IDEAS IN CONTEXT

Roman Law in the State of Nature

The Classical Foundations of Hugo Grotius' Natural Law

BENJAMIN STRAUMANN

ROMAN LAW IN THE STATE OF NATURE

Roman Law in the State of Nature offers a new interpretation of the foundations of Hugo Grotius' natural law theory. Surveying the significance of texts from classical antiquity, Benjamin Straumann argues that certain classical texts, namely Roman law and a specifically Ciceronian brand of Stoicism, were particularly influential for Grotius in the construction of his theory of natural law. The book asserts that Grotius, a humanist steeped in Roman law, had many reasons to employ Roman tradition and explains how Cicero's ethics and Roman law – secular and offering a doctrine of the freedom of the high seas – were ideally suited to provide the rules for Grotius' state of nature. This fascinating new study offers historians, classicists, and political theorists a fresh account of the historical background of the development of natural rights, natural law, and international legal norms as they emerged in seventeenth-century early modern Europe.

BENJAMIN STRAUMANN is Alberico Gentili Fellow at New York University School of Law. He is the editor, with Benedict Kingsbury, of Alberico Gentili's *The Wars of the Romans: A Critical Edition and Translation of De armis Romanis* (2011). With Nehal Bhuta and Anthony Pagden, Straumann edits the new series in the History and Theory of International Law for Oxford University Press.

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"[Moral] science had been most highly esteemed by the wisest of the ancients, who devoted themselves to its study with great care. It then lay buried under debris, together with almost all the other noble arts, until a little after the beginning of the last century, when it was restored to more than its pristine splendor . . . by the incomparable Hugo Grotius in his outstanding work *The Rights of War and Peace*."

Gershom Carmichael (1724)

"[L]es compilations de Grotius ne méritaient pas le tribut d'estime que l'ignorance leur a payée. Citer les pensées des vieux auteurs qui ont dit le pour et le contre, ce n'est pas penser."

Voltaire (1768)

"The system of Grotius is implicated with Roman law at its very foundation, and this connection rendered inevitable – what the legal training of the writer would perhaps have entailed without it – the free employment in every paragraph of technical phraseology, and of modes of reasoning, defining, and illustrating, which must sometimes conceal the sense, and almost always the force and cogency, of the argument from the reader who is unfamiliar with the sources whence they have been derived."

Henry Sumner Maine (1861)

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Preface and acknowledgments

This book presents an argument about the foundations of Hugo Grotius' system of natural law. While Grotius provided a very wide variety of citations to develop and bolster his theory, only certain kinds of sources were authoritative, namely Roman law and Ciceronian ethics – or so this monograph argues. My book does not simply take Grotius' practice of citation as conclusive, but instead offers an argument that specific Roman sources were much more important to Grotius than the other texts he cites and indeed provided the foundations for his highly influential system of natural jurisprudence.

Parts of this book have appeared previously in various places, and I am grateful to the editors and publishers of that material for allowing republication in the present book: "*Appetitus societatis* and *oikeiosis*: Hugo Grotius' Ciceronian Argument for Natural Law and Just War," *Grotiana* 24–25 (2003–4); "The Right to Punish as a Just Cause of War in Hugo Grotius' Natural Law," *Studies in the History of Ethics* 2 (February 2006); "'Ancient Caesarian Lawyers' in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius' *De iure praedae*," *Political Theory* 34, no. 3 (2006); "Natural Rights and Roman Law in Hugo Grotius's *Theses LVI*, *De iure praedae* and *Defensio capitis quinti maris liberi*," *Grotiana* 26–28 (2005–7), also published in H. W. Blom, ed., *Property, Piracy and Punishment: Hugo Grotius on War and Booty in* De iure praedae (Leiden: Brill, 2009); "Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius' Early Works on Natural Law," *Law and History Review* 27, 1 (Spring 2009); "Introduction" (with Benedict Kingsbury), in Alberico Gentili, *The Wars of the Romans: A Critical Edition and Translation of* De armis Romanis, ed. B. Kingsbury and B. Straumann (Oxford: Oxford University Press, 2011).

Significant parts of this book are based on my previous *Hugo Grotius und die Antike. Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht*, which appeared with Nomos Verlagsgesellschaft (Baden-Baden) back

in 2007 and had grown out of my Zurich doctoral thesis written under the supervision of Beat Näf. I am grateful to Nomos for allowing me to use material from that book. The present book represents a thoroughly revised, restructured, and updated version of the previous study, to which quite a bit of newly written material has been added that reflects my latest thinking on the subject. Substantial parts have been expertly translated from the original German by Belinda Cooper. To the extent that the language is comprehensible and clear this is Belinda's achievement. I have hugely profited not only from her knowledge of German and general linguistic sensitivity but also from her expertise in law and history.

This monograph and its German predecessor have been a long time in the making, and I have incurred many debts on the way. Beat Näf invited me to write the article on Rome in the reception section of *Der Neue Pauly* (*Brill's New Pauly*) and furthered my interest in the classical tradition early on; what this kind of research can contribute to the study of the history of political thought shall become apparent, I hope, from the present book. An invitation to a conference at the Netherlands Institute for Advanced Study assisted me in thinking about my main arguments. Thanks are due especially to Hans Blom, Laurens Winkel, Peter Haggenmacher, Peter Borschberg, and Martine van Ittersum (who let me read a draft of her *Profit and Principle*). Laurens Winkel later was to provide very useful critical comments at the thesis defense, and Jörg Fisch and Wilfried Nippel helped to get the research off the ground and supported my application for funding from the *Forschungskredit* of the University of Zurich. The *Forschungskredit* and the Swiss National Science Foundation deserve ample thanks for their generous support over the years.

In the United States and further afield, many excellent scholars have provided support, read drafts and provided input over the years, chief among them Clifford Ando, David Armitage, Lauren Benton, Nehal Bhuta, Andrew Fitzmaurice, Jacob Giltaij, Leslie Green, Kinch Hoekstra, Benedict Kingsbury, Martti Koskenniemi, Randall Lesaffer, David Lupher, Jon Miller, Anthony Pagden, Peter Schröder, Kaius Tuori, Jeremy Waldron, Joseph Weiler, James Whitman, and James Zetzel. At New York University School of Law, William Nelson, Daniel Hulsebosch, and the Golieb fellows were hospitable to my distinctly un-American legal historical activities. I have much profited from Annabel Brett's impressive erudition and would like to thank Chris Brooke, Knud Haakonssen, and Peter Garnsey for their help and scholarly and friendly correspondence. The late István Hont, whose own work is a model to aspire to, provided me the opportunity to make a presentation in Cambridge and kindly hosted me at King's

College, which allowed me to get a taste of the Cantabrigian way of doing intellectual history. Further, I would like to express thanks to Chris Brooke and Leslie Green for facilitating my visit to Oxford and Balliol in 2009, and to Oxford's Faculty of Classics and Andrew Lintott for receiving me there very kindly.

Over the years, Tobias Schaffner has been an extremely incisive reader of various drafts and, more importantly, an interlocutor very well versed in, and passionate about, Grotius' ideas. More recently, Daniel Lee has emerged as a major and original scholar of the Roman tradition in political thought with many overlapping interests, and I owe him thanks for stimulating conversations, criticism, and correspondence. During my years at NYU Law School, Benedict Kingsbury has been an unfailing source of support and a very warm, open-minded, erudite, entrepreneurial, and cheerful collaborator, and the Institute for International Law and Justice an excellent institution to conduct research at. I should like to thank Liz Friend-Smith at the Press for her efficient work and the two anonymous readers for their reviews, and I am grateful to the Ideas in Context editors for including my manuscript in their series. I am very grateful to the copy-editor, Andrew Dyck, whose erudition saved me from many mistakes; any remaining errors are my own. The longstanding intellectual exchange and friendship with Andreas Gyr has been a crucial stimulus and source of ideas; my brothers Till and Patrick, the Wolffs in Basel, Jascha Preuss and Naomi Wolfensohn, and Eva Kim have provided major sustenance and a congenial framework for a few quiet ones on both sides of the Atlantic.

Abbreviations

ARPB	Grotius, Hugo. *De antiquitate reipublicae Batavicae. The Antiquity of the Batavian Republic*, with the notes by Petrus Scriverius, ed. and trans. Jan Waszink et al. (Bibliotheca Latinitatis Novae 2). Assen, 2000.
BHG	Molhuysen, P. C. (ed.). *Briefwisseling van Hugo Grotius*. 17 vols. The Hague, 1936.
BR	Blair, Emma Helen and James Alexander Robertson (eds.). *The Philippine Islands 1493–1898*. Vol. 1. Cleveland, 1903.
CC	Clark, George N. and Willem J. M. Eysinga. *The Colonial Conferences between England and the Netherlands in 1613 and 1615*. Vol. 1 (Bibliotheca Visseriana 15). Leiden, 1940.
CD	Vázquez, Gabriel. *Commentariorum ac disputationum in primam secundae S. Thomae*. Vol. 2. Alcalá, 1605.
CI	Vázquez de Menchaca, Fernando. *Controversiarum illustrium aliarumque usu frequentium libri tres*, ed. F. Rodriguez Alcalde. Vol. 2. Valladolid, 1931.
CLP	Hugo Grotius. *Commentary on the Law of Prize and Booty*, ed. and with an Introduction by Martine J. van Ittersum, trans. Gwladys L. Williams. Indianapolis, 2006.
CT	Borschberg, Peter. *Hugo Grotius 'Commentarius in theses XI'. An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt*. Bern, 1994.
DC	Hobbes, Thomas. *De cive*, ed. H. Warrender. Oxford, 1983.

DCQ	Grotius, Hugo, *Defensio capitis quinti Maris liberi oppugnati a Guilielmo Welwodo*, in Samuel Muller, *Mare Clausum: Bijdrage tot de Geschiedenis der Rivaliteit van Engeland en Nederland in de Zeventiende Eeuw*. Amsterdam 1872: 331–61.
EL	Hobbes, Thomas. *The Elements of Law, Natural and Politic (1640),* ed. F. Tönnies. 2nd edn. London, 1969.
Encyclopédie	Boucher d'Argis, Antoine-Gaspard, "Law of Nature, or Natural Law," in *The Encyclopedia of Diderot and d'Alembert Collaborative Translation Project,* trans. Susan Rosa. Ann Arbor, 2002. http://hdl.handle.net/2027/spo.did2222.0000.021 (orig. "Droit de la nature, ou droit naturel," *Encyclopédie ou Dictionnaire raisonné des sciences, des arts et des métiers,* vol. 5, 131–34, Paris, 1755).
EPM	Hume, David. *An Enquiry concerning the Principles of Morals*, ed. Tom L. Beauchamp. Oxford, 1998.
IB	Gentili, Alberico. *De iure belli libri tres*. 2 vols. (The Classics of International Law 16). Oxford, 1933.
IBP	Grotius, Hugo. *De iure belli ac pacis libri tres, in quibus ius naturae et gentium item iuris publici praecipua explicantur*, ed. B. J. A. de Kanter-van Hettinga Tromp. Leiden, 1939 (rpt. Aalen, 1993, with additional notes by R. Feenstra and C. E. Persenaire).
IBP Barbeyrac	Grotius, Hugo. *The Rights of War and Peace, in three books. Wherein are explained, The Law of Nature and Nations, and The Principal Points relating to Government, translated into English. To which are added All the large Notes of Mr. J. Barbeyrac*. London, 1738 (= Ter Meulen and Diermanse 1950, no. 635).
IBP Gronovius	Grotius, Hugo. *De jure belli ac pacis libri tres, in quibus jus naturae & gentium, item juris publici praecipua explicantur. Cum annotatis auctoris, ejusdemque dissertatione De mari libero; ac libello singulari De aequitate, indulgentia, & facilitate; nec non Joann. Frid. Gronovii nostis in totum opus De jure belli ac pacis. Editionem omnium, quae hactenus prodierunt, emendatissimam, ad fidem priorum & optimarum recensuit; loca pleraque auctorum*

	laudatorum distinctius designavit; innumeros in illis errores sustulit aut indicavit, notulas denique addidit Joannes Barbeyrac. Amsterdam, 1720 (= Ter Meulen and Diermanse 1950, no. 602).
IBP Schätzel	Grotius, Hugo. *De jure belli ac pacis libri tres, Drei Bücher vom Recht des Krieges und des Friedens Paris 1625*, tr. with introduction by Walter Schätzel (Die Klassiker des Völkerrechts 1). Tübingen, 1950.
IBP Scott	Grotius, Hugo, *De jure belli ac pacis libri tres*, trans. Francis W. Kelsey, with introduction by James Brown Scott (The Classics of International Law, ed. J. B. Scott, 3.2). Oxford, 1925.
IPC	Grotius, Hugo. *De iure praedae commentarius. A Collotype Reproduction of the Original Manuscript of 1604 in the Handwriting of Grotius belonging to the State University of Leyden* (The Classics of International Law, ed. J. B. Scott 22.2). Oxford, 1950.
IPC Hamaker	Grotius, Hugo. *De jure praedae commentarius*, ed. H. G. Hamaker. The Hague, 1868.
IPC Scott	Grotius, Hugo. *De iure praedae commentaries*, trans. from orig. ms. of 1604, by Gwladys L. Williams and Walter H. Zeydel (The Classics of International Law, ed. J. B. Scott 22.1). Oxford, 1950.
Leviathan	Hobbes, Thomas. *Leviathan*, ed. Noel Malcolm 3 vols. Oxford, 2012.
LJ	Smith, Adam. *Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein. Oxford, 1978.
LS	Long, A. A. and D. N., Sedley. *The Hellenistic Philosophers. Volume 2: Greek and Latin Texts, with Notes and Bibliography*. Cambridge, 1987.
MC	Selden, John. *Mare clausum, seu, De dominio maris libri duo. I. Mare, ex iure naturae seu gentium, omnium hominum non esse commune, sed dominii privati seu proprietatis capax, pariter ac tellurem, esse demonstratur. II. Serenissimum Magnae Brittaniae regem maris circumflui, ut individuae atque perpetuae imperii britannici appendicis, dominum esse asseritur: accedunt Marci Zuerii Boxhornii apologia pro navigationibus Hollandorum adversus Pontum*

	Heuterum, et Tractatus mutui commercii & Navigationis inter Henricum VII. regem Angliae & Philippum archiducem Austriae. London, 1636.
ML	Grotius, Hugo. *Mare liberum, The Freedom of the Seas, or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, trans. with a revision of the Latin Text of 1633 by Ralph van Deman Magoffin, ed. with an introductory note by James Brown Scott. New York, 1916.
ML Armitage	Grotius, Hugo. *The Free Sea, Translated by Richard Hakluyt with William Welwod's Critique and Grotius's Reply*, ed. and with an introduction by David Armitage. Indianapolis, 2004.
PE	Hume, David. *Political Essays*, ed. Knud Haakonssen. Cambridge, 1994.
RWP	Grotius, Hugo. *The Rights of War and Peace*, ed. Richard Tuck and Jean Barbeyrac. Indianapolis, 2005.
SVF	Arnim, J. von (ed.). *Stoicorum veterum fragmenta*. 4 vols. Leipzig, 1903–1924.
Theses LVI	Grotius, Hugo. *Theses sive Quaestiones LVI de iure hominis in actiones et res suas*. MS University Library Leiden, BPL 922 I foll. 287–90.
THN	Hume, David. *A Treatise of Human Nature*, ed. D. F. Norton and M. J. Norton. 2 vols. Oxford, 2007.
TLL	Suárez, Francisco. *Tractatus de legibus ac Deo legislatore*. Naples, 1872.
TMS	Smith, Adam, *The Theory of Moral Sentiments*, ed. D. D. Raphael and A. L. Macfie. Oxford, 1976.
WR	Gentili, Alberico, *The Wars of the Romans. A Critical Edition and Translation of* De armis Romanis, ed. and with an introduction by Benedict Kingsbury and Benjamin Straumann, trans. David Lupher, Oxford, 2011.

A note on texts and translations

De iure praedae (abbreviated as *IPC*) is cited after Hugo Grotius, *De iure praedae commentarius*. A Collotype Reproduction of the Original Manuscript of 1604, ed. J. B. Scott, The Classics of International Law 22, vol. 2 (Oxford, 1950); when *IPC* is cited in English, the following translation was used: Hugo Grotius, *De iure praedae commentarius. Commentary on the Law of Prize and Booty*, trans. G. L. Williams, with W. H. Zeydel, ed. J. B. Scott, The Classics of International Law 22, vol. 1 (Oxford, 1950). *Mare liberum* (*ML*) too is cited after this *IPC* edition, except for passages not contained in *IPC*, which have been taken from James Brown Scott's 1916 edition. *De iure belli ac pacis* (*IBP*) is cited after the reprint, with added notes by Robert Feenstra (Aalen 1993), of the edition of 1939. For the translation, I have used Richard Tuck's edition of the anonymous English 1738 translation of Barbeyrac's annotated edition (Indianapolis, 2005); translations of the 1625 edition are my own. Some of the translations have on occasion been modified. The translations of the *Theses LVI* are mine. For Cicero's *Republic* and *Laws* as well as the relevant fragments by Lactantius and Augustine I have used the translations by James E.G. Zetzel in the Cambridge Texts in the History of Political Thought (Cambridge, 1999) and for Cicero's *De officiis* the translation by Margaret Atkins in the same series (Cambridge, 1991). For Cicero's *De finibus* I used Julia Annas' edition, translated by Raphael Woolf (*On Moral Ends*, Cambridge, 2001). Translations of Justinian's *Digest* are taken from the edition by Alan Watson (revised edition, Philadelphia, 1998). Classical authors are cited according to prevailing scholarly standards, and medieval, early modern and modern authors are cited by name and date as indicated in the Bibliography below. With regard to classical authors as well as legal compilations I have used standard editions and methods of citation.

Introduction

> Latinorum Philosophorum decus omne penes Ciceronem stat: cujus duo opera de Legibus; & praesertim de Officiis, mirum quantum conferre possunt huic materiae . . . Grotius multa debet his libris, etiam ubi non ostendit.
>
> Johann Heinrich Böcler (1663)

Thomas Hobbes (1588–1679), in his *Elements of Law*, hinted at the problems associated with establishing a doctrine of sources of natural law: "What it is we call the law of nature, is not agreed upon by those that have hitherto written. For the most part, such writers as have occasion to affirm, that anything is against the law of nature, do allege no more than this, that it is against the consent of all nations, or the wisest and most civil nations." This notion of the wisest and most civil nations seemed problematic to Hobbes, and not sustainable: "But it is not agreed upon, who shall judge which nations are the wisest."[1] This contention aimed directly at the heart of Hugo Grotius' (1583–1645) natural law theory as stated in his *De iure belli ac pacis* which confines the relevant consent to the "wisest and most civil nations." Grotius does not seem to share Hobbes' qualms in his judgement as to which nations are the wisest: "Histories have a double Use with respect to the Subject we are upon, for they supply us both with Examples and with Judgments. Examples, the better the Times and the wiser the People were, are of so much the greater Authority; for which Reason we have preferred those of the ancient Grecians and Romans before others."[2]

Grotius' use of classical antiquity, starting in his early work, did not go unnoticed by his adversaries. In 1613, the Scottish jurist William Welwod in his *An Abridgement of All Sea-Lawes* mounted fierce criticism of Grotius' famous 1609 essay *Mare liberum*, attacking especially Grotius' way of arguing with classical texts:

[1] *EL*, 75. [2] *RWP*, 1.123–24; *IBP* prol. 46.

> Now remembering the first ground whereby the author would make *mare liberum* to be a position fortified by the opinions and sayings of some old poets, orators, philosophers, and (wrested) jurisconsults – that land and sea, by the first condition of nature, hath been and should be common to all, and proper to none – against this I mind to use no other reason but a simple and orderly reciting of the words of the Holy Spirit concerning that first condition natural of land and sea from the very beginning . . .[3]

After adducing citations from Genesis in support of his stance, Welwod continues: "And thus far have we learned concerning the community and propriety of land and sea by him who is the great Creator and author of all, and therefore of greater authority and understanding than all the Grecian and Roman writers, poets, orators, philosophers, and jurisconsults, whosoever famous, whom the author of *Mare Liberum* protests he may use and lean to without offence."[4]

The dispute between Grotius and Welwod thus clearly turned on the proper identification of the relevant rules governing "that first condition natural of land and sea from the very beginning." While Grotius "uses and leans to" Greek and Roman writers to develop the norms of the natural law, his adversaries in the dispute about the freedom of the seas rely chiefly on other sources, such as "the words of the Holy Spirit" in the case of Welwod, or the papal donation and custom in the case of Grotius' Spanish and Portuguese opponents, as discussed below. A crucial premise of Grotius' argument therefore lies in the contested doctrine of sources of the law he is trying to establish – a law that has its ultimate source declaredly in nature, yet seems to be discernible in the "illustrations and judgements" provided by some Greek and Roman writers. The question of the sources of law is of fundamental importance in a horizontal system lacking a lawgiving authority, and the way Grotius attacks his adversaries' position on the level of the sources of law is therefore of general significance.[5]

Grotius was a humanist.[6] When the Dutch East India Company (VOC) retained Grotius' humanist skills in 1604 to mount a legal defense of the VOC's expansionist war in the East Indies,[7] he was able to fall back upon a tradition of classical arguments in favor of Roman imperialism. By adapting the classical tradition to contemporary circumstances, Grotius brought

[3] *ML* Armitage, 66. [4] Ibid., 67.
[5] Reminiscent of today's debates about the sources of international law; see, e.g., Higgins 1994, 17.
[6] See the contributions to Blom and Winkel 2004.
[7] See Fruin 1925, 39–42; see also Ittersum 2006.

about what has been hailed as a revolutionary and essentially *modern* theory of natural law and of subjective natural rights.[8] This seeming tension between modern liberalism having its origins in the European overseas expansion of the seventeenth century[9] on the one hand and the "extremely deep roots in the philosophical schools of the ancient world"[10] displayed by Grotius' work on the other can only be elucidated by investigating the use the moderns made of the classical tradition.[11] Grotius' work is eminently suitable for such an undertaking, because he is a figure at the crossroads: steeped in classical learning, yet of considerable importance for the subsequent history of modern political and legal thought. The adaptation of the classical tradition in Grotius' natural law works is thus of considerable interest, given the effect of Grotian natural law on the history of political thought, including the framing of the American Constitution.[12] The question arises of the extent to which Grotius' reception of classical texts had an effect on the areas in which scholars have portrayed him as a revolutionary reformer. The question is especially urgent with regard to Grotius' doctrine of subjective natural rights, which would prove extraordinarily influential and has been described as an innovative, essentially modern theory that paved the way for liberalism and human rights.[13]

This book seeks to provide an account of Grotius' influential theory of natural law and natural rights from the vantage point of Grotius' use of the classics. It is my argument that Hugo Grotius developed his influential theory of natural law and natural rights on the basis of a Roman tradition of normative texts. Formally, Grotius' natural law was derived from universal reason; more often than not, reason's precepts happened to be found in the Roman law texts of the *Digest*. Seeking to situate Grotius in European intellectual history, the book argues that his natural law doctrine relied primarily on a Roman tradition of law and political thought. This Roman tradition allowed for the formulation of a set of universal rules and, importantly, rights which were supposed to hold outside of states and be binding on them. At the heart of this doctrine lies a certain conception of the state

[8] See Tully 1980, 68–72, 80–85, 90, 114, 168; Tuck 1979, 58–81; Tuck 1993, 137–76; Tuck 1999, 78–108.

[9] Tuck 1999, 14–15.

[10] Ibid., 9.

[11] For a broad overview of the connection between natural rights, imperial expansion and the Roman legal tradition, see Pagden 2003.

[12] See Haakonssen 1985; Haakonssen 1996, 30; Haakonssen 2002, 27–28, claiming a tradition from Grotius to Barbeyrac and Burlamaqui up to the Founding Fathers; Grunert 2003; White 1978. For a bibliography of all editions of Grotius' works up to the twentieth century, see Ter Meulen and Diermanse 1950

[13] See Tuck 1979, 58–81; Tully 1980, 68–72, 80–85, 90, 114, 168; Tuck 1993, 137–176; Tuck 1999, 78–108. Haggenmacher 1997, 114n1 emphasizes the importance of Grotius' doctrine of subjective natural rights for the human rights declarations of the seventeenth century.

of nature and of human nature. I should like to argue in the course of the book that Grotius built his influential theory of natural law and natural rights out of certain classical materials: a Stoic anthropology served as the basis of an essentially Ciceronian theory of justice. This in turn was given expression as a legal code with the help of a Roman law framework. The classics for Grotius, then, were everything but "mere humbug"[14] – they provided crucial elements of his influential doctrine of natural law and natural rights.

The result was an important vision of a rights-based theory of justice which had ramifications both within states and internationally. Grotius' system of rights could potentially limit the power of governments while at the same time providing justification for freedom of trade and punitive wars between states. Reasons for the doctrine's success include the fact that it was based on a secular theory of obligation and the sources of law. Furthermore, Grotius' theory did not presuppose either an established polity or a conception of the good life. The resulting body of rules and rights was thus neither concerned with distributive justice – the prerogative of government – nor with virtue and *eudaimonia*. It was concerned, instead, with private property as the yardstick of justice, expressed in the fine-grained idiom of Roman law. This made Grotius' into a theory that was both highly applicable and largely insulated from ethical disputes about the good life.

Few of these features were exclusive to Grotius. There are however two important reasons for focusing this book on him, rather than, say, on predecessors such as Fernando Vázquez de Menchaca (1512–69) or Alberico Gentili (1552–1608).[15] The first lies in the fact that Grotius' enormous success eclipsed his predecessors, and he thus represents one of the most prominent and influential links between the classics on the one hand and the writers of the seventeenth and eighteenth centuries on the other. To the extent that we are still under the influence of Grotius and the ideas flowing through him and shaped by him, the exercise of situating him more precisely in terms of European intellectual history will allow us to get a firmer grasp on our own ideas and their presuppositions.[16] The natural law tradition that he shaped later endowed political theorists of

[14] Eyffinger 2001/2, 118, rendering the Leiden lawyer and professor Benjamin M. Telders' view of Grotius' classical references. Telders had issued an extract of *De iure belli ac pacis* omitting these references completely (Telders 1948a). Cf. also Telders 1948b, 8ff.

[15] See Brett 2011, 69–71, on the relationship between Vázquez' and Grotius' understandings of natural law.

[16] See n12 above. For Grotius' influence on the political thought of the English Whigs, see Zuckert 1994, 106–15, 188 (on the influence on John Locke's *Questions Concerning the Law of Nations*). For Grotius' status as the second most important legal authority after Coke in pre-revolutionary

the republican mold with a moral account of a realm outside of or prior to the political, viz. the state of nature, thus providing political theory with a yardstick for a moral evaluation of the extent of political power. Historically, this combination of the natural law tradition, growing out of the reception of the normative Roman texts mentioned above, with the republican "institutional" tradition led to constitutionalism and the entrenchment of some of the Roman remedies as constitutional rights.[17] The second reason lies in Grotius' extremely nuanced way of fleshing out a rule-based theory of natural justice with the intricate details – intimately known to him – of Roman law. This yielded a doctrine of natural law that was correspondingly fine-grained and, above all, legalized and juridical, containing a very high percentage of Roman legal rules and remedies. This, and the resulting equally fine-grained theory of natural rights, set Grotius apart from his predecessors, even Gentili.[18]

I am seeking to make the case that the classics must be taken seriously as a highly relevant intellectual context for the humanist Grotius, a context which needs to be taken into account alongside contemporary politics and other intellectual traditions. Both Grotius' immediate political context – his "experience of international relations"[19] – and the medieval and late scholastic just war tradition[20] certainly deserve the ample scholarly attention paid to them and constitute important influences on Grotius' natural law doctrine.[21] If the findings of the present book are correct, however, the impact of the normative Roman sources outlined above on Grotius and

America, see Howard 1968, 118–19. For Grotius' impact on international law, see Haggenmacher 1985. For the influence on the early German enlightenment, see Hochstrasser 2000.

[17] István Hont argues, largely based on Tuck's interpretation of Grotius and thus, to my mind, not entirely convincingly, that Grotius was pivotal in integrating the republican principle of reason of state into natural jurisprudence and that he "juridically reformatted reason of state": Hont 2005, 11–17.

[18] Grotius is widely acknowledged to have made important contributions to an influential doctrine of individual natural rights. See already Hartenstein 1850, 522, referencing *IBP* 1.2.1.5. On Grotius as the first of the natural lawyers to develop a fully fledged and detailed account of subjective natural rights, see Haggenmacher 1990, 161; Harrison 2003, 144–52. For an interpretation downplaying the importance of subjective natural rights in Grotius' works, see Zagorin 2000, especially 33ff.; and Zagorin 2009, 25. Zagorin's account of Grotius on natural rights and the state of nature is deeply flawed, and, far from supporting his claim, the passage from Haggenmacher he references actually asserts the importance of both natural rights and of the concept of the state of nature in Grotius' thought; see Haggenmacher 1997, 119. Zagorin is correct in pointing out that Grotius' rights are not grounded exclusively in the "desire for self-preservation and the conveniences of life," but this does not, of course, show that Grotius does not have a concept of natural rights, only that Grotius' is not the same as Hobbes'. Incidentally, Zagorin's characterization of Hobbes' natural rights as grounded in self-interest seems to be in tension with the main thrust of his interpretation.

[19] Roelofsen 1983, 79.

[20] See Haggenmacher 1983.

[21] For the political context see Borschberg 1999; Borschberg 2002; Ittersum 2006; Ittersum 2007a; Ittersum 2010b.

his successors is much more important than hitherto assumed. As Haggenmacher has pointed out, Grotius' main reference points were not primarily political events, but intellectual traditions.[22]

When starting research on this study, my assumption was that both Greek and Roman sources deserved examination; and while a comprehensive investigation of the full range of Grotius' classical citations – an enormous task that would result in quite different a book – proved impossible, initially equal attention was given to Greek and Roman texts. I came to conclude, however, that the central place Grotius gives to Roman law and to a Ciceronian brand of Stoicism in his doctrine of natural law by far outweighs other classical sources and thus deserves pride of place in the book. It is important to note that this is not simply by virtue of the number of citations, but, more importantly, by virtue of the substantive influence of these Roman sources. Grotius' own claim that both "ancient Grecians and Romans" come "before others" should not be allowed to obscure the fact that he developed his main ideas and arguments out of specifically *Roman* traditions. The main thrust of my argument thus comes to focus on Cicero and the Roman law of the *Digest*, because Grotius' own argument rests ultimately on these Roman foundations. At various points the question of the relative weight of Greek, Roman, and other classical sources is disussed,[23] issuing in the result that the Roman sources had a much greater impact on the substance of Grotius' doctrine of natural law and natural rights than any other classical tradition he was influenced by.

Despite the overwhelming number of classical references in *De iure belli ac pacis*, amounting to nearly 90 percent of all references,[24] and despite the obvious extent of the reception of the classics in all of Hugo Grotius' natural-law works, there has been no monographic study of the influence of Greco-Roman antiquity on the Grotian natural-law system. Kaltenborn in 1848 devoted to classical antiquity a very general section of his *Die*

[22] Haggenmacher 1981, 90–91: "[C]e n'est pas en première ligne par rapport à ce contexte politique que raisonnait Grotius . . . Comme pour nombre de ses contemporains, ses points de référence principaux sont à rechercher dans des textes . . . qui ont nourri la réflexion de générations d'auteurs sur le *ius gentium*."

[23] See especially 30–52; 70–82 on various types of sources, and on their relative weight for Grotius' undertaking the following discussion on the relative weight of Roman law and classical sources generally speaking; 83–88 on the relationship to the Aristotelian tradition; 119–29 on how the Roman law and Cicero's ethics map onto the Aristotelian distinction between distributive and corrective justice and how that motivates Grotius' choices, as well as the remarks on Greek vs. Roman Stoicism on property; and 107–19 on the differentiation between Greek and Roman Stoicism.

[24] Of 5,951 references in *IBP*, only 741 are to post-classical texts. 5,210 references are to sources from Greco-Roman antiquity, amounting to almost 90 percent. See Gizewski 1993, 340.

Vorläufer des Hugo Grotius auf dem Gebiete des jus naturae et gentium *sowie der Politik*.[25] In 1927, in his *Private Law Sources and Analogies of International Law*, international-law scholar Hersch Lauterpacht emphasized the influence of Roman private law on Grotian natural law and outlined it as follows: "[W]hat were the sources or the evidence of this natural law? They, in turn, were in most cases identical with those rules of private and especially of Roman law which appeared to him as of sufficient generality and as suitable for the purposes of international law."[26] In his *Ancient Law* of 1861, Henry Sumner Maine pointed expressly to the importance of Roman private law in Grotius' *De iure belli ac pacis* and named some plausible reasons why this influence had been neglected by his readers:

> The system of Grotius is implicated with Roman law at its very foundation, and this connection rendered inevitable – what the legal training of the writer would perhaps have entailed without it – the free employment in every paragraph of technical phraseology, and of modes of reasoning, defining, and illustrating, which must sometimes conceal the sense, and almost always the force and cogency, of the argument from the reader who is unfamiliar with the sources whence they have been derived.[27]

Since then, there have been few attempts to demonstrate the effect of Grotius' classical sources on his ideas about natural and international law. Most recently, these have included those by the ancient historian Christian Gizewski, and Karl-Heinz Ziegler and David Bederman, historians of international law, who have emphasized the relevance of the classical tradition to Grotius' work, as well as legal historian Laurens Winkel, who has discussed the classical origins of Grotius' theory of *appetitus societatis*. Winkel and the historian of philosophy Hans Blom also published a collection of essays on Grotius' relationship with the Stoa.[28] Jon Miller, also a historian of philosophy, contributed an essay to this collection, after previously writing about Grotius' understanding of Stoic ethics in the 2003 collection *Hellenistic and Early Modern Philosophy*, edited with Brad Inwood.[29] In a 1973 article, Jonathan Ziskind provided a useful comparison of Grotius' and John Selden's use of classical sources in *Mare liberum* and *Mare clausum*.[30] More recently, Christopher Brooke's investigation into Stoicism in early modern political thought and work by Daniel Lee have greatly helped to improve

[25] Kaltenborn 1848, 29–37. [26] Lauterpacht 1927, 14. [27] Maine 2002, 351.
[28] Gizewski 1993; Ziegler 1972; Ziegler 1991/92; Bederman 1995/96; Winkel 2000; Blom and Winkel 2004.
[29] Miller 2003; Miller 2004. [30] Ziskind 1973.

our understanding of Grotius' use of the classics.[31] The two indices of authors quoted in the English translation of *De iure praedae commentarius* and *De iure belli ac pacis*, by James Brown Scott, also provide a very useful aid in studying the reception of classical authors by Grotius.[32] Robert Feenstra undertook a study of the sources cited by Grotius in general, in which he paid attention to the classical sources only to the extent they were of a legal nature.[33] This contrasted with Scott's edition, which limited its examination of Grotius' citations to texts available from the Loeb Classical Library and the Oxford Classical Texts.

Increasing attention is being paid to the study of the late Spanish scholastics and their effect on seventeenth-century natural law; and the connection between the contemporary political context and Grotius' earlier natural-law theories was only recently the subject of thorough monographic treatment.[34] But the influence of classical antiquity on Grotius' natural-law works has largely been ignored, aside from the above-mentioned exceptions and the lip service to Grotius' debt to the Stoa that is often found in scholarship on early modern natural law. The view that Grotius' use of a wealth of primarily classical texts and theories was purely ornamental, without any influence on the substance or methodology of his doctrines, and that it arose from a baroque zeitgeist, can be considered to be the *communis opinio* of scholars of the history of international law in particular.

This view is generally joined with a theory about supposedly more significant influences on Grotius. Thus Peter Haggenmacher, who places great emphasis on the influence of scholastic laws of war on Grotius, speaks generally of the "cohorte obligée d'auteurs anciens." Medievalist Brian Tierney points out that Grotius "decorated" his text in *De iure praedae* "in his usual fashion" with quotations from Cicero, while the actual basis of his thinking should be sought in Pope John XXII's dispute with the Franciscans and can only be described in medieval categories.[35] Similar views have been expressed by scholars who deal mainly with Grotius, such as Edwards, Vermeulen, and Van der Wal.[36] In contrast, scholars of the history of ideas in the early modern period, such as Richard Tuck and

[31] Brooke 2012; Lee 2011.
[32] *IPC* Scott, 397–412; *IBP* Scott, 889–930. See Feenstra's discussion of the indices in *IBP*, 929–34.
[33] Ibid., *IBP*, 930; Feenstra 1992, 14–16.
[34] See, e.g., Chroust 1943; Brett 1997; Seelmann 1979; Seelmann 1997; Lupher 2003; Ittersum 2006.
[35] Haggenmacher 1997, 101 (noting, however, the crucial importance of Cicero, 119); see also Haggenmacher 1983; Tierney 1997, 330; Tierney 1983.
[36] Edwards 1981, 47–64; Vermeulen and Van der Wal 1995/96, 58ff.

Knud Haakonssen, have endeavored to portray Grotius as a thinker closely related to Thomas Hobbes, stressing his modernity, and as the creator of a secular natural law that contained within it the seeds of a theory of personal natural rights.[37] The controversial question of the secular nature of Grotian natural law is often reduced to a discussion of the famous *etiamsi daremus* passage in the Prolegomena of *De iure belli ac pacis* – where Grotius argues that "indeed, all we have now said would take place, though even if we should grant (*etiamsi daremus*), what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs."[38]

The authors who emphasize the importance of certain traditions to Grotius' works of natural law contrast with historians who consider the political conditions surrounding the works' origins, especially the earlier works of natural law, to be more important. Although he is in principle willing to grant "considerable value" to the intellectual tradition manifested in Grotius' classical references, C. G. Roelofsen concludes with resignation "that the foundations of the Grotian system cannot be easily discerned among the impressive mass of materials." He ascribes the main "source" of Grotius' natural law doctrine to "the author's experience of international relations and his extensive knowledge of contemporary diplomatic history."[39] Some scholars who have paid particular attention to the political context of Grotius' natural law works, above all *De iure praedae*, seem to seek to discredit Grotius' arguments by studying the political and socio-economic conditions under which they emerged.[40]

Study of Grotius' method has also suffered from blindness towards Grotius' humanistic education and his use of classical references: research has so far mainly concentrated on the Prolegomena of *De iure belli ac pacis* and has sought to connect Grotius to various authors such as Ramus and Descartes, from whom Grotius' methodological orientation is then derived.[41] The role of classical rhetoric, which could already be seen in *De iure praedae* and then appears very prominently in *De iure belli ac pacis* in Grotius' natural law epistemology and methods of proof, and which

[37] Tuck 1979, 58–81; Tuck 1999, 78–108; Haakonssen 1985, 240; Haakonssen 1996, 26–30.

[38] *RWP* 1.89; *IBP* prol. 11. For a discussion of the passage see, e.g., Todescan 2003; Schneewind 1998, 67–68; Haakonssen 1996, 29; Besselink 1988; Zajadlo 1988; Passerin d'Entrèves 1967, 50ff.; St. Leger 1962; Chroust 1943.

[39] Roelofsen 1983, 75; 79.

[40] Cf. Pauw 1965; Röling 1990; Ittersum 2006. Such discrediting is, of course, impossible; it depends on the genealogical fallacy.

[41] See Schnepf 1998; Tanaka 1993; Vermeulen 1982/83; Dufour 1980; Röd 1970; Ottenwälder 1950, 15ff.; Vollenhoven 1931.

also exercised a profound influence on the concept of natural law and the distinction between natural law and *ius gentium*, has been ignored.

The influence of Ciceronian ethics and of the *Corpus iuris* can be shown in the way Grotius justifies and undergirds his natural law system, but it is most pronounced in his conception of subjective natural rights. Recently, Peter Garnsey has convincingly drawn our attention to the important "contribution of Roman law to Rights Theory,"[42] concluding, very much in accord with my own findings, that "the Romans did possess the concept of property rights and individual rights in general."[43] This is a view that goes against that put forward by Michel Villey and Brian Tierney, who have argued, respectively, that modern rights doctrines were the result of a deformation of Christian doctrines brought about by William of Ockham and the Franciscan Order,[44] or that the origin of rights doctrines lies in the rights language of the canonists,[45] thereby relegating the rather obvious fact that Grotius "in his usual fashion" quoted widely "from Cicero and Seneca"[46] to a mere humanist whim. Villey attempted to show that the development of subjective rights doctrines constituted an aberration from a pure Thomist natural law, acknowledging Grotius as one of the main protagonists in the development of the modern, post-Ockham doctrine of rights, a doctrine the Thomist Villey himself deemed detrimental. He argued vehemently against a subjective Roman notion of right – an argument that has influenced Isaiah Berlin's "Two Concepts of Liberty" – and charged the early modern jurists with misrepresenting Roman law on this point.[47] The medievalist Brian Tierney, while critical of Villey with regard to the sharp fault line drawn between Thomist natural law and Ockham's notion of subjective rights and locating the origin of subjective rights in the canonist jurisprudence of the twelfth century, has adopted Villey's stance on the Roman sources and their use by early modern lawyers such as Grotius.[48]

In this book I argue that Grotius developed his natural law and natural rights doctrine primarily out of normative Roman sources, that is to say, Roman law and ethics. If this Roman tradition has been as central to Grotius' influential writing on natural rights as I will suggest, why has it not received more scholarly attention? The main reason lies in the view that while rights are constitutive of modern liberty, they were

[42] Garnsey 2007, 237. [43] Ibid., 194; see esp. 184–203; 211–12. [44] Villey 1964.
[45] Tierney 1997, 43–77. [46] Ibid., 330.
[47] See Villey 1946; Villey 1957. For a good summary of Villey's views and the debate surrounding the origins of individual rights, see Tierney 1997, 13–42.
[48] See Tierney 1997, *passim* and esp. 93–130.

unknown in classical antiquity. The classic expression of this view of rights as an essentially modern phenomenon can be found in Benjamin Constant's famous 1819 lecture *De la liberté des anciens comparée à celle des modernes*, where Constant, drawing on Condorcet, developed a rights-based notion of "modern" liberty by contrasting it with the "liberty of the ancients." According to Constant, the "ancients, as Condorcet says, had no notion of individual rights. Men were, so to speak, merely machines, whose gears and cog-wheels were regulated by the law."[49] Modern liberty, on the other hand, in Constant's view consists of an array of individual rights.[50] Constant, very much in the tradition of the Scottish Enlightenment, credited commerce as the crucial force for the development of this rights-based, "modern" conception of liberty, which not only "inspires in men a vivid love of individual independence"[51] and "emancipates" the individual, but also helps to make individuals "stronger than the political powers."[52]

This tenacious view of an "ancient" version of liberty, lacking any notion of subjective rights and therefore lacking what Isaiah Berlin has called "negative" liberty,[53] seems to be informed by a focus on the historical social institutions of classical antiquity, and, as far as democracy and the democratic elements of Greek antiquity are concerned, nourished by the bias against democracy expressed by classical political philosophy. It is a line of thought that can be found in Hobbes' scornful remarks about the "Libertie, whereof there is so frequent, and honourable mention, in the Histories, and Philosophy of the Antient Greeks, and Romans" in *Leviathan* as well as in the contrast drawn by Rousseau in his *Contrat social* between the modern and the ancient state.[54]

How did this historical picture develop in the first place? Broadly speaking, there are two traditions that deserve attention. The first is concerned with the early Roman republic and its institutions, as they appear in the historical writings of Livy and Dionysius of Halicarnassus, in the biographies of Plutarch, and in Polybius' constitutional analysis. This is the

[49] Constant 1988, 312.

[50] Ibid., 310–11. Professor Leslie Green has pointed out to me that Constant could be interpreted as claiming only that there were no individual rights among the ancients which *amounted to our basic liberties*; on my interpretation of Constant, however, he is resting his case on the claim that there were no individual rights among the ancients *tout court*.

[51] Ibid., 315.

[52] Ibid., 325. For this tradition of thought, see Nippel 2003. Nippel shows a line of argument ranging from Constant over Fustel de Coulanges, Jacob Burckhardt and Lord Acton to Max Weber, and influencing twentieth-century historians such as Moses Finley and Paul Veyne.

[53] Berlin 1969.

[54] *Leviathan*, 2.332; Rousseau 1997, 114–15.

"neo-Roman"[55] or republican tradition[56] and can be found in Machiavelli and then again in seventeenth-century English and eighteenth-century French and American political thought, and it was this tradition that provided the foundation for Hobbes', Rousseau's, and Constant's claims about the nature of ancient liberty.[57]

But there is a second tradition that has proved at least as influential, looking not to the mythical Roman republic of Livy's first ten books (covering the years 509 to 292 BC), but to texts stemming from the last century of the Roman republic and later. More importantly, the texts used in this second tradition are not historical narratives, nor are they concerned with analyses of various constitutional or institutional arrangements. Rather, they are of a *normative* nature, comprising some of Cicero's ethical works and, most importantly, texts from the body of private Roman law contained in Justinian's *Digest*.

The thinkers of this second tradition were not, strictly speaking, concerned with political theory; instead they put forth ethical theories about the normative conditions obtaining in a state of nature, in other words, theories of natural law. In developing these theories, the exponents of the natural law tradition referred back to resources providing a rights-based account of rules obtaining both within and without the Roman polity. The state of nature, as conceived by Hugo Grotius and his followers, became a domain governed by remedies contained in the Roman praetor's edict and later integrated in Justinian's *Digest*; these remedies, however, were stripped of their original jurisdictional meaning and turned into

[55] See Skinner 1998; however, cf. Skinner 2008 for a change in terminology.

[56] The literature on republicanism is of course vast; just for starters, see the groundbreaking classic Pocock 1975; see also Rahe 1992; Gelderen and Skinner 2002, with further literature; Skinner 1998; Skinner 2008; Kapust 2011.

[57] Constant's view is probably untenable with regard to "the ancients" as a whole even if one were willing to grant the narrow, restricted focus on institutional history. The view seems tailored to the Greek concept of freedom, and would most probably not withstand scrutiny in terms of Roman institutional history; the Romans considered their constitutional safeguards, such as the right to appeal a magistrate's order (*provocatio*), as "bulwarks to guard freedom": Livy 3.45.8; see also Cic. *Rep*. 2.55. In the Greek city-states, "the concept of freedom gained political importance [in the context] of the community's defense against foreign rule and tyranny," and was thus understood collectively. In Rome, by contrast, *libertas* had a "primarily negative orientation" and was "almost without exception – for aristocrats and commoners alike – protection against (excessive) power, force, ambition, and arbitrariness." In Rome, the freedom concept was focused "on the needs of individual citizens," and "its function was markedly negative and defensive," and was "linked primarily with individual rights that eventually were fixed by law." It is of course this last aspect that provides the link to our topic. Raaflaub 2004, 267; see also Wirszubski 1950, esp. 24–30. It bears mentioning that the Romans did not have the legal concept of expropriation; even for public projects, the government had to buy (without any means of legal coercion) property regularly like a private actor.

substantive rights.[58] By letting just causes of war arise from unlawful acts as defined under Roman private law,[59] Grotius was attempting to resolve the fundamental problem of the medieval law of war, which had been that of establishing unlawful acts conclusively and with sufficient precision.[60] Grotius combined the tradition of the Roman doctrine of just war with the Roman private law tradition and used the latter to formulate a detailed catalogue of just causes of war.[61]

Throughout this book I shall argue that these normative Roman works were particularly authoritative and influential – in a way other sources were not – for Grotius' doctrine of natural law and his theory of subjective natural rights. Grotius' doctrine of natural law and natural rights was intended to bolster the claims of the expanding commercial empire of the United Provinces.[62] The Dutch humanist made a crucial contribution to the development of a modern, rights-based natural law advocating the freedom of trade,[63] clearly driven by a desire to promote what Constant thought to be the force behind "modern liberty," namely commerce. Yet paradoxically Grotius developed his conception of natural rights out of materials stemming from a time that had allegedly "no notion of individual rights" and when "[m]en were, so to speak, merely machines, whose gears and cog-wheels were regulated by the law."[64]

The present book seeks to lay out some of the hitherto neglected evidence for an appreciation of the Roman law influence on Grotius' conception of natural rights. While the results of my research thus do have a tendency to diminish the importance of Thomism and canon law for the development of modern rights doctrines, stressing the influence of Roman law remedies

[58] Reminiscent of the way Edward Coke's *First Institute* was used in the American colonies before the Revolution and in the early Republic: "From the late seventeenth century until the early nineteenth, Americans learned property law from Coke's treatise without regard to the court system in which those rules arose, which magnified the conceptual division between remedy and right, jurisdiction and jurisprudence, the Westminster courts and the common law": Hulsebosch 2003: 480.

[59] See *IBP* 2.1.2.1.

[60] See Haggenmacher 1990, 164–65.

[61] Vollenhoven 1931, 103 notes with regard to *De iure belli ac pacis*: "The system used for expounding the law of binding duties . . . is practically the system of Justinian's corpus of Roman private law." See also Ottenwälder 1950, 125–26. For a detailled account of Grotius' system, see Feenstra 1991.

[62] For an account of Grotius' Dutch context and the relation in the early seventeenth century between Dutch Roman legal scholarship and the rise of a new commercial morality in the United Provinces, see Whitman 1996. For the intellectual climate of the humanist so-called "niederländische Bewegung," see Oestreich 1980, 301ff.

[63] Grotius' contribution to the development of a doctrine of natural rights is well known and has received a lot of scholarly attention; see Haggenmacher 1997, 114n1; Tierney 1997, 316–42; Tuck 1979, 58–81; Tuck 1993, 137–76; Tuck 1999, 78–108; Tully 1980, 68ff., 80ff., 90, 114, 168; Villey 1957.

[64] Constant 1988, 312.

and Ciceronian political theory instead,[65] I do not of course mean to argue that scholasticism and canon law had no impact on Grotius' work. But what I should like to show is that with regard to Grotius' doctrine of natural law and his elaborate system of subjective rights flowing from that doctrine, the Roman sources emphasized throughout this book deserve primary attention – attention they have not hitherto received.

The most important immediate predecessors of Grotius were certainly the legal humanists of the *mos Gallicus*, above all Donellus, who did develop an influential account of subjective rights based on material found in the *Corpus iuris*, but theirs was not a doctrine of natural rights.[66] And while several of Grotius' immediate predecessors, especially Alberico Gentili, Vázquez de Menchaca, and Francisco Suárez,[67] did indeed have a notion of subjective natural rights and influenced Grotius, particularly in his decision to remove the Roman law remedies from their origins and frame his doctrine as an account of *natural* rights, the fine-grained legalistic elaboration of a system of subjective rights by the Dutch humanist is a novel and momentous contribution to the earlier writing on natural law.[68]

It is important to note that the approach followed in this book does not allow us to determine with much precision the extent to which Grotius depends on the ancient sources directly. Insofar as contemporary scholastic writers also availed themselves of the normative Roman sources in question – especially the Spanish jurist Fernando Vázquez de Menchaca (1512–69) is a prime candidate in this regard, but so were Gentili and others[69] – Grotius must at times have followed their lead in his selection of classical sources. For example, Grotius might well have borrowed the term *appetitus societatis* from Vázquez, a writer who was also very well versed in

[65] In his later natural law work, when the argument was no longer directed against Spain, Grotius turned at times very explicitly against the school of Salamanca (see, e.g., *IBP* 2.20.40.4, on which see Chapter 9 on the right to punish), while he sometimes adduced the Spanish neo-Thomists in his earlier works for prudential reasons.

[66] On Donellus' subjective rights, see Coing 1962, 251–54; Haggenmacher 1983, 178–80; Haggenmacher 1997, 113; Garnsey 2007, 201–3. On Donellus' and Grotius' respective doctrines of subjective rights and their relationship to modern human rights, see Giltaij 2011, 23–27; Brett 2011, 102ff.

[67] For Gentili, see Haggenmacher 1990; Kingsbury and Straumann 2010b; see also the Introduction in Kingsbury and Straumann 2011, esp. xxiv–xxv; for Vázquez, see Brett 1997, 165–204; for Suárez, see Tuck 1979, 54ff.

[68] As Haggenmacher has shown, Grotius is, of course, indebted to the just war tradition, but he was original in adding to that medieval tradition his detailed account of rights modeled after Roman remedies. Grotius did not invent all elements of his doctrine of subjective natural rights, "mais des différents apports qui s'y combinent résulte une construction inédite." Haggenmacher 1997, 130.

[69] On Vázquez and the Roman law tradition, see Brett 1997; on Gentili, see Kingsbury and Straumann 2010b.

the Roman law tradition. Thomas Aquinas himself, as Jean-Marie Aubert showed some time ago, owed a fair amount to concepts taken from the Roman law.[70] While it is thus perfectly clear that the use of the classics was by no means exclusive to Grotius and that various scholastic natural lawyers also put classical texts to work in their writings, an investigation into the relative weight of the classics versus the influence of contemporary natural law on Grotius lies outside the scope of this book; the different intellectual currents that can be detected in Grotius' thought do not work at each other's expense as in a zero-sum game, and it remains for others to determine the precise limits of the influence of contemporary natural law on Grotius.

It would therefore be foolish to claim exclusive importance for the classical, especially Roman, sources at the *expense* of contemporary natural law, but there is still a way in which I believe specific Roman materials were used by Grotius in order to justify a novel conception of natural law and natural rights that is stripped of an Aristotelian or Thomist metaphysical framework and correspondingly difficult to detect in contemporary natural lawyers (again with the exception of Vázquez and Gentili). This novel conception, focused as it was on rules as opposed to virtues, may best be called a "jural" or "quasi-jural" doctrine as opposed to a eudaimonist one.[71] Grotius' use of Roman sources, to the extent that its effects differ in his work from his contemporaries' use of classical sources, can thus legitimately serve to shed light on a question still very hotly debated in the history of ethics and political thought, namely the question of Grotius' modernity. Whether or not Grotius should be seen as a pioneer is therefore a question that can to my mind be profitably and freshly approached from the viewpoint of his use of classical sources, as I try to demonstrate especially in Chapter 4.[72] Furthermore, as we shall see in Chapter 9, Grotius' concept of a universal right to punish does not sit comfortably, as a matter of substance, with the doctrinal framework established by the late Spanish scholastics. The fact that Grotius in his early work chose, for political reasons, not to emphasize this difference,[73] has often led scholars to exaggerate the Spanish influence on Grotius.

It is instructive to keep in mind that Grotius' humanist acquaintance with Roman law and the classics was immense, something borne out not simply by the vast number of citations but also, as will be shown

[70] See Aubert 1955. [71] The term is Sidgwick's; see the discussion below, 86–87.
[72] See the discussion of Grotius' modernity below, 84–88.
[73] In contrast to *De iure belli ac pacis*, where Grotius openly turned against the late Spanish scholastics; see below, 216 see also 78n133.

throughout this book, by his intimate knowledge of the substance of the concepts involved. The view that Grotius' use of a Roman tradition of normative texts represented something important and novel is not itself new. It has a quite estimable pedigree reaching back into the seventeenth century, when in 1663 the Strasbourg history professor Johann Heinrich Böcler can be found emphasizing that the "whole glory of the Latin philosophers is represented in Cicero, whose two works (the *De legibus* and especially the *De officiis*) can speak volumes on this subject . . . Grotius is indebted at many points to these books, even when he does not show it."[74] Böcler's intention was to reproach Pufendorf for failing to pay sufficient attention to Grotius' classical, and especially Roman, sources.[75] Jean Barbeyrac is known in 1729 to have deemed Grotius a pioneer for having emancipated ethics from scholasticism.[76] Gershom Carmichael (1672–1729), first professor of moral philosophy at Glasgow and probably the most important link between the natural lawyers of the seventeenth century and the Scottish Enlightenment, had in 1724 already described Grotius as following in the footsteps of the classics: "[Moral] science had been most highly esteemed by the wisest of the ancients, who devoted themselves to its study with great care. It then lay buried under debris, together with almost all the other noble arts, until a little after the beginning of the last century, when it was restored to more than its pristine splendor . . . by the incomparable Hugo Grotius in his outstanding work *The Rights of War and Peace*."[77]

Apart from the fact that Grotius as a humanist lawyer was steeped in Roman law, there are four substantive reasons for Grotius' use of normative Roman texts. First, Grotius' aim was to put forward a *secular*,

[74] Böcler 1687, 13, "Latinorum Philosophorum decus omne penes Ciceronem stat: cujus duo opera de Legibus; & praesertim de Officiis, mirum quantum conferre possunt huic materiae . . . Grotius multa debet his libris, etiam ubi non ostendit." Trans. Hochstrasser (2000, 58). On Böcler see below, 76–77.

[75] See Hochstrasser 2000, 57.

[76] Barbeyrac 1749, 67. On Barbeyrac's take on Grotius, see below, 55–56.

[77] Carmichael 2002, 9–10. For Carmichael's nuanced view of the role of Roman law, see 14: "They are therefore merely dabblers in one or in both kinds of law who persuade themselves that an accurate knowledge of natural law can be derived from the study of Roman law or of any civil law whatsoever. This is not to denigrate the study of civil jurisprudence, however; for besides the value of studying the law that is used in the courts for the authority of such law in addition to its manifest equity, I also readily acknowledge that the civil law of the Romans often illustrates the natural law, reflecting the light which it receives from it. So just as it is reasonable to teach moral science to those students of the civil law who want it, a knowledge of civil law is virtually necessary in the present state of our moral studies. Indeed the need is so great that the science of natural law will never reach perfection or be cultivated with felicity, until the philosophers know more about the civil law and the jurists know more about philosophy; until, that is, the philosophers recover, or the jurists restore, the garments borrowed from philosophy which at one time added luster to the attire of Roman jurisprudence."

denominationally neutral natural law which had to be based on secular, non-Christian sources – Grotius explicitly states in the dedication to *Mare liberum* that his natural law work "does not depend upon an interpretation of Holy Writ in which many people find many things they cannot understand."[78] This ties in with, and lends additional support to, those strands in the scholarly literature that have affirmed the essentially secular nature of Grotius' natural law doctrine and might help move the debate about Grotius' secularity away from the famous *etiamsi daremus* passage in the *De iure belli ac pacis libri tres*.[79] As Knud Haakonssen points out, "Grotius firmly denies that natural law can be identified with either the Old or the New Testament (Prol. XLIX, LI), in sharp contrast to Suárez, who saw the Decalogue as containing the natural law."[80] To some extent, this secular outlook of Grotius' natural law doctrine is simply an expression of his rationalist outlook when it comes to the relationship between God's will and the norms of natural law, a rationalism perfectly in line with many protagonists of mainstream scholasticism. But in the case of Grotius, his use of the Roman law of property and obligations and, most importantly, his argument for a novel doctrine of the sources of law acquire a new quality in that his argument is motivated by concerns with the rise of commerce and the need for a denominationally neutral doctrine of the sources of law. While Grotius' rationalist conception of the law of nature as expressed in the *etiamsi daremus* passage is thus anything but novel, his grafting of a doctrine of sources that gives Roman private law its due onto this rationalist conception can lay claim to originality.[81]

Second, as we have seen, Roman law had already developed a doctrine of the freedom of the high seas, based on the idea of the sea as having remained in a natural state; this, as we shall see in the sixth chapter, was highly congenial to the interests Grotius was hired to defend. Third, the

[78] *ML*, 5: "Sed quod hic proponimus nihil cum istis commune habet . . . non ex divini codicis pendet explicatione, cuius multa multi non capiunt . . . " For an excellent discussion of the secular character of Grotius' natural law and especially the famous *etiamsi daremus* passage, see Haakonssen 1985, 247ff., with further literature; see also Haakonssen 1996, 29. Grotius in his use of a Stoic concept of nature could be described as a precursor to Deism; he was also perceived as an atheist and precursor to Deism due to his innovations in biblical criticism: cf. Israel 2001, 447–56. On Grotius' secularity, see Somos 2011 383–438.

[79] The literature on the *etiamsi daremus* passage is vast, but it does provide a good starting point for the debate on Grotius' secularism. See especially Todescan 2003; Schneewind 1998, 67–68; Haakonssen 1996, 29; Besselink 1988; Zajadlo 1988; Passerin d'Entrèves 1967, 50ff.; St. Leger 1962; Chroust 1943; Grotius' secularity is affirmed above all by Passerin d'Entrèves and Haakonssen.

[80] Haakonssen 1996, 29.

[81] For Gentili as an important predecessor in this regard, see Haggenmacher 1990; and our Introductions in Kingsbury and Straumann 2010b and Kingsbury and Straumann 2011.

parallels between Roman imperialism and the Dutch expansion in the East Indies made Roman political and legal theory particularly attractive for Grotius. Finally, Roman law provided a fair number of commerce-driven remedies in contract law, which were part of the so-called law of peoples (*ius gentium*), a body of law initially created to accommodate foreigners (*peregrini*), especially merchants, and give them standing in Roman courts. This body of rules – albeit clearly positive Roman law founded upon the praetor's edict, and flowing from the jurisdictional authority of the praetor (*ius praetorium*) – was thought to obtain even beyond Roman jurisdiction and contained remedies granted by the praetor as a matter of equity because they were taken to be furthering rightful claims.[82] (Constant was thus not wrong in identifying a causal relationship between commerce and the development of individual rights – the remedies contained in the *ius gentium*, which in turn had a distinct impact on Cicero's ethics, were indeed largely commerce driven.)

The book proceeds in nine chapters. In the first, I shall present Grotius' main works on natural law in their historical and intellectual contexts. Concrete political challenges concerning the Dutch East India Company motivated Grotius to formulate a doctrine of natural law which was not based on state practice and customary law, but on a doctrine of the sources of the relevant norms – itself gleaned from classical texts – which put a premium on a priori reasoning, human nature, and certain normative texts from classical antiquity. This doctrine of the formal sources of Grotius' norms will be the subject of the second chapter. Here it will be shown that Grotius puts arguments from (human) nature and certain classical texts front and center. The classical texts he has in mind are, first and foremost, Roman private law as contained in the *Digest*, and philosophical works by Cicero. The use of these classical texts is justified by virtue of their being indicative of what a priori reasoning, and therewith natural law, demand. There are also further norms, not part of natural law, but of (arbitrary) agreement and will, which can be shown from consensus. This two-fold structure of rational a priori natural law on the one hand and consensual positive law of nations on the other corresponds neatly with

[82] The legal foundation of these remedies, however, was deemed to consist, in a positivist manner, entirely in the authority (*iurisdictio*) of the praetor. For the *ius gentium*, see the authoritative Kaser 1993, esp. 4–7, 165; see also Grosso 1973, 442: "[S]i può dunque dire che la trasformazione e crescita sociale di Roma trova nel *ius gentium*, in particolare nei negozi sanzionali *ex fide bona*, la diretta traduzione in schemi giuridici." See also Cicero's account of equitable remedies in the praetor's edict, Cic. *Off.* 1.32. For a recent expression of the opposing view that *ius gentium* was nothing more than a loose term used by the Roman lawyers to embrace all the legal provisions commonly observed by all humankind, see Ando 2006, 134ff.; Ando 2010.

Grotius' method of proving natural law and the law of nations, which is the subject matter of the third chapter, where it is shown to be very much dependent on classical rhetoric.

Chapters four and five are concerned with fleshing out the presuppositions of the system of natural justice Grotius proposes, namely his (Stoic) anthropological assumptions (dictated by the doctrine of sources described earlier) and the way he fleshes out these assumptions along very Roman, Ciceronian lines into a universal, rule-based theory of natural justice and natural rights. Chapter five will also show how his view of the natural condition pushes Grotius to rid himself of much Aristotelian ballast, as he jettisons the most important elements of Aristotle's virtue theory of justice, namely distributive justice, guarding only those parts amenable to being formulated as rules, that is to say *corrective* justice.

Chapter six is concerned with Grotius' concept of the state of nature. It will become clear that for Grotius, the state of nature, far from being merely a hypothetical device, was actually existing, namely on the high seas, for which the norms of his natural law doctrine were originally designed. The chapter will also show how Grotius' conception of the natural state differs from that of his eminent successor, Hobbes, and will critically engage with the scholarly distinction usually drawn between "humanist" and "scholastic" approaches to political thought.

Grotius' theory of natural justice and his concept of the state of nature, which relies on that theory of justice, yield famously a doctrine of subjective natural rights. These natural rights, which lie in many respects at the very core of the theory of justice Grotius propounds, are discussed in chapters seven to nine, where it is shown that natural rights, for Grotius, resemble suspiciously the legal actions made available by the law of civil procedure contained in the *Digest*. Grotius' state of nature, then, comes to resemble the Roman Forum, a place governed by the rules and remedies of private Roman law, giving rise to a set of specific natural rights which will be treated in chapter eight. Grotius' is a state of nature which, importantly, also contains an enforcement mechanism for the natural law that governs it: a universal right to punish violations of natural law and natural rights, a right which will be discussed in chapter nine.

A few words on method

Much has been written on method in the practice of intellectual history, or the history of ideas. This is not the proper occasion to add unduly to this kind of scholarly literature, but a few words are in order. This

book aims to identify intellectual influences on Hugo Grotius and his work and consequently to help situate him in the history of political thought. This requires clarity with regard to the kind of "influence" we are talking about. In a way, my approach is orthodox and Cantabrigian in nature: both Grotius' pragmatic context, the political circumstances he found himself in, as well as the ideas he was impressed with and used in his arguments, are going to be of interest to us. The role of pragmatic reasons and political motives is quite obvious in Grotius' case, and it will be seen that they play a weighty part indeed, primarily in providing the initial motivation to develop particular arguments and ideas. When it comes to intellectual influences, which constitute the primary focus of this book, we shall attend first and foremost to ideas and works he both demonstrably knew and which he put explicitly to use by citing them.[83]

As we shall see, the reasons for adopting particular intellectual influences rather than others need to be explained in part by reference to the immediate political context, but in part it is clear that Grotius adopts positions on what he believes their philosophical merits to be. This makes it necessary to attend to both pragmatic as well as epistemic reasons when describing Grotius' use of the classical tradition. It also requires an open mind when it comes to the (itself almost perennial) issue of "perennial questions." The mere possibility of certain questions which, remaining in important ways the same, have met with longstanding interest in the history of political thought should not be excluded on a priori grounds, nor should every work of political thought be described exclusively in pragmatic terms as a political performance. Rather, the question whether and the degree to which a work of political thought is responding to "perennial" ideas rather than to individual historical circumstances seems itself to be an empirical question open to and worthy of historical scrutiny.[84]

Such scrutiny requires proper regard to arguments – as Knud Haakonssen puts it, it "would seem to be part of the intellectual historian's task

[83] See the following two conditions for influence in Skinner 1969, 26: "(a) that there should be a genuine similarity between the doctrines of A and B; . . . (c) that the probability of the similarity being random should be very low (. . . it must . . . be shown that B did not as a matter of fact articulate the relevant doctrine independently)." I take these two necessary conditions to be jointly sufficient. See also the illuminating discussion of influence in Schneewind 2003.

[84] Haakonssen 1996, 13: "[W]e have no means of knowing whether there are such ideas except by piecemeal investigation. We cannot start from them; whether we can end up with them is at least questionable." See ibid., 8–14, for a convincing outline of this methodological outlook.

to write the history of the utterance not only as a performance but also as a reference. The latter, however, cannot be done except through an investigation of the purported objects of reference, which, in intellectual history, will primarily be the ideas employed by an historical speaker in making an utterance."[85] A similar stance is Morton White's, when he says, in a preface aptly titled "On the Absurdity of Writing the History of Ideas without Analyzing Them": "a work in which an effort is made to place ideas in a historical and social context *must*, to some degree, offer a logical analysis of those ideas." White goes on to say that

> psychology, sociology, or history of ideas . . . go beyond logical analysis but for that reason they are not only compatible with it but presuppose it. They *supplement* the logical analysis of ideas; they are not rivals of it. The scholar who tells us what the "Protestant ethic" *is* gives a logical analysis of it, and when he tells us how it is causally linked to capitalism, he is advancing a sociological thesis . . . [A]ll of which amounts to saying that if your are going to talk about the causes and consequences of philosophical beliefs, you had jolly well better know a lot about what those beliefs *are*.[86]

The humanist nature of Grotius' undertaking makes it necessary to extend the horizon of the relevant intellectual contexts far beyond his age into classical antiquity. This is an approach which has been shown to be highly fruitful, with Iain McDaniel's book *Adam Ferguson in the Scottish Enlightenment*, Christopher Brooke's *Philosophic Pride*, Daniel Lee's work on Grotius,[87] Eran Shalev's *Rome Reborn on Western Shores*, Wilfried Nippel's *Antike oder moderne Freiheit?*, Peter Garnsey's *Thinking about Property*, Eric Nelson's *The Greek Tradition in Republican Thought*, or David Lupher's *Romans in a New World* merely being the most recent examples. Investigating early modern political thought in light of the classical tradition is an extraordinarily interesting and promising undertaking, and it is very obviously a prime candidate for the kind of long-range diachronic intellectual history David Armitage has recently proposed.[88]

Grotius' natural law works are a particularly fruitful object of such research, as they are located halfway, as it were, between modernity and antiquity. *De iure praedae* and *De iure belli ac pacis* both freely make use of humanist scholarship and are rich in references to the classical period, while the significance of Grotius' natural-law ideas, and especially his doctrine

[85] Haakonssen 1996, 10. [86] White 1978, xiii–xiv.
[87] Lee 2011. [88] Armitage 2012.

of subjective natural rights, for political and legal thinking up to the end of the eighteenth century is unquestioned.

It is the central claim of this book that the traditions that exercised the greatest influence on Grotius' natural-law works were classical, and above all Roman. Biblical and patristic sources were obviously used by Grotius in *De iure belli ac pacis* with great erudition. As far as the normative content of Grotius' *natural law* is concerned, however, they played a negligible role. Grotius explained the reasons for this in his dedication in *Mare liberum*, addressed to the princes and free peoples of the Christian world. There Grotius stated that the natural law arguments in which his work was grounded did not depend on biblical exegesis, equating the Bible with the particular laws of individual peoples and underscoring the lack of universality of biblical norms and thus their unsuitability for natural law arguments.[89] The independence of natural law norms from biblical and patristic sources remained in *De iure belli ac pacis,* where Grotius explained that the Old Testament primarily contained norms originating in God's free will, while the New Testament contained norms binding exclusively on Christians.[90]

At first glance, Grotius seemed to speak of antiquity quite generally, expending little effort on geographic or historical differences; it was "ancient Grecians and Romans" whom he preferred to all others, without showing any preferences within these rough categories. Such preferences emerge quickly, however, if one studies the historical development and normative substance of Grotius' natural law theory. Grotius was an exponent of a Roman tradition, or more exactly, the tradition of Cicero's ethical writings and the imperial legal scholars of the *Corpus iuris*. In Grotius' early work *De iure praedae*, especially its twelfth chapter, published as *Mare liberum*, we can see with great clarity his use of Cicero and "some old Caesarian jurists" (*Caesariani aliquot Iureconsulti veteres*), as Grotius' English antagonist John Selden would later remark disparagingly in his *Mare clausum*.[91] His *De iure belli ac pacis libri tres* in 1625, in contrast, demonstrates at first glance a more balanced use of classical sources, which increased in each later edition; the Bible, too, was used more frequently than in *De iure praedae*. As far as the fundamental legal principles were concerned, however, twenty years after *De iure praedae* little had changed.

[89] *ML* ded., 5: "Sed quod hic proponimus . . . non ex divini codicis pendet explicatione, cuius multa multi non capiunt, non ex unius populi scitis quae ceteri merito ignorant."
[90] *IBP* prol. 48–50; see the discussion below, 77.
[91] *MC* ded., 3.

In substance, Grotius remained faithful to his Roman legal sources and the ethics of Cicero, who was well disposed towards the principles of Roman private law; in combination, they made up the majority of his substantive legal sources, even in *De iure belli ac pacis*. In addition, he increasingly brought methodological questions to the fore, and thus an orientation towards classical rhetoric, especially that of Quintilian.

CHAPTER I

Natural law in historical context

Early works on natural law and the Dutch Republic

The United Provinces, as the Dutch Republic was officially called after its founding in 1579 in the Union of Utrecht, emerged in 1568 from the revolt against the rule of the Spanish Habsburgs by the seven northern provinces of the Netherlands. In the 1590s, during the war of independence from Spain, the Dutch succeeded in building up a highly successful European trade in spices and pepper, which proved to be the decisive factor in the subsequent rise of the Netherlands' foreign trade outside of Europe.[1] In 1598, the United Provinces were subjected to a trade embargo by Spain and Portugal[2] in order to prevent the export of colonial products from the Iberian peninsula to the Dutch Republic. The embargo had, however, the unintended effect of causing Dutch merchants to invest more heavily in the East India trade, in order to obtain the commodities at the source. This process ultimately led, in 1602, to the founding of the United Dutch East India Company (VOC) under the auspices of the Dutch Republic. It was a new type of commercial organization chartered by the Dutch Estates General and endowed with certain delegated sovereign powers.[3]

Hugo Grotius was born into a patrician family in 1583 in Delft, in the Dutch Republic, at the time fighting for its independence.[4] At age eleven he matriculated at the University of Leiden, where Joseph Justus Scaliger was one of his teachers, and completed a propaedeutic humanist course of study in the liberal arts in 1597. In 1598, Grotius accompanied the Advocate of the States of Holland, Johan van Oldenbarnevelt, on an official

[1] On the developments leading to the Dutch colonial empire, see Israel 1989, 50–67.
[2] The two crowns were united under a personal union from 1580 to 1640.
[3] On the history of the VOC, see Gaastra 1991; see also the overview in Israel, 1995, 318–23.
[4] See Nellen 1985; see also the short biographical sketch in Eysinga 1952; on Grotius' youth and education, see Knight 1925, 17–35; on the institutions of the United Provinces during the years of their consolidation, see Israel 1995, 276–306. For a good, concise portrait of Grotius' life and work, see Hofmann 1995.

mission to the French court and received the title of *doctor iuris utriusque* from the University of Orléans, without ever having formally studied law.[5] After returning to the United Provinces, Grotius published editions of the works of two classical authors, Martianus Capella's *Satyricon* (*De nuptiis Philologiae et Mercurii*) and *Phaenomena*, a didactic poem on astronomy by the Hellenistic poet Aratus,[6] which influenced Grotius' conception of the state of nature, as we shall see in Chapter 5.

Between 1599 and 1600, Grotius wrote the treatise *De republica emendanda* with the intention of improving the institutional framework of the Dutch Union.[7] He was admitted to the practice of law in The Hague in late 1599, which soon led to a flourishing legal practice and brought Grotius prominence in the area of law as well.[8] In 1601, Grotius was appointed historiographer of the States of Holland and began writing his *Parallelon rerumpublicarum*, a comparison of the Athenians, the Romans, and the Dutch, which was intended to show, by rhetorical means, the moral superiority of the Dutch compared with the Athenians and Romans.[9] Between 1601 and 1612, he also produced a history of the Dutch Revolt after 1588, the *Annales et historiae de rebus Belgicis*.[10] When Grotius was commissioned in 1604 by the directors of the VOC to write a legal advisory opinion, the humanist scholar accepted the assignment, beginning work on a natural-law justification of Dutch expansion in Southeast Asia.

