



Declaring War *in* Early Modern Europe

Frederic J. Baumgartner

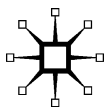


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For Mackenzie, Evan, and Benjamin

CONTENTS

<i>Acknowledgments</i>	ix
1 Introduction	1
2 Ancient and Medieval Precedents	7
3 The Sixteenth Century—The Practice	33
4 The Sixteenth Century—The Theory	55
5 The Seventeenth Century	85
6 The Eighteenth Century	115
7 The Age of Revolution	147
<i>Notes</i>	173
<i>Bibliography</i>	197
<i>Index</i>	199

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CHAPTER 1

INTRODUCTION

Is a declaration of war necessary? There has been a vociferous debate for the past half-century over this tenet of international law as it was formulated in the early modern era. The questions of whether a declaration of war is necessary and what is the proper way to issue one certainly are not new to recent time. For hundreds of years, European scholars have debated these matters, while kings, emperors, and presidents have often ignored the conclusions they have reached. The consensus reached in the eighteenth century required a declaration of war for an offensive war, defined as one undertaken by attacking the lands and forces of another state, but only for the purpose of repairing a manifest injury, while a clearly defensive war did not need a declaration.

Although the necessity of the declaration of war appeared permanently settled by the mandates of the International Peace Conference at The Hague in 1907, a half-century later the matter again became a point of heated debate in the United States. The last declarations of war were issued during World War II, but when President Harry S. Truman committed U.S. armed forces to a major war in Korea, he did so without a declaration of war. It was the first time a president had ordered large American forces into battle without a declaration of war. The constitutional issues were muted, however, because Truman acted under a mandate of the United Nations, whose charter had been accepted by the U.S. Senate as a formal treaty.

Far more than the Korean War, the Vietnam War created major issues concerning the legal authority to conduct a foreign war. What President Lyndon B. Johnson and Congress intended by the Tonkin Gulf Resolution of 1964 quickly became, and remains, a matter of great controversy, especially over the question of whether it was the legal equivalent of a declaration of war or a presidential usurpation of Congress's power to declare war. From the first, there was considerable scholarly

publication arguing the latter point, and in the decades since, the preponderance of scholarly opinion has supported that view. Among those writing against presidential war powers as used in the Vietnam War was Arthur Schlesinger, Jr., probably the best-known historian of the era, whose *The Imperial Presidency* of 1973 became a hallmark of opposition to that war and presidential war prerogatives.¹ Yet there were those outside the executive branch who defended those presidential powers; Henry Monaghan, a professor of law, was perhaps the most eminent among them.² The passage of the War Powers Resolution in 1973, which was intended to delineate what the presidential powers in war making are, led to a heated debate in which two law professors took the lead: Robert Turner, objecting to the resolution's restrictions on presidential power, and Bennett Rushkoff, demanding it be followed.³

The debate over the necessity of a declaration of war became far more heated following the September 11, 2001, al-Qaeda attacks on the World Trade Center and the Pentagon, when President George W. Bush spoke to Congress and the American people. He declared, "The enemies of freedom committed an act of war against our country." He went on to announce: "Our war on terror begins with al-Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated."⁴ When the Taliban government of Afghanistan refused to turn Osama Bin Laden over to American authorities unless it was given definitive proof of his complicity in the al-Qaeda attacks, the United States—supported by the United Kingdom, Canada, and numerous other countries—initiated military actions in Afghanistan in October 2001, without a declaration of war, and bombed Taliban and al-Qaeda camps.

Most scholarly opinion agrees the war against the Taliban in Afghanistan was a proper form of self-defense under international law. That was far less true in October 2002, when the Bush administration submitted to Congress a request to authorize the use of military force against Iraq. Congress passed the Use of Military Force Against Iraq Resolution of 2002 as a joint resolution. In March 2003, the British House of Commons voted to support the government's motion for an attack on Iraq. Even before the formal votes for using military force were taken, major controversy had erupted in the United States over whether authorizing military force constituted a constitutional manner of beginning a war. Since 2002, a significant subset in the debate over the legality of the war is concerned with whether Congress needed to pass a declaration of war against a sovereign state that had not attacked the United States, instead of relying on a resolution allowing the president to act at his discretion.

The issue of who has the legal authority to commit the United States to war has vexed politicians, constitutional lawyers, and historians alike. The matter arose within a decade of the framing of the American Constitution and reappeared dozens of times—some argue over a hundred by 2000, if the wars with Indian tribes are included. The war of words heated up a great deal more after the 2003 invasion of Iraq. Two authors who forcefully represent the opposite sides on the issue of war-making authority in the United States are another professor of law, John Yoo, who served in President Bush's Office of Legal Counsel, and again Arthur Schlesinger.⁵

The debate over the absence of declarations of war for recent conflicts has led to attempts to provide a theoretical construct for declaring war as found in the U.S. Constitution and American history. Saikrishna Prakash, a professor of law, has proposed that there are three different approaches to the understanding of what declarations of war entail in the context of American history and current practice: (a) a categorical theory, which posits that the authority to declare war includes the power to control all decisions to enter war; (b) a pragmatic theory, which proposes that such power may be made unnecessary by an act of war in itself against the United States; and (c) a formalist theory, which finds that the power of declaring war constitutes only a formal implementation of executive power to conduct war.⁶ Prakash argues for the first, holding that the U.S. Constitution's clause giving Congress the power to declare war limits presidential authority to engage in war only to that which Congress authorizes, with or without a formal declaration of war: "Necessarily, the President cannot unilaterally choose to wage war against another nation, even when that nation has already declared war." Michael Ramsey, another law professor, is perhaps the leading supporter of the view that when another state attacks the United States or declares war on it, the president can respond with full war without requiring an act of Congress, but in other cases must wait for a congressional declaration: "Carrying on War begun by another nation was not part of the declare-war power. It therefore remains part of the President's executive power."⁷ John Yoo is the best known of those who advocate the third position, arguing that a congressional declaration of war is necessary only to begin total war and implement the full range of presidential war powers. "Textually, a declaration of war places the nation in a state of total war, which triggers enhanced powers" on the part of the executive branch.⁸

The purpose of this book is determining which of the above approaches to declaring war comes closest to the historical record of both the practice and the theory of the declaration of war. Most authors involved in the debate are weak on the history of declaring war before 1787, and some

ignore it entirely; but that lack of interest in the historical perspective is not unusual, as most discussions of the constitutional issues involved in this controversy are limited to an analysis of American law and history, rarely looking earlier than the era of the writing of the American Constitution. They do not realize that the modern declaration of war, at least as it was done until 1945, was developed in the early modern era, when the medieval custom of sending heralds to enemy courts to hurl defiance against their masters' foes gave way to the practice of having ambassadors present formal declarations of war to enemy governments.

Any study of the practice of declaring war, or not declaring it, inevitably draws upon the work of Lieutenant Colonel Frederick Maurice of the British Army, who in the late nineteenth century studied all the conflicts "between civilized powers" from 1700 to 1870 to determine whether they began with or without declarations of war.⁹ As Brian Hallett writes, "The importance of Colonel Maurice's study is difficult to overestimate. It is the definitive empirical study in English. It is cited whenever anyone wishes to demonstrate empirically that formal declarations of war no longer served any useful function after the seventeenth century."¹⁰ The study's context involved discussions in 1881–82 between Britain and France on digging a tunnel between Dover and Calais. In Britain the discussion was derailed by fears the French might use the tunnel to invade without declaring war, thereby catching the British by surprise. Maurice was commissioned to determine whether civilized powers ever had done such perfidious acts in the recent past. To his apparent surprise he concluded that it was far more common for European states to begin conflicts without announcing their intentions, or they would issue declarations of war only after hostilities had already begun.

Maurice was specifically interested in those cases in which declarations of war were used as a warning to the foe before hostilities began, since any agreement with France to dig a tunnel depended on a sense of security in Britain that France would not use it for a surprise attack. He concluded that there had been "less than ten instances of the kind" in the 171 years he examined, along with two or three doubtful instances of prior declaration. He included a discussion of only four of his positive cases—France and Britain against Spain in 1719; France against Prussia and Austria in 1792, and later that year against Spain, the Netherlands, and Britain; and France against Prussia in 1870; only the last, he concluded, truly served as a warning to the intended enemy. He described, usually very briefly, 107 cases of the outbreak of hostilities (between 1700 and 1870) in which either the attacking state never issued a declaration of war or it came after hostilities had commenced.¹¹ The inclusion of several cases in that category is, however, highly dubious. For example, he

included two Irish Republican Army raids (in 1866 and 1870) from the United States into Canada, which hardly constituted “hostilities between civilized powers.” In a number of cases, as well, he was wrong either about the absence of declarations of war or the beginning of hostilities before one was issued. The record of the “civilized powers” was not quite as dismal as the colonel concluded.

Furthermore, nearly a third of Maurice’s cases involve violence at sea that occurred without a declaration of war. For at least four reasons, both statesmen and political thinkers of the early modern era were more forbearing of undeclared violence at sea. First, the difference between privateer and pirate was often most difficult to ascertain, and governments generally were prepared to attribute attacks on their ships to pirates, unless they were already determined to go to war. Second, there existed a separate code of law that dealt with ships seized as prizes, cargos and contraband found in neutral ships, and rights of merchants and seafarers against pirates, which dated back to the fourteenth century. Third, clashes between ships, often far from the coasts of the states involved, were deemed less a threat to a nation’s safety than did the violence perpetrated by land forces on its frontiers or territory. Fourth, the states of Europe, except for Britain and the Netherlands, thought mostly, and in several cases exclusively, of war on land; the land powers were reluctant to allow naval confrontations involving their allies to trigger a larger war on land. In short this work will show that the extensive, and in some cases exclusive, use of Maurice’s book by those seeking to answer the question on the current necessity of a declaration of war requires a major caveat: It is not entirely reliable.¹²

The issue of whether war ought to be declared prior to hostilities is largely a concern of the Western world, if one includes the Islamic lands in that discussion. To be sure, declarations or equivalents were common among non-European cultures, but the emphasis in European history on properly declaring war was in large part a consequence of the influence of Roman culture, as was true in so many aspects of Western civilization, but it also owed much to Augustine of Hippo, the preeminent Christian subject of the Roman Empire, and the Christian concept of the just war developed in the Middle Ages from his thought. Accordingly, the first chapter of this book is a survey of the Greek, Roman, and medieval aspects of the declaration of war. Because the sixteenth century was the key period in the transformation of both the act of declaring war and its theory, separate chapters are devoted to the practice and the theory of declaring war in that century. In the chapters on the seventeenth century, the eighteenth century, and the era of the two great revolutions of the early modern period, the practice of declaring war and the theory about

it are woven together. The final chapter investigates the approaches to declaring war found in the constitutions of the new American and French republics, and it concludes with a survey of the practice of declaring war to the present, offering a brief discussion of whether it has become obsolete since World War II.

While the debate over recent congressional resolutions authorizing use of the armed forces overseas has generated a large number of publications, the wider history of declaring war and making peace has been far less a topic of study. There exist several works describing the practices of the Greeks and Romans but, for the early modern period, one is hard pressed to find anything that examines declaring war for that era. For example, Garrett Mattingly's classic *Renaissance Diplomacy* (1955) has almost nothing on the declaration of war. The Hague Conventions on International Law in 1907–08 led to several works that are general studies of the topic, but they emphasize the ancient era and their own period and slight the early modern times. Some works dealing with contemporary American issues provide brief surveys of the history of declaring war that touch on the early modern era, but they are cursory, and some contain obvious mistakes.

Although the history of declaring war is certainly part of the history of international law and political theory, especially the issue of just war, this present work includes little discussion of the principles of natural law and international law beyond what is needed to understand the different positions on declaring war. Some major names in the history of political thought, including Thomas Hobbes, David Hume, and John Locke, barely touched on the topic, and hence I have little to say about their thought. On the other hand, because of the importance for the creation of modern international law of the debate in Spain in the sixteenth century over whether the Spanish had the right to conquer the American natives, I give special attention to the Spanish theologians who formulated a new understanding of the just war and the declaration of war. I also provide brief biographical sketches of those authors whose works are discussed within, in part because most of them are not well known, but also because frequently their experiences help explain their positions on the key issues of just war and how to declare one.

CHAPTER 2

ANCIENT AND MEDIEVAL PRECEDENTS

Declarations of war were probably the oldest form of diplomacy. The descriptions of the earliest Roman declarations found in Livy's *History of Rome* have been interpreted as reflecting a Neolithic magical tradition of unknown antiquity. Since the ritualistic warfare as practiced by those Stone Age tribes, which has survived into historical times, usually required a ceremony for inaugurating a war, it is logical to suppose it was also true for European tribes in the distant past.¹ In the course of what are usually labeled as the ancient and medieval eras of European history, the act of declaring war was transformed from a magical process to one entirely conventional, although the proper performance of the act was still seen as conveying divine approval of the coming war.

Declarations, or their equivalents, were common among non-European cultures. The early Chinese are said to have used declarations of war as the expected way for beginning a war, although examples of its use and discussions about it are difficult to find.² Amerindian peoples often used declarations of war. The Aztec emperor was required to consult his counsellors and people before declaring a just war, which usually followed an attack on Aztec merchants. The declaration was announced in the central plaza, usually for five days and, before the army was dispatched, envoys were sent to the enemy, demanding submission and tribute.³ The Incas sent messengers to the peoples they intended to conquer, asking them to submit and agree to worship the Sun god before an attack could begin.⁴ The Amahuaca of eastern Peru have been described as "one of the few tribes that makes a formal declaration of war," which it did by scattering corn on the trails leading to the enemy's villages.⁵ When the Moari of New Zealand saw strangers approaching, a scout was sent to the gate to ascertain if they were peaceful or hostile. To determine their intent, the scout would go through a *wero*, or challenge. After grimacing fiercely and performing menacing gestures, he would place a small ceremonial

token such as a carved stick on the ground before the strangers. If a visitor accepted the token and held it in his hand or aloft, it signified that he came in peace. If the token was refused, it was taken as a declaration of war.⁶ These examples, especially the latter ones, suggest what might have been used among the European tribes long before recorded history began.

The earliest recorded example of declaring war is found in the Mesopotamian epic *Gilgamesh*. Around the year 2600 BC, Aga of Kish sent envoys to Gilgamesh of Erech demanding his submission. Gilgamesh convoked two assemblies: the first, of the elders, recommended submitting to Aga; the second, of the able-bodied men, counseled war. Gilgamesh, pleased at the belligerent response, then ordered: "On this account let the weaponry and arms of battle be made ready," and proceeded to defeat Aga's army and take him captive.⁷ The ancient Hebrews were told to offer terms of peace to a town they were approaching for the purpose of attacking it (Deuteronomy 20: 10): "If it accepts your terms of peace and surrenders to you, then all the people in it shall serve you at forced labor. If...it makes war against you, then you shall besiege it; and when the Lord your God gives it into your hand, you shall put all its males to the sword, and take the women, children and everything else as booty." There is, however, no clear example of the Hebrews using that method to begin a war, while there are several instances of their going to war with a surprise attack, for example, when Joshua attacked the cities of Jericho and Ai (Joshua: 6–7). For early modern Christians, who drew so heavily on Scripture, there was not much to establish a firm principle of the need for a formal notice of war, but the concept of a holy war fought at God's command was clear.

The Greeks expected a formal declaration of war and explicit abrogation of existing treaties. They used the term *keryx*, usually translated as herald, to identify their messengers. The symbol of their office was a white wand, called a *caduceus*, with two serpents intertwined. Hermes, the Romans' Mercury, carried such a wand as the herald of the gods; it manifested him as the mediator and go-between in matters of peace and war between disputants. Greek heralds were dispatched with a list of grievances and demands that, it generally was assumed, the foe would not accept, thereby providing legal and religious sanctions for war. The heralds beseeched the gods of the enemy to abandon him, and a defeat was regarded as the gods' judgment against the vanquished. A war begun without "proclamation by heralds" was deemed an offense for which the offenders could not atone. In addition, there were often ritualistic acts that accompanied the heralds' proclamations. A lamb, for example, might be sent into enemy territory, signaling that the state declaring war

intended to turn the foe's land into pasture. The *keryx* also was sent to convey peace terms or request terms of surrender.

Among the Greeks, there were few surprise attacks or undeclared wars before the mid-fifth century.⁸ The most intriguing aspect of the Greek style of war was the meeting before the battle between the *strategoí* of two warring armies to agree on a site for battle, almost always a level plain where neither side would have the advantage of holding the high ground. Herodotus (*The History*: 7, 9) places a discussion of this practice in the mouth of the Persian general Mardonius, who is presented as being flabbergasted at it. As for the Persians, Herodotus (*The History*: 6, 48) relates that prior to the invasion of 490 BC, Darius sent heralds to the Greek states demanding earth and water for the emperor, which demand Xerxes repeated in 481 BC. Those who offered it were accepted as Persian allies. For example, when the Athenians heard Aegina (an island near Athens) had done so, they believed the Aeginetans "intended to join the Persian in his attack upon Athens." Those who refused were expected to take the demand as a declaration of war.

Thucydides provides more detail on Greek practice. In his *History of the Peloponnesian War* (I, 29), he describes how, in the dispute in 433 BC between Corcyra and Corinth (the prelude to the larger war between Athens and Sparta), the Corinthians "sent in front of them a herald to declare war and then set sail with a force of seventy-five ships." In 415 BC Athenian ships were sent to Syracuse with the purpose of both shouting to persons on shore Athens's intention to wage war and scouting the city's harbor and defenses. Philip of Macedonia sent a letter with his demands to Athens in 340 BC with a clear threat of war should the city not respond as he wanted. The Athenians, having heard the demands, "voted to destroy the stele that had been set up to record the peace and alliance with Philip, to man a fleet, and to put themselves in all other respects on a wartime standing."⁹ Whether Athens informed him of their decision is not stated. Seven years later his son, Alexander, preparing to land in Asia Minor, threw a spear from his ship to the shore as a declaration of war against the Persians. He proclaimed the war on the grounds that he was seeking justice for the Persian wars against his ancestors 150 years earlier.

The obligation of declaring war was acknowledged in ancient Greece, but it was not always respected. The Spartans offended the most frequently in that respect. According to Pausanias (*Description of Greece*: V, 8), they neither declared war nor openly renounced their alliances before attacking. He relates how mounting tensions over several years between Sparta and Messenia led the Spartans in 740 BC to attack, "without sending a herald to declare war on the Messenians or renounce their friendship

beforehand.” When Pyrrhus of Epirus attacked Sparta in 272 BC, the Spartans complained that he began the war before it was proclaimed. “We know very well,” he countered, “that neither do you Spartans, when you design anything, talk of it beforehand.” Yet, the Spartans had their own strange tradition: Plutarch states that as soon as the *ephors*, who were elected annually, entered into their office, they declared war against the helots, the permanent slaves of the Spartan state, so that they could be killed as an act of war without a breach of religion and law.¹⁰

The use or absence of a declaration of war had no impact on the treatment of prisoners of war among the Greeks. Early in Greek history they often were summarily executed, since the gods had abandoned them, but some were held for ransom. By 500 BC their usual fate was enslavement. According to Aristotle in his *Politics* (1255a–1256b), enslavement of prisoners was part of the law by which things conquered in war belonged to the conquerors. In the era of wars among the small city-states, that fate was rarely extended to noncombatants (with the exception of the helots of Sparta); but during the Peloponnesian War and after, as the larger city-states began to build empires, noncombatants of defeated states often were made slaves as well. More important to later Europeans was Aristotle’s theory of natural slavery (*Politics*, 1254): barbarians, that is, non-Greeks, were slaves by nature. Lacking the ability to form a *polis* and deficient in reason, barbarians were naturally subject to the Greeks, who have the right to wage war on them and enslave them as an inferior form of human being. Aristotle contrasted such natural slaves with civil slaves—those who committed some act for which slavery was the punishment or had been captured in a just war against another Greek polis and were granted their lives in exchange for their freedom. Consequently, Greeks waging war against barbarians were not concerned with such formalities as declarations of war.

For the early Romans, the highly legalistic people that they were for much of their history, declarations of war were mandatory and formal. They had a special order of twenty priests called the *fetiales*, so named according to Plutarch, because “their office was to put a stop to disputes by conference and speech; for it was not allowable to take up arms until they had declared all hopes of accommodation to be at an end.”¹¹ Plutarch relates further that when the Gauls, who had invaded central Italy, put the city of Clusium under siege, the Romans dispatched Fabius Ambustus to their camp to negotiate peace. Receiving a rude refusal, Fabius decided his embassy was at an end and engaged in combat alongside the Clusinians. When the Gauls discovered it, they sent a herald to Rome to complain about him, since he breached the peace before war was declared, against the law of nations. The Senate debated the matter,

and the fetials decreed he had to be handed over to the Gauls for punishment. Forewarned of their judgment he appealed to the people, and by their protection escaped the sentence. Informed of this, the Gauls marched to Rome in 387 BC, and sacked it.

According to Livy, the principal source on the fetials, King Ancus Marcius established the mode of declaring war, an event dated to 638 BC (*History of Rome*: I, xxxii). Livy states Rome borrowed from “the ancient race of the Aequicolae that form of demanding satisfaction that is still used.” Four fetials would be sent to demand satisfaction from another state; their spokesman was called the *Pater patratus populi Romani*. The fetials, wearing caps of wool and red stoles, went to the frontiers of the state from which restitution was demanded; this nonnegotiable demand for satisfaction was the *rerum repetitio*. It usually sought the handing over of persons who had harmed Romans or their property and was not meant to begin negotiations. The *Pater patratus* shouted: “O Jupiter, hear, and hear ye, frontiers of (naming the state), let justice hear; I am a public messenger of the Roman people. I come, an ambassador duly authorized, according to the forms of justice and religion; let my words therefore meet with credit.” He then crossed the border, repeating the demands to the first person he met and then within the foe’s forum (Rome’s foes in this era being other Latin tribes). If the demands were not met after a period of thirty or thirty-three days (the sources disagree on how many), he returned to proclaim: “O Jupiter, hear me! And thou, Juno, and all ye gods of heaven, and ye of earth, and ye of the infernal regions, hear, I call you to witness, that this people are unjust, and do not perform what equity requires. But concerning those affairs we will consult the elders in our own country, by what means we may obtain our rights.”¹² This act was the *denuntiatio*.

When the fetials had returned to Rome to inform the king, he consulted the Senate, asking each senator, “What is your opinion?” The senators were expected to say, “I am of the opinion that the performance of the demands ought to be enacted in just and regular war, wherefore I consent and vote for it.” When a majority of those present gave that opinion, a vote for war passed. The fetials carried a spear burnt at the point and dipped in blood to the frontiers, and there, in the presence of at least three adults from the other side, the *Pater patratus* shouted: “Inasmuch as the states of the ancient Latines, and the ancient Latine people, have acted against and behaved unjustly towards the Roman people . . . the Senate of the Roman people has given the opinion, consented, and voted that war should be made with the ancient Latines; therefore, I, and the Roman people, do declare and make war against the states of the ancient Latines and the ancient Latine people.” Then he threw the spear across the

boundary; this was the *indictio belli*. Livy concludes: "In this manner was satisfaction demanded from the Latines, at that time, and war declared; succeeding generations adopted the same method." The Romans thereby insured the gods were on their side in the coming war. Romans later proclaimed their hegemony over the world resulted from the fact that their wars were always divinely sanctioned; such a war was *bellum justum et pium*, *pium* referring to the gods' sanction.

The fetial priests also played the major role in negotiating peace for the early Romans. According to the tradition cited by Livy, the Romans always fought for the unconditional surrender of their foes. Once a foe had capitulated, the Romans insisted on a ritualistic formula for making peace, usually intended to incorporate the defeated state into its system of allies. Once the terms had been agreed upon, a fetial swore to them in the name of the Roman people. A pig was then brought forward and stabbed with a stone knife, while the fetial said: "If it [the Roman people] should . . . first depart from them, then do you, Jupiter, so strike the Roman people as I strike this pig this day." Historians assume the other Latin tribes had their own fetials who swore a similar oath. The fetials were responsible for seeing the peace terms were carried out and for handing over for punishment by the former foe any Roman who failed to follow them.

For early Romans, war was seen as an important source of booty and slaves. Captured enemy soldiers might be exchanged or ransomed back to their homeland, the going rate being two "mina" per soldier (a mina was valued at about 0.94 pound of silver, the price Hannibal demanded for Romans taken at Cannae), but if their homeland refused to pay or could not, they would be sold into slavery. Enemy noncombatants could be taken as slaves and sold, especially in the case of taking a city that did not surrender right away. The Romans had no compunctions about killing prisoners when the military situation made it difficult to hold them. Since Rome always waged only just wars, fighting in a war against Rome put the enemy beyond the protection of law and deserving of death; merely enslaving them was actually an act of generosity by the Romans. For many captured, a violent death was only deferred, as they became gladiators in the Roman arenas. Claudius allegedly used most of the captives from Britain after its conquest in 43 AD in games celebrating his triumph.¹³ In a civil war, however, there was no formal declaration of war or formal enemies. Fighting men captured in a civil war between Romans could not be made slaves, even if they were liable to execution for treason. For Plutarch, this situation explained why defeated men in a civil war were usually massacred, as they had no value as slaves.

A Roman taken prisoner of war lost all his property and rights as a Roman citizen, and his wife and children were released from their obligation of obedience to him. Should he eventually return home by exchange or ransom, the right of *postliminium* entitled him to everything he possessed before, as if he had never been in the enemy's hands. Postliminity was extensively discussed in the Roman law codes, indicating that the return home of prisoners of war was frequent and subject to controversy.

As Rome's wars expanded beyond the region of Latium, the role of the fetials declined. The new foes did not have their own fetials with whom to interact, and the new theaters of war were far from Rome, making it difficult for the fetials to perform their rituals. The war that began in 281 BC against King Pyrrhus of Epirus involved a foe from overseas, and the Romans were at a loss about how to declare war on him, especially in respect to the ritual of throwing the spear into his territory. They settled on the expedient of having a prisoner from Pyrrhus's army buy a piece of land near the Columna Bellica in the Forum; boundary stones were set up around it; and the spear thrown into what was now hostile territory. By the mid-third century BC, this practice had become standard, and legates from the Senate delivered the declaration of war at the frontiers of the foe, if it failed to accept the Roman demands. Livy indicates this was the way war was declared against Carthage in 218 BC. The fetials kept their place in making peace longer. In 201 BC they traveled to Carthage with their sacred flint knives and herbs to swear the peace treaty with that city. In 200 BC the fetials were asked whether the declaration had to be delivered to a king directly—in this case, Philip V of Macedonia—or could it be given to an officer of his on the frontier. The decision was that it could be done in either way; both fulfilled the requirements of law. Nine years later, when King Antiochus of Syria attacked Roman allies in Greece, that decision was reaffirmed.¹⁴

As early as the First Samnite War in 327 BC Rome had made use of strategic ploy of making allies of states threatened by another power deemed as Rome's likely enemy in the future. When the enemy attacked that ally, the Romans had cause to declare war, always insisting it was just war. The details of how such an alliance would come about and its terms are found the Deutrocanonical book of I Maccabees (8: 14); the Jews, knowing Rome was eager to reduce Greek Seleucid power, sent a delegation to Rome in 160 BC to secure an alliance against the Seleucid King Demetrius. Rome quickly agreed and sent a delegation to Demetrius to ask him, "Why he had made his yoke heavy on our friends and allies the Jews? If now they appeal again for help against you, we will defend their rights and fight you on sea and on land." Rome on several occasions

warned enemies of the Jews to desist from fighting them, but it never actually went to war on their behalf. A century later Judea had become a Roman client state, and Rome sent Pompey to intervene in an internal political dispute. He proceeded to take Jerusalem in 63 BC and turn Palestine into a Roman province.

As the Roman state expanded, and conquered territories were organized into provinces, their governors were left largely on their own. They often picked quarrels with nearby tribes and states as a pretext for expanding their spheres of power and gaining political support in Rome. In 59 BC the Senate passed the *lex Julia*, forbidding governors from starting wars without its authorization. Julius Caesar was the force behind the law, intending it to forestall his rival Pompey; yet his activities in Gaul showed it could be ignored.¹⁵ By Caesar's era, the fetial priests had lost their role in declaring war and may well have disappeared. Cicero, a defender of republican tradition, objected when the three proconsuls who made up the triumvirate—Caesar, Crassus, and Pompey—were given the power to declare war and make peace in their provinces without recourse to the Senate or the people. Cicero's definition of war—*Bellum est genus decertandi per vim* ("War is a form of contending by force")—became the standard, while his statement on just war has been the foundation of just war theory to the present: "It seems that no war can be regarded as just, unless it has been announced and declared and unless satisfaction has been demanded" (*On the Commonwealth*: II, 17). Cicero, as did all Roman authors, excluded from that requirement rebellion and defense against invasion.

Varro, Cicero's contemporary, wrote that the Romans had ceased waging just war in his era, since they no longer used the traditional method of declaring war (*On the Latin Language*: V, 86). A complication of such a view involved the opinion that only in a just war could the surviving people of the enemy nation be made slaves after its defeat. In a society both as legalistic and dependent on slaves as Rome's was, that stand created a conundrum, but the Romans nearly always solved it in favor enslaving defeated foes. Still, it remained a point in Roman law that "enemies are those on whom the Roman people has publicly declared war or who have publicly declared war on the Roman people, but others are termed robbers or brigands," as the jurist Ulpian put it in the early third century AD,¹⁶ a position incorporated into Justinian's *Corpus Juris Civilis* (49:15).

Spurred on by such views, Octavian used the old tradition in 32 BC to declare war on Queen Cleopatra of Egypt, and through her, on Antony. Octavian himself acted as the fetial priest, probably because the order had disappeared. While he sought to legitimize his war against his enemies

by the traditional method, the fact that he acted as a fetial pointed to an important change in Roman law: from then on it was the emperor who declared war on his own authority, even if emperors such as Claudius continued to use the fetial rite, sacrificing pigs in the Forum when concluding treaties. The last mention of the fetial practice of throwing the bloody spear over the Columna Bellica to declare war is dated to 178, when Marcus Aurelius used it for war against the Marcomanni, a German tribe. When the king of the Chionitae, a Middle Eastern people, declared war on Rome in 359 by throwing a bloody spear over a Roman wall, Ammianus Marcellinus (*Book of Deeds*, XIX, 2, 6) recalled that it was ancient fetial practice.

In 363 Emperor Julian began a war against Persia, in which he was killed, without a declaration. Some Romans argued that Julian's death was a consequence of his offending the gods by his failure to follow ancient tradition, although the Christians decided that it happened because he had abandoned Christianity. By then Christianity was legal in the Roman Empire, and a significant number of Roman leaders had become Christian. The issue of what Christians thought of war and how to declare it now became important. Prior to the Edict of Milan (313), Christians could give emphasis to the strong streak of pacifism found in the New Testament, such as Christ's admonition to "turn the other cheek" (Luke: 6, 29).¹⁷ Many early Christians were strongly opposed to war; some, such as the second-century theologian Marcion, went so far as to declare that the deity found in the blood-stained books of the Old Testament was not the God of Christianity. After 313, the situation changed entirely. Christianity went from being a persecuted minority to becoming the majority religion within the Roman Empire, with Emperor Constantine himself being baptized late in life. Christian denunciations of the Roman Empire and its violent history disappeared, as Christians accommodated themselves to being part of the establishment. It is probably no coincidence that when the canon of the Bible was set at the end of the fourth century, it included the Old Testament and the Book of Revelation in the New, both with accounts of bloody wars waged by divine command.

Constantine had a further role in bringing the Christian Church to endorse state-sponsored violence. During the fierce persecution prior to his reign, many Christians had conceded to imperial authority by handing over the sacred books to Roman officials. After persecution had ended, the Church faced the problem of what to do with those who had apostatized. A rigorist group, especially strong in North Africa, insisted they had to be rebaptized. The Christians in Rome rejected that demand, and Constantine chose to support them. In 317 he sent troops to North Africa to enforce orthodoxy, which resulted in many deaths. Then, in

380, Emperor Theodosius included several heresies among crimes worthy of capital punishment. Meanwhile, the Roman Empire was becoming more and more Christian. In 391 Emperor Theodosius banned paganism, and defense of Rome now became a Christian responsibility.

The possibility that a Christian might be required by state authority to kill another person because of either heresy or war forced a thorough rethinking of the Christian attitude toward war and state-sponsored violence. The most important contribution to the process came from Augustine of Hippo, who was born in North Africa in 354. His generation was faced with both the sacrilege of heresy and the devastation of barbarian invasion, most seriously the Visigoth sack of Rome in 410 and the Vandal invasion of his native North Africa. In fact, these German tribes combined both evils, for they were Arian Christians, whose beliefs had been denounced as heresy at the Council of Nicaea (325), as well as barbarians.

Confronting the lingering opposition to war among Christians, Augustine combined the divinely sanctioned wars of the Old Testament with the Roman tradition of the just war. If God can command war, it cannot be inherently evil in all circumstances. He also had to neutralize those statements in the New Testament that many Christians had taken as barring their participation in war. If among faith, hope, and charity, the greatest was charity, then, Augustine argued, it was an act of charity to wage war against evildoers to restrain them from doing further evil. It was in the sinners' own interest to be prevented from sinning, by force if necessary. A Christian could kill or enslave an enemy, provided he did so without malice but out of a "kind harshness" (Letter to Marcellinus). Not to resist evil was for Augustine a greater wrong and revealed a lack of charity. In his Letter to Boniface, he cited Luke: 3, 14 to argue that the Gospels did not prohibit soldiers from serving: "And the soldiers also asked him [John the Baptist], saying: 'And what shall we do?' And he said to them: 'Do violence to no man, neither calumniate any man; and be content with your pay.'"

For Augustine the proper status was peace, and he certainly was not ready to justify all violence: war had to be for the public good and, therefore, decided on by the one responsible for the public good—the emperor. The emperor in Augustine's time was the head of the Church as well as of the state, and thus he had responsibility for both maintaining religious unity and defending the empire. Provided he went to war for the right reason—to repair or prevent injury to the Church or the empire—such a war was a just war. In regard to heresy, Augustine regarded the act of breaking church unity as a crime, and the emperor had to deal with heretics as he would with rebels, bandits, or pirates. There was no need

for any formal declaration of war against them. In respect to war against other states, Augustine largely followed Cicero: the purpose of war was to create a just peace, but he said nothing about how such a peace was to be achieved. For the Romans until his time, a just peace occurred when an enemy nation was defeated and incorporated into the Roman state. There is no reason to think Augustine believed otherwise, although by his era it was becoming obvious that Roman victory was no longer certain, as it had almost always been for the previous nine centuries.

Augustine's immense authority in Christendom for the next millennium ensured his doctrine of the just war dominated medieval thought, and it still is cited in the twenty-first century. His subtle arguments and distinctions, however, were often misunderstood or disregarded, and his point that the nation waging a just war did not always emerge victorious was ignored in favor of the belief that God would ensure the just side would prevail in war. In the decades after Augustine, as the power of the Roman Empire declined, the sense that the only just wars were ones the emperor declared dwindled as well. More and more, the Catholic hierarchy took upon itself the authority to determine what was a just war. Church sanction meant a war had God's blessing, giving victory to the state on the side of right. Isadore of Seville, writing two centuries after Augustine, proclaimed precisely that point. Nonetheless, he took his definition of what constituted a just war directly from the Roman tradition. It was a war fought to recover lost goods or repel invaders; it had to be formally declared by one who had authority to make such a decision and could not be waged out of revenge or hatred. Isadore failed to define how a war was properly declared, but approval by church authorities was necessary to ensure it was just.¹⁸

By Isadore's time Roman tradition was becoming mingled with Germanic practice, but how the German tribes declared war remains obscure. Tacitus indicated the Germans made major decisions, such as going to war, in the assembly of freemen, but he gave no hint whether such a decision was transmitted to their foes or how it might have been. Among the Anglo-Saxons, the *wittenagemote*, the assembly of free landholders, possessed the power of making peace and war, which was regarded as inseparable from its members' land-holding status.¹⁹ Such assemblies remained the practice among the Franks into Charlemagne's reign. He gathered his warriors at the annual Mayfield to decide against whom to wage war that summer. His first war was against the duke of Gascony for harboring a fugitive from his court. According to Einhard's *Life of Charlemagne*, he sent messengers to the duke demanding the fugitive be handed over or he would be taken by force. Likewise, when Charlemagne was ready to take on the Avars in the Hungarian Plains, he

sent messengers to deliver an ultimatum. Envoys were not mentioned for the many other wars he fought, and it is not clear whether the chroniclers regarded them as so routine that they were not worth noting, or were not sent.

In the Eastern Empire, Justinian sent a letter in 532 to the Vandals in North Africa, denouncing their king as a tyrant and asking that they join his troops in overthrowing him. The envoy entrusted with the task of delivering it failed in his mission, but that did not stop the emperor from sending Belisarius to recover North Africa for his empire (Procopius, *History of the Wars*: III, xvi, 10). After Justinian's death in 567, the Byzantines were always either on the defensive or seeking to recover lost provinces, so there apparently never was any sort of formal declaration for the rest of the empire's existence. In the early tenth century, Emperor Leo VI stated that war was the work of the devil, and he would go to war only against those who, under the devil's control, invaded his territory. Under those circumstances a declaration of war was not necessary.

The devil's agents Leo VI had in mind were the Muslims, who had been at war with the Byzantine Empire for three centuries by his time. Probably because Muhammad himself was involved in war against the city of Mecca and several Arab tribes, the Qur'an has far more on the rules and regulations of war than does the Bible. It has so many that they lead to apparent inconsistencies. Consequently, since 632 Muslim scholars and lawyers have debated what the obligations for waging war are. In Islam, the only valid reason for war is for the expansion or defense of the true religion; the term *jihad* (struggle) is applied to it. While term is used for the personal struggle against sin, it also refers to the fight against unbelievers to spread belief in Allah and make his word supreme in the world. Whether Muslims are in permanent war against unbelievers depends on the nature of the unbelievers. Muhammad differentiated between idolaters and the peoples of the Book—Christians and Jews—who also believe in the true God but in erroneous ways. Against idolaters, the state of war is permanent until the last one has become Muslim or been killed, although there need not be constant fighting. In respect to the peoples of the Book, Muslims are permitted to allow them to remain in their erroneous faiths, as long as they acknowledge Muslim overlordship and pay a special tax.

The Qur'an (XVII, 15) states: "We do not punish until we have sent a Messenger." This command is amplified in a *hadith* (a saying attributed to Muhammad) that Muslims are obliged to give a summons to the unbelieving enemy to convert to Islam or, if they are people of the Book, agree to pay the special tax, before war can begin. If they agree, then the Muslims are obliged to accept their submission; if not, Muslims must ask

God for assistance and fight them. According to tradition, Muhammad sent letters to the Byzantine and Persian emperors, inviting them to join *Dar al-Islam*, Muslim lands. A decade later, Caliph Umar sent such a summons to the Persian emperor: "After you receive my letter, send me guarantees and you will have peace; otherwise, in the name of Allah, I shall send you men who like death as much as you like life."²⁰ Usually, the Muslims waited three days after sending a summons before attacking. Able-bodied males who become captives of Muslim forces were liable to death but usually were made slaves. The Muslims began to allow ransoming of captured fighting men during the Crusades, but only high-ranking captives were ransomed. Women, children, slaves, and old men among the enemy were not to be killed unless they took a direct part in combat.

The only valid reason for war in Islam is for the expansion or defense of the faith; there can be no secular war. Nor should there be war between Muslims, since all are brothers. Yet it is recognized that some believers would fall into error or rebellion, and force was permitted either to bring them back to the truth or kill them to prevent injustice. From early on, violence among Muslims occurred, and after the unity of the Arab Empire collapsed in 751, war between Muslim states often happened. Even when they did not truly involve differences over doctrine or the leadership of the Muslim community, they were always presented as concerning such matters. According to the Qur'an, the head of the true Muslim community must send a summons to the dissenters, warning them to return to the true faith. Should they refuse, they must be fought with special vigor and punished severely. Once the split between the Sunni and Shi'i occurred, a difference of opinion arose over who had the authority to declare offensive jihad.²¹ For the Shi'i, after the last divinely appointed imam went into hiding, the obligation to wage offensive jihad has been suspended until he returns, although the injunction of defensive jihad has always remained. The Sunni, however, having accepted the caliph as the humanly appointed head of the Muslim community, allow him to determine at his discretion how best to advance the cause of the true faith by offensive or defensive jihad.

The issue of whether war against the unbelievers was permanent dictated how the Muslims thought of peace treaties. In the age of conquest the Arabs rarely were faced with a situation in which they had not achieved their goal of the complete defeat of their foes. The treaties they negotiated then involved the capitulation of the enemy under terms they dictated. So, for example, in 642 the Byzantine forces in Alexandria accepted a treaty that called for a year-long truce, the evacuation of Byzantine forces from the city, the payment of tribute, the protection of

the right of Christians and Jews to practice their religions, and the handing over of 200 hostages to the Arabs.²² After the age of conquest was over, the debate whether permanent peace could be made with unbelievers who had not been subdued became more important. Those who believed jihad against unbelievers was permanent would accept only a truce accompanied by the payment of a large sum of gold, although the truce could last up to ten years, based on a truce Muhammad made with an Arab tribe. The more militant Muslims insisted an annual raid into enemy territory had to be made in order to show jihad had not ended. Others argued that the good of Islam might require a peace treaty that would endure until the other side broke it. Two verses from the Qur'an were cited to make the latter case: "As long as these honor their obligations to you, honor yours to them (IX, 7)"; and "Should you fear treachery from any people, throw back their treaty to them in like manner (VIII, 58)." The latter verse is often cited as evidence for the obligation of formally declaring war as well. All Muslims were adamant that no treaty could surrender any portion of Dar al-Islam to unbelievers. Should an enemy seize Muslim land, all believers must wage jihad to recover it as soon as possible without any need to declare war.

Neither Muslim nor Christian sources reveal whether the Arabs sent a summons for submission before they began to cross the Straits of Gibraltar in 711 into Iberia and over the Pyrenees into Frankish territory by 720. Their defeat at Tours in 732 marked the high point of their advance in the West, and the failure of their siege of Constantinople in 718 meant that a Christian empire would endure longer in the eastern Mediterranean. As the Muslims began to accommodate themselves to a world in which vast conquests no longer were being won, the western Christians initiated counterattacks, beginning with Charlemagne's campaigns in northern Spain. Whether either side issued anything equivalent to declarations of war in the centuries of warfare between Muslims and Christians in what the Spanish call the *Reconquista* is unclear.²³

By the late eleventh century, Catholic Europe had become secure enough to carry the fight to the Muslims in the Middle East. Pope Urban II's call for the crusade in 1095 was a declaration of war on the Muslims in the Middle East. Whether Urban was familiar with the Muslim concept of jihad except in a superficial way is unknown, but the content of his speech at Clermont in France has similarities to it. He promised: "All who die by the way, whether by land or by sea, or in battle against the pagans, shall have immediate remission of sins." After criticizing the French for waging unjust wars against fellow Christians, the pope said: "We now hold out to you wars that contain the glorious reward of martyrdom, which will retain that title of praise now and forever." The

warriors hearing his speech shouted, "It's the will of God! It's the will of God!"²⁴

The papal speech at Clermont constituted a declaration of war against the Muslims of the Middle East, but it is hardly likely that any notice was sent to them. It was already standard belief in the West that such formalities need not be carried out for pagans, infidels, and heretics. When the Crusaders reached the Middle East and succeeded in conquering Jerusalem and most of Palestine and Syria, the Muslims declared a jihad, since part of the *Dar al-Islam* had been lost to unbelievers. They and the Crusaders often made truces, but both sides violated them quickly enough.²⁵ Neither side would accept the possibility of a permanent peace. Fighting was nearly continuous until the Muslims ousted the Crusaders from their last outpost in the Middle East in 1291.

Holy war in Europe against heretics followed soon after the appearance of the crusade against the infidel. Pope Innocent III proclaimed a crusade against the Albigensians of southern France in 1208 after they killed a papal legate. Although the act of calling the crusade is a declaration of war, Pope Innocent made it clear that as rebels and traitors to God, heretics did not warrant the customary formalities of war. Nor could there be any truces with them: peace would return only when error had been eradicated. Mindful of the experience of the out-of-control Fourth Crusade that sacked Constantinople in 1204, the pope declared that the churchmen themselves would direct crusades against heretics and dispose of the lands seized from them. Campaigns against heretics were by definition the most just of wars. Innocent thus established the principles for holy war against the Church's internal enemies, which endured largely unchanged until 1700.

Later in the Middle Ages, the popes often found themselves in violent confrontations with secular states. Since the pope was the father of all Christian rulers, however, he would not declare war on them, but those deemed guilty of heresy or disobedience were the targets of crusades. In 1309, for example, the pope declared a crusade against Venice for disobedience, which had the effect of persuading Venice's mercenaries not to fight, thus forcing the city to capitulate.²⁶ More typical of such papal actions, Pope Innocent VIII 175 years later issued a bull taking the city of Aquila under papal protection against King Ferrante of Naples and announced he was sending troops to defend the city. Since clerics were barred from fighting, Innocent called on the fighting men of Italy to come to the Church's aid against those who were harming its interests. He declared he would support them with money, prayers, and spiritual weapons.²⁷

For many medieval churchmen, holy war was the only just war, which only the pope could summon. Most scholars, however, continued to

recognize the authority of the Holy Roman emperor to declare war. Since the emperor was regarded as the sole secular authority in western Christendom until around 1300, against whom would he declare war? For over five centuries after 955, when Otto I reestablished the imperial title, there were no known examples of imperial declarations of war. Yet, war was common in the Middle Ages, usually among the feudal nobles and princes. In one fashion or another every prince and nobleman within feudal Europe was regarded as the lord or vassal of another. War among feudal nobles was private war, while public war was fought between sovereign princes, but for several centuries the emperor was the only prince so acknowledged. Hence, medieval declarations of war took on the feudal practice of "the defiance."

The *Song of Roland* presents the earliest known example of the defiance, although it took its final form three centuries after the events it allegedly narrates. When Roland persuades Charlemagne to give Ganelon, Roland's stepfather, the dangerous mission of delivering a letter declaring war to a Saracen commander who has a reputation for killing the messenger, Ganelon becomes enraged and thunders that Roland is trying to get him killed. He swears three times to take vengeance on Roland. This thrice-repeated declaration was the defiance, and according to feudal law was the start of a legitimate feud. If the person issuing the defiance succeeded in killing the person whom he defied, or if he was killed, it was not considered a crime but the resolution of a private war. In this story the first medieval mention of the office of herald also is found. Charlemagne gives Ganelon the letter and hands him the wand that will make him his herald. But the wand falls to the ground before he can take it, and he has to pick it up rather than receive it from Charlemagne's hand, which is a bad omen. Ganelon gains his revenge on Roland, when during the course of Roland's fatal battle against the Saracens, he persuades Charlemagne that Roland is blowing his horn, not as a call for help, but as a signal of victory. Charged with treason, Ganelon maintains that because of his defiance, he was justified in acting against Roland; but the counterargument that his obligation as Charlemagne's vassal carries greater weight than his defiance of Roland persuades his peers; and Ganelon is condemned and brutally executed.

The original practice of the defiance (from *defi*, renunciation of faith) involved feudal lord and vassal. It became the word used in later centuries to challenge another to a duel. In the French feudal system, when the vassal accused his lord (occasionally the lord did so to a vassal) of violating his rights as a vassal, he broke a stick and threw it at the feet of the lord. Since that usually resulted in immediate blows between the two, it quickly became practice to send one's defiance by proxy, or in writing,

followed by an obligatory forty-day period imposed by royal authority, *quarantine du roi*, before they could begin fighting. Violating the quarantine was treason. Later, in the Golden Bull of 1356 for governance of the Holy Roman Empire, a wait of three natural days was required following the defiance before fire, spoliation, or rapine could begin.

If the dispute involved men at the highest levels of the feudal system, such as princes or dukes, they would send their heralds to proclaim their defiance. Heralds emerged out of obscure origins in the thirteenth century, when heraldic devices on shields, tunics, and banners became used widely by armored warriors to indicate who they were. Men knowledgeable in the meaning of the devices became necessary (both at battles and tournaments) to record the deeds of the brave and the mighty and also to determine who was worth holding for ransom and what the ransoms should be. John Ferne, a sixteenth-century English author on heralds, enumerated the virtues required of a herald: he must be learned in law, history, Scripture, since his office “approaches, most near, to the office and ministration of a priest,” and in sundry languages, “that he may the better deliver, either his sovereign’s peaceful congratulations to foreign princes, or else the dreadfull defainces and indiction of war, to those who do offer cause of hostility.” The seventeenth-century German author, Samuel Rachel, gave a thorough history of the origins of the herald and the etymology of the word, which he finds came from an old Germanic word for army—*hari*. Among the ancients, it was the wand of Mercury, which they carried in their hands and which rendered *feciales* and *caduceatores* “sacred, immune, inviolable even at the hands of the enemy.” In Europe, wrote Rachel, they were called heralds and wore the tabard, “and this covering makes them sacrosanct, that is, safe from all harm; it is commonly called a coat-of-arms.”²⁸

Expected to be objective in all circumstances, the herald acquired immunity from harm. Once that principle became well established, heralds were used also for conveying messages, hostile or benign, free from the threat of killing the messenger. In Thomas Mallory’s *Morte d’Arthur* (ca. 1470), Rome’s Emperor Lucius sends heralds to Arthur’s court to demand tribute from the king of Britain. Several hotheaded knights declare their intention of killing them because of this insult to their king. Arthur ordered “none of them, upon pain of death, to missay them nor do them any harm, and commanded a knight to bring them to their lodging, and see that they have all that is necessary and requisite for them, with the best cheer, and that no dainty be spared, for the Romans be great lords, and though their message please me not, yet I must remember mine honour.” A good example of how seriously late medieval kings took the immunity of heralds occurred during the First French Invasion of Italy

in 1494. When Charles VIII sent two heralds to the fortress of Monte San Giovanni to demand its surrender, the defenders cut off their ears and noses and sent the mutilated men back. When the French took the place, they executed the garrison as punishment.²⁹ It was also culpable to pretend to be a herald. The only known example of such an instance involved Louis XI of France. In 1475 he was eager to offer peace terms to Edward IV, but lacking any legitimate heralds in his entourage at the moment, he chose a “simple valet” and dressed him up as best he could as a herald. Apparently the counterfeit tabard the man wore to negotiations with the English king was too obviously fake, since the English deduced immediately that he was not legitimate. The event was regarded as a truly serious blot on Louis’s honor.

The late medieval herald is usually depicted in modern literature and film as arriving at the court of the foe with a sword in one hand and a torch in the other and wearing his talbard.³⁰ He proclaims his master’s defiance of his foe and his intention of waging war “by fire, sword, and bloodshed” on him and his realm. While the spoken formula often was used, there is no certainty that heralds ever did appear with sword and torch. On occasion the herald delivered a defiance that called for single combat between two kings, as happened in 1361 when Pedro I of Castile challenged Pedro IV of Aragon to determine the fate of Valencia. Since neither man was in a feudal relationship to the other, this event reveals that the defiance had moved out of the feudal system and had become the means of declaring war, although it perhaps reflected the still current belief that only the emperor could declare war in the formal manner.

The most famous medieval defiance occurred in 1337. Jean Froissart’s *Chronicles* (chapter 25) describes how Edward III sent a letter to Philip VI, defying “Philip of Valois, who calls himself King of France.” It was carried to Paris by the bishop of Lincoln, who returned to England under a safe conduct given by Philip. Edward’s defiance was made as Philip’s vassal for the duchy of Gascony and contained little about his claim to the French throne. Philip responded by ordering the *oriflamme* to be taken from the abbey church of St-Denis, where it was kept as the alleged standard of the martyred Roman soldier, Denis. This red banner with eight green streamers had been used as the battle standard for the French monarchy since the early twelfth century. To unfurl the oriflamme was to declare war, but it was further a signal that no quarter would be given to the enemy—in Edward’s case because he was deemed a traitor.

Froissart has several examples of defiance that occurred during the fourteenth century. King Robert Bruce of Scotland “about Easter, 1327, sent a defiance to King Edward and all the country, informing them that he would enter the kingdom, and burn it.” In 1358 King Charles

of Navarre, who had escaped from the castle where the French had imprisoned him for the murder of a Spanish nobleman, “declared war on France. He sent his defiances to the Duke of Normandy [the Dauphin], to the Parisians, and indeed to the whole realm.” After the Treaty of Brétigny of 1360 had given Gascony to the English king, a Gascon revolt in 1368 led Charles V of France to intervene. He sent a young page to England with his challenge to Edward III, presenting it to the English king on his knees. The English courtiers were offended that the French king would use such a low-ranking person to declare war between two such great lords: “A prelate or baron ought to have the bearer of such a declaration.” Duke William of Guelders sent a challenge to French King Charles VI in 1387 that “was much talked about everywhere, from the rude and uncourteous language it contained.” Guelders was a fief of the empire, but the duke clearly believed he was entitled to act as a sovereign by declaring war.

Although the Hundred Years War began in the context of a dispute over feudal lands, the French kings had long proclaimed they were “emperors in their own realm,” which meant they did not recognize the Holy Roman emperor’s overlordship. As sovereign rulers in their own right, they claimed the power to declare war against other sovereigns, including the emperor himself. Such claims to the authority of the Roman emperor arose in conjunction with the renewed interest in Roman law that occurred in the twelfth century and sparked a fresh awareness of the theory of just war and who could declare war. Canon lawyers and scholastic theologians incorporated both topics in their analyses of war. When Gratian compiled his *Decretum* about 1140, he included a chapter on the morality of war drawn heavily from Cicero, Augustine, and Isadore. He defined a just war as one waged by authoritative edict (*bellum ex edicto*) to avenge injuries. He took for granted that only the emperor could declare war, except for a crusade, which the pope had the authority to proclaim. Dante declared in his *De Monarchia*, written around 1318, that the emperor had universal authority because he alone could declare war. Dante’s statement was made in response to Pope Clement V’s ruling of 1312 that Emperor Henry VI could not cite King Robert of Naples for treason and summon him to be judged, because a king could not be guilty of treason against another king. It was a clear statement of the principle that this king was “emperor in his own realm.”

Later canonists elaborated on Gratian’s brief definition, taking into account the broadening power of the national kingdoms. Bartolus writing about 1380 stated that only a prince who had no superior could declare war justly. By his time, such a ruler was no longer exclusively the emperor, but exactly who they were, was more difficult to determine.

Was every king so authorized, even those within the Holy Roman Empire, or was the authority restricted to a few kings, such as the French or the English? Were princes, dukes, or independent cities so empowered? John of Legnano, in his *Treatise on War* (1360), provided the most extensive discussion of the issue among the canonists. He declares, "The end of war is peace and tranquility in the world." Just war is divinely ordained, but it also is recognized in the *jus gentium*, the law of nations, the code of law found in nature and accepted by all peoples.³¹ He defines three types of wars: universal corporeal war or nation against nation; reprisal, or a government taking revenge against foreigners for harm done to its subjects; and private war, or personal self-defense. John then treats of the right of the Church to declare war against infidels, which, he says, at first reading of the law of nations seems untrue. The pope, however, has the keys to the kingdom of heaven, which give him lawful authority over all pagans, infidels, heretics, and the excommunicated. A crusade declared by the papacy against the Muslims would be lawful because the Holy Land had been a rightful part of the Roman Empire, and the pope as successor to the emperor could legitimately wage war to recover it. So, too, would be a war against an excommunicated prince, even an excommunicated Holy Roman emperor. According to John, the pope can declare war on anyone, either directly himself or through the emperor.

In John's view, the emperor, having no superior in secular matters, could declare war against his enemies but never against the pope. Because all princes of Christendom were his subjects, he need not declare war when involved in a conflict with them. Yet, John admitted there were many princes who did not recognize any superior to whom they might submit their case for justice. They did have the right to declare war, as long as they did not recognize a superior. He mentioned the kings of England, France, and Spain along with the Greek emperor as those who did not recognize a superior, but he was not willing to include the Italian cities among them, because they still owed obedience to the emperor or the pope. Baldus de Ubaldis, another Italian canon lawyer, who died in 1400, proclaimed that to begin a war without a declaration was a form of treachery.

The scholastic theologians paid less attention to the issue of the just war; but it did come up in their works, because Peter Lombard, who created the standard textbook for scholasticism about 1160, included several texts on when killing was justified. Thus, Alexander of Hales argued that the New Testaments texts taken as barring Christians from participating in war applied only to those who sought perfection in this world: that is, the monks.

