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

Randall Lesaffer

V. The French and Spanish Declarations of 1635

The French Declarations

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

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

---

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

143 The edition from Paris, 1635, is used here.
144 The edition by Jacques Roussin from Lyon, 1635, is used here.
145 François Le Clerc du Tremblay. On his foreign policy, see Fagniez, supra note 55, and Aldous Huxley, Grey Eminence: A Study in Religion and Politics (1949).
146 On the drafting process of the texts, see Weber, supra note 17, at 97-113. The three drafts of the Manifeste are in the archives of the French foreign ministry: Paris, Archive of the Ministry of Foreign Affairs, Correspondance Politique, Espagne No. 18, 140-8 (Joseph), 149-53 (Bouthillier), and 129-32 (Richelieu).
The casus belli which Louis XIII had invoked in his formal declaration of May 19, 1635 upon Spain, was the attack on Trier and the abduction of the Elector by the troops of the Cardinal-Infante on March 26, 1635. Earlier, the French resident diplomat in Brussels, Amontot, had demanded the release of the Elector of Trier in the form of an ultimatum. The refusal of the Cardinal-Infante, whose evading answer had reached Louis XIII on May 9, was considered the direct cause for the war. In the formal declaration it was stated that the Elector fell under the protection of the King of France. This protection was justified because neither the Emperor nor any other prince proved to be capable of offering protection. The attack against the Elector went against the dignity of the Empire as well as against the law of nations.147

The Manifeste du Roy

Because the Manifeste was drafted, if not finalized, before the Declaration, we will first discuss the former. The Manifeste du Roy took the events of Trier as the casus belli, but put them in a wider context. The events of March 26 were presented as only the last of a long series of injustices committed by the Spanish against France and its allies. The Manifeste opened by referring to the peace efforts made by the French King Louis XIII, going back to his accession in 1610. The desire to ensure peace for his people had induced Louis XIII to disregard the ancient jealousies and ill will of the Spanish and to renew the alliance between the two crowns through a double marriage between the Habsburgs and the Bourbons (1615).148 Even at that time, the French King was already advised against such a move by his allies, who feared that Spain’s traditional desire for expansion and oppression would go unopposed. Since the double marriage, the Spanish had committed all kinds of offenses against the French King. Next, there followed a long list of such offenses, including the attacks against Savoy (1614-1617), the attacks on the Grisons in the Valtelline (as of 1620) with the design of bringing “war from Germany to Italy and from Italy to Germany,”149 the Spanish intrigues to divide the French from the English (during the early 1620s), the exhortations to the French Huguenots to rebel (1627), and the attacks on Casale and Mantua while the French were engaged before La Rochelle (1628). During the Mantuan war, France could have inflicted a “just punishment” on Spain and profit in a “legitimate” way from its victory, but had chosen not to do so and had helped Spain get out of the dire straits it had worked itself into.150 Spain, unrelenting, had broken the public faith and the treaties it had signed, and had incited the imperial troops to attack Mantua and to disturb the peace in Italy again. Louis XIII had thus been forced to intervene once

147 Formal declaration of May 19, 1635 as published in 67 Gazette de France 269, 272 (1635).
148 In 1615, Louis XIII had married Anne of Austria (1601-1666), sister to the later King Philip IV and the Cardinal-Infante. Philip IV married Louis’ sister Isabelle (1602-1644) in the same year.
150 “… une juste punition”, 6 and “occasion si legitime,” Manifeste, 5.
more. After the events of 1628-1631, Spain had lusted for revenge. The Spanish had gone as far as to incite dissent within the French royal house and had used the Duke of Lorraine, a sworn enemy of France, for their purposes. As everybody knew, they had “armed France against France” and had made several treaties to that extent.151

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

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

The Spanish had done everything and essayed every device to lure the French into a war and thus deflect the blame for it upon Louis XIII. But their desire to offend had gotten the better of them. Now they had gone to the extreme of laying “their hands upon the Archbishop of Trier, a sacred person, Prince & Elector of the Holy Empire.”154 Apart

151 “… armé la France contre la France,” Manifeste, 7. The most important of these treaties being the Treaty of May 12, 1634 with Charles IV of Lorraine and Gaston of Orléans. In the Treaty, the Spanish promised 15,000 troops to the Duke of Orléans but demanded some of the conquests the Dukes would make in France in compensation; Arts. 4 and 6, Du Mont, supra note 15, vol. 6-1, 73. In 1631, the French King’s mother, Marie dei Medici (1573-1642), had fled to the Spanish Netherlands. From there, she worked with her younger son, Gaston d’Orléans, against his elder brother. On the dissensions within the French royal family and the rebellions of the 1630s, see Gaston Dethan, Gaston d’Orléans. Conspirateur et Prince charmant (1959); Paul Henrard, Marie de Médicis dans les Pays-Bas, 1631-1638 (1875); Toby Osborne, “Chimères, monopoles and stratagèmes: French exiles in the Spanish Netherlands during the Thirty Years’ War,” 15 The Seventeenth Century 149 (2000).

152 “… liberté publique,” Manifeste, 7. “… de s’assujettir l’Empire en forme de monarchie perpetuelle de la Maison d’Austriche,” 7.

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

154 “… de prendre l’Archevesque de Treves, personne sacrée, Prince & Elector du Sainct Empire,” Manifeste, 10.
from the disdain for the dignity of the Church and its prelates this act showed, it was a measure of the lack of the Spanish respect for electors, princes of the Empire, and sovereigns in general. The act was such that the whole of Christianity must recognize that the French King had just cause to resent it, since the Elector was under his protection.\(^{155}\)

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

The authors of the Manifeste next resumed their enumeration of Spanish offenses, this time not against France but against almost all other princes of Europe, the allies and neighbors of France. It was claimed that the Spanish had stirred up troubles in the Empire by inducing the Emperor to oppress the Protestants. They had also tried to take territories from Catholic princes such as the Bishop of Liège and the Archbishop of Cologne and illegally occupied the Lower Palatinate. They had caused trouble in the Swiss cantons and for the Grisons because of the Valtelline. Heeding the pleas of the Grisons, Louis XIII had sent some small contingents of troops to assist them. It was only after the French King had been informed of the attack on Trier that he allowed the Duke of Rohan to intervene with his army and prevent the Spanish from occupying the Valtelline.\(^{156}\) Both Protestants and Catholics were said to applaud these actions. It was also pointed out that France had earlier protested against the Spanish infringements on the Peace of Cherasco (1631), which had been duly noted by the papal nuncios.

The Manifeste went on to deplore that Louis XIII had not been able to limit his intervention to the just defense of his allies and was now forced to take up arms to obtain reparation for all the offenses he had suffered, most particularly the capture of the Elector of Trier. Before he declared war, he sent his resident diplomat in the Spanish Netherlands to demand the release of the Elector from the Cardinal-Infante. Such a demand was just as the Elector was a protégé of the King. The Elector’s capture was illegal. He was a sovereign who lived peacefully and was not at war with any power. The King’s protection had been offered because the Emperor was incapable of giving his. In his response, the Cardinal-Infante had left no room to doubt his intention to keep the Elector in captivity. The King feared that matters would become even worse if he did not demand justice. The matter, so the Manifeste stated, did not only concern the “sensibility” of great kings, but also the law of nations.\(^{157}\) The French King could

---

\(^{155}\) “… lesquelles feront juger à toute la Chrestienté le juste sujet que sa Majesté a de s’en ressentir, veu l’assistance qu’elle donnoit à ce Prince, lequel elle tenoit en sa protection,” Manifeste, 10-11.

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

\(^{157}\) “… qui ne sont pas seulement sensibles aux grands Roys ; mais qui sont aussi les plus recommandées par le droit des Gens,” Manifeste, 16.
not let this pass because of the offense committed against the Church in the person of one of its prelates. Doing nothing would also mean abandoning the allies and would encourage the Spanish. It would jeopardize the liberty of all.

According to the authors of the Manifeste, there was no doubt that the Spanish had held every intention to attack France before the war was brought to them. The fleet that had by now appeared on the coasts of the Provence was proof enough for that. Knowing of these Spanish plans and preparations, the French King had resolved to have his troops enter the Duchy of Luxemburg in order to obtain redress for the many wrongs suffered.