In his *De iure praedae commentarius*, written between 1604 and 1606 on commission from the VOC[11] – the twelfth chapter was published separately and anonymously, with little editing, in 1609 under the title *Mare liberum*[12] – Grotius developed a theory of natural law that was already closely related to his later *De iure belli ac pacis* (1625). The essay *De iure praedae* was a response to a concrete event: In February 1603, Jakob van Heemskerck, a Dutch admiral serving the United Amsterdam Company, a precursor to the VOC, had seized a Portuguese ship, the *Santa* Catarina,

[5] See Wolf 1963, 264–65; see also Hofmann 1995, 52–53.
[6] See Knight 1925, 40–42, 45–46; Wolf 1963, 265.
[7] First published in 1984 by Arthur C. Eyffinger in the journal *Grotiana*, 5.
[8] See Eysinga 1952, 16.
[9] On the *Parallelon*, see Eyffinger 1996.
[10] First published in 1657.
[11] For the date of *De iure praedae*, as well as a careful examination of the historical circumstances in which the work was written, see now Ittersum 2009, who argues that Grotius revised the text repeatedly in the context of the truce negotiations with Spain and Portugal, justifying the continuation of colonial warfare even given a truce; see also Ittersum 2006, 105–88; Borschberg 1999, 226–29.
[12] For the editing that did take place, see Ittersum 2007a and 2007b, esp. 79–80, where she shows how concerns about the negotiations for the Twelve Years' Truce made Grotius delete any references to the tenuous character of Spanish claims to the Americas and present a tamer version of his own rights theory.

in the straits of Singapore;[13] its cargo was later sold in Amsterdam for the phenomenal price of more than three million Dutch guilders.[14] In the subsequent debate about the legality of the seizure of a Portuguese ship by the Netherlands, Grotius, now only 21, began to write his *De iure praedae*, which would clarify the VOC's position that the ship had been taken as a prize in a just war. The question of the legality of the Dutch actions in the Portuguese colonial sphere was of vital interest to the young republic, particularly as its colonial expansion in East India not only served commercial interests, but was also viewed as an important part of the war of independence against Spain, which was at the time united with Portugal under the Spanish crown.[15] Grotius himself drew attention to this aspect of his treatise and his motivation for writing it roughly ten years later: "A few years ago, when I saw that the commerce with that India which is called East was of great importance for the safety of our country and it was quite clear that this commerce could not be maintained without arms while the Portuguese were opposing it through violence and trickery, I gave my attention to stirring up the minds of our fellow-countrymen to guard bravely what had been felicitously begun, putting before their eyes the justice and equity of the case itself . . . "[16]

The debate on the legality of Dutch privateering in East India focused essentially on the question of freedom of trade and its necessary prerequisite, the freedom of the seas. In *The Free Sea*, subtitled "A Disputation Concerning the Right Which the Hollanders Ought to Have to the Indian Goods" (*Mare liberum: De iure quod Batavis competit ad Indicana commercia*), Grotius argued for the natural right of the Dutch to have access to the Portuguese sphere of influence in East India, without addressing the concrete incident of the cargo captured in 1603. However, the twelfth chapter

[13] On the capture of the Portuguese ship *Santa Catarina*, see Ittersum 2003, where it is argued that Grotius' justification of the capture relied to a significant extent on Heemskerck's own arguments for privateering; see also Fruin 1925; Borschberg 2002; Ittersum 2006, 1–52.

[14] An amount that represented twice the capitalization of the English East India Company; see Armitage 2004, xii; Borschberg 2002, 35.

[15] On the mixed, partly commercial, partly political arguments at the founding of the VOC, see Tex 1973, 302–12.

[16] In his *Defense of Chapter V of the* Mare Liberum/*Defensio capitis quinti maris liberi* (1615). *ML* Armitage, 77; *DCQ*, 331: "Ante annos aliquot, cum viderem ingentis esse momenti ad patriae securitatem Indiae quae Orientalis dicitur commercium, id vero commercium satis appareret obsistentibus per vim atque insidias Lusitanis sine armis retineri non posse, operam dedi ut ad tuenda fortiter quae tam feliciter caepissent nostrorum animos inflammarem, proposita ob oculos causae ipsius iustitia et aequitate, unde nasci τὸ εὔελπι recte a veteribus traditum existimabam. Igitur et universa belli praedaeque iura, et historiam eorum quae Lusitani in nostros saeve atque crudeliter perpetrassent, multaque alia ad hoc argumentum pertinentia eram persecutus amplo satis commentario, quem edere hactenus supersedi."

of *De iure praedae* had originally been intended to prove the legality of the capture of the Portuguese carrack. *Mare liberum* argued the legality of the spoils under the law of nature (*iure naturali*), even if the trading company on whose behalf Admiral Heemskerck had traveled to East India were to be considered a private entity without public authority. The natural right to free access to the world's oceans, as well as to free trade, made the Portuguese colonial monopoly and the Portuguese claim to exlusive rights of navigation on the high seas in the Indian Ocean a just *causa belli*. The East Indian waters were painted as a *state of nature*, characterized by the absence of state authority and by the fact that they were "common to all" (*res communes omnium*), that is to say that the high seas could not possibly be the object of private rights.[17] The state of nature prevailed on the high seas (*mare liberum*), which were claimed to be governed by the norms of natural law.

The first question for Grotius, however, concerned the identification and the sources of the natural-law norms to which the state of nature is subject. As was already apparent in the attacks by the Scottish legal scholar William Welwod mentioned in the Introduction,[18] the question of the correct identification of the relevant norms, the doctrine of legal sources, was central to the debate, an issue that will further occupy us in Chapter 2. The Spanish and Portuguese based their claims to a trade and shipping monopoly in East India on a particular doctrine of legal sources, the validity of which Grotius sought to undermine with a competing doctrine; and as we shall see, for Grotius, in answering the chronic virulent question of the formal origin of legal norms in a "horizontal," international system lacking a central lawmaker, certain strands of the classical tradition played a fundamental role.

In the dedication of his *Mare liberum*, Grotius provided an illuminating explanation of his point of departure that already permitted inferences about the sources of the norms he intended to apply. The issues dealt with in *Mare liberum* did not involve the type of cases normally brought by ordinary citizens against their neighbors, such as complaints about water dripping off roofs (*stillicidia*) or obstructing others' property; nor did it involve cases that nations would normally bring against one another concerning borders or the ownership of rivers or islands. It involved, instead, a case that concerned the entire ocean, the right of navigation (*ius navigandi*) and free trade (*libertas commerciorum*). The following questions, Grotius continued, were controversial among the Dutch and the Spaniards:

[17] See on this Benton and Straumann 2010, esp. 26–29. [18] See above, 1–2.

> [W]hether the huge and vast sea be the addition of one kingdom (and that not the greatest); whether any people (*populus*) has the right (*ius*) to forbid people that are willing neither to sell, buy nor change nor yet to come together; and whether any man could ever give that which was never his or find that which was another's before, or whether the manifest injury [*manifesta iniuria*] of long time give any right [*ius*].[19]

In the last sentence, Grotius already granted that the situation prevailing in the East Indian waters was similar to European state practice and consisted of a division of the waters among the main seafaring powers.[20] This situation had a customary-law character for the East Indian waters,[21] and thus supported the Portuguese legal claims, which were based, among other things, on such customary arguments.[22] The Spanish and Portuguese additionally based their claims to control of the Indian Ocean on the same legal title upon which the acquisition of territory in the foreign colonies was based: title through papal donation, through treaty, through discovery, and through occupation.

Legal claims to the high seas were granted in the mid-fifteenth century by papal bulls and increasingly ensured thereafter by bilateral treaties between Portugal and Spain. For example, the edict *Romanus Pontifex*, issued in 1455 by Nicholas V, granted title of possession to islands, ports and the high seas.[23] In contrast to these older papal bulls, however, neither the edicts *Inter Caetera* (1493) nor the Treaty of Tordesillas (1494) undertook a specific legal definition of the Iberian nation's claims to authority over the ocean. Rather, the two edicts *Inter Caetera* made all trade and shipping to any of the overseas territories granted to the Spanish throne subject to permission from the Spanish king, and the Treaty of Tordesillas permitted Spanish ships to cross through the Portuguese zone, but imposed certain restrictions on their routes.[24] The 1529 Treaty of Saragossa provided for exclusive zones

[19] *ML* Armitage, 7; *ML* ded., 4: "[N]on hercule de stillicidiis aut tigno iniuncto, quales esse privatorum solent, ac ne ex eo quidem genere quod frequens est inter populos, de agri iure in confinio haerentis, de amnis aut insulae possessione; sed de omni prope oceano, de iure navigandi, de libertate commerciorum. Inter nos et Hispanos haec controversa sunt: Sitne immensum et vastum mare regni unius nec maximi accessio; populone cuiquam ius sit volentes populos prohibere ne vendant, ne permutent, ne denique commeent inter sese; potueritne quisquam quod suum numquam fuit elargiri, aut invenire quod iam erat alienum; an ius aliquod tribuat manifesta longi temporis iniuria."

[20] Alexandrowicz 1967, 61: "[C]ontrol over the Oceanic expanse of waters was parcelled out among the main maritime powers . . . "

[21] See Fahl 1969, 48.

[22] The following discussion of the legal foundations of the Iberian monopoly is based on Grewe 1988, 300–1.

[23] Grewe 1988, 301n1.

[24] On the edict *Inter Caesera* of May 3, 1493, see BR, 101; on *Inter Caesera* of May 4, 1493, see BR, 110.

for shipping and trade in the Asiatic region.[25] All three documents thus established Spain and Portugal's claims to some sort of exclusive authority over the high seas, though without more closely defining those claims legally – without defining them as jurisdictional claims, say, or claims to property, or possession.[26] With the unification of Spain and Portugal in 1580, these reciprocal assurances became obsolete, but the Iberian trade monopoly, based on papal donation, discovery, and possession, remained and was of a fully customary nature.[27]

Grotius therefore could not anchor his arguments in customary law expressed through state practice. Custom, papal edicts, and titles of discovery and possession, as the foundations of the Iberian claims, had to be undermined with the help of an alternative doctrine of the sources of law – a radically new doctrine that lent legal norms taken from antiquity relevance to the practice of the early seventeenth century.[28] Grotius' use of ancient texts in *De iure praedae* must be seen in this context. It in no way shows the "inadequacy"[29] of his method, but should be seen as an original attack on the bases of the Spanish and Portuguese legal claims – an attack that met the Iberian claims on the level of sources of law.[30] Grotius' doctrine of legal sources formally declared "nature" to be the source of the law relevant to the oceans, while in terms of content or substance, certain norms that had been established by "Roman writers" and "wrested jurisconsults" (as William Welwod would reproach him)[31] were granted

[25] The Treaty of Saragossa is in BR, 222–39; see esp. 231–34. On the Treaty, see also Fahl 1969, 26–33.

[26] Grewe 1988, 301.

[27] Although the legal force of the Iberian title, that is, of the papal bulls, was always controversial, the bulls lent their legal claims additional weight, which could have an effect, in particular, in connection with treaty negotiations; see Fisch 1984, 46–54. Fahl 1969, 129–30 plays down the significance of the bulls as formal bases of the Iberian legal claims, but fully recognizes their importance as sources of legal argument.

[28] Roelofsen 1989, 46: "According to his [Grotius'] terms of reference, a rule of law, once demonstrated in Antiquity . . . was applicable to seventeenth-century practice." See also Bederman 1995/96, 5; Ziskind 1973.

[29] Roelofsen 1989, 45 sees in the use of classical texts an "inadequacy of Grotius' method," which led to an inability to develop a normative role for actual state practice. Roelofsen misses the fact that Grotius could have no interest in granting actual state practice such a role.

[30] Bederman 1995/96, 10 lends too little significance to the historical context of *De iure praedae* when he says: "It seems inconceivable to me that Grotius . . . would refer to the classical heritage in law only to divert attention from the current law." The same problem weakens the analysis of Grotius' doctrine of legal sources in Gizewski 1993, 343–45, although Gizewski here correctly observes (344), that Grotius' natural law made possible an "assessment and derivation of international legal norms for the present, especially from classical documentation, free of positive-law assumptions." However, Grotius' natural law did not originally emerge at "the greatest possible distance from contemporary controversies" (345).

[31] *ML* Armitage, 66. See above, 2.

legal significance. The following will more closely examine the way in which Grotius developed his doctrine of the sources of law.

The above contrast made by Grotius between cases normally brought by neighbors against each other because of water running off roofs (*stillicidia*) or similar banalities and the case that he sought to handle in *Mare liberum*[32] already contains suggestions of the natural-law character of the piece, as well as the tradition from which he took his natural-law arguments. The passage in the dedication of Grotius' *Mare liberum*, with its contrast between the law of eaves and more important natural law questions, alludes to a statement by Cicero in his treatise on natural law, *De legibus*. Cicero answers his friend Atticus, who has asked him to "explain your ideas about the civil law," as follows:

> My ideas? I think that there have been very eminent men in our state who have made it their business to interpret the law to the people and to give opinions, but although they have made great claims they have been occupied in small matters . . . I don't believe that the men who were in charge of this function were ignorant of universal law, but they have only explored what they call the civil law[33] to the extent that they wanted to provide it to the people; that, however, is as slight intellectually as it is necessary in practical matters. So where do you want me to go, and what are you urging me to do? that I write pamphlets on the law about water running off roofs [*stillicidia*] or about shared walls? that I write the formulas for contracts or civil judgments? Many people have done that diligently, and it is more humble than I think is expected of me.[34]

Shortly after, Cicero explained in *De legibus* the types of observations he thought were expected of him, rather than writing briefs on petty cases such as dripping eaves or shared walls. Asked by Atticus whether he, Cicero, did not believe "that the discipline of law should be drawn from the praetor's edict (as is the current custom) or from the Twelve Tables (as

[32] *ML* ded., 4. See above, 27.

[33] The phrase *ius civile* is used to refer to the praetorian law of Rome, as opposed to *ius gentium* on the one hand, and to statutory law on the other.

[34] Cic. *Leg.* 1.14: *Egone? Summos fuisse in civitate nostra viros, qui id interpretari populo et responsitare soliti sint, sed eos magna professos in parvis esse versatos. Quid enim est tantum quantum ius civitatis? Quid autem tam exiguum quam est munus hoc eorum, qui consuluntur? (Quamquam est populo necessarium.) Nec vero eos, qui ei muneri praefuerunt, universi iuris fuisse expertis existimo, sed hoc civile, quod vocant, eatenus exercuerunt, quoad populo praestare voluerunt; id autem in cognitione tenue est, in usu necessarium. Quam ob rem quo me vocas, aut quid hortaris? ut libellos conficiam de stillicidiorum ac de parietum iure? An ut stipulationum et iudiciorum formulas conponam? Quae et conscripta a multis sunt diligenter, et sunt humiliora quam illa, quae a nobis exspectari puto.*

our predecessors did), but from the deepest core of philosophy,"[35] Cicero gave the following answer:

> Philosophers have taken their starting point from law; and they are probably right to do so if, as these same people define it, law is the highest reason [*ratio summa*], rooted in nature, which commands things that must be done and prohibits the opposite. When this same reason is secured and established in the human mind, it is law [*lex*].[36]

The "philosophers" to whom Cicero refers are clearly the Stoics, and the definition of law is taken largely from Chrysippus' definition of law[37] – Cicero's Roman audience would probably have expected a different definition.[38] In fact, Cicero's portrayal of natural law in *De legibus* is essentially a Stoic one, the attractiveness of which for Grotius was twofold. First, the Greek Stoics, with their identification of law (*nomos*) and right reason (*orthos logos*), had pursued a goal that was of great value to Grotius' project of an alternative doctrine of legal sources: "[T]he point of their equation of law with right reason is to identify an alternative source for its authority."[39] Positive law based on customary law and papal donations, which claimed validity on the oceans at the beginning of the seventeenth century, could thus be countered with a law of reason originating in the Stoic concept of right reason (*recta ratio* or *ratio summa*).[40] A further advantage of such a law of reason would lie in its denominational neutrality.[41]

The second reason why the natural law in Cicero's *De legibus* exercised a strong attraction for Grotius and was suited to his purposes can be seen in the function that the doctrine of natural law of the Hellenistic Stoics had for Cicero in a specifically Roman context.[42] Stoic natural law in *De legibus* served primarily to resume and further develop an argument that had been dealt with in Cicero's earlier work *De re publica*, in which the natural law doctrine of the Stoics had already been used to refute the rhetorical attacks advanced against Roman imperialism by the Academic skeptic Carneades.

[35] Cic. *Leg.* 1.17: *Non ergo a praetoris edicto, ut plerique nunc, neque a duodecim tabulis, ut superiores, sed penitus ex intima philosophia hauriendam iuris disciplinam putas?*

[36] Cic. *Leg.* 1.18: *Igitur doctissimis viris proficisci placuit a lege, haud scio an recte, si modo, ut idem definiunt, lex est ratio summa, insita in natura, quae iubet ea, quae facienda sunt, prohibetque contraria. Eadem ratio, cum est in hominis mente confirmata et confecta, lex est.*

[37] See *SVF* 2.4.2–3; LS 67R.

[38] See Dyck 2004, 109, who cites Ateius Capito's definition from Aulus Gellius 10.20.2 as a typical Roman definition: *lex est generale iussum populi aut plebis rogante magistratu.*

[39] Schofield 1991, 69.

[40] The latter is the non-technical expression for *recta ratio* (*orthos logos*); see Dyck 2004, 106.

[41] But see, on the relationship between Protestant legal theory and natural law, my considerations in Straumann 2010, 116–18, with further literature.

[42] On the Hellenistic background of Cicero's natural law doctrine, see Johann 1981.

Grotius had a use for this Roman adaptation of Stoic natural law in a number of important respects. First of all, Grotius, in his legal defense of Dutch expansion in Southeast Asia, could draw on Cicero's natural law defense of Roman imperialism; further, natural law offered the appropriate framework for the development of an alternative doctrine of legal sources; and finally, Cicero's handling of the skeptical challenge to the justice of Roman imperialism was convincing on a methodological level – Cicero had countered the rhetorical character of Carneades' attack with the tools of rhetoric, which must have seemed a promising method to Grotius. Cicero's defense of Rome's military expansion with the help of a Roman version of Stoic natural law was thus to leave a mark on Grotius' natural law writings not only from a substantive point of view, but also methodologically.[43]

On the Law of War and Peace

Almost twenty years passed between the completion of *De iure praedae* and the first edition of *De iure belli ac pacis* in 1625. In those years, Grotius first continued his career as public prosecutor of the province of Holland, begun in 1607, and then, after 1613, as Pensionary (legal adviser) of the city of Rotterdam, began to play a role in the politics of the United Provinces.[44] As prosecutor, Grotius had both a criminal law function and the task of protecting Holland's property rights and financial interests. Grotius also continued, at the behest of the VOC, to represent Dutch interests abroad by leading the Dutch delegation at the Anglo-Dutch Colonial Conferences in 1613 and 1615 in London and The Hague.[45] This was also the period in which Grotius' "Defense of Chapter V of the *Mare Liberum*" (*Defensio capitis quinti maris liberi*) was published, in which he defended his natural-law arguments for freedom of the seas against a Scottish jurist – arguments that had ironically been used and directed against Grotius himself by the English during the Colonial Conferences.[46]

In the United Provinces, the original theological dispute between supporters of the Leiden theologians Arminius and Gomarus on the question

[43] For a short account of these contexts, see Straumann 2006b.

[44] See 24n4 above.

[45] On Grotius' role in the Colonial Conference, see Ittersum 2006, 371–96; Borschberg 1999, 241–48.

[46] On the arguments of the English, based on Grotius' *Mare liberum* and also loosely quoting from *ML* 8.63–64, see *CC*, 115–16n38: "Nec enim latere vos arbitramur quid in hanc sententiam scripserit assertor Maris liberi: 'Commercandi (inquit) libertas, quae ex iure est primario gentium et quae naturalem et perpetuam causam habet, tolli non potest et, si posset, non tamen nisi omnium gentium consensus.'" See also *CC*, 120n39; on the Colonial Conference of 1613 in general, see the monograph by Clark and Eysinga 1951, 59–81; on the Dutch position on England and on Grotius' function at the Colonial Conference, see Tex 1973, 489, 545ff.

of predestination now acquired an urgent political dimension. This dispute between the Arminians and the Calvinist orthodoxy around Gomarus led to a conflict that affected the position of the province of Holland in the Union. It escalated when the Gomarists attempted to take control of Arminian-controlled Holland through a national synod, and Holland, under the leadership of Oldenbarnevelt, considered countering this threat to its independence with military force, which led to the fall of the Oldenbarnevelt regime.

In this dispute, Grotius had taken the side of Oldenbarnevelt and the Arminians since publication of his work *Pietas ordinum Hollandiae ac Westfrisiae vindicata* in 1613. In late August of 1618, he and Oldenbarnevelt were arrested by the Dutch Stadtholder (governor), Maurice of Nassau, and convicted of treason by the Estates General. In prison, Grotius wrote the highly influential *Introduction to Dutch Jurisprudence* (*Inleidinghe tot de Hollandse Rechtsgeleerdheid*), an introduction to the positive law of the province of Holland. In 1621, he was able to escape to Paris, where he began working on his major treatise of natural law, *On the Law of War and Peace* (*De iure belli ac pacis libri tres*), in 1622. The work appeared in Paris in 1625.

De iure belli ac pacis was written in a completely different context with great distance in time and space from the questions of colonial expansion that had been the reason for Grotius' earlier work on natural law, his propaganda brief for the VOC's warfare in East India. Nevertheless, *De iure belli ac pacis* in terms of doctrinal substance was essentially an expanded version of *De iure praedae* and the arguments presented in *Defensio capitis quinti maris liberi*.[47] He retained his doctrine of sources of law and his method, along with a system of just causes of war and subjective rights from chapter 7 of *De iure praedae*; these were developed and deepened in the second book of *De iure belli ac pacis,* the centerpiece of the later work.[48] Given the very different circumstances under which the two works originated, this continuity is certainly remarkable. It lends at least some credence to Grotius' rhetorical statement in the Prolegomena to *De iure belli ac pacis* that he had ignored the existing and foreseeable controversies

[47] In April 1622, and again in June, Grotius asked his brother-in-law, who had remained in the Netherlands, for the manuscript of the *Defensio*, probably to use it for *IBP*; see *BHG*, 2: no. 744; no. 766.

[48] Haggenmacher 1983, 549: "En réalité, le livre second représente essentiellement une extension du système des causes matérielles esquissé au chapitre VII du Mémoire et dont on se souvient qu'il avait coïncidé avec un système général de compétences et de droits subjectifs." On the doctrinal continuity between the two works, see also Haggenmacher 1997, 97ff.

of his times and, in treating law, had abstracted from unique facts like a mathematician.[49]

It does indeed seem that Grotius essentially preferred not to judge the problems caused by the Thirty Years' War, which were not addressed in *De iure belli ac pacis*, any differently than the dispute between the United Provinces and the Spanish crown. This was especially so as his contract theory, already present in *De iure praedae* and greatly expanded in his later works, was sympathetic to constitutionally grounded resistance to the Habsburgs' claim to universality.[50] This is historically consistent; one can certainly see, in the separation of the United Provinces from the empire and their sovereign establishment, an anticipation of the contradictions resolved in many other places only after the Thirty Years' War. With a little exaggeration, one might say that many of the difficulties throughout Europe that were significant in the Thirty Years' War, to the extent they had already played a role in the Spanish–Dutch dispute from the end of the sixteenth century, were also reflected in *De iure praedae* and Grotius' earlier historical works, especially *De antiquitate reipublicae Batavicae.*

Let us recall that Grotius had formulated the normative elements in *De iure praedae* – that is, his natural law doctrine – in response to the extremely specific question of the justice and legality of the seizure of a Portuguese ship by the VOC. Although for Grotius, in exile in Paris, this question was hardly pressing during the genesis of the monumental *De iure belli ac pacis*, this later work was, in its normative content, very closely related to *De iure praedae*, the work of legal advocacy written almost twenty years earlier. The main features of this natural law doctrine survived not only the collapse of Grotius' political career and his exile, but even the twelve-year armistice between the United Provinces and Spain (1609–21) and the rise of the Dutch Republic as a seafaring power, which allowed the Dutch to be seen by the British as the newest monopolists in Southeast Asia. There is no indication of a reorientation in the basic normative commitments and structure of *De iure belli ac pacis* during the Thirty Years' War, notwithstanding the effect that contemporary events undoubtedly had on Grotius' life, especially after his appointment in 1634

[49] *IBP* prol. 58: "Iniuriam mihi faciet si quis me ad ullas nostri saeculi controversias, aut natas aut quae nasciturae praevideri possunt, respexisse arbitratur." However, at the time he wrote *De iure belli ac pacis*, Grotius still cherished the hope of soon being able to return to the Netherlands. See Wolf 1963, 267.

[50] See the discussion on constitutional contractualism and the contract of government (*Herrschaftsvertrag*) below, 195–206, esp. 203–6.

as Swedish ambassador to Paris.[51] Grotius' natural law doctrine survived these changes in the political context largely intact – apart maybe from an increasing emphasis on contract theory, which might have been owed to the Anglo-Dutch Colonial Conferences,[52] and which exercised a great influence on political thought in Europe and the North American colonies into the eighteenth century.[53]

In the remainder of this book I should like to argue that the continuity in the normative content of these two works is mainly due to the Roman tradition upon which it drew. As we shall see, Grotius found support for significant parts of *De iure praedae* – the doctrine of the sources of law, his method, and above all the norms and rights obtaining in the state of nature – in the Roman law of the *Digest* and in Ciceronian moral philosophy. In contrast, *De iure belli ac pacis* is characterized, at least at first glance, by a much broader range of sources. The overwhelming dominance of texts that I have subsumed under the heading of the Roman tradition and which, in *De iure praedae*, stands behind the formulation of natural law norms and the development of a subjective concept of rights, gives way in *De iure belli ac pacis* to a citation practice that covers the entire literary output of Greco-Roman antiquity. When it comes to the central themes of this study, however – the sources of natural law, its basis and content, and the development of natural rights – a closer look indicates that very little indeed has changed in *De iure belli ac pacis*, with regard to its dependence on specific *Roman* texts, when compared with Grotius' legal argument in 1606.

Grotius certainly proved his humanist erudition, adding new quotes to each new edition of his monumental natural law work from 1625 onward.

[51] But see Tuck 1999, 99ff., who, referring exclusively to the Prolegomena, unpersuasively connects changes in the 1631 edition of *IBP* in comparison with the 1625 edition with Grotius' attempt to return to the Netherlands in 1631. For a balanced discussion, see Brooke 2012, 53–56.

[52] During the conferences, Grotius defended the compatibility of the Dutch monopoly in East India with natural law, based on the contractual character of that monopoly, against the English, who took *Mare liberum* and the natural freedom of trade as their basis. See *CC*, ann. 37, 109: "Ius gentium libera vult esse commercia inter volentes et non obligatos; hoc ius nobis ut alibi ita et per Indiam competit ex nostra certe, non ex Lusitanorum sententia; ultra extendi et contra pactorum fidem iuris gentium libertas nec potest nec debet, cum inter primas eius sit regulas standum promissis, et de re sua liberum cuique esse arbitrium, ita tamen ut quod ante contractum fuerat voluntarium, id post contractum fit necessarium." See also *CC*, ann. 37, 113: "Cogitate, quaesumus, quam iustas habeant causas ea, quae Indis fecimus foedera, quae libertatem mercandi non, ut vos dicitis, tollunt, sed (quod ubique fit) pactorum finibus circumscribunt." See Ittersum 2006, 359–99; Borschberg 1999, 246–47.

[53] See Haakonssen 1985; Haakonssen 1996, 30; Haakonssen 2002, 27–28; Grunert 2003; White 1978. See also Ter Meulen and Diermanse 1950, no. 565–618, which documents 54 Latin, 23 English, and 12 French editions of *IBP* by the mid-twentieth century.

Yet the fundamental traditions central to the sources, the identification, and the content of natural law remained the same as in *De iure praedae*. In *De iure belli ac pacis*, Grotius seems, for example, to show great interest in, and greater knowledge of, the Stoic doctrine of natural law and its origins in the older Greek Stoa (which was certainly due to his translation, published in 1623, of Stobaeus' anthology).[54] But in the later work, the arguments for natural law, as well as the content of natural-law norms, remained essentially influenced by Cicero and the *Digest*.[55]

Grotius also added a great deal thematically to *De iure belli ac pacis* that was not included in *De iure praedae*, but these additions – such as the discussion of sovereignty (*summum imperium*) in the third chapter of the first book – concern areas that are not part of natural law. The basis of natural law remained beholden to Roman private law and to Cicero. Grotius included Cicero's concept of justice as put forward in *De officiis*, with its orientation towards private property, in *De iure belli ac pacis* and identified it with Aristotle's corrective justice; while the Stagirite's Greek virtue ethics, with its orientation towards the distributive justice of a city-state, had no place in Grotius' rule-based natural law. This last point, as we shall see, is simply the upshot of the fact that these natural law rules are supposed to hold in a state of nature which is by definition devoid of the *polis* and any authority from which distributive justice could possibly emanate.

[54] *Dicta poetarum quae apud Io. Stobaeum exstant. Emendata et Latino carmine reddita ab Hugone Grotio*, published in 1623 in Paris by Buon. See Grotius' letter to his friend Gerard Vossius in 1619, in which Grotius writes of his interest in Stobaeus while in prison: *BHG*, 2: no. 590: "Iuris studium per multas occupationes intermissum repeto, reliqua pars temporis morali sapientiae impenditur; cui excolendae sententias omnes poëtarum a Stobaeo collectas toga donavi." See also Eysinga 1952, 76–77; Knight 1925, 167.

[55] See Hartenstein 1850, 500 (trans. Belinda Cooper): "Grotius . . . generally agrees with the legal views of Roman legal scholars, and largely for this reason, his doctrine differs from the empty abstractions of later natural law."

CHAPTER 2

A novel doctrine of the sources of law
Nature and the classics

The formal sources of "The Entire Law of War and Peace" in *De iure praedae*

Various passages in *De iure praedae* reveal something about the origin of the norms of natural law and can be interpreted as a doctrine of the sources of law. The following will deal exclusively with Grotius' doctrine of the sources of law in the formal sense, rather than the *actual* provenance of the norms postulated in *De iure praedae*; that is to say, we will in this chapter be concerned with the "sources" of law not in the sense of historical influence, explaining causally how a given legal rule came about, but rather with Grotius' doctrine of "sources" in the formal sense as criteria bestowing legal validity to norms. It will be shown that Grotius relied on a Roman tradition not only in regard to the substantive content of the natural law in *De iure praedae* – we will deal with this question of historical influence and Grotius' use of norms taken from Roman law in later chapters – but also in regard to the doctrine of sources upon which it was based, a doctrine he drew largely from Cicero and developed in analogous fashion. I will attempt to show that Grotius' largest debt in his doctrine of the sources of law derives largely from Cicero's treatment of "nature," which appears in Cicero's *De legibus* as a formal legal source of all types of norms.[1]

In the first chapter of *De iure praedae*, Grotius discusses the legal sources upon which the law obtaining among various peoples is based:

> [I]t would be a waste of effort to pass judgment regarding acts between different peoples [*inter . . . populos diversos*] rather than between citizens –

[1] As a matter of fact, Cicero derived many of his allegedly natural norms from the Roman civil law (*ius civile*). On his treatment of the Twelve Tables in *De legibus*, see Dyck 2004, 3–5, 13, 390ff. On the importance of the concept of *ius naturale*, originally taken from philosophy, in historical Roman law, see Voggensperger 1952.

> acts committed, moreover, under conditions not of peace but of war – solely on the basis of written laws.[2]

Grotius continues by denying that written law, and especially all of Roman law, has any relevance for this law that applies to relations between hostile peoples. He bases this explicitly on Cicero, and cites this description of the law obtaining among peoples, from his forensic speech *Pro Balbo*:

> [I]t is from some source other than the Corpus of Roman laws that one must seek to derive that preeminent science which is embodied, according to Cicero, in the treaties, pacts, and agreements of peoples, kings, and foreign tribes, or – to put it briefly – in every law of war and peace.[3]

The fact that Grotius cited *Pro Balbo* – and was indeed to draw the title for his later major treatise on natural law from this very passage – is no accident. In this passage of his speech, Cicero had also attempted as best he could to avoid a discussion of existing positive law, and had instead appealed to Pompey's excellent "knowledge of our treaties, agreements and pacts with communities, kings and foreign peoples" and to his "knowledge of our entire law of war and peace."[4] And although neither the praetorian edict nor the Twelve Tables was relevant, in Grotius' view, to the issue at hand, it was the legal scholars of Roman antiquity who had developed a correct doctrine of the sources of law. Grotius quoted Cicero once again, this time from *De legibus*, and, linking the law of war and peace obtaining among nations in *Pro Balbo* with the Stoic natural law in *De legibus*, put forward his view of the formal sources of the relevant legal rules:

> The true way, then, has been prepared for us by those jurists of antiquity whose names we revere, and who repeatedly refer the art of civil government back to the very fount of nature [*naturae fontes*]. This is the course indicated also in the works of Cicero. For he declares that the science of law [*iuris disciplina*] must be derived, not from the Praetor's edict (the method adopted by the majority in Cicero's day), nor yet from the Twelve Tables (the method of his predecessors), but from the inmost heart of philosophy. Accordingly,

[2] *IPC* 1, fol. 4: "Nam illi quidem operam mihi ludere videntur, qui res non inter cives sed populos diversos gestas, idque non pace sed bello, ex scriptis duntaxat legibus diiudicant."

[3] *IPC* 1, fol. 4′: "Aliunde igitur quam ex legum Romanarum corpore petenda est praestabilis illa scientia, quam Cicero dicit consistere in foederibus, pactionibus, conditionibus populorum regum exterarumque nationum, in omni denique belli iure ac pacis." The citation is from Cic. *Balb*. 15. Grotius derived the title of his *De iure belli ac pacis* from this; Livy also speaks of the "laws of war and of peace," see Livy 5.27.6: *sunt et belli sicut pacis iura*, a passage quoted in *IBP prol.* 26.

[4] Cic. *Balb*. 15.

> we must concern ourselves primarily with the establishment of this natural derivation.[5]

The second chapter of *De iure praedae*, the Prolegomena, contains a list of various legal sources, formulated in a range of normative principles or rules (*regulae*), which present Grotius' doctrine of the formal pedigree of norms; the sources of natural law relevant to the present study and the so-called primary law of nations (*ius gentium primarium*) are put forward in the first two normative principles. Considered from the formal point of view of the doctrine of sources, the will of God represents the original source of the "law of war and peace" at issue. The first principle reads: "What God has shown to be His Will, that is law." The will of God reveals itself in his creation, which illuminates the intention of the Creator, and from which natural law is derived.[6] Such a derivation is possible because every individual creature is endowed with certain natural characteristics (*proprietates naturales*), which contribute to its self-preservation and lead each individual to his own good (*bonum*).[7] Therefore, although God's will is the original source of law, natural law must derive from the natural characteristics of individual creatures – talk of natural law would make no sense without these natural characteristics. This ultimately secular, naturalist starting point is made clear by a reference to a passage in Cicero's *De finibus*, in which the anthropology of the Stoics is summarized[8] – the relevant formal source of natural law is thus found directly in some universal human nature.

This is of course not to say that Grotius, a devout Arminian himself, conceived of natural law in a theological vacuum; it is just to say that the *grounds of validity* of his natural law were established independently of God's will, following the scholastic rationalist mainstream in this regard. What set Grotius apart from this tradition, however, was that for Grotius, even the obligatory force of the precepts of the natural law was to be explained independently of God's will, so that they derived their capacity

[5] *IPC* 1, fol. 5: "Verum igitur nobis viam munierunt veteres illi iurisconsulti, quorum nomina reveremur, qui saepissime artem civilem ad ipsos naturae fontes revocant. Quod et apud Tullium est: dicit enim non a praetoris edicto, ut tunc plerique faciebant, neque a XII tabulis, ut superiores, sed penitus ex intima philosophia hauriendam iuris disciplinam. In hoc igitur prima esse debet cura . . . " The quotation is from Cic. *Leg.* 1.17.

[6] *IPC* 2, foll. 5–5′: "QUOD DEUS SE VELLE SIGNIFICARIT ID IUS EST . . . Dei voluntas . . . maxime ex creantis intentione apparet. Inde enim ius naturae est."

[7] *IPC* 2, fol. 5′: "Cum igitur res conditas Deus esse fecerit et esse voluerit, proprietates quasdam naturales singulis indidit, quibus ipsum illud esse conservaretur et quibus ad bonum suum unumquodque, velut ex prima originis lege, duceretur."

[8] Cic. *Fin.* 4.25.

to oblige from their character as dictates of reason. Obligations to the authority of God are on this view themselves derived from the laws of nature, to which the basic obligations are owed.[9]

Human nature is, according to Grotius, prior to the divine will in terms of justification. God's will is a source of law only in the sense that the relevant body of law *originated* from the will of God. This genealogical claim must be carefully distinguished from the *justification* of this body of law and from its obligatory character, however; Grotius' natural law is justified and creates obligations by virtue of its being perceptible by reason and its suitability for human nature. This ties in with Grotius' later stance in the famous *etiamsi daremus* passage in *De iure belli ac pacis*. Knud Haakonssen offers the following succinct observation regarding the important difference between Grotius and his scholastic predecessors in this regard: while for Grotius, the obligatory aspect of the law of nature arises independently of God's will, "the scholastic point was that human beings have the ability to understand what is good and bad even without invoking God but have no obligation proper to act accordingly without God's command."[10] This goes hand in hand with Grotius' denial that natural law and either Old or New Testament can be identified, which contrasts with scholastics such as Suárez, for whom the Decalogue contained the natural law.[11]

According to Grotius, the second principle or rule relevant to natural law is derived from the first and postulates the source of the primary law of nations, which is also described by Grotius as secondary natural law: "What the common consent of mankind has shown to be the will of all, that is law."[12] This source of law contained in the second principle should not be confused with a source of the conventional law of nations, based merely on agreements and human will; it is also, like the primary law of nature, a source of immutable natural law – *ius naturae secundarium* – because this type of consensus, according to Grotius, involves an expression of natural right reason (*recta ratio*),[13] which imposes certain universal binding

[9] In this Grotius' doctrine of obligation prefigures Hobbes'; cf. Nagel 1959, and see 107 below.

[10] Haakonssen 1996, 29. [11] Ibid. See above, 17.

[12] *IPC* 2, fol. 6′: "QUOD CONSENSUS HOMINUM VELLE CUNCTOS SIGNIFICAVERIT ID IUS EST."

[13] *IPC* 2, fol. 6′: "Placuit autem plerisque hunc ipsum consensum ius naturale secundarium, seu ius gentium primarium appellare: cuius legem Cicero nihil aliud esse ait nisi rectam . . . rationem . . . " Here Grotius is quoting Cic. *Phil.* 11.28. Haggenmacher 1983a, 531 correctly relates the scholastic distinction between *ius naturale primarium* and *secundarium* to the later distinction, made in *IBP* and borrowed from Cicero's *De finibus* (3.16–17 and 20), between *prima naturae* and *quaedam consequentia*.

provisions on all of humanity. Grotius took this idea, too, from the first book of Cicero's *De legibus*.[14]

Grotius' doctrine of sources permitted a distinction between the contemporary property order prevailing in much of the world, on the one hand, and an original, *natural* property order on the other, which applied in those parts of the world that had never left the original state of nature – that is, on the high seas. The distinction – undertaken on the level of legal sources – between natural law in the actual sense and a *secondary* law of nations (*ius gentium secundarium*) thus had grave consequences for the law to which the seas were subject. While private property, since its introduction, had enjoyed the protection of the norms of natural law, in Grotius' argument there were things, like the high seas, that under natural law were not suited ever to be the subjects of allocation as private property. These latter things were therefore forever subject, according to Grotius, to natural law in its narrow sense, meaning that the conventional norms of the secondary law of nations *could not* be applied to the sea lanes to East India and the related conflict between the VOC and the Portuguese.

Grotius' doctrine of legal sources, with its hierarchy of norms of natural law and the law of nations, thus presented the necessary conditions for his natural law argument against the Portuguese claim to a monopoly in East India. The concrete case upon which *De iure praedae* was based required of Grotius an identification of the legal norms relevant to the shipping routes to East India. By declaring the *ius naturae*, originating from the legal sources named in the first two *regulae*, to be applicable, he was already indicating that, in his view, the seas had remained in a state of nature,[15] and thus no positive law could apply to them.[16]

The doctrine of sources in *De iure belli*

The doctrine of legal sources from which Grotius developed his natural law in his later magnum opus *De iure belli ac pacis* reveals strong similarities

[14] Grotius was probably referring to Cic. *Leg*. 1.22–23, a passage based on the philosophy of nature of orthodox Stoicism; see LS 67L. He quotes from the first book of the *Tusculanae disputationes*; see Cic. *Tusc*. 1.30.

[15] In *De iure praedae*, Grotius does not use the term "state of nature"; only in *De iure belli ac pacis* can the expression *status naturae* be found, see *IBP* 2.5.15.2; 3.7.1.1. However, Grotius' natural law doctrine can hardly be described, even in *De iure praedae*, without the concept of the state of nature. Tuck 1999, 6: "[T]he idea [of a state of nature] seems to be present already in effect in the works of Hugo Grotius . . . "

[16] Nor to the customary law of the Indian Ocean, to which Alexandrowicz ascribes far too great a role in Grotius' thinking; see Alexandrowicz 1967, 64–65.

to the doctrine presented earlier in *De iure praedae*. Although Grotius no longer found himself under pressure to develop a new doctrine of legal sources in order to undermine a concrete opponent's legal arguments, as in the period of *De iure praedae*, in *De iure belli ac pacis* he adhered to a radically new doctrine of sources developed originally in *De iure praedae*. In his later work, Grotius was able to abstract from the concrete legal case that had given rise to *De iure praedae*. Nevertheless, he held to the fundamental separation between unalterable natural law and the positive law of nations that he had introduced in his earlier work and that had formed the basis of his argument against the Portuguese claims to a trade monopoly in East India. The primary and secondary natural law postulated by Grotius to be the only relevant laws governing shipping routes to East India now merged, in *De iure belli ac pacis*, into a single concept of natural law (*ius naturale*), while the secondary law of nations from *De iure praedae* was more or less adopted, in the later work, as the *ius gentium*.[17]

In a *captatio benevolentiae* at the beginning of the Prolegomena of his *De iure belli ac pacis libri tres*, Hugo Grotius declared his intention of dealing in its entirety with the body of law existing among nations, or among the rulers of nations. He justified this intention by pointing to the interest of the human species in such a study. This interest was all the more urgent as Grotius advocated the view that such an all-inclusive study, faithful to certain ordering principles, had not yet been written. Almost as an aside, Grotius presented the possible sources of the law existing among nations or their rulers, apparently in an exclusive sense. This law could either originate in nature itself, be constituted through divine law, or be introduced through custom and tacit agreement.[18]

In the Prolegomena, Grotius offered reasons for the lack of precedent for his undertaking. He claimed that many had attempted a scholarly portrayal of this area of jurisprudence; however, he argued, a significant reason for the failure of his predecessors lay in their inability to sufficiently distinguish between the various legal sources in the area of law being portrayed:

[17] On the negligible differences, see Haggenmacher 1983a, 523–25, who points to the addition of custom to the element of tacit agreement as the decisive difference from the concept of *ius gentium secundarium* in *IPC*. See also Haggenmacher 1981 on the development of the concept of *ius gentium* in Grotius. For practical examples that illustrate the distinction between natural law and the law of nations, see Wehberg 1954, where, however, Grotius' *ius gentium* is identified inaccurately with "international law" in today's sense.

[18] *IBP* prol. 1: "at ius illud, quod inter populos plures aut populorum rectores intercedit, sive ab ipsa natura profectum, aut divinis constitutum legibus sive moribus et pacto tacito introductum attigerunt pauci, universim ac certo ordine tractavit nemo: cum tamen id fieri intersit humani generis." Divine law (*divinae leges*) as a source was only added to the editions after 1631.

> Many have before this designed to reduce it into a System [*artis formam*]; but none has accomplished it; nor indeed can it be done, unless those things (which has not been yet sufficiently taken Care of) that are established by the Will of Men, be duly distinguished from those which are founded on Nature. For the Laws of Nature [*naturalia*] being always the same, may be easily collected into an Art; but those which proceed from Human Institution being often changed, and different in different Places, are no more susceptible of a methodical System, than other Ideas of particular Things are.[19]

Of the legal sources mentioned above, the main one for Grotius, as in *De iure praedae*, is nature, as the source of a system of law that could be dealt with in scholarly fashion, because only natural things remained the same and thus lent themselves to systematic examination. This contrasted with the fluctuating norms arising from positive decrees, which resisted a systematic approach. Grotius here makes use of a formulation of Cicero's, the origin of which can probably be traced to his lost work *De iure civili in artem redigendo*.[20] Cicero addressed the problem in *De oratore*: an examination of law was difficult because, among other things, no one had as yet subjected the content of law to systematic classification.[21]

This complaint, which became a topos of legal humanism, was adopted by Grotius. However, in contrast to the humanists of the early *mos Gallicus*, he placed less emphasis on restoring the classification system of the *Corpus iuris civilis* as the decisive legal source. Instead, he offered a new system, which would require a demotion of the Justinianic code and thus a fundamental reordering of the doctrine of legal sources, as initiated by later advocates of the *mos Gallicus* after Hotman and Bodin.[22] Because, for Grotius, the *naturalia* enjoyed the status of a prominent source of law,

[19] *RWP*, 1: 107; *IBP* prol. 30: "Artis formam ei imponere multi antehac destinarunt: perfecit nemo: neque vero fieri potest, nisi, quod non satis curatum est hactenus, ea quae ex constituto veniunt a naturalibus recte separentur. nam naturalia cum semper eadem sint facile possunt in artem colligi: illa autem quae ex constituto veniunt, cum et mutentur saepe et alibi alia sint, extra artem posita sunt, ut aliae rerum singularium perceptiones."

[20] The work is mentioned in Aulus Gellius 1.22.7. See on this, as well as on the use of the formula *ius in artem redigere* among the legal humanists of the *mos Gallicus*, Franklin 1963, 29.

[21] Cic. *De or*. 1.186ff. In 1618, Grotius had in his library an edition of the *Noctes atticae* by Aulus Gellius, as well as several collected works by Cicero; see Molhuysen 1943, nos. 188, 271, 307.

[22] On the humanist jurists of the *mos Gallicus,* see Skinner 1978, 1.:203–8; 2.290–93, 310. On the earlier attempts to systematize, especially by Donellus, see Franklin 1963, 30–35. Schnepf 1998, 8n40 and 9n43, even believes that Grotius "followed" Bodin's *Methodus ad facilem historiarum cognitionem* of 1566, which is certainly conceivable, but was never explicitly stated by Grotius. In *IBP* prol. 55, Grotius only referred expressly to his use of Bodin's later *Six livres de la république*. Furthermore, Bodin's position on Justinian's corpus of Roman law in the *Methodus* is diametrically opposed to Grotius' view; see Franklin 1963, 67–68. On the methods of the French humanists in general, see Kelley 1970.

the provisions of the *Corpus iuris* had to be seen as either legal precepts *ex constituto* or, if they were amenable to systematic representation as an *ars*, positivized norms of natural law. This distinction allowed Grotius, as in *De iure praedae*, to view many of the Roman legal precepts in the *Corpus iuris* as declaratory of natural law norms, and to adopt them into his system of just causes of war.[23]

Grotius saw the reason for the unprecedented nature of his undertaking in his predecessors' lack of historical expertise; he mentioned specifically the theologians Francisco Vitoria, Henricus Gorcumensis, and Wilhelmus Mathie, as well as the legal scholars Johannes Lupus, Franciscus Arias, Johannes de Lignano, and Martinus Laudensis. None had said very much about an extremely rich subject, and they had thus confused the things belonging to natural law with those involving divine right, the law of nations, civil law, and canon law.[24] Thus Grotius repeated his earlier admonition against the failure to distinguish between various legal sources, before going on to consider the significance of historical evidence. All his predecessors, he claimed, had lacked historical erudition, *historiarum lux*. It was true that the French Jesuit Petrus Faber, the Spanish jurist Balthasar Ayala and, to a greater degree, the Lutheran Bartolist Alberico Gentili, who had emigrated to England, had matched a large number of historical examples to certain definitions; and Grotius acknowledged, at least in Gentili's case, having benefited from them. But in his view, on crucial points, Gentili had followed either a few *exempla* that could not always be proven, or the authority of contemporary lawyers whose opinions were often written in the interests of clients, and not with an eye to the nature of what was just and equitable (*ad aequi bonique naturam*).[25]

Confusion of disparate legal sources and lack of historical knowledge: these were the two fundamental charges Grotius laid at the feet of his

[23] See Haggenmacher 1990, 161: "What the French systematizers had done for Roman civil law – an orderly reconstruction of the materials affforded by the *Corpus Juris Civilis* according to logical principles – he was to accomplish for the whole field lying beyond the ken of civil law, that is, the *jus belli ac pacis*, the part of social relations where no civil magistrate was competent to settle the disputes and where consequently war had to be considered as a lawful institution . . . " On Grotius' system, see Feenstra 1991.

[24] *IBP* prol. 37. This contradicts Gizewski 1993, 339, who assumes that Grotius based his system on the "theological-casuistic literature" of the late scholastics.

[25] *IBP* prol. 38: "Quod his omnibus maxime defuit, historiarum lucem, supplere aggressi sunt eruditissimus Faber in Semestrium capitibus nonnullis . . . diffusius, et ut ad definitiones aliquas exemplorum congeriem referrent, Balthazar Ayala, et plus eo Albericus Gentilis, cuius diligentia, sicut alios adiuvari posse scio et me adiutum profiteor . . . Illud tantum dicam, solere eum saepe in controversiis definiendis sequi, aut exempla pauca non semper probanda, aut etiam auctoritatem novorum Iurisconsultorum in responsis, quorum non pauca ad gratiam consulentium, non ad aequi bonique naturam sunt composita."

predecessors. The following will attempt to juxtapose his admonitions with the methodological considerations upon which Grotius based his own works. As will be shown, these methodological considerations rest, in large part, on statements attributable to the philosophy and, more importantly, the rhetoric of Greco-Roman antiquity; the same methodological considerations also determine the use of specific historical (in the broadest sense) evidence. Here Grotius made a preliminary decision in favor of Greco-Roman antiquity regarding the origins of this evidence, a fact that must be seen in the context of the late-humanist climate of the "Netherlands movement"[26] and Grotius' own humanist education. This is by no means to say, however, that Grotius was part of the humanist trend described by Gerhard Oestreich as "Neo-Stoicism" and associated especially with Justus Lipsius.[27] Aside from the fact that Lipsius' views on moral philosophy were hostile to Cicero's Stoic natural law, which was highly important to Grotius,[28] the intentions of the two authors are profoundly different. Lipsius, in the tradition of the mirror-for-princes genre and Machiavelli, was interested in providing practical advice to monarchs, while Grotius was developing a universal doctrine of natural law, rather than a practical doctrine in the narrow sense.[29]

According to Grotius, the mistakes of his predecessors in their efforts to develop natural law consisted of not sufficiently distinguishing between nature and other sources of law, which made a thorough and systematic study of the subject impossible from the start. Grotius, in contrast, sought universality in his work: it was to be relevant to the human species as a whole. To achieve this, he had to concentrate primarily on the part of the law among nations that originated in nature, and could thus be portrayed systematically. Anything subject to free will had to be ignored.[30] In subsuming the sources of law mentioned in the initial paragraphs of the Prolegomena (nature, divine laws, custom, and tacit agreement) under the dichotomy suggested here between *naturalia* and *ea quae ex constituto veniunt*, Grotius had to remove both divine laws and custom and tacit agreement from the category of *naturalia*, as they originated in free will.

[26] Oestreich 1980, 301.

[27] See Oestreich 1989. For a discussion and trenchant criticism of the National Socialist pedigree of Oestreich's post-war scholarship, see Miller 2002.

[28] Emphasizing Grotius' Stoicism; for an overview of the justified criticism of Oestreich's description of Lipsius as a "Neostoic," see Waszink in Lipsius 2004, 10–14, 108–10, 138–46.

[29] For a sophisticated argument placing Lipsius halfway between Machiavelli and Hobbes and interpreting the *Politica* as at least a partial resurrection of Seneca's mirror-for-princes model in the face of Machiavelli's assault, see now Brooke 2012, 12–36, with literature.

[30] *IBP* prol. 31: "semotis iis quae ex voluntate libera ortum habent."

This is the reason that Grotius would attempt to construct his entire law between nations and peoples, the entire *ius belli ac pacis*, on the basis of a natural law system.

As in *De iure praedae*, the ultimate source of law in *De iure belli* was again the will of God, in a genealogical sense, because God had willed the existence of human beings in the first place.[31] As in *De iure praedae*, however, this caveat does not extend very far, especially since a voluntarist interpretation is ruled out by the limitation that natural law cannot be changed even by God and the grounds of validity as well as the obligatory force of the law of nature are here, as in the earlier work, based on the dictates of reason and sociability. This did not change even when Grotius, in the 1631 edition of *De iure belli ac pacis*, added "divine laws" as a possible source of norms between peoples.[32] These were additional to the natural law and did not provide the basis of natural law; any obligatory force the law of nature has it owes to natural reason, not to the command of God.[33] The command of God is merely the genealogical source of natural law, not its justification.[34] This once again leads to human nature as the source of natural law, which is essentially social and rational:

> This Sociability [*societatis custodia*], which we have now described in general, or this Care of maintaining Society in a Manner conformable to the Light of human Understanding, is the Fountain of Right [*fons iuris*], properly so called.[35]

Thus natural law (*ius naturale*), in perfectly Stoic fashion, can be described as "a command of right reason"; it is

> the Rule and Dictate of Right Reason [*recta ratio*], shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature, and consequently,

[31] *IBP* prol. 12. Grotius ascribes this view to Chrysippus: "Chrysippus et Stoici dicebant iuris originem non aliunde petendam quam ab ipso Iove . . . "

[32] *IBP* prol. 1.

[33] *IBP* 1.1.10.5: "Est autem ius naturale adeo immutabile, ut ne a Deo quidem mutari queat. Quanquam enim immensa est Dei potentia, dici tamen quaedam possunt ad quae se illa non extendit . . . Sicut ergo ut bis duo non sint quatuor ne a Deo quidem potest effici, ita ne hoc quidem, ut quod intrinseca ratione malum est malum non sit."

[34] *Pace* Tuck 1999, 100–1. While Grotius does indeed make divine law "a basis for natural law" in the genealogical sense, he does not make it "a basis" when it comes to the natural law's grounds of validity and obligatory force, which arise from right reason.

[35] *RWP*, 1.85–86; *IBP* prol. 8: "Haec vero quam rudi modo iam expressimus societatis custodia humano intellectui conveniens, fons est eius iuris, quod proprie tali nomine appellatu . . . "

> that such an Act is either forbid or commanded by God, the Author of Nature.[36]

Johann Sauter has pointed out, correctly, that Grotius' definition of natural law owes much to his scholastic predecessors, especially to the Jesuits Gabriel Vázquez (1549–1604) and Francisco Suárez (1548–1617). Sauter claims that from Vázquez Grotius had taken the idea of *recta ratio* and of the suitableness to a rational nature, and from Suárez the notion of a *ius naturale* (rather than a *lex naturalis*).[37] While Grotius certainly was very well acquainted with both Vázquez and Suárez, and with his definition does indeed reiterate mainstream scholastic tenets,[38] Sauter's argument fails to capture the fact that for Grotius, as indeed for Vázquez himself, this was a definition which – albeit "filtered" through the scholastics – went back to Cicero.[39] Although Vázquez seems to have believed (or at least pretended) that natural law as right reason expressed an Aristotelian, rather than Stoic, view,[40] both he and Grotius were well aware of the Ciceronian pedigree of this notion.

The definition of natural law as the dictate of right reason is Stoic[41] and is taken, by both Vázquez and Grotius, from Cicero. As Malcolm Schofield writes, "Cicero does not tell us that this is Stoic material he is producing . . . although it is clearly a reworking of basically Stoic material." Most importantly, "the proposition that law is simply right reason employed in prescribing what should be done and forbidding what should not be done is a securely Stoic and indeed Chrysippean thesis"; Chrysippus' definition of natural law has been preserved by the jurist Marcianus in the *Digest*,[42] and related accounts can be found in Plutarch and Stobaeus.[43] Grotius in a note quotes explicitly Philo of Alexandria on right reason (*orthos logos*),[44]

[36] *RWP*, 1.150–51; *IBP* 1.1.10.1: "Ius naturale est dictatum rectae rationis indicans, actui alicui, ex eius convenientia aut disconvenientia cum ipsa natura rationali, inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut vetari aut praecipi."

[37] Sauter 1932, 92–93.

[38] Grotius does not reference the Spaniards in this passage, but Sauter's suspicion is sensible. Incidentally, Suárez does not quote Vázquez verbatim, but is clearly borrowing from him; cf. *CD* disp. 150, cap. 3; *TLL* 2.5.2.

[39] See Vázquez's extended discussion of Cicero's definition of natural law as expressed in *De legibus*: *CD* disp. 150, cap. 1.

[40] See the way Cicero is discussed after Aristotle and said to largely agree with the Stagirite: *CD* disp. 150, cap. 2, nn13–14, fol. 7–7′.

[41] Schofield 1991, 68–69. See LS 67L.

[42] *Dig*. 1.3.2 (= *SVF* 3.314 = LS 67R). Cf. for *recta ratio* (*orthos logos*) LS 63C.

[43] For Plutarch, see LS 53S; Stob. 2.96.10–12; 2.102.4–6 (not contained in LS, adduced by Schofield).

[44] *SVF* 3.360 (not contained in LS).

which is of course a Stoic technical term.[45] For Grotius as for the scholastics before him, Cicero is the most important source. Grotius points in his notes to the following passage from *De re publica*:

> True law is right reason [*recta ratio*], consonant with nature, spread through all people. It is constant and eternal; it summons to duty by its orders, it deters from crime by its prohibitions.[46]

In his sequel to *De re publica*, the dialogue *De legibus*,[47] Cicero says that the source of law[48] can be explained only by the "natural bond there is" among people, and not, as mentioned above in connection with *De iure praedae*, taken from an edict of the praetor: "We must explain the nature of law, and that needs to be looked for in human nature."[49] In a passage cited verbatim and discussed extensively in connection with similar passages by Gabriel Vázquez,[50] Cicero then repeats the definition of natural law he had given in *De re publica* pointing out that this is a Stoic definition:

> [A]s these same people [Stoic philosophers] define it, law is the highest reason, rooted in nature, which commands things that must be done and prohibits the opposite.[51]

The way Grotius identifies his natural law with the dictates of right reason is deeply indebted to Cicero's formulation of this Stoic doctrine. Grotius' rationalist conception of the relationship between God's free will and natural law, too, can be found prefigured in Cicero's rendering of right reason as the primary bond between humans and the divinity: "reason forms the first bond between human and god."[52] In Cicero's Greek Stoic models, the argument about right reason being an attribute of the gods and of the Stoic sage was "probably originally framed with gods and sages in mind and then adapted to human beings generally."[53] It is noteworthy that Cicero, when talking about the dictates of right reason constituting natural

[45] See, for *recta ratio* as law, Diog. Laert. 7.87 (= *SVF* 1.43.1–3); Cic. *Phil.* 11.28. For further sources, see Dyck 2004, 109–10; 125–26.

[46] Cic. *Rep.* 3.33: *Est quidem vera lex recta ratio, naturae congruens, diffusa in omnis, constans, sempiterna, quae vocet ad officium iubendo, vetaundo a fraude deterreat . . .*

[47] For the dating, see Dyck 2004, 7, 17–18.

[48] Cic. *Leg.* 1.16: *. . . quae sit coniunctio hominum, quae naturalis societas inter ipsos. His enim explicatis fons legum et iuris inveniri potest.*

[49] Cic. *Leg.* 1.17: *natura enim iuris explicanda nobis est, eaque ab hominis repetenda natura . . .*

[50] *CD* disp. 150, cap. 2, nn14–15, fol. 8.

[51] Cic. *Leg.* 1.18: *ut idem definiunt, lex est ratio summa, insita in natura, quae iubet ea, quae facienda sunt, prohibetque contraria.* See the fuller treatment of this Stoic theme in Cic. *Leg.* 1.22–27; 1.42. See Dyck 2004, 108–9 on the Stoic sources of the definition, and see, for the Stoic source, Chrysippus, LS 67R.

[52] Cic. *Leg.* 1.23: *prima homini cum deo rationis societas.*

[53] Dyck 2004, 125.

law, goes on to apply this doctrine to human beings alone.[54] The view lends itself to Grotius' rationalist conception of natural law as a dictate of right reason curbing God's free will, and it is easy to see how it could later prove amenable to deism.[55]

For Cicero as for Grotius, everything now depended on the characteristics of human nature. Is human nature indeed, as Grotius suggested, typified by some "Care of maintaining Society" (*societatis custodia*)?[56] Grotius' doctrine of natural law was directed against an opponent whose formal doctrine of legal sources did not deviate in principle from Grotius' own, but who drew radically different substantive conclusions from it.[57] This opponent was the Greek skeptic Carneades, which is not surprising, given Grotius' Ciceronian definition of natural law – Cicero had already used an argument based on natural law against Carneades and his attacks on Roman imperialism in *De re publica*. We shall look at this in depth in the next chapter on Grotius' method, but we can say for now that Carneades' stipulation of human nature differs fundamentally from Cicero's and Grotius', which led Grotius to the following portrayal of the sources of natural and positive law:

> Therefore the Saying, not of Carneades only, but of others, Interest [*utilitas*], that Spring of Just and Right [*iusti prope mater et aequi*], if we speak accurately, is not true; for the Mother of Natural Law is human Nature itself, which, though even the Necessity of our Circumstances should not require it, would of itself create in us a mutual Desire of Society [*ad societatem mutuam appetendam ferret*]: And the Mother of Civil Law is that very Obligation which arises from Consent, which deriving its Force from the Law of Nature, Nature may be called as it were, the Great Grandmother of this Law also.[58]

[54] Cic. *Leg.* 1.33: "Those who have been given reason by nature have also been given right reason, and therefore law too, which is right reason in commands and prohibitions; and if they have been given law, then they have been given justice too. All people have reason, and therefore justice has been given to all."

[55] See Dyck 2004, 35–36. It was this affinity which would later lead to allegations of atheism by the Huguenot theologian Pierre Jurieu (*L'Esprit de Monsieur Arnauld*, 1684). See Bayle 1740, 617.

[56] *IBP* prol. 8.

[57] For an eloquent modern criticism of arguments based on human nature, see Tugendhat 1993, 71.

[58] *RWP*, 1.93; *IBP* prol. 16: "Quod ergo dicitur non Carneadi tantum, sed et aliis, Utilitas iusti prope mater et aequi; si accurate loquamur, verum non est: nam naturalis iuris mater est ipsa humana natura, quae nos etiamsi re nulla indigeremus ad societatem mutuam appetendam ferret: civilis vero iuris mater est ipsa ex consensu obligatio, quae cum ex naturali iure vim suam habeat, potest natura huius quoque iuris quasi proavia dici." The words put in Carneades' mouth are from Hor. *Sat.* 1.3.98. Cf. his seemingly contradictory use of this reference in *IPC* 2, foll. 5′–6. The contradiction, however, is superficial, as he is here only talking about the first stage of *oikeiosis*, as shall be seen below in Chapter 5.

The human drive for society is the source of natural law, and not expediency or interest, as Skeptics like Carneades and Epicureans like Horace (with whom the quotation attributed to Carneades originated) tended to claim. We do not know exactly how the historical Carneades argued. However, the reason Carneades, as he figures in Cicero's *De re publica*, plays the role of main antagonist for Grotius arises from Carneades' function in Cicero's dialogue, where Carneades was portrayed as an orator who argued against the justice of Roman imperialism. Skepticism about the possibility of natural law was merely a secondary aspect – the reality of Rome's military expansion was portrayed as irreconcilable with the possibility of natural law. Cicero's counterargument portrayed the reality of Rome's military expansion as justified by Stoic natural law, cannily combined by Cicero with the Roman doctrine of just war.[59] Grotius' natural law doctrine also originated in a context that required a justification of military expansion, a task that had already placed Grotius in a Ciceronian tradition in *De iure praedae*. In *De iure belli ac pacis*, Grotius adopted Cicero's approach, from both a methodological and a substantive point of view. Grotius' method is the subject of the next chapter.

[59] On the relationship between the portrayal in Cicero and the speech given by the historical figure Carneades, see Zetzel 1996.

CHAPTER 3

The influence of classical rhetoric on Grotius' method

I will attempt to show in this chapter that Grotius' doctrine of legal sources springs naturally from his rhetorical method, which leads to the recognition of two differing sets of legal norms, natural law and the law of nations; and that this method was crucially influenced by the precepts of classical rhetoric. While, according to Grotius, natural law can be identified a priori from self-evident principles, the law of nations could be proven empirically in the positive law concepts of the "wise men and most admirable nations of the past."[1] This epistemological distinction between natural law and the law of nations corresponds to the distinction Grotius makes on the level of the doctrine of legal sources. Just as the two sets of legal norms differ in regard to their formal origins, they must also be found and proven using differing methods.

Research on Grotius' method has until recently focused largely on the Prolegomena of *De iure belli ac pacis*, and the significance of classical rhetoric has not so far been sufficiently appreciated.[2] Richard Tuck's attempt to interpret Grotius' entire doctrine of natural law as a response to skepticism is certainly questionable overall,[3] but it points in the right direction in regard to Grotius' method, as this method, from *De iure praedae* to *De iure belli ac pacis*, can indeed be understood as a rhetorical answer to the rhetorical challenge to imperial expansion advanced by the skeptic Carneades.[4] That Grotius' method followed in the tradition of classical rhetoric will be shown in particular detail for *De iure belli ac pacis*,[5] but it can already be seen in the earlier *De iure praedae*. Grotius was

[1] *IPC* 1, fol. 5.

[2] Grotius' method has been described in extremely varied ways in the literature; assessments range from successor to Peter Ramus to ascription of a Cartesian character, see Schnepf 1998; Tanaka 1993; Vermeulen 1982/83; Dufour 1980; Röd 1970; Vollenhoven 1931.

[3] Tuck 1983. For criticism of Tuck's emphasis on skepticism, see Shaver 1996, esp. 28; Tierney 1997, 323; Zagorin 2000; Mautner 2005; Straumann 2006b; Kingsbury and Straumann 2010a; and now Brooke 2012, 37–58, esp. 37–41. Schneewind 1998, 70–73, follows Tuck.

[4] Cic. *Rep*. 3.21, quoted in *IBP* prol. 5.

[5] See below, 61–82.

familiar with this tradition through Cicero and, especially, Quintilian. Grotius the humanist knew Quintilian and his *Institutio oratoria* intimately, as is evident from his excerpts from that work.[6]

In the first chapter of *De iure praedae*, Grotius explicitly declares the rhetorical character of his work in the context of certain methodological remarks, in which he referred in his marginalia to Quintilian and applies to *De iure praedae* Quintilian's distinction among three categories of speech – forensic, panegyric, and political:

> Thus our undertaking requires a combination of all the various forms of discourse [*disceptandi genera*] customarily employed by orators. It calls not only for debate as to whether the aforesaid act was right or wrong, to be conducted as if the point were being argued in court, but also for the assumption of the censor's functions of praise and blame; and furthermore, since the circumstances that gave rise to the act remain unchanged, advice must be given as to whether or not the course of action already adopted is expedient for the future. First of all, then, we must examine the matter from the standpoint of law [*iuris quaestio*], thus establishing a basis, so to speak, for the treatment of the other questions to be considered.[7]

The category of forensic speech, and thus the legal viewpoint, are most prominently represented in *De iure praedae*. It takes up all fifteen chapters of the work, aside from the last two, in which the Dutch approach in East India is the subject of a panegyric in chapter 14, and is then recommended as useful for the future in a political speech in the last chapter. The few methodological observations in the first chapter of *De iure praedae* make it clear that the fundamental legal question (*iuris quaestio*) should be decided in a rhetorical manner and that, as in classical rhetoric, the proof of the correctness of an opinion – formulated as a *quaestio* – can be found by deriving normative precepts from principles, as well as from unanimous testimonies, as the crucial elements of a speech.[8] The starting points here are a priori, self-evident principles as well as precepts deduced (*deductio*) from

[6] Grotius excerpted all the volumes of the *Institutio oratoria*; the excerpts are found in the Leiden University Library (BPL 922 IV, foll. 437–444v.). He quotes the *Institutio oratoria* in both *De iure praedae* and *De iure belli ac pacis*. Grotius was also familiar with Cicero's *De inventione*, which he quotes repeatedly in *De iure praedae*.

[7] *IPC* 1, fol. 4, with references to Quint. *Inst.* 3.4: "Ita fit ut quotquot disceptandi genera quae apud oratores tractari solent, hic omnia concurrant. Nec enim hoc duntaxat rectene an perverse factum sit velut apud iudicem agitandum est, sed in laudando aut vituperando munere censoris sumendae partes, et quia manet occasio, anne idem quod hactenus factum est in posterum fieri expediat consilium oportet dari. Prima igitur iuris erit quaestio, quae caeterarum quodammodo praeiudicialis est."

[8] See Quint. *Inst.* 5, pr. 5; Cic. *Inv.* 1.34; on the *quaestio*, see Quint. *Inst.* 3.11.2; for an overview, see Lausberg 1990, § 348.

these a priori principles, the validity of which would be tested against the agreement "in earlier times by men of wisdom and by nations of the highest repute."[9] The convictions tested in this way were regarded by Grotius as "common notions" (*communes notiones*) to which all people could simply agree, and from which one could extract the proof of a legal question to be decided.[10] In *De iure praedae*, the characteristics of such common notions were attributed to "certain rules and laws of the most general nature."[11]

The use Grotius made of common notions and consensus in *De iure praedae* corresponds to the rhetorical method of induction (*inductio*).[12] In his *De legibus*, Cicero had appealed to these common notions of humanity and had taken this "semi-rhetorical" approach as the basis of his concept of natural law, in similar fashion to Grotius.[13] However, classical rhetoricians, like Grotius later on, had already reduced the range of people relevant to these common notions from all of humanity to a specific group.[14] For Grotius, this reduced group, from which information regarding the norms of natural law could be gleaned, included "in earlier times . . . men of wisdom and . . . nations of the highest repute."[15] This referred, concretely, to a few philosophers and legal scholars, primarily from Roman antiquity.

Apart from the pervasive influence of classical rhetoric on the milieu of humanist scholarship, Grotius' choice of method was dictated by the

[9] *IPC* 1, fol. 5: "nec parum tamen ad confirmandam fidem valet, si quod iam nobis naturali ratione persuasum est, sacra auctoritate comprobetur, aut idem videamus sapientibus quondam viris et laudatissimis nationibus placuisse."

[10] *IPC* 1, fol. 5: " . . . quemadmodum mathematici, priusquam ipsas demonstrationes aggrediantur, communes quasdam solent notiones, de quibus inter omnes facile constat praescribere, ut fixum aliquid sit, in quo retro desinat sequentium probatio . . . "

[11] *IPC* 1, fol. 5: ". . . nos quo fundamentum positum habeamus, cui tuto superstruantur caetera, regulas quasdam et leges maxime generales indicabimus . . . "

[12] For a description of *inductio* in classical rhetoric, see Lausberg 1990, § 419. Grunert 2000, 71, correctly finds that Grotius utilized an inductive method of proof, without, however, considering the rhetorical character of this method.

[13] Cic. *Leg.* 1.24, where Cicero presents the shared human concept of God (*notitia dei*) as the source of a universal consensus among human beings; see Dyck 2004, 134–35. See also Cic. *Leg.* 1.40, where Cicero attempts to establish a *consensus omnium* for the natural character of justice by arguing from the behavior of the offender (*impii*). For the use of the consensus argument in classical philosophy, see Obbink 1992, 195: "Yet as an attempt to establish a set of naturally acquired, indisputable general principles as criteria for agreement in enquiry (or a ground of common agreement as support for a given theory), the semi-rhetorical argument from *consensus omnium* carries with it the appeal of tradition, and a pedigree reaching far back in ancient philosophy."

[14] See Obbink 1992, 197. According to Obbink 1992, 220, the Hellenistic schools, and especially the old Stoics, had referred less to actual consensus and more to a normatively ideal consensus "which attempts to uncover what the universal (and hence natural) view *would* be, if everyone reasoned perfectly naturally from perceptions according to uncorrupted thinking." See the discussion of Grotius' rhetorical method in *De iure belli ac pacis* below, 61–82.

[15] *IPC* 1, fol. 5.

subject matter of his tract. The paradigmatic classical background to Grotius' argument for the lawfulness of colonial expansion and use of force can be found in the debate surrounding the expansion of Rome and its wars, a debate conducted using the tools of rhetoric and manifested in Cicero's presentation of the so-called Carneadean debate and of Carneades' skeptical attacks. This Roman background decisively influenced Grotius' choice of method and made a rhetorical approach seem appropriate.

As will be shown in the following, this rhetorical method is of a piece with Grotius' doctrine of legal sources; this is so in particular because the distinction made in rhetoric between the deduction of certain principles from pre-empirical, a priori precepts and the induction of such principles from consensus and common notions corresponded perfectly to Grotius' distinction between various sources of law. Like the Spanish Thomists before him, Grotius distinguished between natural law in the narrow sense, *ius naturale*, and the law of nations, *ius gentium*.[16] This distinction ascribed the two normative systems to different sources of law. While natural law had to be deducible from "right reason" (*recta ratio*), and could thus be found using the rhetorical method of deduction (*deductio*), the law of nations involved positive law, a product of human will, and was thus accessible through *inductio*. The method of classical rhetoric thus gave Grotius a methodological justification for distinguishing between natural law (*ius naturale*) and the (secondary) law of nations (*ius gentium secundarium*).[17] This is of great significance because the distinction between natural law and the law of nations served as a foundation for Grotius' argument in *De iure praedae*; it permitted a distinction between the natural, imperative character of certain legal institutions of *ius naturale*, on the one hand, and the purely conventional character of the norms of *ius gentium secundarium*, with the latter thus robbed of any objective, natural validity. In chapter 12 of *De iure praedae, Mare liberum*, Grotius then identified, in accordance with this distinction between natural law and the law of nations, certain areas that had remained in a state of nature and were therefore subject exclusively to natural law. In this way, certain legal institutions, such as free

[16] This deviates from the traditional view, as represented in the *Digest*, according to which *ius gentium* was an element of *ius naturale*. Vitoria was most likely the first to distinguish between the two types of law, followed by Soto, Molina, and Suárez; for a concise overview, see Skinner 1978, 2.151–54. In contrast to this tradition, Gentili, Hobbes, and Pufendorf held to the view that *ius gentium* was identical to natural law, or derived directly from it; see Malcolm 2002, 439.

[17] This distinction was accentuated even more strongly in *De iure belli ac pacis*, as Grotius no longer differentiated in *De iure belli* between *ius gentium primarium* and *secundarium*. On the development of the concept of *ius gentium* in Grotius, see the meticulous analysis in Haggenmacher 1981, esp. 84–85.

trade, were lent the superior status of natural lawfulness in the narrow sense, from which no deviations through the law of nations were permissible.

The role of Carneades

Grotius' concern with the arguments put forward by the ancient Skeptic Carneades has met with lively interest among scholars. Richard Tuck offered the theory that Grotius' interest in Carneades' skepticism was somehow central to *De iure belli ac pacis*, which allowed for Grotius to be seen as an essentially modern natural law writer.[18] According to Tuck, Grotius was the first to base his natural law system on a refutation of Carneades' arguments; a discussion of skepticism played no role in either Scholastic natural law or in the doctrines of the school of Salamanca, where interpretations of Aristotelian or Thomist natural law took priority – and skepticism had not been a primary issue for either Aristotle or Thomas.[19] This unprecedented use of Carneadean arguments, however, and the centrality of the challenge of skepticism, proved in Tuck's view to be of extremely serious consequence in the early modern writing on natural law, and could thus be seen as a specific break, introduced by Grotius, between earlier natural law thought and a new, specifically modern doctrine of the law of nature.[20]

Tuck's view of the history of moral philosophy was based on earlier claims by, among others, Samuel Pufendorf in the late seventeenth century, the Lausanne legal historian Jean Barbeyrac (1674–1744), and other eighteenth-century historians such as Johann Jakob Brucker in his *Historia critica philosophiae* of 1742–44, writers who had put forward the notion of Grotius as an innovative pioneer.[21] Adam Smith, too, perceived Grotius in the vein of Barbeyrac as a pioneer.[22] The success of Grotius' refutation of Carneadean skepticism was based, on this view, on the successful integration of the original skeptical arguments regarding the instinct for self-preservation into Grotian natural law theory, as well as on an argument *more geometrico* geared towards the instinct for self-preservation that took a deductive approach.[23] The historian of philosophy J. B. Schneewind,

[18] See Tuck 1983. [19] Tuck 1987, 109.

[20] It is Tuck's view that insufficient attempts were made, in the Middle Ages and in classical antiquity alike, to refute moral skepticism: " . . . if one is principally alert to the problem of moral scepticism, then it is true that both ancient and medieval moral philosophy will prove unsatisfactory." Tuck 1987, 115.

[21] Ibid., 115. This view was adopted by Haakonssen 1996, 24–25; Haakonssen 2002, 34.

