

## WHAT IS THE GROTIAN TRADITION IN INTERNATIONAL LAW?

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## 1. INTRODUCTION

In *The Power and Purpose of International Law*, Mary Ellen O'Connell confronts Jack Goldsmith and Eric Posner's version of the familiar claim that international law does not create obligations that are binding and enforceable in their own right, and that it is primarily a reflection of the rational efforts of states to pursue their own interests.<sup>1</sup> She begins by putting their argument into "a history of scholars attempting to free sovereigns or sovereign states from the rules of the world community."<sup>2</sup> At the root of this history sits Niccolo Machiavelli, who propounded the theory that "sovereigns are above the law."<sup>3</sup> Alongside Machiavelli is Thomas Hobbes, the great but controversial theorist of human nature and sovereignty,<sup>4</sup> with Emmerich de Vattel playing a more ambiguous but ultimately negative role.<sup>5</sup> John Austin, Carl Schmitt, and Hans Morgenthau round out the main characters in this history of sovereign disregard for—and sometimes denial of—international law.<sup>6</sup>

O'Connell uses a different historical narrative to frame her own claims. First, she invokes Hugo Grotius, "the seventeenth-century Dutch scholar and diplomat credited with founding modern

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<sup>1</sup> See MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT* 2-3 (2008). For Goldsmith and Posner's summary of their claims, see JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3-17 (2005).

<sup>2</sup> O'CONNELL, *supra* note 1, at 3.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 5, 27.

<sup>5</sup> *Id.* at 36-37. Cf. HERSCH LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* 7 (rev. ed. 2011) [hereinafter LAUTERPACHT, *THE FUNCTION OF LAW*] (referring to Vattel's "elegant manner of evasion" on international arbitration of disputes).

<sup>6</sup> O'CONNELL, *supra* note 1, at 4, 6.

international law.”<sup>7</sup> According to O’Connell, “[i]n the Grotian worldview, law is as present and important for the rulers of nations in their relations as for individuals within nations. Grotius saw law for nations as a moral imperative.”<sup>8</sup> Second, she highlights Hersch Lauterpacht, one of the great twentieth-century scholars and jurists of international law and author of the classic essay, *The Grotian Tradition in International Law*<sup>9</sup>: “As Hersch Lauterpacht put it, for Grotius, ‘the hall-mark of wisdom for a ruler is to take account not only of the good of the nation committed to his care, but of the whole human race.’”<sup>10</sup> Later in the book, O’Connell credits Lauterpacht not only with “reviving the Grotian tradition of natural law” but also with describing the several “‘features’ of the Grotian tradition that were essential aspects of postwar international law.”<sup>11</sup> Other contemporary theorists whom she identifies as advancing at least some Grotian ideals are Hans Kelsen, Louis Henkin, and Thomas Franck.<sup>12</sup>

For his part, Lauterpacht argued that the Grotian tradition is central to international law, that by extension international law is a moral project, and that realism is peripheral to and destructive of it.<sup>13</sup> The Grotian tradition as articulated by Lauterpacht and O’Connell thus posits the moral necessity of international law, contends that it has binding force, and provides a normative perspective for scholarly engagement with these ideas and goals. And, as Michael Scharf recently observed, “the ‘Grotian tradition’ has come to symbolize the advent of the modern international legal regime, characterized by a community of states operating under binding rules, which arose from the 1648 Peace of Westphalia.”<sup>14</sup>

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<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT’L L. 1 (1946) [hereinafter Lauterpacht, *Grotian Tradition*].

<sup>10</sup> O’CONNELL, *supra* note 1, at 3-4 (quoting Lauterpacht, *Grotian Tradition*, *supra* note 9, at 31).

<sup>11</sup> *Id.* at 53.

<sup>12</sup> *Id.* at 6-9.

<sup>13</sup> Lauterpacht, *Grotian Tradition*, *supra* note 9, at 51.

<sup>14</sup> MICHAEL P. SCHARF, CUSTOMARY INTERNATIONAL LAW IN TIMES OF FUNDAMENTAL CHANGE: RECOGNIZING GROTIAN MOMENTS 4 (2013). Scharf focuses on contemporary perceptions, not historical accuracy. *See id.* at 26 (“That the legend suffers from historical inaccuracy does not diminish its usefulness as a metaphor for critical turning points in international law and relations.”).

Arrayed against these views, once again, are the “realists,” who conceive of international relations as a Hobbesian state of nature, ungoverned by law, in which force, self-interest, and pragmatism are the primary tools.<sup>15</sup>

This article critically examines the claims that (1) there is a meaningfully definable “Grotian tradition in international law” that stretches from the 1600s to today, and (2) any tradition that begins with Grotius should best be interpreted to provide concrete and specific support for the goals of contemporary liberal internationalism (or other non-realist schools of thought).<sup>16</sup>

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<sup>15</sup> Goldsmith and Posner deny they are “realists,” which is a label they associate with international relations theory, and they insist international law has an important role in international affairs. See GOLDSMITH & POSNER, *supra* note 1, at 16, 180 (distinguishing traditional “realism” from their research agenda). They also emphasize their use of rational choice theory as an instrumental approach. *Id.* at 7-10, 14-17. Yet they appear to conceive of international law as subservient to and in the service of international relations, which creates at least a partial alignment between them and realists. See Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265, 1270 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 1) (“The vision of international law that Goldsmith and Posner espouse, though newly dressed up in the trappings of rational choice theory and econometric analysis, is at bottom just the same old realist vision.”); Edward T. Swaine, *Restoring (and Risking) Interest in International Law*, 100 AM. J. INT’L L. 259, 259 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 1) (quoting the book’s conception of international law as “binding and robust, but only when it is rational for states to comply with it,” and asserting this is “a fine line to walk, and though the authors do so with great skill, their ambivalence is apparent”).

<sup>16</sup> I use “liberal internationalism” as rough shorthand for the general package of positions that Lauterpacht, O’Connell, and many others have advanced. Despite his tone, Walter Russell Mead’s description is useful:

Liberal internationalists . . . believe, passionately, that only international law can save us from chaos, violence and, hopefully, war. A strong body of international law, enforced by international courts and obeyed by national governments is the way to make war less likely and less dreadful when it occurs; it can also deter torture, human rights violations and a whole host of other bad things. Liberal internationalists want the world to become a more orderly and law abiding place. Ideally many would like the United Nations or some other international organization to evolve into something a little bit like a world government: the European Union on a global scale. But failing that, liberal internationalists would like to see better enforcement mechanisms for documents like the Universal Declaration of Human Rights. They would like the ‘laws of war’ to become ever more clearly codified and ever more effectively enforced. They look to the day when power shifts from national governments to international bureaucracies and institutions.

Grotius's ideas, as articulated most fully in his masterwork, *The Rights of War and Peace*,<sup>17</sup> do not provide an obvious basis for a continually relevant tradition in the form described by Lauterpacht, O'Connell, and other writers. Nor do his ideas provide much more than spotty support for contemporary ideas of pacifism, human rights, and limited national sovereignty.<sup>18</sup>

To the extent it is important to situate Grotius, his life and writings put him firmly within Antony Anghie's genealogy of international law developing hand-in-hand with colonialism and imperialism—although Anghie's account pays little attention to Grotius.<sup>19</sup> Outside of legal studies, historians and theorists

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Walter Russell Mead, *Liberal Internationalism: The Twilight of a Dream*, THE AMERICAN INTEREST (Apr. 1, 2010), <http://blogs.the-american-interest.com/wrm/2010/04/01/liberal-internationalism-the-twilight-of-a-dream/>.

<sup>17</sup> HUGO GROTIUS, DE JURE BELLI AC PACIS [THE RIGHTS OF WAR AND PEACE] (1625). Grotius wrote in Latin, but the book was quickly translated into several languages, and an influential French edition appeared in 1724. I use the 1738 English translation of the French edition, which is the edition English and American readers typically used well into the nineteenth century. See Richard Tuck, *Introduction*, in 1 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE x-xi (Richard Tuck ed., 2005) (remarking that the 1738 edition is "very common" and that copies of it were found in "most academic and private libraries of the period"). If a Grotian tradition in Anglo-American writing on international law extends further back than the mid-twentieth century, this translation is likely the most appropriate. Note, as well, that commentators have questioned the 1925 translation published by the Carnegie Endowment. See Patrick Capps, *Natural Law and the Law of Nations*, in RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 61, 62-63 (Alexander Orakhelashvili ed., 2011) (asserting the Carnegie translations "leave[] us with a 'very misleading picture' about the nature of the intellectual endeavour which these early writers on war and peace were undertaking").

<sup>18</sup> Edward Keene makes a similar point, more in the context of international relations theory:

Often without realizing it, the numerous scholars today who use concepts like the 'Westphalian system', the 'Grotian tradition' and the 'society of states' . . . are therefore committing themselves to a peculiarly narrow and twisted perspective on order in modern world politics. The very idea of a society of states is itself something of a hybrid, and it is quite incorrect to suppose, as so many do, that it accurately reflects a Grotian tradition of thought about international political and legal order that goes back to the dawn of the modern era in the seventeenth century.

EDWARD KEENE, BEYOND THE ANARCHICAL SOCIETY: GROTIUS, COLONIALISM AND ORDER IN WORLD POLITICS 38 (2002).

<sup>19</sup> See ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY, AND THE MAKING OF INTERNATIONAL LAW 224, 292-93 (2004) (noting the importance of self-defense in Grotius's work and recognizing Grotius wrote "several of his most important

increasingly have recognized not only that Grotius was a person of his times and a complex thinker, but also that he was an engaged participant in the politics of the United Provinces.<sup>20</sup> Those politics, in turn, centered on questions of national sovereignty, identity, and the role of religion, as well as on commercial and imperial ambitions. As such, Grotius is certainly an apt figure for the formative period of European statehood and of international law as a European project—a period that encompasses, at its outer reaches, the founding of the United States. His suitability as a positive figurehead for a progressive contemporary vision of international law is, however, more problematic.

To be sure, there is a longstanding tradition of advocating for pacifism, human rights, and limited national sovereignty as critical components of international law. There also has been a creative tradition of engagement with Grotius's ideas in fields outside international law.<sup>21</sup> These traditions are distinct from the idea of a Grotian tradition in international law or international relations. Even more, the link between Grotius and contemporary theories about international law and relations is an invention.<sup>22</sup> Put somewhat differently, many of the ideas that Lauterpacht, O'Connell, and other writers identify as the Grotian tradition did not come from Grotius and did not emerge from a tradition of direct engagement with his work. The Grotian tradition, in short, is less about Grotius than it is about the ideas and goals of his post-World War II interlocutors.

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works as a justification for advancing [the] interests" of the Dutch East India Company). A more recent essay recognizes Grotius's greater significance for post-colonial scholarship. See Antony Anghie, *International Law in a Time of Change: Should International Law Lead or Follow?*, 26 AM. U. INT'L L. REV. 1315, 1321-22 (2011); see also *infra* notes 106-08 and accompanying text (discussing Anghie's more recent assessment of Grotius).

<sup>20</sup> See generally MARTINE JULIA VAN ITTERSUM, *PROFIT AND PRINCIPLE: HUGO GROTIUS, NATURAL RIGHTS THEORIES AND THE RISE OF DUTCH POWER IN THE EAST INDIES 1595-1615* (2006). See also JONATHAN ISRAEL, *THE DUTCH REPUBLIC: ITS RISE, GREATNESS, AND FALL 1477-1806* 421-59 (1995) (discussing Grotius's role in the Oldenbarnevelt regime).

<sup>21</sup> For example, Renée Jeffery argues there is a Grotian tradition "of thought concerned with the relationship between law and morality." RENÉE JEFFERY, *HUGO GROTIUS IN INTERNATIONAL THOUGHT* 140 (2006).

<sup>22</sup> See *infra* Part 4.1 (analyzing the invention of the Grotian tradition and the invention of traditions generally). Jeffery similarly explores the possibility of an invented Grotian tradition in international relations. See, e.g., JEFFERY, *supra* note 21, at 17-26, 140-45.

Why did post-World War II international law theorists invent the Grotian tradition? There are at least three reasons. First is the post-World War II effort to remake the international system. Second is the desire to provide a historically situated theoretical foundation for the ideas that arguably undergird that system. Third is the utility of “purifying” Grotius’s ideas so as to be able to claim not only that Grotius provides the necessary theoretical foundation for the post-War order, but also that properly understood, the foundation of that order—and by extension international law itself—has *always* forwarded pacifism, human rights, and an international rule of law as much or more than it has accommodated a system of independent nation-states that pursue their own interests.

If the Grotian tradition is invented, then perhaps the counter-tradition of realism is also invented.<sup>23</sup> After all, contemporary invocations of both positions typically seek to advance contemporary ideological purposes that supposedly follow from those positions, such as those I described above.<sup>24</sup> Claiming that a tradition or history is an invention—that it is, as Eric Hobsbawm wrote, “factitious” instead of real or natural<sup>25</sup>—does not mean that the ideologies behind such efforts are pernicious. Still, positing a Grotians–realists dichotomy as the fundamental tension in international law obscures the breadth of views among contemporary scholars of international law. The related effort to posit a realists–Grotians–idealists continuum in international relations theory is similarly obfuscating.

I am not trying to attack O’Connell, Lauterpacht, or anyone else for their interpretations of Grotius. Nor do I want to fuel arguments against the existence or efficacy of international law. But, I do mean to suggest that international lawyers and theorists should not spend time searching for origins or creating historical

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<sup>23</sup> Thus, although I do not argue the point here, the versions of Hobbes and Machiavelli advanced by self-styled Grotians are often acontextual and overly simplified.

<sup>24</sup> For a more critical but similar claim, see David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT’L L.J. 1, 2 (1988) (“[T]he discipline of international public law, narratives of public law history and public law doctrine, and even international institutions, seem structured as movements from imagined origins through an expansive process towards a desired substantive goal.”).

<sup>25</sup> Eric Hobsbawm, *Introduction: Inventing Traditions*, in *THE INVENTION OF TRADITION 2* (Eric Hobsbawm & Terence Ranger eds., 1983).

accounts that supposedly generate unique, foundational, or overarching insights into and solutions for current debates. The various positions associated with liberal internationalism and its successors do not depend on valorizing a Grotian tradition of natural law-based rules, and it makes little sense to judge contemporary commentators by how close they come to a made-up version of Grotius (or, for that matter, to a made-up version of Machiavelli), particularly when few people easily pass (or fail) the test. Whatever place remains for Grotius, it is something more chastened, less foundational—and if useful at all, only in limited ways.

## 2. GROTIUS IN CONTEMPORARY INTERNATIONAL LAW AND RELATIONS

### 2.1. *Grotius as the Foundation of Liberal Internationalism*

#### 2.1.1. *Hersch Lauterpacht*

According to his son, Hersch Lauterpacht believed that his 1946 essay, “The Grotian Tradition in International Law”<sup>26</sup> was “probably the most important [article] that he ever wrote.”<sup>27</sup> The essay begins by admitting that Grotius’s work can be difficult to interpret—that, for example, “we often look in vain [in *The Rights of War and Peace*] for a statement as to what is *the* law governing the matter.”<sup>28</sup> He also noted that some writers have criticized Grotius or his writing as “reactionary.”<sup>29</sup>

These observations did not deter Lauterpacht from arguing for Grotius’s importance to the post-World War II international legal order. Lauterpacht’s interpretation begins with a characterization of Grotius himself: “not primarily a man of affairs,” he was “a

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<sup>26</sup> See generally Lauterpacht, *Grotian Tradition*, *supra* note 9.

<sup>27</sup> Elihu Lauterpacht, *Editor’s Note* to Hersch Lauterpacht, *The Grotian Tradition in International Law*, in INTERNATIONAL LAW, BEING THE COLLECTED PAPERS OF HERSCHE LAUTERPACHT, VOLUME 2: THE LAW OF PEACE 307 (Elihu Lauterpacht ed., 1975) (“From conversations which my father had with me, I know that he regarded this article as probably the most important that he ever wrote. Certainly, I can recall the immense amount of labour that he put into it.”). See also JEFFERY, *supra* note 21, at 93 (noting, as well, Lauterpacht’s assessment).

<sup>28</sup> Lauterpacht, *Grotian Tradition*, *supra* note 9, at 5.

<sup>29</sup> *Id.* at 14. Lauterpacht specifically mentioned Rousseau but dismissed his criticisms as a “low level of vituperation.” *Id.* at 1. He never mentioned Kant.



prodigy, almost a miracle, of learning," a polemicist on religious issues, and "a brilliant literary scholar."<sup>30</sup> His diplomatic career "was merely a source of livelihood"<sup>31</sup>—although Lauterpacht also noted the possibility that *The Rights of War and Peace* was "prepared with an eye to diplomatic employment."<sup>32</sup> The general picture is of a disinterested scholar who wrote out of disgust at the carnage of the Thirty Years War and who sought to "humaniz[e] . . . the conduct of war."<sup>33</sup> Further, Lauterpacht argued, Grotius's work contains "a unity and a consistency which transcend its evasions and contradictions."<sup>34</sup> Finally, he insisted on the contrasts between Grotius and Machiavelli, "the realist," and between Grotius and Hobbes, "the atheist."<sup>35</sup> Lauterpacht thus put readers on notice that he would be advancing a comprehensive, authoritative, and normatively attractive interpretation of Grotius.

Less clear is the extent to which Lauterpacht was also making a more controversial historical claim about a continually operative, dominant, and relatively unified tradition stretching from Grotius's day to 1946 and beyond. Though Grotius undoubtedly

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<sup>30</sup> *Id.* at 2–3.

<sup>31</sup> *Id.* at 3.

<sup>32</sup> *Id.* at 13.

<sup>33</sup> *Id.* at 12. In the introduction or Prolegomena to *The Rights of War and Peace*, Grotius wrote:

I had many and weighty Reasons inducing me to write a Treatise . . . . I observed throughout the Christian World a Licentiousness in regard to War, which even barbarous Nations ought to be ashamed of: a Running to Arms upon very frivolous or rather no Occasions; which being once taken up, there remained no longer any Reverence for Right, either Divine or Human, just as if from that Time Men were authorized and firmly resolved to commit all manner of Crimes without Restraint.

1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 106. Scholars typically assume this is a reference to the Thirty Years War. *But cf.* JEFFERY, note 21, at 12–13 (noting Grotius denied the war affected his reasoning). Grotius later wrote that he sought "to convince authorities of the necessity to abstain from cruelty in warfare . . ." Henk J.M. Nellen, *Hugo Grotius's Political and Scholarly Activities in the Light of His Correspondence*, 26–28 *GROTIANA* 16, 28 (2005–07).

<sup>34</sup> Lauterpacht, *Grotian Tradition*, *supra* note 9, at 1.

<sup>35</sup> *Id.* On Hobbes's supposed atheism, see ROSS HARRISON, HOBBS, LOCKE, AND CONFUSION'S MASTERPIECE: AN EXAMINATION OF SEVENTEENTH-CENTURY POLITICAL PHILOSOPHY 54 (2003), which describes the debate over Hobbes's religious beliefs, and Jeremy Waldron, *Hobbes on Public Worship*, in *NOMOS XLVIII: TOLERATION AND ITS LIMITS* 31 (Melissa S. Williams & Jeremy Waldron eds., 2008), which takes seriously the idea that religion was important to Hobbes for its own sake as well as for its political implications.

has been a significant figure, his importance has ebbed and flowed. Renée Jeffery has argued, for example, that “by the middle of the 18th century . . . [his] popularity was experiencing a significant decline.”<sup>36</sup> If she is correct, then Lauterpacht’s essay is part of an effort to revive Grotius, which weakens any claim that there was a meaningful tradition during the interim period.<sup>37</sup>

Turning to the substance of Grotius’s writing, Lauterpacht declared:

[T]he principal and characteristic features of *De Jure Belli ac Pacis* are identical with the fundamental and persistent problems of international law and . . . in nearly all of them the teaching of Grotius has become identified with the progression of international law to a true system of law both in its legal and in its ethical content.<sup>38</sup>

Lauterpacht spent the rest of the essay identifying and explaining these “principal and characteristic features,” and near the end of the essay he summarized the principle features of *The Rights of War and Peace*:

[T]he subjection of the totality of international relations to the rule of law; the acceptance of the law of nature as an independent source of international law; the affirmation of the social nature of man as the basis of the law of nature; the recognition of the essential identity of states and individuals; the rejection of ‘reason of State’; the distinction between just and unjust war; the doctrine of qualified neutrality; the binding force of promises; the fundamental

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<sup>36</sup> Renée Jeffery, *Hersch Lauterpacht, the Realist Challenge, and the ‘Grotian Tradition’ in 20th-Century International Relations*, 12 EUR. J. INT’L REL. 223, 223 (2006). *The Rights of War and Peace* was “reprinted or translated fifty times between 1625 and 1758’, [but] in the following hundred years it would only be published . . . twice.” *Id.* at 224 (citing Mark Weston Janis, *American Versions of the International Law of Christendom: Kent, Wheaton and the Grotian Tradition*, 39 NETH. INT’L L. REV. 37, 43 (1992); J.G. Starke, *The Influence of Grotius Upon the Development of International Law in the Eighteenth Century*, in GROTIAN SOCIETY PAPERS 1972: STUDIES IN THE HISTORY OF THE LAW OF NATIONS 162, 163 (C.H. Alexandrowicz ed., 1972)).

