
Imagining the Rule of Law: Rereading the Grotian ‘Tradition’

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Abstract

*International law exists in the slippery zone between abstract speculation on binding principles and realistic deference to power. The position of Hugo Grotius as ‘father’ of international law, this article will suggest, results from the way later lawyers have appreciated his suggestion that when human beings enter that zone, they will discover a tendency to subordinate themselves to ‘rules’ that is lacking from other living creatures. Grotius then uses this assumed tendency to explain the trust and confidence with which members of good societies agree to live in peace and expect mutual benefits from cooperating with each other. The same tendency also entitles them to punish those who question the beneficial nature of these rules or lay down obstacles to their expansion. The importance of Grotius in the history of legal thought is highlighted by the manner in which the idea (though not the expression) of the ‘rule of law’ emerges in *De iure belli ac pacis* (1625) as a powerful justification of the government of a post-feudal, commercial state.*

1 ‘Politics of International Law’: One Last Time

In two earlier contributions to this journal, I discussed the role that international law plays in the international political world. In the first issue 30 years ago, I examined the old belief that recourse to law would take international actors away from the divisive and dangerous field of ‘politics’ and into the world of abstract and neutral rules to be applied by impartial courts and expert arbitrators.¹ I tried to show that even as law did offer a specialist vocabulary and a set of institutions that would enable the translation of raw interests into the language of rules, the way those rules then operated remained still dependent on contestable (and often contested) assumptions about the world. This was not to say that international law was useless. On the contrary, its ‘indeterminacy’ – the way it did not contain substantive resolution

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¹ ‘The Politics of International Law’, 1 *European Journal of International Law* (EJIL) (1990) 4.

within itself – enabled the activities of international actors to be assessed in a professionally competent way by reconciling the demands of practice with the ideals those actors trumpeted to the world at large. If, in the end, all depended on the ‘structural bias’ within that profession, this did not detract from its authority as long as the bias was understood by dominant actors in that community – in practice, elites – to be respectful of the way they had come to distinguish ‘law’ from mere ‘politics’. Legal competence was the ability to produce that equivalence. In providing it, law made historically specific relations of power seem natural and acceptable.

In the update to that article that I was invited to publish in 2009, my goal was to say a little more about the operation of the linguistic techniques that accounted for the formal ‘grammar’ of competent law.² I also focused on how ‘fragmentation’ had undermined the centrality of generalist bodies like the International Court of Justice and moved authoritative speech into functional ‘regimes’ that derived their persuasive power from a combination of technical complexity and commitment to substantive objectives. The ‘politics of international law’ would now express itself in the clash of specialist vocabularies – trade and environment, security and human rights, human rights and humanitarian law and so on. Political conflict had become a conflict of jurisdictions. This would often take place through ‘re-description’, the professional characterization of an aspect of the world in the language of a functional institution, enabling the institution to assume competence over that aspect. I expressed a worry about how those re-descriptions tended to move the relevant problems from the realm of political contestation. They became part of an increasingly managerialist approach to world problems. But I also suggested that the regimes actually remained quite open-ended – that they were, in fact, equally indeterminate as law – and, thus, opened strategic possibilities for engagement in the search for a more just world.³

These texts analysed the operations of law as language. Focus was on argumentative rules. How were contrasting principles ‘reconciled’, or rights ‘balanced’ against each other, so as to produce a feeling of closure? What about the rule/exception structure? How did arguments about ‘will’ turn into points about ‘behaviour’ and vice-versa so as to produce a sympathetic nod from the audience? If this was ‘critical’, it was so to the extent that it revealed how, despite its formal nature, law still invited those engaged in it to operate with the help of concepts and frameworks that were not neutral in respect of their distributive consequences. This led me to examine how legal institutions developed their ‘structural bias’, the set of usually unarticulated assumptions about the world that enabled closure in an otherwise open world of argumentative possibility. The result of this two-pronged analysis – a discussion of the formal properties of the legal ‘grammar’ and a study of its uses within international institutions – was an exposé of the ‘politics of international law’, a demonstration of how authoritative speech was generated in international legal institutions. The exposé

² ‘The Politics of International Law: Twenty Years Later’, 20 *EJIL* (2009) 7.

³ This was further elaborated in my ‘Hegemonic Regimes’, in M. Young (ed.), *Regime Interaction in International Law: Facing Fragmentation* (2011) 305.

was intended also to suggest ways in which students and practitioners who wanted to make an impact in the world, by attacking or supporting a position, were to go about that task in a professionally competent way.

Since that time, much of my work has become historical. I have wanted to examine the ways in which types of legal speech have become authoritative, have operated to support or critique powerful institutions and have eventually lost to competing vocabularies. If the older work was mostly analytical, the newer studies tried to understand how legal concepts have operated in response to developments in the political world – how, for instance, law once replaced theology as a form of authoritative speech and economics took over from law.⁴ Both lines of enquiry focused on (not to say, were obsessed by) international law's relationship to international power. The analytical work asked questions such as 'how does "customary law" operate?' and 'what are the strengths and weaknesses of argument on "human rights", "humanitarian intervention" or "the definition of aggression"?' The newer studies examined the life and times of 'discursive formations' with significant legal content such as 'Spanish scholasticism', 'the public law of Europe' or '*ius naturae et gentium*' and, of course, 'international law' *tout court*.⁵ What did they mean? How did they emerge? What institutions were they associated with? What understandings of the world did they project? What were their strengths and weaknesses?

There are many ways to write about the history of international law. Older histories were often composed as exercises in providential or 'Whig' history that told the story of international law as increasing institutional maturation and specialization of a 'tradition' going back to the formation of modern statehood and diplomacy, perhaps even into Greco-Roman antiquity. These studies were frequently inspired by a moral commitment to international law as a progressive force. Other histories have preferred to describe international law as an element in the unending struggle for power in a world history where imperial 'epochs' have followed each other in more or less monotonous succession. The tenor of these works has been more detached, even critical. Alongside linear or circular narratives, works with more limited ambition have focused on particular legal institutions such as 'just war' or more technical items such as 'freedom of the high seas', 'diplomatic immunity' or 'investment law'. Many histories have concentrated on individual lawyers or moments; the interwar period being a recent favourite. Many have been written from a post-colonial angle.⁶

⁴ I have explained this in more detail in 'Law of Nations and the Conflict of the Faculties', 8 *History of the Present: A Journal of Critical History* (2018) 4.

⁵ The idea of 'discursive formation' comes, of course, from M. Foucault, *The Archaeology of Knowledge* (1972). While it is common to separate in Foucault's career distinct 'archaeological' and 'genealogical' phases, I have read it as a much more continuously vacillating set of insights into the formation and operation of types of European knowledge as forms of European power. Like many others, in seeking inspiration, I find myself constantly coming back to all aspects of Foucault's work.

⁶ I have discussed these in 'A History of International Law Histories', in B. Fassbender and A. Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 943.

These debates have sometimes taken a methodological direction. Attention has been given to questions about ‘anachronism’ and the context.⁷ To what extent is it allowed to read a past text, a lawyer, period or institution by reference to considerations that are important today but were not present (in the same form) at that earlier moment? Is legal meaning imprisoned in context or does it travel in time? And what is ‘context’ in the first place? While such methodological strictures have their uses, the choices they present are sometimes overly Manichean. All significant history is inspired by contemporary concerns and carried out through the lenses provided by the present. All good history also seeks to understand its object, to the extent it can, by reference to the conditions and concerns valid at the time the object was present. In any case, a history from which we learn nothing is a waste of time (though ‘learning’ can rarely be captured as unequivocal ‘lessons’).

In this article, I want to return to the theme of the ‘rule of law’ by picking up a historical figure – Hugo Grotius – so as to examine the way his principal work generated a novel space for international lawfulness between utilitarian politics and theology. For, according to Grotius, ‘no Community ... can be preserved without some Sort of Right’, and this applied ‘certainly [to] the Society of Mankind, or of several nations’.⁸ What was at stake? I believe it was the objective of *De iure belli ac pacis* (1625/1632) to consolidate an authoritative form of legal speech that could sustain firm government at home, help orient subjects towards profitable activities and order human relations in general outside the sphere of domestic laws. Grotius had already tried something like this in the unpublished advocacy brief *De Indis* (or *De iure praedae*) that he produced for the Amsterdam Admiralty Court in the context of the *Santa Catarina* affair in 1604–1606. What laws could be applied in the ‘free sea’?⁹ But the ambition and the intended audience of the new work were much larger. Even as its immediate reception proved disappointing for its author, it was gradually understood as a fresh and useful source for reflecting about the government of a Europe emerging from a century of confessional warfare. In due course, the work received canonical status. Although it has become customary to point to its technical deficiencies and stylistic eccentricities, its beneficial character has been understood to lie in its successful inauguration of a ‘Grotian’ tradition situated somewhere between the unscrupulous ‘realism’ of Thomas Hobbes and the abstract ‘idealism’ of Immanuel Kant.¹⁰ When international lawyers have invoked this tradition, they have often prefaced it by a confession of faith

⁷ See Orford, ‘International Law and the Limits of History’, in W. Werner, A. Galán and M. de Hoon (eds), *The Law of International Lawyers: Reading Martti Koskeniemi* (2015), 297.

⁸ H. Grotius, *De iure belli ac pacis* (DIBP) [*The Rights of War and Peace*], edited and introduced by R. Tuck (2005 [1625/1631]), Preliminary Discourse, s. XXIV, (98).

⁹ H. Grotius, *De iure praedae* [*Commentary on the Law of Prize and Booty*], edited and with an introduction by M.J. van Ittersum (2006 [1606/1868]). Only Chapter 12 of that work had been published in Grotius’ lifetime as *De mare liberum*.

¹⁰ M. Wight, *International Theory: The Three Traditions*, edited by G. Wight and B. Porter (1991). A good overview of Grotian ‘traditions’ is in Kadelbach, ‘Hugo Grotius: On the Conquest of Utopia by Systemic Reasoning’, in S. Kadelbach et al., *System, Order, and International Law: The Early History of International Legal Thought from Machiavelli to Hegel* (2017) 153.

in its pragmatic moral wisdom.¹¹ One of them was the former UN secretary-general, Boutros Boutros-Ghali, who chose to address the post-Cold War turn of the mid-1990s as a ‘Grotian Moment’.¹²

Such a positive response has not been unexceptional. In the later 17th century, both Protestant and Catholic jurists in Germany were scandalized over the suggestion that natural law could possess legal validity even under the assumption that there was no God. Was Grotius an atheist?¹³ In the 18th century, radical thinkers such as Jean-Jacques Rousseau and Gabriel Bonnot de Mably regarded Grotius as a reactionary defender of absolutism. They were especially shocked by his suggestion that individuals and even communities could commit themselves to slavery.¹⁴ Kant famously discarded the intellectual heritage of the whole pre-critical natural law tradition, including Grotius and his followers as ‘miserable comforters’ whose pretended legal rules – because they were derived from ‘facts’ (of human nature) – could not have any binding force at all.¹⁵ More recently, critical attention has focused on the colonialist attitudes of Grotius, especially displayed in *De iure praedae*, and on the rules about occupation of territory and property rights in *De iure belli ac pacis*.¹⁶ Grotius’ reputation as an idol of peace has been challenged by the suggestion that he ‘endorsed for a state the most far-reaching set of rights to make war which were available in the contemporary repertoire’.¹⁷

2 Legal Imagination in History

I will suggest here that Grotius’ success had to do with the skill with which the Dutch humanist combined his sources to produce a work that, although it relied on a number of old vocabularies and was often confusing or incoherent, produced a new and

¹¹ Lauterpacht, ‘The Grotian Tradition in International Law’, 23 *British Year Book of International Law (BYIL)* (1946) 1, reprinted in E. Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht* (1975), vol. 2, 307, at 361.

¹² Boutros-Ghali, ‘A Grotian Moment’, 18 *Fordham International Law Journal* (1994) 1609.

¹³ Although there had been some awareness of *DIBP* during the Thirty Years’ War, larger notice of the work was taken only in the latter half of the century through contacts with Leiden and Dutch intellectual culture. But then it soon overcame its rivals. By 1661, 13 Latin editions were circulating in Germany and the first German commentaries began to be published in the 1660s and 1670s, including annotated student editions and larger analyses, both positive and critical. For a full list of these works, many of which supplemented the original text with large footnoted commentaries, see G. Hoffmann-Loertzer, *Studien zu Hugo Grotius* (1971), at 250–260. For the Grotius reception in Germany more generally, see Grunert, ‘The Reception of Hugo Grotius’ *De jure belli ac pacis* in Early German Enlightenment’, in T. Hochstrasser and P. Schröder, *Early Modern Natural Law Theories* (2003) 89.

¹⁴ J.-J. Rousseau, *The Social Contract*, translated and introduced by M. Cranston (1968), part 1 ch. 4 (53–58); G. Bonnot de Mably, *Des droits et devoirs du citoyen* (1789), at 20, 127.

¹⁵ Kant, ‘Towards Perpetual Peace’, in H. Reiss (ed.), *Political Writings* (1991) 103.

¹⁶ M. Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595–1615)* (2006); E. Wilson, *The Savage Republic: De Indis of Hugo Grotius, Republicanism and Dutch Hegemony within the Early Modern World-System (c. 1600–1619)* (2008).

¹⁷ R. Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999), at 108.

promising way to overcome Europe's confessional violence. Although complex and ideologically eclectic – or perhaps because it was such – *De iure belli ac pacis* offered a manageable basis for thinking about the organization of European polities and their relations with each other. It was a hugely ambitious work, offering not only a general theory of law and legal sources as well as of breach and punishment but also, as Frank Grunert has observed, a view of the state within international and domestic public law, together with the various institutions of private law (contract, territory, family and so on), expanding into a 'comprehensive legal structuring of all domestic and international conditions of human life'.¹⁸ The work not only foregrounded the role of law and lawyers in public life but also projected a 'morality of law' under which the subjects of a legal system – human beings equipped with 'reason', of which Grotius offered a specific understanding – would be called upon to commit to natural and positive laws as well as to the subjective rights underlying them.

