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### Anticipatory action in self-defence: The law of self-defence - past, presence and future

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## 2 Self-defence in ancient and medieval natural law

The aim of Chapter 2 is to offer a brief review of how self-defence was viewed in the ancient Greek as well as the early and medieval Christian conceptions of natural law. It is important to reiterate at this point that this chapter does not aim to offer a comprehensive portrayal of natural law theories and their evolution.<sup>1</sup> It merely puts the subject of self-defence within the context of natural law. This contextualisation is needed given the fact that natural law had been the predominant intellectual foundation of legal order for much of the historical phase examined in this chapter.<sup>2</sup>

The concept of natural law has evolved over the centuries. In the Western tradition, the idea began with the ancient Greeks' conception of a universe governed by eternal law on the basis of which one could distinguish between what was just or unjust by nature.<sup>3</sup> Christian philosophers took over the natural law theory and equated eternal law with that of God. Later, the Renaissance and the Reformation process brought about a gradual secularization of society in which positive law and judicial processes gained more important role. Against this background, natural law theory also became more secular and gradually shifted its emphasis from divine order to human reason. Starting with the seventeenth to eighteenth centuries, however, natural law theory was confined to the realms of ethics and morality in the face of the positivist and jurisprudential trends of the time.<sup>4</sup>

After a succinct portrayal of the importance of self-defence in the ancient Greek and Roman conception of natural law, this chapter will examine the early, medieval and reformer Christian theory of natural law up to the end of the Thirty Years' War and the conclusion of the Peace of Westphalia. Attention will be given to the way war and warfare were understood in this natural law conception in order to map out the framework in which the right of self-defence was acknowledged.

As explained in section 1.3.3.3, because of the long time-span reviewed in this chapter, the legal-historical research will mainly rely on authoritative and representative writings of the different time periods analysed within it. It will rely less on state practice, because of the difficulties in selecting a representative category of documentary evidence. This chapter will thus concentrate on the way self-defence was defined, justified and limited by contemporaneous publicists. The concluding remarks of this section will assess whether anticipatory action was part of the natural law understanding of self-defence, and if yes, under what conditions.

Before embarking on the analysis, the clarification of certain terms needs to be reiterated.<sup>5</sup> Use will be made of the concepts of 'just war' and 'just cause' to describe those circumstances and conditions in which Christian philosophers approved wars on the basis of natural law and God. Accordingly, a just war was one sanctioned by the law of nature and a 'just cause' was a combination of circumstances that allowed war to be waged. Since it is not the purpose of this research to offer an exhaustive portrayal of the

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<sup>1</sup> Also stated *supra* 1.5.

<sup>2</sup> Neff, p. 10; Reichberg et al., p. 37.

<sup>3</sup> For an elaborated analysis on how law was viewed in ancient Greece, see C. Phillipson, *The International Law and Custom of Ancient Greece and Rome*, Vol. 1 (London, MacMillan 1911) pp. 53-65.

<sup>4</sup> Bellamy, pp. 120-121.

<sup>5</sup> Also stated *supra* 1.4.

Christian just war tradition, there will be no detailed analysis of conditions under which a war could be deemed ‘just’.<sup>6</sup> Furthermore, distinction will be made between ‘(early and) medieval Christian’ thinking, on one hand, and ‘Christian legalist’ approach, on the other. The first category will examine the work of Christian theologians and canonists in the first fifteen centuries of the Common Era. The second category will look at the writings of late scholastics and reformer writers who devoted special attention to normative thinking about war between nations.<sup>7</sup>

## 2.1 War in ancient Greece and Rome

While it is considerably laborious to offer an elaborate exposition of how ancient civilizations viewed and regulated war, a short incursion into ancient war-related traditions is useful, because many of their elements have survived and are part of contemporary frameworks. This short portrayal will only focus on ancient Greek and Roman rules, because in many ways, they served as basis for the development of Western war traditions.<sup>8</sup>

Both ancient Greeks and Romans recognized several causes for legitimate war. In the absence of these causes, to engage in warfare was forbidden by law and religion alike.<sup>9</sup> In ancient Greece, warfare was certified by both natural law and conventional law (customs). The concept of natural law stemmed from a general idea of just and unjust in accordance with nature, which all human beings understood, even if there was ‘neither communication nor agreement between them.’<sup>10</sup> Apart from natural law, ancient Greeks also recognized conventional law. Accordingly, rules stemming from natural law were seen as possessing the same validity everywhere regardless of being deliberately adopted or not.<sup>11</sup> Conversely, conventional law was viewed as acquiring existence and importance only after it had been laid down. As part of conventional law, customs were given great importance, because they were seen as having intrinsically more force than written laws.<sup>12</sup> Such customs were considered in both ancient Greece and Rome to be applicable to all sovereign, properly organized states or communities, but not to those seen as barbarians, robbers or pirates.<sup>13</sup>

No war was commenced in either Greece or Rome before allegations of legitimacy (*justum bellum*, for Romans) were made. Phillipson identified as ‘the most usual grounds’

<sup>6</sup> For a thorough analysis of the ‘just war’ tradition and the significance of ‘just causes’, see Bellamy, pp. 5-8, 15-29, 39-40, 126-134; Christopher 2004; Neff, pp. 29-30, 49-57.

<sup>7</sup> Reichberg et al., pp. 288, 339-340, 371-372, 385-386.

<sup>8</sup> In case of Greece, the time frames under review are the Classical (500-336 BC) and the Hellenistic (336-146 BC) periods. For ancient Rome, the period of the Republic (510-23 BC) and of the Early Empire (23 BC-96 AD) are relevant.

<sup>9</sup> C. Phillipson, *The International Law and Custom of Ancient Greece and Rome*, Vol. 2 (London, MacMillan 1911) p. 167.

<sup>10</sup> Aristotle, *The ‘Art’ of Rhetoric*, trans. by J.H. Freese (London, William Heinemann 1959) Bk. I, ch. 13, § 2, p. 139.

<sup>11</sup> Aristotle, *XIX The Nicomachean Ethics*, trans. by H. Rackham (London, William Heinemann 1968) Bk. V, ch. 7, § 1, p. 295; Phillipson, Vol. 1, p. 54.

<sup>12</sup> Phillipson, Vol. 1, pp. 54-55.

<sup>13</sup> *Ibid.*, Vol. 2, p. 195.

for resorting to war violation of a treaty, withdrawal from an alliance, offence committed against the state or an ally, breach of neutrality, offence against envoys and so on.<sup>14</sup>

The Roman *ius fetiale*<sup>15</sup> gave a formal legality to matters of war. Commencement of hostilities was considered “just” only when it was carried out in conformity with this set of religious laws. The adherence to the rules was assured and overseen by the *fetiales*, a college of priests who had special responsibility for maintaining peaceful relations among the Latin. They had to oversee, *inter alia*, the making of treaties and declarations of war.<sup>16</sup> The fetials, although required to discuss only the mere formalities of war, often analysed the legitimacy of the reasons invoked.<sup>17</sup> Although the *ius fetiale* had a prominent religious character, the actual proceedings possessed also a political and a judicial nature, because the fetials could act as ambassadors or judges and not only as guardians of religion.<sup>18</sup> As Watson explained, Roman declarations of war were cast in the form of a lawsuit, if they were preceded by a verdict of the fetials that proclaimed the war to be legitimate.<sup>19</sup>

Romans dispatched envoys to the potential enemy to present the formal demand of the Roman government. According to Cicero, wars had to be formally declared and limits were imposed on what the state might do to its enemies in the form of retribution or punishment.<sup>20</sup>

An important aspect of the natural law conception of the ancient Greeks was their perception of the city-state or the commonwealth. Aristotle saw the state as a ‘wider self’,<sup>21</sup> the conclusion of a process of human development, in which each step was necessary and natural.<sup>22</sup> Therefore, the city-state was itself natural.<sup>23</sup> The same view was later adopted by the Roman orator Cicero, who believed that Nature prompted human beings to form public assemblies and take part in them themselves.<sup>24</sup>

Since the state was natural, ensuring its survival and prosperity was also seen as natural. Accordingly, both ancient Greek and Roman philosophers accepted that defending the state from its enemies was also natural. Aristotle believed that a city had to be ready to ‘avoid becoming enslaved to others.’<sup>25</sup> Likewise, Cicero asserted that the main justification for going to war was that ‘we may live in peace unharmed.’<sup>26</sup> Besides this narrow understanding of defence, both Aristotle and Cicero added a broader ground

<sup>14</sup> Phillipson, Vol. 2, p. 182.

<sup>15</sup> Fetial law was a set of religious norms related to the commencement and conduct of war by Romans. It was developed during the regal period in the seventh century BC and it lasted until the first century AD. 60. Phillipson, Vol. 2, pp. 315-316; Reichberg et al., p. 47.

<sup>16</sup> Reichberg et al., p. 47.

<sup>17</sup> Brownlie 1963, p. 4.

<sup>18</sup> Phillipson, Vol. 2, pp. 181, 325-329.

<sup>19</sup> A. Watson, *International Law in Archaic Rome: War and Religion* (Baltimore, John Hopkins University Press 1993), p. xiii.

<sup>20</sup> M.T. Cicero, *De Officiis*, trans. by W. Miller (London, William Heinemann 1968), Bk. I, chs. 11-12, sections 36-38, pp. 39-41.

<sup>21</sup> E. Barker, *The Political Thought of Plato and Aristotle* (New York, Dover Publications 1959) p. 269.

<sup>22</sup> Barker, pp. 269-270; S. Everson, ‘Aristotle on the Foundations of the State’, in J. Dunn and I. Harris, eds, *Aristotle*, Vol. 2 (Cheltenham, Edward Elgar 1997) p. 294.

<sup>23</sup> Aristotle, *Politics*, trans. by H. Rackham (London, William Heinemann 1967) Bk. I, ch. 1, §§ 8-9, p. 9.

<sup>24</sup> Cicero, *De Officiis*, Bk. I, ch. 4, section 12, pp. 13-15.

<sup>25</sup> Aristotle, *Politics*, Bk. VII, ch. 13, §§ 14-15, p. 611.

<sup>26</sup> Cicero, *De Officiis*, Bk. I, ch. 11, section 35, p. 37.

for war as well. Accordingly, the state could also ‘hold despotic power over those who deserved to be slaves’ (Aristotle) and fight for supremacy and glory (Cicero).<sup>27</sup>

The Peloponnesian War<sup>28</sup> was a good illustration of how the expansionist ideals of a state could raise the suspicion and fear of its neighbours without their survival being endangered. One of the reasons for the outbreak of the Peloponnesian War was the help that Athens had given to Corcyra against Corinth, a Spartan friend and ally, in pursuance of its expansionist plans.

According to Thucydides, the Corinthians encouraged the Spartans to attack Athens to prevent plans for further Athenian expansion and dominance in the Peloponnesus:

‘Spartans, you still delay and fail to see that peace stays longest with those who are not more careful to use their power justly than to show their determination not to submit to injustice [...]. Here, at least, let your procrastination end. For the present, assist your allies and Potidaea in particular, as you promised, by a speedy invasion of Attica, and do not sacrifice friends and kindred to their bitterest enemies, and drive the rest of us in despair to some other alliance.’<sup>29</sup>

The justification for the Spartan military action not only bore the characteristics of war for supremacy (in Cicero’s words), but was also a very strong argument for preventive war. Cicero, however, cautioned that such wars had to be waged with less brutality than those for survival, because one was not fighting against a deadly enemy, but rather against a worthy rival.<sup>30</sup>

The idea which drove Sparta and its allies to war against Athens was to later resurface and justify similar military actions. Also, numerous authors from the medieval and modern ages used similar arguments to justify preventive war.<sup>31</sup>

Early and medieval Christian thinkers adopted the ancient Greek and Roman theory of natural law and saw it as stemming from the law of God.<sup>32</sup> Within this concept, both individuals and the state had the natural right to defend themselves.<sup>33</sup>

## 2.2 Early and medieval Christianity

In the first three centuries of Christianity, the early pacifist approaches rendered war a capital sin. Later, however, as Christianity became the official religion of the Roman Empire and as the Roman Catholic Church assumed a more secular role, military action was acknowledged as necessary in certain situations. The Christian normative framework

<sup>27</sup> Aristotle, *Politics*, Bk. VII, ch. 13, §§ 14-15, p. 611; Cicero, *De Officiis*, Bk. I, ch. 11, section 38, p. 41.