<sup>37</sup> See *id.* at 229–34 (discussing the early twentieth century revival of Grotius and natural law).

<sup>38</sup> Lauterpacht, *Grotian Tradition*, *supra* note 9, at 19.

rights and freedoms of the individual; the idea of peace; and the tradition of idealism and progress.<sup>39</sup>

These eleven ideas make up “what has here been called the Grotian tradition in international law.”<sup>40</sup>

Four of these ideas—the importance of the law of nature, the natural sociability of humans as the basis for the law of nature, a commitment to human rights, and the goal of peace or pacifism—deserve more discussion here because of their foundational role in defining the Grotian tradition, both in its affirmative aspects and in its differences from what Lauterpacht identifies as realism. Part Three will consider the extent to which Lauterpacht’s articulation of these ideas line up with Grotius’s writings on international law.

Lauterpacht admitted that “we are often at a loss as to the true meaning which [Grotius] attaches to the law of nature.”<sup>41</sup> But, he argued, what Grotius meant to say is that “[t]he law of nature . . . is the law which is most in conformity with the social nature of man and the preservation of human society . . . .”<sup>42</sup> After describing different aspects of this law of nature, and further uncertainties—such as the distressing possibility that on occasion Grotius’s “conception of natural law approaches very much that of Hobbes’s notion of the right of nature and the law of nature”<sup>43</sup>—Lauterpacht concluded that, “[o]n the whole we are probably right in assuming that the most frequent use of the notion of the law of nature by Grotius is what we should describe as general principles of law arrived at by way of a generalization and synthesis of the principal systems of jurisprudence.”<sup>44</sup> From there, Lauterpacht took care to emphasize that, for Grotius, the law of nature was robust. It was:

[T]he ever-present source for supplementing the voluntary law of nations, for judging its adequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations.<sup>45</sup>

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<sup>39</sup> *Id.* at 51.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 7.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 9.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 21–22.

With respect to human sociability, Lauterpacht stressed the importance of this issue for the content of international law:

It is a law of nature largely based on and deduced from the nature of man as a being intrinsically moved by a desire for social life, endowed with an ample measure of goodness, altruism, and morality, and capable of acting on general principles and of learning from experience. He admits that man is an animal, but one different in kind from other animals. That difference consists in his impelling desire for society—not for society of any sort, but for peaceful and organized life according to the measure of his intelligence.<sup>46</sup>

Lauterpacht further made clear that this desire for a strong moral community demonstrated the essential difference between Grotius and other writers—primarily Machiavelli and Hobbes—whose skewed and dark views of human nature as “selfish, anti-social, and unable to learn from experience” led them into the errors of realism.<sup>47</sup>

Lauterpacht did not mince words on the bedrock quality of this distinction. The “pessimism” of realists leads them to conclude that “the basis of political obligation is interest pure and simple” and that “the idea of a sense of moral duty rising supreme over desire and passion is a figment of imagination fatal alike to action and to survival.”<sup>48</sup> These views, he went on to say, are

[T]he typical realistic approach of contempt towards the ‘little breed’ of man. On that line of reasoning there is no salvation for humanity but irrevocable subjection to an order of effective force which, while indifferent to the dignity of man, yet contrives to prevent his life from being ‘solitary, poor, nasty, brutish, and short’.<sup>49</sup>

“The approach of Grotius,” Lauterpacht concluded, “is diametrically different” because of his continued faith in and appeals to morality and reason as capable of triumphing “over

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<sup>46</sup> *Id.* at 24 (footnote omitted).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 25.

<sup>49</sup> *Id.*

unbridled selfishness and passion, both within the state and in the relations of states."<sup>50</sup>

With respect to pacifism and human rights, Lauterpacht was less detailed. Initially, Grotius's approach to rights is "disillusioning,"<sup>51</sup> but Lauterpacht argued it is more nuanced than it first appears, and he noted several instances in which Grotius appeared to define natural human rights.<sup>52</sup> On war, Lauterpacht asserted that "not the least important . . . aspect of the Grotian tradition is his pacifism."<sup>53</sup> But, Lauterpacht's actual discussion required him to hedge. Despite Grotius's articulation of the circumstances in which a war can be just, and his admission that the law of nature allowed "pronounced inhumanity" in the conduct of war, Lauterpacht contended that, "[i]n general, there breathes from the pages of *De Jure Belli ac Pacis* a disapproval, amounting to hatred, of war."<sup>54</sup>

In the last pages of the essay, Lauterpacht noted that some of these ideas had made their way into international law, while others were "still an aspiration."<sup>55</sup> And, he also made clear that the aspirations were as important as the creation of legal rules, because Grotius is "a well-spring of faith in the law as it ought to be. . . . What Grotius did was to endow international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also of a universal moral code."<sup>56</sup> The treatise itself "became identified with the idea of progress in international law."<sup>57</sup>

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<sup>50</sup> *Id.* at 25-26. Lauterpacht also placed Locke in Grotius's camp. *See id.* at 25 (noting how Locke did not take the "irrevocable subjection" approach to "salvation for humanity").

<sup>51</sup> *Id.* at 43.

<sup>52</sup> *See id.* at 46 (describing how Grotius considered there to be a natural right of expatriation and a right of economic freedom).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 47. *See also supra* note 35 and accompanying text.

<sup>55</sup> Lauterpacht, *Grotian Tradition*, *supra* note 9, at 51.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 52. Lauterpacht's account of *The Rights of War and Peace* thus matches up almost exactly with his approach to international law. *See* Patrick Capps, *Lauterpacht's Method*, 82 BRIT. Y.B. INT'L L. 248 (2012) (suggesting Lauterpacht's two ideals were "the establishment of peace between nations and the protection of fundamental human rights").

### 2.1.2. Mary Ellen O'Connell

More than sixty years later, Mary Ellen O'Connell devoted a critical part of *The Power and Purpose of International Law* to the Grotian tradition. As I noted in the introduction, she used the Grotian tradition to frame her response to Goldsmith and Posner. More specifically, she reached back to Lauterpacht's essay as evidence of a pre-existing Grotian tradition which she self-consciously brought into the twenty-first century and which she also connected to the entire history of international law. In the process, she presented Lauterpacht's essay, not as a useful document that is situated in a particular historical and academic context, but rather as a desirable account of Grotius and his reception, and of the sources of international law.

O'Connell did, however, situate Grotius to a limited extent, consistent with Lauterpacht's own analysis. Thus, O'Connell wrote that Grotius sought "to contribute to ending the Thirty Years' War. He wanted to inspire greater humanity in the conduct of the war and encourage the establishment of a legal order above all warring factions after the war."<sup>58</sup> Even more, his treatise "provided the necessary law for the new order" after the Peace of Westphalia.<sup>59</sup> Now, nearly four hundred years later, "[h]e is being newly examined at the start of the twenty-first century as the source of a classical response to leaders willing, as in his day, to use violence and cruelty in achieving ambitions."<sup>60</sup> The Grotian tradition, in other words, is not only alive and well, but also is more relevant than ever.

O'Connell adopted Lauterpacht's dichotomy between pessimistic realists, with their contempt for humanity, and the Grotian understanding that "what impels human action . . . is the 'desire for society – not for society of any sort, but for peaceful and

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<sup>58</sup> O'CONNELL, *supra* note 1, at 26. See also *id.* at 33 ("Grotius wrote in reaction to the horrors of the Thirty Years' War"); *supra* note 35 and accompanying text (discussing this point).

<sup>59</sup> O'CONNELL, *supra* note 1, at 26. See also *id.* at 31 ("The essence of Grotian thought is evident in the Peace of Westphalia"). For a similar assertion, see Hedley Bull, *The Importance of Grotius in the Study of International Relations*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS 65, 75 (Hedley Bull, Benedict Kingsbury, & Adam Roberts eds., 1990) (stating Grotius's theories were "given concrete expression in the Peace of Westphalia").

<sup>60</sup> O'CONNELL, *supra* note 1, at 27.

organized life according to the measure of [human] intelligence.”<sup>61</sup> O’Connell then noted that although Grotius referred to Christian doctrine as a basis for his understanding of human nature and natural law, he also sought to provide a secular grounding for his ideas about human reason and the sources of international law.<sup>62</sup> She asserted, however, that this “secularization of natural law” ended up fostering “[t]he tendency away from community toward individualism” and sovereign authority.<sup>63</sup> That is to say, Grotius’s ideas, and the Peace of Westphalia that reflected his ideas, “also contained the seeds of the ultimate challenge to the Grotian worldview.”<sup>64</sup>

Be that as it may, O’Connell argued that Grotius’s natural law thinking provided a firm basis for just war doctrine as well as for the idea that nations should “avoid war at all costs.”<sup>65</sup> More generally, his ideas on the use of force “are still found in the law regulating force.”<sup>66</sup> Perhaps most important, the principles he articulated “remain integral aspects of international law today,” including “[i]n the area of enforcement.”<sup>67</sup>

Although O’Connell also singled out Hans Kelsen as an important proponent of the Grotian tradition,<sup>68</sup> Lauterpacht

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<sup>61</sup> *Id.* at 5 (quoting Lauterpacht, *Grotian Tradition*, *supra* note 9, at 24-25). See also *id.* at 27 (making a similar contrast).

<sup>62</sup> *Id.* at 27. See also HARRISON, *supra* note 35, at 139-41, 158-60 (noting Grotius appealed to God but suggesting his focus was on a secular foundation for natural law). John Haskell disagrees that Grotius was seeking to provide a secular grounding for international law, and he suggests that language frequently cited in support of this claim “was a common technique among earlier Catholic jurists,” including Francisco Suárez. John D. Haskell, *Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial*, 25 EMORY INT’L L. REV. 269, 272 & n.10 (2011).

<sup>63</sup> O’CONNELL, *supra* note 1, at 32.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 30.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> O’Connell linked Grotius and Kelsen because of their shared belief in the authority of law, and she contended that Kelsen “revived basic Grotian concepts of a unified legal system” and “brought Grotian concepts into the post World War II peace order.” *Id.* at 6, 21, 48. See also *id.* at 48 (discussing Kelsen and “the belief in the binding force of customary law”). I am less sure that Kelsen fits into Lauterpacht’s version of the Grotian tradition. In *Pure Theory of Law*, Kelsen advanced a monist conception of international and national law, but his version of monism made room for the primacy of national law. See HANS KELSEN, *PURE THEORY OF LAW* 333-44 (Max Knight trans., 2d ed. 1967). In addition, Lauterpacht

remains the central contemporary figure. It was Lauterpacht, she argues, who looked back to Grotius for the idea of natural law, and it was Lauterpacht who sought “to revive primary elements of Grotius’s teaching” and “the Grotian tradition of natural law.”<sup>69</sup>

O’Connell’s praise of Grotius and Lauterpacht supports her major claim about the importance of international law:

International law has deficits, yet it persists as the single, generally accepted means to solve the world’s problems. It is not religion or ideology that the world has in common, but international law. Through international law, diverse cultures can reach consensus about the moral norms that we will commonly live by. As a result, international law is uniquely suited to mitigate the problems of armed conflict, terrorism, human rights abuse, poverty, disease, and the destruction of the natural environment. It is the closest thing we have to a neutral vehicle for taking on the world’s most complex issues and pressing problems.<sup>70</sup>

O’Connell thus invoked Grotius and the tradition associated with him in order to buttress her claim that there is a universal and enforceable international law that serves the goal of peaceful, orderly, and sociable existence. From the standpoint of the Grotian tradition, international law is not only necessary, but also it is

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“differed strongly [from Kelsen] in regard to the place of natural law for legal construction.” MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, 356 (2002). See Capps, *supra* note 57, at 265-66, 271 (explaining the different interpretative approaches of Kelsen and Lauterpacht); see also JEFFERY, *supra* note 21, at 94-95, 105-06 (discussing the influence of natural law on international law, as conceptualized by Lauterpacht). Further, as Harold Koh noted, Kelsen saw international law as it then existed as “a primitive form of law, based on self-help.” Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2616 (1997). See also KELSEN, *PURE THEORY OF LAW*, *supra* at 323 (asserting similarities between international law and primitive law). Still, as Koh also observed, Kelsen believed “states must eventually . . . become a genuine, organized community in which ‘real’ obligations are enforced by judges and a police force deployed by a supranational executive.” Koh, *supra* at 2616 n.70 (quoting HANS KELSEN, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 417-18 (1952)). See also KELSEN, *supra* at 328 (stating “the ultimate goal of the legal development directed toward increasing centralization, appears the organizational unity of a universal legal community, that is, the emergence of a world state”).

<sup>69</sup> O’CONNELL, *supra* note 1, at 52, 53.

<sup>70</sup> Compare O’CONNELL, *supra* note 1, at 14 (describing the importance of international law), with Mead, *supra* note 16 (discussing liberal internationalism).



natural. It is natural both because it reflects the aspirations of human sociability and because it is based in universal principles that are neutral and above competing interests – that is, because it reflects, derives from, or simply is natural law in some sense of the term.

O’Connell noted Lauterpacht’s attempt to define the main features of the Grotian tradition, but because her book focuses on enforcement, she did not expend much effort in applying those features, with the exception of his ideas on the use of force. For both her and Lauterpacht, the critical features of the Grotian tradition came down to the importance of human sociability as a foundation for law, the existence and definition of natural law, the critical role of human rights, the need to control the use of force and promote peace, and the clear and obvious distinction between Grotian ideals and the dangerous pessimism of realists.

This idea of a Grotian tradition that is consistent with liberal internationalism or progressive approaches to international law continues to have great force,<sup>71</sup> even for those who do not profess allegiance to it. Indeed, the efforts of some scholars to develop critical perspectives on the Grotian tradition reaffirm the importance of these views.

## 2.2. *Variations: Grotius as Essential to a Liberal World Order*

The Lauterpacht/O’Connell version of the Grotian tradition in international law may be the most significant contemporary account of Grotius’s importance, but it is not the only one. A different Grotius appears in, for example, the writings of Martin Wight and Hedley Bull on international relations. Still, most of

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<sup>71</sup> E.g., Randall Lesaffer, *The Grotian Tradition Revisited: Change and Continuity in the History of International Law*, 73 BR. Y.B. INT’L L. 103 (2002). See also SCHARF, *supra* note 14, at 22-27 (arguing that although the Grotian tradition has experienced ups and downs, its pervasive influence can be seen in various areas of international law). Larry May’s work also reflects the Lauterpacht/O’Connell view. See LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* 27-33 (2008); LARRY MAY, *WAR CRIMES AND JUST WAR* 53-58 (2007) (echoing Lauterpacht and O’Connell’s viewpoint with an analysis of Grotius and natural law). But his views sometimes differ, such as when he follows Richard Tuck and refuses to draw a sharp distinction between Grotius and Hobbes. See also MAY, *AGGRESSION*, *supra* at 3 (arguing that “crimes of aggression are deserving of international prosecution when one State undermines the ability of another State to protect human rights.”). For a critical assessment of the Grotian tradition in the general sense that Lauterpacht defined it, see generally Haskell, *supra* note 62.

these variations on the Grotian tradition overlap with Lauterpacht, and O'Connell's version of Grotius in at least one critical respect: the claim that Grotius himself is the wellspring for the most normatively attractive vision of international order and therefore that he is the foundational figure in the tradition that bears his name.

### 2.2.1. *Grotian Moments*

Richard Falk's writings on Grotius overlap with the orthodox view. Indeed, in many ways he continued where Lauterpacht left off, albeit with more of a focus on international relations than on international law. Falk assesses Grotius's work as follows:

What Grotius attempted, whether wittingly or not, was to provide the foundation for a new normative order in international society that acknowledged the realities of an emergent state system and yet remained faithful to the shared heritage of spiritual, moral, and legal ideas that any Christian society could still be presumed to affirm as valid.<sup>72</sup>

In this view, Grotius is an essential figure in the progressive narrative toward an international rule of law that advances such things as democracy and human rights.

But Falk's praise of Grotius stops well short of Lauterpacht's. He insists that "[i]t is a mistake to suppose, as do such recent diverse commentators on Grotius as Hersch Lauterpacht and Hedley Bull, that the Grotian solution proposes substantive answers that are directly applicable to the transitional twentieth-century torments of the state system."<sup>73</sup> To the contrary, Falk suggests that, from a contemporary perspective, Grotius erred by "accommodating statism to an excessive and unnecessary degree" and being "insensitiv[e], from a normative standpoint, to the fate of individuals and groups confronted by repressive patterns of governance."<sup>74</sup>

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<sup>72</sup> RICHARD FALK, *The Grotian Quest, in* INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 36, 37-38 (Richard Falk, Friedrich Kratochwil, & Saul H. Mendlovitz eds., 1985).

<sup>73</sup> *Id.* at 40.

<sup>74</sup> *Id.* at 38-39.

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Although he holds on to one arguably specific claim in his reading of Grotius—"the idea that restraint and decency could be grounded in law"<sup>75</sup>—Falk largely abstracts from the specifics of Grotius's writings to stress, instead, the role that Grotius played in his time. Falk claims that Grotius "fulfilled the normative potential of his historic epoch" and that his writings illustrate "the possible role of law and legal thought in a time of transition between world order systems."<sup>76</sup> Within this partial historicization, Falk stresses Grotius's larger goal of meeting world historical moments ("Grotian moments") with a "blend [of] disparate moral, legal, and political perspectives" that coalesce into "a coherent conception of world order."<sup>77</sup>

For Falk, in short, the legacy of Grotius—the ongoing "Grotian quest"—is the task of advancing the transition from statism to globalism. The Grotian skill that this quest requires is a somewhat pragmatic idealism; in particular, the ability to "accord[] sufficient status to international developments that depart from the premises of the state system without losing persuasiveness."<sup>78</sup> For all that, however, the idea of a Grotian moment suggests that one is present at and part of a creation. More specifically, it suggests that Grotius and his response to his moment are touchstones for responding to subsequent similar moments. In the end, therefore, and despite their differences, Falk joins Lauterpacht in portraying Grotius as a heroic, foundational, and inspirational theorist who continues to be relevant to contemporary problems.

Falk's idea of a Grotian moment has not only been influential; it has also become a nearly irresistible catchphrase.<sup>79</sup> More recently,

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<sup>75</sup> *Id.* at 38.

<sup>76</sup> Richard Falk, *The Grotian Moment*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE, *supra* note 72, at 7.

<sup>77</sup> Falk, *The Grotian Quest*, *supra* note 72, at 39.

<sup>78</sup> *Id.* at 41.

<sup>79</sup> Boutros Boutros-Ghali famously invoked the term. See Boutros Boutros-Ghali, *A Grotian Moment*, 18 FORDHAM INT'L L.J. 1609 (1995). For other works that have used the term in either their text or title, see B.S. Chimni, *A Just World Under Law: A View from the South*, 22 AM. U. INT'L L. REV. 199, 201 (2006); Ibrahim J. Gassama, *International Law at a Grotian Moment: The Invasion of Iraq in Context*, 18 EMORY INT'L L. REV. 1 (2004); Samuel K. Murumba, *Grappling with a Grotian Moment: Sovereignty and the Quest for Normative World Order*, 19 BROOK. J. INT'L L. 829 (1993); Milena Sterio, *A Grotian Moment: Changes in the Legal Theory of Statehood*, 39 DENV. J. INT'L L. & POL'Y 209 (2011). Falk's variant phrase—the Grotian quest—has been used to describe Judge Christopher Weeramantry, who

Michael Scharf has gone beyond the rhetoric to develop the idea of the Grotian moment in a new direction. Where Falk stressed “international developments that depart from the state system,” Scharf uses the Grotian moment “to denote a transformative development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance. Usually this happens during a period of great change in world history.”<sup>80</sup> Scharf thus uses the Grotian moment in a very concrete fashion to assist the analysis of and gain critical purchase on the development of customary international law.