Historians of legal and political thought have often queried whether Grotius should be read as the last representative of scholasticism or the originator of distinctly 'modern' natural law. Peter Haggemacher, for example, sees Grotius' main work as a systematization of the medieval genre of the just war.¹⁹ The Dutch author's views on *ius gentium* and *dominium* resemble those of the scholastic theologians. Fernando Vázquez's *Controversiae illustris* serves him as a constant point of reference on civil government, territorial rights and the laws of war.²⁰ As a scholar of theology and jurisprudence, Grotius has been claimed to offer 'an abbreviated and simplified version of the central naturalist aspects of Aquinas and Suárez' theory of morality'.²¹ Some feel he 'seems to be reading Suárez transposed to a different idiom'.²² On the other hand, Grotius was trained as a Protestant humanist, and his prose was very different from, say, Francisco Suárez's dry and repetitive scholasticism.²³ Grotius experimented with (Ramist) methods and humanist sources and literary tropes, sometimes even claiming his conclusions to follow as mathematical truths from his premises.²⁴

¹⁸ '[E]in umfassende rechtliche Strukturierung aller staatlichen wie überstaatlichen Lebensverhältnisse.' F. Grunert, *Normbegründung und politische Legitimität. Zur Recht- und Staatsphilosophie der deutschen Frühaufklärung* (2000), at 66.

¹⁹ Haggemacher, 'Grotius and Gentili: A Reappraisal of Thomas Holland's Inaugural Lecture', in H. Bull, A. Roberts and B. Kingbury, *Hugo Grotius and International Relations* (1990), at 163–167.

²⁰ For Vitoria as a source to Grotius, see, e.g., P. Borschberg, *Hugo Grotius 'Commentarius in Theses XI': An Early Treatise on Sovereignty, the Just War and the Legitimacy of the Dutch Revolt* (1994), at 48–52.

²¹ T. Irwin, *The Development of Ethics: A Historical and Critical Study*, vol. 2: *From Suárez to Rousseau* (2008), at 98.

²² B. Tierney, *The Idea of Natural Rights: Studies of Natural Rights, Natural Law and Church Law 1150–1625* (1997), at 316. In fact, Grotius' debts to Suárez and the other Spaniards are many and have been often highlighted. See especially Dufour, 'Les "Magni hispani" dans l'oeuvre de Grotius', in F. Grunert and K. Seelmann, *Die Ordnung der Praxis: Neue Studien zur Spanischen Spätscholastik* (2001), at 351–380.

²³ For Grotius as a humanist, celebrating republican liberty, see, e.g., R. Tuck, *Philosophy and Government 1572–1651* (1993), at 155–169.

²⁴ 'Just as the mathematicians customarily prefix to any concrete demonstration a preliminary statement of certain broad axioms on which all persons are easily agreed, in order that there may be some fixed point from which to trace the proof that follows, so shall we point out certain rules and laws of the most general nature, presenting them as preliminary assumptions which need to be recalled rather than learned for

Scholastic writers and Grotius both used the vocabulary of ‘reason’, but, for Grotius, this did not point to supernatural *felicitas* but, rather, to the human ability of committing oneself to principles of sociability that could be clearly known.²⁵ If this resembles Aristotle, unlike the latter, he did not confine sociability to the *polis*. And if the ‘modernity’ of Grotius is highlighted by the centrality he gave to individual rights, the ‘secularizing’ effects of his natural law and his concern to engage with the sceptics, each was already present in medieval theologians and canon lawyers, a fact prompting Brian Tierney to conclude that ‘Grotius did not create a new theory of natural rights and natural law; but what he achieved was equally important. He made it possible for the old theory to live in the new world’.²⁶

Deciding on whether Grotius should be read backwards to the middle ages or forwards to ‘modernity’ is hardly necessary or even useful to the extent that his principal legal works, *De iure praedae* and *De iure belli ac pacis*, while doubtless taking up *topoi* familiar from the past were employed so as to respond to pressing events around him: war, domestic unrest, confessional dispute, expanding trade and colonization. In response, Grotius developed a theory of legal obligation that was independent of (contested) religious assumptions while also avoiding the reduction of law to the search for utility that would always raise the question: ‘useful for whom?’ The sceptic Carneades had notoriously suggested that ‘[l]aws ... were instituted by Men for the sake of Interest’ and that ‘that which is called Natural Law [was] mere Chimera’.²⁷ Grotius responded to this with his theory of rational sociability that would generate its own binding force and offer a vocabulary with which rulers could claim obedience from their subjects irrespective of their religious views or interests. But it would also entitle individuals to demand that their freedoms and properties be left untouched by whatever considerations of abstract justice rulers might be inclined to invoke.

If the latter concerns – in which we may recognize those of sovereignty and property – would in due course emerge as important, perhaps the most important concerns of legal modernity, they were also concerns (and concepts) with a long pedigree. The notion of individual rights and the genealogy of political community that referred back to free subjects contracting and occupying land in a state of nature was already present in the Spanish scholastics and, indeed, in Cicero.²⁸ But when Grotius then continued that ‘liberty in regard to actions is equivalent to ownership in regard to property’, the reference to Aristotle could hardly veil the novelty of the understanding of social relations he was now offering: ‘old’ words – ‘new’ concepts? There is something overly academic in the effort to read a legal text with the view to its systemic coherence. More interesting would be to try to understand what it was that made his

the first time, with the purpose of laying a foundation upon which our other conclusions may safely rest.’ Grotius, *DIP*, ch. I, Introductory Remarks, at 17–18.

²⁵ H. Welzel, *Naturrecht und materiale Gerechtigkeit* (1990), at 123–125.

²⁶ Tierney, *supra* note 22, at 342.

²⁷ Grotius, *DIBP*, Preliminary Discourse, s.v. (79).

²⁸ See Cicero, *On Duties*, vol. 1, at 21–22, as quoted and translated in P. Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (2007), at 114.

writing seem persuasive in view of the problems that preoccupied his contemporaries. As Grotius well knew, those had especially to do with religion and the economy.

My purpose, however, is neither to celebrate the ‘Grotian tradition’ nor to attack it as an unscrupulous instrument for legitimating capitalism, authoritarianism and colonial rule. Unlike the most influential 20th-century representative of the ‘Grotian tradition’, I am not impressed by the ‘atmosphere of strong conviction, of reforming zeal, of moral fervor’ in the oeuvre of the Dutchman.²⁹ Instead, I am interested in experimenting with a type of legal-historical writing that takes seriously the thesis of law as a ‘language’ and the task of the lawyer as ‘*bricolage*’ – trying to construct a persuasive argument from the bits and pieces of authoritative language lying about in the appropriate professional context.³⁰ Thinking about Grotius in this way – as an ambitious man seeking to persuade an audience – might not only provide a realistic sketch of the man but might also help in linking what Hans-Georg Gadamer might have called his intellectual ‘horizon’ to ours.

3 Grotius in the World

Grotius composed the first and second editions of *De iure belli ac pacis* as a refugee in Paris in the 1620s and 1630s, where he received a small pension from the king to whom he also dedicated the work. Among the elements that framed his life were his moderate (‘Arminian’) Protestantism, his past experience as an attorney for the Dutch East India Company and as a high official in the government of the United Provinces, as well as his self-identification as a humanist and a jurist (though he had no formal legal training), hoping to impress the elites of his former home to which he wished to return after years in exile. The time in Paris also coincided with the moment when Jean-Armand du Plessis, Cardinal Richelieu, commenced the centralization of the French government. To support this project, and especially his attacks on the nobility, the cardinal had set up a propaganda machine that churned out more or less sophisticated pamphlets and treatises in the genre of *raison d'état* that celebrated his achievements and supported his policies against his many adversaries.³¹ Grotius himself had met the cardinal in the autumn of 1625 as the latter had requested information about the operations of the Dutch East India Company and had even invited Grotius to align himself with the plan of setting up something similar in France. Grotius had politely declined, providing the cardinal only some of the information he had requested,

²⁹ H. Lauterpacht, ‘Grotian Tradition’, *supra* note 11, at 361.

³⁰ An excellent recent overview of the different sources and their authoritativeness for Grotius is F. Iurlaro, *Unpuzzling Customary International Law: The Invention of Customary Law of Nations from Francisco de Vitoria to Emer de Vattel* (2018) (PhD thesis on file at the European University Institute, Florence), s. 4.2.

³¹ Out of the wealth of literature, see especially Gauchet, ‘L’Etat au miroir de la raison d’état’, in M. Gauchet, *La condition politique* (2005) 205; see, e.g., L. Catteeuw, *Censures, et raison d’état: Une histoire de la modernité politique (XVIe–XVIIe siècle)* (2013). On the counter-reformation basis of *ragion di stato*, see especially R. Descendre, *L’État du monde: Giovanni Botero entre raison d’État et géopolitique* (2009), at 58–65. The principal examination of the relevant literature in France remains E. Thuau, *Raison d’Etat et pensée politique à l’époque de Richelieu* (2000 [1966]).

subsequently writing home that he could never agree to the cardinal's view that, 'in matters of state, the weak will always have to yield'.³² With this in mind, it is hardly surprising that the *Prolegomena* of Grotius' principal work would engage at length with the arguments of the sceptic philosopher Carneades, according to whom natural law was a mere 'chimera' and all human beings were always moved only by their interests.³³ Not so, Grotius would argue. Human beings were, on the contrary, sociable creatures, possessing 'a certain Inclination to live with those of [their] own Kind, not in any Manner whatever, but peaceably, and in a Community regulated according to the best of [their] Understanding'.³⁴

The rest of the book then unfolds as an elaboration of what this 'inclination' would produce in view of the rights and duties in practically any human relationship amenable for legal articulation. Seeking to understand what Grotius was 'doing' as he was writing this work requires coming to terms with his clearly stated wish to distance himself from the 'politics' of the *raison d'état* while also taking into account his desire to be regarded as useful by the next generation of Dutch political leadership. If there was one aspect of his Dutch background that was the object of Europe-wide envy and emulation, it was the economic successes of the United Provinces. Despite its small size and lack of natural resources, the country had come to exercise a controlling position in the trade between north and south Europe and functioned as a kind of world entrepôt by offering a stable and efficient regime for protecting property and facilitating commercial exchanges. Early on in *De iure praedae*, Grotius had observed that trust and confidence were key to the country's economic success. Quoting Quintilian on the need of owners to be secure in their possessions, Grotius further stated: 'In this principle of confidence, so to speak, lies the origin of human society, a way of living towards which, by the design of the Creator, man was more strongly impelled than any other living creature.'³⁵ To the extent that such confidence was not naturally present, it had to be created by law, accompanied by a strong sense of obedience. Law would ground and delimit everybody's rights and legitimize the institutions of government. In this way, law would preside over the marriage of statehood and commerce that had made the United Provinces 'self-sufficient in war-making and state-making, and combined regional consolidation with world-wide expansion of Dutch trade and finance'.³⁶

Grotius frequently expressed his admiration for the Dutch merchant class, viewing 'the Hollanders' as 'a people surpassed by none in their eagerness for honourable gain'.³⁷ In comparison to the humble business of private shop keeping, wholesale commerce carried by maritime routes, of which Amsterdam was the world centre, provided an indispensable service to societies and was 'absolutely necessary according

³² In H. Nellen, *Hugo Grotius, A Lifelong Struggle for Peace in Church and State 1583–1645* (2014), at 329, n. 79.

³³ Grotius, *DIBP*, Preliminary Discourse, s. V, (79).

³⁴ Grotius, *DIBP*, Preliminary Discourse, s. VI, (79–81).

³⁵ Grotius, *DIP*, ch. II, (28).

³⁶ G. Arrighi, *The Long Twentieth-Century: Money, Power and the Origins of Our Times* (2010), at 140.

³⁷ Grotius, *DIP*, ch. I, (9).

to nature's plan'.³⁸ This mercantile ideology was underpinned by strong faith in providence; freedom of navigation expressed a 'design of Divine justice, that one nation supplies the needs of another, so that in this way (as *Pliny* observes) whatever has been produced in any region is regarded as a product native to all regions'.³⁹ Over and over again, Grotius aimed to convince his readers that there was nothing worrying in profit seeking; on the contrary, it contributed to the welfare and interest of the state.⁴⁰

Today, Grotius is recognized as the initiator of an influential strand of European jurisprudence. Jurists have found his texts often persuasive, whatever objections or queries they might have had about his style or objectives. No doubt, his situation was not too different from that of any lawyer today, arguing a case, writing a memorandum or producing an academic study. We are expected to connect texts and fragments imaginatively and make use of whatever legal and political vocabularies and tropes that might impress and convince our audiences. In most cases, the choices are really very limited; the routines of legal argument and the expectations of professional audiences do not leave much room for manoeuvring. Yet law changes; old laws come to seem 'inadequate', and new idioms push through to enable saying new things. But the passive form – 'law changes' – obscures the fact that it is the lawyer who chooses a new description to an interest or a problem that gives it legal sense. Some moments are more amenable to such re-describing than others. The 1990s may have been such, which surely is what Boutros-Ghali wanted to connote with his reference to the 'Grotian moment'.⁴¹

The religious wars in Europe – which lasted through the lifetime of Grotius – were also such. The authority of the old religious and political vocabularies was breaking at the edges: what attitude should be taken when trading with the infidel or the heretic; how to resolve claims over territory or passage outside domestic jurisdiction; what about taking hostages at war or lying to the enemy; how to deal with a tyrant? Religious moralities and *raison d'état* provided many different answers to such questions; which should be believed? According to Grotius, it was possible to receive reasonably certain answers to such problems by examining human nature itself; more particularly, the rules and principles that upheld social life.⁴² This would be the objective of his proposed science of moral actions, as Annabel Brett has noted, actions that were voluntary rather than natural and that, therefore, could (and ought) to be directed in accordance with 'invariable rules' and principles.⁴³ One consequence of this was the imprecision of the result. But this was still infinitely better than choosing

³⁸ Grotius, *DIP*, ch. XII, (356).

³⁹ Grotius, *DIP*, ch. XII, (303–304). See further Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' *De Iure Praedae*—The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"', 31 *Brooklyn Journal of International Law* (2006) 741, especially at 756–774.