<sup>28</sup> The Peloponnesian War (431-404 BC) was fought between the city-state of Athena and the Peloponnesian League, led by Sparta.

<sup>29</sup> Thucydides, *The Peloponnesian War*, Bk. I, ch. 71, reprinted in Reichberg et al., pp. 4-5.

<sup>30</sup> Cicero, *De Officiis*, Bk. I, ch. 12, section 38, p. 41. Cicero also advocated the granting of protection for those who laid down their arms and for those who did not participate in the hostilities. *Ibid.*, Bk. I, ch. 12, section 35, p. 37.

<sup>31</sup> See *infra* 2.2.2, 2.3.3.2, 3.1.3 and 3.2.1.

<sup>32</sup> For instance, the influence of Aristotelian natural law theory on Thomas Aquinas was thoroughly discussed in A.J. Lisska, *Aquinas’s Theory of Natural Law: An Analytic Reconstruction* (Oxford, Clarendon 1996). The same book also makes reference to the work of other early and medieval Christian thinkers who borrowed ideas from the ancient Greek conception of natural law.

<sup>33</sup> J.M. Mattox, *Saint Augustine and the Theory of Just War* (London, Continuum 2006) pp. 73-74.

was gradually secularized during the high Middle Ages and opened the way to more juridical approaches.<sup>34</sup>

### 2.2.1 Early Christian approach to war during the Roman Empire

The first three centuries of Christianity were characterized by an isolationist and pacifist approach to all social matters, including military action.<sup>35</sup> Pacifism was propagated by the Early Christian Fathers, such as Tertullian of Carthage (circa 160 - circa 225). Although early Christianity mixed elements of Greek culture (still dominant in the Roman Empire) and Jewish religion (from the Old Testament), participating in warfare proved to be a difficult question, because the teachings of the New Testament endorsed a 'turn the other cheek' approach to violence. Consequently, the Early Church Fathers believed that the New Testament demanded them to avoid violence.<sup>36</sup>

The general prohibition of war in the early pacifist philosophy had the merit of persuading later theologians to grant great importance to thorough justifications of military actions. Accordingly, starting with the fourth century, the main characteristic of the Christian normative framework was the requirement to demonstrate the existence of a justifying ground to make the resort to war acceptable to both divine and earthly authority.

Although pacifists propagated avoiding service in the army, the first accounts of Christian soldiers began to appear by the end of the third century.<sup>37</sup> During the reign of Constantine (306-337 AD), there were already many Christians serving in the military and taking up important public positions. Once Christianity was proclaimed the official (state) religion of the Roman Empire, it became necessary to have a more comprehensive approach towards military service and warfare. This way, the isolationist pacifist attitude was replaced by a more pragmatic perspective on the issue and the main question to be answered referred to the conditions under which a Christian could participate in warfare.<sup>38</sup>

These changes were also mirrored in contemporaneous religious writings. One of the most important thinkers of early Christianity was Augustine,<sup>39</sup> who built his observations on Cicero's writings and on the Roman concept of *justum bellum*. Although his work did not contain significantly new ideas, but rather a refinement and synthesis of earlier writings, Augustine's merit was to give expression to an early Christian understanding of just wars.<sup>40</sup> As said by Mattox, Augustine's criteria for 'just cause' constituted a

<sup>34</sup> Bellamy, pp. 20-25; Neff, pp. 45-49; Reichberg et al., pp. 60-62.

<sup>35</sup> In 313 Emperor Constantine I announced the toleration of Christianity and by the end of the fourth century, the new religion became the most prevalent in the Empire. In 380, Emperor Theodosius issued *De Fide Catholica* declaring Catholic Christianity as the state religion of the Roman Empire. Two years later, the Canon of the Bible was officially assembled to comprise only the accepted books of the Old Testament and the New Testament, creating, this way, the fundaments of Christian canon law.

<sup>36</sup> See, for instance, Tertullian, *On Idolatry*, ch. 19, in L.J. Swift, ed., *The Early Fathers on War and Military Service* (Wilmington, Michael Glazier 1983) pp. 41-42.

<sup>37</sup> Brownlie 1963, p. 5; Bellamy, p. 21.

<sup>38</sup> Bellamy, pp. 23-25; Neff, pp. 46-48.

<sup>39</sup> Aurelius Augustine also known as Augustine of Hippo or Saint Augustine (354-430) was one of the most important figures in the development of Christianity in Europe. His most important works are *On Christian Doctrine* (397-426), *Confessions* (397-398) and *City of God* (?413-426).

<sup>40</sup> Bellamy, p. 25.

synthesis of the theories embraced by Cicero and early Christian predecessors.<sup>41</sup> Accordingly, war had to be fought to obey a divine command, to defend the safety or the honour of the state, to avenge injuries, to punish a nation for failure to take corrective action for wrongs committed by its citizens and to come to the defence of one's allies.<sup>42</sup> Augustine also asserted that wars could not be fought for territorial expansion and had to be authorized by the appropriate public authority.<sup>43</sup> Moreover, war could only be 'just' for the side that was exercising defence or seeking revenge as accepted by religion and by God, thus it could not be just for both parties.<sup>44</sup>

In *The Problem of Free Choice*, Augustine explained that when an individual killed in self-defence, he killed to protect earthly things and such conduct was only justifiable by temporal law (as opposed to eternal), because one should love only that which cannot be taken against one's own will. Killing for defending one's own life or property was a sign of loving transitory, earthly goods, hence such conduct could not be justified before God. Even though Augustine rejected the idea of killing in one's self-defence, he discussed two situations in which the necessity of self-defence might arise: against an attacking enemy (*hostis inruens*) and against an assassin lying in ambush (*insidiator sicarius*).<sup>45</sup> He treated both situations as equally life-threatening and the reasons why he rejected such defence were not related to the timing of the defence, but to the nature of goods and values protected. Augustine, however, admitted that when individuals used force to defend others, public order or the common good, their act was justified by both temporal and eternal law. Soldiers could be exonerated of sins on this basis, because 'self-defence' in this case meant fighting for the sake of others or for the city in which they resided, provided that they acted according to the commission lawfully given to them.<sup>46</sup>

What is interesting to note in Augustine's view on self-defence, is that he first discussed individual self-defence and then inferred his conclusions on the defence of the community. This was in line with the practice of the ancient Greek and Roman philosophers, who regarded the community as the completion of the self and derived their findings from the latter to the former.<sup>47</sup> Further, he treated self-defence separately from any retaliatory measures and understood it as a situation in which the soldier had to fight against an on-going attack.<sup>48</sup> Additionally, Augustine discussed the hypothesis of defence against an enemy lying in ambush, thus the necessity to act preemptively.<sup>49</sup> The redress of injuries and the punishment of the guilty were seen as a separate cause.<sup>50</sup>

As with the ancient Greek and Roman philosophers, self-defence or defence of the state in general, was seen as stemming from natural law by early Christian thinkers.

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<sup>41</sup> Mattox, p. 74.

<sup>42</sup> Ibid.

<sup>43</sup> Augustine, *City of God*, Bk. XIX, ch. 7, reprinted in E.L Fortin et al., eds., *Political Writings / Augustine* (Indianapolis, Ind., Hackett, 1994) p. 149.

<sup>44</sup> Augustine, *City of God*, Bk. XIX, ch. 7, in Fortin et al., p. 149.

<sup>45</sup> Augustine, *The Problem of Free Choice (De libero arbitrio)* trans. by M. Pontifex (Westminster, Md., Newman Press 1955) Bk. I, 5.12, pp. 44-45. See also W.S. Smith, 'Augustine and the Limits of Preemptive and Preventive War', 35 *Journal of Religious Studies* (2007) p. 147.

<sup>46</sup> Excerpts from Augustine, *Letter 47*, section 5, in J.M. Mattox, p. 108.

<sup>47</sup> Barker, pp. 269-270; Cicero, *De Officiis*, Bk. I, ch. 4, section 12, pp. 13-15; Everson, p. 294.

<sup>48</sup> Mattox, p. 74.

<sup>49</sup> Smith, pp. 146-147.

<sup>50</sup> Mattox, p. 74.

Augustine believed that defending the common good was justified by eternal law, even if fighting in self-defence was always driven by earthly desires.<sup>51</sup>

Two additional aspects of the concept of self-defence were taken further by subsequent Christian authors. First, the fact that self-defence was treated first as the right of an individual and then as a prerogative of the sovereign, led to the acceptance of both private and public wars in self-defence. As it will be shown, thinkers of the medieval ages adopted the same approach as the ancient Greek philosophers and the early Christian authors when discussing self-defence: they referred to the situation of an individual and then applied the findings to the sovereign.<sup>52</sup>

Secondly, succeeding authors kept the distinction between self-defence and revenge of injuries, mainly by referring to the temporal factor: self-defence was supposed to repel an ongoing or imminent attack, whereas revenge was meant to punish the authors of wrongs already committed.<sup>53</sup>

### 2.2.2 Christian approach to war in the Middle Ages

From the fifth century onwards, the Catholic Church assumed a more prominent role in European affairs. After the fall of the Roman Empire several smaller kingdoms and provinces were established and the Catholic Church acquired ever greater responsibility. Early medieval popes often had to act as political rulers to keep a frail public order. Between the fourth and the eighth centuries, the so-called barbarian invasions took place, which forced the Church and the European rulers to adopt a more realistic view on issues of military action.<sup>54</sup> During this period, the doctrinal tradition of Augustine was maintained by authors such as Gregory of Tours (538-594) and Isidore of Seville (560-636).<sup>55</sup>

Beginning with the tenth century, the secular functions of the Catholic Church became as important as its divine functions. In its secular function, the Church took up the tasks of a sovereign. Hence, towards the end of the first millennium, the Church began to engage in military affairs. For instance, Pope Leo IV ordered the restoration and fortification of the walls of the City of Rome and the building of a battle fleet which inflicted a defeat on Muslim forces in the Battle of Ostia in 849.<sup>56</sup> Between 1095 and 1099, Pope Urban II called upon the first crusade, against the Muslims and the Jews in the Holy Land.<sup>57</sup>

In his speech at Clermont (1095), Pope Urban II justified crusades as a measure defending the Christian religion. The Pope claimed that ‘the people of the kingdom of the

<sup>51</sup> Excerpts from Augustine, *Letter 47*, section 5, in Mattox, p. 108.

<sup>52</sup> See *infra* 2.2.2 and 2.2.3.

<sup>53</sup> See *infra* 2.2.2, 2.2.3, as well as 2.3.

<sup>54</sup> A. Nussbaum, *A Concise History of the Law of Nations* (New York, Macmillan 1947) pp. 23-27.

<sup>55</sup> Gregory of Tours was a historian and a bishop and through his work he aimed to popularize Christian faith. Saint Isidore, Archbishop of Seville, not only took further the teachings of Augustine, but also the ideas of Aristotle and other ancient Greek philosophers. K. Mitchell and I. Wood, *The World of Gregory de Tours* (Leiden, Brill 2002); J. Fontane, *Isidore de Seville. Genese et originalite de la culture hispanique au temps des Visigoths* (Turnhout, Brepols 2000).