[22] See below, 129.

[23] Tuck 1987, 109, 114. See Tuck 1983, 51, where it is claimed that Grotius applied mathematics as a methodological argument. See, in contrast, Schnepf 1998, 7.

agreeing with Barbeyrac, describes his outlook thus: "His claim is in effect that the Grotian program for the reconstruction of natural law provided the first major positive impetus that led beyond ancient thought, beyond medieval natural law, beyond restatements of natural law theory tied to specific religious confessions, and beyond skepticism. Barbeyrac's claim is sound."[24]

Tuck's view proved problematic in various regards and was contradicted from several directions. One basic weakness lies in its neglect of some of Grotius' predecessors, such as Ayala and Gentili, for whom the Carneadean debate had played an important role as well.[25] This fact serves to undermine the contention that Grotius' approach to the Carneadean debate had been pioneering and unprecedented. Robert Shaver argued that Grotius' refutation of Carneadean skepticism was based not on making self-interest useful for natural law, but rather on the idea of the social nature of humankind.[26] Petter Korkman agreed, offering the view that Grotius' influence had nothing to do with a successful refutation of skepticism, but rather with his perceived renunciation of the scholastic method and an emphasis on the role of reason.[27] In contrast, Stephen Buckle and Robert Schnepf see a "methodological conversation with history" as the central characteristic "which most distinguished Grotius' approach."[28]

The fundamental weakness in this scholarly discussion consists of the lack of attention paid to the Roman context of Carneades' arguments, the way in which Carneades' speech was passed down by Cicero and Lactantius, and, most importantly, the natural law arguments brought against Carneades by Cicero. Tuck sees Carneades, as he is quoted in *De iure belli ac pacis*, merely as a representative of the early-modern skeptics Michel Montaigne (1533–92) and Pierre Charron (1541–1603), and prefers to ignore the classical context of Carneades' arguments.[29] This necessarily results in an unfocused perception of the arguments used by Grotius to refute Carneadean skepticism, in regard to both their substantive content and the methods used by Grotius.

[24] Schneewind 1998, 67. For a contrary interpretation of Grotius as a traditional naturalist in the scholastic tradition, see Irwin 2008, 88–99.

[25] See below, 97. [26] Shaver 1996, 30–37.

[27] Ibid., 39–44; Korkman 1999/2000, 87, 98. Cf. Röd 1970, 71.

[28] Schnepf 1998, 8; Buckle 1991, 5.

[29] Tuck 1987, 109: "for 'Carneades' one should in effect read 'Montaigne' or 'Charron'." Haakonssen 1996, 24n12, sees Carneades' function as a mere "sceptic man of straw," present in Grotius only to represent an early modern version of Epicureanism. Schneewind 1998, 71 follows Tuck 1987, 107 in denying that the refutation of skepticism had any role in ancient natural law. Similarly, Schnepf 1998, 5–6 sees in Grotius' use of Thucydides' Melian Dialogue merely a hidden reference to Machiavelli. See also Ottenwälder 1950, 12ff., who pays no attention to the classical context.

Korkman's critique of Tuck also neglects the classical dimension, although Korkman realizes that, in his refutation of Carneades' views, Grotius resorted to arguments that had already been developed in antiquity.[30] But he wrongly identifies the Christian apologist Lactantius (c. 250–c. 325) with the entire "Ciceronian tradition," as he calls it, which was devoted to combating Academic skepticism[31] – in fact, Lactantius, the rhetorician and Christian apologist, sided with Carneades' skepticism against Plato, Aristotle, and Cicero, as he deemed any refutation of skepticism possible only in the context of a Christian framework.

The fact that Grotius had not adopted Lactantius' point of view, but, as will be shown, formulated a Ciceronian answer to Carneades, can indeed be interpreted – with Tuck, but for different reasons – as an expression of a specifically modern natural law. Furthermore, it is true that Grotius – in Korkman's spirit – was perceived by posterity as a revolutionary, especially in regard to his method, which represented a break from scholasticism. The choice of Carneades as Grotius' main antagonist already indicates that this method did not consist solely of emphasizing the importance of reason, but was crucially indebted to classical rhetoric. Grotius was interested in Carneades not merely because of his withering attack on Rome's imperialist expansion, but also because, like Cicero and Quintilian before him,[32] he saw Carneades as a highly skilled orator.[33] If Grotius was to counter Carneades' arguments – advanced in the context of a rhetorical *in utramque partem dicere* – he would do so using the tools of classical rhetoric. To corroborate this presumption, a more detailed examination will be undertaken of both Carneades' arguments and Grotius' response.

Grotius could not quote Cicero's writings directly, as book three of *De re publica* had been lost,[34] but had to rely on Lactantius' rendering of Cicero's work.[35] According to Lactantius, the third book of Cicero's *De re publica* reproduced Carneades' speeches for and against justice, as the Academic

[30] Cf. Shaver 1996, 30 and Miller 2003, 121, where the Carneadean debate is discussed without any reference to its classical background.

[31] Korkman 1999/2000, 84.

[32] Cic. *De or*. 1.45; for Quintilian's views of Carneades, see Quint. *Inst*. 12.1.35; 12.2.25.

[33] It is illuminating to compare Grotius' stance on rhetoric with Hobbes'. Quentin Skinner has maintained that Hobbes "was not primarily responding to a set of epistemological arguments. Rather he was reacting against the entire rhetorical culture of Renaissance humanism within which the vogue for scepticism had developed": Skinner 1996, 9. For Grotius on the other hand both epistemological arguments and rhetoric have importance. Grotius clearly reacted to epistemological arguments, but did so, as we shall see, with Carneades' means – the means of classical rhetoric.

[34] It was not until 1819 that Angelo Mai discovered fragments from *De re publica* in a palimpsest in the Vatican library.

[35] Grotius in 1618 had an edition of Lactantius' works; see Molhuysen 1943, no. 279.

skeptic had given them on the occasion of his mission to Rome in 155 BC. The question of the historicity of these speeches has not been fully clarified and is not relevant in our context; what is certain, however, is that the passage from Lactantius quoted by Grotius is a fragment from Cicero's *De re publica*, and thus Grotius' account of Carneades' arguments goes back ultimately to Cicero.[36] In Prolegomena 5, Grotius repeats Carneades' arguments as an almost word-for-word quotation from Lactantius' *Divinae institutiones*.[37] In contrast, Grotius' assessments of Carneades' arguments are diametrically opposed to Lactantius' appraisal. According to Lactantius, after giving a speech for justice in the spirit of Aristotle and Plato, Carneades had in fact successfully refuted all the views presented in his first speech the next day.[38]

Lactantius obviously found Carneades' arguments persuasive and portrayed his opponent's position as weak.[39] Cicero, he said, could not refute Carneades' arguments, but "left them unanswered and avoided them like a trap," defending ultimately "not natural justice, which had been charged with stupidity" by Carneades, but merely "civil justice (*civilis iustitia*)," positive law, which Carneades had shown to be potentially unjust.[40] However, Lactantius' portrayal of the arguments made against Carneades by Cicero in *De re publica* is highly inaccurate and even contradicts his own quotes from *De re publica*. In this dialogue, Cicero had an advocate of natural justice, Laelius, respond to Carneades' arguments and thus defend not mere obedience to positive law, but the existence and obligatory character of natural justice on the Stoic model. Lactantius, however, did not wish to let stand Cicero's non-Christian defense of natural justice and thus praised Carneades' arguments.

For Grotius, the exact opposite was true. Interested in a denominationally neutral, secular foundation of natural law, Grotius adopted the natural law arguments that Cicero had deployed against Carneades. According to Grotius, Carneades was the man most suited to find arguments against the existence of the law he would describe, but not even he could provide particularly strong arguments: "Who more proper for this Purpose than

[36] See Ferrary 1984; Heck 1966.

[37] Lactant. *Div. inst.* 5.16.3 (= Cic. *Rep.* 3.21).

[38] Lactant. *Div. inst.* 5.14.5: *Carneades autem ut Aristotelem refelleret ac Platonem iustitiae patronos, prima illa disputatione collegit ea omnia quae pro iustitia dicebantur, ut posset illa, sicut fecit, evertere.*

[39] See Lactant. *Div. inst.* 5.16.2: *Carneades ergo, quoniam erant infirma quae a philosophis adserebantur, sumpsit audaciam refellendi, quia refelli posse intellexit.*

[40] Lactant. *Div. inst.* 5.16.13: *Arguta haec plane ac venenata sunt, et quae M. Tullius non potuerit refellere; nam cum faciat Laelium Furio respondentem pro iustitiaque dicentem, inrefutata haec tamquam foveam praetergressus est, ut videatur idem Laelius non naturalem, quae in crimen stultitiae venerat, sed illam civilem defendisse iustitiam, quam Furius sapientiam quidem esse concesserat sed iniustam.*

Carneades . . . ? This Man having undertaken to dispute against Justice, that kind of it, especially, which is the Subject of this Treatise, found no Argument stronger than this."

Grotius then went on, following Lactantius' account closely, to reproduce Carneades' claims.[41] Carneades' argument, as Lactantius took it from Cicero's *De re publica* and Grotius in turn from Lactantius, went as follows: For the sake of expediency or interest (*pro utilitate*) alone, human beings had created laws that differed depending on custom and changed frequently at different times for the same people. However, no natural law existed; all people and other living creatures, guided by nature, were driven by their own advantage and interest (*ad utilitates suas*). Therefore, either justice (*iustitia*) did not exist, or, if it did, it could be equated with the greatest foolishness (*stultitia*), since it was concerned with the benefit of others and therefore harmed oneself.[42]

According to Cicero's Carneades, law is essentially conventional and created by human beings as the product of their will, a fact reflected in the multiplicity of different positive law systems depending on place and time. It was particularly important to identify the natural with the advantageous and expedient, while at the same time setting apart the just: the self-interested pursuit of advantage by all living things is natural and thus universal, while the various legal norms have nothing natural and thus nothing universal about them. What the advocates of universal natural law call justice is, according to Carneades, mere foolishness – the only sort of justice that is not foolishness is obedience to law, which can be wise if it is advantageous. Cicero placed this argument, which is of course heavily indebted to Glaucon's in the second book of Plato's *Republic*, in a Roman context and, in his *De re publica*, had the Greek Carneades (or rather his mouthpiece in the dialogue, Lucius Furius Philus) illustrate the equation of justice and foolishness to his Roman audience with a discussion of Roman imperialism:

[41] Cf. Lactant. *Div. inst.* 5.16.3 (= Cic. *Rep.* 3.21).

[42] *RWP*, 1.79; *IBP* prol. 5: "Cum vero frustra de iure suscipiatur disputatio, si ipsum ius nullum est, et ad commendandum et ad praemuniendum opus nostrum pertinebit, hunc gravissimum errorem breviter refelli. Caeterum ne cum turba nobis res sit, demus ei advocatum. Et quem potius quam Carneadem, qui ad id pervenerat, quod Academiae suae summum erat, ut pro falso non minus quam pro vero vires eloquentiae posset intendere? Is ergo cum suscepisset iustitiae huius praecipue de qua nunc agimus, oppugnationem, nullum invenit argumentum validius isto: iura sibi homines utilitate sanxisse varia pro moribus, et apud eosdem pro temporibus saepe mutata: ius autem naturale esse nullum: omnes enim et homines et alias animantes ad utilitates suas natura ducente ferri: proinde aut nullam esse iustitiam; aut si sit aliqua, summam esse stultitiam, quoniam sibi noceat alienis commodis consulens."

> All successful imperial powers, including the Romans themselves who have gained possession of the entire world, if they should wish to be just – that is to say to return property that belongs to others – would have to go back to living in huts and languishing in want and wretchedness.[43]

Lactantius agreed that Roman imperialism should be unmasked as a clever, self-interested, and advantageous, but also unjust, type of conduct. Given his own pessimism regarding the pagan Roman empire, the author of *Divinae institutiones*, written during the Diocletian persecutions, must have found Carneades' views plausible.[44] For the Christian rhetorician and apologist who identified *iustitia* with the worship of the Christian God, the skeptical differentiation undertaken by Carneades between *sapientia* and *iustitia* would indeed have been valid, in the absence of the Christian premises of the immortality of the soul and the eternal life of the chosen.[45] The pagan Cicero and his predecessors would be denied insight into true justice, which, from Lactantius' point of view, made it impossible to present a satisfactory response to Carneades.

It is noteworthy that Grotius did not adopt Lactantius' portrayal of the relative strength of Carneades' arguments and Cicero's natural law reply.[46] As will be shown, Grotius oriented his own response to Carneades heavily around the classical, more precisely Roman, arguments against skepticism and, unlike Lactantius, linked them to the natural-law tradition that Cicero had employed against Carneades. Both the embedding of Carneades' arguments in the context of Roman world domination and the restitution of others' property as a defining criterion of natural justice indicate quite clearly the specifically Roman background of the debate for Cicero, and both were features Grotius was going to adopt.

In Chapters 6 and 7 I shall discuss the central role played by private property in determining the content of natural law and will show how a deeply Ciceronian concept of natural justice was adopted by Grotius both in *De iure praedae* and in *De iure belli*. The choice of Carneades as antagonist points, from a methodological point of view, to the kind of justification of natural law Grotius is aiming at. As we have already begun to show in regard to *De iure praedae*, Grotius aimed to prove the existence and validity of his natural law using the tools of classical rhetoric he knew

[43] Lactant. *Div. inst.* 5.16.4 (= Cic. *Rep.* 3.21): *omnibus populis qui florerent imperio, et Romanis quoque ipsis qui totius orbis potirentur, si iusti velint esse, hoc est si aliena restituant, ad casas esse redeundum et in egestate ac miseriis iacendum.*

[44] See Lactant. *epit.* 59; *Div. inst.* 6.9. He emphasizes that Rome was based on might, not right: Lactant. *epit.* 55. Cf. Wieacker 1967, 261.

[45] Lactant. *epit.* 51.1; 52.7.

[46] *Pace* Korkman 1999/2000, 84.

so well. This is true to an even greater degree of *De iure belli ac pacis*, and shall now be demonstrated in some more detail.

Proof of natural law

Somewhat surprisingly, in his later work Grotius did not cite Carneades' unmasking of Roman imperialism.[47] Instead, in later editions of *De iure belli ac pacis*, he referred to a famous example of sophistic realpolitik, the Melian Dialogue in Thucydides,[48] which allows us to assume an awareness on his part of the sophistic tradition upon which Carneades' skepticism was based. To the extent that they were not enriched by Cicero with specific Roman characteristics, Carneades' claims drew on arguments familiar from sophistic political thought about the foolishness of the just, which had already been raised to the international realm in the Melian Dialogue.[49]

As a Spartan colony, the Dorian island of Melos, according to Thucydides' account, refused – unlike the Ionian islands – to submit itself to the supremacy of the Athenians. The Athenians then attempted to induce the Melians to enter the Delian League. They would not accept legal arguments, especially as the dispute was not one between equals, but a confrontation between a position of military strength and a position of weakness. The only appropriate arguments are portrayed as being based on self-interest and expediency. The Melians therefore refrained from offering moral or legal arguments, attempting instead to counter the Athenians with arguments based on self-interest.

In Grotius' version, added to the notes of *De iure belli ac pacis* in the 1642 edition, the arguments put forward by the Athenians against the Melians are the following: "For you cannot but know that, according to the common Notions of Mankind, Justice is regulated by the equal Necessities of the Parties; and that those who are invested with a superior Power, do all they find possible, while the Weak are obliged to submit."[50] The sophistic skepticism passed down by Thucydides anticipates Carneades' antagonism between self-interest or expediency (*utile*) and justice (*iustum*). At the same time, as with Carneades, the sophistic speeches of the Athenians in Thucydides' work made it necessary, from a methodological perspective,

[47] Unlike his predecessor Alberico Gentili, who quotes the passage from Lactantius in a mangled form in *WR*, 68.

[48] *IBP* prol. 3. The reference to Thuc. 5.89 was added to the editions from 1642 onward.

[49] On the sophistic tradition behind Carneades' argument, see Ottmann 2001/12 II/1, 30–33.

[50] *RWP*, 1.76; *IBP* prol. 3, note 5: "iusta humanae rationi ea censeri quae par necessitas indicit: caeterum quae fieri possunt ea fieri a validioribus, ab infirmioribus tolerari."

to reply using the tools of rhetoric. This reply had to be more convincing than that of the Melians reported in Thucydides, who were after all unable to persuade the Athenians to accept their offer of neutrality and leave them their freedom, which led to the fall of Melos and illustrated forcefully the appeal of sophistic *raison d'état*.[51]

With this use of Thucydides at the very beginning of his work in Prolegomena 3, Grotius accepted the rhetorical challenge of the sophistic skeptics, intending to refute it more effectively – meaning primarily more persuasively – than the Melians had been able to do in Thucydides. Grotius would do this not by countering the Athenians' views with considerations of self-interest and expediency or trust in divine intervention, as the Melians had done, but by using arguments of a legal and moral nature. This is the context in which the use of Carneades in the Prolegomena should be seen. Carneades' argument as well as the Melian Dialogue were perceived by Grotius as a rhetorical challenge.

Grotius adopted from the skeptic the criterion of empirical verifiability, sharing with Carneades the view that the empirical verifiability of natural law was desirable, especially in a rhetorical context. That is to say he shared with Carneades the view that if one had to convince one's audience of the existence of natural law, then it was easier to do so with empirical, rather than exclusively a priori, evidence of its existence. He considered the Carneadean conclusion that no natural law exists to be persuasive given Carneades' premises – Grotius therefore had to dispute the truth of the relativist finding, from empirically obtained premises, that laws "are different, not only in different Countries, according to the Diversity of their Manners, but often in the same Country, according to the Times."[52] The alleged variety of empirically verifiable views of law and moral norms is the reason that Grotius felt the need to include very varied historical evidence in his portrayal of natural law. References to the categories of sources that he would use in so doing, and a presentation as well as an explanation of his method, can be found in the Prolegomena:

> I have likewise, towards the Proof of this Law, made Use of the Testimonies of Philosophers, Historians, Poets, and in the last Place, Orators; not as if they were to be implicitly believed; for it is usual with them to accommodate themselves to the Prejudices of their Sect, the Nature of their Subject, and the Interest of their Cause: But that when many Men of different Times and Places unanimously affirm the same Thing for Truth, this ought to

[51] Cf. Schnepf 1998, 3.
[52] *RWP*, 1.79; *IBP* prol. 5 (= Lactant. *Div. inst.* 5.16.3 = Cic. *Rep.* 3.21).

> be ascribed to a general Cause [*causa universalis*]; which in the Questions treated of by us, can be no other than either a just Inference [*recta illatio*] drawn from the Principles of Nature [*naturae principia*], or an universal Consent [*communis consensus*]. The former shews the Law of Nature [*ius naturae*], the other the Law of Nations [*ius gentium*]. The Difference between which is not to be understood from the Testimonies themselves (for the Law of Nature and of Nations are Words used every where promiscuously by Writers)[53] but from the Quality of the Subject. For that which cannot be deduced from certain Principles [*certa principia*] by just Consequences [*certa argumentatio*], and yet appears to be every where observed, must owe its rise to a free and arbitrary Will.[54]

To prove the existence of the body of law in question, Grotius would use the evidence of philosophers, historians, poets, and orators. The reason he gave for using all these kinds of evidence lay in his intended refutation of Carneades' arguments: if many people, at different times and in different places, had affirmed the same thing to be certain, this unanimity had to be ascribed to a universal cause (*causa universalis*). This universal cause could lie either in the principles of nature, or in consensus.

The difference between a valid conclusion from the principles of nature and general consensus is significant for Grotius, because it points to the difference between natural law, on the one hand, and the law of nations, on the other. While the latter is merely conventional and has its source in an arbitrary act of will (*ex voluntate libera*), the former can be deduced from self-evident first principles. Empirically identifiable, historically transmitted propositions could be norms of natural law only if they were able to be deduced from self-evident first principles. In Grotius' view, provisions of natural law could therefore potentially be manifested positively in the historical record, if agreed upon by the many – consensus was, however, not the source of their validity; their self-evident character was.

In his essay on "Natural Law and History in Hugo Grotius," Robert Schnepf shows that Grotius' use of historical evidence was primarily "a

[53] Grotius' remark is aimed at the Roman jurist Gaius, who uses the terms *ius gentium* and *ius naturale* synonymously. See *Dig*. 1.1.9; *Inst. Iust*. 1.2.11: *naturalia quidem iura, quae apud omnes gentes peraeque servantur*. See on this Winkel 1993.

[54] *RWP*, 1.111–12; *IBP* prol. 40: "Usus sum etiam ad iuris huius probationem testimoniis philosophorum, historicorum, poëtarum, postremo et oratorum: non quod illis indiscrete credendum sit; solent enim sectae, argumento, causae servire: sed quod ubi multi diversis temporibus ac locis idem pro certo affirmant, id ad causam universalem referri debeat: quae in nostris quaestionibus alia esse non potest quam aut recta illatio ex naturae principiis procedens, aut communis aliquis consensus. Illa ius naturae indicat, hic ius gentium: quorum discrimen non quidem ex ipsis testimoniis (passim enim scriptores voces iuris naturae et gentium permiscent) sed ex materiae qualitate intelligendum est. Quod enim ex certis principiis certa argumentatione deduci non potest, et tamen ubique observatum apparet, sequitur ut ex voluntate libera ortum habeat."

recourse to legal opinions in history," which was not, however, a mere "recourse to authorities": "It depends on the greatest variety of legal opinions, without any of these already having been distinguished as authorities." This is what makes Grotius' method special: "That is exactly the point of the process, that by expanding the source material, scholastic 'authorities' can be undermined."[55] However, in my view Schnepf insufficiently emphasizes that this "expanding of the source material" is not tantamount merely to recourse to the "greatest variety of legal opinions." Rather, Grotius endeavored to glean these legal opinions from the kinds of *testimonia* enumerated by him in the passage cited above; these did not have a primarily legal character, but became "legal opinions" only through their use by Grotius. The main expansion of legal source material consisted precisely in the fact that this evidence from philosophers, historians, poets, and orators would be evaluated in regard to the normative views they contained.

Schnepf further demonstrates that Grotius' "history of legal opinions" fulfills two essential functions for him: first, making legal views available as material, and second, providing "evidence" for creating hierarchies within this material, in which a norm had more validity "the more widespread it is or the more worthy are those who recognize it."[56] Here, however, Schnepf fails to mention two basic characteristics of Grotius' method. First, for the most part, Grotius took the material from Greco-Roman antiquity;[57] and second, the types of sources that were to constitute Grotian natural law, like the method of proof used to demonstrate it, were determined substantially by Grotius' use of classical, and especially Roman, rhetoric.[58] The following will first consider the latter aspect, Grotius' use of classical rhetoric. This will clarify its effect on Grotius' method.

The description of his method, as Grotius presented it in the above-cited passage from the Prolegomena, corresponds to Roman rhetoricians' description of reasoning (*argumentatio*) as the central and determinative part of a speech. Grotius owes his rhetorical knowledge primarily to Cicero's

[55] Schnepf 1998, 9: "Darin liegt gerade der Pfiff des Verfahrens, dass durch diese Ausweitung des Quellenmaterials scholastische 'Autoritäten' unterlaufen werden können." Schnepf credits Bodin's *Methodus ad facilem historiarum cognitionem* with the original idea to enlarge thus the pool of legal source and thinks it must have influenced Grotius.

[56] Schnepf 1998, 9.

[57] Biblical testimony, flowing from God's free will, is thus not considered for the proof of natural law; biblical evidence on Grotius' view never contradicts the provisions of natural law, however. Natural law is not subject to God's will and must thus remain distinct from biblical norms; see *IBP* prol. 48–50.

[58] Röd 1970, 70 and Grunert 2000, 67–76, neglecting the rhetorical aspects, describe Grotius' method merely as eclectic.

De inventione as well as Quintilian's *Institutio oratoria*.[59] Grotius had already addressed Quintilian's work and the three types of speeches he discussed,[60] in the introductory remarks to *De iure praedae*. There he said it was necessary to utilize all three types – forensic speech, panegyric, and political speech – and thus advertised the influence of classical rhetoric on *De iure praedae*.

The following will show that Grotius' fundamental methodological principles can only be understood in light of his use of Roman rhetoric. The very terminology used by Grotius in the above-cited passage from the Prolegomena clearly shows his familiarity with rhetorical theory. Grotius described his intentions as follows: he intended to prove (*probatio*) natural law using evidence or testimony (*testimonia*). Agreement among these *testimonia* allowed certain convincing statements about the issues in question (*quaestiones*), which in turn could be classified by origin: they either emerge from simple consensus (*consensus*) or can be deduced from first principles (*deducere*).

With this explanation, we find ourselves in the midst of Quintilian's classical theory – *probatio*, *quaestio*, *testimonium*, *consensus*, and deduction from first principles are all basic concepts of rhetoric. Quintilian described the "absolutely necessary" part of the speech as proof (*probatio*), which serves to establish the credibility of the view being advocated.[61] The substance of the *probatio*, in order to be capable of being proven, is formulated as a *quaestio*, since in most types of speeches (specifically forensic and political speeches), two parties are dealing with the same subject in adversarial fashion.[62] A *probatio* is made up of at least one, but generally several, proofs that can be grouped under the heading of *argumenta* or *probationes*.[63]

The concept of *testimonia* is used in rhetorical theory for statements made at trial by witnesses (*testes*) either orally or, in their absence, in writing.[64] Depending on party standpoint, the orator must then argue for or against these witness testimonies and either support or deny the value of the statement.[65] Both consensus and deduction from first principles played an important role for Quintilian in proving a *quaestio*. The following sections will now more closely examine the various rhetorical methods of

[59] Grotius' library in 1618 contained a work by Quintilian, most probably the *Institutio oratoria*, as well as various editions of the collected works of Cicero. See Molhuysen 1943, no. 211, 271, 307; Grotius also knew Cicero's *De oratore* and *Brutus* as well as Aristotle's *Rhetoric*. He excerpted Quintilian's *Institutio oratoria* early on (see BPL 922 IV, foll. 437–44v.); see above, 52.

[60] Quint. *Inst.* 3.4.

[61] Cic. *Inv.* 1.34; Quint. *Inst.* 5. pr. 5; see Lausberg 1990, § 348.

[62] Quint. *Inst.* 3.11.1.

[63] Quint. *Inst.* 5.1.1; 5.9.1; see Lausberg 1990, § 349.

[64] Quint. *Inst.* 5.7.1.

[65] Quint. *Inst.* 5.7.1–4.

proof, their use by Grotius, and their methodological consequences for Grotius' work.

A priori proof of natural-law norms

"Witness testimony" of philosophers, historians, poets, and orators is only one of many possible proofs of natural law that Grotius sought to utilize. Another possibility has in his view both a more compelling and a more general character. In Prolegomena 39, Grotius showed how he would first prove natural law norms independently of any *testimonia*. At the same time, he argued that the certainty of the basic principles of nature, from which both the *causa universalis* as a direct conclusion and, indirectly, the empirical proof of natural law emerged, was accessible to anyone and was completely plain. Grotius invokes self-evident principles: ideas so certain that no one could deny them without doing violence to himself. The principles of natural law were per se obvious and evident, almost in the same way as things perceptible by the senses:

> My first Care was, to refer the Proofs of those Things that belong to the Law of Nature to some such certain Notions [*notiones certae*], 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 [*per se patent atque evidentia sunt*], 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.[66]

The method presented here of proving natural law, like the proofs constructed upon "witness testimonies," conformed to a rhetorical method of logical reasoning and substantiation, so called *ratiocinatio*, characterized by the construction of proofs "rationally and conclusively" on the basis of unquestioned statements.[67] This was the same method Grotius had addressed above, in connection with the criteria of deducibility he had postulated to distinguish between sources of natural law and of the law of nations.[68] Since only natural-law rules rested on a correct conclusion deduced from principles of nature, this deducibility provided a criterion for distinguishing natural law from the law of nations. "For that which cannot be deduced from certain Principles by just Consequences, and yet appears

[66] *RWP*, 1.110–11; *IBP* prol. 39: "Primum mihi cura haec fuit, ut eorum quae ad ius naturae pertinent probationes referrem ad notiones quasdam tam certas ut eas nemo negare possit, nisi sibi vim inferat. Principia enim eius iuris, si modo animum recte advertas, per se patent atque evidentia sunt, ferme ad modum eorum quae sensibus externis percipimus; qui et ipsi bene conformatis sentiendi instrumentis, et si caetera necessaria adsint, non fallunt."

[67] Lausberg 1990, § 367.

[68] *IBP* prol. 40; see above, 63.

to be every where observed, must owe its rise to a free and arbitrary Will,"[69] and according to Grotius' doctrine, it was part of the law of nations (*ius gentium*). But whatever could be deduced from certain – that is, evident – principles was part of natural law.

The bifurcation of his argument that Grotius undertook in Prolegomena 40 with his reference to the consensus among various "testimonies," on the one hand, and to "certain principles" (*notiones certae*), on the other, is not remarkable simply because Grotius here connected two different theoretical lines of argument in an exceptionally intricate way.[70] It corresponds to a dichotomy in rhetoric of the type suggested by Quintilian, following Cicero and most Greek rhetoricians: induction and reasoning (*ratiocinatio*).[71] In the first chapter of the first book of *De iure belli ac pacis*, a chapter dedicated to identifying natural law, in a paragraph bearing the heading "How the Law of Nature may be proved" ("Quomodo probetur ius naturale"), Grotius provided a more detailed discussion of the two fundamentally different proofs of natural law, which in his view supplemented one another.[72]

Deviating terminologically from the methodological passages in the Prolegomena cited above, the two main types of natural law proofs are described here as a priori, on the one hand, and a posteriori, on the other.[73] The a priori proof of natural law apparently corresponds to a method, introduced by Grotius in the Prolegomena and just explained, involving deduction of things belonging to natural law from *notiones certae* or self-evident principles through valid argumentation ("ex certis principiis certa argumentatione").[74] This in turn corresponds to the rhetorical method of logical substantiation and reasoning (*ratiocinatio*). Essentially, the distinction made by Grotius between the more compelling a priori and the more popular a posteriori reasoning harks back to Quintilian, and originally to the two forms of dialectical method described by Aristotle – specifically, the description of dialectic syllogism and induction (*epagoge*) in the *Topica*, with which Grotius was familiar:[75]

> Induction is the more convincing and clear: it is more readily learnt by the use of the senses, and is applicable generally to the mass of men, though reasoning is more compelling and effective against argumentative people.[76]

[69] *RWP*, 1.112. [70] Grunert 2000, 71. [71] Quint. *Inst.* 5.11.2. [72] *RWP*, 1.159; *IBP* 1.1.12.1.
[73] *IBP* 1.1.12.1: "A priori, si ostendatur rei alicuius convenientia aut disconvenientia necessaria cum natura rationali ac sociali: a posteriori vero, si non certissima fide, certe probabiliter admodum, iuris naturalis esse colligitur id quod apud omnes gentes, aut moratiores omnes tale esse creditur."
[74] *IBP* prol. 40. [75] He cites the work six times in all; see *IBP* Scott, 892.
[76] Arist. *Top.* 1.105a16ff. The translation is W. A. Pickard-Cambridge's, slightly altered. See also Arist. *An. post.* 1.71a1–10.

This differentiation, based on Aristotelian rhetoric, was adopted by Grotius for his rhetorical method of proving natural law; however, his conception of a priori proof was based less on Aristotle's concept of dialectic syllogism than on his "demonstrative syllogism," which led to necessarily true, and not merely credible, conclusions[77] and had played an occasional role in Aristotle's work in the sphere of practical philosophy.[78] This proximity to the Aristotelian model in the *Topica* then gave way to a description of the criterion for being in accordance with natural law, strongly influenced by the Stoics.[79]

In the section "How the Law of Nature may be proved," Grotius provides a characterization of the two methods of proof that is strongly reminiscent of the distinction provided by Aristotle in the *Topica*:

> Now that any Thing is or is not by the Law of Nature, is generally proved either a priori, that is, by Arguments drawn from the very Nature of the Thing; or a posteriori, that is, by Reasons taken from something external. The former Way of Reasoning is more subtle and abstracted; the latter more popular. The Proof by the former is by shewing the necessary Fitness or Unfitness of any Thing, with a reasonable and sociable Nature.[80]

According to Grotius, the a priori method of proof, more subtle than the a posteriori, permitted a stronger argument; it is applied to show the necessary accordance of a thing with the rational, social nature of humankind, and thus to prove the natural-law nature of this thing – which can be a specific action or a normative rule. This is a reference to the main criterion for conformity with natural law: the fit with a reasonable and sociable nature ("convenientia cum natura rationali ac sociali"), the necessity of which, in a strict sense, can only be proven a priori and is based on certain metaphysical presuppositions. Here the evident principles of natural law, or *notiones certae*, of which Grotius spoke in the Prolegomena are being substantiated and given more content, to the extent that nature is understood as "natura rationalis ac socialis," suggesting the anthropological dimension of Grotius' metaphysical commitments. This anthropological dimension, in turn, represents the result of the reception of Stoic and Roman sources and will be discussed in Chapters 4 and 5. For now we

[77] See Arist. *An. post.* 1.71b9ff.
[78] See Arist. *Eth. Nic.* 6.1143b11–14.
[79] *IBP* 1.1.12.1. See the discussion below, 83–88.
[80] *RWP*, 1.159; *IBP* 1.1.12.1: "Esse autem aliquid iuris naturalis probari solet tum ab eo quod prius est, tum ab eo quod posterius. quarum probandi rationum illa subtilior est, haec popularior. A priori, si ostendatur rei alicuius convenientia aut disconvenientia necessaria cum natura rationali ac sociali . . . " The second sentence, with its Aristotelian flavor, was added to the editions from 1631 onward.

will first address the a priori proof of natural law and its relationship to the rhetorical method of logical reasoning (*ratiocinatio*).

The method of *ratiocinatio* was considered by classical rhetoricians to be artificial evidence that, in contrast to non-artificial evidence using witness testimony, created its proofs only through rhetoric; such "artificial proofs" could only be found through the use of rhetoric.[81] Proof established through *ratiocinatio* owed its strength to reason: "Since an argument is a process of reasoning which provides proof and enables one thing to be inferred from another and confirms facts which are uncertain by reference to facts which are certain, there must be something in every case which requires no proof."[82] These certain facts, "quod dubium non est," serve as the premise from which a conclusion can be drawn. The procedure resembles a syllogism, and is called *oratorius syllogismus* by rhetoricians.[83] However, these premises could be omitted, since the logical explanation, in rhetoric, need not meet the requirements placed on it by philosophers; quite the contrary, an overly strict concern with syllogistic rules of inference would undermine their persuasiveness.[84]

As the secure basis that required no further proof and which could prove the *dubium* of the natural-law character of certain norms, Grotius introduced the self-evident certain principles (*notiones certae*), which qualified as natural-law principles and could be understood by anyone – "almost after the same Manner as those Things are that we perceive with our outward Senses."[85] As the first of a total of seven types of statement that could be used as undeniable bases of proof by *ratiocinatio*, Quintilian had offered the perceptions of the senses: "We may regard as certainties, first, those things which we perceive by the senses, things for instance that we hear or see."[86] The reason Grotius deviated here from his rhetorical model and conceded somewhat less evidentiary weight to his natural-law principles than to the perceptions of the senses is undoubtedly due to his epistemological distinction, new in comparison with classical rhetoric, between a priori and a posteriori proof. Since Grotius' natural-law principles were recognizable a priori, they could not be based on any empirical, sensual perceptions,

[81] Lausberg 1990, § 350.

[82] Quint. *Inst.* 5.10.11: *ratio probationem praestans, qua colligitur aliquid per aliud, et quae quod est dubium per id, quod dubium non est, confirmat, necesse est esse aliquid in causa, quod probatione non egeat.* I have used the Loeb translation by H. E. Butler.

[83] Quint. *Inst.* 5.14.24.

[84] Quint. *Inst.* 5.14.27–32. See Lausberg 1990, § 371.

[85] *RWP*, 1.111; *IBP* prol. 39.

[86] Quint. *Inst.* 5.10.12: *pro certis autem habemus primum quae sensibus percipiuntur, ut quae videmus, audimus.*

like Quintilian's certainties, but were merely self-evident, "almost" like the things perceived by the senses.

Interestingly, Grotius changed his views on this in the course of the publication of various new editions of *De iure belli ac pacis*. In the first edition, in 1625, he had described the certainty of self-evident first principles as "much stronger than those things that we perceive through the external senses" ("multo magis quam quae sensibus externis percipimus").[87] Only in the editions after 1631 were the words cited above published, and thus the importance of empiricism more strongly emphasized. This suggests a decreasing confidence in the persuasiveness of a priori evidence of natural law, but also undoubtedly did greater justice to the role of the numerous historical testimonies, also growing in number with successive editions, in *De iure belli ac pacis*.[88]

For Grotius, as we have seen, the principles of natural law were self-evident (*notiones certae*), and were thus able to serve as undeniable foundations for an argument demonstrating that norms resulting from such self-evident notions (*notiones certae*) by the process of *ratiocinatio* do in fact constitute natural law in themselves. For Grotius, however – and this is a consequence of his rhetorical method – these rules, together with the rules of the law of nations, could at the same time also be proven empirically through the above-mentioned witness testimonies (*testimonia*), examples (*exempla*), and judgments (*iudicia*).

Empirical proof of natural law norms

We have seen that Grotius, to prove his system of natural law, thought to use testimonies from various types of sources, specifically from historical writing and the testimonies of philosophers, poets, and orators.[89] This selection of sources corresponds precisely to the various genres recommended to orators as reading material by Quintilian.[90] The following will discuss the status held by the various genres in Grotius' method. It will become clear that Grotius, in using the various testimonies, closely followed the models of classical rhetoric, particularly Quintilian.

[87] See *IBP* prol. 39.
[88] Cf. Grunert 2000, 71–72, who seems to rely on the wording of the 1625 edition too much and does not pay sufficient attention to subsequent changes.
[89] *IBP* prol. 40.
[90] Quint. *Inst.* 10.1.20–36. See on Quintilian's influence on the education and curricula of English humanists and their "overwhelming debt to the Roman tradition of rhetorical education" Skinner 1996, 21–23.

i) The testimonies of historians

During his methodological statements on the *testimonia historicorum* in the Prolegomena, Grotius, following the model of classical rhetoric, went into greater detail about the function of these "witness testimonies by historians." They made both examples (*exempla*) and judgments (*iudicia*) available; concurring judgments, in particular, were relevant for proving natural law and the law of nations, and the *exempla* owed their authority largely to their Greco-Roman origin:

> Histories have a double Use with respect to the Subject we are upon, for they supply us both with Examples [*exempla*] and Judgments [*iudicia*]. Examples, the better the Times and the wiser the People were, are of so much the greater Authority; for which Reason we have preferred those of the ancient Grecians and Romans before others. Nor are the Judgments we meet with in Histories to be despised, especially when they agree: For the Law of Nature, as we have already said, is in some Measure proved from hence, but of the Law of Nations there is no other Proof but this.[91]

This use of examples, as Grotius intended, accords with the use made of examples in classical rhetoric in the inductive method.[92] While logical reasoning (*ratiocinatio*) was a method that developed proof from subject matter being debated itself, induction (*inductio*) used examples (*exempla*) and judgments (*iudicia*) external to the question being debated. As unquestioned facts, these are placed in an analogy to the case to be proven through induction.[93]

Examples (*exempla*) were, according to Quintilian, mainly found in historical writing, the main use of which for an orator was to equip him with examples that enjoyed the status of witness testimonies, but were all the more effective because, unlike witness testimonies, they could not be accused of prejudice for or against a point of view.[94] According to Quintilian, examples could also be taken from poetry, which, however, because of its subjectivity and lesser credibility, was less persuasive than

[91] *RWP*, 1.123–24; *IBP* prol. 46: "Historiae duplicem habent usum qui nostri sit argumenti: nam et exempla suppeditant et iudicia. Exempla quo meliorum sunt temporum ac populorum, eo plus habent auctoritatis: ideo Graeca et Romana vetera caeteris praetulimus. Nec spernenda iudicia, praesertim consentientia: ius enim naturae ut diximus aliquo modo inde probatur: ius vero gentium non est ut aliter probetur."

[92] Cf. Grunert 2000, 71.

[93] See Lausberg 1990, § 419.

[94] Quint. *Inst*. 10.1.34: *est et alius ex historiis usus et is quidem maximus, . . . ex cognitione rerum exemplorumque, quibus in primis instructus esse debet orator, nec omnia testimonia expectet a litigatore, sed pleraque ex vetustate diligenter sibi cognita sumat, hoc potentiora, quod ea sola criminibus odii et gratiae vacant*. Cf. also Quint. *Inst*. 12.4.1–2.

examples taken from works of history and did not have the weight of witness testimonies.[95] The poetic example is used in classical rhetoric mainly as *ornatus*.[96] This weighting was adopted by Grotius – "The Opinions of Poets and Orators are not of so great Weight" – and was used less to create credibility (*fides*) for the reader than as ornamentation.[97]

The advantages of historical examples also apply, according to Quintilian, to those proofs that are called judgments (*iudicia*) and consist of what various nations, communities, philosophers, eminent citizens, and distinguished poets have thought about something. Even what emerges from the masses and reflects the convictions of the general public should not be ignored. That is, such general judgments represent a type of witness testimony (*testimonium*) that, because of their independence of concrete cases, can be particularly effective: they are made only because they appear to be particularly virtuous (*honestissima*) and true (*verissima*), and are not produced with an eye toward the individual circumstances of any concrete case.[98]

It should be noted that the whole genre of "testimony of historians" (*testimonia historicorum*)[99] was not understood by Grotius merely in the sense of a history of events; in addition to the examples (*exempla*), as we have seen, it also included judgments (*iudicia*), by which Grotius meant normative moral judgments from which he hoped to glean the content of his natural law rules.[100] Nor is it entirely clear whether Grotius understood "examples" also to include normative texts. In any event, Grotius' "testimony of historians" must be seen as an umbrella term for all historical testimonies incorporated into his works, which would include not only accounts of historical events, but also works in the history of philosophy and law, as well as works of classical and, for Grotius, primarily Roman philosophers, lawyers, orators, and poets. Grotius was interested in all these various types of sources in regard to *exempla* and *iudicia* – however, the normative judgments are most important, as they provide the standard for normative assessment of examples in the history of events.

[95] Quint. *Inst*. 10.1.28, on the genre of poetry: *solam petit voluptatem eamque fingendo non falsa modo, sed etiam quaedam incredibilia sectatur* . . . . See also Quint. *Inst*. 12.4.2, on the lesser weight of *exempla* taken from poetry compared to examples from historiography.

[96] See Lausberg 1990, § 413.

[97] *RWP*, 1.124; *IBP* prol. 47: *poëtarum et oratorum sententiae non tantum habent pondus*. Rousseau famously thought that while Hobbes "relied on sophisms," Grotius relied "on the poets," and that this was the only difference between the two authors: Rousseau 1966, 600. See Tuck 1999, 13, who follows Rousseau's interpretation.

[98] Quint. *Inst*. 5.11.36f.

[99] *IBP* prol. 40.

[100] As for example the speeches in Thucydides; see *IPC* 2, foll. 11–12, where Grotius adduces a speech by Pericles (Thuc. 2.60), or the quotation from the Melian Dialogue in *IBP* prol. 3 (Thuc. 5.89).

This does not mean that Grotius rarely used the works of historians – quite the contrary, Livy, with over 400 references, is the most cited individual author from Greco-Roman antiquity in *De iure belli ac pacis*, surpassed only by the *Corpus iuris civilis*, with over 570 references.[101] Normally, Grotius applied the normative judgments to historical events and then, depending on the example, described the historical event in retrospect as either in conformity with natural law or as unlawful. In their Roman law and Roman ethical substance, as will be shown in the next chapter, the normative judgments do not differ substantially from the natural law in *De iure praedae* – in *De iure belli*, Grotius simply added an incomparably greater number of historical events to which he referred and applied his natural law.[102] Here the historical events themselves do not develop any normative power of their own.[103] For example, in explaining the question of what can be considered public wars and whether wars waged *ultra vires* by junior magistrates acting on their own can be considered public, Grotius offered various examples from Roman history, but judged the events passed down by Livy[104] normatively and with a certain detachment. Grotius concludes:

> This Example, . . . and many more that one may meet with, ought to teach us, not to approve of every Thing that is said by the most famous Authors: For they often reason according to the Circumstances of the Times, and often according to their own Passions; fitting, τῷ μέτρῳ στάθμην, the Line to the Stone, or the Rule of Equity to Things, and not Things to the Rule of Equity. Wherefore we must endeavour in the Examination of such Matters, to use an unbiassed Judgment, and not rashly draw those Things into Example, which may be rather excused than commended, in which respect we often fatally err.[105]

[101] See the Index in *IBP* Scott, 900–1, 912.

[102] In *De iure praedae* the *Corpus iuris civilis* was the most cited work, with 453 references; Cicero was the most cited author, with 109 references; Livy was adduced merely 55 times. See the Index in *IPC* Scott, 401, 402, 407. Gizewski's analysis of Grotius' use of classical antiquity in *De iure belli ac pacis* (Gizewski 1993, 340–41) does not take *De iure praedae* into consideration, thus obscuring the continuity of the two treatises, in particular the normative continuity, on which is based Grotius' reception of Roman law and Roman ethics.

[103] Pace Bederman 1995/96, 32–33; cf. also Ziegler 1991/92, 84–85. But see von Albrecht 1998, 62 on Grotius' use of Livy: "So wird Livius einerseits als Schatzkammer für Modelle politischer Verhaltensweisen und Situationen (*exempla*) herangezogen, andererseits als Quelle für Natur- und Völkerrecht (*iudicia*)."

[104] Livy 38.14; Livy 21.18.6.

[105] *RWP*, 1.257; *IBP* 1.3.5.6: "Moniti hoc exemplo, et plura occurrent, meminerimus non omnia probare quae a quamvis praeclarae famae auctoribus dicuntur. Saepe enim tempori, saepe affectibus serviunt, et aptant τῷ μέτρῳ στάθμην quare danda est opera uti in his rebus defecato utamur iudicio, nec quae excusari magis quam laudari possunt temere in exemplum rapiamus, in quo perniciose errari solet."

This statement is paradigmatic for Grotius' way of dealing with the various historical sources. The value of all types of sources was measured above all by the normative judgments they contained, which could be employed to explain the natural law norms in Grotius' work. This is the reason that philosophical testimonies held an especially prominent place among Grotius' sources, fully in accordance with Quintilian's assessment of philosophy, especially moral philosophy, as the most important discipline for rhetoric.

ii) Philosophers

According to Quintilian, the genre of philosophy played such a central role in rhetoric because the orators had left to philosophers the most important area of their work, that is to say moral philosophy: "The fact that there is so much for which we must have recourse to the study of the philosophers is the fault of orators who have abandoned to them the fullest portion of their own task. The Stoics most especially . . . argue with great keenness on what is just, honourable, expedient and the reverse, as well as on the problems of theology, while the Socratics give the future orator a first-rate preparation for forensic debates and the examination of witnesses."[106] Philosophy's important status arose from Quintilian's definition of the perfect orator, as he would emerge from the instructions in *Institutio oratoria* – a definition that included his moral qualities.[107]

While for Grotius, the poets and orators of Greco-Roman antiquity avowedly played a subordinate role in regard to proofs of natural law, in full accordance with rhetorical theory, his explanations of philosophy as a source shed some light on the prominent position still held by Aristotle in the context of the first half of the seventeenth century. They also show, in light of the debate with Aristotle, how Grotius sought to position himself with regard to the philosophical traditions inherited from classical antiquity. While paying tribute to Aristotle, Grotius made explicit the distance that separates him from the views of the Peripatetics, particularly in dealing with Aristotle's theory of justice, something we shall discuss in Chapter 5.

[106] Quint. *Inst.* 10.1.35. Cf. Quint. *Inst.* 1.pr.11: *quare, tametsi me fateor usurum quibusdam quae philosophorum libris continentur, tamen ea iure vereque contenderim esse operis nostri proprieque ad artem oratoriam pertinere*. Similarly also Quint. *Inst.* 12.2.5.

[107] Quint. *Inst.* 1.pr.9: *Oratorem autem instituimus illum perfectum, qui esse nisi vir bonus non potest*; cf. also Quint. *Inst.* 12.1.1: *vir bonus dicendi peritus*. See on this Winterbottom 1964.

Aristotle deservedly took first place among the philosophers, according to Grotius, although his authority (*principatus*) had degenerated into "tyranny":[108] much use will be made of him, Grotius says, but with the same liberties taken by Aristotle in regard to his own teachers.[109] Grotius would therefore follow the example of early Christian apologists and church fathers, who did not commit themselves to any of the philosophical schools; they believed none of these possessed the whole truth, but that each perceived a partial truth. Awareness of this partial truth could be explained by the doctrine of *logos spermatikos*, formulated by the apologist and former Platonist Justin and cited by Grotius: the doctrines of Plato and the Stoics were not entirely different from those of Christ, which could be explained through innate reason.[110] The role of reason in Grotius' explanation of natural law will be discussed in later chapters below. Here it will suffice to point to the shared anthropological assumptions made among the various philosophical schools.

Augustine held of the Platonists that they were Christians *paucis mutatis* and believed that the mores recommended by Cicero and other philosophers were consistent with the doctrines and content of the emerging church; and Tertullian declared Seneca *saepe noster*.[111] By maintaining, with Lactantius, that the eclectic merging of the truths found in the various philosophical schools into a single corpus meant, in reality, the introduction of a Christian doctrine, Grotius indicated his basic ecumenical standpoint. At the same time, he suggested that his *De iure belli ac pacis* tied in with the patristic natural law debate, which was also based on pre-Christian classical philosophy.[112] Apart from this patristically justified eclecticism, Grotius also found himself methodologically in harmony with the classical rhetorical doctrine that orators need not commit themselves to any one philosophical school.[113] From the context of the Prolegomena, it can be seen that Grotius understood *testimonia philosophorum* to include only the testimonies of classical philosophers. Thus in the relevant passages, he deals only with classical philosophy,[114] and counters possible objections

[108] *IBP* prol. 42; *RWP*, 1.113: "I could only wish that the Authority of this great Man had not for some Ages past degenerated into Tyranny." Grotius' terminology here is of course indebted to Aristotle's: see Arist. *Eth. Nic.* 8.1160a35–36.

[109] *IBP* prol. 45.

[110] *IBP* prol. 42, 22n1 (reference to Justin, *Apol.* 2.13).

[111] Ibid. (reference to August. *Ep.* 118.21 on the Platonists, August. *Ep.* 91.3 on Cicero and to Tert. *De anim.* 20).

[112] *IBP* prol. 42: "Itaque veritatem sparsam per singulos, per sectasque diffusam, in corpus colligere, id vero existimabant nihil esse aliud quam vere Christianam tradere disciplinam." See Lactant. *Div. inst.* 7.7.4.

[113] Quint. *Inst.* 12.2.26: *oratori vero nihil est necesse in cuiusquam iurare leges*.

[114] *IBP* prol. 42–45.

against the use of philosophical testimonies with the question "Why should they not be thus employed? The Emperor Alexander Severus read every Day Cicero's Books *De Republica*, and his Treatise *of Offices*."[115]

The methodological quotations from Augustine, Tertullian, and Lactantius on philosophical testimonies show that Grotius no longer included the statements of church fathers in the *testimonia philosophorum*.[116] Nor were the scholastics included in this category; they were seen instead as successors to the patristics and treated separately.[117] Grotius offered references to the church fathers, which urged eclecticism, primarily to explain his distancing from Aristotle in the context of the extraordinarily influential Spanish scholastics. These references to the church fathers and the eclecticism recommended by them remain however merely on the surface of Grotius' work; substantively, we see neither an extensive eclecticism nor an ecumenically motivated orientation towards the church fathers, but rather – as in his earlier *De iure praedae* – first and foremost a normative orientation towards Roman law and the moral philosophy of Cicero. Cicero is in fact the most cited philosophical author in *De iure belli ac pacis*, and certainly the single most important author in terms of his normative influence on Grotius' thought.[118] This was recognized early on; Johann Heinrich Böcler, professor of history at Strasbourg and commentator on *De iure belli ac pacis*, emphasized Grotius' reliance on Cicero and criticized Pufendorf severely for his perceived lack of classical erudition.[119] As Tim Hochstrasser explains, according to Böcler "Pufendorf's claim to be the successor to Grotius was vitiated by his reluctance to examine the process of historical reference that had been a crucial means to the creation of Grotius' book. If he had done this he would not have made the mistake of claiming priority for a concept of the fundament of natural law which was in fact Cicero's – an antecedent recognised and integrated by Grotius."[120] And in the preface to his commentary on the first book of *De iure belli ac pacis*, Böcler in 1663 stressed that the "whole glory of the Latin philosophers is represented in Cicero, whose two works (the *De legibus* and especially

[115] *RWP*, 1.111; *IBP* prol. 4011. The note was added to the editions after 1642.
[116] This also follows from *IBP* prol. 51.
[117] *IBP* prol. 52.
[118] The edition of 1646 contains 290 references to Cicero's works, with roughly half to his philosophical works, especially to *De officiis*, while the rest are references to Cicero's speeches. See the Index in *IBP* Scott, 898–99. See also Bederman 1995/96, 6–9 on the importance of Cicero in *De iure belli ac pacis*.
[119] Letter of Böcler to Boineburg of February 3, 1663: "Si Socialitas Naturae humanae (utitur hac voce Plinius) primum Pufendorfii principium est, primum scire debebat, non ipsius hoc ingenio deberi; sed Ciceronem in officiis & alios, vel ante quam Theognis natus esset, omnia iuris & officii praecepta ab ea origine repetiuisse": Böcler 1715, 901.
[120] Hochstrasser 2000, 57.

the *De officiis*) can speak volumes on this subject . . . Grotius is indebted at many points to these books, even when he does not show it."[121] But as the citation index of *De iure belli ac pacis* demonstrates, very often he does in fact show it.[122]

Grotius did include the Old and New Testaments among the sources of which he sought to make use. However, he left no doubt that they contained no contributions to natural law, as they arose not from nature, but from divine free will: "Some there are who urge the Old Law for the very Law of Nature, but they are undoubtedly in the wrong: For many Things in it proceed from the Free Will of God . . . "[123] The binding nature of the biblical doctrine did not cover all of humankind; it extended to a smaller group of addressees than universal natural law. The normative rules of the Old Covenant, binding on the Jews, were to some extent maintained in the New Covenant; in part, rules binding only on Christians were added, which might outdo natural law in their holiness, but needed to be clearly distinguished from it in terms of sources and addressees: "The New Testament I use for this Purpose, that I may shew, what cannot be elsewhere learned, what is lawful for Christians to do; which Thing itself, I have notwithstanding, contrary to what most do, distinguished from the Law of Nature; as being fully assured, that in that most holy Law a greater Sanctity is enjoined us, than the mere Law of Nature in itself requires."[124] The biblical testimonies were thus eliminated as a means to refute the Carneadean arguments and as the basis of a system of universal natural law.[125]

[121] Böcler 1663, 13: "Latinorum Philosophorum decus omne penes Ciceronem stat: cujus duo opera de Legibus; & praesertim de Officiis, mirum quantum conferre possunt huic materiae . . . Grotius multa debet his libris, etiam ubi non ostendit" (trans. Hochstrasser 2000, 58).

[122] This is of course not to say that the citation index serves as the ultimate criterion for influence. Grotius' citations will not be taken as conclusive in what follows; rather, it will be argued that Grotius' Roman sources were much more important to him for substantive reasons than the other texts he cites.

[123] *IBP* prol. 48: "Antiquam legem sunt qui urgent pro ipso iure naturae: haud dubie mendose; multa enim eius veniunt ex Dei voluntate libera . . . " Gronovius in his comments writes that Grotius here must have had "judaizing" authors in mind, especially Bodin; see *IBP* Gronovius, xxxin14. Cf. Nelson 2010, 97–107, on Grotius' use of the example of the *respublica Hebraeorum*. It seems that Grotius belonged himself, in his works on politics – as opposed to his works on natural law – to the "judaizing" authors, which does not contradict his denial that the Old Law constitutes a source of natural law.

[124] *RWP*, 1.126; *IBP* prol. 50: "Novo federe in hoc utor, ut doceam, quod non aliunde disci potest, quid Christianis liceat: quod ipsum tamen, contra quam plerique faciunt, a iure naturae distinxi: pro certo habens in illa sanctissima lege maiorem nobis sanctimoniam praecipi quam solum per se ius naturae exigat." See Grunert 2000, 91–97.

[125] As Grotius had already done in *Mare liberum*; see *ML* ded., 5, where Grotius says that his treatise "non ex divini codicis pendet explicatione, cuius multa multi non capiunt . . . "

iii) Roman law

Roman law, for Quintilian a necessary element in the education of an orator,[126] represented for Grotius instead a crucial basis of natural law.[127] He subdivided the scholars of the *iuris Romani scientia* into three classes, varying in their fruitfulness for *De iure belli ac pacis*:[128] the first class included classical and post-classical Roman jurisprudence, such as the authors of the *Digest*, the *Codex*, and the *Novellae*; the second subsumed glossators and commentators, to use terms unfamiliar to Grotius, such as Irnerius, Accursius, and Bartolus;[129] and the third consisted of the legal humanists, among whom Grotius interestingly included not only the representatives of the *mos Gallicus* Bodin and Hotman, but also the late Spanish scholastics Covarruvias and Vázquez.[130]

Only the first class, the Roman jurists, were given great weight by Grotius: "For the first I have a great Deference; for they both supply us with Reasons, and those often the very best, to demonstrate what belongs to the Law of Nature,"[131] while the glossators and commentators, like the scholastic philosophers, had the disadvantage that they had lived in unhappy times, which was detrimental to their understanding of Roman law.[132] To Grotius, the authority of Roman law was based, according to Wieacker, "no longer on the medieval concept of empire, but on the exemplary quality of antiquity."[133] Justinian's law, according to Grotius in his *Defensio* of the *Mare liberum* against William Welwod, showed a

[126] Expertise in the *ius civile* for Quintilian is part of the basic training of the *vir bonus dicendi peritus*. See Quint. *Inst*. 12.3.1–12 on the *iuris civilis necessaria scientia* of the *perfectus orator*.

[127] While Grotius was interested in Greek law, as can be seen from his notes on Attic law extant in the Leiden University Library (BPL 922 II, foll. 319–347), Greek law did not play any significant role in the formulation of the norms of natural law in Grotius' doctrine.

[128] *IBP* prol. 53–55.

[129] Cf. on this Barbeyrac's comments: *IBP* Barbeyrac, prol. LIV, p. XXXIVn3.

[130] See on Grotius' use of the authors of the School of Salamanca in general Peter Borschberg's comments in *CT*, 48–52, 73–74, 81–87, 94–95, 99–101.

[131] *RWP*, 1.129; *IBP* prol. 53: "rationes saepe optimas suppeditant ad demonstrandum id quod iuris est naturae." See Borschberg's discussion on the use of the *Corpus iuris* in the *Commentarius in theses XI* and other works by Grotius in *CT*, 63–69.

[132] *IBP* prol. 54. See *IBP* prol. 52 on the scholastics: "in infelicia et artium bonarum ignara saecula inciderunt." See on this Tanaka 1993, 23–24.

[133] Wieacker 1967, 289–90. Wieacker's view that the Spanish late scholastics of Salamanca had constituted an authoritative source ("bedeutende Autorität") for Grotius should be contested however; *IBP* prol. 40ff. does not mention the Spaniards at all and in *RWP*, 1.130 (*IBP* prol. 55) Grotius says of his third category (under which Covarruvias and Vázquez are subsumed) that "they are scarce of any Use to us in our Subject" ("vix ullum habent usum qui nostri sit argumenti"). See also Brett 1997, 165, where the Spaniards are similarly accorded too much weight. For a more skeptical view regarding the influence of the Salamancans on Grotius, see Feenstra 1984, 78–80;

"wonderful sense of justice and consummate knowledge of the ancient law of the Quirites"; therefore "it has happened that many peoples have of their own accord accepted the Justinianic laws."[134] The *Corpus iuris* thus also was referenced over 570 times in the index of cited authors in the 1646 edition, and is therefore easily the most cited work of Greco-Roman antiquity in *De iure belli ac pacis*.[135]

As far as the class of those who combined dealing with Roman law with *humaniores litterae*, the Spaniards Covarruvias and Vázquez had dealt with a certain precision of judgment with disputes between nations and regents, yet their approach is called scholastic by Grotius, which makes clear his distance, given his usually pejorative use of this term. Grotius had great sympathy for the advocates of the *mos Gallicus*: The French had undertaken to incorporate history into their dispute with Roman law, which had turned Bodin and Hotman, especially, into valid models whose works Grotius sought to use in the course of his study.[136]

iv) The weight of classical antiquity

The use of all these sources was dictated for Grotius by the empirical method of proof prescribed by Quintilian's classical rhetoric. Just as the rhetorical method of logical deduction (*ratiocinatio*) had been used as a priori evidence of natural law, now induction was placed in the service of empirical proof. The *exempla* and *iudicia* taken from historiography were used to discover and prove natural law rules a posteriori, with consensus playing a decisive role – *consentientia iudicia* could provide proof of natural law. Quintilian had attributed great authority to the "general judgments" of major authorities, since principles that had found general (*vulgo*) acceptance belonged, as it were, to everyone and appeared true to everyone.[137] For Roman rhetoricians, consensus had the status of an unquestioned basis of a proof, an "id quod dubium non est," similar to

but see also Feenstra 1992, 19–20, where Feenstra maintains, oddly, that Covarruvias and Vázquez were adduced by Grotius "comme des grandes autorités" (19).

[134] *ML* Armitage, 120; *DCQ*, 355: "... ut in omni iuris Iustinianei corpore et aequitas admiranda et prisci Quiritium iuris summa cognitio resplendeat; quo factum est ut populi plerique sponte sua leges Iustinianeas receperint ..."

[135] *Pace* Bederman 1995/96, 6, who claims that the Roman jurists had been used only sparingly by Grotius, since *De iure belli*, in Bederman's view, is not so much a legal treatise as a compendium of ancient state practice. Of the 572 references to the *Corpus iuris*, 458 are taken from the *Digest*. See *IBP* Scott, 900–1.

[136] *IBP* prol. 55. [137] Quint. *Inst.* 5.11.41.

what could be perceived with the senses.[138] Grotius adopted this wholesale from Quintilian.[139] According to Grotius, the required consensus now had to be discovered empirically:

> But the Proof by the latter [*a posteriori*] is, when we cannot with absolute Certainty, yet with very great Probability, conclude that to be by the Law of Nature, which is generally believed to be so by all [*omnes gentes*], or at least, the most civilized [*moratiores omnes*], Nations. For, an universal Effect requires an universal Cause. And there cannot well be any other Cause assigned for this general Opinion, than what is called Common Sense.[140]

Proof of natural law a posteriori, described as popular by Grotius and based on consensus among all nations, was less persuasive, and less certain, than a priori proof – but if all nations believed something to be part of natural law, it most probably was. The focus on empirically verifiable similarity or difference in "moral data" exhibited in the Carneadean argument was thus appreciated by Grotius; he hoped to force the skeptics – in the presence of non-difference, where "many Men of different Times and Places unanimously affirm the same Thing" – to accept this "same thing" as flowing from non-conventional, natural principles.[141]

An example of this is the right to self-defense under certain circumstances. Grotius offers a citation from Solon, taken from a speech by Demosthenes, as well as a rule from the Twelve Tables, and concluded:

> So is he reputed innocent by the Laws of all known Nations, who by Arms defends himself against him that assaults his Life; which so manifest a Consent is a plain Testimony, that there is nothing in it contrary to the Law of Nature.[142]

It is crucial to notice that the scope of the relevant consensus which Grotius sought to include in his rhetorical refutation of Carneades' skeptical rhetoric was now limited to Greco-Roman antiquity. The historically substantiated, a posteriori determinable consensus in which Grotius was

[138] Quint. *Inst.* 5.10.12. For Quintilian, consensus served as a basis for proof found using the method of *ratiocinatio*. Grotius, in contrast, used consensus as part of induction, as consensus must be gleaned from historical examples and judgments.

[139] *IBP* 1.1.12.2: "Quintilianus: Pro certis habemus ea in quae communi opinione consensum est."

[140] *RWP*, 1.159; *IBP* 1.1.12.1: " . . . a posteriori vero, si non certissima fide, certe probabiliter admodum, iuris naturalis esse colligitur id quod apud omnes gentes, aut moratiores omnes tale esse creditur. Nam universalis effectus universalem requirit causam: talis autem existimationis causa vix ulla videtur esse posse praeter sensum ipsum communis qui dicitur."

[141] *IBP* prol. 40.

[142] *RWP*, 1.242; *IBP* 1.3.2.2: "Sic insons omnium, quos novimus, populorum legibus iudicatur qui adversus agressorem armis vitam periclitantem defenderit: qui tam manifestus consensus testimonium praebet, nihil in eo esse quod naturali iuri adversetur."

interested could not be observed, in doubtful cases, among all peoples, but only among the more civilized ones ("apud omnes gentes, aut moratiores omnes"). The fact that Grotius understood these more civilized peoples to be the Greeks and Romans can be gleaned from the above-cited passage in Prolegomena 46, where Grotius gave clear preference to historical testimonies of Greco-Roman provenance. In his view, the better the epoch and the peoples from which examples and judgments emerged, the greater their authority. Therefore, the classical Greeks and Romans were given preference over all other epochs and peoples.[143]

Thus, for Grotius, it was the testimonies, examples and consenting normative judgments of Greco-Roman antiquity that were best equipped to refute Carneadean skepticism and to be put to work to empirically prove the existence of natural law. As stated above, this was due to the fact that the Greeks and Romans and their epoch were "better" – that is, because they were "more civilized" and "more moral" than other peoples and epochs.[144] Empirical examples and philosophical theories, which in their agreement permitted the assumption of a universal cause whose origin, in turn, lay in natural principles and which unquestionably, with logical necessity, could be derived from these principles, could not, according to Grotius, be extracted from any random historical testimonies. Only among those "civilized peoples" did the principles of nature create the historically substantiated consensus, to the search for which *De iure belli ac pacis* is dedicated.[145]

Grotius supported this limitation of his source-base to Greco-Roman antiquity with arguments that ascribe greater insight, where human nature is concerned, to some epochs and peoples than to others. Thus Grotius used as an argument a statement by Porphyry that some peoples had become wild and inhuman, and no assessments of human nature could be undertaken based upon them.[146] This is supplemented by a rule by

[143] *IBP* prol. 46. [144] See *IBP* prol. 46; *IBP* 1.1.12.1.

[145] *IBP* 1.1.12.1: "a posteriori vero . . . iuris naturalis esse colligitur id quod apud omnes gentes, aut moratiores omnes tale esse creditur." See also *IBP* 1.1.12.2, which refers to Hesiod: "Hesiodi est dictum a multis laudatum: . . . Non etenim penitus vana est sententia, multi quam populi celebrant." This view, rooted largely in rhetorical theory, of a consensus that can be gleaned from certain *exempla* is, significantly, as we saw in the Introduction, refuted by Hobbes in his *Elements of Law*, with the argument that there was no obvious answer to the question whether natural law consisted in the "the consent of all nations, or the wisest and most civil nations" or rather in "the consent of all mankind." This is so, according to Hobbes, because "it is not agreed upon, who shall be judge which nations are the wisest." Empirically observed consensus was thus jettisoned by Hobbes in favor of arguments exclusively based on reason: *EL*, 75.

[146] *IBP* 1.1.12.2.

Aristotle that human beings are a *zoon hemeron phusei*.[147] But according to Aristotle, what is natural had to be observed in the things that acted according to nature, not in those that were corrupted – a further argument for limiting the source base to Greco-Roman antiquity.[148] Aside from this, these statements provide an important indication of the intention behind the use of historical testimonies. The goal was to gain knowledge about human nature from the *exempla* and *iudicia* of antiquity. The rhetorically inspired explanation that all of Greco-Roman antiquity was decisive in this should not conceal the fact that Grotius, as we will see in the rest of this book, first and foremost used arguments – as he had already in *De iure praedae* – that had been developed in or adapted to a specifically Roman context.

[147] Ibid.

[148] This distinction between an empirical, potentially corrupted human nature and a normatively charged concept of (human) nature corresponds to the distinction drawn by Julia Annas in her work on Aristotle between "mere nature," which is "strongly contrasted with what matters for ethical development; it is what we must improve on, not what guides our improvement": Annas 1993, 142–58, at 144.

CHAPTER 4

Social instinct or self-preservation?

Carneades had justified his skepticism concerning justice and natural law empirically – the various laws of humankind were different everywhere, "in different Countries, according to the Diversity of their Manners," as well as "in the same Country, according to the Times."[1] Grotius wished to counter Carneades' arguments empirically as well – though not exclusively – in order to dispute the alleged relativist evidence for skepticism, according to which no consensus could be found in the sphere of morality and law. As we have seen above, Grotius sought to do this through historical *exempla* and *iudicia* and thus force the skeptic to acknowledge natural norms. This approach, essentially owed to classical rhetoric, had in his opinion been left untried by his scholastic and late-scholastic predecessors and had thus left them vulnerable to the Carneadean argument. For Grotius, the methodological consequence of this was to prove his natural law system, according to the requirements of rhetoric, with normative statements that could be taken from classical antiquity.

Rhetorical skepticism of the Carneadean type starts with the empirically perceivable as the sphere from which proofs, or concrete *exempla* or *iudicia*, could be gleaned, and then proceeds by drawing conclusions from this. In the areas of natural law and morality, in particular, Carneades, with his speech against natural justice, was one of the people who see in moral judgments mere arbitrary acts of will that can only be perceived empirically, but have nothing natural, and therefore necessary, about them. This is why Grotius sought a persuasive rhetorical refutation of Carneades' position that took its *exempla* and *iudicia* also from this empirical sphere. For although Grotius, in Knud Haakonssen's view, was one of those thinkers who conceive "morality as inherent in the structure of the world and

[1] *RWP*, 1.79; *IBP* prol. 5.

accessible to human reason along with the rest of the world,"[2] he declared natural law to be empirically perceivable as well (specifically in certain historical testimonies from Greco-Roman antiquity) – a view that, as we saw in the chapter on Grotius' method, emerged primarily from his choice of rhetorical means to explain his natural law. The empirical approach, however, was not alone sufficient, especially as empirically supported agreement in itself did not force skeptics, in Grotius' own view, to accept natural norms. Such agreement, Grotius admitted, could merely point to conventional provisions of the law of nations or to provisions of *ius divinum*, which also originated not in nature, but in divine free will.[3]

In claiming the existence of natural justice, Grotius could not therefore be satisfied with merely referring to empirically provable testimonies forming a consensus; he had to dispute Carneades' statements on the incompatibility of nature and justice using a priori arguments. Grotius had described the aim of his a priori method of proving natural law as "shewing the necessary Fitness or Unfitness of any Thing, with a reasonable and sociable Nature."[4] In order to refute Carneades and prove the existence of natural law a priori, Grotius seeks to show a necessary "fit" between justice and nature.

But what kind of "nature" is natural law exactly based on according to Grotius? To what extent is he a naturalist in the Aristotelian and scholastic tradition, where naturalism is usually taken to describe a position that seeks to ground normative ethical standards in an account of human nature? Is Grotius indeed committed to a view, usually associated with Aristotelian naturalism, of "an account of the human good as happiness (*eudaimonia*), consisting in the fulfilment of human nature, expressed in the various human virtues,"[5] as Terence Irwin succinctly summarizes Aristotelian naturalism in ethics? Or does he adhere to a new, essentially "modern"

[2] Haakonssen 2002, 28. Haakonssen emphasizes the a priori element too strongly; for Grotius, *ius gentium*, the treatment of which permeates large portions of his work, can only be proven empirically. This assessment ignores Grotius' rhetorical efforts to "prove" natural law empirically. But see Haakonssen 1985, 250–51.

[3] According to *IBP* 1.1.14.1, the law of nations draws its binding nature from the will of all or many peoples and cannot claim the universality of natural law: "ius Gentium, id est quod Gentium omnium aut multarum voluntate vim obligandi accepit. Multarum addidi, quia vix ullum ius reperitur extra ius naturale . . . omnibus gentibus commune. Imo saepe in una parte orbis terrarum est ius gentium quod alibi non est . . . " *Ius divinum* also originates in the will and thus cannot be considered natural law, see *IBP* 1.1.13: "Alteram iuris speciem esse diximus ius voluntarium, quod ex voluntate originem ducit: estque vel humanum vel divinum."

[4] *RWP*, 1.159; *IBP* 1.1.12.1: "A priori, si ostendatur rei alicuius convenientia aut disconvenientia necessaria cum natura rationali ac sociali."

[5] Irwin 2007, 4.

conception of natural law, as Richard Cumberland and, most influentially, Jean Barbeyrac maintained, who in his history of moral philosophy credits Grotius with being the first to have emancipated ethics from scholasticism.[6] It seems reasonably clear that what Grotius seeks to advance, first and foremost, is an epistemological point of view; being rational, human beings are in a position to discover through reason the rules of natural law, what it is that natural law requires from them. So far, this seems consistent not only with Grotius' Stoic sources, but also with a Thomist framework. Furthermore, Grotius' natural law is also natural due to the fact that its content makes it suitable to humans by virtue of the kind of beings they happen to be; natural law is the "Rule and Dictate of Right Reason [*recta ratio*], shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature . . . "[7]

The nature in question is thus human nature, and certain objective facts about human nature provide standards for natural law. It can therefore be said that Grotius' conception of natural law seeks to address both the epistemological question of how to identify natural law – through right reason – and doubts regarding the objectivity of the natural legal norms – through reference to natural facts which are independent of arbitrary conventions.[8]

As we shall see in this and the following chapter, however, there is a crucial departure from the Aristotelian tradition (as well as from the earlier Greek Stoic tradition) to be found in Grotius' work, in that the principles underlying Grotius' natural law are not, as they are in Aristotle and the Stoa, justified by an eudaimonist account of the final human good – that is to say that Grotius' natural law is a practical ethics couched in legal terminology that is (to deploy anachronistic language) not of a teleological, but of a deontological nature. Although the norms of natural law for Grotius do "suit" or "fit" human nature, they *oblige* us by their *moral necessity* rather than simply motivating us through references to the final end that is *eudaimonia*. A further essential feature of Grotius' naturalism lies in his rules having validity in a pre-political or extra-political state of nature. Grotius' is thus a natural law in the sense that it holds outside of

[6] Barbeyrac 1749, 67.

[7] *RWP*, 1.150–51; *IBP* 1.1.10.1: "Ius naturale est dictatum rectae rationis indicans, actui alicui, ex eius convenientia aut disconvenientia cum ipsa natura rationali, inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut vetari aut praecipi." On natural law as what *recta ratio* requires, see above, 46–49, and Chapter 5 below.

[8] See Striker 1987, esp. 211 on objectivity as a crucial motivation for the development of a concept of natural justice and, eventually, natural law.

established polities; in the sense that we can discover it by virtue of having right reason qua human beings (*recta ratio* – notice the built-in normative tendency); and in the sense that we can plausibly be motivated to follow it by our antecedently given natural social instinct, our *appetitus societatis*.

In an illuminating and characteristically fine-grained and balanced discussion, Terence Irwin has pondered whether or not Grotius deserves to be called, with Barbeyrac, a pioneer. Drawing on Henry Sidgwick's fruitful distinction between "a more ancient view of Ethics"[9] as an "inquiry into the nature of the Good, the intrinsically preferable and desirable, the true end of action," on the one hand, and the more modern view of ethics as "an investigation of the Right, the true rules of conduct, Duty, the Moral Law, &c.,"[10] Irwin concludes that Grotius' is a natural law doctrine still very closely related to scholastic naturalism, albeit with some non-scholastic features.[11] These features, in Irwin's view, are that Grotius' exposition of natural law is "not embedded in the moral and metaphysical context of Aquinas' Treatise on Law." Irwin cautions that this does not amount to a pioneering role, since Grotius holds on to a scholastic naturalism in that "he takes morality to consist in observance of what is naturally right" and in that Grotius, in his reply to Carneades' skepticism, "does not reduce justice to utility, but sticks to a Stoic and Peripatetic naturalist conception."[12] This, according to Irwin, amounts to a rejection of what Sidgwick had called the "jural" or "quasi-jural" outlook of the "modern view of ethics" and thus refutes Barbeyrac's claim that Grotius was a pioneer.