In *Summa Theologica*, Thomas Aquinas, drawing mostly from Augustine of Hippo, produced what is still regarded as the classic discussion of the just war. Aquinas held, as did everyone in the Middle Ages, that anyone, whether king or private person, had the right of self-defense. Three conditions are necessary for an aggressive war to be just: it must be fought on right authority, have a just cause, and be waged with the right intention and with a realistic expectation that it will advance the good. These requirements defined the right to go to war, *jus ad bellum*. By right authority Aquinas meant sovereignty, but he did not expand on that definition except to quote Paul (Romans 13: 4): "For authority does not bear the sword in vain! It is the servant of God to execute wrath on the wrongdoer." He gave two examples: heretics are guilty of an offense against God and can be attacked regardless of how peaceful they are, while debtors who refuse to pay a just debt can be required by force to pay. Aquinas spent more time on the issue of right intention: the just warrior is a peacemaker and must always love his enemy even as he corrects him by force. Therefore, the just warrior's use of war must be limited to whatever is required to make the enemy correct his error, not to dominate or harm him. Aquinas's discussion of this last point led in the direction of *jus in bello*: acts that are permitted or forbidden to a Christian in a just war. Propelled also by the concept of chivalry, with its code of conduct in war, late-medieval theologians invested more effort in defining *jus in bello* than *jus ad bellum*, whose principles seemed clearly established.³²

The late fourteenth-century monk, Honoré Bonet, combined the scholastic definitions of just war with the chivalric tradition in his *Book of the Tree of Battles* (ca. 1387). Although a cleric, he was thoroughly imbued with the chivalric attitudes of the nobility; and as a Frenchman during the Hundred Years War, he was eager to defend the cause of his king as a just war against the unjust attack by the English: "The king of France could not abstain from making war against the king of England without mortal sin, for if he were to allow his men to be killed and pillaged, and his kingdom to be robbed and destroyed, who would pardon such negligence?"³³ Wars of self-defense could be waged by anyone, but only a prince who had no sovereign could declare a just war of aggression. Those who recognized a sovereign over them were obliged to seek justice from him and then acquire consent from him if the offending party did not provide compensation as adjudicated. Bonet had no doubts the French king was fully qualified to declare war on his own authority, but was less certain about those of Spain and England.

By Bonet's time, the practice of enslaving defeated foes had disappeared with respect to fellow Christians. In the early thirteenth century,

Johannes Teutonicus, a commentator on Gratian's *Decretum*, wrote: "If a war is just, he who is captured becomes the slave of his captor."³⁴ By 1400, however, several authors noted it had become the custom in Western Europe not to enslave defeated Catholic foes or their families. The idea developed from the concept that all Catholics were subjects of the Roman Empire, and war among them was civil war, and thus the practice of not enslaving fellow citizens applied to them. But it was not extended to non-Christians, namely Muslims, who continued to show up in slave markets in Italian cities and on galleys as slave rowers.³⁵

Writing some 20 years after Bonet, Christine de Pisan, an Italian author who resided at the French court, drew on his work in her *Book of Deeds of Arms and of Chivalry*, but she went well beyond him in discussing proper declarations of war:

There is no doubt in law that the undertaking of war or battle for whatever reason belongs to no one except to sovereign princes, which is to say, emperors, kings, dukes, and other landed lords who are duly and rightfully heads of temporal jurisdictions. No baron, or any other person, however great he may be, may undertake war without the express permission and will of his sovereign lord. That this law is right is demonstrated by plain reason, for if it were otherwise, of what use would sovereign princes be, who were not set up except to do right for and on behalf of any of their subjects who might be oppressed by some extortion, to defend them and keep them as the good shepherd risks his life for his flock? For this reason, the subject must turn to his lord as to his refuge whenever he is harmed in some way, and the good lord will take up arms for him, if need be.³⁶

Christine argued that prior to declaring war the prince should assemble in council the four estates of his realm, following Thomas of Chobham, who almost two centuries earlier had written that a war without the consent of the council of the realm was unjust.³⁷ For Christine, the council consists of "the elder nobles experienced in arms, who know how to organize and attack; the law clerks, for in the laws are set forth the cases in which a just war can be undertaken; also the burghers, for it is necessary for them to participate," since they would need to take charge of fortifying towns and cities, and they would help persuade the common people to aid their lord. Additionally, there should be some representatives of the craftsmen, "the more to honor these people. They must be carefully approached so that they will be the more inclined to help the lord financially." Christine praised Charles V for calling such an assembly in Paris in 1369 after he decided the English were violating the Treaty of Brétigny (1360), which had ended the first phase of the Hundred Years

War, and arranged for the ransom of John II, captured in battle at Poitiers in 1356. She noted Charles included jurists from Bologna with the four estates of his realm. "To these, in a very wise manner, he made his points against the English, asking their opinion whether he had reason to begin war again, for without just cause, their due consideration of the matter, and the conscience and goodwill of his subjects, he did not wish to undertake it." The council concluded there was due and just cause to begin the war again.

Honoré Bonet and Christine de Pisan are credited with popularizing the discussion of a just war. Their books were translated into several languages from their original French and were among the earliest secular books to be printed after the invention of the printing press. By 1400 the principles they advocated about who could declare war and how it was to be done were well established. One of those principles was that ending a truce did not require a new declaration of war, and the fact that Henry V sent a letter of defiance via his herald to French king Charles VI in 1415 indicated that he regarded his forthcoming attack as a new war (the 1396 Treaty of Paris having ended the earlier one), citing Deuteronomy 20:10 to justify his act.³⁸ The French, in turn, unfurled the oriflamme. As the French pursued the enemy north toward Agincourt, they "decided it was imperative to fight the English, and, following the correct procedure, they sent heralds to Henry V to announce their intention and ask that the selection of time and place be made by deputies from both sides."³⁹ Henry replied there was no need for such formality because his men were ready at any time to respond to the challenge. In their victory at Agincourt, the English captured the oriflamme. Whether they returned it is unclear, but eventually either the original or a copy reappeared at St. Denis. It was never again taken into battle before being destroyed shortly after 1789.

In the fifteenth century, declaration of war by herald clearly had become standard procedure in western Europe. When, for example, John II of Castile declared war on John II of Navarre in 1452, he sent his herald in the time-honored ceremony.⁴⁰ In eastern Europe, however, there was an example of a written declaration of war in the same era. In 1471 Duke Ivan III of Moscow declared war on Novgorod because it had accepted the Catholic duke of Lithuania as its overlord. After sending several letters to the leaders of Novgorod to return to obedience to him and the Orthodox Church, Ivan "dispatched to Novgorod the Great a challenge in writing exposing the malpractices of the people and their treason, and announcing that he was himself marching with a force against them."⁴¹ It is intriguing to note that Ivan declared war on the people of Novgorod, his nominal subjects, rather than on the Lithuanian duke.

Far more to be feared than a letter from the duke of Moscow was the display of seven long crimson poles topped with braided black horsetails known as the *tuğ* at the gate of the Ottoman sultan's palace, which served as his signal of war. Displaying horsetails was a device of Asian nomads; Genghis Khan used white horsetails to denote peace and black ones for war. Since the Ottoman sultan always commanded the army in person until 1566, the tails were taken with him when he departed his capital for war, then placed in front of his tent. This act was not necessarily conveyed to foes; it often became obvious that Ottomans intended to wage war only when their army appeared at the frontier. Although the sultan in theory had the sole authority to go to war, that authority was limited in fact by the obligation to consult the *divan*, his council of principal advisers, and the *ulema*, the scholars of Muslim law, who would issue a *fatwa* that the war met the definition of a jihad against infidels or Muslim dissenters.⁴²

In early 1514 Sultan Selim I moved his army eastward to make war on Ismail, the shah of Persia. The Persians and Turks had been at war off and on for decades over the split in Islam between the Shi'i and Sunni. The existence of Shi'ite Persia offended Selim far more than it had any previous Ottoman sultan. When a Persian spy was found in the Ottoman camp in late April, Selim sent him back with a letter to the shah, which he drafted himself. After a preamble praising Allah and Muhammad, Selim enumerates his many titles and attributes: "I, chief and sovereign of the Ottomans; I, the master of the heroes of the ages; I, the exterminator of idolaters, the destroyers of the enemies of the true faith, the terror of tyrants[,] ... I graciously address my words to you, Emir Ismail, chief of the Persian troops, who are destined to perish."⁴³ Selim informs the shah that the teachers of the law have pronounced death upon him, perjurer and blasphemer that he is. He (Selim) has put on his cuirass and coat of mail, unfurled his ever-victorious banner, and assembled his invincible armies to deliver the countries and peoples who are groaning under the shah's yoke. Nonetheless, Selim, in the spirit of the Qur'an, exhorts him to accept the truth and give up the lands he has seized from the Ottoman domains. If Ismail refuses, "you shall see your plains covered with our tents and flooded with our battalions. Then shall be performed prodigies of valor; and then shall the world witness the decrees of the Most High, who is the God of Battles." The shah responded by denying that there were any reasons for the sultan to wage war on him. He further commented that Selim's letter was so poorly and intemperately written that it must have the hasty work of some overworked secretary who had taken an overdose of opium. Ismail sent a box of opium as a present for that secretary.⁴⁴

In the campaign that followed, Selim was victorious, thereby ensuring Persia would not be a threat while he went on to attack Egypt. Letters were sent to the Mameluk caliph of Egypt, demanding his submission to Selim; when he refused, the Ottoman army marched southward. In 1517 Selim succeeded in conquering not only Egypt but also Palestine, Syria, and the holy cities of Mecca and Medina. With the Muslim holy places under Ottoman control, he declared himself caliph, thus settling for the next 400 years the issue of who among the Sunnis had the authority to declare jihad.

In the West the question of who rightly could declare war did not disappear. The major reason why late medieval thinkers paid so much attention to the issues of a just war and how to declare one was the fragmented authority within the feudal system. This was particularly a problem in respect to the powerful duke of Burgundy, who held lands as fiefs from both the French king and the Holy Roman Emperor. In 1470, Louis XI of France formally declared war on Charles the Bold for perpetrating violence in the realm, despite the fact Charles, as duke of Burgundy, was his vassal. Louis declared Charles's French lands and titles forfeit. His herald took the news to Charles, while the declaration was printed and distributed across France. In 1475 English king Edward IV, as an ally of Burgundy, sent his herald Garter King of Arms with a declaration of war against Louis. Louis was not eager to fight England, so he loaded up the English herald with 300 gold crowns and 30 yards of velvet cloth and promised the herald a further thousand crowns if he could persuade his king to meet with Louis and not immediately go to war. The English herald, for his part, indiscreetly told Louis he believed that Edward was not eager to go to war but had promised Charles the Bold he would attack France. Louis sent his herald with Garter to England with safe conducts for English envoys to come to France to negotiate.⁴⁵

Louis's ploy failed him at this juncture, as Edward did strike into France later in 1475, but "the Universal Spider who weaved webs of deceit around his enemies," as Louis was described, found other ways to counter the duke of Burgundy. Charles was eager to establish himself as king of a unified region from the North Sea to the Alps. That entailed conquering Alsace and Lorraine and frightening the Swiss, part of whose lands had been in the early medieval kingdom of Burgundy. Plenty of French gold and cunning diplomacy persuaded both to go to war against Charles. The duke of Lorraine dispatched a herald to declare war on Burgundy, although neither duke was a sovereign prince.⁴⁶ The Swiss also were at war with Charles, and combined Swiss and Lorrainer forces defeated his army and killed him at the Battle of Nancy in 1477. He left as his sole heir a daughter, Mary. Casting about Europe to find a prince who could

help her protect her inheritance against France, she married Maximilian of Habsburg, who became Holy Roman Emperor in 1493. By placing the Burgundian inheritance in the hands of the emperor, this marriage, the first of several that would pass much of Europe under the scepter of their grandson, Charles V, helped solved the problem of the powerful, autonomous feudal nobles. As the sixteenth century arrived, the question of who had authority to declare war was largely settled, although there would be instances in that century of a prince declaring war who would not necessarily meet the contemporary definition of a sovereign ruler. The issue of who could declare war remained important, because it remained as true in 1500 as it had for the early Romans that doing it properly brought heavenly approval for the prince waging a just war.

CHAPTER 3

THE SIXTEENTH CENTURY—THE PRACTICE

The sixteenth century became highly productive of new approaches to the problem of declaring war, in good part because of the opening up of new lands to European occupation. Already by 1500, the peoples of Iberia confronted an issue that had not faced the leaders and thinkers of the ancient and medieval eras—the conquest of lands previously unknown to them. The Greeks and the Romans never seem to have given much thought to the question of whether the conquest of lands of the “barbarians,” that is, anyone not Greek or Italian, had to be justified and a proper declaration of war issued before their lands could be seized. Medieval sensibilities in that respect were little different until the end of the fifteenth century: the rules governing war against fellow Christians did not hold in regard to Muslims and pagans. The Spanish in particular confronted this issue of new lands head-on, creating a major corpus of works on the laws of war that played a significant role in forming international law.

Almost from Christopher Columbus’s first voyage, some Spanish missionaries began to question whether their king had the right to seize the lands of the natives of the New World, and, if he did, what was the correct way to go about it? The strength of the convictions of these missionaries persuaded King Ferdinand of Aragon to issue a decree in 1513 establishing a procedure for justly warring on the American Indians and taking over their lands. It formulated a “Requirement” that had to be read aloud to inhabitants of new lands before the Spanish could legally begin hostilities.¹ The idea of such a summons probably drew from the Muslim practice of demanding submission to Islam before a war of conquest could begin.² Upon hearing the Requirement, natives were obliged to acknowledge that the pope, as vicar of Jesus Christ, son of the true God, had dominion over the entire world and that he had passed his rights in these lands to the Spanish king. They were told to allow the

true faith to be preached freely and without threat of violence throughout their lands.

If the Indians accepted the demands, they would be acknowledged as rightful vassals of the Spanish monarchy with attendant rights and obligations and were prepared for baptism. If they did not, the Requirement listed the rights that the Spanish gained by their refusal. One historian of the Spanish conquests has written: "The text of the speech was not a request for consent, but a declaration of war."³ The Spanish could enter "your lands by fire and sword and seize you and your wives and your children, and shall make slaves of them, and as such shall sell and depose of them; . . . and we shall take away your goods, and shall do all the harm and damage that we can as to vassals who do not obey and refuse to receive their lord." Any resulting deaths and losses would be considered the fault of the natives, not the Spanish. Last, it called for the presence of a notary who would attest in writing that the Requirement had been read and the natives had not submitted. The Requirement was considered to be a proper declaration of war, creating the circumstances for a just war against the Indians and permitting their enslavement. If the natives were cannibals, whom the Spanish considered enemies of humanity, the Requirement need not be read to them.

The Spaniards of that era were a legalistic people and usually followed the letter of the law, if not its spirit. Numerous notarized documents survive, demonstrating how the Requirement was carried out. Sometimes it was shouted from a boat before the Spanish landed or to empty huts whose occupants had fled. When Indians were present to hear it, it was read in Spanish to people who had not the slightest inkling of the language and in some cases were already bound in chains ready to be removed as slaves when they failed to accept it. The Spanish often plied the native leaders with wine and gifts before reading them the Requirement. A cacique in Mexico was in the position to demand a translator, and upon hearing the Requirement in his own language, he replied that he approved of the part about the one God, but the pope who gave away lands he did not own must have been drunk and the king who accepted such a gift must be crazy.

For many Spaniards the Requirement was a source of humor and cynicism, but Spanish authorities usually took it seriously enough. During Coronado's expedition in the American Southwest, he and several officers were accused of mistreating and murdering natives. In testimony taken in the case, twelve witnesses swore that the Requirement had been properly read to the Indians. As one put it,

Through an Indian who knew the language they delivered the Requirement to the people of Cíbola, summoning them to offer peace and telling them

that no harm would be done to them, but rather benevolent treatment and peace. And they were told that they would be given knowledge of our lord Jesus Christ and the manner in which they would be saved. Although they were told this many times and made to understand it through their interpreters, those Indians were never willing to submit or come out in peace. On the contrary, they took up stones and arrows and began to launch them at the general, the friars, and those who went with them to deliver the Requirement. When [Coronado] saw that, he ordered his captains to attack and enter the pueblo of Cíbola.⁴

When confronted by the rebellion of the Acoma people in 1599, the Spanish governor of New Mexico sought the advice of missionaries present. They answered with appropriate quotations from Augustine, Aquinas, and others that war against the Indians was justified under the circumstances. The governor, “all doubt being removed from his mind, therefore publicly proclaimed that war by blood and fire be declared against the Indians.”⁵ In the Philippines the same debates and procedures held. After violence broke out in 1570 between Spaniards and natives, the Spanish governor reported that the natives had been read the Requirement many times through an interpreter. A later governor complained that the chiefs had asked for a year to make a decision but used the time to prepare for war.⁶

There were Muslims in the Philippines in the sixteenth century, and their presence created a different problem than that of the pagans. Muslims, the Spanish argued, already knew about Christ and rejected him; therefore, reading the Requirement to them was not needed for waging just war against them. Since the Portuguese were mostly involved in lands and seas that the Muslims controlled or influenced, they took the same position and did not engage in debate over just war against Muslims, nor did they enact any practice similar to the Requirement. That attitude carried over to the Portuguese in Brazil. Some missionaries protested unprovoked war on the Brazilian natives, but, for the most part, Portuguese opinion maintained that nonbelievers had no right to property or political power, and there need not be any sort of formal declaration of war against them.⁷

For all of their high-minded talk of bringing peace, justice, and salvation to the pagan peoples of the new lands, the Christian rulers of Europe hardly set a good example of being peaceful or of at least adhering to correct norms in declaring war on each other. The conflicts of the late fifteenth century had largely settled the question of who had authority to declare war—sovereign rulers—but resolution of this issue did not reduce the incidence of warfare. The many petty wars of the feudal system were replaced with war on a grander scale between larger states.

With its Burgundian problems solved for the time being after the death of Charles the Bold in 1477, the French monarchy was free to concentrate on another issue—its claim, dating back to 1265, to the kingdom of Naples. In 1494, Charles VIII began the First French Invasion of Italy. Since he regarded the Aragonese prince who ruled Naples as a usurper, there was no need to declare war. The same was true in 1499, when Charles VIII's successor, Louis XII, seized Milan from Ludovico Sforza, which Louis claimed by inheritance from Valentina Visconti, his paternal grandmother. These acts brought the French monarch into the tortured politics of Italy, at which Pope Julius II outmaneuvered the gullible Louis. Julius persuaded Louis to go to war against Venice to recover lands formerly held by the Papal States. On April 17, 1509, the French herald Montjoie appeared before the Signory of Venice in the antechamber of the Audiencia. He was vested in his *lazoneda* and accompanied by a trumpeter, who also served as translator for him. The herald handed over a letter to the doge and announced that his master intended to wage war with fire and blood against their state for usurping lands that belonged to the papacy and to the duchies of Milan, Ferrara, and Mantua. The doge replied that Venice had always walked in the Lord's way and therefore took up the challenge boldly, for he did not expect God to abandon the republic now.⁸

Twelve days later Pope Julius issued a bull giving the Venetian Signory twenty-four days to abandon papal territory and repay all revenues seized or suffer excommunication.⁹ A bull of excommunication was the closest that the papacy came to declaring war on a Christian state. Usually a pope in that situation would call on other Catholic monarchs to wage war against the offending ruler, but Julius II, the "Warrior Pope," was more than willing to take the field himself (his most famous exploit was recovery of the city of Mirandola at the head of the small papal army). Venice replied by arranging for the posting of placards in Rome denouncing Julius and appealing for a general council to depose him as an antipope. In May 1509, the French soundly defeated the Venetians at Agnadello, only to find that Julius, having thereby recovered the papal lands, had already turned his attention to the larger goal of driving the "barbarians" from Italy. After two years of mounting tension between pope and king, Julius excommunicated Louis and invited his neighbors to wage war against the French monarch. This constituted a just war insofar as the pope had the right to protect the Christian community by calling for a holy war against the church's enemies, whether external enemies such as Muslims or internal heretics and excommunicates. Henry VIII of England, whom Julius promised to crown as king of France in Paris if he took that city, Ferdinand of Aragon, and the Swiss Confederation responded to the pope's appeal.

Louis XII in turn called on Scotland, France's traditional ally, to come to his aid by attacking England. The Scottish king James IV had a claim to the English throne, which he hoped to make good through war, so he responded favorably to the French request, not that the Scots needed French encouragement to raid northern England. On July 26, 1513, the Scot herald Lyon crossed the English Channel, since Henry was already in France, with what has been described both as an ultimatum and a declaration of war. On August 11, Lyon, "with his coat of arms on his back" and accompanied by the English King of Arms Garter, entered Henry's tent outside of Théroutanne, which the English had under siege. Lyon handed over a letter and also delivered an oral message. He said that since the English had laid siege to the city for two months without taking it, thereby forcing the French king to recall his forces from Italy, the English king should return home without further war. Henry, standing with his hand on his sword, asked the herald if he had completed his tale to its end. Replying that he had not, Lyon added: "Sir, [my king] summonth your Grace to be at home in your realm in defence of his ally." Henry complimented the herald on delivering his message well and responded: "It becometh ill a Scot to summon a King of England, since I am here for my right and inheritance.... Tell him there shall never Scot cause me to turn my face. I will return to my domain at my pleasure." As for France being the Scottish king's ally, Henry exclaimed that since James was married to his sister (Margaret), he should count England as his ally. "And now, recommend me to your master and tell him if he be so hardy to invade my realm or cause to enter one foot of my ground I shall make him as weary of his part as ever was man that began any such business." Lyon gave a brief remonstrance, to which Henry replied: "I know what all this matter meanth; the King your master has [been] anointed with crowns of the sun [French gold *écus*], but I trust ere it be long the French king shall have enough to do to keep his crowns for himself."¹⁰ Henry ordered that Garter take the Scottish herald to his tent and entertain him until a written response was prepared.

In the letter, dated July 26, 1513, at Edinburgh, that Lyon delivered to Henry, James IV detailed the grievances against Henry. In addition to warring against the French king, James's ally, James complained of piracy against Scottish ships and about the killing of several of his officials. Henry ordered that James's letter be read to the English council and captains, and in Henry's response, written the day after Lyon's appearance, the English king lamented that James was breaking the perpetual peace to which he had sworn, but declared that such an action was "provided against." Henry asserted that he was the sovereign lord of Scotland and that James was his vassal; James had, therefore, no right to declare

war on him. He advised James to look to the example of the king of Navarre, "who, for assisting the French King, is now a King without a realm."¹¹ Along with his reply Henry gave the herald 100 gold coins and safe conduct to return to Scotland. Two weeks later, Henry ordered that all Frenchmen and Scots in England be deemed enemies, their properties seized and themselves banished, except for those Scots married to English women, who would have to forfeit half of their property to the crown and give security for the rest.¹²

Regardless of whether the message that Lyon carried was an ultimatum or a declaration of war, the English took it to mean war, and Henry sent a letter to the earl of Surrey, his commander in northern England, to prepare to fight the Scots. In an encounter between the two men in 1497, James had challenged Surrey to combat *mano-a-mano*, but Surrey deflected the challenge by replying that a king should not stoop to fighting a mere earl in single combat. This time Surrey sent his herald Islay to James to issue a challenge to give battle four days hence. James replied via Islay that he accepted the challenge but refused to fight on the field selected by Surrey. Surrey agreed to fight on one chosen by James. In order to reach the Scottish army, which had established itself in a strong defensive position, Surrey's forces had to cross a broad river. Historians have debated why James failed to attack the English army when it was split as it crossed the river. The best explanation is that James had accepted the challenge from Surrey to fight on an appointed day, and chivalry demanded that he not attack until then. On the morning of the chosen day, September 9, 1513, James's council urged him not to endanger his own life by fighting in the front lines, as was his style. He angrily rejected such advice, insisting on winning renown in the midst of his troops. In this Battle of Flodden Field, the Scots were routed, and James was killed.¹³

By the time that battle was fought, the situation for France had become less dangerous. Julius II died in February 1513, and Leo X, the new pope, backed down, allowing Louis to make peace with his enemies. Louis died two years later and was succeeded by Francis I. Within six months of his succession, Francis was on his way across the Alps to win back Milan from the Swiss, who had seized the city in 1512. Since this was an invasion to regain what he claimed was rightfully his, the king did not deem it necessary to declare war before battling the Swiss at Marignano in September 1515. Upon victory, Francis had himself installed as duke of Milan without seeking investiture from the Holy Roman emperor, who still claimed feudal jurisdiction over the city. Soon after Charles of Habsburg was elected emperor in 1519, he denounced Francis for usurping Milan and set about recovering it. Seeking to distract Charles, Francis persuaded Robert de La Mark, the duke of Sedan, to attack Luxembourg,

a Habsburg fief. La Mark declared war on Charles in February 1521, sending his herald to Charles's court. The emperor refused to receive La Mark's herald on the grounds that La Mark was an inferior prince who lacked the authority to declare war on an emperor.¹⁴ La Mark proceeded to invade Luxembourg, but his forces were soon routed.

This invasion, for which Charles V blamed Francis, was one of several events that raised tensions between the emperor and French king; another was the French effort to recover Milan, which had fallen to imperial forces in November 1521. When an imperial army defeated the French and their Swiss allies at La Bicocca in April 1522, Henry VIII decided that the time was right to join Charles in a war against France. On May 28, the English king-of-arms Clarencieux appeared at the French court at Lyon to proclaim Henry's declaration of war against Francis I.¹⁵ The next day Clarencieux presented his king's defiance, declaring his master bade the French king beware of him as he was his mortal enemy, because of his infraction of the Treaty of Ardres (accepted by Francis and Henry at the Field of the Cloth of Gold in 1520). The herald gave Henry's reasons for declaring war: Francis aided La Mark; he allowed John Stuart, an enemy of the English crown, to return to Scotland; and he assisted de Foix in invading Spanish-held southern Navarre. Henry also challenged Francis for allowing French pirates to pillage his ships, for hiring foreign mercenaries (the Swiss), and for discontinuing his annual pension of a million gold crowns (a legacy of the Hundred Years War).

Francis, without waiting to deliberate, replied that he never assisted La Mark; that he was obliged to hire the Swiss because the emperor had invaded Champagne under the pretext of making war on Sedan; that Stuart had left without his knowledge and he tried but failed to make him return; and that there was nothing about Navarre in the Treaty of Ardres. Concerning the pension, he had felt for years that the king of England was his mortal enemy, and he would not pay him money to be used against himself. He said he would give the lie ("Giving the lie" was the classic formula for a challenge to a duel.¹⁶) to anyone who said he had not kept the promises made in 1520. Francis concluded that if these were Henry's only complaints, they were certainly not worthy of war. Whenever the English king chose to come into the field, he said, he would deal harshly with him. According to Louise of Savoy, Francis's mother, the herald quaked as he delivered his message, whereas her son delighted everyone by his eloquent and scornful reply.¹⁷ Francis agreed to exchange Clarencieux for the French ambassador in England, but Clarencieux was not allowed to leave until the Frenchman reached Calais.

Fighting began in July 1522, when an English force moved out of Calais to lay siege to Hesdin. When the siege failed and the English army

retreated to Calais, Francis felt free to go to Italy to attempt to recover Milan. Because both Francis and Charles were convinced that they were fighting only to regain or defend what was rightfully theirs, neither formally declared war. In late 1524, Francis led a large army toward Milan, only to be defeated and captured at the Battle of Pavia in 1525. In the 1526 Treaty of Madrid, Francis agreed to Charles's enormous ransom demands, arranging to have his two older sons serve as hostages so he could be released to arrange for the transfer of territories and to collect the huge sum of gold that Charles required.

The French king had no intention of fulfilling the ransom treaty as written. Claiming that he had been coerced into agreeing to it by the ill treatment that he suffered, which he said went against the standards of chivalry, he organized the League of Cognac, allying in 1527 with the papacy, Venice, Florence, and England. In January 1528 Charles became aware of an impending declaration of war when the French ambassador requested leave to depart the court for France. On January 22, at Burgos, Spain, the English herald Clarencieux and the French herald Guyenne arrived at Charles's court. The courtiers formed two lines through which the heralds passed, carrying in their hands their coats of arms.¹⁸ Kneeling before Charles, they asked permission to speak and for a guarantee of a safe return home, which were immediately granted. Clarencieux spoke first, in the name of "my master the king of France and England." (Note that even while allied with France, the English monarch still insisted on using the title of king of France, another legacy of the Hundred Years War.) Clarencieux accused Charles of refusing to make peace with France, thereby allowing the enemies of Christendom to conquer Hungary and the island of Rhodes. Charles should instead have joined with all the Christian rulers in a crusade to take Jerusalem from the Turks. Clarencieux also included as causes of war the Sack of Rome and the confinement of the pope in the Castel Sant'Angelo by the Imperial army in the previous year. Also cited were the huge sums that Charles owed Clarencieux's king, which Charles was refusing to pay. The English herald declared that his master challenged the emperor and intended to make war on him by fire and sword, by sea and land, unless within forty days from that moment Charles agreed to free the pope (the pope had in fact escaped from Rome several months earlier), return the French princes to their father, and pay the 1.4 million ducats owed to the English king.

When the English herald had finished, Guyenne rose from the kneeling position he had maintained during Clarencieux's harangue. Guyenne repeated the same accusations, adding to them that Charles had refused to accept the ransom he had himself set for the French princes. When

Guyenne finished, both heralds put on their coats-of-arms, which they had been holding on their left arms. Charles then replied to the English herald that if his king became fully informed of the situation, he would realize that it was the king of France who was the sole disturber of the peace. Should the English king fail to understand that and remained adamant about going to war, the emperor declared he was ready to defend himself and his lands and trusted in God to give him victory over his enemies. Turning to Guyenne, he declared that he found it really strange that his own prisoner of war was declaring war on him. Equally odd, proclaimed Charles, was that while the French king “had previously shown no scruples in carrying out the lengthiest campaigns against him without pausing for any such formality,” he now sent defiance. It is as curious now as it was then to Charles that Francis deemed it necessary to declare war at this point in time. Perhaps the fact that he had accepted the Treaty of Madrid led him to believe a declaration of war was needed.

In the written reply to Henry VIII that Clarendieux requested, the emperor expounded at greater length in defense of his actions, emphasizing how he had always looked to the English king as a mediator of the quarrels between Charles and the French king. Charles noted that their letters of commission were dated November 11, two months earlier. He complained bitterly that this date indicated both kings had long intended to declare war; the negotiations of the previous weeks were meant only to gain time while they prepared for war.¹⁹ After the formal statements had been exchanged, some seven hundred Spanish nobles present, who were said to be immensely offended by the French and English defiances, drew their swords and swore that they would avenge the emperor’s honor, or infamy would be theirs and their descendents forever. Copies of a printed proclamation of war against the king of France were posted throughout Spain with a red sword and a flaming brazier painted on it. The English king’s name was not mentioned, but word spread that he had also defied the emperor.²⁰

On the same day as the heralds made their declarations, Charles V proclaimed that subjects of his enemies in his territories would have forty days to leave with their lives and properties unmolested, since the two heralds had indicated that the same time period would hold for Charles’s subjects in their lands. Harsh penalties were mandated for anyone who violated the immunity of enemy subjects until the forty-day period had ended. He also told his officers to begin arranging for letters of marque for captains to raid enemy shipping.²¹ He further commanded that the ambassadors of France, England, Florence, and Venice leave his court, but they were detained at a nearby fortress until his ambassadors returned from those states.²² Since the heads of the allied states issued the same

orders, all the ambassadors except for those posted to and from Venice ended up remaining in captivity until peace was made in 1529.

Charles's written reply to the French declaration of war was duly delivered to Francis, and, in March, Nicolas Perrenot, the Imperial ambassador, was called before the French king, who was surrounded by an enormous crowd of great nobles and royal officials.²³ Francis asked the ambassador to read the response, but Perronet refused on the grounds that his instructions did not mention doing that. Francis then asked Jean Robertet, a secretary of state, to read it aloud. Besides defending his acts against the French defiance, Charles V wrote that the French king had acted the part of a coward who had broken his word. Francis replied that the emperor "lies falsely in his throat . . . and we are determined to defend our honor to the uttermost drop of our blood." Francis challenged Charles to choose the field, as was Charles's right as the accuser, and he the defendant would select the weapons. Charles soon replied that he was ready to risk his life in hand-to-hand combat against Francis. According to Charles's biographer, the emperor's advisors sought to restrain his passion, arguing that the duel was a means of discovering God's justice but could be used only when there was a gap in the law. Here there was no gap in the law; it was as clear as day that the French king was in the wrong. Charles, however, was adamant about fighting Francis *mano-a-mano*.²⁴

Francis responded by repudiating all blame but added that if Charles wished to duel, he had only to name a time and place. In June, Guyenne appeared before Charles to settle the challenge. Charles proposed that the duel take place at the River Bidossa, which formed the western border between France and Spain.²⁵ He rewarded Guyenne extravagantly with a gift worth 400 ducats and a velvet robe with gold braid.²⁶ His herald Bourgogne, however, was kept waiting at the frontier for a month. When Bourgogne did finally reach the French court, Francis refused to allow him to present the challenge, because he allegedly did not bring the proper patent for a challenge to a duel.²⁷ The possibility of a duel between the two most powerful monarchs of Europe sputtered out, as did the war that followed.

In August 1529, Margaret of Savoy, Charles's aunt, and Louise of Savoy, Francis's mother, negotiated a peace treaty known as the "Peace of the Ladies." The two French princes were ransomed for a sum of two million *écus*, which took a train of eighty mules carrying two boxes of coins apiece to transport to Spain. Habsburg sovereignty over Flanders and Milan and Naples was recognized, while France kept the duchy of Burgundy, which the Treaty of Madrid had required to be handed over to Charles. In 1536, Charles told the pope that he had been ready to fight Francis in a duel "to spare the blood of his subjects."²⁸

In the same year, Huldreich Zwingli, at the head of the Reformed League of Swiss cantons, declared war on the Catholic cantons. Zwingli, the reformer of Zurich, was the only major Protestant reformer who saw battle. As a young priest he served as chaplain to Swiss forces fighting on the side of the papacy against the French in Italy, but the horrors and waste of life that he witnessed in the Italian wars turned him against the Roman Church. Largely through Zwingli's influence, most of the Swiss towns accepted Protestantism, while rural cantons in the high Alps remained Catholic. Tensions among the cantons were usually high, even when they were cooperating in war, such as the one against Charles the Bold. The execution in early 1529 by each side of a churchman of the opposite faith exacerbated tensions, and the Catholic cantons secured an alliance with Ferdinand of Habsburg, who was serving as duke of Austria for Charles V. Zwingli took the lead in writing a declaration of war against the five Catholic cantons. The alliance with Austria, the traditional Swiss foe, was the last straw for Zwingli and the Zurichers, and in June of 1529 Zurich declared war in the name of God on the Catholic cantons. The war was not to be fought to exterminate or to conquer but to vindicate Protestantism as the true faith and force the Catholic cantons to give up their alliance with Austria, the traditional enemy of the Swiss. The printed declaration of war gave seven reasons why Zurich was declaring war; the two major ones were the alliance with Austria and the execution of the Protestant preacher Jacob Keyser.²⁹ Although this First Kappel War (and the Second) is usually described as a civil war, each canton within the Swiss Confederation was legally a sovereign state, and so a declaration of war was regarded as necessary when hostilities broke out among them. The Swiss were less punctilious when it came to fighting other nations.

The large Zurich army marched to the town of Kappel on the border with the canton of Schwyz, where it confronted a small force from the Catholic cantons. While the two sides faced off, a mediator persuaded them to accept a truce; its principal clauses required the Catholic cantons renounce their alliance with Austria, pay a sum of money to cover Zurich's expenses, and desist from accepting pensions from foreign rulers. Freedom of belief was also to be established, in that no one would be compelled to accept another faith. Zwingli was upset, because he was convinced that the matter had to be settled by blood. Nonetheless, he wrote a short piece setting out what he regarded as just terms for peace: freedom to preach the gospel, the end of Austrian pensions to their allies among the Swiss, punishment of those who had been taking the pensions, and a sum of 3,000 crowns for damages.

The uneasy peace that followed did not endure. Arguing that the Catholic cantons were not abiding by the clause allowing freedom of

belief in their territories, Zwingli in 1531 persuaded the Protestant cities to impose a blockade against them, preventing passage of food and salt. Faced with the prospect of famine or war, the Catholic cantons chose war. On October 4, 1531 they drew up a notification of intention to begin hostilities. This document denounced Zurich for using force to turn several villages Protestant and bringing foreigners into Swiss affairs, a reference to Zurich's efforts to make the cities of Constance and Strasbourg part of the Confederation. The Catholics proclaimed the justness of their cause and called on God to demonstrate this by giving them victory.³⁰ Whether the document ever reached Zurich is not known; a Protestant pastor brought the news to the city that the Catholic cantons intended to fight.

Bern, Zurich's principal ally, refused to fight until enemy forces had crossed into Zurich territory, and a herald from Lucerne arrived on October 9, to announce that Lucerne was repudiating its alliance with Zurich. Thus, only Zurichers fought for the Protestant cause in the Battle of Kappel on October 11, 1531. It turned into a rout when the Catholic forces struck at the Zurichers' exposed flank. Among those killed was Zwingli, who was present officially as a chaplain but took an active role as a captain. Bern now joined Zurich, but their combined forces were again defeated on October 24. The following month the Second Peace of Kappel reestablished the status quo and Swiss would not fight Swiss again until 1656. The Swiss canton of Bern, however, received a declaration of war in 1534 from the duke of Savoy accusing the canton of supporting rebels who had accepted the Reformation. Nothing came of this.

The tensions created by the new religious divisions in Europe led to other instances of minor states declaring war. In 1522, Franz von Sickingen, the leader of the German knights in their revolt—known as the Knights War—against the princes, issued a defiance of his feudal lord, the archbishop of Trier, who had refused to compel two councilors of that city to repay von Sickingen 5,000 Rhenish guilders that he had paid as ransom to a knight who had taken the councilors prisoners. This was a sufficient cause for war in those times, but Sickingen also declared himself the champion of the gospel, that is, the new faith of Martin Luther. He announced his intention to free the subjects of the archbishop from the temporal yoke of their tyrant, who had acted against God and the imperial majesty, and from the spiritual yoke of godless priests, and to place them in possession of the liberty that the gospel alone could provide. The rebellion failed, and Sickingen was killed in the course of it.

Twenty years later, when Charles finally gained some respite from his wars with France and the Ottoman Empire, he prepared to use force against the Lutheran princes and cities. The German historian John

Sleidan relates that in the year 1546, the Lutheran leaders, the duke of Saxony and the landgrave of Hesse, and the whole Schmalkaldic League raised open war against their emperor Charles, sent him a defiance, renounced all faith and allegiance to him, and debated long in council whether they should even honor him with the title of emperor.³¹ In general, however, conflicts within states over religion did not lead to declarations of war, since religious uprisings were usually regarded as rebellions.

The ill will between Charles V and Francis I hardly dissipated after the Peace of the Ladies, and intermittent hostilities continued without declarations of war. In 1541, near Pavia, Imperial troops killed the French ambassador to the Turkish sultan, once an Imperial agent, and the French ambassador to Venice. Charles denied any responsibility for the deed but also justified it because the two men were crossing his territory without a safe-conduct. Francis denounced him but put off any response for a year. When his new ambassador to the sultan returned with a pledge of aid from Suleiman the Magnificent and after Charles's naval expedition against Algiers was destroyed by a storm, the French king was ready to act.

On July 12, 1542, Francis declared war on the emperor. In an important innovation, he did not send his herald to the imperial court but published a proclamation, a *cri de guerre*, detailing the many injuries he had received from Charles, most notably the murder of his diplomats, which he decried as "an injury so great, so detestable, and so strange . . . to those who bear the quality and title of prince that it cannot be in any way forgiven, suffered, or endured."³² Francis called on God to favor him in his just quarrel with Charles. The proclamation went on to denounce the emperor and all of his subjects in his hereditary lands as enemies of France, but it did not include the Holy Roman Empire, as Francis hoped to recruit German mercenaries. He called on his subjects to bear arms against his enemies both by sea and land, to injure, molest, damage, and abuse the enemy in every way possible. The printed proclamation was posted in the cities, ports, and harbors of the realm to the sound of trumpets and public shouts. Francis gave his enemy's subjects forty days to leave the realm with their bodies and properties unmolested. This new way of declaring war was highly suggestive of the style of declaring war in use by the late seventeenth century. With some adjustment in terminology, Louis XIV could have issued it.

The war that followed scandalized Christendom with the spectacle of the French fleet fighting in conjunction with the Turkish fleet in the Mediterranean; worse yet, the French turned over the harbor at Toulon to the Turks for wintering their fleet. The treaty of alliance that Sultan Suleiman signed with Francis reflected a change in Islamic law regarding

treaties, since it was made for the lifetime of the sultan instead of for just ten years.³³ Probably because the French seamen were themselves affronted by cooperation with the infidel, the alliance failed to produce any significant victories. The explicit French alliance with the Turks prompted Henry of England to threaten war against France, and as was usual for that era, the French monarch then pressed Scotland to attack England. The Scottish king James V found himself in a cruel quandary: Francis I was his former father-in-law, since James had been married to his daughter Madeleine, who died less than a year after the wedding; but Henry was his uncle. Nor did he want a war with England, since he was aware of the weakness of his army. Henry for his part was eager to fight, since he was confident that he could favorably settle accounts with the Scots.

The chronic raids by both sides across the border, with or without royal warrant, exacerbated tensions. In mid-1541 the Scots trapped a band of English raiders and captured several nobles, whom they held without offering them for ransom. The indignation this caused at the English court was enormous; Henry had his cause for war. His commissioners met at York with their Scots counterparts on October 6, 1541, but failed to agree; their report to Henry ended with the question of what sort of "customary defiance" he wished to send to James before attacking Scotland.³⁴ A month later on November 5, with fighting already occurring along the border, Henry issued "A Declaration conteynyng the just causes and considerations of this present warre with the Scottis."³⁵ Henry charged his nephew, whom, he said, he had protected during his minority, with provoking the war. Rarely had a king of Scotland been given a daughter of England in marriage, and his father had expected the union of families would result in perpetual friendship between the two realms, a friendship, Henry insisted, that he always worked to maintain. He had been willing to attribute earlier breaches to James's council and advisors, but the events of the last year, such as James's refusal to come to York to meet with him as agreed, showed that the fault was his nephew's. After listing numerous provocations by the Scots, Henry pointed out that if domination of Scotland were his goal, he could have gained it during James's minority. He had desisted, he said, because he hoped to join with all Christian princes against the Turks, the common enemy.

Henry then went on to proclaim that the Scots kings had always rendered homage to the kings of England, as shown "by instrumentes of homage made by the kynges of Scotese, and divers notable personages of Scotland, at divers and sundry tymes sealed with their seales, & remaining in our treasury."³⁶ He detailed the seventeen times that the Scots kings had rendered homage, first in 947 and most recently in

1423. He explained the absence of any such acts in the past 120 years by wars and troubles and the frequent minorities of the kings of Scotland. Nonetheless, Henry asserted, he would rather have his nephew's friendship than to force him to give homage. In the end, however, it would be the work of God, who wishes all to live in peace and tranquility, to establish that due superiority be made known.

When Henry sent a copy of his declaration of war to James is unknown, but on the same day it was printed, he ordered the duke of Norfolk to invade Scotland. Four days later James wrote to Pope Paul III from Edinburgh to inform him of the English invasion, which he claimed his forces had driven off, and beg for aid. James declared that the king of England raged against him because he would not desert the Holy See and join in the war on France. Since the English king was endowed with tremendous resources, he would doubtless compel James to follow his will or devastate his kingdom. James entreated the pope to use his influence to persuade other Christian princes to send speedy succor, "for if this fire is neglected, it will shortly pervade all Christendom."³⁷

Adding to the rancor between the two sides was the murder of the English herald Somerset on Scottish soil in November 1542. Norfolk had sent him to James to ask him to allow the English captives to be ransomed. During his return (with what answer about the captives is unknown) two English exiles killed him. The Scots, recognizing the crime's severity, quickly arrested the two and clapped them in Edinburgh Tower. The royal council then wrote to its English counterpart to announce that the murderers would be punished according to the severity of the crime, since a herald was "a public and privileged person."³⁸ The Scots king, eager that the crime not be imputed to him and the punishment of the perpetrators made known to all princes, asked for a safeguard for his heralds to go to King Henry and inform him of what had and would transpire. Before James received an answer, the English routed the Scots at Solway Moss, and James himself died three weeks later, from a broken heart, it was said, leaving a week-old daughter, Mary Stuart, as his successor.

Although Henry VIII now had the opportunity to settle affairs in Scotland to English advantage for a long time to come, he allowed himself to be distracted by entreaties from Charles V to join him in the war against France. Early in 1543, Henry and Charles send their heralds, Garter and Toison Dor, to France with an ultimatum to deliver to Francis. He refused to allow them to enter his realm, so they returned home, and the ultimatum was delivered to the French ambassador in London. Henry sent 6,000 men to Calais in late July, and on August 3 the emperor and the English king declared war on the French king.³⁹ The

French did win a major battle at Ceresoles in northern Italy in April 1544 over the Imperial forces, but that failed to prevent Charles and Henry from invading France from two directions later that year. Both invading armies stalled short of Paris, and the Peace of Cr  py was negotiated late in 1544.

Three years later both Henry and Francis died. The English successor was nine-year-old Edward VI, whose minority took England out of active involvement in war for the time being, while the French throne passed to Henry II, the younger of Francis's sons who had served as hostages for him in 1526. Henry II bore a bitter grudge against Charles V for what he regarded as ill treatment while he was a hostage. He was ready to war against Charles at any time and any place and with any allies, both German Lutherans and Turks. He never felt any need to issue a declaration of war against Charles or his son Philip, who succeeded him as king of Spain and prince of the Low Countries. Philip was married to Queen Mary Tudor, who had succeeded her half-brother in 1553, putting England in the Habsburg camp. By early 1557, the Valois and the Habsburgs were at war in both northern France and Italy. Henry II had aided several rebellions by English nobles hostile to Mary, most recently one led by Thomas Stafford, who had landed a small force on the English coast from several French ships in April 1557. Stafford proclaimed himself king of England; but the local militia captured him; and a month later he went to the block. The rebellion occurred while Philip was in England hoping to persuade the royal council to declare war on France. It ended any hesitation by the English authorities, although Henry rejected responsibility for the rebellion, claiming that the ships were supposed to be going to Scotland. In late May the English royal council decided on war.⁴⁰

Mary Tudor's declaration of war on Henry of France in June 1557 fit the late medieval ideal of how it was supposed to be done. On May 26, a letter was drawn up informing Nicholas Wooten, the English ambassador in France, that he was being recalled because the peace had ended. The letter was dispatched on May 29.⁴¹ Three days later Mary gave William Flower, Norroy King of Arms, a commission to go to France to declare war.⁴² The articles of war declared that the French king had been aiding and abetting rebellion against Mary since she first came to the throne, but she had been willing to overlook such perfidious behavior for the peace and tranquility of Christendom, attributing the acts to his ministers rather than to him. Despite her forbearance, the French king continued to support rebels, inviting them to his court and giving them pensions. Thereby he set a dangerous example to all princes, "whose states cannot be secure if traitors are thus encouraged." Ignoring her protests, he aided

rebels in their attacks on her, and she realized that nothing she could do would persuade him to stop. Furthermore, the French king favored pirates who despoiled English subjects and aided counterfeiters who put false coins into circulation in her realm. For those reasons, "We command all Englishmen to regard Henry, the French King, and his vassals as public enemies of this kingdom and to harm them wherever possible, abstaining from trading or any other business with them." Mary added that although the French king molested her subjects without declaring war, she would give his subjects forty days to leave with such property as the law permitted them to take with them.⁴³

The English herald was expected to take seven days to reach the French court, which was then at Reims; and so, on June 7, the declaration of war was proclaimed in London. According to the diary of a London merchant, "the vij day of Juin was a proclassyon in London by the queens grace, of the late duke of Northumberland was supported and furered by Henry the Frenche kyng and ys mensters, and by the heddes of Dudley, Asheton, and by the conspiracy of Wyatt and ys trayturs band."⁴⁴ That same day the Venetian ambassador was informed that a herald was on his way to the French court to declare war, and he was given a copy of the articles of war. He commented about "the magnanimous custom of this realm, never to go to war without first giving notice."⁴⁵

Flower reached Reims on June 7, but the news of impending war had arrived before him, as a French spy in London had sent a dispatch that came the day before. Wooten gained an audience with Henry II early on June 7 to inform him of his recall but made no mention of the reason, although the French knew well enough why he was leaving. Nonetheless, Henry gave him "gentle words" and promised him a gift of 1,200 *écus* at his farewell and an escort to accompany him to the frontier. Henry immediately left to go hunting and was not available when the English herald came to the court a few hours later.⁴⁶ Flower was dressed in a black cloak, not the usual attire of heralds, and would not state his purpose to the royal guards, until the Constable Anne de Montmorency was summoned to speak with him. When Montmorency found out that Flower came to declare war in the name of the queen of England and was shown his commission, he became angry that the herald had passed the frontier in disguise and declared that he deserved to be hanged. But, Montmorency said, he knew his king was merciful and would forgive Flower. Since the king was off hunting, Flower would not get an audience for two days.

On June 9, the herald returned to the court and was led in to see Henry as part of a great procession of the Dauphin, three cardinals, the keeper of the seals, four dukes, the prince of Mantua, and "numerous

other princes, lords, knights, bishops, prelates, captains, and gentlemen.” The ambassadors of the papacy, Venice, Portugal, and Ferrara had also been summoned to hear Flower. Kneeling before the king with his coat-of-arms on his left arm, Flower presented a parchment to him. Henry had it read aloud. Then he said: “Herald, I see that you have come to declare war on me by order of the Queen of England. I accept the declaration, but I wish every one to know that I have always observed toward her good faith and amity. . . . Now that she picks so unjust a quarrel with me, I hope that God will be pleased to grant me this grace, that she shall gain no more by it than her predecessors did when they attacked my realm.” He then ordered the herald not to say another word on pain of death, because a woman was declaring war on him, and he regarded that as unchivalrous. Flower was returned to Wooten’s house, where he received a gold chain worth 200 *écus* from Henry, who wished to show that even in time of war he was chivalrous and generous.

Five days later, Philip wrote to one of his ambassadors that the English would not allow the French ambassador to leave until Wooten and his entourage returned from France, to ensure that the French would not detain them. On June 27, the two ambassadors were exchanged outside of Calais.⁴⁷ In declaring war, England entered a conflict that had already been going on for over a year. Although Philip’s forces won a great victory at St-Quentin in August 1557, their failure to push on to Paris allowed Henry II to use the army he had collected for defense of the city to surprise the English at Calais in a mid-winter attack and take the place. With both sides winning a great victory and suffering a major defeat, men of the time believed that God was making clear His desire for peace. Lengthy negotiations led to the Peace of Cateau-Cambrésis in early 1559. It included a marriage between Philip II, now a widower as Mary Tudor had died in late 1558, and Princess Elisabeth, Henry’s oldest daughter. Henry held a great tournament in Paris in late June to celebrate both the peace and the marriage. While jousting, he was fatally injured, leaving to his fifteen-year-old son Francis II a realm beset with problems, most serious being the religious division between Catholics and Huguenots. Shortly it spilt over into violence in the French Wars of Religion.

England under Elizabeth I allied itself with the Huguenots both for religious reasons and in hope of recovering Calais. In late 1562, a small English fleet was dispatched to France to support the Huguenot effort to relieve the city of Rouen, which royalist forces had under siege after the Huguenots had seized it earlier that year. Sailing up the Seine River, three English boats broke through a barrier on the river that the French had erected, but two others were sunk. Constable Montmorency ordered the hanging of the surviving crew members on the grounds that, because

the English queen had not declared war, the crew members had no claim to the protection of the laws of war. The three English boats that reached Rouen were not able to prevent the fall of the city, which fell to royalist forces in late October. Except for the captain, who was eventually ransomed, the surviving Englishmen were either executed or condemned to serve as galley slaves.⁴⁸ Probably as a consequence of the executions of her troops in 1562, Elizabeth was careful to issue "A Declaration of the Causes Moving the Queene of England to Give Aide to the Defence of the People Afflicted and Oppressed in the Lowe Countries,"⁴⁹ when in 1585 she sent six thousand men under the earl of Leicester to support the Dutch Rebellion against Philip II. In the declaration she declared that as sovereign prince and queen, she had no need to give an account of her actions to anyone, whether her own subjects or strangers, yet she had chosen to do so in order that all would understand the justice of her cause. In 1596, Elizabeth issued a similar "Declaration of the Causes Moving the Queenes Majesty of England to prepare and send a Nauy to the Seas for the defence of her Realmes agains the King of Spaines."⁵⁰ In addition to repeating the points of the prior declaration, the queen ordered that it be printed in French, Italian, Dutch, and Spanish and distributed in the ports of Spain and Portugal so that all might have better knowledge of the matter.

The events at Rouen were among the earliest to occur during the nearly forty years of civil war that ravaged France. This civil war provided no opportunities for formal declarations of war, but for the ardent Catholics, papal excommunication mandated taking arms against a sovereign prince, namely Henry, king of Navarre, the Huguenot leader, whom the pope anathematized in 1585 as a relapsed heretic. Although Henry was from the cadet line of the French royal family, the Bourbons, he was also a sovereign prince as king of Navarre through his mother, Jeanne d'Albret. Within months of Navarre's excommunication, the Catholic League, organized to resist the Protestants, forced Henry III to sign the Edict of Nemours, which the Leaguers later claimed was a declaration of war against Henry of Navarre. When Henry III in 1588 ordered the summary execution of the duke of Guise and his brother, the cardinal of Guise, the Leaguer leaders, as enemies of the French crown, the pope issued a bull of excommunication against him. Members of the League proclaimed that this was the equivalent of a declaration of war against Henry, denounced him as a tyrant, and called for his assassination as justified tyrannicide. A Leaguer took them at their word and stabbed Henry III to death in August 1589. Now Henry of Navarre was king according to the French monarchy's law of succession. The Leaguers rejected that claim on the grounds that there was a Law of Catholicity, which

required the French king to be Catholic, and declared that Navarre's uncle, Charles, the cardinal of Bourbon, was the rightful heir to the throne because he was a Catholic and one generation closer to their common royal ancestor, Louis IX.

Leaguer King Charles X died from natural causes in 1590. The fact that the Catholic League did not have another viable candidate for the throne was one factor in Henry of Navarre's success in making good his claim to the royal succession, although his conversion to Catholicism in 1593 was far more important. Even Spanish intervention on the League's behalf failed to prevent Henry IV from gaining control of Paris and most of France. By 1595, Henry felt secure enough on the throne that he could declare war on Spain. It was a key expression of his claim to sovereignty in France, since declaring war was an act of a sovereign king.

On January 17, 1595, Henry IV's declaration of war was printed and posted throughout the realm. It began with a list of grievances against the king of Spain, especially the Spanish armed intervention in France under the false pretence of religion. Henry called on his "subjects, vassals, and servants to make war by land and sea against the said king of Spain, his lands, subjects, vassals and adherents as enemies of my person and my realms."⁵¹ Henry's subjects were told to enter the Spanish king's lands with force, assault and take his cities and lands, levy contributions on his people, and take prisoners to be held for ransom. He barred all communications and commerce with the Spanish king and his subjects, and all passports and safeguards were revoked forty days after the date of the declaration. It was ordered disseminated by public crier throughout the provinces and at the frontiers so that "no one can claim ignorance, but everyone must obey under penalty of treason." A herald carried the declaration to Archduke Ferdinand, the Habsburg ruler of the Spanish Netherlands, and another, to the Spanish border with France. The archduke responded a month later with two placards, one enjoining his provinces to be ready to make war by fire and blood on the subjects of the Prince of Navarre (the Spanish refusing to acknowledge Henry as king of France), the other mandating that the French subjects in his provinces presented themselves to the magistrates to swear a new oath of loyalty. Philip II's reply arrived at the French court in March. It was largely a pained listing of the many services Spain had rendered to the French monarchy and the Catholic religion.

In 1588, the duke of Savoy, Philip II's ally, had taken advantage of the anarchy in France to seize the marquisate of Saluzzo on the border between France and Savoy. Once peace was made between France and Spain in 1598, Henry IV demanded the return of the territory. In 1599 the duke went to Paris to negotiate its return, but when he failed to

follow through on his promises, Henry declared war at Lyon on August 11, 1600. The “Declaration of the King containing the Reasons for opening War against the Duke of Savoy” was distributed to the town criers of the provinces bordering Savoy; accompanied by trumpeters, they were to read it at the crossroads and in the town squares, “so that no one can plead ignorance.”⁵² In the document, Henry declares that to his great regret and against his desire for friendship and peace with all of his neighbors, the duke of Savoy had refused to return the land usurped during the reign of the late Henry III despite agreeing to do so. Therefore, in order to meet his duty as prince and satisfy his honor, Henry declared his intention to wage war on said duke and treat with hostility his subjects, vassals, and lands. Henry enjoined his soldiers from injuring members of the church and its properties and the people in the lands he claimed. Those who owed loyalty to the king but lived in Savoy had fifteen days to return to the kingdom under penalty of *lèse-majesté*—loss of life and goods—and any subject of the duke now in France was also given fifteen days to leave the realm without injury. Hostilities must be directed against only the duke and those who serve him, and the king’s officers are ordered to punish rigorously all who violate these orders. The short war that followed involved French troops successfully assaulting several Savoyard fortresses in the Alpine passes. In January 1601, the duke sued for peace and gave up Saluzzo.