<sup>56</sup> Neff, p. 48; P. Llewellyn, *Rome in the Dark Ages* (London, Faber & Faber 1970) pp. 263-264.

<sup>57</sup> The term ‘Holy Land’ usually refers to the historic geographical region comprising ancient Palestine (Concise Oxford Dictionary, 1995).

Persians, a strange people, a people wholly alienated from God, a generation that set not their heart aright and whose spirit was not steadfast with God' have invaded the kingdom of the Greeks and the land of Jerusalem. As a response, he called upon soldiers to 'capture that land from the evil nation,' because undertaking the journey was 'for the remission of [...] sins, assured of the imperishable glory of the kingdom of heaven.'<sup>58</sup> Pope Urban II was thus offering one of the first justifications of crusades as holy wars to defend the Holy Land against 'evil' and to remission sins.

Similar views were expressed by Pope Innocent IV, some one hundred years after the speech given by his predecessor, Urban II. According to Pope Innocent IV, although 'infidels' could hold under their jurisdictions dominions and possessions, they had no right to occupy the Holy Land, 'which is consecrate by the birth, life and death of Jesus Christ.'<sup>59</sup> As a result, Innocent IV asserted without any doubt that it was licit for the pope, 'by persuading the faithful and granting indulgences, to defend the Holy Land and all the faithful inhabiting it.'<sup>60</sup>

In the twelfth and thirteenth centuries eight other crusades took place, most of them for the (re-)conquest of the Holy Land. In this period, the Church took up the role of a true sovereign and did not shy away from commanding several invasions under the auspices of the Christian cross.

A comprehensive description of how war was understood in the time of the crusade was given by the *Decretum*, attributed to Gratian, a twelfth century canon lawyer from Bologna. The *Decretum* was a monumental collection of canon law compiled and written in the form of a legal textbook. The collection was continuously annotated by canonists (Decretists, later coined Decretalists) in the second half of the twelfth century.<sup>61</sup>

The *Decretum* had three main parts, the second of which was a compilation of cases coined *causae*. In the *causae* Gratian raised a number of legal questions. *Causa 23* was dedicated to the conditions under which Christians can resort to war (private or public) and it was a reliable characterization of the contemporaneous beliefs held by the Church on the topic:

'That war is just which is waged by an edict in order to regain what has been stolen or to repel the attack of enemies.'<sup>62</sup>

Accordingly, the *Decretum* justified war to punish wrongdoings and to resist injury. In line with its predecessors, Gratian also specified that defending the *patria* from the barbarian invasions was a 'just cause'.<sup>63</sup> Moreover, Gratian asserted that if someone failed to ward off an injury from an associate, if he could do so, he was as blameable as the one who inflicted it.<sup>64</sup> Likewise, Gratian acknowledged holy war as a 'just cause' and

<sup>58</sup> Pope Urban II's speech at Clermont, 27 November 1095, as reported by Robert the Monk, in R.G.D. Laffan, ed., *Select Documents of European History: 800-1492* (New York, Henry Holt 1929) pp. 54-56.

<sup>59</sup> Pope Innocent IV, 'On Vows and the Fulfilling of Vows', decretal *Quod superbis*, reprinted in Reichberg et al., pp. 152-153.

<sup>60</sup> *Ibid.*, p. 152.

<sup>61</sup> More on the legacy of the Decretists and the Decretalists in Reichberg et al., p. 104; Bellamy, pp. 34-36.

<sup>62</sup> Gratian, *Decretum*, Part II: Decreti Pars Secunda, causa 23, question II, canon 1, reprinted in Reichberg et al., p. 113.

<sup>63</sup> *Ibid.*, question III, canon 5, in Reichberg et al., p. 114.

<sup>64</sup> *Ibid.*, canon 7, in Reichberg et al., pp. 114-115.

asserted that those who died ‘in the fight against the infidels’ should not be seen as murderers, but as soldiers worthy of the kingdom of heaven.<sup>65</sup> As Augustine, Gratian believed that only one side can be just in war, ‘the good laudably pursue the wicked, and [...] the wicked damnably pursue the good.’<sup>66</sup>

Despite the permissive rights of the Church and the sovereign to wage holy wars, the *Decretum* also discussed a more *stricto sensu* self-defence, both from the perspective of an individual and that of a sovereign, thus re-affirming that not only sovereigns, but also individuals could wage defensive wars. Individuals – be they lords, property owners, soldiers, merchants or peasants – could wage ‘particular wars’<sup>67</sup> in self-defence against their attacker. ‘Blameless defence’ did not need the special authority of the church or of the prince, because it was allowed by natural law.<sup>68</sup> They could defend themselves against an ongoing attack or against an enemy in ambush. Self-defence thus referred to the time immediately before and during the attack. Action after the attack was seen as a reprisal or revenge of injuries which was seen more as a prerogative of the sovereign. The only case in which one could defend himself after an attack was if the attacker was preparing to strike again.<sup>69</sup>

A good illustration of this distinction is served by the Decretists’ glosses, which appeared alongside the *Decretum* from the thirteenth century onwards:

‘Let us see who may resist violence, and how it may be resisted [...]. If it is directed at persons, then force may be resisted before it strikes. But certain people have contended that no one ought to resist force before it strikes, yet it is permitted to kill an ambusher and anyone who tries to kill you [...]. If, however, someone returns violence, this should be done with the assumption that it is for defence, rather than for revenge [...], and only if the first attacker intends to strike once more; otherwise, if the attacker does not intend to strike once more and the other person still returns force, this should be seen as revenge rather than resistance to force. And this is what I understand when it is said that force may be resisted “on the spot” (*incontinenti*). It is therefore required that a return blow be in defence, not in revenge [...], and that self-defence be exercised in moderation (*cum moderamine*).’<sup>70</sup>

Another important document that, *inter alia*, confirmed the distinction was Raymond of Peñafort’s *Summa de casibus poenitentiae*, written from 1224-1226, revised between 1234 and 1245 and annotated by William of Rennes in the thirteenth century. The *Summa* relied extensively on the *Decretum* and Peñafort argued that self-defence had to aim solely at repelling an attack that was already in progress or about to commence. This way, Peñafort put defence in sharp contrast with reprisals, because he saw the former as concerning the present and the near future, whereas the latter imposed sanctions for acts already done.<sup>71</sup> This view reinforced the opinions held by Augustine (thus the *Decretum*

<sup>65</sup> Ibid., question V, canon 46, in Reichberg et al., p. 119.

<sup>66</sup> Ibid., question IV, canon 36, in Reichberg et al., p. 115.

<sup>67</sup> According to Neff, in the fourteenth century, John of Legnano, professor of civil law at the University of Bologna, characterized self-defence as a species of ‘particular war’, in other words, a ‘war’ waged by one person on his own behalf, as opposed to a ‘universal war’ waged by the prince and involving the entire community. Neff, p. 60 n. 67.

<sup>68</sup> Raymond of Peñafort, *Summa de casibus poenitentiae*, Part II, § 18, reprinted in Reichberg et al., pp. 138-139.

<sup>69</sup> Gratian, question I, in Reichberg et al., p. 110.

<sup>70</sup> Ibid., in Reichberg et al., pp. 109-110.

<sup>71</sup> Peñafort, § 18, in Reichberg et al., pp. 133, 140.

as well) on the separation between defence (against imminent or on-going attacks) and retaliation (punishment of wrongs or response to attacks that already occurred). William of Rennes, however, in his annotations argued that a defender could be justified in delaying his armed response for a significantly longer time, provided it was for defensive and not retaliatory purposes.<sup>72</sup>

The *Decretum* thus discussed both private and public self-defence. Regarding individual (or particular) self-defence, pre-emptive strikes were allowed against an enemy in ambush, but self-defence had to be exercised with moderation.<sup>73</sup> As to the prerogative of the sovereign to wage defensive wars, military action against an invader would qualify as defence of the fatherland and would enjoy the same standing as individual self-defence, i.e., it would need no special authority.<sup>74</sup> Nonetheless, the *Decretum* also recognized the prerogative of the Church and the sovereign to wage preventive wars against the enemies of the Christian religion.

There are thus three important points to be made regarding the understanding given to self-defence by the above-mentioned works. First, exercising self-defence (by an individual or a sovereign) needed no special authority. The law of nature itself allowed such defensive action. Secondly, self-defence was distinguished from punishment on a temporal basis. Accordingly, the former pertained to the time before or during the attack, whereas the latter related to the time after the attack. Thirdly, ‘blameless’ self-defence had to be exercised with moderation.

At the time when the *Decretum* was compiled, a new approach on combining ancient philosophy with Christian theology emerged under the name of scholasticism.<sup>75</sup> Thomas Aquinas (ca. 1225-1274) was a prominent scholastic author and his best-known work is the *Summa Theologiae*, written between 1265 and 1274, which compiled all of the main theological teachings of the time. The *Summa Theologiae* was based on a clear theory of natural law, which was seen by Aquinas as the way through which the human being participated in eternal law. As in the ancient Greek conception, natural law was binding on the whole universe and on its basis one could distinguish right from wrong in the interest of the greatest good.<sup>76</sup> From the sixteenth century onwards, this work served as a textbook in theology and many professors in Western Europe organized their teachings on its basis.<sup>77</sup>

In *Question 29 – On Peace (Summa Theologiae)*, Aquinas touched upon the subject of recourse to war, by discussing peace as the ultimate goal of the belligerent. Like Augustine, he contended that only one side can be just in war, because ‘true peace is only

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<sup>72</sup> William of Rennes, *Apparatus ad Summam Raymundi*, § 18, reprinted in Reichberg et al., pp. 133, 143.

<sup>73</sup> Gratian, question I, in Reichberg et al., p. 110.

<sup>74</sup> Peñafort, § 18, in Reichberg et al., p. 139.

<sup>75</sup> This method of teaching was earlier used by Muslim scholastics of Al-Andalus (today Andalusia). The scholastic method was based on the critical analysis of the main work (or works) of a renowned scholar (*auctor*) and in such way, the students learned to understand and appreciate the theories of the author. Three periods of scholasticism can be distinguished: early scholasticism (11<sup>th</sup>-12<sup>th</sup> century), high scholasticism (13<sup>th</sup> century) and late scholasticism (14<sup>th</sup> and early 15<sup>th</sup> century).

<sup>76</sup> Thomas Aquinas, *Summa Theologiae*, Secunda Secundae, question 91, articles 1 and 2, and question 94, articles 2 and 4, in A.J. Lisska, *Aquinas’s Theory of Natural Law: An Analytic Reconstruction* (Oxford, Clarendon 1996) pp. 263-266, 272-278.

<sup>77</sup> Reichberg et al., p. 169.

in good men and about good things’ and ‘the peace of the wicked is not a true peace but a semblance thereof.’<sup>78</sup>

In *Question 40 – On War*, Aquinas discussed whether any war was legitimate or not. In his answer, he named three conditions for a war to be legitimate, thus ‘just’: the war had to be ordered by a public authority (the prince), it had to have a ‘just cause’ and it had to be fought with the right intention. As to the ‘just cause’ of the war, Aquinas cited Augustine and agreed that war should be fought to avenge wrongs and to punish a nation for failure to take corrective action for wrongs committed by its citizens.<sup>79</sup> Aquinas also acknowledged the legality of laying ambushes in war, because he thought that soldiers had to learn the art of concealing, especially from unbelievers, their strategy.<sup>80</sup>

Although Aquinas held that wars could be waged in defence of the faith, he also believed that faith depended on the will and that unbelievers could not be compelled to take up Christ, as long as they did not endanger the faith or they had not promised to accept it.<sup>81</sup> Thus Aquinas was more in favour of limiting the prerogative of the sovereign to wage war only in defence of the fatherland (regardless of whether the danger was of a religious nature or not), the same way as an individual would be allowed to defend himself or others in face of an attack.