Both Falk and Scharf move away from a direct reliance on the specific positions taken by Grotius in his writings, even as they valorize his accomplishments. Their shift in perspective arguably undermines the Grotian tradition by raising the question why commentators feel a persistent need to link current debates, concerns, and commitments to what Grotius wrote. Indeed, notwithstanding Scharf’s thoughtful development of Falk’s idea, many contemporary references to “Grotian moments” drain the phrase of any meaningful link to Grotius and instead serve as a fancy synonym for “turning point,” “crossroads,” or “important” moment for international law.<sup>81</sup>

### 2.2.2. Grotius and the Middle Path

For the English school of international relations, Grotius was centrally important, but his importance took a different form. Martin Wight argued that Grotius stood for a rationalist, reformist approach—“a broad middle road”<sup>82</sup>—between Machiavellian realism (or positivism) and Kantian idealism. And not surprisingly

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in turn has also embraced the idea of the Grotian moment. See Saul Mendlovitz & Merav Datan, *Judge Weeramantry’s Grotian Quest*, 7 *TRANSNAT’L L. & CONTEMP. PROBS.* 401 (1997); Christopher Weeramantry, *Opening Tribute to Hugo Grotius*, 14 *AM. U. INT’L L. REV.* 1516, 1518 (1999).

<sup>80</sup> SCHARF, *supra* note 14, at 5. See also Michael P. Scharf, *Seizing the “Grotian Moment”: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 *CORNELL INT’L L.J.* 439, 443-53 (2010) (explaining the concept of “Grotian Moment”).

<sup>81</sup> See Benedict Kingsbury, *A Grotian Tradition of Theory and Practice?: Grotius, Law, and Moral Skepticism in the Thought of Hedley Bull*, 17 *QUINNIPIAC L. REV.* 3, 10 (1997) (making a similar point).

<sup>82</sup> MARTIN WIGHT, *INTERNATIONAL THEORY: THE THREE TRADITIONS* 15 (Gabriele Wight & Brian Porter eds., 1991).

the middle way, the balanced approach, is the most attractive because it matches best with the world as it actually is, in which states will have periods of cooperation and of conflict but in which larger, general principles are also important. Thus, Wight appears to have taken the position that the actual content of Grotius's writing was less important than what he saw as Grotius's general stance as "reconciler and synthesizer." Accordingly, Wight argued that "Grotius reflects more accurately [the] morally multidimensional character of our experience than, arguably, any other writer on the subject . . . . He reproduces an endless dialectic of the real and ideal, the actual and permissible, with all its tensions and facets, hesitations, and qualifications."<sup>83</sup>

Hedley Bull drew on Wight, and in particular on the idea of three traditions: Hobbesian realism on one end, Kantian idealism on the other, and, in the middle, the Grotian "internationalist" position. According to Bull, this version of the Grotian tradition "views international politics as taking place within an international society" of sovereign states that have "common rules and institutions."<sup>84</sup> Bull did not feel the need to adopt Grotius's view on specific topics, and he wrote that Grotius's reliance on natural law was outdated and that "the Grotian idea of international society later came to rest on the element of consensus in the actual practice of states" - a view that he endorsed.<sup>85</sup> Wight and Bull agreed that the Grotian tradition was the most attractive way to approach international relations, but they differed on its exact content. As Edward Keene has pointed out, "conventional legal

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<sup>83</sup> MARTIN WIGHT, *FOUR SEMINAL THINKERS IN INTERNATIONAL THEORY: MACHIAVELLI, GROTIUS, KANT, AND MAZZINI* 33, 34 (Gabriele Wight & Brian Porter eds., 2005). Wight's approach itself reflects a tradition. Mark Janis has suggested William Blackstone, Thomas Jefferson, and James Kent all "adopted a middle position, not unusual among eighteenth- and nineteenth-century lawyers, called 'mixed' or 'Grotian', which incorporated both positivist and natural elements." MARK WESTON JANIS, *AMERICA AND THE LAW OF NATIONS, 1776-1939*, at 52 (2010). See also MARK WESTON JANIS, *THE AMERICAN TRADITION OF INTERNATIONAL LAW: GREAT EXPECTATIONS, 1789-1914*, at 32 (2004) (providing additional discussion of this argument).

<sup>84</sup> HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* 23, 25 (3d ed. 2002). See also Bull, *supra* note 59 (making a similar argument).

<sup>85</sup> See Andrew Hurrell, *Foreword to the Third Edition*, in BULL, *ANARCHICAL SOCIETY*, *supra* note 84, at x (quoting a letter from Hedley Bull to Shaie Selzer from Nov. 14, 1975); see also Kingsbury, *supra* note 81 (analyzing Grotius and the concept of the "Grotian moment").

positivists and naturalists" were realists under Wight's formulation but would "presumably be in [Bull's] Grotian-Rationalist tradition."<sup>86</sup> As for Lauterpacht, he arguably fits better as an idealist than as a Grotian under either Wight's or Bull's account; the same is true of Lauterpacht's version of Grotius. In any event, and like the Lauterpacht/O'Connell version of the Grotian tradition, the Wight/Bull idea of the Grotian middle path has weathered criticism and remains influential.<sup>87</sup>

### 2.3. *Dissents: Grotius as Authoritarian, Realist, or Hobbesian*

The dominant trend has been to portray Grotius as the father of international law, the foundation of liberal internationalism, and the blazer of the middle path in international relations. But there has also long been an alternative view of Grotius that links him to realism, statism, and even absolutism.<sup>88</sup>

Aspects of this dissenting view may have been the received wisdom among early writers. For example, Pufendorf and Vattel did not trouble to characterize Grotius as a great humanitarian, even as they adopted and sometimes revised many of his views.<sup>89</sup> Perhaps more important is the tradition of dissenting from Grotius's views because they fostered or accommodated authoritarian regimes. Thus, for Rousseau, Grotius and Hobbes did not articulate diverging philosophies. "The truth is that their principles are exactly alike. They differ only in their manner of

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<sup>86</sup> Edward Keene, *The Reception of Hugo Grotius in International Relations Theory*, 20-21 *GROTIANA* 135, 153-54 (1999-2000). See also KEENE, *supra* note 18, at 29-39. For other accounts of Wight and Bull's views on the Grotian tradition, see Benedict Kingsbury & Adam Roberts, *Introduction: Grotian Thought in International Relations*, in *HUGO GROTIUS AND INTERNATIONAL RELATIONS*, *supra* note 59, at 55-57; A. Claire Cutler, *The 'Grotian Tradition' in International Relations*, 17 *REV. INT'L STUD.* 41-45 (1991); Kingsbury, *supra* note 81, at 19-20.

<sup>87</sup> For additional discussion of the English school and the relationship among Bull, Lauterpacht, and Wight, see JEFFERY, *supra* note 21, at 113-38; Lesaffer, *supra* note 71, at 108-09.

<sup>88</sup> See J.P. Somerville, *Absolutism and Royalism*, in *THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT, 1450-1700*, 347, 362 (J.H. Burns & Mark Goldie eds., 1991) ("Since Rousseau, [*The Rights of War and Peace*] has . . . commonly been seen as a major text of early modern absolutist thinking.")

<sup>89</sup> Cf. HARRISON, *supra* note 35, at 132-62 (discussing Grotius and Pufendorf); RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND INTERNATIONAL ORDER FROM GROTIUS TO KANT* 152-65, 191-96 (1999) (discussing the relationships among the writings of Grotius, Pufendorf, and Vattel).

expression. Hobbes bases himself on sophisms, and Grotius on poets. They have everything else in common.”<sup>90</sup> Rousseau also asserted that Grotius’s “most persistent mode of reasoning is always to establish right by fact. One could use a more rational method, but not one more favorable to tyrants.”<sup>91</sup> Indeed, according to Rousseau, Grotius “spares nothing to divest the people of all their rights and to endow kings with them as artfully as possible.”<sup>92</sup> Writing in 1795, Immanuel Kant similarly derided Grotius (along with Pufendorf and Vattel) as a “sorry comforter” of “military aggression.”<sup>93</sup>

A handful of recent writers have advanced similar criticisms of Grotius. B.V.A. Röling was particularly harsh. For Röling, “Grotius’ system was in keeping with the arrogance of power, namely of the power which Europe was to exercise over the rest of the world.”<sup>94</sup> Grotius’s ideas were “hypocritical”:

[T]he enormous popularity of Grotius’ just war doctrine is rendered comprehensible when we recognize that in theory it could gratify the high-minded and could point to the way which could reasonably lead to a better world, while it did not in any way restrict the endeavour of subjugating the non-European nations to European authority. Grotius’ system could afford a pretext for every desired act of violence.<sup>95</sup>

More recently, Edward Keene has disputed the idea—embraced by Bull and others—that Grotius was important because he anticipated the Westphalian system. To the contrary, Keene argues, Grotius was important for two primary reasons. First, his

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<sup>90</sup> JEAN-JACQUES ROUSSEAU, *EMILE OR ON EDUCATION* 458 (Allan Bloom trans., Basic Books 1979) (1762).

<sup>91</sup> Jean-Jacques Rousseau, *On the Social Contract or Principles of Political Right*, in 1 *ON THE SOCIAL CONTRACT WITH GENEVA MANUSCRIPT AND POLITICAL ECONOMY* 45, 47 (Roger D. Masters ed., Judith R. Masters trans., 1978) (1762).

<sup>92</sup> *Id.* at 60. Rousseau also highlighted Grotius’s arguments about slavery. *Id.* at 49–50.

<sup>93</sup> Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in *KANT: POLITICAL WRITINGS* 93, 103 (Hans Reiss ed., H.B. Nisbet trans., 1991) (“Hugo Grotius, Pufendorf, Vattel and the rest (sorry comforters as they are) are still dutifully quoted in justification of military aggression . . .”).

<sup>94</sup> B.V.A. Röling, *Jus ad Bellum and the Grotian Heritage*, in *INTERNATIONAL LAW AND THE GROTIAN HERITAGE* 121 (T.M.C. Asser Instituut ed., 1985).

<sup>95</sup> *Id.* at 121–22.

idea of divisible sovereignty not only served Dutch interests in their struggle with Spain but also provided the intellectual foundation for unequal treaties whereby one party would transfer part of its sovereignty to the other.<sup>96</sup> Second, Grotius argued that the private right to occupy property, although largely obviated in Europe, still applied “in places without inhabitants, as on the sea, in a wilderness, or on vacant islands,” which provided a justification for European seizures of land.<sup>97</sup> Keene suggests that Grotius himself did not intend these consequences.<sup>98</sup> Still:

It is the colonial and imperial systems beyond Europe that have the closest affinity with Grotian ideas about the law of nations and, if we are to talk about a ‘Grotian conception of international society’ at all, we should rather be concerned with the distinctly non-Westphalian structure of political and legal order in the extra-European world.<sup>99</sup>

One writer has approached the dissenting position from a different perspective. Richard Tuck has elaborated on Rousseau’s assertion that Grotius and Hobbes shared the same principles. Among other things, Tuck argues that Grotius developed “a theory about minimal natural sociability, based on a general view of the role of self-interest in the natural world.”<sup>100</sup> Even more, “Grotius endorsed for a state the most far-reaching set of rights to make war which were available in the contemporary repertoire.”<sup>101</sup> In the end, “Hobbes need not be seen as differing from Grotius over ethical matters, strictly understood, *at all*; his very different

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<sup>96</sup> See KEENE, *supra* note 18, at 45-52 (explaining Grotius’s theory that sovereignty is divisible). See also Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius’ De Iure Praedae – The Law of Prize and Booty, or “On How to Distinguish Merchants from Pirates,”* 31 BROOK. J. INT’L L. 741, 780-86 (2006) (focusing on how Grotius’s theory of divisible sovereignty aided the Dutch in their struggle with Spain).

<sup>97</sup> KEENE, *supra* note 18, at 54-57 (quoting Grotius, DE JURE BELLI AC PACIS at 92).

<sup>98</sup> See *id.* at 6, 94-95 (noting that there is little to no evidence to suggest that Grotius was an imperialist).

<sup>99</sup> *Id.* at 97. For extensive deconstructive and post-colonial analysis of Grotius, see ERIC WILSON, THE SAVAGE REPUBLIC: DE INDIS OF HUGO GROTIUS, REPUBLICANISM, AND DUTCH HEGEMONY WITHIN THE EARLY MODERN WORLD-SYSTEM (C. 1600-1619) (2008).

<sup>100</sup> TUCK, *supra* note 89, at 102.

<sup>101</sup> *Id.* at 108.



conclusions can all follow solely from a disagreement about the material conditions for the application of the ethical principles.”<sup>102</sup> Thus, Tuck argues, it is no wonder that “it became to a degree a commonplace in late seventeenth-century Germany . . . that there was at bottom little to choose between Grotius and Hobbes.”<sup>103</sup> Tuck’s argument, which does not criticize Grotius for his apparent closeness to Hobbes, is controversial. One commentator has charged that “Tuck has presented a work of history with an evident political message, but one that is . . . politically backward-looking, not to say regressive.”<sup>104</sup>

The Grotian tradition persists in the writings of international lawyers and international relations scholars, even if the diverging elements sometimes threaten to outweigh the common ones. That is to say, particularly when one also takes account of dissenting views, agreement exists on the importance of Grotius and the existence of a Grotian tradition of some kind, but the specific content of the tradition remains somewhat elusive. Grotius and the Grotian tradition operate, at least sometimes, as placeholders for particular theories about what international law is and how it should operate. The tradition, then, is in part one of content, and in part one of invocation.<sup>105</sup>

### 3. GROTIUS IN HISTORY AND THE RIGHTS OF WAR AND PEACE WITHOUT TRADITION

In a recent lecture, Antony Anghie agreed that, for Lauterpacht, Grotius “is a heroic figure seeking to control the escalation of violence and to reconstitute a ruined Europe.”<sup>106</sup> But Anghie also

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<sup>102</sup> *Id.* at 135. Compare Larry May’s distinction between Grotius and Hobbes: “Thomas Hobbes is a minimal natural law theorist who proceeds to construct norms on the basis of human desires for self-preservation and for peace; and Hugo Grotius is a minimal natural law theorist who constructs norms . . . grounded in the human desire for a peaceful and happy life in a community.” MAY, WAR CRIMES, *supra* note 71, at 58. See also HARRISON, *supra* note 35, at 132–62 (agreeing Hobbes and Grotius were minimalist but also noting differences between them).

<sup>103</sup> TUCK, *supra* note 89, at 102.

<sup>104</sup> George Wright, *Tuck’s Grotius: De Iure Praedae in Context*, 26–28 GROTIANA 366, 378 (2005–2007).

<sup>105</sup> For a similar assessment, see JEFFERY, *supra* note 21, at 14–16 (arguing the Grotian tradition is an intermediate legal category without firm definition).

<sup>106</sup> Anghie, *International Law in a Time of Change*, *supra* note 19, at 1321.

noted that recent scholarship on Grotius casts him in a different light. This newer version of Grotius:

is a more ambitious and self-interested figure, seeking his own advancement and writing on the themes of war, commerce, privateering, mercenaries, and trade in a manner clearly linked with his immediate employment. This is the Grotius that engaged in the dual enterprise of establishing the Dutch Republic and asserting Dutch sovereignty as an incipient trading empire.<sup>107</sup>

As for the content of Grotius's writing:

[I]t is also disconcerting to note that his great work, which is understood as a blueprint for peace, is principally about war, and that war appears to be placed under little restraint in Grotius's system. . . . A survey of *The Rights of War and Peace* indicates that Grotius permitted recourse to war in an extraordinarily broad range of circumstances, including breach of contract.<sup>108</sup>

This part addresses these issues. The first section draws on recent historical work about Grotius and the Dutch Republic to compile a biographical sketch that situates Grotius and his early writing on international law firmly in their historical context. The second section reads portions of *The Rights of War and Peace* in a similar way. Not surprisingly, the effort to contextualize Grotius shows that he was a man of his times who was engaged in the political issues of his day and who expended his energies to resolve them in a way that accorded with his worldview – which centered very much on the survival and prosperity of the Dutch Republic. The same can be said of reading *The Rights of War and Peace* as a document addressed to a particular time and place. But this effort also raises a standard set of questions. If Grotius and his work are products of their time, is there anything special that remains beyond historical analysis? Why, if at all, should he or his

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<sup>107</sup> *Id* (citation omitted). See also Martine Julia van Ittersum, *The Long Goodbye: Hugo Grotius' Justification of Dutch Expansion Overseas, 1615–1645*, 36 *HIST. EUR. IDEAS* 386, 409 (2010) (“[T]he imperialist framework of Grotius' thinking on natural law and natural rights . . . is fast becoming the new consensus”).

<sup>108</sup> Anghie, *International Law in a Time of Change*, *supra* note 19, at 1321, 1322 (citation omitted).

work be an inspiration today? Is he a prototype of something that remains useful? The final part of this article turns to these questions.

### 3.1. *Hugo Grotius*

#### 3.1.1. *Background and Early Career*

Hugo Grotius (Hugo de Groot) came from a wealthy family with noble pretensions that was part of the ruling oligarchic elite of Delft, in Holland, and whose members had financial interests in Dutch trading efforts.<sup>109</sup> His family provided him with every possible educational opportunity, along with access to their intellectual and political connections.<sup>110</sup> Grotius responded by excelling at his subjects and engaging in scholarly and literary activity from a young age.<sup>111</sup>

Although Grotius remained heavily engaged in scholarly and literary pursuits throughout his life, he also trained as a lawyer and quickly involved himself in the politics of the United Provinces, which included not just maintaining their fragile independence from Spain, but also issues of political structure, commercial expansion, and religious toleration and reform.<sup>112</sup> He

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<sup>109</sup> See WILLIAM S.M. KNIGHT, *THE LIFE AND WORKS OF HUGO GROTIVS* 2-16, 24 (1925) (noting Grotius was not of strictly noble birth but that the De Groot family had significant financial and political connections); Martine Julia van Ittersum, *Preparing Mare liberum for the Press: Hugo Grotius' Rewriting of Chapter 12 of De iure praedae in November-December 1608*, 26-28 *GROTIANA* 246, 249 (2005-07) (describing Grotius as a Delft patrician by birth). See also C.G. Roelofsen, *Grotius and the International Politics of the Seventeenth Century*, in HUGO GROTIVS AND INTERNATIONAL RELATIONS, *supra* note 59, at 98 (designating Grotius as "a member of the patriciate of so-called 'regents' which dominated public life in Holland and Zeeland."); Tuck, *supra* note 17, at xii (describing the De Groots as regents of the "self-selecting oligarchy which governed Delft"). See also CHARLES S. EDWARDS, *HUGO GROTIVS, THE MIRACLE OF HOLLAND: A STUDY IN POLITICAL AND LEGAL THOUGHT* 1 (1981) (answering the question of how Grotius was able to accomplish so much at a young age by focusing on the support his "fairly well-to-do" father gave him).

<sup>110</sup> KNIGHT, *supra* note 109, at 22-30.

<sup>111</sup> EDWARD DUMBAULD, *THE LIFE AND LEGAL WRITINGS OF HUGO GROTIVS* 4 (1969); EDWARDS, *supra* note 109, at 2; KNIGHT, *supra* note 109, at 31-32.

