenots, thereby keeping to his old, *dévo*t policies. But he also proposed a more assertive foreign policy. From the very beginning of his time in office, Richelieu set France on a collision

⁴⁵ On Zuñiga's and Olivares' strategy, see Peter J. Brightwell, *The Spanish System and the Twelve Years' Truce*, 89 *ENGLISH HISTORICAL REVIEW* 270 (1974); idem, *The Spanish Origins of the Thirty Years' War*, 9 *EUROPEAN STUDIES REVIEW* 409 (1979); idem, *Spain and Bohemia: The Decision to Intervene*, 12 *EUROPEAN STUDIES REVIEW* 117 (1982); JOHN H. ELLIOTT, *THE COUNT-DUKE OF OLIVARES: THE STATESMAN IN AN AGE OF DECLINE* 55-84 (1986); EBERHARD STRAUB, *PAX ET IMPERIUM. SPANIENS KAMPF UM SEINEN FRIEDENSORDNUNG IN EUROPA ZWISCHEN 1617 UND 1635* 11, 19-28 and 109-29 (1980).

course with Spain. He direly needed foreign policy successes in order to justify his strong-armed policies at home. But he also developed a very consistent foreign strategy for its own sake.⁴⁶

Richelieu did not perceive Spain's strategy to be merely defensive. He argued that Spain sought the domination of the whole of Christianity: universal monarchy, or *monarchia universalis*.⁴⁷ Spain's current position was such that it threatened the liberty and sovereignty of all European princes, especially those of Germany and Italy. Furthermore, the territories of Spain and its Austrian allies encircled France and prevented it from intervening in Italy or Germany, since more than a century the battle grounds of Europe. Throughout his long term in office (1624-1642), Richelieu consistently defined France's vital interests in the same terms: breaking the encirclement of France by the Habsburgs through gaining strategic footholds in Germany and Italy that allowed France better to defend itself, to intervene military in those countries and, in one and the same movement, to cut the Spanish Road if so wished.⁴⁸ This did not translate in outright expansionism, but in a flexible policy that used various means – from pushing dynastic

⁴⁶ David Parrott, *The Causes of the Franco-Spanish War of 1635*, in THE ORIGINS OF WAR IN EARLY MODERN EUROPE 72, 85-8 (Jeremy Black ed., 1987).

⁴⁷ Franz Bosbach, *Die Habsburger und die Entstehung des Dreißigjährigen Krieges. Die "Monarchia Universalis"*, in KRIEG UND POLITIK 1618-1648. EUROPÄISCHE PROBLEME UND PERSPEKTIVEN 151 (Konrad Repgen ed., 1988).

⁴⁸ Richelieu himself consistently defined the French foreign policy and war aims as such. Compare his famous advice to King Louis XIII of January 13, 1629 in AVENEL, *supra* note 2, vol. 3, 179-213, with the *Instruction pour Messieurs les Ambassadeurs des France, envoyez à Cologne pour le Traitté de Paix générale (1637)*, in ACTA PACIS WESTPHALICAE SERIE I INSTRUKTIONEN I FRANKREICH, SCHWEDEN, KAISER 38-58 (Fritz Dickmann et al. eds., 1962) or *Die Ausfertigung der Hauptinstruktion für Münster (1643)*, in IBIDEM 58-123.

claims over alliance treaties to war – in order to gain effective control – not necessarily involving sovereignty – over a few strategic fortresses at the Alpine passes and on the Rhine.⁴⁹

The first major clash between France and Spain came when the death of the last Duke from the house of Gonzaga, late 1627, triggered a succession crisis in Mantua. A French nobleman took power. Spain, however, could not condone that one of the most strategic fortresses of Northern Italy, Casale, would thus fall into the hands of a French ally and decided to act. Casale was besieged. In reaction, Louis XIII led an army into Italy (February 1629). In 1630, the imperial army descended upon Mantua and gave Spain the military advantage. But in the summer of that same year, Ferdinand II turned the tables and opted for a compromise peace that left the Spanish empty-handed (Peace of Cherasco, 1631).⁵⁰ Through silent and treacherous diplomatic maneuvering, France gained the fortress of Pinerolo from the Duke of Savoy and thereby secured itself a strategic entrance into Italy.

⁴⁹ The traditional views on Richelieu's dream of giving France natural borders (e.g. the Rhine) and therefore pursuing a blatantly expansionist policy is now far and wide rejected. On the old views, see P.E. Hübinger, *Die Anfänge der französischen Rheinpolitik als historisches Problem*, 171 HISTORISCHE ZEITSCHRIFT 21 (1951). Good statements of the new assessment of Richelieu's foreign policy can be found in, WILLIAM F. CHURCH, RICHELIEU AND REASON OF STATE (1972); JOHN H. ELLIOTT, RICHELIEU AND OLIVARES 86-172 (1984); Hermann Weber, *Richelieu et le Rhin*, 249 REVUE HISTORIQUE 265 (1968); IDEM, FRANKREICH, KURTRIER, DER RHEIN UND DAS REICH, 1623-1635 59-68 (1969).

⁵⁰ The first Peace Treaty of Regensburg of October 13, 1630 between the Emperor and France was subsequently rejected by Louis XIII and never ratified; D.P. O'Connell, *A Cause Célèbre in the History of Treaty-Making: The Refusal to Ratify the Peace Treaty of Regensburg in 1630*, 42 BRITISH YEARBOOK INT'L L. 71 (1967). See for these events, John H. Elliott, *Spain and the War*, in THE THIRTY YEARS' WAR 92 (Geoffrey Parker, 1997); IDEM, *supra* note 45, at 337-346. TOBY OSBORNE, DYNASTY AND DIPLOMACY IN THE COURT OF SAVOY: POLITICAL CULTURE AND THE THIRTY YEARS' WAR 143-192 (2002).

The French-Spanish collision over Mantua did not lead to an all-out war yet. But it sent home the message to both Olivares and Richelieu that, in the long term, war was unavoidable. Richelieu wanted to postpone if not prevent such a war because he realized that France and his regime were not ready for it. But from 1630 onwards, Richelieu intensified his struggle against the Spanish monarchy by waging a true ‘war by proxy.’ This was done by giving diplomatic and financial support to all Spain’s enemies, including the Dutch, the Swedes, and the German Protestant princes. Richelieu also tried to stir up trouble for the Habsburgs by seeking favor with the princes of Italy and the members of the Catholic League within the Empire, chiefly among them the Elector of Bavaria Maximilian (1591-1651), all of them allies of the Emperor. Olivares rightly blamed France for much of the difficulties Spain met in Italy, Germany, and the Netherlands. As the years went by, he came to consider Richelieu’s France as the most important stumbling block for his main strategic goal: the restoration of the *Pax Hispanica* through a stable and advantageous peace in the Empire and, ultimately, in the Netherlands. Realization dawned upon the Count-Duke that sooner or later the Cardinal-Minister and his regime would have to be taken out of the equation. Maybe, the road to peace ran through Paris after all. While neither of both great statesmen had decided upon war by the early 1630s, both at least started to consider it in terms of contingency planning.⁵¹

The early 1630s were overshadowed by the military successes of the Swedes in Germany. After his landing at Peenemünde in 1630, the Swedish King Gustav Adolph quickly scored some major victories. The lands of the main members of the Catholic League such as Mainz, Cologne, Trier, and Bavaria were occupied or threatened, while an army invaded Bohemia and struck at

⁵¹ ELLIOTT, *supra* note 45, 359-408. RICHARD A. STRADLING, *EUROPE AND THE DECLINE OF SPAIN: A STUDY OF THE SPANISH SYSTEM, 1580-1720* 103 (1981).

Vienna itself.⁵² The Habsburg position in North-West Europe also deteriorated as the Dutch, for the first time since 1621, had gone on the offensive in the war against Spain as of 1629.⁵³

Richelieu grabbed the opportunity to strengthen the French positions at the eastern borders. Once again, he tried to break the Catholic League loose from the Emperor and form a third, neutral party in the Empire. He used the leverage the Swedish threat gave him, offering the Catholic princes French protection against the Swedes in exchange for their neutrality. Of the more important princes, only the Archbishop-Elector of Trier, Philip von Sötern (1623-1652), accepted at first (April 9, 1632). He gave the French the right to garrison several strategic places in the Archbishopric such as Trier on the Mosel, Ehrenbreitstein on the Rhine and Philippsburg, also situated on the Rhine in Sötern's Bishopric of Speyer.⁵⁴ In order to take the town of Trier, the French had to drive out the Spanish garrison that was there on the invitation of the burghers of the town, who had asked for protection against their own prince. Later, in September 1633, the Archbishop-Elector of Cologne followed suit and allowed French garrisons into his towns. Meanwhile, the French overran the Duchy of Lorraine and forced Duke Charles IV (1624-1675), an ally of the Emperor, to cede his lands temporarily and to allow them to be garrisoned by the

⁵² RONALD G. ASCH, *THE THIRTY YEARS WAR: THE HOLY ROMAN EMPIRE AND EUROPE, 1618-1648* 101-7 (1997); GEORGES PAGÈS, *LA GUERRE DE TRENTE ANS 1618-1648* 117-50 (1972); 2 PARKER, *supra* note 42, 108-19; MICHAEL ROBERTS, *GUSTAVUS-ADOLPHUS: A HISTORY OF SWEDEN, 1611-1632* vol. 2 (1958); C.V. WEGDWOOD, *THE THIRTY YEARS WAR* 269-334 (1938).

⁵³ DAVID PARROTT, *RICHELIEU'S ARMY: WAR, GOVERNMENT AND SOCIETY IN FRANCE, 1624-1642* 101-2 (2001).

⁵⁴ Treaty of Ehrenbreitstein of April 9, 1632, in DU MONT, *supra* note 15, vol. 6-1, 29. The Swedes, however, had already taken Philippsburg and only gave it up at the end of 1634.

French (1631-1634). Louis XIII and Richelieu also gained some places in Alsace along the Upper-Rhine.⁵⁵

By the winter of 1632-1633, Spain and its allies were in dire straits. The war in the Netherlands had turned disastrous. The towns of 's Hertogenbosch (1629) and Maastricht (1632) had been lost while rebellion threatened in the Spanish Netherlands (1632-1633). Richelieu's 'war by proxy' seemed on the verge of success. At that point, Olivares decided to mobilize all the energies of the monarchy to mount a new offensive against Spain's enemies. The cornerstone of this endeavor was the decision to send King Philip's youngest brother, the Cardinal-Infante, with an army through the Empire to open up the Spanish Road, take over the government of the Spanish Netherlands, and reinvigorate the Spanish military operations in the North. On his way through the Empire, on September 6, 1634, the Cardinal-Infante scored a major victory together with his brother in law, the Emperor's son Ferdinand (later Ferdinand III, 1637-1657) against the Swedish army at Nördlingen. Instead of capitalizing upon that victory and further push back the Swedes, Don Fernando continued his journey to the Spanish Netherlands, where he arrived in November 1634.⁵⁶

In recent years, historians have quarreled about the question whether Madrid had by that time decided upon a war against France and was planning to invade France in 1634 or 1635.

Richard Stradling has argued that an offensive against France was surely in the making. In his

⁵⁵ Louis Batifol, *Richelieu et la question d'Alsace*, 138 REVUE HISTORIQUE 161 (1921); BERTOLD BAUSTAEDT, RICHELIEU UND DEUTSCHLAND. VON DER SLACHT BEI BREITENFELD BIS ZUM TODE BERNHARDS VON WEIMAR (1936); JOSEPH BAUR, PHILIPP VON SÖTERN, GEISTLICHER KURFÜRST VON TRIER, UND SEINE POLITIK WÄHREND DER DREIßIGJÄHRIGEN KRIEGES vol. 1, 203-374; Georges Fagniez, *Le Père Joseph et Richelieu*, 36-8 REVUE HISTORIQUE (1888-1890); WILHELM MOMMSEN, RICHELIEU, ELSAB UND LOTHRINGEN (1922); WEBER, *supra* note 49, 108-321.

⁵⁶ ALFRED VAN DER ESSEN, LE CARDINAL-INFANT ET LA POLITIQUE EUROPÉENNE DE L'ESPAGNE 1609-1641 (1944).

view, Spain only did not start the war of 1635 itself because France forestalled it. Indeed, in 1634 and 1635 plans to invade France circulated and naval preparations were made. In its session of April 13, 1634 the Council of State in Madrid had decided that time was not yet ripe for a declaration of war against France and that it was better to let events unfold themselves.⁵⁷ At the meetings of the Council of State of January 14 and 16, 1635 and of March 3, 1635, however, Olivares was clearly entertaining thoughts about a rupture with France and discussed the preparation for an invasion of France.⁵⁸ In April 1635, the Spanish ambassador in Paris, Cristobal de Benavente, was recalled.⁵⁹ In 1636, after the Cardinal-Infante had repulsed the Franco-Dutch invasion of 1635, he invaded France. Also, after the Battle of Nördlingen, the Spanish intensified their attempts to secure an offensive and defensive alliance with Vienna against the Republic and France.⁶⁰ Stradling also implied that Olivares had planned an offensive war against France ever since the Mantuan debacle and gave it strategic priority over an offensive against the Dutch.⁶¹ Though Stradling shrinks from taking this final step, from there to the claim that Spain after all wanted to strengthen its hand in a great-power war that would give it *monarchia universalis* would be a small step. Jonathan Israel took offense at Stradling's

⁵⁷ ELLIOTT, *supra* note 45, at 472; PARROTT, *supra* note 53, at 106.

⁵⁸ SIMANCAS, *General Archive, Estado* No. 2049 and No. 2050, 3 and 32. See Richard A. Stradling, *Olivares and the Origins of the Franco-Spanish War of 1627-1635*, 101 *ENGLISH HISTORICAL REVIEW* 68, 90-3 (1986).

⁵⁹ Stradling, *supra* note 58, at 93.

⁶⁰ HEINRICH GÜNTER, *DIE HABSBURGER-LIGA 1625-1635. BRIEFE UND AKTEN AUS DEM GENERAL-ARCHIV ZU SIMANCAS* 178-90 (1908); Randall Lesaffer, *Het einde van de Spaanse hegemonie in Europa. De kardinaal-infant en het Spaans-Oostenrijks 'familiepact' (1633-1637)*, 74 *REVUE BELGE DE PHILOLOGIE ET D'HISTOIRE* 317, 333-7 (1996).

⁶¹ Stradling, *supra* note 58, at 78-80. Parrott sides with him, though with more nuance; *supra* note 46, at 92.

analysis. He defends the view that Spain, even after the opening of the hostilities with France, kept granting an offensive against the Republic priority and opted for a defensive military posture against France, at least in the Netherlands. The invasion of France by the Cardinal-Infante of 1636 was a one-time event, an opportunistic move that was only decided upon after the planned attack on the Republic was aborted for that year and ultimately triggered by the possibilities it gave for joint action with the imperial army.⁶²

These opposing views are less irreconcilable than they seem. In general, politicians' actions are less consistent than scholars' generalizations need them to be. The truth of the matter is that Stradling concentrates on the decision-making in Madrid, while Israel also takes into account the position of the Cardinal-Infante and his advisers in Brussels. Behind all this lurks a discrepancy between the level of strategic planning on a European scale and the level of operational planning for the distinct military theaters. Stradling is right in as far as he claims that Olivares thought a war against France to be probable if not unavoidable ever since the Mantuan crisis and that he incorporated this possibility into his plans. During 1634, he also made plans for an offensive against France.⁶³ He seemed to be convinced by then that it would be necessary to take France out of the equation to make victory against the Dutch possible. A quick and

⁶² Jonathan Israel, *Olivares, the Cardinal-Infante and Spain's Strategy in the Low Countries (1635-1643): The Road to Rocroi*, in *SPAIN, EUROPE AND THE ATLANTIC WORLD: ESSAYS IN HONOUR OF JOHN H. ELLIOTT* 267 (Richard L. Kagan and Geoffrey Parker eds., 1995). See also JONATHAN ISRAEL, *THE DUTCH REPUBLIC AND THE HISPANIC WORLD 1606-1661* 254-5 (1982).

⁶³ Madrid understood that the Emperor would not declare war upon either France or the Republic before he had made his peace with the main German Protestant princes, such as the Electors of Saxony and Brandenburg. This was finally done at the Peace of Prague of May 30, 1635. The Emperor would only start campaigning against France in 1636.

devastating attack on France followed by a peace treaty would accomplish this.⁶⁴ On the level of the Spanish strategy war planning, France came to the fore as a main concern of Olivares as the 1630s progressed. But that does not mean that the same was true on the level of the operational planning for the Netherlands. Nor does it imply that, even on a European scale, the plan for an attack against France was prepared concretely and seriously enough or had sufficiently progressed by the winter of 1634-1635 for the invasion to materialize any time soon.⁶⁵ The evidence Israel brought in is quite convincing to the point that, on the operational level of the Netherlands, Olivares did not give priority to an attack against France over the operations against the Republic.⁶⁶ But the Count-Duke was not consistent in this either. Olivares was opportunistic and volatile in his decisions at the operational level. When the Spanish scored a major, unexpected success against the Republic with the capture of the fortress of Schenk at the end of 1635, his hopes for a successful offensive against the Republic for 1636 soared. Once the fortress was recaptured in the early days of the 1636 campaigning season and the Cardinal-Infante decided to invade France in concordance with the imperial army, Olivares agreed. The Cardinal-Infante, as Israel indicated, showed a similar flexibility, but was more driven by the realities on the ground than the armchair military planner Olivares.⁶⁷ Finally, Israel is right to stress the continuity in Olivares' main strategic goal: an advantageous peace with the Republic. War and a subsequent peace with France were a means to that end, and not the other way around.

⁶⁴ This view is shared by ELLIOTT, *supra* note 45, at 457-519.

⁶⁵ During the meeting of the Spanish Council of State of March 5, 1635, at which Olivares talked about war with France, he also proposed military actions against Maastricht, Grave, or Venlo in the Northern Netherlands. SIMANCAS, *General Archive, Estado* No. 2050, 32.

⁶⁶ Israel, *supra* note 62, at 272-80.

⁶⁷ ELLIOTT, *supra* note 45, at 492-5 and 504-5.

In short, Israel is right that the war with France did not change Olivares' main goal – securing peace with the Hague – and did not dominate the operational planning and decision-making for the Netherlands. Stradling for his part is right that during the years 1634 and 1635 Olivares took into account the possibility of an attack on France and even had plans drawn up. But they were not pursued sufficiently for them to materialize in time and no actual decision to attack France was made.

The crucial question for our purposes, viz. whether Spain would have invaded France if France had not moved first, cannot be answered with certainty. But to indulge for a brief moment in the conjectures of counter-factual history, my hunch is that Spain would in any case have made its decision to declare war and start an offensive against France dependent upon the Emperor and would thus have waited one or more years.⁶⁸ The Cardinal-Infante for his part did not plan an invasion of France in 1635. Before the French invasion of May of that year, Don Fernando had only issued orders for his troops to march towards Trier to prevent the French from joining up with the Dutch.⁶⁹ But whatever the answer to this question might be and however offensive the actions of Olivares might have become, the goal of Spain's grand strategy had not changed. Spain did not aspire to any French territory nor did it seriously expect to reconquer the

⁶⁸ For the circumstantial evidence for this, see Lesaffer, *supra* note 59, 333-51 and footnotes there; also RANDALL LESAFFER, *DEFENSOR PACIS HISPANICAE. DE KARDINAAL-INFANT, DE ZUIDELIJKE NEDERLANDEN EN DE EUROPESE POLITIEK VAN SPANJE: VAN NÖRDLINGEN TOT BREDA (1634-1637)* 87-116 and 141-63 (1994). See also RENÉ VERMEIR, *IN STAAT VAN OORLOG. FILIPS IV EN DE ZUIDELIJKE NEDERLANDEN, 1629-1648*, 126-7 (2001).

⁶⁹ Letter of the Cardinal-Infante to Philip IV of May 15, 1635, in *CORRESPONDANCE DE LA COUR D'ESPAGNE SUR LES AFFAIRES DES PAYS-BAS AU XVIIIE SIÈCLE* vol. 3, 54 (Hubert Lonchay, Joseph Cuvelier, and Joseph Lefèvre eds., 1930).

Northern Netherlands. As ever, the Spanish war aims were peace and the restoration of the *status quo ante*, in other words, of its hegemony, the *Pax Hispanica*.

The French decision to declare war upon Spain and invade the Spanish Netherlands in May 1635 is easier to understand. The victory of the two Habsburg princes at Nördlingen changed the balance of power in the German theater. All of a sudden, Richelieu had reason to fear that his greatest nightmare would become true: that his allies would make their peace with the Emperor and Spain and that France would be left alone to face the wrath of the *Casa de Austria*. For years, France's Protestant allies had implored Paris to break openly with the Spanish. France had always evaded this. Even in 1634, when news reached Paris of an offensive alliance between Spain and Louis XIII's rebellious brother and heir, Duke Gaston of Orléans (1608-1660),⁷⁰ did Richelieu still resist the pressure for an open war.⁷¹

After Nördlingen, this was no longer a possibility. In November 1634, the Lutheran Elector of Saxony signed a preliminary peace agreement with the Emperor. The Republic and Sweden increased the pressure on France to enter the war. As the imperial armies rolled back the Swedish and approached the French positions on the Rhine, the fear for a Habsburg invasion grew.⁷² Whereas Richelieu still stalled on a final decision in his negotiations with the Swedish,

⁷⁰ Treaty of Brussels of May 12, 1634.

⁷¹ The King himself at some point promoted war, see the *Lettre du Roy à Son Eminence sur le sujet de l'ouverture de la guerre of 4 August 1634*, in *supra* note 48, at 17-20. In a memoir from June 1634, Richelieu had strongly pleaded against a war. PARIS, *Archives of the Ministry of Foreign Affairs, Correspondance Politique Hollande* No. 16, 464. See Hermann Weber, *Vom verdeckten zum offenen Krieg. Richelieus Kriegsgründe und Kriegsziele 1634/1635*, in *KRIEG UND POLITIK 1618-1648. EUROPÄISCHE PROBLEME UND PERSPEKTIVEN* 203, 204-10 (Konrad Repgen ed., 1988).