However, my sense is that Sidgwick, whose interpretation of the history of ethics is indeed very helpful in this context, would have agreed with Barbeyrac. It seems to me that Sidgwick's view of the modern, "jural" or rather "quasi-jural" conception of ethics does not imply, *pace* Irwin, a view of moral principles as legislated, prescriptive laws which derive their validity from their source; rather, a quasi-jural conception of moral rules is also consistent with a view of moral principles as indicative laws independent of will, deriving their validity from their content rather than their source. The distinction vis-à-vis the "non-jural," ancient Greek view lies rather in the fact that the jural conception formulates moral principles as rules rather than virtues; rules that have to be followed by virtue of their inherent (natural) rightness, not by virtue of their fulfilling human nature and being the final good for human beings. It is in this sense, then, that Grotius, albeit indeed a naturalist, seems to part company with Aquinas

[9] Sidgwick 1874, 93.
[10] Ibid., 2–3.
[11] Irwin 2008, 70–99.
[12] Ibid., 98.

and Suárez – and it is these features of his doctrine which would have made it rather difficult for him to embed his exposition of natural law in a Thomist metaphysical framework. Grotius should thus indeed be seen as one of the thinkers who provoked the "great separation" between natural law and Aristotelian metaphysics.[13]

It is therefore important to note that the thoroughgoing rationality of the natural law norms guarantees Grotius' confidence in their content, but that the content of these norms does not tell us anything about the highest good for humans, or about the ends they should pursue – Grotius' natural law is thus stripped of its Aristotelian and Thomist metaphysical framework and may, from a systematic point of view, best be described as a protoliberal theory, where the right is prior to the good and where the requirements of natural law do not ultimately depend on a teleological account of human nature. This might be so, I suggest, because Grotius lacks the confidence of both his immediate Stoic sources and his Aristotelian predecessors of extending rational evaluation from the sphere of justice and natural law to the sphere of ethics broadly understood, to the *summum bonum*. His is thus not an eudaimonist doctrine,[14] and he seems agnostic when it comes to choices made in this regard; his natural law does not provide criteria to give content to the ultimate end or happiness, any more than it seeks to differentiate between constitutional arrangements[15] – it is all subject to freedom of contract:

> But as there are several Ways of Living, some better than others, and every one may chuse which he pleases of all those Sorts; so a People may chuse what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers Opinions, but by the Extent of the Will of those who conferred it upon him.[16]

The necessary fit between justice and nature, then, does not intrude into the sphere of ethics understood as the discipline to do with our final or ultimate end. It only extends to rules to do with justice, narrowly understood as corrective justice, and does not aim at the sort of Aristotelian virtue education which is the true aim of Peripatetic political science. The reason for Grotius' appeal to a natural social instinct, the *appetitus societatis*

[13] To borrow Mark Lilla's term from another context. Cf. Carmichael 2002 for the view that Grotius was novel in clearly separating scholastic theology and ethics from moral philosophy.

[14] At least not in his natural law treatises. It may indeed be the case, as Tobias Schaffner maintains, that Grotius exhibits a more eudaimonist view in *De veritate religionis christianae* and in the *Meletius*; if so, this was certainly not Grotius' most influential legacy. See Schaffner 2012, esp. 234.

[15] See Schneewind 1998, 175.

[16] *RWP*, 1.262; *IBP* 1.3.8.2.

(see below), lies in his attempt to show that there is a natural motivational basis for cooperation and adherence to a pre-political set of norms in the state of nature – that is to say that it is possible for human beings to be motivated to follow the natural legal norms accessible to them through their reason. This does not mean that humans necessarily are so motivated, simply that it is not implausible, given their nature, that they can be. Conversely, it is apt to shed doubt on a Hobbesian account of motivation framed exclusively in terms of self-interest.

For Grotius, the necessity of fit between justice and nature would arise from the a priori character of the method. However, the nature with which justice, in the case of a valid proof of natural law, must necessarily be compatible was not without conditions: Grotius had already established them more concretely, so that he was no longer dealing with "nature" per se, but with the rational, social nature of humanity – an anthropology whose second part, which saw human nature as social, would hardly have been accepted by Carneades.

Carneades' significance for Grotius' anthropological justification of natural law

By offering an alternative to the anthropology presented by Carneades, Grotius attempted to refute the conventionality of all normative rules that was claimed by natural-law skeptics. For this undertaking, he had to consistently take human nature, as constituted by his anthropology, as the source of his natural law, as this differentiation of sources of law was all that permitted a distinction between universal, necessary natural law on the one hand and the conventional, contingent law of nations on the other. In order to withstand the Carneadean argument, empirical evidence of a consensus on normative rules had to be supplemented by a priori statements about human nature,[17] from which a second methodological consequence emerged for Grotius: the development of a specific anthropology.

As will be shown below, Grotius gleaned this anthropology essentially from the debate with his classical sources, specifically the Roman-influenced Stoic doctrine as he encountered it in Cicero's works.[18] In *De iure praedae*, Grotius had already made use of an originally Stoic doctrine of natural law, adapted to Roman conditions by Cicero; and not unlike

[17] Because the a posteriori derivation of natural law could never claim more than probability; see *IBP* 1.1.12.1.

[18] *Pace* Schneewind 1998, 175.

Cicero, he used it to defend the Netherlands' colonial expansion into Southeast Asia. This Ciceronian background – rather than a general wish to refute moral skepticism – was in fact the reason he would, twenty years later, in *De iure belli ac pacis*, turn Carneades into the primary adversary of a doctrine of just war based on natural law. In *De iure belli ac pacis*, the anthropological prerequisites for this doctrine were developed more clearly, which can be explained not least by Grotius' improved knowledge of the classical philosophical texts and his great interest in the theoretical prerequisites of natural law.

Carneades' arguments, as they found their way into Cicero's *De re publica*, were already familiar from the sophists, especially the speech of Glaucon in the second book of Plato's *Republic*. The originality and controversial character of these arguments in *De re publica* lay in their application to Roman world domination,[19] the practice of which Carneades aligned with piracy and thus made morally as well as legally questionable. Cicero met the attack on Roman imperialism with a natural law doctrine taken from Stoic texts, which provided the urgently needed criteria for distinguishing between just and unjust wars. Cicero's defense, which he had his Stoic protagonist C. Laelius present in the form of a reply to Carneades in *De re publica*, utilized the Stoic concept of universal natural law in order to lend legal legitimacy to Roman expansion. Cicero's sequel to *De re publica*, the dialogue *De legibus*, begins at the point where Laelius' speech in *De re publica* had ended, with the Stoic doctrine of natural law and justice.

This was the tradition that Grotius claimed as the basis of his natural law and his doctrine of just war. Cicero's answer to Carneades' critique of the Roman doctrine of just war maintained the existence of a natural law formulated along Stoic lines, and thus represented an attractive philosophical justification for Grotius' own doctrine of natural law, which originated in the legal legitimation of Dutch expansion into Southeast Asia. Grotius countered the skeptical notion that nature drives living beings to secure their advantage and self-interest with an anthropological doctrine that held that human beings by nature crave community. Carneades had not shaped his doctrine of utility as the only natural principle as an anthropology; for him, all living things, not just humans, were driven by nature "to seek their own particular Advantage" (*ad utilitates suas*).[20] It was no accident that Grotius therefore drew a sharp distinction between human beings and

[19] See Ottmann 2001/12 II/1.107.
[20] *RWP*, 1.79; *IBP* prol. 5 (= Lactant. *Div. inst.* 5.16.3 = Cic. *Rep.* 3.21).

other living things at the head of his refutation of Carneades' arguments. He followed his repetition of the Carneadean argument with a verse by the Epicurean Horace according to which nature cannot distinguish between right and wrong (*nec natura potest iusto secernere iniquum*).[21] According to Grotius, neither this verse nor the Carneadean arguments needed to be admitted, for

> Man is indeed an Animal, but one of a very high Order, and that excells all the other Species of Animals much more than they differ from one another; as the many Actions proper only to Mankind sufficiently demonstrate. Now amongst the Things peculiar to Man, is his Desire of Society [*appetitus societatis*], that is, a certain Inclination to live with those of his own Kind, not in any Manner whatever, but peaceably, and in a Community regulated according to the best of his Understanding; which Disposition the Stoicks termed Οἰκείωσιν. Therefore the Saying, that every Creature is led by Nature to seek its own private Advantage [*ad suas utilitates*], expressed thus universally, must not be granted.[22]

The specific difference that distinguishes humans from other beings thus consists of *appetitus societatis*.[23] The reference to the *proprium* that distinguishes humans from all other animals is crucial to the success of his defense against the arguments presented by Carneades, together with Horace, according to which law does not have sources in nature; by reducing the concept of nature relevant to justice to human nature, Grotius could recognize the validity of the Carneadean doctrine of some beings that naturally obey utilitarian principles, without giving up the idea of natural justice universally applicable to human beings. Grotius thus finds himself in a classical context, which he illustrates by identifying his *appetitus societatis* with Stoic *oikeiosis*.

The concept of *appetitus societatis*, which Grotius might have taken from the works of the Spanish jurist Fernando Vázquez,[24] is found infrequently

[21] Hor. *Sat*. 1.3.113. In 1618 Grotius' library included a copy of Heinsius' edition of Horace's *Opera omnia* of 1610; see Molhuysen 1943, no. 90.

[22] *RWP*, 1.79ff.; *IBP* prol. 6: "Homo animans quidem est, sed eximium animans, multoque longius distans a caeteris omnibus quam caeterorum genera inter se distant: cui rei testimonium perhibent multae actiones humani generis propriae. Inter haec autem quae homini sunt propria, est appetitus societatis, id est communitatis, non qualiscunque, sed tranquillae et pro sui intellectus modo ordinatae cum his qui sui sunt generis: quam οἰκείωσιν Stoici appellabant. Quod ergo dicitur natura quodque animal ad suas tantum utilitates ferri, ita universe sumtum concedi non debet."

[23] This identification of *appetitus societatis* with the Stoic *oikeiosis* cannot be found until the edition of 1631. See *IBP* 7n5.

[24] Fernando Vázquez de Menchaca uses the term *naturalis appetitus societatis* in his *Controversiarum illustrium usuque frequentium libri tres* (1564); for Vázquez it has a Peripatetic, not a Stoic, connotation. The connection with Stoicism is not made until Grotius. *CI* praef. 122: "Ergo et humana

in *De iure belli ac pacis*. It is used most prominently in the passage cited above, where it is also introduced. It is characterized as one of many specifically human traits that testify to the fundamental difference between human beings and all other living beings. The positing of this essentially human instinct as an anthropological premise serves to refute the Carneadean claim that all animals strive only for their own advantage.[25] A sharp distinction between people and animals is thus central to Grotius. This is also the reason why he must reject the Roman law definition of natural law, which did not distinguish between human beings and animals.[26] Grotius gave no indication regarding the sources of Roman law to which he was referring; it is clear, however, that this must involve Ulpian's definitions of natural law and *ius gentium* in the *Digest*.[27]

According to Grotius, there was no law common to all living things, a view that led him to reject Ulpian's definition of natural law.[28] He thus found himself in the company of the Stoics, whose attitude towards

necessitas, et naturalis appetitus societatis (est enim homo secundum Philosophum animal sociabile) peperit hominum vitam socialem et politicam . . . " This *pace* Winkel 2000, 399ff., who situates the origin of the term in classical antiquity. For the context in Vázquez' thought, see Brett 1997, 172–73. See also Vivenza 2001, 204–5, who thinks it unlikely that Adam Smith could have interpreted the term as Stoic, Grotius' example notwithstanding.

[25] *IBP* prol. 6. Pohlenz in his standard work on the Stoa writes: "Grotius geht in *De iure belli et pacis* ausdrücklich von dem Gegensatz zu Karneades aus und stellt diesem den *appetitus societatis cum his qui sui sunt generis, quam οἰκείωσιν Stoici appellabant* entgegen . . . um daraus das *ius naturae* abzuleiten": Pohlenz 1970 2.229.

[26] *RWP*, 1.157: "But that Distinction, which we find in the Books of the *Roman* Laws, of immutable Right into such as is common to Men with Beasts, which they call in a strict Sense the *Law of Nature;* and that which is peculiar to Men, which they often style the *Law of Nations*, is of very little or no use." *IBP* 1.1.11.1: "Discrimen autem quod in Iuris Romani libris exstat, ut ius immutabile aliud sit quod animantibus cum homine sit commune, quod arctiori significatu vocant ius naturae, aliud hominum proprium, quod saepe ius gentium nuncupant, usum vix ullum habet."

[27] Ulp. *Dig*. 1.1.1.3–4: "*Ius naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals – land animals, sea animals, and the birds as well. . . . so we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law. *Ius gentium*, the law of nations, is that which all human peoples observe. That it is not co-extensive with natural law can be grasped easily, since this latter is common to all animals whereas *ius gentium* is common only to human beings among themselves." (*Ius naturale est quod natura omnia animalia docuit: nam ius istud non humani generis proprium sed omnium animalium quae in terra quae in mari nascuntur avium quoque commune est. . . . videmus etenim cetera quoque animalia, feras etiam istius iuris peritia censeri. Ius gentium est, quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit*.) This text is often viewed as an interpolation; see Vander Waerdt 1994a, 4891–92. For a survey of the two definitions, see Winkel 1988, who assumes for the definition of *ius naturale* a Peripatetic and for the definition of *ius gentium* a Stoic background. See also Winkel 1993, where the passage from Ulpian is viewed as syncretistic and contrasted with Gai. *Inst*. 1.1, whose definition of *ius gentium* is attributed to the Stoic tradition.

[28] On the humanist predecessors of this argument against Ulpian, especially François Connan, see Brett 2011, 68–69.

the relationship between people and animals he knew from Cicero's *De finibus*:[29]

> But though they hold that there is a code of law [*iuris vincula*] which binds humans together, the Stoics do not consider that any such code exists between humans and other animals. Chrysippus made the famous remark that all other things were created for the sake of humans and gods, but that humans and gods were created for the sake of their own community and society; and so humans can use animals for their own benefit without wrongdoing. He added that human nature is such that a kind of civil code [*quasi civile ius*] mediates the individual and the human race: whoever abides by this code will be just, whoever breaches it unjust.[30]

There is a legal community of the entire human species, while a sharp distinction is made between human beings and animals. In further explaining his *appetitus societatis*, Grotius slightly retracted this sharp distinction – by extending the drive for community, which he had just portrayed as specifically human, at least in part to the sphere of animals and eventually also to children. The Carneadean claim that all living beings are driven merely by their own advantage and self-interest is thus undermined even with regard to animals and children:

> For even of the other Animals there are some that forget a little the Care of their own Interest [*utilitates suae*], in Favour either of their young ones, or those of their own Kind. Which, in my Opinion, proceeds from some extrinsick intelligent Principle, because they do not shew the same Dispositions in other Matters, that are not more difficult than these. The same may be said of Infants, in whom is to be seen a Propensity to do Good to others, before they are capable of Instruction, as Plutarch well observes; and Compassion likewise discovers itself upon every Occasion in that tender Age.[31]

In consideration in part for their own offspring and in part for other members of the same species, other living things besides humans could

[29] Grotius cites the Cicero passage in the context of the origin of private property, see *IBP* 2.2.2.1.

[30] Cic. *Fin.* 3.67: *Sed quo modo hominum inter homines iuris esse vincula putant, sic homini nihil iuris esse cum bestiis. praeclare enim Chrysippus, cetera nata esse hominum causa et deorum, eos autem communitatis et societatis suae, ut bestiis homines uti ad utilitatem suam possint sine iniuria. Quoniamque ea natura esset hominis, ut ei cum genere humano quasi civile ius intercederet, qui id conservaret, eum iustum, qui migraret, iniustum fore.* See Wright 1995, 190–91.

[31] *RWP*, 1.82–84; *IBP* prol. 7: "Nam et caeterarum animantium quaedam utilitatum suarum studium, partim foetuum suorum, partim aliorum sibi congenerum, respectu aliquatenus temperant: quod in illis quidem procedere credimus, ex principio aliquo intelligente extrinseco, quia circa actus alios istis neutiquam difficiliores par intelligentia in illis non apparet. Idemque de infantibus dicendum, in quibus ante omnem disciplinam ostendit se, ad bene aliis faciendum propensio quaedam, prudenter a Plutarcho observata: sicut et in ea aetate misericordia sponte prorumpit."

somewhat control their instincts for their own advantage. This partial leveling of the distinction between human and animal[32] could be reconciled with the quotation from John Chrysostom offered by Grotius in a comment on his identification of the *appetitus societatis* with Stoic *oikeiosis*.[33] We human beings, according to Chrysostom, have a natural *oikeiosis* vis-à-vis other human beings, which wild animals also possess vis-à-vis other wild animals. Grotius translated this into Latin to read that we human beings naturally have a *societas* with one another – something that wild animals also have.[34]

Not only did the strict distinction between humans and animals seem to be eliminated with this comment, but there was also a shift in accent with regard to the identification of *oikeiosis*. While this Stoic concept was still promoted as a valid description of *appetitus societatis*, *oikeiosis* was translated as *societas* by Grotius. An *appetitus societatis*, or a natural *oikeiosis*, could be perceived in both animals and children as well as in adults, and in all cases leads to formation of society, of which they are naturally a part.

Grotius thus did not dispute the presence of a drive toward one's own advantage (*utilitatum suarum stadium*) on the level of animals; however, this drive was moderated by the opposing drive towards society. This must have its origin in an extrinsic intelligent principle, since no similar intelligence is visible in animals regarding other behaviors that are no more difficult. The same was also true of children, who also exhibited spontaneously altruistic tendencies. The *appetitus societatis* now had to be additionally distinguished as a property of human beings, as the drive in itself could also be shown in animals. Grotius undertook this distinction in the next section:

> 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

[32] See also Cic. *Nat. D.* 2.129 and Cic. *Fin.* 3.62: *atque etiam in bestiis vis naturae perspici potest; quarum in fetu et in educatione laborem cum cernimus, naturae ipsius vocem videmur audire*. Olof Gigon argues that Cicero's adducing of the behavior of animals is owed to a Peripatetic revision of the text; see his commentary on *De finibus* in the Tusculum series (Munich, 1988), 503; Peripatetic influence is now argued in detail by Schmitz 2014. Such use of the behavior of animals can, however, according to Plut. *Stoic. Rep.* 1038b already be found in Chrysippus (see also Diog. Laert. 7.85 for *oikeiosis* and animals) and can thus probably be attributed to Stoic orthodoxy; see Long and Sedley 1987, 352; the passage is also contained in the *SVF*. Schofield 1995, 195 describes Cic. *Fin.* 3.62–63 as "a passage which appears to derive from a standard Stoic doxography." See also Wright 1995, 174, who considers this description of the behavior of animals and children "the best approach to investigating primary instincts in what is 'natural.'"

[33] *IBP* prol. 6.

[34] *IBP* prol. 6, 7n4; John Chrysostom, *Rom. Hom.* 5.1, v. 31. See Winkel 1988, 679, who takes this reference to indicate that Grotius was not particularly well acquainted with Stoicism. This might be true if we take Stoicism to include only the orthodox Stoa, not the later Stoic thought as it appears in the Roman sources.

> Desire of Society [*societatis appetitus excellens*], for the Satisfaction of which he alone of all Animals [*solus inter animantes*] 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 [*generalia praecepta*]; so that what relates to this Faculty is not common to all Animals, but properly and peculiarly agrees to Mankind [*humanae naturae congruentia*].[35]

It is thus the social drive, the *appetitus societatis*, characterized by linguistic ability and the ability to recognize general rules and act accordingly, that is unique to human beings – not from birth, however, but only after acquisition of the "Faculty of knowing and acting, according to some general Principles"; this faculty can be understood as an inherent characteristic, but more in the sense of a disposition towards the emergence of certain behaviors and ideas.[36] Grotius had after all already begun by saying that the *appetitus societatis*, understood as a property of human beings, did not mean a drive towards some arbitrary community – the "certain Inclination to live with those of his own Kind" would express itself "not in any Manner whatever, but peaceably, and in a Community regulated according to the best of his Understanding [*pro sui intellectus modo*]."[37]

This is a clear reference to the rational nature of human beings, which also distinguishes them from animals. Human beings possess the necessary requirements for the social instinct – specifically, the ability to act rationally and the instrument of language. This combination is clearly Stoic: Grotius could glean it from Cicero's *De officiis*. In the first chapter of the first book of *De iure belli ac pacis*, devoted to the definition of law (*ius*), Grotius quoted from *De officiis* in a paragraph meant to show that instinct, common to all living things, does not constitute its own form of law.[38] The passage from *De officiis* is taken out of context; while Grotius notes merely that Cicero was unwilling to ascribe justice (*iustitia*) to horses and lions,[39] the passage in its original context in Cicero emphasizes that reason (*ratio*) and speech

[35] *RWP*, 1.84–85; *IBP* prol. 7: "Homini vero perfectae aetatis cum circa similia similiter agere norit, cum societatis appetitu excellente, cuius peculiare solus inter animantes instrumentum habet sermonem, inesse etiam facultatem sciendi agendique, secundum generalia praecepta, par est intelligi cui quae conveniunt ea iam sunt non omnium quidem animantium, sed humanae naturae congruentia."

[36] Miller 2004, 157–58 distinguishes between "content" theories of innate ideas, where "individual instances of knowledge or belief or concepts or behaviour" are taken to be innate, and "dispositional" theories. According to Miller (165–66), Grotius' is thus a "dispositional theory, where the soul's faculty consists in a natural tendency to form knowledge."

[37] *IBP* prol. 6.

[38] *IBP* 1.1.11: "Instinctum cum aliis animantibus communem aut proprium hominibus non facere aliam iuris speciem." The quotation from *De officiis* was added to the editions from 1631 onward.

[39] *IBP* 1.1.11.1: "In equis, in leonibus iustitiam non dicimus, inquit Cicero de Officiis primo."

(*oratio*) unite men "in a kind of natural fellowship" (*naturalis societas*), which "most distances us from the nature of other animals," who have "no share in reason and speech."[40]

Thus reason and speech are necessary conditions for *iustitia*, and most strongly distinguish humans from animals[41] – a thought also found in Cicero, in *De legibus*.[42] In Cicero's terminology, the relationship between reason, linguistic ability, and human nature is clear; *ratio et oratio* together express the Stoic *logos*,[43] in which all human beings take part and which links all human beings in a kind of natural community. Animals are excluded from this natural community; they share with humans at most the virtue of courage (*fortitudo*),[44] but because they have no part in *ratio et oratio*, they know no justice, the awareness of which is thus made dependent, among other things, on the ability to form concepts and general principles. This view was already common among the older Stoa. Animals were ascribed "general empirical concepts," but they were unable to form concepts, with "the concepts of good and evil being most foreign to them."[45]

We have seen that Grotius used the notion of *appetitus societatis* as an anthropological argument against Carneades' views. Both his own reference that the *appetitus societatis* was identical with the Stoics' *oikeiosis* as well as the nature of his arguments revealed the Stoic background to this concept. In the next sections, we will examine the function of the "social instinct" in his works and the relationship between this idea and *oikeiosis*.

Social instinct and Stoic *oikeiosis*

What Grotius called *appetitus societatis* in the first edition of *De iure belli ac pacis* in 1625, and later identified with the Stoic *oikeiosis*, is essentially identical to the Stoic idea of *oikeiosis* as portrayed by Cicero. Regardless of

[40] Cic. *Off.* 1.50: *Sed quae naturae principia sint communitatis et societatis humanae, repetendum videtur altius. Est enim primum quod cernitur in universi generis humani societate. Eius autem vinculum est ratio et oratio, quae docendo, discendo, communicando, disceptando, iudicando conciliat inter se homines coniungitque naturali quadam societate, neque ulla re longius absumus a natura ferarum, in quibus inesse fortitudinem saepe dicimus, ut in equis, in leonibus, iustitiam, aequitatem, bonitatem non dicimus; sunt enim rationis et orationis expertes.*

[41] According to the "Streben der Stoiker, überall die Grenze zwischen Mensch und Tier scharf zu ziehen"; see for the contrast with Epicurean views, Pohlenz 1970 I.40, 84.

[42] Cic. *Leg.* 1.22: *Solum est enim ex tot animantium generibus atque naturis particeps rationis et cogitationis, quom cetera sint omnia expertia*. See, on the relationship of this passage with *IBP* prol. 6, Gronovius in his commentary: *IBP* Gronovius, Vn32.

[43] See Dyck 1996, 90–91, 167.

[44] That animals had *fortitudo* was broadly accepted in classical antiquity – see, e.g., Pl. *Leg.* 12.963e. See on this Sorabji 1993, 10–11.

[45] Pohlenz 1970 I.85.

whether Grotius was aware of the orthodox Stoic background of this doctrine or not, Cicero's description must be considered the decisive influence on Grotius and the model for his doctrine of *appetitus societatis*, which served as the basis for natural law and the legality or justice of waging war in *De iure belli ac pacis*.

Scholars of the history of ideas have devoted considerable attention to the doctrine of *oikeiosis* in antiquity. The general consensus is that this doctrine originated with the Stoics,[46] although there is still no agreement regarding the significance and precise function of the doctrine in Stoic ethics.[47] There is agreement, however, that there is no single conception of *oikeiosis* in the documents we have. Two main concepts of *oikeiosis*, which can be translated as "recognition and appreciation of something as belonging to one,"[48] can be discerned.[49] For one, *oikeiosis* is the recognition and appreciation of oneself, as part of oneself, which can be seen in every living thing and is expressed as the instinct for self-preservation. For another, *oikeiosis* is described as human recognition and appreciation of the human species as being akin to the individual human being. The historian of philosophy Gisela Striker has pointed out that these two differing views correspond to two distinct functions of *oikeiosis* in Stoic philosophy. The first is to support the Stoic concept of the final end (*telos*), while the second provides the justification for justice as part of the Stoic doctrine of virtue, though this latter function is to some extent dependent on the teleological use.[50]

At first glance, Grotius' *appetitus societatis* contains elements of both uses: the term *appetitus* encompasses the aspect of instinct from the first, teleological use, while *societas*, as the object of this instinct, refers more to *oikeiosis* in the sense of recognition and appreciation of natural human fellowship and the *societas humani generis* than to being part of individual humans. In his influential portrayal of Grotius' system of natural law, Richard Tuck emphasized the importance of the instinct for self-preservation as the basis of this system and considered the refutation of Carneadean Skepticism using the principle of self-preservation to be "Grotius's most powerful and original idea."[51] Grotius' supposed originality and his role as a pioneer

[46] See Pohlenz 1940, 1–81; Brink 1956.
[47] See Pohlenz 1940; Pembroke 1971; Striker 1983; Engberg-Pedersen 1990.
[48] Striker 1983, 281. See also Pembroke 1971, 116.
[49] Pembroke 1971, 121 speaks of different kinds of *oikeiosis*.
[50] Striker 1983, 282. See also Winkel 1988, who suspects an influence of Stoic *oikeiosis* on Ulpian's definition of justice (Ulp. *Dig.* 1.1.10) which can be seen (678) especially in Ulp. *Dig.* 1.1.1.4, where the *ius gentium* is defined.
[51] Tuck 1987, 113. See Shaver 1996 for pertinent criticism of Tuck's position; Shaver argues, correctly but without paying any attention to the arguments' classical background, that Grotius' arguments against Carneadean skepticism are based, not on self-preservation, but on man's social nature.

was based on a view that had already been advocated by Jean Barbeyrac in the early eighteenth century in a historical study of the development of moral philosophy. Barbeyrac had claimed that neither in antiquity nor in the Middle Ages had arguments against Carneades or his skepticism been developed: "According to Barbeyrac, the writers of antiquity and the Middle Ages all failed to produce an adequate scientific ethics; the Stoics and Cicero . . . came nearest, but even they were deficient in a number of crucial aspects."[52] Tuck himself follows Barbeyrac's view: not only does he see the Grotian natural law system as a humanist refutation of Academic skepticism based ultimately in the principle of self-preservation, he also agrees with Barbeyrac in viewing this refutation as a revolutionary, specifically modern argument first introduced by Grotius.[53]

Tuck emphasizes, in my view with good reason, the humanist character of Grotius' work. He contrasts this humanist trait however with the late scholastics of Salamanca, a contrast Grotius himself would have hardly noticed, who presented the late scholastics Covarruvias and Vázquez together with the humanists Bodin and Hotman as representatives of that category of scholars of Roman law who joined humanist scholarship with the study of law.[54] Tuck's claim that the humanist Grotius was the first to have reacted to humanist skepticism à la Montaigne or Charron by using Carneades as the "principal spokesperson" of such skepticism stands in need of qualification as well. In 1554 Carneades had already been perceived by Theodore Beza, in a theological context, as a potential enemy of Calvinism, and the dialogue between Laelius and Philus from Cicero's *De re publica* was subsequently referenced in the Spanish jurist Ayala's work in an international legal context. Ayala mentioned the Carneadean debate in his *Praefatio de Jure Belli* (1582), arguing that Laelius had been utterly persuasive in his defense of justice against Carneades.[55] The whole structure of Alberico Gentili's (1552–1608) polemical work *The Wars of the Romans* (1599) should be interpreted as being based on Carneades' challenge (to which the first book corresponds), and on Laelius' answer to it as formulated in Cicero's *De re publica* (corresponding to the second book of *The Wars of the Romans*).[56] The Carneadean debate, in short, was very much a topos of sixteenth-century natural-law writing.

In what follows I will argue that Grotius' natural law refutation of Carneades should not be interpreted as a refutation of general moral skepticism based on the principle of self-preservation. Just as, on the

[52] Tuck 1987, 107. [53] Tuck 1987, 109–15.
[54] See *IBP* prol. 53, 55. [55] On Beza, see Popkin 2003, 11.
[56] See Lupher 2011; and the introduction in Kingsbury and Straumann 2011, esp. xii–xvi.

methodological level, Grotius used Quintilian's rhetoric for his so-called proof of natural law, he also accepted and made use of the arguments brought by Cicero against Carneades' criticism of natural justice. The main reason Cicero's arguments for natural law resonated with Grotius lies in the fact that both Cicero and Grotius had originally developed their natural law doctrines as part of a legal and moral defense of imperialist expansion. In Cicero's *De re publica* – and its continuation, *De legibus* – Stoic natural law had served as the main argument against Carneades' criticism of Roman imperialism and the Roman doctrine of just war, not as an argument against general moral skepticism.

In *De iure praedae*, Grotius had already drawn upon this Ciceronian tradition to defend the military expansion of the United Provinces in East India using natural-law arguments – not to refute the skepticism of early modern moral relativists such as Michel Montaigne and Pierrre Charron, as Tuck holds. Furthermore, Cicero's natural law arguments were not based on the principle of self-preservation, nor had Grotius limited these arguments to self-preservation and self-interest; rather, his arguments began with the Stoic idea of *oikeiosis*, which had originally been the basis for the Stoic ethics of virtue. For Cicero, and later for Grotius, this ethics of virtue was further developed in the direction of natural law, which could be formulated in terms of universal norms and rules of behavior and was no longer limited merely to descriptions of virtues. I will begin with this description of *oikeiosis* in Cicero, the main source from which Grotius developed his concept of *appetitus societatis*.[57]

Cicero's two-stage description of Stoic *oikeiosis*

In the third book of *De finibus*, Cicero has the the Stoic Marcus Porcius Cato explain the entire ethical system of the Stoa (*tota Zenonis Stoicorumque sententia*). Cato begins by explaining *oikeiosis* – that is, by explaining human development, beginning with birth – with the aim of showing the natural development of the human being towards the *telos*, as understood by the Stoics. The doctrine of *oikeiosis* thus served to support the Stoic doctrine of the final end (*telos*) and to assist in the search for what is done only for its own sake – the *summum bonum*. This search for the ultimate goal of human endeavor, however, required a clarification of the natural human instincts, an approach that seemed unavoidable after Epicurus and needed to refute the Epicurean *telos*-formula, as presented in the first book of *De finibus* by

[57] See *IBP* 1.2.1.1. See the discussion below, pp. 103–7.

the Epicurean Lucius Manlius Torquatus.[58] Starting from the moment of birth, Manlius had equated the *summum bonum* with pleasure (*voluptas*). Birth served as the starting point to guarantee the natural character of the drive for pleasure; living beings observed at later stages in their development might already be corrupted, and could no longer serve to exemplify the workings of nature.[59] Cato's portrayal of the Stoic concept of *oikeiosis* also begins at the moment of birth:

> Those whose theory I accept have the following view. Every animal, as soon as it is born (this is where one should start), develops self-love [*ipsum sibi conciliari*], and commits to self-preservation [*commendari ad se conservandum*]. It favours its constitution and whatever preserves its constitution, whereas it recoils from its destruction and whatever appears to promote its destruction.[60]

At the moment of birth, he argues, every living thing is familiarized with and commended to itself. This serves the purpose of self-preservation. To the older Stoa, the instinct for self-preservation was an expression of the self-love inherent in every living thing, which goes hand in hand, from birth on, with joint perception (*sunaisthesis*) of the self. From this self-awareness arises the first impulse (*horme*), that is, the first movement of the soul (*prote psuches kinesis*) towards an object,[61] in this case towards one's own being, which is perceived as part of itself (*oikeion*). This "orientation towards one's own being"[62] is *oikeiosis*. Cicero translated the Stoic *oikeiousthai* as *conciliari* and *commendari*, and correspondingly used the nouns c*onciliatio* and *commendatio* in presenting *oikeiosis*. As opposed to the Epicureans, the Stoics believed the instinct for self-preservation was expressed in newborns, before pleasure (*voluptas*) even affected them, so that pleasure can no longer be considered the first object of natural impulse. In *De finibus*,

[58] See Pohlenz 1970 1.113: Zeno was convinced that Epicurus had proceeded in a methodologically sound way. Zeno for the first time posed the philosophical problem of the development of the first human instinct given man's rational nature; the doctrine of *oikeiosis* was designed to provide a solution to this challenge. See also Pohlenz 1940, 40, on the Epicurean influence. On the Epicurean version of *oikeiosis*, where pleasure is held to be the *proton oikeion*, see Brunschwig 1986, 115–16.

[59] Cic. *Fin.* 1.30: *Omne animal simul atque natum sit voluptatem appetere eaque gaudere ut summo bono, dolorem aspernari ut summum malum et quantum possit a se repellere; idque facere nondum depravatum, ipsa natura incorrupte atque integre iudicante.*

[60] Cic. *Fin.* 3.16: *Placet his, quorum ratio mihi probatur, simulatque natum sit animal – hinc enim est ordiendum – , ipsum sibi conciliari et commendari ad se conservandum et ad suum statum eaque, quae conservantia sint eius status, diligenda, alienari autem ab interitu iisque rebus, quae interitum videantur adferre*. For the differences between Cicero's and Chrysippus' versions, see Wright 1995, 174–75.

[61] *SVF* 2.458; see also *SVF* 3.169.

[62] Pohlenz 1970 1.114 ("Hinwendung auf das eigene Wesen").

Cicero had the Stoic Cato illustrate this argument using the example of a newborn.[63]

In the Stoics' view, then, the object to which the first impulse resulting from self-love is addressed is not pleasure but the preservation of one's health, one's body, and, in addition, one's perceptive and cognitive faculties. These are the objects that living things pursue by nature. In regard to human beings, however, these things are not merely objects that are in accordance with nature (*ta kata phusin*). They are the *primary* objects in accordance with nature (*ta prota kata phusin*) – the *principia naturalia* that are the first to be striven for (*res, quae primae appetuntur*). Grotius was well aware of this Stoic distinction between primary and secondary objects of impulse[64] – a distinction that, once again, served to distinguish animals and children, on the one hand, from older human beings on the other. This distinction made it possible to differently characterize the natural objects pursued by more mature people.[65] Cato the Stoic had undertaken to demonstrate that virtue alone was the *summum bonum* and that, therefore, the wise man needed to select from among the things that were in accordance with nature. It was therefore necessary for him to show plausibly that a shift from the first stage, the *prota kata phusin*, aimed at self-preservation, to the second stage, the true Stoic *telos* of the morally right (*honestum*), was possible. In this process, as Striker rightly comments, a change takes place: consideration of a "normal development" towards use of increasingly rational capacities (in line with the increasing development of speech) gives way to consideration of moral development.[66]

After the section of *De finibus* described above, Cato goes on to describe the process by which the object of *oikeiosis* shifts from the primary natural things, and from self-preservation, to the Stoic ultimate end. Formally, based on the criteria established by Aristotelian ethics[67] and in accordance with the other Hellenistic schools, the Stoic tradition understood the ultimate end to be that which is done for its own sake, and for which everything else is done.[68] When it came to the content of the term, however, the Stoics

[63] Cic. *Fin.* 3.16–17: *id ita esse sic probant, quod ante, quam voluptas aut dolor attigerit, salutaria appetant parvi aspernenturque contraria, quod non fieret, nisi statum suum diligerent, interitum timerent. fieri autem non posset ut appeterent aliquid, nisi sensum haberent sui eoque se diligerent. ex quo intellegi debet principium ductum esse a se diligendo. in principiis autem naturalibus plerique Stoici non putant voluptatem esse ponendam.*

[64] See below, 103–7.

[65] See *SVF* 3.140–46; 181, on things in accordance with nature. According to Pohlenz 1970, 2.66, Zeno created the term *ta prota kata phusin* as an addition to the existing doctrine on things *kata phusin*. See also Pohlenz 1940, 13.

[66] Striker 1983, 289–90.

[67] Arist. *Eth. Nic.* 1.1097a15–b21; see Irwin 1986, 206ff.

[68] Stob. 2.77.16–17.

understood *telos* to be "life in accordance with nature."[69] It was this life in accordance with nature that was the sole object of *oikeiosis* in Stoic ethics, as opposed to the other schools of philosophy. In the development described in *De finibus*, Gisela Striker sees the explanation of why this shift from self-preservation to a life in accordance with nature, as the exclusive object of *oikeiosis*, can be regarded as plausible: "What seems to be needed is an argument to show that man's interest should at a certain point in life shift from self-preservation or even self-perfection to an exclusive interest in observing and following nature."[70]

Cato's argument can be outlined as follows: The initial human *oikeiosis* (*conciliatio*) is directed towards things that are in accordance with nature (*ea, quae sunt secundum naturam*). However, as soon as human beings gain insight and understanding (*ennoia*, *notio*) and are able to recognise the order and harmony of things and actions, they give clear preference to harmony (*concordia*). By applying their perception and reason (*ratio*), they ultimately realize that this harmony – because it is the Stoic *homologia* (translated by Cicero as *convenientia)* – is in fact the supreme human good (*summum bonum*), to be praised and sought for its own sake. It is in the Stoic *homologia* that this good (*bonum*) – virtue (*honestum*) itself, the only component of good to which everything else must be related – is to be found. Although virtue does not develop until a later stage, it is the only quality worth pursuing for its own sake. The primary things in accordance with nature (*quae sunt prima naturae*) are not part of the supreme human good.[71]

Here we see Cato providing an explanation of the way in which the object of *oikeiosis* shifts, through the use of reason, from the first stage, self-preservation, to the second stage, virtue. Scholars differ on whether this paraphrased passage represents an argument in favor of the Stoic thesis that life in accordance with nature is the *summum bonum* for humankind, or whether the text merely attempts to make plausible the shift in the object of *oikeiosis* during the course of human development.[72] It is clear,

[69] Writers differ on the origins of this designation. Diog. Laert. 7.87 attributes this *telos* formulation to Zeno, while in Stobaeus (2.75.11ff.; LS 63B) Arius Didymus is quoted as saying that Cleanthes was the first person to use the complete formulation, thereby extending Zeno's original shorter formulation, which defined *telos* as *to homologoumenos zen*, and transforming it into *telos esti to homologoumenos tei phusei zen*. See Inwood 1999 for a synthesis of the doxography of the different Stoic formulations of *telos*.

[70] Striker 1983, 289.

[71] Cic. *Fin*. 3.21.

[72] See Engberg-Pedersen 1990, 81–97, for the view that Cicero's *De finibus* 3.21 represents an argument in favour of the Stoic *telos*. Engberg-Pedersen discusses the arguments of Striker 1983, 289–93, where she maintains that in *Fin.* 3.21 Cicero simply assumes that life in accordance with nature is the

however, that the Stoic notion of *oikeiosis* – as presented to us in the third book of Cicero's *De finibus* – has been extended beyond the idea of self-preservation to encompass what is just or morally right, and moreover, that this extension is somehow attributable to *ratio*.[73] Grotius adopted this model of a two-stage *oikeiosis* from Cicero.

yardstick for human action. However, even Striker admits that the "vague phrase" *cognitione et ratione collegit* is a slight indication – at least – that there may be an argument here.

[73] See Wright 1995, 176–77.

CHAPTER 5

Justice for the state of nature
From Aristotle to the Corpus iuris

> If the *socialitas* of human nature . . . is Pufendorf's first principle, then he ought to know first of all that it is not the fruit of his own talent, but that Cicero in his *De officiis* and others . . . sought to extract all the precepts of law and duty from this source.[1]

Grotius' use of Cicero and the move away from self-preservation

Referring explicitly to the third book of Cicero's *De finibus*[2] and its Stoic sources, Grotius adopted the idea of a transition from the self-preservation impulse – as the first object of *oikeiosis* – to virtue and the morally right (*honestum*) as the superior good, preferable to mere self-preservation. He did so, however, in a context more similar to Cicero's *De re publica* or *De officiis*[3] – specifically at the start of the second chapter of the second book of *De iure belli ac pacis*, which sought to demonstrate that war did not in itself contradict natural law. One might say that Grotius sought to prove the natural-law nature of certain wars, with the help of a more detailed understanding of the Stoic bases of natural law than Cicero himself; the latter, in his attempts to portray wars as just, clung to a version of fetial law dressed up as Stoic natural law, without more closely investigating *oikeiosis* as the basis of this natural law.[4] The doctrine of *oikeiosis* was portrayed by Cicero as part of his account of Stoic ethics, while Grotius consulted it and used it to justify his natural-law doctrine of just war:

> *Cicero* learnedly proves, both in the third Book of *De finibus*, and in other Places, from the Writings of the *Stoicks*, that there are two Sorts of *natural*

[1] Letter of Böcler to Boineburg of February 3, 1663 at Böcler 1715, 901, trans. Hochstrasser 2000, 57.
[2] Cic. *Fin*. 3.21. On Cicero's theory see also Wright 1995.
[3] Which may account for Zarka's confusion between *De finibus* and *De officiis* in Zarka 1999/2000, 38.
[4] See Cic. *Rep*. 2.31; 3.34–35; *Leg*. 2.34; *Off*. 1.34ff.

> *Principles;* some that go before, and are called by the *Greeks* Τὰ πρῶτα κατὰ φύσιν, *The first Impressions of Nature* [*prima naturae*]; and others that come after, but ought to be the Rule of our Actions, preferably to the former.[5]

After discussing Cato's explanation in *De finibus*, which begins with birth, the doctrine of *oikeiosis*, and the primary things in accordance with nature,[6] Grotius turns to the role of *honestum*, using the Stoics' two-stage *oikeiosis* model familiar to him from Cicero. *Ratio* is given an important role, but one that differs slightly from the corresponding passage in *De finibus*, making evident the use Grotius made also of Cicero's *De legibus*:

> After that follows, *(according to the same Author)* the Knowledge of the Conformity of Things with Reason [*convenientia rerum cum ipsa ratione*], which is a Faculty more excellent than the Body; and this Conformity, in which virtue [*honestum*] consists, ought (*says he* [Cicero]) to be preferred to those Things, which mere natural Desire at first prompts us to; because, tho' the first Impressions of Nature [*prima naturae*] recommend us to Right Reason [*recta ratio*]; yet Right Reason should still be dearer to us than that natural Instinct. Since these Things are undoubtedly true, and easily allowed by Men of solid Judgment, without any farther Demonstration, we must then, in examining the Law of Nature, first consider whether the Point in Question be conformable to the first Impressions of Nature, and afterwards, whether it agrees with the other natural Principle, which, tho' posterior, is more excellent, and ought not only to be embraced when it presents itself, but also by all Means to be sought after.[7]

[5] *RWP*, 1.180; *IBP* 1.2.1.1: "M. Tullius Cicero tum tertio de Finibus, tum aliis in locis, ex Stoicorum libris erudite disserit esse quaedam prima naturae, Graecis τά πρῶτα κατὰ φύσιν, quaedam consequentia, sed quae illis primis praeferenda sint." Cf. Schneewind 1998, 175, who rightly claims that Grotius "sets aside . . . questions of the highest good" and "says nothing about individual perfection." Schneewind denies therefore that Grotius' natural law deserves to be called Stoic. Grotius must have known the formulation *ta prota kata phusin* from Aulus Gellius or from Stobaeus.

[6] *IBP* 1.2.1.1: "Prima naturae vocat, quod simulatque natum est animal, ipsum sibi conciliatur et commendatur ad se conservandum, atque ad suum statum et ad ea quae conservantia sunt eius status diligenda: alienatur autem ab interitu iisque rebus quae interitum videantur afferre. Hinc etiam ait fieri ut nemo sit, quin cum utrumvis liceat, aptas malit et integras omnes partes corporis, quam easdem usu imminutas aut detortas habere: primumque esse officium ut se quis conservet in naturae statu, deinceps ut ea teneat quae secundum naturam sint, pellatque contraria." This passage is based almost verbatim on Cic. *Fin.* 3.16, 3.17, and 3.20. On *De finibus* 3, see Wright 1995. On Grotius' use of the passage, cf. Brooke 2012, 48–53.

[7] *RWP*, 1.181; *IBP* 1.2.1.2: "At post haec cognita sequi notionem convenientiae rerum cum ipsa ratione quae corpore est potior; atque eam convenientiam, in qua honestum sit propositum, pluris faciendam quam ad quae sola primum animi appetitio ferebatur; quia prima naturae commendent nos quidem rectae rationi, sed ipsa recta ratio carior nobis esse debeat quam illa sint a quibus ad hanc venerimus. Haec cum vera sint et ab omnibus qui iudicio sano sunt praediti facile sine alia demonstratione assensum impetrent; sequitur in examinando iure naturae primum videndum quid illis naturae

This presentation is obviously based on the explanation paraphrased above, which Cato provided in the third book of *De finibus* (3.21) to explain the shift in the object of *oikeiosis* away from the primary things in accordance with nature and from self-preservation and towards the Stoic *telos,*[8] and which also saw the use of reason as the crucial element.[9] Grotius clearly took this passage as his source when justifying the hierarchical relationship between self-preservation and the superior quality of *honestum*. The latter was a product of human reason and the insight derived through the use of this faculty. However, in the quoted passage Grotius differed from Cato in applying the two stages of the Stoic doctrine of *oikeiosis* to his discussion of natural law. By contrast, Cicero's Cato did not discuss *ius naturae* since, although he maintained that there was a link between virtue (*honestum*) and the Stoic *summum bonum*, he was unable to show that virtue fulfilled the criteria required for the Stoic *summum bonum*. In other words, he could not demonstrate that virtue and virtuous conduct corresponded to human nature or were demanded by it. An additional, connected difference between this and the cited passage from Grotius' work consists in the different function of *ratio* suggested above. While in *De finibus* the purpose of reason was to recognize the *summum bonum* and to identify it with life in accordance with nature, Grotius, in the passage cited, had already integrated the metaphysical aspects of of the Stoic concept of reason, passed down mainly in Cicero's *De legibus.* This allowed him to create a link between *honestum* and justice, on the one hand, and human nature, on the other, via *recta ratio*.

Virtue (*honestum*) is seen when things comply (*convenientia*) with reason, which is superior to the body, said Grotius; and this compliance should be valued more highly than those things to which instinct draws people (by which he means the instinct of self-preservation). The primary things in accordance with nature (*prima naturae*) are leading us toward right reason (*recta ratio*), which in turn becomes more valuable to us than the primary

initiis congruat, deinde veniendum ad illud quod quanquam post oritur, dignius tamen est; neque sumendum tantum, si detur, sed omni modo expetendum."

[8] Cic. *Fin*. 3.21: *prima est enim conciliatio hominis ad ea, quae sunt secundum naturam. simul autem cepit intellegentiam vel notionem potius, quam appellant ἔννοιαν illi, viditque rerum agendarum ordinem et, ut ita dicam, concordiam, multo eam pluris aestimavit quam omnia illa, quae prima dilexerat. atque ita cognitione et ratione collegit, ut statueret in eo collocatum summum illud hominis per se laudandum et expetendum bonum, quod cum positum sit in eo, quod ὁμολογίαν Stoici, nos appellemus convenientiam, si placet, – cum igitur in eo sit id bonum, quo omnia referenda sint, honeste facta ipsumque honestum, quod solum in bonis ducitur, quamquam post oritur, tamen id solum vi sua et dignitate expetendum est; eorum autem, quae sunt prima naturae, propter se nihil est expetendum.*

[9] See above, 98–102.

things in accordance with nature themselves. Because this is true and would be agreed upon easily and without further proof (*demonstratio*) by anyone equipped with uncorrupted judgment (*qui iudicio sano sunt praediti*), it follows that in examining things in accordance with natural law (*in examinando iure naturae*), it must first be considered what corresponds to those (first) principles of nature; and one must then come to what is more valuable (*dignius*), although it emerges later. The latter should not be applied only casually, but must be pursued by all means (*omni modo expetendum*).[10]

Grotius' formulation of the Ciceronian *convenientia* is somewhat idiosyncratic, but correctly renders the Stoic formulation of reason's consistence with nature. Similarly, the hierarchical relationship between the *prima naturae* and the *honestum* corresponds perfectly to the model provided by Cicero.[11] The requirement of uncorrupted judgment also corresponds to the Hellenistic models passed down by Cicero and must be seen in connection with the Stoic ideas (*ennoiai*) mentioned by him, which consisted of "what natural and therefore veridical thinking on a point would be like if reasoning were not subject to the usual (but unnatural) process of corruption."[12]

The fact that Grotius bases his account of moral motivation on a theory of *oikeiosis* is significant, but it might be even more significant to point out the specifically *Ciceronian* provenance of this account. As Christopher Brooke argues convincingly, there is a "close fit between the general structure of a Ciceronian Stoic natural law theory and the argument that Grotius builds" in *De iure belli ac pacis*, especially in view of "the organising role that *appetitus societatis*/*oikeiosis* plays in connecting the arguments about self-interest with the argument about sociability and the argument about property rights." The fact that Grotius' argument aims at an account of "natural laws concentrated around the rights of noninterference, especially with regard to property,"[13] rather than offering a Greek Stoic view focused on the human *telos* understood as happiness (*eudaimonia*), should give us pause and deter us from describing Grotius' view as Stoic in an unqualified way. Rather than exhibiting a concern with human agents' happiness as the ultimate end or goal (*summum bonum*), Grotius makes natural law and the morally right, the *honestum*, fundamental and prior to any teleological considerations. Somewhat anachronistically, we might say that for Grotius the right is prior to the good.

This outlook is due to the specific coloring which Stoicism received at the hands of Cicero. As Jacob Klein explains in a very lucid essay

[10] *IBP* 1.2.1.2. [11] See Haggenmacher 1983, 531–33, where, however, *oikeiosis* is not treated. [12] Obbink 1992, 223. [13] Brooke 2012, 57–58.

on Stoic eudaimonism and the natural law tradition, if "the eudaimonist framework of earlier Stoicism is neglected, it becomes easier to regard the prescriptions of natural law not simply as principles to which one must adhere in order to live a life that is happy because rational, but as a source of obligation in their own right." In this view, "Cicero's treatment obscures our view of early Stoicism, but it helps to explain how the doctrine preserved in his accounts inspired later, diverse articulations of natural law theory."[14]

This is precisely what can be seen in Grotius' reception of Cicero's account of *oikeiosis*. While *oikeiosis* still serves to counter the motivational implications of Epicurean – and later Hobbesian – anthropology by offering a rational justification of motivation, the aim of this doctrine is no longer ethical in the Greek Stoic sense. That is to say, it no longer consists in the good life of an agent, but in an account of rules – the natural law – which human beings can be motivated to observe qua rational beings, but which oblige by virtue of their being just and not by appealing to the agent's *eudaimonia*. Virtue in Grotius thus comes to consist merely in the right according to the rules of natural law, while teleological considerations and ideas of perfectionism are relegated decidedly to the background. The obligatory force of the rules of natural law goes beyond the appeal to the agent's happiness and seems based on the idea that these rules are actually commands of right reason. This account of obligation, then, comes to anticipate and resemble Hobbes', where the laws of nature are neither obligatory by virtue of being God's commands, nor simply advice, but commands of *recta ratio* that oblige by themselves. But for Grotius, as opposed to Hobbes, right reason provides itself motivation beyond merely prudential considerations – this is what the account of *oikeiosis* is designed to achieve. And of course, the content of Grotius' commands of right reason differs markedly from the content of those of Hobbes.

From the Stoic sage to the Roman rules of natural law

In contrast to orthodox Stoicism, Grotius nowhere characterizes virtue (*honestum*) as the only good, but also grants value to the primary things in accordance with natural law (*prima naturae*), which to him are not merely indifferent (*adiaphora*) things. In orthodox Stoic ethics, the primary, natural things fall into the category of those things that may be viewed

[14] Klein 2012, 80. This adds an interesting twist, and an additional Roman layer, to the observations on Stoicism and Augustinianism as the "two faces" of humanism by Bouwsma 1975.

conventionally as good or bad,[15] but do not correspond to the Stoic concept of good, which was reduced to moral goodness. They are thus irrelevant in regard to the Stoic *summum bonum*, which can only be found in virtue.[16] Nevertheless, Stoic orthodoxy had developed criteria that would make it possible to give some of these indifferent things preference over others, without abandoning the basic position that these preferable indifferent things (*adiaphora proegmena*) could not in any way be constitutive of the good. In contrast to the good, which had the specific characteristic of being necessarily advantageous, the indifferent things are neither beneficial nor harmful; however, they are more or less natural, and can therefore – based on the merit ascribed to natural things – be described as preferable by nature (thus, for example, health is preferable to sickness by nature, in the interests of the instinct for self-preservation).[17] This merit is dependent, however, on circumstance, in contrast to the absolute merit specific to virtue (thus it can be correct, for the sake of the good, to risk the objective, natural merit of health in certain situations).

Grotius did not adopt the orthodox Stoic description of the morally right and just (*honestum*) as the only good. He gives up on the fundamental distinction between virtue as the only good, on the one hand, and preferable indifferent things on the other. However, he does not seem to sacrifice the Stoic hierarchy between *honestum* and preferable indifferent things to which the *prima naturae* and the instinct for self-preservation belong. This gives rise to a puzzle: justice, no longer understood as a virtue but expressed through rules, overrules self-preservation and the "first things according to nature." At the same time, justice itself for Grotius consists crucially in respect for property rights, making what the Greek Stoics would have labeled a preferable indifferent, private property, into the primary criterion of justice.[18] This puts him squarely into a tradition beginning with Cicero and leading through Locke and some of the proponents of the Scottish Enlightenment to Robert Nozick's "entitlement theory" of justice, but it sits rather uncomfortably with the Greek Stoics' concern with virtue as the sole and sufficient guarantee for happiness.

[15] Such as self-preservation, health, or wealth; see LS 58A.

[16] See Mitsis 1999, 171, who ascribes a concept of subjective right already to the orthodox Stoics, not with regard to indifferents, however: "Thus, any defence of rights attached to such things as health, life, or wealth is similarly liable to come to naught . . . "

[17] According to Plutarch, Chrysippus had to concede that the preferred indifferents were identical with those things conventionally called "good"; see Plut. *Stoic. Rep.* 1048a (= LS 58H). See on this Aristo's position, which amounted to criticism within Stoicism, denying any differentiation between preferred and non-preferred things; see LS 58F.

[18] Long 1997, 24–25 ascribes the moral defense of private property implausibly already to the Greek Stoa after Chrysippus. In contrast, see Mitsis 1999, 171–72. See also below, 175–88.

As Knud Haakonssen points out in an illuminating essay, what matters for Grotius is not self-preservation *tout court*, but "questions of justice or of rightful acts of self-preservation."[19] He goes on to remind us that Francis Hutcheson had interpreted Grotius precisely thus: for Hutcheson, Grotius does not give self-preservation or the natural desires (the Stoic *prima naturae*) pride of place, but justice and respect for natural rights. However, as Haakonssen appreciates, when we "turn to the obvious question of the notion of justice in terms of which rights are accorded, we appear to come close to a circle." This is so because "Grotius' theory is that justice in the strict sense consists in the abstaining from injury to the rights of others. This, however, presupposes a prior judgement to determine what such rights are."[20] This is not circular, however, as Grotius introduces respect for property rights across the board as the linchpin of justice – that is to say, when determining the rightfulness of acts of self-preservation, the rules of justice have justificatory priority. Private property rights and justice are basic, self-preservation is not.

When examining what accords with natural law, one must first consider what the preferable indifferent things – that is, the *prima naturae* – correspond to; then, however, one must arrive at the more valuable morally right things, the *honesta*.[21] For Grotius, relinquishing the basic Stoic distinction between virtue and preferable indifferent things goes hand in hand with relinquishing a further crucial Stoic distinction: between the Stoic sage (*sapiens*) and the rest of humankind, consisting of the ignorant (*insipientes*). Here Grotius' views barely differed from those of the *Roman* Stoa – Grotius in fact adopted Cicero's portrayal of Stoic doctrine, as contained in Cicero's various works of political philosophy, law, and ethics.[22] Just as Cicero's Cato, in opposition to the extreme views of Aristo, granted a high status to the preferable indifferent things, arguing that without a certain amount of distinction between the indifferents (*adiaphora*), all of life would fall into disorder (*confunderetur omnis vita*),[23] Grotius also distinguished between more or less preferable indifferent things. Grotius, however, seemed to believe that these Stoic doctrines, as passed down and shaped by Cicero, represented Stoic doctrine *tout court*.[24]

[19] Haakonssen 2002, 32. [20] Ibid., 33. [21] *IBP* 1.2.1.2.

[22] It is telling that Mitsis 1999, 175–76, in his attempt to ascribe a subjective conception of rights to the orthodox Stoics, relies above all on Cicero.

[23] Cic. *Fin.* 3.50.

[24] In this he resembles the stance assumed by many prominent scholars of Hellenistic philosophy; see the literature referenced in Mitsis 2005, who himself argues – convincingly, in my view – against that stance.

Neither Cicero nor Grotius could avoid granting the *adiaphora* a prominent status; both, after all, crucially defined justice by way of private property. Private property rights assume thus a fundamental status in both Cicero's and Grotius' conception of justice. They are the most prominent among the rights "strict justice" obligates us to refrain from violating. This view, however, leads Grotius much closer to Cicero's outlook than to the view of any of the earlier Greek Stoics. Looking forward, both the rule-based character of justice as well as the role of property as its fundamental criterion had an important impact on the Scottish Enlightenment.[25] Notwithstanding the artificial rather than natural character of justice in Hume's account, there are many parallels even here, and there is every reason to assume a certain similarity between, on the one hand, Hume's artificial virtue of justice and respect of property, the rules of which may according to him nonetheless be called "laws of nature,"[26] and the intermediate character of private property in Grotius' doctrine on the other, where property is not private by nature, but still pre-political and protected by natural law.[27]

In orthodox Stoic ethics, the sage was the only person capable of arriving at the ultimate end, the *telos*, and achieving happiness (*eudaimonia*) in harmony with nature. He was the only person capable of living a virtuous life and attaining the ultimate end by acting in a morally correct fashion. Unlike the normal human being – the *insipiens* – the Stoic *sapiens* was capable of carrying out *appropriate* actions (*kathekonta*) – in other words, actions that could be justified through reason, and aimed at achieving the preferable indifferent things, such as self-preservation. Moreover, the Stoic wise man performed *perfectly appropriate actions* (*katorthomata*) because they pursued the good, were morally right, and were based not merely on reason (*ratio*), as are the appropriate actions of other human beings, but on "right reason," *recta ratio* (*orthos logos*), which the wise man shared with the gods. In early Stoic philosophy, this *recta ratio* of the wise man was considered identical to natural law, which dictated perfectly appropriate or right actions (*katorthomata*). The wise man, *per definitionem,* was the only human capable of these.[28] In the early Stoic political philosophy of Zeno this resulted in an ideal society consisting solely of *sapientes* and gods.[29]

[25] See Berry 1997, 129–33. [26] *THN*, 1.311. [27] See below, 175–88.

[28] Mitsis 1994, 4829–34, disputes the view that, under the early Stoa, natural law prescribes *katorthomata* alone. This view is put forward by Vander Waerdt 1994a, 4854–56. However, Mitsis does admit that "only the wise man completely understands nature's injunctions and . . . can interpret the laws and act as a lawgiver. His reason and nature's law are isomorphic" (Mitsis 1994, 4831n46).

[29] Diog. Laert. 7.33, 122ff., 131.

This must have been of an entirely Utopian nature, since the Stoic sage was even according the Stoics' own admission the rarest of phenomena.[30] It served the purpose of providing a philosophical defense of the idea of natural justice and was hardly intended to be a feasible political program.[31] The only law in force in Zeno's Utopia was natural law, in other words, *recta ratio*, shared in only by gods and wise men. Thus, in this early Stoic approach, natural law was addressed only to the Stoic sage.

Scholars differ on whether or when, precisely, Stoic philosophy abandoned Zeno's Utopian ideas in favor of a political philosophy dedicated to specific issues and institutions, as manifested above all in Cicero's *De republica*, *De legibus*, and *De officiis*.[32] However, it is clear that, from the time of Cicero, at the latest, there are cohesive sources on Stoic doctrine in the fields of ethics and political philosophy that go beyond descriptions of a Utopian society made up of *sapientes* and Gods and endeavor to clarify the practical implications of Stoic ethics for normal people – that is, for *insipientes*. Such a practical approach necessarily entailed a more heavily action- or norm-oriented ethics, at the expense of the older ethics of virtue, which was limited to statements about the disposition or character of the actor, without providing norms for the acts in question.[33] In addition to widening the field of application of Stoic natural law by extending *recta ratio* to the *insipientes*, Cicero was also interested in the substantive content of the actual rules of natural law. This cannot be said of the early Stoa, at least not on the basis of the fragmentary evidence available to us, and must be attributed to specific Roman concerns that were also important to Grotius, especially the treatment of Roman imperialism in the third book of Cicero's *De republica*.[34]

[30] Only one or two examples of a *sapiens* can be cited according to the Stoics; Alexander von Aphrodisias, *De fato* 199.14–22.

[31] See the convincing argument presented in Vander Waerdt 1991. Plutarch describes Zeno's utopian society as a philosophical dream: *De Alexandri magni fortuna aut virtute* 329a-b (= LS 67 A).

[32] Paul Vander Waerdt identifies a transformation of this kind and sees – mainly based on Cic. *Leg.* 3.13–14. – Diogenes of Babylon as the critical figure who modified the political philosophy of the early Stoics, adapting it to the rival Academic and Peripatetic political philosophies; see Vander Waerdt 1991, 205–10. However, Schofield 1991, 93–103, does not regard Zeno's "republicanism" as a theory of natural law, maintaining that Chrysippus was the first thinker to produce a theory of natural law by extending Zeno's society of sages to encompass a society of rational living beings. This view equates natural law with normative reason; see Schofield 1991, 67–74. These discussions do not touch on the question of what the actual substantive provisions of natural law might be.

[33] See, on the differentiation of ethical systems based on virtue on the one hand and rules on the other, the lucid explication by Tugendhat 1993, 41–42, 226–38.

[34] See also the Roman examples of *kathekonta kata peristasin* in time of war in Cic. *Off.* 1.34–40. Academic and Peripatetic philosophical influences might also have played a role; see Vander Waerdt 1991, 204–5.

Whatever our view of the early Stoa in this respect, it is likely that, from the time of Diogenes of Babylon, and certainly after Cicero, natural law took the form of a paralegal system of general abstract norms, rather than residing in the internal disposition of the Stoic sage with respect to specific situations:[35] "By Cicero's time, however, the Stoic theory had been revised in such a way that conduct in accordance with natural law was now held to be attainable by moral progressors; accordingly, the strict early Stoic standard that only *katorthomata*, actions performed by an agent who possesses the sage's right reason, accord with natural law is now relaxed, and the basis is laid for the conception in which natural law is specifiable in a code of moral rules."[36]

This means that Grotius was able to draw on Cicero's model[37] when he extended the normative scope of *recta ratio,* thereby universalizing the audience for natural law. Grotius certainly admits preferable indifferent things (*prima naturae*) alongside virtue (*honestum*) as criteria when it comes to giving substance to the natural law, thus lending them moral relevance, very much in contrast to the orthodox Stoic position. Grotius' stance with regard to virtue, and with it justice, is the result of his adoption of Cicero's doctrine of *oikeiosis* and shares the characteristics of Roman late Stoicism. For Grotius, too, after all, justice takes a superior position and – in the case

[35] Vander Waerdt, for instance, notes a reorientation in the Stoic doctrine of natural law. He argues that the early Stoa did not believe that natural law or the sage's *recta ratio* constituted any universal normative rules with substantive content, but rather dispositions relating to the intentions of the wise man. It was not until the time of the late Stoa that natural law consisted of general abstract norms established on the model of legal rules and furnished with substantive content. Natural law, he writes, is "constituted by the sage's rational disposition, not by a code of rules or legislation." For this reason it is "a dispositional rather than rule-following model of natural law": Vander Waerdt 1994b, 287. Cf. also Vander Waerdt 1994a, 4854–55. This view is opposed by Phillip Mitsis, in particular, who postulates universal rules following the model of legal norms even in the natural law ideas of the early Stoa. Based on the beginning of Chrysippus' *Peri Nomou*, as passed down to us by the jurist Marcianus (*Inst.* 1 = LS 67 R), Mitsis 2003, 42, argues that "Chrysippus does not claim that natural law prescribes to animals whose nature is political *how* and *how not* they should perform actions or with what sorts of inner attitudes. He maintains that natural law prescribes *what* they should and should not do." Cf. also Mitsis 1994, 4835–41. Although Mitsis' argument is convincing, it should be noted that we do not have any early Stoic sources corroborating the substantive content of these natural law norms; for this reason the precise content of Chrysippus' norms will remain unclear. Not until the time of Cicero do we find statements relating to the content of natural law norms (for example, from Diogenes of Babylon, whose statements have been passed on by Cic. *Off.* 3.51–57). Vander Waerdt 1994a, 4854, appears to contest the Stoic origins and the natural law character of these statements (as well as the moral norms discussed by Seneca in *Epistulae* 94–95) when he states that "no Stoic account of the precepts of natural law has survived."

[36] Vander Waerdt 1994a, 4855. Vander Waerdt regards Antiochus as the source of this change in Stoic theory.

[37] See Miller 2003, 124–26, who does not pay sufficient attention however to the differentiation between orthodox Stoicism and Roman Stoicism nor to the connected leveling between Stoic sage and the *insipientes*.

of competing rules – represents a clear barrier in the Stoic sense against actions that pursue merely the *prima naturae*. The crucial break with the older Stoa,[38] however, consists in the fact that, for both Cicero and Grotius, virtue is defined through certain preferable indifferent things – specifically through property.[39] This makes it possible to give considerable moral and natural-law weight to primary things in accordance with nature, such as one's own life and private property, and to interpret the Stoic *honestum* as a prohibition against the violation of the property rights of others.[40] This is about as far removed from Stoic eudaimonist ethics as can be.[41] However, this does not turn self-preservation into Grotius' basic criterion of justice – not violating other people's rights is the basic criterion.[42]

A legalized ethics of rules and rights

Grotius' treatment of justice and the instinct for self-preservation as criteria *in examinando iure naturae* is indeed strongly influenced by Cicero. A key example of this, and of the importance of the just or morally right (*honestum*) in this process, is his discussion of the extent to which war is in accordance with natural law at the beginning of the second chapter of the first book in *De iure belli ac pacis*. The following analysis of this passage should clarify the exact relationship between *prima naturae* and *honestum* in Grotius' thinking and thus help resolve the question of the precise status of the instinct for self-preservation in his theory of natural law.

When discussing the basic legality, or justice, of waging war – *an bellare unquam iustum sit*, an issue of fundamental importance for all his works – Grotius substantiates his argument by stating that war does not fundamentally contradict natural law. The first relevant criteria in a closer examination of this relationship are the primary things in accordance with nature. Grotius then takes an additional step, discussing the question of whether war contradicts the natural primary things (*prima naturae*), and concludes, on the evidence of poets and philosophers – Ovid, Horace,

[38] Contrary to Mitsis 1999. [39] Cic. *Off.* 1.21; *IPC* 2, fol. 7.

[40] See Tuck 1987, 112–13, who, not paying sufficient attention to the Stoic background, overlooks the role of the *honestum*. See Besselink 2002 on the status of the *adiaphora* in Grotius' work in general.

[41] See Brooke 2012, 51: in Grotius' use of Cicero "there is no claim that acting in accordance with practical reason is something to be done for its own sake, let alone . . . a claim that this is the highest good, or the only good." Cf. Schneewind 1998, 175.

[42] Adam Smith, drawing out the consequences of this outlook, was to refer to justice as a "negative virtue" because it "only hinders us from hurting our neighbour." The man who thus abstains from violating his neighbour "fulfils . . . all the rules of what is peculiarly called justice." Smith concludes: "We may often fulfil all the rules of justice by sitting still and doing nothing": *TMS* 2.2.1.9, 82.

Lucretius, Xenophon, Galen, and Aristotle – that, rather than contradicting war, the *prima naturae* actually support it:

> Among the first Impressions of Nature [*prima naturae*] there is nothing repugnant to War; nay, all Things rather favour it: For both the End of War (being the Preservation of Life [*conservatio vitae*] or Limbs, and either the securing or getting [*acquisitio*] of Things useful to Life) is very agreeable to those first Motions of Nature; and to make use of Force, in case of Necessity, is in no wise disagreeable thereunto; since Nature has given to every Animal Strength to defend and help itself. *All Sorts of Animals*, says *Xenophon*, *understand some Way of Fighting, which they learnt no where but from Nature.*[43]

From this text it is clear that, like the Stoics, Grotius identifies the primary natural things with the instinct for self-preservation. According to Grotius, both the purpose of war – the preservation of life and limb – and the retention or acquisition of things useful for life are completely in accordance with the primary natural things. The need to use force did not run counter to the primary natural things, since this is the reason that all living beings had been endowed with sufficient physical strength to defend and help themselves. Clearly Grotius includes war among the Stoic "appropriate actions" (*kathekonta*) that pursue things in accordance with nature, such as health (for Grotius the *vitae membrorumque conservatio*), or, ranking somewhat lower, property[44] (for Grotius the *rerum ad vitam utilium aut retentio aut acquisitio*). Although irrelevant with respect to the good, they are still preferable to other indifferent things (*proegmena adiaphora*) and thus constitute "preferable indifferents" for the Stoics.

The inclusion of war among appropriate actions in the Stoic sense (*kathekonta*) is also supported by the authorities cited by Grotius. In his quotation from Xenophon's *Cyropaedia*, as in the quotations from Ovid, Horace, Lucretius, Galen, and Aristotle, human beings are compared to animals and equated with them when it comes to warlike actions. Since war pursues self-preservation and thus the *prima naturae* of *oikeiosis* – in other words, objects that *all* living beings strive for by nature – it belongs

[43] *RWP*, 1.182–83; *IBP* 1.2.1.4: "Inter prima naturae nihil est quod bello repugnet, imo omnia potius ei favent. nam et finis belli, vitae membrorumque conservatio et rerum ad vitam utilium aut retentio aut acquisitio illis primis naturae maxime convenit. et vi ad eam rem si opus sit uti, nihil habet a primis naturae dissentaneum, cum animantibus singulis vires ideo sint a natura attributae, ut sibi tuendis iuvandisque sufficiant. Xenophon: . . . omnia animantium genera pugnam norunt aliquam, quam non aliunde quam a natura didicerunt." The reference to Xenophon was added to the editions from 1631 onward.

[44] Diog. Laert. 7.101ff., on the *proegmena adiaphora*.

in the category of actions not only in accordance with the nature of human beings, but indeed of all living things: *cum animantibus singulis vires sint a natura attributae*. Grotius' idea of war as an action not limited merely to human beings, and in accordance with the nature of the living thing carrying out the action, corresponds perfectly to the criteria for the Stoic *kathekon*.[45]

Nevertheless, as a Stoic *kathekon*, war for Grotius does not contradict natural law; however, it does not contradict natural law because it does not belong to natural law in its proper sense. With respect to war as *kathekon*, Grotius states that certain things "not properly, but by way of Reduction" (*non proprie, sed reductive*) are said to belong to natural law merely because there is no contradiction between them and natural law.[46] However, the only actions that are truly in accordance with natural law are those that correspond to the *honestum*, which means, in turn, that they must be prohibited or prescribed by *recta ratio.*[47] Initially, war as a *kathekon,* as a means of self-preservation, is irrelevant with respect to the *honestum*, since *recta ratio*, in other words natural law in its real sense, says nothing about *adiaphora*, to which self-preservation undoubtedly belongs. This also corresponds precisely to the Stoic doctrine of the category of appropriate actions (*kathekonta*), which, if we consider the actions carried out *only* by human beings, includes those actions that, as perfectly appropriate or right actions (*katorthomata*), constitute a special class of *kathekonta*. These are morally right actions associated with virtue (*honestum*), which can be performed only by the Stoic sage.

It is noteworthy that, in his analysis of war's compatibility with natural law, Grotius insists on the strict Stoic distinction between actions that are relevant with respect to virtue (*honesta*) and thus with respect to natural law in its true sense, on the one hand, and morally irrelevant actions on the other. As regards natural law in its true sense, Grotius regards war quite simply to be irrelevant, to the extent that it pursues self-preservation, which is indifferent. This is evident in the following description of virtue and the relationship between the *honestum* and natural law that results from this notion of virtue:

[45] See the Stoic definition of *kathekon* in Stobaeus 2.85.13–86.4 (= *SVF* 3.494 = LS 59 B). Even plants can carry out *kathekonta*, see Diog. Laert. 7.107.

[46] *RWP*, 1.153; *IBP* 1.1.10.3: "Ad iuris autem naturalis intellectum, notandum est, quaedam dici eius iuris non proprie, sed ut scholae loqui amant, reductive, quibus ius naturale non repugnat, sicut iusta modo diximus appellari ea quae iniustitia carent." Actions in accordance with the merely conventional *ius gentium* would fit this characterization.

[47] *IBP* 1.1.10.1.

> This last Principle, which we call virtue [*honestum*], according to the Nature of the Things upon which it turns, sometimes consists (as I may say) in an indivisible Point; so that the least Deviation from it is a Vice: And sometimes it has a large Extent [*spatium*]; so that if one follows it, he does something commendable, and yet, without being guilty of any Crime, he may not follow it, or may even act quite otherwise. Just as in contradictory Things, one passes immediately from one Extreme to the other; a Thing either is or is not, there is no Medium: But between Things that are opposed after another Manner, as between Black and White, there is a Medium, which either partakes of both Extremes, or is equally removed from both. The last Sort of virtue is most commonly the Subject of Laws both Divine and Human, which by prescribing Things relating thereto, render them obligatory, whereas before they were only commendable. But the Matter in Question is concerning the first Sort of *honestum.* For, as we have said above, when we enquire into what belongs to the Law of Nature, we would know whether such or such a Thing may be done without Injustice; and by *unjust* we mean that which has a necessary Repugnance to a reasonable and sociable Nature [*natura rationalis ac socialis*].[48]

Grotius presented various concepts of virtue (*honestum*). In some places, he argued that it consisted of a single point, as it were, with even the slightest deviation from this point resulting in wrong (*vitium*). In other places its scope was less restricted, and an action might be carried out in a praiseworthy manner, omitted without being unpraiseworthy, or carried out in some other manner. The rule of law subject to the will concerned itself with this second notion of virtue – *honestum* with its unlimited scope. This applies both to human laws and to laws imposed by God, which provided legal sanction for actions regarded as praiseworthy or virtuous in the second sense. Yet *natural* law, in its true sense, relates to the first, more narrow conception of virtue – in other words, *honestum* in the sense of a single "point," where there is no transition between virtue and wrong, as in the case of Stoic *honestum.*

With regard to war, this means that, if war is to correspond to the narrower conception of *honestum* and thus to natural law in its narrower sense, it must also, in a second step, meet the criteria of *recta ratio*. War

[48] *RWP*, 1.181–82; *IBP* 1.2.1.3: "Hoc ipsum vero, quod honestum dicimus, pro materiae diversitate, modo (ut ita dicam) in puncto consistit, ut si vel minimum inde abeas, ad vitium deflectas; modo liberius habet spatium, ita ut et fieri laudabiliter, et sine turpitudine omitti aut aliter fieri possit, ferme quomodo ab hoc esse ad hoc non esse statim sit transitus; at inter aliter adversa, ut album et nigrum, reperire est aliquid interpositum, sive mixtum, sive reductum utrinque. Et in hoc posteriori genere maxime occupari solent leges tum divinae, tum humanae, id agendo, ut, quod per se laudabile tantum erat, etiam deberi incipiat. Supra autem diximus, de iure naturae cum quaeritur, hoc quaeri, an fieri aliquid possit non iniuste: iniustum autem id demum intelligi quod necessariam cum natura rationali ac sociali habet repugnantiam."

that is compatible with natural law in this narrower sense cannot be an appropriate action (*kathekon*) alone, but must be based on one of the *just causes* of war, as presented by Grotius in the second book of *De iure belli ac pacis*. Only wars waged for just causes accord with natural law in the narrow sense and may qualify as *katorthomata*; mere self-preservation is not sufficient.