<sup>112</sup> ISRAEL, *supra* note 20, at 421-22. See also DUMBAULD, *supra* note 111, at 7 (describing Grotius's training as a lawyer and admission to practice in 1599); EDWARDS, *supra* note 109, at 2 (discussing Grotius's youthful studies culminating in law); KNIGHT, *supra* note 109, at 36, 55-58, 67-68 (looking at Grotius's involvement in various political matters).

obtained opportunities and high office at a young age because of the combination of his abilities and his family's connections.<sup>113</sup> Many of his early writings were linked to Dutch politics and Dutch identity, and he helped to create "a republican political outlook to fit the reality" of political life in the United Provinces.<sup>114</sup> For Grotius and his peers, republican government had a specific character: "Grotius developed the idea that liberty, stability, virtue, and prosperity are best preserved when government is consultative and reserved to a closed oligarchy."<sup>115</sup>

In 1604, the Dutch East India Company retained Grotius to defend its interests, in particular its claim that it could seize Spanish or Portuguese vessels as prizes. Over the next decade, Grotius became "extremely successful as a political lobbyist" for the Company, which in turn meant that he helped "shape the foreign policy of the Dutch Republic in the 1600s and 1610s."<sup>116</sup> Because of his extensive involvement in advancing Dutch commercial ambitions, Martine Julia van Ittersum argues that Grotius is "one of the founding fathers of the First Dutch Empire,"<sup>117</sup> although she also maintains that for Grotius the Dutch empire was always "essentially maritime and mercantile in nature," not territorial.<sup>118</sup>

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<sup>113</sup> KNIGHT, *supra* note 109, at 76; van Ittersum, *supra* note 109, at 249.

<sup>114</sup> ISRAEL, *supra* note 20, at 421. See also SIMON SCHAMA, *THE EMBARRASSMENT OF RICHES: AN INTERPRETATION OF DUTCH CULTURE IN THE GOLDEN AGE* 78-81, 566-67 (1987) (discussing how Grotius helped invent traditions of Dutch identity); van Ittersum, *supra* note 109, at 249 (noting that in 1601, "the States of Holland commissioned [Grotius] to write a history of the Dutch Revolt against Spain").

<sup>115</sup> ISRAEL, *supra* note 20, at 421-22. Richard Tuck contends Grotius's "early political writings were very much in the modern humanist tradition, tracing out an argument for the aristocratic republic, though stressing above all the need for it to engage in commerce and manufacturing in order to secure its liberty against its enemies, particularly of course Spain." TUCK, *supra* note 89, at 79. Tuck also argues this strain of humanism "applauded warfare in the interests of one's *respublica*, and saw a dramatic moral difference between Christian, European civilization and barbarism." *Id.* at 78. For a different view of humanism and its relationship to early international law theory, see Benedict Kingsbury & Benjamin Straumann, *The State of Nature and Commercial Sociability in Early Modern International Legal Thought*, 31 *GROTIANA* 22 (2010) (arguing Hobbes and Pufendorf held different opinions than Grotius about the relationship between humanism and international law).

<sup>116</sup> VAN ITTERSUM, *supra* note 20, at xi-xix.

<sup>117</sup> *Id.* at xix.

<sup>118</sup> van Ittersum, *supra* note 107, at 387.

### 3.1.2. *The Law of Prize*

Grotius's involvement with the Dutch East India Company is important for several reasons. The first is that he wrote his first major legal work—*De Jure Praedae* [*Commentary on the Law of Prize and Booty*, or more simply, *The Law of Prize*]<sup>119</sup>—at the Company's request.<sup>120</sup> Second, Grotius's long identification with the Company and its interests had a powerful effect on his legal thinking. Van Ittersum argues that Grotius's theoretical arguments “were always subject to the . . . [Company's] political needs and commercial interests.”<sup>121</sup> *The Law of Prize* bears out this claim.

The general goal of *The Law of Prize* was to show “that war might rightly be waged against, and prize taken from, the Portuguese, who had wrongfully tried to exclude the Dutch from the Indian trade.”<sup>122</sup> To achieve that goal, Grotius sought to

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<sup>119</sup> HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY (Martine Julia van Ittersum ed., 2006). Grotius never published *The Law of Prize*. The original Latin text was published in 1868, with an English edition in 1950. See *Note on the Text*, in *id.* at xxiii (explaining the edition of the text and publication).

<sup>120</sup> See VAN ITTERSUM, *supra* note 20, at xxv. For extensive discussion of the context in which Grotius took on the Company's commission, see *id.* at 7-104. See also Bull, *supra* note 59, at 70 (discussing how the capture of a Portuguese vessel in 1603 by a vessel of the Dutch East India Company led to *De Jure Praedae*); DUMBAULD, *supra* note 111, at 7, 25; KNIGHT, *supra* note 109, at 81-83; Roelofsen, *supra* note 109, at 100, 103-06; Tuck, *supra* note 17, at xxvii.

<sup>121</sup> VAN ITTERSUM, *supra* note 20, at iv. See also *id.* at 109 (stating “the survival of the . . . [Company] and the safety of the Dutch commonwealth were of paramount concern” to Grotius). My analysis of *The Law of Prize* is generally consistent with but not identical to that of van Ittersum and Porras, *supra* note 96, both of whom have also analyzed it extensively for similar reasons.

<sup>122</sup> KNIGHT, *supra* note 109, at 80. Thus, *The Law of Prize* begins with the following statements:

A situation has arisen that is truly novel, and scarcely credible to foreign observers, namely: that those men who have been so long at war with the Spaniards and who have furthermore suffered the most grievous personal injuries, are debating as to whether or not, in a just war and with public authorization, they can rightfully despoil an exceedingly cruel enemy who has already violated the rules of international commerce. Thus we find that a considerable number of Hollanders (a people surpassed by none in their eagerness for honourable gain) are apparently ashamed to lay claim to the spoils of war, being moved forsooth, by compassion for those who in their own relations with the Dutch have failed to observe even the legal rights of enemies. . . .

[I]f the Dutch cease to harass the Spanish [and Portuguese] blockaders of the sea (which will certainly be the outcome if their efforts result only in profitless peril), the savage insolence of the Iberian peoples will swell to

construct an argument that would justify not only the specific seizure by the Company of a Portuguese ship that gave rise to the dispute that he was addressing, but also the nature of the relationship between the United Provinces and Spain,<sup>123</sup> and the public-private issues raised by the fact that it was the Company, and not the Dutch navy, that had acted.

Grotius's solution was to insist that natural law, properly understood, resolved these issues. One of the first claims in *The Law of Prize* is that international relations, or at least the laws of war and peace, do not derive from a code but rather from natural law in the form of custom and reason.<sup>124</sup> From that initial position, Grotius developed a system of natural rights that applied equally to public and private actors, which in turn allowed him to ground the Dutch political and legal positions in fundamental principles of justice while also making a series of arguments in the alternative about the rules that ought to govern public and private disputes, including public and private wars.

He began his analysis by asserting that "all things in nature . . . are tenderly regardful of self, and seek their own happiness and security."<sup>125</sup> Applied to humans, this means that "the just man's highest concern is for himself," and "in human affairs the first principle of a man's duty relates to himself."<sup>126</sup> From this general observation he derived the first two "precepts of the law of nature": "first, that It shall be permissible to defend [one's own]

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immeasurable proportions, the shores of the whole world will soon be blocked off, and all commerce with Asia will collapse—that commerce by which (as the Dutch know, nor is the enemy ignorant of the fact) the wealth of our state is chiefly if not entirely sustained. On the other hand, if the Dutch choose to avail themselves of their good fortune, God has provided a weapon against the inmost heart of the enemy's power, nor is there any weapon which offers a surer hope of liberty.

GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 9-10 (brackets in original).

<sup>123</sup> TUCK, *supra* note 89, at 81. As Tuck observes:

It was not even clear to neutral observers that the States-General, let alone the States of Holland, were legitimate sovereign bodies: Holland was a 'province' of the Netherlands whose status was disputed, while the States-General represented a union of provinces in revolt against their king (the King of Spain). The Dutch thus seemed to be violating some of the most fundamental principles of international relations.

<sup>124</sup> GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 16.

<sup>125</sup> *Id.* at 21.

<sup>126</sup> *Id.* at 22.

life and to shun that which threatens to prove injurious; secondly, that it shall be permissible to acquire for oneself, and to retain, those things which are useful for life."<sup>127</sup>

Only after stressing the primacy of self-interest and self-defense did Grotius go on to note that "God . . . also will[ed] that one created being should have regard for the welfare of his fellow beings, in such a way that all might be linked in mutual harmony as if by an everlasting covenant."<sup>128</sup> From this, he deduced two additional laws of nature "whereby the preceding laws, which relate to one's own good, are complemented and confined within just limits": "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."<sup>129</sup>

Taken together, these four laws support human society, and Grotius highlighted the "social impulse" of humans.<sup>130</sup> Because justice is central to maintaining society, Grotius also proclaimed two more laws of nature: "first, Evil deeds must be corrected; secondly, Good deeds must be recompensed."<sup>131</sup> So far, however, Grotius was depicting human society as it would exist in something similar to a state of nature.<sup>132</sup> Although he did not use that term, he did say that "it came to pass" that the tension between self-interest and the social impulse resulted in "many persons . . . either fail[ing] to meet their obligations or even assail[ing] the fortunes and the very lives of others, for the most part without suffering punishment."<sup>133</sup> "[T]here arose the need," he continued, "for a new remedy, lest the laws of human society be cast aside as invalid":

Therefore, the lesser social units began to gather individuals together into one locality, not with the intention of abolishing the society which links all men as a whole, but rather in order to fortify that universal society by a more dependable means of protection, and at the same time, with

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<sup>127</sup> *Id.* at 23 (alteration in original) (emphasis omitted).

<sup>128</sup> *Id.* at 24.

<sup>129</sup> *Id.* at 27 (emphasis omitted).

<sup>130</sup> *Id.* at 28.

<sup>131</sup> *Id.* at 29 (emphasis omitted).

<sup>132</sup> *Cf.* TUCK, *supra* note 89, at 86 (arguing these passages present "in general an extremely minimal picture of the natural moral life").

<sup>133</sup> GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 35.

the purpose of bringing together under a more convenient arrangement the numerous different products of many persons' labour which are required for the uses of human life.<sup>134</sup>

This more dependable means of protection "is called a commonwealth . . . and the individuals making up the commonwealth are called citizens."<sup>135</sup> The commonwealth is also a source of law, not of immutable natural law but rather of changeable human municipal law.<sup>136</sup> By choosing to live together in a commonwealth, an individual agrees to lay aside the natural right "to pronounce judgment for himself and of himself" and instead consents to be bound by the judgments of municipal law.<sup>137</sup>

Grotius then declared that, "[i]n the light of the foregoing observations, it is clear that the civil power which manifests itself in laws and judgements resides primarily and essentially within the state itself."<sup>138</sup> What then of relations among states? Grotius stated flatly that "there is no greater sovereign power set over the power of the state and superior to it, since the state is a self-sufficient aggregation."<sup>139</sup> But the lack of a higher sovereign did not mean there was no international law. To the contrary, Grotius contended that the law of nations consisted, first, of "right reason" that promotes "universal concord . . . in relation to that which is good and true," which he also described as "a secondary law of nature."<sup>140</sup> The second component of the law of nations was "a species of mixed law, compounded of the [primary] law of nations and municipal law."<sup>141</sup> The municipal law of nations, in turn, consisted of "the various peoples who had established states for themselves enter[ing] into agreements" about the "common good of an international nature."<sup>142</sup> Further, these agreements about the

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 36.

<sup>136</sup> *Id.* at 40-41.

<sup>137</sup> *Id.* at 42-43.

<sup>138</sup> *Id.* at 43.

<sup>139</sup> *Id.* at 47.

<sup>140</sup> *Id.* at 25.

<sup>141</sup> *Id.* at 45 (alteration in original).

<sup>142</sup> *Id.*



international common good took two forms: laws formed by express agreement and “accepted custom.”<sup>143</sup>

Grotius also used “the law of nature, or law of nations” to explain the contrasting relationships between a state and its citizens and between a state and the citizens of other states.<sup>144</sup> All of the state’s power, including its power to punish and make war, comes from the original “collective agreement” among the individuals who become its subjects, which means that “the right of chastisement was held by private persons before it was held by the state.”<sup>145</sup> But it also follows, according to Grotius, that when a state inflicts punishment, it does so under two different legal regimes. When it punishes its citizens, it does so under “civil law.”<sup>146</sup> Yet the state “derives no power over [“foreigners”] . . . from civil law, which is binding upon citizens only because they have given their consent.”<sup>147</sup> For foreigners, therefore, “the law of nature, or law of nations, is the source from which the state receives the power in question.”<sup>148</sup> Put differently, when a state takes action against other states or against people outside its community, its powers and obligations derive from natural law. Further, those powers and obligations are presumably similar to the broad powers and limited obligations of an individual in the state of nature.<sup>149</sup> Even more, it seems to follow that whenever

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<sup>143</sup> *Id.* Because there was no neutral forum for deciding disputes about international rights, Grotius suggested a different approach: “In regard to judicial procedure, precedence shall be given to the state which is the defendant, or whose citizen is the defendant; but if the said state proves remiss in the discharge of its judicial duty, then that state shall be the judge, which is itself the plaintiff, or whose citizen is the plaintiff.” *Id.* at 47 (emphasis omitted). He also made clear the defendant state does not satisfy this obligation merely by having a proceeding—the state must actually confront the claim of right and satisfy it if it is a just claim. *Id.* at 48.

<sup>144</sup> *Id.* at 137.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> See TUCK, *supra* note 89, at 82-83. Tuck argues this passage makes “the claim that an individual in nature . . . was morally identical to a state, and that there were no powers possessed by a state which an individual could not possess in nature.” Further, he argues that because Grotius had a strong idea of state sovereignty, this passage also means Grotius was articulating the idea of the “autonomous right-bearing individual,” such that “we can best understand the

anyone—state or individual—is acting in a state of nature, violence is permitted to redress wrongs.<sup>150</sup>

Grotius emphasized the hierarchy of laws and rules that he had developed, so that readers would know what to do if different rules pointed in different directions. “[F]rom the standpoint of origin,” he said,

the divine law is superior to human law, and the latter to civil law. From the standpoint of purpose, that which concerns one’s own good is preferred to that which concerns another’s good; the greater good, to the lesser, and the removal of a major evil, to the promotion of a minor good.<sup>151</sup>

Self-interest thus held a privileged position.

War, in the system that Grotius was developing, was a method for executing judgments, but it could only be appropriate if used to enforce the kinds of rights that his system created. It could not be used merely to inflict injuries.<sup>152</sup> It was important, therefore, to consider the circumstances in which a war, or the conduct of a war, would be just—which included the question of when it would be just to seize the enemy’s goods. After extensively analyzing these issues,<sup>153</sup> Grotius applied his insights to the specific issues between the Dutch and, on the one hand, the people of the East Indies and, on the other hand, the Portuguese and Spanish.<sup>154</sup>

At each point, Grotius concluded, the actions of the Dutch had been just and proper, and they were entitled both to wage war and to take prizes. He explained how the Dutch Republic, which in theory was a rebellious province of the Spanish Empire, could exercise sovereign powers and qualify as an entity capable of

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rights which individuals possess vis-à-vis one another . . . by looking at the rights which sovereign states seem to possess against one another.” *Id.* at 84-85.

<sup>150</sup> Tuck declares that, for Grotius, “there is no significant moral difference between individuals and states,” with the result that “both may use violence in the same way for the same ends.” *Id.* at 85. He adds that “Grotius, like the good humanist he was, had of course endorsed the claim that we may punish men over whom we do not possess political rights.” *Id.* at 89.

<sup>151</sup> GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 49.

<sup>152</sup> *Id.* at 50.

<sup>153</sup> *See id.* at 51-242 (covering chapters iii to x).

<sup>154</sup> *See id.* at 243-436 (covering chapters xi to xiii).

engaging in a just war.<sup>155</sup> He also concluded that “a just cause of war exists when the freedom of trade is being defended against those who would obstruct it,” which meant “the Dutch had a just cause for war against the Portuguese.”<sup>156</sup> This same analysis “should be applied to the [private] cause of the Dutch East India Company, in so far as its recourse to arms on its own behalf is concerned.”<sup>157</sup> The Dutch were also justified in waging war because of “the injuries inflicted upon our people” by the Portuguese and Spanish.<sup>158</sup> And, because the position of the Dutch and of the Company was just, both the Company and the country were allowed to take and keep prizes.<sup>159</sup>

Although Grotius plainly developed the arguments in *The Law of Prize* to serve the interests of his country and his employer, he also appears to have found these arguments convincing and satisfying on a personal level—which is no surprise given his identification with the interests of his country and the company.<sup>160</sup> And this point introduces the third reason that *The Law of Prize* is important. It does not only exhibit a Grotius who was deeply engaged in the major events of his day. It was also an important source for – arguably even a first draft of – *The Rights of War and Peace*.<sup>161</sup>

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<sup>155</sup> See *id.* at 392-95; see also Porras, note 96, at 780-81 (describing Grotius’s argument that Holland could legitimately wage war against Spain because Spain had attempted to usurp powers retained by the Dutch government); TUCK, *supra* note 89.

<sup>156</sup> GROTIUS, LAW OF PRIZE, *supra* note 119, at 363.

<sup>157</sup> *Id.* at 389. In fact, the public and the private were one and the same. The commanders of the Company’s ships also had official commissions from Prince Maurits, who was high admiral of the United Provinces. See van Ittersum, *supra* note 109, at 253 (arguing that such commissions made those commanders agents of the Dutch state).

<sup>158</sup> GROTIUS, LAW OF PRIZE, *supra* note 119, at 403.

<sup>159</sup> *Id.* at 429-31.

<sup>160</sup> See VAN ITTERSUM, *supra* note 20, at 108.

<sup>161</sup> See Bull, *supra* note 59, at 71 (asserting *The Law of Prize* had a formative effect on Grotius’s later works); see also DUMBAULD, *supra* note 111, at 23, 41, 54; KNIGHT, *supra* note 109, at 80, 84; Peter Haggemacher, *Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 59, at 133, 145; Tuck, *supra* note 17, at xvii.

### 3.1.3. Lobbying, Diplomacy, and The Free Sea

Grotius never published *The Law of Prize*, apparently because it was superseded by events and was no longer important to the Company.<sup>162</sup> But he continued to work for the Company while also occupying official positions. For example, Grotius took part in the 1607-09 peace talks between the United Provinces and Spain that led to the Twelve Years Truce. He was involved both as a representative of the Company and as a close associate of Johan van Oldenbarnevelt, who held the high office of Land's Advocate for Holland and was also "in effect the prime minister of the Dutch Republic."<sup>163</sup>

During this period, Grotius also had a role in changes to the structure of the Company—including the creation of the position of Governor-General for the East Indies—that supported the creation of a Dutch mercantile empire in addition to a trading system. Indeed, van Ittersum contends that Grotius had "imperial ambitions for the Company."<sup>164</sup> The publication of *The Free Sea* in 1609 supports her contention.

During the Dutch-Spanish negotiations, a group of the Company's directors asked Grotius to publish part of *The Law of Prize* to strengthen the Dutch position and, in particular, to respond to the Spanish argument that the Dutch should abandon or curtail their trading efforts in the East Indies.<sup>165</sup> Grotius lifted out much of Chapter XII and made extensive edits to prepare it for publication as a separate, anonymous pamphlet. Because the United Provinces were negotiating a truce with Spain, Grotius toned down the original manuscript's criticisms of Spain; he also

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<sup>162</sup> See VAN ITTERSUM, *supra* note 20, at 188 (indicating that publication was halted due to political happenings).

<sup>163</sup> Tuck, *supra* note 17, at xiii. On Grotius's involvement, see VAN ITTERSUM, *supra* note 20, at 189-294, 331-44, 351-58. On Oldenbarnevelt, who was also a family friend, see *id.* at xxiv. Grotius may have been less committed than Oldenbarnevelt to peace with Spain, perhaps because of his closer association with the Company. See generally C.G. Roelofsen, *Grotius and the Development of International Relations Theory: "The Long Seventeenth Century" and the Elaboration of a European States System*, 17 QUINNIPIAC L. REV. 35, 52 (1997).

<sup>164</sup> VAN ITTERSUM, *supra* note 20, at 354.