⁷² PARROTT, *supra* note 53, at 108.

he concluded an offensive league with the Republic on February 8, 1635.⁷³ Thereby the parties agreed that they would jointly invade the Spanish Netherlands that year. The allies agreed to call upon the population to rise against the Spanish and liberate themselves. If this transpired, then the Spanish Netherlands would become a sovereign and Catholic federation. If not, then their lands would be carved up by France and the Republic.⁷⁴ Nevertheless, the Treaty included an escape clause. The Preamble made the Treaty conditional upon the fact that the Spanish would continue to refuse a reasonable accommodation.⁷⁵ Richelieu also sent diplomats to Italy in order to form an offensive alliance against Spain with as many Italian states as possible and start a war there. This met with partial success.⁷⁶ To ward off disaster on the eastern borders of France, in late 1634 the French had sent an army into the Lower Palatinate and thus became involved in the war in the Empire against the Emperor – though a state of war was not openly recognized.⁷⁷

Meanwhile, the Habsburgs continued to strengthen their positions in the West of the Empire. On January 24, 1635, imperial troops captured the fortress of Philippsburg. On February 2, they drove the French garrisons out of the Bishopric Speyer. Two months later, on March 26, 1635, the Spanish, knowing of the French-Dutch invasion plans, took an ominous step. On that

⁷³ A year before, Richelieu had still refused Dutch proposals for an offensive alliance; Fagniez, *supra* note 55, vol. 2, 206-7; ISRAEL, *supra* note 62, at 303-4; PARROTT, *supra* note 53, at 106.

⁷⁴ Treaty published in DU MONT, *supra* note 15, vol. 6-1, 80. See JEAN DE PANGE, CHARNACE ET L'ALLIANCE FRANCO-HOLLANDAISE (1633-1637) 114-27 (1905).

⁷⁵ '... if the Spanish do not accept reasonable terms for an accommodation,' Preamble (my transl.), in DU MONT, *supra* note 15, vol. 6-1, 80.

⁷⁶ BAUSTAEDT, *supra* note 55, 132-3; AUGUSTE LEMAN, URBAIN VIII ET LA RIVALITE DE LA FRANCE AVEC LA MAISON D'AUTRICHE DE 1631 A 1635 462-5 (1949); Weber, *supra* note 71, at 210.

⁷⁷ PARROTT, *supra* note 53, at 108.

day, a Spanish corps took the town of Trier by surprise, thereby killing some two hundred French soldiers and capturing another six hundred. They also secured the Archbishop-Elector Philip von Sötern and abducted him to the Spanish Netherlands.⁷⁸ Louis XIII and Richelieu now decided to act and declare war.⁷⁹ On April 21, 1635, the French resident diplomat Gabriel d'Amontot was instructed to demand the release of the Elector from the Cardinal-Infante and threaten with war.⁸⁰ A week later, Louis XIII and Richelieu hastily secured their alliance with the Swedish at Compiègne.⁸¹ Meanwhile, the Spanish ambassador in France left Paris quietly.⁸² After the Cardinal-Infante's reply of May 4, 1635 had reached them,⁸³ Louis XIII and Richelieu instructed Jean Gratiollet to go and declare war, invoking the capture of Trier and its sovereign as the *casus belli*.

An eventual final decision by Olivares to invade was forestalled by France's action. Richelieu took that action, although he was even less assured of success and the readiness of his country than Olivares already wasn't. But the Battle of Nördlingen had turned France's war by proxy on itself, and after the Cardinal-Infante's bold move against Trier, Richelieu must have felt that he was running out of options. Turning down his main protégé in this hour of need was

⁷⁸ Letter of Richard Pauli Stravius to Cardinal Francesco Barberini of March 31, 1635, *supra* note 2, at 56-7;

VERMEIR, *supra* note 68, at 114.

⁷⁹ Already on March 31, 1635. See Weber, *supra* note 17, at 92-3.

⁸⁰ AVENEL, *supra* note 2, vol. 4, 762.

⁸¹ Treaty of Compiègne of April 28, 1635, in DU MONT, *supra* note 15, vol. 6-1, 88.

⁸² Letter of Grotius to Manasse de Pas, Marquis of Feuquières of May 9, 1635, *supra* note 9, vol. 5, 454-5. That move was already suggested by Olivares on March 5, 1635; see SIMANCAS, *General Archive, Estado* No. 2050, 32.

⁸³ The Cardinal-Infante stalled by saying that he awaited instructions from the Elector's suzerain, the Emperor. See for his other efforts at evasion, Letter of Stravius to Barberini, May 5, 1635, *supra* note 2, at 63.

simply not one of the few remaining options if further defections from the anti-Habsburg alliance were to be prevented. But all the preparations, plans, and diplomatic maneuvers of the winter of 1634-1635 did not impede the protagonists to continue to search each other out for peace until the last moment.⁸⁴ For a long time, war had been expected, prepared, and even planned for; but above all, it had been dreaded.

IV. JUST AND LEGITIMATE WARS IN EARLY-MODERN DOCTRINE

The medieval just war doctrine

To the Dominican theologian Thomas Aquinas (1224/1225-1274) falls the merit of having laid down the classical formula of the just war doctrine. According to Aquinas, for a war to be just three conditions had to be fulfilled. First, a war had to be waged under the authority of a prince (*auctoritas principis*). War was distinct from acts of violence between private persons, who had to seek redress for injuries suffered through the courts of their prince. The same went for subordinate rulers and bodies politic. By the days of Aquinas, it had become widely established that war was the privilege of those princes who did not recognize a higher authority (*superiorem non recognoscens*) – apart from the higher authority of the Pope and maybe the

⁸⁴ LEMAN, *supra* note 76, at 510-15. See also *Mémoire du Comte Duc de Olivares au Roi Philippe 4 con occasion del rompimiento de Franceses en Flandes (August 1634)*, SIMANCAS, *General Archive*, No. K. 1644, 9. In fact, Richelieu and Olivares would continue to seek each other out throughout the war; see AUGUSTE LEMAN, RICHELIEU ET OLIVARÈS. LEURS NEGOCIATIONS SECRETES DE 1636 A 1642 POUR LE RETABLISSEMENT DE LA PAIX (1938).

Emperor, that is.⁸⁵ Second, a war had to be waged for a just cause (*causa iusta*). Aquinas indicated the avenging or punishing of a wrong suffered at the hands of the enemy and the restoring of what had been unjustly seized as the main causes of war. More generally, under medieval doctrine, war was just if it was a reaction to a wrong suffered at the hands of an enemy, whether it was defensive or offensive on an operational level. It served as an instrument of law enforcement, as a substitute for judicial trial, as a kind of trial by battle. By and large medieval doctrine did not touch much upon the issue of self-defense as a just cause for war because it was considered the exercise of a natural right of each man, and not only of princes. Moreover, to many theologians, it was considered somewhat morally deficient as it was self-serving. Finally, doctrine also distinguished actions in the exercise of the natural right of self-defense from actual war. Actions in self-defense did not trigger the full application of the *iura belli* – the rights of war – such as the right to make booty and conquests. The natural right of self-defense was also limited in that resort to force had to stop once the attack was warded off. An actual war, could go on, however, after the attack was stopped in order to inflict punishment on the enemy.⁸⁶ Third, the belligerent needed to be of a righteous intention (*recta intentio*). This referred to his moral disposition. The goal of the war had to be something morally good, such as the establishing of a firm and just peace.

To many of the scholastic scholars of the Late Middle Ages, a war could only be just on one side. As the justice of the cause and the righteousness of the intention of the belligerent could be held to the light of a common and authoritative body of law (the *ius commune* of

⁸⁵ Other scholars, like Cardinal Hostiensis (ca. 1200-1270), stuck to the view that only the supreme sovereigns, the Pope and Emperor, could wage war or authorize it; SUMMA AUREA LIBER I, rubr. *De treuga et pace*.

⁸⁶ STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 59-61 (2005); FREDERICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 161-2 and 270-3 (1975).

Roman and canon law) and morality (Christian moral theology), the truth about the claims of the belligerents could be established objectively. Doing this was the realm of the ecclesiastical courts and, above all, the Pope. According to Roman lawyers, only the belligerents that were waging a war in accordance with the *ius ad bellum* enjoyed the benefits of the application of the *ius in bello*, the laws regulating the conduct of war, such as the right to appropriate the lands and property of the enemy.⁸⁷ Several civilians, among whom the great commentator Bartolus of Saxoferrato (1314-1357), however, mitigated the consequences of this discriminatory concept of war. For a belligerent to qualify as a *hostis* whose right to wage war was recognized and thus to enjoy the *iura belli*, it sufficed that he was sovereign and that war had been formally declared. As there was no higher authority to judge on the claims of *superiorem non recognoscentes*, each had to judge the justice of his claims for himself.⁸⁸

⁸⁷ On the basis of D. 49.14.24; HAGGENMACHER, *supra* note 24, at 280-8; THEODOR MERON, HENRY'S WARS AND SHAKESPEARE'S LAWS: PERSPECTIVES ON THE LAW OF WAR IN THE LATER MIDDLE AGES 40-1 (1993). In reality, the *ius in bello* was by and large applied indiscriminately between sovereign belligerents, and even often between sovereigns and their vassals.

⁸⁸ On the medieval just war doctrine, see IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 6-8 (1963); GREWE, *supra* note 29, at 105-13; HAGGENMACHER, *supra* note 24, at 23-42, 53-223 and 280-8 (1983); Georges Hubrecht, *La juste guerre dans la doctrine chrétienne, des origines au milieu du XVIe siècle*, 15 RECUEIL DE LA SOCIÉTÉ JEAN BODIN POUR L'HISTOIRE COMPARATIVE DU DROIT ET DES INSTITUTIONS 107 (1961); JAMES TURNER JOHNSTON, IDEOLOGY, REASON AND THE LIMITATION OF WAR: RELIGIOUS AND SECULAR CONCEPTS 1200-1740 (1975); MAURICE H. KEEN, THE LAWS OF WAR IN THE LATE MIDDLE AGES 63-185 (1965); NEFF, *supra* note 86, at 49-82; ROBERT REGOUT, LA DOCTRINE DE LA GUERRE JUSTE, DE SAINT AUGUSTIN À NOS JOURS D'APRÈS LES THÉOLOGIENS ET LES CANONISTES CATHOLIQUES (1935); RUSSELL, *supra* note 86; Joachim von Elbe, *The Evolution of the Concept of Just War in International Law*, 33 AJIL 665, 669-73 (1939); Karl-Heinz Ziegler, *Kriegsrechtliche*

Neo-scholasticism and humanism

To the early-modern writers of the law of nations, the just war was of great concern.⁸⁹ The collapse of the medieval order and the erosion of the authority of the papal courts and the medieval theological and juridical doctrines jeopardized the traditional conceptions. What Bartolus had already touched upon now became a problem of insurmountable proportions. In the absence of any higher or neutral authority to rule on the justice and morality of a belligerent's claims and intentions and of any common moral and legal framework, how could the justice of this or that belligerent be established? And if both parties stuck to their positions and stated to be the sole just belligerent and thus the sole to benefit from the *ius in bello*, how could the application of that *ius in bello* be guaranteed? The issue was also intensified by the problems raised in relation to the non-Christian and non-Roman peoples of the New World. How could the

Literatur im Spätmittelalter, in DER KRIEG IM MITTELALTER UND IN DER FRÜHEN NEUZEIT. GRÜNDE, BEGRÜNDUNGEN, BILDER, BRÄUCHE, RECHT 57 (Heinrich Brunner ed., 1999).

⁸⁹ On early-modern doctrine relating to the just war, see Michael Behnen, *Der gerechte und der notwendige Krieg. 'Necessitas' und 'utilitas publica' in der Kriegstheorie der 16. und 17. Jahrhundert*, in STAATSVERFASSUNG UND HEERESVERFASSUNG IN DER EUROPÄISCHEN GESCHICHTE DER FRÜHEN NEUZEIT 43 (Johannes Kunisch ed., 1986); Fritz Dickmann, *Krieg und Frieden im Völkerrecht der frühen Neuzeit*, in FRIEDENSRECHT UND FRIEDENSICHERUNG. STUDIEN ZUM FRIEDENSPROBLEM IN DER GESCHICHTE 116 (1971); Joachim Engel, *Von der spätmittelalterlichen res publica christiana bis zum Mächte-Europa der Neuzeit*, in HANDBUCH DER EUROPÄISCHEN GESCHICHTE vol. 3, 307 (1971); HAGGENMACHER, *supra* note 24; JOHNSTON, *supra* note 88; Kimminich, *supra* note 38; REGOUT, *supra* note 88, at 51-278; ERNST REIBSTEIN, VÖLKERRECHT. EINE GESCHICHTE SEINER IDEEN IN LEHRE UND PRAXIS vol. 1, 237-481 (1958); Von Elbe, *supra* note 88, at 673-80.

old, medieval rules based on Roman and canon law as well as Christian theology be applied to those peoples?⁹⁰

Modern scholarship has classified the forefathers of the modern law of nations of the sixteenth and early seventeenth centuries, sometimes referred to as the ‘precursors of Grotius,’⁹¹ in two broad categories: the neo-scholastic writers such as the Spanish theologians of the School of Salamanca, who continued the tradition of medieval, scholastic theology, and the writers who were, to a greater or a lesser extent, influenced by humanism.⁹² Whereas most international legal historians have stressed the novel contributions of the authors of both schools to the just war

⁹⁰ On the significance of the discoveries for the development of the modern law of nations, see Antony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOCIAL AND LEGAL STUDIES 321 (1996); EDWARD KEENE, *BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS* (2002); Karl-Heinz Ziegler, *Völkerrechtliche Aspekte der Eroberung Lateinamerikas*, 23 ZEITSCHRIFT DER NEUERE RECHTSGESCHICHTE 1 (2001).

⁹¹ ERNEST NYS, *LE DROIT DE LA GUERRE ET LES PRÉCURSEURS DE GROTIUS* (1882); CARL VON KALTENBORN, *DIE VORLÄUFER DES HUGO GROTIUS AUF DEM GEBIETE DES JUS NATURAE ET GENTIUM* (1848).

⁹² Recently, RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 1-77 (1999). In my view, one can further distinguish among this last group between a purely humanistic approach and a more political or pragmatic approach. Among the pure humanists, I rate authors such as Desiderius Erasmus (ca. 1469-1536) and the jurist Andreas Alciatus (ca. 1490-1550). The humanists paved the way for the political or pragmatic tendency. The authors of this latter group took the new realities of the emerging state and the emancipation of politics and law from Christian ethics to its consequences by focusing on state sovereignty and the interests of the state – reason of state – as the guiding principle of international relations and its law. I count Balthazar de Ayala and Albericus Gentilis belonging to this group. 1 Lesaffer, *supra* note 27, 121-2 (2002). On the contribution of some ‘pure’ humanists, see José Antonio Fernandez-Santamaria, *Erasmus on the Just War*, 34 JOURNAL OF THE HISTORY OF IDEAS 209 (1973); IDEM, *THE STATE, WAR AND PEACE: SPANISH POLITICAL THOUGHT IN THE RENAISSANCE, 1516-1559* (1977).

doctrine, one has to keep in mind that their writings, including those of Grotius, stood in a dialectic relation to the traditions of the past. Confronted with the collapse of the old and with the challenge of new realities, they fought a downhill battle, but one in retreat. But apart from some exceptions – e.g. Ayala – and whatever the outcome, their endeavors were inspired by the desire to save what they could from the old doctrines by adapting them to the new realities.

Francisco de Vitoria

First among the neo-scholastic thinkers of the period was the Dominican Francisco de Vitoria (ca. 1480-1546). Vitoria's first concern was the justice of the Spanish conquest of the Indian lands in the Americas.⁹³ Vitoria restated Aquinas' doctrine of the just war, but also

⁹³ FRANCISCO DE VITORIA, RELECTIO DE IURE BELLII, Introduction, English translation in FRANCISCO DE VITORIA, POLITICAL WRITINGS 295 (Anthony Pagden and Jeremy Lawrance eds., 1991). For a recent edition of the Latin text (with German translation), see FRANCISCO DE VITORIA, VORLESUNGEN II. VÖLKERRECHT, POLITIK, KIRCHE 542 (Ulrich Horst, Heinz-Gerhard Justenhoven and Joachim Stüben eds., Kohlhammer 1997). On Vitoria's doctrine, see Camillo Barcia Trelles, *Francisco de Vitoria et l'école moderne du droit international*, 17 RECUEIL DES COURS 111, 242-333 (1927); FERNANDEZ-SANTAMARIA, *supra* note 92, at 131-41; JÖRG FISCH, DIE EUROPÄISCHE EXPANSION UND DAS VÖLKERRECHT. DIE AUSEINANDERSETZUNGEN UM DEN STATUS DER ÜBERSEEISCHEN GEBIETE VOM 15. JAHRHUNDERT BIS ZUR GEGENWART 212-23 (1984); GREWE, *supra* note 29, at 204-7; ALEJANDRO HERRERO Y RUBIO, DERECHO DE GENTES. INTRODUCCIÓN HISTÓRICA 43-63 (1995); Kennedy, *supra* note 26, at 32-5; HEINZ KIPP, MODERNE PROBLEME DES KRIEGSRECHT IN DER SPÄTSCHOLASTIK. EINE RECHTSPHILOSOPHISCHE STUDIE ÜBER DIE VORAUSSETZUNGEN DES RECHTES ZUM KRIEGE BEI VITORIA AND SUAREZ (1935); JAMES BROWN SCOTT, THE SPANISH ORIGIN OF INTERNATIONAL LAW: FRANCISCO DE VITORIA AND HIS LAW OF NATIONS 195-241 (1934); Antonio Truyol y Serra, *La conception de la paix chez Vitoria et les classiques espagnols du droit des gens*, 15

nuanced it to such an extent that much of it became irrelevant. Whereas, objectively speaking, a war could only be just on one side, Vitoria acquiesced to the fact that war could be just on both sides from a subjective point of view. A sovereign prince who on the basis of an ‘invincible ignorance’ was convinced of the justice of his cause and acted in good faith, could be excused from the guilt of waging an unjust war. A war between two sovereigns who were convinced of their cause, was to be considered a war between two just belligerents.⁹⁴

As for the causes of a just war, Vitoria clinched to Aquinas’ view that war was only justified as a reaction against a wrong suffered.⁹⁵ Among the just causes, Vitoria named war on account of tyrannical oppression of subjects by their own ‘barbarian masters’ and war in the defense of the innocent victims of two particular sins against nature: human sacrifice and cannibalism.⁹⁶ A right of intervention existed to protect those who had converted to Christianity and were afterwards forced to forswear their new faith.⁹⁷ Vitoria’s ideas about the just war on

RECUEIL DE LA SOCIÉTÉ JEAN BODIN POUR L’HISTOIRE COMPARATIVE DU DROIT ET DES INSTITUTIONS 241(1961); Joe Verhoeven, *Vitoria ou la matrice du droit international*, in ACTUALITÉ DE LA PENSÉE JURIDIQUE DE FRANCISCO DE VITORIA 97, 112-17 (1988); Ziegler, *supra* note 90, at 5-15.

⁹⁴ VITORIA, *supra* note 93, 2.4.32.

⁹⁵ VITORIA, *supra* note 93, 1.3.13. Vitoria also considered self-defense a natural right belonging to each individual. He defined it as a ‘response to immediate danger, made in the heat of the moment’. It did not include punitive action after the attack had ceased, as a just war did, 1.2.4-5.

⁹⁶ VITORIA, RELECTIO DE INDIS 3.15, English Translation in FRANCISCO DE VITORIA, POLITICAL WRITINGS 233, 287-8 (Anthony Pagden and Jeremy Lawrance eds., 1991). For a recent edition of the Latin text (with German translation), see FRANCISCO DE VITORIA, VORLESUNGEN II. VÖLKERRECHT, POLITIK, KIRCHE 370 (Ulrich Horst, Heinz-Gerhard Justenhoven and Joachim Stüben eds., 1997).

⁹⁷ VITORIA, *supra* note 93, 3.13. On the ideas of Vitoria, as well as Ayala, Gentilis, and Grotius about intervention, see G.P. van Nifterik, *Religious and Humanitarian Intervention in Sixteenth- and Early Seventeenth-Century Legal*

both sides were adapted by most of the later Spanish neo-scholastics.⁹⁸ They offered a way out of the dilemma caused by the collapse of the old authorities without having to abandon the general outlines of traditional doctrine. But for all practical purposes, they went a long way towards reducing the old doctrine to its first condition: a war waged by a sovereign who took the trouble of justifying his actions through a plausible claim had to be considered a just one.

Balthazar de Ayala

On the Spanish side, Balthazar de Ayala (1548-1584) has to be mentioned, especially since he lived and worked in the Spanish Netherlands. His notoriety was not limited to the Spanish world; Grotius himself referred to him.⁹⁹ Ayala studied law at the Leuven law faculty. As an auditor in the Spanish army in the Netherlands, he was above all a practitioner and a pragmatist. Among the authors discussed, his ideas were the least influenced by traditional doctrine and were the most innovative. For Ayala, war was the privilege of sovereigns. And

Thought, in SOVEREIGNTY AND THE LAW OF NATIONS (16TH-18TH CENTURIES) (Randall Lesaffer and Georges Macours eds., forthcoming 2006).

⁹⁸ GREWE, *supra* note 29, at 206. The Jesuit Francisco Suarez (1548-1617), another leading representative of the Spanish neo-scholastics, rejected the notion of a war that is just on both sides. But he went to great lengths to attribute the benefits of the *ius in bello* to the soldiers fighting on the ‘wrong’ side; Kennedy, *supra* note 26, at 54-6; LUCIANO PEREÑA VICENTE, *TEORIA DELLA GUERRA EN FRANCISCO SUAREZ* vol. 1, 119-315 (1954); JOSEF SODER, *FRANCISCO SUAREZ UND DAS VÖLKERRECHT* 248-307 (1973).

⁹⁹ HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI III, PROLEGOMENA* 38 (Francis W. Kelsey transl., Carnegie 1925) (The text is that of the 1646 edition. It was originally published in Paris in 1625. I used this edition for the Latin text).

because they were sovereigns, nobody could judge on the justice of their actions. Ayala enumerated the just causes of war, but he attached no legal consequences to such matters.¹⁰⁰ They belonged solely to the domain of moral justice – that is, binding on someone’s conscience –, but not of ‘complete’ – that is, externally binding – law. Ayala was the first author of the Early-Modern Age to distinguish between the justice and the legality of war. For a war to be legal and the laws of war to apply, it sufficed that it was, first, waged by a sovereign and, second, formally declared.¹⁰¹ If these conditions were fulfilled, it was legal and the laws of war applied.¹⁰² By consequence, all wars formally declared between sovereigns were lawful on all sides.¹⁰³ One of Ayala’s main concerns was to reject the legitimacy of the Dutch rebellion against the Spanish monarchy. Because rebels were no sovereigns and because rebellion itself was unlawful, a rebellion could never be considered a war and rebels could hold no claim to be treated as *hostes* and enjoy the benefits of the *ius in bello*. They had to be treated on a par with

¹⁰⁰ He enumerated the defense of oneself, one’s allies, and property, the revindication of property and the avenging of a wrong; BALTHASAR DE AYALA, *DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI III* 1.2.11 (John Pawley Bate transl., Carnegie 1912) (1582). On Ayala, see Manuel Fraga Iribarne, *Baltasar de Ayala*, 1 *REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL* 125 (1948); GREWE, *supra* note 29, at 207-9; W.S.M. Knight, *Balthasar Ayala and His Work*, 3RD *SERIES 3 JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW* 220 (1921); JAIME PERALTA, *BALTHASAR DE AYALA Y EL DERECHO DE LA GUERRA* (1964); HANS-JÜRGEN WOLFF, *KRIEGERKLÄRUNG UND KRIEGSZUSTAND NACH KLASSISCHEM VÖLKERRECHT MIT EINEM BEITRAG ZU DEN GRÜNDEN FÜR EINE GLEICHBEHANDLUNG KRIEGFÜHRENDER* 181-8 (1990).