Although Grotius superficially maintained the Stoic distinction between merely appropriate actions and the morally correct actions of the orthodox Stoic wise men, he ultimately undermined the substance of this distinction, as all his causes of just war (both in *De iure praedae* and in *De iure belli*) are based on the protection of the primary natural things, such as life and property.[49] This is the price paid by Grotius for abandoning an ethics of virtue for an ethics of rules, as Cicero had done before him; because of this, he was forced to name the norms that regulate behavior and could not fall back on describing the dispositions to act in a virtuous way (the dispositions exhibited by Stoic sages). The universalization of natural law and the formulation of natural-law rules had already led Cicero to emphasize the *prima naturae*, such as property. Grotius, like his Roman predecessor influenced by the norms of Roman law, built upon this Roman tradition.

Grotius took his concept of the social instinct from Cicero's description of the Stoic doctrine of *oikeiosis* in the philosophical works *De legibus*, *De finibus*, and *De officiis*. Grotius, it is true, rendered this doctrine by using the concept of the *appetitus societatis* and avoiding Cicero's translation *conciliatio,* and he did not identify the *appetitus societatis* with the technical Stoic concept of *oikeiosis* until the 1631 edition of *De iure belli*. However, there can be no doubt of the Ciceronian origins of the concept. For Grotius, as for Cicero, *oikeiosis* served to provide an anthropological basis for universal natural law that was no longer limited to the Stoic sage, as it was in orthodox Greek Stoic thought.

As we have seen, for Grotius, as for Cicero, individual development corresponded to a two-stage *oikeiosis* process. For both Cicero and Grotius, this meant that every adult was thought to be equipped with the *recta* or *perfecta ratio* that, in the older Stoa, was reserved for the sage. Although Cicero's definition went on to equate natural law with the *recta ratio* of the Stoic sage,[50] he negated any generic differences among human beings: "Thus, whatever definition of a human being one adopts is equally

[49] See Besselink 2002, 194–95, where the importance of the *prima naturae* is not sufficiently emphasized.
[50] See Cic. *Leg*. 1.18–19; 2.8.

valid for all humans. That, in turn, is a sufficient proof that there is no dissimilarity within the species."[51] The addressees of natural law were thus all of humanity. They could act in accordance with right reason and thus with natural law, which continued to be described as the exercise of virtue; at least since Cicero, however, its content had been supplemented with an ethic of rules. War as a morally relevant act was subject, for Cicero, to certain rules that permitted a distinction between just and unjust war. Grotius adopted these rules, oriented around the institution of private property, in *De iure belli ac pacis*, as he had in *De iure praedae*. These norms form natural law proper as we became acquainted with it in *De iure praedae*, where Grotius made private property, in the sense it was used in Cicero's *De officiis*, the main criterion of natural justice. The description of natural law in the Prolegomena to *De iure belli ac pacis* sounds familiar:

> This Sociability, which we have now described in general, or this Care of maintaining Society [*societatis custodia*] in a Manner conformable to the Light of human Understanding, is the Fountain of Right, properly so called; to which belongs the Abstaining from that which is another's [*alieni abstinentia*], and the Restitution [*restitutio*] of what we have of another's, or of the Profit we have made by it, the Obligation [*obligatio*] of fulfilling Promises, the Reparation of a Damage done through our own Default, and the Merit of Punishment among Men.[52]

Here, too, as in *De iure praedae*, violation of these norms allows subjective natural rights to emerge. The question whether war is in accordance with natural law in the narrower sense must be decided, according to Grotius, by using *recta ratio* as the standard; and *recta ratio* does *not* recognize the instinct for self-preservation, the first stage of *oikeiosis*, as a sufficient condition. Only the substantive criterion of justice was sufficient; it was no longer understood merely as a virtue – that is, a disposition to act in a certain way – as it was for the older Stoa, but as a system of norms, in accordance with Cicero. Self-preservation only accorded with natural law, in Grotius' view, to the extent that it was just, which meant, in turn, to the extent that the norms of natural law grant the individual the right to self-preservation.[53] Violence in the service of self-preservation that violates others' rights cannot be just, and cannot reflect right reason. Grotius here

[51] Cic. *Leg.* 1.29–30: *Itaque quaecumque est hominis definitio, una in omnis valet. Quod argumenti satis est nullam dissimilitudinem esse in genere.* See Vander Waerdt 1994a, 4872: "[N]atural law is now the prescription not strictly of right reason, which only the sage possesses, but of the rationality in which all human beings share."

[52] *RWP*, 1.85–86; *IBP* prol. 8.

[53] See Haakonssen 2002, 32.

referred once again to the second stage of *oikeiosis*, and thus overcame the view that the principle of self-preservation is the only criterion:

> But Right Reason [*recta ratio*], and the Nature of Society [*natura societatis*], which is to be examined in the second and chief Place, does not prohibit all Manner of Violence, but only that which is repugnant to Society, that is, which invades another's Right [*ius alienum*].[54]

As a result, "the Use of Force, which does not invade the Right [*ius*] of another, is not unjust."[55] The criterion for use of force that accords with natural law is thus justice, prescribed by right reason, and not the principle of self-preservation. However, Grotius reformulates justice, and thus Cicero's Stoic *honestum*, and frames it in terms of *subjective rights*: just action is action that violates no one else's rights.[56] Grotius arrived at this conclusion through an equation of justice per se with corrective justice. As we shall see in the following section, this put in place the presuppositions for Grotius' rich conception of the state of nature, which is based on a particular theory of justice. Rejecting what Aristotle had deemed the more important part of justice, namely distributive justice, in favor of an account of what Aristotle had called corrective justice implied a rejection of an Aristotelian, *polis*-based account of justice as an eudaimonist virtue, and made possible a theory of justice suited for a rule-governed state of nature. As we shall see in later chapters, from this theory of corrective justice flows both an account of the state of nature and a doctrine of subjective natural rights which are held to exist in such a natural state. A detailed discussion of the individual rights envisaged by Grotius follows in Chapters 7, 8, and 9.

Rejecting Aristotle's "tyranny": from distributive to corrective justice

Grotius' lack of interest in the kind of justice that presupposes the context of an established political community is shown in the use he made of Aristotle's theory of justice in the *Nicomachean Ethics*. In *De iure praedae*, Grotius adopted the Aristotelian dichotomy between distributive and corrective justice;[57] but unlike Aristotle himself, he devoted his main attention

[54] *RWP*, 1.184; *IBP* 1.2.1.5. [55] *RWP*, 1.185; *IBP* 1.2.1.6.

[56] This creates a moral obstacle to the mere pursuit of self-preservation, which can thus – contrary to Tuck 1987, 113 – not be taken to be the basic principle. See Haakonssen 2002, 32. Cf. also Besselink 2002, 193–95.

[57] Arist. *Eth. Nic.* 5.1130b30ff. Both types are, in Aristotle, parts of particular justice, which is contrasted with universal justice. The latter, broad sense of justice is identical with the whole of virtue, when

to corrective justice,[58] which alone he identified with natural law.[59] Grotius referred to Aristotle's *Politics*, and quoted the characterization of justice there as virtues affecting the social sphere (ἀρετή κοινωνική), which must be understood in Aristotle as an essential element of the *polis* and of the good life of the *polis*.[60] The distinction made in the *Nicomachean Ethics* between proportional (τὸ δίκαιον ἀνάλογον) and arithmetic (κατὰ τὴν ἀριθμητικήν) justice[61] is also adopted by Grotius, who speaks of *iustitia proportionalis* or *iustitia assignatrix*.[62] However, in Grotius, Aristotle's proportional or distributive justice is reinterpreted, in a rather anti-Aristotelian way, as limited in effect to the household.[63] In Aristotle, both types of justice are connected to the *polis* and have no applicability to the household, which knows no justice in the actual sense and is structured as a monarchy: justice is political, belongs to the political sphere (ἡ δὲ δικαιοσύνη πολιτικόν).[64] In contrast to Aristotle, Grotius applies only corrective justice to the sphere of the free, equal subject of law, as "Number (*numerus*) merely orders the parts in their relations with one another; proportion relates the parts to the whole."[65] This follows from the purpose of the theory of justice in *De iure praedae*: to be of use to Grotius, this theory of justice had to be first of all transferable to a *theory of law*.[66]

This one-sided concentration on Aristotle's corrective justice is thus determined by a number of factors. Apart from the fact that the state of nature, to Grotius, presupposes the absence of a distributive authority and thus simply rules out distributive justice,[67] the concentration on corrective justice allows the formulation of a rule-based ethics that need not depend on an abstract description of character, or on dispositions to act virtuously – need not depend, in short, on an ethics of virtue.

As he would later do more clearly in *De iure belli ac pacis*, Grotius thus extracted those parts of the Aristotelian theory of justice from the *Nicomachean Ethics* that involved an area of morality for which, according

virtue is expressed towards other people; see Arist. *Eth. Nic.* 5.1130a10ff. On Aristotle's concept of justice, see Irwin 1988, 424–38; Miller 1995, 66–86; Kraut 2002, 98–177.

[58] The status of reciprocal or commercial justice (*Eth. Nic.* 5.1132b21: τὸ ἀντιπεπονθός) as a further kind of particular justice in Aristotle is unclear; Grotius clearly thought of it as a part of corrective justice (*CLP*, 29; *RWP*, 1.142–43). For commercial justice in Aristotle, see Irwin 1988, 429–30, and 625n11.

[59] If not yet with law in general, as he later would in *De iure belli ac pacis*. See Haggenmacher 1997, 89.

[60] *IPC* 2, fol. 8; Arist. *Pol.* 3.1283a37ff. See Newman 1902, 235.

[61] Arist. *Eth. Nic.* 5.1131a29ff.; 5.1132a1ff. [62] *IPC* 2, fol. 8. [63] Ibid. [64] Arist. *Pol.* 1.1253a38.

[65] *IPC* 2, fol. 8: "Numerus tantum partes inter se componit, proportio partes ad totum refert."

[66] Apart from the historical eleventh chapter and chapters 14 and 15, all the chapters of *IPC* have a specifically legal character.

[67] See Haggenmacher 1997, 122: "Dans l'état de nature il n'y a guère que Dieu ou le père de famille qui puissent procéder à de telles distributions."

to Aristotle, *rules* of behavior could be formulated, as opposed to virtues. These rules did not require a certain attitude or disposition of character on the part of the actor.[68] Grotius derived these rules primarily from Roman sources, with Cicero and the *Digest* playing the most prominent roles. Aristotelian ethics played a role only superficially and only to the extent that it could be adapted to a Roman ethics in which private property and respect for contractual obligations were pivotal.[69] This also corresponds to the relative weight of the references – the *Corpus iuris* is the work most often cited in *De iure praedae*, with 453 express references, and Aristotle, with around 100 references, is narrowly exceeded by Cicero as the author to whom Grotius explicitly refers most frequently.[70]

Grotius describes distributive justice (*iustitia assignatrix*) as proportional in Plato's sense – this, he said, was the justice meted out by the *paterfamilias* when he distributes goods to members of his household depending on their age and health.[71] Then Grotius explains corrective or compensatory justice (*iustitia compensatrix*) and derives from it two further laws (*leges*) of natural law:

> The other kind of justice, which we now choose to designate as the Compensator [i.e., compensatory justice, *iustitia compensatrix*], is concerned not with communal affairs [*communia*], but with those peculiar to the individual [*propria*]. Thus compensatory justice does not relate the parts to the whole; that is to say, it weighs things and acts without regard for persons. The function of such justice is twofold, namely: in regard to good, the preservation thereof; in regard to evil, its correction. Hence these two laws arise: first, *Evil deeds must be corrected*; secondly, *Good deeds must be recompensed*.[72]

These two norms, described by Grotius as laws, together with the four laws that preceded them, form the principles of natural law and emerge from the two normative principles or rules (*regulae*) discussed above in Chapter 2,

[68] For a lucid discussion of the status of rules in Aristotle's virtue ethics, see Tugendhat 1993, 253.

[69] See Miller 2003, 124–26 for the view that Grotius' interpretation of Stoicism is rule-oriented (which Miller calls a "generalist reading of Stoicism"), without, however, distinguishing between earlier Greek and later Roman Stoics.

[70] There are 339 references to the *Digest*. I count 110 references to Cicero, with the emphasis on *De officiis* with 40 references, and 103 for Aristotle, including two references to the spurious *Rhetorica ad Alexandrum*. See the index in *IPC* Scott, 398, 401, 402.

[71] *CLP*, 28–29; *IPC* 2, fol. 8: "Numerus tantum partes inter se componit, proportio partes ad totum refert. Itaque hi quibus alicuius totius procuratio convenit, iustitia utuntur proportionali, quae et assignatrix dici potest. Hac paterfamilias domesticis suis, pro diversa aetatum ac conditionum ratione, dimensum pensumque assignat."

[72] *CLP*, 29; *IPC* 2, fol. 8: "Altera autem iustitia, quam nunc compensatricem placet dicere, non in communibus sed in propriis cuiusque versatur, ideoque partes ad totum non refert, hoc est res et actiones seposito personarum respectu examinat. Opus eius duplex, circa bonum quidem, servare; circa malum autem, sanare. Et leges igitur duae: una MALEFACTA CORRIGENDA: altera BENEFACTA REPENSANDA."

or from the sources of natural law defined in these precepts. The first so-called law (*lex*) of natural law is that "it shall be permissible to defend [one's own] life and to shun that which threatens to prove injurious."[73] The second is that "it shall be permissible to acquire for oneself, and to retain, those things which are useful for life."[74] These first two laws are part of primary natural law, while the third and fourth laws derive from secondary natural law or the primary law of nations. While the first two *leges* are based on the principle of self-preservation, the third and fourth are due to the Stoic doctrine of the community of people with the Gods and among themselves, which Grotius took from Seneca's *De ira*, Cicero's *De legibus*, and a passage by Florentinus from the *Digest*.

It should by now be clear that Grotius was referring here, as Cicero had done in *De legibus*,[75] to the Stoic doctrine of *oikeiosis*, which was of course foundational for his theory of natural law, and which is aimed here – as it had been by Cicero before him – against the Academic skeptics of natural law.[76] As we have seen, this underlying doctrine of Grotius' Stoic anthropology, which is really the philosophical foundation on which his conception of the state of nature and his natural-law doctrine rest, is given much more elaboration in the *De iure belli* than in his earlier work, but can already be found in inchoate form in the *De iure praedae*. The *cognatio* of people among themselves, Grotius argued, which the Stoics in particular had propagated, yielded laws three and four, which refer to the goods of others.[77] These two are: "Let no one inflict injury upon his fellow" and "Let no one seize possession of that which has been taken into the possession of another."[78] Grotius refers explicitly to Cicero's *De officiis*, where the duty of justice is presented as follows: "Of justice, the first office is that no man should harm another unless he has been provoked by injustice, the next that one should treat common goods as common and private ones as one's own."[79] In his first four laws of natural law, Grotius thus followed Cicero

[73] *CLP*, 23; *IPC* 2, fol. 6: "VITAM TUERI ET DECLINARE NOCITURA LICEAT."

[74] *CLP*, 23; *IPC* 2, fol. 6: "ADIUNGERE SIBI QUAE AD VIVENDUM SUNT UTILIA EAQUE RETINERE LICEAT."

[75] Cic. *Leg*. 1.22ff.

[76] *IPC* 2, fol. 7: "Unde apparet quam non recte magistri ignorantiae Academici contra iustitiam disputaverint, eam quae natura est ad utilitatem duntaxat suam ducere . . . "

[77] *IPC* 2, fol. 7: "Haec est illa hominum inter se cognatio, illa mundi civitas, quam tot tantisque praeconiis veteres philosophi nobis commendant, praesertim Stoici, quorum sententiam etiam Cicero exsequitur . . . Ex regula igitur prima et secunda leges duae procedunt de bono alieno, quae prioribus de bono suo respondent, easque iusto limite circumscribunt."

[78] *CLP*, 27; *IPC* 2, fol. 7: "Una NE QUIS ALTERUM LAEDAT; altera NE QUIS OCCUPET ALTERI OCCUPATA. Haec lex abstinentiae, illa innocentiae est . . . "

[79] *Cic. Off.* 1.20: *Sed iustitiae primum munus est, ut ne cui quis noceat, nisi lacessitus iniuria, deinde ut communibus pro communibus utatur, privatis ut suis*.

in his concentration on the inviolability of the person and property; he identified Cicero's Stoic-inspired,[80] but essentially Roman, theory of justice with Aristotle's corrective justice.[81] In addition to his use of Cicero's works, Grotius prominently, and very influentially, builds the Roman private law of the *Digest* into this theory of justice.

Grotius emphasized that all six laws of natural law counted as corrective and not distributive justice in Aristotle's sense. In his explanations, Grotius made it clear that his concept of corrective, natural justice essentially involves a doctrine of property law and of the law of obligations (which includes torts and contracts):

> In accordance with this form of justice, he who has derived gain from another's good deed repays that exact amount to the benefactor whose possessions have been diminished, while he who has suffered loss through the evil deed of another receives the exact equivalent of that loss from the malefactor whose possessions have been increased.[82]

Grotius continued by drawing a link between Aristotle's portrayal of corrective justice (τὸ διορθωτικὸν δίκαιον) and the description of various obligations by Roman legal scholars:

> Hence it follows that there are two kinds of obligation [*obligationes*], in the terminology of the philosophers ἑκούσιον καὶ ἀκούσιον, "voluntary and involuntary"; in that of the jurists, obligation *ex contractu* [i.e., arising from a contract] and obligation *ex delicto* [i.e., arising from wrongdoing]. In both cases, the person who has gained is regarded as the debtor and he who has lost as the creditor, the former having been enriched by the precise amount of the latter's impoverishment; and if the amount thus lost is taken from the debtor and given to the creditor, that is true justice [*vera iustitia*].[83]

The identification of Aristotle's corrective justice with the doctrine of obligations in the Roman law of the *Digest* is typical of Grotius' way of dealing with classical sources and, substantively speaking, constitutes the

[80] Long 1997, in line with Annas 1989 and Schofield 1999, ascribes already to the Greek Stoics a concern with private property; this seems, however, a retrojection of a specifically Roman, Ciceronian concern. See for criticism along these lines Mitsis 2005.

[81] On the specifically Roman character of Cicero's theory of justice, see Atkins 1990, 278–81, who convincingly ascribes the lion's share of this theory not to Panaetius, but to Cicero himself (279): "The detailed content of the theory itself is strikingly appropriate to the public political life and traditions of Rome." Cf. also Garnsey 2007, 112–14; Lefèvre 2001: 23–40.

[82] *CLP*, 29–30; *IPC* 2, fol. 8: "Per hanc et qui plus habet alterius benefacto idipsum benefactori minus habenti reddit, et qui minus habet alterius malefacto idipsum a malefactore plus habente recipit."

[83] *CLP*, 30; *IPC* 2, fol. 8f.: "Unde sequitur obligationum genera esse duo, Philosophis ἑκούσιον καὶ ἀκούσιον, voluntariam et nec voluntariam, Jurisprudentibus ex contractu et delicto. Utrovis modo qui plus habet debitor, qui minus creditor dicitur, tantumdemque alteri superest quantum alteri deest: quod si illi demtum huic additur, ea vera iustitia." In his notes, Grotius refers to the discussion of corrective justice in Arist. *Eth. Nic.* 5.1131a1ff. and to the division of obligations in *Dig.* 44.7.1.

crucial move to gear the Aristotelian framework of justice towards a theory of justice ultimately inspired by Cicero and the Roman jurists that has nothing in common with Aristotle's eudaimonistic concerns. Grotius uses the elements of Aristotelian ethics suited to adaptation to the obligation and property-law categories of Roman private law, neglecting the doctrine of distributive justice that plays an incomparably greater role than corrective justice does for Aristotle, both in the *Nicomachean Ethics* and especially in the *Politics*.[84] Grotius thus foists the theory of justice developed by Aristotle for the context of the *polis* onto a property-oriented theory of justice of Roman provenance, which he then transfers to the sphere of the oceans, understood as the state of nature, and has them develop their full legal effect there.[85]

The norms of natural law are thus norms of corrective justice that endow the subjects of natural law with subjective rights. While Grotius' reception of Aristotle's doctrine of justice in the *Nicomachean Ethics* had already begun in *De iure praedae*,[86] *De iure belli ac pacis* gave even greater weight to compensatory or corrective justice. True to his announcement in the Prolegomena, Grotius was not willing to subject himself to what he increasingly felt to be Artistotle's "tyrannical" dominance.[87] As opposed to the Aristotelians, Grotius was attracted to a conception of justice that could be transposed from Artistotle's *polis* context to the pre-political and interstate sphere, a conception that did not necessarily presuppose a legally constituted polity.[88] In *De iure belli ac pacis* he thoroughly criticized Aristotle's conception of justice.[89] Grotius found it plausible to contrast the virtue of justice with *pleonexia*, the desire to have too much, or greed, especially as justice to him "consists wholly in abstaining from that which is

[84] This neglect of distributive justice seems ultimately to be the reason for Villey's criticism that Aristotle's legal philosophy was "deformed" in legal humanism, especially in Grotius: see Villey 1976, esp. 212. Villey fails to note, however, that this "deformation" is ultimately based upon the reception of Roman private law.

[85] See Tuck 1979, 63, who emphasizes the "unAristotelian character of all this."

[86] See Brett 2002, 38: "the Aristotelian treatment *peri tou dikaiou* in Book V of the *Nicomachean ethics* continues to structure Grotius's Latin treatment *de iure*." In 1618 Grotius owned Heinsius' 1607 edition of the *Ethica*; see Molhuysen 1943, no. 71.

[87] *IBP* prol. 42: "Utinam tantum principatus ille ab aliquot hinc saeculis non in tyrannidem abiisset . . . "

[88] This aspect is overlooked by Haakonssen 1985, 254–56, who confuses Grotius' *iustitia expletrix* with Aristotle's notion of particular justice, which would include distributive justice as well. This is however not the case, for Grotius identifies his corrective justice clearly with Aristotle's justice *en tois sunallagmasi*; see *IBP* 1.1.8.1; Arist. *Eth. Nic*. 5.1131a1ff.

[89] Rejecting in particular the idea of embedding justice in Aristotle's *mesotes*-structure of the virtues: *IBP* prol. 43–45; Arist. *Eth. Nic*. 5.1132a29f.

another Man's."[90] In Grotius' view, the "very Nature of Injustice" consisted exclusively of "the Violation of another's Rights."[91]

As in *De iure praedae*, therefore, Grotius adopted that aspect of the doctrine of justice in the *Nicomachean Ethics* that could be expressed in rules of behavior, rather than merely requiring virtue – a certain attitude or disposition – on the part of the actor. The Aristotelian doctrine of justice, arising out of the context of the *polis*, was thus adapted to late-Stoic, and especially Roman, concepts of natural justice. In *De iure belli ac pacis*, Grotius transposed the corrective justice (*diorthotikon dikaion*) reserved, by Aristotle, for established polities, onto the extra- and pre-political sphere of the state of nature. Aristotle's *Politics*, which dealt exclusively with distributive justice and never spoke of corrective justice, was interpreted by Grotius in the Prolegomena to *De iure belli ac pacis* as the portrayal of a discipline separate from law, and contrasted with the ethical doctrine in the narrower sense dealt with in the *Nicomachean Ethics*:

> I have forborn meddling with those Things that are of a quite different Subject, as the giving Rules about what it may be profitable or advantageous for us to do: For they properly belong to the Art of Politicks, which Aristotle rightly so handled by itself, that he mixed nothing foreign with it: Bodin on the contrary has confounded it with that which is the Subject of this Treatise. Yet in some Places I have made mention of the useful [*quod utile est*], but by the by, and to distinguish it more clearly from a Question of the just [*iustum*].[92]

In *De iure belli ac pacis*, Grotius explicitly narrowed this "question of the just," that is to say, the sphere of corrective justice, to the sphere of natural, subjective rights. In this work, Grotius distinguished, as did Francisco Suárez before him, between *ius* as what is objectively right, *ius* as a subjective right, and *ius* as what is prescribed by a law.[93] But only *ius* in the sense of a subjective right, as a *facultas*, was viewed by Grotius as "Right properly, and strictly taken" (*ius proprie aut stricte dictum*).[94] Such subjective rights fulfilled the conditions of precisely that justice defined as "justice in the actual or narrow sense," that is, Aristotle's corrective justice,

[90] *RWP*, 1.120; *IBP* prol. 44. [91] *RWP*, 1.121; *IBP* prol. 44. [92] *RWP*, 1.131; *IBP* prol. 57.

[93] *IBP* 1.1.3–9. This differentiation Grotius could have gleaned from Suárez' *De legibus ac Deo legislatore*, 1.2.4–6 (1612). See Vermeulen 1982/83, 57–58. But cf. Haggenmacher 1981, 51–52, 75ff., 83; and Feenstra 1984, 79, who argue against such an influence.

[94] *RWP*, 1.138; *IBP* 1.1.5. The identification of *ius* with *facultas* (something Jean Gerson and the Spanish scholastics had already done) can first be found in Grotius' work in his *DCQ*. See Tierney 1997, 207–35.

which Grotius termed *iustitia expletrix* and contrasted with distributive justice:[95]

> 'Tis expletive Justice, Justice properly and strictly taken, which respects the *Faculty* [*facultas*] or *perfect Right*, and is called by *Aristotle* συναλλακτικὴ, *Justice of Contracts*, but this does not give us an adequate Idea of that Sort of Justice. For, if I have a Right to demand Restitution of my Goods, which are in the Possession of another, it is not by vertue of any *Contract*, and yet it is the Justice in question that gives me such a Right. Wherefore he also calls it more properly ἐπανορθωτικὴν, *corrective* Justice. *Attributive Justice*, stiled by *Aristotle* διανεμητικὴ *Distributive*, respects Aptitude or *imperfect Right*, the attendant of those Virtues that are beneficial to others, as Liberality, Mercy, and prudent Administration of Government.[96]

Grotius' *iustitia expletrix* deviates in some minor ways from Aristotle's corrective justice, as defined in the *Nicomachean Ethics*. Thus Grotius wrongly alleged that corrective justice for Aristotle had meant merely voluntary contractual relations.[97] Aristotle's corrective justice no longer referred, as in *De iure praedae*, merely to matters affecting individuals,[98] but was interpreted as capable of being applied to the behavior of governments: "when the State repays out of the publick Funds what some of the Citizens had advanced for the Service of the Publick, it only performs an Act of *Expletive Justice*."[99] This opens up the possibility of certain natural rights of citizens vis-à-vis the state, and therefore represents a potential limitation on state power. The question of the relationship between natural justice and the state can thus be raised, at least in principle. In *De iure praedae*, this had not yet played a role.

Grotius' corrective or "expletive" justice is thus defined through its object, and the object of this justice is subjective rights – *iura* or *facultates*. Only corrective justice can be called justice or natural law in the narrow and proper sense. Distributive justice, the object of which is imperfect right or aptitude (*aptitudo*), is not part of this. The virtue that accompanies this last type of justice is not justice in the narrow sense (*iustitia*), but beneficence (*liberalitas*). This type of justice is at best "by the wrong Use

[95] *IBP* 1.1.8.1: "Facultatem respicit iustitia Expletrix, quae proprie aut stricte iustitiae nomen obtinet, συλλακτικὴ Aristoteli . . . "
[96] *RWP*, 1.142–43; *IBP* 1.1.8.1.
[97] Notwithstanding Arist. *Eth. Nic.* 5.1131a1ff.; 1131b25ff. (cf. *IPC* 2, fol. 8). Barbeyrac noticed this; *IBP* Barbeyrac 1.1.8n1, pp. 5–6.
[98] See *IPC* 2, fol. 8: "Altera autem iustitia, quam nunc compensatricem placet dicere, non in communibus sed in propriis cuiusque versatur . . . "
[99] *RWP*, 1.46; *IBP* 1.1.8.3.

of the Word . . . said to belong to this Natural Law."[100] It becomes clear here that, in *De iure belli ac pacis*, Grotius adapted the distinction between corrective and distributive justice to a distinction undertaken in Cicero in the first book of *De officiis*.[101] Cicero had differentiated between justice in the broader sense (*beneficentia*) and actual justice (*iustitia*), which deals with private property and obligatory rights *in personam*:

> There are two parts of this: justice [*iustitia*], the most illustrious of the virtues, on account of which men are called 'good'; and the beneficence [*beneficentia*] connected with it, which may be called either kindness or liberality.[102]

For Cicero, justice in the narrow sense (*iustitia*) concentrated on property and contractual rights.[103] *Liberalitas*, in contrast, "is bestowed upon each person according to his standing."[104] It becomes clear that Grotius was indeed following Cicero's *De officiis* not only from the terminology, but from a reference added to the editions after 1642. To explain the object of distributive justice, *aptitudo*, Grotius used a quotation from *De officiis* in which Cicero created a hierarchy of various addressees of *liberalitas* and completed his portrayal of beneficence.[105] Grotius' postulates of distributive justice resemble Cicero's *beneficentia* – they are not part of natural law, *iustitia* in the actual sense, and are not really owed. In contrast, as for Cicero, the subjective rights, or *facultates*, which make up the actual object of natural law, are those rights protected by Roman property law and the law of obligations.[106]

In the editions after 1631, Grotius added to his discussions of both types of justice a quotation from Xenophon's *Cyropaedia*, with which he summed up the difference between distributive and compensatory justice as follows:

[100] *RWP*, 1.154; *IBP* 1.1.10.3.

[101] Haakonssen's discussion of Grotius' conception of corrective justice obscures the Ciceronian background of this doctrine: "It was, however, Grotius's handling of this Aristotelian distinction that was to determine the modern debate": Haakonssen 1985, 254.

[102] Cic. *Off.* 1.20: *cuius partes duae: iustitia, in qua virtutis splendor est maximus, ex qua viri boni nominantur, et huic coniuncta beneficentia, quam eandem vel benignitatem vel liberalitatem appellari licet*.

[103] See Cic. *Off.* 1.21–41.

[104] Cic. *Off.* 1.42: *Videndum est . . . ut pro dignitate cuique tribuatur*. Annas 1989, 168–69, writes the following on the difference between *iustitia* and *liberalitas* in Cicero: "I think it can be shown that justice proper is concerned with what we could call matters of legal obligation and rights, while benevolence is concerned with moral duties which we have towards others as fellow human beings."

[105] Cic. *Off.* 1.58.

[106] Thus Annas 1989, *passim*.

> This Distinction *Cyrus* learnt of his Tutor: For when *Cyrus* had adjudged the lesser Coat to the lesser Boy, tho' it belonged to another Boy of a bigger size; and so on the other side gave his Coat, being the bigger, to that bigger Boy. His Tutor told him, ὅτι ὁπότε μὲν κατασταθεῖν τοῦ ἁρμόττοντος κριτὴς, &c. That *had he been appointed Judge of what fitted each of them best, he ought to have done as he did: But since he was to determine whose Coat it was, his Business was to have considered which had a just Title* [κτῆσις δικαῖα *possessio iustior*] *to it, whether he who took it away by Force, or he who made it, or bought it.*[107]

Grotius' translation of κτῆσις δικαῖα as *possessio iustior* also indicates that Grotius wished to represent Aristotle's corrective conception of justice using the categories of Roman property law.[108]

It is important to emphasize that Grotius adopted and made explicit Cicero's implied distinction between essentially *legal* claims, arising from property, contracts, and wrongdoing (delicts), and moral duties, which were not legally sanctioned. Applied to the Aristotelian theory of justice, this means that for Grotius, only corrective justice enjoyed legal protection, while Aristotle's distributive justice was denied any specifically legal character.[109] Thus in Grotius' *De iure belli*, corrective justice gained a very prominent position indeed and, as in *De iure praedae*, was expressed in the terminology of Roman law. Furthermore, in *De iure belli ac pacis*, in contrast to *De iure praedae*, corrective justice was clearly defined by way of the subjective natural rights that Grotius – probably following Francisco Suárez – had already called *facultates* or *iura* around 1615 in his *Defensio capitis quinti maris liberi*.[110] The formulation of this highly influential theory of natural rights we shall discuss in Chapter 7. But let me note here one important trajectory of influence of Grotius' doctrine, the straight line pointing from Grotius' exclusive emphasis on corrective justice to Adam Smith's identical emphasis, when he writes (referencing *De iure belli ac pacis*) that corrective or commutative justice "can alone properly be called Justice," and that "the Rules of what is properly called Justice" can be "extorted by force," are "not left to the freedom of our own wills," and admit of "exact precision." The violation of this justice "exposes to punishment."[111]

[107] *RWP*, 1.146–47; *IBP* 1.1.8.3.

[108] Roman property law granted possession (via interdicts) to the party who had merely a *better* (*iustior*) right than the other party, without making a determination as to absolute property rights (which would involve proving title with a *vindicatio*); see Kaser 1971/75, § 96, III.

[109] See Tanaka 1993, 21–22.

[110] See Villey 1976, 212, who takes this to be tantamount to a "deformation" of the Aristotelian tradition.

[111] *TMS* 2.2.1.5, 79; 7.2.1.10, 269; fragment on justice, 390.

Corrective justice, as opposed to the virtue of distributive justice, lends itself to being expressed as rules. This is a further reason for the impact of Grotius' theory of justice – both Adam Smith and David Hume as well as other Scottish writers of the eighteenth century, not to mention the natural lawyers, put an emphasis on the rule-based character of justice as well as its accuracy. As opposed to generosity or prudence, the rules of justice are "accurate in the highest degree," Smith writes. "If I owe a man ten pounds, justice requires that I should precisely pay him ten pounds," and the "rules of justice" resemble "the rules of grammar" in that they are equally "precise, accurate, and indispensable."[112] Smith's view of the history of this outlook is instructive: "In none of the ancient moralists, do we find any attempt towards a particular enumeration of the rules of justice." By contrast, "Grotius seems to have been the first who attempted to give the world any thing like a system of those principles which ought to run through, and be the foundation for the laws of all nations: and his treatise of the laws of war and peace, with all its imperfections, is perhaps at this day the most complete work that has yet been given upon this subject."[113]

This system of "rules of justice" had been designed by Grotius with a particular, actually existing state of nature in mind: the high seas of Southeast Asia. Grotius' focus on Aristotle's corrective justice served thus to undergird his concept of the state of nature, of a realm without *polis* but with rules of corrective justice, apt to being formulated in *legal* terms and giving rise to subjective rights. In the following chapter we shall treat this concept of the state of nature.

[112] *TMS* 3.6.10–11, 175.
[113] *TMS* 7.4.37, 341–42. This stance Smith probably owes to Barbeyrac.

CHAPTER 6

Grotius' concept of the state of nature

The idea of a pre-political state of nature, devoid of any of the conventions created by political community, had been an essential premise of modern natural law thinking since the seventeenth century.[1] The outstanding importance of the theory of the state of nature for the development of early modern natural law doctrine is generally recognized in the literature; the prevailing view can still be well encapsulated in Leo Strauss' assessment that the philosophical doctrine of natural law has been, since Thomas Hobbes, essentially a doctrine of the state of nature.[2]

In addition, the *communis opinio* in the scholarly literature agrees that the concept of the state of nature was made usable for political philosophy by Hobbes after it had served medieval Christian theology as an antithesis to the state of grace. In Thomas Aquinas, *status legis naturae* describes the state in which humanity found itself before the revelation of Mosaic law. This use can also be found in the late Spanish scholastics, and it establishes a fundamental dichotomy between *status naturae* on the one hand and *status legis Christianae* on the other. "State of nature" in this sense can also describe a political community, specifically a pagan one, and need not refer exclusively to pre-political conditions.[3]

Fernando Vázquez de Menchaca (1512–69),[4] the Spanish legal scholar and advisor to Philip II, then formulated a dichotomy between original, natural freedom, which is absolute, and life in a political community based on convention, where the original natural freedom has been limited by contract for the benefit of its members.[5] This sharp differentiation anticipated Hobbes, for whom the term "state of nature" applied exclusively to the pre-political situation of humanity outside of states (a "conditio

[1] For a survey, see Kingsbury and Straumann 2010a. [2] Strauss 1953, 184.
[3] See the overview in Strauss 1953, 184ff. Höpfl and Thompson 1979, 940 even ascribe to Hobbes the invention of the concept of the state of nature itself.
[4] On his life, see Seelmann 1979, 25–30. [5] On Vázquez, see Brett 1997, 165–204.

hominum extra societatem civilem").[6] The two authors both developed their concepts of the state of nature with an eye to the problem of legitimizing rule; the theory of the state of nature "must convey the 'exeundum e statu naturali' insight, must provide proof that a condition that lacks all government order and security functions, and in which each pursues his own interests by any means that appear proper and available to him, must lead to a virtual war of all against all, and thus must be equally unbearable to everyone."[7]

In Richard Tuck's view, the use of the concept of the state of nature is typical of natural law scholars of the seventeenth and eighteenth centuries; these conceptions of a state of nature, he says, were characterized above all by the fact that individuals placed in the state of nature were granted a very limited number of rights and duties.[8] According to Tuck, they drew on the contemporary experience of international relations in the world of the early seventeeth century. The behavior of early modern sovereign states among themselves served as a model for the idea of individuals in a pre-political situation: "There is a real and imaginatively vivid example of just such agents interacting with each other in the domain of international relations. We can conceive of ourselves as natural individuals behaving like sovereign states . . . "[9]

It will become clear from the following analysis that, in regard to Grotius, it was not so much the contemporary world and the relations of emerging states among themselves that influenced his concept of the individual in the state of nature, and thus of his doctrine of subjective natural rights; on the contrary, for Grotius it was primarily private-law doctrines and classical ideas of a state of nature that were applied to inter-state relations of the early modern era. Here it was mainly Roman law, Cicero, and classical doctrines of the origin of society and culture formation that played a major role. The contemporary international world, with its state practice favoring Iberian monopoly claims and creating customary law in East India, could have no particular normative attractiveness for Grotius, who sought to undermine

[6] *DC*, 81. Hobbes continues (*Praefatio ad lectores* 14, p. 81) by describing this state of nature as "bellum omnium contra omnes; atque in eo bello jus esse omnibus in omnia." This is the reason that people wish to leave the state of nature: "Deinde homines omnes ex eo statu misero et odioso, necessitate naturae suae, simulatque miseriam illam intellexerint, exire velle."

[7] Kersting 1994, 15.

[8] Tuck 1999, 6, who wrongly ascribes to Hobbes the invention of the term "state of nature"; aside from the earlier use of *status naturae* by the scholastics as well as by the late scholastics of Salamanca, the concept had also already been used by Grotius himself; see *IBP* 2, 5, 15, 2; 3, 7, 1, 1. See also above, 51n15.

[9] Tuck 1999, 8–9.

precisely these prevailing legal conditions. Also, for Grotius' concept of the state of nature, the problem of legitimizing rule, which informs the doctrines of both Vázquez and Hobbes, was unimportant – Grotius dealt with natural norms applied to the state of nature in order to judge disputes in this state of nature, not in order to find a criterion for the legitimacy of existing political orders. In this sense, his doctrine was not a *political* theory in the narrow sense at all.

Grotius was not the first to come up with the idea of governing an actually existing state of nature with rules of Roman law which were taken to be declaratory of, and to a certain extent identical with, natural law. For the civilian jurist Alberico Gentili (1552–1608), an important predecessor of Grotius, it seemed already plausible to apply rules taken from the Roman law of the *Institutes* and the *Digest* to the relations between different polities both within and beyond Europe. This was something the Spanish scholastics from Soto and Francisco de Vitoria onwards had already tried to do, if only to the limited extent that they were versed in Justinian's law code, drawing on the Roman law concepts of natural law and the law of nations (*ius gentium*) in order to apply them to the behavior of Spain overseas, effectively using the universality of these legal ideas against the jurisdictional claims of the old universalist powers, the pope and the emperor. Before Gentili, one of the first to apply Roman law to the state of nature in a more sustained fashion was Vázquez de Menchaca in his *Controversiae illustres* (1564).

Gentili then explicitly put forward the claim that Roman law was valid in the extra-European domain and between sovereign polities and empires, on the ground that Justinian's rules, or at least some of them, were declaratory of the *ius naturale* and *gentium*: "It is also an absurd statement . . . that it is inadvisable to appeal to jurists in the case of such differences among sovereigns, because these disputes must be decided by the law of nations and not by the subtleties and fictions of the civil law of Justinian, which was later established by the emperors for the disputes of private individuals alone." Quite to the contrary, Gentili held, "the law which is written in those books of Justinian is not merely that of the state, but also that of the nations and of nature; and with this last it is all so in accord, that if the [Roman] empire were destroyed, the law itself, although long buried, would yet rise again and diffuse itself among all the nations of mankind. This law therefore holds for sovereigns also, although it was established by Justinian for private individuals . . . "[10]

[10] *IB* 1.3.16–17.

To what extent does the humanist vs. scholastic distinction matter?

The identification of Justinian's corpus of Roman law with the law of nature was to have a major impact on how this key concept of early modern political thought, the state of nature, was construed. In the historiography of political thought, it has become common to distinguish sharply between "scholastic" and "humanist" accounts of international relations in the early modern epoch, with the latter demonstrating a well developed taste for self-preservation and imperialist aggrandizement and the former insisting on a richer sphere of moral and legal constraints that reach beyond the established polities.[11] While Aristotelian and Thomist accounts of justice are said to have nourished the scholastic tradition from Aquinas to the Spanish scholastics of Salamanca, the humanists, breaking with the scholastics, allegedly combined a fresh account of natural rights with a classical Roman tradition of reason of state, drawing on Cicero and Tacitus and acknowledging to a large degree the force of skeptical anti-realist and subjectivist arguments in the domain of morals. This humanist tradition is the one that is said to have led from Gentili and especially Grotius up to its most radical representative, Thomas Hobbes.

But what distinguished the various early modern writers from each other was less the different traditions of scholasticism and humanism than the view they put forward of rights and obligations in the realm external to established polities – the state of nature. This is not to deny the importance of the humanist or scholastic traditions for the content of the various doctrines. It is merely to say that the distinction may explain less than it is often asked to explain and that the traditions these writers were drawing upon did not determine the content of their doctrines, especially not with regard to their views on self-interest and imperial expansion. For example, the humanist Vázquez de Menchaca, quoting extensively from Roman literature and Roman law, was among the most ardent critics of the Spanish imperial endeavor, more critical in fact than any of the Spanish theologians. Affirming a firm belief in the natural liberty of all human beings,[12] Vázquez rejected any arguments designed to bestow title to overseas territories based on religious[13] or civilizational superiority.[14] Such arguments had on the

[11] See, e.g., Tuck 1999; Piirimäe 2002; see on this distinction the introduction in Kingsbury and Straumann 2010b as well as Noel Malcolm's and my own contribution therein.

[12] *CI* 1.10.4–5. This belief was taken from Roman law; see *Inst.* 1.3. [13] Ibid. 2.24.1–5.

[14] Ibid. 1.10.9–12; 2.20.10; 2.20.27. See for Vázquez' political and legal thought Brett 1997, 165–204; for his stance on empire and the law of nations, see Pagden 1995, 56–62.

other hand been supported both by humanists, such as Sepúlveda, and theologians in the medieval tradition, such as Suárez.

Gentili, while in some sense a humanist and influenced in his *De legationibus libri tres* (1585) by Machiavelli's account of statecraft,[15] in *De iure belli* (1598) eschewed the humanist practice of justifying wars by reference to "imperial power and glory."[16] Gentili's doctrine of just war instead relies on more or less orthodox criteria for just war supplemented with reasoning from Roman law.[17] In his *Wars of the Romans* (1599), a work in two books putting forward, in a Carneadean vein, first an accusation of the Roman empire and then a defense, Gentili defends the justice of the Roman empire and its imperial wars on grounds of natural law, precisely as Cicero had made Laelius do in the *Republic*.[18] Interestingly, and in line with the passage quoted above from his *De iure belli*, Gentili in this work presents Roman law as the most important legacy of Roman imperialism because it is declaratory of natural law and thus a source for norms that are binding even between sovereign states in the state of nature.

Indeed, a feature of both *De iure belli* and *The Wars of the Romans* is that Gentili, like Grotius after him, endeavored to give a specifically *legal* answer to the problems of the content, applicability, and validity of norms in the pre- and extra-political state of nature.[19] A key element of Gentili's defense of Roman imperialism in the second book of *The Wars of the Romans* is that the Roman empire provided not only civilizing peace but, most importantly, the advantages of a high-quality and durable system of law which was potentially binding in a natural state. While the defender of Roman imperialism takes pride in the fact that the Romans had as a matter of policy left many particular laws and customs of the conquered populations untouched,[20] the unifying role of Roman law is praised both in a Christian and in a pagan register. God is said to have given Rome the "scepter of the world" so that "the customs, the reverence, the languages, the minds, and the sacred rites of diverse peoples" could be brought under "one set of laws."[21] Similarly, citing the pagan Claudian's panegyric of

[15] Although Gentili certainly did not start out as a *legal* humanist, but as a rather explicit follower of the *mos Italicus* and Bartolus.

[16] Tuck 1999, 23. [17] See Haggenmacher 1990, 133–76.

[18] See the introduction in Kingsbury and Straumann 2011.

[19] See on this also the introduction in Kingsbury and Straumann 2010b and Straumann 2010.

[20] See, e.g., *WR* 2.13, 337: "And the city-states of Sicily we received into our friendship and protection in such a way that, after they were subjugated in war, they lived under the same lawcode as they had before."

[21] *WR* 2.13, 262.

Stilicho, Rome, the "parent of arms and law," is said to have "offered the cradle of the beginnings of law."[22]

This leads to an account of a state of nature ruled by those rules of Roman law which can be said to be indicative of natural law.[23] Gentili's relatively rich natural legal order is not exclusively based on prudential norms of utility but depends, as does Grotius', on a more substantive moral vision. Gentili's arguments for subjective natural rights,[24] including a natural right to punish, further attest to this. Gentili's treatment of punishment as a just cause for war – present in *De iure belli* and further affirmed in *The Wars of the Romans* – necessarily presupposes an objective natural-law framework of norms against which the claims of punishment can be measured and justified. The argument for the right to punish is not merely a prudential argument based on self-preservation such as self-defense. The right to punish presupposes an offence against natural law, a violation of duties under some natural legal order – something unthinkable in a state of nature conceived along Hobbesian lines, where there are no moral duties whatsoever,[25] just prudential grounds of obligation, and where there is consequently no natural right to punish either. Such a right implies a more substantive natural legal order, and Gentili in this regard belongs to a tradition stretching ahead to Grotius and then Locke, who, not surprisingly, also acknowledge a right to punish in the state of nature.[26]

The state of nature as a moral and legal order: Grotius vs. Hobbes

In a series of important studies, Richard Tuck has drawn a tight connection between Grotius' doctrine of natural law and Thomas Hobbes' natural law, and sees in Grotius a precursor of Hobbes. According to Tuck, both Grotius and Hobbes had declared self-preservation to be the highest principle in their universal moral philosophy: "For Grotius, Hobbes, and their followers, self-preservation was a paramount principle, and the basis for whatever universal morality there was . . . "[27] The most important

[22] *WR* 2.13, 351. The citation is from Claudian, *De consulatu Stilichonis* 3.136–37.
[23] *IB* 1.1, 27–28.
[24] For a strong formulation of a subjective natural right, see *WR* 2.6, 210: *ius suum naturae*.
[25] See Nagel 1959; but cf. Malcolm 2002.
[26] See on this Kingsbury and Straumann 2010a; and the contribution by A. Blane and B. Kingsbury in Kingsbury and Straumann 2010b.
[27] Tuck 1999, 5. This thesis was developed by Tuck early on, beginning in Tuck 1983, 60–61, where the distinctions are, however, ascribed much greater significance, continuing in Tuck 1987 and, less distinctly, Tuck 1993, 154–201.

conceptual instrument for these authors, in his view, was the idea of the state of nature, "a state of nature, in which agents defined in minimal terms – that is, possessing an extremely narrow set of rights and duties – engage in dealings with one another which lead to the creation of a civil society."[28] The comparison of Grotius with Hobbes suggested by Tuck is very helpful to more clearly delineate the characteristics of Grotius' conception of the state of nature.

While the importance of the concept of the state of nature to natural law scholars in the seventeenth century is unquestionable, Tuck's assessment of Grotius' conception of natural law, as well as of the close connection between Grotius and Hobbes, must be disputed – in regard to both the role of self-preservation as the supposed basis of Grotius' natural law and the rights and duties that prove relevant in Grotius' state of nature. The contrast between Grotius and Hobbes is based primarily in the fact that Grotius, unlike Hobbes, did not describe his state of nature as a hypothetical pre-political condition in relation to the "creation of a civil society"; instead, he sought to transpose his conception of the state of nature, and the accompanying normative rules, onto the high seas leading to East India. Great differences result from this in each author's portrayal of the conditions that prevail in the state of nature, especially in regard to the status of self-preservation.[29]

Unlike Hobbes, Grotius equipped the state of nature with a comprehensive system of rights and duties that can hardly be characterized as "extremely narrow." While for Hobbes, no moral, let alone legal, problems arose from self-interested behavior in the state of nature, Grotius argued that behavior aimed exclusively at self-interest and self-preservation in the state of nature was not only immoral, but also unlawful. Hobbes did recognize certain pre-political norms that promote each person's unlimited freedom in the state of nature and which he calls "moral," but are these norms in fact of a moral or even legal nature?

In stark contrast to Grotius' conception, Hobbes' natural state is characterized by norms that are legal only in a metaphorical sense and moral only by name. It is characteristic that Hobbes does not acknowledge a natural right to punish: "A Punishment, is an Evill inflicted by publique Authority," defines Hobbes, because the "Right which the Common-wealth . . . hath to Punish, is not grounded on any concession, or gift of the Subjects." This

[28] Tuck 1999, 6.

[29] For an emphasis on the differences, see Haggenmacher 1997, 117–21. See also Miller 2003, 123–24, 137n28, on the role of self-preservation in Grotius' doctrine; and see the balanced discussion in Brooke 2012, 37–58.

follows straight from Hobbes' conception of the state of nature, where "every man had a right to every thing,"[30] that is to say, people in the natural state did not have, on Hobbes' account, claim-rights of any sort, but rather Hohfeldian privileges,[31] which cannot give rise to any duties on anybody else's part. Consequently, there is nothing, no possible violation, that could possibly trigger a right to punish.

In an important contribution, Noel Malcolm has argued that Hobbes' state of nature is, with regard to international relations, a much more regulated place than has hitherto been thought, with the dictates of natural law being applicable at the international level.[32] While Richard Tuck has interpreted Grotius and Gentili to be much more akin to Hobbes as traditionally understood, Malcolm presents a Hobbesian view of international relations much closer to Grotius, as traditionally understood. Malcolm maintains that Hobbes, in terms of what behavior his take on international relations prescribed, was guarding against imperialism and therefore far from being a Machiavellian.[33] Furthermore, in terms of the jurisprudential justification of his normative outlook, Hobbes was, to speak anachronistically in the idiom of today's jurisprudential disputes, a "naturalist," and his state of nature "not a realm of sheer amorality" according to Malcolm.[34] But this is as misleading as Richard Tuck's qualification of Grotius' natural law as based ultimately on self-preservation and consisting only in "an extremely narrow set of rights and duties."[35]

As the example of Hobbes' stance on the right to punish shows, there are in Hobbes' natural state not only no legal rights and duties, but also no moral ones, at least not if one is to understand by "moral" anything going beyond prudential self-interest. There are no legal ones because according to Hobbes' legal theory, natural laws are called "by the name of Lawes, but improperly: for they are but Conclusions,"[36] dictates of reason, to

[30] *Leviathan*, 2, ch. 28, 482.

[31] See Hohfeld 1946, 36. For an application of Hohfeld's analysis to Hobbes see Malcolm 2002, 445.

[32] Malcolm 2002. [33] Ibid., 441.

[34] Ibid., 439–40. Readers familiar with the scholarly literature will notice that my own view of Hobbes' state of nature is also opposed to that interestingly defended by Zagorin 2009; see esp. 99–103 and 43, where Zagorin contends that Hobbes' laws of nature "are genuine moral principles" aimed at "other-regarding behaviour." See also the subtle interpretation put forward by Brett 2011, 70–72, 102–14. Brett is rightly skeptical of Zagorin's claims, but she also, in my view, puts too much emphasis on continuity from the later scholastics to Grotius and Hobbes when she describes (114) Hobbes' natural liberty as not resisting the commonwealth but rather constituting the "very basis upon which" the commonwealth "can be erected."

[35] Tuck 1999, 6.

[36] *Leviathan*, 2, ch. 15, 242. The laws of nature are not simply obligatory as the commands of God, it is rather that obligations to the authority of God are themselves derived from the laws of nature, or dictates of reason, to which the basic obligations are owed: see Nagel 1959, 75–78.

which the basic obligation of the subjects in the state of nature, to preserve themselves, is owed. And there are moral ones only if one is willing to buy into Hobbes' exercise in renaming purely prudential grounds of obligation as moral ones.

It could be said that, broadly speaking, in classical Greek ethics there was a prevailing attempt to identify prudential with moral reasons for action by showing that to act morally is in one's own self-interest, that is to say by changing the meaning of and effectively re-defining "self-interest" such that other-regarding, moral reasons become a requirement for acting in one's "self-interest." Hobbes, on the other hand, engaged in a re-definition of "moral," so that self-interested action becomes a requirement of Hobbes' changed meaning of "moral." As in classical ethics, self-interest and morality in Hobbes thus do not *seem* to be in conflict – yet once Hobbes' exercise in renaming is understood, it becomes clear that Hobbes' position really amounts to framing the moral in terms of what prudence requires.[37]

For Thomas Nagel, "Hobbes's feeling that no man can ever act voluntarily without having as an object his own personal good is the ruin of any attempt to put a truly moral construction on Hobbes's concept of obligation. It in a way excludes the meaningfulness of any talk about moral obligation . . . Nothing could be called a moral obligation which in principle never conflicted with self-interest."[38] The reason why there are no moral duties in the state of nature is thus that for Hobbes there simply are no such duties *tout court*.

Noel Malcolm is of course correct in pointing out Hobbes' strong reservations against imperialism – but these reservations are based on mere prudence, not on anything resembling a notion of legal, let alone moral, obligation.[39] Similarly, the breakdown of the analogy between states and individuals in Hobbes, the fact that the parallel between the interpersonal and international state of nature does not go all the way, might diminish the "moral" duty of self-preservation as far as polities are concerned;[40] but, again, this is so simply for prudential reasons. If individuals were any less secure in commonwealths than they contingently happen to be, commonwealths would not exist in the first place. Hobbes' state of nature, void of both moral and legal norms, proves to be a continuing inspiration for so-called realist views, i.e. skepticism regarding international law and the

[37] Unlike the classical identification of the beneficial or prudent (*utile*) with the morally right and just (*honestum* and *iustum*), where a re-definition of the beneficial does take place. However, there is usually an attempt to show how that re-definition at a deeper level is in accord with the conventional understanding of expediency or prudence. Cf. Dyck 1996, 492–94.

[38] Nagel 1959, 74. [39] See *DC*, ch. 13, 14, p. 202. [40] Malcolm 2002, 448.

applicability of moral standards to international affairs.[41] In contrast, in Grotius' state of nature, certain norms apply that underwrite legal claims which significantly differ from Hobbes' natural freedom. As we have just seen, Hobbes' "naturall right of every man to every thing"[42] comes closest to Hohfeld's privilege in that it does not correspond to any duties on anybody else's part. The rights Grotius had in mind, on the other hand, which we shall treat in some detail below, are best described as Hohfeldian claim-rights in that they establish corresponding duties on one or more counterparties. Although not all of Grotius' claim-rights are presented as natural in origin, once established, they all enjoy the protection of natural law and can be enforced by any subject of natural law in the state of nature. The state of nature, for Grotius, is a condition subject to obligatory norms enforceable, as we shall see, by a universal right to punish.

The difference between Grotius and Hobbes with regard to their respective conceptions of the state of nature can be explained, at least in part, by the diverging purposes that the doctrines were at first supposed to serve. Whereas Grotius had developed his doctrine of a state of nature and the natural right to punish against the backdrop of the need to show that the Dutch East India Company, even if acting on its own behalf as a private actor, had the right to wage a war of punishment against the Portuguese fleet in Southeast Asia, Hobbes' theory was a political one in a much narrower sense. Hobbes' state of nature served the primary purpose of explaining political authority; Grotius' had the purpose of exhibiting the norms governing the high seas. Whereas Hobbes sought to justify a strong form of political authority, Grotius wanted to theorize an environment in which a strong overarching authority was *ex hypothesi* lacking.

When it comes to their conception of the state of nature, however, the crucial difference between Grotius and Hobbes remains in their sharply diverging anthropological assumptions. Both deem it necessary to appeal to an element of human nature which motivates human beings and which is antecedent to any normative ethical and political theory they will then erect on its foundation. In Hobbes' case, this antecedently motivating factor is, of course, self-preservation, and for Grotius, as we have seen, it is the social instinct (*appetitus societatis*) which guarantees that the subjects of Grotius' natural law can be motivated to abide by it. This crucial difference is something which was not lost on Grotius himself. As soon as he had read Hobbes' *De cive*, he wrote to his brother that although he did

[41] For the latter, see the criticism of Hobbes' position in Beitz 1979, 11–66.
[42] *Leviathan*, 2, ch. 14, 198.

appreciate some of Hobbes' conclusions, he could not at all agree on the foundations on which Hobbes had constructed his political theory: that is to say, Hobbes' state of nature with its war of all against all was deeply antagonistic to Grotius' own view of the natural condition.[43]

As Grotius' references show, when explicating the features of his natural state he operated to a certain extent in the tradition of Cicero[44] – the state of nature in *De iure praedae* is based on the model of the dissolving Roman republic, which Grotius took mainly from Cicero's forensic speech *Pro Milone*. In his forensic speeches in the fifties of the first century BC, Cicero had repeatedly justified the unlawful behavior of his political friends with the natural right of the private citizen to assert and enforce his claims himself in the face of failing state institutions: "The argument gained . . . natural-law support when Cicero suggests that, in cases of blatant failure by magistrates, a virtual pre-political condition is restored, in which force may be resisted by force."[45] In the speech *Pro Milone*, written in 52 BC at a time of general lawlessness and shortly before the civil war, Cicero justified the right to lawful self-help by referring to a law that was not written, but created by nature (*non scripta, sed nata lex*). This description of natural law was cited by Grotius in *De iure praedae* and applied to his concept of the state of nature.[46]

For Grotius, it is true, the reason to leave the state of nature was not entirely unrelated to the prudential benefits and the utility (*utilitas*) offered by political communities. However, unlike the Epicureans, skeptics such as Carneades, or Hobbes, he did not perceive this as being mutually exclusive with justice. Legal norms in general, both the positive ones of the polity and the natural ones, could not be reduced to a prudential utilitarian core, according to Grotius; it is not exclusively the advantages and utility that they bring that makes them desirable. Moreover, if justice were really striven for only because of its utility, this would make the application of moral and legal norms to the sphere of inter-state dealings seem impossible:

> But whereas many that require Justice [*iustitia*] in private Citizens, make no Account of it in a whole Nation or its Ruler; the Cause of this Error is, first, that they regard nothing in Right but the Profit [*utilitas*] arising from

[43] *BHG*, 14, no. 6166, letter to his brother Willem from April 11, 1643: "Librum de Cive vidi. Placent quae pro regibus dicit. Fundamenta tamen quibus suas sententias superstruit, probare non possum. Putat inter homines omnes a natura esse bellum et alia quaedam habet nostris non congruentia."

[44] Cf. Haggenmacher 1997, 119–20.

[45] Nippel 1993, 67.

[46] *IPC* 1, fol. 4′: "quod apud Tullium non scripta, sed nata lex . . . " See Cic. *Mil.* 10, where the passage is found in the context of an appeal to the judges: *Est igitur haec, iudices, non scripta, sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa adripuimus, hausimus, expressimus . . .*

> the Practice of its Rules, a Thing which is visible with Respect to Citizens, who, taken singly, are unable to defend themselves. But great States, that seem to have within themselves all things necessary for their Defence and Wellbeing, do not seem to them to stand in need of that Virtue which respects the Benefit of others, and is called Justice.[47]

The argument is in the form of a *reductio* – as "great States" both internally and externally clearly do stand in need of "that Virtue which respects the Benefit of others," the Epicurean, or Hobbesian, argument for a utilitarian social contract based on self-interest must be wrong. As soon as the state of nature was overcome among individuals, and a state of nature among states emerged as a result of their creation, the prudence-based utilitarian argument became unusable. Law between established polities, which for Grotius was identical with natural law among individuals, could thus not be based on utilitarianism.[48] According to Grotius, utility became part of natural law in connection with the creation of states because nature had isolated human beings and made them weak and needy in various ways, in order to encourage them to maintain community – this concession to the Epicurean view provided for Grotius an additional motivational source in addition to the social instinct (*appetitus societatis*). Utility thus provided the occasion to establish positive law (*ius civile*) and create political authority.[49] Grotius here seems to give an account of the actual, genealogical coming about of the polity rather than a normative *justification* for the establishment of a political community.[50] This is consistent with Grotius' use of Seneca's *De beneficiis*, where society is also viewed as the answer to the natural weakness of human beings,[51] but Grotius could also have

[47] *RWP*, 1.97; *IBP* prol. 21: "Quod vero multi quam a civibus exigunt iustitiam, eam in populo aut populi rectore insuper habeant, eius erroris causa est, primum quod in iure nihil spectant nisi utilitatem quae ex iure oritur, quae evidens est in civibus qui singuli ad sui tutelam invalidi sunt: at magnae civitates cum omnia in se complecti videantur quae ad vitam recte tuendam sunt necessaria, opus habere non videntur ea virtute quae foras spectat et iustitia appellatur."

[48] Cf. on Hobbes' allegedly moral duties in the state of nature, which are based purely on self-preservation, Malcolm 2002, 444.

[49] *IBP* prol. 16: "Sed naturali iuri utilitas accedit: voluit enim naturae auctor nos singulos et infirmos esse et multarum rerum ad vitam recte ducendam egentes, quo magis ad colendam societatem raperemur: iuri autem civili occasionem dedit utilitas: nam illa quam diximus consociatio aut subiectio utilitatis alicuius causa coepit institui. Deinde et qui iura praescribunt aliis, in eo utilitatem aliquam spectare solent, aut debent."

[50] Aristotle, too, explained the emergence of the *polis* by reference to survival and the things needed for mere life (*zen*), while the philosophical justification of the established commonwealth could be found only in the "good life" (*eu zen*); see Arist. *Pol.* 1.1252b29–30. A similar differentiation can be found in Cic. *Off.* 1.158.

[51] See *IBP* prol. 8, with a reference to Sen. *Ben.* 4.18.2: *hominem imbecillitas cingit . . . duas res dedit, quae illum obnoxium caeteris, validissimum facerent, rationem et societatem.*

taken this motivational cue from texts by Cicero, such as *Pro Sestio* or *De inventione*.[52]

The war of the VOC in Southeast Asia and the Roman tradition of just war

Approximately two years before Cicero wrote the speech for Titus Annius Milo, he had begun working on his dialogue *De re publica* on the ideal political system, which he published in the year 51 BC. While still working on *De re publica*, Cicero must have already begun writing the never completed dialogue *De legibus*, which was something of a sequel to *De re publica* and showed some continuity with the speeches of the 50s.[53] As we have already seen, in the third book of *De re publica*, in a passage known to Grotius only through Lactantius' *Divinae institutiones* and Isidore of Seville's *Etymologiae*, Cicero reproduced the two famous speeches by Carneades, held in Rome in the year 155 BC. One speech extolled justice, while the other, equally convincingly, sought to demonstrate the incompatibility of political authority and justice. Although Carneades' speeches were probably only concerned with internal justice within a state and not with justice in regard to a polity's external affairs, Cicero – as we have seen – had turned this speech against the possibilities of justice into an indictment of the justice of Roman expansion and rule. In Cicero, this indictment was then rejected and refuted by one of the interlocutors of the dialogue, Laelius, notably with a natural-law argument, in a speech that should be viewed as the first surviving philosophical justification of Rome's imperialist expansion.[54]

The connection Cicero drew between natural justice and Roman imperialism was based primarily on two conceptions of very different origin – Stoic natural law doctrine on the one hand and the Roman doctrine of just war on the other. Cicero adapted the Greek concept of natural law to Roman conditions and made it usable for Roman purposes by seeking to show that Rome was acting in accordance with natural law and that natural and Roman law essentially coincided. This model of a legal and philosophical justification of Rome's military expansion was obviously very attractive to Grotius the humanist, who was expertly able to utilize this Roman tradition.

[52] See, e.g., Cic. *Sest.* 91–92; Cic. *Inv.* 1.2–3.
[53] For the dating and the relationship to the speeches, see Dyck 2004, 7, 17–18.
[54] For the relationship between Cicero's account and the speeches given by the historical Carneades, see Zetzel 1996.

In *De iure belli ac pacis*, Grotius presented Carneades the Skeptic as his main adversary, which led in the scholarly literature to an understanding of Grotius' treatises on natural law primarily as attempts to refute the early modern moral skepticism of those such as Montaigne or Charron.[55] But as I have shown above, Carneades was interpreted by Grotius first and foremost as the representative of a rhetorical tradition. Substantively, Grotius saw Carneades not as a moral skeptic, but rather as an orator who expressed criticism of Rome's imperialism and sought to counter arguments based on the Roman theory of just war. This Roman theory of just war already played a central role in *De iure praedae*. When the young historian, philologist, and jurist Grotius was confronted in the early seventeenth century with the task of writing his apologetic legal brief on behalf of the VOC to prove the justice as well as lawfulness of the Company's behavior in East Indian waters, he needed criteria to define as a just war the action that the VOC had been waging in Southeast Asia against Portugal – an action that operated in the gray area between privateering and the fringes of piracy.

The Roman doctrine of just war (*bellum iustum*) was essentially a formal legal procedure that was, however, also distinguished by certain substantive aspects, subjecting the justification of war to certain necessary conditions.[56] The concept originated in the *ius fetiale* of the early Roman republic and should be seen as a specifically Roman invention, tailored to the needs of the Roman city-state and firmly tied to its institutions, especially the priestly college of fetials (*fetiales*),[57] and to the senate and the people.[58] The necessary conditions imposed by the *ius fetiale* on the waging of war are preserved in certain passages in Cicero, in Isidore of Seville, who based his views on Cicero, and in Livy, in a historiographic context.[59] These conditions were the denunciation of an alleged wrongdoing and the demand for redress from the potential enemy (*rerum repetitio*), a notification, thirty

[55] See Tuck 1983; Tuck 1987; Haakonssen 1996, 26–30. For a detailed discussion of the scholarly debate on Grotius' treatment of Carneades' arguments, see below, 55–61.

[56] For a more skeptical, quasi-Carneadean assessment of Roman just-war theory in the context of Roman imperialism, see Brunt 1978, 175–78.

[57] On the fetials, see Albert 1980, 12–16; on early fetial law, with great trust in the annalist tradition, see Watson 1993. For a skeptical view, see Saulnier 1980, who sees the college of the Fetiales – not *ius fetiale* itself – as a creation of the Augustan period; Ando 2010 is skeptical even with regard to the *ius fetiale* itself and interprets it as a backward projection from Augustan times into the republic; see also Wiedemann 1986. On Roman international law in general, see Heuss 1933; Dahlheim 1968.

[58] See Barnes 1986, 46: "Les lois de la guerre, les *iura belli*, ne sont nées ni dans la philosophie grecque ni dans la théologie chrétienne: leur paternité doit être attribuée à la politique de Rome, et précisément à un rite païen et archaïque de la République romaine."

[59] The main passages are Cic. *Rep*. 2.31; 3.35; *Off*. 1.36. Livy 1.32.5ff. For an excellent discussion of, in particular, the passages in Cicero and their tradition, see Barnes 1986.

days later, that the potential enemy was risking war (*denuntiatio*), and finally an ensuing formal declaration of war (*indictio*).[60]

Grotius borrowed the concept of *bellum iustum*, which was central to the Roman laws of war; in chapter 7 of *De iure praedae*, in his discussion of the just causes of war, he quoted the formula for wars initiated under the provisions of the *ius fetiale*, as it was passed down by Livy.[61] Grotius was very obviously aware of the tradition in which he stood. His knowledge of Roman doctrine was hardly limited to the evidence from Livy, but extended to the philosophical texts. This can be seen in the discussion of the specific conditions for just war at the beginning of chapter 7, which Grotius introduced with a quotation from Isidore's *Etymologiae*: "Cicero has said: 'Those wars are unjust which have been undertaken without cause [*causa*].'"[62] In Isidore, the Cicero quotation continues as follows: "For aside from vengeance or for the sake of fighting off enemies no just war can be waged. No war is considered just unless it is announced and declared and unless it involves recovery of property [*de repetitis rebus*]."[63]

Grotius left out the continuation of the Cicero quotation, but in chapter 8 of *De iure praedae*, dealing with the formal requirements of declarations of war, he quoted a related passage from Cicero's later work *De officiis*: "[I]n the words of Cicero: 'No war is just unless it is waged either after the procedure of *rerum repetitio* has been followed, or after notification and warning thereof have been given and a formal declaration made.'"[64] Grotius placed importance on interpreting this passage from *De officiis* in such a way that the conditions were understood alternatively and not cumulatively: "Cicero requires that one of these conditions, not both, shall be fulfilled."[65] This minimalist interpretation of the conditions serves in Grotius to make the condition of the recovery of property (*rerum repetitio*) the necessary and also sufficient condition for the waging of just war, neglecting *denuntiatio* and *indictio*, and thus lends the demand for reparations and the recovery of property primary importance in his argument. This approach is grounded in the fact that, according to Grotius,

[60] Livy 1.32.5–14.
[61] *IPC* 7, fol. 29′; the quotation is from Livy 1.32.5. See also *IBP* prol. 26, where Livy 1.32.12 is cited.
[62] *CLP*, 102; *IPC* 7, fol. 29′: "Cicero: illa bella iniusta sunt quae sunt sine causa suscepta."
[63] Cic. *Rep.* 3.35 (= Isid. *Etym.* 18.1.2–3): *Nam extra ulciscendi aut propulsandorum hostium causam bellum geri iustum nullum potest. Nullum bellum iustum habetur nisi denuntiatum, nisi dictum, nisi de repetitis rebus.*
[64] *CLP*, 149; *IPC* 8, fol. 45′: "quam sententiam nemo melius Cicerone interpretabitur cum dicit nullum bellum esse iustum, nisi quod aut rebus repetitis geratur, aut denuntiatum ante sit et indictum." The quotation is from Cic. *Off.* 1.36.
[65] *CLP*, 149; *IPC* 8, fol. 45′: "Alterum, non utrunque requirit."

only *rerum repetitio* was based on natural law, while the other conditions of formal announcement and declaration of war were merely conventional practices that had belonged to the Roman *ius civile* and had already been abandoned by the Romans themselves due to their lack of universality.[66] The condition of *rerum repetitio*, in contrast, had the following significance:

> This latter expression [*res repetendae*] (as Servius well says) covers every possible case of injury [*iniuria*], inasmuch as both *res* [things, goods] and recovery [*repetitio*] are general terms. Now, that which is claimed is threefold: restitution, satisfaction, surrender; and the third item is not of an unmixed character, since it may consist in simple surrender [*dedi*], or it may involve punishment [*animadverti*].[67]

While the demand for reparations (*rerum repetitio*) arises from an unlawful act (*iniuria*) and represents a necessary formal condition for the waging of a just war, from the point of view of substantive law the just cause of war, the *iusta causa*, is found in the unlawful act itself at which the demand for reparations is aimed. Such unlawful acts, or the failure to live up to contractual obligations, represent violations of the norms of natural law and give reason or cause (*causa*) for a just war. In this and the following chapters, I will seek to show that while Grotius' portrayal of the just causes of war was based at heart on the fetial law of *rerum repetitio*, it went far beyond the requirements formulated in Roman fetial law. In the condition of recovery, Grotius concentrated on the only Roman requirement for waging just war that possessed moral as well as formal significance, and thus lent itself to natural law arguments.[68]

The connection between the early Roman doctrine of just war and the Greek concept of natural law had already been made by Cicero; he not only turned the Roman *bellum iustum* into a natural law institution, but also extended the doctrine of natural law to polities and to the plane of political theory. Grotius then completed the analogy of individual and political system laid out in this extension by applying the doctrine of just war to individuals in the state of nature and characterizing the state of nature, referring to Cicero's *Pro Milone*, as the absence of judicial authorities:

[66] *IPC* 8, fol. 45′: "Varro etiam et Arnobius morem illum solemniter bellum denuntiandi, sicut alia quae sunt iuris civilis, apud Romanos abolitum testantur."

[67] *CLP*, 146; *IPC* 8, fol. 44′: "Nam rerum repetendarum nomine egregie Servius omnem iniuriam dicit contineri. Est enim et rei et repetitionis nomen generale. Quod autem postulatur triplex est: reddi, satisfieri, dedi: dedi autem non simpliciter, sed aut dedi aut animadverti . . . "

[68] See Barnes 1986, 50–51, who points out the moral dimension of the Roman concept of *res repetere*. See also Wieacker 1967, 291 on the importance of the doctrine of *bellum iustum* for Grotius' tenets, which later were to enter private law.