⁴⁰ See especially Grotius, *DIP*, ch. XV, (462–497): 'The Seizure of the Prize in Question Was Beneficial.'

⁴¹ Boutros-Ghali, *supra* note 12.

⁴² H. Welzel, *Naturrecht und materiale Gerchigkeit* (1990), at 123–125.

⁴³ Brett, 'The Subject of Sovereignty: Law, Politics and Moral Reasoning in Hugo Grotius', *Modern Intellectual History* (2019).

between contradictory dogmas espoused by warring factions. Grotius' law could be understood and employed even (and perhaps especially) by religious or political adversaries – after all, they 'flow[] from the internal Principles of Man'.⁴⁴ It was unnecessary to believe in them; rather, it was sufficient that the protagonists would find them persuasive – perhaps because they would be able to link them to conventional experience, as Grotius suggested.⁴⁵

4 A Question from the Present

To deal with a situation of great political complexity and danger, Grotius had recourse to reason and conventional wisdom, compressed into 'rules' and, consequently, a sort of 'legalism' and 'rule of law'. In this sense, international lawyers are his faithful successors. The idea of international government by judges and legal expertise constitutes a hugely important strand of 20th-century jurisprudence.⁴⁶ Is that receipt still valid? Part of the present right-wing backlash in the West has to do with objection to being ruled by 'unelected' judges operating within a disembedded system of global economic governance. As the liberal-progressive consensus of the 1990s breaks down and legitimate popular grievance is being hijacked by reactionary nihilists and nostalgia for white male privilege, can the 'rule of law' be invoked as an antidote? If the rule of law relies on a structural bias accepted by the elites (as I suggest above), is not the attack on the elites automatically an attack against that bias as well? If so, then the politics of legalism will appear simply as one politics among others, only having hidden its elitism behind a facade of fake neutrality. How can it then be defended? Why should it be? One of the legacies of the 1990s that inspires the backlash is the ever-growing global inequality. Has the 'rule of law' been complicit in creating and perpetuating it? Surely it has. Is it possible to address global inequality through it? It is hard to say. No doubt, ideas about justice and equality – with all of their question-begging indeterminacy – belong to the same family of notions as the rule of law. To strengthen that relationship will surely require addressing the structural bias; international law cannot survive as merely another part of an extremely unjust and violent world. Instead of consolidating its roots more firmly in that world (for example, by expanding investment arbitration), it must find a normative voice that addresses that inequality directly.

As I will now turn to discuss the idea of the 'rule of law' in Grotius, my intention is not to suggest that we should adopt, or even understand, that idea in the way Grotius did (though some of us might do so, at least sometimes). The expression figures nowhere in his writings. I use it anachronistically to invite the reader to sympathize with a lawyer who died more than three-and-a-half centuries ago, but whose employment of what I have called 'legal imagination' is not at all that different from what

⁴⁴ Grotius, *DIBP*, Preliminary Discourse, s. XII, (91).

⁴⁵ Grotius, *DIBP*, bk I, ch. I, s. XII, (159).

⁴⁶ I have discussed this tradition in 'The Function of Law in the International Community: 75 Years After', 71 *BYIL* (2008) 353.

seems required of us as we struggle to come to grips with the puzzling collapse of our inherited intellectual and political certainties. Surely, the authority of the vocabularies of economic globalization, human rights and democratic progress can no longer be taken for granted. Instead of continuing the construction of a just international world from such well-tried materials, we are compelled – perhaps a little like Grotius – to ‘bricolage’, grasping other texts and utopias so as to try as best we can to persuade new audiences of the authority of what we have to say, provided that there is anything we are able to say.

5 A Vision of European Social Life, AD 1625

At the time of Grotius’ meetings with Cardinal Richelieu, ideological divisions were tearing the European continent apart; Protestant rebellion in Bohemia would soon trigger the Thirty Years’ War. Political struggles expanded from the clash of constitutional principles at home – the extent of royal authority and right of resistance, for example – with imperial rivalry in the Americas and in the East Indies. Sustaining European polities in their almost perpetual wars and in their colonial projects ‘now depended, to an extent never seen before, on an essential underpinning of economic strength’.⁴⁷ Each factor touched Grotius personally, and each had a place in his effort to develop a conception of law that would organize public power and private rights in a system of principles whose validity and binding force would be untouched by the conflicts that pitted Europeans against each other. This would be the ‘moral science’ of natural law that, as Grotius suggested, would build on nothing more than reason – ‘a Faculty of knowing and acting, according to some Principles’ – as the irreducible core of human nature.⁴⁸ For Grotius, those ‘Principles’ would support a very specific organization of social life: ‘But Right Reason, and the Nature of Society ... does not prohibit all Manner of Violence, but only that which is repugnant to Society, that is what invades another’s Right. For the Design of Society is, that every one should quietly enjoy his own, with the united Force of the whole Community.’⁴⁹

Much was included in this quote – the idea of society as a system of rights protection and a bourgeois idyll of community where everyone looks no further than ‘quietly enjoy[ing] his own’. Grotius completed this image by occasionally nodding towards a notion of justice that concerned benevolence to one’s neighbours. But he insisted on a clear distinction between strict, enforceable law and the ‘Counsels and such other Precepts which, however, honest and reasonable they be, lay us under no Obligation [and] come not under this Notion of *Law*, or *Right*’.⁵⁰ Through such distinctions, and by insisting that the ‘strict law’ was binding everywhere, he would extend a Dutch

⁴⁷ M.S. Anderson, *The Origins of the Modern European State System 1494–1618* (1998), at 49.

⁴⁸ Grotius, *DIBP*, Preliminary Discourse, s. VII, (85). My reading of Grotius’ legalism is greatly inspired by A. Brett’s works, including Brett, ‘Natural Right and Civil Community: The Civil Philosophy of Hugo Grotius’, 45 *Historical Journal* (2002) 31; Brett, ‘The Space of Politics and the Space of War in Hugo Grotius’ *De iure belli ac pacis*’, 1 *Global Intellectual History* (2016) 1; Brett, *supra* note 43.

⁴⁹ Grotius, *DIBP*, bk I, ch. II, s. I, at 5, (184).

⁵⁰ Grotius, *DIBP*, bk I, ch. I, s. IX, (148) (emphasis in original).

model of political and economic life from the rebellion against Habsburg rule to the struggle over East Indian markets and to the conflicts over settlement in the Americas. It would explain the economic and political success of a country whose virtues he had celebrated in his early years but that would eventually leave him sidelined and bitter as he watched those successes accumulate from imposed exile.

This image of social life was very much in harmony with Grotius' moderate Protestantism, exposed in his theological writings where he concentrated on Christianity's shared truths and ethical precepts. Grotius himself believed that his most important activities had to do with advancing Christian unity, an effort reflected in his legal writings as well.⁵¹ Long after his death, he was more famous as the composer of *De veritate religionis christianae* (1640) than for *De iure belli ac pacis*.⁵² He hated the dogmas about predestination and free will that had divided even Protestants against each other. He believed that state power needed a religious foundation that would not be dependent on contested dogmas but would still engage the world of internal obligation.⁵³ Faith was particularly important, he wrote, to uphold obedience 'in the universal Society of Mankind', where the laws were few and 'derive their Force chiefly from the Fear of a Deity'.⁵⁴ Grotius was keen to provide conclusive proof of the rightness of the Christian religion. The same desire operated in his effort to develop natural law into an incontrovertible technique for discovering universal rules applying across religious divisions. As he wrote in the famous passage in the Prolegomena to *De iure belli ac pacis*, he wanted

to refer the Proofs of those Things that belong to the Law of Nature to some such certain Notions, as none can deny, without doing Violence to his Judgment. For the Principles of that Law, if you rightly consider, are manifest and self-evident, almost after the same Manner as those Things are that we perceive with our outward Senses, which do not deceive us, if the Organs are rightly disposed, and if other Things necessary are not wanting.⁵⁵

This quotation resembled the attack on 'dogma' in the theological works and led directly to the famous response to the sceptic view of 'Right' as 'nothing but an empty Name' that was 'instituted by Men for the Sake of Interest'.⁵⁶ Feeling the power of this attack, Grotius responded with a view of natural human sociability that nobody in their right mind – that is to say, nobody with 'reason' – could deny.⁵⁷ Law was neither an aspect of religious 'dogma' nor about fitting one's external behaviour in

⁵¹ See, e.g., B. Kniepel, *Die Naturrechtslehre des Hugo Grotius als Einigungsprinzip der Christenheit, dargestellt an seiner Stellung zum Calvinismus* (1971); Hoffmann, 'Hugo Grotius', in M. Stolleis (ed.), *Staatsdenker in der frühen Neuzeit* (1995) 52, at 59–60.

⁵² Heering, 'Hugo Grotius' *De veritate religionis christianae*', in Nellen, *supra* note 32, at 41. For a thorough study of the contents and the reception (including translations) of this work, originally written as a poem in Latin, see J.P. Heering, *Hugo Grotius as an Apologist for the Christian Religion: A Study of His Work De veritate religionis christianae* (2004), at 199–241.

⁵³ For the theological underpinnings of Grotius' legal work, see further Hoffmann, *supra* note 51, at 63, n. 34; Kniepel, *supra* note 51.

⁵⁴ Grotius, *DIBP*, bk II, ch. XX, s. XLIV, at 6, (1031).

⁵⁵ Grotius, *DIBP*, Preliminary Discourse, s. XL, (110–111).

⁵⁶ Grotius, *DIBP*, Preliminary Discourse, s. III, IV, (76, 79).

⁵⁷ See also Tuck, *supra* note 23, at 172–179.

accordance with utility or self-interest. As nature pushed humans to society, it also compelled them to respect the rules that made social life between predominantly (though not wholly) self-regarding individuals possible.⁵⁸ It was precisely the ability to live by rules that distinguished human beings as creatures of ‘reason’:

But it must be owned that a Man grown up, being capable of acting in the same Manner with respect to Things that are alike, has, besides an exquisite Desire of Society, for the Satisfaction of which he alone of all Animals has received from nature a peculiar Instrument, viz. the Use of Speech; I say, that he has besides that, a Faculty of knowing and acting, according to some general Principles; so that what relates to this Faculty is not common to all Animals, but peculiarly agrees to Mankind.⁵⁹

Here was the core of the Grotian ‘rule of law’, the effort to uphold a sense of obligation that would compel humans to act in ways that would go against their immediate self-interest. It was true, Grotius wrote, that obedience was often useful and that violation ‘saps the Foundation of [one’s] own perpetual Interest’. But law ‘has not Interest merely for its End’. We have an ‘impulse’ to obey that ‘brings Peace to the Conscience while Injustice, Racks and Torments’. We seek happiness but learn that ‘[t]hat is happy indeed which has Justice for its Boundaries’.⁶⁰ Grotius rejected the blunt empiricism of jurists such as Alberico Gentili, who, he argued, had failed to enquire into the ‘rules of Equity and Justice’ behind his ‘few Examples’ as well as Jean Bodin’s ‘political’ outlook. The point was to proceed from mere control of external behaviour to the ‘very Foundation upon which we build our Decisions’.⁶¹ What this would mean is illustrated by the distinction Grotius made between ‘internal’ obligations that consisted of what was ‘really lawful in itself’ and things that were ‘only lawful externally’.⁶² Even if it was true that only the latter were subject to public enforcement, law as ‘moral science’ included both, which is why, for example, after having given an account of the very permissive rules of warfare under the law of nations in Book III of *De iure belli ac pacis*, he wrote long sections on ‘moderation’ (*temperantia*) that seemed to deprive the belligerent parties of ‘almost all the Rights, which [he] may seem to have granted them’.⁶³ The relationship between the two orders – external and internal – has puzzled commentators. It is, however, an absolutely central aspect of Grotius’ view of law as ‘moral science’ that dealt with ‘Principles’ entrusted both with a sense of obligation and public enforceability.

⁵⁸ The ‘reason’ in Grotius, Brett has written, is not so much a ‘tamer of passions’ as a ‘recognizer of likeness, or alterity’. Brett, ‘Natural Right and Civil Community’, *supra* note 48, at 42.

⁵⁹ Grotius, *DIBP*, Preliminary Discourse, s. VII, (84–85).

⁶⁰ Grotius, *DIBP*, Preliminary Discourse, s. XIX, XXI, XXV, (95, 96, 100).

⁶¹ Grotius, *DIBP*, Preliminary Discourse, s. XL, (110).

⁶² Grotius, *DIBP*, bk II, ch. X, s. I, at 3, (1414). For a discussion of the complex relations between ‘internal’ and ‘external’ justice in *DIBP*, see P. Haggemacher, *Grotius et la doctrine de la guerre juste* (1983), at 572–525, 579–588; Schwartz, ‘Grotius on the Moral Standing of the Society of Nations’, 14 *Journal of the History of International Law* (2012) 130.

⁶³ Grotius, *DIBP*, bk III, ch. X, s. I, at 1, (1411). On the ‘*temperantia*’, see Grotius, *DIBP*, bk III, ch. X–XVI, (1411–1518).

In his *Introduction to Dutch Jurisprudence*, Grotius stated quite clearly the basic principle behind the operation of ‘law’ (in contrast to coercion or the prudential pursuit of interests): a law has ‘an obligation affecting even the mind; for obedience must be given not only through fear, but for conscience sake, and this is a consequence of all laws’.⁶⁴ He then explained this by noting that ‘all beings seek their common benefit, and further what is peculiarly their own, and especially self-preservation; as beasts, by the union of male and female, seek the propagation of their species and the rearing of their young offspring’. But a human being, ‘while thus acting, as conscious in his mind that he does what is right; but, in so much as he is a being endowed with reason, he is inclined to be further guided by religion, and the rules of social intercourse with mankind, the foundation of which is to do unto others as we would they should do unto us’.⁶⁵

If natural law was authoritative (as it was, of course), this was because nature had been created by God.⁶⁶ An argument based on divine will helped lift nature’s pronouncements from the realm of physical ‘inclinations’ to facts of a normative character, binding on humans generally. Despite the great scholastic controversy about divine voluntarism and rationalism that preoccupied theologians and of which Grotius was well aware, he never gave up this point – even as (like in many other matters) he refrained from taking a clear position and sought to write in such a way that neither committed voluntarists nor rationalists would object.⁶⁷ With some exasperation, he wrote in *De iure belli ac pacis* that the acts that reason dictates as obligatory or unlawful ‘must consequently be understood to be either commanded or forbid by God himself’.⁶⁸ They must be so understood because otherwise it would be inexplicable why they would be other than mere counsel of prudence. But, in regard to the content of that law – the point at which Carneades’ sceptical arguments were at their most powerful – the theological frame could be set aside. All that was needed was to examine the features of the social world and the ways in which ‘many men of different Times and Places’ had in fact behaved.⁶⁹ Both *a priori* and *a posteriori* methods were available, and their results were binding because they emanated from God. But this was not the God of the Calvinists, not a god of predestination and theocracy, but, rather, one who only decreed the general frame within which human society had to be formed and who had bound Himself to his creation. Within that frame, humans were

⁶⁴ H. Grotius, *Inleydinge tot de Hollantsche rechtsgeleertheit (IHR)* [*Introduction to Dutch Jurisprudence*], translated by C. Herbert (1845 [1631]), bk I, ch. II, (4).