Aquinas had a restrictive view on the so-called particular wars or private wars. When discussing ‘strife’, which he defined as ‘a kind of private war (*bellum particulare*),’ Aquinas claimed that:

‘[O]nly him who defends himself, it may be without sin [...]. For if his sole intention be to repel the injury done to him, and he defend himself with due moderation, it is no sin, and one cannot say properly that there is strife on his part.’<sup>82</sup>

Accordingly, Aquinas was of the opinion that individuals could wage wars only in self-defence and not to avenge injuries. In other words, Aquinas denounced private reprisals as unjust. His view was taken over by some of the subsequent authorities, but many continued to permit private reprisals.<sup>83</sup>

The differentiation between self-defence and the revenge of injuries made by Aquinas, upheld the temporal distinction that the *Decretum* and the decretalists had made.<sup>84</sup> He also reiterated the requirement to exercise self-defence with due moderation.<sup>85</sup>

<sup>78</sup> Thomas Aquinas, *Summa Theologiae*, Part II-II, question 29, article 2, reprinted in Reichberg et al., p. 173.

<sup>79</sup> Ibid., question 40, article 1, in Reichberg et al., pp. 176-177.

<sup>80</sup> Ibid., article 3, in Reichberg et al., pp. 180-181.

<sup>81</sup> Ibid., question 10, article 8, in Reichberg et al., pp. 192-193.

<sup>82</sup> Ibid., question 41, article 1, in Reichberg et al., pp. 182-183.

<sup>83</sup> Such an author was Bartolus de Sassoferrato (ca.1313-1357), who considered private reprisals for the recovery of property legal if there was no judge available to protect the person. Bartolus de Sassoferrato, *Secunda super Digesto novo*, ad Dig., 49, 15, 24, n. 9 in Reichber et al., p. 207. For details on the law of reprisals in the Middle Ages and Bartolus’ work, see Grewe, pp. 116-118. Another author who extensively dealt with the issue of reprisals was Giovanni da Legnano (ca. 1320-1383) in his *Tractatus de Bello, de Represaliis et de Duello* (1360). See: G. da Legnano, *Tractatus de Bello, de Represaliis et de Duello*, ed. by T.E. Holland (Oxford, Oxford University Press 1917), Chs. cxxii-clxvii, pp. 307-331.

<sup>84</sup> Gratian, question I, in Reichberg et al., pp. 109-110; Peñafort, in Reichberg et al., pp. 131-133.

<sup>85</sup> Aquinas, question 41, article 1, in Reichberg et al., p. 183.

Enthusiasm for crusades subsided towards the end of the thirteenth century, as both statesmen and theologians departed from the concept of religious wars for the defence of the Holy Land. The justification of crusades served the Church and the sovereign with a much broader right of defence than that articulated by the early Christians. Accordingly, a sovereign could wage defensive war not only against an invader, but also against a religious enemy that endangered Christianity or peace. The existence of a *justa causa* ('just cause') only required that 'the war be fought out of necessity, so that peace is achieved by the fighting.'<sup>86</sup> Accordingly, many objectives of a war could qualify as 'necessity' and such objectives were usually combined. As Neff observed, just wars had the purpose of preventing evil from overcoming good and even if they had a punitive objective, they were waged to prevent a recurrence of the wrongdoing.<sup>87</sup> For instance, crusades were seen as defensive wars against the 'infidels', but they also purported a strong expansionist, punitive or preventive character.

Nonetheless, self-defence in its strict sense was distinguished by Christian thinkers when analysing the natural right of the individual. Accordingly, individual self-defence was believed to stem from natural law, thus no special authority was needed for its exercise. Furthermore, self-defence allowed action against an imminent or an ongoing attack. It did not allow punitive action after the attack occurred, unless a new attack was in preparation. Likewise, the strict interpretation of self-defence did not justify preventive action against a potential enemy. Furthermore, self-defence had to be exercised with moderation. The distinction between individuals' self-defence and public defensive wars was taken further by authors of chivalric codes and was also widely accepted in the late middle ages.

### 2.2.3 The impact of chivalric codes on the Christian approach to war

As a result of the continuous secularization of the function of the Church, the views on war also became increasingly secular. Chivalric codes (created for the purpose of offering a code of conduct to crusaders) played a significant role in this process.<sup>88</sup>

In the age of medieval chivalry, thinking about war had its emphasis on the righteous conduct in battle. Since knighthood was the symbol of loyalty and generosity, the limits on the conduct of hostilities gained importance.<sup>89</sup>

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<sup>86</sup> Peñafort, § 17, in Reichberg et al., p. 134.

<sup>87</sup> Neff, p. 59.

<sup>88</sup> Elements of chivalric notions appeared as early as the tenth century in Spain. Crusaders were the early knights and the object of their vow was the rescue of the Holy Land from Muslim domination and the defence of pilgrims. After the conquest of Jerusalem, the defence of the Holy City became necessary, so crusaders became members of different orders that saw themselves permanently at war with the 'infidels'. Chivalry reached its peak in these orders, where religious motivations were efficiently combined with military culture. After the thirteenth century, chivalry gradually became a secular enterprise, closer to the secular prince or sovereign, some of the orders becoming veritable guardians of the monarch. Bellamy, pp. 42-43.

<sup>89</sup> Many rules of righteous conduct in battle were recorded by Legnano in his *Tractatus*: Legnano, Chs. xvii-lviii, pp. 235-268. See also: M.H. Keen, *The Laws of War in the Late Middle Ages* (London, Routledge & Kegan Paul 1965) pp. 19-22.

Writings such as the *Ordene de chevalerie* (written before 1250), the *Book of the Order of Chivalry* of Ramon Lull (?1232-1315) and the *Book of Chivalry* by Geoffrey de Charny (?1300-1356), are just a few worth mentioning.

Christine de Pisan's *Book of Deeds of Arms and of Chivalry*, written around 1410, was among the first works to be published in print (in French in 1488 and in English in 1489). In the first part of her book, Pisan discussed just and unjust reasons for war, behaviour of military leaders and the conduct of negotiations. The second part of Pisan's book contained lessons drawn from Roman history, whereas the third and fourth part was an imagined dialogue between her and her mentor. In this last part, Pisan posed questions to the 'master', most of which concerned right conduct in war. One of the questions read as follows: 'A man has injured another, and soon after striking the blow, he flees as far as he can. But the injured party goes after him, overtakes him and injures him. I ask you whether the pursuer should be punished. From what you have said, it would seem not, in view of the fact that he did not exceed the limits of justice. As he was the first one to be assaulted, he has the right of self-defence and should be excused, even if he has killed his adversary. Also he did not wait, for if he had waited until another day, I would not say this, for that would be vengeance.'<sup>90</sup>

The master did not fully agree with Pisan's contention, because he believed that it was illegal to pursue the attacker. Self-defence had to be instant. Accordingly, 'if he had killed the other when the other struck the first blow, and it can be proved that said other struck first, justice has no part in this affair, because he was struck by a sword.' But if the first attacked pursued the assailant, then the attacked had to be punished. The question was only relevant for a greater or lesser punishment, but not for acquittal.<sup>91</sup>

Several conclusions can be drawn from this passage as to the fifteenth century view on self-defence. First, it was still widely accepted that self-defence concerned imminent and ongoing attacks, not wrongs already committed. Secondly, the 'limits of justice' had to be observed when exercising self-defence, that is to say that any counteraction had to be moderate. Thirdly, pursuing an attacker was seen as vengeance, rather than self-defence, in line with the earlier teachings of Augustine, restated in Gratian's *Decretum* and in Raymond of Peñafort's *Summa*. Finally, self-defence was primarily discussed from the perspective of the individual and the findings were applied to the sovereign.

#### **2.2.4 The medieval Christian normative framework and self-defence**

The time period examined saw the developments of a medieval Christian framework concerning the recourse to war and the conduct of hostilities. The early pacifist Christian approach to war was bound to be abandoned along with the recognition of the Christian religion and the inclusion of Christian believers in societal matters. By the fourth century AD, the conditions under which Christians could go to war were seen as important questions to be answered by contemporaneous thinkers.

Thinking about war developed against the background of natural law and natural rights, a view of the world that Christian thinkers inherited and took further from ancient Greek and Roman philosophers. Accordingly, the ideas promoted by Augustine, Gratian, Aquinas and others were explained by reference to natural law.

<sup>90</sup> C. de Pisan, *The Book of Deeds of Arms and of Chivalry*, Part III, ch. 12, in Reichberg et al., p. 219.

<sup>91</sup> Ibid.

Between the fourth and tenth centuries, ‘just causes’ could be divided in two groups: defensive causes and offensive causes. The first group comprised self-defence and defence of one’s allies. The second group related to the avenging of injuries and to the punishment of wrongdoers.

Starting with the eleventh century and until the end of the crusade-period, an additional ‘just cause’ was taken up by the Church: war commanded by God or holy war in the defence of the religion. Such validation was confirmed in Gratian’s *Decretum* (war ‘against the infidels’) and in Pisan’s chivalry book (war to defend the Church).

These justifications were widely accepted not only by the Christian Church, but also by sovereigns and princes. Both religious and secular leaders were viewed in the Christian normative framework as ‘public authority’ that had the right to wage war against enemies. Moreover, since many military actions were commanded by the Church, the pope had the highest authority to justify and wage war.<sup>92</sup>

Starting with the thirteenth century, the idea of holy wars as a justification for military action started to lose its strength. Thomas Aquinas was one of the theologians who claimed that such wars were just only if the faith was indeed endangered. Nonetheless, holy wars continued to be listed as validations in all important fourteenth- and fifteenth-century chivalry books, such as Pisan’s *Book of Deeds*.

During the period under consideration, the right of self-defence was seen as an independent justification for the use of force against an ongoing or an imminent attack. Such a right was bestowed upon humans by natural law; there was no need for any public authority to confirm it.

Augustine’s discussion of the attacking enemy and the enemy lying in ambush, as well as the *Decretum*’s analysis of ongoing (*incontinenti*) or imminent attacks, were all accepted as demonstrating the legitimacy of self-defence before and during the strike. Moreover, the *Decretum* and Aquinas, as well as Pisan’s *Book of Deeds*, emphasized that when self-defence had to be exercised against an ongoing attack, no time was allowed to pass by between the first strike and the defence. If the attacked party took its time to prepare for the response, the defensive action became revenge. Self-defence was not seen as a reactive measure and was clearly distinguished from avenging injuries or punishment of enemies. The temporal dimension of self-defence was relevant to the time *before* and *during* the attack, and not to the time after the strike. The only case in which it could refer to the time after the strike was when the attacker was preparing to strike again.

Two elements can be discerned from this understanding of self-defence: the existence of an attack (imminent or ongoing) and the immediate need for action. A third element of the understanding of self-defence can be identified in the principle of *moderatio*. Starting with the earliest writings on self-defence, Christian theologians cautioned against transgressing the limits of such a right much the same way as Cicero did in his treatise.<sup>93</sup> The *Decretum* required that self-defence against an ongoing attack should be made with moderation. Similarly, Aquinas demanded that warding off an attack should be the limit of self-defence; otherwise it could not be justified.

Apart from the three elements identified in the content of self-defence, two other points are essential to be made. First, individuals were allowed to defend themselves against an imminent or an ongoing attack and to resort to private action (private wars) for

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<sup>92</sup> Bellamy, p. 48.