<sup>165</sup> See *id.* at 279, 281-82, 331-42 (outlining Grotius's contributions to the peace negotiations between the United Provinces and their former rulers).

delayed publication until the truce was signed, at the request of Oldenbarnevelt.<sup>166</sup>

*The Free Sea*,<sup>167</sup> as the pamphlet was titled, quickly became influential because its arguments had broad application to “contemporary disputes regarding the freedom of navigation, trade, and fishing.”<sup>168</sup> But its immediate purpose was to “legitimize the continuation of the war in the East Indies during the Twelve Years’ Truce, something that Grotius and the [Company] directors had expected (and hoped for) all along.”<sup>169</sup>

*The Free Sea* contains two primary arguments. Most famous is the one suggested by the title. The Portuguese could not restrict Dutch ships from traveling to the East Indies because they did not own the sea. The sea, Grotius declared, is “common to all and proper to none.”<sup>170</sup> He also insisted the shore is similar to the sea — no one can wholly exclude another from the shore even if it is possible to exercise some property rights over it.<sup>171</sup> The point of this argument, again, was to deny the claims of the Spanish and Portuguese and uphold the claims and interests of the Dutch.

But Grotius also attacked the claim that the Portuguese could have any kind of lawful possession of the islands in the East Indies. They could not claim the islands by right of discovery, because Europeans long had known about them. Nor could they claim the islands were otherwise available for possession because the islands already had owners: the people who lived on them.<sup>172</sup> “These

<sup>166</sup> See generally, van Ittersum, *supra* note 109, at 256, 259–60, 273–74.

<sup>167</sup> HUGO GROTIUS, *THE FREE SEA [MARE LIBERUM]* (David Armitage ed., Richard Hakluyt trans., 2004) (1609).

<sup>168</sup> David Armitage, *Introduction*, in *id.* at xviii.

<sup>169</sup> VAN ITTERSUM, *supra* note 20, at 327. See also GROTIUS, *FREE SEA*, *supra* note 167, at xviii (noting after the truce was signed, “Grotius’ arguments could still justify the [Company’s] encroachment on the Portuguese colonial empire, despite the armistice in Europe”); KNIGHT, *supra* note 109, at 103–07 (arguing Grotius’s works were used to perpetuate conflict between the Company and the Portuguese Empire); Roelofsen, *supra* note 109, at 106–12 (pointing out that *The Free Sea* meshed well with Dutch foreign policy).

<sup>170</sup> GROTIUS, *FREE SEA*, *supra* note 167, at 25. See also GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 322–23. Throughout this discussion, I will also cite the analogous but earlier language in *The Law of Prize*.

<sup>171</sup> See GROTIUS, *FREE SEA*, *supra* note 167, at 26–27. See also GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 323–25.

<sup>172</sup> See GROTIUS, *FREE SEA*, *supra* note 167, at 14–15. See also GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 307–08.

islands we speak of have, and always had, their kings, their commonwealth, their laws and their liberties."<sup>173</sup>

The primary goal of this second set of arguments, like the first, was to disentitle Portuguese (and, by extension, Spanish) claims and to justify Dutch trading activity. But Grotius also made clear in an unpublished part of *The Law of Prize* that he saw the inhabitants of the East Indies both as allies and as people oppressed by the Portuguese and Spanish.<sup>174</sup> Even more, as he wrote in both books, they had the same natural rights as the Europeans. Thus, they had "authority over their own substance and possessions which without just cause could not be taken from them."<sup>175</sup> These rights of property were equal to those of European traders.<sup>176</sup> This meant in turn that both the Dutch and the peoples of the East Indies were free to enter into trading contracts with each other, because "liberty of trading is agreeable to the primary law of nations," and no nation "may justly hinder two nations that are willing to trade between themselves."<sup>177</sup>

What followed from these arguments? At a general level, Grotius's analysis, derived from *The Law of Prize*, rested on the idea of a law of nature and a law of nations that were universal and

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<sup>173</sup> GROTIUS, *FREE SEA*, *supra* note 167, at 13. See also GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 306.

<sup>174</sup> See GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 296-98. See also VAN ITTERSUM, *PROFIT*, *supra* note 20, at 359-60 (explaining the Company earned trust by ousting the Spanish and Portuguese from the East Indies).

<sup>175</sup> GROTIUS, *FREE SEA*, *supra* note 167, at 14. See also GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 308.

<sup>176</sup> Grotius paraphrased Francisco de Vitoria: "Victoria therefore rightly saith that the Spaniards got no more authority over the Indians for this cause than the Indians had over the Spaniards if any of them had come formerly into Spain." GROTIUS, *FREE SEA*, *supra* note 167, at 15. See also GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 308 (also relying on Vitoria). For Vitoria's statement, see Francisco de Vitoria, *On the American Indians (De Indes)*, in VITORIA: *POLITICAL WRITINGS* 231, 233, 264-65 (Anthony Pagden & Jeremy Lawrence eds., 1991) ("[T]he barbarians possessed true public and private dominion. The law of nations . . . expressly states that goods which belong to no owner pass to the occupier. Since the goods in question here had an owner, they do not fall under this title. . . . [O]f itself it provides no support for possession of these lands, any more than it would if they had discovered us.").

<sup>177</sup> GROTIUS, *FREE SEA*, *supra* note 167, at 51. See also GROTIUS, *LAW OF PRIZE*, *supra* note 119, at 356-57; VAN ITTERSUM, *supra* note 20, at 359 (arguing Grotius used a natural rights theory that "assumed the full humanity and unencumbered sovereignty of indigenous peoples, who were, essentially, rights-bearing individuals" to justify the Company's aggression against the Portuguese).

apparently did not depend upon religious or cultural commitments. At the more concrete level of application, however, Grotius concluded *The Free Sea* by reiterating that the Dutch had the right to go where they wanted to go on the high seas and to trade with whomever they wanted to trade, “whether we have peace, truce or war with the Spaniard.”<sup>178</sup> And if the Spanish or Portuguese were to dispute or interfere with these natural rights, then “proceed, thou most invincible nation on the sea, and boldly fight not only for thine own liberty but for the freedom and liberty of all mankind!”<sup>179</sup>

#### 3.1.4. *Pacta Sunt Servanda*

During the Twelve Year Truce, a new challenge arose. English merchants began to avail themselves of the same navigation and trading rights that the Dutch claimed for themselves. Even worse, they started offering better prices to people in the East Indies, who therefore stopped complying with the exclusive agreements into which they had entered with the Dutch. The Dutch “resorted to harassment and intimidation, and, increasingly, the use of force in order to make the natives honor the delivery contracts.”<sup>180</sup> Tensions rose between the United Provinces and England, and they held a series of conferences on these issues, which they were not able to resolve until 1619, after Grotius had fallen from power and influence. But, Grotius was active in the 1613 and 1615 conferences, once again in his dual role of government official and Company lawyer.<sup>181</sup> His efforts to defend Dutch interests required him to apply his earlier writing to a new situation.

In his dealings with the English, Grotius prepared a series of memoranda on which he argued they could not have unfettered access to the East Indies. Free trade was not something that existed in the abstract; the Dutch had earned it by taking risks, while the English sought merely to take advantage of Dutch efforts.<sup>182</sup> Even more, the agreements between the Dutch and the peoples of the East Indies were not simple commercial contracts. The mutual

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<sup>178</sup> GROTIUS, *FREE SEA*, *supra* note 167, at 57.

<sup>179</sup> *Id.* at 58.

<sup>180</sup> VAN ITTERSUM, *supra* note 20, at 360.

<sup>181</sup> *See id.* at 358–95, 481–83.

<sup>182</sup> *See id.* at 384 (discussing Grotius’s assertion that the Dutch, not the English, had been the first to establish certain trading posts).

obligations between the Company and the rulers of the various islands made the agreements more like treaties.<sup>183</sup> The Dutch, therefore, were doubly wronged, first by their treaty partners who violated agreements, and second by the English who intentionally interfered with those agreements.<sup>184</sup>

To ground these arguments, Grotius returned to the idea that the peoples of the East Indies had the same natural rights as Europeans, which included the right to enter into and bind themselves by contracts. But these treaty-like contracts could not be governed by municipal law. Instead, they were subject to natural law, specifically the obligation to honor covenants. Going further, Grotius addressed the claim that the agreements were unfair and, therefore, not binding, by making an argument that would return in *The Rights of War and Peace*: the validity of the unequal treaty. History afforded examples of people selling themselves into slavery to obtain security, so that “[t]he inhabitants of the Spice Islands were much more fortunate: they might have lost their self-determination in economic affairs, but not in any other sense.”<sup>185</sup>

Grotius also returned to the idea of private war. As he argued, “in the absence of an independent and effective judge” – of which there were none available in the East Indies – “each private person resumed his sovereign powers and executed judgment in his own cause.”<sup>186</sup> That is to say, Company commanders could take up arms against the English and the islanders to protect and enforce

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<sup>183</sup> See *id.* at 385 (describing Grotius’s assertions about the relationship between the Company and the people of the Spice Islands).

<sup>184</sup> See *id.* at 361–62 (explaining Grotius’s position that “even though [they] were not guilty of breach of contract themselves,” the English “blatantly disregarded the . . . principle *pacta sunt servanda* (contracts must be honored)” because they provided the natives with firearms and a higher price for local products, thus leading the natives to break their promise to deliver goods to the Dutch).

<sup>185</sup> *Id.* at 362, 387. See also 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17 at 826–28 (citing historical examples of peoples who have been part of “unequal [a]lliance[s]”). Grotius was careful to insist the Dutch did not have sovereignty over any territory in the East Indies, perhaps because that would have created an obligation on their part to respect rights of free trade. See VAN ITERSUM, *supra* note 20, at 385–86 (discussing Grotius’s insistence that formal sovereignty remained with the indigenous population).

<sup>186</sup> VAN ITERSUM, *supra* note 20, at xxiii.



the Company's treaty rights.<sup>187</sup> More bluntly, the Dutch could use violence to enforce unequal treaties that laid the groundwork for a Dutch empire.

Grotius consistently maintained the virtue of the Dutch position against English intrusions—just as he had earlier asserted the virtue of the Dutch against the Portuguese and Spanish. But “[i]t was clear from the sources at his disposal that [Company] officials in the Spice Islands used both fair means and foul to get rid of English interlopers, with little regard for the liberty and sovereignty of the natives.”<sup>188</sup> Thus, Grotius pressed his arguments about natural rights, the sanctity of treaties, and the legitimacy of private enforcement through force of arms against a background of Dutch violence of which he ought to have been aware. To the extent Grotius was aware of this violence, his arguments about consent and contract appear in a different light.<sup>189</sup>

Grotius's first application of *pacta sunt servanda*—an idea that would later be called “the *grund norm* of modern international law”<sup>190</sup>—was thus to prevent the English from interfering in unequal treaties between the Dutch and the soon-to-be-colonized people of the Spice Islands, and to force those people to adhere to those agreements. Grotius's legal arguments, moreover, are completely consistent with the ways in which, according to at least some scholars, “treasured icons” of European modernity, such as liberalism and nationalism, developed through colonial practices.<sup>191</sup>

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<sup>187</sup> See *id.* at xxii, 388 (explaining Grotius favored the idea of Company Commanders taking justice into their own hands). And, of course, the Company commanders also held commissions from Prince Maurits, so that their actions were arguably public as well as private. See *supra* note 157 and accompanying text.

<sup>188</sup> VAN ITTERSUM, *supra* note 20, at 483.

<sup>189</sup> See also *id.* at 265 (contending Grotius's theories about natural rights translated in his lifetime into colonial policies of acquiring possession to land and entering into treaties with native rulers that bound those rulers and their people to Dutch interests).

<sup>190</sup> SCHARF, *supra* note 14, at 20 (citing MAURICE H. MENDELSON, *THE FORMATION OF CUSTOMARY INTERNATIONAL LAW* 183 (1998)). See also Lauterpacht, *Grobian Tradition*, *supra* note 9, at 43 (“[T]he rule *pacta sunt servanda* is the initial hypothesis of the law of nations.”).

<sup>191</sup> ANN LAURA STOLER, *CARNAL KNOWLEDGE AND IMPERIAL POWER: RACE AND THE INTIMATE IN COLONIAL RULE* 146–47 (2002) (arguing “those most treasured icons of modern Western culture—liberalism, nationalism, state welfare, citizenship, culture, and ‘Europeanness’ itself” were “clarified among Europe's

Several commentators have bemoaned what they see as Grotius's willingness at the Anglo-Dutch conferences to soft-pedal the views that he had published only a few years earlier in *The Free Sea*.<sup>192</sup> This position, and the debate it generates, depends in part on the idea that Grotius was a disinterested or at least not politically active scholar before the 1613 conference and that he modified his scholarly ideas under pressure. But it seems clear that Grotius always viewed *The Law of Prize*, and the excerpt that became *The Free Sea*, as works of advocacy, even as he also believed that his theories and conclusions were sound. After all, as an attorney, a government official, and a diplomat, he was not merely a mouthpiece; he was an active agent in the development of Dutch policy and was also deeply committed to Dutch interests.

Thus, van Ittersum suggests a nuanced assessment that is consistent with Grotius's varied commitments: Grotius was careful in his arguments at the trade conferences not to write anything "that was in formal contradiction" with *The Law of Prize*, "[y]et he certainly reformulated his argument and extended it in new directions."<sup>193</sup> But even that assessment may nod too much in the direction of the Grotian tradition. Yes, Grotius extended his arguments, but his position at the Anglo-Dutch conferences is consistent with what he wrote in *The Law of Prize* and *The Free Sea* about the natural law rights to contract and to enforce contracts by violence. Those were always arguments in which clear rules would apply regardless of differences in power or information. What is different here is the context in which Grotius articulated his theories, which in turn made it harder for him to maintain the

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colonial exiles in Asia, Africa, and Latin America and only then brought 'home'); cf. KEENE, *supra* note 18, at 45-57.

<sup>192</sup> See generally KNIGHT, *supra* note 109, at 138-42. For the importance of the negotiations to the idea of a Grotian tradition, compare Guy Ladreit de Lacharrière, *The Controversy Surrounding the Consistency of the Position Adopted by Grotius*, in INTERNATIONAL LAW AND THE GROTIAN HERITAGE, *supra* note 94, at 207 (suggesting Grotius was a good lawyer who tailored his arguments to the needs of his client over time), with M. Bos, *Response*, in INTERNATIONAL LAW AND THE GROTIAN HERITAGE, *supra* note 94 at 221, 223 ("I doubt whether it is right to suggest that it was his clients' interests that shaped his convictions. The suggestion does not fit the depths of Grotius' personality, it underestimates his *noblesse de caractère*. Grotius was more than advocate, more than the servant of his clients.").

<sup>193</sup> VAN ITTERSUM, *supra* note 20, at 370.

tone of moralism and wounded outrage that had characterized his earlier work.

Whether one accepts van Ittersum's assessment or the one I have suggested, one must then also at least consider whether or to what extent this combination of lawyerly skill, formalism, conviction, and service to Dutch interests also shaped *The Rights of War and Peace*.<sup>194</sup> And, in fact, the case has been made in part already, with respect to Grotius's discussion of free trade and exclusive treaties in the later work.<sup>195</sup>

### 3.1.5. *Revolt and Exile*

In 1613, the year of the first Anglo-Dutch conference, Oldenbarnevelt obtained Grotius's appointment as pensionary of Rotterdam.<sup>196</sup> This new position coincided with a broader scope of political activity—including engagement with the religious issues Grotius already had begun to address in his writings.<sup>197</sup> Protestants ruled the United Provinces, but they were split into two factions: Arminians, or Remonstrants, controlled Holland and Utrecht, but the rest of the United Provinces were dominated by more orthodox Calvinists, or Counter-Remonstrants.<sup>198</sup> In general, Arminians supported a degree of religious toleration—which would allow them to exist alongside Calvinists—even though politically many Arminian leaders sought to continue Holland's hegemony over the rest of the United Provinces (a policy that Grotius also supported).<sup>199</sup> Calvinists, again in general, favored a

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<sup>194</sup> See Roelofsen, *supra* note 109, at 131 ("That [Grotius wrote] with a political purpose is of course clear as regards *Mare Liberum*, but applies also, though much more subtly, to *De Jure Belli ac Pacis*.").

<sup>195</sup> See Rosalyn Higgins, *Grotius and the Development of International Law in the United Nations Period*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 59, at 267, 279 (suggesting a link between the Dutch East India Company's successful conclusion of several treaties creating exclusive trade rights, and the approval of such treaties in *The Rights of War and Peace*); B.V.A. Röling, *Are Grotius's Ideas Obsolete in an Expanded World?*, in HUGO GROTIUS AND INTERNATIONAL RELATIONS, *supra* note 59, at 281, 281-82 & n.1 (making the same point as Higgins).

<sup>196</sup> ISRAEL, *supra* note 20, at 428.

<sup>197</sup> *Id.* at 428-29.

<sup>198</sup> EDWARDS, *supra* note 109, at 3.

<sup>199</sup> See *id.* (stating Arminius "came to doubt the rigid doctrine of unconditional predestination, and to ascribe to man a moral freedom which was contradictory to conservative Calvinism"); see also KNIGHT, *supra* note 109, at 148-

closer relationship between church and state, and of central or federal government control over the various provinces (perhaps in part to control Holland), and they were suspicious of negotiations with Spain.<sup>200</sup> They also had the support of Prince Maurits.<sup>201</sup> Maurits was Stadholder of five of the seven provinces, including Holland, and both he and his father had already played crucial roles in establishing and maintaining Dutch independence.<sup>202</sup>

Although Grotius initially sought to remain neutral in the Arminian-Calvinist controversy, “he abandoned his neutrality [in late 1613], siding categorically with Oldenbarnevelt and the Remonstrants” and becoming “an indefatigable participant in the fray.”<sup>203</sup> During this period, Grotius did not publicly propose full religious toleration. His focus was on a tolerant unity among Dutch Protestant churches; in fact, it was only later, while in exile, that he announced his willingness to tolerate Lutherans.<sup>204</sup> Rather, he advocated “liberty of conscience but within a strong public (or

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49 (stating Grotius’s belief “that Holland should enjoy the hegemony of the Dutch Netherlands, even at the cost of an almost enslaved United Provinces and central national Government”). For Holland’s extensive influence on the structure of the United Provinces, see ISRAEL, *supra* note 20, at 277.

<sup>200</sup> See EDWARDS, *supra* note 109, at 3–4 (stating the anti-Arminian faction known as the Gomarists advocated for the Calvinist state church, and a greater degree of centralized government power); ISRAEL, *supra* note 20, at 434 (describing Maurits’s position at the time—to remain moderate and avoid further destabilization); KNIGHT, *supra* note 109, at 153–54 (stating the Calvinists supported a centralized government as opposed to the Arminians who supported the provinces and the oligarchs who ruled them); Tuck, *supra* note 17, at xiv (“[B]roadly speaking, the Calvinist Church and its ministry looked to the princes of the House of Orange to secure its power over the population . . .”).

<sup>201</sup> EDWARDS, *supra* note 109, at 3–4.

<sup>202</sup> See *id.* (stating Maurits aligned with the Calvinist Counter Remonstrant causes to expand his authority over the central government); KNIGHT, *supra* note 109, at 153–54 (contending Maurits used the conflict between Calvinists and Arminians to centralize his power). Each province had at least the nominal ability to select its own stadholder, who commanded its military forces. See ISRAEL, *supra* note 20, at 301–04. But “the stadholderate, as such, was essentially a non-military office, carrying powers and responsibilities relating to the political process and administration of justice. The Stadholder . . . was the highest-ranking officeholder and dignitary in each province.” *Id.* at 305.

<sup>203</sup> ISRAEL, *supra* note 20, at 429. See also Roelofsen, *supra* note 109, at 117 (stating Grotius defended the states of Holland).