¹⁰¹ AYALA, *supra* note 100, 1.2.34. Ayala referred extensively to the procedure of declaring war by the Roman fetials according to Livy; AYALA, *supra* note 100, 1.1; LIVY 1.32.6.

¹⁰² MERON, *supra* note 87, at 42-3.

¹⁰³ AYALA, *supra* note 100, 1.2.34-5.

pirates and robbers.¹⁰⁴ More generally, Ayala rejected any form of intervention by a ruler on behalf of another ruler's subjects. In the Christian world, it fell to the Pope to act against a tyrannical ruler and, if necessary, to depose him.¹⁰⁵

Albericus Gentilis

On the Protestant side, Albericus Gentilis (1552-1608) and Hugo Grotius (1583-1645) were the two foremost authors. It is certain that Grotius' work was known in French government circles by 1635, and Grotius acknowledged his indebtedness to Gentilis.¹⁰⁶

Gentilis was a Protestant of Italian origin who had fled his homeland and had found a new home in England. He became Regius Professor of Civil Law at Oxford (1587). He was definitely influenced by humanism.¹⁰⁷ Like his immediate predecessors and contemporaries, Gentilis paid lip service to the traditional just war doctrine, but adapted it to the realities of his day.¹⁰⁸ According to the Italian jurist, all defensive wars waged by sovereigns were just, whether

¹⁰⁴ AYALA, *supra* note 100, 1.2.12-15.

¹⁰⁵ AYALA, *supra* note 100, 1.2.27.

¹⁰⁶ GROTIUS, *supra* note 99, *Prolegomena* 38.

¹⁰⁷ TUCK, *supra* note 92, at 16-50.

¹⁰⁸ ALBERICUS GENTILIS, *DE IURE BELLI LIBRI TRES* 1. 2-3, 5, 7 and 12 (John Rolfe transl., Carnegie 1933) (This is the 1612 edition. The work was first published in separate parts during the years 1588-1589, and then again in one volume in 1598). On Gentilis, see Peter Haggemacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland's Inaugural Lecture*, in *GROTIUS AND INTERNATIONAL RELATIONS* 133 (Hedley Bull, Benedict Kingsbury, and Adam Roberts eds., 1990); *idem*, *Il diritto della guerra et della pace di Gentili. Considerazioni sparse di un Groziano*, in *IL DIRITTO DELLA GUERRA E DELLA PACE DI ALBERICO GENTILI. ATTO DEL CONVEGNO QUARTA*

fought in defense of themselves, their subjects, or allies and friends.¹⁰⁹ Among offensive wars, he made a distinction between wars avenging a wrong and wars waged to enforce a juridical claim. Not only did he follow Vitoria to the point that a war could be just on both sides subjectively speaking, but he also found that it could be just on both sides objectively speaking. In the absence of a higher judicial authority, sovereigns enjoyed a legal right to wage war in order to enforce a disputed claim, even if this claim proved to be unjust. In this sense, a war over the enforcement of a disputed claim had to be likened to a civil trial. As in a civil trial procedural law granted both parties the right to bring their case to court, so the law of nations granted all sovereigns the right to fight over their claims. Gentilis acknowledged that nothing guaranteed the victory of the party who had the stronger claim, but that could not be helped.¹¹⁰ For the state of war to be legal and the *ius in bello* to apply, a formal declaration of war was necessary, except in cases of self-defense against an ongoing attack. In Gentilis' view, the declaration served as an ultimate attempt to prevent war. The party who declared war had to observe a period of thirty-three days between the rendering of the declaration and the opening of the hostilities.¹¹¹

Furthermore, Gentilis made some interesting points concerning defensive warfare on behalf of others. Referring to the great Stoic tradition of Cicero and Seneca, which had been

GIORNATA GENTILIANA 21 SETTEMBRE 1991 7 (1995); Thomas Erskine Holland, *Alberico Gentili*, in IDEM, *STUDIES IN INTERNATIONAL LAW* 1 (1898); Kennedy, *supra* note 26, at 65-74; Theodor Meron, *Common Rights of Mankind in Gentili, Grotius and Suárez*, 85 AJIL 110 (1991); G.H.J. VAN DER MOLEN, *ALBERICO GENTILI AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1968).

¹⁰⁹ Gentilis considered the defense of oneself, one's property, and subjects a *natural* cause for war (and for private violence); GENTILIS, *supra* note 108, 1.13.

¹¹⁰ GENTILIS, *supra* note 108, 1.6.

¹¹¹ GENTILIS, *supra* note 108, 2.1.217-8 and 2.2.218-9.

revived by the humanists, Gentilis recognized that all mankind was bound together through ‘kinship, love, kindness and a bond of fellowship.’¹¹² From this, he derived a moral obligation to render aid to other peoples, if one could do so without prejudice to oneself. This obligation was not limited to princes and peoples with whom one had a treaty of alliance, but extended to peoples of the same ‘race and blood,’ and certainly the same religion.¹¹³

Contrary to Ayala, Gentilis held the opinion that if a rebellion was sufficiently widespread, it could be considered a war. The rebels took on the characteristics of a public body politic and thus gained the right to wage war.¹¹⁴ If the rebels had a just cause, their war was a just war. Such belligerents could then be lawfully assisted by other princes against their own (former) sovereigns. More generally, princes had the right to intervene to protect foreign subjects if those were treated unjustly by their sovereigns.¹¹⁵ This allowed one, under certain circumstances, even to assist rebels in a cause that was not just.

Gentilis touched upon the question of preventive defense. Whereas self-defense properly speaking was referred to as ‘necessary defence’ (*necessaria defensio*), this was referred to as ‘defence by expediency’ (*utilis defensio*). Gentilis allowed for anticipatory defense, which he defined as making ‘war through fear that we may ourselves be attacked’.¹¹⁶ By this he meant anticipatory action against dangers ‘that are already meditated and prepared,’ or what we could almost compare to our current notion of preemptive defense. ‘Preventive action,’ to use present-

¹¹² GENTILIS, *supra* note 108, 1.15.107 (transl. vol. 2, 67).

¹¹³ GENTILIS, *supra* note 108, 1.15.116-17.

¹¹⁴ He supported the English intervention of 1585 on behalf of the Dutch Republic; GENTILIS, *supra* note 108, 1.16.127.

¹¹⁵ GENTILIS, *supra* note 108, 1.16.120-2.

¹¹⁶ GENTILIS, *supra* note 108, 1.14.96 (transl. vol. 2, 61).

day terminology, against ‘probable and possible dangers’ was also justifiable. He explicitly referred to the danger that Europe would fall under the domination of Spain. But the danger of a state becoming too powerful, a ‘probable and possible danger,’ made a war not just by itself. Only if another just cause could be invoked, would war be just.¹¹⁷ Finally, as regards offensive war, Gentilis allowed for interventions in order to punish those who committed grave violations of the laws of nature and of mankind such as cannibalism or atheism. He vested this right in the common responsibility of all sovereign, public authorities for mankind and human nature.¹¹⁸

Hugo Grotius

The strength of Grotius’ seminal *De jure belli ac pacis* of 1625 does not lie in its clarity or consistency. Its merit is that it offers the most comprehensive synthesis of the law of nations of the early seventeenth century. As such, it became a work of reference for generations to come. But Grotius’ work was eclectic as it drew from various intellectual backgrounds, including neo-scholasticism and humanism.¹¹⁹ Although Grotius may have been an innovative author on some points, whose ideas have withstood the test of times and certainly helped form the modern law of nations, he did not radically break with the old, medieval intellectual traditions. This and the tendency of the humanist erudite to quote extensively from an abundance of historical and

¹¹⁷ GENTILIS, *supra* note 108, 1.14.104-7; Tuck did not mention this last nuance in his exposition on Gentilis and preventive war, TUCK, *supra* note 92, 18-31.

¹¹⁸ GENTILIS, *supra* note 108, 1.25.

¹¹⁹ Since the late nineteenth century, Grotius’ dependency on the neo-scholastic writers has been stressed. More recently, Tuck rightly vindicated the humanist influence on Grotius’ work; TUCK, *supra* note 92, 78-9.

literary sources make up for the fact that Grotius' thought is often unclear, unsystematic, and, at times, paradoxical or outright contradictory. After all, it is these paradoxes and contradictions that allow scholars to grant Grotius at one and the same time both the title of father of the modern law of nations, based upon an almost absolute concept of state sovereignty,¹²⁰ and of the 'post-modern' international law of the twentieth century, which sought to limit that same sovereignty.¹²¹

Like his 'precursors', Grotius sought to reconcile tradition with the new reality of the emerging sovereign state and the collapse of the old caused by religious warfare and the discovery of a new world. The elasticity of his thought was facilitated by his distinguishing two kinds of law of nations: the natural law of nations (*ius gentium naturale* or *primarium*), which was derived from natural law, and the volitional law of nations (*ius gentium voluntarium* or *secundarium*), which was man made and found its basis in human will.¹²² The latter category

¹²⁰ For the discussion about Grotius's 'fatherhood' of the modern law of nations, see Maurice Bourquin, *Grotius est-il le père du droit des gens?*, in GRANDES FIGURES ET GRANDES OEUVRES JURIDIQUES 77 (1948); Wilhelm G. Grewe, *Grotius – Vater des Völkerrechts?*, 23 DER STAAT 161 (1984); Karl-Heinz Ziegler, *Hugo Grotius als Vater des Völkerrechts*, in GEDÄCHTNISSCHRIFT FÜR WOLFGANG MARTENS 851 (Peter Selmer and Ingo von Münch eds., 1987).

¹²¹ GREWE, *supra* note 29, at 193-4 and 214-5; 1 Lesaffer, *supra* note 27, at 108-9. Early defenders of the 'Grotian tradition' in twentieth-century international law include Maurice Bourquin, *Grotius et les tendances actuelles du droit international*, 7 JOURNAL DE DROIT INTERNATIONAL ET DE LÉGISLATION COMPARÉE 85 (1926); Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRITISH YEARBOOK INT'L L. 1 (1946); CORNELIUS VAN VOLLENHOVEN, *THE THREE STAGES IN THE EVOLUTION OF THE LAW OF NATIONS* (1919).

¹²² As Hersch Lauterpacht already remarked, Grotius did not construe a system of law, but explained what different bodies of law had to say; Lauterpacht, *supra* note 121, at 5. This is actually true for many humanist writers who

was, of course, to be found in treaties and customs, but it could also be based on the general consent of the peoples. The natural law of nations was binding *in foro interno*, upon conscience, and the voluntary law of nations was binding *in foro externo*, in the external legal order. To Grotius and his predecessors, the binding on the conscience meant more than the cynical international lawyers of the twenty-first century are likely to think. Natural law was still the law that mattered. Natural justice and morality remained closely associated to religion, which continued to weigh heavily on the decisions of princes, to the extent that it constituted one of the major issues in international relations. Moreover, throughout the early seventeenth century, princes often made the most important decisions after consulting their confessors or a council of theologians.¹²³ The ultimate basis for the binding character of the volitional law of nations was the natural law principle of *pacta sunt servanda*.¹²⁴ In Grotius' view, the volitional law of nations could never contradict natural law. Its purpose was only to clarify or specify natural law.

were often more concerned with showing off their erudition than with building a comprehensible doctrine; Kennedy, *supra* note 26.

¹²³ On Olivares, Philip IV, Ferdinand II, see in this respect BIRELEY, *supra* note 44 (2x); ELLIOTT, *supra* note 49, at 97-9 and 126-7; RICHARD A. STRADLING, PHILIP IV AND THE GOVERNMENT OF SPAIN, 1621-1665 (1988); STRAUB, *supra* note 45, at 79-108.

¹²⁴ GROTIUS, *supra* note 99, *Prolegomena* 15, 17 and 1.1.9-14. See H. van Eikema Hommes, *Grotius on Natural and International Law*, 30 NETHERLANDS INT'L L. REV. 61 (1983); Hartmut Schiedermaier, *Hugo Grotius und die Naturrechtsschule*, in EINIGKEIT UND RECHT UND FREIHEIT. FESTSCHRIFT FÜR KARL CARSTENS vol. 1, 477 (Bodo Börner, Hermann Jahrreiß, and Klaus Stern eds., 1985); Hans Wehberg, *Die Unterscheidung von Natur- und Völkerrecht in der Lehre von H. Grotius*, in MENSCH UND STAAT IN RECHT UND GESCHICHTE, FESTSCHRIFT H. KRAUS 227 (1954).

After all, the binding force of the volitional law rested upon the law of nature and its inherent justice and rationality.¹²⁵

In his *De jure belli ac pacis*, Grotius developed two doctrines on war, without clearly and consistently separating and distinguishing them: one pertaining to the domain of natural law and one pertaining to volitional law.¹²⁶ In the realm of natural law, the Dutch humanist abided by the Thomist tradition of the just war. The just causes for war were the traditional ones: defense, including that of subjects, allies, and friends, revindication of property, and punishment of a wrong suffered.¹²⁷ In more general terms, Grotius stated that war could only be undertaken ‘for the enforcement of rights.’¹²⁸ War was thus rejected as an instrument for change. Grotius adopted Vitoria’s views on invincible ignorance and the war being just on both sides.¹²⁹ Wars fought for a just cause were just if they were fought for one’s own sake or for the sake of another. The defense of subjects, allies, friends, and all people with whom one had a bond of kinship was as laudable, if not more, than self-defense.¹³⁰

¹²⁵ Kennedy, *supra* note 26, at 82-3.

¹²⁶ The best expositions of Grotius’ thought on the laws of war can be found in G.I.A.D. Draper, *Grotius’ Place in the Development of Legal Ideas about War*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 177 (Hedley Bull, Benedict Kingsbury, and Adam Roberts eds., 1990); HAGGENMACHER, *supra* note 24; A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS (Yasuaka Onuma ed., 1993); JOAN D. TOOKE, THE JUST WAR IN AQUINAS AND GROTIUS (1965); TUCK, *supra* note 92, at 78-108.

¹²⁷ ‘Authorities generally assign to wars three justifiable causes, defence, recovery of property, and punishment’; GROTIUS, *supra* note 99, 2.1.2.2 (transl. vol. 2, 171).

¹²⁸ GROTIUS, *supra* note 99, *Prolegomena* 25 (transl. vol. 2, 18).

¹²⁹ GROTIUS, *supra* note 99, 2.23.13.

¹³⁰ GROTIUS, *supra* note 99, 2.25.1 and 4-6.

Grotius' ideas about the justice of intervention were inspired by those of Gentilis and, to a lesser extent, Vitoria. He discussed the problem in terms of natural, and not volitional law. Much like Vitoria and Gentilis, Grotius indicated the sovereign rulers of the world as the defenders and upholders of natural rights, be it for their own or for foreign subjects.¹³¹ He accepted the right of intervention to punish acts against the law of nature and to protect innocent people from those acts. Among other things, he expressly referred to acts of cruelty committed against Christians because of their religion.¹³²

In line with medieval doctrine and his immediate predecessors, Grotius considered self-defense, whether against a just or an unjust attack, a natural right. It pertained to both individuals and states, whereas war did only to the latter. The use of force by private persons Grotius referred to as private wars, as opposed to public wars by princes and republics. An action in self-defense did not amount up to actual war. It only allowed for limited – proportional – violence to ward off the attack and should end once the attack had stopped. From this, Grotius distinguished a defensive war. Defensive war was the prerogative of princes and republics. It was a war justified by the *causa iusta* defense, whether this was self-defense or the defense of property, subjects or allies. The concept of defense as a just cause was more extended. Defensive war encompassed preventive action. According to Grotius, fear of the might of a neighbor was insufficient as a cause for war unless the – aggressive – intentions of that neighbor were certain.¹³³ Such a war

¹³¹ Grotius' doctrine of intervention derived more from the humanist tradition than the neo-scholastic tradition; TUCK, *supra* note 92, at 94-108.

¹³² GROTIUS, *supra* note 99, 2.1.16, and 2.20.40 and 49.

¹³³ It should be noted that Franciscus Zypaeus (1578/79-1650), a jurist from the Spanish Netherlands in the service of the Bishop of Antwerp, roughly agreed with this point of view; FRANCISCUS ZYPAEUS, IUDEX, MAGISTRATUS, SENATOR LIBRIS IV EXHIBITUS 4.7.7, 149-50 (1633).

was justified because of its necessity, not because of the justice of its cause. Defense was only just if it was directed against an unjust attack. As a natural right, self-defense was also allowed against a just attack.¹³⁴

In Grotius' system, just like in medieval doctrine and with the other early modern writers of the law of nations, self-defense had a double function. On the one hand it was a natural right which gave rise to a right to use force that was limited both in relation to its goal and duration, and to its legal consequences. On the other hand, it could serve as a just cause for war. Like their medieval predecessors, most early-modern writers hardly commented upon it in relation to the just war, but none of them would deny that it was a just cause. Defense was predominantly discussed in terms of defense of third persons, or of preventive defense.

In the realm of the volitional law of nations, Grotius only spoke of the legality of law. Next to the just war (*bellum iustum*), Grotius thus introduced the notion of formal war (*bellum solenne*). For a war to be legal, it had to be waged by a sovereign and had to be formally declared. In claiming this, Grotius adhered to both Ayala's and Gentilis' views. In a war formally declared and fought between sovereigns, all belligerents were protected by the laws of war and could reap the benefits of the state of war, such as making booty.¹³⁵ The declaration served to prove that it was a war between sovereigns.¹³⁶

But still, the two kinds of war were not completely separated. Even in a formal war, the justice of the war was not irrelevant. For Grotius it was of great consequence in relation to third parties. The justice of a war did not only apply to the belligerent who had just cause, but also to

¹³⁴ GROTIUS, *supra* note 99, 2.1, esp. 2.1.2 and 2.1.16-7; and 2.22.5; NEFF, *supra* note 86, at 126-30.

¹³⁵ GROTIUS, *supra* note 99, 1.3.4.1, 3.3.4-5 and 3.3.12. On principle, a delay had to be respected; 3.3.13. See also MERON, *supra* note 87, at 51.

¹³⁶ GROTIUS, *supra* note 99, 3.3.11.

those assisting him.¹³⁷ Allies who were under an obligation by treaty to assist both sides should waive those obligations as regards the belligerent(s) fighting an unjust war.¹³⁸ Those who were neutral (*in bello medii*) were only allowed to assist those waging a just war and were prohibited to hinder the same.¹³⁹ Grotius also claimed that subjects who thought a war to be unjust were excused from serving in that war.¹⁴⁰ In stating these claims, Grotius correctly assessed that justifications of the causes of war were usually of a propagandistic nature towards subjects, vassals, and third powers, but that they were important for that reason.¹⁴¹ The legal consequences he attributed to these were devoid of much reality, but Grotius was right to reflect the significance material justifications had in political reality with a place in his system of the law of nations.

Regardless of the justice or the legality of a war, Grotius strongly recommended sovereigns not to wage war except if it was really necessary or only for the ‘most weighty cause at a most opportune time.’¹⁴² Hereby, he introduced the purposes of the war into the discussion,

¹³⁷ GROTIUS, *supra* note 99, 2.25.1.1.

¹³⁸ GROTIUS, *supra* note 99, 2.15.13.

¹³⁹ GROTIUS, *supra* note 99, 3.17. On neutrality in early-modern doctrine, see STEPHEN NEFF, *THE RIGHTS AND DUTIES OF NEUTRALS: A GENERAL HISTORY* 10-43 (2000).

¹⁴⁰ GROTIUS, *supra* note 99, 2.26.3.

¹⁴¹ This was also a purpose of formal declaration: ‘Declarations of war in fact, as we shall shortly be saying, were wont to be made publicly, with a statement of the cause, in order that the whole human race as it were might judge of the justness of it;’ GROTIUS, *supra* note 99, 2.26.4.7 (transl. vol. 2, 593).

¹⁴² GROTIUS, *supra* note 99, 2.24.8-9 (transl. vol. 2, 575); see also the rest of Chapter 2.24. A prince also had to weigh the evil and the good that could come from the war. This was a traditional demand in the just war doctrine. JUDITH GARDAM, *NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES* 35 (2004).

not in moral terms – like ‘intention’ in the classical just war doctrine – but in terms of expediency.

The early ‘classics of international law’ up to Grotius did much to adapt the just war doctrine to the realities of a world where the sovereign princes were truly that, as there was no higher authority or even common, authoritative legal and moral framework to govern their actions. To guarantee that belligerents would treat one another according to the laws of war, the writers from the various traditions went a long way towards designing a concept of ‘legal’ war that was devoid of much material substance in terms of causes and goals, and was almost purely formalistic. The distinction between the (moral) justice and the (formal) legality of war was a step towards the emancipation of the law of nations from theology and the *ius commune* where Christian morality, natural law, and positive law formed an inextricable amalgam. But the distinction did not yet turn into an absolute rejection of the moral, natural law discourse. From Vitoria to Grotius, all writers of the early modern law of nations stubbornly refused to give up the old doctrine of the ‘just’ war and all recognized the significance of the moral-political justification of war. Grotius for his part even tried to recuperate it in the sphere of positive law. His attempt was unsuccessful and purely theoretical, but in doing so he succeeded in indicating the significance of material justifications: the audiences for the benefit of whom they were made.

V. THE FRENCH AND SPANISH DECLARATIONS OF 1635

The French declarations

In the weeks after the French herald Gratiollet had formally declared war upon the Cardinal-Infante, the French government released two lengthy justifications for its actions. On June 6, 1635, Louis XIII had the *Declaration du Roy, sur l'ouverture de la guerre contre le Roy d'Espagne* issued, which was registered by the Parliament of Paris, the highest court of the realm, on 18 June.¹⁴³ Around the same date, a second text was promulgated: the *Manifeste du Roy Contenant les justes causes que sa Majesté a eües de declarer la guerre au Roy d'Espagne*.¹⁴⁴

The *Declaration* was co-signed and edited, if not written, by Abel de Servien (1593-1659), a jurist by training and Secretary of State for War. It had been written while the drafting process of the *Manifeste* was already well underway, and it was partly based on it. The *Manifeste* was based on an original draft by Father Joseph (1577-1638), one of Richelieu's main advisers on foreign policy.¹⁴⁵ It had later been revised by Claude le Bouthillier (1581-1652), a jurist too and Secretary of State for Finance, and by Richelieu.¹⁴⁶

The *casus belli* which Louis XIII had invoked in his formal declaration of May 19, 1635 upon Spain, was the attack on Trier and the abduction of the Elector by the troops of the Cardinal-Infante on March 26, 1635. Earlier, the French resident diplomat in Brussels, Amontot, had demanded the release of the Elector of Trier in the form of an ultimatum. The refusal of the

¹⁴³ The edition from Paris, 1635, is used here.