<sup>93</sup> Cicero, *De Officiis*, Bk. I, chs. 11-12, sections 36-38, pp. 39-41.

that purpose. The core of the sovereigns' prerogative to defend the fatherland was derived from this natural right of the individual. As shown above, publicists often discussed defence of the fatherland under the same terms as defence of individuals.<sup>94</sup> Nonetheless, the right of the sovereign went one step further: it allowed war in defence not only against an (imminent) invader, but also against a potential enemy. The right to self-defence of the sovereign was perceived as more permissive, because it allowed preventive wars against religious enemies.

Secondly, on the basis of the differences between the defensive rights of the individual and the sovereign, a distinction was made between a *stricto sensu* right of self-defence that allowed use of force against an imminent or an ongoing attack, and a more permissive interpretation of defence, which permitted sovereigns to wage preventive wars on religious grounds. The former was seen as stemming from natural law and accessible to both individuals (to defend themselves and their property) and to sovereigns (to defend the fatherland), whereas the latter was viewed as an exclusive prerogative of the sovereign.

As it will be shown below, the early and medieval Christian views on self-defence were used by Spanish scholastics and Protestant jurists, who combined them with elements of canon law, as well as humanist and renaissance ideas.

### 2.3 Christian legalism

The tenets of early and medieval Christian approach to war were partly retained by authors of the fifteenth to seventeenth centuries. Nevertheless, some aspects had undergone definite changes, as a result of certain key events of that period. The year of 1453 saw both the end of the Hundred Years' War between France's main crown contenders and the fall of Constantinople marking the beginning of the Ottoman Empire. At the same time, the fifteenth century gave birth to the ideas of Italian Renaissance as well as to early French humanism. The sixteenth century was torn by the conflict between the Catholic Church and the Protestant reformers and saw the boundaries of Europe being endangered by the Ottoman threat. The discovery of new territories brought on fresh expansionist plans in Spain and brought forward the question of the justice of forcing European rule upon peoples outside the European continent.<sup>95</sup> Against this background, the fifteenth- and sixteenth-century Christian ideas about just war combined both the more traditional theological teachings and the new humanist thought, while engaging in the discussion of topics that had not been previously addressed.<sup>96</sup> Additionally, the first incipient forms of rejection of the principles of just war appeared.

Two distinct trends could be distinguished in this period: Christian legalism (as a continuation of early and medieval Christian thought) and early realism (as the first clear-cut rejections of the Christian just war doctrine).

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<sup>94</sup> For instance: Gratian, question I, in Reichberg et al., pp. 109-110; Peñafort, § 18, in Reichberg et al., p. 139.

<sup>95</sup> Nussbaum, pp. 53, 58-59.

<sup>96</sup> Bellamy, pp. 49-50; Nussbaum, p. 57.

### 2.3.1 Probabilistic arguments and the first rejections of the just war theory

Up to the end of the thirteenth century, wars were seen as just only for one side. As shown in the case of Augustine, Gratian and Aquinas, justice was believed to stand only on the side of the righteous, the one with a cause permitted by God. For such just war theologians it was unthinkable that both sides could be right. Nonetheless, an Italian commentator, Raphael Fulgosius (1367-1427), advanced the idea that war could be just on both sides and that no distinction should be made in public war as to which side was right and which side was wrong. By analysing Roman texts on war, Fulgosius argued that the war was just if it was public and if it was declared by someone with authority to do so.<sup>97</sup> This argument was later coined bilateralist or probabilistic theory.<sup>98</sup>

Fulgosius' ideas were slowly taken up, in part or in whole, by subsequent thinkers. As is shown below, Spanish scholastics (15<sup>th</sup>-16<sup>th</sup> centuries) accepted the probabilistic view, but only in certain conditions. Later, Protestant theologians (16<sup>th</sup>-17<sup>th</sup> centuries) took over the concept, but did not completely renounce the just war tradition. Other authors, such as Balthazar Ayala (1548-1584), assumed the bilateralist argument and used it to shift the focus from just wars to lawful wars. In his treatise, published in 1582, Ayala asserted that 'just causes' of war dealt rather with considerations of fairness and goodness, and not with the character of the legal result which was produced. If war was waged by a sovereign prince who had no superior, then the discussion of the equity and fairness of the cause was superfluous. Accordingly, nothing was needed other than that the war was waged by parties which considered themselves enemies and who had the right to wage war. In such case, Ayala argued, the opinion of Fulgosius had to be accepted.<sup>99</sup> Spanish scholastics of the sixteenth century and Protestant jurists of the seventeenth century were not the only ones who took up the bilateralist argument. For those who sought the rejection of the just war tradition, Fulgosius' opinion was just a small part of the equation.

For Niccolò Machiavelli (1469-1527), the relative nature of what was 'just' in war was obvious, when he quoted an ancient Roman saying that 'war is just to whom it is necessary and arms are pious when there is no hope but in arms.'<sup>100</sup> His rejection of the just war tradition was obvious. In his opinion, war was a necessary tool to secure one's principality and to enlarge one's possessions. Moreover, Machiavelli believed that when it came to the safety of one's country, no attention had to be paid 'either to justice or injustice, kindness or cruelty, or to its being praiseworthy or ignominious' and the alternative adopted had to be the one that 'will save the life and will preserve the freedom of one's country.'<sup>101</sup> Machiavelli thus put aside concerns of morality and ethics and did not engage in the analysis of 'just causes' stemming from natural law. For him, political

<sup>97</sup> Fulgosius, *In primam pandectarum partem comentaria*, reprinted in Reichberg et al., pp. 228-229.

<sup>98</sup> Brownlie 1963, pp. 10-11.

<sup>99</sup> *Ibid.*, p. 10 (quoting Balthasar Ayala, *De jure et officii bellicis et disciplina militari libri (On the Law and Duties of War and Military Discipline)* Bk. I, ch. 2).

<sup>100</sup> N. Machiavelli, *The Prince & the Art of War* (London, Collector's Library 2004) ch. 26, p. 130.

<sup>101</sup> N. Machiavelli, *Discourses on the First Decade of Livy*, Bk. III, ch. 41, reprinted in B. Crick and L.J. Walker, eds., *Niccolo Machiavelli: The Discourses* (London, Penguin 1970), p. 515.

power was a value in itself and the prince was vested with omnipotent power – unrestrained by morality – to preserve the freedom of the state.<sup>102</sup>

Although at the time his works were published Machiavelli's views did not directly lead to the general rejection of the just war theory (Spanish scholasticism was still to follow the early and medieval Christian doctrine), his contribution to the development of realist thinking was of great significance. Similar opinions were expressed by the Italian jurist Alciatus (1492-1550) in *Paradoxa* and by French jurist and political philosopher Jean Bodin (1529/30-1596) in *De republica*.<sup>103</sup>

### 2.3.2 Late Spanish scholasticism

Despite the incipient realist trends, the Christian just war tradition was continued by both Catholic and reformer thinkers. Late Spanish scholasticism was the first that combined early and medieval Christian theology with humanist thought.

#### 2.3.2.1 War in the scholastic view

The first philosopher to write an independent treatise on the problem of war between nations was Francisco de Vitoria (ca. 1492-1546), a Spanish scholastic and Renaissance theologian, founder of the tradition in philosophy known as the School of Salamanca. He delivered two lectures (*De Indis* and *De iure belli*) in 1539, which were first published in 1557.<sup>104</sup> Both lectures thoroughly discussed recourse to war and were subsequently used as essential points of reference by authors. Because of them, Vitoria is still acknowledged as a significant contributor to the Christian doctrine of just war and the origins of international law.

In *De Indis*, Vitoria discussed illegitimate and legitimate titles of conquest in relation to Spain's claim to dominion in the New World. He asserted that military conquest and claims of domination could not be made on the basis of the Catholic Church's acclaimed secular jurisdiction over the non-Christian world.<sup>105</sup> Vitoria also refuted the claim that a refusal to accept the faith of Christ was in itself reason enough to conquer the so-called barbarians.<sup>106</sup> Vitoria therefore followed Aquinas' lead in rejecting war and conquest for the mere difference of religion or for the rejection of the Christian faith. He did, however, defend the right of proselytising Christianity by engaging in trade and commerce with the non-believers.<sup>107</sup>

In *De iure belli* Vitoria discussed conditions for the recourse to war and righteous conduct of hostilities. In this lecture, he rejected enlargement of an empire as a legitimate cause for waging war, as well as the personal glory or convenience of the prince as a

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<sup>102</sup> Reichberg et al., pp. 251-253; B. Russell, *History of Western Philosophy* (London, Routledge 2009) p. 468.

<sup>103</sup> Brownlie 1963, p. 11.

<sup>104</sup> F. de Vitoria, *De Indis*, reprinted in A. Pagden and J. Lawrance, eds., *Vitoria: Political Writings* (Cambridge, Cambridge University Press 1991), pp. 233, 293.

<sup>105</sup> *Ibid.*, pp. 250-252.

<sup>106</sup> *Ibid.*, pp. 269-270.

<sup>107</sup> *Ibid.*, pp. 285-286.

justification.<sup>108</sup> Vitoria distinguished between offensive and defensive wars.<sup>109</sup> Concerning the former, he asserted that ‘offensive war is for the avenging of injuries and the admonishment of enemies’ and that ‘there can be no vengeance where there has not first been a culpable offence.’<sup>110</sup> Regarding defensive wars, Vitoria believed that they were justified by both natural and divine law, inasmuch as it was lawful ‘to resist force with force.’ In his findings, he relied on the teachings of Augustine and Thomas Aquinas to prove that there was no doubt about the natural justifiability of defensive wars.<sup>111</sup>

Regarding justice on both sides, Vitoria believed that there were exceptional situations (coined as ‘invincible ignorance’) when both belligerents were right in their actions.<sup>112</sup>

Vitoria cautioned against waging war to inflict cruel punishment for all crimes indiscriminately. He believed that it was unlawful to persecute those responsible for trivial offences by waging war upon them. In his opinion, only the most serious offences justified recourse to war.<sup>113</sup> In other words, war had to be contemplated as the last resort, only to be adopted when it was truly necessary. Moreover, he advised that once the war had been fought and victory won, the victor ought to show moderation and Christian humility.<sup>114</sup>

Regarding conduct of warfare, Vitoria reiterated his predecessors view on moderation and he offered the first attempt to organize rules pertaining to that principle. Accordingly, he devoted a separate section in his *De jure belli* lecture on limits to be observed in a just war.<sup>115</sup>

The tradition of Vitoria was taken further by several sixteenth century scholastics, of which one of the most important was the Jesuit theologian Francisco Suárez (1548-1617). His most famous work was the *Metaphysical Disputations*, written in 1597, which also analysed the question of war (chapter *De bello*). Besides being a follower of Vitoria, Suárez adhered to the teachings of Aquinas and to some extent, to those of Augustine. Similarly with Vitoria, Suárez distinguished between defensive and offensive wars and rendered a war justifiable if it was fought by a sovereign ruler with the purpose of redressing an injury or for the purposes of defence.<sup>116</sup> He also confirmed Vitoria’s opinion that not any cause whatsoever was sufficient to justify war, but only causes that were very serious and proportionate to the ravages of war, ‘for it would be contrary to

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<sup>108</sup> F. de Vitoria, *De jure belli*, reprinted in A. Pagden and J. Lawrance, eds., *Vitoria: Political Writings* (Cambridge, Cambridge University Press 1991) pp. 302-303.

<sup>109</sup> *Ibid.*, p. 300.

<sup>110</sup> *Ibid.*, p. 303.

<sup>111</sup> *Ibid.*, p. 297.

<sup>112</sup> *Ibid.*, p. 313. This idea, although quite different from the teachings of Augustine and Aquinas, was not completely new in Vitoria’s time. As discussed previously, the bilateralist argument was promoted by Fulgosius, more than one century before Vitoria’s lectures.

<sup>113</sup> *Ibid.*, p. 304.