<sup>204</sup> See ISRAEL, *supra* note 20, at 430, 502–03 (discussing changes in Grotius’s toleration of other religions); Nellen, *supra* note 33, at 18 (“Before 1618 Grotius envisaged his ideal of church unity within the framework of the Protestant churches.”).

state) Church which would overwhelmingly—to an extent coercively—dominate, in the sphere of religion, for purposes political and social, as much as spiritual.”<sup>205</sup>

Grotius and Oldenbarnevelt were unable to garner enough support for this political settlement, which also would have allowed each province to decide its own religious doctrine.<sup>206</sup> Maurits in particular refused to approve Grotius’s plan, and the political situation continued to deteriorate in 1617 and 1618.<sup>207</sup> Unrest also grew among the artisan class who were suffering economically under Oldenbarnevelt’s policies—and support of the Calvinists tended to align with opposition to those policies.<sup>208</sup> Maurits was a popular leader, and the unrest played into his hands, because “he at least stood for central government and the curbing of the power of the local oligarchies.”<sup>209</sup> By contrast, while Grotius sought compromise, he may also have been seen as—and may in fact have been—trying to protect the interests of his class in Holland. Be that as it may, to the Arminian political leaders and their supporters, these developments were a harbinger of repression at the hands of the more numerous Calvinists.<sup>210</sup>

In response both to popular unrest and the threat of Calvinist repression, the government of Holland—controlled, in large part, by Oldenbarnevelt and Grotius—authorized the cities of the

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<sup>205</sup> ISRAEL, *supra* note 20, at 430. See also *id.* at 505 (asserting that, for Grotius, “toleration . . . could only be safe in the hands of the Republic’s proper ruling élite”); Nellen, *supra* note 33, at 25 (noting Grotius advocated tolerance within a state-controlled church). Grotius may later have become less enamored of a state church, as evidenced by his criticism of Hobbes’s view that people could be required to adhere to an official religion. See JEFFERY, *supra* note 21, at 10–11, 54. On these issues, however, the details were always crucial. Cf. HARRISON, *supra* note 35, at 167 (“The most vigorous disputes in England [in the 1600s] were not in fact about central issues of doctrine but rather about apparently trivial variations in how people behaved in church . . .”).

<sup>206</sup> See ISRAEL, *supra* note 20, at 431–32 (chronicling efforts by Grotius and Oldenbarnevelt to find agreement among the Remonstrant and Counter-Remonstrant factions).

<sup>207</sup> *Id.* at 436–39.

<sup>208</sup> *Id.*

<sup>209</sup> KNIGHT, *supra* note 109, at 154.

<sup>210</sup> See *id.* (arguing the Calvinists’s determination to assert their power, “was, in short, a Calvinistic declaration of war—clear indication of an intention to give no quarter to Arminianism”); see also Roelofsen, *supra* note 163, at 55 (noting Grotius’s elitism with respect to political and religious matters in Holland).

province to raise their own militias to restore order.<sup>211</sup> Utrecht followed suit.<sup>212</sup> In keeping with Grotius's views, the government also declared that military officers from Holland owed primary allegiance to Holland, not to the United Provinces or Maurits.<sup>213</sup> These actions were effectively an "assertion that sovereignty, in the United Provinces, lay entirely in the provinces" except with respect to matters delegated to the States-General—which again in Grotius's view, did not include religion.<sup>214</sup>

Maurits organized the opposition to Holland's actions, and he advanced the political position that the States-General had the authority to settle "all differences and difficulties of importance" in the United Provinces—essentially a declaration that the individual provinces had limited sovereignty.<sup>215</sup> The States-General ordered Holland and Utrecht to disband the militias, but they refused, claiming they were sovereign states and threatening to withhold their financial contributions to the States-General.<sup>216</sup> In the eyes of Maurits and other Calvinists, Holland and Utrecht "had overturned the fundamental principles of the Union."<sup>217</sup> Maurits responded by marching through the two provinces with a body of troops.<sup>218</sup> He met no opposition and was able to disband the

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<sup>211</sup> ISRAEL, *supra* note 20, at 441; KNIGHT, *supra* note 109, at 155.

<sup>212</sup> ISRAEL, *supra* note 20, at 441–42.

<sup>213</sup> *Id.* at 441.

<sup>214</sup> *Id.* See also *id.* at 446–47 (discussing Grotius's view of the relationship between political sovereignty and religion, and noting each province was "fully sovereign" when it came to religion). Tuck suggests this was Grotius's consistent position on sovereignty within the United Provinces, and he links it to his claim that, for Grotius, states were "sovereign in a strong sense." TUCK, *supra* note 89, at 82–84. Keene, by contrast, argues Grotius's writings on the Dutch revolt mirror his more general theoretical position that sovereignty can be divided, such that the holder of one part of the sovereignty can wage "a just public war" against the entity that holds another party of the sovereignty, which in turn Keene uses to refute the claim that Grotius was committed to an absolutist version of sovereignty. KEENE, *supra* note 18, at 44–48. See also Gustaaf van Nifterik, *Hugo Grotius, Privileges, Fundamental Laws and Rights*, 32 GROTIANA 1, 7–15 (2011) (discussing Grotius's arguments on sovereignty in 1617–22). My sense is that, for Grotius, sovereignty was necessarily a work in progress within the republic, which allowed him to advance this version of divided sovereignty at a point of crisis, even if he might have taken a somewhat different view had his and Oldenbarnevelt's original plans succeeded.

<sup>215</sup> ISRAEL, *supra* note 20, at 441–44, 446–47.

<sup>216</sup> *Id.* at 444–45.

<sup>217</sup> *Id.* at 447.

<sup>218</sup> KNIGHT, *supra* note 109, at 156.

militias, imprison Grotius and Oldenbarnevelt, and purge Arminians from positions of authority.<sup>219</sup>

Grotius wrote to Maurits from prison, “skillfully throwing all the blame upon [Oldenbarnevelt] and suing for the Prince’s mercy,” but he was unable to obtain his freedom.<sup>220</sup> The States-General convened an ad hoc tribunal to try both men.<sup>221</sup> Grotius and Oldenbarnevelt contested the tribunal’s jurisdiction over them and claimed they could only be tried by their sovereign government of Holland.<sup>222</sup> Their arguments were unavailing, and the tribunal found both men guilty of treason.<sup>223</sup> Oldenbarnevelt was executed, while Grotius was sentenced to life in prison and his property was confiscated.<sup>224</sup>

At the same time that Grotius found himself on the losing end of political/religious violence, Europe was descending into the Thirty Years War.<sup>225</sup> This development, which for the Dutch threatened the renewal of what must have seemed an eternal war with Spain,<sup>226</sup> easily could have influenced Grotius’s choice of activities during his confinement and in France after his escape from prison in 1621.<sup>227</sup> Among other things, Grotius returned to his unpublished *Law of Prize* and to the related topics of

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<sup>219</sup> For descriptions about the events surrounding Grotius’s arrest, see DUMBAULD, *supra* note 111, at 12; EDWARDS, *supra* note 109, at 4–5; ISRAEL, *supra* note 20, at 448–49, 451–54, 457–58, 460–63; KNIGHT, *supra* note 109, at 155–58 (same); and Tuck, *supra* note 17, at xiv–xv.

<sup>220</sup> KNIGHT, *supra* note 109, at 158. See also Roelofsen, *supra* note 109, at 118–19 (stating Grotius’s pleas were not able to persuade Prince Maurits because “Grotius had rendered himself particularly odious to Mauri[ts]”).

<sup>221</sup> DUMBAULD, *supra* note 111, at 12.

<sup>222</sup> *Id.* at 13; ISRAEL, *supra* note 20, at 458–59.

<sup>223</sup> ISRAEL, *supra* note 20, at 459.

<sup>224</sup> For sources recounting the events surrounding Grotius’s and Oldenbarnevelt’s trials, see DUMBAULD, *supra* note 111, at 12–13; EDWARDS, *supra* note 109, at 4–5; ISRAEL, *supra* note 20, at 458–59; and KNIGHT, *supra* note 109, at 159–61.

<sup>225</sup> For a history of the war, see C.V. WEDGWOOD, *THE THIRTY YEARS WAR* (1938).

<sup>226</sup> See HARRISON, *supra* note 35, at 134–35 (noting Grotius lived with war nearly his entire life); SCHARF, *supra* note 14, at 14–15 (making the same point).

<sup>227</sup> See EDWARDS, *supra* note 109, at 5–6 (recounting the events leading up to Grotius’s escape); KNIGHT, *supra* note 109, at 162–63 (telling the tale of Grotius’s escape); Tuck, *supra* note 17, at xvi (discussing Grotius’s activities in prison and in France after escaping).

jurisprudence and international law.<sup>228</sup> W.S. Knight suggests Grotius's scholarly goals were at least partly mercenary, stating that, "[a]s author of an authoritative work on the Law of Nature and Nations, he would have credentials for public employment which, added to the influence of his personal friends, would be certain of appreciation in the highest circles of Government in any European State."<sup>229</sup> Be that as it may, the result was the publication in 1625 of *The Rights of War and Peace*.

Grotius appears to have been torn about his next steps. He carefully monitored and wrote about commercial, political, and religious developments in Holland,<sup>230</sup> and he held out hopes of returning.<sup>231</sup> At the same time, however, Grotius had opportunities for employment with Denmark and France, and his correspondence reflects uncertainty about what path to take.<sup>232</sup>

In 1631, Grotius briefly returned to Holland, hoping for permission to remain from the new Stadholder, Frederik Hendrik, who had taken office on his brother's death.<sup>233</sup> He almost certainly also hoped to return to public life—his first appearance after settling in Rotterdam “was to visit the town's celebrated statue [of the controversial humanist, Erasmus] to ‘show my affection for the memory of [the man] who . . . showed the way to the right kind of

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<sup>228</sup> Tuck, *supra* note 17, at xvii (asserting Grotius “must have” returned to the manuscript of *The Law of Prize* while in prison); van Ittersum, *supra* note 107, at 391 (noting a letter written from prison in which Grotius claimed to have “resumed ‘the study of jurisprudence [*iuris studium*], which had been interrupted by all my affairs’”) (alteration in original) (citation omitted).

<sup>229</sup> KNIGHT, *supra* note 109, at 191. See also Lauterpacht, *Grotian Tradition*, *supra* note 9, at 13 (suggesting Grotius may have written *The Rights of War and Peace* “with an eye to diplomatic employment”). Whether Grotius actually intended to write “an authoritative work on the Law of Nature and Nations,” or whether he intended to write something narrower on the law of war—as evidenced by the title—has been disputed. Compare Haggenmacher, *supra* note 161, at 156–59 (arguing *The Rights of War and Peace* is about the law of war, not international law in general), and Peter Haggenmacher, *On Assessing the Grotian Heritage*, in INTERNATIONAL LAW AND THE GROTIAN HERITAGE, *supra* note 94, at 152–56 (presenting a similar argument), with Nellen, *supra* note 33, at 28 (noting Grotius's later statement that one purpose of the book was “to introduce young lawyers to the science of law”).

<sup>230</sup> ISRAEL, *supra* note 20, at 501–02, 505, 511.

<sup>231</sup> See Roelofsen, *supra* note 109, at 122–23 (discussing Grotius's desire to return to public life in Holland).

<sup>232</sup> See van Ittersum, *supra* note 107, at 393–95 (detailing the various employment opportunities described in his correspondences).

<sup>233</sup> *Id.* at 395–96.



Reformation’.”<sup>234</sup> While in Holland, he also prepared a new edition of *The Rights of War and Peace* in which “some of his more disturbing claims were modified,” with the goal, according to Tuck but disputed by others, of “win[ning] over his Dutch opponents.”<sup>235</sup> In particular, he edited the Prolegomena to deemphasize further the role of self-interest and to “widen the scope of God’s authority.”<sup>236</sup> He also performed legal work for another Dutch mercantile enterprise, the Northern Company, in support of its effort to exclude British and Danish whaling vessels from competing with it in the waters around Spitsbergen.<sup>237</sup> Similar to his participation in the earlier negotiations with England, Grotius had to grapple with the implications of his earlier writings. According to van Ittersum, “[h]is legal opinion of March 1632 successfully reconciled the freedom of the seas with the titles of ‘discovery’ and ‘actual possession’, largely by fine-tuning the arguments of *Mare Liberum* and *De Jure Belli ac Pacis*.”<sup>238</sup>

But Grotius’s efforts to reinsert himself into Dutch commercial and political life were unavailing. The towns of Holland voted against an amnesty and ordered him to leave the country.<sup>239</sup> Grotius subsequently accepted a position as Sweden’s ambassador to France.<sup>240</sup> Over time, his Dutch patriotism ebbed, as did his focus on religious toleration and accommodation within an exclusively Protestant framework.<sup>241</sup> Yet he remained sufficiently

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<sup>234</sup> ISRAEL, *supra* note 20, at 514.

<sup>235</sup> Tuck, *supra* note 17, at xv. Henk Nellen objects that this submissive approach “would be totally incompatible with the approach Grotius observed towards the fatherland in his correspondence after 1621.” Henk Nellen, *On the Occasion of the Acquisition of the First Edition of De iure belli ac pacis by the Peace Palace Library*, 33 *GROTIANA* 1, 14 (2012). Nellen also describes the publication history of the first edition and confirms the importance of distinguishing among editions. *See id.* at 14–15.

<sup>236</sup> Tuck, *supra* note 17, at xxv.

<sup>237</sup> *See* van Ittersum, *supra* note 107, at 396 (describing the background and circumstances which led Grotius to write a legal opinion for the Northern Company).

<sup>238</sup> *Id.* at 397 (citations omitted).

<sup>239</sup> ISRAEL, *supra* note 20, at 514–15; van Ittersum, *supra* note 107, at 398. *See also* JEFFERY, *supra* note 21, at 13–14 (providing additional information about Grotius’s efforts to return to Holland and the opposition to his return); Roelofsen, *supra* note 109, at 126–27 (same).

<sup>240</sup> van Ittersum, *supra* note 107, at 398.

<sup>241</sup> Nellen, *supra* note 235, at 17–19.

interested in the Dutch political and commercial cause (and the cause of his family) that he went on giving advice to his former colleagues.<sup>242</sup> He, his brother, and his son all made free use of *The Rights of War and Peace* as an authority in support of Dutch interests.<sup>243</sup>

As a Swedish ambassador, Grotius was involved in issues relating to the Thirty Years War, but disputes exist about how effective he was.<sup>244</sup> There is no indication that he did much to advance peace or to mitigate the brutality of the war. He may have deplored the war's excesses, but he willingly advanced the interests of a monarchy that was prosecuting that war.<sup>245</sup> Sweden "passed over Grotius in putting together their delegation to the Westphalia conference in 1643," but that decision may have had as much to do with internal Swedish politics as with any dissatisfaction with Grotius.<sup>246</sup> Whatever the reason for that decision, Grotius lost his position the next year and died in 1645, before the end of the war.<sup>247</sup>

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<sup>242</sup> See van Ittersum, *supra* note 107, at 399–406 (discussing Grotius's continued efforts to provide advice to the Company and his desire to advance the careers of his sons).

<sup>243</sup> See *id.*

<sup>244</sup> Compare Bull, *supra* note 59, at 69 ("Grotius does not seem to have been a success as a diplomatist."), and JEFFERY, *supra* note 21, at 14 ("Grotius was a particularly poorly skilled diplomat who did not care much for the profession."), with Roelofsen, *supra* note 109, at 128–29 (opining that Grotius "admirably fulfilled" the duties of his diplomatic post, even though he "did not play an important role in Swedish-French negotiations").

<sup>245</sup> C.G. Roelofsen is particularly assertive on this point:

Grotius' Swedish career is interesting mainly for one reason, namely his taking political office under Oxenstierna [the Swedish Chancellor] at all. This in itself goes far to disprove the view of the 'sage of Delft' as a dispassionate prophet of the rule of law. Those who try to give Grotius some credit for promoting the 1648 peace settlement in Westphalia are, in our opinion, taking his own pious utterings in his letters to Dutch friends far too seriously. However reluctantly, it seems that we have to reconcile ourselves to a Grotius acting the part of an ornament to Oxenstierna's war machine. It may have been a somewhat incongruous role, but Grotius stuck to it—albeit it with some hesitations and misgivings.

Roelofsen, *supra* note 109, at 129–30 (footnotes omitted). See also Nellen, *supra* note 33, at 27 (stating "Grotius was not a pacifist" and noting his support for Swedish military expansion).

<sup>246</sup> Bull, *supra* note 59, at 69.

<sup>247</sup> See generally KNIGHT, *supra* note 109, at 224–44, 273–74, 286–88.

### 3.2. *The Rights of War and Peace*

In this section, I will focus on four of the features that Lauterpacht claimed are central to the Grotian tradition: the importance of the law of nature, the natural sociability of humans as the basis for the law of nature, “the fundamental rights and freedoms of the individual,” and the goal of peace or pacifism.<sup>248</sup> Along the way, Lauterpacht’s claims that, for Grotius, all of international relations are subject to law and that Grotius is a progressive figure, also receive attention. My stress here is on the differences between Lauterpacht’s characterizations of *The Rights of War and Peace*, and my reading of that work—where my reading is heavily influenced by the historical narrative in the previous section. Although I am privileging Lauterpacht’s identification and framing of these issues, they are all important to the idea of a Grotian tradition in international law as well as, although to a lesser extent, to the Grotian tradition in international relations theory and the idea of Grotian moments.

#### 3.2.1. *Lauterpacht’s Description of Grotius’s Arguments*

Lauterpacht argued that, for Grotius, “[t]he law of nature . . . is the law which is most in conformity with the social nature of man and the preservation of human society.”<sup>249</sup> Despite some uncertainty, he concluded that “the most frequent use of the notion of the law of nature by Grotius is what we should describe as general principles of law arrived at by way of a generalization and synthesis of the principal systems of jurisprudence.”<sup>250</sup> Lauterpacht also claimed that Grotius had a robust conception of the law of nature as:

the ever-present source for supplementing the voluntary law of nations, for judging its adequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of states cannot be the exclusive or even, in the last resort, the decisive source of the law of nations.<sup>251</sup>

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<sup>248</sup> Lauterpacht, *Grotian Tradition*, *supra* note 9, at 51.

<sup>249</sup> *Id.* at 7.

<sup>250</sup> *Id.* at 9.

<sup>251</sup> *Id.* at 21–22.

As for human sociability, Lauterpacht stressed its importance to international law, because international law is “a law of nature largely based on and deduced from the nature of man as a being intrinsically moved by a desire for social life, endowed with an ample measure of goodness, altruism, and morality, and capable of acting on general principles and of learning from experience.”<sup>252</sup> The difference between humans and animals is that “man” has an “impelling desire for society—not for society of any sort, but for peaceful and organized life according to the measure of his intelligence.”<sup>253</sup>

With respect to fundamental human rights, Lauterpacht admitted that a cursory reading of Grotius is “disillusioning.”<sup>254</sup> He recognized, for example, that Grotius did not value popular sovereignty and rejected a general right of resistance to oppression.<sup>255</sup> But Lauterpacht suggested that Grotius was reflecting “the essential needs of the times” and that he was not alone in recoiling against “[t]he horrors of civil war.”<sup>256</sup> As for Grotius’s approval of people selling themselves into slavery, his views were actually “humanitarian,” because enslavement was preferable to other ways of treating captives.<sup>257</sup> Further, Lauterpacht observed that Grotius made several exceptions to his rule against resistance and also made limited room for “humanitarian intervention” when he declared that a state’s mistreatment of its citizens provides a just cause for war.<sup>258</sup> Alongside these points, Lauterpacht also listed specific instances in which Grotius appeared to define natural human rights.<sup>259</sup>

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<sup>252</sup> *Id.* at 24.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 43.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 44.

<sup>257</sup> *Id.* at 45.

<sup>258</sup> *Id.* at 45–46.

<sup>259</sup> *See id.* at 46 (“Neither must we forget that . . . he permitted and enjoined the right of passive resistance; that he safeguarded the conscience and the freedom of the individual in such matters as the right to refuse to carry arms in an unjust, and even doubtful, war; and that he championed the cause of such claims of the individual as the right of expatriation, the rights of economic freedom, and the right to share, through a plebiscite, in the decision to transfer part of national territory.”) (footnotes omitted).

Finally, on the question of peace and pacifism, Lauterpacht noted that Grotius “does not deny that war is a legal institution.”<sup>260</sup> But, he noted the various ways in which Grotius sought to control and limit the use of war, and he insisted that “[i]n general, there breathes from the pages of *De Jure Belli ac Pacis* a disapproval, amounting to hatred, of war.”<sup>261</sup>

### 3.2.2. Grotius's Arguments in *The Rights of War and Peace*

Grotius's discussion of sociability and natural law changed between *The Law of Prize* and *The Rights of War and Peace*. It also changed between the first and second editions of *The Rights of War and Peace*. As my earlier discussion of *The Law of Prize* indicates, there is little support in that work for Lauterpacht's claims about sociability.<sup>262</sup> Grotius grounds sociability largely in self-interest. His conception of natural law encompasses many rules, and it forms an important part of the law of nations. Whether it is an “ever-present source” is at least debatable, and it is not necessarily “decisive.”<sup>263</sup> Things are different with both versions of *The Rights of War and Peace*.