¹⁴⁴ The edition by Jacques Roussin from Lyon, 1635, is used here.

¹⁴⁵ François Le Clerc du Tremblay. On his foreign policy, see Fagniez, *supra* note 55, and ALDOUS HUXLEY, GREY EMINENCE: A STUDY IN RELIGION AND POLITICS (1949).

¹⁴⁶ On the drafting process of the texts, see Weber, *supra* note 17, at 97-113. The three drafts of the *Manifeste* are in the archives of the French foreign ministry: PARIS, *Archive of the Ministry of Foreign Affairs, Correspondance Politique, Espagne* No. 18, 140-8 (Joseph), 149-53 (Bouthillier), and 129-32 (Richelieu).

Cardinal-Infante, whose evading answer had reached Louis XIII on May 9, was considered the direct cause for the war. In the formal declaration it was stated that the Elector fell under the protection of the King of France. This protection was justified because neither the Emperor nor any other prince proved to be capable of offering protection. The attack against the Elector went against the dignity of the Empire as well as against the law of nations.¹⁴⁷

The Manifeste du Roy

Because the *Manifeste* was drafted, if not finalized, before the *Declaration*, we will first discuss the former. The *Manifeste du Roy* took the events of Trier as the *casus belli*, but put them in a wider context. The events of March 26 were presented as only the last of a long series of injustices committed by the Spanish against France and its allies. The *Manifeste* opened by referring to the peace efforts made by the French King Louis XIII, going back to his accession in 1610. The desire to ensure peace for his people had induced Louis XIII to disregard the ancient jealousies and ill will of the Spanish and to renew the alliance between the two crowns through a double marriage between the Habsburgs and the Bourbons (1615).¹⁴⁸ Even at that time, the French King was already advised against such a move by his allies, who feared that Spain's traditional desire for expansion and oppression would go unopposed. Since the double marriage, the Spanish had committed all kinds of offenses against the French King. Next, there followed a

¹⁴⁷ Formal declaration of May 19, 1635 as published in 67 GAZETTE DE FRANCE 269, 272 (1635).

¹⁴⁸ In 1615, Louis XIII had married Anne of Austria (1601-1666), sister to the later King Philip IV and the Cardinal-Infante. Philip IV married Louis' sister Isabelle (1602-1644) in the same year.

long list of such offenses, including the attacks against Savoy (1614-1617), the attacks on the Grisons in the Valtelline (as of 1620) with the design of bringing ‘war from Germany to Italy and from Italy to Germany,’¹⁴⁹ the Spanish intrigues to divide the French from the English (during the early 1620s), the exhortations to the French Huguenots to rebel (1627), and the attacks on Casale and Mantua while the French were engaged before La Rochelle (1628). During the Mantuan war, France could have inflicted a ‘just punishment’ on Spain and profit in a ‘legitimate’ way from its victory, but had chosen not to do so and had helped Spain get out of the dire straits it had worked itself into.¹⁵⁰ Spain, unrelenting, had broken the public faith and the treaties it had signed, and had incited the imperial troops to attack Mantua and to disturb the peace in Italy again. Louis XIII had thus been forced to intervene once more. After the events of 1628-1631, Spain had lusted for revenge. The Spanish had gone as far as to incite dissent within the French royal house and had used the Duke of Lorraine, a sworn enemy of France, for their purposes. As everybody knew, they had ‘armed France against France’ and had made several treaties to that extent.¹⁵¹

¹⁴⁹ ‘... pour porter aysement la guerre d’Allemagne en Italie, & d’Italie en Allemagne,’ MANIFESTE, 4.

¹⁵⁰ ‘... une juste punition’, 6 and ‘occasion si legitime,’ MANIFESTE, 5.

¹⁵¹ ‘... armé la France contre la France,’ MANIFESTE, 7. The most important of these treaties being the Treaty of May 12, 1634 with Charles IV of Lorraine and Gaston of Orléans. In the Treaty, the Spanish promised 15,000 troops to the Duke of Orléans but demanded some of the conquests the Dukes would make in France in compensation; Arts. 4 and 6, DU MONT, *supra* note 15, vol. 6-1, 73. Since 1631, the French King’s mother, Marie dei Medici (1573-1642), had fled to the Spanish Netherlands. From there, she worked with her younger son, Gaston d’Orléans, against his elder brother. On the dissensions within the French royal family and the rebellions of the 1630s, see GASTON DETHAN, *GASTON D’ORLÉANS. CONSPIRATEUR ET PRINCE CHARMANT* (1959); PAUL HENRARD, *MARIE DE MÉDICIS DANS LES PAYS-BAS, 1631-1638* (1875); Toby Osborne, ‘*Chimères, monopoles and stratagèmes*’: *French Exiles in the Spanish Netherlands during the Thirty Years’ War*, 15 *THE SEVENTEENTH CENTURY* 149 (2000).

The French King had patiently suffered these offenses, regardless of many pleas to the contrary. It had been said to the King that, while he depleted his forces without any benefit by having to keep a large army for his defense, the Spanish were destroying the foundations of ‘public liberty’ – that is the liberty of all princes – and were gradually attaining their goal: the suppression of the Holy Roman Empire and its transformation into a permanent – read hereditary – monarchy of the House of Austria.¹⁵² For that purpose, they had been trying to bring some of the Empire’s seven electors into their camp (Mainz, Cologne, Saxony and Brandenburg) and destroy others (the Palatinate, Trier). Meanwhile, the Spanish extorted the Italian princes to the extent of making them powerless. Some also pointed out to the King the Spanish dissimulation concerning religion. While the Spanish styled themselves as the champions of the Catholic religion and professed their hatred for the Protestants, they did not refrain from making advantageous peace treaties with the latter and waging war upon the former.¹⁵³ As some Protestant allies of France had indicated, there was nothing new about this tactic which went back to the days of Emperor Charles V.

All these reasons might have been enough for any other king to decide upon war. But Louis XIII’s resolve to work for ‘public tranquility’ and his consideration that war, even if sometimes necessary, must always be reserved as a last resort, had withheld him from taking this step.

The Spanish had done everything and essayed every device to lure the French into a war and thus deflect the blame for it upon Louis XIII. But their desire to offend had gotten the better

¹⁵² ‘... liberté publique,’ MANIFESTE, 7. ‘... de s’assubjetir l’Empire en forme de monarchie perpetuelle de la Maison d’Austriche,’ 7.

¹⁵³ This refers to the Peace of Prague of May 30, 1635 with, among others, Saxony and Brandenburg.

of them. Now they had gone to the extreme of laying ‘their hands upon the Archbishop of Trier, a sacred person, Prince and Elector of the Holy Empire.’¹⁵⁴ Apart from disdain for the dignity of the Church and its prelates this act showed, it was a measure of their lack of respect for electors, princes of the Empire, and sovereigns in general. The act was such that the whole of Christianity must recognize that the French King had just cause to resent it, since the Elector was under his protection.¹⁵⁵

The French King had never stopped to support all papal initiatives to ensure a stable peace among Christian powers. However, even while these papal endeavors were taking place, the King was informed of the Spanish plans to attack France. Not only had the Spanish sent spies into some French provinces, but they had also prepared their fleets in Italy to attack France. The Spanish ambassadors in Vienna were exhorting the Emperor to declare war upon France.

The authors of the *Manifeste* next resumed their enumeration of Spanish offenses, this time not against France but against almost all other princes of Europe, the allies and neighbors of France. It was claimed that the Spanish had stirred up troubles in the Empire by inducing the Emperor to oppress the Protestants. They had also tried to take territories from Catholic princes such as the Bishop of Liège and the Archbishop of Cologne and illegally occupied the Lower Palatinate. They had caused trouble in the Swiss cantons and for the Grisons because of the Valtelline. Heeding the pleas of the Grisons, Louis XIII had sent some small contingents of troops to assist them. It was only after the French King had been informed of the attack on Trier that he allowed the Duke of Rohan to intervene with his army and prevent the Spanish from

¹⁵⁴ ‘... de prendre l’Archevesque de Treves, personne sacrée, Prince & Electeur du Sainct Empire,’ MANIFESTE, 10.

¹⁵⁵ ‘... lesquelles feront juger à toute la Chrestienté le juste sujet que sa Majesté a de s’en ressentir, veu l’assistance qu’elle donnoit à ce Prince, lequel elle tenoit en sa protection,’ MANIFESTE, 10-11.

occupying the Valtelline.¹⁵⁶ Both Protestants and Catholics were said to applaud these actions. It was also pointed out that France had earlier protested against the Spanish infringements on the Peace of Cherasco (1631), which had been duly noted by the papal nuncios.

The *Manifeste* went on to deplore that Louis XIII had not been able to limit his intervention to the just defense of his allies and was now forced to take up arms to obtain reparation for all the offenses he had suffered, most particularly the capture of the Elector of Trier. Before he declared war, he sent his resident diplomat in the Spanish Netherlands to demand the release of the Elector from the Cardinal-Infante. Such a demand was just as the Elector was a protégé of the King. The Elector's capture was illegal. He was a sovereign who lived peacefully and was not at war with any power. The King's protection had been offered because the Emperor was incapable of giving his. In his response, the Cardinal-Infante had left no room to doubt his intention to keep the Elector in captivity. The King feared that matters would become even worse if he did not demand justice. The matter, so the *Manifeste* stated, did not only concern the 'sensibility' of great kings, but also the law of nations.¹⁵⁷ The French King could not let this pass because of the offense committed against the Church in the person of one of its prelates. Doing nothing would also mean abandoning the allies and would encourage the Spanish. It would jeopardize the liberty of all.

According to the authors of the *Manifeste*, there was no doubt that the Spanish had every intention to attack France before the war was brought to them. The fleet that had by now

¹⁵⁶ Henry, Duke of Rohan (1579-1638), was a Huguenot prince. In April 1635, before the French formally declared war, he led an army from Württemberg into the Valtelline (April 21) and occupied it, assisted by forces of a Swiss Protestant rebel; see BAUSTAEDT, *supra* note 55, at 154. PARROTT, *supra* note 53, at 117.

¹⁵⁷ '... qui ne sont pas seulement sensibles aux grands Roys ; mais qui sont aussi les plus recommandées par le droict des Gens,' MANIFESTE, 16.

appeared on the coasts of the Provence was proof enough for that. Knowing of these Spanish plans and preparations, the French King had resolved to have his troops enter the Duchy of Luxemburg in order to obtain redress for the many wrongs suffered.

With this *Manifeste*, the French King wanted to make public the just causes he had for the war, so the text continued. It was repeated that the King had wanted to limit himself to the defense of his allies against the most blatant oppression. The possible Spanish allegations against the French concerning their actions in the Empire would surely be disbelieved by anyone with sound judgment. The causes for the Swedish intervention, in which the French King had no part, were well-known. The French King was forced to intervene because of the injustices of the Spanish who wanted to turn the Empire into a hereditary monarchy and aspired to universal monarchy over the whole of Christianity.¹⁵⁸ For the sake of these ambitions, the Spanish did not shrink from attacking whomsoever, often using the cause of religion as a cover for their true designs. Here, reference was made to the ‘unhappy’ pamphlets attacking the honor and life of persons who were considered sacred under divine law.

There could be not doubt about the ‘just and righteous intentions’ of the French King in declaring this war.¹⁵⁹ His goal was peace for the whole of Christianity. God was said already to have sanctioned the French cause in granting the King’s army victory.¹⁶⁰ The King’s intentions comprised the delivery of the Church from the troubles caused by the confusion in Italy and the wars between Catholic powers. He rejected all accusations against him assisting Protestant powers from those who themselves had wanted peace with them, only to be able to molest

¹⁵⁸ ‘... la pretention imaginaire de leur Monarchie sur la Chrestienté,’ MANIFESTE, 20.

¹⁵⁹ ‘... ses iustes & droites intentions,’ MANIFESTE, 21.

¹⁶⁰ At the Battle of Les Avins on May 20, 1635.

Catholic powers and to bring them under their monarchy. The *Manifeste* ended with an invocation of God's favor for the just designs of the French, which were 'the honor of His Divine Majesty, the tranquility of the State, and the conservation of his good Neighbors and Allies.'¹⁶¹

The Declaration du Roy

The *Declaration* opened with a reference to the many, well-known offenses of the Spanish against the French monarchy, without however listing them at this point. These offenses were inspired by the hatred and natural jealousy of the Spanish for the French and had always been committed with stealth. Now their ambition had driven them to openly oppress the allies of the French King. Once their covert actions to bring down the French crown had failed,¹⁶² the Spanish began plotting an open attack upon France. Therefore, Louis XIII could no longer refrain from using the power God had granted him, not only to drive the enemy back, but also to prevent the pending attack in a just war, which reason and law forced the King to bring to the Spanish lands instead of awaiting an attack upon his own.¹⁶³

¹⁶¹ '... de l'honneur de sa Divine Majesté, repos de cet Estat, & de la conservation de ses bons Voisins & Alliez,' MANIFESTE, 23.

¹⁶² This refers to the alliance with Gaston d'Orléans.

¹⁶³ 'Nous ne pouvions, sans deffailir à nostre Estat, & à nous-mesmes, differer davantage d'employer les forces que Dieu nous a données, non seulement pour repousser leurs entreprises, mais pour tâcher de les prevenir par une juste guerre, que toutes sortes de raisons & de Lois, nous obligent de porter plutôt dans leurs Pays, que de l'attendre dans nostre Royaume,' DECLARATION, 4-5.

The *Declaration* then turned to the period of the alliance and double marriage between the crowns of France and Spain, which had brought hope for a lasting peace within Christianity. To attain this, France had been willing to turn the page on all old quarrels. Spain should have forgone its unjust desire to usurp the states of its neighbors and to establish a universal monarchy. But neither this alliance, nor the many good offices France had granted Spain, had deflected Spain from these aims. To the contrary, they had only served Spain because it could now operate by stealth. France's trust had turned to its detriment. At this point, some instances of France's goodwill towards Spain were mentioned. These included the active intervention of the King's father, Henry IV (1589-1610), to promote the Twelve Years' Truce (1609) as well as the French diplomatic offensive during the Bohemian rebellion (1618-1621) to have Bavaria and the Catholic League support the Emperor and neutralize some of the Protestant princes of the Empire. In recompense for these services, the Spanish had then taken the Valtelline from the Grisons, allies of France, without any other explanation than that they needed the valley to shift their troops from Spain and Italy to Germany and the Netherlands, and vice versa. Their duplicity had further been proven by their refusal to execute the ensuing Treaty of Monzon (1626) as well as by their maneuvering at the time of the Treaty of Cherasco (1631). Here, the same offenses committed by the Spanish since the accession of Louis XIII that were mentioned in the *Manifeste*, were listed. Explicit reference was made to the Treaty of May 12, 1634 with which Spain tried to arm France against itself and the text of which had fallen into the hands of the King. In short, the Spanish friendship had resulted in nothing but assistance to internal dissenters and exhortations against France and its allies.

Until this time, so the *Declaration* stated, the French King had done nothing but neutralize all the Spanish enterprises and protect his friends and states against the evils prepared

for them. But now the King had to recognize that his moderation had made the Spanish more audacious since experience had taught them that they could always keep the peace and stay out of harm's way. Therefore, he was now forced to express his resentment about the offenses he had suffered and to stop the Spanish once and for all. The King acknowledged that his moderation after his victories in Italy in 1629 and during the times of trouble for the Habsburg in the Empire during the last years as well as his preference for 'public peace' over 'just vengeance'¹⁶⁴ had not dissuaded the Spanish from their continuous conspiracies nor stopped them from constantly pitting new enemies against France.¹⁶⁵ This 'simulated peace, this covert war' was all the more dangerous because 'their stratagems were since long more to be feared than their forces.'¹⁶⁶ It allowed the Spanish to enjoy the sureties of peace, while they forced upon France the disadvantages and perils of war. But all this was coming to an end. Now their passion had prevented the Spanish from further hiding their designs and they were openly preparing for war against France. They had accused the French of being allied with Protestant powers. But they themselves had acted contrary to the interests of the Catholic faith, while they used the same faith to cover up their injustices. They did not hesitate to make promises that were incompatible with one another and attack France with all their might. It had come to such a point that the King of France would almost feel guilty himself for the losses his people would suffer if he did not,

¹⁶⁴ '... si nous n'eussions toujours préféré le desir de la paix publique, à celui d'une juste vengeance,'

DECLARATION, 13.

¹⁶⁵ '... n'y diminué l'aigreur avec laquelle ils travaillent à nous jeter tous les jours sur les bras de nouveaux Ennemis,' DECLARATION, 13.

¹⁶⁶ '... une paix déguisée, une guerre couverte, d'autant plus dangereuse, que leurs artifices ont esté de tous temps beaucoup plus à craindre, que leurs forces,' DECLARATION, 13.

thanks to his ‘just foresight’, use his most powerful means to safeguard his people, even at the risk of his own person.

The authors of the *Declaration* now turned to the invasion of the Spanish Netherlands. It was said that it had been the ‘place of arms’ of the Spanish and that they had wanted to turn it into the basis for an ‘immortal war’ to subject the people they had recognized to be free in treaties as well as to check France.¹⁶⁷ They had continuously tried to steal away fortresses on the borders of France, mostly through stratagems. Their seasoned troops in the Netherlands constituted such a threat that they could either surprise France, or bleed it dry by forcing it to spend as much in peacetime as in war. Nobody could therefore deny it to be honorable and useful to search for more security and a true peace by way of arms, rather than to see the French forces dwindle away and see the people languish under ‘a doubtful and uncertain peace France had to safeguard with 150,000 men.’¹⁶⁸

Reference was made to the French cooperation in the peace initiatives of the papal nuncios. According to the *Declaration*, the French King had even now contemplated not to open hostilities yet and to content himself with strengthening his defenses and await the attack. But he had had to change his mind because of the grave violation of the law of nations the attack on the Elector of Trier constituted. This was said to concern all princes of Christianity. The attack on the Elector’s capital, where he was living in peace, his status as a French protégé, the refusal to release him, and the mockery that was the answer the French King received from the Cardinal-Infante, all these injustices forced the King to take action. As king of a realm that had waged so

¹⁶⁷ In the Twelve Years’ Truce of Antwerp of April 9, 1609, King Philip III and the Archdukes Albrecht and Isabella had called the United Provinces of the Dutch Republic ‘free’; Art. 1, DU MONT, *supra* note 15, vol. 5-2, 99, 100.

¹⁶⁸ ‘... une pais douteuse & incertaine, qu’il faut conserver avec cent cinquante mil’hommes,’ DECLARATION, 17.

many wars in defense of its allies and had been the safehaven of the afflicted and the support of the oppressed for such a long time, Louis XIII had no other choice.

It was the combination of the series of old offenses and the most recent injuries that had convinced the French King to break with the King of Spain. But before he commenced hostilities, he had sent a herald to the Cardinal-Infante so that he would not be surprised by the invasion of his lands. God, in his divine wisdom, had informed the French of the Spanish plans to have France invaded from the Netherlands by Prince Thomas of Savoy, from the east by Charles IV of Lorraine, and from the Mediterranean by the Spanish fleet. God had allowed the French to nip the first invasion in the bud, repulse the second, and be prepared for the third.

For all these reasons, the French King, the *Declaration* continued, declared ‘open war by sea and by land on the King of Spain, his subjects, lands, and vassals in order to obtain redress for the wrongs, injuries and offenses committed against the King, his estates, subjects and allies.’¹⁶⁹ The King hoped that God, who had already indicated the justice of the French designs by granting them an early victory, would continue to assist them so that he could establish ‘a sure and durable peace within Christianity.’¹⁷⁰ In order to achieve this goal more speedily, the King called upon all ‘princes, states, and republics who loved peace and are concerned with public liberty’, to take up arms and join him.¹⁷¹

Next, the King of France ordered all his subjects, vassals, and servants to make war by land and sea on the King of Spain, his lands, subjects, vassals, and adherents who were declared

¹⁶⁹ ‘... la guerre ouverte par mer & par terre audit Roy d’Espagne, ses Sujets, Pays, & Vassaux, pour tirer raison sur eux, des torts, injures, & offenses que Nous, nos Etats, Sujets, & Alliez, en ont receuës,’ DECLARATION, 23.

¹⁷⁰ ‘... une seure & durable Paix dans la Chrestienté,’ DECLARATION, 23.

¹⁷¹ ‘... tous les Princes, Etats, & Republicues, qui aiment la paix, & prennent interest à la liberté publique,’ DECLARATION, 23.

enemies of the King, the state, and public peace. The *Declaration* stipulated the implications of the state of war. The subjects of the enemy could be taken prisoner, held for ransom, or treated according to the laws of war. It was forbidden to communicate or trade with the Spanish, under the penalty of death. All passports and safe passages were revoked.

The *Declaration* restated the main outlines of the alliance treaty France had made with the Republic on 8 February 1635 concerning the invasion of the Spanish Netherlands. It was stated that this would be the first military operation of the war because it would end the long and unfortunate war waged in the Netherlands and because it would liberate the population there from Spanish oppression. The King reiterated his promise that if the people from the Spanish Netherlands would drive the Spanish from their towns and places within two months after the *Declaration*, these places would form a free and sovereign state and the Catholic faith would be safeguarded. The King promised to protect the people of the Spanish Netherlands during the war and look after their interests in the ensuing peace treaties. If they would wish so, the King was prepared to make a defensive and offensive alliance with them, together with the Republic, and to include them in all future peace treaties. Even if only three or four towns close to one another were to rise and liberate themselves, they would be allowed to form a free state. The *Declaration* concluded with an order to all officials of the realm to publish and register the text and to observe and enforce it.