<sup>114</sup> *Ibid.*, p. 327. At the same time, Vitoria also asserted that ‘even after the victory had been won and property restored to its rightful owners, and peace and security were established, it was lawful to avenge the injury done by the enemy and to teach the enemy a lesson by punishing them for the damage they have done.’ *Ibid.*, p. 305.

<sup>115</sup> *Ibid.*, pp. 314-326.

<sup>116</sup> F Suárez, *The Three Theological Virtues: On Charity*, Disputation XIII (On War), § 2, reprinted in J. Brown Scott, ed., *Selections from Three Works of Francisco Suárez, S.J.*, trans. by G.L. Williams et al. (Oxford, Clarendon Press 1944) pp. 802-804, 815-816.

reason to inflict the most serious damage because of a slight injury.<sup>117</sup> Suárez also believed that since war was the most severe punishment of all, it had to be inflicted with the utmost restraint.<sup>118</sup>

### 2.3.2.2 Self-defence in the scholastic view

Vitoria reiterated his predecessors' view on self-defence as a precept of natural law. Accordingly, 'any person, even a private citizen, may declare and wage defensive war' to defend himself, others or his property, because such action was allowed by the natural-law principle of 'force may be resisted by force.'<sup>119</sup> For such action, no authority was needed, because it was permitted by natural law.

Vitoria also acknowledged the prerogative of any commonwealth to declare and wage war.<sup>120</sup> Here again, he reiterated earlier views on the rights of the sovereign. Accordingly, Vitoria recognized defence of the homeland as one of the most important 'just causes' for waging war together with offensive war for avenging injuries.<sup>121</sup>

In his opinion, the difference between the right of a private person to wage war and that of the commonwealth was that the former only had the right to defend himself and his property. A private person did not have the right to avenge injury, to seize back property and to 'teach its enemies a lesson' as the sovereign had.<sup>122</sup>

The attempt to restrict aggressive wars to the realm of sovereign rights was also apparent with Suárez. In his opinion, aggressive war could only be waged by 'the possessor of sovereign power.'<sup>123</sup> He saw offensive war 'to repel injuries' and 'to hold enemies in check' as 'right and necessary' in accordance with 'the custom of the Church' and the opinion of 'the Fathers and the popes.'<sup>124</sup>

When it came to self-defence, Suárez believed that such a right was 'natural and necessary' and defence of others (on an individual level) or defence of the homeland (on a commonwealth level) was prescribed or could be rendered an official duty.<sup>125</sup> Suárez also made a distinction between defensive and offensive wars.

'We have to consider whether the injustice is, practically speaking, simply about to take place, or whether it has already done so, and redress is sought through war. In this second case, the war is aggressive. In the former case, war has the character of self-defence, provided that it is waged with a moderation of defence which is blameless.'<sup>126</sup>

Since Suárez was against offensive private wars, it is clear that the above-quoted passage referred to public wars – defensive and offensive. The distinction also sheds light on the way 'blameless defence' of individuals was seen as the core right of the sovereign to defend the country. The offensive-defensive dichotomy and the private defence – public

<sup>117</sup> Ibid., § 4, pp. 815-817.

<sup>118</sup> Ibid., § 7, pp. 845-846, 850-851.

<sup>119</sup> Vitoria, *De jure belli*, p. 299.

<sup>120</sup> Ibid., p. 300.

<sup>121</sup> Ibid., p. 300.

<sup>122</sup> Ibid., pp. 299-301.

<sup>123</sup> Suárez, Disputation XIII, § 2 (1), p. 805.

<sup>124</sup> Ibid., § 1 (5), p. 804.

<sup>125</sup> Ibid., § 1 (4), pp. 802-803.

<sup>126</sup> Ibid., § 1 (6), p. 804.

defence interaction were also discussed by prominent Protestant jurists of the sixteenth and the seventeenth century.

### 2.3.3 Protestant legalism

While Spanish scholastics were criticizing war against non-believers, the European sovereigns were dragged into their own holy war: the conflict between the Catholic Church and the Protestant Reformation movement. The roots of this movement went back to the fourteenth and the fifteenth centuries, but open and organized dissent manifested itself only from 1517 onwards, with the protests of Martin Luther, a Roman Catholic monk and academic. The Reformation process and the firm opposition from the Catholic Church led Europe into its own holy war period, in spite of the fact that both jurists and theologians attempted to depart from the concept of religious wars. After many fifteenth- and sixteenth-century commentators renounced war owing to differences of religion (like Vitoria and Suárez), political arguments in favour of war for the faith were dominant during the first half of the seventeenth century, when the Thirty Years' War<sup>127</sup> engaged virtually all European powers in conflict.

During this time, the tradition of Spanish scholastics was taken further by Protestant jurists, who brought new insights into the normative framework. Both Alberico Gentili and Hugo Grotius continued to discuss 'just causes' for waging war in line with Vitoria and Suárez. Nonetheless, they also dismissed many arguments that were held by theologians such as Augustine or Aquinas.

#### 2.3.3.1 Protestant lawyers about war – Gentili and Grotius

The sixteenth century saw the first genuine works on the law of nations being written, published and discussed by public officials. Today we recognize both Alberico Gentili and Hugo Grotius as 'founders' of international law for their treatises written on external state affairs. Both of them wrote independent dissertations on war.

##### (i) The Italian refugee

Alberico Gentili (1552-1608) was an Italian Protestant, born at Sanginesio (Italy), who became a doctor in law of the University of Perugia at the age of twenty. He fled Italy together with his father in 1579 to escape the Holy Inquisition. He lived a major part of his life in England, practicing as an advocate and teaching at the University of Oxford. Although he died ten years before the outbreak of the Thirty Years' War, he lived his life in the midst of the escalating conflict between Catholics and Protestants, thus his views on war were a self-conscious reaction to the events of his age. He is most famous for his *De jure belli libri tres*, first published in 1588-1589.<sup>128</sup>

In the second chapter of Book I of his *De jure belli*, Gentili affirmed that war was a 'just and public contest of arms' between sovereign equals and it could be 'just' on both sides not merely because one party was mistaken about its motivations, but also because

<sup>127</sup> The Thirty Years' War (1618-1648) began as a religious conflict between Catholics and reformer Protestants, but ended up involving many other issues, such as territorial annexations and consolidation of power.

<sup>128</sup> Nussbaum, p. 94.

objectively both belligerents might have entered into the conflict in good faith. For that reason, Gentili believed that the laws of war had to apply for both sides.<sup>129</sup> Regarding the authority to wage war, Gentili followed the lead of Aquinas and claimed that only ‘supreme princes’, who had no superior, could resort to war. Gentili also cautioned that war had to be the last resort: ‘whereas there are two modes of contention, one by argument and the other one by force, one should not resort to the latter if it is possible to use the former.’<sup>130</sup>

Gentili rejected the justification of war for religious motives, explicitly breaking away from the doctrine of holy war and from the idea of obeying a divine command to go to war.<sup>131</sup>

(ii) The exiled Dutchman

Like Alberico Gentili, Hugo Grotius (1583-1645) was also a Protestant. He was born in Delft (the Netherlands) and was a philosopher and a law practitioner who wrote his books while the Thirty Years’ War was ongoing. From 1621 onwards, Grotius spent his life in exile, being forced to escape from the Netherlands because of his religious views. He wrote some of his most famous dissertations in Paris, while in exile, including *De jure belli ac pacis libri tres* (On the Laws of War and Peace), published in 1625.<sup>132</sup>

Several authors agree that the work of Grotius marked the beginning of a more modern conception of the law of nations, which served as basis for the development of modern international law, ‘valid apart from religious sanction, suprasectarian and human in spirit and still embodying the tradition of Christian piety and morality.’<sup>133</sup>

In the Prologue of his *De jure belli*, Grotius lists all the predecessors whose teachings served as the basis for his treatise. Accordingly, he acknowledges the importance of authors like Francisco de Vitoria, Balthasar Ayala and Alberico Gentili, but he also specifies the weaknesses of these authors and pledges to take them to task on arguments not fully explained.

Like his predecessors, Grotius believed that war had to be considered only as last resort: ‘where judicial means (*iudicia*) fail, war begins.’<sup>134</sup> He distinguished between private wars and public wars. According to him, public war was waged by one who had jurisdiction (the sovereign), whereas private war was waged by one who had no such authority, but was nevertheless allowed to resort to war to ward off an injury.<sup>135</sup>

Both private and public wars were permitted by the law of nature, if certain conditions applied. Grotius defined the law of nature as a ‘dictate of right reason’ that

<sup>129</sup> A. Gentili, *De jure belli libri tres*, trans. by J.C. Rolfe (Oxford, Clarendon Press 1933) Bk. I, ch. 2, pp. 12-13, 31-33.

<sup>130</sup> Gentili, Bk. I, ch. 3, p. 15.

<sup>131</sup> *Ibid.*, ch. 9, pp. 38-39.

<sup>132</sup> L.E. van Holk, ‘Hugo Grotius, 1583-1645: A Biographical Sketch’, in L.E. van Holk and C.G. Roelofsen, eds., *Grotius Reader: A Reader for Students of International Law and Legal History* (The Hague, T.M.C. Asser Instituut 1983) pp. 32-39.

<sup>133</sup> Nussbaum, p. 2. For Grotius’ importance for international relations theory, see C.G. Roelofsen, ‘Grotius and the International Politics of the Seventeenth Century’, in H. Bull, B. Kingsbury and A. Roberts, eds., *Hugo Grotius and International Relations* (Oxford, Clarendon 1990) pp. 96-131.

<sup>134</sup> H. Grotius, *De jure belli ac pacis libri tres*, trans. by F.W. Kelsey (New York, Oceana 1964) Bk. II, ch. 1 (ii), p. 171.

<sup>135</sup> *Ibid.*, Bk. I, ch. 3 (i), p. 91. He also named a third category, mixed wars, which were partly public, partly private.

pointed out which acts were in conformity with rational nature and thus ‘enjoined by the author of nature, God.’<sup>136</sup> Regarding public wars, Grotius named four ‘just causes’. Regarding the first three, he acknowledged that they were accepted by the majority of authors: defence, recovery of property, and punishment. He added a fourth, ‘the obtaining of what is owed to us,’ in other words, pursuing an obligation not fulfilled by the other.<sup>137</sup> Grotius reiterated the view of the Spanish scholastics and outlawed wars for religious motives.<sup>138</sup> When it came to private wars, Grotius asserted that the law of nature allowed individuals to wage war in cases where ‘public tribunals’ could not help.<sup>139</sup> This argument will be given thorough attention below.

Like his predecessors, Grotius also employed the offensive-defensive dichotomy. Punishment and the recovery of property was to be exercised after the wrong was done. Punishment had to be exercised only in cases when the recovery of the property or the undoing of the wrong was no longer possible.<sup>140</sup> Defence, on the other hand, had to do with ‘an injury not yet inflicted (*iniuria nondum facta*), which menaces either one’s body or one’s property.’<sup>141</sup>

Grotius took further Vitoria’s attempt to discuss limits of warfare as a separate matter and devoted an entire Book to this topic. Accordingly, in Book III of his *De jure belli*, Grotius extensively discussed righteous and moderate conduct in war as permitted by the law of nature and established by the law of nations.<sup>142</sup> Grotius reiterated Cicero’s assertion that even in war certain duties to limit vengeance and punishment applied and moderation was to be observed.<sup>143</sup> In great detail, Grotius outlined all the obligations a sovereign and his soldiers had in a lawful war towards combatants and non-combatants alike. These obligations were discussed under different headings elaborating on *moderation* in warfare.<sup>144</sup> As Vitoria, Grotius also believed that wars could be just on both sides only as a result of unavoidable ignorance.<sup>145</sup> Consequently, he also restricted his analysis of conduct in warfare to just wars, thus conditioning the applicability of such rules on the underlying causes of the conflict.<sup>146</sup> Nonetheless, owing to his detailed emphasis on conduct of warfare, subsequent authors began to discuss the topic as a separate one, distinct from the causes of war.<sup>147</sup>

<sup>136</sup> Grotius, Bk. I, ch. 1 (x), pp. 38-39.