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

There could be not doubt about the “just and righteous intentions” of the French King in declaring this war.\textsuperscript{159} His goal was peace for the whole of Christianity. God was said already to have sanctioned the French cause in granting the King’s army victory.\textsuperscript{160} The King’s intentions comprised the delivery of the Church from the troubles caused by the confusion in Italy and the wars between Catholic powers. He rejected all accusations against him assisting Protestant powers from those who themselves had wanted peace with them, only to be able to molest Catholic powers and to bring them under their monarchy. The Manifeste ended with an invocation of God’s favor for the just designs of the French, which were “the honor of His Divine Majesty, the tranquility of the State, and the conservation of his good Neighbors and Allies.”\textsuperscript{161}

\textbf{The Declaration du Roy}

The Declaration opened with a reference to the many, well-known offenses of the Spanish against the French monarchy, without however listing them at this point. These offenses were inspired by the hatred and natural jealousy of the Spanish for the French and had always been committed with stealth. Now their ambition had driven them to openly oppress the allies of the French King. Once their covert actions to bring down

\textsuperscript{158} “… la pretention imaginaire de leur Monarchie sur la Chrestienté,” Manifeste, 20.
\textsuperscript{159} “… ses iustes & droites intentions,” Manifeste, 21.
\textsuperscript{160} At the Battle of Les Avins on May 20, 1635.
\textsuperscript{161} “… de l’honneur de sa Divine Majesté, repos de cet Estat, & de la conservation de ses bons Voisins & Alliez,” Manifeste, 23.
the French crown had failed, the Spanish began plotting an open attack upon France. Therefore, Louis XIII could no longer refrain from using the power God had granted him, not only to drive the enemy back, but also to prevent the pending attack in a just war, which reason and law forced the King to bring to the Spanish lands instead of awaiting an attack upon his own.

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

Until this time, so the Declaration stated, the French King had done nothing but neutralize all the Spanish enterprises and protect his friends and states against the evils prepared for them. But now the King had to recognize that his moderation had made the Spanish more audacious since experience had taught them that they could always keep the peace and stay out of harm’s way. Therefore, he was now forced to express his resentment about the offenses he had suffered and to stop the Spanish once and for all. The King acknowledged that his moderation after his victories in Italy in 1629 and during the times of trouble for the Habsburg in the Empire during the last years as

---

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

163 “Nous ne pouvions, sans deffaillir à nostre Estat, & à nous-mesmes, differ davantage d’employer les forces que Dieu nous a données, non seulement pour repousser leurs entreprises, mais pour tâcher de les prevenir par une juste guerre, que toutes sortes de raisons & de Lois, nous obligent de porter plutost dans leurs Pays, que de l’attendre dans nostre Royaume.” Declaration, 4-5.
well as his preference for “public peace” over “just vengeance” had not dissuaded the Spanish from their continuous conspiracies nor stopped them from constantly pitting new enemies against France. This “simulated peace, this covert war” was all the more dangerous because “their stratagems were since long more to be feared than their forces.” It allowed the Spanish to enjoy the sureties of peace, while they forced upon France the disadvantages and perils of war. But all this was coming to an end. Now their passion had prevented the Spanish from further hiding their designs and they were openly preparing for war against France. They had accused the French of being allied with Protestant powers. But they themselves had acted contrary to the interests of the Catholic faith, while they used the same faith to cover up their injustices. They did not hesitate to make promises that were incompatible with one another and attack France with all their might. It had come to such a point that the King of France would almost feel guilty himself for the losses his people would suffer if he did not, thanks to his “just foresight”, use his most powerful means to safeguard his people, even at the risk of his own person.

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

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

164 “… si nous n’eussions toujours préféré le désir de la paix publique, à celui d’une juste vengeance,” Declaration, 13.
165 “… n’y diminué l’aigreur avec laquelle ils travaillent à nous jeter tous les jours sur les bras de nouveaux Ennemis,” Declaration, 13.
166 “… une paix déguisée, une guerre couverte, d’autant plus dangereuse, que leurs artifices ont esté de tous temps beaucoup plus à craindre, que leurs forces,” Declaration, 13.
167 In the Twelve Years’ Truce of Antwerp of April 9, 1609, King Philip III and the Archdukes Albrecht and Isabella had called the United Provinces of the Dutch Republic “free”; Art. 1, Du Mont, supra note 15, vol. 5-2, 99, 100.
168 “… une pais douteuse & incertaine, qu’il faut conserver avec cent cinquante mil’hommes,” Declaration, 17.
was the answer the French King received from the Cardinal-Infante, all these injustices forced the King to take action. As king of a realm that had waged so many wars in defense of its allies and had been the safehaven of the afflicted and the support of the oppressed for such a long time, Louis XIII had no other choice.

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

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

Next, the King of France ordered all his subjects, vassals, and servants to make war by land and sea on the King of Spain, his lands, subjects, vassals, and adherents who were declared enemies of the King, the state, and public peace. The Declaration stipulated the implications of the state of war. The subjects of the enemy could be taken prisoner, held for ransom, or treated according to the laws of war. It was forbidden to communicate or trade with the Spanish, under the penalty of death. All passports and safe passages were revoked.

The Declaration restated the main outlines of the alliance treaty France had made with the Republic on February 8, 1635 concerning the invasion of the Spanish Netherlands. It was stated that this would be the first military operation of the war because it would end the long and unfortunate war waged in the Netherlands and because it would liberate the population there from Spanish oppression. The King reiterated his promise that if the people from the Spanish Netherlands would drive the Spanish from their towns and places within two months after the Declaration, these places would form a free and sovereign state and the Catholic faith would be safeguarded. The King promised to protect the people of the Spanish Netherlands during the war and look after their interests in the ensuing peace treaties. If they would wish so, the King was prepared

169 “… la guerre ouverte par mer & par terre audit Roy d’Espagne, ses Subjets, Pays, & Vassaux, pour tirer raison sur eux, des torts, injures, & offenses que Nous, nos Estats, Subjets, & Alliez, en ont receuës,” Declaration, 23.

170 “… une seure & durable Paix dans la Chrestienté,” Declaration, 23.

171 “… tous les Princes, Estats, & Republiques, qui aiment la paix, & prennent interest à la liberté publique,” Declaration, 23.
to make a defensive and offensive alliance with them, together with the Republic, and to include them in all future peace treaties. Even if only three or four towns close to one another were to rise and liberate themselves, they would be allowed to form a free state. The Declaration concluded with an order to all officials of the realm to publish and register the text and to observe and enforce it.

The author of the Declaration du Roy of June 6, 1635, most likely Abel de Servien, made use of the draft of the Manifeste but clearly added some different accents. Both texts employed the same arguments and referred to the same facts, but there was a difference. The Manifeste stressed that France undertook the war to save the whole of Christian Europe from Spanish oppression. The Declaration played down this argument and argued somewhat more along the lines of French interests. This is made most clear by considering the differing structures of the two texts. While the Manifeste started by stating the many offenses Spain had committed against the whole of Christianity – France and its allies –, the first paragraphs of the Declaration underscored the offenses suffered by the French King. In the Manifeste, the attack on Trier was the last of a long line of offenses by the Spanish against the “public liberty” of Europe, whereas in the Declaration it was yet another attack on French interests and honor.

---

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

173 According to Hermann Weber, the differences have to be explained from the difference in view on foreign policy held by Father Joseph, who was close to Richelieu, and by Servien, who was close to the King. This discrepancy between the King’s entourage and that of the Cardinal-Minister went back to the debate both leaders had had during the summer of 1634 about a rupture with Spain. At that time, the King was most aggrieved by the offensive alliance signed between Philip IV and his rebellious brother Gaston. He constantly pressurized Richelieu for war with Spain. The Cardinal-Minister withstood that pressure and wanted to prolong his “war by proxy” for as long as he could. In June 1634, Richelieu wrote a lengthy memoir to argue his case. In it, he rejected the recent Dutch proposal to jointly attack and divide the Spanish Netherlands. First, the war would be a war of conquest. The inhabitants of the Spanish Netherlands might not welcome the domination of the French and the Protestant Dutch might come to replace their Spanish rulers. Second, it would leave the French and the Dutch direct neighbors, a situation that would lead to conflict. Third, a war might weaken the Spanish to the extent that France would then have to shoulder the burden of the defense of the Catholic faith against the Protestants alone. Richelieu advised to abide with the Alliance Treaty of April 15, 1634 in which France had promised new subsidies for the Dutch war effort. In his letter of August 4, 1634 to the Cardinal-Minister, King Louis XIII made the case for war, arguing that the circumstances would never be so advantageous to France as they were at the time. As cause for the war, he invoked the attacks by Spain on France through the services of members of his family. Whereas the King only heeded the interests of France, the Cardinal-Minister held an eye on the long-term and larger European picture and rather associated France with the cause of the Catholic religion. Memoir of Richelieu of June 1634, supra note 71, at 466-8; Lettre du Roy à Son Eminence sur le sujet de l’ouverture de la guerre, supra note 48, at 18-19. Treaty of 15 April 1634, published in Du Mont, supra note 15, vol. 6-1, 69. Anuschka Tischer, however, forwards the view that the difference is consequential to the fact that both texts were addressed to slightly different audiences. Whereas the Declaration was mainly aimed at the French power elite, the Manifesto
The Spanish Declarations