The author of the *Declaration du Roy* of June 6, 1635, most likely Abel de Servien, made use of the draft of the *Manifeste* but clearly added some different accents. Both texts employed the same arguments and referred to the same facts, but there was a difference. The *Manifeste* stressed that France undertook the war to save the whole of Christian Europe from Spanish

oppression.¹⁷² The *Declaration* played down this argument and argued somewhat more along the lines of French interests. This is made most clear by considering the differing structures of the two texts. While the *Manifeste* started by stating the many offenses Spain had committed against the whole of Christianity – France and its allies –, the first paragraphs of the *Declaration* underscored the offenses suffered by the French King. In the *Manifeste*, the attack on Trier was the last of a long line of offenses by the Spanish against the ‘public liberty’ of Europe, whereas in the *Declaration* it was yet another attack on French interests and honor.¹⁷³

¹⁷² Claude le Bouthillier and Richelieu had made quite some changes to Joseph’s draft, downplaying the European and Christian dimensions a bit; see Weber, *supra* note 17, at 106-7.

¹⁷³ According to Hermann Weber, the differences have to be explained from the difference in view on foreign policy held by Father Joseph, who was close to Richelieu, and by Servien, who was close to the King. This discrepancy between the King’s entourage and that of the Cardinal-Minister went back to the debate both leaders had had during the summer of 1634 about a rupture with Spain. At that time, the King was most aggrieved by the offensive alliance signed between Philip IV and his rebellious brother Gaston. He constantly pressurized Richelieu for war with Spain. The Cardinal-Minister withstood that pressure and wanted to prolong his ‘war by proxy’ for as long as he could. In June 1634, Richelieu wrote a lengthy memoir to argue his case. In it, he rejected the recent Dutch proposal to jointly attack and divide the Spanish Netherlands. First, the war would be a war of conquest. The inhabitants of the Spanish Netherlands might not welcome the domination of the French and the Protestant Dutch might come to replace their Spanish rulers. Second, it would leave the French and the Dutch direct neighbors, a situation that would lead to conflict. Third, a war might weaken the Spanish to the extent that France would then have to shoulder the burden of the defense of the Catholic faith against the Protestants alone. Richelieu advised to abide with the Alliance Treaty of April 15, 1634 in which France had promised new subsidies for the Dutch war effort. In his letter of August 4, 1634 to the Cardinal-Minister, King Louis XIII made the case for war, arguing that the circumstances would never be so advantageous to France as they were at the time. As cause for the war, he invoked the attacks by Spain on France through the services of members of his family. Whereas the King only heeded the interests of France, the Cardinal-Minister held an eye on the long-term and larger European picture and rather associated France with the cause of the

The Spanish declarations

Though the war had been raging for over a month by June 24, 1635, on that day the Cardinal-Infante had his *Declaration de son Alteze touchant la guerre contre la couronne de France* published in Brussels.¹⁷⁴ The text was in the first place aimed at the population of the Spanish Netherlands. In the light of the French and Dutch claims that they came to ‘liberate’ the Netherlands from Spanish oppression and their call upon the people to rise, it was important to explain the justice of the Spanish cause to the local nobility and elite. This was all the more important as in 1632-1633 there had been serious trouble with the estates in the Spanish Netherlands, where, moreover, some nobles and higher officers had conspired against Spain.¹⁷⁵ The text was issued two weeks after the Franco-Dutch invaders brutally sacked the small town of Tienen to the east of Brussels and on the day they laid siege to Leuven. Apart from offering a

Catholic religion. Memoir of Richelieu of June 1634, *supra* note 71, at 466-8; *Lettre du Roy à Son Eminence sur le sujet de l’ouverture de la guerre*, *supra* note 48, at 18-19. Treaty of 15 April 1634, published in DU MONT, *supra* note 15, vol. 6-1, 69. Anuschka Tischer, however, forwards the view that the difference is consequential to the fact that both texts were addressed to slightly different audiences. Whereas the *Declaration* was mainly aimed at the French power elite, the *Manifesto* was also written for foreign audiences. Both explanations seem plausible and are not mutually exclusive.

¹⁷⁴ Here the French text published by Hubert Velpius in Brussels, 1635, will be used.

¹⁷⁵ Alicia Esteban Estringana, *La crise politique de 1629-1633 et le début de la prééminence institutionnelle de Pierre Roose dans le gouvernement des Pays-Bas Catholiques*, 76 *REVUE BELGE DE PHILOGIE ET D’HISTOIRE* 939(1998); Paul Janssens, *L’échec des tentatives de soulèvement aux Pays-Bas sous Philippe IV (1621-1665)*, 92 *REVUE D’HISTOIRE DIPLOMATIQUE* 110 (1978); VERMEIR, *supra* note 68, at 63-90.

justification for the Spanish cause, the text was a formal declaration of war issued in the name of Philip IV. The author of the text is unknown, but it is likely that some of the main ministers of the Cardinal-Infante had a say in the drafting of the text. Among them were probably the Cardinal-Infante's second-in-command, Francisco de Moncada, Marquis of Aytona (†1635), Don Martin de Axpe, head of the Secretariat for State and War, the Cardinal-Infante's confessor, Juan de San Agustin, and Pierre Roose (1586-1673), the powerful Chief-President of the Privy Council in the Spanish Netherlands and a trustee of Olivares.¹⁷⁶ Axpe and Roose were both university-trained jurists.

On June 2, 1635, Olivares had stated that the Spanish government needed a general paper or letter to defend the Spanish cause and to address to the Pope and the princes of Europe, as well as some manifestos to distribute within France. A junta was convened to prepare such texts. It consisted of Francisco de Calatayud, royal secretary, Alonso Guillén de la Carrera,¹⁷⁷ a jurist and polemicist, as well as Juan de Palafox y Mendoza (1609-1659), also a jurist and the future Bishop of Pueblo de los Angeles in Mexico.¹⁷⁸ This junta drafted a lengthy declaration in the name of Philip IV, the *Declaracion de don Felipe Cuarto, Rey de las Españas, al rompimiento de la guerra que sin denunciarla ha hecho Luys, Rey de Francia*.¹⁷⁹ It was, however, not put into print. By the time the junta was ready – sometime by the end of July 1635 –, the French had

¹⁷⁶ On Roose, see RENÉ DEPLANCHE, UN LÉGISTE ANVEROIS AU SERVICE DE L'ESPAGNE : PIERRE ROOSE, CHEF-PRÉSIDENT DU CONSEIL PRIVÉ DES PAYS-BAS, 1586-1673 (1945).

¹⁷⁷ He was also the author of the MANIFIESTO DE ESPAÑA Y FRANCIA (before the war of 1635), to be found in MADRID, *Biblioteca Nacional*, Ms. 2.366, 218-345, in which he defended the Spanish view on Europe. JOVER, *supra* note 15, at 166-90.

¹⁷⁸ ELLIOTT, *supra* note 45, at 489-90.

¹⁷⁹ Here the manuscript from MADRID, *National Library*, Ms. 290, 103, was used.

already issued both the *Declaration* and the *Manifeste*. But in the months to come, many polemicists on the Spanish side, some of them high officials in the service of the King, would take up their pens and write in defense of their sovereign.¹⁸⁰ Because the *Declaracion de don Felipe Cuarto* was not issued, it will be treated fairly briefly below.

The Declaration of the Cardinal-Infante

The Cardinal-Infante's *Declaration* opened by referring to the Peace of Vervins of May 2, 1598, the most recent peace treaty between France and Spain.¹⁸¹ The Cardinal-Infante's grandfather, Philip II (1558-1598), had decided upon peace at the exhortation of the Pope, thus ending the misery that the war had brought over Christianity. France had promised that it would strictly abide with this treaty between the two leading Catholic powers. The treaty had invoked the wrath of God on whom would first break it.¹⁸² As is commonly known, France had never respected the peace but had maintained its old alliances and entered into new ones that were against Spain. It had continued to support the Dutch rebels with men and money and had helped them fight both the faith and Spanish sovereignty. King Philip III as well as the Archdukes Albrecht (1598-1621) and Isabella (1598-1633) had always preferred to ignore these offenses. They had placed the common peace above their own interests, even when King Henry IV of France started to stir up trouble for the whole of Europe. As it befitted the holder of the title of 'Catholic King', Philip III

¹⁸⁰ JOVER, *supra* note 15, at 263-387

¹⁸¹ Published in DU MONT, *supra* note 15, vol. 5-1, 561.

¹⁸² There was no such invocation in the treaty texts or the ratifications by Philip II or Henry IV.

continued to reward evil with goodness in assisting the current French King Louis XIII against the discontent of his own subjects. But princes could not continue to condone the provocations of their neighbors if these harmed their own subjects.

With regret, the Cardinal-Infante was obliged to state that that point had been reached. He did this in the name of the King, who himself was still withholding his resentment because of the generosity which characterized a great prince. But it would be weakness rather than discretion to remain passive in the face of the acts of some of those close to the French King, who had now finally succeeded in persuading him to direct all his forces against the House of Austria. These people wanted to enjoy peace within France, while violating it outside their borders. The *Declaration* listed a series of events leading up to the ongoing invasion. The French were at the root of many troubles experienced by the King of Spain, going from war to rebellion. They had tried to steal away some towns by way of treason,¹⁸³ had imposed new taxes and duties contrary to the Peace of Vervins,¹⁸⁴ had violated the immunity of the Spanish King's couriers traveling through France, and had invaded Luxemburg, Artois, and the County of Burgundy.

The alliance the French and the Dutch rebels had recently signed would convince everybody not to put any trust in them.¹⁸⁵ In it, 'they have already carved up the loyal provinces of the Netherlands, even before they have occupied them.'¹⁸⁶ Meanwhile, the French and the

¹⁸³ Here, reference is made to a plot of 1632-1633, when some noblemen and military commanders from the Spanish Netherlands conspired to turn over some fortresses to the French; Janssens, *supra* note 175, at 110-18.

¹⁸⁴ Art. 3 of the Treaty stipulated that the subjects and merchants of the other signatory would only be reasonably taxed; DU MONT, *supra* note 15, vol. 5-1, 561.

¹⁸⁵ This is, of course, the Alliance Treaty of February 8, 1635.

¹⁸⁶ '... ayans partagé les Provinces obeissantes auparavant de les avoir occupées,' DECLARATION, 4.

Dutch had committed such atrocities against the town of Tienen, that posterity would have a hard time believing it.

The treachery of the French King was clear from the way the war had started. He had needed to declare war openly to convince his rebel allies to start the campaign. But he had not dared to risk his own subjects before he was assured about the success of his evil designs. Therefore, he had the invading troops march under the colors of the Prince of Orange.¹⁸⁷ Only after they had met with some success did he change his course and use ‘the pretext of demanding the Archbishop of Trier.’¹⁸⁸

In any case, the French King should not have acted before the Cardinal-Infante had received an answer from the Emperor and the King of Spain to his questions in the matter of the Elector of Trier. But against the law and the usages of war,¹⁸⁹ Louis XIII had declared war using the case of Trier as a pretext. That this was nothing but a pretext was proven by the Franco-Dutch Treaty and the fact that the French King had already commenced hostilities before ‘a certain person’ had come to Brussels. He came ‘so it was claimed, in the capacity of herald, though he was not as he did not carry the essential signs nor did he behave like a herald, nor did he even produce a commission or credentials.’¹⁹⁰

At first, the Cardinal-Infante had been willing to receive this man as he had wanted to take every chance to show the justice of his actions to the world. But he had decided against it because he did not want to create a precedent and did not want to lose respect. Reference was

¹⁸⁷ Frederick Henry, Stadtholder of Holland and captain-general of the Dutch army (1625-1647).

¹⁸⁸ ‘... il prit le le pretexte de demander l’Archevesque de Treves,’ DECLARATION, 5.

¹⁸⁹ ‘... contre tout droict & usages de guerre,’ DECLARATION, 5.

¹⁹⁰ ‘... (comme l’on pretend) en qualité d’herault, sans l’estre, ny en porter les marques essentielles, ny se conduire comme tel, & moins en exhiber aucune commission, ou lettre de creance,’ DECLARATION, 5.

made to an incident involving the King of England, who had been duped into believing someone was a herald of the King of France.¹⁹¹ France had abused the office of heraldry in the past and must now suffer that it had lost its credibility. The sending of the herald was neither lawful nor civil, as the Spanish King could hardly have received the Cardinal-Infante's messages concerning Trier in time nor had received word from his brother. The Elector of Trier was, furthermore, not subject to the King of France or to the laws of his realm and was not openly under his protection. The Elector had been thanking God and the heavens ever since he had been liberated from the bad treatment and insolences he had suffered at the hands of the French.¹⁹² In the meantime, the King of Spain, who was protector of the town of Trier,¹⁹³ and the Emperor who judged in such cases, were seized by the matter. Any measures concerning the person of the Elector were sanctioned by the Emperor. Therefore, it was no wonder that no other Christian prince had taken on his cause. It was hard to understand that the French King had taken up arms to fight for a subject of the Empire against his own Emperor and against the council of the judges the Elector himself recognized as being competent. For this feat, the French King argued that he

¹⁹¹ During the sixteenth century, the stratagem to dress up somebody else as a herald and have him declare war had been used. It was considered the ultimate insult to the receiving prince; STEINLEIN, *supra* note 13, at 23-4.

¹⁹² It was true that the Elector of Trier had frequently complained in 1633 about the behavior of the French garrisons within his territories; WEBER, *supra* note 49, at 238-59. That the Elector considered his abduction to be a liberation was somewhat more than a euphemism, and the Cardinal-Infante knew this. In a letter to Philip IV of May 15, 1635 the Cardinal-Infante had reported on his visit to the Elector. He explained that he had tried to persuade the Elector that he should not consider himself a prisoner. The Cardinal-Infante somewhat weakly stated that the Elector had seemed to accept that; published in CORRESPONDANCE DE LA COUR D'ESPAGNE, *supra* note 69, vol. 3, 56.

¹⁹³ During the early 1630s, the town of Trier had repeatedly called upon the Spanish to help them in their conflict with the Elector. They had invited a Spanish garrison into the town, which was driven out by the French in 1632. WEBER, *supra* note 49, at 227.

fought in defense of an ally. But this alliance, which hardly deserved that name, was not just and it postdated the Peace of Vervins and the double marriages of 1615, which were instrumental in safeguarding peace within Christianity.

The Cardinal-Infante had not broken the peace nor had he done anything that would allow the French King to start a war. Making use of the full powers he had received to that extent from the King of Spain, he declared in the name of the King that the French King, his lands, subjects, vassals, and adherents were enemies of the King and crown of Spain. He declared open war by sea and land against them, in their capacity of violators of the law of nations, supporters of heretics, and disturbers of the Catholic religion as well as of the peace in the Spanish Netherlands. He ordered all the subjects of the King to open hostilities against the King of France and his lands, subjects, vassals, and adherents and prohibited all communications, commerce, and agreements. It was also forbidden to pay any taxes or duties, this all under the penalty of death. The *Declaration* revoked all passports and safe passages for the French and their adherents. Moreover, all French found within the Spanish lands would be arrested and their properties and assets seized.

The Declaracion of Philip IV

The *Declaracion*, prepared for Philip IV, commenced by laying the blame for the rivalry between the crowns of France and Spain with the French. Their envy, their desire to change the world and to destroy the House of Austria, which was the bulwark of the Catholic faith and had assisted the French in so many ways, was at the root of all troubles. Since long, France was

doing everything in its power to harm Spain, even while it was fighting the ‘Saracenes.’¹⁹⁴ Its hatred for the House of Austria was such that France had even committed the ‘incredible impiety’ of cooperating with the Turks, ‘the first enemy of the faith.’¹⁹⁵ Just like the *Declaration* of the Cardinal-Infante, the Madrid text referred to the many infringements of the French on the Peace of Vervins. Apart from the French support to the Dutch rebels, cooperation with the Turks and French incursions into Italy were mentioned. A long list of all the offenses the French had committed against the Spanish ensued. The text named support to the Dutch rebels, alliances with German Protestant princes aimed at suppressing the Catholic princes of the Empire,¹⁹⁶ the French occupation of Lorraine, Alsace (1631-1634) and the Valtelline (1635), attacks on Susa (1629), Pinerolo (1631), Cologne, and Trier (1633), attempts against Spanish fortresses (1633), the open rupture by the invasion of the Spanish Netherlands and the ending of all commerce (1635), the arrest of Spanish subjects and the violation of their passports and countless infringements of the Treaties of Monzon (1626), Regensburg (1630),¹⁹⁷ Cherasco (1631), as well as Vervins (1598). All these actions had caused ‘great harm to the *respublica christiana*’.¹⁹⁸ The Spanish King wanted to force the French to abide by the treaties and to restitute all they had unjustly taken. He also demanded them to stop their support for the Protestant heretics.

The King of Spain had therefore decided to take up arms and reduce the French to what was ‘just and honest.’ He did it for the ‘universal good of the whole of Europe’ and in assistance

¹⁹⁴ ‘... los Sarracenos,’ DECLARACION, 104.

¹⁹⁵ ‘... ympiedad incredible’ and ‘enemigo mayor de la fee,’ DECLARACION, 104.

¹⁹⁶ Not only those of the Thirty Years’ War, but also those of the sixteenth century commencing with the Treaty of Chambord of October 5, 1551, DU MONT, *supra* note 15, vol. 4-3, 31.

¹⁹⁷ Which Louis XIII refused to ratify.

¹⁹⁸ ‘... tan gran dano de la republica Christiana,’ DECLARACION, 106.

of the vassals of both crowns, so that they all would enjoy peace and tranquility in the future.¹⁹⁹

The war was first and foremost a war in defense of the faith, and the Catholic King Philip IV waged it rather in his capacity of ‘Catholic’ than of ‘King’. He could not condone that the enemy would do so much damage to the faith and the entire Christian republic. He would enforce divine justice upon them.

Peace was said to be the only licit goal for war, but that did not mean that injustices should be suffered. The offenses committed by the French against the Church, the Crown, and the House of Austria were of such a magnitude that, since open war had broken out, the King could not accept them any longer without causing irreparable harm to the majesty and reputation of the Spanish arms. The French had, so it was alleged, waged a terrible war upon Spain in the name of peace. To achieve this, the French had bought with money what they refrained from buying through the use of arms. While their allies worked for them, they reaped the fruits of peace at home. Philip IV’s magnanimity made this possible.

Spain had always desired and worked for peace. It had refrained from war after the Peace of Regensburg and the Peace of Cherasco had been violated by the French. Nor had Spain taken up arms when the French plotted the Swedish invasion of Germany. They had assisted the

¹⁹⁹ ‘Y para conseguir estos tan grandes fines que han de redundar en mayor gloria de Dios, conseguir tropheos gloriosos de nuestros enemigos que, cediendo en bien universal de toda Europa, e alivio de los vasallos de ambas Coronas que puedan goçar de Paz, reposso y tranquilidad, sin desistir de sus artes y commercios en que la Provincias de Italia son tambien ynteressadas ; y finalmente para librarles de el peligro de las armas enemigas y del contajio de la heregia, hemos resuelto con celo ardiente, atentos al exemplo de nuestros ascendientes gloriosos, emplear nuestras armas siempre valerosa presentandonos en la campaña, con exercito tan numeroso que se digno de nuestra grandeza, poderosso para domar los franceses gente mas jactanciosa que vellicosa, y reducirlos a lo justo y onesto que es lo que siempre hemos deseado y desearemos, haciendo el ultimo esfuerzo,’ DECLARACION, 106.

French in the siege of La Rochelle, wanting to help the French King in his fight against the Huguenots.²⁰⁰ But the French had committed one offense after another, attacking the Spanish interests in Italy and the Netherlands. It was, worst of all, their support to the Dutch rebels that served the cause of heresy most and did so much damage to the faith. Their help to the Dutch allowed these to continue their attacks on the Spanish and Portuguese possessions in the Indies, including assaults on the Catholic missionaries there. This was all made possible through the endeavors of one who claimed the title of Most Christian King.

The French aspired to nothing less than usurpation of the Empire and the destruction of the House of Austria. For this purpose, they had constantly stirred up wars in the Empire, the Netherlands, Hungary, Italy, Spain, Asia, and America and had sent army upon army against the Catholic powers of Europe. They had cooperated with the Turks (since 1536), the rebels from Bohemia and the Palatinate (1618), the Hungarian rebel Bethlen Gabor (1580-1629, from 1618), the Swedes, the imperial general Albrecht von Wallenstein (1583-1634) during his conspiracy against the Emperor (1633-1634),²⁰¹ the Grisons, and close to all heretic estates of the Empire. They subsidized the Dutch and the Palatinate Elector.²⁰² They had tried to dissuade Catholic Bavaria from its alliance with the Emperor. The French alliances with the Swedes²⁰³ and the

²⁰⁰ The Spanish had indeed sent, somewhat belatedly, a fleet to assist the French and ward off the English fleet. Richelieu had refused to acknowledge the help and had thus insulted the Spanish by doing so (1627). ELLIOTT, *supra* note 45, at 328-9.

²⁰¹ At the end of his life, Wallenstein had been pursuing an independent diplomacy, which Spain found harmful to itself. In 1634, he was murdered by order of Emperor Ferdinand II. 2 PARKER, *supra* note 42, at 124-5.

²⁰² Frederick V of the Palatinate (1596-1632), who had been elected King of Bohemia by the rebels of 1618 and had lost his lands in the first years of the Thirty Years' War.

²⁰³ The Treaty of Bärwalde of January 13, 1631 is mentioned, DU MONT, *supra* note 15, vol. 6-1, 1.

German Protestants²⁰⁴ were clearly contrary to the Treaty of Regensburg, which prohibited such a thing.²⁰⁵ By allying themselves to the heretics, the French had become little better than heretics themselves. But God had already punished them for their insolence by setting loose both the Huguenots and members of the royal house upon the French government.

The French had tried to cover up their misdeeds by claiming that they fought for the liberation of their neighbors. They used this scam to support those who rebelled against their rightful rulers and suzerains. Their true ambition was to tear down the greatness of Spain and they acted ‘against justice, peace of the laws,’ which they should respect by the commands of God and nature.²⁰⁶

The French had been disturbing the peace of Europe for a long time now. In those circumstances, it would be better to have an open war than such a peace, both for the stability of the realm and for the conservation of the faith. Spain must therefore take up arms against the coalition of France, Sweden, the Protestant League of Heilbronn, and the Republic, whose sole goal was the destruction of the true religion.

Spain for its part had never made alliances with heretics. It had made peace, or accepted a truce if reason and the good of the Church had dictated such a course of action. This had happened because Spain had been exhausted by the continuous attacks of its enemies.

The authors of the *Declaracion* returned to the many misdeeds of the French of the 1620s and the 1630s. Again their attacks on the Valtelline (1625) and Mantua (1629), their infringements of the Peace of Regensburg (1630) and the occupation of Lorraine (1631-1634)

²⁰⁴ Reference is made here to the Treaty of Frankfurt with the Protestant League of Heilbronn of September 20, 1634; DU MONT, *supra* note 15, vol. 6-1, 78.

²⁰⁵ Treaty of Regensburg of October 13, 1630, Art. 1; DU MONT, *supra* note 15, vol. 5-2, 615, 616.