⁶⁵ Grotius, *IHR*, bk I, ch. VI, (5).

⁶⁶ Unlike Suárez, Grotius did not read the Ten Commandments or the Old or New Testament as natural law. They were part of God’s ‘voluntary law’ – a law directed to a particular people at a particular time.

⁶⁷ The continuity between the ‘voluntarism’ of his early work and the rationalism of *DIBP* is well demonstrated by Hagenmacher, *supra* note 62, at 501–507.

⁶⁸ Grotius, *DIBP*, bk I, ch. I, s. X, at 2, (151–152).

⁶⁹ Grotius, *DIBP*, Preliminary Discourse, s. XLI, (112). For a good discussion of the sources of the two methods in Aristotelian rhetoric and Stoicism, see B. Straumann, *Hugo Grotius und die Antike, Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht* (2007), at 110–127.

entrusted with subjective rights and the liberty that would enable them to choose the moral life of good Christians.

6 Natural Law as Frame

Grotius objected to the Calvinist doctrine of predestination and defended the freedom of the will, but he regarded that issue as something on which Christians could reasonably disagree.⁷⁰ Similarly, in his legal works, he constructed natural law so as to allow human beings to enjoy the rights of personal freedom and property and to construct political communities in accordance with their will. In those ‘self-made’ communities, they could live securely under domestic civil laws that would push them towards conforming behaviour, virtue and happiness. From the safety of their societies and with emboldened consciences, these industrious people could undertake voyages to distant lands to conduct profitable trade with the infidel.⁷¹ They could purchase and deliver slaves across the oceans⁷² and work on and occupy ‘any waste or barren Land’ because ‘whatever remains uncultivated is not esteemed a Property’.⁷³

Grotius gave an early formulation of this view as he sat down in his office in The Hague to produce the long advocacy tract *De iure praedae* in 1604. The principal elements of *De iure belli ac pacis* remained as he set them down – the view of natural law within which (subjective) rights of liberty and property combine with a system of reacting to violations and punishing the guilty.⁷⁴ Both works were written under the shadow of war and translated a set of Roman remedies into four just causes of war: self-defence, the defence of property, the collection of debts and the punishment of injury.⁷⁵ Natural law became a ‘frame’ within which individuals may use their liberty and enjoy their properties in the secure knowledge that any violation will trigger a punishment either by themselves or by a public authority.⁷⁶

⁷⁰ See, e.g., Trapman, ‘Grotius and Erasmus’, in Nellen, *supra* note 32, at 81–84.

⁷¹ For the (then unorthodox) point about contracting with the infidel being just, see Grotius, *DIP*, ch. XIII, (434).

⁷² This, it appears, applies only to prisoners of war made slaves under the law of nations (the usual justification for enslaving Africans captured in slavery raids). In that case, the owner ‘has the Power to transfer his Right to another, in the same manner as the Property of Goods’. Grotius, *DIBP*, bk III, ch. VII, s. V, at 2, (1364). In these and other paragraphs, Grotius uses the term ‘*servitus*’, which covers many different types of personal subordination. However, in these passages, ‘slavery’ is what is being indicated. See van Nifferik, ‘Hugo Grotius on Slavery’, 22 *Grotiana* (2001–2001) 233, at 241. By 1605, the Dutch had only occasionally participated in the slave trade, the first large transport having been in 1606. After its establishment in 1621, the West India Company refrained from slaving operations for nearly a decade. Nevertheless, the company seems to have sold close to 3,000 slaves taken in 1621–1637 from captured vessels. See J. Postma, *The Dutch in the Atlantic Slave Trade 1600–1815* (1990), at 10–25.

⁷³ Grotius, *DIBP*, bk II, ch. II, s. XVII, (448).

⁷⁴ This is also the conclusion of the extensive comparison of the two works in Haggemacher, *supra* note 62, especially at 615–627.

⁷⁵ Grotius, *DIP*, ch. VII, (102–104); *DIBP*, bk II, ch. I, s. II, at 2, (393–395). The continuity between the essential jurisprudential content in the two works is the core message in Haggemacher, *supra* note 62, especially at 176–180, 549–552.

⁷⁶ The permissive character of Grotius’ natural law is usefully discussed in B. Tierney, *Liberty and Law: The Idea of Permissive Natural Law, 1100–1800* (2014), at 218–247.

In the early work, Grotius stressed that God had designed the principles of the natural order, including the ‘first’ among these, ‘self-interest’. From this, it followed for Grotius that ‘expediency might perhaps be called the mother of justice and equity’.⁷⁷ The determination of the just causes in terms of subjective rights (of person, property, obligation and punishment) followed from the deliberate choice by Grotius of ‘the standpoint of a particular individual’: ‘What each individual has indicated to be his will, that is law with respect to him.’⁷⁸ This grounded the binding force of contracts and laid the foundation for the confidence and good faith that were needed to secure the operation of a transnational system of commercial exchanges.⁷⁹ Respect of property and the efficient enforcement of contracts also allowed the sovereign to ‘sleep’ while the subjects were busily engaged in commercial dealings.⁸⁰ Through contracting, individuals would choose the nature of their relations – law was premised on that freedom of choice⁸¹ – while their private transactions would benefit the state as well. Even civil community would result from a contract to protect rights, while the binding force of that contract was based on ‘the rule of good faith’ (*fidei regula*).⁸²

Twenty years later, Grotius had left the voluntarism of his early work. The question treated in *De iure belli ac pacis* had to do again with the permissibility of something that Christians were eagerly practising – war – but expediency now gave way to sociability (*‘appetitus societatis’*). He was particularly desirous to give a good response to those who, like Carneades, believed that any idea of law among nations was something ‘instituted by Men for the sake of Interest [only]’.⁸³ For this purpose, he gave ‘sociability’ a distinctly legal meaning.⁸⁴ It may be true, Grotius admitted, that what is closest to us is

⁷⁷ Grotius, *DIP*, ch. II, (21–22). The degree to which expediency dominated Grotius’ early work, in contrast to the legal formalism of *De iure belli ac pacis*, is highlighted in Brett, ‘Natural Right and Civil Community’, *supra* note 48, at 39–44.

⁷⁸ Grotius, *DIP*, ch. II, (34).

⁷⁹ ‘Good faith’, Grotius wrote, was ‘a veritable necessity in those farthest corners of the world where persons previously unknown cannot very well make themselves known save through their virtues’. *DIP*, ch. XIV, (453).

⁸⁰ R. Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (2016).

⁸¹ Kniepel, *supra* note 51, at 20–25, 32–34. ‘For what is that well-known concept of “natural liberty”, other than the power of the individual to act in accordance with his own will?’ Grotius, *DIP*, bk II, (33–34).

⁸² Grotius, *DIP*, ch. II, (34). The significance of the rule of good faith or *fides* in *De iure praedae* and its transformation in the later works into the *appetitus societatis* is usefully discussed in Blom, ‘The Meaning of Trust: Fides between Self-Interest and *Appetitus Societatis*’, in P.-M. Dupuy and V. Chetail, *The Roots of International Law. Liber amicorum Peter Haggemacher* (2013) 39. According to Blom, the lack of ‘*fides*’ meant for Grotius that the civil community was on its way to destruction. Blom, ‘Sociability and Hugo Grotius’, in 41(5) *History of European Ideas* 589, at 593–596.

⁸³ Grotius, *DIBP*, Preliminary Discourse, s. V, (79). For the argument that Grotius’ primary concern in taking up Carneades was to refute the sceptics who were Grotius’ contemporaries, especially the views by Montaigne and Charron, see Richard Tuck, ‘Grotius and Selden’, in J.H. Burns, *The Cambridge History of Political Thought* (Cambridge University Press 1991), 515–522; R. Tuck, *Natural Rights Theories: Their Origin and Development* (1979), at 58ff, 72–75; Tuck, *supra* note 23, at 196–201. For a critique of Tuck’s views, see Tierney, *supra* note 22, at 321–324.

⁸⁴ Grotius, *DIBP*, Preliminary Discourse, s. VI, (79–80).

our self-love and the inclination of self-preservation. But that was in no way contrary to the existence of a system of law and order; on the contrary, it was the best guarantee of it. Grotius began by using the famous argument that ‘the Mother of Natural Law is human Nature itself’.⁸⁵ And a part of human nature was ‘a desire for Society, that is, a certain Inclination to live with those of his own kind, not in any way whatever, but peaceably and in a community regulated according to the best of his Understanding’.⁸⁶

In the 1631 edition, Grotius would expressly associate this inclination with the Stoic notion of *oikeiosis*, as mediated through Cicero.⁸⁷ This was neither designed to further Aristotelian happiness (*eudaimonia*) nor the orthodox Stoic notion of moral goodness. Instead, it was to account for the idea of being bound by rules in a community with others.⁸⁸ To explain this, Grotius took up Cicero’s distinction between sociability according to the ‘first impressions of nature’ that collapsed into the right of self-defence and sociability associated with ‘the Knowledge of the Conformity of Things with Reason which is a Faculty more excellent than the Body’.⁸⁹ The former expressed itself in the same way as ‘every Animal seeks its own Preservation’, while the latter – a higher-level orientation – was valid for humans in society with others whose preferences were alien and opaque but who nevertheless shared parallel instincts. It expressed the character of human beings as beings of reason, able to follow rules; it ought therefore to ‘be dearer to us than natural Instinct’.⁹⁰

Unlike animals, humans operated under rules, or, as Grotius put it, they were ‘capable of acting in the same way in respect of Things that are alike’.⁹¹ This bound human beings to directives of action they should follow even when, at least in the short term, doing so might go against their immediate interests. Above all, it called upon them to ‘[a]bstain[] from that which is another’s and the Restitution of what we have of another’s or of the Profit we have made by it’. It created the ‘[o]bligation of fulfilling Promises’ and ‘the Reparation of a Damage done through our own Default’.⁹² The capacity of ‘[j]udgment’ that would seek out binding rules functioned beyond mere ‘[f]ear, or the Allurements of present Pleasure’.⁹³ It showed us ‘the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness

⁸⁵ Grotius, *DIBP*, Preliminary Discourse, s. XVII, (93).

⁸⁶ Grotius, *DIBP*, Preliminary Discourse, s. VI, (79–81).

⁸⁷ This has been a matter of widespread commentary. See Welzel, *supra* note 25, at 125–126; Straumann, *supra* note 69, at 83–119; C. Brooke, *Philosophic Pride: Stoicism in Political Thought from Lipsius to Rousseau* (2012), at 37–58. For the distance of Grotius’ natural law from orthodox, virtue-oriented Stoicism, see Brouwer, ‘On the Ancient Background of Grotius’ Notion of Natural Law’, 29 *Grotiana* (2009) 1, especially at 10–22. Grotius’ Stoic sources are also treated in volumes 22 and 23 of *Grotiana* (2001–2002).

⁸⁸ See here especially Straumann, *supra* note 69, at 103–119.

⁸⁹ Grotius, *DIBP*, bk I, ch. II, s. I, at 1–2, (180–181).

⁹⁰ Grotius, *DIBP*, bk I, ch. II, s. I, at 2, (181). Already in Grotius, *IHR*, ch. VI, (5), he distinguished between human beings as beings of reason, by referring to the capacity to obey ‘rules of social intercourse’ consisting above all of a sense of reciprocity (‘do unto others as we would they should do unto us’).

⁹¹ Grotius, *DIBP*, Preliminary Discourse, s. VII, (84).

⁹² Grotius, *DIBP*, Preliminary Discourse, s. VIII, (85–86).

⁹³ Grotius, *DIBP*, Preliminary Discourse, s. IX, (87).

to a reasonable Nature'.⁹⁴ Here was the legal *proprium* – the obligation that was based neither on interest nor on revelation. It provided Grotius' response to Carneades as well as to '*politici*' such as Bodin's content to explain 'what it may be profitable or advantageous for us to do'.⁹⁵ And it distinguished him from the Aristotelian view of virtue as a mean: if justice was about respect of the rights of others, there was nothing 'mediate' about it. Temperance or fortitude may affect the way we interpret rules, but they do not affect the call for obedience: you either obey or you do not.⁹⁶ Of course, Grotius believed that God had created human nature and the rules of reason and had told us to abide by them. In other ways, however, theology played no role in discerning the contents of natural law. That had become a purely human affair.⁹⁷

The character of natural law ('*ius naturae*') as a 'frame' within which human society would develop was further specified by Grotius' three-part definition of '*ius*' that he took over practically unchanged from Suárez. The first meaning was the old 'objective' one: 'that which is just.' But Grotius defined this in an astonishingly negative, almost question-begging, way as 'that which may be done without Injustice', supplying the explanation that 'unjust is that which is repugnant to the society of reasonable Creatures'.⁹⁸ Despite the superficial resemblance this carried to the Thomistic notion of justice as the object to which all (just) action strives, in practice, it was subordinated to the subsequent two meanings of *ius* as a subjective right and a lawful command. It simply told its addressee that I am all right as long as I do not violate anybody's right or break the law.⁹⁹ This suited very well an ideal of social relations where the position of individuals, their rights and their liberties was central. The famous passage in the Preliminary Discourse that described sociability as 'the Fountain of Right, properly

⁹⁴ Grotius, *DIBP*, bk I, ch. I, s. X, (150–151).

