

## CHAPTER 2

### Wars May Be Lawful Without a Formal Declaration

WRITERS on the law of nations have laid down various elements that are essential in a lawful war, and among these is the requirement that a war should be openly declared either by a special proclamation or by sending a herald; and this opinion accords with the practices of the modern nations of Europe. Indeed I grant that before we resort to force we must demand satisfaction for the injuries sustained or complained of. However, the question here at issue is whether we may apply force without a declaration of war as soon as reparation has been demanded and refused. Alberico Gentili thinks this unlawful, for he holds that there must be a public renunciation of friendship so that the war be not secretly commenced. Grotius agrees with me that the law of nature does not require a declaration of war, and he quotes authorities that have held wars lawful without a declaration. However, in accordance with the law of nations he would have a 'formal protest by which it may appear that in no other way can we obtain our property or our debt'. Then he adds concerning public declarations: these are required, 'that it might be clearly known that the war was undertaken not as a venture of private persons but by the will of the two peoples or their heads'. Pufendorf holds the same view regarding the law of nations, and Huber uses the same argument as Grotius. There are some, however, who add certain exceptions, notably the above-mentioned Gentili and Zouche. Hertius moreover, while admitting that the declaration of war has become part and parcel of the practices of nations, thinks that those practices are not obligatory and that the nations which disregard them are merely to be excluded from the group which we call the most civilized.

Christian Thomasius, a man of sound judgement, rightly, in my opinion, considers a declaration of war as an act of mere humanity, which no one can be compelled to perform; and he properly asks what difference there is, or has ever been, between a war that has and one that has not been declared, and whether there is a different law for the one and for the other. He therefore disagrees with Grotius, who, quoting Dio Chrysostom to the effect 'that wars are generally entered without previous declaration', believes that this condition merely concerns the law of nature. Thomasius, on the contrary, considers that this practice of not declaring war constitutes a part of the law of nations, and he presently adds that the question is worthy of fuller discussion in a special dissertation.

Although I cannot give a special study to the question, I wish to devote the present chapter to it. My opinion, then, is that a declaration is not demanded by any exigency of reason, that while it is a thing which may properly be done, it cannot be required as a matter of right. War may begin by a declaration, but it may also begin by mutual hostilities. This the States-General seemed to imply by their edict of January 17, 1665, which held that it was possible to lay claim to the ships taken by the English because they had been taken before a declaration of war, and 'before the Dutch had commenced hostilities'. War may also begin properly upon the denial of a demand, which in my opinion does not differ from actual force. I grant to the fullest extent that we ought first to demand what is due to us, but not that the demand must be accompanied with threats of war or with an actual declaration. What Grotius says about *interpellatio* applies only to a demand, but not what he says presently about a public declaration. Nevertheless it was from his and others' unreasonable prejudices that a subject otherwise clear began to become obscure. It should indeed have been clear that, where, as in the case of different sovereigns, no courts have jurisdiction, each one may properly seize the property which another has wrongly taken and refused to restore. If this be true, every one is at liberty to make or to withhold the declaration, otherwise a declaration is a certain solemn form

that could only have been introduced by an agreement between nations a thing which does not exist.

However, nations and princes endowed with some pride are not generally willing to wage war without a previous declaration, for they wish by an open attack to render victory more honorable and glorious. But here I must repeat the distinction between generosity and justice which I laid down in the preceding chapter. The latter permits the use of force without a declaration of war, the former considers everything in a nobler manner, deems it far from glorious to overcome an unarmed and unprepared enemy, and considers it base to attack those who may have come to us in reliance upon public amity and to despoil them when such amity has suddenly been broken through no fault of theirs. Hence Polybius highly praises the custom of declaring war which was peculiar to the Achaeans and the Romans, as indeed he praises these peoples because they avoided fraud and deceit in warfare; but in both instances the praise was meted out for their generosity. Speaking of the Achaeans, Polybius adds that they even were accustomed to appoint a place for battle. Indeed we read that certain Counts of Holland in ancient times not only issued a declaration, when about to make war, but even appointed a time and a place for battle. This appointment of time and place Grotius admits is not necessary, and yet he insists upon the declaration of war as an essential. If we ask for the difference between the two we shall not find any other than that it is not now customary in Europe to appoint time and place. Hence it is apparent that Grotius wrote his books *On the Law of War and Peace*, not concerning the actual law of nations, but rather concerning the practices that hold in most of the European nations; and yet Grotius himself teaches us that customs do not constitute the law of nations. But as in this case, so also in others he has frequently deduced the law of nations from customs, and consequently when customs differ he has hardly dared to decide the question.