<sup>137</sup> Ibid., Bk. II, ch. 1 (ii), pp. 171-172.

<sup>138</sup> Ibid., ch. 20 (xlviii), pp. 516-517.

<sup>139</sup> Ibid., ch. 3 (i-ii), pp. 91-92. See also: P. Haggenmacher, ‘On Assessing the Grotian Heritage’, in J. Dunn and I. Harris, eds., *Grotius*, Vol. 2 (Cheltenham, Edward Elgar 1997) pp. 368-369.

<sup>140</sup> Ibid., ch. 20 (i), p. 462.

<sup>141</sup> Ibid., ch. 1 (ii), p. 172.

<sup>142</sup> Ibid., Bk. III, ch. 1 (i), p. 599. For an appraisal of Grotius’ Bk. III, see G.I.A.D. Draper, ‘Grotius’ Place in the Development of Legal Ideas about War’, in H. Bull, B. Kingsbury and A. Roberts, eds., *Hugo Grotius and International Relations* (Oxford, Clarendon Press 1990) pp. 197-199.

<sup>143</sup> Grotius, Bk. III, ch. 11 (i), p. 722.

<sup>144</sup> For instance: ‘Moderation with respect to the right of killing in a lawful war’ (Grotius, Bk. III, ch. 11, pp. 722-744), ‘Moderation in laying waste and similar things’ (ibid., Bk. III, ch. 12, pp. 745-756), ‘Moderation in regard to captured property’ (ibid., Bk. III, ch. 13, pp. 757-760), ‘Moderation in regard to prisoners of war’ (ibid., Bk. III, ch. 14, pp. 761-769), ‘Moderation in the acquisition of sovereignty’ (ibid., Bk. III, ch. 15, pp. 770-777).

<sup>145</sup> Grotius, Bk. II, ch. 13 (xiii), pp. 565-566.

<sup>146</sup> Ibid., Bk. III, ch. 11 (i), p. 722.

<sup>147</sup> A. Roberts, ‘The Equal Application of the Laws of War: A Principle under Pressure’, 90 *International Review of the Red Cross* (No. 872, 2008) p. 938.

### 2.3.3.2 Self-defence – as seen by Gentili and by Grotius

Both Gentili and Grotius understood self-defence as pertaining to the time before and during the attack. Gentili referred to ‘necessary defence’ to describe an imminent or an ongoing attack:

‘One who is attacked by an armed enemy makes a necessary defence, and his action is that of necessary defence, and so also does one against whom an enemy has been making preparations.’<sup>148</sup>

The ‘necessary defence’ was sanctioned by the law of nature and was a right of both an individual and a sovereign.<sup>149</sup> The individual could not go beyond the limits of such a right, because for him reparation could be secured through the authority of a magistrate.

‘Now a just fear is defined as the fear of a greater evil, a fear which might properly be felt even by a man of great courage. Yet in the case of great empires, I cannot readily accept that definition, which applies to private affairs. For if a private citizen commits some offence against a fellow citizen, reparation maybe secured through the authority of a magistrate. But what a sovereign has done to a sovereign, no one will make good.’<sup>150</sup>

Gentili thus took further the restriction both Vitoria and Suárez endorsed and according which private individuals were only allowed to defend themselves and their property through private war; the redress of an injury was insured by the public authority.

That view was also adopted by Grotius. War was permissible ‘if an attack by violence is made one one’s person, endangering life, and no other way of escape is open.’<sup>151</sup> ‘This right of self-defence,’ Grotius asserted, ‘has its origin directly and chiefly in the fact that nature commits to each his own protection, not in the injustice or crime of the aggressor.’<sup>152</sup> On the basis of this right, both private and public wars were allowed, but under different conditions.

In Grotius’ view, private war was allowed only to ward off an injury. Moreover, killing the assailant in self-defence could not be the primary intent, but ‘the only resource available at the time.’<sup>153</sup> In other words, ‘the person who is attacked ought to prefer to do anything possible to frighten away or weaken the assailant, rather than cause death.’<sup>154</sup> In case of private wars, the danger of an attack had to be ‘immediate and imminent in point of time.’<sup>155</sup> If the danger could in any other way be avoided or if it was not altogether certain that the danger could not be otherwise avoided, killing in self-defence – thus private war – was not permissible.<sup>156</sup> Moreover, private war was not permissible if

<sup>148</sup> Gentili, Bk. I, ch. 13, p. 58.

<sup>149</sup> Ibid., p. 59.

<sup>150</sup> Ibid., ch. 14, p. 62.

<sup>151</sup> Grotius, Bk. II, ch. 1 (iii), p. 172.

<sup>152</sup> Ibid. Because of this, self-defence was permitted also against a blameless assailant, because the protection of one’s life is more important than the absence of guilt of the attacker.

<sup>153</sup> Ibid., ch. 1 (iv), p. 173.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid., ch. 1 (v), p. 173.

<sup>156</sup> Ibid., pp. 174-175.

‘judicial procedure’ was readily available. Grotius thus defended private wars in self-defence only if judicial remedy was temporarily or continuously unavailable.<sup>157</sup>

Matters were different when it came to public wars. Grotius asserted that the arguments pertaining to private self-defence could also be applied to public wars, ‘if the difference in conditions be taken into account.’<sup>158</sup> Since public wars arose only where there were no courts or where courts ceased to function, such wars were prolonged and were ‘continually augmented by the increment of fresh losses and injuries.’<sup>159</sup> For that reason:

‘Public powers have not only the right of self-defence, but also the right to exact punishment. Hence for them it is permissible to forestall an act of violence which is not immediate, but which is seen to be threatening from a distance.’<sup>160</sup>

Grotius thus saw the forestalling of an immediate act of violence as defence and the forestalling of an act of violence threatening from a distance as a form of punishment. This view is somewhat confusing given the fact that elsewhere he maintained the defensive-offensive dichotomy based on temporal considerations.<sup>161</sup> Nonetheless, he gave an eloquent explanation of what he meant by acts of violence threatening from a distance: ‘a wrong action commenced but not yet carried through.’<sup>162</sup> In other words, Grotius believed that sovereigns were entitled to forestall not only an immediate attack, but also one that was commenced, but not carried out (thus imminent or in preparation). He further believed that this right of the sovereign stemmed from the same foundation as the right of individuals to defend themselves.<sup>163</sup> For the same reasons, Gentili believed that in case of a war ‘undertaken for the purpose of necessary defence,’ a declaration of war was not required.<sup>164</sup>

From this point onwards though, the views of Gentili and Grotius part from each other. According to Gentili, sovereigns also had a right to ‘defence dictated by expediency’:

‘I call it defence dictated by expediency when we make war through fear that we may ourselves be attacked. No one is more quickly laid low than one who has no fear, and a sense of security is the most common cause of disaster.’<sup>165</sup>

In Gentili’s view, a watchful sovereign would not waste the opportunity to ‘strike at the root of the growing plant and check the attempts of an adversary who is meditating evil.’<sup>166</sup> Although he insisted that ‘[a] just cause for fear is demanded; suspicion is not

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<sup>157</sup> Ibid., Bk. I, ch. 3 (ii), p. 92. Haggemacher asserts that Grotius also saw private wars to vindicate one’s right as legal if no legal remedy was available. Haggemacher, p. 368.

<sup>158</sup> Ibid., Bk. II, ch. 1 (xvi), p. 184.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

<sup>161</sup> Ibid., ch. 1 (ii), p. 172.

<sup>162</sup> Ibid., ch. 1 (xvi), p. 184.

<sup>163</sup> Ibid.

<sup>164</sup> Gentili, Bk. II, ch. 2, p. 136.

<sup>165</sup> Ibid., Bk. I, ch. 14, p. 61.

<sup>166</sup> Ibid.

enough,<sup>167</sup> Gentili claimed that ‘defence is just which anticipates dangers that are already meditated and prepared, and also those which are not meditated, but are probable and possible.’<sup>168</sup> In other words:

‘No one ought to expose himself to danger. No one ought to wait to be struck, unless he is a fool. One ought to provide not only against an offence which is being committed, but also against one which may possibly be committed.’<sup>169</sup>

Moreover, he advised to ‘oppose powerful and ambitious chiefs, for they are content with no bounds, and end by attacking the fortunes of all.’<sup>170</sup> He cautioned, however, that the existence of ‘probable and possible dangers’ should not be interpreted as allowing a state ‘to resort to a war [...] as soon as anyone becomes too powerful.’<sup>171</sup> Despite such restrictions, Gentili’s definition of ‘defence dictated by expediency’ pertained to a veritable preventive war. Unlike, necessary defence, war dictated by expediency had to be declared.<sup>172</sup> The causes that Gentili named as justifying such expediency were very similar to those which started the Peloponnesian War. This is not to say that Gentili revived the ancient Greek concept of preventive war. That concept had survived the ancient times and was acknowledged as part of the sovereign’s broader right to wage war. Nonetheless, Gentili made a far more elaborate exposé of this prerogative than his predecessors. His ideas were taken further by positivist jurists of the seventeenth and eighteenth centuries.

Grotius did not share Gentili’s view on preventive wars. Although he agreed that public wars could be waged in face of a danger ‘threatening from a distance,’<sup>173</sup> Grotius characterized Gentili’s view as plainly ‘untenable’.<sup>174</sup> In his opinion, such reasoning could prove to be far-sighted to undertake the war.

‘That the possibility of being attacked confers the right to attack is abhorrent to every principle of equity.’<sup>175</sup>

It may be concluded that Grotius’ arguments were similar to Gentili’s inasmuch as both concurred that private wars could be waged against an ongoing or imminent attack. They also agreed on the permissibility of public wars in the face of an immediate attack, as well as one that was imminent or in preparation. Nevertheless, they differed on the permissibility of preventive wars. Grotius adopted a more restrictive view, in which simple fear of being attacked was not enough to allow self-defence, whereas Gentili upheld the right of the sovereign to defend the state against possible dangers.

There are three lines of reasoning on the content of self-defence that can be contoured in the combined opinions of Gentili and Grotius. First, there is a *stricto sensu*

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<sup>167</sup> Ibid., p. 62.

<sup>168</sup> Ibid., p. 66.

<sup>169</sup> Ibid., p. 62.

<sup>170</sup> Ibid., p. 64.

<sup>171</sup> Ibid., p. 66.

<sup>172</sup> Ibid., Bk. II, ch. 2, p. 136.

<sup>173</sup> Grotius, Bk. II, ch. 1 (xvi), p. 184.

<sup>174</sup> Ibid., ch. 1 (xvii), p. 184.

<sup>175</sup> Ibid.

understanding of self-defence that applies to individuals and which is only allowed in the face of an imminent or ongoing attack. This is the same understanding that was given to individual self-defence by Augustine, the *Decretum*, Aquinas and chivalric codes.<sup>176</sup> This will be referred to as the concept of individual or private self-defence.

Secondly, there is an intermediate understanding of self-defence according to which states or sovereigns could exercise self-defence against a danger which ‘is not immediate, but which is seen to be threatening from a distance.’<sup>177</sup> By this contention, Grotius was differentiating between the right of self-defence of individuals (which was very much a form of on-the-spot action) and that of states (where an invasion could be imminent or prepared without being about to happen in the sense of an attack from one person to another). The phrase ‘threatening from the distance’ did not refer to action against a potential threat, because, as shown above, Grotius distanced himself from justifying such use for force.<sup>178</sup> Moreover, Grotius actually explained what he meant by a danger threatening from a distance: a wrong action that was commenced, but not carried through.<sup>179</sup> In other words, an attack that was in process of being prepared or launched against the target state. The intermediate understanding of self-defence referred thus to states and allowed defensive action against an ongoing attack or one that was imminent or prepared, in a somewhat more reasonable understanding meant to correspond to the realities of public warfare. Although Grotius referred to defence in full-fledged public wars when he put forward his arguments, the understanding he gave to this form of forestalling assaults would resurface in subsequent justifications for ‘imperfect’ wars in self-defence. This Grotian understanding of self-defence was thus the result of applying *stricto sensu*, private self-defence to the realities of public warfare.