Though the war had been raging for over a month by June 24, 1635, on that day the Cardinal-Infante had his *Declaration de son Alteze touchant la guerre contre la couronne de France* published in Brussels. The text was in the first place aimed at the population of the Spanish Netherlands. In the light of the French and Dutch claims that they came to “liberate” the Netherlands from Spanish oppression and their call upon the people to rise, it was important to explain the justice of the Spanish cause to the local nobility and elite. This was all the more important as in 1632-1633 there had been serious trouble with the estates in the Spanish Netherlands, where, moreover, some nobles and higher officers had conspired against Spain. The text was issued two weeks after the Franco-Dutch invaders brutally sacked the small town of Tienen to the east of Brussels and on the day they laid siege to Leuven. Apart from offering a justification for the Spanish cause, the text was a formal declaration of war issued in the name of Philip IV. The author of the text is unknown, but it is likely that some of the main ministers of the Cardinal-Infante had a say in the drafting of the text. Among them were probably the Cardinal-Infante’s second-in-command, Francisco de Moncada, Marquis of Aytona (†1635), Don Martin de Axpe, head of the Secretariat for State and War, the Cardinal-Infante’s confessor, Juan de San Agustin, and Pierre Roose (1586-1673), the powerful Chief-President of the Privy Council in the Spanish Netherlands and a trustee of Olivares.

On June 2, 1635, Olivares had stated that the Spanish government needed a general paper or letter to defend the Spanish cause and to address to the Pope and the princes of Europe, as well as some manifestos to distribute within France. A junta was convened to prepare such texts. It consisted of Francisco de Calatayud, royal secretary, Alonso Guillén de la Carrera, a jurist and polemicist, as well as Juan de Palafox y Mendoza (1609-1659), also a jurist and the future Bishop of Pueblo de los Angeles in Mexico. This junta drafted a lengthy declaration in the name of Philip IV, the *Declaracion de don Felipe Cuarto, Rey de las Españas, al rompimiento de la guerra que sin denunciarla was also written for foreign audiences. Both explanations seem plausible and are not mutually exclusive.

---

174 Here the French text published by Hubert Velpius in Brussels, 1635, will be used.
177 He was also the author of the *Manifiesto de España y Francia* (before the war of 1635), to be found in Madrid, *Biblioteca Nacional*, Ms. 2.366, 218-345, in which he defended the Spanish view on Europe. Jover, *supra* note 15, at 166-90.
178 Elliott, *supra* note 45, at 489-90.
It was, however, not put into print. By the time the junta was ready – sometime by the end of July 1635 –, the French had already issued both the Declaration and the Manifeste. But in the months to come, many polemicists on the Spanish side, some of them high officials in the service of the King, would take up their pens and write in defense of their sovereign. Because the Declaracion de don Felipe Cuarto was not issued, it will treated fairly briefly below.

The Declaration of the Cardinal-Infante

The Cardinal-Infante’s Declaration opened by referring to the Peace of Vervins of May 2, 1598, the most recent peace treaty between France and Spain. The Cardinal-Infante’s grandfather, Philip II (1558-1598), had decided upon peace at the exhortation of the Pope, thus ending the misery that the war had brought over Christianity. France had promised that it would strictly abide with this treaty between the two leading Catholic powers. The treaty had invoked the wrath of God on whom would first break it. As is commonly known, France had never respected the peace but had maintained its old alliances and entered into new ones that were against Spain. It had continued to support the Dutch rebels with men and money and had helped them fight both the faith and Spanish sovereignty. King Philip III as well as the Archdukes Albrecht (1598-1621) and Isabella (1598-1633) had always preferred to ignore these offenses. They had placed the common peace above their own interests, even when King Henry IV of France started to stir up trouble for the whole of Europe. As it befitted the holder of the title of “Catholic King”, Philip III continued to reward evil with goodness in assisting the current French King Louis XIII against the discontent of his own subjects. But princes could not continue to condone the provocations of their neighbors if these harmed their own subjects.

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

179 Here the manuscript from Madrid, National Library, Ms. 290, 103, was used.
180 Jover, supra note 15, at 263-387.
181 Published in Du Mont, supra note 15, vol. 5-1, 561.
182 There was no such invocation in the treaty texts or the ratifications by Philip II or Henry IV.
183 Here, reference is made to a plot of 1632-1633, when some noblemen and military commanders from the Spanish Netherlands conspired to turn over some fortresses to the French; Janssens, supra note 175, at 110-18.
Vervins, had violated the immunity of the Spanish King’s couriers traveling through France, and had invaded Luxemburg, Artois, and the County of Burgundy.

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

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

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

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

At first, the Cardinal-Infante had been willing to receive this man as he had wanted to take every chance to show the justice of his actions to the world. But he had decided against it because he did not want to create a precedent and did not want to lose respect. Reference was made to an incident involving the King of England, who had been duped into believing someone was a herald of the King of France. France had abused the office of heraldry in the past and must now suffer that it had lost its credibility. The

184 Art. 3 of the Treaty stipulated that the subjects and merchants of the other signatory would only be reasonably taxed; Du Mont, supra note 15, vol. 5-1, 561.
185 This is, of course, the Alliance Treaty of February 8, 1635.
186 “… ayans partagé les Provinces obeissantes auparavant de les avoir occupées,” Declaration, 4.
187 Frederick Henry, Stadtholder of Holland and Captain-General of the Dutch army (1625-1647).
188 “… il prit le pretexte de demander l’Archevesque de Treves,” Declaration, 5.
189 “… contre tout droit & usages de guerre,” Declaration, 5.
190 “… (comme l’on pretend) en qualite d’herault, sans l’estre, ny en porter les marques essentielles, ny se conduire comme tel, & moins en exhiber aucune commission, ou lettre de creance,” Declaration, 5.
191 During the sixteenth century, the stratagem to dress up somebody else as a herald and have him declare war had been used. It was considered the ultimate insult to the receiving prince; Steinlein, supra note 13, at 23-4.
Sending of the herald was neither lawful nor civil, as the Spanish King could hardly have received the Cardinal-Infante’s messages concerning Trier in time. The Elector of Trier was, furthermore, not subject to the King of France or to the laws of his realm and was not openly under his protection. The Elector had been thanking God and the heavens ever since he had been liberated from the bad treatment and insolences he had suffered at the hands of the French.\footnote{It was true that the Elector of Trier had frequently complained in 1633 about the behavior of the French garrisons within his territories; Weber, supra note 49, at 238-59. That the Elector considered his abduction to be a liberation was somewhat more than a euphemism, and the Cardinal-Infante knew this. In a letter to Philip IV of May 15, 1635 the Cardinal-Infante had reported on his visit to the Elector. He explained that he had tried to persuade the Elector that he should not consider himself a prisoner. The Cardinal-Infante somewhat weakly stated that the Elector had seemed to accept that; published in Correspondance de la Cour d’Espagne, supra note 69, vol. 3, 56.} In the meantime, the King of Spain, who was protector of the town of Trier,\footnote{During the early 1630s, the town of Trier had repeatedly called upon the Spanish to help them in their conflict with the Elector. They had invited a Spanish garrison into the town, which was driven out by the French in 1632. Weber, supra note 49, at 227.} and the Emperor who judged in such cases, were seized by the matter. Any measures concerning the person of the Elector were sanctioned by the Emperor. Therefore, it was no wonder that no other Christian prince had taken on his cause. It was hard to understand that the French King had taken up arms to fight for a subject of the Empire against his own Emperor and against the council of the judges the Elector himself recognized as being competent. For this feat, the French King argued that he fought in defense of an ally. But this alliance, which hardly deserved that name, was not just and it postdated the Peace of Vervins and the double marriages of 1615, which were instrumental in safeguarding peace within Christianity.