The difference emerges in the opening paragraphs. Grotius made clear right away that he was arguing against the primacy of self-interest and the claims of skeptics that there were no foundations for truth or justice.<sup>264</sup> The answer to skepticism and unchecked self-interest was Grotius's reformulated, minimalist version of natural law. Thus, the Prolegomena to the first edition stated that natural law and natural rights do not arise simply from the fact that “all men and the other animals are impelled by nature to seek their own interests,” but instead from the human “desire

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<sup>260</sup> *Id.* at 46.

<sup>261</sup> *Id.* at 47.

<sup>262</sup> See *supra* Section 3.1.2 (discussing *The Law of Prize*).

<sup>263</sup> Lauterpacht, *Grotian Tradition*, *supra* note 9, at 21–22.

<sup>264</sup> 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 76–79. Grotius cited the classical skeptic Carneades, but he just as easily could have cited more contemporary skeptics such as Charron and Montaigne, who argued that there are no universal rules and one should simply follow the established customs of one's country. See Capps, *supra* note 17, at 63, 72 (presenting the views of scholars that Grotius targeted moral skepticism in his work and highlighting Tuck's theory that Grotius was “implicitly attacking the scepticism of Montaigne and Charron”); HARRISON, *supra* note 35, at 40–41 (summarizing the views of Charron and Montaigne).

for society [*appetitus societatis*], that is, for community with those who belong to his species—though not a community of any kind, but one at peace, and with a rational order [*pro sui intellectus modo ordinatae*].”<sup>265</sup> He continued, “Therefore, when it is said that nature drives each animal to seek its own interests [*utilitates*], we can say that this is true of the other animals, and of man before he came to the use of that which is special to man.”<sup>266</sup>

As the following quotation indicates, this is quite different from the argument in *The Law of Prize*. Instead of reasoning directly from self-interest, Grotius turned right away to sociability and identified it—not self-interest—as the source of natural law:

This care for society in accordance with the human intellect, which we have roughly sketched, is the source of *ius*, properly so called, to which belong abstaining from another’s possessions, restoring anything which belongs to another (or the profit from it), being obliged to keep promises, giving compensation for culpable damage, and incurring human punishment.<sup>267</sup>

Whether or not the account of sociability in *The Rights of War and Peace* is objectively robust, it is certainly broader than it was in *The Law of Prize*, and self-interest plays a less important role.

For the second edition, Grotius edited the Prolegomena into the form that is familiar to readers today. He altered the discussion of human pursuit of self-interest by deleting the passage that humans, as animals, seek their own self-interest and inserting the following: “Therefore the Saying, that every Creature is led by Nature to seek its own private Advantage, expressed thus universally, must not be granted.”<sup>268</sup> In this version, although he

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<sup>265</sup> Grotius, *Prolegomena to the First Edition of De Jure Belli ac Pacis*, in 3 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 1747. Translations of passages from the first edition of the Prolegomena are by Richard Tuck. All other translations are from the 1738 English translation of Jean Barbeyrac’s French edition. See source cited *supra* note 17.

<sup>266</sup> Grotius, *Prolegomena to the First Edition of De Jure Belli ac Pacis*, *supra* note 265, at 1747.

<sup>267</sup> *Id.* at 1747–48.

<sup>268</sup> 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 81. See also *id.* at 84–85 (adding additional distinctions between humans and other animals). For a discussion of these changes, see Tuck, *supra* note 17, at xxv, and *supra* text accompanying notes 235–36.

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admits that humans are animals, the stress is on the difference between humans and other animals and on the denial that pursuit of self-interest is a universal truth.<sup>269</sup> In *The Law of Prize*, by contrast, the affirmation of self-interest led directly to the two most important laws of nature.<sup>270</sup>

Grotius also softened the claim in the first edition that sociability as a source of natural rights would be true “even if we were to suppose (what we cannot suppose without the greatest wickedness) that there is no God, or that human affairs are of no concern to him.”<sup>271</sup> Even in the first edition, Grotius had followed this passage with a discussion of how God’s will “gives rise to another *ius* in addition to that of nature,” which “our reason [*intellectus*] irrefutably tells us . . . we should submit to.”<sup>272</sup> He also wrote that the law of nature does not only “derive[] from the intrinsic principles of a human being [*ex principiis homini internis necessario profluit*], it can also justly be attributed to God, since he willed that there should be such principles in us.”<sup>273</sup>

In the second edition, Grotius went on at greater length to explain:

[T]hat God by the Laws which he has given, has made these very Principles more clear and evident, even to those who are less capable of strict Reasoning, and has forbid us to give way to those impetuous Passions, which, contrary to our own Interest, and that of others, divert us from following the Rules of Reason and Nature.<sup>274</sup>

But, if the original discussion was theologically controversial, the clarification does not seem to help, for it ends up

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<sup>269</sup> See generally 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17.

<sup>270</sup> See generally GROTIUS, LAW OF PRIZE, *supra* note 119.

<sup>271</sup> Grotius, *Prolegomena to the First Edition of De Jure Belli ac Pacis*, *supra* note 17, at 1748. See also *supra* note 62 and accompanying text (providing contrasting views on whether Grotius grounded his philosophy of international law in secularism).

<sup>272</sup> Grotius, *Prolegomena to the First Edition of De Jure Belli ac Pacis*, *supra* note 265, at 1748.

<sup>273</sup> *Id.* at 1749.

<sup>274</sup> 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 91–92 (footnotes omitted).

underscoring—in line with Mary Ellen O’Connell’s claim<sup>275</sup>—that the basis for natural law is really in reason, that it is against self-interest to give in to passion, and that God is there to help people control their passions, so that they can reason, which accords with their self-interest.

Grotius returned to these issues in Chapter 1, and further complicated his position, when he adopted Aristotle’s distinction between natural and voluntary rights and went on to say:

Natural Right is the Rule and Dictate of Right Reason, shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature, and consequently, that such an Act is either forbid or commanded by GOD, the Author of Nature.<sup>276</sup>

As such, a natural right is distinct both from human right and voluntary divine right. Natural rights exist where actions “are in themselves, or in their own Nature, Obligatory and Unlawful” —as opposed to making things unlawful through the act of forbidding or commanding.<sup>277</sup> Further, the law of nature can apply to “Things which are consequent to some Act of [human] Will.”<sup>278</sup> Grotius explained that humans created property, but once created, under the law of nature “it is a wicked Thing to take away from any Man, against his Will, what is properly his own.”<sup>279</sup> And then, Grotius asserted that “the Law of Nature is so unalterable, that God himself cannot change it.”<sup>280</sup> Natural law, in short, would exist even if there were no God; and if there is a God, he cannot change natural law.

Grotius said more in both editions of the Prolegomena on the relationship between sociability and self-interest. The first law of

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<sup>275</sup> See *supra* notes 63–64 and accompanying text (citing O’Connell’s opinion that Grotius opened the door to secular accounts of international law).

<sup>276</sup> 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 150–51 (footnotes omitted).

<sup>277</sup> *Id.* at 151–53.

<sup>278</sup> *Id.* at 154.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 155 (footnote omitted). See also *id.* at 190 (“But let none here object, that the Law of Nature being unchangeable, GOD himself cannot decree any Thing against it . . .”).



nature that he identifies is “the fulfilling of Covenants,” and it is the wellspring of civil law.<sup>281</sup> He went on to state that:

those who had incorporated themselves into any Society . . . had either expressly, or from the Nature of the Thing must be understood to have tacitly promised, that they would submit to whatever either the greater part of the Society, or those on whom the Sovereign Power had been conferred, had ordained.<sup>282</sup>

The point here is that the natural desire for society leads to the rule about enforcing covenants, which leads to civil law. And, too, this is another example of the law of nature applying to “Things which are consequent to some Act of that Will.”<sup>283</sup>

Fulfilling covenants is not the most important law of nature,<sup>284</sup> but by mentioning it first Grotius was able to return quite quickly from sociability to self-interest “to the Law of Nature Profit [utility, in Tuck’s translation] is annexed.”<sup>285</sup> Because individual humans are weak and need many things, they are more willing to enter into society—and this provides a different basis for civil law: “Whereas of the Civil Law Profit was the Occasion; for that entering into Society . . . began first for the Sake of some Advantage. And besides, those who prescribe Laws to others, usually have, or ought to have, Regard to some Profit therein.”<sup>286</sup> Civil law—meaning municipal or national law—thus has a basis in the law of nature, but it also has a basis in self-interest. Moreover, Grotius indicates that the desire for profit is God-given, because it will lead humans to do what God wants them to do: enter into society.<sup>287</sup>

The valorization of covenants also has important implications for other rights. Grotius’s stress on contracts elevated personal autonomy, but it did so at the expense of other rights. It is a fair reading of Grotius that all rights are alienable, as evidenced by his

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<sup>281</sup> *Id.* at 93.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 154.

<sup>284</sup> See *infra* note 307 and accompanying text (citing Grotius’s views on the duties of individuals under natural law).

<sup>285</sup> 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 93.

<sup>286</sup> *Id.* at 94 (footnote omitted).

<sup>287</sup> See *id.* at 93–94 (explaining that, although men are interested in profiting themselves, the law also is concerned with advantage to the entire body of men).

arguments that people can sell themselves into slavery or agree to be governed by an absolute ruler.<sup>288</sup> Still, other passages in *The Rights of War and Peace* indicate that some limits exist on the ability to alienate one's rights and also, as Lauterpacht recognized, create small spaces for resistance to oppressive governments.<sup>289</sup>

Grotius's next topic in the Prolegomena was the law of nations, and his discussion revealed the same interplay between justice or sociability, and self-interest. He noted that:

[just] as the Laws of each State respect the Benefit of that State; so amongst all or most States there might be, and in Fact there are, some Laws agreed on by common Consent, which respect the Advantage not of one Body in particular, but of all in general. And this is what is called the Law of Nations . . . .<sup>290</sup>

Here, the idea of advantage allows a transition from a narrow idea of benefit to a broader one, which he then equates with justice.<sup>291</sup>

Yet Grotius also links the law of nations to a more parochial idea of advantage or benefit. A citizen obeys the laws of his country even if it means giving up some immediate benefit, because he knows that failure to do so "saps the Foundation of his own perpetual Interest, and at the same Time that of his Posterity."<sup>292</sup> The same is true for nations: "People which violate the Laws of Nature and Nations, break down the Bulwarks of their future Happiness and Tranquility."<sup>293</sup> But then Grotius turns again from interest to justice: "But besides, though there were no Profit to be expected from the Observation of Right, yet it would be a Point of Wisdom, not of Folly, to obey the Impulse and Direction of

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<sup>288</sup> *Id.* at 261. See also HARRISON, *supra* note 35, at 148-50 (discussing this reading of Grotius).

<sup>289</sup> See Capps, *supra* note 17, at 75-77 (describing Grotius's views that although people incorporate themselves into society and alienate some natural rights, there are some circumstances where resistance is justified); HARRISON, *supra* note 35, at 151-52 (stating that Grotius focuses on the "actual agreement" and people's intentions in limiting agreements). Lauterpacht, *Grotian Tradition*, *supra* note 9, at 45-46.

<sup>290</sup> 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 94.

<sup>291</sup> See *id.* at 94-95 (explaining people and nations will sometimes have to "pass by" individual benefits and advantages in favor of respect and reverence for the law, which will, in turn, also secure their long term advantage).

<sup>292</sup> *Id.* at 95.

<sup>293</sup> *Id.*

our own Nature” – presumably our natural inclination toward sociability.<sup>294</sup> Left unclear is whether justice plays the same role in this discussion as God does in the discussion of sociability.

Finally, Grotius makes a curious argument. He repeats that “Right has not Interest merely for its End.”<sup>295</sup> And then he provides the following explanation, in the context of the law of nations:

[T]here is no State so strong or well provided, but what may sometimes stand in need of Foreign Assistance, either in the Business of Commerce, or to repel the joint Forces of several Foreign Nations Confederate against it. For which Reason we see Alliances desired by the most powerful Nations and Princes, the whole Force of which is destroyed by those that confine Right within the Limits of each State. So true is it, that the Moment we recede from Right, we can depend upon nothing.<sup>296</sup>

This passage begins and ends with language that supports the idea that Grotius wanted to undermine self-interest as a basis for international society. Yet the actual explanation is quite different, for the argument essentially is that, because no one can go it alone, nations create alliances out of self-interest. Yes, they may forego temporary advantages, but they realize that their long-term advantage requires some amount of cooperation. In other words, ideas of right and justice—and the law of nations in general—have utility because they assist self-preservation. Still, Grotius tried to be clear that his focus was on rights and law, not on “Rules about what it may be profitable or advantageous for us to do”—a topic that “properly belong[s] to the Art of Politicks.”<sup>297</sup>

We get some sense of how Grotius meant to go beyond self-interest as a basis for the law of nations when he mentions war. Contrary to Lauterpacht, Grotius was not a pacifist, and he did not hate war. He certainly desired peace, but he clearly states in *The Rights of War and Peace* that “every Kind of War is not to be condemned. History, and the Laws and Customs of all People,

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<sup>294</sup> *Id.*

<sup>295</sup> *Id.* at 97.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 131. Grotius was distinguishing his work from that of, for example, Bodin and Machiavelli.

fully inform us, that War is not disallowed of by the Voluntary Law of Nations.”<sup>298</sup> Grotius was most concerned about the reasons for war, and the ways in which wars were carried out. Thus, he denied “that the Obligation of all Right ceases in War . . . [O]n the contrary, no War ought to be so much as undertaken but for the obtaining of Right; nor when undertaken, ought it to be carried on beyond the Bounds of Justice and Fidelity.”<sup>299</sup> Indeed, “War is made against those who cannot be restrained in a judicial Way.”<sup>300</sup>

Far from being the ultimate opportunity to pursue self-interest, war—in Grotius’s account—is appropriate only when it is a method of enforcing a legal right that cannot be enforced through less drastic means (and Grotius uses this initial discussion to explain why he is writing his treatise, which, of course, goes on to say much more about just or lawful reasons for war and lawful means of carrying out a war). There is some tension between these passages and Grotius’s earlier discussion of war in *The Law of Prize*. But, in both works, war is legitimate and perhaps even desirable when a right is at stake—and the rights that justify war include interference with commerce. Further, as Lauterpacht recognized, Grotius did not develop clear natural law or law of nations rules against slaughter or destruction of property in war. Rather, “[i]n general, by the law of nations anything is permissible as against an enemy.”<sup>301</sup>

After his initial discussion of war, Grotius returned to natural law, and to the differences among Christian morality, the law of nature, and the law of nations. First, on the place of Christian morality, “in that most holy Law a greater Sanctity is enjoined us, than the meer Law of Nature in itself requires,” and Grotius stated that he would nonetheless discuss in his treatise what is “rather recommended to us than commanded,” not because of legal obligation but “so to aim at the highest Perfection.”<sup>302</sup>

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<sup>298</sup> *Id.* at 189.

<sup>299</sup> *Id.* at 101. See also 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 393 (“There is no other reasonable Cause of making War, but an Injury received . . .”).

<sup>300</sup> 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 101.

<sup>301</sup> Lauterpacht, *Grotian Tradition*, *supra* note 9, at 12.

<sup>302</sup> 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 126 (footnote omitted).

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Second, on the differences between natural law and the law of nations, Grotius seems to have believed that the law of nations overlapped with natural law.<sup>303</sup> But they were not co-extensive:

[W]hen many Men of different Times and Places unanimously affirm the same Thing for Truth, this ought to be ascribed to a general Cause; which in the Questions treated of by us, can be no other than either a just Inference drawn from the Principles of Nature, or an universal Consent. The former shews the Law of Nature, the other the Law of Nations.<sup>304</sup>

Note, though, that Grotius also adopted a more practical approach to determining the law of nature. In addition to proving it by “shewing the necessary Fitness or Unfitness of any Thing,” one can also “with very great Probability, conclude that to be by the Law of Nature, which is generally believed to be so by all, or at least, the most civilized, Nations.”<sup>305</sup> With this less precise method of determining natural law, the difference between it and the law of nations narrows, for it comes down to the difference between general belief about the content of the natural law that applies to all and general consent about what laws apply to all.

For all that, the content of the law of nature – which also gives some content to the law of nations – is not a series of ethical rules. Remember that Grotius has already distinguished between Christian morality and the law of nature.<sup>306</sup> The “first Duty of every one [imposed by natural law is] to preserve himself in his natural State, to seek after those Things which are agreeable to Nature, and to avert those which are repugnant.”<sup>307</sup> Although the language is more subtle, this is very similar to the first two laws of nature in *The Law of Prize* – the rights to defend oneself, avoid injurious things, and acquire and retain useful things.<sup>308</sup> And all of this equates to a natural law foundation that validates a significant

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<sup>303</sup> *Id.* at 163.

<sup>304</sup> *Id.* at 112 (footnote omitted).

<sup>305</sup> *Id.* at 159. *See also id.* at 161 (agreeing that “[s]ome People are savage and brutish, whose Manners cannot, with Truth and Justice, be reckoned a Reproach to human Nature in general”) (footnote omitted).

<sup>306</sup> Grotius also insisted Mosaic law is not the law of nature. *See id.* at 166–76.

<sup>307</sup> *Id.* at 180.

<sup>308</sup> *See supra* Section 3.1.2 (discussing *The Law of Prize*).

amount of self-interest. The second law of nature is roughly equivalent to the third and fourth laws in *The Law of Prize*, and it placed some limits on self-interest: the law of nature prohibits "Violence . . . which is repugnant to Society, that is, which invades another's Right."<sup>309</sup> Grotius added to the law of nature throughout the book, but he was at pains to deny that many of the obligations of one kind or another that he discussed rose to the level of natural law.<sup>310</sup>

The law of nations was also not as robust as it might first appear. Even when it addressed a particular issue, Grotius insisted on the distinction between two forms of the law of nations. The distinction was:

between that which is truly and in every Respect lawful, and that which only produces a certain external Effect after the Manner of that primitive Law; so that, for Instance, it may be lawful to resist it, or that it even ought to be every where defended with the publick Force, for the Sake of some Advantage that attends it, or that some great Inconveniences may be avoided.<sup>311</sup>

Importantly, too, the distinction between civilized and uncivilized for purposes of discovering natural law almost certainly carried through to the law of nations. On the one hand, the idea of broad or universal consent was both important and required a degree of formality, for Grotius faulted earlier writers, who "often call that the Law of Nations, which prevails among some Nations only, and that not by a sort of tacit Agreement, but by Imitation of one another, or even by a casual Consent."<sup>312</sup> On the other hand, the idea of universal consent was also an exaggeration, for Grotius later referred to "the *Right of Nations*, which derives its Authority from the Will of all, or at least of many, Nations."<sup>313</sup> It seems fair to assume that the "many nations" whose

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<sup>309</sup> *Id.* at 184 (footnote omitted).

<sup>310</sup> See HARRISON, *supra* note 35, at 157 (discussing Grotius's distinction between the minimal obligations of natural law and the recommendations of religious doctrine, such as the ten Commandments).

<sup>311</sup> 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 113.

<sup>312</sup> *Id.* at 129–30.

<sup>313</sup> *Id.* at 162–63 (footnotes omitted). Grotius appears to suggest the law of nations could be different in different parts of the world: "there is scarce[ly] any Right found, except that of Nature, which is also called the Right of Nations,

consent is required for the law of nations would overlap with the “civilized nations” whose beliefs are relevant to the content of natural law. If that is true, then the Grotian system of international law is not merely colonial or imperial because of how it was used – as Keene has argued – but also in its foundations.