In the course of the sixteenth century, the issue of who had the authority to declare war had been settled. The ambiguous status of such powerful nobles as the dukes of Burgundy had long been resolved by denying lesser princes any right to declare war. It was a significant signal that the process of creating the absolute monarchy of the *ancien régime* was well underway. Similarly the Holy Roman Emperor had become just another monarch, declaring war and having it declared on him, making clear the demise of the imperial claim to universal, or at least Christendom-wide, jurisdiction. The papacy’s right to call a crusade, while challenged by Protestant leaders, was not yet abandoned. When Pius V issued his call to arms to Christian rulers in 1571 against the Ottoman Turks, who had attacked Venetian-ruled Cyprus, it was perhaps the closest the papacy ever came to a formal declaration of war.⁵³ The ultimatum that Sultan Selim II had sent to Venice in February 1570 is interesting in its own right. At his request the grand mufti had issued a *fatwa*: because Cyprus had once been under Muslim rule (for 300 years after 688), the obligation to recover it was more binding than the keeping of a treaty, such as the one Suleiman I had signed with Venice in 1540. After giving his many titles, including “Lord of Jerusalem,” Selim wrote: “We demand Cyprus of you, which you shall give to us willingly or perforce. Do you not

irritate our horrible word, for we shall wage a most cruel war against you everywhere; nor let you trust in your treasury, for we shall cause it suddenly to run away from you like a torrent. Beware to irritate us.”⁵⁴ The Venetians replied that since Venice was the master of Cyprus in justice, it would also in justice and by Christ’s grace have the courage to defend it. The city had the courage but not the resources to defend Cyprus, which fell to the Turks in July 1571, setting the stage for the Christian victory at the Battle of Lepanto in October of that year.

By the end of the sixteenth century, the procedure of declaring war changed from a thoroughly medieval practice to one that would be largely used in the western world until the mid-twentieth century. Resident ambassadors had largely replaced the heralds, and they took printed declarations of war to enemy courts in place of the spoken defiance of war that would be waged by sword, fire, and bloodshed. This transformation was most obvious in France, as shown by Henry IV’s declarations of war in 1595 and 1600, since the French kings declared war or had it declared war on them more often than anyone else. For the practice of declaring war even more than for the theory of doing it, the sixteenth century was the most highly innovative period in European history.

CHAPTER 4

THE SIXTEENTH CENTURY—THE THEORY

In the early sixteenth century, the concepts and principles of the Italian Renaissance were well established and known across much of Europe. For the Renaissance humanists, Roman practice was superior in every respect to that of the Middle Ages. Gianantonio Campano produced the first printed edition of Livy's *Histories* in 1470, which was the principal source on Roman practice of declaring war. As Niccolo Machiavelli wrote in his *Discourses on Livy* (II, 23), "I think that (reading this history of Livius and wanting to profit) all the methods of procedure of the Roman People and Senate should be considered." How to declare war was no exception, although the number of humanists concerned with issues of war was relatively small. They were largely confined to those who served their states in some fashion, as did Machiavelli. They called attention to Roman practice and advocated a return to it. One consequence of the humanists' obsession with Roman practice was an almost complete absence of references to contemporary events in their works concerning a just war and how to declare it. There was a serious disconnect between what the humanists wrote and what the rulers did. By the end of the century, however, the more astute political thinkers were cognizant of Roman procedure, Spanish advances, and the changes in practice that occurred in the century to promote a quite different approach to declaring war.

Machiavelli, who served as secretary for the commune of Florence and its agent in France under Louis XII on three missions between 1500 and 1510, wrote extensively about war, and he was especially taken with the Roman practice of preemptive war, citing Cicero: "Be on your guard before you suffer, for it is rash to allow dangers to come upon you and then to repent of it, when you might have anticipated them."¹ Since there is no higher human authority than the prince, each ruler has the final decision on what is best for his power and state. If he deems necessary

striking at a neighboring prince in a preemptive war, neither law nor custom dictate that he not attack.² Machiavelli's comments on declaring war were largely limited to praising the Roman practice. He described the Romans as taking the field as soon as war was declared, which was not entirely accurate, as he made no mention of the waiting period the Romans required.³ He also was impressed with how the Roman people, while delegating the power to declare war to the Senate, gave complete discretion over the waging of the war to their "Consuls, Dictators, and other Captains of armies . . . who could either make an engagement or not make it, and lay siege to this or that town as seemed proper."⁴

Machiavelli described how his native Florence in the thirteenth century

[h]ad a bell called Martinella, which was rung during a whole month before the forces left the city, in order that the enemy might have time to provide for his defense; so great was the virtue then existing among men, and with so much generosity of mind were they governed, that as it is now considered a brave and prudent act to assail an unprovoked enemy, in those days it would have been thought disgraceful, and productive only of a fallacious advantage.⁵

This bell was also taken with the army and served to regulate the keeping and relief of the guard and other matters necessary in time of war.

Machiavelli's service at the French court gave him the opportunity to observe how the monarch of a large realm acted in respect to declaring war. When French king Louis XII declared war on Venice in 1509, several French authors wrote pieces justifying the war and praising the king for his victory. One of them, Jean Lemaire de Belges, wrote that the French had won because God favored their king for waging a just war in all respects: properly declaring war, treating captives humanely, restricting the war to recovering the papal lands over which it was fought, and not continuing to fight and invade Venetian territory.⁶ Claude de Seyssel was a royal secretary and ambassador for Louis XII and had a good relationship with Machiavelli, when the Italian served in France. Seyssel included a chapter in *The Monarchy of France* on when it is permissible to declare war according to divine and human law.⁷ He wrote *The Monarchy of France* as a guide for the new king, Francis I, who was twenty years old at his succession in 1515. Seyssel provided the first significant French discussion of the theory of just war since that of Christine de Pisan a century before. He followed the medieval just war tradition without citing the authorities or laying out the syllogisms of the scholastic theologians.⁸ War is not to be fought for the glory of victory and conquest or any other "disordered passion" but

only to recover what has been unlawfully seized, or gain reparations for injuries inflicted on the prince or his subjects, or to aid friends and allies who have been unjustly attacked. "Then it is permissible to declare war by divine and human law." Of course, to defend oneself against an attack is always legal and does not require a declaration of war.

Whether Francis paid any attention to Seyssel's book is impossible to say, but it is probable that the author, who died in 1520, would have found the king's wars often violated the principle of not going to war for the sake of the glory. Seyssel cautioned against foreign conquests, "in the past and recently such conquests have proved to be very expensive both in good and honorable men and in money, and although well based have not lasted long; and . . . the kingdom has suffered as much or more shame and harm in losing them than it has acquired honor and profit from winning them."⁹ Within six months of his succession, Francis was on his way to win back Milan from the Swiss, who had taken the city in 1512. Since this involved winning back what he claimed was rightly his, the king did not declare war before winning the Battle of Marignano over the Swiss in September 1515. He had himself installed as duke of Milan without bothering to seek investiture for the duchy from the Holy Roman emperor, who still claimed feudal jurisdiction over it. Emperor Charles V would use that as cause for declaring war against Francis in 1522.

England's Thomas More, whose service to his monarch included a stint as lord chancellor, placed in his *Utopia* (1516) a discussion on declaring war that came largely from Roman practice. His attitude toward war is expressed in Book Two, where he writes: "[The Utopians] detest and abhor war or battle as a thing very beastly." Yet, he goes on to write that they practice the discipline of war daily, and even the women do it on certain days, so that they are not found wanting in skill at arms. More presents the Utopians as going to war to defend their own country or drive invaders out of their friends' lands or free a people oppressed with tyranny, very much the Augustinian definition of the just war. After mentioning a war in which the Utopians came to the aid of a nation whose merchants had been harmed by a third people, More's narrator states that the Utopians severely punish wrong done to their friends but are less concerned about loss of their own property, since they have such an abundance. If, however, one of their own is killed or maimed by non-Utopians, they first send envoys to look in to the circumstances and demand the guilty parties be handed over for punishment. If that request is refused, they declare war at once, preferring, however, to win by skill and cunning than by bloodshed. More presents as praiseworthy the Utopian practice, once a war has been declared, of having secret agents post placards with the names of the enemy's king and leaders for whose

deaths a bounty would be paid. He acknowledges that such assassinations are regarded as cruel villainy elsewhere in the world, but he argues this practice is wise and merciful since it avoids the deaths of many who bear no blame for the war and punishes those who are responsible.¹⁰

Another situation in which More presents his Utopians as declaring war involves the taking of barren land. The skills of the Utopians are so great that they are able to make land that is “too barren and paltry even to support the natives” yield abundance. The natives are invited to live with the Utopians, but if they resist, the Utopians declare war. More says the Utopians find it “perfectly justifiable to make war on people who leave their land idle and waste yet forbid the use and possession of it to others who, by the law of nature, ought to be supported from it.”¹¹ More’s attitude toward vacant lands was new for his era, although it may have been based on the Greek and Roman practice of building colonies on unoccupied land; later authors would make use of it to justify seizure of lands from American Indians, especially in the English and Dutch colonies, where the number of natives was small.

Clearly, the Roman way of declaring war influenced More, which was also true of Tommaso Campanella (1568–1639), another author of a utopian work. Born in 1568 to a cobbler’s family in Calabria, he was educated in theology and became a member of the Dominican order. Campanella drew the wrath of the Roman Inquisition for rejecting Aristotle’s authority, but his more serious offense was participating in a plot to free the kingdom of Naples from Spanish rule. Betrayed by an informer, he saved himself from execution by pretending to be insane. Given a life sentence in 1600, that sentence was commuted in 1629, and Campanella spent his last years in France. *The City of the Sun* was originally written before 1602, when Campanella was imprisoned. He later revised it in 1613–14, and the first printed edition appeared at Frankfurt in 1623.

The work is a dialogue between a grandmaster of the Knights Hospitaller and a Genoese sea captain who had lived for a time in a utopian society on an island somewhere near India, where goods, women, and children are held in common. Like the Utopians its residents are peaceful but manifestly well equipped to deal with any attack. Although they use gunpowder weapons, their style of war is that of the Romans, but women are trained for war so they can aid the men in conflict if need be. There are three other kingdoms on the islands, whose peoples envy the City of the Sun, and one or the other often attacks the people of the city. Campanella’s description of how the city goes to war is in clear imitation of the Romans:

As soon as they suffered from insult or plunder, or when their allies have been harassed, or a people have been oppressed by a tyrant of the state

(for they are always the advocates of liberty), they go immediately to the council for deliberation. After they have knelt in the presence of God that he might inspire their consultation, they proceed to examine the merits of the business, and thus war is decided on. Immediately after, a priest, whom they call Forensic, is sent away. He demands from the enemy the restitution of the plunder, asks that the allies should be freed from oppression, or that the tyrant should be deposed. If they deny these things war is declared by invoking the vengeance of God for destruction of those who maintain an unjust cause. But if the enemy refuse to reply, the priest gives him the space of one hour for his answer, if he is a king, but three if it is a republic, so that they cannot escape giving a response. And in this manner is war undertaken against the insolent enemies of natural rights and of religion.¹²

Unlike More and Campanella, whose ideal societies were always ready to go to war but only in the most just of causes, the Dutch humanist Desiderius Erasmus was one of the very few committed pacifists of the sixteenth century outside of the Anabaptist churches. His most powerful antiwar statement comes from *The Education of a Christian Prince*:

Some princes deceive themselves as follows: "Some wars are entirely just, and I have just cause for starting one." First I will suspend judgment on whether any war is entirely just; but who is there who does not think his cause just? Amid so many shifts and changes in human affairs, amid the making and breaking of so many agreements and treaties, how could anyone not find a pretext, if any sort of pretext is enough to start a war? It can be argued that papal laws do not condemn all war. Augustine too approves it somewhere. True enough, but Christ himself, and Peter, and Paul, always teach the opposite. Why does their authority carry less weight than that of Augustine or Bernard? Augustine does not disapprove of war in one or two passages, but the whole philosophy of Christ argues against war. Nowhere do the Apostles approve it, and as for those holy doctors who are alleged to have approved of war in one or two passages, how many passages are there where they condemn and curse it?¹³

Erasmus reluctantly agrees that defense against invasion is permissible but wonders why any prince would prefer to waste lives and treasure in increasing his territory when improving his realm is a far better thing to do. Surely, it is good for Christians to fight against the common enemy, the Turks. But wait, is not the Turk a man and a brother also? In the end, however, Erasmus agrees that the Turks threaten *Respublica Christiana* and accepts the righteousness of war against them as long as it is fought only for the defense of Christendom.

The Dutch humanist expressed his opposition to war in three other works: *Against War* (1515), *The Complaint of Peace* (1517), and *On the War against the Turks* (1520). In the latter, he argues that while war among the ancients was cruel and ugly, it was mitigated somewhat by such practices as sending the fetial priests to demand recompense before war began, and searching for ways to avoid war if possible. Also, no one was allowed to begin a war until a signal was given, which had to be so clear that the most ignorant soldier could understand it. He laments that such worthy practices have disappeared in his own time, and that those who should be Christians never miss an opportunity for war. Among Christians war has become brigandage, and their monarchs go to war only for glory. He also notes that once war is declared, the whole business of the state becomes subject to the will of a few and can lead to tyranny.¹⁴ Nonetheless, he grudgingly agrees that just as magistrates can punish delinquents, Christian princes may at times go to war with fellow Christians for a compelling and just cause, but only if every conceivable means to prevent it has been exhausted before war is declared, which it is required to be.¹⁵

For François Rabelais, who served as physician to a French captain on campaign in Italy, war was a subject for satire. While he lampoons the warmongering of princes throughout his works, his only comment on declaring war appears in *Gargantua*. When the bakers of the kingdom of Lerné refuse to sell their hot cakes to shepherds from the realm of King Grangousier, Gargantua's father, the shepherds take offense and seize the cakes by force. When the bakers complain to King Pierochole of Lerné, he flies into a rage and orders beating the drums of war to summon his men to fight. By not announcing his decision for war to Grandgousier, he intends to catch him by surprise, as does happen. There follows a catalogue of the devastation done to the invaded realm, a hugely disproportionate response to the injury inflicted. Grandgousier summons Gargantua from Paris to defend his realm, and he easily defeats Pierochole's forces. After his victory Gargantua addresses the men of the defeated army, denouncing them as brigands and robbers for going to war without proper notification. He speaks of the need for magnanimity after victory, which he then applies to the defeated men, except for Pierochole's officers (the defeated king himself has fled), who are put to work in Grandgousier's printing shop. Although Rabelais does not say so, it can be assumed that one point of the tale is that fate favors those who wage a just war, which requires a proper declaration of war.

The early Protestant reformer, Martin Luther, had little to say about declaring war. Trained as a scholastic theologian, he followed medieval just war theory for the most part in his discussions of war. He sees war as an unavoidable consequence of sinful human nature; thus, the prince has

a right to resist invasion in order to punish evildoers and restore peace. In the several texts where he discusses war, Luther emphasizes the view that in a just war, equal fight equal. Above all, inferiors cannot rebel against their superiors. Rebellion by anyone against his proper lord is a serious sin. The only point in the medieval theory of war where Luther diverges is on the crusade. He is completely opposed to allowing the pope or anyone else to wage war for the sake of religion. True religion cannot be defended or imposed by force. The clergyman's responsibility is the preaching of the Gospel, not leading a war.

There quickly appeared charges from Luther's foes that he rejected defending Christendom from the Turks. In a lengthy tract "On War against the Turk" (1529), he responded to those charges. He makes it clear that the Turks can be resisted by war when they invade the territory of Christian states. The proper leader of such a war is the emperor, not the pope: "If there is to be war against the Turk, it should be fought at the emperor's command, under his banner and in his name. Then everyone can be sure in his conscience that he is obeying the ordinance of God, since we know that the emperor is our true overlord and head and whoever obeys him in such a case obeys God also."¹⁶ As Charles V made it clear after 1529 that he supported Catholicism, Luther became less sure that obeying the emperor was indeed obeying God. By 1540 he accepted the right of the German princes and cities to resist the emperor in defense of the true faith.

The Zürich reformer Huldreich Zwingli had a great deal more on war. As an early follower of Erasmus, part of Zwingli's motivation for breaking with the papacy was the revulsion he developed toward the papal use of Swiss mercenaries. Early in his ministry he set himself strongly against war: he saw it as God's punishment on those who have offended Him. Nonetheless, a people has the right to defend itself against naked aggression. Zwingli is dubious about the idea of the rights of war, which he denounces as nothing more than the right to commit violence.¹⁷ In such circumstance he has little place for the concept of declaring war; an aggressor's declaration hardly mitigates the evil he has undertaken by his aggression, while those who defend themselves against him have no need for it.

During his early period as a Protestant, Zwingli has to deal with the fact that God had ordered the ancient Hebrews to go to war. He explains this as God's way of chastising evildoers but argues that such wars have no pertinence to his times. By 1529, however, the political situation in Switzerland had changed much for the worse from Zwingli's point of view: The five Catholic cantons were using force to prevent the word of God from being preached openly in their territories. In such

circumstances, Zwingli argued, God permits the use of the sword, as found in the Old Testament. He objected to the term *crusade*, because he understands it to refer to a war declared by the pope against infidels, and the pope has no authority to wage war on anyone, even Muslims. Defense of the true faith, however, is not merely allowed but required of the true Christian.¹⁸ Since each canton regarded itself as a sovereign state, Zwingli agreed war had to be declared before the cantons could wage war on one another, and he took the lead in drawing up the declarations of war for Zürich during the two Kappel Wars. John Calvin, the principal theologian for the Protestant Reformed tradition that Zwingli initiated, had much less on war in a vast opus. He had a stronger opinion than Luther on the obligation of the state to protect true religion and, thus, on the right of lesser magistrates to resist an evil ruler who threatened it, but he commented very little on war itself.

The major work that discussed declaring war to come out of sixteenth-century Germany was by Conrad Brunus, who is called the first writer who published a separate treatise on the topic of the ambassador. Born in the duchy of Württemberg about 1491, he was educated in canon and civil law at the University of Tübingen and had a long career as an advisor to several German princes and prelates, especially the dukes of Bavaria. He died at Munich in 1563. He was the author of a large number of legal works, the most important being *De Legationibus libri V* (*On Legations, Five Books*), published in 1548.¹⁹ The book is important less for any originality of thought than for the vast amount of information Brunus amassed on ambassadorial practice from the ancient world to his own time. He believes sovereigns must obey a customary set of rules, which are ascertained by study of the past. He describes at length the Roman practice of the *fetials*, who used rituals to authorize war. In his own day, such formalities are not necessary to declare war, since public ministers, who represent their sovereigns, negotiate everything relating to war and peace. However, a proper declaration of war is still essential, and Brunus complains that because of its absence the wars of his era are often unjust. From earliest times public ministers were immune from harm, civil suits, criminal charges, and taxes and duties in lands where they were posted. Unfortunately, his own period has seen widespread violations of these privileges.²⁰

Ambassadors need such immunities, according to Brunus, because they have responsibility for one of the most crucial task of government—the declaration of war, since the likely response of those against whom war is being declared is striking out at the representative of the enemy before them. The power to make war belongs to the supreme authority of the state, which it must do by solemn declaration. Such an act is a necessary

part of what constitutes just war, which can be undertaken only for self defense and public security. Following Cicero, he deplores war undertaken for acquiring fame and conquest. Even a just war cannot be begun until a demand has been made for satisfaction for the harm done to the state, unless a delay would result in irreparable damage. In such circumstances the enemy's borders may be breached in order to recover what has been unjustly taken. It is this last point that leads into Brunus's discussion of war against infidels and heretics. All wars by Christians against enemies of the Christian faith are just if undertaken to recover dominions held by infidels and which may be made useful to all Christendom. There is no hint in his works that he had heard anything of the contemporary Spanish debate over the right to wage war on those who had never heard of Christ. It is equally true that his work went largely unnoticed despite the value of his history of ambassadorial practice. Hugo Grotius, for example, did not mention him.

While the Germans concerned themselves largely with the issue of the defense of the true religion by violence and war—whether against papists, heretics, or Turks—the Spanish faced a much different problem: how to justify the conquest of lands and people previously unknown to Europeans. In 1452 Portugal requested Pope Nicholas V to affirm their right to rule lands claimed by its sailors along the west coast of Africa in order to preempt any claims on those lands by other Christian states, especially Castile. The pope wrote a bull giving Portugal's King Alfonso V the right to invade and conquer the kingdoms of Saracens, pagans, and other enemies of Christ, seize their possessions, and enslave them and their families as prisoners of war. The lands so gained would lawfully pass to the king's successors. The Portuguese king was obliged, of course, to bring Christianity to the conquered people. It was a powerful statement of papal claims to universal jurisdiction over the entire world "by the plentitude of apostolic power," going well beyond the idea of a crusade to defend the Holy Faith or to recover lands lost to infidels.²¹

This forceful expression of papal authority went little noticed by everyone except the Castilians. When Christopher Columbus returned from his first voyage across the Atlantic, Queen Isabella immediately asked Pope Alexander VI for identical authority in the lands Columbus had seen. Alexander responded favorably, drawing up a bull that repeated point for point the rights his predecessor had granted Portugal and gave them to Castile over new lands to the west of a meridian a hundred leagues west of Cape Verde Islands. The Portuguese objected fiercely to this violation of their papal-recognized monopoly over new lands and, in 1494, the two realms hammered out the Treaty of Tordesillas, which moved the line 270 leagues farther west, giving the eastern part of Brazil

to Portugal. In 1497 the pope recognized the new arrangement. Three decades later, when the French became involved in sending ships to the New World, King Francis I objected strenuously to the neat deal dividing up the new lands between Spain and Portugal, demanding to know, "Where in Adam's will is the world so divided?" What Francis wanted was papal recognition of the same rights for him; he had no doubts about the concept that the pope could grant Christian kings the authority to conquer the new lands.

Objections came from an unexpected source: missionaries in the Spanish colonies and theologians at Spanish universities. Within two decades of Columbus's first voyage, several Spanish missionaries were questioning whether their people had the right to seize the lands of the New World natives and enslave them. In 1511 Antonio de Montesinos, a Dominican, preached a fiery sermon to colonists on Hispaniola denouncing the enslavement of the Indians. Other missionaries quickly picked up on this theme, and Ferdinand ordered them back to Spain. There, they had enough of an impact to persuade him to call a *junta* of jurists, theologians, and councilors to meet at Burgos in 1513 to establish proper procedure for dealing with the natives. The *junta* discussed many of the same points that participants in later debates over native rights would. For example, Fra Bernardo de Mesa argued that those who held the Aristotelian position that the natives were natural slaves defamed God by claiming he had made an imperfect creature. Those who supported the Spanish crown's rights of conquest carried the day, and the resulting Laws of Burgos permitted use of force to coerce Indian subjugation if necessary.²²

Two participants, Juan de Palacios Rubios, a lawyer, and Matias de Paz, a theologian, were told to expound on their opinions, which were then printed. According to Rubios, the pope holds Christ's absolute dominion over the earth and has jurisdiction over all nonbelievers and can require their obedience to the Church. Therefore, a Christian prince acting under papal authority has the right to invade the lands of pagans, provided he makes it clear to them that he or his men have come to offer them the true religion. If he fails to do that, the pagans have the right to resist; if he does make it clear and the natives resist, then they lose their right to their goods and their personal freedom. The clinching argument for Rubios was the point that if the Indians were truly a worthy race, God would have sent missionaries to them long ago, as Augustine of Canterbury had been sent to the Anglo-Saxons.²³ Rubios drew up the Requirement, which had to be read aloud to inhabitants of new lands before the Spanish could legally begin hostilities; Ferdinand put it into effect in 1513.

The theologian Matias de Paz was not willing to concede the legal and moral high ground so completely to the Spanish. He distinguished between those infidels who had been exposed to Christian truth and rejected it and those who had never heard of Christ. The American Indians could rightfully resist any war waged on them, unless the Spanish made it absolutely clear that the sole purpose of their presence in their lands was for bringing them the true faith. The Spanish sovereign and his men must have only the purest of motives; otherwise any violence on their part would be unjust.²⁴ De Paz comes across as being well aware that very few of the Spaniards in the Americas could meet such a standard, and accordingly he staked out a position questioning Spanish rights of conquest while not edging onto the slippery slope of denying the Church's right to convert pagans.

The most outspoken of those who denounced Spanish behavior and rapacity was Bartholomé de Las Casas, a man who for a time enjoyed the fruits of the conquest. He was born in Seville probably in 1484; he sailed to Hispaniola in 1502 and soon received an *encomienda*, a grant of land with the Indians on it obliged to serve as a labor force. He was one of those who heard Montesinos's sermon in 1512, but it took at least a year to have an impact on him. He then gave up his estate, was ordained a priest, and joined the Dominican order. For the rest of his long life, which ended in 1566, he labored to protect the Indians from Spanish exploitation.

The major event of Las Casas's life was his debate with Juan Ginès de Sepúlveda, a well-respected humanist translator of Aristotle's political works, who had studied in Italy.²⁵ Sepúlveda defended the colonists, claiming the Indians met Aristotle's definition in *The Politics* of natural slaves: "Those whose condition is such that their function is the use of their bodies and nothing better can be expected of them, those, I say, are slaves of nature. It is better for them to be ruled thus." His translation of this sentence into Latin was more explicit in its depiction of natural slaves than the one in use in the Middle Ages. In 1550 he published *Tratado sobre las justas causas de la guerra* (*Treatise on the Just Causes of War*), where he argued that the backwardness of Indian cultures and political systems allowed the Spanish conquests. He defended the Requirement as meeting the standards of a just war through a proper declaration.

Perplexed by the two strongly argued, but contradictory, positions on the justice of the conquest in the Americas, Charles I, king of the Spanish realms (better known as Emperor Charles V), arranged for a public debate at Valladolid between Sepúlveda and Las Casas.²⁶ In August 1550 a commission of fourteen prominent jurists, theologians, and officials chosen by Charles assembled to hear the two men give their answers

to the question: "Is it lawful for the King of Spain to wage war on the Indians before preaching the faith to them, in order to subject them to his rule, so that afterward they may be more easily instructed in the faith?" Sepúlveda went first, spending three hours presenting a précis of his *Tiariado*. The next day Las Casas appeared with such a mammoth manuscript that he spent five days reading it; it became known as *In Defense of the Indians*, but was not printed until the twentieth century.²⁷ Whether he finished reading it, or the commission told him to stop, as Sepúlveda claimed, is uncertain. Domingo de Soto, a commission theologian, was assigned the task of summarizing the arguments, and the members dispersed to think through the issues. The next year they met to issue a decision; but if they did reach one, and there is reason to believe they did not agree, their report has been lost.

In the debate Sepúlveda's argument that some people were natural slaves drew scornful rebuttal from Las Casas, who ardently argued that the achievements and culture of the Indians were as high as those of ancients, such as the Aristotle's Greeks, and in some ways even exceeded them.²⁸ Sepúlveda had concluded that wars waged against unconquered Indians were legal and just if done according to the 1513 Requirement, that is, with a proper declaration, as long as the goal was to convert them to Christianity. That could be done only by making slaves of them for some indefinite time period under Spanish tutelage; he was vague on whether a time would ever come when their descendants could regained their liberty. Las Casas rejected out of hand the possibility that any war of conquest against the American natives was just. They had all the same human qualities and all the rights to their possessions, liberty, and own forms of government as did the Spanish. The Gospel was to be preached to them peacefully and through good example; should there be places where the natives resisted the Gospel by force, then the Spanish king should erect fortresses with a hundred devout soldiers to protect the missionaries as they won converts.

Because Las Casas's *Defense of the Indians* remained unpublished for centuries, his treatment of a just war in it never received the broad readership his *History of the Indies* did, with its powerful attack on the Spanish for their mistreatment of the Indians. More important in the history of just war theory was the work of his friend and fellow Dominican, Francisco de Vitoria, who was weaker, however, in his defense of the Indians.²⁹ Vitoria was born in the Basque-speaking region of northern Spain, probably in 1483. He entered the Dominican order, which sent him to the University of Paris in 1507 to study theology. He remained there as a student and a teacher for eighteen years. Two years after his return to Spain he received the *prima* chair of theology at the University of Salamanca.

The title referred to the fact that the chair's occupant lectured early in the morning at the hour of prime, the most prestigious time to teach.

Although Vitoria never voyaged to the Americas, he took a deep interest in the Spanish conquest of the natives. He devoted his annual lectures, given to the entire university in 1539 and 1540, to the issue. In the first, given the title *De Indiis recenter inventis* (*On the Indians Lately Discovered*) when both lectures were printed in 1557, well after his death at Salamanca in 1546, Vitoria stated: "The whole of this dispute has arisen again because of the barbarians of the New World, commonly called Indians, who came under the power of the Spaniards forty years ago, having been previously unknown to our world."³⁰ Vitoria's arguments in the lectures spread by word of mouth and manuscript soon after they were delivered, and they influenced Charles V's "New Laws for the Indies" of 1542, long before they were printed. The second lecture was entitled *De iure belli Hispanorum in barbaros* (*On the Spanish Right of War against the Barbarians*).

As a scholastic theologian, Vitoria argues from *definitio*, *questio*, and *propositio*, and accordingly builds an elaborate edifice to support his conclusions. He begins by declaring international law is composed of natural law, custom, and the consent of the majority of mankind:

The world as a whole being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matter, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law; the latter having been established by the authority of the whole world.³¹

International law is a construct of humanity, but violations carry a spiritual penalty.

Vitoria continues: "Inasmuch as the seizure and occupation of these lands of the barbarians whom we style Indians can best be defended under the law of war, I propose to supplement the foregoing discussion of the titles, some just and some unjust, which the Spaniards may allege for their holding the lands in question, by a short discussion of the law of war."³² In that regard there are three key questions: first, whether Christians may make war at all. Vitoria gives four texts supporting a negative answer from the New Testament and, he says, it would be odd if Christians can go to war against the Lord's admonition. He cites Luther who, he finds, denies Christians may take up arms even against the Turks, and who relies not only on the above-cited texts of Scripture, but also on the fact

that if the Turks attack Christendom, it is the will of God, which may not be resisted. Vitoria also cites Pope Adrian VI as arguing that if a subject doubts whether the alleged cause of a war is a sufficient one, or whether there exists a just cause for declaring war, he should not serve, even at his prince's command, for he lays himself open to the danger of mortal sin. The citation to Adrian is intriguing, because he had been serving as viceroy in the Spanish kingdoms for Charles V when elected pope in 1522. Adrian had no chance to put his radical views on warfare into action, since he reigned for barely a year, but it is noteworthy that Vitoria knew of his views.³³

Against those pacifist opinions, Vitoria retorts that Christians may make war and serve in it. There can be no doubt that in a defensive war, force may be employed to repel force. This is also proven with regard to an offensive war, that is, a war where "we are not only defending ourselves or seeking to repossess ourselves of property, but also where we are trying to avenge ourselves for some wrong done to us." His argument for his position draws largely from Augustine of Hippo.

In answer to his next question: "In whose hands lies the authority to declare and to make war?" Vitoria gives three propositions. First proposition: Anyone, even a private person, can wage a defensive war; force may be repelled with force. Anyone can make this kind of war for the defense not only of his person but also his property and goods. Also to avoid shame and disgrace, a private person can strike at an attacker even if he has stopped. Second proposition: Every state has authority to declare and make war. If defensive war is permissible to private persons, all the more so for a state. A state is within its rights not only to protect itself but also to avenge itself and redress wrongs. It cannot protect the public weal, "if it cannot avenge a wrong and take measures against its enemies, for wrongdoers would become readier and bolder for wrongdoing if they could do wrong with impunity. It is, therefore, imperative for the due ordering of human affairs that this authority be allowed to States." Third proposition: A prince has the same authority in this respect as the state has. The prince holds his power through the state; therefore, he is its representative and wields its authority.³⁴ But what is a state and who properly can be called a sovereign prince? A perfect state is one that is properly a perfect community. But what is that? It is one complete in itself, for example, Castile or Venice, not part of another. Such a state, or its prince, has the power to declare war, and no one else. Kings subordinate to the emperor can make war on one another without waiting for his authorization; for a state ought to be self-sufficient; and this it would not be so if it did not have the power in question. Petty rulers and princes, however, are parts of larger states and do not have perfect states; thus they cannot declare war.

Vitoria then asks: What may be a reason and cause of just war? This, he says, is especially necessary to ask in regard to the case of the Indians. Difference of religion is not a cause of just war. He argues against the concept of *Dominium of Grace*, according to which only those true believers who are in a state of grace have a right to possess land and political power. He cites in particular the Council of Constance's condemnation of John Wycliffe's statement: "No one who is in mortal sin has civil dominium." Accordingly, the fact that the Indians are idolaters is not in itself a just cause for war against them. Nor are expansion of empire and the personal glory of the prince or any other advantage to him. There is only one just cause for war: a wrong received, but not just any wrong; It must be serious wrong that corresponds to the punishment of war to correct it. Once an enemy has inflicted so serious a wrong on a state, war can be justly declared. Vitoria includes in this category a wrong inflicted on an ally, a common Roman pretext for their wars of conquest. He explicitly refers to the alliance between Hernando Cortes and the Tlaxcalteca against the Aztecs, which appears to put his seal of approval on the Spanish conquest of their empire, even as he argues against the legitimacy of other Spanish conquests.

The Indians, proclaims Vitoria, are the rightful possessors of their lands and persons, thereby staking out new ground. The Holy Roman Emperor's claims to universal jurisdiction do not extend to the newly discovered lands. The pope's claims to authority are spiritual only and pertain only to Christians. The Indians cannot be punished for refusing to accept a dominium that does not exist. Nor does there exist a right of discovery of lands already occupied; it pertains only to lands that have no owner. Even the Indians' refusal to recognize Christ as their overlord provides no just cause for conquering them, nor does any refusal to accept the true faith. Belief in Christianity must not be procured through coercion, since force will only result in creating bad Christians. Vitoria notes that some authorities have argued for the right to conquer the Indians because of their sins of cannibalism and idolatry. That makes no more sense, he declares, than saying that the Spain can make war on France because adultery or blasphemy occur there. In respect to cannibals, however, natural law permits the use of force against them to protect the innocent.

Yet, Vitoria is not eager to reject all claims of the Spanish crown to rights in the New World, which hardly would have been expedient. The Spanish have the right to trade, travel, and preach the true faith freely among the Indians, and any violation of those rights by a pagan ruler would be just cause for war; even more so do the Spanish have just cause against a ruler who uses force against those of his subjects who have

converted. While there have been a few such breaches of natural law on the part of Indian rulers, certainly they have not been enough to justify the huge conquests that had taken place since 1492. He concludes that the Spanish king could hold a kind of trusteeship over the natives, going even as far as replacing their rulers, as if he were a guardian of minor children, as long as everything were done for the benefit of the natives and not for the profit of the Spanish.

Vitoria left only a slim thread of legitimacy for Spanish conquests in the Americas. Those who objected to his criticism, and that of others, against the Spanish conquests complained to Pope Paul III, on the grounds that the papacy had granted the Spanish monarch the right to occupy the new lands in order to convert their peoples to Christianity. Paul responded, however, with the bull *Sublimis Dei* in 1537, which affirmed the humanity of the American natives and their right to dominium and property. Vitoria's arguments had enough appeal to Charles V to prompt rumors, unsubstantiated to be sure, that he planned to abandon the conquests. More practically Vitoria had a significant impact on the "New Laws of 1542," which banned the enslavement of Indians and phased out the *encomienda*. Neither the papal bull nor the New Laws had much effect on the situation in the Americas, where the Spanish colonists largely ignored them.

Vitoria was the great authority among Spanish theologians. Las Casas cited him, albeit not extensively. De Soto, Melchior Cano, Juan de Mariana, and Francisco de Suarez, other major names among Spanish theologians/political thinkers, followed him in most aspects in their discussions about a just war and how to declare one. De Soto probably paid as much attention as his mentor to the issue of whether the Spanish had just cause to conquer the American natives, but his work on the topic has been lost. In his *Commentary on the Sentences* (1555) he attacked the proposition that the papacy had the authority to give Spanish kings dominion over the lands of the Indies, because the pope had no right to it himself.³⁵ De Soto also rejected the claim that the Holy Roman Emperor, as heir to the Roman emperors, had jurisdiction over the whole world, since the Romans knew nothing about the newly found lands. Even the claim that conversion of the natives required the use of war received a negative assessment: Did not Jesus send out his apostles as sheep among wolves? Cano declared that an act of charity, such as converting the Indians to Christianity, could never require coercion.³⁶ He even challenged his mentor, Vitoria, on the latter's reaffirmation that denial of the right of travel was a reason for just war, pointing out that the Spanish were not in the lands of the Indians as travelers but as invaders, unless one would label Alexander the Great as merely a traveler.³⁷

Francisco Suarez's massive writings provide a thorough analysis of what was permitted to Christians to spread the true faith. Born in Granada in 1548, he joined the Society of Jesus at age sixteen and taught at every university in Spain, spending the last years of his life at the University of Coimbra in Portugal, where he died in 1617. His was a divergent point of view, perhaps because, as a Jesuit, he belonged to an order little involved in the American missions during his lifetime. His discussion of the just war is more universalized. *On Faith* tackles whether the pope has the right to confer sovereignty over pagan peoples on Christian princes in order to bring those peoples to the true faith.³⁸ The Church, he argues, has not only the right, but also the duty, to send out missionaries to pagan lands to teach the true faith, a duty that pertains only to the pope, not to the bishops. But Suarez criticizes those who hold that it is just for Christian princes to seize pagan kingdoms to ensure the Gospel can be preached with ease and security; that position is impossible to justify. Those who argue a Christian prince may send soldiers with the missionaries and build forts so the true faith might be taught in security usually follow with the proposition that the Christian prince providing soldiers has the right to collect taxes from the pagans to reimburse him for his expenses. He rebuts this by pointing out that the pagans would either be forced to defend themselves and their property or be coerced into accepting the faith, which is against the right practice of the Church: Did not Pope Gregory I send Augustine and his monks to England without a military force? If the pagan kings resist the missionaries, however, Catholic princes may provide armed escorts. Suarez limits that concession by declaring that the right to preach the Gospel does not bring with it authority to seize the lands of pagan kings or enslave their people. The point, however, reveals the conundrum facing these theologians—eager to see the pagans Christianized, yet determined to curtail any claim that Christians had authority thereby to conquer them. It was a delicate balance they tried to maintain, and in the end they must have expected that among their countrymen greed would trump charity.

Despite the futility in trying to persuade their countrymen to change their treatment of the American natives, these Spanish theologians made an important contribution to the foundation of international law. Their argument that the infidels had rights to their own property and sovereign states was a major innovation. They made the case that the *jus gentium* did apply to all peoples. Vitoria and his fellow theologians stood at what James Johnson calls "the beginning of the great shift in European culture that produced international law as a secular science rather than a religious belief."³⁹

Besides the conquest of the Americas, the Spanish monarchy faced other conflicts that proved productive in delineating the laws of war and

the theory of just war, especially the Dutch Revolt, or Eighty Years' War (1566–1648). One of the first to use that war as a focal point and apply some of the principles the Spanish theologians advocated was Balthazar de Ayala, born in Antwerp in 1548. His father was a Spaniard who had become a citizen of Antwerp; his mother was a native whose father had been an alderman in the city. Ayala took a law degree from the University of Louvain and, in 1580, became auditor of the camp to the duke of Parma, Philip II's governor for the Low Countries. That position was responsible for giving legal advice to Parma and serving as a military judge for offenses and crimes committed by soldiers. Three years later he also became a member of the Great Council for the Low Countries, but occupied that office for barely a year, dying in 1584.

In 1581 Ayala published *De Jure et Officiis Bellicis et Disciplina Militari* (*On The Law and Duties of War and on Military Discipline*).⁴⁰ It is dedicated to Parma, who is called *Imperator*, in the Roman sense of “he who has authority to command.” While most of the book considers the sort of matters with which Ayala dealt as auditor, such as the treatment of prisoners and the dividing of booty among the troops, it does include a discussion of just war and who can declare it. He rejected Machiavelli's position that the prince knows no bounds on his acts, although he did not cite the Italian; there are both a natural law and a law of nations drawing on reason and custom that limit war. The customs of war depend heavily on Cicero's description of Roman practice, from which Ayala takes the statement that no war can be just unless preceded by a demand for satisfaction and due declaration.⁴¹ Ayala proposes that the Romans had given the fetial priests the highest degree of authority to ensure they did not make an unjust war; when the fetials disapproved of a war, neither the Senate nor the consuls or the people could insist that it begin. Fetial practice did not require a declaration of war be made against the king of the realm that would be the foe; it was sufficient to make it against any body of troops. After a proper declaration, writes Ayala, it is permitted to act as an enemy would—collect troops, make raids, seize booty, and ravage districts with fire and sword. Such an honest war is better than a shameful peace.

Applying those principles to his own time, Ayala defines a just war as one that is properly declared and waged under the authority of a sovereign prince, “in whose hands is the arbitration of war and peace.”⁴² A private person cannot begin a war, and were he to try, he would fall under the Julian law against treason. Ayala points out that Cato urged recalling Julius Caesar's army and handing him over to the Gauls for waging war in Gaul without authorization from the Roman people. He provides several examples of the Roman people authorizing war, and goes on to declaim

that since the people have conferred all power on the prince, he has the sole authority to determine war and peace. Yet, in case of the need to defend against invasion, anyone can take up arms to drive an enemy out of his land and also to take vengeance for an enemy's incursion. In such circumstances, the laws of war pertain, even when there is no formal declaration of war, and captives and booty belong to their captors. Since private war is illegal, it follows that duels are also, since duelers arrogate to themselves the role of the prince's courts to settle disputes. Ayala reflected the growing consensus of the later sixteenth century that only the prince had a right to determine whether a person was to die violently. He did allow for single combat as a substitute for battle and cited several examples of it from Scripture as well as from ancient history, but he stated it was not prudent to risk all on the strength and virtue of a single individual.

Ayala then turned his attention to the main topic of his work: the nature of violence against rebels. Since a prince has a truly just cause of war against rebels and subjects who abjure his sovereignty, there is no need for a declaration of war, nor are they to be classed as enemies under the rules of a just war. Rather, it is a matter of seeing to justice against those who stand as pirates and robbers under the law. Therefore, the full range of legal penalties and consequences of being defeated in a just war can be directed against rebels: they can be killed, enslaved, and have their property confiscated. Rebels, however, have no right to impose the same fate on the prince's men whom they capture, nor to destroy the property of his loyal subjects. Since the rules of war do not pertain to an enemy fighting an unjust war, one need not keep faith with the enemy who attacks without properly declaring war, and certainly not with rebels. Heretics are also rebels, and war on them is justified for the same reason.

On the issue of whether a Christian ruler or the pope can wage just war on infidels, which had so exercised the Spanish authors whom Ayala cited extensively, he concludes with them that the only basis for a just war on infidels and pagans is when they seek to hinder the Christian faith by blasphemies or prevent the preaching of the Gospel; Christians are entitled to preach the Gospel throughout the world. According to Ayala, a just war also followed from the mistreatment or murder of ambassadors, provided they had been acting as appropriate for their office. "For an outrage offered to ambassadors is deemed offered to the king or state whose embassy they are carrying out."⁴³ He uses examples from Roman history of when war was declared because of violence done to ambassadors, and when war was averted when the offending side punished those who had committed such violence. Rebels and traitors have no claim to

the immunity of ambassadors, even when they have been sent to negotiate. Thus, he exonerates Charles V's officers who killed the two men sent by Francis I as ambassadors to the Ottoman sultan as they passed through Italy in 1541 on the grounds that the men were Charles's vassals and, therefore, traitors. Francis had used the incident as the basis for a declaration of war against Charles in 1542.

Spain's wars reached beyond the Spaniards themselves in provoking works about just war. An Italian, Pierino Belli, wrote a huge work, *De Re Militari et de Bello* (*On the Military and War*), on the topic. He was born in the Piedmont in 1502. Little is known of his childhood, but he received a humanist education and studied law, probably at the University of Perugia. In 1535 he was named military auditor in Charles V's armies. After Duke Emmanuel Philibert of Savoy was restored to his duchy in 1559, he named Belli to his council, where he served until he died in 1575.

Belli dedicated *De Re Militari* to Philip II; it was first printed in 1563. He intended to define a law of war based on the principles of natural law, thereby becoming a leader in separating law from theology; this meant that he drew heavily on Roman law and practice. He hoped to reduce the abuses, rapine and devastation of war and make this less common by setting forth strict rules for going to war. The work contains vast citations of ancient and medieval authorities as well as a few contemporary examples. The translator of the English edition of the work regards the style as unpolished, rough, labored, with "an excess of erudition not always well applied."⁴⁴

Belli states that war is an ancient business. Both the Bible and ancient history show brother killing brother and, even before the world was fashioned, there was war in heaven. He writes, "It is no occasion for surprise that in all ages since the world began, peoples, kings, and other rulers have persisted in war even down to our time."⁴⁵ The name of war, *bellum*, he argues, came from a word for beast, because war is more suited to beasts. Yet it might also have come from beautiful, in reference to the splendor and beauty of an armed line. Wars arise out of the infliction, or warding off, of injury. Belli then examines the kinds of war, finding that some authorities say there are three—offense, defense, and for the recovery of things lost—while others identify as many as seven. He accepts only two—lawful and unlawful, or just and unjust.

After four brief chapters examining the above matters, Belli turns to his first major topic: "Those Who have the Right to declare War." His answer: "Without doubt a sovereign has this right." Examples found in the medieval authorities include the pope, the emperor, and the kings of Spain and France. He assigns this same right to the duke of Milan,

since the duke fills the office of a supreme ruler and has full powers like the emperor. He finds several authorities that asserted Venice enjoys this right by arguing that the city is the “new Rome” and is regulated, not by imperial laws, but by natural justice and self-evolved rights. “More briefly, it is my view that any people or nation living under its own laws and at its own charges, and any king or ruler who is fully independent, may declare war at will and when the occasion arises.”⁴⁶ If the party declaring war is under a higher authority, while the person against whom war is declared is independent, then the consent of the overlord is still required. If both parties—he who declares war and he upon whom war is declared—are subjects, the lord must be notified in advance; otherwise they are guilty of treason. In regard to ecclesiastical rulers, such as those bishops who ruled much of Germany, they are allowed to declare war, but it is not permissible for them to fight or even to direct soldiers, although they can urge their men to fight well. Any clergyman who kills or maims a person loses his status as a cleric.

Although independent states within a larger realm are free to declare war, as are true sovereigns, Belli does not think the rights of enslavement and postliminity would be appropriate to them, because such a war would be a sort of civil war in which those rights have no place. In respect to enslaving prisoners or the families of defeated foes, Belli proclaimed, “things captured in war belong to the captors,” which applies not only to “things movable or self-moving, but also immovables.”⁴⁷ The word slave, he proposes, came from the Latin world to spare, and “Nature herself admonishes us that it is humane to spare the captured enemy[.]” while the slaughter of captives is something “most abominable.” Slavery is a natural and lawful consequence of defeat in war. The Spanish have a right to enslave “those Indians of the West, who live far away from our world.” Belli praises the Christian spirit of the Spanish monarchs for granting freedom to the Indians who accept the true religion.

Belli defines three conditions for a just war: proper person, just cause, and good intent. Of these just cause is most essential, because in war there is no objective but peace, and there is no peace apart from justice. Even if the cause of war is just, once those with just cause for waging it have taken enough to compensate fully for the injury that gave rise to the war, they should terminate it. If war is declared against a prince who shows himself ready to abide by the law and justice touching the matters of complaint, warlike proceedings should be stopped, for war truly must be a court of last resort. Likewise, if a war is waged ruthlessly and for vengeance, it becomes unlawful, and those things captured may not be rightfully retained. Despite these principles the ruler’s caprice frequently is too often counted a just cause for making war.

None of these points, Belli states, apply to rebels, brigands, and pirates. They have no legal right to enslave defeated foes; the law of postlimin-ity is inoperative because becoming a captive of a pirate does not cost a man his rights; and to commit violence against them is always just and legal.⁴⁸

It is only after these issues have been resolved that Belli turns to the matter of the declaration of war. He emphatically states that hostilities must not begin without a declaration of war. In the *Iliad* the Greeks sent Menelaus and Ulysses to Troy to demand the restoration of Helen before they began hostilities. Belli examines in detail the Roman practice, noting that Livy describes the Samnites as using fetial priests as well. He cites with approval Baldus's statement that it is treachery to begin a war without a declaration. It is also treachery, he argues, for one to declare war and simultaneously begin the attack. He admits, however, history and law do not provide an answer to the question of how long the one declaring war must wait to begin hostilities. Common sense, however, dictates that time be allowed to lapse before the attack so that the foe has some time to prepare for defense. He cites a Roman imperial decree that three days are required.⁴⁹

Other points about declaring war on which Belli touches include the opinion that anyone may attack persons whom the pope or the emperor have branded as public enemies, for such persons are beyond the pale of the law. He gives a negative answer to the question of whether there is need for a new declaration of war after a truce has run out; at a truce's expiration the war reverts to the status the truce interrupted. In respect to the issue of whether a declaration of war against a king includes all his confederates and allies, Belli believes it is a serious mistake to so argue, providing examples of when a prince declared war on his foe's allies only to be defeated by the combined forces of both. Finally, Belli makes the statement that anyone pondering war must think long and contemplate well and have wide experience at war. Unfortunately, the prince who is resolved on war rarely receives good advice, since "no one ventures to oppose a sovereign, and adulation is more acceptable and expedient than candor."⁵⁰

Another Italian lawyer, Alberico Gentili, put his talents to work for the other side, as he became famous as a teacher of law in Elizabethan England. He was born in 1552 in Ancona in northeastern Italy.⁵¹ His father was a physician who gave his sons a humanist education. Alberico attended the University of Perugia, where he earned a degree in law. He held a judicial office, until his father, who had become a Protestant, fled from Italy. Alberico and a brother accompanied him northward; they halted at Tübingen, where his brother became a professor of law. In 1580,

Alberico was invited by a group of Italian Protestant refugees to go on to England. A year after he arrived, the University of Oxford conferred on him a degree in civil law, which gave him the right to teach law there. He died in 1608.

In 1583 Gentili published his first book, *De legationibus libri tres* (*Three Books on Embassies*), on the history, rights, and duties of ambassadors. He made use of the same sources as did Brunus, but did not cite him. Gentili's reputation for knowledge of the law and customs of diplomacy led the English government to consult him on the affair of the Spanish ambassador Mendoza, who was accused of complicity in a plot against Queen Elizabeth. Arguing against those who wanted to try and execute Mendoza, Gentili upheld the tradition of diplomatic immunity, which protected even an ambassador as nefarious as the Spaniard.⁵² His opinion carried the day, and Mendoza was expelled in 1584, establishing the principle of *persona non grata* in diplomacy. Because of his work in the case and the fact that he was Italian, Spain retained him as its advocate in English prize courts for suits involving Spanish ships seized as prizes.

Gentili was a productive writer on a wide range of topics, but his major work was *De Iure Bello libri tres* (*Three Books on the Law of War*). The first book appeared in 1588, and the complete work was printed in 1598 in Germany. It did not receive as much attention as did Hugo Grotius's publications of two decades later, but Grotius cited it frequently, albeit often with negative comments. The appearance of a modern edition in 1877 brought Gentili's work to the notice of modern scholars, and he now is counted among the founders of international law for his role in separating law from theology. *De Iure Bello* evidently was a product of Gentili's lectures at Oxford, and if so, it serves as evidence of the difference between the English and Spanish universities by the late sixteenth century. It does not use the *questio* and *propositio* format of scholasticism found in the Spanish scholars' works. Gentili's work was the product of the humanism he learned in Italy, in which Cicero, not Augustine, was the primary source of thought; he also drew more heavily on Roman law.

For many historians of international law, Gentili has been seen as marking the break from the church fathers and the scholastics on the theory of war, a view that his own words support: "Let theologians keep silence about a matter that is outside their province."⁵³ Second, Gentili looked to historical examples, including those from his own times, to argue there was a law, *jus voluntarium*, based on custom and general consent. Because of this view, he is sometimes called the first positivist in the history of international law. Legal positivists contend the law of nations is derived exclusively from the tacit agreements, conventions, and treaties established between states—the actual practices of nations, although its

early proponents, such as Gentili, incorporated elements of both natural and positive law in their works.

Gentili differs from his Spanish predecessors also in his way of considering European colony building in the Americas. By the time he wrote *De Jure Bello*, it was fairly clear the Spanish had conquered all the major American cultures, and the lands other Europeans claimed were neither so densely populated nor as advanced. He argues: "God did not create the world to be vacant, and nature abhors a vacuum." Even if there should be a sovereign who claims the vacant lands, those who occupy them have a right to them, "but let the sovereign retain jurisdiction over them."⁵⁴ Echoing More's *Utopia*, Gentili proclaims it is a law of nature that those who could productively use vacant land have a right to it.⁵⁵ While Spain claimed the entire New World, most of it remained vacant. The English colonists, upon reaching an American shore, would immediately set to work to build houses, plant crops, and erect fences to indicate their right to what was regarded as vacant land. The fact that the natives may have hunted extensively in the area was not seen as conveying to them dominion over that land, nor did the English regard Indian style of agriculture, with its plots of crops scattered about without fencing, as constituting proper ownership.⁵⁶ Hence, there was no English equivalent of the Requirement, since they were not declaring war on the Indians but simply making use of vacant lands. Consequently, it was important for English colonists to portray the natives as very few in number and too backward to practice proper agriculture.

For his discussion of declaring war, the longest of any such dissertation in the sixteenth century, Gentili uses Ulpian's definition of *enemy*: "Those upon whom the Roman people have officially declared war, or who have themselves officially declared war on the Roman people."⁵⁷ Proper war must be public and acknowledged on both sides, and there must be sovereigns on both sides to direct it. Those who commit warlike violence, but are under a sovereign or refuse to recognize a sovereign, are rebels, pirates, and brigands to whom the laws of war do not apply. A true sovereign accepts no one as his superior; thus, disputes between two sovereigns must be settled by war, since they have no judge who has the power to force a settlement. Anyone who submits to a judge is not a sovereign.

Gentili examines at length the issues of whether war can ever be just and the causes for just war. Regarding the first point, he argues against such foes of the concept of a just war as Tertullian, Basil, and Erasmus, calling the last "a flighty dilettante." The causes of just war, he finds, do not include religion; natural law bars the use of war to force a people to accept Christianity or maintain the established religion. Nor

can subjects rebel against a prince who seeks to force them to change religion. Just reasons for war involve defense or to prevent a foe from taking or destroying something nature has bestowed on a state or its people, but Gentili also supports attacking a foe that seems to be threatening war or harm, which he calls defense by expediency or anticipatory self-defense. Among other causes of just war is the denial of trade rights to the merchants of another state, unless that denial is universal, and of free passage at sea. The use of the sea is common to all, and anyone who denies it gives cause for war.

Having delineated the just causes of war, Gentili proclaims it must be waged justly. He quotes Cicero as saying that in war "an enemy retains his religion and his rights."⁵⁸ Waging a war justly begins with a proper declaration of war; a key sign of unjust war would be the absence of such a declaration. He cites numerous authorities to support his position, including the Bible, Greek and Roman authors, and medieval canonists: "There is no doubt that war ought to be declared, if the agreement of so many peoples is of any effect in establishing the law of nations." Natural law, says Gentili, dictates that before taking hostile steps, a state must denounce any friendship or ties that had existed with the foe. A good man does not do anything furtively, and to go to war without declaration is an act that contravenes the good. Gentili treats at length the Roman usage, giving emphasis to the wait of thirty-three days before beginning hostilities, which he proclaims the regular Roman practice. Only beasts start war immediately. It is, therefore, unjust to declare war and begin to fight concurrently. He gives several examples from history, including the Roman attack on Carthage that began the Third Punic War. He notes that some say, "Attack your enemy without delay, before he can strengthen himself"; but the law of nations and the command of God require a delay before beginning hostilities.⁵⁹

There follows a chapter on when a declaration of war may not be necessary. Gentili asks whether people must wait for a formal declaration before defending themselves, since the pillagers would return to their own land laden with goods and laugh at them from a secure position. In respect to rebels there is no need for a declaration, if they are under subjugation; but if the rebels had voluntarily submitted to authority and now sought to renounce it, then the state that had accepted their voluntary subjugation must declare war. Another situation is when a kingdom requests the right of passage for its army marching to attack a third state. A request for passage ought to be granted if there is no good reason to refuse it, but the army in passage has no right to commit acts of war. Should it do so, the sovereign whose territory is thus violated may commence war without declaration.