⁹⁵ Grotius, *DIBP*, Preliminary Discourse, s. LVIII, (131).

⁹⁶ Grotius, *DIBP*, Preliminary Discourse, s. XLIV–XLV, (114–121); see also J.B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (1998), at 75–78. Grotius did not deny the significance of virtue *alongside* (strict) law. It founded many of the *temperamenta* that sought to diminish the harshness of the law of nations in bk III.

⁹⁷ There has been much debate about the role of Grotius in secularization. The conclusion depends on what one means with that expression. At the time, many saw this type of natural law as a secularizing vehicle and God's role has in fact become irrelevant for the daily determination of social morality. See Grunert, *supra* note 18, at 77–91; see also M. Somos, *Secularization and the Leiden Circle* (2011), at 383–437 (arguing that Grotius' 'revolutionary effort to secularise natural law' was particularly clear in the 'conspicuous and consistent idiosyncrasy of Grotius' biblical interpretation') (at 435).

⁹⁸ Grotius, *DIBP*, bk I, ch. I, s. III, at 1, (136).

⁹⁹ See further Haggemacher, *supra* note 62, at 462–463. The strikingly permissive character of Grotius' natural law, especially as it unfolded in *DIP*, has been often noticed. It is true that in the later work he did sometimes confine natural law to provisions that were either mandatory or prohibited something so that things 'that [were] merely permitted by the Law of Nature [were] properly without the Bounds of the Law of Nature'. Grotius, *DIBP*, bk I, ch. II, s. V, (190). Here what was permitted appeared to fall outside the law altogether. Yet much of the law of nations that had to do with belligerent action was formulated as specific permissions of types of behaviour of which Grotius was critical. Such variations of language reflected the way Grotius often moved invisibly between enforceable (expletive) justice and standards that merely concerned the inner life of virtue that he sometimes did and sometimes did not integrate as part of his system of law. See further Tierney, *supra* note 76, at 233–247.

so called' was about '[a]bstaining from that which is another's and the restitution of what we have of another's, or of the Profit we have made by it, the Obligation of fulfilling Promises, the Reparation of Damage done through our own Default, and the Merit of Punishment among Men'.¹⁰⁰ Clearly, this was a society whose members, above all, were desirous to secure their possessions and to punish those who intervene in them. The absence of reference to the common good or public utility is striking. The standpoint remains as it was in *De iure praedae* – namely, that of the individual, called upon to act 'justly' not in pursuit of some moral *telos* but, rather, to protect his or her *suum*. The normative substance of society emerged gradually from the operations of a horizontal network of subjective rights and liberties.

7 A World of Rights

But the strongest formulation of the 'primacy of the right over the good' emerged from the way in which Grotius concentrated on the (second) meaning that he ascribed to the expression of '*ius*' as 'a *Moral Quality* annexed to the Person, *enabling him to have, or do, something justly*'.¹⁰¹ This resembled greatly the 'right' put forward by scholastic theologians, but, unlike the latter, Grotius suggested that the substance of 'strict' justice, the justice that was enforceable by public authorities, was filled by such rights.¹⁰² These rights had emerged from relations of commutative justice, and their counterpart was the duty to abstain from what belonged to others, restore any property unjustly taken and keep promises.¹⁰³ Although Grotius did suggest that governments were also to exercise distributive justice by giving some attention to the merits or need of subjects, this was a secondary concern that was not to disturb the enjoyment of rights 'properly speaking' – namely, those that 'consist[ed] in leaving others in quiet Possession of what is already their own, or doing for them what in Strictness they may demand'.¹⁰⁴

The comprehensive nature of *De iure belli ac pacis* – the way it extended from a commentary on a just war into a discussion of property, contract, sovereign power and punishment (Book II of Grotius' main work) – had to do with the way Grotius made lawful punishment, and, hence, the justice of war, dependent on the violation of rights ('strictly speaking'). If a just cause was constituted of a violation of a subjective right, then a full treatment of the matter had to contain a full discussion of the number and

¹⁰⁰ Grotius, *DIBP*, Preliminary Discourse, s. VIII, (86).

¹⁰¹ Grotius, *DIBP*, bk I, ch. I, s. IV, (138) (emphasis in original). The primacy of (subjective) rights in Grotius' system was next highlighted in his *Introduction to Dutch Jurisprudence* where Grotius defined 'law' in its 'particular' sense as either a right of merit that followed by distribute justice or a right of property based on commutative justice. Grotius, *IHR*, chs V–X, (1–2); see also Tuck, *supra* note 83, at 66–68.

¹⁰² Or as Knut Haakonssen puts it, '*ius naturale* in the strict sense is, then, every action which does not iniure any other person's *suum*, which in effect means that it is every *suum* which does not conflict with the *sua* of others'. K. Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (1996), at 27.

¹⁰³ Grotius, *DIBP*, Preliminary Discourse, s. VIII, (86).

¹⁰⁴ Grotius, *DIBP*, Preliminary Discourse, s. X, (88–89).

nature of the rights we have, how those rights were acquired and lost, how they were transacted and enforced in daily business and how, precisely, reactions to rights violations were to be conducted. These latter tasks raised, over again, the question about the relationship between property and sovereignty.

Grotius came to that question by differentiating between two types of subjective right, those he called 'Faculty' (*facultas*) and those he termed 'Aptitude' (*aptitudo*). The term *facultas* covered '[r]ight properly, and strictly taken'.¹⁰⁵ It was strict law and enforceable by public authorities. Grotius explained that in making the connection between *facultas* and subjective right he followed Roman law by including under that term the power that one had over oneself (that is to say, one's personal liberty) and those under one's tutelage (wife, children or slaves) as well as the *dominium* that one had over one's property, together with the claims one had to those who owed something to oneself.¹⁰⁶ Every human being possessed such *facultas* by virtue of merely being human. The network of relations between such *facultates* (or their holders) was covered by what Grotius termed expletive justice ('commutative justice' in Aristotelian language), the horizontal system of inter-individual relations characterized by the exercise of such subjective rights, on the one hand, and the duty to respect them, on the other hand.¹⁰⁷ Possession of a '*facultas*' committed everyone else to '[a]bstaining' from any interference as well as '[r]estitution of what we have of another's, or of the Profit we have made by it'. It also covered 'the Obligation of fulfilling Promises, the Reparation of Damage done through our own Default, and the Merit of Punishment among Men'.¹⁰⁸

A *facultas* was contrasted by mere '*aptitudo*' that Grotius received from the Aristotelian notion of distributive justice (re-labelled 'allocative justice') governing the vertical relations between public power and the subject.¹⁰⁹ Or, in Grotius' own words, '[a]ttributive Justice, styled by Aristotle ... Distributive, respects Aptitude or imperfect Right, the attendant of those Virtues that are beneficial to others, as Liberality, Mercy, and prudent Administration of Government'.¹¹⁰ While '*facultates*' were 'perfect' rights that may be exercised against everyone and implemented, if necessary, by just war, '*aptitudes*' consisted of rights 'of larger Extent' that had to do with the human capacity 'to discern Things pleasant or hurtful' and to which belonged things such as: 'prudent Management in the gratuitous distribution of Things that properly belong to each particular Person or Society, so as to prefer sometimes one of greater before of

¹⁰⁵ Grotius, *DIBP*, bk I, ch. I, s. V, (138).

¹⁰⁶ Grotius, *DIBP*, bk I, ch. I, (138–139).

¹⁰⁷ Grotius made the distinction between two kinds of rights and the corresponding forms of (distributive and commutative) justice already in Grotius, *IHR*, chs X–XIII, (2–3). Even as he later moved away from the Aristotelian vocabulary, already here he ended in the conclusion that associated the law of nature wholly with the maintenance of subjective rights. Tuck, *supra* note 83, at 66–67; Schneewind, *supra* note 96, at 79–81.

¹⁰⁸ Grotius, *DIBP*, Preliminary Discourse, s. VIII, (86).

¹⁰⁹ For a discussion of the Grotian terminology here, see E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique* (1998), at 167–171.

¹¹⁰ Grotius, *DIBP*, bk I, ch. I, s. VIII, (143).

lesser merit, a relation before a Stranger, a poor Man before one that is rich.¹¹¹ While the rights of life and property as well as their derivatives – rights based on commutative relationships between individuals – were binding as strict law, entitlements based on allocative (distributive) justice, based on merit, charity, liberality and other such virtues, remained legally unenforceable. But, although they did not have any strong claim on the state and were not enforceable against a *facultas*, they were part of ‘law’ as moral science that had the objective of pushing subjects to virtue.¹¹²

This famous concept of subjective rights departed from the scholastic view of law as an instrument of universal justice where every thing and person would possess its determined place.¹¹³ From now on, ‘strict law’ would operate through the disposal by private individuals of their subjective rights in accordance with their inclinations; it would be for the state to see that they did this by respecting each other’s coterminous rights.¹¹⁴ By contrast, the imperfect social rights would remain confined in the court of conscience so that ‘if a Man owes another any Thing, not in strictness of Justice but by some other Virtue, suppose Liberality, Gratitude, Compassion, or Charity, he cannot be sued in any Court of Judicature, neither can War be made upon him on that Account’.¹¹⁵ No humanitarian intervention was allowable on Grotian premises. *De iure belli ac pacis* projected a system of just war by conceptualizing the international society (or, indeed, any society) in terms of the horizontal system of subjective rights to which corresponded a duty on everyone not to cause ‘injury’ to them.¹¹⁶ It was then to the elucidation of what rights we have that the largest part of Book II of *De iure belli ac pacis* was devoted. That his work has been seen as a general treatise on natural law follows from the extraordinary exhaustiveness whereby Grotius undertook this task.¹¹⁷

8 Law as a ‘Moral Science’ of Government

It is true that, as moral science, law for Grotius also ‘comprehends the Acts of [such] other Virtues as of *Temperance, Fortitude and Prudence*; so that in certain Circumstances they are not only *honest*, but of an *indispensable Obligation*. Besides that ... *Charity* does

¹¹¹ Grotius, *DIBP*, Preliminary Discourse, s. VIII, (87–88).

¹¹² See further Haggemacher, ‘Droits subjectifs et système juridique chez Grotius’, in L. Foisneau (ed.), *Politique, Droit et Théologie chez Bodin, Grotius et Hobbes* (1997) 74. The role that Grotius left for virtues in a society predominantly ruled by natural rights has been much debated in recent years especially after Tuck declared that, with his system of subjective rights, Grotius had conducted an ‘open attack on the basis of Aristotelian ethics’. Tuck, *supra* note 83, at 75; see also Tuck, *supra* note 17, at 98–99. For a review of the debate, see, e.g., Gaddert, ‘Beyond Strict Justice: Hugo Grotius on Punishment and Natural Rights’, 76 *Review of Politics* (2014) 559.

¹¹³ See Jouannet, *supra* note 109, at 167–176.

¹¹⁴ See Tuck, *supra* note 17, at 66–77.

¹¹⁵ Grotius, *DIBP*, bk II, ch. XXII, s. XVI, (1112).

¹¹⁶ See again Haggemacher, *supra* note 112, at 98–99.

¹¹⁷ ‘*Ces développements de théorie juridique générale sont en fait si fouillés et semblent être tellement faits pour eux-mêmes qu’on oublierait par moments – s’il n’y avait des rappels périodiques en ce sens – qu’ils doivent servir en fin de compte à déterminer des causes de guerre possibles*’. *Ibid.*, at 99.

also oblige us'.¹¹⁸ Although such virtues were not the effect of contractual arrangements and could therefore not be enforced by public authorities, they still served to direct the ways of public government. When punishing offenders, for example, magistrates were to take into account 'the Nature and Circumstances of Fact' – a task that 'doth often require great Diligence, and the proportioning of Punishment' as well as 'much Prudence and Equity'. For this reason, 'in all well regulated Societies', those that were 'judged to be the best and most prudent' were to be appointed magistrates.¹¹⁹ All ruling was to take place through prudence and equity, for as Grotius acknowledged with express reference to Aristotle, 'we cannot expect the same Degrees of evidence in Moral, as in Mathematical Sciences'.¹²⁰ The criteria of prudence and equity, among other aspects of good government, were thus also included by Grotius in the third meaning of 'ius' as the same as 'law' ('*Lex*'), which was further divided into 'natural' and 'voluntary' law, the former comprising a wide category of judgments by 'Right Reason, shewing the Moral Deformity of Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature'.¹²¹ Something might be morally necessary even if it did not give rise to enforceable rights.

The project that Grotius set himself to accomplish was to turn law into a science of moral actions – actions, Annabel Brett has observed, that were voluntary rather than natural and that therefore could (and ought) to be directed in accordance with 'invariable rules' and principles.¹²² One consequence of this was the imprecision of the result. Moral reasoning (a sub-class of which was legal reasoning) produced only more or less persuasive arguments, the famous *a priori* and *a posteriori* points that Grotius discussed in the Preliminary Discourse and which called for contextual balancing. As he wrote, '[i]n Things of a Moral nature ... those Means which conduce to certain Ends do assume the very Nature of that End'.¹²³ If we have the 'moral quality' of a right, we are authorized by natural law to do what is necessary for its realization, sometimes even against those who are innocent. But it is also the case that the 'law of Charity' might call upon us to mitigate such effect.¹²⁴ Here, it appears, two rights (mine and that of the innocent person) clash so that prudential adjustment is needed.

In other words, different kinds of 'moral quality' entailed different kinds of duties, whose relationship to each other was not always obvious, as illustrated by the famous contrast between just war, which was regulated by natural law, and solemn public war ('*bellum solenne*'), which was addressed under the voluntary law of nations.¹²⁵

¹¹⁸ Grotius, *DIBP*, bk II, ch. I, s. IX, at 1, (403–404).

¹¹⁹ Grotius, *DIBP*, bk II, ch. XX, s. IX, at 4, (974–975). Many more examples of prudential administration of punishment are given in Gaddert, *supra* note 112, at 566–574.