> If, for example, your life is imperilled in the wilderness as the result of an attack from some individual, under circumstances of time and place that do not permit of recourse to a judge, you will rightly defend yourself . . . [69]

In his notes on this passage, Grotius refers not only to *Pro Milone*, but also to a part of the *Digest* that was central to Roman private law; more precisely, to the chapter on the Aquilian law (*lex Aquilia*), which dealt with questions of liability.[70] In the passage cited by Grotius, the violation of other people's rights through self-defense is carved out from the sphere of unlawful wrongs (*iniuria*), "for natural reason [*naturalis ratio*] permits a person to defend himself against danger."[71]

The application of Roman private law in combination with a doctrine of just war grounded in natural law is highly characteristic of Grotius and contributed significantly to completing the analogy between individual and political system begun by Cicero, which can be seen as one of the most important results of Grotius' adaptation of Cicero's work. This analogy permitted Grotius to portray individuals in a state of nature, waging war under the conditions of Roman just war theory and in the process obeying the rules of natural law. The war waged by the VOC in Southeast Asia could thus be described as a just war, even if the VOC were to be viewed as private persons operating under private law and not as the authorized agent of a sovereign state – that is, a subject of international law in the narrower sense. The reason for this was that Grotius could of course hardly assume such sovereign status for the United Provinces, as the VOC's military undertakings were aimed at achieving formal independence for the Dutch Republic in the first place.[72]

The necessity of making the actions of the VOC comprehensible on the level of private law now led Grotius to a novel doctrine of just war much more nuanced than any such doctrine that had existed previously, whether among the Romans or in the scholastic doctrines of just war. Grotius related the fetial law condition of *rerum repetitio* systematically to the complaints of Roman private law, and thus made possible an interpretation of the doctrine of just war in the private-law category of the *Corpus iuris*. This can already be observed in the explanation of the just causes of war, as we have seen above, where Grotius first offered a passage from Livy's version of the fetial formula, his intention being to give a proper interpretation

[69] *CLP*, 49; *IPC* 2, fol. 13′: "Exempli gratia si in solitudine insultu alicuius de vita pericliteris, hic cum adiri iudicem neque locus neque tempus ferat . . . merito temet ipse defendes."
[70] *Dig*. 9.2. [71] Ibid. 9.2.4: *nam adversus periculum naturalis ratio permittit se defendere*.
[72] See Tex 1973, 302–12.

of the formula. The interpretation was then undertaken with the help of a private-law separation of the appropriate remedy or action, taken from the *Institutions*, into obligatory and *in rem*.[73] Here we see that Richard Tuck's analysis, in which the behavior of the early modern states provides a normative example for the development of individual rights in a state of nature, has it backward. Grotius instead began with the norms of Roman private law in order to describe the actions of both private entities (be they natural persons or trading companies) and states from a legal point of view.[74]

The analogy between private and public subjects of natural law is thus expressed in the parallels Grotius establishes between causes of war and justiciable claims, primarily in private law:[75] a violation of these claims can be at the same time a reason to call upon courts and – in the absence of judicial bodies – to initiate a just war based on a just cause. This turns the choice of means for enforcing these natural rights into a more or less ancillary procedural aspect of the question of the substantive legal claim. From the perspective of substantive law, the *causa belli* and the justiciable legal claim are equivalent; the subject matter "is the same in warfare and in judicial trials,"[76] as we will see more clearly in Chapters 7 and 8. War is primarily an *executio iuris*, the enforcement of a legal claim in areas that do not have judiciaries: "Now, as many Sources as there are of judicial Actions, so many Causes may there be of War. For where the Methods of Justice cease, War begins."[77] The lack of a judiciary is thus for Grotius the most important characteristic of the state of nature, which however does not appear as a lawless state, but rather one subject to the "naturalized" provisions of Roman private law.

The high seas as an actually existing state of nature

After William Welwod,[78] the English jurist John Selden also noticed that Grotius, in developing his arguments, made heavy use of Roman law. In the dedication he addressed to Charles I in his book *Mare clausum*, first

[73] *IPC* 7, fol. 29′.
[74] Against Tuck 1999, 8–9, who draws from his analysis the odd conclusion (14), that a devaluation of state sovereignty would make it difficult today even to imagine a "sovereign individual."
[75] Haggenmacher 1997, 86.
[76] *CLP*, 105; *IPC* 7, fol. 30: "quod ad materiam attinet, quae in bello et iudiciis eadem est."
[77] *RWP*, 2.393; *IBP* 2.1.2.1: "Ac plane quot actionum forensium sunt fontes, totidem sunt belli: nam ubi iudicia deficiunt incipit bellum."
[78] See above, 1–2.

published in 1635 in reaction to Grotius' *Mare liberum*, Selden made the following statement:

> There are among foreign writers, who rashly attribute your Majesty's more southern and eastern sea to their princes. Nor are there a few, who following chiefly some of the ancient Caesarian lawyers [*Caesariani aliquot Iureconsulti veteres*], endeavor to affirm, or beyond reason too easily admit, that all seas are common to the universality of mankind.[79]

This reference was clearly aimed at Grotius, who had indeed used the classical jurists of the *Corpus iuris* extensively in his *Mare liberum*.[80] Similar criticisms were also later made by Robert Filmer, who in his 1652 work *Observations Concerning the Originall of Government* accused Grotius of relying too strongly on the doctrines of Roman jurists in his discussion of the state of nature. Grotius' position, Filmer held, was an error,

> which all heathens taught, that "all things at first were common," and that "all men were equal." This mistake was not so heinous in those ethnic [i.e. pagan] authors of the civil laws, who wanting the guide of the history of Moses were fain to follow poets and fables for their leaders. But for Christians, who have read the Scriptures, to dream of a community of all things, or an equality of all persons, is a fault scarce pardonable.[81]

In *Mare liberum*, the twelfth chapter of *De iure praedae*, which was published anonymously in 1609 under the title "The Right of the Dutch to Trade with East India" (*De iure quod Batavis competit ad Indicana commercia*), the character of Grotius' concept of the state of nature gained additional clarity. The publication of *Mare liberum* was encouraged by the Zeeland Chamber of the VOC[82] and was supposed to influence the truce negotiations with Spain that ended in 1609.[83] Spain was willing to enter into a peace agreement with the United Provinces, perhaps even to

[79] *MC* ded., 3: "Sunt inter Scriptores Exteros qui Mare tuum Australius Orientaliusque Principibus suis temere attribuunt. Nec pauci habentur qui Maria qualiacunque, ex Iure Naturae atque Gentium, universitatis hominum esse Communia, Caesarianos aliquot Iureconsultos veteres maxime secuti, aut adstruere satagunt aut patientius quam par est admittunt." English version quoted in *ML*, ix. On Selden's citation practice for *Mare clausum*, see Ziskind 1973.

[80] On Grotius' use of Roman law compared to Selden's, see Ziskind 1973.

[81] Filmer, 1991, 209; Filmer is referring here to *De iure belli ac pacis*.

[82] For a careful reconstruction of the circumstances of its publication, see Ittersum 2006, 321–43.

[83] See Armitage 2004, xii. See also Grotius' own declared intentions regarding the separate publication of *Mare liberum* in his *Defensio capitis quinti maris liberi*, some six years later: "At cum post aliquanto ab Hispanis spes aliqua patriae ostentaretur pacis aut induciarum, sed ab iisdem postularetur res iniquissima, ut Indiae commercio abstineremus, partem eius commentarii, in qua ostensum erat nec iure nec probabili ullo iuris colore niti hanc postulationem, seorsim edere statui Maris Liberi nomine . . . ": *DCQ*, 331–32.

recognize the Dutch Republic's independence, but only at the price of dissolution of the VOC and withdrawal of the Dutch from trade with East India.[84] This trade was portrayed in *Mare liberum* as a natural right of the Dutch.

In chapter 5 of *Mare liberum*,[85] Grotius attempted to prove the most basic aspects of his view, specifically that "neither the oceans leading to East India nor the right of navigation [*ius navigandi*] on these oceans based on the title of acquisition [*occupatio*] belong to the Portuguese."[86] To do this, Grotius had to show that (a) a state of nature had existed governed by natural law; (b) parts of the world, specifically the high seas, continued to be in such a state; and (c) the norms of natural law did not permit acquisition of exclusive property rights over these parts of the world. If this could be shown, then the exclusive Portuguese claim to the oceans leading to East India was an unlawful violation of the norms of natural law, which did not permit such a claim, and thus also an infringement of the Dutch right of navigation (*ius navigandi*) and free trade (*libertas commerciorum*), giving in turn rise to a just cause of war against the Portuguese.[87] In Chapter 7, the formulation of these reciprocal claims and just causes of war will be examined in the highly influential terminology of subjective natural rights (*iura*). First, however, we will look at the substantive objective norms to which the state of nature was subject according to Grotius: that is, the natural law that he insisted regulated the high seas.

First, in the fifth chapter of *Mare liberum*, Grotius explained the issue at hand as well as his use of classical sources, in the process of which it becomes clear that the state of nature here is not simply to be understood as an epoch belonging exclusively to the past, but rather as a remnant of the early history of humankind that could be shown still to be present in Grotius' day:

> Granting, then, that the Portuguese have not acquired any legal right [*ius nullum*] over the East Indian peoples, lands or governments, let us ascertain whether or not the former have been able to bring the sea and matters of navigation, or the conduct of trade, under their own jurisdiction [*sui iuris facere*]. We shall consider first the question of the sea, which, although it is variously described as in no one's property [*in iure nullius*], as

[84] On the negotiations and the conditions for the armistice signed on April 9, 1609, see Israel 1995, 399–420. For an overview of the international-law consequences of the armistice abroad, see Fisch 1984, 71–79.

[85] Publication of which in early 1609, however, occurred too late to influence the negotiations with Spain; see Ittersum 2007a; Ittersum 2006, 341–42.

[86] *ML*, 22: "Mare ad Indos aut ius eo navigandi non esse proprium Lusitanorum titulo occupationis."

[87] See Brandt 1974, 37–38, who completely neglects this aspect of Grotius' theory of property.

> common property [*commune*], and as public property [*publicum*], [is] a right of the nations.[88] The significance of these different terms will be very easily explained if, in imitation of the method employed by all the poets since the days of Hesiod as well as by the ancient philosophers and jurists, we draw a chronological distinction between things which are *perhaps not differentiated from one another by any considerable interval of time*, but which do indeed differ in certain underlying principles [*ratio*] and by their very nature. Moreover, we ought not to be censured if, in our explanation of a right derived from nature [*ius a natura procedens*], we avail ourselves of the authority and express statements of persons generally regarded as pre-eminent in natural powers of judgement [emphasis mine].[89]

Here Grotius is preparing for the point that the distinction to be made between the law governing the state of nature on the one hand and contemporary positive law on the other was not simply a distinction between various epochs of human history, but that these various legal systems could exist simultaneously – that the state of nature was a contemporary phenomenon, one that still prevailed on the ocean. This of course contradicted the view of Grotius' opponents (such as, later, John Selden) that the ocean might at times in certain places be "in no one's property" (*in iure nullius*), but that, as *res nullius*, it was *in principle* fully capable of being owned – a point to which we shall return.[90] In the passage cited, Grotius already refers to the prominent role of ancient poets, philosophers, and jurists in describing the norms governing the state of nature – not historical examples, it should be noted, but normative sources in the broader sense.[91] This

[88] The sentence is difficult to understand; following Grotius' argument in the *Defensio capitis quinti*, and deviating from the translation from *CLP* otherwise followed, I suggest the following reading, interpreting *quod* as a relative pronoun: "De mari autem prima sit consideratio, quod, cum passim in iure aut nullius, aut commune, aut publicum dicatur, iuris gentium [est]." In the *Defensio*, Grotius explains his choice of language as follows: "Adde iam quod mare non tantum dicitur a iurisconsultis esse commune gentium iure, sed sine ulla adiectione dicitur esse iuris gentium, quibus in locis ius non potest significare normam aliquam iusti, sed facultatem moralem in re . . . ": *DCQ*, 348. The translation that comes closest to my reading is Richard Hakluyt's in *ML* Armitage, 20. On this turn of "law of nations" (*ius gentium*) into a subjective "right of peoples," see below, 163.

[89] *CLP*, 314–15; *IPC* 12, foll. 100f. (= *ML* 5.22): "Si ergo in populos terrasque et diciones Lusitani ius nullum quaesiverunt, videamus an mare et navigationem, aut mercaturam sui iuris facere potuerint. De mari autem prima sit consideratio, quod cum passim in iure aut nullius, aut commune, aut publicum iuris gentium dicatur, hae voces quid significent ita commodissime explicabitur, si Poetas ab Hesiodo omnes, et Philosophos; et Iurisconsultos veteres imitati in tempora distinguamus, ea, quae tempore forte haud longo, certa tamen ratione, et sui natura discreta sunt. Neque nobis vitio verti debet si in iuris a natura procedentis explicatione auctoritate et verbis eorum utimur quos constat naturali iudicio plurimum valuisse."

[90] On *res nullius* in early modern writing and practice, see Benton and Straumann 2010.

[91] Cf. Buckle 1991, 15. He imputes to Grotius a "historical method" and states that "human history is the stage on which the story of property unfolds," but then concedes that "Grotius is quite happy to idealize history."

was followed by a description of the state of nature, understood first of all as a long-forgotten time, the language for describing which was presented as deviating from the terminology used by Grotius' contemporaries.

Alluding to the ancient concept of a Golden Age, Grotius described the "earliest epoch of man's history" and the right to property existing in this epoch. Grotius referred explicitly to a Hellenistic poet of the third century BC, Aratus,[92] whose astronomical didactic poem *Phaenomena* he edited in 1607.[93] Aratus' works must be viewed as following in the tradition of Hesiod, whose concept of the golden *genos* Aratus sought to portray more coherently and furnish with greater moral significance.[94] In particular, Grotius utilized the idea, which could be found in Aratus' poetry, of common property in goods, which is said to have prevailed in the Golden Age.[95] The crucial point is that Grotius gave new meaning to the terms *dominium* and *commune* for his law of the state of nature, the *ius pristinum*, and that he placed them in opposition to his contemporary language.[96] In his view, in the "earliest epoch" or Golden Age the term *dominium* had meant, not ownership of private property, which had not yet existed, but simply of goods that were open to the use of the general public and were thus designated by the term *commune*. This *commune* in the state of nature, said Grotius, was not to be confused with the modern *commune*. While the latter described a system of common property defined by exclusive, collectively exercised private ownership of a thing, the early *commune* had meant merely, in non-exclusive form, the entirety of all goods that belonged collectively to humanity:

> There was no private property under the primary law of nations [*ius gentium*], to which we also give the name of "natural law," from time to time, and which the poets represent in some passages as prevailing in the Golden Age while in other passages they assign it to the reign of Saturn or of Justice. In fact, we find this statement in the works of Cicero: "There is, however, no

[92] Aratus was probably a student of the philosopher Zeno; see Blundell 1986, 144.

[93] See Wolf 1963, 204. In 1618 Grotius' library included a Greek edition of the *Phaenomena*, next to Grotius' own edition; see Molhuysen 1943, nos. 206/218, 161.

[94] Blundell 1986, 144.

[95] On the ancient concept of the Golden Age and Aratus' contribution to it, see ibid., 137, 144–45.

[96] *CLP*, 315; *IPC* 12, fol. 100′ (= *ML* 5, 22f.): "Sciendum est igitur in primordiis vitae humanae aliud quam nunc est dominium, aliud communionem fuisse. Nam dominium nunc proprium quid significat, quod scilicet ita est alicuius ut alterius non sit eodem modo. Commune autem dicimus, cuius proprietas inter plures consortio quodam aut consensu collata est exclusis aliis. Linguarum paupertas coegit voces easdem in re non eadem usurpare. Et sic ista nostri moris nomina ad ius illud pristinum similitudine quadam et imagine referuntur. Commune igitur tunc non aliud fuit quam quod simpliciter proprio opponitur; dominium autem facultas non iniusta utendi re communi . . . "

> such thing as private property in the natural order [*privata nulla*]." Horace, too, wrote as follows:
>
> Nor he, nor I, nor any man, is made
> By Nature private owner of the soil.
>
> For in the eyes of nature no distinctions of ownership were discernible. In this sense, then, we say that all things were common property [*communes*] in those distant days, meaning just what the poets do when they declare that the men of earliest times made acquisitions on behalf of the community, and that the communal character of goods was maintained by justice in accordance with a sacred pact.[97]

The reference to Cicero is especially illuminating. Grotius quoted here from *De officiis*, where Cicero distinguishes between two types of property – *res communes* and *res privatae* – in order to then explain how this situation emerged: "Now no property is private by nature [*sunt autem privata nulla natura*], but rather by long occupation [*occupatio*] (as when men moved into some empty property in the past), or by victory (when they acquired it in war), or by law, by settlement, by agreement, or by lot."[98] Cicero's work was obviously the main source of Grotius' explanation of the origins of private property, in which original acquisition is of central importance and in which he quotes again from the above passage from *De officiis*.[99] Even more significant, however, is the fact that Cicero saw it as a duty of (natural) justice to take account of the difference between common property and private property: it is the duty of justice "that one should treat common goods as common and private ones as one's own."[100] In another passage, which Grotius quoted word for word from *De officiis*,

[97] *CLP*, 316; *IPC* 12, fol. 100′ (= *ML* 5.23): "Iure primo Gentium, quod et Naturale interdum dicitur, et quod poetae alibi aetate aurea, alibi Saturni aut Iustitiae regno depingunt, nihil proprium fuit; quod Cicero dixit: 'Sunt autem privata nulla natura' [*Off.* 1.21]. Et Horatius: 'Nam PROPRIAE telluris ERUM NATURA neque illum / Nec me nec quemquem statuit' [*Sat.* 2.2.129–30]. Neque enim potuit natura dominos distinguere. Hoc igitur significatu res omnes eo tempore communes fuisse dicimus, idem innuentes quod poetae cum primos homines in medium quaesivisse, et Iustitiam . . . res medias tenuisse dicunt."

[98] Cic. *Off.* 1.21: *Sunt autem privata nulla natura, sed aut vetere occupatione, ut qui quondam in vacua venerunt, aut victoria, ut qui bello potiti sunt, aut lege, pactione, condicione, sorte . . .* See the discussion of the right to property below, 175–88.

[99] *IPC* 12, fol. 101′ (= *ML* 5.25): "et Tullius [dicit], factas esse veteri occupatione res eorum qui quondam in vacua venerant."

[100] Cic. *Off.* 1.20: *Sed iustitiae . . . munus est, ut . . . quis . . . communibus pro communibus utatur, privatis ut suis.* The term used for "task," *munus*, also had a legal meaning and referred to military duties; Paul. *Dig.* 50.16.18. Cicero used the term, however, as a translation of the Stoic *kathekon*; see Dyck 1996, 109. On Cicero's doctrine of private proprety and Ambrosius's relationship to this doctrine, see Wacht 1982.

Cicero described this duty in greater detail and linked it with the Stoic doctrine of the community of all of humankind. Grotius incorporated this doctrine, *oikeiosis*, in his *De iure belli ac pacis* and, as we have seen in Chapter 4, made it a central element in his doctrine of natural law. It had already played an important role in *Mare liberum* in explaining what Grotius called common property (*commune*) under that "earlier law" (*ius pristinum*) – that is, in explaining the law of the state of nature. In the context of the quotation from *De officiis* Grotius was drawing the following crucial conclusions regarding the things that, under the early natural law of the Golden Age, were common property (*communes*): first, "those things [*res*] which are incapable of being occupied [*occupari non possunt*], or which never have been occupied, *cannot* become the private property of any owner, since all property" originates from occupancy (*occupatio*). Secondly, "all those things" which by nature "suffice for general use by other persons without discrimination, *are today and should remain for all time*" in that original natural state. Grotius concludes by quoting Cicero from *De officiis*: "Herein, to be sure, lies the most comprehensive of the bonds uniting men to men and all to all; and in observance thereof, our common participation in all things produced by nature for mankind's common use should be maintained."[101]

In *De officiis*, Cicero continues as follows: "whatever is assigned by statutes and civil law should remain in such possession as those laws may have laid down, but the rest . . . is common."[102] This moral duty, derived by Cicero from the Stoic concept of "appropriate action" (*kathekon*), that things considered common property from time immemorial are to be treated as common property, was taken up by Grotius and proclaimed a *legal* norm of the state of nature. Grotius also links this prescription to the rule presented in his first conclusion, from Roman property law, under which things that cannot be taken possession of (*occupatio*) can never acquire the status of property (*proprietas*). This rule in the *Corpus*

[101] *IPC* 12, fol. 102 (= *ML* 5.27): "Prius est, eas res quae occupari non possunt, aut occupatae numquam sunt, nullius proprias esse posse; quia omnis proprietas ab occupatione coeperit. Alterum vero, eas res omnes, quae ita a natura comparatae sunt, ut aliquo utente nihilominus aliis quibusvis ad usum promiscue sufficiant, eius hodieque condicionis esse, et perpetuo esse debere cuius fuerant cum primum a natura proditae sunt. Hoc Cicero voluit: Ac latissime quidem patens hominibus inter ipsos, omnibus inter omnes societas haec est, in qua omnium rerum, quas ad communem hominum usum natura genuit, est servanda communitas." Emphases are mine. The quotation is from Cic. *Off.* 1.51; on the Cicero passage, see Wacht 1982, 35.

[102] Cic. *Off.* 1.51: *ut quae discripta sunt legibus et iure civili, haec ita teneantur, ut est constitutum legibus ipsis, cetera sic observentur, . . . amicorum esse communia omnia.*

iuris led to a clear separation between sea and land, which was convenient for Grotius and which he adopted. Land, in contrast to sea, was open to acquisition and was therefore *res nullius*, able to become property.[103]

Res nullius under private Roman law are things which belong to no one. In the Roman sources they are discussed in the context of modes of acquisition of ownership (*dominium*). Things which belong to no one are susceptible of being acquired by taking (*occupatio*), a mode of acquisition understood by the Roman jurists to be natural, based on natural reason and the *ius gentium*, and therefore open to Roman citizens and non-citizens (*peregrini*) alike – an aspect that is obviously of no small importance when it comes to the early modern use of this doctrine. Here is the Roman jurist Gaius on the acquisition of ownership of unowned things:

> Of some things we acquire ownership [*dominium*] under the law of nations [*ius gentium*] which is observed, by natural reason, among all men generally, of others under the civil law [*ius civile*] which is peculiar to our city. And since the law of nations is older, being the product of human nature itself, it is necessary to treat of it first. So all animals taken on land, sea, or in the air, that is, wild beasts, birds, and fish, become the property of those who take them . . . What presently belongs to no one [*quod nullius est*] becomes by natural reason the property of the first taker [*occupans*]. So far as wild animals and birds are concerned, it matters not whether they be taken on one's own or on someone else's land . . . Any of these things which we take, however, are regarded as ours for so long as they are governed by our control [*custodia*]. But when they escape from our custody and return to their natural state of freedom, they cease to be ours and are again open to the first taker.[104]

Unowned things can thus be acquired by anybody, Roman citizen or not, under the law of nations (*ius gentium*) simply by taking them (i.e., by *occupatio*). The effective seizure of an unowned thing was sufficient for establishing ownership, *occupatio* being an instant conveyer of ownership; however, with loss of actual control, ownership would be lost too, so that ownership (*dominium*) was limited by factual possession (*possessio*). It does not seem as if Gaius had meant to establish an exhaustive enumeration of unowned things here with his list of "wild beasts, birds, and fish," but had offered merely a few examples. However, it is important to note that title to certain classes of things could not be gained by *occupatio*. Things that were open to everyone (*res communes*), for example, such as the high seas or air,

[103] On the influence of the Roman doctrine of *res nullius* on the law of nations doctrine of *terra nullius*, see Lesaffer 2005.

[104] Gai. *Dig.* 41.1.1–3.

simply *could not* be acquired by capture. Such things were not susceptible to being in anybody's private property, nor could they possibly become public property (*res publica*), a rule that was to become very important for Grotius, and for the early modern writers on the law of nations more generally in their quarrels over the freedom of the seas.

Grotius faced the task of transferring the *ius pristinum* of a long-past mythical Golden Age to the high seas of his present age and thus to a contemporary legal regime.[105] Grotius used for this purpose and combined the two rules mentioned: the rule from Roman property law that there were things that could not possibly become property, as they could not – for practical reasons – be taken and possessed,[106] and the rule from Cicero's moral philosophy that there are things that, for moral reasons, all people should be free to use.

In Grotius, the two rules supplement and strengthen each other and merge in one natural-law norm. The reason that the sea and other comparable goods such as air are assigned to the category of things that belong to everyone equally, is that these goods, first of all, "proceeded originally from nature and have (never been placed under the ownership of anyone as [the Roman jurist] Neratius points out); and in the second place, it is evident (as Cicero observes) that nature produced them for our common use."[107] It was not true, he added, that the sea had become no one's property merely by accident and therefore remained "in this early state . . . in which all things were common."[108] Rather, the sea "is so vast that no one could possibly take possession of it,"[109] both for legal and factual,[110] as well as moral and normative,[111] reasons.[112]

Grotius, perfectly true to his Roman law sources, underscored the difference between the high seas and land. The latter counted, in early times,

[105] Against Buckle 1991, 9, who assumes a "bygone age."

[106] See Lauterpacht 1927, 108–9, on the relevance of this principle of Roman private law to the law of nations into the nineteenth century.

[107] *CLP*, 321; *IPC* 12, fol. 102′ (= *ML* 5.28): "tum quia primum a natura prodita sunt, et in nullius adhuc dominium pervenerunt (ut loquitur Neratius) tum quia, ut Cicero dicit, a natura ad usum communem genita videntur."

[108] *IPC* 12, fol. 104 (= *ML* 5.34): "mare . . . relictum in suo . . . primaevo, quo omnia erant communia."

[109] *CLP*, 322.

[110] *IPC* 12, fol. 102′ (= *ML* 5.29): "Haec igitur sunt illa quae Romani vocant communia omnium iure naturali . . . " Grotius references *Dig.* 1.8.2.

[111] *IPC* 12, fol. 102′ (= *ML* 5.29): "Hoc est quod Cicero dicit inter prima esse iustitiae munera rebus communibus pro communibus uti." Grotius refers to Cic. *Off.* 1.20.

[112] Wieacker 1967, 292 points to the distinction, taken from Justinian's *Institutes*, between original and derivative acquisition, which was the basis of Grotius' arguments; Grotius, using a doctrine of *original* acquisition, attacked the Spanish–Portuguese concept of law, based, among other things, on the idea of papal endowments and thus on *derivative* legal title.

also among the *res communes*, but could in fact be taken into possession and thus acquired under natural law. Grotius described such legal acquisition in his historical work *De antiquitate reipublicae Batavicae*, which portrays the seizure of Holland by the Batavians: "And this area was empty, as Tacitus tells us, when they took possession of it, in order to use it for agriculture. On the basis of the extremely just natural law, according to which those become owners of unoccupied things who first take possession of them."[113] The sea, on the other hand, *cannot* be owned and may not be, according to Cicero's above-mentioned moral considerations, even if it were possible. Thus the sea cannot, for natural-law reasons, ever become private property. In contrast to various other rules of natural law, this is not merely a permissive, but a mandatory, norm, which cannot be deviated from under any circumstances: "It is, then, quite impossible for the sea to be made the private property of any individual; for nature does not merely permit, but rather commands, that the sea shall be held in common."[114]

This view would not even permit acquisition of the sea in case the conditions of the *Corpus iuris* – actual occupation and control – were fulfilled. Such occupation would not, as in the case of a *res nullius*, permit the creation of property, but merely the "semblance of ownership," which emerges from "unjust" appropriation (*iniusta detentio*).[115] The Portuguese could not, in Grotius' view, even claim this "semblance," the unlawful appropriation of the routes to Southeast Asia, as they were not capable of actually controlling these routes. The deciding factor in Grotius' argument, however, was the moral norm, taken from Cicero's *De officiis* and turned into a legal norm of the state of nature, that things created for common use may not be transformed into exclusive private property.

[113] *ARPB* 2, 1: "eaque loca, ut Tacitus narrat, cultoribus vacua occupantibus cessisse, aequissima naturae lege, qua rerum sine domino iacentium domini fiunt qui primi eas possident."

[114] *IPC* 12, fol. 103 (= *ML* 5.30): "Mare igitur proprium omnino alicuius fieri non potest, quia natura commune hoc esse non permittit, sed iubet . . . "

[115] *CLP*, 333; *IPC* 12, fol. 106 (= *ML* 5.39): "Quia enim prima, ut diximus, occupatio res proprias fecit, idcirco imaginem quandam dominii praefert quamvis iniusta detentio."

CHAPTER 7

Roman remedies in the state of nature

Protection of free trade through Roman law remedies

The portrayal of the high seas as a state of nature, governed by natural law and regulated by the common property of a *ius pristinum* as it had reigned in the Golden Age, allowed Grotius to describe the Portuguese ban on Dutch navigation and trade with the East Indies as an unlawful breach of the legal norms of this state of nature – an attack on lawful Dutch claims to humanity's *res communes*. In the case of things common to all and open to everyone (*res communes*), such an attack was "savagery" (*immanitas*) that deserved to be prosecuted under the "law of human fellowship" (*lex humanae societatis*).[1] The appeal to these natural laws of humanity was not, however, enough for Grotius; he clothed the violation of lawful Dutch claims in the procedural terminology of Roman actions and remedies. Although the norms underlying Grotius' state of nature in *De iure praedae* flowed, formally speaking, from the legal sources defined in the Prolegomena, substantively Grotius had used mainly the "ancient Caesarian lawyers" and the "wrested jurisconsults," as charged by his British critics John Selden and William Welwod. In regard to the status of the sea, Grotius based his arguments, as we have seen, on the property-law rules from the *Corpus iuris* regarding the natural acquisition of property. As far as the violations of the norms of natural law with which he charged the Portuguese were concerned, he now portrayed these in the categories of Roman procedural law; that is, he described the Portuguese misdeeds as delicts (*delicta*) as defined by the principles of Roman civil procedure.

This required a – momentous – extension of the applicability of private-law norms, from private subjects to the relations among nations and states, something Alberico Gentili had already attempted in his work on the

[1] *CLP*, 333, 332; *IPC* 12, fol. 106 (= *ML* 5.38).

law of nations.[2] Grotius was certainly aware of the significance of this extension, and he formulated it explicitly. After a discussion of a passage from the classical Roman jurist Ulpian dealing with servitudes, Grotius makes his crucial move and justifies his use of private law in a natural-law and international context as follows:

> It is true that Ulpian was referring to . . . private law; but the same principle is equally applicable to the present discussion concerning the territories and laws of nations, since nations [*populi*] in their relation to the whole of mankind occupy the position of private individuals [*privati*].[3]

The analogy between private subjects and polities is thus perfect; not only could a trading company like the VOC be described as a private subject in the state of nature, but Portugal, which undoubtedly held the status of a state, could equally be seen as a subject of comprehensive natural law, which regulated the state of nature. The Portuguese attacks on Dutch claims to freedom of navigation and trade, claims protected by the norms of natural law, were consequently seen as delicts under Roman law, which allowed obligations to arise vis-à-vis the Dutch, for the enforcement of which the remedies of Roman civil procedure were available.

Grotius regularly discussed these Portuguese obligations arising out of delict (wrongdoing) in the context of passages from Books 47 and 43 of the *Digest*. Book 47 deals with legal actions (*actiones*) related to obligations arising from private wrongdoing (*delicta*), while Book 43 features certain remedies, namely interdicts (*interdicta*), that served to rapidly enforce the plaintiff's demands and aimed to restore the original situation existing before any wrongdoing. Thus Grotius stated, in a crucial passage, that the Portuguese interference with the universal use of the high seas resembled the behavior of a person who forbids others to fish in front of their homes. Grotius continued by adducing a passage from Book 47 of the *Digest*, where the jurist Ulpian called such a prohibition an illegal usurpation (*usurpatio nullo iure*) and stated that anyone on whom such a prohibition is imposed may bring an action for damages (*actio iniuriarum*).[4]

[2] See Straumann 2010 and the introduction in Kingsbury and Straumann 2011; see also Lesaffer 2005; Lauterpacht 1927. For a general, very brief overview of the influence of Roman law on the law of nations, see Nussbaum 1951/52.

[3] *CLP*, 330; *IPC* 12, fol. 105 (= *ML* 5.36): "Verum est loqui Iurisconsultum [Ulpianum] de . . . lege privata, sed in territorio et lege populorum eadem hic est ratio, quia populi respectu totius generis humani privatorum locum obtinent."

[4] *CLP*, 327; *IPC* 12, fol. 104 (= *ML* 5.33): "Ante aedes igitur meas aut praetorium ut piscari aliquem prohibeant usurpatum quidem est, sed nullo iure, adeo quidem ut Ulpianus contempta ea usurpatione si quis prohibeatur iniuriarum dicat agi posse." Ulpian indeed came to this conclusion, by adopting

Given Grotius' purposes, it is important to emphasize the punitive character of an *actio iniuriarum*, which was a penal action.[5] The amount of the penalty lies within the judge's discretion.[6] According to Grotius, therefore, the Dutch had the possibility of bringing an action seeking punitive damages against Portugal, in which the sentence would be at their own discretion, as the state of nature, that is to say the high seas, is characterized by the absence of any centralized judicial power. In an interpretation of Roman sources that is not entirely convincing,[7] Grotius also suggested for the Dutch the possibility not only of an obligatory action (*in personam*), such as the *actio iniuriarum*, resulting from Portugal's delict, but in addition an action *in rem* such as an injunction or interdict (*interdictum*) under the Roman law of possession, a property-law tool serving the protection of possession and aimed at maintaining or restoring possession. Grotius was thinking of the *interdictum uti possidetis utile*,[8] which forbids violence against the last lawful possessors and beneficiaries of a thing and thus permits the last lawful possessor, in which position the Dutch appear here, to take possession on his own authority, if he is not already in possession:

> It is, then, a universally recognized fact, that he who prohibits navigation on the part of another is supported by no law. In fact, Ulpian declares that the person who issues such a prohibition is even liable for damages [under the *actio iniuriarum*], and other authorities have furthermore held that an interdict against interference with [common] utilities [*utile prohibito*] would be admissible in such circumstances. Thus the Dutch plea rests upon a universal right [*commune ius*], since it is admitted by all that navigation of the seas is open to any person whatsoever, even when permission to navigate them has not been obtained from any ruler.[9]

the definition of the sea as *res communis* from the *Institutes* and the beginning of the *Digest*; however, he did not, strictly speaking, describe the prohibition as *usurpatio*. See Ulp. *Dig.* 47.10.13.7: *Si quis me prohibeat in mari piscari . . . , an iniuriarum iudicio possim eum convenire? sunt qui putent iniuriarum me posse agere: et ita Pomponius et plerique esse huic similem eum . . . si quis re mea uti me non permittat: nam et hic iniuriarum conveniri potest . . . et quidem mare commune omnium est et litora, sicuti aer, et est saepissime rescriptum non posse quem piscari prohiberi . . . usurpatum tamen et hoc est, tametsi nullo iure, ut quis prohiberi possit ante aedes meas vel praetorium meum piscari: quare si quis prohibeatur, adhuc iniuriarum agi potest*. See *Inst.* 2.1.1; *Dig.* 1.8.2, for the sea as *res communis*. On the use of *Dig.* 47.10.13 in *ML* see Ziskind 1973, 542–45.

[5] Kaser 1971/75, § 145; Buckland 1963, 690.

[6] Ulp. *Dig.* 47.10.17.2: *quantum ob eam rem iudici aequum videbitur*.

[7] Not, in any case, the passage offered from the *Digest* (43.8.2.9), where an interdict or injunction is in fact ruled out and only an *actio iniuriarum* is considered. If anything, it is *Dig.* 47.10.13.7 that seems to suggest the possibility of an injunction, based on an analogy with an evicted tenant.

[8] See Kaser 1971/75, § 96, IV. For this injunction, see *Fragmenta Vaticana* 90.

[9] *IPC* 12, fol. 108 (= *ML* 5.44): "Omnes igitur vident eum qui alterum navigare prohibeat nullo iure defendi, cum eundem etiam iniuriarum teneri Ulpianus dixerit: Alii autem etiam interdictum utile

The Dutch, harmed in their personality, could bring a penal action against Portugal, and because they were denied the use of a common thing (*res communis*), the sea, they could also pursue an injunction and thus take lawful possession of the sea on their own authority – that is, they could go to sea. This amounted to reinstating the Dutch in their lost possession of the part of the high seas they are entitled to use. The Roman remedies from the *Digest* substantially shaped Grotius' doctrine, especially as he identified the Roman remedies that, in his opinion, the Dutch would have been granted by a praetor in the Roman forum, thus supplementing, with the nuanced remedies of Roman property law and the law of obligations, the Roman doctrine of *bellum iustum*.

Roman remedies as natural rights

As we have seen, the state of nature forms the basis of the Grotian law of nature and his law of nations, resting on a doctrine of just war as a doctrine of just causes of war.[10] Such legitimate *causae belli* consist for Grotius in the violation of rights inhering naturally in every inhabitant of the natural state.[11] The subjective natural rights, violation of which could represent a reason for war, correspond to the natural rights the individual possesses under natural law in pre-political and extra-state situations, and also to a certain degree in lawfully constituted polities. While the discussion of subjective natural rights was present in an inchoate form in *De iure praedae* and its offshoot *Mare liberum*, these rights were laid out explicitly and more elaborately in Grotius' early *Theses LVI* and in the *Defensio capitis quinti maris liberi,* Grotius' defense of the fifth chapter of *Mare liberum*, written around 1615 and directed against the Scottish jurist William Welwod's attack on that work.

The conditions for the development of a concept of subjective rights are found in the Roman remedies-law background of Grotius' doctrine of just causes of war. Grotius attempted to show that justifications for war,

prohibito competere existimaverint. Et sic Batavorum intentio communi iure nititur, cum fateantur omnes permissum cuilibet in mari navigare etiam a nullo Principe impetrata licentia . . . "

[10] Grotius attempted to interpret the causes of war as an Aristotelian *causa materialis*, a terminology that, however, remains on the surface and is given up completely in *De iure belli ac pacis*; on aspects of the Aristotelian doctrine of causation in *De iure praedae*, see Haggenmacher 1983, 63ff.

[11] Grotius' doctrine of just war is also reflected in the earlier *Commentarius in theses XI*, where, however, only public war is discussed and no natural right to punish is postulated; see *CT*, 237ff., 263. In an earlier, as yet unedited manuscript by Grotius found in the Leiden University Library and entitled there *Commentarius de bello ob Libertatem eligendo* (BPL 922 I, foll. 293–307), the four just causes of war are already present; BPL 922 I, fol. 304 recto.

whether public or private, depended on the justice of the relevant reason for war, and explicitly compared possible substantive causes of war with the legal remedies provided by Roman law in the *Digest*. After distinguishing the four genera of just causes of war, which he ascribed to the objective legal norms of his natural "laws,"[12] Grotius went on to identify these categories with the various types of Roman legal actions:

> [I]n both kinds of warfare, [public and private,] one must consider the causes involved. Of these there are four kinds, as we have pointed out: for the authorities who hold that there are three just causes of war (defense, recovery, and punishment, according to their classification), fail to mention the not uncommon cause that arises whenever obligations are not duly discharged. *Indeed, in so far as we are concerned with subject-matter, which is the same in warfare and in judicial trials, we may say that there should be precisely as many kinds of execution [exsecutiones] as there are kinds of legal action* [*actiones*] [emphasis added]. To be sure, legal judgements are rarely rendered in consequence of causes of the first class, since the necessity for defending oneself does not admit of such delay; but interdicts against attack [*interdicta de non offendendo*] properly fall under this head. The actions relating to property [*actiones in rem*] which we call recovery claims [*vindicationes*], arise from the second kind of cause, as do also injunctions obtained in behalf of possession [*interdicta possessionis gratia*]. The third and fourth classes give rise to personal actions, namely, claims to restitution [*condictiones*], founded upon contract [*ex contractu*] or upon injury [*ex maleficio*].[13]

Grotius qualified the prohibition on Dutch trade and navigation imposed by Portugal as an injury under Roman law.[14] Should the disputes between Portugal and the Netherlands come to court, in Grotius' view, there was no doubt of the verdict that a just judge would reach; what could not be

[12] See *IPC* 7, fol. 29′: "Ius autem omne, quod nobis competit, ad quatuor leges referri potest, primam, secundam, quintam et sextam . . . Bellum igitur omne quatuor causarum ex aliqua oriri necesse est."

[13] *IPC* 7, foll. 30a′–30: "Spectandae igitur in utroque causae quas esse quatuor diximus. Nam qui tres statuunt iustas bellorum causas, defensionem, recuperationem et punitionem, ut loquuntur, illam non infrequenter omittunt, quae locum habet, quoties quae convenerint non praestantur. Totidem enim esse debent exsecutionum, quot sunt actionum genera, quod ad materiam attinet, quae in bello et iudiciis eadem est. Et ex primo quidem genere raro iudicia redduntur, quia moram istam se tuendi necessitas non permittit. Attamen interdicta de non offendendo huc pertinent. Secundo ex genere sunt in rem actiones, quas vindicationes dicimus: interdicta etiam possessionis gratia comparata. Ex tertio et quarto actiones personales, condictiones scilicet ex contractu et ex maleficio." Punishment is a just cause of war (in conformity with the penal nature of some of the *actiones*), as fault (*culpa*) creates an obligation; see *IPC* 12, fol. 119. This doctrine of punishment as a natural cause of war was permitted by Grotius' theory, under which the individual in the state of nature has the right to punish; see below, 207–20. On the effects of this Roman-law doctrine of *culpa* on the international-law doctrine of state responsibility, see Lauterpacht 1927, 135–36.

[14] *IPC* 12, fol. 119 (= *ML* 13.74). Grotius quotes the following passages: Ulp. *Dig*. 43.8.2.9; 47.10.13.7.

achieved by judicial verdict, however, had to be attained through just war.[15] The crucial point for Grotius was, as Pomponius had found in the *Digest*, that one who usurps a thing that is everyone's property in common and open to everyone (*res communis*), to the detriment of all others, must be prevented from doing so by force (*manu prohibendus*).[16] That this referred to the sea followed from an interdict cited by Grotius that served in Roman law to prevent any acts on the seas that would hinder navigation.[17] Most importantly, the violation in question does not have to concern just corporeal things, such as an attack on property – abstract *rights* could be violated as well:

> The defense [*defensio*] or recovery of possessions [*rerum recuperatio*] and the exaction of a debt [*debitum*] or of penalties due [*poena*], all constitute just causes of war [*iustae bellorum causae*]. Under the head of "possessions" [*res*], even rights [*iura*] should be included.[18]

The use of common goods (*res communes*) such as the high seas is exactly such a right that can be defended in a just war. Grotius, true to his Roman law sources, treats the right to use the sea as a quasi-possession under Roman law,[19] in that he treats it as an interest that is, although strictly speaking not capable of being possessed – since *usus* in Roman law is as an incorporeal interest not capable of *possessio*, just of *quasi possessio*[20] – still enjoying the protection of the remedy designed to protect possession. According to Grotius, a prohibitory interdict, which usually prohibits the use of force against the last rightful possessor, can enforce the right to the use of the high seas. In *De iure praedae*, however, this turns into a *right* of the last rightful possessor, i.e. the Dutch, to assert their claim to the use of the high seas by force, given the absence of courts: "For in all cases to

[15] *ML* 13.75: "Quod autem in iudicio obtineretur, id ubi iudicium haberi non potest, iusto bello vindicatur."

[16] *ML* 13.75: "Et quod proprius est nostro argumento, Pomponius eum qui rem omnibus communem cum incommodo ceterorum usurpet, MANU PROHIBENDUM respondit." The quoted passage (Pomp. *Dig.* 41.1.50) is: *Quamvis quod in litore publico vel in mari exstruxerimus, nostrum fiat, tamen decretum praetoris adhibendum est, ut id facere liceat: immo etiam manu prohibendus est, si cum incommodo ceterorum id faciat: nam civilem eum actionem de faciendo nullam habere non dubito.* The view of Ziskind 1973, 545 that the use of force is not mentioned in Pomponius is incomprehensible.

[17] *IPC* 12, fol. 119 (= *ML* 13.74). The quotation is from Ulp. *Dig.* 43.12.1.17.

[18] *IPC* 12, fol. 116′ (the passage is not contained in *Mare liberum*): "Iustae bellorum causae sunt rerum aut defensio aut recuperatio, debiti et poenae exactio. In rebus etiam iura comprehendere debemus."

[19] *IPC* 12, fol. 116′ (omitted from *ML*): "Si quis igitur ius tale quasi possideat . . . "

[20] The terminology is probably post-classical; see Buckland 1963, 196–97.

which prohibitory interdicts are properly applicable in court procedure, armed prohibition is proper outside the courts."[21]

This illustrates a crucial way in which Grotius used private Roman law, viz. how he framed the procedural remedies provided by that law, in a language of subjective natural rights. In his *Defensio capitis quinti maris liberi* around 1615, a defense of the fifth chapter of *Mare liberum* from criticism by the Scottish jurist William Welwod in 1613, Grotius explained his concept of "right" in the subjective sense, as used, for example, in the subtitle of *Mare liberum*: "*The right* [*ius*] *which belongs to the Dutch to trade with East India*."[22] Grotius, who in *De iure praedae* had used the term "right" (*ius*) in an equivocal way to denote both objective law and subjective rights, ten years later in the *Defensio* explicitly introduced the notion of a subjective right.[23] Here, he now explained the difference between *ius* in the subjective and the objective senses, and indicated that he saw the Roman law of the *Digest* as the basis of his concept of subjective right:

> Now add the fact that the sea is not only said by the jurists to be common by the law of nations, but without any addition it is said to be of the right [*ius*] of nations [*esse iuris gentium*]. In these passages "right" [*ius*] can not mean a norm of justice [*norma iusti*], but a moral faculty [*facultas moralis*] over a thing, as when we say "this thing is of my right [*ius*], that is, I have ownership [*dominium*] over it or use or something similar."[24]

Grotius here obviously imputes to the scholars of the *Digest* a subjective use of the concept of *ius*. The question of subjective use of *ius* in Roman law is highly contested.[25] There are examples of subjective use of *ius* in Roman

[21] *CLP*, 364; *IPC* 12, fol. 116′ (omitted from *ML*): "Nam quoties in iudiciis interdicta competunt prohibitoria, toties extra iudicia prohibitio competit armata."

[22] *Mare liberum, sive de iure quod Batavis competit ad Indicana commercia.*

[23] For an excellent discussion of the gradual development of a concept of subjective right in Grotius, see Haggenmacher 1997.

[24] *ML* Armitage, 107; *DCQ*, 348: "Adde iam quod Mare non tantum dicitur a Iurisconsultis esse commune gentium iure, sed sine ulla adiectione dicitur esse Iuris gentium, quibus in locis ius non potest significare normam aliquam iusti, sed facultatem moralem in re: ut cum dicimus haec res est iuris mei id est habeo in ea dominium aut usum aut simile aliquid." The idea of *ius* as a *facultas* was already developed by Jean Gerson in the early fifteenth century; see Tuck 1979, 25–26. Tierney 1983, 437–38 disputed Tuck's interpretation of Gerson as a theorist of subjective rights – at least on the basis of the text cited by Tuck; in Tierney 1997, 207–35, Gerson is granted an important role in the development of subjective rights, but in a conciliar context and against the background of an older canonical tradition.

[25] Looking at the way the term *ius* was used led Villey to argue against a subjective Roman notion of right; see Villey 1957. For a Greek origin of rights, see Miller 1995; Mitsis 1999; more nuanced and skeptical is Burnyeat 1994. The question of whether the Greek Stoics possessed a concept of rights remains open and need not concern us here. For an overview, see Miller 2003, 117–20. See also

law, but pronounced subjective use of the term is doubtful.[26] This debate on the origins of the idea of subjective right suffers from undue concentration on the word *ius*, and it would most likely be more promising to pay greater attention to the actual enforcement of subjective legal claims in Roman civil-procedure law.[27] From this perspective, a subjective concept of right can be ascribed to the Romans with greater plausibility – the terms *actio* and *interdictum* need merely be translated with the term "right," a translation that is anyway hardly avoidable, as argued convincingly by Alan Gewirth,[28] and more recently by Charles Donahue: "A legal system like the Roman that conceives of rights and duties in terms of what one can bring an action for, must have the concept of subjective right, even if it never uses the term."[29]

Grotius did in fact, as it were, translate the technical terms in Roman law for the various legal remedies in this way and rendered them with the term *ius*, in *De iure praedae* and then more explicitly in *De iure belli ac pacis*. His "translation" of the various *actiones* and *interdicta* by using the term *iura*, and especially his rendering of the concept of prohibited acts as the violation of subjective rights, was obviously inspired by the humanists of *mos Gallicus*, and especially by Donellus,[30] but it could already be found in the texts of Roman law codified by Justinian.[31] Grotius already used the term ambiguously in its subjective and objective senses in *De iure*

Kammasch and Schwarz 2001, who deny an ancient origin of subjective natural rights. Arguing convincingly for a subjective use even of the term *ius* in Roman law is Donahue 2001; see also Kaser 1977 and now Garnsey 2007. Pugliese 1954 argued early on for a Roman concept of subjective rights; see also, in a similar vein, Zuckert 1989; Gewirth 1978, 100.

[26] For a good overview of the discussion, with references to the literature, see Tierney 1997, 15–19; Michel Villey argued vehemently against a Roman concept of subjective rights (a position which found its way into Isaiah Berlin's *Two Concepts of Liberty*) and ascribed to Grotius an important role in developing such a concept: Villey 1957. Now, however, on the subjective use of *ius* in Roman law, see Donahue 2001, who argues convincingly for a Roman concept of subjective rights and finds no less than 191 examples of it in the *Digest*, but also recognizes that Roman law had no developed concept of subjective rights. See Donahue 2001, 508–9. See also Kaser 1971/75, § 48, II, who compares the concept *ius* with "our word 'right'" and says that the concept also meant a "subjective authority lent to the individual by the legal system," though it was not "fully formed theoretically." See also Kaser 1977.

[27] As suggested in Pugliese 1954. [28] See Gewirth 1978, 100. [29] Donahue 2001, 530.

[30] On Donellus and his subjective concept of *ius*, see Coing 1982, 251–54; Haggenmacher 1983, 178–80; Haggenmacher 1997, 113; Garnsey 2007, 201–3; Brett 2011, 102ff.; see also Giltaij 2011, 23–27, on Donellus' and Grotius' respective doctrines of subjective rights and their relationship to modern human rights.

[31] See, e.g., the way Celsus characterizes the term *actio* as a right (*ius*) in the context of actions *in personam* in *Dig.* 44.7.51: *Nihil aliud est actio quam ius quod sibi debeatur, iudicio persequendi.* ("An action is nothing else but the right to recover by judicial process that which is owing to one.") For further examples, see the appendix in Donahue 2001, 531ff. (which does not contain, however, the passage by Celsus just cited).

praedae.[32] He then clearly ascribed it a subjective meaning in the *Defensio*, in which he claimed that *iuris gentium esse* already had a subjective sense in the *Digest*[33] and suggested that the genitive *iuris gentium esse* used the term *ius* in a subjective sense, as in *iuris mei esse*, in order to be able to portray the seas, or access to them, as a subjective right of nations. This interpretation undertaken by Grotius of *mare iuris gentium* in the *Digest* is surely unsustainable – the Roman jurists meant by it only that the norms of *ius gentium* prevailed on the seas. It is not even certain that Grotius himself, when writing *De iure praedae*, had understood the relevant passage in this way.[34] Later, however, and after the *Defensio* at the latest, he found this interpretation opportune, as it supported his use elsewhere of *ius* as subjective right and was compatible with his view of the various *actiones* and *interdicta* as rights.

Important elements of Grotius' subjective view of "right" could be found in an earlier, hitherto unpublished manuscript, the *Theses sive quaestiones LVI*, which may have been written between 1602 and 1606 and thus would belong in the context of works such as *De iure praedae commentarius* and *Commentarius in theses XI*.[35] The *Theses LVI* provide an initial account of Grotius' theory of the subjective rights that people are granted by nature, and is thus an extraordinarily illuminating source for the development of Grotius' thought on rights in a state of nature.[36] In the second thesis, Grotius provides a description of these inherent rights:

[32] Brett 2011, 104, asserts that Grotius in *De iure praedae* "did not conceive *ius* either as law or as individual rights. *Ius* instead has a more objective sense of what is rightful, the object of the virtue of justice with which the work is centrally concerned." I think rather Grotius was concerned with both law and subjective rights, oscillating between the two senses; as for *ius* as the object of the virtue of justice, this is correct only insofar as we mean by the virtue of justice Grotius' corrective justice, which is precisely enshrined in his law of nature and guaranteed by rights.

[33] Grotius was probably alluding to *Dig*. 1.8.4, which says that no one can be denied access to the beach as long as those involved stay away from houses and buildings, *quia non sunt iuris gentium sicut et mare*. See *Inst*. 2.1.1.

[34] In the *Defensio*, Grotius referred to the passage discussed above, 1500n88, *IPC* 12, fol. 100′ (= *ML* 5.22): "De mari autem prima sit consideratio, quod cum passim in iure aut nullius, aut commune, aut publicum iuris gentium dicatur." In the manuscript, *iuris gentium* appears to have been changed to the genitive and was at first simply *iure gentium*, according to natural law.

[35] On the dating of the manuscript, see Ittersum 2009, 143, who dates it to roughly the same time as *De iure praedae* based on her research on watermarks and paper use. Her arguments are largely persuasive; the only reasons arguing for a later date, around 1615 and the time of the *Defensio*, are the clear-cut subjective use of *ius* and a marginal note denying a natural right to punish, which, in terms of substance, would be more in line with later works such as *Defensio fidei catholicae de satisfactione Christi* and *De imperio summarum potestatum circa sacra*, both written between 1614 and 1617. To my mind, it is most convincing to assume that the manuscript was written early and that the marginal note on the right to punish was added later. See also Borschberg 2006/7.

[36] See Borschberg 2006/7.

> A human being naturally [*naturaliter*] has a right [*ius*] to his actions [*actiones*] and his possessions [*res*], a right both to retain them and to alienate them: regarding life and body, only to retain them. This right, flowing from the law of God, is restricted by the law of God, by the law of nature [*per legem naturalem*], and . . . by the Bible and the revelation.[37]

It must first of all be noted that Grotius apparently already made clear, subjective use of the term *ius* in an earlier stage of his development, and distinguished this subjective *ius* from *ius* in an objective legal sense.[38] Right in an objective sense placed limits upon the subjective rights enjoyed by humanity in the state of nature and consisting of the right to one's own life, one's own body, one's own actions, and one's own things (*res suae*). Objective right is understood, as in *De iure praedae*,[39] alternately as God's rules or a natural law, and provides for a voluntary act of self-obligation as a possible limit on subjective natural rights; this is substantively determined only to the extent that an agreement involving the alienation of one's own life or body is null and void. Aside from this, a person in the state of nature can give up certain rights by obligating himself and thereby creating new personal or property rights in others:

> Both natural law [*lex naturalis*] and the Bible relate the restriction that man, by an indication of his will [*indicio voluntatis*], is being obliged [*obligetur*] to his fellow man and insofar gives up his right [*ius*], both with regard to his actions [*actiones*] and his possessions [*res*].[40]

To Grotius, the state of nature is thus a natural legal state. The possibility of obligating oneself already exists and is guaranteed by the objective norms of the law of nature, *lex naturalis*. This objective law grants the individual in the state of nature certain subjective rights, which include property rights; in *Theses LVI*, possessions or property are simply assumed in the state of nature, without a theory of the origin of the institution or original acquisition of property. The objective law may restrict the subjective rights

[37] *Theses LVI*, fol. 287 recto, thesis 2: "Homo naturaliter ius habet in actiones et res suas tum retinendi tum abdicandi: vita autem et corpus retinendi tantum. Hoc tamen ius a iure Dei dimanans ab eodem restringitur, per legem naturalem et per verbum tum extrinsecum tum intrinsecum, id est Scripturam et Revelationem."

[38] See Haggenmacher 1997, 81–82, who (probably without being familiar with the *Theses LVI*) assumes that Grotius did not achieve a clear concept of *ius* in its subjective dimension until later.

[39] See *IPC* 2, foll. 5–6.

[40] *Theses LVI*, fol. 287 recto, thesis 3: "Lex naturalis simul et Scriptura hanc restrictionem tradunt, ut Homo indicio voluntatis <alteri> facto obligetur, et eatenus amittat ius cum in actiones tum in res suas." The words in brackets were added later by Grotius.

bestowed on human beings in the state of nature.[41] The individual in the state of nature has the right to his things (*res*), as he has the right to his own body, his life and his actions. But in contrast to things and actions, his own body and his life are inalienable. These four natural, universal subjective rights form a quasi-sovereign territory for the individual legal subject in the state of nature, and create an absolute limit vis-à-vis the claims of all other legal subjects:

> Human beings do not have an inherent natural right [*ius non habet naturaliter*] to the life, body, actions and possessions of other people, insofar as the other's life, body, actions or possessions are ordinary means to the self-interested [*ad bonum suum*] pursuit of the right [*ius*] to life, body, actions, and possessions [*res*] that everybody has [*quod quisque habet*]. Consequently, human beings do not have a [natural] right to punishment [*ius puniendi*].[42]

Before the individual legal subjects enter into transactions with one another and take on obligations, there is, therefore, no opportunity to assert legal claims to the life, body, actions, or possessions of others. All these are protected by an absolute claim-right against everyone else, modeled on the *actio in rem* of Roman law, a remedy that entails a correlative duty of non-interference on the part of everyone else.[43]

Aside from the fact that these rights to life, body, actions and certain things exist vis-à-vis everyone and are thus absolute, they are also rights that everyone is due by nature *ab initio*, and are not called into being by some contingent act of will – a situation that qualifies these rights and lends them additional moral weight. In regard to these rights, Jeremy Waldron, following H. L. A. Hart,[44] has spoken of "general rights," in order to emphasize the fact that these rights are considered to belong to each person, not on the basis of a special transaction or relationship in which the person is involved ("special rights"), but simply as a human being, "a being such that it is a matter of moral importance that he should not be interfered with."[45] The rights that, for Grotius, are due the legal subject in the state of nature are thus general in nature, in that they do

[41] In a way similar to natural liberty in Roman law, it may be restricted by law (*ius*); Flor. *Inst.* 1, 3, 1: *Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur*. *Pace* Skinner 1998, 19, the Romans jurists did think of freedom as a natural power.

[42] *Theses LVI*, fol. 287 recto, thesis 6: "Homo autem ius non habet <naturaliter> in <vitam corpus> actiones et res alterius hominis, insiquatenus illae <vita corpus> actiones aut res alterius sunt media ordinata ad consequendum <ad bonum suum> ius quod quisque habet in vitam, corpus, actiones et res suas. <Ergo non habet ius puniendi.>"

[43] See Kaser 1971/75, § 55, I. [44] Hart 1984, 88. [45] Waldron 1988, 108.

not arise from a special, contingent transaction, but are due every human being *naturaliter*. They are, in addition, rights that in the spirit of Roman law of actions could be called claims *in rem*, in that they obligate all other bearers of rights to respect these rights.

As long as people in the Grotian state of nature did not enter into social transactions with each other, no one could assert any natural law claims against the other holders of these general rights *in rem*.[46] Grotius compared the relationship among the various rightsholders with that between a doctor and his patients, which also has merely an advisory character and grants the doctor no legal claims regarding the acts of his patients:

> To the extent such regular means are an advantage for everyone, to that extent, another person has no right to them [*in ea ius non habet*]; and thus the sage and the doctor have advisory power, not the power to command [*consilii potestas non imperii*]. This is called executive power [*ius exsecutionis*].[47]

In this view of the state of nature, however, no one is granted any kind of inherent power to command or enforce, in the sense of coercive means (*ius exsecutionis*); this power can only be created by a contingent transaction dependent on the will of the participating parties:

> This is accurate if no consensus [*consensus*] comes about through which one obtains a right [*ius*] to acquire the means to someone else's property.[48]

Such a transaction requires a meeting of minds (*consensus*) among the participating parties and is clearly modeled on Roman consensual contracts, the *obligationes consensu contractae*, as portrayed by Gaius in the *Institutions*.[49] A formlessly declared meeting of minds, a consensus, is sufficient to create an obligation.

This is how Grotius portrayed the rights due to human beings in the state of nature in *Theses LVI*. The idea of a *numerus clausus* of rights that one can have, as put forward in *De iure praedae* as well as in *De iure belli ac pacis*, can also be seen in the *Theses LVI*. The rights here are comparable

[46] A state that, in this regard, resembles Rousseau's state of nature.

[47] *Theses LVI*, fol. 287 recto, thesis 7: "Quatenus autem eadem illa sunt media ordinata ad bonum cuique suum, eatenus homo alter in ea ius non habet; atque ita sapiens et medicus consilii habent potestatem non imperii: quod iure exsecutionis demonstratur." The example can be attributed to Plato's *Gorgias* and the view advocated by Gorgias of the necessity of rhetoric, illustrated by the example of the doctor who has to convince his patient to take medicine and cannot be satisfied with merely prescribing: Pl. *Grg*. 456b. But aside from persuasion, which the doctor would best leave to the orator, he has no means of coercion at his disposal.

[48] *Theses LVI*, fol. 287 recto, thesis 8: "Quod ita ver(um) est nisi consensus accesserit: cuius virtute alter ius habet ad eliciendi media ad bonum alterius."

[49] Gai. *Inst*. 3.135–36.

to the rights enumerated in *De iure praedae*; the right to one's own actions points to the freedom of contract, which constitutes the premise of the right to enforce contractual claims. The right to one's own things foreshadows the right to private property, as well as to contractual claims arising out of contracts of sale, while the right to one's life and body corresponds to the right to self-defense. It is remarkable that, as opposed to both *De iure praedae* and *De iure belli ac pacis*, the right to one's own life and body in this early treatise is not alienable and the right to punish is denied. In the following, we will discuss the individual subjective rights arising from the just causes of war, as described in Grotius' main treatises on natural law, *De iure praedae* and *De iure belli ac pacis*.

CHAPTER 8

Natural rights and just wars

Of the four natural rights that may give rise to a just cause of war – the right to self-defense, to property, to collect debt, and to punish – the right to private property and the right to collect debt[1] are the two rights that are most intricately tied to what has been acknowledged by liberals such as Constant as a driving force behind the modern concept of rights, that is to say commerce and free trade.[2] Grotius' right to punish is a secondary right of sorts, derivative of the primary rights of self-defense, property, and collection of debt, and designed to prevent these rights from being violated; we shall treat it separately in Chapter 9.

The right to self-defense

The right to self-defense arises from the first so-called law, as Grotius formulated it in the second chapter of *De iure praedae*: "It shall be permissible to defend [one's own] life and to shun that which threatens to prove injurious."[3] In the marginal notes, Grotius pointed to passages in Cicero's *De officiis* and *De finibus* as the sources of this law; it is in fact a paraphrase of these passages, in which the natural drive to self-preservation is presented in Stoic tradition as something common to all creatures.[4] What is portrayed by Cicero as natural, and thus desirable, in the Stoic context[5]

[1] For Grotius' right to property, see Brandt 1974; Buckle 1991. For contractual rights, see Diesselhorst 1959.

[2] See Constant 1988, 325: "The effects of commerce extend even further: not only does it emancipate individuals, but . . . it places authority itself in a position of dependence."

[3] *CLP*, 23; *IPC* 2, fol. 6: "VITAM TUERI ET DECLINARE NOCITURA LICEAT."

[4] Cic. *Off.* 1.11: *Principio generi animantium omni est a natura tributum, ut se, vitam corpusque tueatur, declinet ea, quae nocitura videantur, omniaque, quae sint ad vivendum necessaria anquirat et paret, ut pastum, ut latibula, ut alia generis eiusdem.* Cic. *Fin.* 4.16: *Omnis natura vult esse conservatrix sui, ut et salva sit et in genere conservetur suo*. Cic. *Fin.* 5.24: *Omne animal se ipsum diligit, ac simul ortum est id agit ut se conservet, quod hic ei primus ad omnem vitam tuendam appetitus a natura datur, se ut conservet atque ita sit affectum ut optime secundum naturam affectum esse possit.*

[5] On the Stoic background (*oikeiosis*) of Cic. *Off.* 1.11, see Dyck 1996, 86ff.

is formulated by Grotius as a permissive norm of natural law. Additionally, in formulating the first law, Grotius again refers to Cicero's forensic speech *Pro Milone*, in which Cicero portrays self-preservation as a legal principle.[6]

In the seventh chapter, on the just causes of war, Grotius again made use of *Pro Milone* in formulating the right of self-defense. Every just war, according to Grotius, originated in one of the four just causes of war, and self-defense (*sui defensio*) was the first of these causes. For, as Cicero said in *Pro Milone*, self-defense was not merely just, but also necessary, when one defended oneself by force against the infliction of force.[7] This right of self-defense applied, according to Grotius, both to individuals and to polities in the state of nature: "The examples afforded by all living creatures show that force privately exercised for the defence and safeguarding of one's own body is justly employed."[8] Grotius provides further support for this with various passages from Roman law, including the following passage by Florentinus in the *Digest*, according to which the law of nations (*ius gentium*) grants the right "to repel violent injuries [*vis atque iniuria*]":

> [I]t emerges from this law [*ius gentium*] that whatever a person does for his bodily security he can be held to have done rightfully; and since nature has established among us a relationship of sorts, it follows that it is a grave wrong for one human being to encompass the life of another.[9]

Defense against an unlawful attack is, according to Roman law, a justification for interference with the rights of others. Grotius quoted yet another passage from the *Digest* that exempted the carrying of weapons for purposes of self-defense from the general prohibition on acquiring weapons, and declared it lawful.[10] Grotius' self-defense as a just cause of war was obviously modeled on Cicero and the *Digest*; once more, the conditions in the declining Roman republic, which formed the context for the *Pro Milone*, served as a model for Grotius' state of nature, characterized by the absence of state judicial organs, but not by lawlessness.

[6] Cic. *Mil.* 10.

[7] *IPC* 7, fol. 29′: "Bellum igitur omne quatuor causarum ex aliqua oriri necesse est. Prima est sui defensio, ex lege prima. Nam ut Cicero inquit, illud est non modo iustum, sed etiam necessarium, cum vi vis illata defenditur." The quotation is from Cic. *Mil.* 9.

[8] *CLP*, 104; *IPC* 7, fol. 30a: "Ad defensionem tutelamque corporis sui privata vis iusta est omnium animantium exemplo."

[9] Flor. *Dig.* 1.1.3: *ut vim atque iniuriam propulsemus: nam iure hoc evenit, ut quod quisque ob tutelam corporis sui fecerit, iure fecisse existimetur, et cum inter nos cognationem quandam natura constituit, consequens est hominem homini insidiari nefas esse.*

[10] *Dig.* 48.6.11.2: *Qui telum tutandae salutis suae causa gerunt, non videntur hominis occidendi causa portare.*

As in *De iure praedae*, in *De iure belli ac pacis* Grotius called upon Cicero for evidence that war was natural, especially war in self-defense. As we have seen, Grotius had already utilized Stoic doctrines from Cicero's philosophical work *De finibus* for the a priori evidence of war's accordance with natural law in principle.[11] Now he hoped to show that war conformed to natural law through a consensus among scholars, in line with his rhetorical methodology as described in Chapter 3.[12] The scholarly opinions that he presented were exclusively Roman, and came primarily from Cicero and the *Digest*. In addition to the passage cited in *De iure praedae* and quoted in greater detail in the later work,[13] Grotius offered yet another passage from the forensic speech *Pro Milone*[14] as evidence of the natural-law character of the right of self-defense and thus the essential natural-law nature of war in general. This was followed by two passages from the *Digest* that also supported self-defense's conformity with natural law.[15]

The right of self-defense in *De iure belli ac pacis* does not differ in essence from the doctrine introduced in *De iure praedae*; however, defense of property against theft is viewed in the later work from the point of view of self-defense, thus expanding the right of self-defense. Grotius justified this using the structure of the Roman law of civil procedure. He distinguished between complaints under Roman law (*actiones*) for unlawful acts not yet committed (*iniuriae*) and those for unlawful acts that had already been committed, and argued that defense of one's own person, as well as of property, from the threat of theft was covered by complaints for unlawful acts not yet committed (*actiones ob iniuriam non factam*). Examples of such complaints *ob iniuriam non factam* were:

[11] See above, 103–7.

[12] *IBP* 1.2.3.1: "Probatur idem [i.e., ius naturae bello non repugnat] quod dicimus omnium gentium ac praecipue sapientium consensione."

[13] Ibid.: "De vi qua vita defenditur notus Ciceronis locus ipsi naturae testimonium perhibens: 'Est haec non scripta sed nata lex, quam non didicimus, accepimus, legimus, verum ex natura ipsa arripuimus, hausimus, expressimus; ad quam non docti, sed facti, non instituti, sed imbuti sumus: ut si vita nostra in aliquas insidias, si in vim, in tela aut latronum, aut inimicorum incidisset, omnis honesta ratio esset expediendae salutis.'" Grotius cites Cic. *Mil.* 10.

[14] Ibid.: "Item: Hoc et ratio doctis, et necessitas barbaris, et mos gentibus, et feris natura ipsa praescripsit, ut omnem semper vim, quacumque ope possent a corpore, a capite, a vita sua propulsarent." Grotius cites Cic. *Mil.* 30.

[15] Ibid.: "Caius Iurisconsultus: adversus periculum naturalis ratio permittit se defendere." Grotius cites *Dig.* 9.2.4 (on the *lex Aquilia*). Grotius goes on to say: "Florentinus Iurisconsultus: Iure hoc evenit ut quod quisque ob tutelam corporis sui fecerit, iure fecisse existimetur," citing *Dig.* 1.1.3. This shows why Grotius reproaches the Roman jurists with a muddled use of the terms *ius naturae* and *ius gentium* – Florentinus here refers to *ius gentium*, while Grotius is concerned with qualifying the right to self-defense as lawful under *natural* law; cf. also *IBP* 1.2.4.2.

> Now in Law there are Actions for Injuries *not yet done,* or for those *already committed.* For the *First,* When Securities are demanded against a Person that has threatened an Injury [*cautio de non offendendo*], or for the indemnifying of a Loss that is apprehended [*cautio damni infecti*]; and other Things included in the Decrees of the superior Judge [*interdicta*], which prohibited any Violence.[16]

Securities (*cautiones*) in Roman law were promises of payments, and especially compensation payments, generally as formal, oral debt obligations in the form of stipulations (*stipulatio*).[17] Certain legal actions (*actiones*) were used to enforce such stipulations. By interdicts or injunctions, Grotius meant Praetorian remedies by which the Praetor prohibited using force against a faultless possessor.[18] Grotius equated these *actiones* and *interdicta* from Roman private law with the subjective rights in his natural law; violations gave rise to just wars of self-defense, be they private or public. The analogy between the right of self-defense and the prohibitive injunctions are easy enough to understand; one's own person and property are protected from unlawful force. But Grotius' reference to securities (*cautiones*) is more difficult to understand. In Roman law, these securities could be enforced with *in personam* actions against those who had promised them. In Grotius' analogy, anyone who has been attacked seems able, under natural law, to assume a prior, tacit promise of a security (*cautio*) from every potential attacker or thief; this then permits the victim to initiate an action, or wage a war, due to violation of this tacit stipulation.

In any case, true to the general construction of his work, which was based on the structure of Roman remedies, the defense of property was now shifted to the sphere of self-defense. This Roman foundation was then supplemented, in typical Grotian form, in later editions of *De iure belli ac pacis* with additional quotes and paraphrases from all of Greco-Roman antiquity. Thus in editions after 1631, Grotius followed the systematization quoted above, which clearly followed the various Roman remedies, with a reference to Plato's *Laws*. The fundamental structure, however, remained faithful to Roman civil procedure.

This was also expressed in the emphasis on corrective justice, which was used to separate natural law from various other types of law, and in which private property gained a prominence reminiscent of Cicero. Defense of

[16] *RWP*, 2.393; *IBP* 2.1.2.1: "Dantur autem actiones aut ob iniuriam non factam, aut ob factam. Ob non factam, ut qua petitur cautio de non offendendo, item damni infecti, et interdicta alia ne vis fiat." See on the *cautio damni infecti* the praetorian edict in *Dig*. 39.2.7.pr.

[17] See Kaser 1971/75, § 128, II. [18] See ibid., § 96.

one's own property by killing a thief was not permitted under divine law, said Grotius, but it was allowed by natural law. In a section entitled "Murther in Defence of our Goods permitted by the Law of Nature" (*Pro rebus defendendis interfectionem non esse illicitam iure naturae*), he wrote:

> We now proceed to those Injuries that affect our Estates or Possessions; and here, if we have Regard to *expletive* [i.e. corrective] Justice, I must own, that for the Preservation of our Goods 'tis lawful, if there's a Necessity for it, to kill him that would seize upon them. For the Inequality betwixt the Goods of one Man and the Life of another is made up, by the Difference betwixt the favourable Cause of the innocent Person, and the odious Cause of the Robber, as was before observed: From whence it follows, that if we have Regard only to this Right, I may shoot that Man who is making off with my Effects, if there's no other Method of my recovering them.[19]

Neither the limit set by the Twelve Tables that a thief could be killed only if armed, nor the limit in Ulpian that only thieves in the night could be killed, was valid under natural law, according to Grotius. Here he used Roman law only to corroborate the view that the restrictions on the right to defend property in Mosaic law as well as in Solon's law had formulated only the conventional law of nations (*ius gentium*), rather than natural law.[20]

The right of self-defense in *De iure belli ac pacis* is, however, also restricted and dealt with in more nuanced fashion compared with *De iure praedae*. In the later work, Grotius distinguished between direct, immediate danger and mere fear of possible attack, and excludes the latter from the natural right of self-defense. "But here 'tis necessary that the Danger be *present,* and as it were, contained in a *Point*," Grotius writes. Only if the attacker possesses the intent to kill could one anticipate the act. In the first book of *De officiis*, Cicero had correctly stated that "one frequently commits Injustice, by attempting to hurt another, in Order to avoid the Evil which he apprehends from him."[21]

[19] *RWP*, 2.408; *IBP* 2.1.11: "Veniamus ad iniurias quibus res nostrae impetuntur. Si expletricem iustitiam respicimus, non negabo ad res conservandas raptorem, si ita opus sit, vel interfici posse: nam quae inter rem et vitam est inaequalitas, ea favore innocentis et raptoris odio compensatur, ut supra diximus: unde sequitur si id ius solum respiciamus, posse furem cum re fugientem, si aliter res recuperari nequeat, iaculo prosterni."

[20] *IBP* 2.1.12, where Grotius references for the norm contained in the Twelve Tables *Dig.* 47.2.55(54).2 and for Ulpian *Dig.* 48.8.9.

[21] *RWP*, 2.398–99; *IBP* 2.1.5.1: "Periculum praesens hic requiritur, et quasi in puncto. Fateor quidem si insultator arma arripiat, et quidem ita ut appareat eum id facere occidendi animo, occupari posse facinus. . . . sed multum falluntur et fallunt qui metum qualemcunque ad ius occupandae interfectionis admittunt. Vere enim dictum est a Cicerone, primo de Officiis, plurimas iniurias

The right to private property

Grotius' second natural-law precept was that "it shall be permissible to acquire for oneself, and to retain, those things which are useful for life."[22] Quoting from Cicero's *De officiis*, Grotius continued,

> The latter precept, indeed, we shall interpret with Cicero as an admission that each individual may, without violating the precepts of nature, prefer to see acquired for himself rather than for another, that which is important for the conduct of life.[23]

Grotius explained that agreement prevailed in this regard among all ancient philosophical schools, and proved this claim with reference to Cicero's portrayal of the various ethical doctrines of Hellenism in *De finibus*.[24] We have seen above how Grotius explained the origins of property, like Cicero, through long-lasting appropriation (*vetus occupatio*).[25] In the second chapter of *De iure praedae*, Grotius had already stated that the use of certain things assumed the acquisition (*apprehensio*) and possession (*possessio*) of these things, and that the ownership of private property (*dominium*) originated as a result. Grotius quoted a passage from the Roman jurist Paulus from the 41st book of the *Digest*, in which the origins of property were explained as arising from "natural ownership," that is, first ownership of an unowned thing.[26] The portrayal of private property as an institution that was not originally part of natural law, but, once constituted, was protected under natural law, corresponds precisely to the concept as presented by Cicero in *De officiis*.[27]

Grotius saw in private property the result not of a sudden decision, but of a gradual change that began under the guidance of nature (*monstrans*

a metu proficisci, qum is qui nocere alteri cogitat timet, ne nisi id fecerit, ipse aliquo afficiatur incommodo." Grotius quotes Cic. *Off.* 1.24.

[22] *CLP*, 23; *IPC* 2, fol. 6: "ADIUNGERE SIBI QUAE AD VIVENDUM SUNT UTILIA EAQUE RETINERE LICEAT."

[23] *IPC* 2, fol. 6: "quod quidem cum Tullio ita interpretabimur: concessum sibi quisque ut malit, quod ad vitae usum pertinet, quam alteri acquiri id fieri non repugnante natura." Cic. *Off.* 3.22 states: *Nam sibi ut quisque malit, quod ad usum vitae pertineat, quam alteri adquirere, concessum est non repugnante natura . . .* In *De iure belli ac pacis*, Grotius would cite the entire paragraph from *De officiis*; see below, 183.

[24] *IPC* 2, fol. 6: "Hac enim de re et Stoicis et Epicureis et Peripateticis convenit, ne Academici quidem videntur dubitasse."

[25] *IPC* 12, fol. 101′ (= *ML* 5.25).