Should a war be interrupted by a truce, whether one of a day or two or up to two years (no reason given for using two years), a new declaration of war need not be issued. Gentili is less certain about whether a prince who is providing aid to an ally at war with another prince must declare war on the other's foe. He suggests the best solution to that quandary was the act of the queen of England who, when providing aid to the rebels in the Low Countries, wrote to the king of Spain to explain what she was doing and why. The author criticizes Hannibal for failing to declare war on Rome at the start of the Second Punic War, as his goal was to win an empire, not to defend his people. King Pyrrhus likewise was wrong for going to war on Sparta without a declaration, for his reasoning that the Spartans did not declare war was fallacious. Gentili ends his section on the declaration of war by proclaiming: "If a war is not declared when it ought to be declared, then war is said to be carried on treacherously; and such a war is unjust, detestable, and savage."⁶⁰

Although he was Italian by birth, Gentili's strong stand on the obligation to declare war fit well into an English tradition (noted by the Venetian ambassador in 1557, when Mary Tudor declared war on France) of never going to war without first giving notice.⁶¹ Edward Hall had made a powerful statement on that tradition in his *Chronicle*, published in 1547. In relating the events leading up to the 1415 Battle of Agincourt, Hall praised Henry V for dispatching the duke of Exeter with his defiance to France; he was a wise ruler for observing the practice of famous kings and renowned princes, which was found among pagans and Christians, "not to invade another mannes territory without open war and the cause of the same to hym published and declared."⁶² In his English dictionary, first printed in 1552, Richard Huloet provided a definition of "declares warres": *Arma canere, Bellum indicere* (to sound to arms, to announce war). In 1583 at the request of the king of Sweden, Queen Elizabeth sent Sir Jerome Bowes to Russia to mediate peace negotiations with Ivan IV. Bowes remonstrated with Ivan that "it was not the part of a Christian, nor allowable by the Law of Nations, to exercise Hostility without first denouncing War, or to come to blows before such time as he that offered the wrong were required to give satisfaction, and to abstain from doing farther injury." Ivan was described as being unwilling to listen to that view.⁶³

Further evidence of such a tradition in England can be found in William Shakespeare's historical plays, which contain several scenes of declaring war. To quote Theodor Meron, "Shakespeare's writings thus constitute an early literary reflection of this [international] law and a vast source of questions still important today."⁶⁴ In his play *King John* (first performed 1596 or 1597) he begins with the French herald, Chatillon,

at John's court, declaring that Philip II of France had judged John to be a usurper of the titles belonging to his dead brother Geoffrey's son Arthur.

King John: What follows if we disallow of this?
 The herald: The proud control of fierce and bloody war,
 To enforce these rights so forcibly withheld.
 King John: Here have we war for war and blood for blood,
 Controlment for controlment: so answer France.
 The herald: Then take my king's defiance from my mouth,
 The farthest limit of my embassy.
 King John: Bear mine to him, and so depart in peace:
 Be thou as lightning in the eyes of France;
 For ere thou canst report I will be there,
 The thunder of my cannon shall be heard:
 So hence! Be thou the trumpet of our wrath
 And sullen presage of your own decay.
 An honourable conduct let him have. (Act 1, Scene 1)

In *Henry V* (first performed in 1599) the English herald, Exeter, relays to the French king and the Dauphin his master's message:

Scorn and defiance; slight regard, contempt,
 And any thing that may not misbecome
 The mighty sender, doth he prize you at.
 Thus says my king. (Act II, Scene I)

Later in the play, French King Charles VI demands of his advisors:

Where is Montjoy the herald? Speed him hence:
 Let him greet England with our sharp defiance. (Act III, Scene 5)

In these plays Shakespeare was trying to depict historical eras quite different from his own in respect to the waging of war, and he allowed several anachronisms to slip in, such as the reference to the thunder of cannon in *King John*. Yet, he clearly is reflecting the view that a formal declaration was the only way to begin a just war. He also seems to have been influenced by Hall's strong statement about the justice of Henry V's cause because he had formally defied Charles VI. Shakespeare presents the duke of Exeter, as found in Hall's chronicle, as the one bearing the defiance to the French king rather than the duke of Glouster, as appears in Hollinshed's chronicles, which were Shakespeare's usual historical source.

Shakespeare's old-fashioned approach to declaring war found an echo in France during the French Religious Wars. Those civil wars provided no opportunities for formal declarations of war, but there was some discussion of when it was proper to go to war in the context of civil war. The Huguenots, comparing themselves to the ancient Israelites, justified their use of the sword against the Catholic monarch as being ordered by divine command. For ardent Catholics, papal excommunication mandated taking arms against a prince. An author from the Catholic League, writing probably in late 1589, called on the Cardinal of Bourbon, whom the League had proclaimed king, to declare war formally on his excommunicated nephew, Henry, King of Navarre, so that all would understand Charles was sovereign king and held the right to make such a declaration, and Henry would be clearly defined as the enemy of the French people. The author spent a paragraph describing the proper form of declaring war: A king must send heralds to the foe and have the war proclaimed in every city and port, so that his loyal subjects know who the foe is. The Leaguer deduced that Henry III's Edict of Nemours of 1585 was such a proper declaration against Henry of Navarre. Since Henry III was now dead, any war he had declared ended with his death, and it was necessary that war be declared again.⁶⁵

Some Frenchmen, called *Politiques*, actively opposed the Catholic League because they believed the League was seeking to destroy the authority of the monarchy. The best known of these was Jean Bodin, author of the *Six Books of the Republic* (1579). Born at Angers in 1529 to a bourgeois family, he entered a religious order as a teenager but after five years was released from his vows. He then studied law at the University of Toulouse, a center for Roman law. Most of his career was spent at the French court, but by 1587 he had lost royal favor and he retreated to his wife's hometown of Laon, where he served as the equivalent of state's attorney. He died there in 1596.

Bodin often criticized Roman law, arguing it should not serve as the sole basis for French law, yet he believed there was much in it to benefit France, especially in respect to royal authority. He applied the principles of Roman imperial authority to the French monarchy and developed his theory of "indivisible sovereignty," in that only one person or group of persons could hold sovereignty in a state. Among the powers and prerogatives of sovereignty was the right of declaring war and making peace. Because Bodin defined the Roman people as being sovereign in the Roman Republic, he devoted much attention to proving that declarations of war and peace treaties could not be made without their participation. For example, he recalled that because Caesar made war in Gaul without the people's consent, Cato argued he should be handed over to the Gauls for punishment. Bodin

admitted it appeared on occasion that the Senate or the consuls declared war; but in doing so they were encroaching on the people's majesty. He also discussed Venice, since it was the most powerful republic of his era. The issue for Bodin was whether the Venetian Great Council had the power to determine war. He doubted it did, but if it did, then Venice was an aristocracy, not a democracy. Regardless of which one it actually was, "The right and power of making war or concluding peace cannot be taken from the nobles or the people if their sovereignty is to be preserved."⁶⁶

For Bodin, determining who could declare war was one of the ways to determine where sovereignty is found in a state. In France, only the king could make such decisions and, thus, that realm was a "pure monarchy." He found the cases of Denmark, Sweden, and Poland-Lithuania to be intriguing, because in those states the nobles claimed the power of making war and peace. He admitted that in those realms power ebbed and flowed between king and nobility, but he was inclined to call them aristocracies, since the power of war and peace did seem to lie with the nobles. Bodin would have been familiar with Poland's practice, because a French prince, Henry of Anjou (later Henry III of France), had been elected king of that realm in 1573, after Sigismund II's death. When Henry arrived in Cracow, the *Sejm* (National Diet) required him to accept the *Pacta Conventa*, which spelled out the powers and duties of the monarch. Among them was the clause stating the king had no right to declare war or make peace without the approval of the *Sejm*. For Bodin, that was sufficient evidence to conclude Poland was not a true monarchy.

Lastly, regarding the Holy Roman Empire, Bodin asks whether the Imperial Diet, made up of three or four hundred men, has sovereign power to declare war and conclude peace to the exclusion of the claims of the emperor, on the one hand, and the princes and cities individually, on the other. "If this is the case, and it is certain that it is, then it cannot be denied that Germany is a true aristocracy." Thus, the emperor, who less than a century earlier had been deemed by many as the only secular authority with the right to declare war, had in Bodin's view been demoted entirely from the ranks of those who held such power. Bodin's diminution of imperial authority failed, however, to affect practice, as the emperor continued to declare war in the name of the German princes and nation for another century.

By the end of the sixteenth century both the theory and practice of declaring war had undergone vast change. Such thinkers as Gentili and Belli used Roman practice to assert that declaring war was necessary, quoted the Spanish theologians on just war, and recognized that sending heralds to declare war was becoming obsolete. The seventeenth century would see the codifying of these ideas and procedures.

CHAPTER 5

THE SEVENTEENTH CENTURY

In the seventeenth century Europe suffered through the Thirty Years War, its bloodiest conflict between the Second Punic War and World War I; yet the first decade of that century was one of the most peaceful in Europe in the early modern era. To be sure, sporadic fighting continued in Hungary between Austria and the Ottoman Empire, and the years 1601–04 saw the bloody siege of Ostend in the ongoing Dutch Revolt, but there was no major new war until 1618. After the brutal wars of the sixteenth century it seemed clear enough that chivalry and the traditional religious theory of the just war had failed to mitigate the belligerence and violence of the European states. Even the Catholic kings, for whom the Council of Trent had enshrined Thomas Aquinas's theological views as the final word, no longer pretended to adhere to the scholastic understanding of just war. Perceptive thinkers began to develop approaches to war that were far less dependent on medieval categories, while paying closer attention to actual practice of the monarchs.

The most radical thinker of the era was Eméric Crucé, who was born in 1590 and died in 1648. He was a monk whose only claim to fame is *Le Nouveau Cynée* (*The New Cineas*), first published in 1623.¹ The title comes from the Greek statesman, Cineas, noted for his peacemaking at King Pyrrhus's court. The book's purpose is clear in its subtitle: *Discourse of State on the occasions and means of establishing a general peace and the freedom of commerce*. In an age of wars over conflicts in theology and church ritual, Crucé puts forward a vision of universal peace and justice. He states in his preface, "I know that heresies must be refuted, but I see none greater than the error made by those who place injustice above all else and who value only arms."² When a neighbor's house is burning or falling down, he declares, one should feel fear and compassion. Human society is one body in which all the members are in sympathy, so it is impossible for sickness in one part not to be communicated to the others. It would decidedly

benefit the human race if the world's nations would engage in commerce and enrich one another rather than trying to destroy each other by war.

Crucé names four main causes of war—honor, profit, righting some wrong, and exercise. Religion, he avows, rarely serves as anything more than a pretext. He criticizes the common opinion that the exercise of arms is noble and glorious: ordinary valor is brute force, but magnanimity and steadfast courage make for true valor, which is to reject all wrongs. Princes ought to be ashamed of warmongering and should control their ambition. Most often war is tremendously expensive, even for the victors. Crucé suggests offering clemency, and even farmland, to pirates who give up piracy, because it is cheaper than suppressing them by force, which he nonetheless requires for those who refuse to cooperate. The avenging of past wrongs is precarious, because sovereigns rule by the grace of God. Too often, fighting for what they think they have a right to does not meet with God's will, and many kingdoms have been lost by rulers who tried to destroy some other power they believed to be unjust. Crucé proclaims that establishing peace is in the public interest, and he begs rulers to have pity on the human race and stop the horrible wars. Instead of resorting to arms to settle disputes, rivals ought to submit their cases to arbitration by sovereign rulers not involved in the particular case.

Crucé proposes, therefore, that an assembly be created of ambassadors from every nation in the world, including the Ottoman Empire, Persia, China, Ethiopia, and the East and West Indies. He recommends Venice as the meeting place, because it is neutral, central, and accessible, and the Turks would more likely accept Venice than any other Christian place. (He does not consider the possibility of meeting in a non-Christian locale.) Complaints would be presented to the assembly, which would decide whether they merit action. Decisions would be made by the whole assembly, which could easily bring violators "back to the path of reason." Princes must be required to remain within their established boundaries and not go beyond them for any reason. Crucé asserts the peace would be extremely valuable to all the monarchs, because once the borders between states are kept the same, the enormous expenses and horrors of war—innocent people massacred, women violated, temples profaned, famine and pestilence rampant—will no longer be inflicted on nations. The money and manpower used for war can be put to work in agriculture, trade, and building canals.

Only savages, Crucé says, would oppose such a program that so clearly would benefit everyone, princes as well as paupers. Yet, he recognizes that some will continue to use war and violence. For example, he has little hope that the corsairs of North Africa could be persuaded to give up their piracy except through the intervention of powerful ships of war.

The council at Venice would have the power to order rulers to use the small but well-trained and disciplined forces they would continue to maintain against those who violate the rights of others and break the general peace. When a ruler breaks the peace, the assembly at Venice must demand he stop; if he does not, those who are represented in the assembly must forcefully declare war on him. A declaration of war must clearly present the reasons why military force will be used against the violator unless he desists from his evil behavior, giving him a precisely stated amount of time to meet the demand—thirty days, suggests Crucé, unless it takes longer for dispatches to reach distant places—and indicating that the states going to war have no intention of seizing lands and goods or replacing the established regime in the offending state. Crucé is convinced that when miscreants hear or read that war is being declared on them, “By the Orders of the King,” their weapons will fall from their hands.³

Crucé’s thought was far in advance of his times, and his book proved to be hard to find. Copies are today very rare. Yet several authors of the next decades, Gottfried Leibniz, for example, indicate that they read it and were impressed with its thought, although Leibniz stated late in his life that he could not again find a copy.⁴ It is probable that Hugo Grotius heard of it when he was in Paris writing *The Law of War and Peace*.

Perhaps as obscure as Crucé, but certainly more conventional in his thought, was William Fulbecke, an English playwright, historian, and legal scholar who in 1602 published a pioneering work in international law, *The Pandectes of the Law of Nations*.⁵ The work reveals Fulbecke’s knowledge of medieval legal scholars such as Bartolus of Sassoferrato and sixteenth-century French legal scholars, including Guillaume Budé and François Hotman. He describes law as being divided into four kinds—Canon, Civil, Common, and of Nations. He proclaims himself to be the first to write a book solely about the last, although he makes no effort to define Law of Nations. Fulbecke defines war as “the just contention of men armed for a public cause.”⁶ He objects to the definition given by Justus Lipsius that war “is force and arms against a strange king or people,” on the grounds that it would not exclude from just war the violence done by pirates and robbers.

War exists, says Fulbecke, because there is no earthly court that can settle disputes between two equal kings. Private men and lesser princes may not go to war, because there are courts in which their suits can be resolved, a point of view that was not unique or new to him, but he was the first to express it so succinctly. It is possible, he argues, for both states to act justly in a war, as when the Israelites attacked the Canaanites by order of God, and the Canaanites justly resisted because they did not

know God had ordered a war against them. Fulbecke approvingly cites Ayla's argument that Christians cannot make war on infidels simply because they are infidels; their lack of faith does not deprive them of their domains, "which they have by the Law of Nations. In grounding war upon divine causes, it is good to be certain of God his will."⁷

Causes of just war include defense against attack, recovery of seized property, and retribution for injury, especially for harm done to ambassadors. Kings can go to war as allies of another state already waging a just war. In order to wage a just war, "it behooves him that commences the war to denounce the war by ambassadors, and by that means to certify [the other king] of his purpose. For this is proscribed by the law of God." The Greeks, barbarians, and most of all the Romans practiced it. Fulbecke is especially impressed that the Romans denied a triumph to a victorious commander unless war had been solemnly proclaimed.⁸ Just as in private suits where summons and citations are issued, so also in undertaking war, denunciations are to be used. It is clear in the Law of Nations that war must be declared, but Fulbecke does not indicate any sanctions for rulers who go to war without a declaration.

Far better known as one of those who defined international law was Fulbecke's contemporary, Huig de Groot, a native of Delft in the Dutch Republic. Made famous in his Latinized name, Grotius, he was born in 1583 into a well-placed family that ensured he received an excellent education. He entered the University of Leiden at age eleven and graduated five years later. The next year he was part of an embassy to France, where he stayed for three years, receiving a law degree from the University of Orléans. After his return home he was appointed attorney general for three Dutch provinces and became involved in a dispute over the capture of a Portuguese ship by a Dutch East India Company fleet commanded by his cousin. He wrote *De Jure Praedae Commentarius* (*Commentary on The Law of Prize and Booty*), which remained in manuscript until 1864, except for one chapter published in 1609 as *Mare liberum* (*The Free Seas*). Besides defending the rights of taking prizes during wartime (arguing that the Dutch Republic and Portugal, then ruled by Spain's Philip II, were at war when the ship was seized and thus taken legally) and of free travel on the open seas during peace, he made the case for an immutable natural law that no government, and certainly not the papacy, could overturn.⁹

Grotius's promising political career came to an abrupt halt in 1618, when he found himself on the losing side of a coup d'état and wound up in prison. Three years later he had himself smuggled out in a large box supposedly full of books. He fled to France, where he finished his major work, *De Jure Belli et Pacis* (*On the Rights of War and Peace*); begun while he was in prison; it was published at Paris in 1625. He returned to Holland in

1631 but failed to win a pardon. He then made contact with the Swedish government and was appointed its ambassador to France.

Grotius's appointment as Swedish ambassador to France resulted from his work on freedom of the seas, since Sweden was eager to gain free passage through straits, controlled by Denmark, between the Baltic and North Seas. Once Sweden had broken off from the Union of Kalmar in 1523, such issues as Danish tolls on all trade through the straits, the continued use of the Swedish royal coat of arms by the Danish monarchy, and Danish support for Swedish opponents of Charles IX roiled relations. Danish King Christian IV would have declared war in 1604 had he received any support from his privy council. Seven years later, Christian informed the council that he intended to declare war on Sweden in his capacity as duke of Schleswig-Holstein and bypass the council entirely. Faced with such an ultimatum, the Danish council agreed to raise taxes and approved a declaration of war against Sweden.

In the spring of 1611, a herald and two trumpeters carried the declaration, to "my neighbor, the king of Sweden,"¹⁰ detailing Christian's grievances as king of Denmark and Norway against his Swedish counterpart. Christian declared his intention to wage war on Charles by fire and sword. The declaration did not include any offer for mediation or compromise on Christian's part; only abject surrender by the Swedes on all issues would have prevented war. When the herald and trumpeters failed to return (the Swedes imprisoned them, a serious breach of international law), Christian began the war without receiving a reply from Charles. What limited fighting the war involved was centered on Kalmar Castle, which its Swedish commander ceded to Christian that summer after a brief siege. Charles IX became so angry at what he saw as treason by the castle's commander that he challenged Christian IV to a duel "according to old Gothic tradition," because the Danish king was neither a good Christian nor an honorable king.

The key part of Christian IV's reply is worth repeating:

We let you know that your coarse and impolite letter was delivered to us by a trumpeter. We could not expect such a letter from you.... As to the fight you refer to, it seems to us very laughable since we know that you are frail and that it would serve better to remain by a warm stove than to fight with us, and that you need more a good doctor who can cure your brain than to meet us in a duel. You should be ashamed, you old fool, to attack an honorable man.¹¹

Christian's letter closed with a demand that the Swedes release the herald and trumpeters whom he had sent to declare war. This was the last time

a European monarch offered to fight a duel *mano-a-mano* with a fellow king to settle a dispute.

Although the Danes gained the upper hand in the fighting, they had little hope of making further gains in the war, so Christian accepted an offer of arbitration from James I of England. In the peace, accepted at the end of 1612, Sweden agreed to pay a large indemnity to Denmark and to allow the Danish monarchy to continue to use its coat of arms; the Danes would control seven Swedish counties as security until the indemnity was paid. The Danes agreed to return to the status quo *ante bellum* and grant Swedish ships free passage through its straits. With Gustavus Adolphus, who became Swedish king in 1617, involved in the ongoing war with Poland, Denmark resumed demanding tolls from Swedish ships and those of other nations using Swedish ports; hence, Grotius was named ambassador to the French court to promote the Swedish case for freedom of the seas. Grotius remained in France for ten years. When he lost his post in 1644, he made an arduous trip to Sweden in hope of gaining another position. Failing in his efforts, he had a hard voyage back to Germany; exhausted, he died there in 1645.

De Jure Belli et Pacis is one of the masterpieces of political theory, and because of it, Grotius is often called the “Father of International Law,” or “the bridge between the School of Salamanca and modern political thought.”¹² Appropriately for one with his erudition, he filled the book with citations to the ancients, the Bible, and the Church fathers, but he was also well read in the works of his immediate predecessors. He owed much to Vitoria and Gentili, in particular, which debt he acknowledged in a rather backhanded way. His purpose in writing the book was to control war (and the violence it created) in respect to both who could wage war and what could be justly done in course of a legal war. In his “Preliminary Discourse,” he lamented the license in making war throughout the Christian world, “of which even Barbarous nations should be ashamed”; when arms were taken up, there was no reverence for divine or human law, as if a single edict had released “a madness driving men to all kinds of crimes.”¹³ There had to be a “common law among nations,” a law of nature, allowing mankind to see what was just and beneficial to the entire human race.

It is usually said that Grotius was responding to the atrocities of the Thirty Years’ War (1618–48), but at the time he was writing *De Jure Belli et Pacis* it had been going on for only a short time in distant Bohemia and seemed to be sputtering to an end after a Habsburg victory in late 1620. The war’s worst battles and atrocities were in the future, and Grotius’s basic principles were already stated in *De Jure Praedae*, written well before 1618. Rather, Grotius’s attention was focused on the Dutch war with

Spain. In 1609, after two years of negotiations carried on in secret, the Dutch and the Spanish agreed on a twelve-year truce.¹⁴ The Dutch provinces were to be treated as free states and their people would have the same rights within the Spanish realms as had been accorded the British king's subjects in the treaty of 1607. Although many Dutch had hoped for a permanent peace, the agreement was clearly only a truce, and by 1618, both sides were preparing for the resumption of war. The Spanish court made three demands for renewing the truce: evacuation of the East Indies by the Dutch, the lifting of the blockade of the river that flowed through Antwerp, and public practice of the Catholic religion in the "rebel" provinces; all were unacceptable to the Dutch. When the truce expired in spring of 1621, there was no need for any formal declaration, since it had been only a truce, nor was there an immediate resumption of hostilities. The first violence in the resumed war occurred in mid-1622, when the Spanish laid siege to Bergen op Zoom.

That war always remained front and center for Grotius in terms of the legal forms of warfare and the right of the Dutch people to be rid of the tyrannical Spanish monarch. He did not view it as a civil war, since the United Provinces had legally rid themselves of the Spanish king's sovereignty through the Act of Abjuration in 1581. Accordingly, Grotius's position that subjects did not have a right to revolt, even against a tyrannical king, did not apply to the Dutch of his era. His work also was intended to rehabilitate himself with the Dutch authorities, who were eagerly pursuing the resumed war with Spain; he had been imprisoned in 1618 because he had sided with those who wanted to renew the truce. War was a fact of life for Grotius, and he should not be regarded as an opponent of war; what he intended was defining in a new way what were *jus ad bellum* and *jus in bello*.¹⁵

For Grotius natural law is based on what he understands to be the nature of humans as social and political beings. Although that concept differs little from his predecessors, he pays less attention to God's role in creating natural law; it is valid "even if we should grant that there is no God," which, of course, would be the "greatest Wickedness."¹⁶ Natural law provides humans with basic rights; the most important are the rights of self-defense and self-preservation. This leads into the discussion of just war that is the focus of his *De Jure Belli et Pacis*. Grotius rejects Cicero's definition of war as "a contending by force," because, he said, war was "not a contest but a condition" and he defines war as "the state and situation of those who dispute by force of arms."¹⁷ "Just" refers to "legality" in the sense of meeting the formal requirements for war under the law of nations. Grotius moves the discussion from the just causes of war under the law of nature to the formal legality of war under the law of nations.

A commonwealth is morally good and differs from a band of pirates or brigands, even when it commits injustice. Bands of pirates and brigands form for wrongdoing, whereas a state is formed to enable its members to enjoy their rights. A state formed for good ends does not lose its *raison d'être* just because it happens to commit an injustice. Since a state is good by nature, one that initiates an unjust war should desist as soon as it becomes aware of the injustice.

One type of unjust war is an offensive war not formally declared to the enemy. Grotius examines declarations of war in *De Jure Belli et Pacis* under the heading, "Of a just or solemn War according the right of Nations." He uses the Latin word *denuntiatio* as his usual term for declaring war. He posits two prerequisites for formal war: "First, it should have the support of the supreme power on both sides, and be fought under their names; second, it should be publicly declared."¹⁸ In the section devoted to the declaration of war, Grotius affirms that in natural law a declaration of war is unnecessary for a just war. It is rather the law of nations that requires it for securing the benefit of a just war. A declaration is not needed when a state defends itself from attack, when punishment is inflicted at the request of the offender himself, and when the owner recovers property from one who is actually holding it—that is, when damage is inflicted on those who have violated another's rights. The purpose of a declaration of war is to demonstrate clearly that the war is conducted by the will of the people or the supreme ruler on both sides, and not as the initiative of a private member of the state. On the grounds that the state exists for a good purpose, the law of nations grants legal effects particular to it, irrespective of whether a war is just or unjust. Grotius, however, rejects the view "by some" that God's command to the ancient Hebrews to offer (a draconian) peace to a city before attacking it is part of the law of nations.

Grotius next examines the means of declaring war under the law of nations and under municipal law. A war declared against a ruler is at the same time declared against his subjects and allies, even if they are not mentioned in the *denuntiatio*. If the war with the enemy against whom the declaration was made comes to an end, and if another people or king is to be attacked because of aid they furnished that enemy, a new declaration is necessary. By the law of nations, war may be waged as soon as it is declared; there is no need to wait the thirty days of Roman practice. Yet, a just and wise ruler will avoid war, because in war the innocent suffer far more than those who fight. Such a ruler avoids war by using one of three methods to settle disputes before they become violent: conference, arbitration, and the casting of lots—all traditional means by which war has been avoided. In regard to conference and arbitration, Grotius makes no

mention of any specific authority or organization (certainly not the pope) that might arrange for their use between two quarreling states, even if he were familiar with Crucé's grand plan. Grotius considers single combat to be similar to lots, and he comments that two princes in dispute about their own honor and dignity, not that of their kingdoms, may use single combat as a way to avoid the far greater calamity of war.¹⁹

The issue over which Grotius was imprisoned in 1618 was whether the Dutch should continue the truce with Spain, set to expire in 1621; he sided against the war party and with those who favored its continuance. Thus, he includes a long section on truces in *De Jure Belli et Pacis*. No other author gives as much space to that topic as does he. He defines it as "an Agreement, by which, during the War, for a time we forbear all acts of hostility."²⁰ A truce, he writes, is not a peace, because although the fighting ceases the status of war continues. He interprets the Latin word *induciae* (truce) as implying a rest for a time; hence a truce is a rest in war. Therefore, it is not necessary to declare war again when a truce has expired, even if the ancient Romans, desirous of showing how they loved peace, chose to send heralds at the end of truces on occasion. Likewise, when one side breaks a truce it is not necessary to declare war again. What is permitted during a truce is determined by the conditions established during negotiations for it. Unless they are specifically banned, such acts as recruiting soldiers or repairing walls are permitted during a truce. Grotius makes no mention of the Twelve-year Truce between Spain and his homeland, but he comments on issues of freedom of the seas during a truce; for example, whether an enemy's ship that is blown by a tempest onto one's shore can be seized as a prize of war. He concludes from cases in ancient times that it would be legal, but it would be "far more humane, far more honorable" to release the ship.

One further issue to which Grotius gives attention is the right of armies to pass through a neutral state to attack an enemy. He gives a number of examples from the Bible, most notably, when the Hebrews waged war on the Amorites for refusing passage (Numbers, 21), and ancient history where denial of passage led to war; he concludes, "[T]he Opinion then is the best, that the Liberty of Passing ought first to be demanded, and if that be denied, it may be claimed by Force."²¹ The sense of danger such a request would arouse in the neutral state is insufficient to deny passage, "for one Man's Right is not diminished by another Man's Fear." The only instances when refusing passage would be justified would be when those demanding it are undertaking an unjust war or are bringing the neutral state's enemies with their army. He adds that the same principle applies to goods and merchandise. Grotius's firm stand on this point probably related to his position on freedom of the seas, as he is truly

adamant about the right of passage through seas claimed by such states as England and Spain.

Most English writers contemporary with Grotius were deeply concerned about war at sea but paid little attention to the issue of how to declare war; this was perhaps because England saw little foreign war for nearly fifty years after peace was made with Spain in 1607.²² John Selden knew Grotius's work well enough to write his *Mare clausum* (*The Closed Seas*) to refute the Dutch author's *Mare liberum*. Finished in 1618, Selden's work was first published in 1635. Selden argues that the sea is nearly identical to land in respect to proprietorship; just as nations are sovereign over vast regions of territory, so also may they claim the same rights over the seas, including the right to deny passage. He has little on land warfare.

On the other hand, Thomas Hobbes's theory that war is the natural condition among men and among states led him to say a great deal on the subject, but his treatment of declaring war is limited to a remark in the context of his definition of war: "For what is WAR [sic], but that same time in which the will of contesting by force, is fully declar'd either by Words, or Deeds?"²³ Francis Bacon, who as a royal councilor wrote frequently on political issues, argued for a preemptive war against Spain in *Considerations Touching a War with Spain* written about 1622. Proclaiming, "[T]here is no question but a just fear of an imminent danger, though there be no blow given, is a lawful cause of a war," Bacon cites as proof the situation in Germany where Spanish forces had ousted from his throne the count palatine, Frederick, James VI/I's son-in-law. The threat Spain posed to English liberty and religion (along with the Armada of 1588), and the Spanish king's overweening power and arrogance, are presented as justifications for such a war. Bacon acknowledges that, according to the *jus feciale*, a legation must be sent to the enemy to demand satisfaction; if it is refused, then there must follow a "denuntiation or indiction of a Warre."²⁴ A just war of preemption does not allow for a surprise attack.

The confrontation between king and parliament that marked the period of the English Revolution produced works that in defending the monarch's authority touched on declaring war. Robert Filmer, who died in 1653, wrote in his *Patriarcha, or the Natural Power of Kings*, printed in 1680: "These acts of judging in capital causes, of declaring war, and concluding peace, are the chiefest marks of sovereignty that are found in any monarch."²⁵ Another royalist, Richard Zouche, was the only English author of that era to examine the issues of war at length. Born in 1590, he studied law with Gentili and succeeded him as regius professor of law at Oxford. He was involved in a case of diplomatic privilege, when the brother of the Portuguese ambassador to England was accused in 1653 of murdering an Englishman. He claimed diplomatic immunity as part

of his brother's entourage, but Zouche argued, and the court agreed, that diplomatic immunity did not extend to an ambassador's entourage in a heinous crime; only the ambassador himself had that privilege in a matter of such gravity. The accused was found guilty and executed. As a royalist, Zouche lost his office in the Admiralty during the Puritan Commonwealth, but before he died in 1661, Charles II returned it to him.

Early in Zouche's career he set about to write a series of works on law—feudal law, church law, military law; the last was his *Juris et Judicii Feccialis, sive, Juris inter Gentes et Quaestionum de Eodem Explicatio*, (*An Exposition of Feccial Law and Procedure, or of Law Between Nations*), published in 1650.²⁶ If not the one who coined the term *jus inter gentes* (law between nations), he is credited as the first to use it in place of the more ambiguous *jus gentium* (law of nations). The former phrase more accurately contains the sense of “international law” as the term is used today, while law of nations seemed to him to designate the internal jurisprudence of a state. Zouche argues that *jus inter gentes* was what the Romans meant when they discussed fetial law. He defines it as “the law which is recognized in the community of different princes or peoples who hold sovereign power—that is to say, the law which has been accepted among most nations by customs in harmony with reason, and that upon which single nations agree with one another.”²⁷ In his works he used far more examples from his own time and the recent past compared to other authors studied thus far. For that reason he is regarded as a positivist in his approach to international law.²⁸ He frequently cited recent authors such as Gentili and Grotius. The format of Zouche's book is that of question and answer; in answering each question, he provides several examples from history that support both sides of the issue and usually concludes with the statement: “The jurists agree.” This mode of presentation permits him to give clear and concise answers.

Zouche's *Juris et Judicii Feccialis* was written to examine “this excellent science, which has to do with the whole law of Peace and War.” Following Augustine, he defines peace as “ordered concord,” while war is “lawful contention between different princes or peoples.” War can be formal, which a state wages after duly declaring it, or informal, waged by private persons. Reprisals that stop short of large-scale violence are examples of informal war. Zouche, citing Cicero, states that no war can be lawful unless it is preceded by a demand for restitution of property or by proclamation and declaration. Still following Cicero he distinguishes among enemies and traitors or robbers: enemies are those whom it is lawful to destroy; traitors are those who have taken up arms against their prince or commonwealth; robbers are those who act like enemies

but without the authority of a state. Lawful enemies are protected from being executed after battle and, Zouche notes, even from slavery among Christian states; the custom has become to detain them until a ransom, set by the captors, has been paid.

Among the many questions Zouche seeks to answer is whether any war can be lawful, to which he answers that the law of nations makes it lawful to repel violence and injury. Another is whether a war can be just on both sides, for which the answer is that objectively one side must be in the wrong, yet both foes may be acting in good faith and, therefore, go to war justly. Third, whether one who does not have supreme power may begin a war, to which his answer is a forceful no. Fourth, whether differences in religion may be the cause of a just war. For the last, Zouche postulates three cases wherein such a war may justly be waged: against those who worship devils or wickedness; those who deny that there is a Deity; and those who persecute professed Christians. He is adamant that war on non-Christians and those Christians believed to be in error, for the purpose of winning them to the truth, is always unjust, because faith cannot be coerced.²⁹

For our purpose the key question is “May war ever be made without a declaration?” The law among nations, writes Zouche, allows three cases when a declaration of war may be omitted: when war is undertaken for necessary defense; when war is made on those already regarded as enemies; and when arms are taken up against rebels. Once a just war has been declared, there is no need for a delay in commencing to fight. A foe that has done such harm to a state or sovereign that war is a just response ought to be ready for it. Nonetheless, even when one state has made just demands on another, prudence and good reason indicate that one should wait until an answer is received or the demands complied with. Zouche then discusses the example of Gustavus Adolphus of Sweden, whom the Holy Roman Emperor had excoriated for invading Germany in 1630 without declaring war. The Swedish king had responded in a manifesto, saying the emperor had violated that practice on several occasions and had no right to criticize him, and he was defending himself against an unjust attack, in which situation nature allows every man the use of arms. Furthermore, he had sent letters to the electors of the Holy Roman Empire and the general of the emperor’s army, informing them that if he did not receive amends for his most just complaints, he had another way of defending himself and his dignity. Zouche proclaims that Gustavus had acted rightly, for he had met the requirements of properly declaring war.³⁰

The Thirty Years’ War began in 1618 with the Defenestration of Prague, an act that signaled the revolt of the Protestant nobles in Bohemia

against their Habsburg ruler. Since it was a rebellion, no declaration of war came from either side. Nor were declarations forthcoming when the war expanded into Germany after 1620 and involved the German princes and then Denmark in the Protestant/anti-Habsburg cause. Danish king Christian IV announced he was entering the war only to defend Saxony; no formal declaration was needed. A war manifesto first appeared in 1630, when Gustavus Adolphus joined the war. Since it was not addressed directly to Emperor Ferdinand II, it should not, perhaps, be regarded as a declaration of war; but because it laid out the Swedish king's reasons for going to war and his war aims, it warrants examination.

The manifesto, which refers to Gustavus in the third person, proclaims that the first issue involved in war is determining whether it is just or not. It answers the question in an indirect manner by first relating how he was victorious in wars against Poland and Muscovy and then made just peace with those states. He has now made himself master of the duchy of Pomerania, not for his own gain but to deliver his relatives and friends from oppression, doing so not by plundering cities and countryside but at his own expense. Since those who envy him or are ignorant of his purpose spread sinister rumors about him, it is "fit and proper to declare to the world the motives of his last progress into Germany." The House of Austria, the document alleges, is determined to impose a universal monarchy on Christendom and especially upon the German principalities and free cities. It has made such progress in this design against the liberties of the most distant lands that several princes of the empire invited the king of Sweden to intervene.

The manifesto also lists the injuries Gustavus believes have been done to his own honor. One involves diplomatic letters he sent to the prince of Transylvania, which were illegally opened and published, and their couriers imprisoned. "False glosses" have been placed on the letters to the detriment of his reputation and made him hated everywhere. Another complaint is how his enemies used the war against Poland, which was justly fought and concluded, to denounce him as a usurper and ravager of Christian lands. Furthermore, his enemies are seeking to persuade the Poles to resume the war against him by promising them the kingdom of Sweden after they subdue the Germans.

More serious, according to Gustavus's manifesto, are the injuries done to Sweden's rights in the Baltic Sea through piracy, confiscation of Swedish ships, and a ban on Swedish merchants at Lübeck. Most intolerable of all is seizure by his enemies of the city of Stralsund and its port, "without a declaration of war." Since then they have been using it as a base for piracy to seek to deny Sweden its traditional rights on the Baltic Sea, which is forcing him to build a navy at great expense to defend those

rights. To those who proclaim the Swedish king must not wage war on the emperor, he asserts that he deeply wants to be at peace with him, but the long list of injuries done to him, his relatives, and his allies make it clear the emperor has taken bad advice from those who usurped the place of true councilors. In conclusion the manifesto asks: "Is there anyone that can blame the most serene King of Sweden for endeavoring by his arms to defend his subjects and friends from such an oppression? He desires that all Christendom would judge whether he has not taken them up with regret and after being forced by extreme necessity."³¹ Perhaps because Gustavus wished to avoid offending France, his Catholic ally, his manifesto makes no mention of the defense of Protestantism as a cause for war. Nor are his own ambitions of gaining the imperial title himself noted.

With Sweden's entry into the Thirty Years' War, the advantage quickly swung to the Protestant side, as the Swedes won major victories in the next two years. At the Battle of Lützen in 1632, however, Gustavus was killed. Although the Swedish army remained powerful, it lost its clear advantage over imperial armies, which became obvious with its disastrous defeat at Nördlingen in 1634. France was forced to rethink its policy of aiding the anti-Habsburg coalition with money and diplomatic support. In April 1635, France and Sweden signed a treaty in which Sweden recognized French sovereignty over most of Alsace, and France agreed to declare war on Spain and not make a separate peace.

A month later, Cardinal Armand de Richelieu, the French first minister, reached back to the past by sending a herald to Brussels to declare war on Spain via the Spanish king's brother, Archduke Ferdinand, governor of the Spanish Netherlands. The pretext for France's decision to enter the Thirty Years' War at that point in time was the arrest by the Spanish of the bishop of Triers, who in 1631 had placed himself under French protection, although Richelieu was convinced Spain was planning a preemptive strike against France without a declaration of war.³² He sent the herald Jean Gratiollet, who arrived at the gates of Brussels dressed in the traditional tabard and herald's cap with a baton in his hand. A royal trumpeter accompanying him blew *chamades*, the call for the surrender of a fortress. Gratiollet did not get an audience with Ferdinand, who spent the day in council debating whether he was obliged to meet with the Frenchman. The reason eventually given for not receiving him was that Ferdinand could not be sure whether he was a fraud. By late afternoon Gratiollet, weary of waiting, went into a square, where he tossed the sheets with the declaration of war to the winds. Two Flemish heralds, who had been shadowing him, shouted to the people present not to pick them up. He and the trumpeter then rode back to the frontier, where he affixed a copy of the declaration of war to a post. The trumpeter then blew *chamades* to

a peasant who had been dragged out of a church for that purpose, and the two men crossed back into French territory.³³ Richelieu, who always insisted on proper behavior and form, was reported as pleased when he learned the ceremony had been carried out correctly.³⁴

When Spain declared war on France later in 1635, Philip IV sent to his ambassador to the French court a printed copy of his declaration, which had been already published in Spain, and the ambassador delivered it to Louis XIII with little of the traditional ceremony. Besides justifying the arrest of the bishop of Triers and responding with indignation at the French declaration, Philip remonstrated about the lack of good faith on the part of the French king, who knew full well that Spain was acting only to protect the Catholic Church. Archduke Ferdinand also wrote a reply in 1636, which denounced the French declaration of war as “beyond all reason and justice.”³⁵

Yet it was not the last time that the medieval and, indeed, ancient act of sending a herald was used to declare war in Europe. That occurred in 1657, when Danish king Frederick III, believing Sweden’s war with Poland provided an opportunity to settle old scores with the Swedes, declared war on Charles X. Denmark and Sweden had fought a brief undeclared war in 1643, when the Swedes engaged in a surprise multiple-front attack on Denmark. The resulting quick defeat for the Danes left them eager for revenge and recouping lost territory. In June 1657 Frederick III signed a document that stated, “We, according to the Law of Arms, denounce war by both land and sea” on King Charles of Sweden for violating the terms of the peace of 1644 and filling the lands of his neighbors with blood.³⁶ Frederick dispatched his herald with the declaration of war, but Charles, then in Poland with his army, received it a considerable time later. The Danes lost this war as well and had to sue for peace in 1660.

Although after 1635 the Thirty Years’ War expanded into old theaters of war, such as Flanders and northern Italy, its carnage and devastation remained centered in Germany. German intellectuals had good reason to seek to reduce the brutalities and atrocities of warfare. Consequently, such elements in the works of Grotius, Zouche, and other predecessors particularly caught their attention. Perhaps because most of the states involved in the conflict had entered it without declaring war, these German theorists put emphasis on the obligation to issue a proper denunciation before fighting could begin. Writing his *Politica* in 1603, before the Thirty Years’ War began, Johannes Althusius, a German Calvinist, had stated that necessary preparation for war included a declaration of war. German writers from after the war often cited him with a sense of regret that his admonition had not been followed.

It was after the war that Samuel von Pufendorf, the best known of these German authors, produced his work. Born a Lutheran minister's son in Saxony in 1632, he was expected to follow his father's career but found the study of theology tedious and turned to law. After completing his education, he became a tutor for the sons of a Swedish diplomat in Denmark. When the war between these states broke out in 1657, he spent eight months in prison. He used the time to write his *Elementa jurisprudentiae universalis* (*Elements of Universal Jurisprudence*), printed in 1661. A stint teaching at the University of Heidelberg ended in 1668, when he published a tract calling for a unified Germany without Austria. The resulting uproar sped him to Sweden to take a position in the University of Lund where, in 1672, he published his opus, *De jure naturae et gentium* (*Of the Law of Nature and Nations*). A year later he produced an abridgement called *De officio hominis et civis juxta naturalem* (*On the Duty of Man and Citizen according to Natural Law*). His work and reputation continued to grow and, in 1684, he received a patent of nobility (hence the von in his name). Returning to Germany in 1688, he entered the service of Elector Frederick William of Brandenburg. He died from a stroke in 1691, while in Sweden retrieving a manuscript he had left there.

Because of the close ties between the Dutch Republic and Protestant northern Germany in the mid-seventeenth century, Grotius's ideas had broad influence among German thinkers such as Pufendorf. But the northern Germans regarded Denmark with more suspicion than they did Sweden, so when the Netherlands and Denmark became allies after 1660, German authors of the late seventeenth century found more to criticize in Grotius—and Hobbes as well. Nonetheless, Grotius was the principal source of inspiration for Pufendorf's political thought and view of war, in which natural law is a universal science that could be known by all men simply using their reason. He argues, contrary to Hobbes, that the state of nature is peace, not war; but this natural state of peace is highly vulnerable to the aggression of evil men and does not preserve civil society, the proper goal of peace and natural law. Going beyond the usual texts used to prove the existence of natural law, he concludes it is not restricted to Christian peoples but properly belongs to all nations, since they together constitute humanity.

Pufendorf's discussion of just war is found primarily in *De officio hominis*. His definition of war is simple: it is the state "where men mutually inflict or repel injuries, and where they strive to extract what others owe them by means of force."³⁷ He begins his chapter "On War and Peace" with the statement: "It is most agreeable to natural law that men should live in peace with each other."³⁸ Peace is what distinguishes mankind from beasts. Yet when the ill will of another prevents one from preserving

property or enjoying rights, then war is permitted. There ought not be immediate recourse to war in case of injury, for it often is not clear where justice lies in a particular case; there is also the possibility of peaceful arbitration of the matter through mediation. Pufendorf recognizes there are unjust wars; some of them are openly so, others begin through pretexts that may appear to justify the war but are in fact shams. A proper declaration of war does not in itself constitute a just war, for men can be as deceitful in such a solemn matter as in any other.

War, says Pufendorf, is normally divided into two forms—declared and undeclared.³⁹ He finds two conditions for declared war: It must be waged on the sovereign's authority on both sides, and a declaration must precede it. Undeclared war is waged without a declaration or against private citizens. The right to declare war is limited to a sovereign; a lesser official has no right to issue a *denuntiatio*, even if he believes his king would agree that immediate war is necessary. Certainly a lesser official can repulse an invasion without the sovereign's permission, but only in the gravest case should he move into the enemy's territory before consulting his sovereign. In the event of a truce, there is no need to issue a new declaration of war, unless a peace treaty has been made in the meantime.

Samuel Rachel was four years older than Pufendorf but published his major work four years after Pufendorf's, which he cites several times. Born in the duchy of Holstein, Rachel suffered directly from the Thirty Years' War, when the Swedes invaded the duchy in 1643, forcing him to abandon his studies. Fortunately for him he was not impressed into service and managed to eke out an education. He was expected to join the Church but turned his attention to law and, by combining tutoring noble youths with attending lectures, finished the law curriculum. At age thirty he became a secretary to the duke of Brunswick, who named him as professor of moral philosophy at the University of Helmstedt. He assumed the chair of International Law at the University of Kiel in 1665. His major work, *Dissertationes de jure naturae et gentium* (*Dissertations on the Law of Nature and of Nations*), appeared at Kiel in 1676.⁴⁰ Soon after, Rachel left for Hamburg, where he served as a diplomat for the duke of Schleswig-Holstein, whom the Danes had driven out of his duchy. Rachel died in 1691.

One valuable aspect of Rachel's *Dissertationes* is his wide citation of contemporary and near-contemporary authors.⁴¹ Grotius is his principal authority on war, although he differs with the Dutch author on his understanding of the relationship between the law of nations and natural law. Rachel divides law into two types—natural law and human law. The latter, in turn, has three divisions: law affecting relations among

individuals in a state, called municipal law; law between sovereign and subjects, called public law; and law among independent communities, called law of nations. Disagreeing with Grotius, he argues that law of nations was based on agreements and customs not directly a part of natural law; law of nations gets its power from long and customary usage. It is impossible, writes Rachel, to say for certain whether such agreements and customs pertain to every nation of the world, since not all nations are known; hence, they may not follow the same customs as civilized nations do. This set of customs, for Rachel, is the law of nations; his law of nations is positive law.

Rachel distinguishes between what the law of nature and the law of nations have to say about war. The law of nature acknowledges war can occur, but insists it be just and fought in a lawful manner, the only points about war included in that law. Because most wars from ancient times to the present arise out of ambition and avarice, most wars have been unjust in natural law, differing little from robbery. Yet, the law of nations provides a set of rules for war, although many wars do not meet the requirements of the law of nature. The law of nations requires that a just war be waged under the authority of the state's sovereign, and much of his prerogative deals with war. Second, the sovereign must proclaim war by "solemn Promulgation, Declaration, Denunciation, or Heraldic Proclamation. Such a war, so dignified, is called 'solemn' in accordance with the Laws of Nations."⁴² Rachel adds that he does not refer to such customs as the use of the herald's baton or the fetial's bloody spear, but rather to the solemnity that shows the war will be waged by the will of the people or its governors, not by private will. This is the first explicit statement recognizing the rubrics of the declaration of war had changed.

Once war has been properly declared, states Rachel, the law of nations allows a broad range of acts that in peacetime would be regarded as criminal. One act, the use of poison, is deemed reprehensible in the law of "the more cultured nations," but Rachel proclaims that in the law of nature it makes no difference whether a person is killed by the sword or poison.⁴³ Enslaving persons of the defeated enemy is also just in the law of nations, but among Christian states it has properly fallen into disuse, and Rachel cites several texts to suggest the same is true among the Muslims. One of the most important laws of nations, according to Rachel, is the guarantee of safety for ambassadors—those persons sent by the highest authority in one state to the highest authority in another to carry on negotiations. They are regarded as so inviolable that to injure one is a violation of divine as well as human law. Even when war has been declared, an ambassador from the enemy state remains sacrosanct, and one who harms him must be turned over for punishment to the state that sent him. A state can

refuse to accept an ambassador, or expel one if he is found to be violating ambassadorial privilege or when war has been declared against his state. A further exemption to ambassadorial protection involves atheists: They cannot be trusted to keep their word and cannot serve in a position that requires good faith, for they have none. According to both divine law and law of nations, atheists have no right to act as ambassadors.

A third German author to write on international law after the Thirty Years' War was Johann Wolfgang Textor. Born in 1638 at Neuenstein, into a family of scholars and officials (the family name of Weber (weaver) was changed to the Latin Textor in the sixteenth century), he earned his *Doctor juris* from the University of Strasbourg in 1663.⁴⁴ Along with a career as a professor of law and a judge, he was a prolific writer on law; his major work, *Synopsis juris gentium* (*Synopsis of the Law of Nations*), was published in 1680 at Basel. He died in 1701 at Frankfurt, where he was serving as mayor.

Textor's concept of international law, as he says himself, was largely Grotius's, but he makes a stronger case for the universal application of the law of nations. Even if there are peoples "so barbarous and wild as not to maintain any respect for agreements or law," and he so designates the Indians of the West and people living around the Cape of Good Hope, they still are bound by the law of nations as established by the civilized nations.⁴⁵ That works to the advantage of such peoples, however, because civilized nations are bound to respect the laws of war in regard to them, and neither their condition nor their religious beliefs are just causes for war on them. A "special question" about just war that Textor considers concerns the issue of whether a war can be just on both sides. He concludes that logically both states cannot be in the right, but their sovereigns may believe each has a just cause for war, and both can fight a just war. Another question asks whether the refusal of a demand for free passage of troops across a realm constitutes a just cause for war. Textor affirms the Bible provides a clear example of such a war, but this was a special right granted by God, a right that should not be expanded into a general rule. Contrary to Grotius, he concludes that such a war would be unjust for three reasons: just as private persons have a right to prevent trespassers, so a king may keep intruders out; allowing another's army to cross one's lands may be damaging to royal authority; and armies are often undisciplined and may do serious damage in a realm. Yet, under certain conditions a king may grant such passage: if the one requesting passage is about to engage in a just war against a third state; if he requests passage in a proper manner; and he provides security, probably in the form of hostages, for any damages and expenses imposed on the people of the realm being crossed.

In respect to declaring war, Textor cites Grotius on the necessity of a proclamation of war in order to produce the proper results of just war. Noting that Grotius wrote at length on Roman practice for declaring war, he states, "But these solemnities in declaring war have fallen into desuetude in modern times, although the declaration in itself is still necessary; and it is clearly discretionary in our day whether war be declared by ambassadors or otherwise by public writing."⁴⁶ The latter is called a manifesto, which sets out the causes for war and demonstrates them fully. What is crucial is that the head of the state upon whom war is being declared receive notice; should it prove impossible to present it to that person, then it is permitted to post it on the frontier. The enemy ought to be given some time to be able to reply to the grievances in the declaration and pledge to make good on them to avoid war; Textor suggests that the three days found in the Golden Bull of 1356 is a proper length. He concludes his discussion with the observation that a declaration of war against an enemy also should be considered as extending to his allies, even if it would be appropriate to send them new declarations.

It is difficult to deduce what influence authors such as Rachel and Textor had on rulers, but formal declarations of war became the more common practice at outbreaks of international violence after 1648. While no war from 1648 to 1700 matched the Thirty Years' War in length and devastation, every year of the period saw war occurring somewhere in Europe, and it had more declarations of war than any other half-century in European history. The first new war broke out in 1652 between England and the Netherlands, both Calvinist republics. The issue that led to hostilities was the same one that had earlier exercised Grotius and Selden—freedom of the seas. The Dutch favored it, and the English were opposed. Tensions between England and the Dutch Republic had been festering for several decades, as the Dutch had become the principal purveyors of the carrying trade in European waters, to the serious disadvantage of English seamen and merchants. Late in 1651 Oliver Cromwell's government issued the Navigation Act, which stipulated that goods must be brought into the English Commonwealth only by English ships, or by ships of a country originally producing the goods being carried. Although the act made no specific distinction among nations, it was intended to cripple the carrying trade upon which the Dutch depended. Their ships would be able only to bring their own produce (primarily butter and cheese) into England and her colonies. The English fleet was also told to enforce the old law that required foreign ships to strike their flags to English men-of-war in recognition of English sovereignty over the English Seas, as the English called the Channel, the Straits of Dover, and the southern North Sea.

During the winter and spring of 1652, large numbers of Dutch vessels were boarded and searched, and the English seized what they regarded as contraband. The Dutch States-General sent their senior statesman, Adriaan Pauw, to London in late June in a last attempt to prevent war, but in vain. English demands had become so extreme that no self-respecting state could accept them. On July 11, according to a Venetian in London, the Dutch ambassadors had taken their leave, and so "war may now be considered as declared."⁴⁷ One of the departing Dutchmen said, "The English are about to attack a mountain of gold; we are about to attack a mountain of iron."⁴⁸ It is often said that the English Parliament declared war on July 10, 1652, but there is no evidence of such a formal act. Parliament did publish a manifesto dated July 9, which defended the justice of the English actions against the Dutch in the past years. It denounced the Dutch for violating English rights at sea, strongly making the point that they had committed violence against English seamen without war "at any time declared." There was "a cloud of reasons" why war would be justified, and the document came about as close as possible to a formal declaration of war without including the phrase: We declare war.⁴⁹

Two months later the Dutch States-General issued a formal declaration of war, proclaiming: "Almighty God will bless our just cause; trusting that all Kings, Republics, Princes and States will take our manifest declaration for true, lawful and requisite, and with us will help to oppose and subdue all such pernicious lawlessness."⁵⁰ The Dutch affirmed their faith that God would bestow His blessings on the measures taken for lawful defense, permitted them by God and nature. "Being confident that the whole world will approve of this our resolution," the said Potent Lords of the States-General declared war on the Commonwealth of England, giving the subjects of that state forty days to leave Dutch territory without injury to themselves or their property. After the English navy seized Jamaica in early 1655, Spain declared war on England, and England reciprocated in October. Cromwell proclaimed in a manifesto that war was justified because of Spanish aggression against English colonies in the West Indies.

This First Anglo-Dutch War, fought entirely at sea, failed to settle the question of which of the two states would dominate trade in northern Europe. Although Charles II, who gained the throne in 1660 upon the monarchy's restoration, had spent time in the Netherlands during his exile and owed money to the Dutch, he was hostile to them. Tensions increased to the point that in December 1664, the English suddenly attacked the Dutch fleet. Although this attack failed, in January 1665 the Dutch ordered their ships in the Americas to open fire on English

warships if threatened. Charles used this as a cause to declare war on the Netherlands in February, soon after his ministers had appeared in Parliament to request an aid of £2.47 million over three years for the navy.