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

\textit{The Declaracion of Philip IV}

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

The King of Spain had therefore decided to take up arms and reduce the French to what was “just and honest.” He did it for the “universal good of the whole of Europe” and in assistance of the vassals of both crowns, so that they all would enjoy peace and tranquility in the future. The war was first and foremost a war in defense of the faith, and the Catholic King Philip IV waged it rather in his capacity of “Catholic” than of “King”. He could not condone that the enemy would do so much damage to the faith and the entire Christian republic. He would enforce divine justice upon them. Peace was said to be the only licit goal for war, but that did not mean that injustices should be suffered. The offenses committed by the French against the Church, the

194 “… los Sarracenos,” Declaracion, 104.
195 “… ympiedad incredible” and “enemigo mayor de la fee,” Declaracion, 104.
196 Not only those of the Thirty Years’ War, but also those of the sixteenth century commencing with the Treaty of Chambord of October 5, 1551, Du Mont, supra note 15, vol. 4-3, 31.
197 Which Louis XIII refused to ratify.
198 “… tan gran dano de la republica Christiana,” Declaracion, 106.
199 “Y para conseguir estos tan grandes fines que han de redundar en mayor gloria de Dios, conseguir tropheos gloriosos de nuestros enemigos que, cediendo en bien universal de toda Europa, e alivio de los vasallos de ambas Coronas que puedan gozar de Paz, reposo y tranquilidad, sin desistir de sus artes y comercios en que la Provincias de Italia son tambien ynteressadas ; y finalmente para librarles de el peligro de las armas enemigas y del contajio de la heregia, hemos resuelto con celo ardiente, atentos al exemplo de nuestros ascendientes gloriosos, emplear nuestras armas siempre valerosa presentandonos en la campaan, con exercito tan numeroso que se digno de nuestra grandeza, poderoso para domar los franceses gente mas jactanciosa que vellicosa, y reducirlos a lo justo y onesto que es lo que siempre hemos desead y deseamos, haciendo el ultimo esfuerzo,” Declaracion, 106.
Crown, and the House of Austria were of such a magnitude that, since open war had broken out, the King could not accept them any longer without causing irreparable harm to the majesty and reputation of the Spanish arms. The French had, so it was alleged, waged a terrible war upon Spain in the name of peace. To achieve this, the French had bought with money what they refrained from buying through the use of arms. While their allies worked for them, they reaped the fruits of peace at home. Philips IV’s magnanimity made this possible.

Spain had always desired and worked for peace. It had refrained from war after the Peace of Regensburg and the Peace of Cherasco had been violated by the French. Nor had Spain taken up arms when the French plotted the Swedish invasion of Germany. They had assisted the French in the siege of La Rochelle, wanting to help the French King in his fight against the Huguenots. But the French had committed one offense after another, attacking the Spanish interests in Italy and the Netherlands. It was, worst of all, their support to the Dutch rebels that served the cause of heresy most and did so much damage to the faith. Their help to the Dutch allowed these to continue their attacks on the Spanish and Portuguese possessions in the Indies, including assaults on the Catholic missionaries there. This was all made possible through the endeavors of one who claimed the title of Most Christian King.

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

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

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

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

203 The Treaty of Bärwalde of January 13, 1631 is mentioned, Du Mont, supra note 15, vol. 6-1, 1.

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

205 Treaty of Regensburg of October 13, 1630, Art. 1; Du Mont, supra note 15, vol. 5-2, 615, 616.
By allying themselves to the heretics, the French had become little better than heretics themselves. But God had already punished them for their insolence by setting loose both the Huguenots and members of the royal house upon the French government.

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

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

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

The authors of the Declaracion returned to the many misdeeds of the French of the 1620s and the 1630s. Again their attacks on the Valtelline (1625) and Mantua (1629), their infringements of the Peace of Regensburg (1630) and the occupation of Lorraine (1631-1634) were reviewed. This time, the series of violations of the peace was crowned with their violent and brutal occupation of the Electorate of Trier (1632). The French were accused of having taken the Elector captive in his own lands. Then, when the Spanish took the legitimate action to free him from their oppression in the name of supreme justice, they had invoked this as a pretext and invaded Spanish territory “contrary to all law.”207 The Spanish King, however, was the hereditary protector of the Electorate of Trier in his capacity of Duke of Luxemburg. This had been confirmed by two electors acting as commissaries of the Empire. So, the Spanish King had every right to intervene and drive out the French in the name of the Empire. The French had, after all, allowed heretics into these Catholic lands, molested the burghers of the town of Trier, and made infringements on the sovereign rights of the Emperor. The Elector had been brought into Luxemburg and the Spanish Netherlands and had expressed his thanks to the Cardinal-Infante for his liberation from French oppression. The dispute fell under the jurisdiction of the Emperor and the imperial courts.

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

206 “… contra la Justicia, la Paz y las Leyes,” Declaracion, 124.
207 “… contra todo derecho,” Declaracion, 129.
208 The army of the Duke of Rohan in Württemberg before he diverted to the Valtelline.
the Spanish Netherlands and the sacking of Tienen on June 9, 1635. The Declaracion mentioned the liberation of Leuven by the Cardinal-Infante, which allows us to date the text at least two to three weeks after July 3, 1635. The attempts of the French and the Dutch rebels to have Spain’s loyal subjects of the Netherlands rise against their King, misfired.

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

The march of heresy, the oppression of the true faith, and the frequent attacks on Spain’s lands and allies had now led to war. Spain had always worked for peace and done everything in its power to prevent such a rupture. It still desired a universal peace. Spain “had made clear to the world that its war was purely defensive, even if the causes to make it offensive had been exorbitant and implacable to the extent that Spain could very well retaliate for the offenses committed against its allies.” So now, for the natural duty of defense of his realms, and on behalf of the Church, which the King of Spain protected by arms in its hour of need against the attacks of France and its sects, and for the sake of the King’s allies and family, Philip IV would force King Louis of France to stop his injustices, force him to abide to his treaty obligations with the Emperor and with Spain, to restitute the fortresses he had taken from the Emperor and the Duke of Lorraine, the House of Austria and its allies and to force upon him a firm and stable peace. The King promised that he had no intention to occupy any part of France by force of arms to which he held no just claim.

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

VI. Just and Legal War in 1635

The Legality of the War

By 1635, the distinction between the legality and the justice of war was well established in doctrine, even if the term “legality” had not been coined yet. Ayala, Gentilis as well

209 “… haciendo manifiesto al mundo como nuestra guerra es defensiva solo, aunque han sido tan exorbitantes las causas para hacerla ofensiva e implacable y retiarle los estragos que nos ha causado y a nuestros amigos y deudos, y para la defensa natural que devemos a nuestros Reynos y estados,” Declaracion, 140.
as Grotius demanded that for a war to be legal, and thus for the *ius in bello* to apply, it had to be waged between sovereigns and had to be formally declared.

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

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

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

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

Both the Cardinal-Infante’s and Philip IV’s declarations disputed the validity of the formal declaration of May 19, 1635. The Cardinal-Infante’s ministers stated that the declaration had not been presented in due form. First, they argued that the herald

---

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

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

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

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

The authors of the Spanish King’s declaration did not take the point any further. But was their position sustainable under the existing law of nations? Was there any support to be found in contemporary doctrine for the Spanish contention that only a declaration of war addressed to a sovereign was valid? Of the great writers on the law of nations of the sixteenth and seventeenth centuries, only the Italian jurist Pierino Belli (1502-1575) and the German jurist Johann Wolfgang Textor took a stand in this matter. Belli, who wrote in 1563, asserted that one who wanted to declare war on the subordinate of another should first seek redress from the overlord of his enemy. From there, one might argue that a fortiori a war could only be declared on a sovereign by addressing the sovereign himself. Textor, in his 1680 Synopsis iuris gentium, stated it to be essential that the declaration of war should come to the knowledge of the head of State himself, or that it should be probable that the declaration would reach him. He accepted that, when there was no opportunity to deliver the declaration to the sovereign, it was issued to the nearest prefect or governor. Of course, this was cutting it
both ways. Textor seemed to imply that as a rule the declaration should be issued to the sovereign, and that only if this was not possible, one could deflect from that rule. Moreover, Textor added that the “defendant” should be allowed some interval to take note of the declaration. 217 This seemed logical because the opposing party had to make it probable that the sovereign of his enemy would come to know of the declaration of war. Textor’s opinion at least makes it clear that the point the Spanish raised in 1635 should not have been considered moot all too readily.

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

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

---

217 Textor, supra note 13, 17.50-2.
218 Belli, supra note 216, 10.2.3; Grotius made a similar point, Grotius, supra note 99, 3.3.9.
219 Grotius, supra note 99, 3.3.1.2.
221 The Cardinal-Infante did, however, not inform the French herald of that problem as he refused even to receive him. For the instruction, see Simancas, Archivo General, Segretarías Provinceales No. 2569, 35. René Vermeir (University of Ghent) was so kind as to provide me with his transcription of this manuscript.
222 For instance, in April 1635, the Cardinal-Infante had received full powers from his brother to represent Spain if talks about a general peace were to be held; Letter of the Cardinal-Infante to
war on France in the name of his brother by means of his declaration of June 24, 1635. He claimed to do so on the basis of the power he had received from his brother. It is not clear whether this was a new and express authorization, received after May 19, or not. The absence of an express authorization in the archives suggests the latter. If this is the case, the Cardinal-Infante’s declaration debilitates the whole Spanish case. One could argue that by this time the Spanish King had decided on all-out war against France and that the Cardinal-Infante acted under implicit permission of the King. The Cardinal-Infante for his part claimed to have received powers to declare war. But all this does little to take away the impression that the whole discussion was far fetched and legalistic to the point of becoming unrealistic.