Moreover, because of the fact mentioned by Polybius, that it was an honor peculiar to the Achaeans and Romans that they made declarations of war, we sufficiently understand that Dio Chrysostom spoke truly in saying that wars are generally waged without a previous declaration, so that we agree not only with the law of nations but also with the practice of nations. Indeed, with the exception of the two above-mentioned nations, the custom of declaring war was not frequently observed among the ancients. For when the Greeks were about to open hostilities against other Greeks or barbarians they were not in the habit of making a public declaration; nor do we read that the Jews, fighting at God's command, ever declared war against the enemy, nor did the Macedonians who so gloriously destroyed the empire of the Persians. Even now, as far as I can discover, European nations are the only ones that make formal declarations of war, and even these do not all do so nor at all times. However, when they do, they follow the customs of the Romans, solely for the reason, I suppose, that they are to a great extent descendants of the Romans. At any rate the European nations have held the Romans in such high esteem that they have taken over their customs as well as their laws, although their customs, as for instance this very practice of declaring war, differed from those of other nations. Therefore, if any European sovereign should begin a war without a declaration, as was done by Gustavus Adolphus upon the Germans in the last century, his action would be considered contrary to the general custom of European nations; but only those would call his act contrary to the law of nations who consider as universal law the customs they observe in their own country.

But let us examine the dictates of reason, whose authority is so great in defining the law of nations. As I have just said, reason does not require any other formalities than that we should in a friendly

manner demand the restoration of that which has been forcibly taken from us. Perhaps it will not even require this, since all laws permit the repelling of force by force, nor do I know whether the law of nations recognizes any formalities that are to be employed before meeting an armed attack. However, let us grant that, since the noble must act with generosity, a formal demand for restitution is desirable; but if that is refused shall we still forbid the employment of force? I should not, though Grotius and others would, provided there has been no formal declaration of war. However, the arguments by which they generally support the requirement of such a declaration are of no worth. Grotius disapproves of the one offered by Gentili, but his own argument, which I have quoted above, if not worse is at least very poor. For if two sovereigns are engaged in hostilities without having declared war, can we have any doubt that war is being waged according to the will of both? In that case there can be no need of a declaration, since it is being waged publicly and needs no proof. This argument therefore has no force, and yet Grotius preferred to rely upon it rather than deduce the necessity of an open declaration from the prevailing practice of European nations, for he knew well that custom does not constitute the law of nations. Reason, I repeat, is therefore the soul of the law of nations, and if we refer to reason, we shall find no argument to support the need of a declaration, but many, which I have mentioned, to the contrary.

But even if this question were to be decided on the score of custom- alone, we might add illustrations from the practices of European nations. To omit reference to the infinite number of precedents in ancient times, the war of extermination which was carried on between Spain and the United Provinces from the time our republic was founded until the year 1648 was begun by mutual hostilities without any formal declaration. Because of this fact shall we doubt the legality of the war, of the victory, and of the peace which followed it in 1648? For my part I do not. However, the Estates of Holland seem to have held a contrary opinion when on March 4, 1600, they published an edict declaring that satisfaction should be given the owners of the vessels which Philip III had confiscated in Spain in 1598, on the ground that they had been seized without a previous declaration, though the Dutch had freely resorted to Spain before that time. That decree I do not intend to support, for who could justly have required the King of Spain to declare war when the Dutch had continued to make open warfare against him since the year 1581? Certainly the mutual use of force may properly begin a war, not to mention other cases which may fall into this class, and which according to the jurists do not require a previous declaration.

