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Defensive Warfare, Prevention and Hegemony. The Justifications for the Franco-Spanish War of 1635 (Part I)

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In grateful memory to Hildegard Penn

I. Saturday, May 19, 1635

On Saturday May 19, 1635, at 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, before 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 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 sergeant-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

* I thank Professor Peter Haggemacher (Graduate Institute of International Studies, Geneva), Dr. Anuschka Ticher (Marburg) and Ignacio Rodriguez Alvarez (Intervict, Tilburg) for their useful comments.

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'état du Cardinal de Richelieu* vol. 4, 762 (Collection des documents inédits sur l'histoire de France No. 55, 1861). For the reply of the 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.

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 sergeant-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 sergeant-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 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 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

⁴ P. Adam Even, “Les fonctions militaires des hérauts d'armes”, 71 *Archives héraldiques 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 années 1634 et 1635, rédigées par Jean-Antoine Vincart, Secrétaire des avis secrets de guerre au Pays-Bas* 124 (1958).

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 Gratiollet Elissavide, “Relation au roi”, in *Notes sur la famille d'Aubas de Gratiollet* 14-18. See also Luc Duerlo, “1635 : Hoe een oorlog begon”, in *Tienen 1635: Geschiedenis van een Brabantse stad in de zeventiende eeuw* 111-113 (1985).

⁸ “Sommaton 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

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 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*,

(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 487-489 (B.L. Meulenbroek ed., 1966).

¹⁰ *Relation de ce qui s'est passé en bataille gagnée par l'armée du roi contre celle d'Espagne, commandée 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* 111-112 (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).

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).

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 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

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,

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).

¹⁵ *Manifeste du Roy Contentant les justes causes que Sa Majesté a eues 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 escrete à 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 Majesté a eues 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, 62-63 (1967).

¹⁷ Hermann Weber, "Zur Legitimation der französischen Kriegserklärung von 1635", 108 *Historisches Jahrbuch* 90, 104 (1988).

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 tweede deel van de placcaeten ende ordonnantien vande hertoghen van Brabant princen van dese Nederlanden* 354-356 (1635).

¹⁹ A Dutch translation was soon made: *Verklaringhe van Sijne Hoogheydt aangaende den Oorloghe teghen de Kroone van Vranckryck* (1635).

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.

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.

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

²⁰ There were Spanish and Italian versions: *Declaración de su alteza ... del señor ... Cardenal-Infante acerca de la guerra 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, 257-258.

²¹ *Declaracion de don Felipe Cuarto, Rey de las Españas, al rompimiento de la guerra que sin denunciarla ha hecho Luys, Rey de Francia*: Madrid, Biblioteca Nacional, Ms. 290, 103-141, partly published in Jover, *supra* note 15, vol. 2, 505-511. 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 Extérieure, Correspondance et Papiers d'Etat, Empire Allemand* vol. 3, 9 (1999).

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 Kriegs begründungen 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 97-99 (1985). Seven Spanish manifestos can be found in Madrid, *Biblioteca Nacional*, Ms. 2366.

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 strives in several countries such as the Holy Roman Empire and France, and the struggle for 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 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

²⁴ On the various contributions of theologians, and canon and civil lawyers to the question of the right to wage war, see Peter Haggemacher, *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, 34-37 (2005); James Muldoon, “The Contribution of the Medieval Canon Lawyers to the Formation of International

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 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 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

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).

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.

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

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 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 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

(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 Vattel and the Myth of Westphalia* (2004).

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, 224-225 (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 \(2002\)](#).

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, 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

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* 135-136 (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 écrits imprimés de Hugo Grotius* 227-231 (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.

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 *Grotius and International Relations* 95, 121-131 (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.

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 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. 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 normally 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

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).