¹²⁰ Grotius, *DIBP*, bk II, ch. XXIII, s. I, (1115).

¹²¹ Grotius, *DIBP*, bk I, ch. I, s. X, at 1, (150–151).

¹²² Brett, *supra* note 43.

¹²³ Grotius, *DIBP*, bk III, ch. I, s. II, at 1, (1186). Or bk II, ch. V, s. XXIV, at 2, (554): '[I]n Things of a moral Nature, what is necessary to obtain the End has the Force of Law.'

¹²⁴ Grotius, *DIBP*, bk III, ch. I, s. II, at 2, (1186–1187); bk II, ch. I, s. IV, at 1, (389).

¹²⁵ The latter type of war was 'generally called *Lawful*, or *made in Form*'. Grotius, *DIBP*, Preliminary Discourse, s. XLII, (113); bk III, ch. IV, (248); bk III, ch. X, s. III, (1416); see also Haggemacher, *supra* note 62, at 526–529.

The latter often permitted action that was prohibited by the former. How was this possible? Was not natural law ‘so unalterable, that God himself cannot change it’?¹²⁶ Well, to explain this, Grotius had recourse to the scholastic device of making a distinction – a division of the law of nations into two sub-types: ‘that which is truly and in every respect lawful, and that which only provides certain external Effect after the Manner of [Civil Law].’¹²⁷ The former only implemented the precepts of the law of nature and shared its binding character on consciences. The latter deviated from the law of nature for reasons of prudence or pragmatism. It included provisions such as, for example, enforcement against private traders for the recovery of public debt when the danger of final loss otherwise became too great.¹²⁸ Likewise, the law of nations allowed third parties to refrain from judging the war’s justness, owing to the ‘danger[]’ that they might otherwise be ‘quickly involved’ in the conflict themselves.¹²⁹

But solemn public war was not entirely dissociated from the requirements of justice and equity. Although it had been ‘established by Nations’ that both sides were entitled to kill their enemies and destroy and appropriate enemy property, all such powers were supplemented by the famous ‘*temperamenta*’ – calls for moderation, extensively detailed in Chapters X–XVI of *De iure belli ac pacis*. A belligerent may indeed enjoy impunity for killing the enemy, but such an act is never ‘entirely innocent’; whether this was the right thing to do ‘internally’ was to be measured by reference to a moral evaluation of the objectives of the action.¹³⁰ The distinction between internal and external duties did not – as it may seem – signify the separation of (‘mere’) morality and law. Both were regimes of law as a system of moral action – in the one case, the action was ‘lawful in itself’; in the other, it was ‘only lawful externally’.¹³¹ The distinction embodied Grotius’ realistic acknowledgement of the legality of certain practices of warfare that had been accepted by European sovereigns, whatever their status under ideal theory. He rejected the pacifism of Erasmus as firmly as he had rejected the scepticism of Carneades.¹³² But the distinction allowed him to take a critical standpoint towards the warring parties even when they acted under the law of nations and to recommend actions ‘which our Reason declares to be honest, or comparatively good tho’ [sic] they are not enjoined us’.¹³³ The representatives of jurisprudence were to

¹²⁶ Grotius, *DIBP*, bk I, ch. I, s. X, at 5, (155).

¹²⁷ Grotius, *DIBP*, Preliminary Discourse, s. XLII, (113).

¹²⁸ Grotius *DIBP*, bk III, ch. II, s. II, (1233–1234).

¹²⁹ Grotius, *DIBP*, bk III ch. IV, s. IV, (1275–1277). A good discussion of the law of nations is Schwartz, ‘Grotius on the Moral Standing of the Society of Nations’, 14 *Journal of the History of International Law* (2012) 123, at 130–136.

¹³⁰ Grotius, *DIBP*, bk III, ch. IV, s. V, at 2 (1279); bk II, ch. V, s. XXIV, at 2, (554): ‘[I]n Things of a moral Nature, what is necessary to obtain the End has the Force of Law.’

¹³¹ Grotius, *DIBP*, bk III, ch. X, s. I, at 3, (1414) and the long discussion of the meanings of the verb *licere* in bk IV, ch. II–IV, (1271–1277); see also Haggemacher, *supra* note 62, at 579–588 (pointing out the way Grotius’ adopts the scholastic distinction between ‘*forum externum*’ and ‘*forum internum*’).

¹³² Grotius, *DIBP*, Preliminary Discourse, s. XXX, (106–107).

¹³³ Grotius, *DIBP*, bk I, ch. I, s. X, at 3, (153, 154). Likewise, Preliminary Discourse, s. XXXVI, (108) (distinguishing two types of ‘what is lawful’, namely ‘that which is done with bare impunity’ and that which is ‘really blameless’).

instruct rulers and subjects not only about their formal rights but also about virtuous behaviour, good mores and a sense of equity and appropriateness, items ‘which [are] the foundation of social life’.¹³⁴ A Dutch patriot needed also to be a staunch moralist!

No doubt, Grotius saw himself providing a realistic view of how a political community could thrive in a world of expanding commerce, colonization and continuous war.¹³⁵ Legal obligation would bind subjects in their conscience, but this was not a problem because that obligation was intended to affirm their natural rights. Enforcement of the law was delegated to a strong public authority the nature of which changed somewhat on the way from *De iure praedae* to *De iure belli ac pacis*. The pragmatic interest in the former to authorize the violence exercised by the Dutch East India Company in the colonies was replaced in the later work by the effort to limit religious resistance to public power at home and to deal with ‘[I]licentiousness in regard to War, which even barbarous Nations ought to be ashamed of’.¹³⁶ Stress in *De iure praedae* had been on how private actors were entitled to punish rights violators, while, in the later work, public authorities would be allocated primary responsibility for ensuring that everyone could enjoy their rights peacefully. The fact that no stable theory of statehood emerged from these works resulted from the Janus-faced character of the result; depending on one’s standpoint, one could see either a system of natural rights or a hierarchical system of public authority.¹³⁷

9 ‘[T]he Law (especially That of Nations), Is in a State, Like the Soul in the Human Body’¹³⁸

In *De iure belli ac pacis*, Grotius achieved the final formulation of his ‘contractual theory of absolute sovereignty’.¹³⁹ Instead of beginning from God’s will, as he had done in his early work, he now began with the nature of human sociability.¹⁴⁰ No distinction emerged between the rise of property rights and public authority. Because the point of the exercise was the protection of liberty and property, the end result was a ‘[c]ommunity of Rights and Sovereignty’.¹⁴¹ Private and public authority further intermingled in two ways. First, the motive for the establishment of public power lay in the effort to maintain social peace with which Grotius understood a situation where ‘every one should quietly enjoy his own, with the Help and with the united Force of

¹³⁴ Haakonssen, *supra* note 102, at 27.

¹³⁵ This was not lost on near contemporaries such as J.H. Boeckler (1611–1672), who read *De iure belli ac pacis* as a contribution to the literature of *Fürsten- und Rathsherren-spiegel*. See Hoffmann-Loertzer, *supra* note 13, at 37, 38.

¹³⁶ Grotius, *DIBP*, Preliminary Discourse, s. XXIX, (106).

¹³⁷ The characterization ‘Janus-faced’ is from Tuck, *supra* note 17, at 79. The absence of a theory of statehood, again, is discussed in C. Link, *Hugo Grotius als Staatsdenker* (1983), at 17–22.

¹³⁸ Grotius, *DIBP*, bk III, ch. III, s. II, at 2, (1250).

¹³⁹ M. Loughlin, *Foundations of Public Law* (2010), at 75.

¹⁴⁰ Grotius, *DIBP*, Preliminary Discourse, s. XVII, (93).

¹⁴¹ Grotius, *DIBP*, bk II, ch. IX, s. VIII, at 2, (672).

the Community'.¹⁴² This was a restatement of Grotius' legalism; everyone's attachment to their liberty and property will inspire them to understand that this requires the reciprocal honouring of everybody else's freedom and property as well. Second, the process whereby the 'pact' was concluded – by '[r]ight of *Prior Occupancy*', on the one hand, or an act of 'subjection' by consent, on the other – differed normally in no way from the ways in which private property was gained: 'Jurisdiction and Property are usually acquired by one and the same Act,'¹⁴³ the juridical nature of the process was illustrated by the way it joined both *corpus* and *animus*: 'Where there is no Will, there is no Property.'¹⁴⁴

Grotius remained vague about whether the act of seizure or the 'pact' was the real origin of sovereign authority – this did not really matter because both were simply evidence of the presence of right-creating will. Everything was transferred, but how the powers then would be distributed between the different 'magistrates' differed on a case-by-case basis:

For those who had incorporated themselves into any Society, or subjected themselves to any one Man, or Number of Men, had either expressly, or from the Nature of the Thing must be understood to have tacitly promised, that they would submit to whatever either the greater part of the Society, or those on whom the Sovereign Power had been conferred, had ordained.¹⁴⁵

The extent of political sovereignty was then not derived from the pact but, rather, from the nature of political community as the 'most perfect of all societies'.¹⁴⁶ The constitutional form or the distribution of the 'marks of sovereignty' may vary, even greatly. Some sovereigns possessed patrimonial rights; others did not. Many were bound by promises or alliances (and even unequal treaties) with other states. But 'sovereignty' itself was invariable, connoting supreme power 'whose acts are not subject to another's Power, so that they cannot be made void by any other human Will'.¹⁴⁷ In the same way, the state remained juridically the same even when its constitutional form changed. The choice between monarchy, aristocracy and democracy was something for politics or the political scientist ('*politicus*') to deliberate. By contrast, the presence of statehood and the identity of a '*civitas*' was a legal matter, unaffected by such transformations.¹⁴⁸ Finally, though sovereignty and property arose from the same acts, they were not to be confused. What was acquired as 'sovereignty' was 'jurisdiction'

¹⁴² Grotius, *DIBP*, bk I, ch. II, at 5, (184).

¹⁴³ Grotius, *DIBP*, bk II, ch. III, s. IV, at 2, (457) (emphasis in original).

¹⁴⁴ Grotius, *DIBP*, bk II, ch. IX, s. I, (664).

¹⁴⁵ Grotius, *DIBP*, Preliminary Discourse, s. XVI, (93).

¹⁴⁶ Grotius, *DIBP*, bk II, ch. V, s. XXIII, (552).

¹⁴⁷ Grotius, *DIBP*, bk I, ch. III, s. VII, (259). Or as Grotius put it, '[w]e must distinguish between the Thing itself, and the Manner of enjoying it'. *DIBP*, bk I, ch. III, s. XI, (279). Sovereignty may thus be divided with other states, limited by treaties or even by promises to the subjects (these latter, however, may not be enforced against the sovereign) without this diminishing the extent of the power that 'sovereignty' connotes. See *DIBP*, bk II, ch. III, at 14, (296); 16, (300–305); 21, (318–330); see further bk I, ch. III, s. XXIV, (335).

¹⁴⁸ Grotius, *DIBP*, bk II, ch. VIII, at 2, (672). Its 'spirit', the association with 'common sovereignty', remains. A. Brett, *Changes of State: Nature and the Limits of the City in Early Modern Natural Law* (2011), at 137–138.

either in a territorial or a personal sense. This would be in the hands of the constitutional ruler(s) who were bound to maintain and secure it. This contrasted with ‘property’, which could also be transferred to foreigners without affecting the powers of jurisdiction.¹⁴⁹

Although governmental power (as ‘sovereignty’/jurisdiction) was received from the ‘people’ and could be divided (even with a foreign power), there was no sense in which it would ever be held by the ‘people’. Grotius distinguished between sovereignty’s ‘common’ and ‘proper’ subject somewhat like he had earlier distinguished between the *respublica* and the magistrates. The former was the source of law and the constitution. By concluding the ‘pact’, the people constituted themselves as a body of citizens – both a *civitas* and a *populus* – and decided on how the marks of sovereignty were to be distributed. But they did not rule. Instead, it was the ‘proper’ sovereign – the prince and other holders of marks of sovereignty – who had the exclusive power to govern the state.¹⁵⁰

The political community in Grotius’ mature work was utterly committed to advancing ‘the peaceful Enjoyment [by subjects] of their own Rights’.¹⁵¹ It was not just some group of robbers or pirates. This was so even if the people or the ruler acted tyrannically. It would still be that manifestation of a legally articulated reason under which the subjects recognize each other as right-bearers committed to solving their disputes by a centralized system of enforcement. The law was absolutely central: ‘And a State (*civitas*), however distempered, is still a State, as long as it has Laws and Judgments, and other Means necessary for Natives, and Strangers, to preserve or recover their just Rights ... [t]he Law (especially that of Nations) is in a State, as the Soul in a human Body, for that being taken away, it ceases to be a State.’¹⁵² The law was what accounted for the continued identity of a state, whether seen as a *populus*, a *civitas* or a *respublica*. This was so because the ‘peace’ that was the objective of the state was not just any kind of system of government (of terror, for example). It was the ability of the subjects to enjoy their rights without disturbance and to bring violations to be adjudicated by public authorities. The very point of government and the basic limit to a ruler’s authority lay in the peaceful operation of civil society, the systems of property and commercial exchange. When Grotius wrote that the law of nations was the ‘soul’ of a state, he meant the basic structure of individual rights and the duty of the magistrate to enforce them. The substance of the laws or even of the character of the constitution was a secondary, ‘political’ matter.¹⁵³ The important thing lay in the foundation of a state on a ‘pact’ and the possession by individual right holders of a ‘common sovereignty’ that, even as it normally lay dormant, nevertheless provided the natural and conceptual condition for a just government.

¹⁴⁹ Grotius, *DIBP*, bk II, ch. III, s. IV, at 1–2, (456–457).

¹⁵⁰ See further Tuck, *supra* note 80.

¹⁵¹ Grotius, *DIBP*, bk III, ch. III, s. III, at 1, (1247).

¹⁵² Grotius, *DIBP*, bk III, ch. III, s. II, at 2, (1249–1250) (Latin text *DIBP*, bk III, ch. III, s. II, at 2, [673]).

¹⁵³ Grotius, *DIBP*, bk II, ch. IX, s. VIII, at 2, (672).