The Estates of Holland add in the preface and again in the body of this edict that formerly, that is to say before 1598, the Belgians enjoyed free commercial intercourse in Spain. But I have not been able to discover whether this statement is true, and if it be, I do not see its bearing upon the justice of the case, as I shall presently explain. If the Belgians resorted to and traded in Spain they did so on sufferance or by the negligence of the authorities rather than in accordance with the laws of war. Indeed, in the preamble of the edict by which on April 4, 1586, the Earl of Leicester, with the advice of the States-General and the Counsellors, prohibited the people of the United Provinces from carrying on commerce with the Spaniards, it is stated that the King of Spain had already confiscated Dutch ships in Spain and Portugal. Furthermore, in the first section of this same edict as well as in the edict of July 18 of the same year, the Earl of Leicester forbade all commerce with the Spaniards. To be sure in the edict of August 4, 1586 ( 1) he restricted this prohibition to the places in Belgium held by the Spaniards, thus permitting commerce with Spain proper; but this was done solely with a view to aiding Dutch merchants; it brought no change to the laws of war, which could not be altered without the consent of the Spaniards.

Even if a declaration had been necessary, this would not have aided the Belgians in preventing the confiscation of their ships. What if the Spanish King in 1598 had solemnly declared war, and then later, perhaps that same day, had seized the ships! This he might well have done according to the laws of war; for when war suddenly breaks out neither the Dutch nor any other state has the custom of giving notice to the subjects of their enemies that they must remove their possessions under penalty of having them seized. You will not find any authority that has required this; indeed Tryphoninus explicitly states the contrary. And this is the practice of all nations unless there is an explicit agreement to the contrary, as is sometimes the case. Here are a few instances of such agreements. In the fourth clause of the Treaty of Utrecht with Muiden and Weesp dated July 1, 1463, it was agreed that the peace should last fourteen days, 'after we, the said city and cities shall have written to each other', within which period the subjects of those cities were to be permitted to depart with all their possessions from the domain of their enemies. In the 16th clause of the treaty between the King of Portugal and the States-General (dated August 6, 1661) it was agreed, that if differences should arise between the two parties, this fact should be set forth in a declaration, and within two years from that declaration it should be unlawful to do any injury to the property of the subjects of either party. And since in 1662 the King of France and the States-General had agreed that in case of war the subjects of both states should have the privilege of departing with their possessions within six months, the said king in declaring war against the Dutch in 1672 issued a special decree, under date of April 14, declaring that he would observe in favor of the Dutch the terms of the convention of 1662. The same states again granted a term of six months for the same purpose by Article 15 of the Peace of Nimeguen, August 10, 1678; nine months by Article 39 of the Marine Treaty signed the same day; nine months by Article 14 of the Treaty dated September 20, 1697; and again nine months by Article 36 of the Peace Treaty of April 11, 1713. Article 32 of the Treaty between England and the States-General, dated July 31, 1667, states that if a war should break out between the signatories, the property of the subjects of either power found in the territory of the other should not be confiscated but should be permitted to be carried out within six months. If this were not enough I could add further instances, and others are to be found in Zentgravius. However, when such conventions for the suspending of a state of war do not exist, war may be commenced at once, whatever writers may say. Grotius, who insists upon a formal declaration, does not require any interval between that and the beginning of hostilities, with whom agree Zouche and Zentgravius. Accordingly the King of Spain in 1598 might have declared war and at once seized the Dutch ships, since there was no convention prohibiting such action; indeed there could not well have been such a convention between the King and those whom he considered his own subjects.