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)* 248-257 and 470-475 (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,

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 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 any real chance of 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 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 bit 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

Friedensrecht und Friedenssicherung 127-129 (1971); Wilhelm G. Grewe, "Was ist klassisches, was ist modernes Völkerrecht?", in *Idee und Realität des Rechts in der Entwicklung der internationalen 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 216-226 and 443-452.

⁴⁰ And partially moral.

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

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 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 more 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 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.

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).

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 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,

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).

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 109-129 (1980).

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 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 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

⁴⁶ David Parrott, "The Causes of the Franco-Spanish War of 1635", in *The Origins of War in Early Modern Europe* 72, 85-88 (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 Reppen 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, envoyéez 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.

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. Hübinge, "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).

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.

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 Vienna itself.⁵² The Habsburg position

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).

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).

⁵² Ronald G. Asch, *The Thirty Years War: The Holy Roman Empire and Europe, 1618-1648* 101-107 (1997); Georges Pagès, *La guerre de trente ans 1618-1648* 117-150 (1972); 2 Parker, *supra* note 42, 108-119; Michael Roberts, *Gustavus-Adolphus: A History of Sweden, 1611-1632* vol. 2 (1958); C.V. Wedgwood, *The Thirty Years War* 269-334 (1938).

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 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

⁵³ David Parrott, *Richelieu's Army: War, Government and Society in France, 1624-1642* 101-102 (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.

⁵⁵ Louis Batifol, "Richelieu et la question d'Alsace", 138 *Revue Historique* 161 (1921); Bertold Baustaedt, *Richelieu und Deutschland. Von der Schlacht bei Breitenfeld bis zum Tode Bernhards von Weimar* (1936); Joseph Baur, *Philipp von Sötern, geistlicher Kurfürst von Trier, und seine Politik während der dreißigjährigen Kriegen* vol. 1, 203-374 (1897); Georges Fagniez, "Le Père Joseph et Richelieu", 36-38 *Revue Historique* (1888-1890); Wilhelm Mommsen, *Richelieu, Elsaß 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).

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 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 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

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, 90-93 \(1986\)](#).

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, 333-337 (1996).

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

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* 254-255 (1982).

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 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.

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

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.

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 272-280.

⁶⁷ Elliott, *supra* note 45, at 492-495 and 504-505.

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 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

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 141-163 (1994). See also René Vermeir, *In staat van oorlog. Filips IV en de Zuidelijke Nederlanden, 1629-1648*, 126-127 (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 XVIIe siècle* vol. 3, 54 (Hubert Lonchay, Joseph Cuvelier, and Joseph Lefèvre eds., 1930).

⁷⁰ Treaty of Brussels of May 12, 1634.

⁷¹ The King himself at some point promoted war, see "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, 204-210 (Konrad Repgen ed., 1988).

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, 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 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

⁷² Parrott, *supra* note 53, at 108.

⁷³ A year before, Richelieu had still refused Dutch proposals for an offensive alliance; Fagniez, *supra* note 55, vol. 2, 206-207; Israel, *supra* note 62, at 303-304; Parrott, *supra* note 53, at 106.

⁷⁴ Treaty published in Du Mont, *supra* note 15, vol. 6-1, 80. See Jean de Pange, *Charnacé et l'alliance franco-hollandaise (1633-1637)* 114-127 (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 rivalité de la France avec la maison d'Autriche de 1631 à 1635* 462-465 (1949); Weber, *supra* note 71, at 210.

⁷⁷ Parrott, *supra* note 53, at 108.

⁷⁸ Letter of Richard Pauli Stravius to Cardinal Francesco Barberini of March 31, 1635, *supra* note 2, at 56-57, Vermeir, *supra* note 68, at 114.

⁷⁹ Already on March 31, 1635. See Weber, *supra* note 17, at 92-93.

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

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 Grotiollet 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 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 Emperor, that is.⁸⁵ Second,

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, 454-455. 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.

⁸⁴ Leman, *supra* note 76, at 510-515. 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 Olivares. Leurs Négociations secrètes de 1636 à 1642 pour le retablissement de la paix* (1938).