The rule of law was visible everywhere. Because the people had bound the ruler(s) to act in accordance with constitutional principles, actions contrary to them would be void.¹⁵⁴ If rulers acted outside their public function – for example, when engaged in commercial ‘buying and selling’ – they were bound by the law just like their subjects.¹⁵⁵ Immunity for acts carried out in public capacity followed from the fact that they were ‘looked on as done by the whole Nation’.¹⁵⁶ What it meant to say that the law was ‘in a state like the soul in a human body’ was that it created that unity without which the pact-making individuals would remain alien to each other and their needs and interests in constant opposition. The unity of the state could not reside in a religious duty, and obedience was compulsory, famously ‘though we should even grant ... that there is no God’.¹⁵⁷ Grotius sometimes referred to the common utility of the subjects as the principle that united the state but gave it no independence from the aggregation of the special utilities of the subjects. Something more was needed, and, in the section that dealt with the extinction of states (and property), Grotius explained what that something was. Although states (now variably associated with the ‘people’) consisted of ‘separate and distant Members’, he wrote, they were nevertheless ‘united in Name’ as having a ‘Constitution’ or a ‘Spirit’ (*spiritus*). It was ‘this Spirit and Constitution in the People’ that made states cohere in ‘a full and compleat Association for a political Life (*vitae civilis consociatio plena atque perfecta*)’ and provided them with ‘the sovereign Power, the Bond that holds the State together (*per quod respublica cohaeret*)’.¹⁵⁸

‘Spirit’ – ‘constitution’ – ‘sovereign power’; the political community received in Grotius’ mature work formed an ephemeral unity that, although based on the ‘pact’, ultimately separated itself from the interests of the pact makers, ascending to a higher spiritual level.¹⁵⁹ There, the constitution and the law became the ‘soul’ of the state; there, subjects would not only be externally, but also internally, subordinated to the laws. A spiritual entity was created, though not one whose servants would be found in the traditional church. The duty of obedience was to that entity, represented by ‘sovereign Power’ that governed through legislative action under the constitution. The spiritual unity of the state called the subjects for obedience to the acts of the ‘proper sovereign’. Because the entity they had created existed as a spirit, they were bound not only externally but also, above all, in the forum of their conscience.¹⁶⁰

¹⁵⁴ Grotius, *DIBP*, bk II, ch. XIV, s. II, at 1, (804).

¹⁵⁵ Grotius, *DIBP*, bk II, ch. XIV, s. V, (806–807); s. VI, at 2, (809); see also bk II, ch. III, s. IV, (296); bk II, ch. III, s. XVI, (300–305). Grotius accepts that the ruler may exempt himself just like he may exempt any of his subjects. But that is not to be presumed but ‘must be gathered from the Circumstances’. Grotius, *DIBP*, bk II, ch. XIV, s. II, at 2, (804–805).

¹⁵⁶ Grotius, *DIBP*, bk II, ch. XIV, s. I, at 2, (803).

¹⁵⁷ Grotius, *DIBP*, Preliminary Discourse, s. XI, (89).

¹⁵⁸ Grotius, *DIBP*, bk II, ch. IX, s. III, at 1, (665–666) (Latin text, *DIBP*, bk II, ch. IX, s. III, at 1, [322]).

¹⁵⁹ Thus, the state continues even when all of its founding subjects are dead, and while generations pass. The spiritual entity of the state dissolves only either when all of its subjects are destroyed or when the ‘Frame and Constitution of the Body is dissolved and broken’ as when they are brought into slavery or ‘utterly deprived of the Right of Sovereignty’. Grotius *DIBP*, bk II, ch. IX, ss V–VI, (670).

¹⁶⁰ Brett explains that Grotius adopts the notion of the ‘disposition’ or ‘spirit’ that maintains the unity of the state in those passages from the Stoic notion of *pneuma hektikon* that makes several parts cohere in a single ‘body’. Brett, ‘Natural Right and Civil Community’, *supra* note 48, at 48–50. I have used the text to give a legal sense to that coherence, the way contract creates a *volonté générale* capable of being imposed against individual contractors on the basis of no other criterion than their original, contract-making will.

10 Rule of Law and Economic Individualism

As Benjamin Straumann has noted, Grotius is a representative of the tradition of ‘economic individualism’ that leads from Marcus Cicero to John Locke (and onwards) and receives the justice of a system of distribution not from its result but, rather, from the process whereby it was established.¹⁶¹ Grotius himself was very clear of this orientation; as he put it in his early work, ‘[u]nder the law of nations ... all men should be privileged to trade freely with one another’. He meant thereby the ‘primary law of nations’ that allowed the natural law character of ‘the principle of exchange’ to be derived from the way nature had organized human societies so that trade had become a necessity among and between them.¹⁶² Grotius could not be too enthusiastic about free trade and navigation; they brought people together from all over the world, enabling the distribution of goods everywhere. They belonged to the ‘sacrosanct law of hospitality’, according to which ‘anyone who abolishes this system of exchange, abolishes also the highly prized fellowship in which humanity is united. He destroys the opportunities for mutual benefactions. In short, he does violence to nature herself’.¹⁶³

To avoid conditioning this busy world of exchange by objectives or moralities from the outside, Grotius claimed to have found in humans a natural sociability that prompted them to organize their relations in a peaceful manner even outside the structures of the state. Indeed, humans possessed rights, and contracts were binding both before the ‘pact’ and in areas (such as the high seas) beyond public authority. The state was needed to deal with human ambition and to set up laws on how to divide and administer properties so as to implement the rights of sociability. But it did not destroy the natural community – the ‘civil society’ that was their predominant sphere of interaction. Grotius did not say too much about this community – the ‘people’ or the ‘nation’ – beyond that it did not disappear with the rise of statehood and received legal meaning as the ‘common subject of sovereignty’ that legitimized the governmental powers of the ruler(s) (as the ‘proper subject of sovereignty’).¹⁶⁴ But, while those on whose behalf sovereignty was exercised played no role in government, they did exist as a community of free individuals, to be left ‘in quiet possession of what is already their own’.¹⁶⁵ The supposition was that properties had been divided already and rules about legitimate entitlements (‘what in strictness they can demand’) had been set before the ‘pact’ was concluded. Existing social relations were, in other words, to be left as they were, and the only task was to implement these in accordance with the laws.¹⁶⁶

¹⁶¹ B. Straumann, *Hugo Grotius und die Antike, Römisches Recht und römische Ethik im frühzeitlichen Naturrecht* (2007), 72–73.

¹⁶² Grotius, *DIP*, ch. XII, (354–355).

¹⁶³ Grotius, *DIP*, ch. XII, (303).

¹⁶⁴ Grotius, *DIBP*, bk I, ch. III, s. VII, (259). The terminological fluidity between the different notions of ‘people’ (*populus*) and ‘nation’ (*gens*) and their overlap with the political community (*respublica, civitas*) is discussed in Brett, ‘Space of Politics’, *supra* note 48, at 9–10.

¹⁶⁵ Grotius, *DIBP*, Preliminary Discourse, s. X, (88–89).

¹⁶⁶ See also the comment in S. Neff, *Hugo Grotius’ On the Law of War and Peace: A Student Edition* (2012), at 3, n. 9.

Even as much of the detail of Book II deals with themes that had been commonplace in scholastic property debates, the tone of Grotius' discussion and some of his conclusions are rather different from those of Vitoria or Domingo de Soto, not least when they relate to Dutch expansion. Grotius rejected the scholastic view that prohibited violent action to enforce natural law. A ruler was entitled to punish not only pirates or cannibals and those who were inhuman to their parents but also all those who 'offend against Nature' – a view that has been taken to justify 'a great deal of European action against native peoples around the world'.¹⁶⁷ Moreover, groups of people who needed passage over lands or rivers were to be granted such passage, including the right 'to settle in some uninhabited Land' when 'just Occasion' required this. This applied not only to persons but also to merchandise and, apparently, to military forces on their way 'to recover, by a just war, what is their own Right and Due'.¹⁶⁸ Finally, such travellers (in fact, colonists) may also lawfully occupy any uncultivated land in a foreign territory; in such case, they would nevertheless come under the public authority of the power that has jurisdiction over such area.¹⁶⁹

Gone was the Aristotelian framework that assessed the permissibility of mercantile activity by reference to the good of the community or the welfare of one's family. As Grotius explained in *Introduction to Dutch Jurisprudence*, the sole criteria from which to judge economic transactions were the will of the parties and the equality of their relationship – this equality being measured by the standards of commutative (expletive) and not distributive (attributive) justice.¹⁷⁰ No extrinsic consideration was needed for a promise to be binding; all that is needed is 'the bare Will, sufficiently declared'.¹⁷¹ This was not just a matter of positive law, but it also lay in 'the Nature of immutable justice'.¹⁷² The point of interpretation was to find out the party's will: 'Nothing is more natural, than that the Will of the proprietor, desiring to transfer his Title to another, should have its intended Effect.'¹⁷³ Any voluntary exchange is presumed valid unless there has been fraud or error – that is to say, unless the free operation of the will has been prevented.¹⁷⁴

The famous chapters on promises and contracts dovetailed prevailing business practices, carefully distinguishing rules that were part of natural law from those belonging

¹⁶⁷ Grotius, *DIBP*, bk II, ch. XX, s. XL, (1020–1025); Tuck, *supra* note 17, at 102–108 (arguing that these passages came into the work owing to the way the Dutch had recently begun to establish settlements in the East and eventually West Indies).

¹⁶⁸ Such passage could be subjected to reasonable conditions but not excessive taxation or other hindrances. Grotius, *DIBP*, bk II, ch. II, ss XIII–XVII, (439–449).

¹⁶⁹ Grotius, *DIBP*, bk II, ch. II, s. XVII, (448). In his editorial note, Barbeyrac disagreed with Grotius on this point, noting that even uncultivated land 'belong[ed] to the Body of the People' (448).

¹⁷⁰ In the *Introduction to Dutch Jurisprudence*, Grotius divided the law of obligations 'contracts (or 'Promissio') and 'inequality which profits another' and thus brings about a duty of the other party. Grotius, *IHR*, bk III, ch. I, s. IX, (272ff); see also E. Wieacker, *A History of Private Law in Europe with Particular Reference to Germany* (1952), at 234.

¹⁷¹ Grotius, *DIBP*, bk II, ch. XI, s. I, at 3–4, (701–702).

¹⁷² Grotius, *DIBP*, bk II, ch. XI, s. IV, (705).

¹⁷³ Grotius, *DIBP*, bk II, ch. XI, s. I, at 4, (701–702).

¹⁷⁴ E.g., Grotius, *DIBP*, bk II, ch. XII, s. X, (739).

to the civil law of particular nations or to the law of nations (very few). For example, Grotius gave much attention to trade by commission, enquiring into the powers of the commissioner – in practice, the ‘factor’ of the colonial outpost – to give promises or to accept performances, remarking specifically that those rules – that is, the rules concerning the delimitation of the powers of the representative and his master – ‘are founded upon the Law of Nature’.¹⁷⁵ Taking up an example close to Dutch interests, he remarked that the master of a ship must naturally be entitled to make contracts on behalf of the owner company, while the company’s liability, however, must be limited to the value of the ship and its goods. Otherwise, ‘[m]en would be discouraged from sending Ships to Sea if they were afraid of being, as it were, infinitely accountable for what the master of the Vessel did’. And, as he explains, not incorrectly, this would be especially bad for ‘Holland, whose Merchandize has of a long Time mightily flourished’.¹⁷⁶

The details of different types of contract – sale and barter, work contract, letting and hiring, contracts for society or insurance and so on – were to be determined by civil law and may ‘be as various as the Actions whereby any reciprocal Advantage may be procured’.¹⁷⁷ The law of nature only required basic equality between the parties. But this too may be deviated from by agreement, for, ‘where the Contributions are unequal, yet if they are consented to, and there be no Lie in the Case, nor any Thing concealed which should have been discovered, in all external Actions, they shall be looked upon as equal; so that ... no Action [is] allowed in Court against such an Inequality’.¹⁷⁸ The pragmatic reason for this rule – one of the few rules that Grotius rendered into the ‘voluntary law of nations’ – was that if one needed to prove the equality of a transaction, this would, ‘by reason of the uncertain Prices of Things’, lead to unending disputes as parties would be tempted to go back on bargains that turned out to be less advantageous than foreseen.¹⁷⁹ Grotius accepted the theory of market value that presumes the smooth operation of regular trade. Again, like his scholastic predecessors, Grotius defined the just price as what was agreed between the buyer and the seller, excepting the case of fraud, coercion or other such absence of genuine will. This helped the emergence of an autonomous system of normativity within commerce: value is decided on the market place, not by royal decree.¹⁸⁰ The law of nations would intervene only so as to make unpunishable something that would otherwise, under natural law, have violated the natural law principles of equality. Instead of the just price, the quality of the object now emerged as the standard to assess the legality of the transaction. Much attention was given to who was to bear the burden of proof.¹⁸¹

¹⁷⁵ Grotius, *DIBP*, bk II, ch. XI, s. XIII, (718).

¹⁷⁶ Grotius, *DIBP*, bk II, ch. XI, s. XIII, (719).

¹⁷⁷ Grotius, *DIBP*, bk II, ch. XII, s. III, at 5, (734–735). They are treated at length in the chapters on ‘Obligations’ in Grotius, *IHR*, bk III, (270ff).

¹⁷⁸ Grotius, *DIBP*, bk II, ch. XII, s. XXVI, at 1, (763).

¹⁷⁹ Grotius, *DIBP*, bk II, ch. II, s. XXVI, at 1, 3, (763, 766).

¹⁸⁰ See Wieacker, *supra* note 170, at 234.

¹⁸¹ As pointed out in regard to Dutch law at this time generally by Whitman, ‘The Moral Menace of Roman Law and the Making of Commerce: Some Dutch Evidence’, 105 *Yale Law Journal* (1996) 1841, at 1866–1868.