Here we have an example of a famous war carried on for a very long time without a formal declaration. I do not even know how the Belgians could have demanded a declaration from the Spaniards since they neither at the beginning nor after the truce ever made such a declaration to the Spaniards. Indeed, even if such a formality were necessary, the Spaniards would perhaps have raised the objection that it was necessary only in case of war between independent powers, but that it was never used in civil war, for in that case it was lawful for a sovereign to seize the property of his rebellious subjects. This argument, however, I do not press: it is enough for my purposes if I have otherwise made it clear that it was not the laws of war, but the interest of the Dutch merchants that brought into being the edict of March 4, 1600. It was the same interest that led the Hollanders astray in 1639 and brought them into an unseemly conflict with the States-General in another case which was no less dependent on the laws of war. For when certain men had treacherously taken the Governor of the Canary Islands and brought him to this country, and the States-General decided that

he had been lawfully taken and should be kept as a prisoner, the Hollanders indeed objected, but only in the interest of their commerce, as Aitzema says. One would think that they might have based their objections on the very merits of the case, since the deed was far more base than the confiscation of ships by the King of Spain in 1598; for although the goods of an enemy are usually seized and hostilities may begin at once after a declaration, unless some convention forbids, it certainly is not permissible to betray a friend. The Dutch had of their own free will resorted to the Canary Islands as friends and for the sake of trade, and there was on both sides the privilege of commercial intercourse, freely exercised. A Dutch captain thus admitted for purposes of trade, pretending that he would convey the Governor from one island to another, seized him and carried him to Rotterdam to make him a prisoner. This appears to me to be the same as going to the enemy with a flag of truce only to kill him on the first occasion.

But let us pass on to other wars that have been waged without a formal declaration. The facts about Gustavus Adolphus invading Germany are well known, and it is also known how, when Ferdinand II complained that he had come without a previous declaration, he responded that the Emperor also had formerly invaded Prussia without any declaration of war. In this way sovereigns, though they are not subject to a higher court, nevertheless force upon each other the principle that 'a man be dealt with after the like rule to that which he maintained against another'. The same thing happened in the year 1657, for when the French in the midst of peace seized the goods of the Dutch subjects among them, the Dutch in the same manner seized the property of the French under the edict of the Holland States of April 26, 1657, and the decree of the States-General of May 6, 1657. The States-General in their decree concerning this matter hold that, according to the law of nations, this seizure among friendly states is manifestly unlawful, unless for a just cause and after satisfaction has been demanded and refused. But no sovereign will make such a seizure except for some cause that he considers just. In fact, since injuries can hardly be made known in any other way, I would also admit of a previous demand, but on account of the present general employment of ambassadors we need hardly concern ourselves about this, for ambassadors are constantly raising objections at every trifling incident that may offend their sovereign. But let us proceed. We read that even the Portuguese in 1657 detained the ships of the Dutch before war was declared and before hostilities commenced. And in the war between the King of England and the States-General, which was concluded by the peace of 1667, the States-General sent on September 16, 1667, a letter to the King of England complaining that much property was taken from them and their subjects, and quite unlawfully, since war had not been declared. Whether this argument is good the reader may judge for himself from the trend of my discussion. In 1667, Louis XIV did not declare war on Spain, and yet, as though keeping the peace, he decided to expel the King of Spain from dominions that he possessed, offering the excuse that there was no need of a declaration of war to recover one's own property. But, indeed, if ever a declaration be necessary, who would ever accept such a pretext? For war is nothing else than to take forcibly from an unwilling prince or people what we think is due to us. On this subject there is a verbose complaint of the States-General in an edict against the French, dated March 9, 1689, declaring that this same French King in 1688, without a formal declaration, detained the Dutch, their ships, and their merchandise, and that presently, when the declaration of war had barely been published at Paris, he took up arms and seized the goods of Dutch subjects. The first part of this complaint is wholly just, for such detention was contrary to Article 15 of the Peace of Nimeguen and Article 39 of the Marine Peace of August 10, 1678; for since the time had not elapsed which was stipulated for the removal of alien property, the state of war being to that extent suspended, the seizure of those goods that might have been rescued within the limited time was an

act of injustice. But there was no convention regarding the other property, and so I doubt whether the latter part of the complaint was equally just. But be this as it may, the instances which I have adduced are sufficient to prove that we need not think so favorably of European customs as to deduce from them the unquestioned necessity of making declarations of war.