²⁰⁶ ‘... contra la Iusticia, la Paz y las Leyes,’ DECLARACION, 124.

were reviewed. This time, the series of violations of the peace was crowned with their violent and brutal occupation of the Electorate of Trier (1632). The French were accused of having taken the Elector captive in his own lands. Then, when the Spanish took the legitimate action to free him from their oppression in the name of supreme justice, they had invoked this as a pretext and invaded Spanish territory ‘contrary to all law.’²⁰⁷ The Spanish King, however, was the hereditary protector of the Electorate of Trier in his capacity of Duke of Luxemburg. This had been confirmed by two electors acting as commissaries of the Empire. So, the Spanish King had every right to intervene and drive out the French in the name of the Empire. The French had, after all, allowed heretics into these Catholic lands, molested the burghers of the town of Trier, and made infringements on the sovereign rights of the Emperor. The Elector had been brought into Luxemburg and the Spanish Netherlands and had expressed his thanks to the Cardinal-Infante for his liberation from French oppression. The dispute fell under the jurisdiction of the Emperor and the imperial courts.

The declaration of war to the Cardinal-Infante was invalid because it had been addressed to the captain-general of the King of Spain, and not to himself. The Romans already had once declared war on an eastern king because he had negotiated with a general, and not with the Senate. Moreover, France had already started its invasion before it had declared war. It had also brought a Protestant army into the Empire²⁰⁸ and tried to force Bavaria to withdraw from the war. At this point, the *Declaracion* retook the long list of French offenses extensively. This time it ended with the invasion of the Spanish Netherlands and the sacking of Tienen on June 9, 1635. The *Declaracion* mentioned the liberation of Leuven by the Cardinal-Infante, which allows us to

²⁰⁷ ‘... contra todo derecho,’ DECLARACION, 129.

²⁰⁸ The army of the Duke of Rohan in Württemberg before he diverted to the Valtelline.

date the text at least two to three weeks after July 3, 1635. The attempts of the French and the Dutch rebels to have Spain's loyal subjects of the Netherlands rise against their King, misfired.

After it had tried to stir up all Christian princes as well as the infidels against the House of Austria and had failed to bring it down, France had seen no alternative but to take up arms itself. Hiding behind their so-called desire for universal peace and the unity of Christianity, the French strove to bring down any prince who was greater than themselves. But in fact, France itself aspired to universal domination and wanted to bring all princes under its sway. Therefore, it wanted to keep the Empire divided so that it could ruin all.

The march of heresy, the oppression of the true faith, and the frequent attacks on Spain's lands and allies had now led to war. Spain had always worked for peace and done everything in its power to prevent such a rupture. It still desired a universal peace. Spain 'had made clear to the world that its war was purely defensive, even if the causes to make it offensive had been exorbitant and implacable to the extent that Spain could very well retaliate for the offenses committed against its allies.'²⁰⁹ So now, for the natural duty of defense of his realms, and on behalf of the Church, which the King of Spain protected by arms in its hour of need against the attacks of France and its sects, and for the sake of the King's allies and family, Philip IV would force King Louis of France to stop his injustices, force him to abide to his treaty obligations with the Emperor and with Spain, to restitute the fortresses he had taken from the Emperor and the Duke of Lorraine, the House of Austria and its allies and to force upon him a firm and stable

²⁰⁹ '... haciendo manifiesto al mundo como nuestra guerra es defensiva solo, aunque han sido tan exorbitantes las causas para hacerla ofensiva e implacable y retariarle los estragos que nos ha causado y a nuestros amigos y deudos, y para la defensa natural que devemos a nuestros Reynos y estados,' DECLARACION, 140.

peace. The King promised that he had no intention to occupy any part of France by force of arms to which he held no just claim.

The text ended with an exhortation to all princes and states, that could not but acknowledge the justice of the King's defensive cause to join him. It was God's cause also because it was a war in defense of the Church. However, its purpose was surely not to convert the heretics by force of arms. All princes should help Spain to ward off France's tyranny from their own doorstep. The war had to be waged for the faith of Austria, the justice of Spain, and for public peace. After all, the King was only king in the name of God.

VI. JUST AND LEGAL WAR IN 1635

The legality of the war

By 1635, the distinction between the legality and the justice of war was well established in doctrine, even if the term 'legality' had not been coined yet. Ayala, Gentilis as well as Grotius demanded that for a war to be legal, and thus for the *ius in bello* to apply, it had to be waged between sovereigns and had to be formally declared.

It was not disputed in the declarations that warfare was the privilege of sovereigns; the Kings of both Spain and France were certainly that. Also, neither would take offense at the idea that war was the privilege of the highest authority within a realm. Spanish authors had been arguing for the better part of a century that the war against the Dutch Republic was not a war but a punitive action against rebels. Just six years earlier, with the siege of La Rochelle, Louis XIII

and Richelieu had completed their campaign to break the military and diplomatic power of the Huguenots and some major French magnates.²¹⁰

Though the terms were not used, the drafters of the four declarations were concerned about showing that the war was ‘legal’ or ‘solemn’ on their part.²¹¹ They accepted that a war had to be declared for the state of war to begin. The validity of the formal declaration of May 19, 1635 constituted a point of concern to the authors of all four texts.

The declaration of war by herald had already fallen into disuse by 1635. As it was pointed out above, the reasons for Louis XIII and Richelieu to take this strange course were political. After having been involved in a ‘war by proxy’ for years and having withstood the pressure from their allies to openly break with Spain, they wanted to send a clear signal that they were doing so now. The message was first and foremost directed at the Dutch who were expected to start their invasion of the Spanish Netherlands at the same time the French did. Even after the declaration was made, doubts persisted whether the French were serious, as it appears from a letter Grotius wrote from France on May 28, 1635.²¹² An additional reason for sending a herald may have been that the French could thus make the most of their indignation at the *casus belli* they invoked.

²¹⁰ In the seventeenth century, the right to wage war was not limited to ‘sovereigns’ as we would understand that concept now. There were some semi-sovereign princes and republics, who were not under any real and effective higher authority as the princes and states of the Kingdom of Italy, fief of the Emperor, whose *ius belli* went undisputed. The right of the estates of the Holy Roman Empire to wage war and make treaties was disputed by the belligerents of the Thirty Years’ War.

²¹¹ The authors of the Cardinal-Infante’s declaration used the term ‘law and usages of war’ once in connection to the invalidity of the French formal declaration; *supra* note 189.

²¹² Letter of Grotius to Nicholas Reigerberch, May 28, 1635, *supra* note 9, vol. 5, 511, 513.

The fact that the French addressed the declaration of war to the Cardinal-Infante and not to the King of Spain was probably dictated by the *casus belli* and by the fact that the attack would begin in the Spanish Netherlands. By choosing this irregular course, they left some room for doubt whether they were really at war with the Spanish monarchy or were only taking limited action to liberate the Elector from the clutches of the Cardinal-Infante. There is no indication, however, that this was intended. What may have been intended is that France wanted to keep the option open that it was only fighting to aid an old ally, the Dutch, and wanted to limit its actions to the Netherlands.

Both the Cardinal-Infante's and Philip IV's declarations disputed the validity of the formal declaration of May 19, 1635. The Cardinal-Infante's ministers stated that the declaration had not been presented in due form. First, they argued that the herald had not worn the proper insignia of his office. This was, if Gratiollet is to be believed, a lie. According to him, the Spanish had tried to convince him from the very start to lay down his insignia and thus jeopardize his position. He claimed not to have given in to that. Second, they wrote that the so-called herald had not offered his credentials. The truth was that the Cardinal-Infante's officials had gone out of their way not to accept anything. From the very beginning, they had been scheming – knowing what the French emissary had come to do – to invalidate his actions. The Spanish now laid the blame on the French King, who they said could not be trusted, because in the past a Frenchman had once abused the office of herald. By adding this far-fetched argument, they actually weakened their position as to the invalidity of the declaration.

Philip IV's text took another line of attack. Here it was argued that the declaration was void because it had not been addressed to the sovereign himself, but to one of his generals.²¹³ It was said that the old Roman law demanded that a declaration was made to the Senate. It was true that in the Roman Republic, all foreign emissaries had to present their credentials to the proper magistrates and address the Senate, but power could be delegated to generals in the field.²¹⁴ On the other hand, it was disputed whether the Romans could declare war at the first outpost of the enemy or whether they should address the declaration to the sovereign.²¹⁵

The authors of the Spanish King's declaration did not take the point any further. But was their position sustainable under the existing law of nations? Was there any support to be found in contemporary doctrine for the Spanish contention that only a declaration of war addressed to a sovereign was valid? Of the great writers on the law of nations of the sixteenth and seventeenth centuries, only the Italian jurist Pierino Belli (1502-1575) and the German jurist Johann Wolfgang Textor took a stand in this matter. Belli, who wrote in 1563, asserted that one who wanted to declare war on the subordinate of another should first seek redress from the overlord of his enemy.²¹⁶ From there, one might argue that *a fortiori* a war could only be declared on a

²¹³ The point was also raised by Guillén de la Carrera, one of the authors of the DECLARACION of Philips IV, in the treatise he wrote on the war of 1635; ALONSO GUILLÉN DE LA CARRERA, MANIFIESTO DE ESPAÑA Y FRANCIA 331, MADRID, *National Library* Ms. 2366, 218. See JOVER, *supra* note 15, at 259-60.

²¹⁴ DAVID J. BEDERMAN, INTERNATIONAL LAW IN ANTIQUITY 105 (2001); COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME, vol. 1, 309-11 (1911). See also GROTIUS, *supra* note 99, 1.3.4.2.

²¹⁵ Ayala thought it could be addressed to any armed body of troops; Gentilis just mentioned that it was disputed whether a declaration to an outpost sufficed, with reference to Varro; AYALA, *supra* note 100, 1.1.5; GENTILIS, *supra* note 108, 2.1.210; see VARRO 5.86.

²¹⁶ PIERINO BELLI, DE RE MILITARI ET BELLO TRACTATUS 1.5.6 (Herbert C. Nutting transl., Carnegie 1936) (1563).

sovereign by addressing the sovereign himself. Textor, in his 1680 *Synopsis iuris gentium*, stated it to be essential that the declaration of war should come to the knowledge of the head of State himself, or that it should be probable that the declaration would reach him. He accepted that, when there was no opportunity to deliver the declaration to the sovereign, it was issued to the nearest prefect or governor. Of course, this was cutting it both ways. Textor seemed to imply that as a rule the declaration should be issued to the sovereign, and that only if this was not possible, one could deflect from that rule. Moreover, Textor added that the ‘defendant’ should be allowed some interval to take note of the declaration.²¹⁷ This seemed logical because the opposing party had to make it probable that the sovereign of his enemy would come to know of the declaration of war. Textor’s opinion at least makes it clear that the point the Spanish raised in 1635 should not have been considered moot all too readily.

Moreover, doctrine provided the Spanish with another, more indirect argument for their allegation. As it was widely accepted in contemporary doctrine, the declaration of war was a prerogative of the sovereign power within a realm. By consequence, there was logic in the argument that the same went for the right to accept a declaration and thus accept the state of war for one’s realm. Pierino Belli had sustained that a declaration of war against a sovereign extended to his associates and helpers.²¹⁸ One could argue *a contrario* that the opposite was not true. Doctrine was not exactly clear on the matter. In any case, the authority to declare war and accept a declaration of war could be delegated.²¹⁹

²¹⁷ TEXTOR, *supra* note 13, 17.50-2.

²¹⁸ BELLI, *supra* note 216, 10.2.3 ; Grotius made a similar point, GROTIUS, *supra* note 99, 3.3.9.

²¹⁹ GROTIUS, *supra* note 99, 3.3.1.2.

If one accepts the Spanish argument that only a sovereign can accept a declaration of war, the whole matter turns on the question whether the Cardinal-Infante had received a mandate from his elder brother to declare war by May 19. If he had the power to declare war by that day, it would become hard to argue that he had no power to accept a declaration. In the patent letters that accompanied his nomination to governor-general of the Netherlands, Philip IV had granted the Cardinal-Infante full powers to exercise royal authority in the Netherlands. The right to wage war, or make treaties, for that matter was not expressly mentioned, but it was not excluded either.²²⁰ But in his secret instructions of October 19, 1632, most of these powers had been limited and made conditional upon express permission of the King to take certain decisions. Accession to a treaty or the decision to go to war were among those.²²¹ By May 19, 1635, the Cardinal-Infante had received no express permission to declare war upon France. As all this was common practice in Spanish politics; France would have a hard case to argue that it did not know about these limitations. In the case of peace negotiations, the Cardinal-Infante would certainly have to hand over full-powers for that particular negotiation before any power would agree to recognize his authority.²²² However, the Cardinal-Infante did declare war on France in the name of his brother by means of his declaration of June 24, 1635. He claimed to do so on the basis of

²²⁰ *Lettres patentes du 7 septembre 1633*, BRUSSELS, *General Royal Archive, Papiers d'Etat et de l'Audience* No. 1619.

²²¹ The Cardinal-Infante did, however, not inform the French herald of that problem as he refused even to receive him. For the instruction, see SIMANCAS, *Archivo General, Secretarías Provinciales* No. 2569, 35. René Vermeir (University of Ghent) was so kind as to provide me with his transcription of this manuscript.

²²² For instance, in April 1635, the Cardinal-Infante had received full powers from his brother to represent Spain if talks about a general peace were to be held; Letter of the Cardinal-Infante to Philip IV, April 30, 1635, in BRUSSELS, *General Royal Archive, Secrétairerie d'Etat et de Guerre* No. 212, 465.

the power he had received from his brother.²²³ It is not clear whether this was a new and express authorization, received after May 19, or not. The absence of an express authorization in the archives suggests the latter. If this is the case, the Cardinal-Infante's declaration debilitates the whole Spanish case. One could argue that by this time the Spanish King had decided on all-out war against France and that the Cardinal-Infante acted under implicit permission of the King. The Cardinal-Infante for his part claimed to have received powers to declare war. But all this does little to take away the impression that the whole discussion was far fetched and legalistic to the point of becoming unrealistic.

Both the Spanish texts also pointed out that the declaration was made after the invasion of Spanish territory had begun. This was clearly in contravention to established doctrine. Where Grotius conceded that hostilities could commence the moment the war was declared, Pierino Belli and Gentilis demanded that a certain interval should be respected.²²⁴ The Brussels declaration made the most of this to show off the French King's duplicity. First, the French invaded the Spanish Netherlands in such a way that they could always claim that the French troops were just auxiliaries sent to their allies in execution of certain treaty obligations.²²⁵ After his victory at Les Avins, King Louis XIII invoked the captivity of the Elector of Trier as a pretext and then declared war.²²⁶ These accusations only partially correspond with the facts. Gratiollet was in Brussels after the invasion had begun but before the Battle of Les Avins took

²²³ DECLARATION, 7.

²²⁴ BELLII, *supra* note 216, 2.8.8; GENTILIS, *supra* note 108, 2.1.217-218, and GROTIUS, *supra* note 99, 3.3.13.

²²⁵ The Alliance Treaty of April 15, 1634 between France and the Republic stipulated that France would provide a regiment of infantry and a company of cavalry to the Dutch army; Art. 5, DU MONT, *supra* note 15, vol. 6-1, 68.

²²⁶ Juan Antonio Vincart, an official of the Spanish Secretariat for State and War in Brussels, repeated the same argument in his history of the 1635 campaign; HUISMAN, DHONDT AND VAN MEERBEECK, *supra* note 5, at 123.

place. But both the Cardinal-Infante's and the King Philip's ministers considered the anteriority of the invasion to the declaration proof of the French King's duplicity and of the invalidity of the declaration of war. Doctrine indeed stated that one could not declare war after one had started it.²²⁷

From all this it can be deduced that the belligerents of 1635 thought an express declaration of war was necessary for the state of war to begin. But to conclude that it should be a declaration by herald as was done by the French in 1635 would be stretching it too far. By 1635, this form had fallen into disuse; the declaration by herald of May 19 of that year was highly exceptional. However, some form of declaration seemed to be in order. The most common form during the seventeenth century consisted in a declaration by a residing diplomat and an official publication of a declaration like that of Louis XIII of June 6, 1635 and that of the Cardinal-Infante of June 24, 1635. In addition to offering justifications for the war, these declarations also announced that a state of war existed. Like the declarations of 1635, these texts often comprised the measures to be taken against enemy subjects and property as well as a prohibition of all

²²⁷ Richard Stradling suggested that the fact that France had first declared war after it had opened the hostilities justified the confiscation of all French assets on Spanish territory; Stradling, *supra* note 58, at 93. This seems to imply that France, because of its defective declaration, could not benefit from the protection of the *ius in bello*. The argument is void because the *ius in bello* anyhow allowed the confiscation of all enemy property, that is if a prior treaty had not excluded this; ANDREAS F. SONNTAG, DIE BEHANDLUNG FEINDLICHEN PRIVATEIGENTUMS BEI AUSBRUCH DES KRIEGES INNERHALB DER EIGENEN GRENZEN IN DER ZEIT VON 1200 BIS 1800. EIN BEITRAG ZUR VÖLKERRECHTSGESCHICHTE 45-6 (1990). See AYALA, *supra* note 100, 1.5.1; BELLI, *supra* note 216, 2.12.1; CORNELIUS VAN BYNKERSHOEK, QUAESTIONUM JURIS PUBLICI LIBRI DUO 1.7.51-52 (Tenny Frank, transl., Carnegie 1930) (1737); GENTILIS, *supra* note 108, 3.7; GROTIUS, *supra* note 99, 3.6.1-2. In any case, the French King Louis XIII had been preparing for a similar confiscation of Spanish property even before May 19, 1635; *Lettre du Roy au Parlement, pour arrester les biens des Espagnols*, May 16, 1635, in 67 GAZETTE DE FRANCE 275 (1635).

communications and commerce with the enemy. But it was not implied in 1635, nor does it appear from the ensuing war, that the nullity of a declaration prevented the laws of war to apply and supersede the laws of peace, as doctrine would have it. In reality, there were no sanctions attached to a faulty declaration of war. Anyhow, in the 1635 case the question was of little practical significance as the French King issued a second declaration on June 6 and the Cardinal-Infante reciprocated with a Spanish declaration on June 24. After that, no party could – or ever did – dispute that there was a state of war between France and Spain. The Spanish rejection of the validity of the declaration of May 19, 1635 served a political, and not a juridical purpose. It was yet another way of showing the world the falseness of the French.

The justice of the war

Arguing the justice – or in modern terms, the legitimacy – of the war was, however, a far greater concern to the parties. For political reasons, both belligerents wanted to convince their allies and subjects of the justice of the war. Another possible purpose of the declarations, which the Spanish certainly contemplated,²²⁸ was to convince allies and subjects of the enemy of the injustice of the war fought by their sovereign or ally. But while the belligerent's purposes were political, they argued their case in terms of the traditional rules of the just war and the *ius ad bellum*. They frequently used the terms 'just,' 'justice,' 'unjust,' 'injustice,' and, less frequently, 'righteous.' They did not distinguish between moral and legal arguments, nor did they between natural or positive law, as Grotius did. These dimensions all remained inextricably intertwined

²²⁸ ELLIOTT, *supra* note 45, at 489.

with one another. Therefore, it would be an anachronism to ban the debate on the justice of the war outside the sphere of law to that of morality or politics. To the authors of the declarations it was, among others, very much a matter of law – just as it was to the great scholars of the era to whom it was a matter of natural *law*, being the highest and most self-imposing form of law.

. How does the state practice as it appears from the declarations relate to Grotius' claim that subjects and allies had the right to abandon their sovereign or ally if they thought his cause unjust? The four texts show that both the belligerents allowed for the possibility that the allies and subjects would abandon their side. The declarations were made to prevent their own allies and subjects from doing so and provoke such behavior with those of the enemy. But what legal rules underlay their practices? From both Kings' declarations, it can be surmised that they accepted that allies and subjects could abandon an unjust cause. But whether the allies and subjects were allowed, as Grotius suggested, to follow their own judgment on the justice of the cause, was a question left unaddressed. Both parties thought their cause manifestly just and were certain their allies and subjects would acknowledge this. It was beyond doubt that the enemy's cause was objectively unjust, so that his allies and subjects had a right, not a duty, to abandon him. Seventeenth-century peace treaty practice furthermore showed that if an ally had invoked the injustice of a war and changed sides, the duped powers would protest but otherwise, even when victorious, never press the point in a peace treaty. Rebellious subjects were another matter. Their right to judge on the actions of their prince was not recognized by their own prince. So in fact, allowing for the difference in scope between a scholar who wants to clarify the law and a king who wants to use it for his own opportunistic ends without caring about it being consequential or clear, Grotius' theory was remarkably in accordance with state practice as far as allies were concerned. Regarding subjects, his claim that they could themselves judge on the

justice of the cause of their prince was treated according to the dictates of expediency. Own subjects could not judge themselves; the enemy's could not but acknowledge that their prince's war was – objectively – unjust.

The casus belli: Self-defense and the defense of allies

According to traditional doctrine, for a war to be just it needed a just cause. Generally speaking, in early-modern as in medieval doctrine, a war could only be just if it constituted a reaction to a prior injustice committed by the enemy.

Both belligerents listed many wrongs they had suffered over an lengthy period of time. But only some of those translated into just causes. The French invoked the attack on Trier, the capture of the Elector of Trier, and the refusal to set him free as their *casus belli*. The war was just on their side because it was declared and fought in defense of an ally who had been unjustly wronged by the Spanish and whom the King of France was obliged to protect by treaty.

First, it must be pointed out that the French did not base their case on the fact that Spanish troops had attacked the French garrison at Trier and thus had opened hostilities between the armies. They did not even refer to that fact. The attack on the French garrison on March 26, 1635 was certainly not the first clash between French and Spanish troops. Two years earlier, the French had driven the Spanish garrison out of that same town. As the leaders of both great powers had been trying to postpone the war for years, they had never before considered such actions a reason for all-out war. As long as such things happened outside the territories of the two Kings themselves, they were content to catalogue them as covert war. In the light of

contemporary doctrine, one could make the argument that these were considered limited actions – of self-defense? –, that did not trigger or constitute actual war. What Louis XIII invoked as the *casus belli* was the attack on the person of his ally. That act in itself was called an infringement of ‘the law of nations’ (*droict des gens*) – the only time that term was used in the French texts – and it was an infringement of the sovereign rights of a prince of the Empire. For this act he claimed the just cause of defending an ally. One could also consider it an act of restitution or revindication of an ally against an injury committed by the enemy.