⁸⁵ Other scholars, like Cardinal Hostiensis (ca. 1200-1271), stuck to the view that only the supreme sovereigns, the Pope and Emperor, could wage war or authorize it; *Summa Aurea Liber*

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 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

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* 161-162 and 270-273 (1975).

⁸⁷ On the basis of D. 49.15.24; Haggemacher, *supra* note 24, at 280-288; Theodor Meron, *Henry's Wars and Shakespeare's Laws: Perspectives on the Law of War in the Later Middle Ages* 40-41 (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 105-113; Haggemacher, *supra* note 24, at 23-42, 53-223, and 280-288 (1983); Georges Hubrecht, "La juste guerre dans la doctrine chrétienne, des origines au milieu du XVI^e siècle", 15 *Recueil de la Société Jean Bodin pour l'histoire*

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 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

comparative du droit et des institutions 107 (1961); James Turner Johnson, *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, 669-673 (1939); Karl-Heinz Ziegler, "Kriegsrechtliche 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 Friedenssicherung. 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; Johnson, *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 673-680.

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).

by humanism.⁹² Whereas most international legal historians have stressed the novel contributions of the authors of both schools to the just war 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

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. I Lesaffer, *supra* note 27, 121-122 (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).

⁹³ Francisco de Vitoria, *Relectio de iure belli*, 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 Camilo 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 131-141; Jörg Fisch, *Die europäische Expansion und das Völkerrecht. Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* 212-223 (1984); Grewe, *supra* note 29, at 204-207; Alejandro Herrero y Rubio, *Derecho de Gentes. Introducción Histórica* 43-63 (1995); Kennedy, *supra* note 26, at 32-35; 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 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, 112-117 (1988); Ziegler, *supra* note 90, at 5-15.

war, but also 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 clung 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 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

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, 287-288 (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 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 54-56; Luciano Pereña Vicente, *Teoria della guerra en Francisco Suarez* vol. 1, 119-315 (1954); Josef Soder, *Francisco Suarez und das Völkerrecht* 248-307 (1973).

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 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 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

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).

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 207-209; 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, *Kriegserklärung und Kriegszustand nach klassischem Völkerrecht mit einem Beitrag zu den Gründen für eine Gleichbehandlung Kriegführender* 181-188 (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 42-43.

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

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

¹⁰⁵ Ayala, *supra* note 100, 1.2.27.

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 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

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 e della pace di Gentili. Considerazioni sparse di un Groziano", in *Il diritto della guerra e della pace di Alberico Gentili. Atti del convegno, quarta 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, 2.1.217-218 and 2.2.218-219.

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 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-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

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

¹¹³ Gentilis, *supra* note 108, 1.15.116-117.

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, 1.16.120-122.

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

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, at 18-31.

¹¹⁸ Gentilis, *supra* note 108, 1.25.

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 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 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

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, at 78-79.

¹²⁰ For the discussion about Grotius' "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 193-194 and 214-215; 1 Lesaffer, *supra* note 27, at 108-109. 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 Year Book 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 were often more concerned with showing off their erudition than with building a comprehensible doctrine; Kennedy, *supra* note 26.

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. 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

¹²³ On Olivares, Philip IV, Ferdinand II, see in this respect Bireley, *supra* note 44 (2x); Elliott, *supra* note 49, at 97-99 and 126-127; 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).

¹²⁵ Kennedy, *supra* note 26, at 82-83.

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); Haggemacher, *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.

subjects, allies, friends, and all people with whom one had a bond of kinship was as laudable, if not more, than self-defense.¹³⁰

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 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 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

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

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, 149-150 (1633).

¹³⁴ Grotius, *supra* note 99, 2.1, esp. 2.1.2 and 2.1.16-17; and 2.22.5; Neff, *supra* note 86, at 126-130.

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 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, 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

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.

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).

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.

(Part II concluding this article is to appear in the next issue)