As the parliamentary record puts it: "the Parl. having thus shown the sense of the people by this royal aid, and the hearts of the trading part of the nation being entirely turned against the Dutch, the king ordered the drawing up of a formal Declaration of War."⁵¹ It accused the Dutch East and West Indies companies and other subjects of the United Provinces of "injuries, affronts, and spoils done to ships, goods, and persons of our subjects." Charles II declared to "all the world, that the said states are the aggressors and that they ought in justice to be looked upon as such by all men." Therefore, he would issue letters of marque to his subjects, allowing them to seize Dutch ships and goods. His own subjects were banned from transporting soldiers, arms, and contraband to the Dutch provinces or plantations, and any ship of any other nations found to be doing so would be seized as a legitimate prize of war. In conclusion, the king stated "[I]t is our will and pleasure that this our present declaration be published in due and usual form."⁵²

This declaration is unusual in that it referred exclusively to events at sea. Both the Dutch alleged injuries, and the English response, involved the seizure of ships and goods. The Second Anglo-Dutch War was again fought entirely at sea, but this time the fighting was broadened to include Denmark and France. Louis XIV of France was obliged by a 1662 treaty to assist the Dutch in a war with England but postponed his aid until January 1666 on the pretext of extending an offer of mediation. Then he issued a declaration of war on England, stating he was resolved to aid the Dutch against the English on land and sea. He enjoined all his subjects, vassals, and servants not to carry on any correspondence, commerce, or intelligence with England. All his officers of the foot, horse, and artillery must be ready to execute his orders: "For such is the will of His Majesty." The town criers of the towns and cities of France, accompanied by a trumpeter, were to proclaim the declaration to the people; Charles Canto, the king's crier in Paris, reported that he had done so with the sound of a trumpet on January 27. In a codicil to the declaration, Louis announced that all English subjects residing in France had three months in which to sell their property and return to England unmolested.⁵³

In February, Charles II declared war against Louis.⁵⁴ After commenting with indignation on the long friendship between the two kings, Charles declared that by allying with the Dutch, the French king was showing himself to be the aggressor. "We relying on the help of God Almighty [and] do declare that we will oppose the French King and

vigorously prosecute this War which he hath so unjustly begun." He ordered his officers both on sea and land and all his subjects to oppose all actions by the French king or his subjects and to undertake all acts of hostility against them. He gave notice that the penalty of death would be exacted for any of his subjects who had any communication with the French. He promised that the subjects of France and the United Provinces living in England could remain without injury or trouble as long as they did not communicate with his enemies. He also pledged that anyone who was oppressed by the enemy states could come to his kingdom and be protected, those of the Reformed Religion (the French Huguenots) being particularly noted. This last clause reflected the situation in France, where Louis XIV was beginning to undermine the 1598 Edict of Nantes.

Louis quickly repented of declaring war on England, because it prevented him from taking quick advantage of the death of Philip IV of Spain in 1665, whose eldest child, Maria Theresa, was Louis's wife. Louis claimed the duchy of Brabant in the Spanish Netherlands on the grounds that its laws of succession favored the first child, even if a daughter, over a younger son, that is, Charles II of Spain. The province was said to "devolve" to Louis's wife; hence the term War of Devolution when the French invaded the Spanish Netherlands in May 1667, Louis having made peace with England. The invasion began without a declaration of war, because Louis was only claiming what was rightly his, according to the French lawyers. The Spanish monarchy defended its domains without declaring war, while England and the Netherlands, fearing any enhancement of French power, quickly made peace and formed an alliance, joined by Sweden, and demanded an end to the war. In May 1668, Louis agreed to withdraw from all but a few fortresses along the border with the Spanish Netherlands.

That result left Louis XIV enraged that the Dutch had double-crossed him, and he was determined to punish them. He undercut their alliances by secret treaties with England and Sweden, and in April 1672 declared war on the Netherlands. The document is unusual in that it makes no attempt to justify the war beyond "the ill opinion His Majesty has entertained of the conduct of the States General, having proceeded so far, that His Majesty without the diminution of his glory cannot any longer dissemble the indignation wrought in him for their acting so little in conformance" to the obligation they owed to Louis and his predecessors.⁵⁵ The king, determined to make war both by land and sea, commanded his subjects, vassals, and servants to fall upon the Dutch. Any commerce and communication with them was banned under punishment of death. He ordered all his officers to prepare for war, "for such is His Majesty's

pleasure.” He mandated that the declaration be posted in all his cities and ports, and “wherever it may necessary so that nobody can plead ignorance of it.” The declaration makes no mention of having it shouted aloud in public by the town criers. A week later another royal proclamation gave Dutch subjects in France six months as set in the treaty of 1662 to remove themselves and their goods from France without being molested, and required all French subjects then in the Netherlands to leave there within fifteen days or be regarded as traitors.

Thus began the Dutch War, which England joined a day later, when Charles II issued his own declaration of war on the Netherlands. It differs from Louis’s in that it devotes considerable attention to the Dutch injures to English subjects and Charles’s attempts to maintain peace: “We had no way left to defend our People from the artifice of that Nation in Peace but by the Valour of our Subjects in War. We have therefore thought fit to declare, and do hereby declare, that we will prosecute War both by Sea and Land against the State General of the United Provinces and all their Subjects.” The Venetian ambassador in London reported: “War against Holland was proclaimed yesterday at all the usual places in London, to the sound of trumpets, the heralds and other officials attending. There were crowds of people who were aware of the causes, through the declaration reported, approved of the step, blessing his Majesty with one accord.”⁵⁶

The Dutch replied with a longer manifesto, which made clear their regret that England, although linked with them by the same religion, should have joined their hated enemy, the king of France.⁵⁷ Many English leaders felt the same way, as Charles’s war was highly unpopular in Parliament. After several naval battles in which the Dutch came out slightly better, Charles agreed to peace with the Netherlands in 1674. The Dutch war with France, however, continued until 1678. France declared war on Spain in October 1673, for aiding the Dutch and violating the peace terms of 1668.⁵⁸ Louis proclaimed that such acts made it clear Spain had no interest in keeping the peace in Europe. The peace treaty of 1678 ending the war cost the Netherlands nothing, since France concentrated on taking the Franche-Comté and forts in the Spanish Netherlands.

The naval wars between England and the Dutch Republic were the background for the publication of Charles Molloy’s *De Jure Maritimo et Navali: Or, A Treatise of Affairs Maritime and Naval*, printed in 1676.⁵⁹ Born in 1646, he served as a barrister at law until his death in 1690. For many years his book was the standard treatise in English on commercial and maritime law. It went through a dozen editions and was translated into Spanish in 1793. The first topic Molloy considers is the cause of war. Since the first thing God did after creating man was to give him dominion over all the things of this world, property rights are divinely endowed,

and violations of them are the usual causes of war. A just war involves the defense or recovery of property or revenge for destroyed property. Molloy adds that some include another—the defense or advancement of religion or the uprooting of a contrary religion. But, he comments, “War is too rough a Hand, too bad a Means, to plant Piety.”⁶⁰ Just war is also called solemn war, which requires two things: It must be waged by the highest power in the state; and certain rites must be used. Because war endangers the entire commonwealth, it must be undertaken only under the authority of the highest power in the state.

Molloy states that according to the laws of England, a war begins only when the king’s standard and his host enter the realm of another prince and remain there for forty days. For a war to be legal under the effect of law, it must have just cause: “For take away Justice, and what are Kingdoms but great Robberies?”⁶¹ There have been wars done under the commission of God, but the Bible also provides examples of wars begun under the law of nature, as was the war Abraham fought against the four kings of Siddim (Genesis: 14), for which he did not receive a direct commission from God. When war is undertaken to resist an attack, or when ambassadors are harmed, it is not proclaimed by heralds but by nature itself. Molloy uses the Latin word *interpellatio* for the demand that a state make good injuries done to another. When that demand goes unsatisfied, then a denunciation may follow. Its purpose is to signify that the supreme power of a state has determined another state is unjust and will not do the right. The author praises the Romans for never sending out their armies until they had demanded justice and warned their enemies to a defense, but such acts as throwing the bloody spear are only customs of a particular nation; there is no specific act required for a denunciation. One is necessary, however, in most circumstances leading to war in order to take booty legally.

The law of nature, writes Molloy, allows the despoiling during war of those whom it permits to kill. That comment introduces the discussion of the real purpose of the book—the law of war at sea. In respect to letters of reprisal, in ordinary circumstances they do not amount to a breach of the peace. When those who have letters of reprisal attack legally targeted ships that then resist, any damage or casualties done to them “will lie at their doors, for hindering the Execution of right, and that which the Law most justly approves of.”⁶² Acts that would lead to war on land do not necessarily bring about war at sea, outside the English Seas, which he includes in the proper realm of England.⁶³

The Dutch had a narrower definition of *causa belli* at sea. By 1678 French depredations of Dutch shipping, among other reasons, left William III of Orange, the most powerful man in the Dutch Republic, with a fierce

hatred of Louis XIV. William set to work to organize a powerful alliance to resist any further attacks by the French. He encouraged the German princes and the Holy Roman Emperor to organize a defensive alliance, called the League of Augsburg when created in 1686. Determined to break up the League before it became a real threat, in early September 1688 Louis ordered his forces to enter western Germany and, two weeks later, published an ultimatum to the German princes and the emperor to accept his demands within three months. It detailed his many grievances and injuries at their hands and alleged that the emperor intended to attack France as soon as he had defeated the Turks in Hungary. Louis, therefore, had ordered his troops to seize the fortifications along the Rhine only to prevent the emperor from using them as bases for the attack on France.⁶⁴ In short, it justified a preemptive attack.

Louis felt no need to issue a formal declaration, since serious fighting was under way in the Rhine valley before the three months had expired, although his ambassador in Germany argued against attacking Trier "when there is no declared war."⁶⁵ The German leaders, however, regarded it as necessary there be some formal act. In February 1689, the "Electors and Princes of the Empire" agreed to a resolution that urged the emperor to declare war. It accused Louis of violating the truce he had signed only a month before his troops struck into the empire, and it detailed the barbarous crimes they had committed—plundering, burning, and despoiling everything in "a deplorable and unchristian manner."⁶⁶ The resolution demanded that all in the Holy Roman Empire take arms to defend it; those princes and others who supported France or hoped to remain neutral were deemed enemies of the Empire until they performed their duty. Emperor Leopold, of course, responded favorably in March 1689, praising their "zeal, care and love for their country," and enacted the mechanisms for waging war—raising troops and money, ordering French subjects to leave the Empire and all subjects of the Empire then in France to return home within forty days, and banning commerce and correspondence with France.

Spain and France exchanged declarations of war in early April; they were little different from those the two monarchs had issued in the previous war, except that Louis chastised his Spanish counterpart for not allying with him in support of James VII/II.⁶⁷ Meanwhile, William of Orange took advantage of Louis's focus on the Rhineland to take a small army across the English Channel and force James to abdicate. In September 1688, he issued a "Declaration of Reasons inducing him to appear in arms" to defend his act and call on the English people to accept him as their true sovereign.⁶⁸ A similar document was proclaimed for Scotland. In 1689 a Scottish lawyer, Francis Grant, as an ardent supporter of the

Glorious Revolution, wrote *The Loyalists Reasons* to justify William's actions.⁶⁹ Accepting Grotius's position that there are only three possible states of existence for a nation—peace, war, or truce—he argues that William's "Declaration of Reasons" was a full and true declaration of war by one sovereign on another. William, as sovereign of a neighboring state, had the right to use force to punish James for his transgressions in abusing "our Propertie in our Goods, Liberties, and Laws." And so, William's victory allowed him to claim the throne not only on behalf of his wife, Queen Mary, but also by the right of conquest in a just war. James's flight to France gave Grant grounds for declaring he had abandoned the crown, and it had properly been given to William and Mary as co-sovereigns.

A key motive in William's seizure of the English throne was turning that realm from being Louis XIV's ally to his foe. In May 1689, England declared war on France immediately after the House of Commons petitioned the king to do so; and on the same day France reciprocated.⁷⁰ The Dutch Republic had declared war on France two months earlier. The most interesting point of this set of declarations, which otherwise followed the formats previously used by each state, is found in the one by the Dutch States General. It barred the Dutch from insuring French goods and ships or those bound for France "on forfeiture of the sum insured."⁷¹

Louis also offended Duke Victor Amadeus II of Savoy to the point that he declared war on France in 1690. The arrival of French troops in the duchy led the duke to call his council of war, which agreed that Savoyard forces should be used to drive the French out. The duke then went out to the square in front of his palace and announced to the people that he was breaking with France. They showed "so great an Aversion against the French that they offered to employ their Lives and Fortunes for the Service of His Royal Highness."⁷² By that point in time all the major states of western and central Europe, except for Denmark, had declared war on France. The anti-French alliance, however, had the usual problems of such leagues: the allied militaries failed to cooperate closely, and several members were unwilling to contribute fully to the war effort. Despite the odds against him, Louis fought the alliance nearly to a draw and escaped from the War of the League of Augsburg with only small losses when it ended in 1697.

Another reason France avoided serious defeat was Austria's inability to invest its full forces against France because of war with the Turks, which was nearly continuous throughout the seventeenth century. What is known as the "Long War" between the Ottoman Empire and Habsburg Austria had broken out in 1593. It sputtered to an end in 1606 with

the Treaty of Zsitva Török, more exactly a truce, which was signed for twenty years instead of the usual ten. In it, the Ottomans recognized the Austrian Habsburgs as an equal power for the first time.⁷³ It was the first formal pact the sultan signed outside of Constantinople. He acknowledged the Habsburgs were "Roman Emperors," not merely "Kings of Vienna," as the Ottomans had previously called them. Since their conquest of the Byzantine Empire in 1453, the sultans always had insisted on using the title of emperor solely for themselves. The Ottomans also agreed that Austria would pay tribute to the sultan one final time, and they would send officials of high rank as ambassadors to Vienna instead of using menial servants; the use of men of low rank had served as highly visible symbols of the Ottoman position that the sultan was superior to Christian rulers. In the seventeenth century, the sultans began also to accept other European sovereigns as their equals, and one result was that they began to use forms of diplomacy, including declarations of war, closer to the western style.

The warring sovereigns in eastern Europe followed the tendency of more frequent declarations of war through the course of the seventeenth century. Yet the unsettled borders and the presence of footloose fighting men and nominally subject princes, who usually ignored the wishes of their ostensible sovereigns, often led to wars erupting without any declarations. The longest and bitterest war for the Turks in the seventeenth century, the attack on Venetian-held Crete, began in 1645 without any sort of notice. The Knights of Malta bore responsibility for the war, having attacked an Ottoman convoy taking pilgrims to Mecca. Many prominent Turks were killed or captured, and Sultan Ibrahim I accused Venice of collusion, which it vehemently denied. Having decided on war, Ibrahim used a ruse to catch Venice by surprise, making it appear his fleet was headed to Malta, and then striking at Crete. Accordingly, a declaration of war would have given away the ruse. Perhaps the sultan also felt no obligation to issue one, because none of his predecessors had ever recognized Venice as an equal.

Fourteen years after Crete finally fell to the Turks in 1669, Mehmed IV sent a declaration of war to Emperor Leopold I. The two empires had signed a twenty-year truce in 1664, in which Ottoman suzerainty over the duchy of Transylvania was accepted. The Habsburgs continued to assert their rights in it, however; and in February 1682, the duke of Transylvania, Michael I, issued "The Declaration of the Hungarian War against his Imperial Majesty," which denounced the Habsburgs for "destroying and trampling liberty," and especially for preventing the free election of the Hungarian king, the "first and fundamental law amongst Hungarians."⁷⁴ Because of the lust for dominion, the insatiable avarice,

and cruelties of the Habsburg king and his officers, the only remedy is war, and arms must be resorted to in defense of “that most righteous cause.” Duke Michael denied that religion had any role to play in his decision to call for war, and justified his alliance with the Ottoman Empire by recalling the many times Christians had allied with Muslims, naming France’s partnership with the Turks in 1542 as one of several examples. The manifesto concludes with a call on the Lord God to “bless our sincere and lawful endeavours.”

Five months later, Sultan Mehmed sent a letter to Emperor Leopold denouncing him for acting against Turkish interests and violating their friendship, “although we have not offended you either by war or any other way.”⁷⁵ The Sultan declared he intended to make himself the master of the German empire, and his horses would trample underfoot everything and everyone in the emperor’s lands. He intended to establish his religion in those lands and warned Leopold not to depend on “your Crucified God, whose wrath I fear not. . . . I will according to my pleasure put your sacred Priests to the Plough and expose the Breasts of your Matrons to be Suckt by Dogs and other beasts.” In conclusion, the sultan advised Leopold: “You will do well to forsake your Religion, or else I will order you to be consumed with Fire.” Despite the vividness of the destruction that awaited him and his people if he did not comply, the emperor accepted the challenge to war. In August 1682, the sultan ordered the *tug*, the seven crimson poles with black horsetails attached to orbs at the top, brought out from deep in the Topkapi Palace and planted beside the Imperial Gate.⁷⁶ The major event of the ensuing war was the great siege of Vienna in 1683, which the Austrians withstood with aid from Poland’s King John Sobieski. In 1687 the Hungarian nobles at war with Vienna conceded and took an oath of fidelity to the Hapsburgs as the hereditary kings of Hungary.

The war continued with little activity until the great Austrian victory at Zenta in 1697, which led to the Peace of Karlowitz of January 1699. The Turks were at a disadvantage during the two months of negotiations with the Christian states while the peace was being hammered out, because the Ottoman state had never used diplomacy and compromise as the means of ending a war; previous agreements had always involved either abject surrender by the other state or a truce. The Turks lacked both the diplomatic corps and experience for such negotiations. Nonetheless, the Turkish representatives managed to forge a treaty with smaller losses for their empire than the military situation might have indicated. It marked the first time that part of Dar al-Islam—Hungary—was given up in a formal agreement. After 1699 the Turks began to develop a formal diplomatic corps, but they did not yet have an understanding of diplomatic immunity.⁷⁷

When the Ottomans declared war on another state, its enemy's ambassador would be thrown into prison, where he might remain for a long time; the reason for this behavior was the hope of forcing ambassadors to reveal the full extent of their instructions. Examples of that practice involved the Venetian ambassador in 1714, and Habsburg and the Russian envoys in 1768. Until the late eighteenth century, western ambassadors were expected to wear Turkish garb during audiences with the sultan.

Despite that exception to western diplomatic practice, even the Turks agreed it was a well-established principle that waging a lawful war required a declaration of war of some sort.⁷⁸ It was also agreed that only true sovereigns could declare war, although there had been several instances of princes with dubious standing declaring war in the seventeenth century. There was, however, little agreement on what format was need for a declaration of war, nor who would have to be named in it, or what charges had to be presented. Those issues were not settled in the seventeenth century, neither would they be in the next one.

CHAPTER 6

THE EIGHTEENTH CENTURY

As of the beginning of the eighteenth century, war had returned to being more of a gentlemanly affair, at least in comparison to the Thirty Years War, and gentlemen announced their intentions to other gentlemen, whether fighting a duel or going to war. The Scottish philosopher David Hume declared that once civil governments had been established in contiguous nations a new set of obligations to neighboring states appeared. Their selfishness and ambition, however, had been perpetual sources of war and discord. Hence, they began to regulate themselves with a new set of rules, called the laws of nations. “Under this head we may comprize the sacredness of the persons of ambassadors, the declaration of war, the abstaining from poison’d arms.”¹ Authors in the century’s early years had good reason to concur that the necessity of a formal declaration of war had become a well-established principle. Monarchs, especially Frederick the Great, were less convinced of its necessity, and a broadening gap developed during the century between what theory dictated and what monarchs actually did.

The large number of formal declarations of war that began the Great Northern War and the War of the Spanish Succession seemed to confirm Hume’s conclusion. The first war occurred because Poland, Denmark, and Russia wanted to destroy Swedish hegemony in the Baltic Sea and gain revenge for earlier defeats. They saw their opportunity when Charles XII took the Swedish throne at age fifteen in 1697. Certain that the young king would be easy to defeat, they formed an alliance in 1699 and agreed to declare war on Sweden. Before any declaration was forthcoming, King Augustus II of Poland, who was also duke of Saxony, sent forty thousand Saxons to attack Swedish-held Riga in March of 1700. Charles then declared war on Poland and Denmark.² Peter the Great of Russia held off until he received word that the Ottoman Empire had agreed to a thirty-year truce in a conflict that had been ongoing since 1695. It had taken

thirty-six days for word to reach Moscow that the sultan had accepted the truce. The next morning, August 9, 1700, Peter declared war on Sweden. The proclamation was read from the Bedchamber Porch of the Terem Palace in the Kremlin. It stated that war would be waged to right the many wrongs Russia had suffered from the Swedish kings, and especially to repay what Peter believed was ill treatment that he received on a visit to Riga in 1697. He intended to win back the provinces of Ingria and Karelia lost to Sweden, “which have always belonged to Russia and were lost in the Time of Troubles.”³

Early on, the war went in Sweden’s favor, especially with Charles’s victory over Peter at Narva in November 1700. The combined strength of Charles’s foes, however, along with his rashness as a commander and his refusal to offer peace terms when he held the advantage, inevitably wore down his army. When the Russians defeated him at Poltava in July 1709, Charles took refuge in the Ottoman Empire. Peter demanded that he be handed over or required to leave, but Sultan Ahmed III refused. When Peter sent an ultimatum with a deadline of October 10, 1710, the sultan found it insulting. After consulting with his *divan* (council), and receiving a *fatwa* from the Grand Mufti that war under those conditions was just and necessary, he declared war against Russia in November 1710. As was traditional, the sultan ordered the *tuğ* placed beside the Imperial Gate of the Topkapi Palace in Istanbul. Peter Tolstói, the Russian ambassador, was seized, paraded through the streets nearly naked, and imprisoned for the war’s duration. It lasted only six months, however, for, in 1713, once the two armies faced each other across the Pruth River both sides agreed to a truce.

Denmark had been quickly defeated in 1700, but it hoped to reopen hostilities to win back territories lost to Sweden. After the Swedish defeat at Poltava, the Danes saw their opportunity and declared war. The declaration of war arrived at Stockholm on October 18, 1709. It denounced Sweden for cheating in respect to the Øresund tolls, and mistreating the people of four Danish provinces conquered by Sweden. With the odds badly against him after the Turks withdrew from the war, Charles made his way back to Sweden and was killed in 1718 while leading an attack on Danish-ruled Norway. His death allowed negotiations to begin, resulting in the 1721 Peace of Nystad. Its most notable provision gave Peter a “Window to the West” on the Baltic, where he built St. Petersburg.

Concurrent with the Great Northern War was the War of the Spanish Succession. When Charles II of Spain died in 1700 without a direct heir, two princes had strong claims to the Spanish inheritance: Louis, the son of Louis XIV and Maria Theresa, Charles’s elder half-sister; and Emperor Leopold I, the son of Charles’s second half-sister. Both Louis XIV and

Leopold knew that they dared not propose a candidate who would unite their crowns with that of Spain, so Louis proposed his second grandson, Philip of Bourbon, while Leopold backed the claim of his younger son, Charles of Austria. Louis, however, was holding the trump card: shortly before dying, Charles II had signed a will that recognized Philip of Bourbon as his successor, if he pledged to keep the Spanish empire intact. Well aware that if he allowed his grandson to take the Spanish throne, there would be war, Louis hesitated, but there was no possibility that he would pass on this chance to aggrandize his dynasty. In November of 1700, he announced that his grandson Philip would accept the Spanish throne, and further, Philip would keep his place, then third, in the line of succession for the French throne. That was as sure a cause for war as there was in that era.

Austria, England, and the Dutch Republic quickly negotiated the Grand Alliance, which supported the Austrian claim to the Spanish Empire, demanded concessions for the Dutch along their border with the Spanish Netherlands, and increased trade for the English in Spanish lands. When Louis installed his grandson as Philip V of Spain and proclaimed that James Stuart, James II's son, was rightful king of England, the members of the alliance declared war. William III's death in March 1702 was only a hiccup in the march to war, as his successor, his sister-in-law Anne, followed his policy to the letter. On May 15—the Duke of Marlborough having arranged the common date—all three members of the Grand Alliance declared war on France.

Queen Anne's declaration of war was presented to Parliament on May 15. She proclaimed that the treaty creating the Grand Alliance required England to act in order to preserve the liberties of Europe and check the exorbitant power of France. She noted that the French had already seized a large portion of the Spanish crown including Milan and the Spanish Netherlands and had blockaded the entrance into the Mediterranean and the ports of Cadiz and the West Indies. Furthermore, the French king had recognized the pretended Prince of Wales as king and had caused Spain to do the same. Thus, "We find ourselves obliged, for maintaining the public faith, for vindicating the honor of our crown, and for preventing the mischief which all of Europe is threatened with, to declare, and we do hereby declare war against France and Spain."⁴

All English officers were ordered to execute acts of hostility on land and sea against France and Spain. The queen banned commerce and correspondence with the two countries and their subjects and assured those subjects of the two states dwelling in her realm that if they acted dutifully toward her, their persons and properties would be protected. The next day the House of Lords gave the queen its "most humble thanks" for

informing it of her intention of declaring war and assured her that “we shall never be found wanting, to give your majesty our utmost assistance in prosecuting so just and necessary a war.” The House of Commons likewise thanked her for communicating her decision and ensured her, “we will to the utmost enable your majesty to carry on the said war.”⁵

The Dutch declaration of war was longer and emphasized the French aggression against the Netherlands in violation of the Treaties of Nijmegen and Ryswick. It also put greater emphasis on trade issues, especially Louis XIV’s refusal to implement the reduced tariffs mandated in the Treaty of Ryswick. For the Dutch, however, the major reason to go to war was the French seizure of the Barrier Fortresses. Ryswick had arranged for the Dutch to garrison five forts within the territory of the Spanish Netherlands to serve as a defense against further French aggression. A year earlier the French had ejected the Dutch and garrisoned the forts themselves.

For Emperor Leopold II the main reason for declaring war was the fact that his forces were already engaged in hostilities with the French in Italy. Louis XIV, in the name of his grandson, had ordered the French army to occupy Milan, Mantua, and other Italian places ruled by Spain. Leopold claimed these were Habsburg properties and rightly his. The emperor denounced the French for failing to live up to the terms of the Treaty of Ryswick by holding on to several forts that it required them to evacuate. In respect to the claim to the Spanish throne, Leopold asserted that intense French pressure and corrupt Spanish advisers in the pay of France had overwhelmed the dying Charles II and coerced him into signing the will recognizing Philip of Bourbon as Spain’s king. Accordingly, Leopold was declaring war in his own name and that of the electors, princes and states of the Empire. In September 1702, Louis concluded an alliance with Bavaria, which then declared war on the Habsburg Emperor.

The two maritime members of the Grand Alliance, England and the Dutch Republic, concentrated on gaining control of Spain. They transported the Austrian prince, who called himself Charles III of Spain, to Spanish soil and worked to persuade Portugal to enter the war on their side. Portuguese king Peter initially supported France, but in May 1703, Portugal and Britain signed a treaty, drawn up by British ambassador John Methuen, that granted mutual privileges for the trade in Portuguese wine and English textiles. In December 1703, a military alliance was made between Portugal, Austria, and Britain, in preparation for an invasion of Spain. When an allied army including Portuguese troops crossed the Spanish border in 1704, the Bourbon king Philip V declared war on Portugal.⁶

With the war now being fought on Spanish soil, Catalonia rose up in support of Charles of Habsburg, while the rest of Spain adhered to the French claimant, Philip V. After the allies gained control of Catalonia, Charles took up residence at Barcelona. The allied effort to make him king of all the Spanish lands floundered unexpectedly when his brother, Joseph I, who had succeeded their father, Leopold, in 1705, died in April 1711 without a son. Charles now became Austrian emperor, and the members of the Grand Alliance were hardly more eager to see him in control of the Spanish Empire than the Bourbon Philip V. After Philip agreed to renounce his right to the French throne, negotiations resulted in the Peace of Utrecht in April 1713, signed by most of the warring states.

Catalonia fought on alone against the hated Castilians. On July 9, 1713, the Catalan Estates met and, by a vote of 78 to 45, decided in favor of declaring war on Castile. At six o'clock in the morning the next day, eight trumpeters and drummers announced the declaration of war in the name of Charles III against Philip of Bourbon in the main square of Barcelona.⁷ The people shouted, "Privileges or death!" a reference to the traditional privileges of Catalonia, which they knew would not survive a Castilian victory. Relying on guerrilla warfare, the Catalans resisted the Spanish army until September 1714, when they surrendered to prevent the burning of Barcelona.

Since the War of the Spanish Succession coincided with the Great Northern War, nearly every sovereign state in Europe that had the power to declare war had done so between 1700 and 1713, although in several cases violence had been going on for some time before the declarations were issued. In keeping with papal tradition, Pope Clement XI did not declare war when, in October 1708, he ordered the papal army to resist Imperial forces headed to take control of the kingdom of Naples for Charles of Austria; but he did excommunicate Prince Eugene of Savoy, the Habsburg commander in Italy. This action was the papal equivalent of declaring war. By January, Clement had to concede everything the Austrians wanted, including recognition of Charles as king of Spain and free passage of their troops to Naples.⁸

The one significant state in Europe that had not participated in either of these early eighteenth-century wars was Venice, which clung to a precarious neutrality. It had, however, taken advantage of the Austrian victory over the Turks in 1697 to seize the Morea (southernmost Greece). This loss of a part of Dar al-Islam, along with appeals from Orthodox Christians in the Morea that the Venetians were mistreating them, led to the Turks' decision to declare war on Venice in December 1714.⁹ The Turks easily recovered the Morea by late 1715, but the Ottoman victory frightened Austria into an alliance with Venice. The sultan declared

that this alliance violated the Peace of Karlowitz. This episode provides the most extensive description of an Ottoman declaration of war. In early January 1716, the Ottoman *divan* met in Adrianople to decide on a course of action. The Grand Vizir Damad-Ali presented the grand muf-ti's *fatwa* that Islamic law required a war against Austria and produced astrological charts predicting victory. The horsetails were placed outside the sultan's palace, and Damad-Ali led the Turks to war on Austria.¹⁰ He was badly defeated and killed in the Battle of Peterwardin in August 1716. The Austrian capture of Belgrade a year later led to a new peace treaty in July 1718.

By the time fighting had ended in the Balkans, new violence had erupted in western Europe. Philip V of Spain was determined to reclaim his place in line to the French throne, where he stood first after the succession of his grand-nephew Louis XV in 1715, and he was also eager to carve out an Italian kingdom for his younger son. The other powers were taken by surprise when a Spanish force landed on Austrian-held Sardinia in August 1717 and occupied it in two months. Austria, England, France, and the Dutch Republic organized the Quadruple Alliance and began operations against Spain, largely at sea. British ships landed an Austrian force on Sicily to hold it against Spain, and the arrival of the Spanish fleet led to the Battle of Cape Passaro in August 1718, before any declarations of war were issued,

Four months later, George I of Great Britain informed Parliament that despite "all of his endeavors to procure redress to the many injuries done to the subjects of Great Britain by the king of Spain, to the unspeakable detriment of the trade of these kingdoms, or even to obtain a discontinuance of the unjust hostilities carrying on by that crown," he now found it necessary to declare war on Spain.¹¹ This time there was a lively debate in the Commons. Many MPs objected, arguing that they did not see the war as necessary in order to gain redress of grievances against Spain and the king was seeking to achieve the Quadruple Alliance's goals, not those of Britain. Robert Walpole, the future prime minister, "exclaimed against the injustice of attacking the Spanish fleet before the Declaration of War." Joseph Jekyll, a supporter of the king, retorted: "Was it just of the king of Spain to attack the emperor's domains while he was engaged in a war with the Turks, without any declaration of war?" The Commons then passed a resolution by a vote of 178 to 107 thanking the king for informing it of the declaration of war and pledging to support him with "the greatest cheerfulness and the utmost vigour, assist and support." In the House of Lords one member asked for a day's delay to check the standing treaties to determine whether war was necessary, but he received no support, and the Lords voted to vow their support. George I in turn

thanked both of the houses for their support and loyalty.¹² Letters were dispatched to the governors of the plantations (colonies) to inform them that the king in his council had signed a declaration of war against Spain, and the heralds at arms had proclaimed it “in the usual places and with the accustomed formalities.”¹³ Included in the letters were copies of the declaration, which the governors were ordered to post so that the king’s subjects “may prevent any mischief from the enemy and do their duty in harassing the subjects of Spain.”

Austria did not declare war against Spain, presumably on the grounds that Spain had attacked first. France joined the war in June 1719, and the Dutch, in August. Philip V’s attempt to aid the Stuarts in Scotland failed when the Spanish fleet floundered in a storm; the Austrians occupied Sicily; and a French army invaded Spain. Philip agreed to the Peace of The Hague in February 1720, which recognized the right of his son to three duchies in Italy, while the duke of Savoy gained Sardinia and the title of its king.

With Europe largely at peace for the next two decades,¹⁴ its political theorists were busy seeking to fit the practices of the law of war used in recent conflicts into their understanding of that law. With its large number of works that discuss declaring war, the first half of the eighteenth century was the most productive in history. Among the century’s earliest authors was Gershom Carmichael, the first Scot to make a contribution to political thought. Born in 1672 into a Presbyterian minister’s family, he taught at the University of Glasgow until his death in 1729. Carmichael is considered to have introduced the natural rights tradition to Scotland. In 1718, he published his lectures on Pufendorf’s work with the title of *Supplementa et Observationes ad C[larissimi] Sam[uelis] Pufendorfii Libros Duos De Officio Hominis et Civis* (*Supplements and Observations upon the Distinguished Samuel Pufendorf’s Two Books On the Duty of Man and Citizen*).¹⁵

Carmichael’s first law of nature declares that every man longs for lasting happiness in reverence for God, which is expressed by respect for God’s creation through self-respect and respect for others. The second and third laws of nature are that one respects oneself and has respect for others. The most appropriate way of signifying respect for others is to acknowledge that every person enjoys certain natural rights. Accordingly, no one may enslave another; “for men are not among the objects which God has allowed the human race to enjoy dominion over another.”¹⁶

The starting point of Carmichael’s view on war is the principle that every individual has a natural right of self-defense. Thus, to Grotius’s definition of war as the state of those who are in violent conflict, Carmichael adds the phrase, “for the sake of rights, so as to exclude

conflicts undertaken for practice or profit." Every just war presupposes a wrong, which has come about through an unjust action that violates some natural right, or through the omission of an action, which constitutes a refusal to satisfy a right.

By nature, according to Carmichael, in the case of legitimate defense against aggression, no declaration of war by injured side is required. In other circumstances, the law of nations requires declarations of war, which are of two types:

A conditional declaration, which is associated with a demand for restoration of property and precedes the outbreak of war by some interval of time, or a pure declaration, which accompanies the actual commencement of hostilities. The aim of a pure declaration is to announce what right it is for whose protection or pursuit the war is being waged.... The aim of a conditional declaration is to make known to all that what we claim as rightly ours or as owed to us, cannot be obtained without military force.

If the state against which a conditional declaration has been issued is not willing to give satisfaction for the injuries alleged, it is obliged at the earliest opportunity either to deny the facts or to present other facts that nullify the first state's claim. Even if one is acting only to take back one's own property, a conditional declaration is required if one cannot recover the property without harming those who are holding it.

On this last point, Carmichael received a rejoinder from Jean Barbeyrac, a French Huguenot who had fled to Germany after Louis XIV's revocation of the Edict of Nantes. Barbeyrac is best known for his French translations, done between 1724 and 1734, of the major works of Grotius and Pufendorf, adding numerous annotations and some corrections. They became the standard editions of the works and sources for their English translations.¹⁷ Barbeyrac rejected Carmichael's opinion that a conditional declaration was required before using force to reclaim one's possessions from persons not party to the war. He considered those retaining such possessions to be "accomplices in the Injustice, and who deserve to be treated with no greater Tenderness than the principal Detainer."¹⁸

According to Carmichael, a conditional declaration is not required when war is made on the guilty parties themselves in order to inflict punishment on them; in such a situation a "pure" declaration, without conditions, is called for. Force should never be used against an enemy without signifying the reason, unless it is clear from the situation itself, that is, in self-defense. Even when someone shows by obvious signs that he intends to use force against a state, a pure declaration is required. When there has been an explicit conditional declaration and the required restitution is not

forthcoming, it is not necessary to make a pure declaration. Carmichael concludes his discussion of declaring war with the statement that a declaration is required for formal war by the law of nations.

In England, Thomas Rutherford (1712–71) seconded Carmichael's stand on the need for declaring war. As one of Grotius's more ardent disciples, Rutherford published lectures given at the University of Cambridge on *De Jure Belli et Pacis* under the title of *Institutes of Natural Law* in 1754. Rutherford's discussion of war is more succinct than Grotius's. He accepts Cicero's definition, "War is a contention by force," but agrees with Grotius that the definition must be expanded to include the situation when there is some matter of dispute that cannot be settled by any other means than force.¹⁹ The difference between private war and public war is not based on the size of the armies or the rank of the persons involved but on the fact that the public war is the act of the two states' executive bodies. When a state uses force against pirates or robbers from another land, it is a mixed war, because it is public on one side, private on the other.

Public war, says Rutherford, is divided into perfect and imperfect, or solemn and unsolemn war. He agrees with Grotius that perfect war is public war expressly declared or proclaimed. The very sense of the word *war* by common usage indicates perfect war; other forms of war usually have a modifier such as private or civil. Imperfect wars between nations carried on without declaration are indeed public wars, but they seldom are wars at all; they are often called reprisals or acts of hostility.²⁰ The use of a state's forces by lawful authority to suppress rebellion is not perfect war, although rebels have issued declarations of war at times. A solemn war "cannot appear to be a national act without being proclaimed or declared."²¹ Such war is just war, and it provides impunity for what is done during it. Among the causes often given for war that do not meet the definition for a just war are fear of the growing power of a nation (preemptive war) and false religion. The declaration of war, by which the war becomes a solemn one, makes it a perfect public war and a just war according to the laws of nations, but its real effect is to make the war a general conflict of one whole nation against another under a general commission. In imperfect wars, only part of a nation such as the navy is involved in acts against other nations by reprisals and privateering. Rutherford argues that a demand for reparations must be made according to the law of nations. Such a demand may be made in a conditional declaration of war, but they are two separate acts. If the offending nation meets the demand for reparations, then the declaration is void. Last, the formalities of declaring war are a matter of civil law for each nation; it determines by what officers, in what places, and with what ceremonies a declaration of war is issued.²²

The strong statements on the need for declarations of war by Carmichael and Rutherford found no support from Cornelius van Bynkershoek, a Dutch jurist, the most outspoken of those who argued that no formal declaration of war was needed for public war. Bynkershoek was born in 1673 at Middelburg in Zeeland and studied law at the University of Franeker, where he became Doctor of Laws “both ancient and modern” in 1694. In 1703 he joined the high court of the Netherlands and became its president in 1724. Although he had a busy judicial career, he found time for legal scholarship before his death in 1743 in The Hague. Bynkershoek emphasized contemporary practice over concepts derived from the Bible and the ancients, becoming a leading member of the Positivist school. His best-known book is *De dominio maris dissertatio* (*Dissertation on Dominion of the Sea*), published in 1702. He is credited with proposing in it the “three-mile limit” rule, which states that a nation may claim sovereignty over territorial waters to a distance of three miles out to sea, the distance that a heavy cannon fired from shore could reach. His purpose in presenting this principle was to support the Dutch position in disputes with Britain over the right of free passage through the Narrow Seas.

Bynkershoek’s discussion of war is in his *Questiones Juris Publici* (*Questions of Public Law*), which appeared in 1737.²³ It is divided into two books: the first dealing with war; the second, a much broader range of legal topics. In his preface he states that he will not repeat what others have said before him but will be guided only by common sense, the chief mistress of international law. He draws heavily on the history and legal documents of the Dutch Republic. Among his predecessors in international law, he cites Grotius and Pufendorf the most, but he finds even his favorite thinkers often in error and feels free to criticize their opinions, often severely.

In his preface he states that he does not intend to take up any problem:

That does not have reference to our government, nor on which I have not cited all the relevant laws of our state from the very beginnings up to our own times. Though the questions I have treated may have interest in any state, they are all closely connected with affairs of the Belgian Confederation. I have added my own opinion, thinking that, in a free republic, this liberty was permissible. But I have thought wise to omit it in questions near our own day, lest I expose myself to ill will or seem to take up swords against the authority of any one still living, if I express a dissenting view.²⁴

Bynkershoek begins by defining war. He rejects Cicero’s definition that war was a kind of contest by force, since that emphasized the state or

condition instead of the action of fighting. He also judges as inadequate Gentili's definition, which spoke of "a just contention by public arms," and provides his own: "War is a contest of independent persons carried on by force or fraud for the sake of asserting their rights." He affirms the public character of war: the contention of parties without a common superior, even of singular individuals, that he also implies the just cause and purpose of the struggle and finally admits all kinds of violence or stratagem, excepting only perfidy. He justifies this exception by declaring that once faith is pledged, the foe ceases to be an enemy. When the foe truly is an enemy, all means of combating and subduing him are legitimate, even if the harm done far outweighs the original wrong. Justice and generosity must never be confused. In using the term *force* in his definition of war, he notes:

I did not say 'lawful force'; for in my opinion every force is lawful in war. So true is this that we may destroy an enemy though he be unarmed, and for this purpose we may employ poison, an assassin, or incendiary bombs, though he is not provided with such things: in short everything is legitimate against an enemy. I know that Grotius is opposed to the use of poison, and lays down various distinctions regarding the employment of assassins. But if we follow reason, the teacher of the law of nations, we must grant that everything is lawful against enemies as such. We make war because we think that our enemy, by the injury done us, has merited the destruction of himself and his people.²⁵

Just as Bynkershoek differs with his predecessors on what is permitted in war, so he argues that there is no need for a declaration of war for a war to be lawful. He devotes an entire chapter to the matter. He notes that such authors as Gentili, Grotius, and Ulrich Huber, one of his teachers at Franeker, argue that a war should be openly declared, which opinion accords with the practices of the European nations. "Indeed I grant that before we resort to force, we must demand satisfaction for the injuries sustained or complained of. However, the question here at issue is whether we may apply force without a declaration of war as soon as reparation has been demanded and refused."²⁶

Bynkershoek cites Christian Thomasius's *Fundamenta juris naturae et gentium* (*Foundations of the Law of Nature and Nations*, 1705)²⁷ as rightly considering a declaration of war as an act of mere humanity, which no one can be compelled to perform. Thomasius asked whether there has ever been a real difference between a war declared and one not declared and concluded that has been none. Bynkershoek agrees that a declaration is not demanded by reason; while it is a thing that ought be done, it cannot be required as a matter of law. War may begin by a declaration, but

it may also begin by mutual hostilities. He provides many examples from recent history in which, he argues, hostilities began before any declaration of war. He gives as one such example the entry of Sweden into the Thirty Years War; he does not regard Gustavus Adolphus's manifesto as a declaration of war. War may also begin properly upon the denial of a demand: "I grant that we ought first to demand what is due us, but not that the demand must be accompanied with an actual declaration.... Every one is at liberty to make or to withhold the declaration, otherwise a declaration is a certain solemn form that could only have been introduced by an agreement between nations—a thing which does not exist."²⁸ It is true, he writes, that nations and princes are not generally willing to wage war without a declaration, for they wish to render their victory more honorable and glorious. "But here I must repeat the distinction between generosity and justice. The latter permits the use of force without declaring war, the former considers everything in a nobler manner, deems it far from glorious to overcome an unarmed and unprepared enemy."

Moreover, writes Bynkershoek, the custom of declaring war was not usually observed among the ancients except the Romans. Because the Europeans follow the customs of the Romans, whom they hold in such high esteem, they have taken over their customs as well as their laws.

If any European sovereign should begin a war without a declaration, his action would be considered contrary to the general custom of European nations; but only those who consider as universal law the customs they observe in their own country would call his act contrary to the law of nations. If two sovereigns are engaged in hostilities without having declared war, can we have any doubt that war is being waged according to the will of both? Be that as it may, the instances that I have adduced are sufficient to prove that we need not think so favorably of European customs as to deduce from them the necessity of making declarations of war.²⁹

Bynkershoek's strong stand that there was no need to declare war was highly unusual for the eighteenth century, but he had some followers. The Englishman Richard Lee published "the principal part" of the *Questiones Juris Publici* in 1759 under the title of *Treatise of Captures in War*. Calling Bynkershoek an author of great reputation, Lee uses his definition of war: "a contest between independent sovereigns, who are therefore entitled to pursue their own just rights by force, or by artifice."³⁰ Lee states, "The Law of nature indeed does not lay us under any necessity of proclaiming war," although the European nations seem to have adopted as a requisite for a lawful war that it be publicly declared either by proclamation or by sending a herald. He agrees that it is necessary that a nation demand redress of its injuries by another before using force,

but when such a demand is rejected, the injured nations may proceed to war without a declaration. It is clear, Lee says, that not all nations agree to the obligation of declaring war, and it becomes a law of nations only when all accept it. He argues that the best reason for solemnly declaring war is informing neutral states of the impending war so that they may observe the rules and customs of neutrality. Lee also notes the distinction between particular and general wars. The former involve the use of *marque* and reprisal, which is restricted to those with the right to injure the enemy; such violence can often grow into a general war, often without it being solemnly declared.³¹

Most authors who wrote on the laws of war after Bynkershoek, however, cite him infrequently except on the law of the seas, although it is not clear whether this was because his views on war were not well known or because they disagreed with his opinions.³² One of those who disagreed with him on the subject of declaring war was Jean-Jacques Burlamaqui. Born in 1694, in Geneva, at age twenty-five Burlamaqui was named professor of ethics and law at the University of Geneva. He taught for fifteen years, until ill-health forced him to resign. He was then elected a member of Geneva's council of state, and he earned a high standing as a statesman. He died in Geneva in 1748. His clear, precise style led to the use of his works as law textbooks.

Burlamaqui's discussion of war occurs in Book Two of *Principes du droit politique* (*The Principles of Politic Law*, 1751). He states that because of its importance in human affairs, "the subject of the right of war merits to be treated with great exactness." It clearly requires great length as well, as he deals with topics that most other authors ignore or barely touch on, which makes his book a valuable source for mid-eighteenth-century thought on war. He argues against Hobbes:

The natural state of nations is certainly that of society and peace. Such is the natural and primitive state of one man with respect to another; and whatever alteration mankind may have in regard to their original state, they cannot, without violating their duty, break in upon that state of peace and society, in which nature has placed them. . . . It is a fundamental maxim of the law of nature and nations, that individuals and states ought to live in a state of union and society; that they should not injure each other, but on the contrary should mutually exercise the duties of humanity. Whenever men practise these duties, they are said to be in a state of peace.³³

Opposite to the state of peace, writes Burlamaqui, is what "we call war, which, in the most general sense, is no more than the state of those, who try to determine their differences by the ways of force. I say this is the most general sense, for, in a more limited signification, common use

has restrained the word war to that carried on between sovereign powers." Divine law gives both individuals and states the right to defend themselves. It is just that force be employed against those who seek to deprive them of their property and rights and even to destroy them. It is for the good of society that people oppose the malice and efforts of those who subvert its foundations; otherwise humanity would become the victim of robbery and worse. He says, "For the right of making war is, properly speaking, the most powerful means of maintaining peace." The sovereign, in whose hands the interest of the whole society is lodged, has a right to make war. He follows Hobbes in arguing that a civil war is a true war, because the two sides are no longer in a relationship of sovereign and subjects but in a state of equity and are trying to obtain justice by their own strength of arms, which is the proper definition of war.³⁴

Before considering the issue of declaring war, Burlamaqui examines the three ways by which war can be avoided, to which he gives far more attention than did Grotius. The first is a conference between the contending parties. He cites Cicero as observing that this method of avoiding war was especially agreeable to the nature of humanity, since force belongs to brutes. The second way of ending a difference between those who do not have a common judge is using arbitration. To be sure, the more powerful neglect this method, but it is a way that great princes and peoples have taken. The third method is casting lots. Burlamaqui is dubious whether it is lawful to use entirely precarious chance to settle issues that could lead to war. He gives no examples from history, but he also says that single combats, which have often been used to terminate such differences, are in a way a resort to chance. Yet combat between small groups of men, agreed upon by both parties, is similar to using lots, and there are many examples in history of its use. But is it lawful to expose a whole state to the fate of such combats? On one hand, such means spare the shedding of much blood and reduce the calamities of war; on the other, by one blow the liberty and safety of the state are at risk; whereas in war, the loss of one or two battles may not end the war, and a third may prove successful. Nonetheless, he concludes, it seems right to use small-group combat as the lesser of two evils.

History shows, says Burlamaqui, that efforts to solve differences in an amicable manner usually fail. If then a decision is taken to undertake a war, it must be declared properly. He rebukes Grotius for arguing that the declaration of war belongs only to the law of nations; he finds it to be a requirement in the law of nature itself. Before a state takes up arms against another state, its sovereign should be summoned to make satisfaction. When one is actually attacked, the enemy must be set on not being accommodating. Hostilities ought not begin immediately upon declaring

war but should be delayed until it is clear that the enemy refuses to give satisfaction; otherwise declaring war would be only a vain ceremony. Burlamaqui believes that declaring war ought to serve as a warning. A just state seeks to convince all the world and even the enemy himself that only absolute necessity obliges the taking up of arms for the recovery or defense of just rights after it has tried every other method and given the enemy time to reconsider.

Burlamaqui divides declarations into conditional and absolute. The conditional is joined with a solemn demand of restitution and states that if the injury is not repaired, war will follow: that is, an ultimatum. The absolute includes no condition, and it completely renounces the friendship and society of the prince against whom war is declared. The just state, however, must always be ready to accept reasonable satisfaction, as soon as the enemy offers it. Nonetheless, it can be assumed that the sovereign against whom war is declared has already shown that he has no intention of sparing his foe the necessity of taking up arms against him. When war has been declared against a sovereign, it should be taken as declared not only against all his subjects but also against all those who have joined him or who will join him afterward. As to the manner of declaring war, it is a matter of indifference whether envoys, heralds, or letters are used, or whether the declaration is made to the sovereign in person or to his subjects, as long as he cannot plead ignorance of it.

The solemn denunciation, Burlamaqui argues, must be made according to the law of nature so that all might be assured that the war was undertaken by the consent of one or other of the nations or their sovereigns and not by private authority. Thus, when a herald is sent to declare war, it is clear to all that just war would be undertaken, and the enemy would be informed that there still is time to avoid it. Declarations of war also are marks of the due respect that princes have for each other and for society in general, to whom they give an account of their conduct in order to obtain the public approval. Last, Burlamaqui makes a distinction between declaration and publication of war. The former is made to an enemy to make him aware that he must prepare for war. The latter is made to subjects of the prince declaring war in order to inform them that they are to look upon a nation as their enemy and to prepare. Once a prince has declared war, his subjects are under an obligation so rigorous that no one is exempted from taking up arms for his sovereign: "Refusal would be a just reason not to tolerate such a person any longer in the society." Most states grant some subjects an exemption from military service because they have other necessary and useful duties, but it is not a privilege belonging to them by right. If a prince lacks troops for the war, all members of his state must take the field.³⁵

For Burlamaqui the declaration of war is the key element in distinguishing between perfect and imperfect war: "A perfect war is that, which entirely interrupts the tranquility of the state, and lays a foundation for all possible acts of hostility. An imperfect war, on the contrary, is that, which does not entirely interrupt the peace, but only in certain particulars, the public tranquility being in other respects undisturbed."³⁶ Imperfect war covers a wide range of possibilities, such as a minor border clash or a fight at sea that does not escalate into full-scale or perfect war. The author proposes that the most common form of imperfect war are reprisals, which involve the seizing the persons or property of the subjects of a foreign prince who refuses to offer justice but "without any other interruption of the public tranquility." Such acts are permitted under the laws of civil societies without requiring a declaring of war.

A last point on which Burlamaqui disagrees with Grotius involves the right of passage of troops through a neutral state into order to attack another. Grotius argued for such a right of passage provided it be requested prior to the movement of troops and the state sending them into the neutral territory have a just cause for war against the third state. Burlamaqui objects that the right of passage, for example, to people who have been expelled from their homeland, is only an act of humanity; it does not confer on a foreign prince an absolute right that might be enforced through violence. Just as a private person has the right to refuse to allow another to trespass on his land, so a state has a greater right to bar another state from sending troops through its territory, not only because of the great risk that such troops are likely to inflict harm on one's people, but also it runs the "risk of making our own country the seat of war."³⁷

Christian von Wolff disagreed with Burlamaqui on the right of passage and with Bynkershoek on whether a declaration of war is required without citing them. Wolff was born into a tanner's family of Breslau in 1679. His father sent him to the universities of Jena and Leipzig. Although his first interest was theology, he was a typical polymath of his era, having a deep knowledge of physics and mathematics as well as philosophy. In 1706 he joined the University of Halle, but a bitter dispute with the theology faculty led to his expulsion in 1723. He moved to the University of Marburg despite offers of positions from across Europe, including from Peter the Great. Frederick the Great also admired Wolff, and when he gained the throne in 1740, he arranged for Wolff to return to Halle. The duke of Bavaria ennobled Wolff in 1744, ten years before his death at Halle.

Wolff produced an enormous corpus on a vast range of topics; he is regarded as the most important German philosopher prior to Immanuel Kant. His major work on political thought, *Jus gentium methodo scientifica*

pertractatum (*The Law of Nations Treated According to a Scientific Method*), appeared in 1749.³⁸ It is an immense book, filled with cross-references to his earlier works, but, among ancient and recent authors, only Grotius is frequently cited. As the title reveals, Wolff believed that law could be explained according to the best scientific methods, making the book highly systematic. It is concerned only with the law of nations, which it argues is contractual. Wolff states that there is a law of nature that dictates the immutable principles of the law of nations. The law of nations in turn is strictly binding, and no nation can free itself or another from it. Arising from this law of nations are adaptations made by nations as needed for the promotion of the common good; this is called the voluntary law of nations, which arises from the association of states, the *maxima civitas* (greatest state), to which all the world's nations belong. In much the way that men who are free in nature come together to form the nation, so all the nations come together to form this greatest state. Individuals must obey the laws of their own nations, and nations must obey the voluntary law of nations.³⁹

According to Wolff, the right to wage war is in the law of nature. Just as persons have natural rights of self-defense and recovery of property, so do nations, even if war between nations is far different from what occurs between individuals. The right to war must be distinguished from license to war: The right to wage war does not allow a nation to go to war without just cause. Wolff devotes much space to delineating the just and unjust causes for war. One unjust cause for war is warring against nations that practice a false religion or are wicked; a second is attacking a neighboring state out of fear of its power. Neither religious war nor preemptive war is permissible. He then turns to the rights of war that rise out of the law of nations. He devotes twenty paragraphs to the issue of the passage of armies through neutral territory. Wolff argues that a nation should allow the passage of another nation's troops and equipment through its territory, but passage must be requested in advance and be harmless. If the nation asked to allow the passage of troops decides that harm might come by permitting it, it has the right of refusal. If, however, the nation requesting passage pledges that no harm will be done and that anything used or damaged will be properly paid for, and permission still is not forthcoming, refusal is a just cause of war for the requesting nation.⁴⁰

Declaring offensive war, says Wolff, falls under the voluntary law of nations; they are not required by the law of nature but are obligatory, because the practice of nations has so established them: "In an offensive war there always is need of an announcement."⁴¹ Only pirates and brigands attack without one. A declaration is a public announcement of war against another nation or its ruler. It must include both the announcement

of the nation's intention of going to war and the reasons why. "The facts are to be reviewed." Yet there is no reason to detail the enemy's vices; that would reveal that one's motive for war was simply a "desire for vengeance and other perverse impulses." A declaration is valid as long as it informs the foe that war is about to begin; there is no requirement for any specific method or ceremonies. It can be conditional or absolute: The former states that war will occur unless satisfaction is given for the wrong causing the war; the latter, that war will begin regardless of what the foe does. If the foe does accept the conditions offered in a conditional declaration, going to war then turns a just war into an unjust one. Wolff presents one instance when a declaration of war is not necessary: When a state finds that it must wage just war and it is impossible to send envoys or letters because the enemy refuses to accept them, and there is no third party to deliver the declaration.

Wolff insists that when a ruler declares war on another ruler, it is understood that a public war has been declared by one nation against another. A sovereign has the power to act for the whole nation, and all of the subjects of a nation become the enemy of all the subjects of the other. There is no need to declare war on an ally of an enemy; an ally, by aiding the foe, has made known that he wishes to participate in the war, and war is also declared against all of the enemy's allies. According to Wolff, a state about to declare a just offensive war on another can move an army to its border prior to declaring it. The comparison to duels, in which both men must be prepared, is erroneous, because delay in war is often detrimental to the state justly going to war. A state, he states, can even send an army into the would-be foe's territory prior to declaring war, as long as it is done without violence, for its right of free passage remains in effect until it commits violence.

The only clear eighteenth-century example of a state having its army at the frontier ready to invade at the moment of declaring war occurred in 1737, when Austria attacked the Ottoman Empire. After lengthy negotiations with Russia for a joint attack on the Turks, the Austrians felt that the time was right to move forces to the frontier in late May. Disagreements among the Austrians delayed declaring war for a month, until the generals urgently pointed out that the spread of malaria in the army was reducing its strength. On July 14, Emperor Charles VI, officials, clergy, and townspeople made a great procession through the streets of Vienna to the cathedral square, where the declaration of war was read; Charles ordered church bells rung every evening at 7:00 to notify all to fall to their knees and pray for victory over the infidel. That same day the declaration of war was delivered to the Turkish pasha at Nish, just inside Ottoman territory. He asked for a ten-day delay in hostilities until he could inform

the sultan and receive orders. The Austrians refused, and the following day the pasha agreed to surrender Nish in exchange for being allowed to leave freely.⁴² The two-year war ended when the Austrians realized that Russia, which was also went to war in July but apparently did not declare it, was making substantial gains against the Turks, while they were not. Austria made peace with the sultan in September 1739, and without its ally, Russia had to do so in November.