Second, the Spanish did not dispute the right to wage a defensive war on behalf of an ally. But they did dispute the French interpretation of the facts and circumstances of the case itself. *Primo*, they disputed the capacity of the French King as protector of the Elector. In their view, the Emperor was his first protector. The Spanish King, as Duke of Luxemburg, was the protector of the town of Trier. The French had argued that Louis XIII had had to extend his protection to the Elector because nobody else was capable. The Spanish did not deign to answer. *Secundo*, the Cardinal-Infante’s action was justified because he had liberated the Elector from French oppression. *Tertio*, all disputes concerning the Elector and town of Trier fell under the jurisdiction of the Emperor, on whose behalf the Spanish acted. The French had no right to intervene in the matters of the Empire and the Elector’s position did not concern ‘all princes of Christianity’ as the French said. Here a fundamental difference of opinion existed between the Spanish and the Emperor on one side and the French on the other side about the measure of ‘liberty’ and ‘sovereignty’ of the princes and estates of the Empire in general and, more particularly, their right to make treaties of alliance with foreign powers. That would only be

solved at the Peace Treaties of Westphalia in 1648.²²⁹ In this context, the Cardinal-Infante in his *Declaration* had it stated that all measures taken against the Elector were covered by imperial authority. That was a lie in so far as his abduction on March 26, was concerned. It was only afterwards that the Cardinal-Infante tried to obtain a sanction for his rash deed from the Emperor,²³⁰ and even from the Pope.²³¹ *Quarto*, in as far as the French King had anything to demand, he had to await the reply and the decisions taken by the Emperor and the King of Spain before declaring war. Refraining from doing so was against ‘the law and usages of war.’²³²

By rejecting the French *casus belli*, the Spanish could claim that the French invasion of the Spanish Netherlands was an unjust attack. They thus justified the war as defensive on their part. To the invasion and atrocities against the Netherlands, they could add the operations of Rohan against the Spanish troops in the Valtelline from April 1635 onwards. Under traditional doctrine, the Spanish could have refrained from declaring war themselves and just acted under the umbrella of the natural right of self-defense. Through the declaration by the Cardinal-Infante,

²²⁹ Ernst-Wolfgang Böckenförde, *Der westfälische Frieden und das Bündnisrecht der Reichsstände*, 8 DER STAAT 449 (1969); DEREK CROXTON, PEACEMAKING IN EARLY MODERN EUROPE: CARDINAL MAZARIN AND THE CONGRESS OF WESTPHALIA 1643-1648 (1999); DICKMANN, *supra* note 38, at 124-63. The French pressed for the recognition and extension of this right to most German princes: Ronald G. Asch, *The ius foederis Re-examined: The Peace of Westphalia and the Constitution of the Holy Roman Empire*, in PEACE TREATIES AND INTERNATIONAL LAW IN EUROPEAN HISTORY: FROM THE LATE MIDDLE AGES TO WORLD WAR ONE 319 (Randall Lesaffer ed., 2004).

²³⁰ After his abduction, the Elector was accused of rebellion against the Emperor and the Spanish King, of witchcraft, and of atheism; Letter of Stravius to Barberini, April 7, 1635, *supra* note 2, at 59. In April 1635, the Emperor had it been known that he had not ordered the arrest of the Elector; VERMEIR, *supra* note 68, at 115.

²³¹ Letter of Stravius to Barberini, April 21, 1635, *supra* note 2, at 62. See also Letter of the Cardinal-Infante to Philip IV of April 1, 1635, BRUSSELS, *General Royal Archive, Secrétairerie d’Etat et de Guerre* No. 212, 370-1.

²³² *Supra* note 189.

the Spanish however recognized that a state of war existed between France and Spain. Their actions of self-defense, which allowed only for a limited and proportional military response as long as the attack was going on, was thus turned into a full defensive war, which was unlimited in scope and duration and triggered the application of the laws of war, including the right to make booty and conquests. The Cardinal-Infante's declaration thus reflects the traditional, doctrinal distinction between actions in self-defense – limited in goal and scope – and defensive warfare.

Both parties thus claimed to wage a defensive war: France in defense of or retribution for an ally, Spain in self-defense against an unjust attack. Both argued that the *casus belli* – the capture of the Elector in the French case and the invasion of the Spanish Netherlands in the Spanish case – was just the last in a long series of offenses against themselves and their allies. In this way, both indirectly invoked self-defense and defense of their allies as a more fundamental just cause for the war and accepted such a right to exist.

Preemptive self- defense

The French invoked a second cause for the war. They claimed that the decision to declare war and invade the Spanish Netherlands was taken because they had been informed of the Spanish plans to invade France. The war was an act of – in present-day terminology – preemptive self-defense against an imminent attack. In the thought of Gentilis and Grotius, this fell within the boundaries of defensive war. The French stated that their invading army had intercepted the Spanish army under Thomas of Savoy on its way to the French border. This was,

however, not its destination. The Spanish corps had been on its way to the Rhineland.

Notwithstanding this, it was not unreasonable for the French government to fear a Spanish invasion in the near future. The Spanish fleet in the Mediterranean was being prepared, plans for a multiple attack had been entertained in Spanish government circles, and Spain had been pressuring the Emperor for months to declare war on France. Still, there was little proof that an attack was imminent and the argument had all the likeliness of a pretext.²³³

It is puzzling why Paris invoked this second just cause, which was much shakier than the first. There are two reasons for this move. First, it can be presumed that they felt that the abduction of the Elector of Trier was not enough to justify the decision to start an all-out war with Spain. After all, that offense was surely not much graver than many others they allegedly suffered in the past and thus, even to the French, it might have appeared as something of a pretext. It was not the abduction of the Elector of Trier that made the French plot and prepare a war for 1635, but the Swedish defeat at Nördlingen and the fear of losing their allies. The events of March 26, only decided the timing and justification of the attack. As it was pointed out above, Louis XIII and Richelieu could not allow themselves to abandon an ally when so many of their allies were thinking about doing just that. Also, Trier may have convinced Louis XIII and Richelieu that it was time to attack before they were attacked. If that is true, the French rulers were not less honest or more dishonest in making the case of preemptive action than in invoking

²³³ The Cardinal-Infante himself was also fearful for some time of a French attack on the Spanish Netherlands; Letters from the Cardinal-Infante to the Count of Oñate of April 29, 1635 and May 11, 1635, BRUSSELS, *General Royal Archive, Secrétairerie d'Etat et de Guerre* No. 334, 208 and 233.

the Elector's plight.²³⁴ Second, the French rulers had something more to explain than the decision to declare war on Spain; namely, the invasion and possible future conquest of the Spanish Netherlands. That the war was an action to help and liberate the Elector of Trier, who was held captive in the Netherlands, was surely an argument to invade that part of the Spanish empire. But the fact that the Spanish army was plotting to attack France from these same lands, strengthened the case for first starting the war there. On the other hand, the argument of preemption did not serve to cover the most embarrassing aspect to the whole case for the French. The French-Dutch attack of May 1635 was not the result of a sudden decision, but had been plotted over a long period of time. In fact, it had been agreed on in the Treaty of February 8, 1635. A future occupation or annexation of parts of the Spanish Netherlands could thus hardly be explained away as the outcome of a war forced upon the Spanish by their imminent attack. It had to be justified on its own terms.

Assistance to an oppressed people and to a rebellion

To do this, the French invoked yet another cause. The authors of the *Declaration du Roy* of June 6 stated that the joint Franco-Dutch invasion of the Spanish Netherlands was the first operation of the war because the population there had been suffering for so long under Spanish 'servitude' and the war against Spain.²³⁵ On this point, the *Declaration* closely followed the Franco-Dutch

²³⁴ Current international lawyers might raise the question whether the war was a proportionate reaction to the enemy's offense. At no point in the declarations, the authors of 1635 gave voice to such a concern, but it played an implicit role in relation to the question whether the war was necessary.

²³⁵ DECLARACION, 26.

Alliance of February 8, 1635. It repeated the treaty text by explaining that those parts of the Spanish Netherlands that liberated themselves from the Spanish within two months after the *Declaration* would be recognized as free states and would enjoy the protection of France.

Thus, the just causes of assistance to an oppressed people and of aid to a rebellion – causes that several of the leading authors of the period accepted – were invoked. The fact that the rebellion in the Spanish Netherlands had not started yet could be swept from the table with the argument that the rebellion had been going on for sixty-seven years, ever since the rebellion of the Netherlands from which the Dutch Republic was born began in 1568. This argument lay dormant in the reference to the longevity of the war in the Netherlands.

A necessary war and a just goal

Under the classical just war doctrine of the Late Middle Ages, for a war to be just three conditions had to be met. First, it had to be waged by a sovereign. Second, it had to be fought for a just cause and, third, the belligerent must have a righteous intention and pursue a just goal. The third condition was predominantly of a moral dimension. It had its roots in Christian theology. In the Thomist tradition, it implied that the belligerent had to strive for the common good.²³⁶ The war should not only be about the enforcement of the belligerent's own rights and the pursuance of his own legitimate interest. It had to be waged to attain a just peace whereby everybody received his due. Once the medieval system of the *respublica christiana* had collapsed and the law of nations had started to emancipate from the scholastic context, this third condition became

²³⁶ PHILIPPE CONTAMINE, *WAR IN THE MIDDLE AGES* 286 (1984).

even more unenforceable than before. But the great writers of the law of nations of the sixteenth and early seventeenth centuries stuck to it and restated it in one form or another in their interpretations of the just war. Students of the history of the medieval and modern law of nations have struggled with that third condition and treated it with certain unease. By and large, the juridical mind has experienced a hard time to take it serious. What did a just goal mean in terms of legal rules?

The men who wrote the four declarations of 1635 had no such difficulties or scruples. As was expounded above, the French and the Spanish both invoked just causes. But for them, these did not suffice to justify an all-out war. In the final analysis, it was the just goal combined with the fact that the war was necessary to attain that goal that truly justified it.²³⁷ This was done through drawing the bigger picture against the background of which the *casus belli* had to be seen. The greater parts of the four declarations were not devoted to the *casus belli* that directly caused the war, but to sketching that bigger picture.

The four declarations of 1635 all betray unease with the *casus belli* the belligerents appealed too. The abduction of the Elector of Trier by the Spanish surely presented the French with an argument for just cause, but it did not truly explain why France, after so many years of covert war and so many other offenses, now decided upon an open and all-out war. The claim that France's war against and invasion of the Spanish Netherlands was a defensive reaction against an imminent attack by Spain was not exactly true, but France had some reason to fear an invasion. The aid to an oppressed people may have been good propaganda, but would probable

²³⁷ Piirimäe, in his analysis of the manifesto issued by Gustav Adolph of Sweden at the occasion of his invasion of the Empire (1630), concluded that the manifesto was rather in the theological tradition of the just war doctrine – stressing cause and goal –, than in the modern, humanist tradition; Piirimäe, *supra* note 30.

not withstand the test of reality as an actual uprising in the Spanish Netherlands was highly uncertain. And above all, these arguments did not answer the accusation that the invasion of the Netherlands had been agreed to with the Dutch Republic in an offensive alliance treaty of early February 1635, in which France finally accepted a proposal the Dutch had already made to them in the spring of 1634.²³⁸ When this treaty became known to the Spanish, France felt caught in the light. It needed more than the three just causes mentioned. The same went for what the French and Dutch had in store for the contingency of the local population of the Spanish Netherlands did not rise: the division and annexation of those territories. From Richelieu's advice of June 1634, in which he argued against a joint Franco-Dutch conquest of the Spanish Netherlands, it is known that Richelieu was not keen on making such a move and was concerned with the fact that it would damage France's reputation. France could not invoke any dynastical claims or other legal rights to the Spanish Netherlands, something the Cardinal-Minister had always seen to with great care in sustaining the other territorial claims of his King.²³⁹ The Spanish had a similar problem. Their just cause – self-defense against an unprovoked and unjust French invasion – stood or fell with the acceptance of their interpretation of the jurisdiction of the Emperor and the Spanish King over the Elector of Trier, which was much disputed, and their reading of the events of March 26, 1635, which was neither clear nor credible.

Necessity and expediency provided the answer to these problems. In this, state practice followed doctrine. The great writers of the law of nations from the sixteenth and early seventeenth centuries all had adopted the medieval phraseology on the righteousness of

²³⁸ DE PANGE, *supra* note 73, at 100-13.

²³⁹ CHURCH, *supra* note 49, at 349-72; Fritz Dickmann, *Rechtsgedanke und Machtpolitik bei Richelieu. Studien an neu entdeckten Quellen*, 296 HISTORISCHE ZEITSCHRIFT 265, 295-308 (1963).

intentions and goals. Without a just goal, even a just cause did not suffice for a war to be acceptable. While seemingly sustaining the medieval tradition, the forefathers of the modern law of nations adapted it to the exigencies of the newly emerging sovereign powers. The emancipation of the law of nations from theology, Christian morality, and scholastic authority robbed the moral dimension of much of its real substance. The ‘just goal’ began, very gradually, to mutate from a moral into a political category – a process only completed in the eighteenth century. Arguments of necessity and expediency slipped in. Grotius, for instance, argued that because war was a dangerous undertaking, one should only wage war out of necessity or/and at the most opportune moment.²⁴⁰ War was wise and just if the benefits were likely to be larger than the costs. It should always be the very last resort, and everything that could be done to avoid it had to be tried first.²⁴¹ To Grotius and his predecessors, this line of argument served as the ultimate means of deterring princes from waging war. But in doing so, they, most probably unwillingly, allowed political deliberations to interplay with juridical and moral arguments and gain a foothold in the just war doctrine.

In the four declarations of 1635, the argument of necessity, and of expediency, played a part in two different ways. First, the incessant offenses the enemy had committed against the King, his subjects, allies, and friends over the preceding two decades made the war inevitable. Large tracts of the four treatises were devoted to listing the misdeeds the King had patiently suffered for such a long time. The enemy, so both parties stated, had corrupted the peace and had made it more costly to the King, his subjects, and allies than war itself. The French declaration of

²⁴⁰ GROTIUS, *supra* note 99, 2.24, esp. 2.24.8-9. For Grotius, the necessity actually served as a kind of fourth point of concern, in addition to authority, cause, and goal. But in practice, it was inextricably connected to ‘goal.’

²⁴¹ GROTIUS, *supra* note 99, 3.20.42-43 and 46.

June 6, 1635 put it most eloquently. Why keep a peace that cost 150,000 men to guard it and depleted the French treasury while the Spanish grew stronger?²⁴² War was thus the responsible act of a patient and just king, who could no longer condone that his people and allies suffered from his moral scruples. For current international lawyers, this reasoning would also answer the question of proportionality. The decision to start all-out war was no disproportionate reaction to an isolated offense. But the declarations of 1635 left it understated; neither was the terminology used nor was the question expressly addressed. But it was in accordance with the exhortations of Grotius and the proponents of the classical just war doctrine not to wage war unless there was no alternative left and the good that would come from it would outweigh the evil.²⁴³

Second, the war was necessary to attain the belligerents' just goal: a firm, just, and stable peace. In stating this, the authors of the 1635 declarations replaced themselves in the age-old tradition of the just war. Firm, just, and stable peace was further qualified; it was identified with the achievement of the long-term strategy and goals of the own monarchy. It was *Pax Hispanica* to the Spanish, and *Pax Gallica* to the French.

The French styled themselves as the champions of 'public liberty' and 'public peace' in Europe. The Spanish Kings were accused of aspiring to universal monarchy. French power was the only thing that stood between Spain and the achievement of that goal. Therefore, the enhancement of the power of France and the abasement of Spain became just goals themselves.

Universal monarchy was an old concept that drew on a long tradition, dating back to the Roman Empire, Charlemagne (768-814), and the heyday of the Holy Roman Empire in the eleventh and twelfth centuries. The claims of the Emperor to universal monarchy had been

²⁴² *Supra* note 168.

²⁴³ NEFF, *supra* note 86, at 51.

consistently rejected by the Pope and the kings of Western Europe since the early thirteenth century,²⁴⁴ but the idea had lived on. With the election of Charles V of Habsburg, who was also King of Spain and lord of the Netherlands, to the imperial throne in 1519, the ideal went through a brief revival. But by the 1540s, Charles V's all in all half-hearted attempts to establish his authority over Western Europe had been thwarted by a coalition of France, the German Protestant princes, and the Turks. When he abdicated in 1555/1556, Charles split his empire between his son Philip II, who inherited Spain, the Netherlands, and the Italian possessions of Spain, and his brother Ferdinand I (1530-1564), who continued to rule in Austria, Bohemia, and Hungary, and became Emperor. A lasting result of this episode was that Spain, and not the Holy Roman Empire, became the seat of true 'empire' in the Latin West.²⁴⁵ From the days of Charles V on, France, which had been the greatest contender of Charles V and later of Spain for the leading position in Europe, used the rhetoric of universal monarchy against Spain to establish itself as the champion of liberty.

In the old medieval and sixteenth-century tradition, universal monarchy did not imply the submission annexation of and direct rule over all kingdoms of the Latin West. It was a combination of factual hegemony and legal precedence. In the medieval ideology of empire, the Emperor was the secular head of Christianity, as the Pope was the spiritual leader. He was the first among kings. Since the tenth century, the imperial crown had been linked to the crowns of the Kingdoms of Germany and Italy – that is, Italy north of Rome. The Emperor took precedence

²⁴⁴ As in the Papal bull *Per venerabilem* of 1202.

²⁴⁵ Randall Lesaffer, *Charles V, monarchia universalis, and the Law of Nations (1515-1530)*, 71 *LEGAL HISTORY REVIEW* 79 (2003); HEINRICH LUTZ, *CHRISTIANITAS AFFLICTA. EUROPA, DAS REICH, UND DIE PÄPSTLICHE POLITIK IM NIEDERGANG DER HEGEMONIE KAISER KARLS V 1552-1556* (1964); M.J. RODRÍGUEZ-SALGADO, *THE CHANGING FACE OF EMPIRE: CHARLES V, PHILIP II AND HABSBURG AUTHORITY, 1551-1559* (1988).

over all other kings, but could not claim to rule them. His main ‘authority’ was vested in his capacity of defender of the faith and protector of the Pope. He was the military arm of the Church. He had to lead the Latin West in its fight against infidels and heretics. The recognition as leader of a crusade by other kings was therefore the ultimate symbol of universal monarchy. The Emperor also had to protect the worldly possessions of the Church, such as the Papal State around Rome and could, if necessary, correct the Pope and the clergy if they diverted from the true path. Few of the Emperors from Otto the Great (936-973) to Charles V had succeeded in having these claims accepted by the Pope and other kings of the West.²⁴⁶

Richelieu and his circle revived the concept of universal monarchy to turn it against the Spanish. In its role as the defender of the freedom of all European princes against Spain’s insatiable lust for domination, France found the way to identifying its own interest and strategy with the common interest of Europe: public liberty and peace.

Richelieu did not aspire to territorial expansion for its own sake. He was very much aware that this would destroy France’s self-declared status as the champion of the sovereignty of all princes and, therefore, he was careful to pursue only those territorial claims for which a credible legal basis could be found or construed.²⁴⁷ His policy was not one of ‘natural frontiers,’ as it has been claimed. Richelieu wanted to obtain some strategic fortresses in west Germany and

²⁴⁶ On *monarchia universalis*: FRANS BOSBACH, *MONARCHIA UNIVERSALIS. EIN POLITISCHER LEITBEGRIFF DER FRÜHEN NEUZEIT* (1986); JAMES MULDOON, *EMPIRE AND ORDER: THE CONCEPT OF EMPIRE, 800-1800* (1999); ANTHONY PAGDEN, *LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C. 1500-C. 1800* 11-62 (1995); KENNETH PENNINGTON, *THE PRINCE AND THE LAW 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION* 8-37 (1993).

²⁴⁷ See, e.g., Richelieu’s *Instruction pour Messieurs les Ambassadeurs de France, envoyés à Cologne pour le Traité de la paix générale* (1637), *supra* note 48, at 38.

Italy that would at the same time give France an east-west entrance into these lands and cut the north-south-route of the Spanish monarchy. He aspired to ‘natural gateways’, not ‘natural frontiers.’²⁴⁸ This would allow France to break the Habsburg encirclement of France and cut the lifeline of the Spanish empire, the Spanish Road. This would bestow upon France the capacity to intervene diplomatically and military in Germany and Italy, to break Spanish hegemony there, and keep those lands divided. Thus Germany, Italy, and, in the final analysis, France and the whole of Europe, would be free from Spanish oppression.

In historiography, Richelieu has often been depicted as an early incarnation of the ideology of ‘reason of state.’ According to this ideology, the interests of the state were the determinant factor in international and internal politics and overruled all consideration of ethics or religion. As such, it was the consummation of the secularization of politics and was a necessary forerunner of an international order of sovereign states. In his seminal *Diplomacy* of 1994, Henry Kissinger pitted Richelieu against the Emperor Ferdinand II. Whereas the Emperor fought to save the old religious order of Europe, Richelieu is styled as the forefather of the modern states system.²⁴⁹

Of course, Richelieu worked for the aggrandizement of his King and country and placed their interests above all. But his idea of ‘reason of state’ was not a secular one and did not differ much of that of the Habsburg leaders, Ferdinand II, Philip IV, or Olivares. Like these men, Richelieu was a deeply religious man who tried to align his King’s interests with that of the faith and the Church. The solution lay not in suppressing the common interests of Christianity and

²⁴⁸ ELLIOTT, *supra* note 49, at 123-4. On the discussion on natural frontiers, see Gaston Zeller, *La politique des frontières au temps de la prépondérance espagnole*, 193 REVUE HISTORIQUE 97 (1942).

²⁴⁹ HENRY KISSINGER, *DIPLOMACY* 59-64 (1994).

upholding the interests of the King, but in the reciprocal identification of both. In the minds of Richelieu and even more of Father Joseph, France was the bedrock of Christianity and Catholicism. King Clovis of the Franks (481-511) was the first of the Germanic kings to have accepted the faith of Rome (496). The French Kings were the true heirs of Charlemagne and with Louis IX (1226-1270) held a second saint among their ancestors. Since almost two centuries, they had proudly carried the title of ‘Most Christian King.’²⁵⁰ Their resistance against the Spanish lust for domination was also a fight for the Catholic Church and the faith, which was as much oppressed by the Spanish as the princes of Europe were.

What kind of ‘just peace’ did France aspire to? What was the European order the war had to make possible? The keywords of this order, the *Pax Gallica*, were ‘public liberty’ and ‘equality.’ France’s war was a fight for ‘public liberty,’ freedom for all. It was a fight to protect the princes and republics outside the Holy Roman Empire against Spain’s desire for universal monarchy. It was a fight to protect the constitutional rights and liberties of the princes and estates of the Empire against the attempts of the Austrian Habsburgs to transform the Empire into a ‘hereditary monarchy.’ And, lastly, it was a fight for the liberty of the Church.²⁵¹ Spain wanted

²⁵⁰ CHURCH, *supra* note 49; Dickmann, *supra* note 239.