[26] *IPC* 2, fol. 6–7; *Dig.* 41.2.1.1: *Dominiumque rerum ex naturali possessione coepisse Nerva filius ait eiusque rei vestigium remanere in his, quae terra mari caeloque capiuntur: nam haec protinus eorum fiunt, qui primi possessionem eorum adprehenderint.*

[27] Cic. *Off.* 1.21. See Wood 1988, 111.

natura).[28] There are some things, wrote Grotius, such as food, that are consumed through use, which makes the use of these things distinguishable from their possession.[29] Grotius proved this view with reference to a passage in the *Digest* that dealt with usufruct (*ususfructus*) of money and other consumable things.[30] Under Roman property law, the beneficiary received *full title* to such things, that is to say they became his private property. The thing belongs to someone alone, in such a way that it cannot at the same time belong to another – thus was formulated the concept of private property as the most comprehensive private right that someone may have to a thing. The concept could be extended analogously to clothing, and then gradually to other immovable objects.[31] In Grotius' view, as the institution of property was thus "invented" (*reperta proprietas*), the law establishing the institution was established, in order to imitate nature.[32] Thus, even though it does not exist by nature, property is nevertheless a pre-political institution of the state of nature, which reflects nature and originated in a natural way. Grotius referred to the famous theater analogy, which probably came originally from Chrysippus,[33] but which Grotius took from Seneca's *De beneficiis*: "The equestrian rows of seats belong to *all* the Roman knights; yet the place that I have *occupied* [*occupavi*] in those rows becomes my *own* [*proprius*]."[34]

[28] On the conception of private property in *Mare liberum*, see the overview in Tully 1980, 68–70.

[29] *IPC* 12, fol. 101 (= *ML* 5.24): "Ad eam vero quae nunc est dominiorum distinctionem non impetu quodam sed paulatim ventum videtur initium eius monstrante natura. Cum enim res sint nonnullae quarum usus in abusu consistit, aut quia conversae in substantiam utentis nullum postea usum admittunt, aut quia utendo fiunt ad usum deteriores, in rebus prioris generis, ut cibo et potu, proprietas statim quaedam ab usu non seiuncta emicuit."

[30] *Dig.* 7.5: *De usu fructu earum rerum, quae usu consumuntur vel minuuntur*. This corresponds to the arguments Pope John XXII used in the fourteenth century against the Franciscans, also with reference to Roman law *ususfructus*. Grotius refers in the marginal notes to both John XXII and Thomas Aquinas. See Tierney 1997, 330–31, who tries to ascribe Grotius' arguments to the canonical tradition alone, ignoring the fact that John XXII himself had argued from Roman law.

[31] *IPC* 12, fol. 101 (= *ML* 5.24): "Hoc enim est proprium esse, ita esse cuiusquam ut et alterius esse non possit: quod deinde ad res posterioris generis, vestes puta et res mobiles alias aut se moventes ratione quadam productum est. Quod cum esset, ne res quidem immobiles omnes, agri puta indivisae manere potuerunt . . . "

[32] *IPC* 12, fol. 101′ (= *ML* 5.25): "Repertae proprietati lex posita est quae naturam imitaretur."

[33] See Cic. *Fin.* 3.67, where the following view is ascribed to Chrysippus: *Sed quemadmodum, theatrum cum commune sit, recte tamen dici potest eius esse eum locum quem quisque occuparit, sic in urbe mundove communi non adversatur ius quo minus suum quidque cuiusque sit.* See Long 1997, 24–25, who takes Cicero at his word and, not very plausibly, ascribes the moral defense of private proprety not first to Cicero, but to the Stoa after Chrysippus. For convincing criticism of this position, see Mitsis 2005; Mitsis 1999, 171–72. See above, 108.

[34] *CLP*, 318; *IPC* 12, fol. 101′ (= *ML* 5.25): "Et Philosophus: Equestria OMNIUM equitum Romanorum sunt: in illis tamen locus meus fit PROPRIUS, quem OCCUPAVI." The quotation is from Sen. *Ben.* 7.12.3.

Grotius here conveniently leaves out the context of Seneca's passage, where common, rather than private, property is at issue. This is instructive: Seneca's concern is with temporary use of one theater seat exclusively for viewing the spectacle, while the seats remain common property. As Phillip Mitsis reminds us: "Seneca's point is about the use of commonly shared property in a system of mutual benefit – something that the theater analogy neatly captures by explaining the kind of coordination of interests and the range of virtuous attitudes necessary for those who – like the wise of friends or citizens in the ideal Stoic polis – hold property in common."[35] As we shall see below, Grotius was to point to Chrysippus' theater example again in *De iure belli ac pacis*, this time quoting from Cicero's *De finibus*, where the context as well as Cicero's own views on the subject of private property rights and the way they had originally arisen were more congenial to Grotius' task.[36]

While it is hard to see how Chrysippus and indeed any of the earlier Greek Stoics could have used the example for anything but for "justifying and explaining the communal use of property,"[37] it is perfectly obvious that for Grotius, no less than for Cicero, the point was to explain the genealogy of private property in the state of nature while at the same time justifying its existence and arguing for its protection under natural law. As we have already seen in the chapter on Grotius' (corrective) conception of justice in the state of nature, this was crucial to Grotius, given the role private property rights play in his theory of justice.

In Grotius' *Defensio*, the defense of the fifth chapter of *Mare liberum*, in which he countered his Scottish critic William Welwod, Grotius describes the process of the origins of private property in a concise section dedicated to an interpretation of Cicero's dictum from *De officiis*, *privata nulla natura*. Welwod, according to Grotius, wrongly ridiculed this statement by Cicero, which was absolutely true. By saying that nothing is private property by nature, Cicero had not meant to say that nature stands in contradiction to private property and, as it were, prohibits anything at all from becoming private property. Rather, Cicero believed that nature did not itself cause something to be privately owned:[38]

[35] Mitsis 2005, 236. [36] Ibid., 235.

[37] Ibid., *pace* the scholarly mainstream view (see, e.g., Annas 1989, Long 1997 and Schofield 1999), where it is held that Cic. *Fin.* 3.67 provides evidence for an early Stoic defense of private property rights.

[38] *DCQ*, 336: "Inter quae Ciceronis illud irrideri maxime miror, nihil esse privatum natura, cum sit apertissimae veritatis. Non enim hoc vult Cicero, repugnare naturam proprietati et quasi vetare ne quid omnino proprium fiat, sed naturam per se non efficere ut quicquam sit proprium . . . " Grotius' interpretation of Cicero corresponds to what Wacht 1982, 35–38 says about Cicero.

> Therefore, in order that this thing become the property of that man, some deed [*factum*] of the man should intervene [*intercedere*], and therefore nature itself does not do this by itself. Hence it is evident that community [property] [*communitas*] is prior to [private] property [*proprietas*]. For [private] property does not occur except through occupation [*occupatio*], and before occupation, there must precede the right of occupation [*ius occupandi*]. Now this right [*ius*] is not competent to this man or that man, but to all men equally [*ex aequo*], and is rightly expressed under the term "natural community" [*communitas naturalis*]. And hence it happens that what has not yet been occupied by any people or by a man is still common, that is, belongs to no one, and open [*exposita*] equally to all. By this argument it is surely proved that nothing belongs to anyone [*proprium*] by nature.[39]

Thus each person possesses, at least potentially, a right to acquire, and thus a (potential) right to private property. In contrast to *Theses LVI*, in the *Defensio* (as already in *De iure praedae*), private property is no longer simply assumed to be natural; instead, the origins of the institution of private property, and thus at the same time the concrete emergence of actual, existing individual property, are explained. Grotius took his explanation unmistakably from Roman law, especially Book 41 of the *Digest*,[40] and from Cicero;[41] while Cicero, in turn, had obviously adopted the doctrines of Roman law on natural acquisition of ownership. The main idea is that one does not have, *ab initio*, the right to private property as a universal right, but merely a general right to the *opportunity* to acquire property. It would thus be correct to describe Grotius' property right, in the spirit of Waldron, as a "special right *in rem*" that originated on the basis of contingent transactions and creates exclusive rights *in rem* in the owner vis-à-vis everyone else; while only Grotius' right to acquisition, the *ius occupandi*, is a "general right *in rem*" due to every person *ab initio*.[42]

On the process of acquisition itself, or the normative determinations that apply to this process, Grotius tells us very little. The original allocation of property, and the pattern of property distribution following from it, is largely left to chance. This account of the origin of title to private property, characterized by very few normative restrictions, can be contrasted with

[39] *ML* Armitage, 85; *DCQ*, 336: "ergo ut res ista fiat istius hominis, factum aliquod hominis debet intercedere, non ergo hoc facit ipsa per se natura. Unde etiam illud apparet, communitatem priorem esse proprietate. Nam proprietas non contingit nisi occupatione, ante occupationem vero praecedat necesse est ius occupandi; hoc autem ius non huic aut illi, sed universis omnino hominibus ex aequo competit, ideoque communitatis naturalis nomine recte exprimitur. Et hinc evenit, ut quae nondum occupata sunt aut a populo ullo aut ab homine etiamnunc sint communia, hoc est nullius propria omnibus ex aequo exposita: quo argumento certissime evincitur nihil a natura cuiquam esse proprium."

[40] See *Dig.* 41.1.1–41.9.2; the passages are taken mainly from Gaius.

[41] Cic. *Off.* 1.21.

[42] See the discussion of subjective "special rights *in rem*" in Waldron 1988, 106–9.

the completed institution of private property that serves as the standard for a natural corrective justice in Cicero as well as in Grotius. Aside from the Roman law requirement that the thing in question be *res nullius* – that acquisition can only happen to a thing that belongs to no one, or no longer belongs to anyone – the origin and original distribution of property is simply not subject to any further normative criteria in either Cicero or Grotius.[43] Once in existence, however, private property plays the role of the central criterion of natural justice. Of the existing property claims, Cicero says directly, in the passage quoted by Grotius: "If anyone else should seek any of it for himself [from the property of another], he will be violating the law of human fellowship."[44] Grotius refers to this statement of Cicero's in formulating his fourth law, which should indeed be read as a paraphrase of Cicero: "Let no one seize possession of that which has been taken into the possession of another."[45] It may be assumed that Grotius, although he nowhere says this explicitly in *De iure praedae*,[46] was writing with the example of Chrysippus in mind, passed down by Cicero in *De officiis*, and that Grotius here was subjecting the process of acquisition to the normative conditions that Chrysippus had taken from the rules of sports competitions:

> Among Chrysippus' many neat remarks was the following: "When a man runs in the stadium he ought to struggle and strive with all his might to be victorious, but he ought not to trip his fellow-competitor or to push him over. Similarly in life: it is not unfair for anyone to seek whatever may be useful to him, but it is not just to steal from another."[47]

Neal Wood has observed an "economic individualism" in Cicero, and especially in *De officiis*, which he believes introduces a completely new element to the history of political thought, one alien to the thinking of Plato and Aristotle.[48] Wood convincingly places Cicero's views of the just original acquisition of property in a tradition leading to John Locke:

[43] Although the normative criteria in Cicero are meager, it is not justified to say, as does Annas 1989, 170, that there is "no criterion for deciding whether an entitlement is just." Cic. *Off.* 1.21 mentions in addition victory in war as an opportunity for acquiring property; Cicero leaves open whether this means victory in a just war. A just war would certainly be a further normative criterion. See the discussion of this passage in Dyck 1996, 110–11. Annas 1989, 170n25 describes conquest as unjust acquisition, without addressing at all the possibility of acquisition in a just war.

[44] Cic. *Off.* 1.21: *e quo si quis sibi appetet, violabit ius humanae societatis.*

[45] *IPC* 2, fol. 7: "NE QUIS OCCUPET ALTERI OCCUPATA. Haec lex abstinentiae . . . "

[46] He first mentioned it in *De iure belli ac pacis*: see *IBP* 2.2.2.5n6. See below, 186.

[47] Cic. *Off.* 3.42: *Scite Chrysippus, ut multa, 'qui stadium', inquit, 'currit, eniti et contendere debet quam maxime possit, ut vincat, supplantare eum, quicum certet, aut manu depellere nullo modo debet; sic in vita sibi quemque petere, quod pertineat ad usum, non iniquum est, alteri deripere ius non est.'*

[48] Wood, 1988, 114. For a similar view, see Long 1995, 233, who sees in Cicero's political thought an "intriguing precursor" to conservative liberalism.

"Cicero, like John Locke much later, sees no contradiction between the imperative of morality and the demand of self-advancement as long as the latter is accomplished in a reasonable fashion and not at the expense of others, although both have a rather broad interpretation of what this means."[49]

Grotius obviously represents an important link in this tradition. The justice, or legitimacy under natural law, of the original distribution of property is demonstrated for Cicero, as well as for Grotius, not with a view to the justice of the *results* of the distribution, but exclusively by reference to the *process* by which the distribution comes about. Grotius made no attempt to argue normatively for this procedural "entitlement" theory of justice.[50] He plainly took his theory of the origins of the *institution* of private property from the Roman law theory of the natural *acquisition* of property, without questioning it morally. This is not surprising, given the function of *De iure praedae* as a legal apologia for the VOC's military expansion in Southeast Asia; the property-law doctrine of Roman law permitted Grotius, without giving up the idea of natural acquisition of property, to apply it only to the land and to remove the sea – in conformity with the *Digest* – from those things subject to the *ius occupandi*. This turned the Portuguese claims to the sea routes to East India into unlawful attacks on something that was the common property of all human beings equally.[51]

The fundamental analogy throughout *De iure praedae* between individual, private trading companies and legally constituted polities is reflected in Grotius' theory of property, which was transferred to the public-law realm. The process of original acquisition (*occupatio*) of entire countries was, according to Grotius, not fundamentally different from the acquisition of private property by individuals. There, too, he followed Cicero, from whose *De officiis* he quoted the following:

> Cicero notes that the territory of Arpinum is said to belong to the people of Arpinum, and that of Tusculum to the Tusculans. To this he adds the following comment: "... and the apportionment of private property [*privatae possessiones*] is similar. Accordingly, since each individual's part of

[49] Wood 1988, 114. Waldron 1988, 153–55, calls this view of the state of nature "negative communism" and ascribes it to Grotius and, to a certain degree, to Locke. For limited criticism of Wood's claims, see Mitsis 2005, 233, 245n10.

[50] For an interesting critique of arguments that justify private property with procedural criteria, see Waldron 1988, 253–83 (where, however, Grotius is hardly mentioned).

[51] See Benton and Straumann 2010. See also Wieacker 1967, 292. Brandt 1974, 37 ignores the historical context of the doctrine when he says that Grotius was mainly striving to legitimize the institution of private property and fails to see that Grotius was also attempting to prove that private acquisition of common property was unlawful.

> those things which nature gave as *common property* [*communia*] becomes his own [*suum*], let each person retain possession of that which has fallen to his lot."[52]

As with private-law acquisition in the state of nature, the occupation of the territory of a state leads to possession, and ultimately to private property, or to sovereignty over a public area.[53]

Grotius further derives from the right to property freedom of action, which forms the origin of every positive and thus fundamentally arbitrary law that deviates from the law of the state of nature. In *Theses LVI*, Grotius calls this freedom of action, as we have seen, "the right to one's own actions" (*ius in actiones suas*), which can be alienated or disposed of through a voluntary act (*indicium voluntatis*). In *De iure praedae*, the freedom of action is analogized with the Roman concept of property: freedom is to action as private property is to things – natural freedom consists of the ability to do what one wants to do, Grotius said, following a passage in the *Institutes*.[54] In contrast to things that, according to *De iure praedae*, were not originally privately owned, freedom of action is, in both this work and in *Theses LVI*, a natural institution in the narrow sense. However, both one's own actions and one's possessions, following the introduction of private property, have in common that they can be sold, which expands the free-trade-friendly aspect of property law to one's own actions and, in *De iure belli ac pacis* at the latest, to one's own person.[55]

Trade is the result of the emergence of private property. Referring to the 18th book of the *Digest*, which deals with sales contracts, Grotius explained the origins of trade as the necessary result of the elimination of common property, and considered exchange to be the natural, universal basis of contracts.[56] Grotius concluded, referring to Aristotle's *Politics*, that free

[52] *CLP*, 320; *IPC* 12, fol. 102 (= *ML* 5.27): "Hoc modo dicit Cicero agrum Arpinatem Arpinatium dici, Tusculanum Tusculanorum: similisque est inquit, privatarum possessionum descriptio. Ex quo, quia suum cuiusque fit eorum quae natura fuerant COMMUNIA, quod cuique obtigit id quisque teneat." The emphasis is Grotius'; the quote is from Cic. *Off.* 1.21. See Long 1995, 234–35.

[53] See Benton and Straumann 2010.

[54] *IPC* 2, fol. 10: "Quid enim est aliud naturalis illa libertas, quam id quod cuique libitum est faciendi facultas? Et quod libertas in actionibus idem est dominium in rebus." Grotius refers to the passage from Florentinus *Inst.* 1.3.1, which says: *Et libertas quidem est . . . naturalis facultas eius quod cuique facere libet* . . . The Florentinus passage had already been used by Fernando Vázquez de Menchaca to equate *dominium* and *naturalis libertas* in his *Controversiae illustres* (*CI* 1.17.4–5), on which see Brett 1997, 181. See Tuck 1979, 51; Haggenmacher 1997, 92. For the medieval history of the concept of property culminating in Donellus, see Willoweit 1974 (on Donellus esp. 148–50).

[55] In *Theses LVI*, the right to dispose is still limited to *res* und *actiones*, while Grotius later logically extended freedom of contract to one's own body and life.

[56] *IPC* 12, fol. 114 (= *ML* 8.62): "Sed cum statim res mobiles monstrante necessitate quae modo explicata est in ius proprium transissent, inventa est permutatio, qua quod alteri deest ex eo quod alteri superest suppleretur . . . Postquam vero res etiam immobiles in dominos distingui

trade is a natural right and thus cannot be eliminated, or at most can only be eliminated with the consensus of all nations.[57] That sentence would be cited and used against him by the English delegation a short time later at the Colonial Conference in 1613.[58]

In *De iure belli ac pacis*, Grotius, aligning his system of natural rights more explicitly with Roman civil procedure, considered that the enforcement of the right to property – if ownership had been lost – was covered by the Roman action for unlawful acts already committed (*actiones ob iniuriam factam*). He mentioned concretely the property-law action for recovery of property, the *vindicatio*, which helped a non-possessing owner in obtaining his things from a possessing non-owner, as well as the *condictiones* from the law of obligations, restitution actions that dealt with unjustified withholding of assets.[59] These analogies are clear; the Roman action of *rei vindicatio* involved surrender of a thing to the owner, while the remedy of *condictio* involved cases in which the respondent had become owner without a legal basis. In *De iure belli ac pacis*, as in *De iure praedae*, Grotius had a Roman law concept of property, and he aligned his right to private property with Roman legal actions and remedies.

Grotius gave a similar portrayal to that in his earlier work regarding the question of the historical emergence of the institution of private property and the original distribution of property, and he also referred to that work in this context. In *De iure belli ac pacis*, Grotius did not depart from the fundamental opposition between the propertyless state of nature and the subsequently introduced institution of private property – an institution that nevertheless was not part of the positive law of the political community, but, as in *De iure praedae*,[60] originated before and outside of the state and was thus protected by natural law:

> We must further observe, that this Natural Law does not only respect such Things as depend not upon Human Will [*voluntas*], but also many Things which are consequent to some Act of that Will. Thus, *Property* for Instance, as now in use, was introduced by Man's Will, and being once admitted, this Law of Nature informs us, that it is a wicked Thing to take away from

coeperunt, sublata undique communio . . . neccessarium fecit commercium . . . Ipsa igitur ratio omnium contractuum universalis, ἡ μεταβλητική a natura est . . . " Grotius refers to *Dig.* 18.1.1.pr.: *Origo emendi vendendique a permutationibus coepit.*

[57] *IPC* 12, fol. 114′ (= *ML* 8.63–64): "Commercandi igitur libertas ex iure est primario gentium, quod naturalem et perpetuam causam habet, ideoque tolli non potest, et si posset non tamen posset nisi omnium gentium consensu . . . " Before this, Grotius quotes Arist. *Pol.* 1.1257a15–17.

[58] *CC*, Ann. 38.116; see below, 191.

[59] *IBP* 2.1.2.1: "Quod reparandum venit, aut spectat id quod nostrum est vel fuit, unde vindicationes et condictiones quaedam . . . " See on the Roman actions Kaser 1971/75, § 103, I, § 139.

[60] Where it had belonged to the *ius naturale secundarium*.

> any Man, against his Will, what is properly his own. Wherefore *Paulus* the Civilian infers, that *Theft is forbid by the Law of Nature.*[61]

According to Grotius, however, human beings had certain property-like rights even before the introduction of private property:

> For the Design of Society [*societas*] is, that every one should quietly enjoy his own [*suum cuique*], with the Help, and by the united Force of the whole Community. It may be easily conceived, that the Necessity of having Recourse to violent Means for Self-Defence, might have taken Place, even tho' what we call *Property* [*dominium*] had never been introduced. For our Lives [*vita*], Limbs [*membra*], and Liberties [*libertas*], had still been properly our own, and could not have been (without manifest Injustice [*iniuria*]) invaded.[62]

Grotius sought to emphasize this thought using Cicero's words, and he goes on to quote verbatim a paragraph from *De officiis* to which he had already referred in the marginal notes in *De iure praedae* to justify the right to property:[63]

> But since *Property* has been regulated, either by Law or Custom, this is more easily understood, which I shall express in the Words of *Tully, If every Member of the Body was capable of Reflection, and did really think that it should enjoy a larger Share of Health, if it could attract to itself the Nourishment of the next Member, and should thereupon do it, the whole Body would of Necessity languish and decay: So if every Man were to seize on the Goods* [commoda] *of another, and enrich himself by the Spoils of his Neighbour, human Society* [societas hominum] *and Commerce* [communitas] *would necessarily be dissolved. Nature allows every Man to provide the Necessaries of Life, rather for himself than for another; but it does not suffer any one to add to his own Estate* [facultates, copias, opes], *by the Spoils and Plunders of another.*[64]

[61] *RWP*, 1.154; *IBP* 1.1.10.4: "Sciendum praeterea ius naturale non de iis tantum agere quae citra voluntatem humanam existunt, sed de multis etiam quae voluntatis humanae actum consequuntur. Sic dominium, quale nunc in usu est, voluntas humana introduxit: at eo introducto nefas mihi esse id arripere te invito quod tui est dominii ipsum indicat ius naturale; quare furtum naturali iure prohibitum dixit Paulus iurisconsultus . . . " Grotius has in mind *Dig.* 47.2.1, where after the definition of theft it is said: *quod lege naturali prohibitum est admittere*.

[62] *RWP*, 1.184; *IBP* 1.2.1.5: "Nam societas eo tendit ut suum cuique salvum sit communi ope ac conspiratione. Quod facile intelligi potest locum habiturum, etiamsi dominium quod nunc ita vocamus introductum non esset. nam vita, membra, libertas sic quoque propria cuique essent, ac proinde non sine iniuria ab alio impeterentur."

[63] In *IPC* 2, fol. 6; see above, 175; see also below, 186n75.

[64] *RWP*, 1.184–85; *IBP* 1.2.1.5: "quod exprimam Tullii verbis: 'Ut, si unumquodque membrum sensum suum haberet, ut posse putaret se valere si proximi membri valetudinem ad se traduxisset, debilitari et interire totum corpus necesse est: sic si unusquisque nostrum rapiat ad se commoda aliorum, detrahatque, quod cuique possit, emolumenti sui gratia, societas hominum et communitas evertatur necesse est: nam sibi ut quisque malit quod ad usum vitae pertineat quam alteri acquiri, concessum est non repugnante natura. Illud natura non patitur, ut aliorum spoliis nostras facultates, copias, opes augeamus.'" See Cic. *Off.* 3.22.

In the passage from *De iure belli ac pacis* in which the origins and development of private property were described, Grotius made far greater use of biblical sources than in *De iure praedae*. This was likely a response to William Welwod's critique of *Mare liberum*, which argued that Grotius had based his work on the Roman jurists and paid too little attention to the Bible.[65] The idea of the gradual emergence of private property and the protection of natural law it enjoys once introduced – in both the pre- and the extra-state spheres – is however identical in substance with the doctrine presented in *Mare liberum*, to which he expressly referred.[66] Grotius saw private property as beginning with the exclusive consumption of consumer goods. He illustrated the "natural" acquisition of such goods in the state of nature, as he had in *De iure praedae*, using Chrysippus' famous theater analogy, in the later work taken from both Cicero's *De finibus* and Seneca's *De beneficiis* without however alluding to Chrysippus as the author of it. According to *De iure belli ac pacis*, too, even in the state of nature and during the introduction of private property, the possibility already existed of committing an unlawful act (*iniuria*):

> From hence it was, that every Man converted what he would to his own Use, and consumed whatever was to be consumed; and such a Use [*usus*] of the Right common to all Men did at that Time supply the Place of Property [*vice proprietatis*], for no Man could lawfully take from another, what he had thus first taken to himself; which is well illustrated by that Simile of *Cicero, Tho' the Theatre is common* [commune] *for any Body that comes, yet the Place that every one sits in* [occupari] *is properly his own.*[67]

This condition in between common and institutionalized property could only have lasted, Grotius continued, if people had persisted in this "primitive Simplicity," as had been the case of the peoples of America for

[65] See Welwod, *An Abridgement of All Sea-Lawes* (1613): "Now remembering the first ground whereby the author would make *mare liberum* to be a position fortified by the opinions and sayings of some old poets, orators, philosophers, and (wrested) jurisconsults . . . against this I mind to use no other reason but a simple and orderly reciting of the words of the Holy Spirit . . . ": *ML* Armitage, 66.

[66] The biblical doctrines were "agreeable to what both Poets and Philosophers have spoken of that early State of Things, when all was common, and of the Divisions that followed. The Testimonies of these Authors I have had Occasion to produce in another Place [*Mare liberum*, ch. 5]." ("satis convenientia cum his quae philosophi et poëtae de primo statu rerum communium, et postea secuta rerum distributione dixerunt, quorum testimonia alibi [*Mari libero*, c. 5] a nobis producta sunt."): *RWP*, 2.426; *IBP* 2.2.2.3.

[67] *RWP*, 1.421; *IBP* 2.2.2.1: "Hinc factum ut statim quisque hominum ad suos usus arripere posset quod vellet, et quae consumi poterant consumere. Ac talis usus universalis iuris erat tum vice proprietatis. Nam quod quisque sic arripuerat, id ei eripere alter nisi per iniuriam non poterat. Similitudine hoc intellegi potest ea quae est apud Ciceronem de Finibus 3: Theatrum cum commune sit, recte tamen dici potest, eius esse eum locum quem quisque occuparit." Grotius added the reference to Cic. *Fin*. 3.67 to the editions from 1631 onward.

centuries.[68] Through discoveries and the progress of the arts, this situation was brought to an end; in his 1642 edition, Grotius called on his audience to read Seneca's 90th letter to Lucilius, in which Seneca explained this process. Seneca believed that avarice (*avaritia*) and excess and luxury (*luxuria*) led to the introduction of private property, but also contributed to the development of morality, which was unknown in the state of nature.[69] Morality was only introduced with the concept of private property. It certainly bears mentioning that the thrust of this developmental view had great influence on the Scottish Enlightenment's views of the subject. For Adam Smith, alienable property was fully developed as a concept only in the last, commercial stage of his conjectural four-stage history of mankind, a stance which aligns itself perfectly with Grotius' and Seneca's insistence on the importance of luxury and with Grotius' view of America's "primitive Simplicity" giving way to progress of the arts and *luxuria*.[70] This ties in with Hume's point that "innocent" luxury, far from having a corrupting influence, produces ages of refinement which are "both the happiest and most virtuous."[71]

Grotius ultimately traced the introduction of private property to the desire for a "more commodious and more agreeable Manner"[72] in which to live, which led to division of common property and, by way of acquisition (*occupatio*), to private property. Thus far, the portrayal corresponds to the one in *De iure praedae*, where it was based on the Roman law criterion for the natural acquisition of ownership. In his later work, as in *De iure praedae*, Grotius accepted Cicero's criterion under which acquisition through war was legal. Grotius made it clear that this required a just war.[73] He added a further element to this account in *De iure belli ac pacis*, however, which proved to be extraordinarily influential: mutual agreement.[74]

> Thus also we see what was the Original of Property [*proprietas*], which was derived not from a mere internal Act of the Mind [*animus*], since one could

[68] *IBP* 2.2.2.1. [69] *IBP* 2.2.2.2; Sen. *Ep.* 90.25ff.

[70] *LJ*, 14–16; 65 on the "savage nations of Asia and America"; 459; 466–67. On the four-stage theory, see Berry 1997, 93–99; esp. 93, where Berry, stressing the natural-law background of the Scots' account of property, rightly points to the significance of the fact that Smith first develops his theory "of the four-stages doctrine . . . in lectures on *jurisprudence*." On luxury, see also Berry 1994 (though Grotius is not mentioned in this context). See also Hont 2005, 159–84.

[71] *PE*, 106. See Berry 1994, 142–52. [72] *IBP* 2.2.2.4.

[73] *IBP* 1.3.8.6: "Iam vero bello iusto, ut ante diximus . . . acquiri potest dominium privatum . . . " Public sovereignty too can be acquired by war, see ibid. Grotius makes it clear that he interprets "war" in Cic. *Off.* 1.21 to mean "just war," which is not altogether clear in Cicero's text. See above, 179n43.

[74] Thus also Buckle 1991, 44, without going into the Roman-law background. See also Brandt 1974, 40.

> not possibly guess what others designed to appropriate to themselves, that he might abstain from it; and besides, several might have had a Mind to the same Thing, at the same Time; but it resulted from a certain Compact and Agreement [*pactum quoddam*], either expressly [*expressum*], as by a Division; or else tacitly [*tacitum*], as by Seizure [*occupatio*]. For as soon as living in common [*communio*] was no longer approved of, all Men were supposed, and ought to be supposed to have consented [*convenire*], that each should appropriate to himself [*proprium*], by Right of first Possession [*occupasset*], what could not have been divided. *'Tis no more,* saith *Cicero, than what Nature will allow of, that each Man should acquire the Necessaries of Life rather for himself than for another.*[75]

Acquisition (*occupatio*) was now viewed simultaneously as tacit contractual agreement (*pactum tacitum*), which expressed agreement to the introduction of private property and its attendant special rights. The rule of natural law under which property could be obtained through acquisition (*occupatio*) was supplemented with everyone's hypothetical tacit agreement to the principle of acquisition. To the natural-law criterion of the justice of the original acquisition (*occupatio*) of property already found in *De iure praedae* – which Grotius had taken from the *Digest* – Grotius now added the element of tacit agreement.

The concept of a tacitly declared will that could be read into certain acts had already been developed in Roman *ius honorarium* (the law made in office expressed in the Praetor's edict), where it was used especially in connection with agreements (*pacta*) of various sorts.[76] Grotius' originality in *De iure belli ac pacis* consisted in combining the Roman-law doctrine of the natural acquisition of ownership, which he had applied in *De iure praedae*, with the Roman-law concept of tacit agreement. Although the institution of property gained an even more decidedly conventionalist touch in *De iure belli ac pacis* due to the contractualist mentality it reflected,[77] it is important to see that property, even in the later work, is a pre-political and extra-state institution that, once introduced, is sanctioned by natural law

[75] *RWP*, 2.426–27; *IBP* 2.2.2.5: "Simul discimus quomodo res in proprietatem iverint: non animi actu solo; neque enim scire alii poterant, quid alii suum esse vellent, ut eo abstinerent; et idem velle plures poterant: sed pacto quodam aut expresso, ut per divisionem, aut tacito, ut per occupationem. simulatque enim communio displicuit, nec instituta est divisio, censeri debet inter omnes convenisse, ut quod quisque occupasset id proprium haberet. Concessum, inquit Cicero, sibi ut quisque malit quod ad vitae usum pertinet quam alteri acquiri non repugnante natura." Grotius had used the passage from Cic. *Off.* 3.22 already in *IPC* 2, fol. 6 and cited the whole paragraph in *IBP* 1.2.1.5. See above, 175, 183.

[76] See Kaser 1971/75, § 56, II.

[77] Grotius does not seem to be entirely clear on this; in *IBP* 1.1.10.4 property is described as a consequence of voluntary human actions, and in *IBP* 2.2.2.5 a distinction is drawn between mere will and tacit contract. Grotius was certainly perceived as a conventionalist by his critic Filmer; see Filmer 1991, 219.

and does not require an established commonwealth. Pufendorf adopted and developed the theory of tacit agreement, Robert Filmer criticized it sarcastically, and in Locke remnants of it may be found as well, especially in his theory of tacit consent given to the laws by those who enjoy their protection.[78]

It is significant that David Hume, who had no sympathy whatsoever for the theory of tacit consent, was to ascribe – in the framework of his theory of justice, where property plays an equally pivotal role as in Grotius – original authorship of his "theory concerning the origin of property, and consequently of justice," to Grotius. "This theory . . . is, in the main, the same with that hinted at and adopted by Grotius."[79] This is astonishing only at first sight; Hume's account of property and justice ties in with other accounts put forward by eighteenth-century Scottish writers, many of whom had espoused a similar view of property, aligned with their four-stage theory of the history of mankind. For Hume, notwithstanding his view of justice as an "artificial virtue," the basic rules of justice, including stability of possession and transfer of property by consent, may properly be called "laws of nature; if by *natural* we understand what is common to any species, or even if we confine it to mean what is inseparable from the species."[80]

The theory of tacit agreement provided the rights of use granted to everyone *ab initio* in the state of nature with an additional characteristic that was otherwise only familiar where property was fully developed – the power of alienation. Simultaneously with the introduction of private property through tacit agreement, people in the state of nature disposed of their prior right to acquire, their *ius occupandi*, which each of them enjoyed *ab initio*. The occupants of the state of nature – the subjects of natural law – thus extended their sphere of natural freedom successively from their bodies and actions to this newly created private property, which – in accordance with the Roman-law concept of property – could now also be disposed of and traded, without ever leaving the state of nature.

[78] Pufendorf 1998, 4.4.5. Filmer in his *Observations upon H. Grotius De Jure Belli ac Pacis* thought it implausible for the agreement ever to have actually taken place: "Certainly it was a rare felicity that all men in the world at one instant of time should agree together in one mind to change the natural community of all things into private dominion": Filmer 1991, 234. See the sensitive discussion in Waldron 1988, 137–252, who convincingly argues against Locke as a conventionalist, and who does not think consent plays a role in Locke's account. For a conventionalist interpretation of Locke, see Tully 1980, 98ff. For a discussion of Locke's use of tacit agreement, see Kersting 1994, 134–39.

[79] *EPM*, 98n63. Cf. Garnsey 2007, 156, who questions Hume's sincerity on this point, but who correctly points out that Hume's analysis was "carried out on the same terrain as that traversed by the natural jurists."

[80] *THN*, 1.311.

> Since the Establishment of Property, Men, who are Masters of their own Goods, have by the Law of Nature a Power of disposing of, or transferring, all or any Part of their Effects [*dominium*] to other Persons; for this is in the very Nature of Property; I mean of full and compleat Property;[81]

Private property and free trade did not require a polity, then, but were institutions in the state of nature. The same holds for Grotius' views on the institution of contract, as we shall see in the following section.

Let me conclude my discussion of Grotius' right to private property by noting certain structural features of his normative outlook. As already in *De iure praedae*, the legitimacy under natural law of the original distribution of property for Grotius lies, not in the justice of the *results* of the distribution, but exclusively in the *process* by which the distribution comes about. To put it anachronistically with Robert Nozick (who himself can legitimately lay claim to be a member of this Ciceronian–Grotian tradition of thought), it is not a "patterned" principle of distributive justice looking to a desirable end-result, but an "entitlement" principle specifying conditions under which property can justly be acquired and transferred, and where any resulting distribution must count as just.[82] It is only the process by which the distribution comes about that must be legitimate under natural law in order to qualify the original distributon of property, and thus also the existing legal titles *in rem* derived from that original distribution, as lawful and just.[83] Grotius made no attempt to argue normatively for this procedural "entitlement" theory of justice.[84]

Contractual rights

Like breaches of property rights, breaches of contractual claims by a debtor could be just causes of war, which Grotius derives formally from his sixth law, "Good deeds must be recompensed,"[85] but in terms of substance from the fetial law condition of *rerum repetitio* for a just war. Grotius placed

[81] *RWP*, 2.566; *IBP* 2.6.1.1: "Homines rerum domini, ut dominium, aut totum, aut ex parte transferre possint, iuris est naturalis post introductum dominium: inest enim hoc in ipsa dominii, pleni scilicet, natura." See Wieacker 1967, 293.

[82] See Nozick 1974, 149–82.

[83] The similarity with Locke and Nozick is obvious. In *The Second Treatise of Government* (§ 27), however, Locke added as a criterion of acquisition his famous "labour-theory," that the future owner "hath mixed his *Labour*" with the thing he wishes to acquire; Locke 1967, 287–88. For a thorough discussion of Locke's theory of property, see Waldron 1988, 137–252.

[84] For an interesting critique of arguments that justify private property with theories of procedural justice in distribution, which play an especially prominent role for John Locke and Richard Nozick, see Waldron 1988, 253–83, where however Grotius is hardly mentioned.

[85] *CLP*, 29; *IPC* 2, fol. 8: "BENEFACTA REPENSANDA."

great value on the determination that the violation of claims in debtor relationships is an independent just cause of war, and proved this with reference to two fetial formulations passed down by Livy:

> A third cause – one that a great many authorities neglect to mention – turns upon debts [*debitum*] arising from a contract or from some similar source. To be sure, I presume that this third group of causes has been passed over in silence by some persons for the reason that what is owed us is also said to be our property. Nevertheless, it has seemed more satisfactory to mention this group specifically, as the only means of interpreting that well-known formula of fetial law: "And these things, which ought to have been given, done or paid, they have not given, paid or done."[86]

Grotius deviates from the categorization of just causes of war that originated in the late-medieval laws of war and adds to the three just causes of war a fourth category, breach of obligations.[87] This new systematization of the laws of war must be seen in light of his description and development of the categories of laws of war through the private-law terminology of Roman law in the *Digest*, as well as the accompanying parallel between individual and polity, private and public war. Grotius here applied Roman private law – directly, but also mediated by the legal humanism of the sixteenth century[88] – in original fashion to the scholastic tradition of the law of war, and thus lent the latter the complexity of Roman private-law terminology.

The use of force, according to Grotius, is just under natural law in order to ensure payment of obligations.[89] This view is typically justified with reference to the law of the *Digest*.[90] Grotius made it clear that the right to

[86] *CLP*, 103; *IPC* 7, fol. 29′: "Tertia, quae a plerisque omissa est, ob debitum ex contractu, aut simili ratione. Sed idcirco praeteritum hoc puto a nonnullis quia et quod nobis debetur nostrum dicitur. Sed tamen exprimi satius fuit cum et Iuris illa Fecialis formula non alio spectet: Quas res nec dederunt, nec solverunt, nec fecerunt, quas dari, fieri, solvi oportuit." The quotation of the fetial formula is from Livy 1.32.5.

[87] On Grotius' relationship to the commentators regarding this question, see Haggenmacher 1983a, 176–80.

[88] See Haggenmacher 1983a, 178–80, who refers, for the distinction between property and personal rights, to the influence of the legal humanist Hugo Donellus and his *Commentarii de iure civili* of 1589. See also Giltaij 2011; Haggenmacher 1997, 113; Coing 1962, 251–54. In 1618, Grotius had in his library Donellus' commentary on the *Codex* title *De pactis et transactionibus*; see Molhuysen 1943, no. 246. However, as is clear from his use of Roman law in *IPC*, Grotius developed his doctrine through direct confrontation with the *Corpus iuris civilis* and never became dependent on the humanist commentators.

[89] *IPC* 7, fol. 30a: "... privata vis iusta est omnium animantium exemplo ... ad consequendum id quod nobis debetur."

[90] *Dig.* 42.8.10.16: *Si debitorem meum et complurium creditorum consecutus essem fugientem secum ferentem pecuniam et abstulissem ei id quod mihi debebatur, placet Iuliani sententia dicentis multum interesse, antequam in possessionem bonorum eius creditores mittantur, hoc factum sit an postea: si ante, cessare in factum actionem, si postea, huic locum fore*. Grotius does not address the distinction made

wage war corresponded to the Roman remedy for exacting debts arising from a contract. The Roman creditor could bring an *actio in personam* to enforce his right to collect a debt, which was aimed at the indebted person; in the same way, everyone in the state of nature had the opportunity to assert his contractual rights through just war – contracts too were, for Grotius, an institution of natural law, which arises from human beings' natural freedom of action:[91]

> The third and fourth classes [of just causes of war] give rise to personal actions [*actiones personales*], namely, claims to restitution [*condictiones*], founded upon contract . . . [92]

These causes of war, corresponding to the contractual *actiones in personam* of Roman law, are those Grotius would identify, in the second chapter of *De iure praedae*, with the voluntary (*hekousia*) legal transactions of corrective justice in Aristotle's *Nicomachean Ethics*.[93] However, the concept of contract was broadly understood and expanded beyond the limited number of the types of Roman contracts, as later in *De iure belli ac pacis*, to include promises (*pacta nuda*); here Grotius supported his views by referring to those passages in the *Digest* and in Cicero's *De officiis* that emphasized the element of a meeting of minds, in addition to the form of the contract.[94]

Rights arising from contractual obligations and freedom of contract play an even more prominent role in *De iure belli ac pacis*. Contractual rights were covered, according to Grotius, by the Roman legal actions for unlawful acts already committed (*actiones ob iniuriam factam*). These were, concretely, actions concerning debts, that is to say "what is properly *our due,* either by *Contract,* by *Offence* [*maleficio*], or by *Law*. To which also we may refer those Things which are said to be due by a *Sort of Contract*."[95]

here upon which the legality of use of force depends (as his argument is designed to work in the absence of a judge).

[91] See Haggenmacher 1997, 92; Diesselhorst 1959 refers almost exclusively to *IBP*.

[92] *CLP*, 105–6; *IPC* 7, fol. 30: "Ex tertio et quarto actiones personales, condictiones scilicet ex contractu et ex maleficio."

[93] *IPC* 2, fol. 8, with reference to Arist. *Eth. Nic.* 5.1131a1ff.

[94] Thus as he does later in *IBP*, Grotius quotes Cic. *Off.* 1.23 on *fides* and *Dig.* 2.14.1, on the *pacta*. The naming of *fides* contradicts the view in Nörr 1991, 45–46, that Grotius' *fides* involves a specific law of nations concept, not one developed from the *bona fides* of Roman private law; Grotius took the concept both from literary sources (Cicero) and from the *bona fides* contracts of Roman law. On *fides* in Grotius' *Parallelon rerumpublicarum*, see Fikentscher 1979. On *fides* in Livy and Grotius, see also von Albrecht 1998, 61–64.

[95] *RWP*, 2.394; *IBP* 2.1.2.1: "Quod reparandum venit, . . . spectat . . . id quod nobis debetur sive ex pactione, sive ex maleficio, sive ex lege, quo referenda quae ex quasi contractu et quasi maleficio dicuntur . . . "

Unlike the *in rem* rights discussed in the previous section, these involved rights of obligation, protected by the Roman *in personam* actions. Grotius subsumed not merely delicts, but also violations of contractual obligations under these unlawful acts (*iniuriae factae*). In the remainder of this section we will consider violations of obligations as they are treated in *De iure belli ac pacis*, while delicts will be the subject of the chapter on the right to punish.[96]

The greater emphasis that Grotius placed in *De iure belli ac pacis* on the doctrine of contracts, compared with *De iure praedae*, was already apparent in the doctrine of tacit agreement (*pactum*) in the context of the formation of private property in the state of nature. This greater emphasis should be traced to the influence of English arguments brought against the Dutch delegation at the Anglo-Dutch colonial conferences of 1613 and 1615. Grotius, as leader of the Dutch delegation, had justified the quasi-monopolistic position of the VOC in Southeast Asia by placing stronger emphasis on his natural-law doctrine of contract, without giving up his support for free trade, and in line with the natural-law doctrine already formulated in *De iure praedae* and *Mare liberum*.[97]

According to Grotius, the creditor had a natural right to use force against his debtor, "for naturally every Man has Power to compel his Debtor."[98] A condition for this right is the existence of a legal transaction creating an obligation, which must also be natural; the contract, according to Grotius, represents such a natural legal transaction.[99] In his chapter on promises, *De promissis*, Grotius dealt with the basic principles of all legal transactions, turning against the Roman law tradition in which no actions could be brought against "naked contracts" (*pacta nuda*); that is, he for once denied the validity of this tradition under natural law, because Roman jurists had based it only on "the *Roman* Laws, which made a Stipulation [*stipulatio*] in Form, an undoubted Sign of a deliberate Mind."[100] However, there were "naturally other Signs of a deliberate Mind [*deliberates animus*],"[101] other than the formalism of the Roman stipulation. It was this will that played a

[96] On the effect of Grotius' doctrine of contracts on the history of private law, see Wieacker 1967, 293–97.

[97] The arguments put forward by Grotius at the 1613 Colonial Conference in London (see especially *CC*, Ann. 40, 123–28), can be found in *IBP* 2.2.24; see Clark 1951, 72–73. See Clark 1951, 96–118, and Ittersum 2006, 382–94, on the 1615 conference in The Hague.

[98] *RWP*, 1.306; *IBP* 1.3.17.1.

[99] See on Grotius' doctrine of contract Diesselhorst 1959, *passim* and esp. 3ff.

[100] *RWP*, 2.706–7; *IBP* 2.11.4.2: "Nam Iurisconsultorum dicta de pactis nudis respiciunt id quod Romanis legibus erat introductum, quae deliberati animi signum certum constituerunt stipulationem."

[101] *IBP* 2.11.4.3.

decisive role for Grotius, and that turned even the *pacta nuda* and promises (*promissa*) into transactions under natural law, about which suits could be brought or wars waged. Grotius here turned against the doctrine of the French humanist François Connan, which stated that *pacta nuda* and promises alone created no obligations under natural law.[102] Grotius argued as follows:

> But this Opinion (of *Connanus*) taken so generally, as he expresses it, cannot be consistent. For, *First,* it would thence follow, that the Articles of Agreement [*pacta*] made between Kings and People of divers Nations, so long as there was nothing performed on either Side, were of no Force, especially in those Places where there are no set Forms of Treaties or Contracts. Nor indeed can any Reason be given, why the Laws [*leges*], which are, as it were, the common Covenant and Promise of the People [*quasi pactum commune populi*] (and so they are called by *Aristotle* and *Demosthenes*) should give such an obliging Force [*obligatio*] to Agreements [*pacta*].[103]

Grotius clearly saw the undesirable consequences of a doctrine that denied the binding nature of promises and contracts entered into in the state of nature; it would nullify all extra-state or inter-state treaties. The second point Grotius is here making is also very important, especially in regard to his political theory.[104] Here Grotius attributed the validity and legitimacy of the positive law that prevails in a political community to a type of contract, a "common contract of the people, as it were" – the social contract. Grotius had already expressed this idea in *De iure praedae*, when he argued that nature preserves the universe through a type of contract among all things, and that the human polity (*societas*) is thus also agreed upon

[102] See Wieacker 1967, 294, with too much emphasis on the alleged religious foundation of Grotius' argument. Grotius in 1618 owned in his library an edition of the *Commentaria iuris civilis* by Connan; see Molhuysen 1943, no. 70. On Connan and the similarities and differences to Grotius, see Brett 2011, 68–69; 79–82; 86–88; 99–101; 105–6.

[103] *RWP*, 2.700–1; *IBP* 2.11.1.3: "Verum haec sententia, ita generaliter ut ab ipso effertur accepta, consistere non potest. Primum enim sequitur inde inter reges et populos diversos, pactorum, quamdiu nihil ex iis praestitum est, vim esse nullam, praesertim iis in locis ubi nulla certa forma federum aut sponsionum reperta est. Tum vera ratio nulla reperiri potest, cur leges, quae quasi pactum commune sunt populi, atque hoc nomine vocantur ab Aristotele et Demosthene, obligationem pactis possint addere . . . " Grotius references a Demosthenes passage transmitted in *Dig.* 1.3.2, where *nomos* is said to be the *suntheke koine* of the polis. In 1618 Grotius had in his library a complete edition of Demosthenes' speeches; see Molhuysen 1943, no. 325.

[104] See Brett 2002, where Grotius is interpreted more as a "civil philosopher" than a natural law theorist, which is plausible insofar as Grotius projects institutions of the *ius civile* such as private property and *pacta* back into the state of nature. The view seems exaggerated, however; Grotius is certainly devising a natural-law theory, if not strictly in the scholastic tradition. It is Grotius' political and historical works, rather than his natural-law treatises, which lend themselves to an analysis of his political theory in the narrow sense: *De republica emendanda*, the *Parallelon rerumpublicarum*, *De antiquitate reipublicae Batavicae*, the *Annales et historiae* and the *Commentarius in theses XI*.

contractually (*contracta*) through consensus.[105] He reiterated the natural-law, social-contract character of *stare pactis* in the Prolegomena to *De iure belli ac pacis*, explaining that a type of mutual obligation must necessarily exist among human beings, and that no other natural type was conceivable.[106] To Grotius, the contract, and thus the social contract, was not in opposition to the natural, as it was for Hobbes, but had itself a natural quality.

We will see below the consequences of Grotius' theory of the social and sovereign contract in regard to the validity of natural law in established political communities and a possible right of individual resistance to established political authority. First, however, he needed to show more clearly that promises and "naked contracts" were already binding in the state of nature,[107] and that the rights arising out of them could be enforced, if necessary with force. Grotius did this by developing an analogy between property rights *in rem* and personal rights *in personam*. As property rights included the possibility of selling property, and as such selling of property created obligations under natural law, it was not clear why personal rights arising from promises and contracts were not also binding. It was not clear, then, why

> a Man's own Will [*voluntas*], endeavouring by all Means possible to oblige itself, cannot do the same Thing . . . Besides, since the Property of a Thing [*rei dominium*] may be transferred by the bare Will, sufficiently declared [*voluntas sufficienter significata*] (as we have said before), why may we not in the same Manner transfer to one the Right [*ius in personam*], either of requiring us to transfer to him the Property of a Thing (which is less than the actual Acquisition of the Right of Property itself) or of requiring us to do something in his Favour, since we have as much Power over our Actions as we have over our Goods?[108]

[105] *IPC* 2, fol. 10′: "Et in hac re, ut in aliis omnibus, humana industria naturam imitata est, quae universi conservationem federe quodam rerum omnium firmavit. Haec igitur minor societas consensu quodam contracta boni communis gratia, id est, ad se tuendam mutua ope, et acquirenda pariter ea quae ad vivendum necessaria sunt sufficiens multitudo, Respublica dicitur: et singuli in ea cives." Grotius references Cicero's definition of *res publica* in *Rep*. 1.39 (thinking, mistakenly, that it belongs to the third book of *Rep*.).

[106] *IBP* prol. 15: "Deinde vero cum iuris naturae sit stare pactis, (necessarius enim erat inter homines aliquis se obligandi modus, neque vero alius modus naturalis fingi potest), ab hoc ipso fonte iura civilia fluxerunt."

[107] Contrary to Kersting 1994, 112, who, overlooking the natural character of Grotius' conception of contract, contrasts Grotius with Locke. Brett sees in the "possibility of pre-civic pacts . . . the key point at which Grotius's analysis of right departs from Aristotle and the humanist Aristotelian tradition": Brett 2002, 40–41.

[108] *RWP*, 2.701; *IBP* 2.11.1.3: "Tum vero ratio nulla reperiri potest, cur . . . voluntas autem cuiusque hoc omni modo agentis ut se obliget, idem non possit . . . Adde quod voluntate sufficienter significata transferri rei dominium potest, ut ante diximus. quid ni ergo possit transferri et ius in personam . . . ?"

Grotius supported this analogy with certain passages in the *Corpus iuris civilis*[109] and by using Cicero's ethics. In interpreting the passages from the *Corpus iuris*, Grotius strongly emphasized the will as a criterion for transferring title to property – in opposition to the classic Roman law view that the actual act of handing something over constituted the legally relevant transfer (*traditio*) of title, not the *voluntas*. However, Grotius made use of the passages that permitted this interpretation and lent support to a general, abstract doctrine in Roman law that was not yet fully developed, under which the will to transfer property sufficed.[110] Then, using the model of property transfer understood in this way, Grotius devised the transfer of the right to recover *in personam*:

> And to this do wise Men agree; for as the Lawyers say, Nothing is more natural, than that the Will of the Proprietor [*voluntas domini*], desiring to transfer his Title [*res*] to another, should have its intended Effect: In like Manner it is said, that nothing is so agreeable to human Fidelity [*fides humanae*], as to observe whatsoever has been mutually agreed upon. So the [Praetor's] Edict for Payment of Money promised, tho' there was no other [legal] Reason [*causa*] alleged why it should be due, but the free Consent of the Promiser, is said to be agreeable to natural Equity [*naturalis aequitas*]. And *Paulus,* the Lawyer, says, that he does naturally become a Debtor, who by the Law of Nations is obliged to pay, because we relied upon his Credit.[111]

Among the passages quoted from the *Digest*, we note a particular passage from Ulpian from the work *De pactis* in which he quoted the classical jurist Sextus Pedius, who saw in every contract an element of meeting of minds, and emphasized this as the central element.[112] In choosing his Roman legal sources,[113] Grotius thus gave preference to a unified concept of contract that brought together all legal transactions based on a meeting of minds and, ignoring Roman formalism, made possible a concept of

[109] Grotius owned two editions of the *Corpus iuris civilis* and a separate edition of the *Institutes*; see Molhuysen 1943, nos. 301, 320, 331.

[110] See Kaser 1971/75, § 56, I; 58, II; 59. For the eventual effects of this doctrine, see Wieacker 1967, 293–94.

[111] *RWP*, 2.701–2; *IBP* 2.11.1.4: "Accedit his sapientum consensus: nam quomodo dicitur a Iurisconsultis, nihil esse tam naturale quam voluntatem domini volentis rem suam in alium transferre ratam haberi, eodem modo dicitur nihil esse tam congruum fidei humanae quam ea quae inter eos placuerunt servare. Sic edictum de pecunia constituta, ubi nulla in constituente debendi causa praecesserat praeter consensum, favere dicitur naturali aequitati. Paulus quoque Iurisconsultus eum ait natura debere quem iure gentium dare oportet, cuius fidem secuti sumus . . . "

[112] Ulp. *Dig.* 2.14.1.3: *adeo autem conventionis nomen generale est, ut eleganter dicat Pedius nullum esse contractum, nullam obligationem, quae non habeat in se conventionem, sive re sive verbis fiat: nam et stipulatio quae verbis fit, nisi habeat consensum, nulla est.*

[113] Grotius also cites *Inst.* 2.1.40 on *traditio*, Paul. *Dig.* 50.17.84.1 from the *regulae iuris* and paraphrases Ulp. *Dig.* 13.5.1 on the praetorian edict.

contract suitable for natural law. Grotius explained the prominent role of promise as a *pactum nudum* in his doctrine of contracts by pointing to Cicero, who had ascribed such great power to promises "that he described keeping one's word as the basis of justice."[114]

This led to a general attitude towards *in personam* rights, or contractual obligations, that largely accorded with the law of the *Corpus iuris civilis*. In discussing warranties for defects in sales contracts (*emptio venditio*), Grotius discussed the inner-Stoic debate, depicted by Cicero, between Diogenes of Babylon and his student Antipater. This debate illustrated the ethical question of the relationship between one's own self-interest (*utilitas*) and justice (*honestas*) through concrete problems involving sales contracts.[115] Grotius took a slightly different position from Cicero's, one corresponding more to the Roman law of the *Digest*,[116] which permitted actions *ex bona fide* against a fraudulent contract partner; Cicero may have seen this as only morally, but not legally, relevant.[117] At the same time, these actions did not go nearly as far as Cicero, agreeing with Antipater, found morally desirable in *De officiis*.[118]

(i) Contract of government and the scope of natural law

In a chapter titled "Of the Promises, Contracts, and Oaths of Those who have the Sovereign Power," true to his parallels between natural persons, legal persons, and polities armed with public authority, Grotius applied his doctrine of contract to the relationship between the sovereign and the private citizen in the domestic arena.[119] Grotius thus developed a doctrine of the contract of government (or contract of submission, *Herrschaftsvertrag*)[120] that represented a special case in his general

[114] *IBP* 2.11.1.4: "M. autem Tullius in officiis tantam promissis vim tribuit, ut fundamentum iustitiae fidem appellet . . . " See Cic. *Off.* 1.23: *Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas.* On the specifically Roman character of *fides* as the foundation of justice in *De officiis* see Atkins 1990, 279. On *fides* in Roman "international law," see Nörr 1991.

[115] See Cic. *Off.* 3.50–74. On the debate, see Annas 1989.

[116] Grotius adduces the description of the *actio empti venditi* in Ulp. *Dig.* 19.1.1.1.

[117] *IBP* 2.12.9.1: "Ad praecedaneos actus pertinet, quod is qui cum aliquo contrahit vitia sibi nota rei de qua agitur significare debet: quod non civilibus tantum legibus constitui solet, sed naturae quoque actus congruit. nam inter contrahentes propior quaedam est societas quam quae communis est hominum. Atque hoc modo solvitur quod dicebat Diogenes Babylonius hoc tractans argumentum . . . "

[118] *IBP* 2.12.9.2: "Non ergo generaliter sequendum illud eiusdem Ciceronis, celare esse cum tu quod scias id ignorare emolumenti tui causa velis eos quorum intersit scire: sed tum demum id locum habet cum de iis agitur quae rem subiectam per se contingunt . . . "

[119] *IBP* 2.14: "De eorum qui summum imperium habent promissis et contractibus et iuramentis."

[120] Gough 1957, 3: "Generally it has nothing to do with the origin of society itself, but, presupposing a society already formed, it purports to define the terms on which that society is to be governed: the people have made a contract with their ruler which determines their relations with him."

doctrine of contract, and which determined the scope of natural law within a polity in which positive law applied. Grotius did not distinguish beween the social contract and the contract of government. However, he had already suggested in *De iure praedae* that contracts were important in the creation of political communities, and he continued to argue this in *De iure belli ac pacis*.[121] In the scholarship on the history of social-contract theory, there is disagreement over whether Grotius was part of this tradition;[122] this seems greatly exaggerated. The emergence of states is ascribed by Grotius to a founding contractual act.[123]

However, it is certainly true that Grotius' doctrine of social and governmental contract is not a *moral* contractualism that derives the normative power of moral norms from the idea of contract, but a *political* contractualism that bases political authority on a contract. Nor are we speaking of a philosophical doctrine of the social contract, a hypothetical "philosophical contractarianism," but of historical "constitutional contractarianism," in Höpfl and Thompson's words, characterized by the relevance of "particular positive laws and the institutional inheritance of specific polities."[124] While philosophical contractualism deals with the logical and conceptual presuppositions of the state, historical "constitutional" contractualism is concerned with its actual historical origins as expressed in an actual contract of government.

The main purpose of the state, according to Grotius, lay in the peace (*tranquillitas*) it created. In addition to this utilitarian consideration, however, Grotius also mentioned the enjoyment of law as a reason for the existence of the state. The state (*civitas*) was, according to Grotius – following Cicero's definition of the *res publica* in *De re publica* – a perfect society of free men united for the sake of enjoying the advantages of law (*iuris fruendi causa*) and by common interest.[125] Grotius borrowed from Cicero the criteria of common interest and law, but unlike Cicero, attached

[121] *IPC* 2, fol. 10′; see the references to the contractarian origins of the state in *IBP* 1.3.8–9; 1.4.7.3; 1.4.8; 1.4.15.1; 2.5.17ff.; 2.5.23; 2.6.4. Gough 1957, 80, sees Grotius as an "influential member of the school of natural law," with a typical "contractarian theory of the state."

[122] See Höpfl and Thompson 1979, 935: Grotius' account had "little use for covenant" and "managed perfectly well without it and its attendant difficulties." Their narrow conception of contract is however not very helpful when dealing with Grotius, who, as we have seen, extends his concept of contract precisely in order to make it amenable to promises and *pacta nuda*.

[123] See Grunert 2000, 116ff.

[124] On the distinction, see Höpfl and Thompson 1979, 940–41. See also Scheltens 1983, 54: "[T]he contract is always seen as a fact from the past to which citizens are bound, and by which their freedom of action is restricted." For Grotius, political authority too has obligations under the contract of government. See also Kersting 1994; Grunert 2000, 117.

[125] *IBP* 1.1.14.1: "Est autem Civitas coetus perfectus liberorum hominum, iuris fruendi et communis utilitatis causa sociatus." Cf. the definition in Cic. *Rep*. 1.39 which Grotius knew from August.

importance to the conclusion that the state was "a perfect society of free men," reflected in the choice of the term *civitas*, which he probably preferred to Cicero's *res publica* because of its suggestion of the *civis*. However, individuals can dispose of their freedom by contract. Every person can place himself in private slavery if he so desires, said Grotius, referring among other things to the Roman rules concerning legal personhood of the *Institutes*.[126] Why, he asked, should not a "People that are at their own Disposal [*populus sui iuris*] . . . deliver up themselves to any one or more Persons, and transfer the Right of governing them [*regendi ius*] upon him or them, without reserving any Share of that Right to themselves?"[127] Grotius illustrated this with, among other things, the example of the Roman *lex de imperio Vespasiani*, the transfer of the powers of the Roman people to the emperor by the Roman people:

> So after the chief Men of *Rome* began to assume [*usurpare*] to themselves the Regal Power [*imperium regium*], the People [*populus*] are said to have bestowed all their Dominion [*imperium et potestas*] upon them, and Power even over themselves.[128]

Original freedom can be disposed of by contract, even after the fact, as Grotius apparently assumed here in the case of the Roman *lex regia*.[129] A "society of free men" thus seems only to be necessary at the time the contract is concluded, when entering into the social and governmental contract.[130] After that, full freedom of contract prevails – a position criticized by Rousseau, who assumed that certain contracts were null and void.[131] It

De civ. D. 2.21: *Est igitur res publica res populi, populus autem non omnis hominum coetus quoquo modo congregatus, sed coetus multitudinis iuris consensu et utilitatis communione sociatus*. Grotius' description of the *coetus* as *perfectus* is due to Aristotle's influence; see Arist. *Pol.* 1.1252b28.

[126] *Inst.* 1.3.4: *Servi . . . fiunt . . . iure civili, cum homo liber maior viginti annis ad pretium participandum sese venumdari passus est*.

[127] *RWP*, 1.261; *IBP* 1.3.8.1: "quidni ergo populo sui iuris liceat se uni cuipiam, aut pluribus ita addicere, ut regendi sui ius in eum plane transcribat, nulla eius iuris parte retenta?"

[128] *RWP*, 1.268; *IBP* 1.3.8.10: "Sic postquam Romani principes imperium vere regium usurpare coeperunt, dicitur populus in eos omne suum imperium et potestatem contulisse, etiam in se . . . " Grotius adduces for the *lex regia Inst.* 1.2.6, a passage in turn taken from Ulp. *Dig.* 1.4.1: *Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit*.

[129] According to Grotius, the emperors from Augustus to Vespasian are usurpers of the people's constitutional prerogatives.

[130] In *IBP* 2.5.17, Grotius describes the original contracting, assuming an important role for the majority principle (referencing Vitoria). From the authority of decisions reached by the majority he excludes, however, fundamental norms (*pacta ac leges*), which seem to have the character of constitutional, more firmly entrenched norms: "quare naturaliter, seclusis pactis ac legibus quae formam tractandis negotiis imponunt, pars maior ius habet integri." See Gough 1957, 80–81.

[131] See on Rousseau's criticism Kersting 1994, 152–53. See also Haakonssen 1985, 246, where Grotius' freedom of contract is not given sufficient weight, however; when contracting, all rights can,

was this freedom of contract that enabled Grotius to defend the Dutch monopoly in Southeast Asia against the English, without abandoning his general support for free trade or the norms advocated in *Mare liberum*.[132] Once the VOC's indigenous trading partners had bound themselves by contract, the contracts had to be honored regardless of their content.

While instinct, *appetitus societatis*, provided the motivation for forming societies, the consequence of the doctrine of social and sovereign contract was to leave the question of the legitimacy of *concrete* state authority to historical research. Grotius did this even in his historical work *De antiquitate reipublicae Batavicae* in 1610, where he made almost no use of natural law ideas, but instead – following François Hotman's *Francogallia* – pursued historiography in the service of a political argument, and more precisely, an argument about constitutional history.[133] The tools of historical research would be used to study the historical governmental contract. Thus in *De antiquitate*, Grotius was able to show that the Habsburg emperor and Spanish king had exceeded the powers arising from the historical governmental contract, which permitted a sympathetic judgment of the legitimacy of the secession of the northern Netherlands from the Empire on the basis of historical findings.[134]

It seems more than plausible that we can impute to Grotius a doctrine of state purpose that saw the "enjoyment of right" and the "common utility" in the protection and guarantee of private property by the state, as formulated by Cicero in *De officiis*:

> For political communities and states (*res publicae civitatesque*) were constituted especially so that men could hold on to what was theirs. It may be true that nature first guided men to gather in groups; but it was in the hope of safeguarding their property (*res*) that they sought the protection of cities (*urbes*).[135]

according to Grotius, potentially be given up – whether this has actually taken place is a matter for historical constitutional research to decide.

[132] See Borschberg 1999, 246–47.

[133] See on Hotman and his dependence on Jean Bodin's *Methodus ad facilem historiarum cognitionem* Skinner 1978, 2.309ff. A natural-law argument in *De Antiquitate* can only be found in *ARPB* 2.1. See on the use of such historical constitutional arguments in seventeenth-century England the classic study by Pocock 1987.

[134] Grotius still used these arguments when he was in exile; in a letter from 1621, probably addressed to the French statesman and student of Cujas Pierre Jeannin, Grotius offered a condensed version of his argument from *De antiquitate*: *BHG*, 2, no. 648.

[135] Cic. *Off.* 2.73: *Hanc enim ob causam maxime, ut sua tenerentur, res publicae civitatesque constitutae sunt. Nam, etsi duce natura congregabantur homines, tamen spe custodiae rerum suarum urbium praesidia quaerebant*. See also Cic. *Off.* 2.78, where redistribution is treated harshly and the end of the state reiterated: *Qui vero se populares volunt . . . labefactant fundamenta rei publicae, concordiam primum . . . deinde aequitatem, quae tollitur omnis, si habere suum cuique non licet. Id enim est proprium, ut supra dixi, civitatis atque urbis, ut sit libera et non sollicita suae rei cuiusque custodia.*

Thus for Cicero the protection of private property is not only the primary *motive* in establishing states and governments, but it is also the crucial *justification* for the authority and coercive power of the state. Grotius never developed such a doctrine of the purpose of the state explicitly, but was most likely referring to this passage from Cicero's *De officiis* in his notes to the *Commentarius in theses XI*.[136] Grotius quite obviously thought in comparable fashion about the purpose of the pre-political, natural society, as can readily be seen in the passage quoted on p. 183 above:

> For the Design of Society [*societas*] is, that every one should quietly enjoy his own [*suum cuique*], with the Help, and by the united Force of the whole Community. It may be easily conceived, that the Necessity of having Recourse to violent Means for Self-Defence, might have taken Place, even tho' what we call *Property* [*dominium*] had never been introduced. For our Lives [*vita*], Limbs [*membra*], and Liberties [*libertas*], had still been properly our own, and could not have been (without manifest Injustice [*iniuria*]) invaded.[137]

This view accords with Grotius' adoption of Cicero's doctrine of the emergence of property and the idea of property as a pre-political institution in the state of nature, which was also central to Grotius' own natural law.[138] Yet Grotius, unlike Cicero, does not offer a doctrine about the purpose of the state, since *De iure belli ac pacis* was not primarily a political theory but, like *De iure praedae*, a theory of natural law, which consisted in an account of corrective justice and required no state or political authority. Grotius talks about natural society as the result of *appetitus societatis*, in the context of his use of the Stoic doctrine of *oikeiosis* as gleaned from Cicero; yet his object is neither the *res publica* nor the *civitas*, as he is not concerned with established *political* communities, but with the state of nature.[139] Grotius' theory of the political community interests us here only to the extent that it is significant for the validity of his natural law.[140] To a certain extent, the norms of natural law have a similar relationship to the state and positive

[136] *BPL* 922 I, fol. 285 recto: "Legum et Reip. origo Cic. *De Off.* 2." I owe this hint to Peter Borschberg.

[137] *RWP*, 1.184; *IBP* 1.2.1.5: "Nam societas eo tendit ut suum cuique salvum sit communi ope ac conspiratione. Quod facile intelligi potest locum habiturum, etiamsi dominium quod nunc ita vocamus introductum non esset. nam vita, membra, libertas sic quoque propria cuique essent, ac proinde non sine iniuria ab alio impeterentur."

[138] See for a similar early view *IPC* 2, fol. 11b, citing from Livy 26.36.9, where the main purpose of the *res publica* is said to lie in the security of the *res privatae*: "Livius breviter ita concepit: Respublica incolumis et privatas res facile salvas praestat: publica prodendo tua nequicquam serves."

[139] The passage therefore cannot be used, *pace* Haakonssen 1985, 246, to impute to Grotius the notion that the social contract serves to protect subjective rights. Cf., however, *IPC* 2, fol. 10′.

[140] For Grotius' political theory, see Tuck 1993, 154–69. See also Hartenstein 1850, 536ff.

state law as they do to the institution of private property; once the state has emerged, natural law prescribes respect for obligations entered into by contract. The state of nature and natural law continue to exist outside the state and, in specific cases, in the domestic arena as well:

> Undoubtedly, the Liberty [*licentia*] allowed before is now much restrained, since the erecting of Tribunals [*iudicia*]: Yet there are some Cases wherein that Right still subsists; that is, when the Way to legal Justice [*iudicium*] is not open. For the Law which forbids a Man to pursue his Right [*suum consequi*] any other Way, ought to be understood with this equitable Restriction, that one finds Judges to whom he may apply. Now the Way to legal Justice may fail, either for some Time or absolutely. It fails *for some Time only,* when the Judge cannot be waited for without certain Danger or Damage. It fails *absolutely,* either by Right or Fact: By Right [*iure*], if a Man be in Places not inhabited [*non occupati*], as on the Seas, in a Wilderness, in desert Islands; and any other Places where there is no Civil Government [*nulla civitas*]. By Fact [*facto*], if Subjects will not submit to the Judge, or the Judge refuse openly to take Cognizance of Matters in Dispute.[141]

If no adjudication is available (*cessat iudicium*), either *de jure* or *de facto*, according to natural law the ban on use of force for private persons ceases: *de jure* on the seas, in the wild, on uninhabited islands, and in all places where no *civitas* exists; *de facto* where jurisprudence fails. Those not subject to positive law (*leges civiles*) must obey whatever right reason (*ratio recta*) prescribes as just (*aequum*), Grotius writes. This was also the case for those subject to positive law, as long as positive law did not grant or take away a right (*ius*), but only failed for some reason to assist natural law.[142] The positive law of a state could interfere with a citizen's rights, as could be shown using the example of property. Grotius presented two types of property rights: a subjective right to property in the private sphere, and a higher subjective right of the state to all private property under its sovereign control:

> *Right strictly taken* [*facultas*] is again of two Sorts, either *private* and *inferior*, which tends to the particular Advantage of each Individual: Or *eminent* and

[141] *IBP* 1.3.2.1: "Certe quin restricta multum sit ea quae ante iudicia constituta fuerat licentia, dubitari non potest. Est tamen ubi locum nunc quoque habeat, nimirum ubi cessat iudicium: nam lex vetans sine iudicio suum consequi, intelligi commode debet ubi copia est iudicii. Cessat autem iudicium momentanee, aut continue. Momentanee cessat, ubi exspectari iudex non potest sine certo periculo aut damno. Continue vero, aut iure, aut facto. Iure, si quis versetur in locis non occupatis, ut mari, solitudine, insulis vacuis, et si qua alia sunt loca in quibus nulla est civitas: facto, si subditi iudicem non audiant, aut iudex aperte cognitionem reiecerit."

[142] *IBP* 2.12.12.2: "Hi vero qui legibus civilibus subiecti non sunt, id sequi debent quod aequum esse ipsis ratio recta dictat: imo et illi qui legibus subiecti sunt, quoties de eo quod fas piumque est agitur, si modo leges non ius dant aut tollunt, sed iuri duntaxat ob certas causas auxilium suum denegant."

> *superior*, such as a Community has over the Persons and Estates of all its Members [*res partium*] for the common Benefit [*boni communis causa*], and therefore it excels the former.[143]

This separation of private property from public authority, and the superordinate position of the latter (*dominium eminens*), made possible a theory of expropriation formulated as a subjective right of the state and represented an influential innovation in comparison with Roman law. Roman law had never included expropriation as a legal institution, and had protected private property from public intervention to a high degree.[144] However, even for Grotius, the extent to which rights protected by natural law, especially property rights, could be infringed upon by positive law was limited. Interventions by the highest state authorities in such rights were subject to a duty of compensation and were additionally limited by the concept of the public welfare:

> For it is contrary to Natural Law, that whatever Property or other Right [*ius*] a Man has lawfully gained to himself, should be taken from him without a sufficient Reason. On the contrary, if a King should do it, he is without doubt obliged to make Restitution, and to repair the Damage; because he acts against the true Right [*verum ius*] of his Subjects.[145]

The possibility of intervening in rights guaranteed by natural law was created only through the alienation of rights in the contract of government – that is, through the binding of the subject by contract.

> And here is the Difference between the Right of Subjects, and the Right of Foreigners [*ius exterorum*], (that is, of such as are in no Respect Subjects) which Right of Foreigners can by no Means be under that Sovereign Dominion [*supereminens dominium*] . . . but the Right [*ius*] of Subjects must be under that Dominion, as long as the Advantage of the Publick [*publica utilitas*] wants and requires it.[146]

Those, then, who do not belong to the polity in question could not have the rights they were guaranteed by natural law violated by a sovereign to whom they are not contractually bound.

[143] *RWP* 1.140; *IBP* 1.1.6: "Sed haec facultas rursum duplex est: Vulgaris scilicet quae usus particularis causa comparata est, et Eminens quae superior est iure vulgari, utpote communitati competens in partes et res partium boni communis causa."

[144] See Kaser 1971/75, § 98, I.

[145] *RWP*, 2.810; *IBP* 2.14.8. This position strongly resembles Bodin's as put forward in his *Six livres de la république* (1583). Bodin cites Sen. *Ben.* 7.4.2, where kingly *potestas* is limited by citizens' property; see Nippel 1993, 75–76.

[146] *IBP* 2.14.8: "Hoc ergo differt ius subditorum et ius exterorum, quod ius exterorum (hoc est qui nulla ratione subditi sunt) supereminenti dominio nullo modo subest . . . subditorum autem ius ei dominio subest quatenus publica utilitas desiderat."

(ii) The right of resistance

Grotius was widely criticized for his conservative attitude toward resistance to established authority.[147] In *De iure praedae*, the question of a right to resistance played no major role, which can easily be explained by the international, or rather extra-state, context of the work; its main concern was the behavior of the subjects of natural law on the seas, understood as the state of nature.[148] In *De iure belli ac pacis*, Grotius devoted an entire chapter, *De bello subditorum in superiores*, to the question whether, after the creation of a state authority, there is also a natural right to resistance on the part of the subjects. Like all other subjective natural rights, the right to resistance arises from a just cause of war. The right of resistance was interpreted by Grotius as a right to wage a private war against the authorities.[149]

At first it seems as though according to Grotius the natural right of resistance was the first right to fall victim to the creation of the polity and the superordinate rights of the state authorities:

> Indeed all Men have naturally a Right to secure themselves from Injuries by Resistance [*ius resistendi*], as we said before. But civil Society [*civilis societas*] being instituted for the Preservation of Peace [*tranquillitas*], there immediately arises a superior Right [*ius maius*] in the State over us and ours, so far as is necessary for that End.[150]

So far, so Hobbesian. However, Grotius permitted some exceptions to this rule – cases in which the natural right to resist had not disappeared even in the context of the established polity. In contrast to the Calvinist monarchomachs of the sixteenth century, who had rejected a right of resistance on the part of private individuals against state authority and developed a theory of resistance based on the Spartan model of ephors, which permitted a

[147] This criticism can be traced back to Rousseau; see Haggenmacher 1990, 166.