A year later both Austria and Russia were again allies in the War of the Austrian Succession. As its name indicates, its major cause was a crisis in the Habsburg family. By 1721 it was clear that the Emperor Charles VI's heir would be his elder daughter, Maria Theresa. Determined to pass his lands to her, he arranged for his family members to recognize her right to them over several male relatives and his older brother Joseph I's two daughters. Procuring their consent, he then asked the major states of Europe to accept this "Pragmatic Sanction," which all did, except for Philip V of Spain, who claimed the Austrian lands as heir to the Spanish Habsburgs. When Charles died in October 1740, Frederick II of Prussia, who had succeeded to the Prussian throne five months prior, announced that he recognized Maria Theresa as the Austrian ruler but claimed the Habsburg duchy of Silesia on the grounds that the duchy's law barred women from ruling it. Therefore, as the next male in the line of the long-ousted ducal family, it was rightfully his. In December 1740, Frederick sent his army to the border with Silesia before informing the Austrians of his intention. Two days later his army crossed the frontier without a declaration of war, which he deemed unnecessary, since he was merely taking what was legally his.

Earlier in 1740, Frederick had been involved in a dispute with the bishop of Liege, who was sovereign ruler in his bishopric, over two fiefs that Frederick claimed as part of the duchy of Jülich-Cleves, under Hohenzollern rule since 1614. He sent a manifesto to the bishop proclaiming that the law permitted any man whose property was unjustly taken from him to enter it with an armed force. He promptly dispatched troops into the disputed land but soon accepted 150,000 crowns from the bishop to concede his claim.⁴³ One can assume that he was ready to make the same argument for Silesia and possibly accept a similar settlement.

Maria Theresa called on the other states that had accepted the Pragmatic Sanction for aid, but none responded. In fact several German states led by Bavaria allied themselves with Prussia against her. Duke Charles Albert of Bavaria now claimed the German territories of the Habsburg dynasty as the son-in-law of late Emperor Joseph I and demanded the title of Holy Roman emperor. In a treaty of July 1741, he joined with France and Spain against Austria, and French troops were dispatched as auxiliaries for the

Bavarian army in an invasion of Upper Austria. As auxiliaries they wore Bavarian insignia. On the grounds that France itself was not at war with Austria, Louis XV did not declare war. Nor did Austria declare war on him.

There is no need to follow the tortured twists and turns of the next three years, except to note the irony of Charles Albert's coronation as emperor by the archbishop of Cologne in Frankfort on the very day that Munich, his capital, fell to the Austrians. By 1743, regular French forces were in Germany, and British soldiers were there under the command of George II in his capacity as duke of Hanover. On June 27, a battle between French and British forces took place in Bavaria with vast casualties on both sides, although the ambassadors of both realms had remained at their posts, and neither king had declared war. As Francis Whitworth, a member of Parliament, wrote, "'tis certain if taking of ships and killing of men be a state of war, we are now without a formal declaration in a war,"⁴⁴ and as Horace Walpole, a British diplomat, put it, "We have the name of war with Spain without the thing, and war with France without the name."⁴⁵

That comment on war with Spain referred to the War of Jenkins' Ear, as the conflict between Britain and Spain that began in 1739 was popularly known. In 1731, a Spanish coast-guard boat off Cuba boarded a British brig captained by Robert Jenkins, and one of his ears allegedly was cut off.⁴⁶ It had not created a stir at the time, but in 1738 Jenkins received the opportunity to tell his story before the House of Commons and dramatically produced a jar containing what he claimed was his sliced-off ear. The incident was proclaimed an insult to British honor and a clear *casus belli*. Britain sent forces to the West Indies and Gibraltar. In response Spain had all British ships in Spanish harbors confiscated. In August 1739, Britain recalled its ambassador from Spain and formally declared war on October 19.

King George's declaration of war, "given at our court at Kensington," was almost entirely concerned with the "many unjust seizures made and predations carried on for several years in the West-Indies, by the Spanish *guarda costas* and other ships acting under the commission of the king of Spain, contrary to the treaties subsisting between us and the crown of Spain, and to the law of nations."⁴⁷ It examined treaties dating back to 1670 to show how Spain had violated them despite the proofs of friendship and regard given to the king of Spain. Therefore, "the honor of our crown, the interest of our subjects, and the regard, which ought to be had to the most solemn treaties, call upon us to make use of the power, which God has given us, for vindicating our undoubted rights; . . . we, relying on the help of Almighty God, who knows the rightness of our intentions,

have thought fit to declare and do hereby declare war against the said king of Spain." George ordered all officers and subjects "to execute all acts of hostility in the prosecution of this war against the king of Spain, his vassals and subjects." The declaration also included the order that no one, whether British subjects or those of other nations, should carry military supplies to Spain or its colonies. Any ship discovered carrying contraband, "being taken, shall be condemned as good and lawful prize."

When the people of London learned that the declaration of war would be announced in the public places of the city, a vast number accompanied the heralds from Kensington Palace with shouts of joy, and all the bells of the churches rang. The Prince of Wales stopped in a popular tavern and along with a large crowd toasted the coming victory, while the London stock market rose rapidly. Prime Minister Robert Walpole, who had opposed the war and whose standing was badly undercut by his failure to prevent it, commented in his memoirs that the unusual joy at beginning a war reflected the popular opinion that it would be carried on at the expense of the enemy; the masses expected that most of the West Indies would fall into British hands, and the commerce of Mexico and Peru would come under the control of British merchants. What Walpole feared, however, did happen: "England will stand singly engaged in war without an ally."⁴⁸

In objecting to the Parliamentary bill supporting the king in his declaration of war against Spain, Walpole commented: "Of late most Wars have been declar'd from the Mouths of Cannons, before any formal Declaration; and it is very probable, that if we are obliged to come to an open Rupture with Spain, the first Declaration of War made on our Parts will be from the Mouth of our Cannon."⁴⁹ The context of his objection was that the absence of a declaration of war would make it impossible for Britain's allies to know that goods of their subjects on Spanish ships would be liable to seizure by British vessels carrying letters of marque. "I think, in common Justice, we ought at least to give our Allies fair Warning." Walpole concluded that his own interest in the matter was simply "strong Motive for our doing every Thing that can procure us just Satisfaction," a powerful statement for the need to demand that the enemy halt the injuries he was committing before war be declared.

Two weeks after declaring war, George II appeared before Parliament asking each house to provide money and the power to raise troops in order to carry on a war that "will make the court of Spain repent of the wrongs they have done us."⁵⁰ Debate seems to have been fierce in the House of Lords, but the war party carried the day there, winning the vote 68 to 41 to thank the king for his "most gracious speech" and pledge support. In the Commons the debate was far less lengthy, and the vote

on supporting the king apparently was not as close, but the exact vote is not provided.

Soon after, King Philip V of Spain issued a *Contejo de la conducta de S. M. con la de El Rey Britannica* (*Comparison of the Conduct of His Majesty with that of the British King*) in which George II's grounds for declaring war were refuted. Although the reasons that the British king gave for war were patently baseless, King Philip was declaring war against him.⁵¹ A British author in turn answered the Spanish king by arguing that the act of refusing a treaty, as Spain was accused of doing, was the same as declaring war, "since it is refusing the only means of peace."⁵²

The war thus begun was primarily a naval war. In 1741 a British fleet was sent to the West Indies. When four men-of-war were sighted near Jamaica at night, the British ships pursued them, and a brisk exchange of cannon fire took place. When it became clear at dawn that the other ships were French, both fleets ceased firing and apologized, "war not having been declared between the courts of London and Versailles."⁵³ The next year a British fleet operating in the Mediterranean Sea undertook actions that violated the norms of neutrality. It entered the harbor of St-Tropaz and burned five Spanish men-of-war there, which the British justified on the basis that the French had so often saved Spanish ships that their neutrality was a sham. Later in 1742 the British fleet sailed into the harbor of Naples to demand that the king of Naples, a relative of the Spanish king, end his aid to Spain. When the British admiral threatened to bombard the city, a Neapolitan diplomat came out to the flagship to negotiate; the admiral hung his watch on a mast and announced that his guns would begin firing in two hours unless the king accepted his demands. Suffice to say that no bombardment took place. Since Britain had not declared war on Naples, this caused consternation among those who advocated neutral rights. France for its part quietly assembled a fleet with 4,000 soldiers for an invasion of Britain in February 1744, but bad weather in the Channel prevented them from landing before the British discovered them off their coast.

In March 1744, the kings of France and Britain finally proceeded to declaring war. The French declaration was issued on March 15 at Versailles. Louis XV denounced "the king of England, elector of Hanover"⁵⁴ for dissuading the court of Vienna from accepting reconciliation and taking every opportunity to irritate France, especially by "everywhere disturbing her commerce, in contempt of the law of nations, and the most solemn treaties."⁵⁵ The final insult to France, declared Louis, was the blockade of the port of Toulon on the Mediterranean. His Majesty could no longer tolerate all those injuries and insults without failing in the protection he owed his subjects, the assistance promised his allies, and

the deference due to his honor and glory. He, therefore, declared war on the king of England, elector of Hanover, both by land and sea. Unlike most contemporary declarations of war, no period of time in which his enemy's subjects could leave the realm is granted; all passports and safe-conducts were immediately revoked. His majesty's officers were ordered to see that the declaration was posted in all cities, ports, harbors, and other places of his kingdom, "that none may pretend ignorance thereof. For such is the will of His Majesty."

Two weeks later George II presented a declaration of war against France to the Parliament. It was considerably longer than Louis's. In addition to enumerating the many French violations of British rights, it took special notice of the aid that the French were providing to the popish pretender's son (Charles Edward Stuart). It also stated: "We cannot omit taking Notice of the unjust Insinuations contained in the French King's Declaration of war against Us," regarding an agreement about Hanover. King George declared that it pertained only to Hanover and had no bearing on his conduct as the British king. George's declaration contained most of the usual phrases, such as "relying on the help of Almighty God, who knows the uprightness of our intentions" and the order to his officers to "execute all acts of hostility in the prosecution of this war by land and sea against the French king, his subjects and vassals."⁵⁶ The British king also declared that all French subjects in his realm who acted dutifully toward him would be safe in their persons and estates. The debates in the two houses of Parliament over voting subsidies were far briefer than in 1739, and the vote in favor was close to unanimous.⁵⁷

Preserved among the papers of governor William Shirley of Massachusetts are several pieces that show how a declaration of war was made known in the colonies. The duke of Newcastle, the Secretary of State, sent Shirley and the other colonial governors a letter dated March 31, 1744, and a copy of the French declaration, which informed them that their king had declared war and ordered that the declaration "be published by the Heralds at Arms in the usual places, and with the accustomed formalities on the like occasions."⁵⁸ Newcastle informed Shirley that care be taken to prevent harm from the enemy, and the colonists must do "their duty to distress and annoy the Subjects of the French King." Since the king was issuing letters of marque as well, the governors were told to encourage the outfitting of ships to act as privateers: "And you will take all opportunities to distress and annoy the French in their Settlements, Trade, and Commerce."

Shirley replied to Newcastle on June 2 that the sloop *Swallow* had arrived that day with his letter and copies of the declarations of war. (The French forces at Louisbourg had received notice already in May and thus

took the British fort at Canso, Nova Scotia, by surprise.) Immediately Shirley posted the British declaration of war and the call for privateers and gave orders that the militia assemble, with extra care taken to prevent any stores from falling into French hands, and an express boat sent to inform the commander of the fortress of Annapolis Royal in Nova Scotia of the war. He sent on letters, which had also arrived on the *Swallow*, informing the other governors. The governor of Connecticut replied that he had received his letter on June 5. Also on June 2, Shirley wrote to the colonel of the regiment of militia in the county of New Hampshire informing him of war and ordering him to make the declaration of war known in all the frontier towns and send a hundred men to guard the places through which the French might attack. On July 7, Shirley wrote again to Newcastle informing him of the steps he had taken to fight the war and of the capture of a French ship, which put 120 prisoners under his control.⁵⁹

The expansion of the War of Austrian Succession brought Frederick II of Prussia, who had made a peace with Maria Theresa in 1742 recognizing Prussian control over Silesia, back into the conflict. On August 10, 1744, in a manifesto published in Berlin, Frederick announced his intention to provide troops as auxiliaries for the use of Austria's enemies. His statement declared that he thought himself obliged to inform all Europe of his resolution to see to the tranquility and public welfare of Germany. He proclaimed that his efforts at promoting reconciliation had failed, and he therefore was using the forces God had given him to reestablish peace and order, return the laws to their vigor, and restore the proper authority of the emperor, who could not be a woman. Whether one should classify this manifesto as a declaration of war is difficult to decide.⁶⁰

Four years of fighting in Bohemia, Germany, the Netherlands, Italy, at sea, and in the colonies ended in a stalemate. The Peace of Aix-la-Chapelle in October 1748 returned Europe largely to the status-quo ante bellum, although it did affirm Frederick II's right to Silesia, and France again recognized the Hanoverian succession in Britain. There was little chance that the peace would last, as Austria still demanded Silesia's return, and the tensions among the other major powers had not been resolved. Austria recognized the futility of its alliance with the British monarchy, which focused on defense of Hanover and saw Prussia as more useful. So the Austrians set about realigning with France to replace Britain as an ally who might aid in reclaiming Silesia. The creation in early 1756 of two new alliances between Prussia and Britain on one hand and Austria and France on the other is called the Diplomatic Revolution, so-called because Austria and France had been at war constantly since the sixteenth century. Despite this reversal of alliances, the two basic rivalries

remained: Prussia versus Austria and Britain versus France. The unresolved tensions led to the Seven Years' War.

In 1754, without any declarations of war, fighting between the French, aided by their native allies, and the British, supported by colonial militias, had broken out in North America. In 1755, France sent a fleet with reinforcements to Canada, which the British intercepted in the Gulf of St. Lawrence, capturing two ships. The French complained that, absent a declaration of war, the act was "in contempt of the law of nations, the faith of treaties, and the usages established among civilized nations."⁶¹ King George II replied that he was acting in proper regard for his honor and rights and the security of his realm. Both sides were content to allow hostile actions take place across the Atlantic without being drawn into full-scale war.

In December 1755, the French foreign minister sent a *mémoire* to his Britannic Majesty reiterating the French desire for peace but denouncing British brigandage and piracy. He demanded that the British return the ships and goods already seized, and then peace negotiations could begin. If the British government were to refuse to do so, the French would look upon the *mémoire* as a "most authentic declaration of war."⁶² The British replied that they would not make any restitution prior to negotiations. Horace Walpole wrote two months later that France had not yet proceeded to a formal declaration but was content with its conditional declaration.⁶³ With tensions rising, formal war could not be far off, but it was only after a major naval battle for the island of Minorca in April 1756 that declarations were issued. On May 27, George II came to the Parliament to thank it for the support it voted in respect to the declaration of war he had issued against the French king on May 17. Its key point proclaimed that the battle for Minorca obliged him to defend the honor of his crown and the rights of his people. "I rely on the Divine protection, and the vigorous assistance of my faithful subjects, in so just a cause."⁶⁴ Louis XV replied with his own declaration of war on June 9.

Meanwhile, Frederick of Prussia, well aware of why the diplomatic map had been redrawn, sent three memoranda to Vienna in the summer of 1756 with demands that Maria Theresa back off her alliance with Russia and France. His ambassador was told to inform the queen of Hungary (Frederick refused to call her the empress) that he was aware of the offensive projects against him. The third note was an ultimatum demanding that she provide a clear and formal statement that she had no intention of attacking his lands. He said he would consider an ambiguous reply as a declaration of war, and he called on heaven to witness that she would bear the blame for all of the innocent blood that would be shed.⁶⁵

By the time it reached Vienna, the Prussian army had already crossed the border of Saxony, an Austrian ally.

Frederick issued a manifesto on August 10 to justify his attack on Saxony, a state not at war with him. This "Declaration of the Motives which have obliged His Majesty The King of Prussia to prevent the designs of the court of Vienna" proclaimed that the new diplomatic arrangements were clearly directed against him, but although he was the first to take up arms, he was not the aggressor. Frederick declared he was abandoning his usual moderation, as it no longer was a virtue when his honor, his independence, and his crown were at stake. He had asked the king of Saxony for free passage for his troops to strike at the Habsburgs, which had been ignored. Accordingly he was justified in sending his forces into Saxony, insisting that he had no intention of conquering it or harming its people.⁶⁶ In fact, he badly exploited Saxony during the four years that he controlled it.

A month later Tsarina Elizabeth of Russia published her own manifesto declaring that she intended to support her allies. "It is clear that the King of Prussia is the author of these troubles. . . . Heaven will offer speedy and powerful success to the party unjustly attacked."⁶⁷ In May 1757 when her troops entered Prussian territory, Frederick declared war on Elizabeth. He threatened reprisals in Saxony if the Russians committed atrocities on his people and denounced her for sending forces through neutral Poland. Later that year Austria and France prevailed on Sweden to declare war on Prussia with the promise of recovering lands lost in Pomerania in 1720. The Swedes denounced Prussia for violating the provisions of the Peace of 1648, for which Prussia was a guarantor.⁶⁸

In January 1761, Spain and Britain exchanged declarations of war after several years of skirmishes between them. War against Spain was decided in council on January 2 and proclaimed two days later. The Spanish were incensed at the manner in which the British ambassador delivered the declaration (what he did is not clear) and declared war on Britain on January 15.⁶⁹ Addressing Parliament, George III announced that he had found himself "indispensably obliged to declare war against Spain."⁷⁰ His major point involved the treaty made to unite "all the branches of the House of Bourbon in the most ambitious and dangerous designs, against the commerce and independency of the rest of Europe and particularly of my kingdoms." He proclaimed that he had "left nothing untried, that could have prevented this rupture." Both houses thanked the king for informing them of the motives that obliged him to declare war and assured him that they "would steadily support your Majesty in the prosecution of this just and necessary war."⁷¹

Early the next year France and Spain presented an ultimatum to Portugal demanding that it cease providing bases for the British fleet.

The document included a bitter complaint about Britain, "which in its pride is incapable of treating any other nation with equity."⁷² Portuguese King Joseph I was given four days to respond to the ultimatum. On May 18, 1762, he declared war on France and Spain. He complained that France and Spain had agreed to depose of kingdoms as if they were their own. They placed sanctions on his subjects, invaded his provinces, and attacked his fortified places. "I have accordingly commanded that it be signified to all my subjects that they be looked upon as violations of the sovereignty of my crown, as aggressors and declared enemies. . . . All my subjects are empowered by me to make use of all methods, which in these cases are lawfully permitted."⁷³ Joseph ordered that all correspondence and commerce with enemy subjects be halted, and any of their subjects in his realm had fifteen days to depart after which they would be treated as enemies and their property confiscated. He mandated that the declaration of war be affixed to placards and posted in all public places, so that it would come to the knowledge of everyone. The Spanish invaded Portugal a week later, but the Portuguese repulsed them with the aid of a British regiment. Spain did seize land along the Rio Plata from Portugal's colony Brazil; this territory is today part of Argentina.

Frederick of Prussia, who had precipitated the Seven Years War, was well read in political thought, perhaps the most so of any king in European history. It could be argued that it was precisely because he was so well read that he insisted on meeting the exact requirements for declaring war, as well as not issuing one when he claimed he was taking back what was justly his. Frederick absorbed the thinking of Christian von Wolff's. Wolff's position on the passage of troops through a neutral state is apparent in Frederick's 1756 manifesto to the Saxon king. For a time, Frederick also had his own in-house political theorist—the Swiss author Emer de Vattel.⁷⁴ Born in 1714 into a minister's family in the canton of Neuchâtel, which the Hohenzollerns then ruled, Vattel was educated at the University of Basel and practiced law before becoming a Prussian diplomat. When he entered the service of Saxony in 1746, he had first-hand observation of Frederick's behavior from the other side. Vattel became the chief adviser to the Saxon king on foreign affairs in 1758 and remained in this position until his death in 1767.

Vattel is cited as second to Grotius, or perhaps his equal, in laying the foundations of international law.⁷⁵ If the criterion is the number of printings of Vattel's major works as compared to Grotius's, then Vattel may be given first place. He is best known for his *Droit des gens; ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains* (*The Law of Nations, or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*). It began as a French

translation of Wolff's *Law of Nations*, but Vattel converted it into a quite different work, although it followed Wolff's outline and kept much of his thought.

Because of its length and detail and because it has been so widely cited, Vattel's *Law of Nations* warrants an extensive discussion of its stand on declaring war. He defines war as "that state in which we prosecute our right by force."⁷⁶ Public war takes place between nations or sovereigns; private war is carried on between private individuals. In treating the right to security, he shows that nature gives men a right to employ force, when it is necessary for their defense, and for the preservation of their rights. This principle, writes Vattel, is widely acknowledged:

Reason demonstrates it; and nature herself has engraved it on the heart of man. Some fanatics, taking in a literal sense the moderation recommended in the gospel, have adopted the strange fancy of suffering themselves to be massacred or plundered, rather than oppose force to violence. But we need not fear that this error will make any great progress.⁷⁷

For Vattel, the right of making war belongs only to the sovereign; and "it is only after satisfaction has been refused to him, and after he has made a declaration of war, that he has a right to take up arms."⁷⁸ This right, originally residing in the body of the nation, may be limited according to the nation's will. The particular constitution of each state determines where the power resides to make war in the name of the society at large. The kings of England, whose power is in other respects limited, have the right of making war and peace. Yet a king of England cannot raise money or compel his subjects to take up arms, unless Parliament concur and provide him with supplies. He cannot compel any person to enlist, nor, without Parliament's consent, keep a standing army. The kings of Sweden have lost that right, because Charles XII's ruinous deeds warranted that the estates of that kingdom reserve to themselves a right of such importance. A private person has no right to make war on a foreign nation, because he has recourse to his own sovereign, who is obliged to protect him. It would be too dangerous, writes Vattel, to allow everyone the liberty of doing himself justice against foreigners, since there might not be a single member of the state not involved in war.⁷⁹

Vattel's one exception to the above principle is civil war. Taking Wolff's division of violence against the sovereign into rebellion, when the subjects take up arms against the ruler without just cause, and civil war, in which subjects take up arms for just cause,⁸⁰ he makes it a three-fold distinction—rebellion, insurrection, and civil war. Rebels are those subjects who unjustly take up arms against their sovereign. Popular

commotions such as riots against the tax collectors are common examples of rebellion. Rebels have no right to use force in such circumstances; if the sovereign, however, makes promises to them to persuade them to put down their arms, he must keep them, unless the promises are truly destructive to the sovereign's authority. If he does not, it would be a valid reason for an insurrection, in that the rebels had some cause for taking arms against the ruler but do not reject his right to rule over them. When rebels have acquired the strength to give the sovereign effective resistance, then the term civil war is appropriate. It indicates two parties in the state consider each other as enemies and acknowledge no common judge. Even in a civil war, the obligation to obey the laws of war is binding on both sides.

The division of war into defensive and offensive for Vattel is straightforward: He who takes up arms to repel the attack of an enemy, carries on a defensive war; he who is first in taking up arms and attacks a nation at peace with him, wages offensive war. The object of a defensive war is simple: "It is no other than self defense: in that of offensive war there is as great a variety as in the multifarious concerns of nations; but, in general, it relates either to the prosecution of some rights, or to safety."⁸¹ Invading another nation for the purpose of conquest is robbery. The right of employing force or making war belongs to nations only as far it is necessary for their own defense and the maintenance of their rights. If any one attacks a nation or violates its perfect rights, he does that nation an injury. Only then does that nation have a right to repel the aggressor. Further, a nation has a right to prevent injury, when it sees itself threatened. Defensive war is just when made against an unjust aggressor, but if the invading nation has justice on its side, then to resist is an act of injustice. If the invading nation waging a just war is offered proper satisfaction and it continues to fight, then it is fighting an unjust war. War cannot be just on both sides, but it may happen that both sides are sincere in believing that they have justice on their side. If it is truly a case of invincible ignorance, then both sides may be waging a just war. Allies of either state must then use their own best judgment whether they should become involved.

Vattel's last issue regarding just war is one that he deems of the highest importance for his times: Is the growth in power of a neighboring state that may one day become strong enough to crush the first state a just cause for just war against it? When a state increases its power by good government, it does what is commendable. Yet history shows that such states seldom fail to oppress their neighbors and even subjugate them whenever an opportunity occurs, and they can do it with impunity. Nonetheless, in itself, an increase in the power of a neighboring state is not a just reason

to wage war upon that state. Once that state has given proofs of injustice, ambition, or a thirst for power, its neighbors may demand securities and, if it hesitates to give them, may prevent its designs by force of arms. Vattel writes: "A nation that has a neighbor at once powerful and ambitious has her all at stake. . . . If the safety of the state lies at stake, our precaution and foresight cannot be extended too far. Must we delay to avert our ruin till it is inevitable?"⁸² He cites the War of the Spanish Succession as the best example of such a case and concludes that the states at war with France and Spain were justified.

In respect to declarations of war, Vattel largely follows Wolff but adds enough of his own views to make them worth analysis. War, he says, is so dreadful and destructive that the law of nature allows it only in the last extreme. Thus, declaring war is necessary as a last effort to convince the adversary to repair an injury. Perhaps it may bring the enemy sovereign to reparations and avoid war, although he does not cite a single case where it did. A declaration should announce one's resolution of making war and set forth the reasons that have led to it. According to Vattel, "This is, at present, the constant practice among the powers of Europe."⁸³ A state may issue a conditional declaration, notifying another that war will commence after a period of time unless satisfaction is given; there is no need to issue a further declaration. Should the enemy offer to repair the injury done upon receiving a declaration of war, it immediately ends all right to use force, although a nation has the right to demand securities. A sovereign's word is sufficient security, as long as he has not disgraced his credit by acts of perfidy.

Vattel asserts that the law of nations requires only that a declaration of war be made known to the state that is its object. Formalities introduced by custom among the states of Europe must be observed, unless a state has made a public proclamation that it will no longer observe them. In the past kings sent heralds to declare war; now they are content with publishing a declaration in the capital, in the principal towns, and on the frontiers. The postal services now "affords expeditious channels of communication through which the intelligence is soon spread on every side."⁸⁴ The state also should publish a declaration of war to instruct its people on the obligations and restrictions imposed on them by war. Vattel follows Wolff in arguing that a declaration need not be sent to a state refusing to admit an envoy. He adds: "The Turks imprison and maltreat even the ambassadors of those powers with whom they are determined to come to a rupture: it would be a perilous undertaking for a herald to go and declare war against them in their own country. Their savage disposition supersedes the necessity of sending one." While there is no need to declare war in a just defensive war, it is practice in Europe for a

sovereign under attack to issue a declaration out of a sense of dignity and for the direction of his subjects. It must be made known to his subjects and neutral powers, in respect to the latter so that they know their traders and ships are subject to seizure if they are carrying contraband. "This publication of the war may be called declaration, and that which is notified directly to the enemy, denunciation."⁸⁵

According to Vattel a nation cannot refuse to issue a declaration of war when one is necessary, just because another nation has not. That nation has violated the law of nature, and its violation does not permit anyone to do the same. There is no obligation of waiting for a period of time after declaring war before beginning hostilities. A nation need not give the enemy time to prepare for an unjust defense, and a declaration need not be made until the army has reached the frontiers. It is even lawful to delay it until the enemy's border has been crossed, but it must precede any act of violence. Until the people of a nation under attack receive an order from their sovereign to commence defense of their territory, they should not confront the invader with violence, but neither should they surrender forts and other strategic locations to him. A sovereign issuing a declaration of war is obliged to allow the subjects of the enemy who are currently in his land the time and opportunity to leave without injury to their persons and property. Such persons came into his realm on good faith, and to seize them and their goods without giving them time to leave would be perfidious. If they fail to leave in the time allowed, he has a right to treat them as enemies but only as unarmed enemies. Should they be detained by problems such as illness, he must grant them an extension of the time. Some sovereigns allow their foes' subjects to remain as long as such persons are properly dutiful to them.

Vattel finds that in his era war is often declared by manifesto, which always contains the reasons, good or bad, on which a sovereign justifies his right to take up arms. He proposes that "the least scrupulous sovereign would wish to be thought just, equitable, and a lover of peace: he is sensible that a contrary reputation might be detrimental to him."⁸⁶ Thus the manifesto of war ought not to contain expressions of hatred, animosity, and rage, which only excite similar sentiments in the enemy. A prince ought to preserve a dignified decorum in his words and in his writings. He should respect his equals: and, even if it is his misfortune to be at war with a nation, he ought not inflame the quarrel by offensive expressions and thus deprive himself of the hope of reconciliation.

Vattel concludes his discussion of declaring war by arguing that an offensive war undertaken without a declaration is an unlawful war; those are the acts of pirates and corsairs, undertaken only for plunder. A nation under surprise attack, however, has no obligation to observe the rules of

legal war. He proves that conclusion by citing the case of Savoy's surprise attack on Geneva in 1602. After defeating the attempt to take their city by surprise, the Genevans hanged their prisoners as robbers, because they had attacked without declaring war. He notes that Geneva was not censured for this act, which would have been detestable had a legal war been waged on it.

While political theorists such as Vattel insisted that international law was powerful enough to prevent surprise attacks from occurring, statesmen and military leaders were well aware that they did happen. Expressions of fear of surprise attacks appeared often in the era's military texts. English authors especially were concerned about a French surprise attack by sea and argued for the creation of a more powerful standing army with bases on the coasts most open to invasion. Among them was Campbell Dalrymple, whose *Military Essay* of 1761 recounted successful surprise attacks, including the recent Prussian attack on Saxony. He believed that "concentration of force was Britain's best defense against surprise attack."⁸⁷

It is ironic that the one ruler of Vattel's era who ignored his strong insistence on the need for formal declarations of war in nearly every possible circumstance should have been his erstwhile patron, Frederick II. The wars that he precipitated with his lust for Silesia ended in 1763 with treaties collectively known as the Peace of Paris; the major treaty between France and Britain was signed in Paris. Europe returned largely to the status quo *ante bellum* except for the permanent transfer to Silesia to Prussia. It was in the wider war across the world that the major changes occurred: Britain gained dominion over India and won control of Canada. This last transfer of territory would have a direct impact on the coming of both the American and the French Revolutions. The long war that effected that transfer, declared at the "will of His Majesty," ensured that the new republics created by these revolutions resolutely formulated constitutions that explicitly placed the power to declare war in the hands of the people's representatives.⁸⁸

CHAPTER 7

THE AGE OF REVOLUTION

The leaders of both the American and the French Revolutions drew heavily from the Enlightenment for inspiration in staging their revolutions and for the concepts of war and ideas for the new governments they created. Enlightened philosophes were sharply critical of war as it had been fought through the ages. They regarded war as the greatest evil confronting mankind, but they had little hope it could be eliminated; thus, they combined proposals for permanent peace with a more realistic discussion of the means by which war might be limited or rendered more humane. The “civilizing of war” seemed to the philosophes a reasonable, worthwhile, and achievable undertaking, especially since it appeared to them that, as Vattel put it, “[A]t the present day the Nations of Europe almost always carry on war with great forbearance and generosity.”¹ That certainly included the use of declarations of war.

What is often described as the Enlightenment’s bible, the *Encyclopédie*, gives little attention to war. Its definition of war and discussion of just and unjust war cite only Grotius. The several articles on war agree that war is just if fought in self-defense and decry that too often what begins as just war becomes unjust because of the brutalities committed during it; there have to be limits on war’s violence. Abbé Edme-François Mallet, who contributed many articles (mostly on religion) to the early volumes, wrote the article on *Déclaration de guerre*. He defined the ancient declaration of war as a public act done by heralds and fetials, who signified to enemies the grievances against them and who exhorted them to provide reparations, without which war was then declared on them.² Most of the brief article is devoted to Roman practice, which was “solemn and august.” Contemporary practice is described in one sentence: “Today war is declared with less ceremony, but kings in order to show their equity reveal their reasons for it in manifestos, which are published either in the kingdom or in the foreign land.” In a longer article on *manifeste*, Mallet

defined it as a defense of a king's conduct. Modern powers, he stated, place in them all the artifices of rhetoric in order to present their just cause for taking arms and the wrongs they claim to have received. A prudent prince who wishes to inform an enemy's allies of his reasons for going to war on that foe often uses them in the hope they might convince the foe's allies not to go to war with him.

One could include such authors as Vattel and Wolff among Enlightenment thinkers, since they wrote at the height of the era and revealed elements of enlightened thought, but they were far more concerned with legal issues and actual practice than was a typical philosopher. In fact, most philosophes have little to say about declaring war beyond seeing it as part of the process of civilizing war. Only Charles de Montesquieu and Jean-Jacques Rousseau have written enough to warrant comment. In *Spirit of the Laws*, published in 1748, Montesquieu rejects Hobbes's view that war is a result of the natural state of mankind. In nature, argues Montesquieu, men are too timid to wage war because an individual man is the most defenseless of all animals; it is only after people create the state that war can occur.³ But a state is like a man; just as a man has the right to kill in self-defense, so does a state. For a state, the right of natural defense at times carries with it the necessity of attacking; to attack another nation instantly may be the only way to prevent its own destruction: "From thence it follows, that petty states have oftener a right to declare war than great ones, because they are oftener in the case of being afraid of destruction."⁴ The right of war is derived from necessity and strict justice. If those who direct the conscience or councils of princes do not abide by this maxim, the consequence is dreadful. When they proceed on arbitrary principles of glory and utility, torrents of blood must overspread the earth. Above all, let them not plead such an idle pretext as the glory of the prince: his glory is nothing but pride and passion and not a legitimate right.

Montesquieu wrote at length about the Roman approach to war in his *Reflections on the Causes of the Rise and Fall of the Roman Empire*. The Senate, he writes, refused to punish those sent by another nation to Rome for having offended the Romans, preferring to consider the entire nation as guilty and taking vengeance at a time convenient for the Romans. Because they made their enemies suffer inexpressible evils, war was seldom declared against them, but they "always made it at a season, in the manner, and with a people, as best suited their interest."⁵ For those nations that had not yet felt the fury of Roman war, the Romans would send ambassadors whose haughty demands were sure to provoke ill treatment; that would furnish the Romans with a sure pretext for declaring war. Montesquieu both admired the incontestable success of

the Romans and detested the cynicism with which they made their conquests; he did not regard Roman practice as the ideal starting point for the law of nations.

For Rousseau the Roman views on slavery were even less worthy a model of justice. In *The Social Contract*, written in 1762, he vehemently attacks the view that victors in war have the right to enslave the vanquished just because they have the right to kill them. It is clear, he writes, that this supposed right to kill the conquered is by no means deducible from the state of war. "War is not a relation between man and man but one between State and State, and individuals are enemies only accidentally, not as men, nor even as citizens but as soldiers; not as members of their country, but as its defenders. Each State can have for enemies only other States, and not men; for between things disparate in nature there can be no real relation."⁶ Rousseau continues: "The other side has a right to kill defenders, while they are bearing arms; but as soon as they lay them down and surrender, they cease to be enemies or instruments of the enemy, and become once more merely men, whose life no one has any right to take." Rousseau intended by these remarks to take hatred and vengeance out of war. If war is fought only by states with armies of professional soldiers, then once the wrong that led to war has been righted by force, there should be no continuing hostility and no right to enslave prisoners. He makes only one comment about declaring war: "Declarations of war are intimations less to powers than to their subjects. The foreigner, whether king, individual, or people, who robs, kills or detains the subjects, without declaring war on the prince, is not an enemy, but a brigand."

The New World was for Rousseau, as it had been for More and Campanella, the idyllic land where war was fought only for the most just causes and only in the moderation requisite for enlightened sensibilities. Yet brutal war had been common in the Americas before and after 1492.⁷ Appalling conflict between Europeans and American natives occurred there, where also European states fought out their wars. Besides the Spanish Requirement used until 1600, the only European-style declaration of war issued in the Americas before 1776 appeared on October 19, 1744, when Governor Shirley of Massachusetts, "with the advice of council," declared war on two tribes in Nova Scotia, the Mi'kmaq and the Maliseet.⁸ He justified the war on the Mi'kmaq, because they had captured a Massachusetts fishing boat and killed its crew, and on the Maliseet, because they, along with the Mi'kmaq, had aided the French in an attack on a British fort in Nova Scotia. Shirley also warned the other tribes in the region not to aid the French or allow passage of enemy tribes through their lands, and demanded they join in the war against the French in Canada. The war with the Mi'kmaq lasted four years.

When the French arrived in Canada, their process of staking claim to lands involved ceremonies of setting up crosses in which the French and the natives participated. French expedition leaders were expected to gain the consent of local leaders beforehand, and both groups of leaders were paired off to march in a procession to a high spot to erect the cross, which was a symbol of the French claiming the land in Christ's name. The French provided blue tunics with the fleur-de-lis and a white cross to the native leaders, who acknowledged that henceforth they and their people would live as Christians and subjects of the French king. The French insisted the natives consented to the placing of their land under French sovereignty and were happy to do so. This approach to colonization led to, or perhaps was a consequence of, the French understanding that they were entering into alliances with the tribes.⁹ Because of this approach, but equally because the French lower classes were reluctant to migrate to the colonies, Canada had only a few Europeans to form a militia, and the French worked diligently to maintain good relationships with their Indian allies. Hence, French attacks on English colonies always included a large number of Indian allies; while the far more numerous English colonists, who often implemented the idea that they were occupying vacant land by eradicating the natives, provided a potent militia for battling France and its allies.

After Canada was transferred to British rule in the Peace of 1763, it greatly reduced the fear among the colonists that such raids would be repeated. It also changed the situation in the British Atlantic colonies from one in which the colonists, at least those closer to the frontiers, were terrified that at any moment French troops with their Indian allies might appear over the hill to burn, plunder, and kill, to one in which they had a sense of security and stability. The law of unintended consequences quickly smacked the British government, as the colonists vehemently objected to the plans to tax them to help pay for the war that had freed them from that constant threat. By April 1775 the tensions between motherland and colonies had become serious enough to generate violence.

Barely two months later, the rebellious colonists issued a "Declaration of the Causes and Necessity of Taking up Arms." On June 23 the Second Continental Congress appointed a committee of five to draw up a declaration that General George Washington would proclaim when he arrived at the camp of the rebel troops near Boston. A draft was presented to the Congress but was voted down. John Dickinson, who was eager to reconcile with Britain, and the more radical Thomas Jefferson were then added to the committee. Jefferson wrote a new draft that Dickinson thought too harsh; he rewrote it but accepted the last four paragraphs of Jefferson's text. The Congress approved this version without change on July 6.

The "Declaration of the Causes" accuses the British government of being motivated "by an inordinate passion not only unjustifiable, but which they know to be reprobated by the very constitution of that kingdom, . . . and have attempted to effect their cruel and impolitic purpose of enslaving these colonies by violence, and have thereby rendered it necessary for us to close with their last appeal from reason to violence."¹⁰ It proclaims that the Congress is "bound by obligations of respect to the rest of the world, to make known the justice of our cause." There follows a list of grievances against the British government. The Parliament, ministers, and generals are blamed for them; they, not the king, have inflicted on the colonies the calamities of fire, sword, and famine. Most colonists believe, states the declaration, that they are being forced to choose between surrender to tyranny or resistance by force, and they accept the latter. "We most solemnly before God and the world, *declare* [sic] that, exerting the utmost energy of those powers, which our beneficent Creator hath graciously bestowed upon us, the arms we have been compelled by our enemies to assume, we will, in defiance of every hazard, with unabating firmness and perseverance, employ for the preservation of our liberties; being with one mind resolved to die freemen rather than to live as slaves." The document insists the Congress is not seeking to dissolve the union with Britain: "Necessity has not yet driven us into that desperate measure." Because the colonists are being attacked by "unprovoked enemies," they have taken up arms and "shall lay them down when hostilities shall cease on the part of the aggressors, and all danger of their being renewed shall be removed, and not before." Like most declarations of war, the document ends with an appeal to God "to protect us happily through this great conflict."

Should this document be considered a declaration of war? It contains most of what was considered necessary for properly declaring war in that era, lacking only the express statement that war was being declared. Stephan Neff argues that it does constitute "in essence" such a declaration, on the grounds that the rebellion of the colonies was being treated on a par with an inter-state war and "was invested with the trappings of a true war."¹¹ He finds it to be a good example of a rebellion becoming what Vattel called a true civil war, where the two sides have become two distinct nations. However, a counter argument can be made in that the "Declaration of the Causes" was not sent to London. The Continental Congress accepted Dickinson's reconciliatory "Olive Branch Petition," which was sent on July 8, 1775. There, it was undermined by a confiscated letter written by John Adams, who had sent it to a friend, expressing his discontent with the Olive Branch Petition and his belief that war was inevitable. Adams's letter reached London at the same time as the

Olive Branch petition. The British used the letter to claim the petition was insincere. George III rejected it without ever reading it.

On August 23, the very day when the American who was to present the petition was scheduled for a royal audience, King George issued a "Proclamation of Rebellion." It denounced as traitors those Americans in arms against him, who have been "misled by dangerous and ill designing men, and forgetting the allegiance which they owe to the power that has protected and supported them."¹² He ordered all his officers, civil and military, "to exert their utmost to suppress such rebellion, and to bring the traitors to justice." Anyone found in correspondence with or aiding and abetting those in arms and rebellion against the crown must also be deemed traitors and appropriately punished. News of the king's proclamation reached America in October; two months later, on December 6, the Congress approved a response to the king. It promised that whatever punishment would be inflicted upon persons "in the power of our enemies for favouring, aiding, or abetting the cause of American liberty, shall be retaliated in the same kind, and the same degree upon those in our power, who have favoured, aided, or abetted, or shall favour, aid, or abet the system of ministerial oppression."¹³ In January 1776 Thomas Payne's pamphlet, *Common Sense*, was published. Its biting attack on Britain and its monarchy helped crystallize support for independence. He wrote: "In England a king hath little more to do than to make war and give away places; which in plain terms, is to impoverish the nation and set it together by the ears."¹⁴

On June 7, 1776, Henry Lee of Virginia introduced a resolution, on behalf of his home state's convention, that the United Colonies declare themselves independent. A vote on it took place on July 2; it passed by a vote of twelve in favor and one abstention (each state having one vote determined by the majority of its delegates). A five-man committee was appointed to draw up a declaration, with Jefferson writing the draft, which was changed only slightly by the other committee members and Congress. On July 4, Congress approved the text of the Declaration of Independence and, on August 2, most of the fifty-six members who eventually signed affixed their names.

Because it was the American position that Parliament never had any authority over the colonies and they had remained bound to Britain only by allegiance to the monarchy, it was George III whom the Declaration denounced as a tyrant and severed all ties to him. Although it is not often considered a declaration of war, it contains all the elements of one except again the precise words. It begins with and is largely made up of a list of the causes that have led to war; "a decent respect to the opinions of mankind" requires such a declaration. Therefore, "let the facts be submitted

to a candid world": Not only is the British king guilty of violating right government by establishing judges dependent solely on his will, imposing taxes without consent, and quartering troops among the people, but he has also waged war on the people, plundered their coasts, burnt their towns, brought in foreign mercenaries, impressed fellow citizens into taking arms against their own people, and incited "the merciless Indian savages" to attack them. The "Thirteen United States" have the authority to declare war because under the "laws of nature and nature's God" a people has the right "to assume, among the powers of the earth, the separate and equal station" to levy war and "do all the other acts and things which INDEPENDENT STATES may of right do." They are acting only as a last resort, because petitions for redress "have been answered only by repeated injury"; they have warned their British brethren and appealed to "their native justice and magnanimity," but they have been "deaf to the voice of justice and of consanguinity." It is necessary, therefore, to hold them, "as we hold the rest of mankind, enemies in war, in peace friends." The intended outcome of the war is for these United Colonies to throw off a government of despotism and "to provide new Guards of their future security" in the form of free and independent states. The Declaration of Independence concludes with an appeal to Divine Providence.¹⁵

From the American point of view, the conflict was no longer a civil war but a war between sovereign states. In February 1777, George III came close to acknowledging this when he presented to Parliament a bill asking for the authority to grant letters of marque to ship owners to seize ships and cargos owned by Americans as prizes of war and also to treat as "all other prisoners of war" those captured in the fighting.¹⁶

After the American victory at Saratoga in October 1777, France decided the United Colonies had a chance at winning and, eager to enhance that chance, came to their aid. The following March the British government received official word (spies had already informed it) that France and "The United States of North America, which are in full possession of Independence" had signed treaties of amity and commerce and alliance.¹⁷ George III ordered the British ambassador's recall from France. There was heated debate in Parliament whether this step meant a declaration of war against France and whether it was prudent. The consensus was that while it was almost impossible to avoid war with France, recalling an ambassador did not in itself declare war. The two houses agreed to support the king, with one-third of each dissenting.¹⁸ On March 17 the British monarch declared war on France.¹⁹ On July 10, 1778, France reciprocated with its own declaration of war against Britain. There is no mention in Louis XVI's manifesto of aiding subjects against an oppressive monarch; he proclaimed he was taking up arms to revenge the injuries

inflicted on his realm and to end the “tyrannical empire which England has usurped and pretends to maintain upon the ocean.”²⁰

France was eager to involve Spain in its conflict with Britain, expecting that with the Spanish fleet it would have naval supremacy. The French promised to help Spain recover Gibraltar and Florida. Although the offer was tempting to the Spanish, Madrid hesitated because of the British threat to its own colonies. Spain first offered to serve as a mediator between the warring sides, with the expectation of compensation for its services, but the Bourbon family bond and the lingering resentment in Spain for its defeat (while a French ally) in the Seven Years’ War led to a decision to go to war. On May 27, 1779, the Spanish ambassador in London received a list of grievances to present to the British as an ultimatum, but he was told to delay presenting it until Spanish ships in English harbors had time to sail. He delivered it on June 16. The grievances included “insults on the Spanish flag, and violations of the King’s territories, carried on to an incredible excess; prizes have been made, ships have been searched and plundered, and a great many have been fired upon, which have been obliged to defend themselves.”²¹ Even diplomatic packets carried on those ships had been opened and destroyed. Two days later the Spanish ambassador left Britain. The British government responded to the ultimatum by ordering its navy to consider any Spanish ships it met as enemies, but it did not declare war, since it was not deemed necessary in these circumstances. Spain provided vital aid to the American cause with its fleet and an attack on western Florida, which drew British troops from the war in the southern colonies, but it did not make an alliance with the revolutionary government.

The Spanish complaints about British seizures of its ships were echoed by the Netherlands, Denmark, Sweden, and Russia. The latter three organized a League of Armed Neutrality and invited the Dutch to join. As the Dutch States-General was debating the matter, the British ambassador delivered an ultimatum on November 10, 1780, demanding the Dutch disavow the League and halt shipping arms to America and France. The Dutch responded by agreeing to join the League. Britain, in turn, ordered its ambassador home, and on December 20 George III issued a manifesto that justified his order to the British fleet to seize Dutch ships and inflict reprisals on them. It gave four major reasons for the order: the Dutch were giving secret aid to Britain’s enemies; the Dutch island of St. Eustatius in the Caribbean Sea was a major center of trade with the rebel colonies; the Dutch were encouraging Britain’s enemies in that sea; and they had concluded a secret treaty with the rebels.²² Admiral Rodney was ordered to proceed immediately to St. Eustatius and destroy the Dutch base there, which he did thoroughly.

By the end of 1780 Britain was at war with its three major naval rivals, while its war in North America was going badly. A powerful peace party

had risen in Parliament, which was coming close to cutting off funding for the American war. For that group and most of the British people, the surrender of General Cornwallis's army at Yorktown on October 19, 1781, was the last straw. George III was persuaded to agree to a truce in January 1783, and the formal peace was signed at Paris on September 3, 1783. The key clause stated: "His Britannic Majesty acknowledges the said United States, [naming the thirteen states], to be free sovereign and independent states, that he treats with them as such, and for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same and every part thereof."²³

As a consequence of the Treaty of Paris, the newborn United States now had the powers of every sovereign state, including the right to declare war. Even as the Second Continental Congress was proclaiming independence and directing the war, it was also busy creating a government for the United States, which might exercise such power. The Articles of Confederation were drafted in the months after independence had been proclaimed, and the Congress adopted them on November 15, 1777. Each state had to ratify them before they took effect, and over three years passed before Maryland's ratification on March 1, 1781. The thirteen states retained their "sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled." Article VI details that the powers restricted to the Congress include the right to send or receive embassies, sign treaties, levy duties, keep ships of war, and engage in any war, unless a state was invaded or had sound information that Indians were planning to attack it and the danger was so imminent that no delay was possible. The power of declaring war was reserved to the United States in Congress assembled:

Nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the Congress, and then only against the Kingdom or State and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.²⁴

Article IX reiterates that "the United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article."

Since there was no true executive established, the legislative body had the power of declaring war; it was not unique in history to that point, but highly exceptional. Weaknesses appeared immediately in the government created by the Articles but were papered over until after independence was confirmed by the Treaty of Paris. One problem involved the fact that the large and small states had equal representation in the Congress, but the large states were asked to contribute substantially greater funds to the national treasury. A second difficulty was that the Articles allowed a state to sign treaties with other sovereign powers or violate them, as the state of Georgia was doing with Indian nations. The most serious problem involved the Muslim Barbary states of North Africa. It was their long-standing practice to capture Christian ships in the Mediterranean and hold their crews and cargos for ransom. Having lost the British navy's protection, the United States was responsible for the safety of its own commerce and citizens. Without the means to create a force necessary to protect ships, the new government allocated \$80,000 in annual "protection" money, a huge sum for a government that had minute revenues. The ransoms demanded far exceeded the amount that Congress had budgeted. In 1785 the Dey of Algiers demanded more, and when it was refused, he declared war on the United States and seized an American ship, holding it and its crew for ten years.²⁵ Under the Articles of Confederation, the Congress was powerless either to raise the ransom or collect money to build a fleet to recapture the ship,

Such problems with the Articles led to the calling of the constitutional convention in May 1787 at Philadelphia. After several competing plans for a constitution were offered, a Committee of Detail was created to present a draft version, which was presented to the convention in July. It called for a federated republic with a strong president, which gave rise to the issue of which institution would have the power to declare war. On June 1 James Wilson of Pennsylvania asserted he did not consider "the prerogatives of the British Monarch as a proper guide in defining the Executive power. Some of those prerogatives were of a Legislative nature, among others that of war and peace."²⁶ Wilson several days later stated: "Making peace and war are generally determined by Writers on the Laws of Nations to be legislative powers."

Wilson's statement on this matter was in sharp contrast to the standard text on English law and government, William Blackstone's *Commentaries on the Laws of England*, published in four volumes from 1765 to 1769. Blackstone was born in 1723 in London into a silk merchant's family and took a law degree from the University of Oxford. After practicing law for twelve years, he returned to Oxford and held a chair in law until he died in 1780. Many of the Constitution's framers, perhaps most, regarded his

work as the definitive exposition of British law, and they frequently cited it. Blackstone states that the right to make treaties and alliances belongs to the king, because it is necessary the sovereign bind the entire nation, and he declares: "Upon the same principle the king has also the sole prerogative of making war and peace."²⁷ All writers on the law of nature and nations, he insists, have held that the right of making war, which by nature subsisted in every individual, has been given up by all to be vested in the sovereign power. It would be highly improper if subjects had the power of binding the sovereign and putting him at war against his will. If private persons commit hostilities against another state, they are treated as pirates and robbers. He cites Grotius to the effect that, according to the law of nations, a declaration of war ought to precede hostilities, but its purpose is not to put the enemy on guard, which is a matter of magnanimity rather than an obligation, but to make it clear that the entire nation has willed it, "whose right of willing has been transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make war completely effectual, it is necessary with us in England that it be publicly declared by the king's authority." Should the king's ministers abuse their power in beginning a war, impeachment by Parliament is the proper check on "the wanton exercise of this prerogative."²⁸

Assuming the framers of the Constitution were aware of Blackstone's views, and surely they were, then it is significant that the original text for Article I, Section 8, on "The Powers of Congress," conferred the power to "make war, raise armies, and build and equip fleets" on Congress. On August 17, 1787, the convention debated the wording of that section.²⁹ South Carolina's Charles Pinckney opposed giving that authority to the entire legislative branch, because its proceedings were too slow; it would meet only once a year; and the House of Representatives would be too large for such deliberations. He recommended the power of declaring war be given to only the Senate, as Alexander Hamilton had proposed in his draft of a constitution.

Pierce Butler of South Carolina responded that Pinckney's objections to vesting that power in the entire Congress applied in a great degree to the Senate as well. He proposed the president have that authority, "who will have all the requisite qualities and will not make war but when the Nation will support it." At that point Elbridge Gerry of Massachusetts and James Madison of Virginia moved to replace the word "make" with "declare," leaving the executive the power to repel sudden attacks. Roger Sherman of Connecticut stated that he preferred the original wording, arguing the president should be able to repel attacks but not commence them. He felt that substituting declare for make narrowed Congress's authority too much. Gerry declared that he "never expected to hear in

a republic a motion to empower the Executive alone to declare war.” Oliver Ellsworth of Connecticut then suggested there was a real difference between the cases of making war and making peace, the latter being placed in the hands of the president by Article II, Section 2, Clause 2: “He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” It ought to be easier, he said, to get out of war than into it. George Mason of Virginia objected to giving the power of war to the Executive, because he could not safely to be trusted with it, nor to the Senate alone, because it was not constructed to be entitled to it. He declared he was for clogging rather than facilitating war, but for facilitating peace. He preferred the term “declare” to “make.”

At that point a vote was taken on the amendment to substitute “declare.” It passed by a vote of ten to two. (Rhode Island did not participate in the convention.) Butler then offered an amendment to add “and make peace” after “declare war,” but it was successfully argued that making peace was an executive function, because peace talks usually required secret negotiations. When the final phrasing was presented to the convention, Connecticut voted against it because of Ellsworth’s opposition. When Massachusetts’s Rufus King declared that “make” war might be understood as meaning to “conduct” it, which was an executive function, Ellsworth gave up his opposition, and Connecticut’s vote was changed, leaving New Hampshire as the only vote against replacing make with declare.

The rest of the clause gave power to Congress to “grant letters of marque and reprisal, and make rules concerning captures on land and water.” Granting Congress this authority, which had always been the king’s in monarchies, further indicates the desire of the Constitution’s authors to limit presidential power in respect to war. A British letter of marque from that era issued by the governor of Nova Scotia stated. “I do by virtue of the Power & Authority to me given conformable to His Majestys [sic] pleasure issue.” Others were signed directly by the monarch. During the War of 1812, President Madison would issue letters of marque “in pursuance of an Act of Congress.”³⁰

Given the strong objections from several delegates against investing the power to begin a war in the executive—which objections others treated seriously—it is difficult to see how the change from make to declare was intended to reduce Congress’s authority in the matter of going to war.³¹ It is obvious also that the writers of the Constitution had no intention of imitating the British monarchy with its sole prerogative of declaring war. They wanted to circumscribe presidential power in that respect, while recognizing the president may have to act immediately to repulse

an invasion or respond to some other act of violence without waiting for a meeting of Congress.

Almost immediately, controversy erupted revolving around the issue of the president's powers and the necessity of congressional action when hostilities were initiated against the United States.³² The offending state was an ally in the War of Independence—France. By 1797 France had also undergone its revolution and had been transformed into a republic, and the enmity that now erupted is another example of how two states with similar governments and ideologies often find themselves violently at odds. Just as the framers of the US Constitution drew heavily on the ideas of the Enlightenment, so did the radicals of the French Revolution, which began two years after the US Constitution was submitted to the states for ratification. The close similarities between the Bill of Rights presented for ratification to the first meeting of the US Congress in June 1789, and the Declaration of the Rights of Man, approved by the French National Assembly in August the same year, reflect their common foundations in Enlightenment thought. It may be assumed that the understanding of the two groups of framers regarding the process of declaring war was also quite similar.

Even more than the British or Americans, the French people had good reason to limit royal power to go to war, having over the centuries endured so many wars begun because "Such is the will of His Majesty." The French Constitution of 1791 decreed, "War can be declared only by a decree of the legislative body, rendered upon the formal and indispensable proposal of the king and sanctioned by him." It further required: "Every declaration of war shall be made in these terms 'On the part of the King of the French, in the name of the Nation.'"³³ It had far more on the war power, however, than does the American Constitution. If hostilities were imminent, or had already begun prior to an act by the National Assembly, the king was obliged to give notice to it and provide the reasons why violence occurred. Should the Assembly be in recess, it was to be convoked immediately. If it decided war ought not be made, the king had to take measures to cease all hostilities. If the legislature found any agents of the executive were culpable in the beginning of hostilities, they would be prosecuted as criminals. Last, the Assembly had the authority to demand the king begin negotiations to end a war, at which point he was obliged to do so. Any peace treaty had to be submitted to the Assembly.