Both the Spanish texts also pointed out that the declaration was made after the invasion of Spanish territory had begun. This was clearly in contravention to established doctrine. Where Grotius conceded that hostilities could commence the moment the war was declared, Pierino Belli and Gentilis demanded that a certain interval should be respected. The Brussels declaration made the most of this to show off the French King’s duplicity. First, the French invaded the Spanish Netherlands in such a way that they could always claim that the French troops were just auxiliaries sent to their allies in execution of certain treaty obligations. After his victory at Les Avins, King Louis XIII invoked the captivity of the Elector of Trier as a pretext and then declared war. These accusations only partially correspond with the facts. Gratiollet was in Brussels after the invasion had begun but before the Battle of Les Avins took place. But both the Cardinal-Infante’s and the King Philip’s ministers considered the anteriority of the invasion to the declaration proof of the French King’s duplicity and of the invalidity of the declaration of war. Doctrine indeed stated that one could not declare war after one had started it.


223 Declaration, 7.
224 Belli, supra note 216, 2.8.8; Gentilis, supra note 108, 2.1.217-218, and Grotius, supra note 99, 3.3.13.
225 The Alliance Treaty of April 15, 1634 between France and the Republic stipulated that France would provide a regiment of infantry and a company of cavalry to the Dutch army; Art. 5, Du Mont, supra note 15, vol. 6-1, 68.
226 Juan Antonio Vincart, an official of the Spanish Secretariat for State and War in Brussels, repeated the same argument in his history of the 1635 campaign; Huisman, Dhondt and Van Meerbeeck, supra note 5, at 123.
227 Richard Stradling suggested that the fact that France had first declared war after it had opened the hostilities justified the confiscation of all French assets on Spanish territory; Stradling, supra note 58, at 93. This seems to imply that France, because of its defective declaration, could not benefit from the protection of the ius in bello. The argument is void because the ius in bello anyhow allowed the confiscation of all enemy property, that is if a prior treaty had not excluded this; Andreas F. Sonntag, Die Behandlung feindlichen Privateigentums bei Ausbruch des Krieges innerhalb der eigenen Grenzen in der Zeit von 1200 bis 1800. Ein Beitrag zur Völkerrechtsges-
From all this it can be deduced that the belligerents of 1635 thought an express declaration of war was necessary for the state of war to begin. But to conclude that it should be a declaration by herald as was done by the French in 1635 would be stretching it too far. By 1635, this form had fallen into disuse; the declaration by herald of May 19 of that year was highly exceptional. However, some form of declaration seemed to be in order. The most common form during the seventeenth century consisted in a declaration by a residing diplomat and an official publication of a declaration like that of Louis XIII of June 6, 1635 and that of the Cardinal-Infante of June 24, 1635. In addition to offering justifications for the war, these declarations also announced that a state of war existed. Like the declarations of 1635, these texts often comprised the measures to be taken against enemy subjects and property as well as a prohibition of all communications and commerce with the enemy. But it was not implied in 1635, nor does it appear from the ensuing war, that the nullity of a declaration prevented the laws of war to apply and supersede the laws of peace, as doctrine would have it. In reality, there were no sanctions attached to a faulty declaration of war. Anyhow, in the 1635 case the question was of little practical significance as the French King issued a second declaration on June 6 and the Cardinal-Infante reciprocated with a Spanish declaration on June 24. After that, no party could – or ever did – dispute that there was a state of war between France and Spain. The Spanish rejection of the validity of the declaration of May 19, 1635 served a political, and not a juridical purpose. It was yet another way of showing the world the falseness of the French.

The Justice of the War

Arguing the justice – or in modern terms, the legitimacy – of the war was, however, a far greater concern to the parties. For political reasons, both belligerents wanted to convince their allies and subjects of the justice of the war. Another possible purpose of the declarations, which the Spanish certainly contemplated, was to convince allies and subjects of the enemy of the injustice of the war fought by their sovereign or ally. But while the belligerent’s purposes were political, they argued their case in terms of the traditional rules of the just war and the ius ad bellum. They frequently used the terms “just,” “justice,” “unjust,” “injustice,” and, less frequently, “righteous.” They did not distinguish between moral and legal arguments, nor did they between natural or positive law, as Grotius did. These dimensions all remained inextricably intertwined with one another. Therefore, it would be an anachronism to ban the debate on the justice of the war outside the sphere of law to that of morality or politics. To the authors of the declarations it was, among others, very much a matter of law – just as it was to the

chichte 45-6 (1990). See Ayala, supra note 100, 1.5.1; Belli, supra note 216, 2.12.1; Cornelius van Bynkershoek, Quaestionum Juris Public Libri Duo 1.7.51-52 (Tenny Frank, transl., Carnegie 1930) (1737); Gentilis, supra note 108, 3.7; Grotius, supra note 99, 3.6.1-2. In any case, the French King Louis XIII had been preparing for a similar confiscation of Spanish property even before May 19, 1635; Lettre du Roy au Parlement, pour arrester les biens des Espagnols, May 16, 1635, in 67 Gazette de France 275 (1635).

228 Elliott, supra note 45, at 489.
great scholars of the era to whom it was a matter of natural law, being the highest and most self-imposing form of law.

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

The casus belli: Self-defense and the Defense of Allies

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

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

First, it must be pointed out that the French did not base their case on the fact that Spanish troops had attacked the French garrison at Trier and thus had opened hostilities between the armies. They did not even refer to that fact. The attack on the French garrison on March 26, 1635 was certainly not the first clash between French and Spanish troops. Two years earlier, the French had driven the Spanish garrison out of that same town. As the leaders of both great powers had been trying to postpone the war for years, they had never before considered such actions a reason for all-out war. As long as such things happened outside the territories of the two Kings themselves, they were content to catalogue them as covert war. In the light of contemporary doctrine, one could make
the argument that these were considered limited actions – of self-defense? – that did not trigger or constitute actual war. What Louis XIII invoked as the \textit{casus belli} was the attack on the person of his ally. That act in itself was called an infringement of “the law of nations” (\textit{droict des gens}) – the only time that term was used in the French texts – and it was an infringement of the sovereign rights of a prince of the Empire. For this act he claimed the just cause of defending an ally. One could also consider it an act of restitution or revindication of an ally against an injury committed by the enemy.

Second, the Spanish did not dispute the right to wage a defensive war on behalf of an ally. But they did dispute the French interpretation of the facts and circumstances of the case itself. \textit{Primo}, they disputed the capacity of the French King as protector of the Elector. In their view, the Emperor was his first protector. The Spanish King, as Duke of Luxemburg, was the protector of the town of Trier. The French had argued that Louis XIII had had to extend his protection to the Elector because nobody else was capable. The Spanish did not deign to answer. \textit{Secundo}, the Cardinal-Infante’s action was justified because he had liberated the Elector from French oppression. \textit{Tertio}, all disputes concerning the Elector and town of Trier fell under the jurisdiction of the Emperor, on whose behalf the Spanish acted. The French had no right to intervene in the matters of the Empire and the Elector’s position did not concern “all princes of Christianity” as the French said. Here a fundamental difference of opinion existed between the Spanish and the Emperor on one side and the French on the other side about the measure of “liberty” and “sovereignty” of the princes and estates of the Empire in general and, more particularly, their right to make treaties of alliance with foreign powers. That would only be solved at the Peace Treaties of Westphalia in 1648.\textsuperscript{229} In this context, the Cardinal-Infante in his \textit{Declaration} had it stated that all measures taken against the Elector were covered by imperial authority. That was a lie in so far as his abduction on March 26, was concerned. It was only afterwards that the Cardinal-Infante tried to obtain a sanction for his rash deed from the Emperor,\textsuperscript{230} and even from the Pope.\textsuperscript{231} \textit{Quarto}, in as far as the French King had anything to demand, he had to await the reply

\textsuperscript{229} Ernst-Wolfgang Böckenförde, “Der westfälische Frieden und das Bündnissrecht der Reichsstände”, 8 Der Staat 449 (1969); Derek Croxton, \textit{Peacemaking in Early Modern Europe: Cardinal Mazarin and the Congress of Westphalia 1643-1648} (1999); Dickmann, \textit{supra} note 38, at 124-63. The French pressed for the recognition and extension of this right to most German princes: Ronald G. Asch, “\textit{ius foederis} Re-examined: The Peace of Westphalia and the Constitution of the Holy Roman Empire,” in \textit{Peace Treaties and International Law in European History: From the Late Middle Ages to World War One} 319 (Randall Lesaffer ed., 2004).

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

\textsuperscript{231} Letter of Stravius to Barberini, April 21, 1635, \textit{supra} note 2, at 62. See also Letter of the Cardinal-Infante to Philip IV of April 1, 1635, Brussels, \textit{General Royal Archive, Secrétairerie d’Etat et de Guerre} No. 212, 370-1.
and the decisions taken by the Emperor and the King of Spain before declaring war. Refraining from doing so was against “the law and usages of war.”