The main rule of *caveat emptor* was accompanied by a provision for fraud on the part of the seller. The duty to disclose matters that might affect the price, however, concerns only qualities of the thing itself and not extraneous circumstances. In the old example concerning the seller's knowledge about more ships laden with corn that are under way, non-disclosure might be a breach of charity, but not an illegality.¹⁸²

Grotius noted the regular fluctuation of price in the market as a function of scarcity. The labour theory of value picked just one of the many factors that affected the common estimation and could not therefore be decisive.¹⁸³ It was thus best to accept the market price – that is to say, how much is customarily offered for a thing in view of the demand, with exception for where price has actually been fixed.¹⁸⁴ The value of money was determined no differently – money was, as he cryptically summarized, 'sometimes worth more, sometimes less'.¹⁸⁵ Grotius rejected vehemently the argument about the sterility or barrenness of money – after all, the 'Industry of Man has made Houses, and other Things naturally barren, to become fruitful'.¹⁸⁶ Usurious practices were prohibited, but some agreements usually regarded as usury in fact may contain provision for *damnum emergens* or *lucrum cessans* and are therefore unproblematic. In addition, 'moderate profit' for lending is allowed. This includes the profits allowed in Holland – namely, 8 per cent for regular lending between citizens and 12 per cent for 'trading People'.¹⁸⁷

This did not mean that subjects' property was sacrosanct. It was subordinated to the ruler's 'super-eminent Right' or 'eminent Domain' ('*dominium eminens*') that extended to 'all the Goods of the Subjects'.¹⁸⁸ This meant that the ruler was entitled to order subjects to participate in the defence of the realm as well as to tax them as necessary for the common good.¹⁸⁹ But the government had no distributive powers; effect was to be given to property rights and private contracts irrespective of considerations of need or merit.¹⁹⁰ The right to confiscate was limited to two cases – punishment and where this may be done for 'publick Advantage' against 'just Satisfaction'.¹⁹¹ But all of these

¹⁸² Grotius, *DIBP*, bk II, ch. XII, s. IX, at 2, (738).

¹⁸³ Grotius, *DIBP*, bk II, ch. XII, s. XIV, at 2, (744–745).

¹⁸⁴ Grotius, *DIBP*, bk II, ch. XII, s. XIV, at 1, (744). Grotius remained silent as to when that might be advisable.

¹⁸⁵ Grotius, *DIBP*, bk II, ch. XII, s. XVII, (751).

¹⁸⁶ Grotius, *DIBP*, bk II, ch. XII, s. XX, at 1, (753).

¹⁸⁷ Grotius, *DIBP*, bk II, ch. XII, s. XXII, (760); see also the discussion of profit and usury in the *Jurisprudence of Holland*, where Grotius bases the right of profit on the argument from *lucrum cessans*, with provision for situations where 'poor people or greedy people ... are in time ruined with usurious interest'. In Holland, this is provided for the limit of 6 ¼ per cent per annum between individuals and 12 per cent between merchants. See Grotius, *IHR*, bk III, ch. X, s. X, (326).

¹⁸⁸ See Grotius, *DIBP*, bk III, ch. XIX, s. VII, (1540); bk II, ch. XXI, s. XI, at 3, (1084). Grotius uses these notions sometimes synonymously, sometimes appearing to indicate with the former a general territorial power and with the latter the specific power over a subject's property.

¹⁸⁹ For the latter case, see Grotius, *DIBP*, bk III, ch. XX, s. VII, at 1, (1556).

¹⁹⁰ The king had, as he explained, not 'been appointed Judge of what fitted each [of his subjects] best ... it was his Business to ... consider[] ... which had a just Title'. Grotius, *DIBP*, I, ch. I, s. VIII, at 2, (147).

¹⁹¹ Grotius, *DIBP*, bk II, ch. XIV, s. VII, (810); see further S. Reynolds, *Before Eminent Domain: Towards a History of Expropriation of Land for the Common Good* (2003), at 94–100.

limitations applied only to subjects; foreigners were not under the ruler's sovereignty so that, apart from the case of criminal punishment, their rights remained inviolable.¹⁹² In accordance with older doctrines, Grotius conceived property to be limited in a state of necessity. In a life-threatening situation such as fire or distress at sea, it was permitted to intervene with property, or, as Grotius explained, the original use right that had existed in the natural state was reinvigorated.¹⁹³ But the power of expropriation for a public good against just compensation was wider than the state of necessity and was geared to the fulfilment of the objectives of the civil pact; the civil community was entitled to demand that its members pay their share of its functioning.¹⁹⁴

In this way, Grotius combined a 'market' notion of civil society with a public power as a kind of local police answerable to the 'nation' – that is, the fathers of families who had set it up and determined its authority by adopting a 'constitution' to it. This did not at all mean that the powers of public authority were necessarily very limited. On the contrary, as Eric MacGilvray has written, subjective rights 'provide a new and powerful secular defense of the legitimacy of absolute rule'.¹⁹⁵ It was possible (and, as far as Grotius was concerned, advisable) for the pact makers to subordinate themselves to it in a very extensive way; even some sort of contract for collective enslavement was possible.¹⁹⁶ All trace of the ideals of virtuous citizenship that Grotius had once identified with the history of the 'Batavians' had vanished in *De iure belli ac pacis*. The call for virtuous government had become a set of non-enforceable exhortations directed to the king and the elites. The political freedom of the subjects was exhausted in the act of giving it up. This would open the way for the realization of another kind of freedom that had to do with their undisturbed enjoyment of private rights, not as citizens, however, but as members of civil society, owning things and trading them with each other.

11 Grotian 'Politics of the Rule of Law'

Grotius was extraordinarily effective in providing a sense of autonomy and normative power to law as a 'moral science', based on the nature of human beings as beings capable of reasoning from rules and principles instead of just acting out their interests or inclinations. In a world of expanding conflict and saturated by talk about the *raison d'état*, many people must have been ready to hear this. Constructing a persuasive science of European public life was a work of great complexity, however. A number of

¹⁹² Grotius, *DIBP*, bk II, ch. XIV, s. VIII, (810).

¹⁹³ Grotius, *DIBP*, bk II, ch. II, s. VI, at 2–3, (434). As Buckle explains, this is not an application of any right of charity but, rather, an independent justification resulting from the nature and natural limits of property. S. Buckle, *Natural Law and the Theory of Property* (1991), at 46–47. The standard in regard to individuals is, however, extremely tight and seems to require a danger to life ('if not starvation, then crime') (at 47); see also Haakonssen, *supra* note 102, at 28.

¹⁹⁴ This right of compensation was mitigated by the duty of the subjects to participate in the discharge of public debt. Grotius, *DIBP*, bk XX, ch. VII, at 2, (1556).

¹⁹⁵ E. MacGilvray, *The Invention of Market Freedom* (2011), at 66.

¹⁹⁶ Grotius, *DIBP*, bk II, ch. V, ss XXVIII, XXXI, (556–558, 563).

factors needed to be considered: the readers' religious attitudes, the way they would receive views on commerce and colonization and the facts and strategies of contemporaneous warfare. Not everyone immediately approved of the result. Grotius was attacked both as a closet atheist and as a utopian dreamer. If later readers have situated his approach between Hobbes and Kant, this has reflected his eclectic style, the complex mediations between law and rights, natural law and *ius gentium*, internal and external duties, just war and solemn public war. It is pointless to ask whether he 'really' fell on one or the other side in such dichotomies – whether he 'really' was a naturalist or a positivist, for example. The power of his texts lies in the way they resist closure in such terms. Their open-endedness allows for their use for the most varied purposes.

So there is both a 'rule of law' and a 'politics' in Grotius. The former emerges from his constant reiteration that law cannot be reduced to prudential or utilitarian maxims; it points to an autonomous 'reason' that, he believed, enables all humans to grasp the rules that bring them together in civil communities. Grotius did not wholly depart from the older view that looked for the good life of the citizens and the public utility of the *polis*.¹⁹⁷ His 'moral science' exhorted governments to exercise prudence and equitable discretion. Rulers ought to act virtuously even during war, at least if this did not undermine victory and the punishment of the unjust adversary. The rules of natural law and *ius gentium* were not limited spatially, however; they enabled private right holders to move about in the world and to contract and exchange property under the firm, but benevolent, eye of their rulers.¹⁹⁸ These are people who look for life in prosperity by moving between the tranquillity in their private homes and the factories and trading posts that they have established abroad. They have left behind whatever republican ambitions they may once have had (though they may sometimes look back with more or less nostalgia towards the hard times of war and state building) and desire nothing more than to be ruled by wise and mild sovereigns watching over the communities within which they raise their families, manage their properties and humbly accept the rewards that providence will continue to thrust on them.

But Grotian 'formalism' also had limitations. In the first place, while it did provide a powerful justification for strong government, it did not have much to say about the daily business of ruling. In this respect, it fell far short of the *raison d'état* literatures that extensively discussed the hands-on aspects of the efficient government: uses of natural resources, financial administration, conduct with respect to subjects, the role of religion as well as diplomatic and military strategy. Grotius offered nothing of comparable usefulness to the writings of one of Cardinal Richelieu's publicists, later Cardinal

¹⁹⁷ For an even stronger case for Grotius as a representative of an ethic of 'care for others and the good of society', see Nijman, 'Grotius' *Imago Dei* Anthropology', in M. Koskeniemi *et al.*, *International Law and Religion: Historical and Contemporary Perspectives* (2017) 87, at 106.

¹⁹⁸ I take it that this is close to what Annabel Brett means when she observes that 'Grotius ... resists theorising the international arena in terms of states as persons'. Brett, 'Space of Politics', *supra* note 48, at 19. Instead, government in a sense trails after private individuals over different spaces as the latter go about occupying land and trading goods with foreigners across the world.

Jules Mazarin's librarian, Henri Duke of Rohan: '*Les Princes commandent aux peuples et l'intérêt commande aux Princes*.'¹⁹⁹ The work suggests that the management of the interests of important social groups would also be for the interest of the prince and his state. Rohan lay out a programme for the scientific conduct of policy based on a careful management of the resources of one's state – its climate, its population, its economy and so on – principles on which Charles-Louis Montesquieu would later base his sociological brand of natural law.²⁰⁰ Grotius really had very little to say about the details of good government. It was only towards the end of the century that Samuel Pufendorf began to integrate *raison d'état* into natural law from his position at Heidelberg and later as advisor to the Swedish and Prussian governments.²⁰¹ In the course of the 18th century, legal scholars in Germany would gradually develop a real governmental science (*Policeywissenschaft* and *Policey-Recht*) that would turn from the justification of sovereign powers to their use in the efficient ruling of the modern state machine.²⁰²

Second, however much revolutionary thinkers such as Jean-Jacques Rousseau detested the authoritarianism of *De iure belli ac pacis*, the idea of human beings as *sui iuris* possessors of private rights could not fail to influence political modernity. For a conservative jurist such as Michel Villey, the contribution of Grotius did not lie in his originality – he had little of that – but precisely in the way he employed old themes to create an absolutist doctrine of rights that paid no attention to the circumstances in which they were to be employed.²⁰³ It is true that the focus of those rights was on enabling economic actors – such as the Dutch East India Company – rather than private individuals and that he reserved no role in government for the 'people' in his mature work.²⁰⁴ But, since then, in the hands of other people and under the influence of Locke, subjective rights of liberty and property have not only become applicable against the government but also have served to re-describe government itself as a trustee for the realization of just those rights. In Locke's famous view, 'the great and chief end ... of men uniting into commonwealths, and putting themselves under government is the preservation of their property'.²⁰⁵

Glancing backwards at these two aspects of Grotius' work, it is not hard to see how important both have been for later developments, pushing political imagination and activism in two opposing directions. On the one hand, there has been the growth of

¹⁹⁹ H. de Rohan, *De l'intérêt des princes et des Etats de la Chrétienté*, edited by C. Lazzeri (1995), at 161. The work was completed probably in 1634.

²⁰⁰ Even Bodin had stressed the importance of analysing the environmental conditions of states in order to understand their constitutional systems. W. Church, *Constitutional Thought in Sixteenth Century France: A Study in the Evolution of Ideas* (1941), at 216–217.

²⁰¹ See M. Stolleis, *Staat und Staatsräson in frühen Neuzeit* (1990).

²⁰² I have told this story in 'Variations of Natural Law: Germany 1648–1815', in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of International Legal Theory* (2016) 59.

²⁰³ This, Villey wrote, 'was perfectly appropriate to procure the security of established possessions, the certainty of transactions, the calm required by economic development, the limitation of violence but [all this] to the detriment of justice'. M. Villey, *La formation de la pensée juridique moderne* (2006), at 557.

²⁰⁴ For that earlier work, see H. Grotius, *Ordinum Hollandiae et Westfrisiae pietas*, critically edited with English translation and *De iure praedae* by E. Rabbie (1995 [1613]).

²⁰⁵ J. Locke, *Two Treatises of Government* (1924), Second Treatise, para 124, (180). By 'property', he meant the 'lives, liberties of estates' of human beings, para 123 (180).

government – bureaucratization, governmentality and the expansion of the welfare state – and the management of the economy and society for the ‘good of the community’, whatever that elusive expression may have been taken to mean. The period of Grotius was followed, as Pierre Rosanvallon has remarked, by a remarkable expansion of executive power across Europe, accompanied by ‘*une véritable sacralisation des lois ... au XVIIIe siècle*’.²⁰⁶ In its search for ‘utility’, the modern science of legislation would eventually shake hands with another creation of 18th-century natural law – namely, economics. The colonization of the life world by constantly expanding economic and technical management was to be disciplined by the parallel development of parliamentary democracies – another type of rule of law. But, as governance became ‘global’, the democratic imagination remained fatally hampered by the way its focus was limited to the single polity. To compensate, Western societies in the 1970s began to remember the universal and inalienable nature of subjective (human) rights, that other great Grotian theme. Could the executive governance of global regimes of knowledge and interest be perhaps controlled by formal entitlements to liberty and property of every individual across the world? In coming to terms with the backlash against the rule of law today, it is insufficient to focus only on its technocratic-managerialist or its individualist side; the two can hardly be separated from each other. During the 1990s, human rights shook hands with the global expansion of economic and expert governance. It is that bargain that is today being questioned: does the capacity to file a human rights complaint suffice to offset the afflictions of life in an underclass targeted by unending austerity?

²⁰⁶ P. Rosanvallon, *Le bon gouvernement* (2015), at 37.