Jacques Necker, who as royal director-general of finances had been twice dismissed for his attempts at fiscal reform (making him a hero to the radicals), objected to the National Assembly's authority over declaring war on the grounds that it would hinder France's ability to respond to the commencing of hostilities by another state. In monarchies, he argued,

kings can meet secretly with their council whenever they please and dispense with such moral restraints as formally declaring war. If monarchs “adhered to the laws of honour” and never went to war without declaring it, then the French constitution would not create a problem. But where, he asked, is “the equality between a monarch, who declares war by actually commencing it, and a national assembly, openly discussing a question like this, and divulging its intentions long before the period that hostilities can begin?”³⁴ He raised the possibility that the National Assembly might publicly discuss declaring war on another state and then by “a trifling majority,” vote against it while leading the other state involved to go to war. Another problem Necker saw in the French Constitution was its separation of powers of declaring war, granted to the Assembly, and commencing hostilities, given to the king, when “hostilities are commonly considered as the strongest declaration of war. This would lead to confusion at a truly precarious time for the nation.”³⁵ Necker’s analysis has important implications for the problems created in the US Constitution by the same separation of powers.

When in 1792 Austria, Prussia, and Sardinia created an alliance and threatened war if Louis XVI and his family were harmed, the revolutionary government took this move as a direct threat. Its foreign minister, Charles-François Dumouriez, was committed to a revolutionary foreign policy.³⁶ He argued that the peoples of Europe were natural allies of each other, but their despots were responsible for wars among the nations. The real enemies of all peoples were aristocrats and princes who were spreading lies about the Revolution. France, he proclaimed, had to do a better job of informing the peoples of Europe of its pacifist intentions and good will. In order to achieve this goal, he proposed the system of ambassadors, which he considered aristocratic titles, be scrapped for two types of diplomats: One group would have temporary commissions to present declarations of war or neutrality or negotiate peace; the other would be essentially ministers of propaganda that would persuade the people of a foreign land of the virtues of the Revolution and encourage them to overthrow their despots. After hearing a long list of grievances presented by Dumouriez as foreign minister, the National Assembly of France ordered the king to declare war in response to the creation of the alliance of the three states to restore royal absolutism in France.

The April 1792 declaration of war proclaimed:

Deliberating on the formal proposition of the King; considering that the court of Vienna, in contempt of the treaties, has not ceased to grant an open protection to French rebels; that it has instigated and formed a concert with several powers of Europe against the independence and security

of the French nation . . . and has refused to reply to the last dispatches of the King of the French leaving no longer any hope of obtaining, by an amicable negotiation, the redress of these grievances[, the National Assembly] decrees war against the King of Hungary and Bohemia.³⁷

Like Jefferson, similarly influenced by the Enlightenment, the authors of this declaration of war believed it necessary to explain to “Europe and the whole of humanity” why war was necessary. They further stated that the French nation had no intention of undertaking the war for the purpose of conquest or to employ its forces against the liberty of any people, but was taking up arms only to maintain its liberty and independence. The ensuing war would be a war against the unjust aggression of monarchs, not against any nation, and the French would never confuse their brothers with their real enemies. It promised to alleviate the scourge of war on the people and protect property, but would direct the miseries of war against those who league themselves against liberty. Finally, it pledged that all who were willing to arrange themselves under the banners of liberty would be assured of a safe haven in France.

Three months later, in July 1792, the duke of Brunswick, commanding the allied forces of Austria and Prussia, issued a manifesto that French *émigrés* had largely written.³⁸ It laid out the reasons why the allied armies had assembled on the border of France: the declaration of an unjust war, attacks on German lands, the outrages and brutalities committed against the French king and his family. It proclaimed that the two monarchs had no goal except the welfare of the French people. Most important, the Parisians must release the king and his family from their custody and escort him to a town close to the border, where allied forces would protect him until proper royal government was reestablished in France; no government or law would be accepted as legal unless it emanated from the free and unforced will of the king. All officers and men of the French armies must return immediately to obedience to their king; and there must be no resistance to the allied forces as they marched through France on the penalty of execution and loss of all property. The manifesto’s penultimate clause declared that if any harm or outrage were done to the French king or his family members, Paris would be delivered over to “military execution and complete ruin.” The duke ended with a call to the French people not to oppose the march of his troops, but give them free passage and assistance as needed.

The manifesto’s uncompromising support of the monarch and its warning of the dire consequences of harming the king led directly to the abolition of the monarchy and creation of the French republic and, ultimately, to Louis XVI’s execution in January 1793. Meanwhile, the

unexpected capabilities of the new revolutionary armies not only allowed them to drive the allied forces out of France, but also to invade Belgium. When Dumouriez, now commander of a French army, overstepped his orders and invaded the Dutch Republic, the growing British concern over events in France turned to open antagonism. In February 1793 the recently organized government of the National Convention, which had replaced the National Assembly in September 1792, speaking in the name of the French people, declared war on the king of Britain and the stadtholder of the Netherlands. The National Convention listed the grievances against the two rulers: withdrawal of the British ambassador from Paris and refusal to accept the one whom the revolutionaries had sent to London, numerous violations of a treaty of 1786, the welcoming of *émigrés* to Britain, and aiding the anti-French alliance. It proclaimed:

Considering, finally, that all these circumstances no longer allow the French Republic to hope to obtain, by amicable negotiations, the redress of its grievances...the National Convention declares, in the name of the French nation, that in view of all these acts of hostility and aggression, the French Republic is at war with the King of England and the Stadtholder of the United Provinces.³⁹

The National Convention ordered the “provisional executive council” to prepare the army and navy for war to repulse aggression and provide for the republic’s safety. The leaders of the Revolution still insisted the war was directed against tyrants and despots, not the peoples of other countries, and they warned against “nationalizing” the conflict, that is, fighting another people instead of only their elite. They declared their soldiers intended to bring revolution and liberty to the peoples of the lands they entered. The National Convention drafted a proclamation to be announced to the people of another land when a French army entered it. Calling them “Brothers and Friends,” it declared, “We have won our liberty, and we shall keep it...We offer to help you too to enjoy this inestimable good, which has always been your right, denied to you by your criminal oppressors.” The behavior of the French armies in foreign lands gave rise to the famous parody on that proclamation: “We have arrived and you are free! Anyone found on the streets after six o’clock will be shot!”⁴⁰

With war against France now raging, the British government moved to improve relations with the United States. In November 1794 the Jay treaty, named after American negotiator, John Jay, was signed but did not take effect until February 1796. The British agreed to withdraw from six forts they still held on American soil in the Great Lakes region,

but gained agreement from the Americans to abide by the trade restrictions against France, which Britain had instituted in 1793. This treaty enraged the French, who saw it as perfidy on the part of their ally, and the American decision to stop repaying debts owed to the French monarchy on the grounds that they had been cancelled with the establishment of the French Republic further angered them. France began to seize American ships trading with Britain and refused to receive the new United States ambassador when he arrived in Paris in December 1796.

An American navy was all but nonexistent, and French privateers went unopposed as they took over three hundred American ships as prizes in the year prior to June 1797. The United States Congress responded to the situation with a series of acts. In June 1798, commerce with France was banned, and American merchant ships were given permission to arm. Congress abrogated the 1778 treaties with France the next month, which is usually seen as the beginning of what is called "the Quasi-War."⁴¹ Congress authorized President John Adams to build a navy of up to twelve ships, and he was empowered to order those ships to capture French warships anywhere in the world. Over the next two years the American fleet engaged in numerous acts of war, mostly against French privateers, but on at least two occasions with French naval vessels. Despite a large increase in the American army, the incidents occurred entirely at sea.

In 1800 the new government of First Consul Napoleon Bonaparte was eager to reconcile with the United States, and in September a convention ended the hostilities. It was not designated a peace treaty; neither side wanted to regard the affair as a war: misunderstandings between the two states were simply being cleared up. Although the three Anglo-Dutch naval wars of the previous century had seen formal declarations of war, in general hostile acts between warships were seen as less threatening than equivalent confrontations between armies and were more likely to fall under the definition of limited or imperfect war.

The legal status of the conflict arose in several suits involving cargos seized during it, which went to the US Supreme Court. One of the issues litigated was the extent of Congress's authority to authorize the taking of prizes, which delved into the question of what sort of conflict the "Quasi-war" had been. In Judge Bushrod Washington's opinion settling a case, he made a clear legal distinction between the two types of war:

Every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind; because one whole nation is at war with another whole nation; and all the members of the nation declaring war, are authorised to commit hostilities

against all the members of the other, in every place, and under every circumstance. . . . But hostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorised to commit hostilities, act under special authority, and can go no farther than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorised by the legitimate powers.

The most important of these decisions came in the case of *Bas v. Tingy*, decided in August 1800. John Bas was the master of the American cargo ship *Eliza*, and Captain Tingy commanded the American naval vessel *Ganges*. In March 1799, a French privateer had captured the *Eliza* on the high seas. Three weeks later, the *Ganges* recaptured the *Eliza* from the privateer, and under the law of capture Tingy claimed rights of salvage. At issue was whether Tingy was entitled to one-half the value of the *Eliza* and its cargo, or merely one-eighth; two congressional acts were involved, each supporting one of the two interpretations. A district court ruled that Tingy was entitled to one-half, which both the circuit court and the Supreme Court affirmed upon appeal.⁴²

Bas's legal arguments rested on the meaning of the words "the enemy" as used in the congressional acts. Was a formal declaration of war necessary for an enemy to exist? Affirming that France constituted an enemy in a legal sense, Justice Samuel Chase stated:

Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws. What, then, is the nature of the contest between America and France? In my judgment, it is a limited, partial, war. Congress has not declared war in general terms. . . . There is no authority given for hostilities on land; to capture unarmed French vessels nor to capture French armed vessels lying in a French port; and the authority is not given, indiscriminately, to every citizen of America, against every citizen of France; but only to citizens appointed by commissions, or exposed to immediate outrage and violence. So it is, unquestionably, a partial war; but, nevertheless, it is a public war, on account of the public authority from which it emanates.⁴³

The case established the principle that US armed forces may be used in a limited way in hostile acts against another nation without requiring a formal declaration of war.

Within a year of that decision, another situation raised the question of whether a declaration of war was necessary for the use of American armed forces. The North African states of Algiers, Tunis, and Tripoli declared war upon the United States in 1801, because it was in arrears in its annual tribute to the Barbary States. The papers and diary of James Cathcart, the American consul in Tripoli, provide an amusing story of how the Pasha Yusuf, Bey of Tripoli, declared war on the United States. On May 9, 1801, Cathcart received word that soldiers would come the next day to chop down the flagpole in front of his consulate as a declaration of war, said to be the traditional way of doing it in North Africa. It was not until May 14 that they did arrive. While the men tried to break the flagpole in half, Cathcart sent word to the pasha that he could offer \$10,000 immediately to avoid war. Yusuf rejected the sum, and his men turned to hacking at the pole with axes, taking an hour to finally fell it. The fallen flagpole signaled that war now existed between Tripoli and the United States, but Cathcart took ten days to pack and leave, unmolested by Yusuf's men.⁴⁴

When word reached America of the pasha's act, a debate began whether Congress had to enact a formal declaration of war to create a legal status of war. President Thomas Jefferson sent a naval squadron to the Mediterranean, but limited its mission to defense in the narrowest sense of the term. In a message to Congress he declared his actions to be in compliance with constitutional limitations on his authority in the absence of a declaration of war. Alexander Hamilton contended that while the Constitution vested in Congress the power to initiate war, when another nation made war upon the United States, there already existed a state of war, and no declaration by Congress was needed.⁴⁵ Since no formal declaration of war was passed, Congress apparently accepted Hamilton's view and enacted a statute authorizing the president to instruct the commanders of armed vessels of the United States to seize all vessels and goods of the Bey of Tripoli, "and also to cause to be done all such other acts of precaution or hostility as the state of war will justify."⁴⁶ Similar statutes directed the American navy against Tunis and Algiers. Several American minor naval victories led to an agreement in 1805, in which Jefferson, drawing a distinction between paying tribute and paying ransom, agreed to ransom American prisoners for sixty thousand dollars.

By 1805 tensions between the United States and Great Britain over issues of the rights of neutrals at sea and the impressment of British natives serving on American ships had begun to worsen. They continued to grow worse, until on June 17, 1812, the Congress passed "An Act Declaring War Between the United Kingdom of Great Britain and Ireland and

the Dependencies Thereof and the United States of America and Their Territories.” One vote had ended in deadlock on June 12; but ultimately the supporters of war had their way; and five days later, the Senate voted nineteen to thirteen in favor of war. Unknown to the Americans, Britain one day earlier had announced it was revoking the most burdensome of the orders affecting American shipping, but it would take three weeks for the news to reach America. On June 18, President James Madison signed the declaration of war he had drafted.

The text of the declaration of war was exceptionally brief:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That war be and the same is hereby declared to exist between the United Kingdom of Great Britain . . . and the United States of America and their territories; and that the President of the United States is hereby authorized to use the whole land and naval force of the United States to carry the same into effect, and to issue to private armed vessels of the United States commissions or letters of marque and general reprisal, in such form as he shall think proper, and under the seal of the United States, against the vessels, goods, and effects of the government of the said United Kingdom of Great Britain and Ireland, and the subjects thereof.⁴⁷

Of interest is the fact that war was declared against the United Kingdom and not the British king. The text contained no mention of the causes of the war, since Madison had enumerated them in his letter of June 1 presenting the case for war, nor did it provide the opportunity for British subjects to leave the United States or give any grace period before the war began. American armed forces went into action against the British before the declaration of war reached London. The declaration was intended to authorize the president to implement his war powers under the Constitution.

The Declaration of 1812 set the tone for the subsequent formal American declarations of war: against Mexico in 1846, Spain in 1898, Germany in 1917, and Japan, Germany, and Italy in 1941.⁴⁸ The president would present a message to Congress laying out the causes for declaring war and Congress would pass a brief resolution formally declaring it. Except for 1917, American forces were already engaged against the enemy when war was declared. Yet, the elaborate declaration of war of the sort that Vattel or Wolff thought necessary for a just war was not entirely obsolete in the nineteenth century. There were several that followed the traditional formula. The best example was the declaration issued in April 1828, when Nicholas I of Russia declared war on the Ottoman Empire, providing a detailed list of the grievances that led to war.⁴⁹

The October 1907 International Peace Conference at The Hague, which was far less concerned about peace than establishing the rules for war, included in its mandates the Convention Relative to the Opening of Hostilities. It declared in Article 1: "The Contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war." Article 2 stated: "The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect in regard to them until after the receipt of a notification, which may, however, be given by telegraph. Neutral Powers, nevertheless, cannot rely on the absence of notification if it is clearly established that they were in fact aware of the existence of a state of war."⁵⁰ The term "reasoned" in Article 1 specifies that the state declaring war must provide to the world community an explanation of the causes that have provoked war. The wording of the article also indicates the declaration is intended as an advance notice to the other state and is not to be issued as one's forces begin to cross the other state's borders. This is by far the most powerful statement ever to be formally articulated of the obligation to issue declarations of war and in the traditional sense of the need to issue them.

In the next years, two of the three wars involving European states began with declarations of war that largely met the conference's expectations. In 1911 Italy issued an ultimatum to the Ottoman Empire over alleged infringements of Italian rights in Libya and, on 29 September, declared war on the sultan. The next year, the First Balkan War began when Montenegro, soon followed by Bulgaria, Serbia and Greece, declared war on the Ottoman Empire. The Second Balkan war of 1913 saw no declarations of war, although it can be argued that it was a continuation of the prior conflict.

For all its destruction and casualties, World War I began according to international law. Austria-Hungary presented an ultimatum to Serbia and declared war on July 28, 1914, when Serbia refused several demands. Declarations of war quickly followed from the other major European states. The most controversial aspect of the war's opening was Germany's request for free passage for its troops through Belgium to forestall "the intention of France to march through Belgian territory against Germany," with a promise to purchase whatever its troops used in Belgian territory, pay an indemnity for any damages caused by its troops, and evacuate Belgian territory upon peace.⁵¹ According to several key figures who formulated international law, Grotius and Wolff in particular, Belgium's subsequent refusal was a proper cause of war.⁵² Germany thus declared war on Belgium on August 4, several hours after its troops had crossed its

border. Later that same day, Great Britain declared war on Germany. In fact, every country that eventually became involved issued declarations of war. Twenty-nine states in all declared war: twenty-five were members of the Allies, and four made up the Central Powers. Not all declared war against every state on the other side: Bulgaria, for example, declared war only on Serbia, while Belgium only did so against Germany.⁵³

World War II is remembered for attacks made without declarations of war—Germany against Poland and the Soviet Union, and Japan against the United States. President Franklin Roosevelt’s “Day of Infamy” address and American wartime rhetoric emphatically stressed that treacherous Japan had attacked without a declaration of war (Japan did in fact issue one, but an unintentional delay in decoding at its embassy in Washington resulted in its issuance after the attack on Pearl Harbor was under way.⁵⁴), but there were some 114 declarations of war.⁵⁵ Many nations declared war against all the states on the opposing side with one declaration; others did so one enemy state at a time. Several states did so twice—for example, Italy against the Allies, and after the fall of Mussolini in 1943, against Germany. Mongolia declared war on Japan as late as August 9, 1945, five days before Japan surrendered; this is considered the last formal declaration of war.

The United Nations charter drawn up at the end of World War II proclaims in Article I:

1. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
2. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
3. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.⁵⁶

These clauses and others banning the use of violence for resolving inter-state conflicts are generally taken as having outlawed war and, thus, declarations of war. History since 1945 clearly has shown the UN has failed to prevent armed conflicts (a euphemism often used to avoid the legal connotations of the term war), but it can be said that declarations of war have disappeared. Two alleged declarations—by five Arab states against Israel in 1967 and by Panama in 1989 against the United States—almost certainly never were issued.⁵⁷ The Gulf War of 1991 was fought

under the authority of a UN resolution, while the British and American invasion of Iraq in 2003 to topple Saddam Hussein's regime was done under a legal claim, at least by the United States, of self-defense against a threat posed by alleged Iraqi weapons of mass destruction. Britain's legal grounds for participating in the war on Iraq were based on Iraqi noncompliance with UN resolutions limiting its weaponry.

In the early twenty-first century, two forms of warfare are still deemed acceptable in international law: UN enforcement action and self-defense.⁵⁸ Neither is seen as requiring a declaration of war. Perhaps declarations of war have truly become obsolete, as Cornelius van Bynkershoek had argued already in 1737,⁵⁹ but given the long history of declaring war, and since it has been barely a century since the explicit mandate specified by the Hague Conference, it is far too early to presume the practice is permanently defunct and valueless.

What conclusion, then, does the history of the declaration of war permit in respect to the question posed in this book's introduction? Which of the three theories on declaring war best fits the intent of the framers of the US Constitution: the categorical theory, which posits that the authority to declare war includes the power to control all decisions to enter war; the pragmatic theory, which proposes that such power may be made unnecessary by an act of war in itself against the United States; or the formalist theory, which finds the power of declaring war constitutes only a formal implementation of executive power to conduct war? The history of declaring war in the early modern era best supports the pragmatic theory, which argues that declaring war may be made unnecessary when the United States has been attacked.

The framers of the Constitution were well aware of the history and the theory of declaring war, although both were ambiguous in that era and could not provide any completely certain conclusions. They were fully cognizant, from Blackstone and other authorities, that it was an executive function in most European states, and especially Britain. The fact that the Constitution assigns the power of declaring war to the Congress, however, was clearly meant to signify they wanted to restrict the executive's power to begin a war. The framers were all too familiar with kings declaring war: "For such is the will of His Majesty," and were determined to prevent that from occurring in their new republic. Probably the most powerful proof the framers intended to severely restrict presidential war-making power lies in the passages that follow the one on declaring war: Congress is also granted the authority to "grant Letters of Marque and Reprisal and to make Rules concerning Captures on Land and Water," and in a later clause to provide for and maintain armies and navies and call out the militia to "suppress Insurrections and repel Invasions." These

were all powers exercised by monarchs, such as the British king. In the eighteenth century, they empowered the authorities who held them to make limited or imperfect war. The framers were aware the exercise of those powers often resulted in full-scale war, often without a formal declaration. Giving control over them to the Congress clearly signified the intention to limit severely the executive's ability to initiate acts that led to waging war.

The Constitution's authors were deeply imbued with English history and knew that British kings were more consistent in declaring war than other monarchs. The framers sought to form an ideal government, which they believed would place the power of making war in the legislative body, since they feared an executive with independent war-making powers could abuse them. Such an ideal government would go to war only upon a formal declaration. They certainly were influenced by the British system of government, but in those aspects where they consciously sought to make changes in the British system, it was the Roman Republic that served as the model. The framers were knowledgeable about Roman history and the practice used in the early Roman Republic in which the Senate decided on war but only after demanding reparations from a potential enemy before declaring war. Since placing the power to declare war in the legislative body and removing it from the executive was one such major change from the British model that adhered to the Roman system, it follows that the framers intended also to accept the Roman example that war against another state must begin with at least a formal declaration, if not a prior demand for reparations.

Yet the framers were aware that the actual practice of their era was less sure than that. The history of declaring war as detailed in this book shows that the statement of James Iredell, a Federalist from North Carolina, that declarations of war had been "for some time out of fashion,"⁶⁰ overstates the case for the absence of declarations of war, but there is no question that war sometimes began without a declaration or, more often, with declarations issued only after hostilities had occurred. The consensus of the major authors agreed that a nation under attack, whether or not a declaration of war was proclaimed prior to the attack, had a right to defend itself without declaring war. Although the text of the Constitution makes no specific statement that the president has the authority to respond to an attack, the record of the debates at the Constitutional Convention made it clear that the president was expected to repel attacks. While it is true that the record probably does not include all the comments made by Convention members, it nonetheless seems certain from it that the framers expected the president to respond to attack or invasion without waiting for a declaration of war from the Congress.

Thus, one can conclude that the Constitution provides a carefully circumscribed role for the president in initiating hostilities, but most of the war-making authority has been placed in Congress. The fact that there have been a good number of occasions throughout American history in which the president probably overstepped his authority in the Constitution and Congress failed to exercise its own does not change the Constitution and the intent of its framers, which supports the pragmatic theory on making war. Practice, however, has become far closer to the formalist approach. Restoring the original intent of the framers requires Congress to assert its prerogative under the Constitution and return to the use of the formal declaration of war.

NOTES

Note on notes: In order to keep the number of notes from approaching infinity, for those paragraphs where I quote extensively from the same text, I provide one citation for the paragraph's first quotation and give no notes for further quotations in that paragraph when they come from the same page in the same source.

1 Introduction

1. Arthur Schlesinger, *The Imperial Presidency* (Boston: Houghton Mifflin Company, 1973). In 1950 Schlesinger had supported Truman's authority to take the actions he did in Korea.
2. Henry Monaghan, "Presidential War-Making," *Boston University Law Review*, 50(1970), pp. 19–33; accessed at <http://www.heinonline.org/HOL/Index?index=journals/bulr&collection=journals>, March 23, 2009.
3. Robert Turner, *Repealing the War Powers Resolution: Restoring the Rule of Law in U.S. Foreign Policy* (New York: Brassey's, 1991); Bennett Rushkoff, "A Defense of the War Powers Resolution," *Yale Law Journal* (June 1984), 1330–1354.
4. "Address to a Joint Session of Congress and the American People," accessed December 23, 2008, at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html>. In 1996 Osama bin Laden, leader of the radical Islamic group al-Qaeda had issued "The Declaration of Jihad on the Americans" and signed a *fatwa* in the name of the World Islamic Front for Jihad Against Jews and Crusaders. See "Jihad Against Jews and Crusaders," at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm>, accessed December 23, 2008. On jihad, see below, p. 20; on the *fatwa*, see below, p. 30.
5. John Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago: University of Chicago Press, 2005); Schlesinger, *War and the American Presidency* (New York: W. W. Norton, 2004).
6. Siakrishna Prakash, "Unleashing the Dogs of War: What the Constitution Means by 'Declare War,'" *Cornell Law Review*, 93(October 2007), pp. 1–2; accessed at <http://ssrn.com/abstract=977244> on March 18, 2009.
7. Michael Ramsey, *The Constitution's Text in Foreign Affairs* (Cambridge, MA: Harvard University Press, 2007), p. 255. See also Ramsey, "Textualism and War Powers," *Chicago Law Review*, 69(2002), 1543–1638.

8. Yoo, *Powers of War and Peace*, p. 151. See also Yoo's rebuttal to Ramsey, "Textualism and War Powers," and Ramsey's response, both in *Chicago Law Review* 69(2002). Interestingly, Yoo, while serving in the President's Office of Legal Counsel, apparently supported the use of some of those enhanced powers during the Second Iraq War, despite the absence of a declaration of war.
9. Frederick Maurice, *Hostilities Without Declaration of War* (London: Her Majesty's Stationery Office, 1883). Maurice drew heavily from E. Cust, *Annals of the Wars of the Eighteenth Century*, 4 vols. (London: John Abermarle, 1862), which contains summaries of that century's wars and is often in error when not dealing with Britain.
10. Brian Hallet, *The Lost Art of Declaring War* (Urbana, IL: University of Illinois Press, 1998), p. 34n.
11. Maurice, *Hostilities*, pp. 4–5. Maurice broke down those 107 cases further: 41 in which the "manifest motive" for not declaring war was catching the other state by surprise; 12 in which a state hoped to delay declaring war or throw the burden of doing so on the other state; another 12 in which a general or admiral was given the authority to begin hostilities, depending on the local circumstances at a distance from the mother country; 9 in which sudden military action was taken to thwart the known or suspected hostile designs of another state; 16 involving reprisals or irregular raids constituting a condition intermediate between war and peace; 4 in which two states acting as allies of other states already at war slipped into war; 4 in which violence in colonies preceded the outbreak of war between the mother countries; and 9 in which the circumstances were so unusual that they do not fall into any category.
12. Both books cited above, note 5, make use of Maurice's work without comment or analysis, although Schlesinger's uncritical use of it is damaging to his argument.

2 Ancient and Medieval Precedents

1. According to J. Bayet, *Croyons et rites dans la Rome antique* (Paris: Payet, 1971), pp. 9–43, the original meaning of the Roman spear thrown into enemy territory was magical. But according to Maurice Davie, *The Evolution of War* (reprint Port Washington, NY: Kennikat, 1968), p. 176, "A declaration of war... does not exist among the lowest peoples. The essence of savage warfare is treachery and ambush." While it is true that the essence of war at any level of culture is treachery and ambush, his Chapter XIV "The Mitigation of War" and Appendix L "The Declaration of War" catalogues the different ways in which tribal societies declared war, and contradict this earlier statement.
2. Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome*, 2 vols., (London: Macmillan, 1911), II, 197. In his *Art of Warfare*, Sun-tzu comments only that when war is declared, the passes should be closed off to the enemy and his emissaries dismissed. Sun-tzu, *The Art of Warfare*, trans. by Roger Ames (New York: Ballantine Books, 1993),

- p. 162. In 1894 China and Japan declared war on each other, but both texts drew upon Western usage: <http://sinojapanese.sewar.com/declaration.htm>, accessed on January 6, 2009.
3. Ross Hassig, *Aztec Warfare: Imperial Expansion and Political Control* (Norman, OK: University of Oklahoma Press, 1988), p. 48. Those Aztec merchants frequently were involved in provocative acts.
 4. Hartley Alexander, *Latin-American Mythology* (Boston: Marshall Jones, 1920), p. 244.
 5. William Farabee, *Indian Tribes of Eastern Peru* (Cambridge, MA.: Peabody Museum, 1922), p. 108. It is not clear whether Farabee was referring to Amerindian tribes in general or only those in the region where the Amahuaca lived.
 6. Accessed at <http://www.polynesia.com/new-zealand/the-pa-or-village.html>, on January 7, 2009.
 7. "Gilgamesh and Aga," accessed at <http://etcsl.orinst.ox.ac.uk/cgi-bin/etcsl.cgi?text=t.1.8.1.1#> on September 25, 2008
 8. Victor Hanson, *The Wars of the Ancient Greeks* (London: Cassell, 1999), p. 68. The best source on the practices of declaring war in the ancient world is Alberico Gentili, *Three Books on Embassies*, trans. by G. J. Laing (Oxford: University Press, 1924), Book I. On Gentili, see below, Chapter III.
 9. Quoted in Philip Harding, ed., *From the End of the Peloponnesian War to the Battle of Ipsus* (Cambridge: University Press, 1985), p. 96.
 10. Plutarch, *Lives*, Lycurgus; Ibid., Pyrrhus, 26. Helots were descendants of the Messenians whom the Spartans conquered in the eighth century BC.
 11. Plutarch, *Lives*, Numa. Plutarch, *Life of Camillus*, XVIII. 1: "These Fetiales were instituted by Numa Pompilius, gentlest and justest of kings, to be the guardians of peace, as well as judges and determiners of the grounds on which war could justly be made."
 12. Dionysius of Halicarnassus, *The Roman Antiquities*: 2, 72, provides a nearly identical but briefer description of the fetials. Since he and Livy were contemporaries, it is probable that both took information from the same sources. J. W. Rich, *Declaring War in the Roman Republic in the Period of Transmarine Expansion* (Brussels: Latomus, 1976), p. 58, argues that the fetials were used to declare war only in cases when persons from another state had committed offenses against Romans and were not condemned by the other state. While it is not clear what other types of wars occurred during the early Republic, Rich's argument would help to explain why the fetials disappeared as Rome began to wage war outside of its local region. On the "revised fetial procedure," see William Harris, *War and Imperialism in Republican Rome, 327–70 B.C.* (Oxford: Clarendon Press, 1979), pp. 167–75, 269–70.
 13. A. Futrell, *The Roman Games: A Sourcebook* (Oxford: Blackwell, 2006), pp. 121–22.
 14. Livy: XXXVI, 3. On the Roman declarations of war in 200 and 192, see A. McDonald and F. Walbank, "The Origins of The Second Macedonian War," *Journal of Roman Studies* 27(1937), 192–97.

15. P. A. Brunt, "Charges of Provincial Maladministration under the Early Principate," *Historia*, 10 (1961), 189–223.
16. Quoted in Sylvester Mazzolini da Pirierio, *Summa Summarum, que Sylvestrina dicitur* (Venice, 1578), Section *Ad Bellum*, p. 40ff. Ulpian restricted the use of the word *hostes* to enemies involved in a formally declared war.
17. The strongest case for early Christian pacifism is found in C. John Cadoux, *The Early Christian Attitude toward War* (New York: Seabury Press, 1982). For the argument that many pre-313 Christians were not pacifists, see Robert Daly et al., *Christians and the Military: The Early Experience* (Philadelphia: Fortress Press, 1985) and James Johnson, *The Quest of Peace* (Princeton: Princeton University Press, 1987).
18. Frederick Russell, *The Just War in the Middle Ages* (Cambridge: University Press, 1975), p. 27.
19. *The Works of James Wilson*, ed. by Robert McCloskey, 2 vols. (Cambridge: Belknap Press, 1967).
20. Majid Kadduri, *War and Peace in the Law of Islam* (Baltimore: Johns Hopkins University Press, 1955). See also Rudolph Peters, trans., *Jihad in Medieval and Modern Islam* (Leiden: Brill, 1970).
21. Abdulaziz Sachedina, "Justifications for Violence in Islam," in Burns, J. Patout, ed. *War and Its Discontents: Pacifism and Quietism in the Abrahamic Traditions* (Washington: Georgetown University Press, 1996), pp. 122–69.
22. Alfred Butler, *The Arab Conquest of Egypt and the Last Thirty Years of the Roman Dominion* (Oxford: University Press, 1967), pp. 230–31.
23. Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World 1492–1640* (Cambridge: University Press, 1995), pp. 74–76, states that the Spanish Muslim scholars were adamant about the need for such a summons, but she gives no specific examples of it being used, and my search, admittedly not exhaustive, in works on medieval Iberian history found no examples.
24. Quotations found in A. Krey, *The First Crusade: The Accounts of Eyewitnesses and Participants* (Princeton: Princeton University Press, 1921).
25. Examples in Ibn al-Qalanisi, *The Damascus Chronicle of the Crusades*, trans. by H. R. Gibb (London: Luzac, 1967), pp. 48, 68, 90.
26. Richard Trexler, *The Spiritual Power: Republican Florence under Interdict* (Leiden: Brill, 1974), p. 12–13; Michael Wilkes, *The Problem of Sovereignty in the Later Middle Ages* (Cambridge: University Press, 1964), pp. 445–46.
27. The bull is in Sigismondo dei Conti da Foligno, *Le storie de' suoi tempi dal 1475 al 1510*, 2 vols. (Rome, 1883), I, 223–27. Ludwig Pastor, *The History of the Popes*, 44 vols. (St. Louis: Herder, 1950), V, 254, states that the Holy See "declared war against the King"; but that phrase does not appear in the bull's text.
28. Marc Bloch, *Feudal Society*, p. 228; John Ferne, *The Blaxon of Gentry* (London, 1586, reprint New York, 1973), part II, p. 85; Rachel,

- Dissertationes de jure naturae et gentium*, trans. by John Bate, 2 vols. (Washington: Carnegie Institute, 1916). According to Ferne, the word herald came from the German words *heerre* and *auld*, meaning an old gentleman. Part 1, p. 151.
29. John Bridge, *History of France From the Death of Louis XI to 1515*, 5 vols. (reprint New York: Octagon, 1978), III, p. 168.
 30. Paul Kendall, *Louis XI* (New York: W.W. Norton, 1971), pp. 265, 283, Guillaume Budé, *Annotationes in XXIV. libros Pandectarum* (Paris, 1535), p. 96.
 31. Giovanni da Legnano, *Treatise on War, Reprisals, and Duels*, trans. by Thomas Holland (Washington: Carnegie Institute, 1917).
 32. Alfred Vanderpol, *La doctrine scholastique du droit du guerre* (Paris: Pedone, 1919); John Eppstein, *The Catholic Tradition of the Law of Nations* (Washington: Catholic University Press, 1935).
 33. Honoré Bonet, *Book of the Tree of Battles*, trans. by G. W. Coopland (Cambridge, MA: Harvard University Press, 1949), p. 192.
 34. John Noonan, *A Church That Can and Cannot Change: The Development of Catholic Moral Teaching* (Notre Dame, IN: University of Notre Dame Press, 2005), p. 241.
 35. Ibid., p. 54; Peter Bordwell, *The Law of War Between Belligerents: A History and Commentary* (Chicago: Callaghan & co., 1908), p. 11.
 36. Christine de Pisan, *The Book of Deeds of Arms and of Chivalry*, trans. by Sumner Willard (University Park, PA: Pennsylvania State University Press, 1999), p. 2. As the editor points out, the inclusion of dukes among those who could declare war might have been a gesture to the duke of Burgundy, one of her patrons, who held fiefs from the king of France and the emperor.
 37. John Baldwin, *Masters, Princes, and Merchants*, 2 vols. (Princeton: Princeton University Press, 1970), I, 209. William Caxton's 1489 translation of the *Book of Deeds of Arms and of Chivalry* used the word Parliament for council, surely giving Christine's statement a more representative sense than she intended.
 38. Text of letter in Edward Hall, *Hall's Chronicle: Containing the History of England* (reprint New York: AMS Press, 1965), pp. 59–60.
 39. Jean LeFèvre de Saint-Rémy, *Chronique*, ed. by J. Morand, 2 vols. (Paris, 1876–81), I, 236–37.
 40. Paul Kendall and Vincent Ilardi, eds., *Dispatches with Related Documents of Milanese Ambassadors in France and Burgundy, 1450–1483*, 3 vols. (Athens, OH: Ohio University Press, 1970), I, 58.
 41. B. Dmytryshyn, *Medieval Russia: A Source Book, 900–1700*, 2nd ed. (Hinsdale, IL: Dryden Press, 1973), p. 176.
 42. The *fatwa* that was issued in 1915 as Turkey joined World War I in alliance with Germany is in A. Bostom, *The Legacy of Jihad: Islamic Holy War and the Fate of Non-Muslims*; (Amherst, NY: Prometheus, 2005), pp. 221–25.
 43. E. Creasey, *History of the Ottoman Turks* (New York: Henry Holt, 1878), p. 133.

44. Ibid., p. 137. Creasey states that the author of the Ottoman letter was indeed Selim who was addicted to opium; Ismail's response only enraged him further.
45. Philippe de Commynes, *Memoirs*, ed. by Samuel Kinser, 2 vols. (Columbia, SC: University of South Carolina Press, 1969–73), I, 264–65.
46. Ibid., p. 256. Kendall, *Louis XI*, p. 271, says that the Swiss declared war on Charles; but he gives no source; and I have not found anything further on a Swiss declaration.

3 The Sixteenth Century—The Practice

1. The English text of the Requirement is in Arthur Helps, *The Spanish Conquest in America*, 4 vols. (reprint New York: AMS Press, 1966), I, 264–67. See also Lewis Hanke, *The Spanish Struggle for Justice in the Conquest of America* (Philadelphia: University of Pennsylvania Press, 1949), pp. 31–36.
2. Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World 1492-1640* (Cambridge: University Press, 1995), pp. 74–79, shows the similarities between the Muslim summons and the Spanish Requirement.
3. Ibid., p. 68.
4. Richard Flint, *Great Cruelties Have Been Reported: The 1544 Investigation of the Coronado Expedition* (Dallas, TX: Southern Methodist University Press, 2002), p. 210. Most histories of the Spanish conquests and biographies of conquistadores contain examples of the proclaiming of the Requirement.
5. Gaspar Perez de Villagra, *Historia de la Nueva Mexico, 1610* (Albuquerque: University of New Mexico Press, 1992), pp. 160–62.
6. Hanke, *Spanish Struggle*, pp. 140–45.
7. Hanke, *Aristotle and the American Indians: A Study in Race Prejudice in the Modern World* (Bloomington, IN: Indiana University Press, 1959), pp. 107–09.
8. Marino Sanuto, *I Diarii*, ed. by F. Stefani, 58 vols. (Venice, 1879–1903), VIII, col. 95; E. Nys, *Le Droit de La Guerre* (Paris: Durand, 1882), p. 109; Bridge, *History of France*, III, 20.
9. Ludwig von Pastor, *History of the Popes from the Close of the Middle Ages*, 40 vols. (reprint Nendelen, Liechtenstein, 1969), VI, 31–32.
10. *Letters and Papers, Foreign and domestic of the Reign of Henry VIII*, ed. by J. S. Brewer (reprint Vaduz: Kraus, 1965), I, part 2, no. 2157; Sanuto, *I Diarii*, XVI, 674. *Hall's Chronicle*, pp. 545–46, provides an account of this episode that varies in details.
11. The text of James's letter, "the true tenor whereof followeth word by word," is in *Hall's Chronicle*, pp. 545–46, as is Henry's response. See also *Letters and Papers*, I, no. 216.
12. *Letters and Papers*, no. 2207.

13. R. Nicholson, *Scotland: The Later Middle Ages* (New York: Barnes and Noble, 1974), pp. 600–604. The herald Lyon had not reached James with Henry's response to the defiance when James was killed.
14. V.-L. Bourrilly and F. Vindry, eds., *Mémoires de Martin et Guillaume Du Bellay* (Paris, 1905), I, 107–12. The text of La Mark's declaration of war is not given, so it is not clear on what grounds he declared war.
15. The English declaration of war and Francis's reply were printed at Lyon.
16. F. Billacois, *The Duel*, trans. by T. Selous (New Haven, CT: Yale University Press, 1990), p. 9.
17. R. J. Knecht, *Renaissance Warrior and Patron: The Reign of Francis I* (Cambridge: University Press, 1994), p. 200.
18. The exchanges between the kings of England and France on one side and Charles V on the other are found in Charles Weiss, ed. *Papiers d'Etat de Cardinal de Granvelle*, 4 vols. (Paris: Imprimerie Royale, 1841), I, 310–424. See also Robert Holinshed, *Chronicles of England, Scotland, and Ireland*, 6 vols. (reprint New York, 1965), III, 723–29; *Calendar of Letters, Despatches, and State Papers Related to the Negotiations between England and Spain*, ed. by P. de Gayangos (reprint Nendeln, Liechtenstein, 1969), III–2, 549–51.
19. *Letters and Papers, Foreign and Domestic, of the Reign of Henry VIII*, ed. by J. Brewer (reprint Vaduz, 1965), IV–2, 1715.
20. Holinshed, *Chronicles*, III, 734.
21. *Calendar of State Letters, Spain*, III–2, 548–49.
22. *Ibid.*, 552.
23. Only the reply to the English herald is extant. The ambassador's report is in *Calendar of State Papers, Spain*, III–2, 636–41.
24. Holinshed, *Chronicles*, III, 732–34; Karl Brandi, *The Emperor Charles V*, trans. by C. V. Wedgwood (London: Jonathan Cape, 1939), p. 265.
25. Granvelle, *Papiers d'état*, I, 407.
26. *Calendar of State Papers, Spain*, III–2, 737.
27. *Ibid.*, 816, 832.
28. Brandi, *Charles V*, pp. 378–79.
29. Heinrich Bullinger, *Heinrich Bullingers Reformationsgeschichte nach dem Autographon*, 3 vols. (Frauenfeld, 1838–40), II, 163–69. See also G. R. Potter, *Zwingli* (Cambridge: University Press, 1978), p. 346ff.
30. Bullinger, III, 88.
31. Sleidan. *De Statu Religionis Et Reipublicae, Carolo quinto, Caesare, Commentarii*. (Strasburg, 1555), I, 17.
32. Granvelle, *Papiers d'état*, II, 628–31; see also Knecht, *Renaissance Prince*, pp. 479–80. There is no evidence that a herald was sent to Charles to declare war on him, but a copy of the French proclamation of war exists in the Spanish archives at Simancas. See *Calendar of Letters and Papers, Henry VIII*, XVII, 287.
33. Khadduri, *War and Peace in the Law of Islam*, pp. 272–74.
34. *Letters and Papers, Henry VIII*, XVII, 522.

35. Full text in *Hall's Chronicle*, 843–53; there is a summary in *Letters and Papers, Henry VIII*, XVII, 582–83. The latter's editor indicates that Henry's accounts included a payment for 36 copies dated November 5, 1542.
36. *Hall's Chronicle*, p. 850.
37. *Letters and Papers*, XVII, 596.
38. *Ibid.*, p. 622. The details of the murder are on p. 623.
39. Holinshed, *Chronicles*, III, 832.
40. For the background to the war, see Baumgartner, *Henry II King of France* (Durham, NC: Duke University Press, 1988), pp. 177–91.
41. *Calendar of State Papers, Foreign Series, Reign of Mary* edited by William Turnbull (reprint Nendeln, Liechtenstein: Klaus, 1967), p. 312.
42. *Letters and Papers*, XIII, Reign of Mary and Philip, pp. 293–94.
43. The text of the declaration is in *Calendar of State Papers, Spain*, XIII, 293–94. What I believe to be the original declaration of war delivered to the French court is in Bibliothèque Nationale, Paris, Collection Clairambault, fonds 350, fol. 149.
44. Henry Machyn, *The Diary of Henry Machyn, Citizen and Merchant-taylor of London, From A.D. 1550 to A.D. 1563*, ed. by John Nicholls (reprint New York: Johnson Reprints, 1986), p. 138.
45. *Calendar of State Papers, Venice*, VI–2, 1146.
46. A French account of the herald's appearance at the French court is printed in L. Cimber and F. Danjou, eds., *Archives curieuses de l'histoire de France*, 1st series (Paris, 1734–1750), III, 213–18. See also Holinshed, *Chronicles*, IV, 87.
47. *Calendar of State Papers, Reign of Mary*, 319.
48. *Calendar of State Papers, Venice*, VII, 345–47; A. Miller, *Sir Henry Killigrew* (Leicester: Leicester University Press, 1963), pp. 85–87.
49. (London, 1585), reproduced by University of Michigan Microfilms.
50. (London, 1596), reproduced by University of Michigan Microfilms.
51. Victor Palma Cayet, *Chronologie novenaire*, in J.-F. Michaud and J.-J. Poujoulat, *Mémoires pour servir à l'histoire de France*, 32 vols. (Lyon, 1853), XII, 654–55.
52. British Library, ms. SP36163, fol. 57, copy of the placard printed at Lyon. It names the city's town crier and trumpeter, who announced the declaration on August 16, 1600.
53. British Library, ms. ADD 8558; Charles Dumont, *Corps universal diplomatique du droit des gens* (Amsterdam: Brunel, 1728), V–1, 203. A Spaniard, Juan de Carthagená, wrote a work, *Propuganculum Catholicum De Jure Belli romani Pontificis* (Rome, 1609), which proclaimed that the pope had as much right as any secular monarch to declare war against violators of the Church's rights.
54. George Hill, *History of Cyprus*, 3 vols. (Cambridge: University Press, 1972), III, 888.

4 The Sixteenth Century—The Theory

1. Niccolò Machiavelli. *The Prince and The Discourses*, ed. by Max Lerner. (New York: Modern Library, 1950), p. 199. The only source for this quotation is Cassius Dio's *Roman History*, but Machiavelli's era regarded it as Cicero's. The early Romans were in fact careful to provoke an enemy into an act that would then be seized on as a cause for a just war.
2. Modern scholars distinguish between preemptive war—the use of force in expectation of an imminent attack—and preventive war—the use of force to deter a threat at an indefinite future time. See, e.g., Louis Fisher, *Presidential War Power*, 2nd ed. (Lawrence, KS: University Press of Kansas, 2004), pp. 202–04. Earlier authors did not make that distinction, but here Machiavelli (and Cicero) seems to have both in mind.
3. *The Prince*, p. 199.
4. *Ibid.*, p. 299.
5. Machiavelli, *History of Florence and the Affairs of Italy from the earliest times*, II, 2; online at <http://ebooks.adelaide.edu.au/m/machiavelli/niccolo/m149h/index.html>, accessed March 15, 2008.
6. Jean Lemaire de Belges, *La Légende des Vénitiens* (Paris, 1510), p. 16.
7. Claude de Seyssl, *The Monarchy of France*, trans. by J. H. Hexter (New Haven, CT: Yale University Press, 1981), p. 130.
8. *Ibid.*
9. *Ibid.*, p. 143.
10. More, *Utopia*, ed. by Robert Adams (New York: Norton, 1975), p. 71.
11. *Ibid.*, p. 45. For the humanist position on occupying vacant land, see Richard Tuck, *The Rights of War and Peace* (Oxford: University Press, 1999), pp. 47–50.
12. Campanella's *City of the Sun*; online at <http://oll.libertyfund.org/index>, accessed November 29, 2008.
13. Erasmus, *The Education of a Christian Prince*, trans. by Neil Cheshire (Cambridge: University Press, 1997), pp. 104–05.
14. Erasmus, *Against War*, trans. by V. Knox (Boston: Merrymount Press, 1907), p. 22.
15. José Fernández, “Erasmus on the Just War,” *Journal of the History of Ideas* 34(1973), pp. 209–26.
16. “On War against the Turk,” *Luther's Works*, XLVI, pp. 155–206. Luther's other major work on war is “Whether Soldiers, Too, Can Be Saved,” *ibid.*, pp. 87–136.
17. Olivier Bangerter, *La pensée militaire de Zwingli* (Bern: Peter Lang, 2003), p. 50.
18. *Ibid.*, pp. 167–71. Another Swiss reformer/humanist who changed his mind on war in the same way was Johannes Oecolampadius of Basel.
19. Conrad Brunus, *Les cinq livres sur les ambassades*, trans. by Dominique Gaurier (Limoges: Pulim, 2008).

20. Ibid., pp. 231–34.
21. This and other treaties and papal bulls are found in Frances Davenport, ed., *European Treaties bearing on the History of the United States to 1648*, 4 vols. (reprint Gloucester, Mass: Peter Smith, 1967). I, pp. 9–168.
22. Anthony Pagden, *The Fall of Natural Man* (Cambridge: University Press, 1982), p. 31.
23. Juan Lopez de Palacios Rubios, *De las isles del mar oceano*, trans. by A. M. Carlo (Mexico City, 1954).
24. Matias de Paz, *Del dominio de los Reyes de Espana sobre los indios*, trans. by A. M. Carlo (Mexico City, 1954), pp. 213ff.
25. Tuck, *Rights of War and Peace*, p. 43, calls him “an absolutely stereotypical humanist” and “an ultra-Ciceronian humanist.”
26. A summary of the Sepúveda–Las Casas debate is in Hanke, *Aristotle and the American Indians*.
27. Bartolomé de Las Casas, *In Defense of the Indians*, trans. by Stanford Poole (DeKalb, IL: Northern Illinois University Press, 1974).
28. Whether there were “natural slaves” did not come up in reference to Africans. Africans brought to Europe or the Americas as slaves by the Iberians were regarded as prisoners of war seized in wars by those who sold them and legally slaves. No one, of course, asked whether those wars were just. See Pagden, *Fall of Natural Man*, pp. 32–33. Las Casas at first agreed and advocated bringing African slaves to the Americas to save the Indians. He soon repented of that view and attacked enslaving of Africans as equally unjust.
29. James Scott, *The Spanish Origins of International Law: Francisco de Vitoria and His Law of Nations* (Oxford: Clarendon Press, 1934), intro. English authors often have spelled his name Victoria.
30. Vitoria, *Political Writings*, trans. by Anthony Pagden (Cambridge: University Press, 1991), p. 233.
31. Scott, *Spanish Origins*, p. 172.
32. Vitoria, *De Indis et Jure Belli Relectiones* trans. by Ernest Nys (reprint New York: Oceana Press, 1964), p. 164.
33. Scot, *Spanish Origins*, p. 227. Vitoria’s citation is to Adrian’s “Questiones Quodlibetical,” which I have been unable to find. Apparently it existed only in manuscript.
34. The Spanish legal writer Fernando Vazquez de Mencheca, who attended the Council of Trent in 1561 as a representative for Philip II, emphasized more than did Vitoria that the power to declare war is invested in the state and not its prince. *Controversiae Illustres* (Venice, 1572), p. 16.
35. Bernice Hamilton, *Political Thought in Sixteenth-Century Spain* (Oxford: University Press, 1963), p. 179 n. 1.
36. Pagden, *The Fall of Natural Man* (Cambridge: University Press, 1982), p. 106.
37. David Lupher, *Romans in a New World: Classical Models in Sixteenth-Century Spanish America* (Ann Arbor, MI: University of Michigan Press, 2003),

- p. 87. Lupher points out that Cano's Latin word, *peregrinus*, also had the sense of pilgrim.
38. Francisco Suarez, *Selections from Three Works*, trans. by Gladys Williams, et al. (Oxford: Clarendon Press, 1944), II, 729ff.
 39. James Johnson, *Just War Tradition and the Restraint of War* (Princeton: Princeton University Press, 1981), p. 94.
 40. Edited by John Westlake, 2 vols. (Washington: Carnegie Institute, 1912).
 41. *Ibid.*, I, p. 4.
 42. *Ibid.*, p. 9.
 43. *Ibid.*, p. 88.
 44. Pierino Belli, *De Re Militari et de Bello*, trans. by Herbert Nutting, 2 vols. (Oxford: Clarendon Press, 1936.) II, pp. 11a–13a
 45. *Ibid.*, p. 3.
 46. *Ibid.*, pp. 6–7.
 47. *Ibid.*, p. 85.
 48. *Ibid.*, p. 11.
 49. I have not found the Roman source for Belli's number here. He may have mistakenly used three instead of thirty-three.
 50. *Ibid.*, pp. 60, 78
 51. An account of Gentili's life is in Coleman Phillipson's introduction to Alberico Gentili, *De Iure Belli Libri Tres*, trans. by John Rolfe (Oxford: Clarendon Press, 1933), pp. 12a–14a.
 52. Regarding an ambassador who conspired against the ruler to whom he was posted, the charge against Mendoza, Gentili wrote: "As the sovereign can order him to leave, he ought not be put to death." *Three Books on Embassies*, II, p. 112. On the Mendoza episode and diplomatic immunity, see Linda Frey and Marsha Frey, *The History of Diplomatic Immunity* (Columbus, OH: Ohio State University Press, 1999), pp. 167–72.
 53. Gentili, *De Iure Belli Libri Tres*, p. 57.
 54. *Ibid.*, pp. 80–81.
 55. Tuck, *Rights of War and Peace*, pp. 49–51.
 56. Seed, *Ceremonies of Possession*, chap. I; David Boucher, "The Law of Nations and the Doctrine of *Terra Nullius*," in Olaf Asbach and Peter Schröder, eds, *War, the State, and International Law in Seventeenth-Century Europe* (Burlington, VT: Ashgate, 2010), pp. 63–82. The concept of *terra nullius* is especially controversial in respect to the British occupation of Australia; see Merete Borch, "Rethinking the Origins of *Terra Nullius*," *Australian Historical Studies*. 32(October 2001), pp. 222–39.
 57. Tuck, *Rights of War and Peace*, p. 15.
 58. *De Iure Belli*, p. 131, citing Cicero, *Against Verres*.
 59. *Ibid.*, p. 135.
 60. *Ibid.*, p. 140.
 61. Calendar of State Papers, Venice, VI–2, p. 1146.
 62. Hall's Chronicle, p. 41.

63. William Camden, *The History of the Most Renowned and Victorious Princess Elizabeth, Late Queen of England* (London, 1688), p. 285.
64. Theodor Meron, *Bloody Constraint: War and Chivalry in Shakespeare* (New York: Oxford University Press, 1998), p. 4.
65. This is the only work that explicitly states that a war declared by a king ends when that king dies, although other authors hint at that possibility. It is also the only source that saw the Edict of Nemours of 1585 as a declaration of war, but *Advertisement fait au Roy de la part du Roy de Navarre . . . touchant la dernière declaration de la guerre* (La Rochelle, 1587), states there was one issued against Henry of Navarre, but does not give specifics.
66. Jean Bodin, *On Sovereignty*, ed. by Julian Franklin (Cambridge: University Press, 1992), p. 63.

5 The Seventeenth Century

1. The few facts known about Crucé are in C. F. and Edith Farrell's introduction to their translation of *The New Cineas* (New York: Garland, 1972).
2. *Ibid.*, p. 3.
3. *Ibid.*, p. 57.
4. Gottfried Leibniz, *The Political Writings of Leibniz*, trans. by P. Riley (Cambridge: University Press, 1972), p. 178.
5. (London, 1602; reprint Amsterdam: Walter Johnson, 1979). A Pandects is a digest of Roman law.
6. *Ibid.*, p. 33. Fulbecke died in 1616, not 1603, according to Wilfred Prest, "William Fulbecke (1560–1616)," *Journal of Legal History* 3 (1982), 173–74.
7. *Ibid.*, p. 35.
8. *Ibid.*, p. 44. I have not found the source that Fulbecke cites.
9. Grotius, *Commentary on The Law of Prize and Booty*, trans. by G. L. Williams (Oxford: Clarendon Press, 1950). For the remark about the papacy, see p. 245.
10. British Library, Ms. Lansdowne 92, fol. 38.
11. J. S. Birch, *Denmark in History* (London: J. Murray, 1938), pp. 197–98. According to Billacois, *The Duel*, p. 91, the chancellor of Poland and the king of Sweden exchanged challenges for single combat in 1602, but it did not take place.
12. For the assessments of Grotius as "Father of international law," see Charles Edwards, *Hugo Grotius: The Miracle of Holland* (Chicago: Nelson-Hall, 1981), pp. 9–25.
13. Grotius, *The Rights of War and Peace*, ed. by Richard Tuck, 3 vols. (Indianapolis: Liberty Fund, 2005), I, p. 106.
14. The text of the truce is in Pierre Jeannin, *Les négociations de Monsieur le president Jeannin* (Amsterdam, 1695), II, 383. Jeannin served as the mediator between the Dutch and the Spanish.