By rejecting the French *casus belli*, the Spanish could claim that the French invasion of the Spanish Netherlands was an unjust attack. They thus justified the war as defensive on their part. To the invasion and atrocities against the Netherlands, they could add the operations of Rohan against the Spanish troops in the Valtelline from April 1635 onwards. Under traditional doctrine, the Spanish could have refrained from declaring war themselves and just acted under the umbrella of the natural right of self-defense. Through the declaration by the Cardinal-Infante, the Spanish however recognized that a state of war existed between France and Spain. Their actions of self-defense, which allowed only for a limited and proportional military response as long as the attack was going on, was thus turned into a full defensive war, which was unlimited in scope and duration and triggered the application of the laws of war, including the right to make booty and conquests. The Cardinal-Infante’s declaration thus reflects the traditional, doctrinal distinction between actions in self-defense – limited in goal and scope – and defensive warfare.

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

**Preemptive Self-defense**

The French invoked a second cause for the war. They claimed that the decision to declare war and invade the Spanish Netherlands was taken because they had been informed of the Spanish plans to invade France. The war was an act of – in present-day terminology – preemptive self-defense against an imminent attack. In the thought of Gentilis and Grotius, this fell within the boundaries of defensive war. The French stated that their invading army had intercepted the Spanish army under Thomas of Savoy on its way to the French border. This was, however, not its destination. The Spanish corps had been on its way to the Rhineland. Notwithstanding this, it was not unreasonable for the French government to fear a Spanish invasion in the near future. The Spanish fleet in the Mediterranean was being prepared, plans for a multiple attack had been entertained in Spanish government circles, and Spain had been pressuring the Emperor for months to declare war on France. Still, there was little proof that an attack was imminent and the argument had all the likeliness of a pretext.

---

232 Supra note 189.
233 The Cardinal-Infante himself was also fearful for some time of a French attack on the Spanish Netherlands; Letters from the Cardinal-Infante to the Count of Oñate of April 29, 1635 and May 11, 1635, Brussels, *General Royal Archive, Secrétairerie d’Etat et de Guerre* No. 334, 208 and 233.
It is puzzling why Paris invoked this second just cause, which was much shakier than the first. There are two reasons for this move. First, it can be presumed that they felt that the abduction of the Elector of Trier was not enough to justify the decision to start an all-out war with Spain. After all, that offense was surely not much graver than many others they allegedly suffered in the past and thus, even to the French, it might have appeared as something of a pretext. It was not the abduction of the Elector of Trier that made the French plot and prepare a war for 1635, but the Swedish defeat at Nördlingen and the fear of losing their allies. The events of March 26, 1635 only decided the timing and justification of the attack. As it was pointed out above, Louis XIII and Richelieu could not allow themselves to abandon an ally when so many of their allies where thinking about doing just that. Also, Trier may have convinced Louis XIII and Richelieu that it was time to attack before they were attacked. If that is true, the French rulers were not less honest or more dishonest in making the case of preemptive action than in invoking the Elector’s plight. Second, the French rulers had something more to explain than the decision to declare war on Spain; namely, the invasion and possible future conquest of the Spanish Netherlands. That the war was an action to help and liberate the Elector of Trier, who was held captive in the Netherlands, was surely an argument to invade that part of the Spanish empire. But the fact that the Spanish army was plotting to attack France from these same lands, strengthened the case for first starting the war there. On the other hand, the argument of preemption did not serve to cover the most embarrassing aspect to the whole case for the French. The French-Dutch attack of May 1635 was not the result of a sudden decision, but had been plotted over a long period of time. In fact, it had been agreed on in the Treaty of February 8, 1635. A future occupation or annexation of parts of the Spanish Netherlands could thus hardly be explained away as the outcome of a war forced upon the Spanish by their imminent attack. It had to be justified on its own terms.

Assistance to an Oppressed People and to a Rebellion

To do this, the French invoked yet another cause. The authors of the Declaration du Roy of June 6 stated that the joint Franco-Dutch invasion of the Spanish Netherlands was the first operation of the war because the population there had been suffering for so long under Spanish “servitude” and the war against Spain. On this point, the Declaration closely followed the Franco-Dutch Alliance of February 8, 1635. It repeated the treaty text by explaining that those parts of the Spanish Netherlands that liberated themselves from the Spanish within two months after the Declaration would be recognized as free states and would enjoy the protection of France.

Thus, the just causes of assistance to an oppressed people and of aid to a rebellion – causes that several of the leading authors of the period accepted – were invoked. The fact that the rebellion in the Spanish Netherlands had not started yet could be swept

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

235 Declaracion, 26.
from the table with the argument that the rebellion had been going on for sixty-seven years, ever since the rebellion of the Netherlands from which the Dutch Republic was born began in 1568. This argument lay dormant in the reference to the longevity of the war in the Netherlands.

A Necessary War and a Just Goal

Under the classical just war doctrine of the Late Middle Ages, for a war to be just three conditions had to be met. First, it had to be waged by a sovereign. Second, it had to be fought for a just cause and, third, the belligerent must have a righteous intention and pursue a just goal. The third condition was predominantly of a moral dimension. It had its roots in Christian theology. In the Thomist tradition, it implied that the belligerent had to strive for the common good.\textsuperscript{236} The war should not only be about the enforcement of the belligerent’s own rights and the pursuance of his own legitimate interest. It had to be waged to attain a just peace whereby everybody received his due. Once the medieval system of the \textit{respublica christiana} had collapsed and the law of nations had started to emancipate from the scholastic context, this third condition became even more unenforceable than before. But the great writers of the law of nations of the sixteenth and early seventeenth centuries stuck to it and restated it in one form or another in their interpretations of the just war. Students of the history of the medieval and modern law of nations have struggled with that third condition and treated it with certain unease. By and large, the juridical mind has experienced a hard time to take it seriously. What did a just goal mean in terms of legal rules?

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

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

---

\textsuperscript{236} Philippe Contamine, \textit{War in the Middle Ages} 286 (1984).

\textsuperscript{237} Piirimäe, in his analysis of the manifesto issued by Gustav Adolph of Sweden at the occasion of his invasion of the Empire (1630), concluded that the manifesto was rather in the theological tradition of the just war doctrine – stressing cause and goal –, than in the modern, humanist tradition; Piirimäe, supra note 30.
all, these arguments did not answer the accusation that the invasion of the Netherlands had been agreed to with the Dutch Republic in an offensive alliance treaty of early February 1635, in which France finally accepted a proposal the Dutch had already made to them in the spring of 1634. When this treaty became known to the Spanish, France felt caught in the light. It needed more than the three just causes mentioned. The same went for what the French and Dutch had in store for the contingency of the local population of the Spanish Netherlands did not rise: the division and annexation of those territories. From Richelieu’s advice of June 1634, in which he argued against a joint Franco-Dutch conquest of the Spanish Netherlands, it is known that Richelieu was not keen on making such a move and was concerned with the fact that it would damage France’s reputation. France could not invoke any dynastical claims or other legal rights to the Spanish Netherlands, something the Cardinal-Minister had always seen to with great care in sustaining the other territorial claims of his King. The Spanish had a similar problem. Their just cause – self-defense against an unprovoked and unjust French invasion – stood or fell with the acceptance of their interpretation of the jurisdiction of the Emperor and the Spanish King over the Elector of Trier, which was much disputed, and their reading of the events of March 26, 1635, which was neither clear nor credible.

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

238 De Pange, supra note 73, at 100-13.
240 Grotius, supra note 99, 2.24, esp. 2.24.8-9. For Grotius, the necessity actually served as a kind of fourth point of concern, in addition to authority, cause, and goal. But in practice, it was inextricably connected to “goal.”
241 Grotius, supra note 99, 3.20.42-43 and 46.
In the four declarations of 1635, the argument of necessity, and of expediency, played a part in two different ways. First, the incessant offenses the enemy had committed against the King, his subjects, allies, and friends over the preceding two decades made the war inevitable. Large tracts of the four treatises were devoted to listing the misdeeds the King had patiently suffered for such a long time. The enemy, so both parties stated, had corrupted the peace and had made it more costly to the King, his subjects, and allies than war itself. The French declaration of June 6, 1635 put it most eloquently. Why keep a peace that cost 150,000 men to guard it and depleted the French treasury while the Spanish grew stronger? War was thus the responsible act of a patient and just king, who could no longer condone that his people and allies suffered from his moral scruples. For current international lawyers, this reasoning would also answer the question of proportionality. The decision to start all-out war was no disproportionate reaction to an isolated offense. But the declarations of 1635 left it understated; neither was the terminology used nor was the question expressly addressed. Nevertheless, it was in accordance with the exhortations of Grotius and the proponents of the classical just war doctrine not to wage war unless there was no alternative left and the good that would come from it would outweigh the evil.