Thirdly, the argument of defence against ‘probable and possible’<sup>180</sup> dangers was put forward by Gentili. This is the broadest understanding of self-defence within the three lines of reasoning. On the basis of this conception, self-defence should also permit preventive wars against potential threats. Grotius disagreed with this argument and characterized it as simply untenable for the purposes of self-defence.<sup>181</sup> Nonetheless, this conception was adopted by subsequent authors and treated as part of the sovereign’s right to wage ‘perfect wars’. Therefore, this understanding will not be referred to as self-defence, but rather ‘preventive war’ or ‘preventive use of force’.

### 2.3.4 The Christian legalist normative framework and self-defence

Thinking about war in the fifteenth to seventeenth centuries was still very much influenced by the Christian conception of natural law. Whether a war was just or not was decided on the basis of the rules of nature and ‘just causes’ were all seen as stemming from the law of nature. Accordingly, Christian thinkers identified causes that justified both defensive and offensive wars. Up until the fourteenth century, wars were seen as justifiable only for one side, the one confirmed by natural law. Starting with Raphael

<sup>176</sup> Gratian, question I, in Reichberg et al., pp. 109-110; Aquinas, question 41, article 1, in Reichberg et al., pp. 182-183; Pisan, Part III, ch. 12, in Reichberg et al., p. 219.

<sup>177</sup> Grotius, Bk. II, ch. 1 (xvi), p. 184.

<sup>178</sup> Ibid., ch. 1 (xvii), p. 184.

<sup>179</sup> Ibid., Bk. II, ch. 1 (xvi), p. 184.

<sup>180</sup> Gentili, Bk. I, ch. 14, p. 66.

<sup>181</sup> Grotius, Bk. II, ch. 1 (xvii), p. 184.

Fulgosius, the possibility of justifying both belligerents' action began to be accepted. Francisco de Vitoria partly took up this bilateralist argument, by showing that in cases of error of fact or of law, both sides could have 'just causes' to fight the war. The 'unavoidable ignorance' argument was later adopted by Grotius as well.

In the sixteenth century, the School of Salamanca combined theology with humanist views and reformed Christian thinking about war. Its main founder, Francisco de Vitoria, rejected wars for difference of religion or for the personal glory of the prince. Vitoria and his follower, Francisco Suárez, reiterated the defensive-offensive war dichotomy as the only paradigm to justify war.

With Spanish scholasticism reviewing and reorganizing religious ideas about war, Christian thinking about war was able to serve as a transition basis for early legalist writers who somewhat secularized the rules pertaining to war. The special merit of Spanish scholasticism, and of Vitoria and Suárez in particular, was that they discussed important questions related to recourse to war from a perspective that, although religious, could fit more secular explanations as well.

In the sixteenth and seventeenth centuries, Protestant jurists like Gentili and Grotius agreed that the authority to wage public war lay in the hands of the prince only. Holy wars were deemed unlawful. As a result of the growing role of judicial procedures, the right of individuals to wage private wars was also restricted. According to Gentili and Grotius, private war could only be waged to ward off an injury. Public wars, on the other hand, could be both defensive and offensive, because, in the absence of international courts, the sovereigns were responsible for ensuring the survival and prosperity of the state.

The understanding given to self-defence in the fifteenth to seventeenth centuries was a continuation of the concept developed by the early and medieval Christian theology from the fourth to fourteenth centuries. Self-defence, as such, was a prerogative of both the individual and the prince bestowed upon all by nature itself. Both Spanish scholastics and Protestant jurists recognized the right of the individual to wage a private war in *stricto sensu* self-defence. But such war had to be an on-the-spot reaction to the imminent or ongoing attack. This narrow understanding of self-defence served as basis for the right of the sovereign to defend the state, although public war needed not be an on-the-spot reaction. This is what Grotius coined self-defence against immediate (ongoing) threats and dangers that were imminent or were being prepared. The same understanding was characterized by Gentili as 'necessary defence'.

A more permissive right of the sovereign to wage preventive wars (as part of the sovereigns' general right to wage war) was also recognized in the the fifteenth and sixteenth centuries.

As regards the elements of self-defence, it is possible to contour the same notions than in the early and medieval conception of Christian natural law. Accordingly, self-defence was always conditional upon the existence of an attack (ongoing or imminent) and the immediate need to take action to ward it off. Furthermore, both the Spanish scholastics and the Protestant lawyers acknowledged the general importance of

moderation in warfare, thus reiterating the third element discerned in early and medieval natural law.<sup>182</sup>

The Christian legalist framework could be seen as a transition from the early and medieval Christian thought to positivist legalism. Protestant legalists continued to support the justification of armed conflict from a moral (natural law) point of view, often embarking in religious explanations. Because of their perspective on questions of war, they still belonged to the Christian tradition. Positivist thinkers departed from moral explanations and from the Christian interpretation of natural law. For them, the outward actions of the sovereign were regulated by positive law. Their views will be discussed in the following section.

## 2.4 Concluding remarks

The aim of this chapter was to elucidate the understanding given to the right of self-defence in the early and medieval Christian as well as Christian legalist conceptions of natural law. Early Christian theologians borrowed natural law concepts from ancient Greek and Roman philosophers and adjusted them to the requirements of the new religion. Medieval Christian thinkers further amended the natural law theory to fit the realities of the Catholic Church and its worldly functions. Scholastics and reformer jurists enriched these tenets with renaissance and humanist thought. Although some differences could be observed between, on one hand, the early and medieval Christian framework and, on the other, the legalist Christian framework, the main legal paradigm of the fourth to the seventeenth centuries was Christianity and its natural law conception. It is therefore reasonable to view this historical phase under one normative framework, dominated by the Christian religion.<sup>183</sup>

In this normative framework, self-defence was viewed as a natural right of both the private person and the sovereign. It was thus accepted as one of the ‘just cause’ for waging private wars as well as public wars. Self-defence was clearly distinguished from avenging injuries and punishment for wrongdoings.

It is important to note at this point that because of the ‘international’ characteristic of the Christian natural-law framework,<sup>184</sup> the natural-law conception of self-defence also had an ‘international’ quality. Simply put, its meaning was generally accepted across the Western tradition and did not pertain only to a specific jurisdiction. Even if it could not be regarded as an international customary rule in the modern sense of the word, it definitely had a certain ‘international’ character on the basis of the general acceptance of natural law.<sup>185</sup> It is also essential to note that the work of Grotius marked the advent of a

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<sup>182</sup> Aquinas, question 41, article 1, in Reichberg et al., p. 183; Vitoria, *De jure belli*, pp. 314-315; Grotius, Bk. III, ch. 11, pp. 722-744, ch. 12, pp. 745-756, ch. 13, pp. 757-760, ch. 14, pp. 761-769, ch. 15, pp. 770-777.

<sup>183</sup> Steiger, pp. 184-187.

<sup>184</sup> Christianity being the intellectual-religious basis in the Western tradition, its norms affected not only the personal lives of individuals, but also every type of rulership in the European space. Steiger, pp. 184-185.

<sup>185</sup> Ibid. Nussbaum explains that the term ‘law of nations’ is more adequate to describe the interrelations of human groups over the centuries before the more modern ‘international law’ system emerged. Nussbaum, pp. 1-2. For the difference between the ‘law of nations’ and present international law, see: Haggemacher, pp. 369-370.

more modern conception of the ‘law of nations’ that served as basis for the developments in subsequent centuries.<sup>186</sup>

There are two essential characteristics of the Christian natural law concept of self-defence that need emphasis. First, there was *no need for public authority* to allow the exercise of this natural right in the face of danger. Secondly, the natural right of self-defence was relevant in the face of an injury *not yet received*. Augustine referred to ‘an enemy lying in ambush,’ Gratian allowed resistance to force ‘before it strikes,’ Suárez believed defensive war against ‘an injury in progress’ was natural, Gentili saw defence as necessary against an enemy preparing to attack and Grotius asserted that defence had to do with ‘an injury not yet committed.’ Consequently, the natural right of self-defence *was*, by nature, anticipatory. There was no strict differentiation made between ‘self-defence’ and ‘anticipatory self-defence’, because the right *as such* had an anticipatory meaning. Consistent differentiation was made between defensive and offensive wars, where the former always referred to an injury not yet inflicted or to an attack not yet occurred and the latter pertained to revenge and punishment of past injuries. This defensive-offensive dichotomy was already present in the writings of Gratian and Aquinas and later clarified by Vitoria, Suárez, Gentili and Grotius.<sup>187</sup>

While medieval reprisals were a prerogative of both the individual and the sovereign, starting with scholasticism, the idea that private wars could only be waged in self-defence began to gain ground. This restriction was strengthened by both Gentili and Grotius: private wars were only allowed to ward off an injury when public tribunals could not offer assistance. As said above, there was no need for public authority to declare or allow such a war in self-defence.

The sovereign also had the right to ward off an injury without officially declaring war.<sup>188</sup> The right of the sovereign to defend the state stemmed from the same natural-law understanding as did private self-defence. Nonetheless, as it became clear from the arguments put forward by Grotius, when applying the concept of private self-defence to public warfare, its limits had to be interpreted more permissively, given the realities of inter-state conflicts. Given the fact that individuals could resort to the central authority for protection, their right of self-defence was understandably more *stricto sensu* than that of states. Nevertheless, according to Grotius, public defensive wars could only be waged against immediate (ongoing) threats and dangers that were imminent or prepared.

Preventive war in self-defence was advocated by Gentili, but rejected by Grotius. Defence against potential threats went well beyond the confines of the natural-law concept of self-defence, which only justified defensive action in the *stricto sensu* (for individuals) and in the Grotian understanding (for states).

Three elements of self-defence could be identified in the Christian conception of natural law. First, there always had to be an ongoing or imminent attack. Secondly, the danger posed by that attack had to give rise to an immediate need for response. In case of individuals, the immediacy referred to on-the-spot action. For sovereigns, it also allowed action against threats that were not necessarily about to happen, but still gave rise to an

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<sup>186</sup> Nussbaum, p. 2.

<sup>187</sup> Gratian, question II, canon 1, in Reichberg et al., p. 113; Aquinas, question 40, in Reichberg et al., pp. 176-178; Vitoria, *De jure belli*, pp. 297, 303; Suárez, Disputation XIII, § 1 (6), p. 804; Grotius, Bk. II, ch. 1 (ii), p. 172, and ch. 20 (i), p. 462.

<sup>188</sup> Gentili, Bk. II, ch. 2, p. 172.

immediate need to act. Thirdly, self-defence had to be exercised with moderation. Only by observing the limits of this principle could one ‘blamelessly’ defend himself.

Consequently, anticipatory action was an intrinsic part of the natural law of self-defence. Therefore, the elements of self-defence (existence of an attack, immediate need to respond and moderation) were also applicable to anticipatory action, as inherently part of self-defence. Since these elements limited the exercise of self-defence, they also limited anticipatory action. It is therefore pertinent to conclude at this point, that the limits of anticipatory action – as understood in the Christian natural-law concept of self-defence – are the imminence of an attack, the immediate need for a response and moderation. The following chapters will examine whether these limits were reiterated by subsequent doctrine and state practice.