[148] In *IPC* 11, fol. 72 rights of a whole people (*iura populi*) are postulated, the defense of which is incumbent on the estates (*ordines*). See also the explicitly acknowledged right of resistance against a tyrant in *IPC* 8, fol. 41′ (in the context of the natural right to punish); *IPC* 9, fol. 55; *IPC* 13, fol. 130′.

[149] See for the late medieval tradition behind this view of the right of resistance Haggenmacher 1983a, 141ff., 533–36. See on Grotius' doctrine Zarka 1999/2000, without however paying attention to the contractual element.

[150] *IBP* 1.4.2.1: "Et naturaliter quidem omnes ad arcendam a se iniuriam ius habent resistendi, ut supra diximus. Sed civili societate ad tuendam tranquillitatem instituta, statim civitati ius quoddam maius in nos et nostra nascitur, quatenus ad finem illum id necessarium est." See the discussion in Hartenstein 1850, 524–25, whose interpretation of Grotius' state of nature is, however, contrary to the one put forward here.

right of resistance only to lower-level magistrates (*magistratus inferiores*),[151] Grotius fell back in exceptional cases on a natural-law right to resistance on the part of the private individual (*privatus*).[152]

For Grotius, the right of resistance arose either from a breach of contract or an unlawful act by the ruler. Grotius distinguished between resistance to legal holders of power and resistance to those who had unlawfully acquired power. In the first case, Grotius thought of the right to resistance in Roman law terms, as the result of a breach of the ruler's contractual obligations. A possible right to resistance against legal holders of the *ius imperandi* was based on the original contract or promise in which the form of authority was determined. Because Grotius saw the sovereign contract as a promise to his subjects by the person holding the highest sovereign power, subjective rights could arise from such a promise. The Roman emperors Trajan and Hadrian had made such promises,[153] Grotius writes, in order to explain the consequences that arose from it:

> Yet I must confess, where such Promises are made, Sovereignty [*imperium*] is thereby somewhat confined, whether the Obligation only concerns the Exercise of the Power, or falls directly on the Power itself. In the former Case, whatever is done contrary to Promise, is unjust; because, as we shall shew elsewhere, every true Promise gives a Right [*ius*] to him to whom it is made. In the latter, the Act is unjust, and void [*nullus*] at the same Time, through the Defect of Power [*defectu facultatis*].[154]

Sovereignty (*summum imperium*) could, according to Grotius, be divided at the time of the original establishment of the form of government: "So also it may happen, that the People in chusing a King, may reserve certain Acts of Sovereignty to themselves, and confer others on the King absolutely and without Restriction."[155] A free people can "require certain Things of

[151] See Nippel 1993, 72–73. See on the use of Cicero's natural law arguments in the Calvinistic theory of resistance Skinner 1980, 316ff.

[152] Grotius explicitly denies lower-level magistrates a right to resist; see *IBP* 1.4.6.

[153] *IBP* 1.3.16.1n15. Grotius refers to Plin. *Pan*. 64.3 and SHA *Hadr*. 7. See Plin. *Pan*. 64.2–3: *Imperator ergo et Caesar et Augustus pontifex maximus stetit ante gremium consulis, seditque consul principe ante se stante, et sedit inturbatus interritus, et tamquam ita fieri soleret. Quin etiam sedens stanti praeiit ius iurandum, et ille iuravit expressit explanavitque verba quibus caput suum domum suam, si scienter fefellisset, deorum irae consecraret*. SHA *Hadr*. 7.4: *in senatu quoque excusatis quae facta erant iuravit se numquam senatorem nisi ex senatus sententia puniturum*.

[154] *RWP*, 1.301–2; *IBP* 1.3.16.2: "Fatendum tamen, id ubi fit, arctius quodammodo reddi imperium, sive obligatio duntaxat cadat in exercitium actus, sive etiam directe in ipsam facultatem. Priore specie actus contra promissum factus erit iniustus, quia . . . vera promissio ius dat ei cui promittitur: altera autem specie erit etiam nullus defectu facultatis."

[155] *RWP*, 1.306; *IBP* 1.3.17.1: "Sic etiam fieri potest, populus regem eligens quosdam actus sibi servet, alios autem regi deferat pleno iure."

the King, whom they are chusing, by way of a perpetual Ordinance" or can add something to the contract "whereby it is implied, that the King may be compelled or punished."[156] Grotius proved this using an example from Plato's *Laws*: "For the *Heraclidae* . . . being settled at *Argos, Messena* and *Lacedemon,* their Kings were obliged to govern according to Laws prescribed to them."[157] Such princes, subject, like the Spartan King Pausanias, to "the People, whether they at first were established on that Foot, or their Authority was thus rendered subordinate by a posterior Agreement," could be repelled by force or punished with death "if they offend against the Laws, and the State."[158]

Grotius also conceded a right to resistance in the case of a ruler who had gained his authority by election or heredity and then alienated his power. Such a ruler enjoyed sovereignty only by usufruct (*usufructuarius*), and it was therefore not transferable.[159] A ruler who, in opposition to the provisions of the Roman law on *usus fructus*, transferred his power could thus be lawfully resisted, according to Grotius.[160] In this context, the right to resistance apparently did not arise primarily from a breach of contract by the ruler; there was, instead, a violation of the norms of Roman property law on usufruct, which in Grotius' view formed the basis for certain forms of political power and were probably conceived of as natural-law norms that preceded any sovereign contract.

Finally, the natural right to resistance could, according to Grotius, be reserved by contract:

> If in the conferring of the Crown [*delatio imperii*], it be expressly stipulated, *that in some* certain *Cases* the King may be resisted; even though that Clause [*pactum*] does not imply any Division of the Sovereignty, yet certainly some Part of natural Liberty is reserved to the People, and exempted from the Power of the King.[161]

While the right to resist a lawful ruler arose, as a rule, from a breach of the contractual agreement (*pactum*) upon which his authority was based, the right to resist an unlawful holder of authority arose from the absence

[156] *RWP*, 1.306; *IBP* 1.3.17.1: "si quid populus adhuc liber futuro regi imperet per modum manentis praecepti; aut si quid sit additum quo intelligatur regem cogi aut puniri posse."

[157] *RWP*, 1.307; *IBP* 1.3.17.2: "Exemplum vetus refertur a Platone de legibus tertio. Cum enim Heraclidae Argos, Messenam et Lacedaemonem condidissent, adstricti reges intra praescriptarum legum modum imperare . . ." See Pl. *Leg.* 3.684a. The example was not added until the 1631 edition.

[158] *RWP*, 1.372; *IBP* 1.4.8.

[159] For a very lucid discussion of Grotius' use of the idea of usufruct, with due attention to the importance of Roman law, see Lee 2011.

[160] *IBP* 1.4.10.

[161] *RWP*, 1.377; *IBP* 1.4.14.

of a legal basis for that authority. Such an "invader of authority" (*invasor imperii*)[162] could, under certain circumstances, be resisted; any private person could use force against someone who had gained his power through an unjust war. Finally, a general right of resistance had to be supposed for polities in which laws were in force that permitted tyrannicide. Anyone who usurped power over such a polity could, under the positive law of the state in question, be killed by any citizen without legal process. As an example, Grotius offered Athenian and Roman laws, with which he was familiar from Plutarch's parallel biographies of Solon and P. Valerius Publicola:

> I think, with *Plutarch,* the same may be said of him, who has usurped the sovereign Authority in a State where there was already a Law [*lex publica*], impowering any Person to kill him, who should do such or such a Thing, visible and manifestly designed: as for Example, if a private Man [*privatus*] should go with a Guard about him, should assault a Fort, or kill a Citizen uncondemned, or illegally condemned, or presume to create a Magistrate without being elected by legal Votes. Many such Laws [*leges*] were extant in the States of *Greece*, with whom it was reputed lawful to kill such Tyrants. Such was *Solon*'s Law at *Athens,* after the Return from the *Piraeus*, against such as should abolish popular Government, or after its being abolished, should exercise any publick Office. And such was the *Valerian* Law at *Rome*, if any one bore an Office without the Order of the People; and the *Consular* Law, after the *Decemviral* Government, that no Man should create a Magistrate without an Appeal; and he that did it might lawfully be killed.[163]

Grotius conceded a right of resistance in the case of a free people that had explicitly agreed upon it in their social contract. The status enjoyed by the Roman popular assembly in Grotius' examples is noteworthy. Like Bodin, Grotius interpreted the Roman republic as a democracy.[164] He thus saw, in the election of magistrates by the Comitia and the right of appeal (*ius provocationis*), the criteria for the maintenance of the republican order. The circumvention of these central institutions by a tyrant was, for Grotius, a just cause of war, which gave every citizen of such a free republic a right to resistance under the positive laws of his polity.

According to Grotius, therefore, the natural right of resistance was revived in cases of breach of contract or violation of natural-law norms by a ruler; the latter existed when someone usurped authority through an

[162] *IBP* 1.4.15. [163] *IBP* 1.4.17. Grotius references Plut. *Publicola* 12.103b, 110c.

[164] See 1.3.19, where Grotius argues against Polybius. The Roman example is mentioned in the same breath with the Athenian one, as both are viewed as democracies. See also *IBP* 1.3.8.11. On Bodin, see Nippel 1993, 75.

unjust war. Failure to observe the norms of *ususfructus* on the part of princes, as discussed above, which could also give cause for lawful resistance, represented such a violation of natural law. The case of breach of contract was a special case of natural rights, which Grotius considered to result from contractual obligations, while violations of natural law were seen as analogous to violations of Roman property law, in which usurpation was viewed as unlawful expropriation of others' property or as violation of the provisions for usufruct. Grotius, analyzing constitutional arrangements in Roman law terms, is not willing to make any substantive normative commitment to a particular kind of constitutional setup[165] – he cannot be described as an author in the civic tradition of republicanism in this regard, let alone as a proponent of "exclusive republicanism."[166] What he does put forward, as Daniel Lee has lucidly observed, is a view according to which "a people may remain free even while under the government of a prince."[167] This is so because if the prince holds sovereignty by usufruct, this will be perfectly compatible with popular liberty; surely a "significant departure from one of the longstanding assuptions of early modern republicanism, that popular liberty requires popular government."[168]

[165] See Harrison 2003, 147–58. [166] Hankins 2010. [167] Lee 2011, 373. [168] Ibid., 391.

CHAPTER 9

Enforcing natural law
The right to punish

Grotius' motivation to establish a natural right to punish which precedes the establishment of a commonwealth and which can be brought to bear against violations of natural law even in the state of nature can be explained by looking to the arguments with which his legal brief *De iure praedae* was originally concerned. Freedom of trade with the East Indies and its necessary prerequisite, freedom of the sea, were the issues on which the legal debate over the legitimacy of Dutch privateering turned. If the seizure of the *Santa Catarina* could be shown to be part of a just war fought against the illegitimate Spanish and Portuguese claims to a monopoly of trade with the East Indies, then the capture itself would be justified. To this end, Grotius in *De iure praedae* adopted a two-pronged strategy, aiming to show, on the one hand, that the VOC's forerunner could be understood as the agent of a sovereign state engaged in a just war against Spain and Portugal, and that, on the other hand, the capture of the ship was justified under the law of nature even if the trading company had been acting on its own behalf as a private actor. It is this latter aspect of Grotius' strategy that made him develop a doctrine of a natural right to punish: the Portuguese, he argued, by monopolizing the high sea, had violated the law of nature, giving rise to the VOC's natural right to punish and providing the trading company with a just cause for war.

The right to punish arises out of an unlawful act. Because, however, such an unlawful act can, true to Grotius' Roman law terminology, consist of either a simple private-law delict or criminally relevant behavior,[1] the question arose for Grotius whether the right due to everyone in the state of nature was merely a right of enforcement arising from a private delict, or whether it constituted a right to execute a punishment, arising from a

[1] See Haggenmacher 1997, 88–89, who recognizes the dual character of the unlawful act, without addressing the Roman background.

crime.[2] Grotius found that many scholars took the view that the power to punish (*puniendi potestas*) was exclusively that of the organized political community, and that private exercise of force had thus to be rejected. To decide this question, however, according to Grotius, it was necessary to study the state of nature to determine what each individual was permitted to do before the polity was established (*ante respublicas ordinatas*).[3]

Once again, Grotius brought in Cicero as his source. Cicero, he said, quoting verbatim from *De inventione*, had seen punishment as a manifestation of natural law and defined it as something through which each person could deflect violence or mistreatment from himself and his loved ones, in order to defend oneself, and with which one punished offenses.[4] This Ciceronian premise led Grotius to the radically novel view[5] that punishment was an institution of natural law that could be derived from his first law, "It shall be permissible to defend [one's own] life and to shun that which threatens to prove injurious."[6] To interpret the right to punish as a natural right was a revolutionary move which Grotius could not possibly have taken from his scholastic predecessors and which put him fundamentally at odds with them, as the Grotius scholar Peter Haggenmacher recognizes.[7] One should note, however, that in *De iure praedae* Grotius derives the right to punish also from a concept that belongs to the Roman just war doctrine, namely from the demand for redress (*rerum repetitio*), which in the Roman doctrine constitutes a necessary condition for a just war.[8] Grotius states his novel view thus:

> In the light of the foregoing discussion, it is clear that the causes for the infliction of punishment are natural, and derived from that precept which we have called the First Law. Even so, is not the power to punish [*puniendi*

[2] For an overview of the right to punish in *IPC* and *IBP*, see Straumann 2006a.

[3] *IPC* 8, fol. 39: "Cum enim doceant plerique puniendi potestatem soli reipublicae concessam, unde et publica iudicia dicuntur, videri potest privata manus omnino excludi. Sed hoc commodius expediri non potest quam si videamus, quid licuerit unicuique ante respublicas ordinatas."

[4] *IPC* 8, foll. 39–40: "Et ipse Cicero . . . cum ius naturae esse dixisset, id quod nobis non opinio, sed innata vis afferat, inter eius exempla statuit vindicationem quam gratiae opponit: . . . definit vindicationem, per quam vim et contumeliam defendendo, aut ulciscendo propulsamus a nobis, et a nostris qui nobis cari esse debent, et per quam peccata punimus." Grotius quoted verbatim Cic. *Inv.* 2.66.

[5] See Haggenmacher 1997, 89: "En reconnaissant au particulier une compétence pénale naturelle il prend sciemment le contre-pied de l'opinion courante qui associe le droit pénal par définition avec l'autorité étatique: ce ne serait là que l'effet du transfert d'un pouvoir d'origine naturelle et donc préétatique."

[6] *CLP*, 23; *IPC* 2, fol. 6: "VITAM TUERI ET DECLINARE NOCITURA LICEAT."

[7] Haggenmacher 1997, 88: "Or, comme on ne reconnaissait la compétence pénale qu'aux puissances publiques, c'est à elles qu'on réservait aussi la guerre punitive."

[8] See *IPC* 8, fol. 44′.

> *potestas*] essentially a power that pertains to the state [*respublica*]? Not at all! On the contrary, just as every right [*ius omne*] of the magistrate comes to him from the state, so has the same right come to the state from private individuals; and similarly, the power of the state [*potestas publica*] is the result of collective agreement . . . Therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state.[9]

Here Grotius adopted from the *Digest* the Roman jurist Ulpian's private-law requirement for the transfer of property that "no one can transfer greater rights to someone else than he possesses himself,"[10] in order to apply it to the right to punish. On the premise that every right of magistrates had been assigned to them by the members of the polity, the members must already have had the right to punish, for otherwise the magistrates could have no such right – analogous to the transfer of ownership in Roman law, which allowed no transfer of property by those without title. Consequently, the right to punish had to belong to the individual in the state of nature prior to the establishment of states (*ante respublicas ordinatas*).[11] Grotius supported this revolutionary argument[12] with an additional one that, as Richard Tuck has pointed out, is surprisingly identical to the argument eventually made by John Locke for the natural right to punish.[13] A polity punishes not merely its own subjects for unlawful acts, but also foreigners – in regard to them, however, the state has no power from positive law, as positive law binds one's own citizens only, because they have agreed to that law through consent. Consequently, the right to punish exercised by a state against foreigners must be an institution of natural law.[14]

Grotius' theory of a natural right to punish is conspicuously similar indeed to the "very strange doctrine" developed by John Locke in his *Second Treatise of Government*, under which "every Man hath a Right to

[9] *CLP*, 136–37; *IPC* 8, fol. 40: "Ex his apparet puniendi causas esse naturales et ex ea lege procedere quam nos primam descripsimus. Quid ergo, nonne puniendi potestas reipublicae propria est? Imo vero ut a republica ad magistratum, ita ad rempublicam ius omne a singulis devenit, collatoque consensu . . . potestas publica constituta est. Quare cum transferre nemo possit, quod non habuit, ius illud antiquius penes privatos fuisse quam penes rempublicam necesse videtur."

[10] Ulp. *Dig*. 50.17.54: *nemo plus iuris ad alium transferre potest quam ipse habet*.

[11] Grotius softened his original wording that this had to be so; he crossed out *necesse est* and replaced it with *necesse videtur*.

[12] In *Commentarius in theses XI* (as in *Theses LVI*) Grotius does not recognize such a natural, pre-political right, but says that the *potestas vindicatrix aut punitiva* is a right of the polity (*penes rempublicam*), or more precisely, of the *potestas iudiciaria*; see *CT*, 262.

[13] See Tuck 1979, 63. Cf. also Harrison 2003, 145–47.

[14] *IPC* 8, fol. 40′: "Respublica non tantum subditos sibi ob maleficium punit, sed etiam extraneos. In hos autem potestatem non habet iure civili, ut quod cives tantum ex consensu obliget: Habet igitur ex iure Naturae seu Gentium."

punish the Offender, and be Executioner of the Law of Nature."[15] Locke was going on to present Grotius' argument, when he wrote, in the *Second Treatise* (§ 9): "And therefore if by the Law of Nature, every Man hath not a Power to punish Offences against it, as he soberly judges the Case to require, I see not how the Magistrates of any Community, can *punish an Alien* of another Country, since in reference to him, they can have no more Power, than what every Man naturally may have over another."[16] Given the fact that Grotius' argument is found in chapter 8 of *De iure praedae* which was not published until the nineteenth century and could not have been known to Locke, Richard Tuck notes that this "must count as one of the most striking examples of intellectual convergence";[17] a very suprising convergence indeed. Although Grotius in *De iure belli ac pacis* was to formulate a very similar position (and John Locke was of course familiar with *De iure belli*), he did not there base his position on the "alien argument."[18]

There exists a further parallel with Locke's doctrine of punishment, namely the important fact that Grotius' right to punish is a right vested in *every* inhabitant of the state of nature, not merely in the person harmed. Grotius derived the natural right to punish from one of his axiomatic laws, "evil deeds must be corrected."[19] This is combined with Aristotle's involuntary (*akousia*) legal transactions[20] and the Roman-law obligations (*obligationes*) arising from delicts.[21] This right was enjoyed by everyone in the state of nature – for Grotius, this is so because an unlawful act (*iniuria*) affects everyone, more or less, even if it is only done to one person.[22] The groundwork is thus laid for a very broad interpretation of the right to punish, which would, for example, permit the Dutch to avenge any breach of natural rights by the Portuguese, even if the Dutch were not directly affected by the unlawful act – which was relevant, given the Portuguese attacks on local rulers who were seen as allies by the Dutch.

The right to punish, for Grotius, was only secondarily that of the political community and its magistrates, but was primarily that of every individual in the state of nature. Every wrongful act (*maleficium*) could be the cause of a just war; every unlawful act (*iniuria*) represented a just cause of war;[23] and in the absence of a central political authority even a private person

[15] Locke 1967, 272. [16] Ibid., 273. The emphasis is Locke's. [17] Tuck 1999, 82.
[18] See *IBP* 2.20.40.4. [19] *CLP*, 29; *IPC* 2, fol. 8: "MALEFACTA CORRIGENDA."
[20] Arist. *Eth. Nic.* 5.1131a1ff. [21] See, e.g., Buckland 1963, 576–603.
[22] *IPC* 2, fol. 8′: "Pertinet autem ad omnes quodammodo iniuria etiam uni illata . . . "
[23] *IPC* 7, fol. 30: "Quarta [causa belli] est ob maleficium iniuriamque omnem quae iniquo animo tam facto quam verbis infertur."

could be the one to impose punishment for unlawful acts; after all, under Roman law, private persons were permitted to execute punishments as a consequence of a delict.[24] Thus Grotius once more laid the groundwork for a favorable assessment of the military acts of the VOC, even if one was unwilling to view the VOC as an organ of a sovereign state.

Unlawful acts that actually amounted to crimes were thus, according to Grotius, capable of eliciting a natural right to punishment and counted as just causes of war. In Grotius' historical context, the crimes of the Portuguese consisted concretely in acting counter to the natural requirement that things belonging to another could not be made private property: they had attempted to take possession of the sea, which was the common right of all humankind (*res communis*), and thus establish an illicit trade monopoly. This behavior had been all the more criminal – "particularly grave" – because "harm [was] inflicted upon the whole of human society," to which each person was obligated and subjected.[25] All these offenses had originated in one central unlawful action – the unvarnished Portuguese trade ban.[26] The Dutch right to punish the Portuguese did not, however, take first place in Grotius' system of just causes of war, as the trade prohibition and other Portuguese crimes far exceeded the VOC's ability to punish.[27] The Dutch claims that had arisen from the private-law delicts of the Portuguese alone went far beyond the booty in question – the cargo of the captured Portuguese ship. Here, too, the trade ban, or the losses suffered by the Dutch as a result, played the most prominent part. According to Grotius, the Portuguese had prevented the Dutch from conducting free trade with any East Indian nations they chose, and were thus obligated to make restitution of all the profits the Netherlands had lost as a result.[28]

Grotius treated private and public delicts similarly, which once again reveals the extent to which he relied on Roman legal doctrine.[29] The

[24] *IPC* 7, fol. 30a: "Etiam expetitio poenae ex delicto privatim permittitur . . . " Grotius offers the following passages from the *Codex Iustinianus*: Cod. 9.9.4; 1.3.54 and 3.27.

[25] *IPC* 12, fol. 119′: "Cum igitur natura dictet ex eo quod alienum est nostrum nos facere non debere, sequitur tanto illos gravius peccare, qui ius commune hominum sibi proprium facere conantur, quanto hac in re pluribus fit iniuria. Praecipue autem grave est peccatum, quo tota laeditur humana societas, cui vinculo antiquissimo obstricti et obnoxii sumus."

[26] *IPC* 12, fol. 119′: "Oriuntur haec omnia ex nuda prohibitione commerciorum . . . "

[27] *IPC* 12, fol. 124′: "Sed omittamus ius omne ultionis, quo Batavi punire Lusitanos potuerunt ob violatum gentium ius in prohibendis commerciis, ob calumnias atroces, ob homicidia, perfidiam, rapinas: cui iuri nulla umquam Lusitanorum iactura satisfieri potest."

[28] Ibid.: "ex eo quod Lusitani impedierunt Batavos cum quibuslibet Indorum nationibus libere negotiari, obligatos eos esse ad restitutionem omnis lucri, quod ea ratione Batavis ereptum est: quae quidem ingens summa est cum primae navigationes per insidias Lusitanorum inanes fere atque infructuosae fuerint."

[29] Eysinga 1947, 27–28 ignores this in regard to Grotius' doctrine of the right to punish.

subjective natural rights of the victim – for Grotius, the VOC – strongly resemble the so-called penal actions of Roman law, the *actiones poenales*, aimed equally at payment of fines and restitution, which in the *Digest* could also address both harm to property and punishment of the perpetrator.[30]

The rights from contractual obligations discussed previously at first played only a subordinate role in *De iure praedae*, although here, too, they are already referred to in order to explain the constitution of legally created polities through the social contract and the validity of positive law. That Grotius nevertheless dealt with them comes first of all from his commitment to the Roman law tradition, where, as Gaius had explained, a *summa divisio* of debtor relations consists of *ex contractu* and *ex delicto*.[31] On the other hand, Grotius had probably already recognized that, given the Dutch Republic's emerging strong position in East India, rights stemming from contractual responsibility were certainly apt to justify this position; the VOC pursued policies that would ensure their market share by contractually binding the autochthonous rulers of East India. Four years after the publication of *Mare liberum*, these policies began to look to the English suspiciously like a monopoly, but Grotius and the Dutch delegation at the Colonial Conference in London in 1613 defended them as simply the consequence of the freedom of contract underwritten by natural law.

Although *De iure belli ac pacis* was written under fundamentally different circumstances from *De iure praedae*, its main teachings, including the doctrine of the natural right to punish, can be understood as an elaborated version of the earlier work. In contrast to *De iure praedae*, Grotius distinguished in *De iure belli ac pacis* clearly between private delicts, which gave rise to actions for compensation, and criminal delicts, which granted a right to punishment; in the later work, he devoted a short chapter of its own to private delicts (*De damno per iniuriam dato, et obligatione quae inde oritur*).[32] The title itself indicates that Grotius based this additional distinction largely on the compensation law of the Roman *lex Aquilia*, to which he referred in a note starting in the 1642 edition.[33] Grotius first defined the private delict (*maleficium*) as any fault (*culpa*),

> whether of Commission or Omission, that is contrary to a Man's Duty, either in respect of his common Humanity, or of a certain particular Quality, an

[30] The so-called mixed penal action; see Kaser 1971/75, § 117, II. The principle is comparable to punitive damages in US tort law.

[31] Gai. *Inst.* 3.88.

[32] *IBP* 2.17. The differentiation can be traced back to Grotius' *Inleidinge tot de Hollandsche Rechts-Geleerdheid* 3.32.7.

[33] *IBP* 2.17.1n3 (wrongly as n2 in the text). The citation is to *Dig.* 9.2, *Ad legem Aquiliam*.

> Injury. From such a Fault or Trespass there arises an Obligation by the Law of Nature to make Reparation for the Damage, if any be done.[34]

Grotius saw harm, from the perspective of subjective rights, as anything that violated a right (*ius*) in the narrow sense,[35] and dealt especially with *in rem* rights. However, he also addressed private liability in connection with offenses that also possessed a criminal component, such as homicide (*homicidium*), though he did not deal with the criminal aspect beyond the penal character already inherent in the Aquilian action.

Grotius distinguished the private delict, as a "deed that can be repaired [*reparare*]," from criminal delicts (*delicta*), as "deeds that can be punished [*puniri*]."[36] reserving the term *delictum* in the later work for the criminal delict[37] and thus allowing for a clarification of the concept of the right to punish, which in *De iure belli ac pacis* stands alone and does not have to bear the additional weight of addressing claims that arise out of tortuous, as opposed to criminal, acts. Apart from this distinction, which applies to the purpose and normative justification of punishment, the doctrine of the right to punish in *De iure belli ac pacis* is identical with the one expounded in *De iure praedae*.[38] Thus the discussion of the natural-law conformity of punishment in the later work corresponds largely word for word to the passages in *De iure praedae* in which Grotius postulated the right of the individual in the state of nature to impose punishment, from which he derived the theory that the right to punish was not first granted to magistrates in the political community, but was transferred to them by individuals, in whom it was originally vested, and was thus natural in origin.[39]

As in *De iure praedae*, Grotius quoted from Cicero's *De inventione* to show the conformity of punishment with natural law[40] and illustrated the natural right to punish, also as in *De iure praedae,* with an anecdote about Caesar taken from the Roman historian Velleius Paterculus:

> Yet the antient Liberty, which the Law of Nature at first gave us [*vetus naturalis libertas*], remains still in Force where there are no Courts of Justice, as

[34] *RWP*, 2.884; *IBP* 2.17.1: "Maleficium hic appellamus culpam omnem, sive in faciendo, sive in non faciendo, pugnantem cum eo quod aut homines communiter, aut pro ratione certae qualitatis facere debent. Ex tali culpa obligatio naturaliter oritur si damnum datum est, nempe ut id resarciatur." See on the effect of this doctrine of *culpa* on the doctrine of state responsibility in international law Lauterpacht 1927, 135–36.

[35] *IBP* 2.17.2: "Damnum intelligi quod pugnat cum iure stricte dicto."

[36] *IBP* 2.20.1.1: "Supra cum de causis ex quibus bella suscipiuntur agere coepimus, facta diximus duplici modo considerari aut ut reparari possunt aut ut puniri." See also *IBP* 2.20.38.

[37] See Haggenmacher 1983, 554. [38] Haggenmacher 1997, 111.

[39] *IPC* 8, foll. 39–41′ correspond to *IBP* 2.20.8. [40] Cic. *Inv.* 2.65–66.

> upon the Sea. Hereunto may perhaps be referred that Action of *Julius Caesar,* yet a private Man [*privatus*], when he pursued with a Fleet, equipped all on a sudden, those Pyrates by whom he had been taken Prisoner, dispersing some of their Ships and sinking others, and when he found the Proconsul negligent in punishing the Captives, he returned to Sea and crucified them himself.[41]

This historical example served as an illustration (not a justification) of the norm that the natural right to punish was even open to citizens of established polities, such as the Roman republic, when political authority broke down, as in the anecdote of Caesar and the proconsul, or when none at all existed, as on the high seas. As in *De iure praedae*, under these circumstances the natural right to punish was granted to everyone, not only those who suffered from injustice, like Caesar in the example offered. The reason for this "very strange doctrine" has to be seen in the need to implement the norms of the natural legal order in a horizontal system without a central political authority.[42]

Transferred to the condition prevailing since the creation of political communities, this meant that every sovereign had the right to punish grave breaches of natural law, even if neither he himself, nor citizens subject to his jurisdiction, had been harmed by this wrong. In Grotius' view, the purpose and normative justification of punishment are threefold: first, it is advantageous to the wrongdoer himself, in that it "corrects" him and thereby makes him better;[43] second, punishment is for the good of him who has been wronged, which is what "*Aristotle* has placed under that Part of Justice which he calls *Commutative*";[44] and third, punishment serves what our contemporary moral philosophers would call the consequentialist purpose "that either he who injured one, may not injure another," or "that others may not be encouraged, by the Hopes of Impunity, to be alike injurious," which is "to be prevented by putting him to Death, or by

[41] *IBP* 2.20.8.5: "Manet tamen vetus naturalis libertas, primum in locis ubi iudicia sunt nulla, ut in mari. Quo forte referri potest, quod Caius Caesar privatus adhuc piratas a quibus captus fuerat classe tumultuaria persecutus est, ipsorumque naves partim fugavit, partim mersit, et cum proconsul negligeret animadvertere in captos piratas, ipse eos in mare reversus cruci suffixit." Grotius paraphrases the same passage from Velleius Paterculus (2.42) in *IPC* 8, fol. 41′. Grotius knew the anecdote also from Plutarch's biography of Caesar (2.708), but follows Velleius more closely.

[42] See the reference to Solon in *IBP* prol. 19, from 1631 onward, where it is said that "*Thus* Solon *did great Things, as he himself boasted,* By linking Force in the same Yoke with Law."

[43] *IBP* 2.20.7.

[44] *RWP*, 2.962; *IBP* 2.20.6.1. By Aristotle's "commutative" or "expletive justice" (*iustitia commutatrix* or *expletrix,* translating *dikaiosune sunallaktike*) Grotius means what he in *IPC* had called *iustitia compensatrix*, compensatory or corrective justice, as opposed to Aristotle's distributive justice. See *IBP* 2.20.2 for the attribution of punishment to the realm of expletive justice.

disabling him, or by imprisoning him, or by correcting and reclaiming him . . . "[45] While the third idea of punishment clearly has a consequentialist character, resorting to anachronistic, contemporary language one might say that the first and the second purpose have a deontological or retributive as well as a consequentialist aspect to them.[46] The natural right to punish, then, serves as a threat, allowing the "linking [of] Force in the same Yoke with Law," in view of the fact that law "has not its Effect externally, unless it be supported by Force".[47]

The implementation of the natural legal order on the international plane, the joining of "force and law together," is of course made much easier by Grotius' doctrine of a general natural right to punish, which recognized certain grave violations of the natural law as being such as to affect the interests of all humankind, and vested the right to punish these violations accordingly in every human being, and only derivatively in the sovereigns of commonwealths. Grotius describes these consequences of his doctrine with utmost clarity:

> We must also know, that Kings, and those who are invested with a Power equal to that of Kings, have a Right [*ius*] to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Persons whatsoever [*quaevis personae*], grievous Violations of the Law of Nature or Nations. For the Liberty [*libertas*] of consulting the Benefit of human Society, by Punishments, which at first, as we have said, was in every particular Person [*singuli*], does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are possessed of the supreme Power, and that properly, not as they have an Authority over others, but as they are in Subjection to none. For, as for others, their Subjection has taken from them this Right.[48]

[45] *RWP*, 2.972; *IBP* 2.20.9.1.

[46] The first justification, the good of the wrongdoer, implies a reformative and therefore consequentialist view of punishment (as it can be found in Plato), as well as a retributive, deontological view (restoring equality). The second justification, the good of him who has been wronged, contains the consequentialist element of prevention in that he who has been wronged "may not suffer any such thing from the same man or from others"; *IBP* 2.20.8.1. It also contains, however, the purely retributive element of corrective justice. These three aspects of the right to punish are already adumbrated in *IPC* 2, foll. 8′–8.

[47] *IBP* prol. 19.

[48] *IBP* 2.20.40.1: "Sciendum quoque est reges et qui par regibus ius obtinent ius habere poenas poscendi non tantum ob iniurias in se aut subditos suos commissas, sed et ob eas quae ipsos peculiariter non tangunt, sed in quibusvis personis ius naturae aut gentium immaniter violant. Nam libertas humanae societati per poenas consulendi, quae initio ut diximus penes singulos fuerat, civitatibus ac iudiciis institutis penes summas potestates resedit, non proprie qua aliis imperant, sed qua nemini parent. Nam subiectio aliis id ius abstulit."

In postulating a general right to punish, modeled upon a class of Roman penal actions, the so-called popular actions (*actiones populares*), open to any citizen in virtue of the public interest and not just to the injured party,[49] Grotius turned self-consciously against his Spanish predecessors, the late scholastics of the school of Salamanca. In terms of content, this had of course already been the case in *De iure praedae*, except at the time it seemed opportune to Grotius to invoke the Spanish scholastics whenever possible in favor of his own position and to omit the differences. In *De iure belli ac pacis*, he turned openly against the Salamancans, saying that his view was

> contrary to the Opinion of *Victoria, Vasquez, Azorius, Molina,* and others, who seem to require, towards making a War just, that he who undertakes it be injured in himself, or in his State, or that he has some Jurisdiction over the Person against whom the War is made. For they assert, that the Power of Punishing [*puniendi potestas*] is properly an Effect of Civil Jurisdiction; whereas our Opinion is, that it proceeds from the Law of Nature . . . And certainly, if the Opinion of those from whom we differ be admitted, the Consequence is, that one Enemy shall have no Right to punish another, even after the War is begun, upon the Account of any Cause that has no Relation to Punishment, which yet is a Right that most allow of, and the Practice of all Nations confirms, and that not only after the Enemy is subdued, but likewise during the War; not on Account of any Civil Jurisdiction, but of that natural Right which was both before the Foundation of Governments, and even is now still in Force in those Places, where Men live in Tribes or Families, and are not incorporated into States.[50]

Grotius saw clearly that, if a right to wage war for purposes of punishment was to be maintained and just wars were to result not merely from

[49] For an *actio popularis*, see, e.g., the action against the violation of a tomb, *Dig.* 47.12.3.pr.: "The praetor says: 'Where it be said that a tomb has been violated . . . I will give an *actio in factum* against him so that he be condemned for what is right and fitting to the person affected. *If there be no such person or if he does not wish to sue, I will give an action for a hundred gold pieces to anyone who does wish to take action* [italics mine].'"

[50] *IBP* 2.20.40.4: "contra quam sentiunt Victoria, Vasquius, Azorius, Molina, alii, qui ad iustitiam belli requirere videntur, ut qui suscipit aut laesus sit in se aut republica sua, aut ut in eum qui bello impetitur iurisdictionem habeat. Ponunt enim illi puniendi potestatem esse effectum proprium iurisdictionis civilis, cum nos eam sentiamus venire etiam ex iure naturali . . . Et sane si illorum a quibus dissentimus admittatur sententia, iam hostis in hostem puniendi ius non habebit, etiam post susceptum bellum ex causa non punitiva: quod tamen ius plerique concedunt et usus omnium gentium confirmat . . . non ex ulla iurisdictione civili, sed ex illo iure naturali quod et ante institutas civitates fuit, et nunc etiam viget, quibus in locis homines vivunt in familias non in civitates distributi." For a very lucid reading of this passage, see Haggenmacher 1983b, 304, who maintains that Grotius' interpretation of the Spaniards is correct only in his first sentence, not in the too narrow second sentence. For our purpose it suffices to say that Grotius was certainly correct in claiming that the Spaniards had not acknowledged a natural right to punish vested in everyone.

self-defense or the enforcement of property or of contractual rights, then a penal power had to be posited under the law of nature. Grotius was able to model his theory of a natural right to punish on Cicero's definition of punishment (*vindictio*) in *De inventione*, while the idea that everyone was entitled to this right in principle arises from the idea upon which the Roman popular actions were based – that, for certain acts, a public interest in punishment existed and the right to punish, or the Roman action, was granted to everyone.

The revolutionary potential of Grotius' doctrine was to become obvious in John Locke's use of the theory against the absolutist tenets of Robert Filmer. For Locke, as for Grotius, the natural legal order, if it was to prevail in the international sphere, had to be backed up by the threat of force, and required therefore a natural right to punish vested in every subject of the law of nature. It was John Locke who enunciated the chief conceptual consequence of Grotius' teachings in his *Second Treatise*:

> And that all Men may be restrained from invading others Rights, and from doing hurt to one another, and the Law of Nature be observed, which willeth the Peace and *Preservation of all Mankind*, the *Execution* of the Law of Nature is in that State, put into every Mans hands, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation. For the *Law of Nature* would, as all other Laws that concern Men in this World, be in vain, if there were no body that in the State of Nature, had a *Power to Execute* that Law, and thereby preserve the innocent and restrain offenders, and if any one in the State of Nature may punish another, for any evil he has done, every one may do so.[51]

Grotius had developed his doctrine of a natural right to punish against the backdrop of the need to show that the Dutch East India Company, even if acting on its own behalf as a private actor, had the right to wage a war of punishment against the Portuguese fleet in Southeast Asia. John Locke carried the doctrine further and made it the basis of his theory of government by predicating the right as well as the power to govern on the delegated natural right to punish, with well-known anti-absolutist ramifications. It is fair to say that the notion of a natural right to punish vested in each person provided a criterion to distinguish between more or less legitimate forms of government, between absolute monarchy on the one hand and civil government on the other, enabling Locke to declare that the state of nature is to be preferred compared to that of absolute monarchy. In the latter, the subjects had to give up their natural right to punish

[51] Locke 1967, 271–72, § 7 (Locke's italics).

without at the same time enjoying the advantages of civil government, namely the enforcement of the law of nature through magistrates. Locke's civil society comes about by a delegation of the individual right to punish to the commonwealth, and by the creation of an authority to appeal to "upon any Injury received," yet such an authority cannot exist under an absolute prince.[52]

Conceptually, Grotius' natural right to punish can be analyzed in Hohfeldian terms both as a privilege and a power.[53] The bearer of Grotius' right to punish is not under a duty to refrain from exercising it, thus having the liberty to punish, and also having the power of altering existing legal circumstances, i.e., he is not under a duty to refrain from altering the legal status of the person who is to be punished. Furthermore, drawing on Jeremy Waldron's useful distinctions between general, special, absolute, and relative rights, it can be said that Grotius' natural right to punish fits the description of a general right *in personam*.[54] The right is general in that it inheres in everyone qua human being *ab initio*, which means that there is no contingent transaction required in order to become the bearer of the right, and it is *in personam* in that it is a right not against everyone else, but only against the perpetrator of a violation of the law of nature, i.e. the right corresponds to a duty incumbent not just on a particular person, but owed by that particular person to all the subjects of the law of nature.

As to the role of the natural right to punish in Hugo Grotius' overall theory of natural justice, it appears that to the extent that this theory of justice is indebted to Aristotle's account of involuntary compensatory justice,[55] it has a strong retributive and therewith deontological thrust. This comes to the fore in Grotius' first and partly in his second justification of the right to punish: punishment is good for the wrongdoer as well as for the victim, it "corrects" the unjust deed and brings about compensatory justness, without reference to matters of distributive justice. The rationale is entirely in line with Grotius' general reception of Aristotle's theory of justice, which does not concern itself with the distributive aspect of that theory whatsoever, but confines itself – both in *De iure praedae* and in *De iure belli ac pacis* – to that part of Aristotle's particular justice which does not require any distributing authority, thereby implanting only a part of Aristotle's *polis*-justice into the state of nature, as it were. But Grotius' right to punish is also a secondary right of sorts, derivative of the primary rights of self-defense, property, and exaction of debt, and designed to prevent

[52] Ibid., 326, § 90. [53] See Hohfeld 1946; for a useful summary, see Feinberg 1973, chapter 4.
[54] See Waldron 1988, 106–9. [55] See Arist. *Eth. Nic.* 5.1131b25ff.

these rights from being violated by being available to everyone, as was the Roman *actio popularis*. Grotius' justification of punishment is thus obviously of a consequentialist character.

The consequentialist element of prevention has a further important implication. By backing up certain rights with the threat of force rather than others, these rights are being distinguished and the norms protecting them are granted a privileged, peremptory character. In Grotius' case, that means that self-defense, property, and the exaction of debt become firmly entrenched rights that assume a non-derogable quality. In the realm of domestic political theory, such a doctrine may lead to the limitation of government power and to the entrenchment of certain privileged rights, a tendency that has made itself felt, on a conceptual level, already in Grotius' own teachings on the right to resistance, and historically in the tradition of constitutionalism commonly associated with John Locke and Montesquieu.

On the international plane, the conceptual consequences of a Grotian natural right to punish go beyond the establishment of certain non-derogable rights and rules, of, in other words, an international *ius cogens*. Given the general quality of Grotius' right to punish, such a right implies not only the nowadays highly contested notion of an international crime, but also the recognition of certain obligations that a state has towards the international community as a whole, i.e. obligations *erga omnes*. Taken together, these implications amount to a rather robust doctrine of unilateral reprisals that can include the use of force, taken by *any* state against a state that offends against the above-mentioned entrenched non-derogable *ius cogens* rights, which potentially could justify the use of force in what today is called a humanitarian intervention, since the offense in question could consist in a violation of citizens' rights by their own state.[56]

It is safe to say that contemporary international law and the United Nations Charter (with its far-reaching prohibition on the use of force and its very narrowly construed permission of force to self-defense)[57] would assess Grotius' natural right to punish unfavorably. However, the legality of reprisals, taken by non-injured states against states which violate certain obligations *erga omnes* is an issue under discussion in contemporary international law,[58] and even the term "international crime" made a short

[56] See Remec 1960, 206–25; Haggenmacher 1983b, 313–14.

[57] UN Charter, Art. 2(4), Art. 51.

[58] The discussion about the use of countermeasures or reprisals by non-injured states focuses mainly on the interpretation of articles 48 and 54 of the *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission in 2001, which does not constitute treaty law and can only partly be seen as declaratory of customary international law. Even the

appearance in 1996 in the *Draft Articles on State Responsability* of the International Law Commission,[59] betraying a noteworthy interest in some sort of general right to punish which might be able to strengthen compliance with some basic rules of conduct.

Roman-law concept of an *actio popularis*, bestowing legal standing on non-injured states in judicial proceedings, has for a while enjoyed some popularity with international lawyers; see the influential article Schwelb 1972.

[59] See Art. 19 of the *Draft Articles on State Responsibility Provisionally Adopted by the International Law Commission on First Reading*, printed in Crawford 2002, 352–53; see also the contributions in Weiler, Cassese, and Spinedi 1989. Art. 19 and the concept of international crimes were rejected on the second reading of the *Draft Articles* and replaced by the final Art. 41 and the notion of "serious breaches" of peremptory obligations; see Crawford 2002, 16–20.

Epilogue

The commission from the VOC to develop a legal argument in favor of Dutch actions in Southeast Asia confronted Grotius first of all with a problem: what doctrine of the sources of law to adopt? On what legal basis could he threaten war by the VOC against Portugal when the prevailing doctrine, as well as applicable state practice, and thus customary law, turned out to be very unfavorable to free shipping and free trade? As Grotius' contemporary opponents Welwod and Selden clearly recognized, in his search for norms that could regulate, in a way amenable to Dutch concerns, the behavior of the seafaring powers on the trade routes to East India, Grotius relied largely on the Roman civil law tradition and on Cicero's ethics of natural law.[1]

As we have seen, Grotius used these two Roman traditions in order to portray the legal situation in which the world found itself before the establishment of states. In conformity with Roman property law, Grotius defined the high seas as a part of the world that continued to find itself in a pre-political state of nature and was thus subject to the rules of natural law. To Grotius, these natural law norms, true to their provenance in private law and Roman ethics, applied to both individuals and private trading companies in the state of nature, as well as to established sovereign polities among themselves. This analogous treatment of natural and legal persons on the one hand, and states on the other, resulted from Grotius' strategy of defining the VOC's war simultaneously as both a just private war and a just public war. This, together with the reception of the private-law norms of the *Digest*, led to a new doctrine of just war, which now, building on the formulas of Roman fetial law passed down by Cicero, was adapted to the structure of Roman private law. The legal remedies of the Romans, the

[1] See Gelderen 1993/94, who sees in Cicero Grotius' "leading classical source" (33) and finds (25) that the colonial expansion of the Dutch Republic caused Grotius to turn to natural law, which had been inspired by certain Roman legal scholars, but does not directly address these traditions or the tradition of *bellum iustum*.

actiones and *interdicta*, thus became subjective natural rights (*iura*), which could be implemented *by force* even by private parties in the absence of a praetor in the waters of Southeast Asia, in order to restore compliance with the norms of natural law. This result should put into a new perspective the view in some of the literature that the idea that the human being, as an individual, is the bearer of subjective natural rights does not have its roots in antiquity.[2]

Although there are certain differences between the concept of the state of nature in *Theses LVI* on the one hand and *De iure praedae* and *De iure belli ac pacis* on the other, most of the points are presented in similar fashion. A difference exists in the conception of the right to punish, which in both *De iure praedae* and *De iure belli ac pacis* has, in revolutionary fashion, a natural character and thus ensures the enforceability of natural-law norms, while in *Theses LVI* it is presented as the product of contingent, voluntarily created circumstances. It seems, nevertheless, that even in *Theses LVI*, such a *ius puniendi* would arise from the breach of absolute natural rights. With the doctrine in *De iure praedae* of a natural right to punish, Grotius as a matter of substance clearly turned against all of the late Salamancan scholastics. However, for opportunistic reasons Grotius did not emphasize this difference in *De iure praedae*,[3] a fact that has often led scholars to exaggerate the Spanish influence on Grotius.

The second important difference consists in the treatment of the institution of property. In *Theses LVI*, private property apparently holds the status of an institution of natural law in the narrow sense – that is, natural law not only permits the establishment of property, but even dictates it, which turns the right to private property into a general right *in rem*. In *De iure praedae* and *De iure belli ac pacis*, in contrast, private property merely has the status of an institution permitted by natural law, which, once established, enjoys the protection of natural-law norms, but does not originally possess natural character. This has the obvious consequence, within the framework of political theory, that the right to private property has less weight vis-à-vis the political authorities than would be the case if it were a natural right *ab initio*.[4]

[2] See Kammasch and Schwarz 2001, 386. See also Garnsey 2007, 177–95; 236–37.

[3] In contrast to *De iure belli ac pacis*, where Grotius turned openly against the Spanish scholastics; see above, 216.

[4] In his *Observations upon H. Grotius De Jure Belli et Pacis*, Robert Filmer's critique of Grotius' concept also addressed this point: "Whereas Grotius saith that by the law of nature all things were at first common [Grotius I.i.x.7] and yet teacheth that after property was brought in it was against the law of nature to use community . . . he doth thereby not only make the law of nature changeable, which he saith God cannot do, but he also makes the law of nature contrary to itself": Filmer 1991, 234.

This political aspect, however, did not motivate Grotius to characterize private property in these works as the product of a voluntary, contingent agreement rather than as an institution of natural law. Instead, working from the problem posed in *De iure praedae*, he located all these things in a state of nature that knew no private property, in order to be able to define the last relic of that period, the sea, as a natural *res communis*. This requirement made it necessary to present private property in *De iure praedae* as an institution introduced subsequently. As it is for Cicero and his natural-law ethics, the concept of private property is central to Grotius' natural rights; however, since he cannot accept property in connection with the high seas, he must maintain the fundamental contrast between the propertyless state of nature (a condition in which the high sea continues to exist) and the land, on which property exists both in states and outside them.

The institution of private property thus takes on an unusual intermediate position in *De iure praedae*: it is seen neither as natural, as in Thomas Aquinas, nor as a positive institution of the established polity or of the law of nations (*ius gentium* or *ius gentium secondarium*).[5] Once introduced, private property, in *De iure praedae* as in Cicero, serves as a criterion of justice, which is determined by Grotius to be Aristotle's corrective justice. This is the main reason for the intermediate status of private property – on the one hand, private property cannot be acknowledged for the state of nature in which the high seas are found; on the other hand, private property, and the accompanying authority of the owner to dispose of it, are the necessary conditions for free trade (*libertas commerciorum*), which is for Grotius the overriding subjective right composed of the four rights providing causes of a just war.

The just allocation of property is of no importance in either *Theses LVI* or *De iure praedae* or *De iure belli ac pacis*, as long as the fundamental requirements of Roman property law[6] – as formulated by Cicero in *De officiis*[7] – are adhered to for original acquisition of property. These requirements, however, have little moral weight. This means that the interests of distributive justice are not considered in any of Grotius' natural-law works; rather, as we have seen, all norms of natural justice are norms of corrective justice, which, given the absence of hierarchy and a central authority that

[5] For the way in which the late Spanish scholastics dealt with this problem, see Skinner 1978, 2.151–54.

[6] Specifically, acquisition, or occupation (*occupatio*) of an unowned thing (*res nullius*).

[7] As we saw above, Grotius referred to Cic. *Off.* 1.21. In regard to *De officiis*, Long 1995, 235 states: "Nowhere in *Off.* does Cicero suggest that it is the business of justice to consider whether the distribution of private property in a community is fair or conducive to the general interests."

could distribute property, appears consistent with a horizontal, egalitarian state of nature devoid of governmental institutions and authority. Grotius' concept of the state of nature can thus be unequivocally assigned to a Roman tradition and bears a strong similarity to Cicero's ethics, which was equally indebted to the institutions of Roman law, above all private property. Grotius' doctrine can therefore be described as a further juridified version of Roman moral philosophy, which ascribed great importance to existing property relations[8] – a version whose applicability extends equally to indivdiuals, private trading companies, and polities in the state of nature and grants them subjective legal rights.

In searching for legal norms for the Southeast Asian seas, Grotius, the humanistically educated lawyer, oriented his earlier work, *De iure praedae*, around the norms of Roman private law, which had been available since the year of Grotius' birth, 1583, as the *Corpus iuris civilis* in an edition by Dionysius Gothofredus (Denis Godefroy). Roman law had arrived in the Netherlands earlier than in other parts of the Holy Roman Empire and had been adopted from the end of the sixteenth century as part of the so-called elegant jurisprudence, starting with Hugo Donellus' professorship in Leiden. This allowed the United Provinces to become the leading center of legal humanism in the seventeenth century.[9] Grotius should be seen as part of this tradition, which arose from the *mos Gallicus*. He himself, however, had provided no textual criticism in his natural law works, but instead accepted Justinian's law in the *Corpus iuris* as an expression of the "old law of the Quirites."[10]

The legal precepts from the *Corpus iuris* were supported by Cicero's practical ethics and the Roman theory of just war. The normative rules that Grotius took from these Roman sources were then set in opposition to the Portuguese claims in East India, which were based on the legal titles of discovery, possession, and papal donation, as well as on customary law, expressed through prevailing state practice. In the effort to dispute the validity of these legal titles, Grotius formulated an alternative theory of legal sources, declaring the situation in the East Indian waters a state of nature in order to declare his Roman rules, nominally arising from nature, authoritative in this state of nature. Grotius thus created a conception of

[8] See Cicero's hostility in *De officiis* towards redistribution of property in connection with the *leges agrariae*, which for him amounted to the destruction of justice itself (*aequitas, quae tollitur omnis, si habere suum cuique non licet*); Cic. *Off.* 2.78–80. On this passage, see Dyck 1996, 471–72; Long 1995, 235–37 sees philosophical reasons, but also (237) "Roman realities" as responsible for Cicero's attitude; see also Wood 1988, 130–32.

[9] See Bergh 2002.

[10] See *DCQ*, 355.

the state of nature that could be contrasted to the norms prevailing in the waters of Southeast Asia and to prevailing state practice.

The present study confirms the fundamental correctness of Henry Sumner Maine's intuition regarding the substantive content of Grotius' natural law that

> after all the efforts which have been made to evolve the code of nature from the necessary characteristics of the natural state, so much of the result is just what it would have been if men had been satisfied to adopt the dicta of the Roman lawyers without questioning or reviewing them.[11]

Maine's statement can be proven above all in regard to the legal substance of Grotius' works *De iure praedae* and *Mare liberum*, especially if one subsumes Cicero's moral philosophy and the Roman doctrine of just war under the "dicta of the Roman lawyers." In *De iure belli ac pacis*, this clear source-basis seemed, at first glance, to have been replaced with a practice of citation that referred much more comprehensively to classical antiquity as a whole. This impression is strengthened in later editions of this work, in which Grotius expanded the mass of classical references, already impressive in the *editio princeps* of 1625, with additional quotations and paraphrases from the entire corpus of Greco-Roman antiquity. Despite this superficial impression, however, the work's fundamental substance remains entirely faithful to the Roman foundations of his earlier natural-law writings.

The most important difference between this and the earlier works was not of a substantive nature, but consisted in Grotius' thoughts on the methodology of natural-law epistemology and his proof of natural-law norms in *De iure belli ac pacis*. Based on the requirements of classical rhetoric, mainly Quintilian's, which were well known to him, Grotius developed a significant dichotomy between a priori and empirical proofs of natural law. Despite the overriding importance of a priori proofs, he conceded indicative power to the empirical evidence of natural law that expressed itself in consenting moral judgments (*iudicia consentientia*). A further difference between this and his earlier works consisted in the increased attention Grotius paid to the Stoic doctrines transmitted, and altered, by Cicero, evidenced in the development of his theory of *appetitus societatis*. In contrast, Grotius retained only those elements of the Peripatetic tradition that could be used to serve a juridical ethics of rules and did not require any existing political authority. This was particularly the case with the concept of corrective or compensatory justice, as well

[11] Maine 2002, 97.

as with Aristotle's idea of intrinsically bad acts, which in any case defied consideration purely through the lens of an ethics of virtue.

Grotius, then, was neither a neo-Stoic nor an Aristotelian; he can be described as the representative of a Roman tradition, who developed a legal theory for a state of nature using the tools of Roman law, Roman ethics, and classical rhetoric. Furthermore, Grotius' whole doctrine of rights bespeaks a distinct Roman-law influence, and it is clear that the Aristotelian theory of justice is used by Grotius only in those parts that are susceptible to being adapted to a Roman framework. Rather than testifying to an "inability" of modern moral philosophers to understand the fragments of a lost Aristotelian tradition, as the philosopher and historian of ideas Alasdair MacIntyre has maintained,[12] Grotius' case rather seems to suggest that in fact modern moral philosophy is based on the self-conscious selection within, and erosion of, the Peripatetic tradition and on an equally deliberate orientation towards a perfectly intelligible tradition of Roman law and Roman ethics – a Roman tradition not, of course, to be confounded with Quentin Skinner's "neo-Roman" thought, which in turn is indebted to the Roman republican institutions as described in Livy, Dionysius of Halicarnassus, and Plutarch.[13]

The classic concept of the state of nature offered by Thomas Hobbes and John Locke served as the basis of a political theory and was used to judge existing polities. Grotius' own conception of the state of nature, in contrast, served to judge in legal terms a part of the world which Grotius presented as an existing state of nature, the high seas of East India, which were characterized by the absence of a superordinate political authority. As part of his doctrine of just war, Grotius formulated an extraordinarily influential doctrine of subjective natural rights for this state of nature from Roman legal remedies, the *actiones* and *interdicta*. As we have seen, these rights could potentially be held by both states and individuals; their influence was largely a result of this parallel.

Grotius' theory of natural law thus had profound implications and would leave a mark on political theory in the years to come, even though it was a work of natural jurisprudence aimed at defining the state of nature rather than a political theory in the narrow sense. In particular, Grotius' discussion of property rights, rights of punishment, and the theory of the governmental contract influenced his successors. The English Whigs of the seventeenth century were heavily influenced by Grotius' theory of the governmental contract and the right to resistance derived from it. In

[12] See MacIntyre 1984, 257. [13] See Skinner 1998; Skinner 2008.

the period following the civil war, Grotius' idea of a sovereign contract sanctioned by natural law, which defined the extent of state authority and whose content could be determined through historical research, was especially important to Whigs such as Gilbert Burnet and Daniel Defoe; this made Grotius an important figure in the history of constitutionalism. Other Whigs, such as Edward Sexbie and Algernon Sidney, and some of the pamphlets against James II, referred explicitly to Grotius and his discussions of the right of resistance.[14] Grotius' ideas were also important for both the Levellers and the humanists at Great Tew, and continued to have an influence after the Restoration.[15]

On the absolutist side, Robert Filmer referred critically to Grotius and wrote sarcastically, in his *Observations upon H. Grotius De Jure Belli ac Pacis*, about Grotius' idea of tacit agreement as the origin of private property.[16] John Locke, developing his own theory of private property in the *Second Treatise of Government*, which was addressed to Filmer, then used the combination developed by Grotius of the Roman-law doctrine of natural acquisition of property and another Roman-law doctrine, that of tacit agreement; thus, in a fashion similar to Grotius, he defined the institution of property as pre- and extra-political. In the same work, also attacking Filmer along anti-absolutist lines, Locke made use of Grotius' theory of a natural right to punish that was potentially available to everyone.[17]

The influence of Grotius' theory of natural law on political theory in the Anglo-Saxon realm is thus profound and extends at least to the Scottish Enlightenment, starting with Gershom Carmichael, who introduced Grotius and the natural-rights tradition to the following generations of Scottish thought,[18] a trajectory we have been touching upon occasionally throughout the book and one of the most consequential for Grotius' impact.[19] Adam Smith, in his *Lectures on Jurisprudence* (1762–63), offered *De iure belli ac pacis* in support of a right to resist in cases of usurpation of

[14] See on Grotius' influence on Whig political theory Zuckert 1994, 106–15.

[15] On the use of Grotius' *De iure belli ac pacis* by the Levellers, the Tew Circle, and later Marchamont Nedham and Anthony Ascham, see Barducci 2010a; on the effect of Grotius' brand of Erastianism in England, via the translations of Clement Barksdale, see Barducci 2010b. On Grotius and the Tew Circle, see also Tuck 1979, 101–18.

[16] Filmer 1991, 234.

[17] Locke owned a 1650 Latin edition of *De iure belli ac pacis* as well as another one, which he had bought in the 1680s in the Netherlands; see P. Laslett, Introduction, in Locke 1967, 137–38. Locke quoted Grotius verbatim in his *Questions Concerning the Law of Nations* (without referencing the quotations); see Zuckert 1994, 188.

[18] Carmichael 2002. On Carmichael as a link between the natural-law tradition and the Scottish Enlightenment, see Moore and Silverthorne 1983.

[19] See Forbes 1982; Hont and Ignatieff 1983; on the influence on Hume, see Buckle 1991.

sovereignty in republics and other non-monarchical polities.[20] By way of Jean Barbeyrac and Jean-Jacques Burlamaqui the natural-law tradition had a very prominent impact on the American Founding Fathers.[21] Grotius' theory of natural law also had an important effect on German political theory,[22] where especially Leibniz held Grotius in high esteem, mentioning him primarily as the author of the *etiamsi daremus* passage (agreeing with his rationalism) and taking from Grotius the distinction between corrective and distributive justice, as well as the emphasis on the former.[23]

This focus on the *etiamsi daremus* passage and the attending interest in Grotius' religious stance was widespread. Pierre Bayle, who granted Grotius an entry in his *Dictionary*, discussed him – "l'un des plus grands hommes de l'Europe" – primarily as an exponent of religious skepticism, defending Grotius against the claim that he had been an atheist, a claim which had arisen primarily as a consequence of Grotius' historical and philological biblical criticism.[24] For the early Enlightenment, Grotius' biblical exegesis undermined confidence in the divine nature of Scripture and "Grotius indeed was not infrequently considered the great exegetical innovator who initiated the process which culminated in Spinoza, Simon, and Le Clerc."[25] Grotius' use of classical references, cited and uncited quotations and paraphrases – what Grotius himself called *historiarum lux* – brought forth mixed reactions. German adversaries of Hobbes such as Hermann Conring and Johann Heinrich Böcler, seeking to press "Hobbes into . . . an Epicurean mould" saw Grotius' views as providing "a space for the restatement of a non-Hobbesian natural law theory . . . which emphasised its foundation in sociability" – to this end, as we have already seen, Böcler wanted Pufendorf to emphasize more strongly the ancient sources of Grotius, the better to "appreciate the extent to which Grotius's theory was a redeployment of ancient ideas."[26] Rousseau, on the other hand, classed Grotius and his doctrine together with Hobbes', and distinguished between the two

[20] *LJ*, 292, referencing *IBP* 1.3.4.2 and *Dig.* 48.4.3. For the sharp contrast with Rousseau's interpretation of Grotius, see Kersting 1994, 152–53.

[21] See, e.g., Haakonssen 1985; White 1978.

[22] For natural-law theories and their influence on the early Enlightenment in Germany, see Hochstrasser 2000. For Grotius' impact on German natural jurisprudence, see Grunert 2003. For the importance of natural-law theories in all of Europe, see the other contributions to Hochstrasser and Schröder 2003. The following is based on Hofmann 1995, 62–64.

[23] Leibniz 1972, 71 and 172.

[24] Bayle, 1740, 617. The claim had been put forward by the important Huguenot theologian Pierre Jurieu in his *L'Esprit de Monsieur Arnauld* (1684).

[25] Israel 2001, 447. See ibid., 447–56 for Grotius as an 'atheistic' Bible commentator and precursor to Spinoza. Cf. also Somos 2011, 383–438 for Grotius' importance for the process of secularization.

[26] Brooke 2012, 104.

authors only because of their differing use of references.[27] An interlocutor in Voltaire's *L'A, B, C, dialogue curieux*, asked what he thinks of Grotius, answers: "[L]es compilations de Grotius ne méritaient pas le tribut d'estime que l'ignorance leur a payée. Citer les pensées des vieux auteurs qui ont dit le pour et le contre, ce n'est pas penser."[28] In a letter Voltaire characterizes Grotius and Pufendorf as "plus graves que solides," preferring Montesquieu to both. Grotius he deemed simply boring: "Ne craignez pas que le bas peuple lise jamais Grotius et Puffendorf [sic], il n'aime pas à s'ennuyer."[29] Notwithstanding these voices, the *philosophes* were by no means united in their disdain for Grotius; the *Encyclopédie*, after pointing to Cicero's *De officiis* and the Roman lawyers as important predecessors and dismissing Hobbes as an Epicurean,[30] celebrated Grotius as "the first to have formed a system of natural law" and cited him thus: "natural law consists of certain principles of right reason that allow us to understand whether an action is morally honest or dishonest, according to its consonance or dissonance with a reasonable and sociable nature."[31] In the later eighteenth century Rousseau's contempt for Grotius as well as Kant's preeminent position were to reduce Grotius' influence in France and Germany.

In the English-speaking world, the utilitarians did not view natural jurisprudence kindly, but clearly perceived the crucial importance of Roman law for the natural lawyers:

> The Stoics and the Epicureans, however irreconcilable in the rest of their systems, agreed in holding themselves bound to prove that their respective maxims of conduct were the dictates of nature. Under their influence the Roman jurists, when attempting to systematize jurisprudence, placed in the front of their exposition a certain Jus Naturale, "quod natura," as Justinian declares in the Institutes, "omnia animalia docuit": and as the modern systematic writers not only on law but on moral philosophy, have generally taken the Roman jurists for their models, treatises on the so-called Law of

[27] Rousseau 1966, 600: "Le droit politique est encore à naître, et il est à présumer qu'il ne naîtra jamais. Grotius, le maître de tous nos savants en cette partie, n'est qu'un enfant, et, qui pis est, un enfant de mauvaise foi. Quand j'entends élever Grotius jusqu'aux nues et couvrir Hobbes d'exécration, je vois combien d'hommes sensés lisent ou comprennent ces deux auteurs. La vérité est que leurs principes sont exactement semblables; ils ne diffèrent que par les expressions. Ils diffèrent aussi par la méthode. Hobbes s'appuie sur des sophismes, et Grotius sur des poètes; tout le reste leur est commun." See Tuck 1999, 13, who follows Rousseau's interpretation.

[28] Voltaire 1762. [29] Voltaire 1974, 434, 436; no. D14039.

[30] *Encyclopédie*: "The best moral treatise that we have from antiquity is the book of duties by Cicero, which contains in summary form the principles of *natural law*." "The principles of natural equity were not unknown to Roman lawyers: some of them even claimed to follow it in preference to the rigor of the law." This view of Cicero's *De officiis* was mainstream and echoes Barbeyrac 1749, 63.

[31] *Encyclopédie*.

> Nature have abounded; and references to this Law as a supreme rule and ultimate standard have pervaded literature. The writers on International Law have done more than any others to give currency to this style of ethical speculation; inasmuch as having no positive law to write about, and yet being anxious to invest the most approved opinions respecting international morality with as much as they could of the authority of law, they endeavoured to find such an authority in Nature's imaginary code.[32]

John Stuart Mill's derisive view is representative in this regard – nothwithstanding the fact that when it came to private property, his own account owed more to the natural lawyers than he cared to admit.

The importance of the natural-law tradition for – as well as the precise nature of its impact on – the French Revolution is a matter of debate.[33] Dan Edelstein has argued provocatively that a particular kind of natural law theory contributed to an intellectual climate which ultimately culminated in the Terror. He is at pains, however, to point out that the classic natural-law theories put forward in the seventeenth and early eighteenth centuries were "very different from those developed in the National Convention by Montagnard deputies."[34] But in the nineteenth century, Grotius was seen by the Prussian political philosopher Friedrich Julius Stahl as the inventor of natural law as a discipline separate from religion – a discipline that, according to Stahl, contributed to the destruction of customs and law, as well as to the French Revolution.[35] To Robert von Mohl, Grotius' laws of war and peace formed the basis for a theory of the rule of law (*Rechtsstaat*), and Lorenz von Stein similarly saw Grotius as having placed limits on state power.[36] In the theory of international relations, in the second half of the twentieth century Grotius served the so-called "English school," along with Kant and Hobbes, as the namesake of a significant trend in international thought, characterized by simultaneous attention to state practice and normative authorities.[37]

Grotius' doctrine had a strong influence on international law and was applied to the emerging world of sovereign territorial states. The effects of Grotius' natural jurisprudence in this area are extraordinarily multifaceted

[32] Mill 1963, 376.

[33] See, e.g., Baker 1990, 2001; Wright 1997; Swenson 2000. From Benjamin Constant onward, a prominent historiographical tradition has, of course, maintained a crucial influence of Rousseau on the *Terreur*. See also the contributions to Belissa et al. 2009.

[34] Edelstein 2009, 259.

[35] Stahl 1847, 158ff. For the impact of the natural-law tradition on European politics from the seventeenth to the nineteenth century, see the contributions in Klippel 2006.

[36] Grotius had founded the "specifischen Charakter der deutschen Rechtsphilosophie": Stein 1884, 79.

[37] See, e.g., Wight 1991.

and cannot be described here in any detail.[38] After 1650, Grotius' natural-law theory became the main reference point for the portrayal of *ius naturae* and *ius gentium* in the Empire, and the importance of *De iure belli ac pacis* to the teaching at Protestant universities greatly increased.[39] In 1661, the Calvinist University of Heidelberg created a chair devoted exclusively to the interpretation of Grotius' natural-law writings, which was first held by Samuel Pufendorf.[40] The universities of Kiel, Greifswald, and Strassburg adopted natural law into their curricula soon after.[41] In the English-speaking world, too, Grotius' natural law influenced international legal thought. Adam Smith can again serve as an example of the theoretical interest in and reception of Grotius; he directly adopted Grotius' doctrine of just causes of war from *De iure belli ac pacis*, with their parallels in the Roman law of civil procedure, and the interpretation of just causes of war as violations of subjective rights into his *Lectures on Jurisprudence*.[42]

Grotius' effect today may be most apparent in international law,[43] where the doctrine of freedom of the seas had definitively prevailed by the end of the eighteenth century.[44] Interestingly, and perhaps astonishingly in light of the imperialist motives of Grotius' early works on natural law, the application of the Roman-law doctrine of *res nullius* had a distinctively anti-imperial thrust in the way it was applied by several early modern writers. *Res nullius*, far from serving simply as an imperialist argument for the acquisition of sovereign rights overseas, was used in many more ways in the normative discussions surrounding European colonial expansion by Grotius and his predecessors. First, *res nullius* served in its original purpose to govern acquisition of private ownership, with Francisco de Vitoria (c. 1485–1546) insisting on its validity universally and even against sovereign claims to the contrary. Second, *res nullius* was put forward, most succinctly by Vitoria's pupil Domingo de Soto (c. 1495–1560), in order

[38] See Haggenmacher 1985; see also Kingsbury 1997.

[39] See Hofmann 1995, 61.

[40] See Klein 1985.

[41] On the reception of Grotius in Germany, see Hofmann 1995, 60–64; Stolleis 1988, 195–96, with further references.

[42] *LJ*, 545: "Quando liceat bellare? In general whatever is the foundation of a proper law suit before a court of justice may be a just occasion of war [reference to *IBP* 2.1.2]. The foundation of a law suit is the violation of some perfect right whose performance may be extorted by force . . . When one nation encroaches on the property of another . . . the sovereign is bound to demand satisfaction for the offence . . . and if redress be refused there is a foundation for war. In the same manner breach of contract, as when a debt is due by one nation to another, and payment refused, is a very just occasion of war." See also *LJ*, 548, on the Roman practice of initiating war, where Cicero's example from *De officiis* 1.35 is taken out of *IBP* 3.2.14.

[43] On Grotius' role in the jurisprudence of the International Court of Justice see the examples in Kingsbury 2000, 41n7.

[44] See Grewe 1988, 477.

to *undermine*, rather than bolster, Spanish claims to sovereignty in the New World.[45] Third, as we have seen, *res nullius* was used by Grotius on behalf of the nascent United Provinces and its trading companies to counter monopolist Iberian claims to rights of navigation on the high seas and to defend the doctrine of the free sea.[46]

Additionally, Grotius' doctrine of a universal right to punish was reflected in the area of universal jurisdiction. Thus the District Court of Jerusalem in 1961 used Grotius' natural right to punish as an argument for Israeli jurisdiction in its judgment in the Eichmann trial.[47] It is noteworthy that the discussion today on peremptory norms of international law (*jus cogens*), the violation of which is a violation not only against a particular state but against the international community in general (so-called *erga omnes* obligations), is also strongly inspired by natural law. The use of reprisals by a state that is not itself affected by the violation of such peremptory norms against the state responsible for the violation is one of the most controversial points in international law today.[48] It requires international law to postulate particularly important norms that comprise *jus cogens*, the violation of which constitutes an international crime.[49] Even today, only natural-law arguments can be made in favor of these particularly important norms.

In the history of international law, the legal claims of polities, arising from the Roman theory of *bellum iustum*, Ciceronian ethical theories, and Roman civil procedure, contributed to establishing the newly emerging sovereign states and provide at the same time a normative yardstick for their behavior. This study hopes to serve as a reminder that many of the substantive legal precepts that are today part of positive international law may be shown a posteriori by state practice, but that these norms of international law ultimately had their origin in a practical ethics compiled out of Roman sources. Thus far this is merely a genealogical claim, but it seems to me that the edifice of international law, for reasons that have hopefully become clearer in the present book, cannot ultimately rest on legal

[45] On Soto's use of Roman materials, see Lupher 2003, esp. 61–68.

[46] See on the early modern use of *res nullius* Benton and Straumann 2010.

[47] *Attorney-General of the Government of Israel v. Adolf Eichmann*, Judgment of the District Court of Jerusalem, Dec. 12, 1961, *International Law Reports* 36 (1968), 18–276, see 27, 51, 56–57.

[48] The discussion occurs mainly in the context of the interpretation of the *Articles on Responsibility of States for Internationally Wrongful Acts*. See Frowein 1994.

[49] The notion of international crime could be found in Article 19 of the 1996 *Draft Articles on State Responsibility Provisionally Adopted by the International Law Commission on First Reading*. See Crawford 2002, 352–53; see also the contributions in Weiler, Cassese, and Spinedi 1989. Art. 19 and the notion of international crime were eventually declined in favor of Art. 41 and the term "serious breach"; see Crawford 2002, 16–20.

positivism alone. A natural law argument at least broadly of the kind provided by Grotius (and, by implication, the Roman tradition that sustains him) seems necessary. The contemptuous assessment by the positivist German constitutional scholar Johann Jakob Moser in the eighteenth century that *De iure belli ac pacis* was merely a private work without any binding power[50] can hardly be maintained. Positivism was never able to prove itself resistant to natural-law arguments for any length of time. Grotius' Roman natural law, one of the most successful modern outlines of a doctrine of natural justice, poses a lasting challenge to any international law built upon a purely positivist basis.

The effects of Grotius' theory of natural law on positive law were not limited to international law, but could also be felt in domestic political theory and positive private and constitutional law. Thus Grotius' law of reason (*Vernunftrecht*) affected the major private-law codifications on the European continent,[51] as well as the constitutional law of the United States and the jurisprudence of the U.S. Supreme Court. The latter has cited *De iure belli ac pacis* 76 times since its creation, in the contexts of international law, constitutional law, and private law, applying it particularly in regard to questions of succession of states following the Civil War, the doctrine of freedom of the seas, the theory of eminent domain on the part of public authorities, and property law issues.[52] The fact that Grotius' works could be cited in interpreting domestic American law can be explained by the prominent position granted *De iure belli ac pacis* in pre-revolutionary America in the eyes of the Founding Fathers and, even earlier, the colonists in Virginia. Judging by the libraries of pre-revolutionary Virginia, Grotius was the second-most prominent political and jurisprudential author after Lord Coke, far more prominent than even John Locke.[53]

This leads to the question of the indirect effect of the Roman foundations of Grotius' theory of natural law. The natural subjective rights, which have meanwhile mutated, on the level of individuals, into human rights, can probably claim the greatest importance in Grotius' legacy.[54] The conclusions reached in this study suggest that the political theory of liberalism, reflected increasingly in positive law since the seventeenth century, can be

[50] See Lauterpacht 1927, 16.

[51] See Wieacker 1967, 287–301, 332.

[52] See, e.g., for cases concerning state succession, *Young v. U.S.*, 97 U.S. 39 (1877), 47; for freedom of the seas, *U.S. v. Maine*, 475 U.S. 89 (1986), 96, n. 11; for eminent domain see *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420 (1837), 472; for property law *U.S. v. Repentigny*, 72 U.S. 211 (1866), 243n23.

[53] See Howard 1968, 118–19.

[54] On Grotius' importance for the prehistory of human rights, see Haggenmacher 1997, 114n1; Kammasch and Schwarz 2001; Gelderen 1993/94, 37; Gelderen 2009. For a skeptical if ultimately

interpreted as a conscious rejection of the peripatetic tradition and the simultaneous reception of a certain well-understood Roman tradition. As a result, the origins of modern liberalism and deontological human rights ought to be sought not merely in the colonial expansion of the seafaring powers in the seventeenth century, or the constitutional arrangements following the wars of religion,[55] but also in Cicero's ethics, his defense of Roman imperialism, the *ius fetiale*, and especially in the Roman law of the *Corpus iuris*.

unconvincing account seeking to erode confidence in a prehistory of modern human rights rooted in early-modern natural law, see Moyn 2010; for an example of the terminology of "inalienable human rights" (*unveräusserliche Menschenrechte*) spilling over from France into German adjudication before the *Reichskammergericht*, see Häberlin 1797.

[55] See Straumann 2008.

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