Second, the war was necessary to attain the belligerents’ just goal: a firm, just, and stable peace. In stating this, the authors of the 1635 declarations replaced themselves in the age-old tradition of the just war. Firm, just, and stable peace was further qualified; it was identified with the achievement of the long-term strategy and goals of the own monarchy. It was Pax Hispanica to the Spanish, and Pax Gallica to the French. The French styled themselves as the champions of “public liberty” and “public peace” in Europe. The Spanish Kings were accused of aspiring to universal monarchy. French power was the only thing that stood between Spain and the achievement of that goal. Therefore, the enhancement of the power of France and the abasement of Spain became just goals themselves.

Universal monarchy was an old concept that drew on a long tradition, dating back to the Roman Empire, Charlemagne (768-814), and the heyday of the Holy Roman Empire in the eleventh and twelfth centuries. The claims of the Emperor to universal monarchy had been consistently rejected by the Pope and the kings of Western Europe since the early thirteenth century, but the idea had lived on. With the election of Charles V of Habsburg, who was also King of Spain and lord of the Netherlands, to the imperial throne in 1519, the ideal went through a brief revival. But by the 1540s, Charles V’s all in all half-hearted attempts to establish his authority over Western Europe had been thwarted by a coalition of France, the German Protestant princes, and the Turks. When he abdicated in 1555/1556, Charles split his empire between his son Philip II, who inherited Spain, the Netherlands, and the Italian possessions of Spain, and his brother Ferdinand I (1530-1564), who continued to rule in Austria, Bohemia, and Hungary, and became Emperor. A lasting result of this episode was that Spain, and not the Holy

242 Supra note 168.
243 Neff, supra note 86, at 51.
244 As in the Papal bull Per venerabilem of 1202.
Roman Empire, became the seat of true “empire” in the Latin West.\textsuperscript{245} From the days of Charles V on, France, which had been the greatest contender of Charles V and later of Spain for the leading position in Europe, used the rhetoric of universal monarchy against Spain to establish itself as the champion of liberty.

In the old medieval and sixteenth-century tradition, universal monarchy did not imply the submission, annexation of and direct rule over all kingdoms of the Latin West. It was a combination of factual hegemony and legal precedence. In the medieval ideology of empire, the Emperor was the secular head of Christianity, as the Pope was the spiritual leader. He was the first among kings. Since the tenth century, the imperial crown had been linked to the crowns of the Kingdoms of Germany and Italy – that is, Italy north of Rome. The Emperor took precedence over all other kings, but could not claim to rule them. His main “authority” was vested in his capacity of defender of the faith and protector of the Pope. He was the military arm of the Church. He had to lead the Latin West in its fight against infidels and heretics. The recognition as leader of a crusade by other kings was therefore the ultimate symbol of universal monarchy. The Emperor also had to protect the worldly possessions of the Church, such as the Papal State around Rome and could, if necessary, correct the Pope and the clergy if they diverted from the true path. Few of the Emperors from Otto the Great (936-973) to Charles V had succeeded in having these claims accepted by the Pope and other kings of the West.\textsuperscript{246}

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

Richelieu did not aspire to territorial expansion for its own sake. He was very much aware that this would destroy France’s self-declared status as the champion of the sovereignty of all princes and, therefore, he was careful to pursue only those territorial claims for which a credible legal basis could be found or construed.\textsuperscript{247} His policy was not one of “natural frontiers,” as it has been claimed. Richelieu wanted to obtain some strategic fortresses in west Germany and Italy that would at the same time give France an east-west entrance into these lands and cut the north-south-route of the Spanish


\textsuperscript{247} See, e.g., Richelieu’s “Instruction pour Messieurs les Ambassadeurs de France, envoyéz à Cologne pour le Traitté de la paix générale” (1637), supra note 48, at 38.
monarchy. He aspired to “natural gateways,” not “natural frontiers.” This would allow France to break the Habsburg encirclement of France and cut the lifeline of the Spanish empire, the Spanish Road. This would bestow upon France the capacity to intervene diplomatically and military in Germany and Italy, to break Spanish hegemony there, and keep those lands divided. Thus Germany, Italy, and, in the final analysis, France and the whole of Europe, would be free from Spanish oppression.

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

Of course, Richelieu worked for the aggrandizement of his King and country and placed their interests above all. But his idea of “reason of state” was not a secular one and did not differ much of that of the Habsburg leaders, Ferdinand II, Philip IV, or Olivares. Like these men, Richelieu was a deeply religious man who tried to align his King’s interests with that of the faith and the Church. The solution lay not in suppressing the common interests of Christianity and upholding the interests of the King, but in the reciprocal identification of both. In the minds of Richelieu and even more of Father Joseph, France was the bedrock of Christianity and Catholicism. King Clovis of the Franks (481-511) was the first of the Germanic kings to have accepted the faith of Rome (496). The French Kings were the true heirs of Charlemagne and with Louis IX (1226-1270) held a second saint among their ancestors. Since almost two centuries, they had proudly carried the title of “Most Christian King.” Their resistance against the Spanish lust for domination was also a fight for the Catholic Church and the faith, which was as much oppressed by the Spanish as the princes of Europe were.

What kind of “just peace” did France aspire to? What was the European order the war had to make possible? The keywords of this order, the Pax Gallica, were “public liberty” and “equality.” France’s war was a fight for “public liberty,” freedom for all. It was a fight to protect the princes and republics outside the Holy Roman Empire against Spain’s desire for universal monarchy. It was a fight to protect the constitutional rights and liberties of the princes and estates of the Empire against the attempts of the Austrian Habsburgs to transform the Empire into a “hereditary monarchy.” And, lastly, it was a fight for the liberty of the Church. Spain wanted nothing less than to use the Church

---


250 Church, supra note 49; Dickmann, supra note 239.

251 In the words of the Manifeste: “Mais que depuis il a esté contraint de s’opposer aux injustices des Espagnols qui voulant rendre l’Empire hereditaire en la maison d’Austriche, ont fait cognoistre tellement à découvert la pretention imaginiaire de leur Monarchie sur la Chrestienté,
as an instrument of power and oppress it. The Pope as the secular leader of the Papal State, who was an objective ally of France at the time, was yet another victim of Spain’s domination over Italy. More equality among the European princes would allow the Church to be free. Only through “their [the princes’] equality, the Church can survive and maintain itself in all its functions and splendor,” Richelieu wrote.\footnote{Armand du Plessis de Richelieu, Memòires du Cardinal de Richelieu vol. 5, 293 (1921), translation from J. Leclerq, “Politique nationale et idée chrétienne dans les temps modernes,” 214 Etudes 683, 690 (1933).}

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

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

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

All this made the war necessary, inevitable, and just. France’s noble aims and Spain’s wickedness forced the war upon Louis XIII. France might want to change the status quo and break Spain’s preexisting position, but it was forced to do so because of the continuous and unjust actions of Spain, which sought expansion and the suppression of all. After all, Spain’s existing empire was but the result of its age-long and unjust lust for expansion and domination. This rhetoric turned France’s strategy from offensive into defensive. In this sense, the war, even the premeditated invasion and conquest of

& leurs entreprises sur tous les Princes ou ils en trouvent l’occasion, que l’on voit évidemment que le pretexte de la Religion, dont ils ont voulu se servir jusques icy, ne leur sert plus que d’un manteau pour couvrir leurs desseins déreglez.” 20. Richelieu hereby courted the German public opinion, which had real concern about the Spanish threat to “public liberty”; Peer Schmidt, Spanisch Universalmonarchie oder “teutsche Libertet”: Das spanische Imperium in das Propaganda der Dreißigjährigen Kriege (2001).
the Spanish Netherlands, became an action that was cloaked under what could be called “hegemonic defense” or “hegemonic strategic defense.” This essentially defensive position made even the most offensive deeds look like just reactions to the enemy’s injustice. The invasion and conquest of the Spanish Netherlands was necessary because these lands for too long had served as the basis from which Spain launched its attacks on France and the Republic and plotted the submission of Europe.253

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

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

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

This conviction of the defensive character of Spain’s grand strategy was for Olivares, as it was for Richelieu, a strong argument to persuade himself of the justice


254 “Pour le dehors, il faut avoir en dessein perpétuel d’arrester le cours des progrès d’Espagne, et au lieu que cette nation a pour but d’augmenter sa domination et estendre ses limites, la France ne doit penser qu’à se fortifier en elle-même, et bastir, et s’ouvrir des portes pour entrer dans tous les Etats de ses voisins, et les pouvoir garantir des oppressions d’Espagne quand les occasions s’en présenteront”; “Advis donné au roy après la prise de la Rochelle” (January 13, 1629), in Avenel, supra note 2, vol. 4, 179, 181 (my transl.).
and essentially defensive nature of even his most offensive actions. According to the declarations of 1635, the war was just because it envisaged nothing but the restoration of the just peace Spain had secured before 1618, the *Pax Hispanica*. The war against France was necessary because it was the only thing that would stop France from attacking Spain and its Catholic allies and from constantly disturbing the peace. A stable peace would have to be forced upon France. This in itself justified a war and all offensive actions that went along with it.