²⁵¹ In the words of the *Manifeste*: ‘Mais que depuis il a esté contraint de s’opposer aux injustices des Espagnols qui voulant rendre l’Empire hereditaire en la maison d’Austrie, ont fait cognoistre tellement à découvert la pretention imaginaire de leur Monarchie sur la Chrestienté, & leurs entreprises sur tous les Princes ou ils en trouvent l’occasion, que l’on void évidemment que le pretexte de la Religion, dont ils ont voulu se servir jusques icy, ne leur sert plus que d’un manteau pour couvrir leurs desseins déreglez,’ 20. Richelieu hereby courted the German public opinion, which had real concern about the Spanish threat to ‘public liberty;’ PEER SCHMIDT, *SPANISCH UNIVERSALMONARCHIE ODER ‘TEUTSCHE LIBERTET’: DAS SPANISCHE IMPERIUM IN DAS PROPAGANDA DER DREIßIGJÄHRIGEN KRIEGES* (2001).

nothing less than to use the Church as an instrument of power and oppress it. The Pope as the secular leader of the Papal State, who was an objective ally of France at the time, was yet another victim of Spain's domination over Italy. More equality among the European princes would allow the Church to be free. Only through 'their [the princes'] equality, the Church can survive and maintain itself in all its functions and splendor,' Richelieu wrote.²⁵²

Equality was a prerequisite for 'liberty,' and not only for the Church. It was a prerequisite for 'public liberty' for all. No power could be allowed to be or become so powerful that it could threaten the liberty and sovereignty of others. This meant that no power could be greater than France, the traditional defender of the weak and the champion of public liberty. Therefore, Spain and its Austrian allies needed to be cut down to size.

Italy and Germany had to remain divided. After all, he who dominated these lands, dominated Europe. The religious divide between Catholics and Protestants could only add to public liberty, although this was a difficult point for the Cardinal-Minister and his King. However, as it was repeatedly stated in the declarations of 1635, Spain's claim to championing the cause of Catholicism was nothing but a sham to push for domination, to keep the Catholic princes in line and conquer the Protestants. It would be better for Europe if Spain no longer was the leading Catholic power. There would be greater protection for the Church in the equality of the princes than in Spanish domination, which provoked the Protestants and suppressed the Catholics. For years, Richelieu and Father Joseph had appealed to the Catholic princes of the Empire to side with France and save their religion without sacrificing their liberty. It remained

²⁵² ARMAND DU PLESSIS DE RICHELIEU, MEMOIRES DU CARDINAL DE RICHELIEU vol. 5, 293 (1921), translation from J. Leclerq, *Politique nationale et idée chrétienne dans les temps modernes*, 214 ETUDES 683, 690 (1933).

understated that under such a peace and with such ‘equality,’ France would become the true power broker of Europe and effectively the hegemonic power.

To attain all this, Spain’s position, as it had existed before 1618 in Germany, Italy and the Netherlands, had to be broken. This in essence offensive long-term strategy was sincerely proposed as being a defensive strategy. This was done on the basis of the allegation that Spain aspired to universal monarchy.

All this made the war necessary, inevitable, and just. France’s noble aims and Spain’s wickedness forced the war upon Louis XIII. France might want to change the status quo and break Spain’s preexisting position, but it was forced to do so because of the continuous and unjust actions of Spain, which sought expansion and the suppression of all. After all, Spain’s existing empire was but the result of its age-long and unjust lust for expansion and domination. This rhetoric turned France’s strategy from offensive into defensive. In this sense, the war, even the premeditated invasion and conquest of the Spanish Netherlands, became an action that was cloaked under what could be called ‘hegemonic defense’ or ‘hegemonic strategic defense.’ This essentially defensive position made even the most offensive deeds look like just reactions to the enemy’s injustice. The invasion and conquest of the Spanish Netherlands was necessary because these lands for too long had served as the basis from which Spain launched its attacks on France and the Republic and plotted the submission of Europe.²⁵³

In short, the declarations of 1635 did nothing but restate what Richelieu had already proposed in his famous advice of 1629:

²⁵³ On Richelieu’s grand strategy, see CHURCH, *supra note 49*, at 283-339; Dickmann, *supra note 239*; ELLIOTT, *supra note 49*; ROLAND MOUSNIER, *L’HOMME ROUGE OU LA VIE DU CARDINAL DE RICHELIEU (1585-1642)* 443-85 (1992); STRAUB, *supra note 45*, at 29-43; Weber, *supra note 49*; Gaston Zeller, *Saluces, Pignerol et Strasbourg. La politique des frontières au temps de la prépondérance espagnole*, 67 *REVUE HISTORIQUE* 97 (1942).

Concerning foreign policy, we need to be constantly worried about stopping the rise of Spain and, unlike this nation, whose goal it is to enhance its domination and expand its borders, France must only think about fortifying itself and build and open gateways to enter the states of its neighbors in order to be able to save them from the oppression of Spain when the moment arises.²⁵⁴

The writers Olivares and the Cardinal-Infante hired to state their case in 1635 used a very similar notion of ‘hegemonic defense.’ In fact, they had an easier task in this. Olivares’ long-term goals did not include territorial expansion or the oppression of the Latin West. Under his rule, Spain aspired to nothing but the *status quo ante* of the years before the Bohemian rebellion, with the exception of obtaining better peace conditions of the Dutch. While this was found oppressive by many of Spain’s enemies and allies, Olivares did not see it in this light. In his eyes, his goal was the defense of the monarchy and the upholding of the reputation of his King. This meant that Spain would not lose any territory, would press its rightful dynastic claims, and defend the authority of the Emperor in Germany and Northern Italy. Also, Spain saw itself as the champion of the Catholic faith and the Church. As the leading power in Italy, it was in a position to play that role *vis-à-vis* the Pope. It had been waging a war against the Dutch heretics for the better

²⁵⁴ ‘Pour le dehors, il faut avoir en dessein perpétuel d’arrester le cours des progrès d’Espagne, et au lieu que cette nation a pour but d’augmenter sa domination et estendre ses limites, la France ne doit penser qu’à se fortifier en elle-même, et bastir, et s’ouvrir des portes pour entrer dans tous les Etats de ses voisins, et les pouvoir garantir des oppressions d’Espagne quand les occasions s’en présenteront’; *Advis donné au roy après la prise de la Rochelle* (January 13, 1629), in AVENEL, *supra* note 2, vol. 4, 179, 181 (my transl.).

part of a century and had always fought for the cause of the faith in the Empire. In its eyes, the Contra-Reformation was not aggression but taking back of what had unjustly been taken away.

This conviction of the defensive character of Spain's grand strategy was for Olivares, as it was for Richelieu, a strong argument to persuade himself of the justness and essentially defensive nature of even his most offensive actions.²⁵⁵ According to the declarations of 1635, the war was just because it envisaged nothing but the restoration of the just peace Spain had secured before 1618, the *Pax Hispanica*. The war against France was necessary because it was the only thing that would stop France from attacking Spain and its Catholic allies and from constantly disturbing the peace. A stable peace would have to be forced upon France. This in itself justified a war and all offensive actions that went along with it.²⁵⁶

VII. CONCLUSION: HEGEMONIC DEFENSE

²⁵⁵ Exception had to be made for the attack on Mantua in 1628, which Philip IV later called the only unjust war of his reign. He lacked, after all, a credible legal claim to Mantua. Olivares later did his utmost to divest himself from any responsibility. Both statesmen realized they had played into the French hands by their aggression; Letter of Philip IV to Maria de Agreda, July 20, 1645, published in *CARTAS DE LA VENERABLE SOR MARIA DE AGREDA Y DEL SEÑOR REY FELIPE IV* vol. 1, 28 (C. Seco Serrano ed., 1958); Gaspar de Guzman de Olivares, *Nicandro*, in *MEMORIALES Y CARTAS DEL CONDE DUQUE DE OLIVARES* vol. 2, 250 (John H. Elliott and José F. de la Peña eds., 1981).

²⁵⁶ On Olivares' grand strategy, see ELLIOTT, *supra* note 45, at 47-84 and 323-386; IDEM, *supra* note 49; Parrott, *supra* note 46; Stradling, *supra* note 58; STRAUB, *supra* note 45, at 11-29 and 44-78.

What customary rules on the *ius ad bellum* emerge from this analysis of the Spanish and French declarations of 1635? What was the *ius ad bellum* in their eyes? Of course, the practices, even of the mightiest states, may as well be infringements of the law as they may reflect or constitute it. But at a time when the *ius ad bellum* was not codified and doctrine had lost much of its authority, the sovereigns of Europe were more than ever thrown upon their own devices to state the law. Doctrine was still an important source of inspiration, but it had lost its conclusive authority. States could and would deflect from what the law said and not be sanctioned for it. In such a system of law, the law of nations was just that: the law *of* nations. That is not to say that the law was what ‘nations’ made of it. It was what they made of it *and* could get away with in the eyes of their peers. For this law, or at least for what states perceived it to be, the propagandistic justifications of war are a primary source.

The writers of 1635 adhered to the established doctrine of the early seventeenth century, with its distinction between legal and just war. They thought that war had to be formally declared for the state of war legally to begin and the laws of war to supersede the laws of peace. However, there was no sanction but the infamy of duplicity not to do so. But much more important than that, war had to be just. At no point, the texts expressly stated that war was the domain of public authorities which recognized no higher authority, but it is absolutely certain that the French and Spanish would agree with that view – the debate on the rights of the imperial estates left aside. For a war to be just, one needed a just cause. It was not disputed that self-defense and the defense of allies counted among the just causes. France invoked the right of, in modern terms, preemptive self-defense to forestall an imminent Spanish invasion. The French also claimed the right to intervene against a monarch suppressing his own people as a just cause. The Spanish

only reacted to this by calling the Dutch rebels and heretics. They certainly agreed with Ayala that no prince had the right to intervene on their side.

But while contemporary doctrine and subsequent historiography have devoted most of their attention to the causes of war, the authors of 1635 stressed the justice of their goals. There lay the conclusive evidence for the justice of their behavior. War had to be prevented at all costs, except the cost of the vital interests of the King, his subjects and allies. War was just because it was necessary to safeguard these vital interests and to achieve the ultimate, just goal of the King: a firm, stable, and just peace. That peace would benefit the whole Christian West. But the interests of the whole were equaled to the interests of the just belligerent. The own grand strategy was veiled with the cloak of the common good. For both powers, this strategy was essentially defensive. It was defense, upholding, or retaking of what was rightfully theirs. In this pursuit of their own interests lay the accomplishment of their responsibility as a leading power for the peace and interest of Europe and of religion.

This notion can be called ‘hegemonic strategic defense’ or just ‘hegemonic defense.’ I will use the shorter term. In historical and in current doctrine of international law, ‘self-defense’ refers to the cause for war. It defines and characterizes military actions. A war is defensive when it is waged to stop or preempt an armed attack by the enemy. States are expected to argue their appeal to defense on a tactical or operational level. But as it appears from the practice of 1635, ‘defense’ in the hands of political leaders puts on another appearance. They appeal to ‘defense’ employing arguments of political strategy. The men of 1635 used and abused the notion of ‘just goal’ from the classical just war doctrine to slip in their political strategy and cover it with law and morals. As such, their grand strategy became undisputedly just in their own eyes and, therefore, all operational decisions that served this higher purpose shared in its justice. As that

higher purpose was defense of the international order they stood for, even the most offensive operations became essentially defensive. As such, the borderlines between reactive defense, anticipatory self-defense, and even outright aggression were fatally blurred. The intellectual process allowing for this was the identification of the own vital interests with the common good and the rightful state of affairs – to be defended or achieved – of the whole international order. This was termed a just and stable peace. Each attack on the interests of the power concerned was unjust because these interests converged with international order and peace. However, each attack constituted an attack on international order and peace. Each action that prevented the power concerned to uphold or restore or attain that order, was an act of aggression against that order and against peace. It gave that power the right to defend the order of Europe in a just war. The identification of self-interest with international order and peace promoted that power to the safeguard of that order and allowed it to define and fight off all threats to it.

The case of 1635 clearly illustrates how political interest slid into a doctrine that was largely medieval, legal, and moral. The forefathers of the early-modern law of nations had the best moral intentions in paying lip service to the classical just war doctrine and in upholding its third condition. But even they had opened the gate to the political by allowing in notions of necessity and expediency. This became the gate through which political arguments flooded in. While the scholars of the sixteenth and seventeenth centuries had stuck with the third condition of Aquinas – righteous intention or just goal – ultimately to prevent war, even when there was just cause, state practice turned this logic on itself. ‘Just goal’ and necessity of war to attain that goal in their hands were no additional conditions; they were conditions that could even sanction an unjust cause – even if that was not yet admitted.²⁵⁷ This process would be accomplished

²⁵⁷ As they would be in the nineteenth century; GARDAM, *supra* note 142, at 5.

halfway the eighteenth century when ‘political interest’ became a sufficient cause as well as goal in state practice. Wars were then simply justified in terms of goals, which served as cause at the same time.²⁵⁸

It remains extremely hard to judge which of the belligerents had the stronger case in terms of the then existing law. The Cardinal-Infante’s rash actions against Trier, which were not covered beforehand by imperial authority, had played the French a credible and convenient *casus belli* into their hands. The Spanish argued that they had acted under the aegis of the Emperor’s jurisdiction, but that was a lie as well as an argument that strengthened France’s posture as the defender of the liberties of the German princes. Nevertheless, France needed more in the line of just causes to explain its premeditated conquest of the Spanish Netherlands. Because its plans with the Netherlands were known, the *casus belli* of Trier, while legally sound, could be unmasked for the politically convenient pretext it was. Therefore, France invoked anticipatory self-defense against an imminent attack and intervention on behalf of an oppressed people. While the latter cause was disputed as a point of law, the former was disputable as a point of fact. For its part, Spain only had to justify the Cardinal-Infante’s actions against Trier to turn the war into a defensive one.

But as stated above, the justice of the war did not turn on the causes but on the goals and the necessity of the war. Who had the stronger claim? In fact, Spain had the easier task because it wanted nothing but the *status quo ante*. France for its part wanted to change the balance of power in Europe and bring down its enemy. But France too constructed a vision of international order that was consistent and promised a lasting and just peace. The French could also find some

²⁵⁸ Randall Lesaffer, *Guerre et paix dans les grands traités du dix-huitième siècle*, 7 JOURNAL OF THE HISTORY OF INTERNATIONAL LAW 45 (2005).

support with both Gentilis and Grotius, who allowed for a preventive war against a neighbor who became too powerful and whose aggressive intentions were clear. But these authors were not unbiased, nor was this idea commonly accepted.

The truth is that there is no clear answer to the question who had law and justice on his side. The war was a war of transition from one international order to another. In this sense, it is impossible to judge whose grand strategy was in accordance with the existing order and the law of nations that was designed to safeguard it. Spain had the sanction of the past, and France had the sanction of the future. Historians and international lawyers have therefore always had a tendency to side with France. After all, as Pompey once told Sulla, nobody prefers the dying over the rising sun.²⁵⁹

So shortly after the diplomatic clash between France and the leading power of today about the war in Iraq (2003) that rings with reminiscences of the case of 1635, it is hard not to give in to the temptation of making some remarks on the relevance of all this for our times. Let us do so briefly. First, the law as it is perceived and applied by states can be far different from what established doctrine says, even if the wording is the same.

Second, there is the notion of ‘hegemonic defense.’ While according to doctrine defense was a just cause and was defined as a reaction to an armed attack, thus on the operational level, the great powers of 1635 also saw it as a strategic notion. While the traditional right to self-defense is a natural right that belongs to all, strategic defense is the privilege of – individually or collectively – hegemonic powers or powers that aspire to such a position. On the basis of this case, we can define ‘hegemonic defense’ as follows. It contains five elements. *Primo*, a hegemonic power, a group of powers that collectively are hegemonic, or a great power or group

²⁵⁹ PLUTARCH, POMPEY 14.

of powers that wants to prevent another power of becoming hegemonic and itself aspires to that position, identifies its own grand strategy with the existing or desired international political and legal order.²⁶⁰ This order is considered inherently and undisputedly just. In history, we commonly refer to this hegemonic order as *Pax Romana*, *Pax Hispanica*, *Pax Britannica*, *Pax Sovietica*, *Pax Americana*. *Secundo*, any attack against the interest of the great power, any attempt to prevent the achievement of the great power's goals is considered an unjust attack against that just international order. *Tertio*, this invites and justifies a defensive reaction. *Quarto*, the ultimate goal and justification of hegemonic defense is the protection of the existing just order or the establishing of the justly desired order. *Quinto*, hegemonic defense is a strong platform for arguing preventive war. The enemy's behavior proves that he wants to disrupt the existing order or prevent the desired order of coming into being. It may therefore be better to wage a preventive war before he becomes too powerful and achieves his goal. By judging the defensive character of a war on the level of goals and grand strategy, the lines between reactive and anticipatory war are blurred.

Was the appeal to 'hegemonic defense' of 1635 an isolated case in modern history? It was not. The use of hegemonic defense is a logical complement to the 'great power principle.' This principle, or 'legalized hegemony' as Gerry Simpson recently dubbed it, implies that great powers are attributed special factual and legal responsibilities, prerogatives, and rights for the formation, functioning, and upholding of the international legal order. During the last three centuries, the principle became a central feature of the international legal order, though this was

²⁶⁰ On the relation between factual dominance and international law and legal order, see Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 374-81 (2005).

and is often understated in doctrine. During that era, it was condoned, if not acknowledged, that the great powers collectively held special responsibilities and rights and executed them by way of a directory of great powers. The principle truly came into its own with the Congress of Vienna (1815) and lives on today, among others, in the permanent membership of the United Nations Security Council.²⁶¹ In fact, it was foreshadowed by the guarantee treaties of the eighteenth century in which great powers, if not exclusively, took on responsibility for the existing legal and political order.²⁶² It is therefore logical to surmise that the institution of ‘hegemonic defense’ flourished during the last three centuries. Our own times offer some interesting cases. Gerry Simpson considers the recent war in Afghanistan to be an example of how great powers attribute themselves special rights in the field of the use of force. One of the arguments brought forward to justify the 2003 invasion of Iraq was that the belligerents acted to uphold international law when the proper institutions of the international society could not. The same went for NATO’s intervention in Kosovo in 1999, though this was done under the name of humanitarian

²⁶¹ ANDREAS OSIANDER, *THE STATES SYSTEM OF EUROPE 1640-1990: PEACEMAKING AND THE CONDITIONS OF INTERNATIONAL STABILITY* (1994); GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNTY IN THE INTERNATIONAL LEGAL ORDER* (2004). On hegemony and the UN Security Council, see recently José E. Alvarez, *Hegemonic International Law Revisited*, 97 AJIL 873 (2003), in reaction to Detlev F. Vagt, *Hegemonic International Law*, 95 AJIL 843 (2001). All this is of course part of a wider and classical discussion on the relation between international law and power. Like Simpson, Nico Krisch, argues that power and law historically are not two opposed and separate phenomena, but that law is both an instrument of (great) power(s) and an obstacle to the free exercise of power; Krisch, *supra* note 260.

²⁶² 1 Lesaffer, *supra* note 27, at 134-5.

intervention and not on the basis of ‘hegemonic defense.’²⁶³ Antony Anghie reaches quite similar conclusions about the current ‘war against terror,’ but also makes reference to Kosovo and Iraq.²⁶⁴ Case studies for the eighteenth, nineteenth, and twentieth centuries could show how frequent this notion of hegemonic defense was used and what it implied at any given time.

Third, in a system without a codified law and without an authoritative doctrine, there is little to stop the behavior of great powers becoming the law. This should be a warning to everyone trying to read too much *ius ad bellum* outside the UN Charter. I refer to the theses that Article 51 of the UN Charter sustained the international customary law of self-defense from before 1945,²⁶⁵ or that the Charter did nothing to abolish the allegedly preexisting customary right of international humanitarian intervention.²⁶⁶

²⁶³ Gerry Simpson quotes the NATO intervention in Kosovo as an example of the claim and/or attribution of special prerogatives to great powers. The war in Afghanistan of 2001 offers an example of the appeal to ‘hegemonic defense;’ SIMPSON, *supra* note 261, at 71, 88, 194-223 and 326-51.

²⁶⁴ According to Anghie, the rhetoric of ‘war against terror’ combines 1) a broad definition of self-defense, covering preemptive self-defense and preventive self-defense, 2) against rogue states, that threaten the existing order, e.g. through the seeking of weapons of mass destruction and, 3) the invocation of a goal, *i.e.* democratization. Anghie refers to the thought of Francisco de Vitoria, who defended the Spanish conquest of the New World as a defensive reaction against attacks by the Indians on the Spanish ‘traders’ and missionaries who came to their lands; ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 273-309 (2005). See also Krisch’s interpretation of Kosovo in terms of a revival of natural law argument, *More Equal than the Rest? Hierarchy, equality and US predominance in international law*, in *UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW* 135, 142 (Michael Byers and George Nolte eds., 2003).

²⁶⁵ On the debate, see CHRISTINE GRAY, *INTERNATIONAL LAW AND USE OF FORCE* 86-87 (2000) and the references there.

²⁶⁶ SIMON CHESTERMAN made a sound argument against this claim in his *JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW* (2001).

Fourth, defining the legitimacy of a war in terms of goals is a way to define it in terms of political goals. War then returns as an instrument to safeguard the existing or desired international order. As long as there is broad consent about this order, this might not cripple the law too much. But as the war of 1635 shows, reminiscent as it is to the Cold War or the attempts of 2002-2003 by former great powers to challenge the existing order by counterbalancing the leading power of the day, in its turn trying unilaterally to impose its view on world order, this saps the very foundations of the legal system if consent is withdrawn.

Hegemonic defense is, of course, an attempt to divest law of its autonomy and to argue politics in legal terms. And it is an old and resilient one. The statesmen of 1635, however, only needed the loophole of traditional doctrine's insistence on intention and goal to harness the law to their endeavor. Article 42 of the UN Charter, which allows military action 'to maintain or restore international peace and security,' that is in terms of goal, is certainly no improvement there. This does not imply that the UN would be any more effective if the law was different, but at least the law would give fewer excuses for inaction or political maneuvering.

But let us go back in time again, even far beyond 1635. The final word goes to a character from one of Tom Holt's historical novels. Euxenus, the self-acclaimed and cynical counterpart of Aristotle as teacher of Alexander the Great, has his own definition of the law. 'The law,' he says, 'is like a bow. It is designed to be bent almost indefinitely, but never to be broken.'²⁶⁷ So, let us not make it all too pliable.

²⁶⁷ TOM HOLT, *ALEXANDER AT THE END OF THE WORLD* (1999).