15. Richard Tuck remarks that Grotius is “a most improbable figure to be the tutelary deity of the Peace Palace at The Hague.” *Rights of War and Peace*, I, p. 95.
16. Grotius, *The Rights of War and Peace*, I, 89. This “impious hypothesis” has been often seen as Grotius’s innovation, but James St Leger, *The Etiamsi daremus of Hugo Grotius; a study in the origins of international law* (Rome, 1962), shows that medieval thinkers often used it.
17. Grotius, *The Rights of War and Peace*, I, p. 135. Grotius argues that the word in Latin has the same root as duel.
18. Ibid., III, 1246–29. Grotius uses *promulgatio* in addition to *denuntiatio* “while the term *indicatio* or *edictum* is used when a war is declared unconditionally (*pura denuntiatio*), as when crimes are committed.”
19. Ibid., pp. 1577–79.
20. Ibid., p. 1595.
21. Ibid., II, 440.
22. In February 1639 Charles I issued a declaration “to inform our loving subjects of the seditious practices of some of Scotland, seeking to overthrow our royal power under the false pretences of religion.” Calendar of State Papers, Domestic, XXXIV, 508–09. It is often termed a declaration of war against Scotland, but it is not, because a king could not declare war on his own kingdom.
23. Thomas Hobbes, *De Cive: English Version*, ed. by Howard Warrender (Oxford: Clarendon Press, 1983), p. 49. Numerous English authors from the later seventeenth century attacked Hobbes for his concept of war as natural to humanity. Richard Cumberland succinctly stated: “War ought to be defin’d by the removal of Peace.” *A Treatise of the Laws of Nature*, trans. by John Maxwell, ed. by Jon Parkin (Indianapolis: Liberty Fund, 2005), Chapter V; at <http://oll.libertyfund.org/title/1353/121358>, accessed September 4, 2008
24. Bacon, *Works*, edited by James Spedding, XIV vols. (reprint Stuttgart: Verlag Holzboog, 1963), VI, p. 421. Tuck, *Rights of War and Peace*, p. 127, suggests that Hobbes wrote the piece for Bacon, his mentor.
25. Filmer, *Patriarcha, or the Natural Power of Kings* (London, 1680), accessed at <http://history.wisc.edu/sommerville/351/filmerpatr.htm>, March 22, 2008. John Locke’s only comment about declaring war was affirming Filmer’s point that it is a power of the sovereign. *Two Treatises of Government*, ed. by Peter Laslett (Cambridge: University Press, 1967), I, sec. 131.
26. Translated by Thomas Holland, 2 vols. (Washington: Carnegie Institution, 1911).
27. Ibid., p. 1.
28. Renée Jeffery, “Hersch Lauterpacht, the Realist Challenge and the ‘Grotian Tradition’ in 20th-Century International Relations,” *European Journal of International Relations* 12(2006), pp. 223–250.
29. Zouche, *Juris et Juridicii Feclialis*, pp. 112–17. Another question he considers is whether the “nicotine herb” may be regarded as contraband because of

- a case regarding an English ship's cargo seized by the Spanish at war with the Dutch. A Spanish court declared it to be food and liable to seizure, while an English judge found the opposite.
30. *Ibid.*, 171–72.
 31. “Gustavus Adolphus’s Manifesto, 1630,” in Geoffrey Symcox, ed., *War, Diplomacy, and Imperialism 1618-1763* (New York: Harper & Row, 1973), p. 112. Another manifesto from the same era was written by György Rákóczi, Duke of Transylvania, in 1644 to justify his taking arms against the Habsburgs in Hungary. “Declaration or Manifesto to the States and Peeres of Hungary,” (London: Edward Blackmore, 1644).
 32. Jeremy Black, ed., *The Origins of War in Early Modern Europe* (Edinburgh: J. Donald, 1987), p. 92.
 33. D. Avenel, ed., *Lettres, Instructions diplomatiques et Papiers d’état du Cardinal de Richelieu*, 8 vols. (Paris, 1861), IV, pp. 760–61.
 34. C. V. Wedgwood, *Richelieu and the French Monarchy* (New York: Macmillan, 1962), p. 76.
 35. British National Archives, SP101/228.
 36. *Jus Feciale armatae Daniae* (London, 1657).
 37. *The Political Writings of Samuel Pufendorf*, ed. by Craig Carr and Michael Seidler (Oxford: University Press, 1994), p. 103, I, 1. 8.
 38. Pufendorf, *On the Duty of Man and Citizen according to Natural Law*, trans. by M. Silverthorne (Cambridge: University Press, 1991), p. 168.
 39. *Ibid.*, p. 169. The seventeenth-century English translation of Pufendorf’s text uses “solemn and unsolemn.”
 40. Rachel, *Dissertationes de jure naturae et gentium*, trans. by John Bate, 2 vols. (Washington, DC: Carnegie Institution, 1916). The introduction has Rachel’s biography.
 41. Rachel had little but contempt for Thomas Hobbes. He refers to his thought on natural law as “filth.” *Ibid.*, p. 71.
 42. *Ibid.*, p. 185.
 43. *Ibid.*, p. 186.
 44. Textor’s biography is in Textor, *Synopsis Juris gentium*, trans. by John Bate (Washington: Carnegie Institute, 1916), II, p. 7a–8a. Textor was the maternal great-grandfather of Johann Goethe.
 45. *Ibid.*, p. 2.
 46. *Ibid.*, p. 181.
 47. CSP Venice, XXVIII, 255.
 48. Quoted in Charles Wilson, *Profit and Power: A Study of England and the Dutch Wars* (The Hague: Nijhoff, 1978), p. 60.
 49. “Declaration of the Parliament of the Commonwealth of England” (London: John Field, 1652). There is no declaration of war in *Letters and Papers relating to the First Dutch War*, ed. by S. R. Gardiner, 5 vols. (London: Naval Records Society, 1900); so it is likely that none was issued. But see Stephen Neff, *War and the Law of Nations* (Cambridge: University Press, 2005), p.107, who accepts the English manifesto as a declaration of war.

50. United Provinces of the Netherlands, "A Declaration or Manifest of War against the Commonwealth of England" (London, 1652).
51. William Cobbett, *The Parliamentary History of England from the earliest period to the year 1803*, 36 vols. (London: Hansard, 1806–1820), IV, col. 508. Lord Clarendon's account of a meeting of prominent members of Parliament to persuade it to grant funds for the Dutch War is in *ibid.*, cols. 303–06.
52. *Ibid.*, cols. 308–09.
53. British National Archives, SP 117/277; it is a broadsheet printed at Paris. Several modern works state that Frederick III of Denmark also declared war in 1666 against England because of an English raid on Dutch ships in the harbor of Bergen, Norway, but I have not found a Danish declaration of war.
54. *His Majesties Declaration against the French* (London, John Barker, 1666)
55. Text in Symcox, *War, Diplomacy, and Imperialism*, pp. 114–15.
56. CSP Venice, XXXVII. 195.
57. *Ibid.*, 1672, p. 225
58. *The Despatches of William Perwich, English Agent in Paris*, ed. by Beryl Curran (London: Royal Historical Society, 1903), p. 268: "Yesterday was the warre with Spaine very solemnly proclaimed all over this city." See also Carl Eckberg, *The Failure of Louis XIV's Dutch War* (Chapel Hill, NC: University of North Carolina Press, 1979), p. 123
59. 3rd ed. (London: John Walthoe, 1744). The first two chapters of this work have an excellent summary of contemporary thought on war.
60. *Ibid.*, p. 4.
61. *Ibid.*, p. 7.
62. *Ibid.*, p. 42.
63. *Ibid.*, p. 32.
64. John Wolf, *Louis XIV* (New York: Norton, 1968), p. 444 and note.
65. Eckberg, *Louis XIV's Dutch War*, p. 29.
66. *The Resolution of the Electors and the Princes of the Empire* (London: Richard Chiswell, 1689).
67. "The King's Declaration of War by Sea and Land against the Spaniards" (Edinburgh, 1689).
68. William III's Declaration is in Cobbett, *Parliamentary History*, V, 1–11. James issued an answer calling on the English people to resist the Dutch invaders; *Ibid.*, 15–17.
69. C. Jackson, "Revolution Principles: *Ius Naturae* and *Ius Gentium* in Early-Enlightenment Scotland," in T. J. Hochstrasser and P. Schröder, eds., *Early Modern Natural Law Theories* (Dordrecht: Kluwer, 2003), pp. 107–40.
70. For the Commons' petition see Cobbitt, *Parliamentary History*, V, 234; for the English declaration of war, see *ibid.*, 235–37.
71. "Declaration of War by the States-General against the French, The Hague, March 12, 1689" (Edinburgh, 1689).

72. "A Full and True Account of the Motives and Occasion of the Duke of Savoy's Declaration of War Against France" (London: Richard Baldwin, 1690).
73. Text in Dumont, *Corp universel diplomatique*, V-2. Whether it was the first formal treaty between Muslims and Christians depends on how one would categorize several agreements reached in medieval Iberia.
74. Michael Apasi, *The Declaration of the Hungarian War. Newly published by the most illustrious Michael Apasi, Prince of Transylvania, against his Imperial Majesty*, (London: J. Grantham, 1682).
75. "The Sultan's Declaration of War on the Emperor, 1683," in C. Macartney, ed., *The Habsburg and Hohenzollern Dynasties in the Seventeenth and Eighteenth Centuries* (New York: Walker, 1970), pp. 56–57.
76. A. Wheatcroft, *The Enemy at the Gate: Habsburgs, Ottomans, and the Battle for Europe* (New York: Basic Books, 2008), p. 13. Wheatcroft states that posting the *tuğ* could also indicate a major hunting expedition for the sultan.
77. R. Abou-El-Haj, "Ottoman Diplomacy at Karlowitz," *Journal of the American Oriental Society* 87(1967), 498–512. See Frey and Frey, *Diplomatic Immunity*, pp. 393–403, for a more detailed account of Ottoman practice.
78. Sources indicate two more times in the seventeenth century in which war was formally declared, both in 1656: Russia against Poland, and Bern and Zürich against five Catholic cantons in the First Villmergen War.

6 The Eighteenth Century

1. David Hume, *A Treatise of Human Nature* (1739), Section XI, accessed online at <http://oll.libertyfund.org/index>, February 9, 2009.
2. E. Cust, *Annals of the Wars of the Eighteenth Century*, I, 2. I have not found the text of Charles's declaration, which apparently was promulgated only to the Swedish people.
3. R. Massie, *Peter the Great: His Life and World* (New York: Knopf, 1980), pp. 300–01.
4. *Cobbett's Parliamentary History*, VI, 17. Since this predated the Act of Union creating the United Kingdom by five years, it committed only England to the war with France. It is not clear whether a separate declaration of war was issued on Scotland's behalf.
5. *Ibid.*, p. 18.
6. A. D. Francis, "Portugal and the Grand Alliance," *Bulletin of the Institute of Historical Research*, 38(1965), 71–93. I have not found the text of the Spanish declaration of war.
7. *The Deplorable History of the Catalans* (London: J. Baker, 1714), p. 69; F. Soldevila, *Historia de Espana*, 8 vols., 3rd ed. (Barcelona: Ediciones Ariel, 1972), V, 292–94.
8. Pastor, *History of the Popes*, XXXIII, 41–63.

9. Shaw, *History of the Ottoman Empire*, I, 232. This is a case where Maurice was wrong. He wrote: "Turks by sudden invasion seize from Venice the Morea without declaration of war." *Hostilities*, p. 14.
10. Creasey, *History of the Ottoman Turks*, pp. 340–42.
11. *Cobbett's Parliamentary History*, VII, 582.
12. *Cobbett's Parliamentary History*, VII, 581–83. There is no mention of the peace treaty of 1720 in Parliamentary records.
13. British National Archives, SP36/49/28.
14. The War for the Polish Throne of 1733–38 involved France, Poland and Spain against Russia and Saxony. Fighting was limited, and as best I can determine, no declarations of war were issued. See John Sutton, *the King's Honor and the King's Cardinal: The War of the Polish Succession* (Lexington, KY: University Press of Kentucky, 1980).
15. James Moore and Michael Silverthorne, eds., *Natural Rights on the Threshold of the Scottish Enlightenment: The Writings of Gershom Carmichael* (Indianapolis: Liberty Fund, 2002). Online at <http://oll.libertyfund.org/index>, accessed February 9, 2009.
16. Quoted in *ibid.*, editors' Foreword.
17. Barbeyrac also translated lesser-known authors' works into French and wrote several books of his own, but his importance in the history of political thought lies largely in his annotations to Pufendorf's book. He disagreed with Pufendorf often enough, but he had little to add to the discussion of declaring war.
18. Barbeyrac's commentary on Grotius, *War and Peace*, III, 1255n.
19. T. Rutherford, *Institutes of Natural Law; Being the Substance of a Course of Lectures on Grotius De Jure Belli et Pacis*, 2nd ed. (Baltimore: William Neal, 1832), p. 236.
20. *Ibid.*, p. 504.
21. *Ibid.*, p. 505.
22. *Ibid.*, p. 539–40. It seems to me that Ramsey, *Constitution Text*, p. 223, overstates Rutherford's disagreement with Grotius on the need for declaring war.
23. Cornelius van Bynkershoek, *Two Books on Questions of Public Law*, trans. by Tenney Frank (Oxford: Clarendon Press, 1930).
24. *Ibid.*, p. 1.
25. *Ibid.*, p. 3.
26. *Ibid.*, p. 5. About Huber, whose *De Jure civitatis libri tres* was published in 1672, Bynkershoek says several times in his discussion on the need for a declaration of war that Huber is "in ignorance."
27. Thomasius, who died in 1728, taught law at the University of Halle in German rather than Latin, an innovation for his era. While he stated that declaring war was not necessary for a just war, his work has little beyond that on declarations of war.
28. Bynkershoek, *Two Books*, p. 14.
29. *Ibid.*, p. 16.

30. Lee, *A Treatise of Captures in War*, 2nd ed. (London: W. Clarke, 1803), p. 2.
31. Ibid., pp. 18–19.
32. Kinji Akashi, *Cornelius van Bynkershoek: his role in the history of international law* (Boston: Kluwer, 1998), pp. 148–173, finds Bynkershoek's influence to be considerable, but the nature of that influence is patchy, since he had no true disciples (p. 172), and it was largely limited to his three-mile rule and the law of hot pursuit.
33. *The Principles of Politic Law* (London: J. Nourse, 1752), Book 2, Part 4, § 1. Accessed at <http://www.lonang.com/exlibris/burlamaqui/index.html>, September 12, 2008.
34. ibid., Book 2. Part 4, § II–IV.
35. Ibid., § XIV.
36. Ibid., § XXX.
37. Ibid., § XXII–XXIII.
38. Wolff, *The Law of Nations Treated According to a Scientific Method*, trans. by Joseph Drake (Oxford: Clarendon Press, 1934).
39. Ibid., pp. 9–11. See Charles Covell, *Kant and the Law of Peace* (New York: St. Martin's Press, 1998), pp. 82–86, for a summary of Wolff on the law of nations.
40. Wolff, *Law of Nations*, pp. 358–64.
41. Ibid., p. 366.
42. Karl Roeder, *The Reluctant Ally: Austria's Policy in the Austro-Turkish War, 1737–1739* (Baton Rouge: Louisiana State University Press, 1972), pp. 98–101.
43. Joseph Tower, *The Memoirs of the Life and Reign of Frederick the Third [sic] King of Prussia*, 2 vols., 2nd edition (London: Charles Dilly, 1795), I, 120. XXII–XXII.
44. Quoted in Black, *The Origins of War*, p. 14.
45. Horace Walpole, *Correspondence*, ed. by W. S. Lewis, 30 vols. (New Haven: Yale University Press, 1960), XVIII, 276.
46. In the treaty of 1729 Spain had received the right to board British ships involved in trade in Spanish America to search for contraband.
47. Text in Walpole, *Correspondence*, XVIII, 530 note.
48. Cited in *Cobbett's Parliamentary History*, XI, 1, note.
49. *The History and Proceedings of the House of Commons: volume 10: 1737–1739* (1742), pp. 292–338. Accessed on December 19, 2008, at <http://www.british-history.ac.uk/report.aspx?compid=37805#s8>.
50. *Cobbett's Parliamentary History*. XI, 3
51. *Contejo de la conducta de S. M. con la de El Rey Britannica* (Madrid, 1739).
52. G. Lyttelton, *Popular prejudices against the convention and treaty with Spain, examin'd and answer'd* (London, T. Cooper, 1739). For a detailed catalog of the many times that the term “declare war” was used in similar ways in the eighteenth century, see Saikrishna Prakash, “Exhuming the Seemingly Moribund Declaration of War,” *Temple Law Review* 80(2007), 245–93.

Some of his examples tell us little about the proper understanding of the need to declare war in that era, since they are similar to a coach telling his team that they will declare war on their next opponent.

53. Cust, *Annals of the Wars*, II, 15.
54. William Pitt, in his address to Parliament supporting the British declaration of war on France, took special note of that phrasing and expressed his resentment at the insolence involved. *Cobbett's Parliamentary History*, XIII, 691 n.
55. "Ordonnance du Roy par tant déclaration de guerre contre le Roy d'Angleterre," British National Archives, SP78/299/275.
56. "Proceedings of the Privy Council Declaring War against Spain," British National Archives, PC115/58. See also *Cobbett's Parliamentary History*, XI, 686.
57. *Ibid.*, 691–98. A bill presented on April 10 to provide £40,000 to the Imperial forces was voted down and required an extensive rewriting before it passed.
58. Charles Lincoln, ed., *Correspondence of William Shirley*, 2 vols. (New York: Macmillan, 1912), I, 117–18. March 31, Shirley replied on June 2.
59. *Ibid.*, pp. 118–33.
60. Tower, *Memoirs of Frederick*, I, 225–26. Maurice, *Hostilities*, p. 20, includes the new fighting between Austria and Prussia in the category of wars without declaration.
61. Cust, *Annals of the Wars*, II, 167.
62. Walpole, *Correspondence*, XX, 524.
63. *Ibid.*, p. 536. Horace Walpole was the son of Robert Walpole.
64. *Cobbett's Parliamentary History*, XV, 770–71. I have not found the texts of either the British or the French declarations of war.
65. Tower, *Memoirs of Frederick*, I, 437–38.
66. *Ibid.*, I, 438.
67. *Ibid.*, I, 466.
68. *Ibid.*, II, 22–27.
69. According to an article in the Madrid Gazette; British National Archives, SP89/55/69.
70. *Cobbett's Parliamentary History*, XV, 1125–26.
71. *Ibid.*, 1127–28. I have not been able to find the text of the declaration of war, but the king's address to Parliament summarizes the causes for war presented in the declaration.
72. British National Archives, SP89/55/229.
73. British National Archives, SP89/56/127.
74. See Francis Ruddy, *International Law in the Enlightenment: The Background of Emmerich de Vattel's Le Droit des Gens* (Dobbs Ferry, NY: Oceana Publications, 1975, pp. 182ff, for similarities between statements of the two men.
75. Rene Jeffery, "Hersh Pauterpacht, the Realist Challenge and 'the Grotian Tradition' in 20th-Century International Relations," *European Journal of International Relations* 12(2006), 223–50.

76. Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, trans. by Joseph Chitty (Philadelphia: T. Johnson, 1853), 3, 1, § 1. Accessed at <http://www.lonang.com/exlibris/vattel/index.html>, September 17, 2008.
77. *Ibid.*, § 3. I assume that Vattel here intended to be ironic.
78. *Ibid.*, 3, 3, § 66.
79. On the grounds that to defend one's country is worthy of the most sacred hands, Vattel objects to the exemption granted to the clergy, "those men who are often so zealous to fan the flame of discord and excite bloody wars." He is especially resentful of the exemption granted to "those immense multitudes of useless monks and friars—those drones....By what right do they pretend to a prerogative?"
80. Wolff, *Law of Nations*, 513–14.
81. Vattel, *Law of Nations*, 3, 1, § 5.
82. *Ibid.*, 3, 2, § 44.
83. *Ibid.*, 3, 3, § 52
84. *Ibid.*, § 55.
85. *Ibid.*, § 64.
86. *Ibid.*, § 65.
87. Mark Danley, "Military Writings and the Theory and Practice of Strategy in the Eighteenth-Century British Army," PhD Dissertation, Kansas State University, 2001, pp. 330–41. I thank Dr. Danley for providing me with a copy of his dissertation.
88. I have not found the declarations of war that Genoa issued against Austria and Sardinia in 1745 (See Walpole, *Correspondence*, XIX, 75) and the ones that began the brief War of Bavarian Succession in May 1779.

7 The Age of Revolution

1. Quoted in Geoffrey Best, *Humanity in War* (New York: Columbia University Press, 1980), p. 36. "Civilizing of war" is Best's phrase.
2. *Encyclopédie, ou dictionnaire raisonné des sciences, des arts et des métiers*, ed. Denis Diderot and Jean le Rond D'Alembert (University of Chicago : ARTFL Encyclopédie Projet, 2008), Robert Morrissey, ed., accessed at <http://encyclopedia.uchicago.edu/>, February 23, 2009. See also John Lynn, "The Treatment of Military Subjects in Diderot's Encyclopédie," *Journal of Military History* 65(2001), pp. 131–65.
3. Montesquieu, *Spirit of the Laws*, Book I chap. II; accessed on February 3, 2009 at <http://www.constitution.org/cm/sol.txt>.
4. *Ibid.*, Book X, chap. II.
5. Montesquieu, *Reflections on the Causes of the Rise and Fall of the Roman Empire* (Oxford: George Whittaker, 1825), pp. 61–62.
6. Rousseau, *The Social Contract*, I, 5; accessed online, October 19, 2008, at http://www.constitution.org/jjr/socon_01.htm#004

7. For wars among Amerindians, see Davie, *The Evolution of War*, pp. 295–96, for examples in which war hatchets, bundles of arrows wrapped in rattlesnake skins, and calumets (pipes) were used for declaring war. In WWI the Oneidas and the Iroquois as sovereign nations declared war on Germany, and did again in WWII, but there is no suggestion that they used a traditional method of doing it.
8. Ayer Manuscript Collection, Newberry Library, Chicago.
9. Seed, *Ceremonies*, pp. 42–68. Seed adds the caveat that the French reports of native joy and consent at becoming French subjects ought not be taken at face value.
10. Charles Tansill, ed., *Documents Illustrative of the Formation of the Union of the American States* (Washington: Printing Office, 1927), House Document 398, pp. 10–17.
11. Neff, *War And The Law of Nations*, p. 255.
12. William MacDonald, *Documentary Source Book of American History* (New York: Burt Franklin, 1899), pp. 189–90.
13. George III, “Proclamation of Rebellion,” accessed online on October 13, 2008 at <http://memory.loc.gov/ammem/ndlpedu/features/timeline/amrev/shots/responds.html>
14. Thomas Payne, *Common Sense*, online at <http://www.let.rug.nl/usa/D/1776-1800/paine/CM/sense01.htm>, accessed on October 15, 2008.
15. The Declaration of Independence, in Richard Perry, ed., *Sources of Our Liberty* (New York: American Bar Foundation, 1959), pp. 319–21. The above paragraph draws from Hallett, *Lost Art of Declaring War*, pp. 52–57, which has a lengthy discussion of how the Declaration meets the criteria for a proper declaration of war. Hallett further argues that in this sense it is the only proper one in American history.
16. Corbett, *Parliamentary History*, XIX, 3–4.
17. *Ibid.*, 913.
18. *Ibid.*, 915–52.
19. The text of the declaration of war, if one was formally drawn up, is not in Corbett, but the king’s address to Parliament and the debates in its houses are included. *Ibid.*, XIX, 912–52.
20. Edmund Burke, et al., *The Annual Register of World Events* (London: Longmans, 1758–), XXII, 386, 390.
21. Corbett, *Parliamentary History*, XX, 877.
22. Piggot and Omond, *Armed Neutralities*, pp. 288–89. The last charge resulted from the British seizure in August 1780 of a Dutch ship that had copies of the treaty between France and America. The British decided the Dutch had concluded, or were about to conclude, a similar treaty with the Americans.
23. Peace of Paris, Article 1, accessed online on November 17, 2008, at http://avalon.law.yale.edu/18th_century/paris.asp.
24. Articles of Confederation, accessed online on October 15, 2008, at http://avalon.law.yale.edu/18th_century/artconf.asp.

25. There is no mention in the sources of how the Dey declared war, but see below, n. 38.
26. M. Farrand, ed., *The Records of the Federal Convention of 1787*, 4 vols., (New Haven, CT: Yale University Press, 1966), I, 65–66.
27. William Blackstone, *Commentaries on the Laws of England*, St. George Tucker, ed., 5 vols. (reprint South Hackensack, New Jersey: Rothman, 1969), II, 257.
28. *Ibid.*, p. 258. Some scholars, emphasizing Blackstone's pervasive influence on the American Constitution, have argued for vast presidential power in war making based on his text, e.g., Yoo, *Powers*, pp. 42–43; but Tucker, in his edition of Blackstone of 1803, wrote in a note: "The constitution of the United States, intrusts the important power of making war, not in the president, nor in the president and senate, but in congress; where the people by their immediate representatives deliberate upon the necessity of involving the nation in such a state of calamity." p. 257 n.
29. James Madison, "Notes on the Debates in the Federal Convention," online at http://avalon.law.yale.edu/subject_menus/debcont.asp, accessed October 26, 2008
30. Some 30 examples of letters of marque from 1205 to 1812 can be found online at <http://www.geocities.com/Tokyo/Garden/5213/marque2.htm>, accessed February 23, 2009. Molloy, *De Jure Maritime*, pp. 34–40, has one issued by Charles II. In 1856 the Declaration of Paris banned letters of marque and reprisal because of the difficulty in determining the difference between privateers, who had them, and pirates, who did not.
31. Yoo, in *Powers* and several earlier articles, touched off a heated debate by asserting that changing "make" to "declare" indicated the writers of the Constitution intended to give the president vast authority to go to war without a congressional declaration of war, except in cases of plunging the nation into "total war" (p. 99). Perhaps the most adamant in rejecting Yoo's argument is Louis Fisher, *The Constitution and 9/11: Recurring Threats to America's Freedoms* (Lawrence, KS: University Press of Kansas, 2008).
32. An overview of the issues and cases that came to define the that relationship can be found in Peter Irons, *War Powers: How the Imperial Presidency Hijacked the Constitution* (New York: Henry Holt, 2005), chapter II.
33. Frank Anderson, ed., *The Constitution and Other Select Documents Illustrative of the History of France 1789–1907* (New York: Russell and Russell, 1908), pp. 78, 86.
34. Necker, *An Essay on the True Principles of Executive Power in Great States*. 2 vols. (London: C. G. and J. Robinson, 1792), p. 271.
35. *Ibid.*, p. 275. Prakash, "Unleashing the Dogs," p. 24, places strong emphasize on Necker's comments that the opening of hostilities is the surest declaration of war, but largely ignores his discussion of the confusion that placing the loci of declaring war and responding to hostilities in two different branches of government might cause.

36. P. Howe, "Charles-François Dumouriez and the Revolutionizing of French Foreign Affairs in 1792," *French Historical Studies* 14(1986), 367–90.
37. Anderson, *The Constitution*, p. 103. The French revolutionaries refused to use the title Holy Roman Emperor.
38. Ibid., pp. 118–22.
39. Ibid., p. 151.
40. Best, *Humanity in War*, pp. 84–86.
41. A. Deconde, *The Quasi-War; The Politics and Diplomacy of the Undeclared War with France 1797–1801* (New York: Scribner, 1966).
42. J. Sidak, "The quasi war cases—and their relevance to whether 'letters of marque and reprisal' constrain presidential war powers," *Harvard Journal of Law & Public Policy* (Spring, 2005), online at <http://www.law.harvard.edu/students/orgs/jlpp/>, accessed December 4, 2008.
43. *Bas v. Tingy*, 4 U.S. (1800), online at <http://supreme.justia.com/us/4/37/case.html>, accessed December 4, 2008.
44. R. Allison, *The Crescent Obscured: The United States and the Muslim world, 1776–1815* (Oxford: University Press, 1995), pp. 180–81.
45. *Works of Alexander Hamilton*, J. Hamilton, ed. (New York: 1851), 746–47.
46. CRS Annotated Constitution, accessed on November 19, 2008, at http://www.law.cornell.edu/anncon/html/art1frag76_user.html.
47. Accessed at <http://www.teachingamericanhistory.org/library/index.asp>, on December 5, 2008,
48. Accessed at http://avalon.law.yale.edu/subject_menus/decmenu.asp, January 8, 2009. Since Japan had attacked American soil in Hawaii, a US declaration of war was not necessary under international law. After Germany and Italy declared war against the US two days after Pearl Harbor, the US declarations of war on them were also unnecessary. It has been argued, however, that they were needed in order to give the president complete war power under the Constitution.
49. "Manifeste de L'Empereur de Toute les Russies contre la Porte Ottomane," *State Papers British and Foreign* (London: James Ridgeway, 1828), XV, 655–67.
50. Accessed at http://avalon.law.yale.edu/20th_century/hague03.asp, January 9, 2009. Thirty-four nations including the United States signed it, although some did so well after 1907, as in the case of Poland, which signed in 1925 after gaining independence from Russia, and Fiji, which did so in 1975.
51. The German request of August 2 and the Belgian refusal of August 3 are online at <http://www.firstworldwar.com/source/begium-germanrequest.htm>, accessed January 13, 2009.
52. See above, chapter V. for Frederick the Great's use of the Saxon denial of free passage of his army as a cause for war in 1756.
53. According to the US State Department's list, at <http://www.sacklunch.net/wwi/2.html>, accessed January 9, 2009. Many of the declared Allies,

- Panama and Honduras for example, contributed essentially nothing to the war effort.
54. Text accessed online on December 17, 2008, at http://en.wikipedia.org/wiki/Japanese_declaration_of_war_on_the_United_States_and_Britain. It presents as Japan's principal reason for war British and American aid to China.
 55. Richard Doody, "Chronology of World War II Diplomacy 1939–1945," at <http://worldatwar.net/timeline/other/diplomacy39-45.html>, accessed on January 9, 2009. Most of the nations of the British Commonwealth, which in 1914 went to war under Britain's declaration, issued their own in World War II, accounting for a significant portion of the 114 states. The United States declared war on Bulgaria, Hungary, and Romania on June 5, 1942. The texts of some of these declarations are online at <http://historicalresources.org/category/documents-pacts-and-treaties/declarations-of-war/> accessed January 9, 2009.
 56. Accessed online at <http://www.un.org/aboutun/charter/chapter1.shtml>, January 9, 2009.
 57. Five Arab states—Algeria, Iraq, Kuwait, Sudan, and Syria—supposedly declared war on Israel after the Israeli preemptive strike on Egypt. (Hallett, *Lost Art*, p. 92.) For an event that is barely forty years in the past, determining whether they declared war is remarkably elusive, but it appears they did not. There is no clear evidence; and those countries did not recognize the existence of Israel, so how could one declare war against a state that did not exist? Also, three of them had been at war with Israel in 1948 in the sense of fighting the "Zionist entity," which conflict had never resulted in peace treaties. I wish to thank my colleague Dr. William Ochsenwald for his insights on this matter. In respect to an alleged Panamanian declaration, news reports in December 1989 stated that the National Assembly of Panama issued a declaration of war at President Manuel Noriega's request, but he only announced in the Assembly that a "state of war" existed between Panama and the United States. *The U.S. Invasion of Panama: The Truth behind Operation "Just Cause"* (Boston: South End Press, 1991), p. 26.
 58. See Neff, *War and the Law of Nations*, pp. 322–30, for a discussion of the forms of war deemed acceptable in international opinion in the early twenty-first century.
 59. In the late nineteenth century that opinion was argued in W. E. Hall, *A Treatise on International Law*, 6th ed. (London, 1909), p. 370.
 60. Cited in Kenneth Moss, *Undeclared War and the Future of U.S. Foreign Policy* (Washington: Woodrow Wilson Center Press, 2008), p. 19.

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INDEX

- Act of Abjuration, 91
Adrian VI, pope, 68
Afghanistan, 2–3
Agincourt, Battle of, 29, 80
Ahmed III, Ottoman sultan, 113
al-Qaeda, 2–3
Albigensians, 21
Alexander VI, pope, 63
Algiers, 45, 156, 165
Althusius, Johannes, 100
ambassadors, 4, 41, 50, 54, 86, 103–4,
 112, 114, 144, 148, 160
 immunity of, 73–4, 77, 88,
 109, 115
 recall of, 105, 134
American revolutionaries,
 declarations by, 150–3
Amerindians, 7, 33–5, 58, 64–7,
 69–70, 75, 78, 103, 150–1, 155
Anglo-Dutch Wars, 105–6
Anne of Great Britain, 117
Antwerp, 72, 91
arbitration, 72, 86, 90, 92, 101, 128
Armada, 94
Articles of Confederation, 155–6
Assembly of people, 7, 8, 17, 28, 86–7
atheists, 103
Augustine of Canterbury, 64, 71
Augustine of Hippo, 5, 16–18, 25, 27,
 35, 59, 68, 77, 95
Augustus II of Poland and Saxony, 115
Austria, 4, 43, 83, 100, 111–12, 113,
 117, 118–21, 132–5, 138–40, 160,
 161, 167
Ayala, Balthazar de, 72–3
Aztecs, 69
Bacon, Francis, 94
Balkan Wars, 167
Baltic Sea, 97, 115
Barbeyrac, Jean, 122
Barcelona, 119
Bas v. Tingy, 164
Bavaria, 62, 118, 130, 133–4
Belgium, 162, 167–8
 see also Spanish Netherlands
Belli, Pierino, 74–6
Bern, 44
Bible, 8, 15, 23, 62, 67, 73, 74, 79, 90,
 103, 124
 texts cited, 8, 13, 16, 27, 93, 109
Bin Laden, Osama, 2
Blackstone, William, 156–7, 169
Bodin, Jean, 82–3
Bohemia, 91, 96–7, 138, 161
Bonet, Honoré, 27–9
Bourbon, Charles, cardinal of, 82
Brazil, 35, 63, 141
Brunswick, duke of, 161
Brunus, Conrad, 62–3, 77
Burlamaqui, Jean-Jacques, 127–30
Bush, George H., 2–3
Bynkershoek, Cornelius van, 169
Byzantine Empire, 18–19, 112
Caesar, Julius, 14, 72, 82
Calais, 4, 39–40, 49–50
caliph, 19, 31

- Calvin, John, 62
 Campanella, Tommaso, 58–9, 149
 Canada, 2, 5, 139, 146, 149–50
 cannibals, 34, 69
 Cano, Melchior, 70
 Canon law, 25, 61–2, 79, 87
 cantons, Swiss, 43–4, 61–2
 Carmichael, Gershom, 121–2
 Carthage, 13, 79
 Castile, 29, 63, 68, 119
 casting lots, 92, 128
 Catalonia, 119
 Cathcart, James, 165
 Catholic League, 51–2, 82
 Cato, 72, 82
 Charlemagne, 17, 20, 22
 Charles II of England and Scotland, 105–8
 Charles II of Spain, 117–18
 Charles V, Holy Roman emperor, 32, 38–9, 42–3, 45, 47–8, 57, 61, 65, 67–8, 70, 74
 Charles V of France, 25, 28–9
 Charles VI, Holy Roman emperor, 117–18, 132–3
 Charles VIII of France, 24, 36
 Charles IX of Denmark, 89
 Charles X of Sweden, 99
 Charles XII of Sweden, 115–16, 142–3
 Charles Albert of Bavaria, 133–4
 Charles the Bold, duke of Burgundy, 31, 36, 43
 Chase, Samuel, 164
 China, 7
 chivalry, 27, 38, 40, 85
 Christian IV of Denmark, 99
 Christianity, 15–16, 63, 66, 69–70, 78
 Cibola, 34–5
 civil war, 12, 28, 43, 51, 75, 82, 91, 128, 142, 151, 153
 Clarencieux, English herald, 39–41
 Clement XI, pope, 119
 coat of arms, 23, 37, 89, 90
 see also tabard
 Columbus, Christopher, 33, 63–4
 common good, 131
 Congress, US, 1–3, 155–9, 165–6, 169–71
 Constantine, 15–16
 Constantinople, 20, 21, 112
 Constitution, U.S., 2–4, 6, 146, 156–9, 160, 165
 Constitution of 1791, French, 6, 146, 159–60
 Constitutional Convention, 156–9
 Coronado, Francisco, 34–5
 Corsairs, 86, 145
 Crete, 112
 Cromwell, Oliver, 104–5
 Crucé, Emeric, 85–7, 93
 crusades, 19, 21
 Cyprus, 53–4
 Damad-Ali, 120
Dar al-Islam, 19, 20–1, 53, 113, 119
 Declaration of Independence, American, 152–3
 declaration of war
 absence of, 1, 3, 5–7, 8–9, 10, 40, 51, 62, 79, 82, 105, 110, 134, 135, 165, 167, 170
 absolute, 129, 132
 against enemy's ally, 13, 69, 80, 132
 conditional, 122–3, 129, 132, 139
 delay after issuing, 63, 79, 96, 129, 132–3, 144, 145, 154, 155, 167
 equivalent of, 1–2, 5, 7, 20, 51, 119
 formal, 3–4, 7, 8, 10–12, 17–18, 20, 24, 31, 41, 51, 79, 81, 92, 95, 104, 106, 115, 123, 134, 139, 146, 159–60, 163, 164–8, 170–1
 printed, 29, 31, 41, 43, 45, 47, 51, 52, 54, 60, 99
 by proclamation, 8, 41, 45, 95, 102, 126, 144
 rights of foreigners given in, 41, 45, 49, 52, 105, 106–7, 108, 110, 117, 137, 141, 145

- rituals of, 7–8, 9, 11–13, 15, 22–3, 62, 104
- theories of, 3, 5, 171–2
- used to warn, 4–5, 7, 19, 96, 109, 139, 167
- when necessary, 1, 5, 8–11, 43, 62, 82, 83, 92, 104, 123, 161, 167
- when not necessary, 1, 12, 16, 21, 26, 35, 79, 91, 92–3, 97, 104, 123, 126, 130, 132, 133, 144–5, 154, 164–5, 166
- see also* defiance, *denuntiatio*, manifesto, ultimatum
- Defenestration of Prague, 97–8
- defensive war, 1, 68, 143–4
- defiance, 4, 22–5, 29, 39, 41–2, 44–6, 54, 80–1
- Denmark, 83, 89–90, 97, 99–100, 106, 111, 115–16, 154
- denuntiatio*, 11, 92, 94, 101
- Dickinson, John, 150
- Diet, Imperial, 83
- Diplomatic Revolution, 138–9
- divan*, 30, 116, 120
- Dominican Order, 58, 65–6
- duel, 22, 38, 39, 42, 73, 89–90, 115, 132
- Dumouriez, Charles-François, 160–2
- Dutch East India Company, 88
- Dutch Rebellion, *see* Eighty Years War
- Dutch Republic, 6–7, 88, 100, 104, 108–11, 118, 120, 124, 162
- Dutch War, 90–1, 108–9
- Edict of Milan, 15
- Edict of Nantes, 107, 122
- Edward III of England, 24–5
- Edward IV of England, 24, 31
- Eighty Years War, 51
- Elizabeth I of England, 50–1, 74, 80
- Elizabeth of Russia, 140
- Ellsworth, Oliver, 158
- “Emperor in his own realm,” 25–6
- Encomienda*, 65, 70
- Encyclopédie*, 147–8
- enemy, definition of, 14, 78
- England, 24–5, 26, 27, 31, 36–40, 46–8, 50–1, 57, 71, 76–7, 80–1, 94, 104–9, 111, 117–18, 120, 135, 137, 142, 152, 157
- see also* Great Britain
- English Channel, 37, 104, 110
- English Seas, 104, 109
- Enlightenment, 147–9, 159, 161
- Erasmus, Desiderius, 59–61, 78
- Eugene of Savoy, 119
- excommunication, 26, 36, 51, 82, 119
- Fatwa*, 30, 53, 109, 120
- Ferdinand, Archduke, 52, 98–9
- Ferdinand II, Holy Roman emperor, 97
- Ferdinand of Aragon, 33, 36
- Ferne, John, 23
- Feudalism, 22–5, 31–2, 35, 38, 44, 57, 95
- Filmer, Robert, 94
- Florence, 40–1, 55–6
- “For Such is His Majesty’s Will,” 106, 108–9, 137, 146, 159, 169
- France, 4, 20–1, 24–5, 26, 27, 31–2, 36–42, 44, 48–54, 56, 58, 69, 80, 81–4, 88–9, 98–9, 106–11, 117–18, 120–1, 133–4, 136–41, 144, 153–4, 159–64, 167
- Francis I of France, 39–40, 42, 45–6, 56–7, 64, 74
- Frederick II the Great of Prussia, 115, 130–1
- Frederick III of Denmark, 99
- freedom of the seas, 93–4
- French Invasions of Italy, 23–4, 36
- French Revolution, 146, 147, 159–62
- French Wars of Religion, 50–2
- Froissart, Jean, 24
- Fulbecke, William, 88–9
- Garter King of Arms, 31, 37
- Gascony, 17, 24–5

- Geneva, 127, 145
 Gentili, Alberico, 76–9, 90, 125
 George I of Great Britain, 120–1
 George II of Great Britain, 134–7, 139–40
 George III of Great Britain, 140, 152–3, 154–5
 Germanic tribes, 17–18
 Germany, 62, 75, 77, 83, 90, 94, 97–99, 100, 110, 122, 134, 138, 166–8
 see also Holy Roman Empire
 Gerry, Elbridge, 157–8
 Gibraltar, 20, 134
 Glorious Revolution, 110–11
 Golden Bull of 1356, 23, 104
 Grand Alliance, 117–19
 Grand Mufti, 53, 116, 120
 Grant, Francis, 110–11
 Gratian, 25, 28
 Gratiollet, Jean, French herald, 98–9
 Great Britain, 2–3, 4–5, 120–1, 134–7, 139–40, 152–3, 154–5, 158, 161–3, 165–6, 168
 see also England, Scotland
 Great Northern War, 115–16, 119
 Grotius, Hugo, 63, 77, 87, 88–94, 95, 99, 100–4, 111, 121, 122, 123–5, 128, 130–1, 141, 147, 157, 167
 Guyenne, French herald, 40–2

 Habsburgs, 48, 112–13, 133, 140
 hadith, 18–19
 Hall, Edward, 80
 Hallett, Brian, 4
 Hamilton, Alexander, 157, 165
 Hanover, 134, 136–8
 Henry II of France, 48–50
 Henry III of France, 51, 53, 82, 83
 Henry IV of France and Navarre, 52–4
 Henry V of England, 29, 80, 81
 Henry VIII of England, 36, 39, 41, 47
 heresy, 16, 21, 26
 Hobbes, Thomas, 6, 94, 100, 127–8, 148

 Holy Land, 26–7
 Holy Roman Empire, 23, 26, 45, 83, 96, 110
 horsetails, display of, *see* *tuğ*
 hostages, 20, 40, 103
 House of Commons, 2, 111, 134
 House of Lords, 135
 House of Representatives, 157, 166
 Huguenots, 50–1, 82
 humanists, 55, 77
 Hume, David, 6, 115
 Hundred Years War, 25, 27, 39, 40
 Hungary, 40, 110, 113, 139

 Iberia, 20, 33
 Ibrahim I, Ottoman sultan, 112
 Innocent III, pope, 21
 International law, 1, 2, 6, 67, 71, 77, 80, 87–8, 89, 90, 95, 103, 124
 International Peace Conference of 1907, 1, 6, 167, 169
 invasion, as cause of war, 14, 38, 59, 61, 73, 101, 107, 118, 159, 169, 170
 Iraq Wars, 3
 Iredell, James, 170
 Isadore of Seville, 17, 25
 Islam, 1, 5, 18–21, 30, 33, 45–6, 113, 119–20
 Ismail, shah of Persia, 30–1
 Italy, 10, 21, 23–4, 36, 40, 43, 48, 74, 99, 118–19, 121, 138, 166, 167, 168
 Ivan III, duke of Moscow, 29
 Ivan IV, tsar of Russia, 80

 Jamaica, 105, 136
 James IV of Scotland, 37–8
 James V of Scotland, 46–7
 James VI/I of Scotland and England, 90, 94
 James VII/II of Scotland and England, 97, 110
 Japan, 168
 Jay Treaty, 162–3

- Jefferson, Thomas, 150, 152, 161, 165
 jihad, 18–20, 21, 30–1
 John of Legnano, 26
 Johnson, James, 71
 Johnson, Lyndon, 1
 Joseph I, Holy Roman emperor, 119, 133
 Joseph I of Portugal, 141
 Julian, Roman emperor, 15
 Julius II, Pope, 36–8
jus ad bellum, 27, 91
jus in bello, 27, 91
jus inter gentes, 95
 Justinian, Roman emperor, 14, 18

 Kappel Wars, 43–4, 62
 King, Rufus, 158
 Knights War, 45
 Korean War, 1

 La Mark, Robert de, 38–9
 Las Casas, Batholome de, 65–6, 70
 law of Catholicity, 51–2
 law of nations, 72, 77, 79, 80, 87–8,
 91–2, 95–6, 101–3, 123, 125–8,
 131, 134, 136, 139, 144, 149,
 157, 164
 League of Armed Neutrality, 154
 League of Augsburg, 110–11
 League of Cognac, 40
 Lee, Henry, 152
 Lee, Richard, 126–7
 Leibniz, Gottfried, 87
 Leo VI, Byzantine emperor, 18
 Leopold I, Holy Roman emperor,
 110, 112–13, 116–17
 Leopold II, Holy Roman emperor,
 118–19
 letters of marque, 41, 106, 135, 137,
 153, 155, 158, 166
 London, 47, 49, 105, 108, 135, 151,
 156, 162, 166
 Louis XI of France, 24, 31
 Louis XII of France, 37, 56
 Louis XIV of France, 45, 106–11,
 116–18, 122
 Louis XV of France, 120, 134, 136–9
 Louis XVI of France, 153–4, 160, 161
 Luther, Martin, 44–5, 60–1, 62, 67
 Lutherans, 47–8
 Lyon, Scot herald, 37–8

 Machiavelli, Niccolo, 55–6, 72
 Madison, James, 157–8, 166
 Mallet, Edme-François, 147–8
 manifesto of war, 96–8, 104, 105,
 108, 113, 126, 133, 138, 140, 141,
 145, 147–8, 153, 154, 161
 Maria Theresa, empress of Austria,
 133–4, 138–9
 Maria Theresa, queen of France,
 107, 116
 Mary of Burgundy, 31–2
 Mary Tudor of England, 48–50, 80
 Mason, George, 158
 Maurice, Colonel Frederick, 4–7
 Mediterranean Sea, 20, 45, 117, 136,
 156, 165
 Mehmed IV, Ottoman sultan, 112–13
 Mendoza, Bernardino de, 77
 messenger, for declaring war, 11,
 18–19
 Mexico, 34, 166
 Mi'kmaq, 149
 Michael I, duke of Transylvania,
 112–13
 Milan, 36, 38–9, 40, 42, 57, 74, 117, 118
 missionaries, Spanish, 33, 35, 64,
 66, 71
 Molloy, Charles, 108–9
 Monaghan, Henry, 2
 Montesinos, Antonio de, 64
 Montesquieu, Charles de, 148–9
 Montmorency, Anne de, 49–51
 More, Thomas, 57–9, 149
 Morea, 119–20
Morte d'Arthur, 23–4
 Muhammad, 18–20, 30

 Naples, kingdom of, 21, 25, 36, 42,
 58, 119, 136

- National Assembly, French, 159–62
 National Convention, 162
 natural law, 6, 67, 69–70, 72, 74,
 78–9, 88, 91–2, 100–2, 123
 Navigation Act, 104
 Necker, Jacques, 159–60
 Neff, Stephan, 151
 neutrality, 119, 127, 136, 160
 New Laws of 1542, 67, 70
 New World, 33, 64, 67, 69, 78, 149
 Newcastle, Thomas, duke of, 137–8
 North Africa, 15–16, 156, 165
 Nova Scotia, 138, 149–50, 158
 Novgorod, 29

oriflamme, 24, 29
 Ottoman Empire, 30–1, 44, 53, 86,
 111–12, 115–16, 132, 166, 167

 pacifism, 15
 pagans, 15, 20, 21, 26, 33, 35, 63–4,
 65, 71, 73, 80
 Palestine, 14, 21, 31, 50
 papacy, 26, 36, 40, 43, 53, 61, 70, 88
 Paris, 24, 28, 36, 48, 50, 52, 106, 146,
 161, 163
 Parliament, 3, 105–6, 108, 117, 120,
 134, 135–6, 137, 139–40, 142,
 151–3, 155, 157
 passage, right of, 44, 79, 89–90, 93–4,
 103, 119, 124, 130–2, 140, 167
 Pavia, Battle of, 40, 45
 Payne, Thomas, 152
 Paz, Matias de, 64–5
 peace treaties
 Aix-la-Chapelle, 138, 152
 Cateau-Cambresis, 50
 Crépy, 48
 Karlowitz, 113, 120
 of the Ladies, 42, 45
 Paris (1763), 146
 Paris (1783), 155–6
 Ryswick, 118
 Utrecht, 119
 Zsitva Torok, 112

 Pedro IV of Aragon, 24
 Persia, 9–10, 15, 30–1, 86
 Peter I the Great of Russia, 115–16
 Philip II of Spain, 50–1, 71, 88
 Philip IV of Spain, 99, 107
 Philip V of Spain, 117–20, 133, 136
 Philippines, the, 35
 philosophes, 147–8
 Pinckney, Charles, 157
 pirates, piracy, 5, 16, 37, 39, 49, 76,
 78, 86, 87, 92, 97, 123, 131, 146,
 155, 157
 Pisan, Christine de, 28–9, 56
 Pius V, pope, 53
 poison, 102, 125
 Poland-Lithuania, 83, 90, 97, 99, 115,
 140, 168
 Pomerania, 97, 140
 Portugal, 50, 51, 88, 118, 140–1
 positivism, legal, 77, 95, 124
 Pragmatic Sanction, 133
 Prakash, Saikrishna, 3–4
 prisoners of war, 10, 12–13, 44, 51,
 63, 72, 75, 96, 138, 146, 149,
 153, 165
 privateers, 5, 123, 137, 138, 163–4
 prizes, naval, 5, 72, 77, 88, 93, 106,
 135, 153, 154, 163
 Protestants, 43, 51, 98
 Prussia, 4, 133, 138–40, 146, 160, 161
 Pufendorf, Samuel von, 100–1, 121, 124
 Punic Wars, 12, 13, 79, 80, 85
 Pyrrhus of Epirus, 10, 13, 80, 85

 Quadruple Alliance, 120
 Quasi-War, 163–4
 Qur'an, 18–20, 30

 Rabelais, François, 60–1
 Rachel, Samuel, 23, 101–4
 Ramsey, Michael, 3–4
 ransom, 10, 12–13, 19, 23, 29, 40, 44,
 46, 47, 51, 52, 96, 156
 rebellion, 14, 19, 45, 48, 51, 61, 97,
 123, 142–3, 151–3

- Reconquista, 20
 Renaissance, 55
 reprisal, 26, 95, 109, 123, 127, 130, 140, 154, 155, 158, 166, 169
 Requirement, the, 33–5, 64–5, 66, 79, 149
 Richelieu, Armand de, cardinal, 98–9
 Robert Bruce of Scotland, 24
 Roman law, 13–15, 25, 74, 77, 82
 Roosevelt, Franklin, 168
 Rouen, 50–1
 Rousseau, Jean-Jacques, 148–9
 Rubios, Juan de Palacios, 64–5
 Rushkoff, Bennett, 2
 Rutherford, Thomas, 123–4

 safe conduct, 24, 31, 38, 45
 Salamanca, University of, 66–7, 90
 Saluzzo, 52–3
 Savoy, 44, 52–3, 74, 111, 121, 146
 Saxony, 45, 140–1, 146
 Schlesinger, Arthur, Jr., 2, 3
 Schleswig-Holstein, 89, 101
 scholastic theology, 6, 25–7, 56, 60, 77, 85
 Scotland, 24, 37–8, 46–8, 100, 121
 Second Continental Congress, 151, 155
 Sejm, Polish, 83
 Selden, John, 94, 104
 self-defense, 2, 26, 27, 79, 91, 121, 122, 131, 147–8, 169
 Selim I, Ottoman sultan, 30–1
 Selim II, Ottoman sultan, 53–4
 Senate, Roman, 10–11, 13, 14, 55, 56, 72, 83, 148, 170
 Senate, U. S., 1, 157–8, 166
 Separation of powers, 160
 Sepulveda, Juan Gines de, 66–7
 Serbia, 166–7
 Seven Years War, 139–41, 154
 Seyssel, Claude de, 56–7
 Shakespeare, William, 80–2
 Shi'i, 19, 30
 Shirley, William, 137–8, 149

 Sickingen, Franz von, 44
 Silesia, 133, 138, 146
 single combat, *see* Duel
 Somerset, English herald, 47
Song of Roland, 22
 Soto, Dominigo de, 66, 70
 sovereignty, 26–7, 52, 71, 73, 82–3, 94, 104, 124, 141, 150
 Spain, 4, 6, 20, 26, 27, 40–2, 48, 51, 52, 64, 66, 69, 74, 77–8, 88, 91, 93–4, 98–9, 105, 107, 108, 110, 116–21, 133–5, 140, 143–4, 153, 166
 Spanish Netherlands, 52, 98, 107–8, 117–18
 Sparta, 9–10, 80
 St. Eustatius Island, 154
 States-general, Dutch, 105, 154
 Suarez, Francisco de, 70–1
 Suleiman I, Ottoman sultan, 45–6, 53
 Sunni, 19, 30–1
 Supreme Court, 163–4
 surprise attack, 4, 8, 9, 94, 145–6
 Sweden, 80, 83, 89–90, 96–9, 100, 107, 115–16, 126, 140, 142, 154
 Swiss Confederation, 31, 36, 38–9, 43–4, 57, 61
 Syria, 13, 21, 31

 tabard, 23–4, 98
 Textor, Johann Wolfgang, 103–4
 The Netherlands, *see* Dutch Republic
 Thirty Years War, 85, 90, 96–9, 101, 103, 104, 115, 126
 Thomas Aquinas, 27, 35, 85
 tolls, 89, 90, 116
 Topkapi Palace, 113, 116
 town crier, 53, 106, 108
 trade, right of, 69, 79, 118, 120, 163
 Transylvania, 97, 112
 travel, right of, 69, 70, 88
 treason, 22, 23, 25, 29, 52, 72, 74, 75, 89
 Treaty of Tordesillas, 63–4
 Tripoli, 165

- truce, 19–20, 21, 29, 76, 80, 91, 93,
101, 111, 112–13, 116, 155
- Truman, Harry, 1
- tuğ*, 30, 113, 116, 120
- Turner, Robert, 2
- Twelve-year Truce, 91, 93
- tyrant, 18, 30, 51, 58–9, 152, 162
- ultimatum, 18, 37, 38, 47, 53, 89, 110,
116, 129, 139, 140–1, 154, 167
- United Nations, 1, 168
- Urban II, pope, 20–1
- vacant land, 58, 78, 150
- Valladolid, debate of, 65–6
- vassal, 22–3, 24, 31, 34, 37, 47, 52, 74
- Vattel, Emer de, 141–6, 147, 148,
151, 166
- Venice, 21, 36, 40, 41, 53–4, 56, 68,
75, 83, 86–7, 112, 119
- Vienna, 113, 132, 140
- Vietnam War, 1–2
- Vitoria, Francisco de, 66–70, 71, 90
- Walpole, Horace, 134, 139
- Walpole, Robert, 120, 135
- war
at sea, 5, 79, 94, 105–6, 109–10,
120, 130, 138, 146, 163
causes of, 13, 40, 46, 51, 59, 78–9,
86, 88, 91, 103, 109, 123, 131,
149, 152, 166, 167
definitions of, 14, 87, 91, 94, 100, 121,
123, 124–5, 126, 128, 142, 147
just, 5, 6, 7, 10, 12, 13, 14, 16–17,
21, 25–9, 31–2, 34–6, 55–7,
60–1, 63, 65–6, 69, 71–5, 78–9,
81, 85, 87–8, 91–4, 96, 100–3,
109, 111, 122–3, 129, 132, 143,
147, 166
preemptive, 55, 94, 98, 110, 123, 131
sanctioned: by God, 8, 16, 17, 21,
32, 43, 44, 59, 61, 87, 92, 103,
109; by the Christian church,
15–17, 21, 26, 36, 64–5; by the
gods, 9, 11–12
to win glory, 56–7, 60, 69, 137, 148
types of: defensive, 1, 18–19, 68,
143–4; formal, 92, 95, 123;
imperfect, 123, 130, 163–4;
offensive, 1, 19, 92, 131–2,
143–4, 145; perfect, 123, 130
unjust, 20, 28, 57, 62, 65, 72, 73,
74, 79, 80, 92–3, 96, 101, 102,
103, 120, 131–2, 143, 147, 161
vote for, 2, 9, 11, 119, 120, 135–6,
137, 139, 160, 166
- War of 1812, 158, 166–7
- War of American Independence,
150–5
- War of Devolution, 107
- War of Jenkins' Ear, 134–6
- War of the Austrian Succession,
133–4, 138
- War of the League of Augsburg,
110–12
- War of the Spanish Succession, 115,
116–19, 144
- war on terror, 2–3
- war resolutions, 1–3
- Washington, Bushrod, 163–4
- Washington, George, 150
- West Indies, 86, 105, 117,
134–5, 136
- William III of Orange, 109–11, 117
- Wilson, James, 156
- Wolff, Christian von, 130–2, 141–2,
144, 148, 166, 167
- Wooten, Nicholas, 48–50
- World War I, 85, 167–8
- World War II, 1, 6, 168
- Yoo, John, 3–4
- Yusuf, bey of Tripoli, 165
- Zouche, Robert, 95–6
- Zurich, 43–4, 62
- Zwingli, Huldreich, 43–4, 61–2