VII. Conclusion: Hegemonic Defense

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

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

---

255 Exception had to be made for the attack on Mantua in 1628, which Philip IV later called the only unjust war of his reign. He lacked, after all, a credible legal claim to Mantua. Olivares later did his utmost to divest himself from any responsibility. Both statesmen realized they had played into the French hands by their aggression; Letter of Philip IV to Maria de Agreda, July 20, 1645, published in *Cartas de la venerable Sor Maria de Agreda y del Señor Rey Felipe IV* vol. 1, 28 (C. Seco Serrano ed., 1958); Gaspar de Guzman de Olivares, “Nicandro,” in *Memoriales y Cartas del Conde Duque de Olivares* vol. 2, 250 (John H. Elliott and José F. de la Peña eds., 1981).

256 On Olivares’ grand strategy, see Elliott, supra note 45, at 47-84 and 323-386; Idem, supra note 49; Parrott, supra note 46; Stradling, supra note 58; Straub, supra note 45, at 11-29 and 44-78.
claimed the right to intervene against a monarch suppressing his own people as a just cause. The Spanish only reacted to this by calling the Dutch rebels and heretics. They certainly agreed with Ayala that no prince had the right to intervene on their side.

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

This notion can be called “hegemonic strategic defense” or just “hegemonic defense.” I will use the shorter term. In historical and in current doctrine of international law, “self-defense” refers to the cause for war. It defines and characterizes military actions. A war is defensive when it is waged to stop or preempt an armed attack by the enemy. States are expected to argue their appeal to defense on a tactical or operational level. But as it appears from the practice of 1635, “defense” in the hands of political leaders puts on another appearance. They appeal to “defense” employing arguments of political strategy. The men of 1635 used and abused the notion of “just goal” from the classical just war doctrine to slip in their political strategy and cover it with law and morals. As such, their grand strategy became undisputedly just in their own eyes and, therefore, all operational decisions that served this higher purpose shared in its justice. As that higher purpose was defense of the international order they stood for, even the most offensive operations became essentially defensive. As such, the borders between reactive defense, anticipatory self-defense, and even outright aggression were fatally blurred. The intellectual process allowing for this was the identification of the own vital interests with the common good and the rightful state of affairs – to be defended or achieved – of the whole international order. This was termed a just and stable peace. Each attack on the interests of the power concerned was unjust because these interests converged with international order and peace. However, each attack constituted an attack on international order and peace. Each action that prevented the power concerned to uphold or restore or attain that order, was an act of aggression against that order and against peace. It gave that power the right to defend the order of Europe in a just war. The identification of self-interest with international order and peace promoted that power to the safeguard of that order and allowed it to define and fight off all threats to it.

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

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

But as stated above, the justice of the war did not turn on the causes but on the goals and the necessity of the war. Who had the stronger claim? In fact, Spain had the easier task because it wanted nothing but the status quo ante. France for its part wanted to change the balance of power in Europe and bring down its enemy. But France too constructed a vision of international order that was consistent and promised a lasting and just peace. The French could also find some support with both Gentilis and Grotius, who allowed for a preventive war against a neighbor who became too powerful and whose aggressive intentions were clear. But these authors were not unbiased, nor was this idea commonly accepted.

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

So shortly after the diplomatic clash between France and the leading power of today about the war in Iraq (2003) that rings with reminiscences of the case of 1635, it is hard

257 As they would be in the nineteenth century; Gardam, supra note 142, at 5.
259 Plutarch, Pompey 14.
not to give in to the temptation of making some remarks on the relevance of all this for our times. Let us do so briefly. First, the law as it is perceived and applied by states can be far different from what established doctrine says, even if the wording is the same.

Second, there is the notion of “hegemonic defense.” While according to doctrine defense was a just cause and was defined as a reaction to an armed attack, thus on the operational level, the great powers of 1635 also saw it as a strategic notion. While the traditional right to self-defense is a natural right that belongs to all, strategic defense is the privilege of – individually or collectively – hegemonic powers or powers that aspire to such a position. On the basis of this case, we can define “hegemonic defense” as follows. It contains five elements. Primo, a hegemonic power, a group of powers that collectively are hegemonic, or a great power or group of powers that wants to prevent another power of becoming hegemonic and itself aspires to that position, identifies its own grand strategy with the existing or desired international political and legal order. This order is considered inherently and undisputedly just. In history, we commonly refer to this hegemonic order as Pax Romana, Pax Hispanica, Pax Britannica, Pax Sovietica, Pax Americana. Secundo, any attack against the interest of the great power, any attempt to prevent the achievement of the great power’s goals is considered an unjust attack against that just international order. Tertio, this invites and justifies a defensive reaction. Quarto, the ultimate goal and justification of hegemonic defense is the protection of the existing just order or the establishing of the justly desired order. Quinto, hegemonic defense is a strong platform for arguing preventive war. The enemy’s behavior proves that he wants to disrupt the existing order or prevent the desired order of coming into being. It may therefore be better to wage a preventive war before he becomes too powerful and achieves his goal. By judging the defensive character of a war on the level of goals and grand strategy, the lines between reactive and anticipatory war are blurred.

Was the appeal to “hegemonic defense” of 1635 an isolated case in modern history? It was not. The use of hegemonic defense is a logical complement to the “great power principle.” This principle, or “legalized hegemony” as Gerry Simpson recently dubbed it, implies that great powers are attributed special factual and legal responsibilities, prerogatives, and rights for the formation, functioning, and upholding of the international legal order. During the last three centuries, the principle became a central feature of the international legal order, though this was and is often understated in doctrine. During that era, it was condoned, if not acknowledged, that the great powers collectively held special responsibilities and rights and executed them by way of a directory of great powers. The principle truly came into its own with the Congress of Vienna (1815) and lives on today, among others, in the permanent membership of the United Nations Security Council. In fact, it was foreshadowed by the guarantee treaties of


the eighteenth century in which great powers, if not exclusively, took on responsibility for the existing legal and political order. It is therefore logical to surmise that the institution of “hegemonic defense” flourished during the last three centuries. Our own times offer some interesting cases. Gerry Simpson considers the recent war in Afghanistan to be an example of how great powers attribute themselves special rights in the field of the use of force. One of the arguments brought forward to justify the 2003 invasion of Iraq was that the belligerents acted to uphold international law when the proper institutions of the international society could not. The same went for NATO’s intervention in Kosovo in 1999, though this was done under the name of humanitarian intervention and not on the basis of “hegemonic defense.” Antony Anghie reaches quite similar conclusions about the current “war against terror,” but also makes reference to Kosovo and Iraq. Case studies for the eighteenth, nineteenth, and twentieth centuries could show how frequent this notion of hegemonic defense was used and what it implied at any given time.

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

see recently José E. Alvarez, “Hegemonic International Law Revisited,” 97 AJIL 873 (2003), in reaction to Detlev F. Vagts, “Hegemonic International Law,” 95 AJIL 843 (2001). All this is of course part of a wider and classical discussion on the relation between international law and power. Like Simpson, Nico Krisch, argues that power and law historically are not two opposed and separate phenomena, but that law is both an instrument of (great) power(s) and an obstacle to the free exercise of power; Krisch, supra note 260.

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

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

263 According to Anghie, the rhetoric of “war against terror” combines 1) a broad definition of self-defense, covering preemptive self-defense and preventive self-defense, 2) against rogue states, that threaten the existing order, e.g. through the seeking of weapons of mass destruction and, 3) the invocation of a goal, i.e. democratization. Anghie refers to the thought of Francisco de Vitoria, who defended the Spanish conquest of the New World as a defensive reaction against attacks by the Indians on the Spanish “traders” and missionaries who came to their lands; Antony Anghie, Imperialism, Sovereignty and the Making of International Law 273-309 (2005). See also Krisch’s interpretation of Kosovo in terms of a revival of natural law argument, “More Equal than the Rest? Hierarchy, equality and US predominance in international law,” in United States Hegemony and the Foundations of International Law 135, 142 (Michael Byers and George Nolte eds., 2003).

265 On the debate, see Christine Gray, International Law and Use of Force 86-87 (2000) and the references there.
allegedly preexisting customary right of international humanitarian intervention. 266

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

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

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

266 Simon Chesterman made a sound argument against this claim in his Just War or Just Peace? Humanitarian Intervention and International Law (2001).