It is also imperial in its specific rules. For example, Grotius considered whether one country “may contract with another, to purchase all the Commodities of a particular Kind, which are the Produce of that Country only.”<sup>314</sup> In general, he thought that such contracts were lawful. But he also took care to raise a variation on the problem:

[I]n Matter of mere Profit, one may lawfully prevent another, especially if there be any particular Reason for it, as when a Nation has taken under their Protection the People with whom they make such a Contract, and are therefore obliged to be at an extraordinary Expence. This Sort of Monopoly, practised in the Manner, and with the Intention I observed, is no Ways repugnant to the Law of Nature . . . .<sup>315</sup>

My sketch of Grotius’s life suggests that this passage relates directly to the disputes between the English and Dutch over trade in the East Indies. But in the course of affirming Dutch conduct, Grotius also assumes that the law of nature – and therefore also the law of nations – allows a country to place the people of another country “under [its] Protection,” and to do so in the course of an ostensibly commercial relationship.<sup>316</sup>

Grotius’s discussion of property and treaties deepens the utility of his treatise for imperial expansion. He has a long discussion of how a person can lose property rights or sovereignty by prescription as well as by agreement, for example by inaction or tacit consent in another person’s – or another sovereign’s – exercise

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common to all Nations. Nay, that which is reputed the Right or Law of Nations in one Part of the World, is not so in another . . . .” *Id.* at 163. Of course, “reputed” is not the same as “established.”

<sup>314</sup> 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 452. See also *supra* note 195 and accompanying text (offering sources discussing free trade and exclusive treaties amongst nations).

<sup>315</sup> 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 453.

<sup>316</sup> *Id.*

of dominion.<sup>317</sup> Exactly what constitutes inaction or tacit consent remains elusive. Further, although “a Sovereignty may have been originally acquired by Force; yet it may become lawful by a tacit Will, which confirms the Enjoyment of it to the Possessor.”<sup>318</sup> And again, the exact way in which this tacit will is expressed remains unclear, although Grotius indicates that failure to fight for one’s property or sovereignty, or even failure to win if one does fight, may be sufficient.<sup>319</sup>

As for treaties, Grotius affirms that Christian countries can make treaties with non-Christians, for as in *The Law of Prize*, “the Right of making Alliances is common to all Men.”<sup>320</sup> Further, the right to make treaties includes the right to make unequal treaties, including unequal treaties that “lessen . . . the sovereign Jurisdiction of the inferior Power.”<sup>321</sup> On the one hand, it is hard to imagine a practical system in which disparities of power would easily invalidate treaties and contracts. On the other hand, the combination of the right to contract with non-Christians, and the right of non-Christians to enter into treaties as inferior partners – and to give up some or all of their sovereignty along the way – provides a firm framework for European expansion. Once again taking Grotius’s experience and earlier writings into account, it is difficult to reach any conclusion other than that he intended just such a result.<sup>322</sup>

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<sup>317</sup> See *id.* at 487–500 (describing how actions and silence can also lead to loss of rights or property and further addressing the rights of royalty and those unborn).

<sup>318</sup> *Id.* at 503.

<sup>319</sup> See *id.* at 503–04 (recounting King Agrippa’s speech to the Jews after conquering their land and depriving them of liberty, which apparently included the assertion, “It is now too late to aim at Liberty. It was formerly your Duty to have fought for Defence of it. . . . But he who, once vanquished, revolts, is not to be called a Lover of Liberty”).

<sup>320</sup> *Id.* at 827–28.

<sup>321</sup> *Id.* at 826.

<sup>322</sup> Keene discusses the colonial/imperial implications of two additional topics: Grotius’s writings on the right to occupy property and divisible sovereignty; although he suggests that Grotius did not intend those implications. See *supra* notes 96–99 and accompanying text (citing sources which discuss divisible sovereignty and European use of Grotius’s writings to seize lands and property from other people).



### 3.3. *Summing Up*

Grotius was by any estimation a remarkable man. He was brilliant, diligent, prolific, and committed to a fairly consistent set of principles that he worked hard to advance throughout his life. But contrary to Lauterpacht's claim, Grotius was in no sense a disinterested scholar. Nor was he a reluctant participant in public life. He also was not a progressive in any meaningful sense of the word, unless one assumes that a belief in reason, restraint, and the importance of law makes one progressive. Certainly, he was not the anti-Hobbes (although he was still something of an anti-Machiavelli).

Instead, Grotius was, first and foremost, an engaged intellectual and an ambitious man of affairs. In his life and work—at least through the first two editions of *The Rights of War and Peace*—politics, religion, commerce, and international affairs overlapped and intermingled. They were essential pieces of the contested past, present, and future of Dutch identity and of the Dutch Republic.

Grotius was also not a pacifist, although it is fair to say that *The Law of Prize* and *The Rights of War and Peace* exhibit somewhat different attitudes toward war.<sup>323</sup> Contrary to Tuck, Grotius was not simply laying the groundwork for Dutch aggression in *The Rights of War and Peace*, and he was not as sanguine about war as he once had been. Lauterpacht's claim of pacifism also goes too far, but he was responding to Grotius's real concern about the costs and carnage of war. Yet for all that concern, Grotius failed to articulate strong limits on the conduct of war, and war remained available as a normal remedy for a violation of rights.

Grotius played an important part in articulating the relationship between natural law and international law, where natural law influenced the content of international law. But the details of that relationship and influence are crucial. For example,

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<sup>323</sup> See DUMBAULD, *supra* note 111, at 31 ("Resort to war as an equivalent for judicial process was viewed by the younger Grotius more zestfully than in 1625. In the *Law of War and Peace* the author was more disposed to discourage warfare, and he dwelt with eloquent dismay upon the shameful license and lawlessness which he beheld throughout the Christian world of his day."); *supra* notes 298–301 and accompanying text (describing Grotius's view that war should only be carried out under limited reasons, for example when there is no other way to enforce a legal right).

although *The Rights of War and Peace* developed a more robust idea of sociability than *The Law of Prize*, there is also a pattern to the analysis in the Prolegomena. Again and again, Grotius would lead with sociability but would also rely on self-interest. Although I disagree with Tuck's assertion that self-interest was paramount for Grotius, this pattern suggests an internal tension in Grotius's conception of natural law's foundation. It suggests, among other things, an openness to realism.<sup>324</sup>

In addition, even if Grotius expanded his idea of sociability between *The Law of Prize* and *The Rights of War and Peace*, that conception remained minimalist in comparison with traditional views of the time. As Tuck explains, for example, "his argument eschewed the rich and complex Aristotelian account of social life, with its stress on friendship and on the development of the virtues."<sup>325</sup> This kind of natural law does not provide an obvious foundation for a humane or progressive system of international law (although it can be consistent with and certainly does not prevent such a system). Nor is it very effective at filling gaps. It does not provide an "ever-present source for supplementing the voluntary law of nations, for judging its adequacy in the light of ethics and reason."<sup>326</sup> Quite the opposite is true. Grotius did not derive the rules of international law simply from natural law,<sup>327</sup>

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<sup>324</sup> In addition, therefore, although I agree with most of Patrick Capps's account, see Capps, *supra* note 17, at 72-74, I do not agree with his analysis of sociability and interest.

<sup>325</sup> Richard Tuck, *Grotius and Selden*, in *THE CAMBRIDGE HISTORY OF POLITICAL THOUGHT, 1450-1700*, at 499, 515-16 (J.H. Burns & Mark Goldie eds., 1991). See also HARRISON, *supra* note 35, at 138, 157 (stressing Grotius's minimalist notion of natural law); MAY, *WAR CRIMES*, *supra* note 71, at 58 (describing Grotius as "a minimal natural law theorist").

<sup>326</sup> Lauterpacht, *Grotian Tradition*, *supra* note 9, at 21-22.

<sup>327</sup> Knight argued, "Nations, in his view and expressing contemporary thought, can be subject to a Law of Nature, and a Law of Nations also, only by consent. . . . But such Law of Nations by consent would not be the natural Law of Nations of individuals, but an arbitrary Law of Nations or States. Grotius has little or no idea of a Natural Law of States." KNIGHT, *supra* note 109, at 199. See also 2 QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT: THE AGE OF REFORMATION 154* (1978) ("[T]here is no doubt that by the end of the sixteenth century, due to the progressive refinement of the underlying idea that the law of nations is simply an aspect of positive human law, the later Jesuit theorists were able to bequeath to Grotius and his successors a recognisable analysis of international law as a special code of positive law founded on the principles of natural justice . . ."). In his notes on *The Rights of War and Peace*, Jean Barbeyrac criticized Grotius for making exactly this distinction. See 1 GROTIUS,

and he frequently denied that natural law forbade practices that he admitted were undesirable.

Natural law minimalism also fails to provide much foundation for robust conceptions of human rights, let alone for liberalism. Despite his support for some religious toleration and his embrace of minimal natural human rights and formal individual autonomy in a state of nature, Grotius was not a proto-liberal. He came nowhere close to articulating strong conceptions of individual liberty, civil, or political rights (let alone fundamental rights that are beyond the reach of state power), or participatory government.<sup>328</sup> Thus, while Grotius's work can be situated along a path of analysis or development that ends with contemporary notions of "the fundamental rights and freedoms of the individual,"<sup>329</sup> there is little basis for the claim that his work does much to advance liberal rights beyond autonomy. In both *The Law of Prize* and *The Rights of War and Peace*, moreover, rights function more to legitimate or condemn violence, than they do to protect liberty, autonomy, or political freedom.<sup>330</sup>

*The Rights of War and Peace* was more than a credential for diplomatic employment or a manual for oppressive war. It is mature, reflective, and scholarly. Grotius meant the book to have immediate usefulness, but he was also reaching for—and achieved—something, perhaps not of transcendent importance, but certainly of abiding value. Yet that general goal and achievement does not bring the book in line with the claims that Grotians make

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RIGHTS OF WAR AND PEACE, *supra* note 17, at 163 n.3; see also Josef L. Kunz, *Natural-Law Thinking in the Modern Science of International Law*, 55 AM. J. INT'L L. 951, 952 (1961) ("Grotius distinguished the 'natural' and the 'voluntary' *jus gentium*, although modern international lawyers are sometimes of exactly opposite opinions as to what part he emphasized.").

<sup>328</sup> See HARRISON, *supra* note 35, at 149–54 (discussing how Grotius's system is consistent with rule by absolute princes and voluntary contracting into slavery); Tuck, *Grotius and Selden*, *supra* note 325, at 519–20 (analyzing a passage written by Grotius discussing total subordination to princes).

<sup>329</sup> Cf. René Brouwer, *On the Ancient Background of Grotius's Notion of Natural Law*, 29 GROTIANA 1, 21 (2008) ("Grotius paved the way for a modern understanding of human rights."); van Nifterik, *supra* note 214, at 17 (suggesting a concept of "proto-rights" appears in some of Grotius's writings).

<sup>330</sup> Cf. *supra* notes 149–50 and accompanying text (noting Tuck's argument that, for Grotius, "an individual in nature . . . was morally identical to a state" and that "both may use violence in the same way for the same ends").

on its behalf. To the contrary, Grotius's writings indicate that he was not really a Grotian, at least as Lauterpacht defined the term.

#### 4. WHAT TO DO WITH GROTIUS

##### 4.1. *Inventing a Tradition*

As I stated in the Introduction, the conclusion that Grotius's life and work has only a sketchy relationship to the Grotian tradition indicates that the tradition is "invented." Eric Hobsbawm famously observed that "[t]raditions' which appear or claim to be old are often quite recent in origin and sometimes invented."<sup>331</sup> The reason for inventing a tradition, according to Hobsbawm, is not to reflect a potentially authentic engagement with the complexities of historical inheritances. Rather, it is "ideological," not technical or natural.<sup>332</sup> The goal of an invented tradition is to "establish[] or symboliz[e] social cohesion or the membership of groups."<sup>333</sup> It achieves this goal by "inculcat[ing] certain values and norms of behaviour by repetition, which automatically implies continuity with the past"—even though "insofar as there is such reference to a historic past, the peculiarity of 'invented' traditions is that the continuity with it is largely factitious."<sup>334</sup> Further, Hobsbawm contends, to achieve the inculcation of values and norms, traditions must have "[t]he object and characteristic of . . . invariance."<sup>335</sup>

Hobsbawm asserts that invented traditions are almost commonplace. But, he also suggests a pattern in their invention:

[Invention will] occur more frequently when a rapid transformation of society weakens or destroys the social patterns for which 'old' traditions had been designed, producing new ones to which they were not applicable, or when such old traditions and their institutional carriers and

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<sup>331</sup> Hobsbawm, *supra* note 25, at 1. I use Hobsbawm's analysis to interpret repeated symbolic invocations of an intellectual continuity, which take on a ritualistic quality, as opposed to dealing directly with rituals or symbols, which is Hobsbawm's focus.

<sup>332</sup> *Id.* at 3.

<sup>333</sup> *Id.* at 9.

<sup>334</sup> *Id.* at 1–2.

<sup>335</sup> *Id.* at 2.

promulgators no longer prove sufficiently adaptable and flexible, or are otherwise eliminated . . . .<sup>336</sup>

Thus, Hobsbawm observes that “one period which saw [invented traditions] spring up with particular assiduity was in the thirty or forty years before the first world war.”<sup>337</sup> He explains that in those years,

[q]uite new, or old but dramatically transformed, social groups, environments and social contexts called for new devices to ensure or express social cohesion and identity and to structure social relations. At the same time a changing society made the traditional forms of ruling by states and social or political hierarchies more difficult or even impracticable.<sup>338</sup>

Peter Brooks approaches the question of invented traditions, and their importance during the same period, from another direction. He contends that “[f]rom sometime in the mid-eighteenth century through to the mid-twentieth century, Western societies appear to have felt an extraordinary need or desire for plots, whether in fiction, history, philosophy, or any of the social sciences.”<sup>339</sup> He attributes this transition to the influence of the Enlightenment and Romanticism, and he suggests that the rise of narrative reflected the decline of theology and the rise of history “as the key discourse and central imagination.”<sup>340</sup> That is to say, “the plotting of the individual or social or institutional life story takes on new urgency when one no longer can look to a sacred masterplot that organizes and explains the world.”<sup>341</sup>

The idea of the invented tradition has considerable explanatory force for the assertion of a Grotian tradition. Grotius wrote at a

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<sup>336</sup> *Id.* at 4–5.

<sup>337</sup> Eric Hobsbawm, *Mass-Producing Traditions: Europe, 1870–1914*, in *THE INVENTION OF TRADITION*, *supra* note 25, at 263.

<sup>338</sup> *Id.* Here, Hobsbawm is again emphasizing the role of invented traditions in shaping and reflecting national life. *Id.* at 263–64. Still, he also notes the creation of traditions, such as May Day, among “organized mass movements claiming separate or even alternative status to states.” *Id.* at 283.

<sup>339</sup> PETER BROOKS, *READING FOR THE PLOT: DESIGN AND INVENTION IN NARRATIVE* 5 (1984).

<sup>340</sup> *Id.* at 6.

<sup>341</sup> *Id.*

time of disruption, one in which historical and political narratives were increasingly important in a Europe that was divided along religious lines. His early work provided such narratives for the Dutch Republic, and one easily can interpret *The Rights of War and Peace*—particularly because of its intense engagement with earlier writers and historical sources—as doing the same for international law. Later commentators who see Grotius as the founder of international law or the theoretical architect of the Peace of Westphalia essentially treat the book in this way. For similar reasons, his work became extremely useful to writers such as Lauterpacht at an analogous moment: the early and mid-twentieth century.<sup>342</sup>

In the Introduction, I suggested that inventing a Grotian tradition—a grand narrative about an international legal system—served at least three goals. First is the post-World War II effort to remake the international system. Second is the desire to provide a historically-situated theoretical foundation for the ideas that arguably undergird that system. Third is the utility of “purifying” Grotius’s ideas so as to be able to claim that he provides the necessary theoretical foundation for the post-War order. Properly understood—that is, understood within the rubric of the Grotian tradition—international law has *always* forwarded pacifism, human rights, and an international rule of law as much or more than it has accommodated a system of independent nation-states that pursue their own interests. One could also add a fourth, and not necessarily least important, goal: the tradition also supports the displacement of politicians and diplomats and suggests the centrality of publicists, scholars, and judges to the project of international law.<sup>343</sup>

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<sup>342</sup> Arno Mayer famously and convincingly asserted that the First and Second World Wars “were nothing less than the Thirty Years’ War of the general crisis of the twentieth century.” ARNO J. MAYER, *THE PERSISTENCE OF THE OLD REGIME: EUROPE TO THE GREAT WAR 3* (Verso 2010) (1981).

<sup>343</sup> See Martti Koskenniemi, *The Function of Law in the International Community: Introduction*, in LAUTERPACHT, *THE FUNCTION OF LAW*, *supra* note 5, at xxix, xlvii (“Hersch Lauterpacht was committed to the belief that international lawyers, in particular international judges, should rule the world.”).

#### 4.2. Reverse Engineering? Surveying the Options

The utility of the Grotian tradition for these goals, and for liberal approaches to international law in general, is fairly obvious. But narratives that take the place of “sacred masterplots”<sup>344</sup> are unstable. And historical narratives always leaves something out. So it is with the Grotian tradition. If one takes account of the absences, what happens to the tradition?

##### 4.2.1. Nothing

The first possibility is that nothing happens. Invented traditions, as selective narratives, always exist in the face of “facts.” Belief in or agreement with a tradition provides an attractive baseline for assessing and dismissing attacks on that tradition. So, for example, it may be that Grotius had a legal and political career, and that he served various state and private interests. But, the defenders of the tradition might say, when he had the chance to do his own work, he produced *The Rights of War and Peace*. Further, although he had to bow in the direction of practical realities when he wrote that book, he deliberately constructed a system that was built for progress along various recognizable paths.

Certainly, there is much that is normatively attractive about the goals packed into the Grotian tradition, and there is a longstanding tradition of advocating for pacifism, human rights, and limited national sovereignty as critical components of international law. But these things just do not have very much to do with the historical figure of Grotius or much of his writing. Even more, the insistence on a tradition, on direct and foundational links to the past, could undermine these goals (as, for example, when others go back to what Grotius really wrote and use those words to reinterpret the tradition in different directions).

And finally, international law has developed in ways that arguably leave the Grotian tradition behind. Martti Koskenniemi has asserted:

Today, few experts conceive of themselves as part of the Lauterpacht tradition of a public law oriented global federalism. Instead, they may work for private or public-private institutions, national administrations, interest

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<sup>344</sup> BROOKS, *supra* note 339, at 6.

groups or technical bodies, developing best practices and standardised solutions . . . as part of the management of particular regimes.<sup>345</sup>

He concludes that “the ‘international’ is no longer a meaningful space for progressive politics” and that “the internationalism of Lauterpacht and his generation is no longer plausible.”<sup>346</sup>

All of this is simply to say that doing nothing not only requires ignoring counter-narratives and the possibilities that they might produce but also may not even advance the underlying goals of the Grotian tradition itself. Doing nothing also ducks the question whether those goals have much purchase in the contemporary international law practice that Koskenniemi describes.

#### 4.2.2. *Abandon Grotius to History*

Grotius led an interesting life during a tumultuous period in western European history. He wrote extensively about important issues of the day. As such, his life and work are important parts of European diplomatic and intellectual history. He remains relevant—not as an authority, but rather to the sorts of questions and puzzles that occupy intellectual historians and historians of diplomacy, jurisprudence, and philosophy. One could go further and say, as I did in the Introduction, that Grotius is also an apt representative, for better and for worse, of the formative period of international law as a European (and therefore also colonial) project—a period that arguably encompasses, at its outer reaches, the founding of the United States. Thus, he could have contemporary legal and political relevance for those who want to articulate the intellectual life of that period for the purpose of arguing that it provides meaning to, for example, the U.S. Constitution—although he would share the stage with other

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<sup>345</sup> Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MOD. L. REV. 1, 8 (2007).

<sup>346</sup> *Id.* at 28. See also MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 613 (2d ed. 2005) (“[I]t does not seem possible [anymore] to believe that international law is automatically or necessarily an instrument of progress.”). *But cf.* FLEUR JOHNS, NON-LEGALITY IN INTERNATIONAL LAW: UNRULY LAW 21 (2013) (rejecting the idea of “decline” “[t]o the extent that it may be extracted from Koskenniemi’s work” on the rise of managerialism).



figures.<sup>347</sup> In this account, there is no tradition, no contemporary doctrinal significance. There is simply history.

#### 4.2.3. Recognize Grotius as a Transitional Figure

If Grotius can be seen as representative of his legal times, then the next option is to take a small step back toward the idea of a tradition. Many scholars have attempted to identify periods in international legal theory, often as part of an effort to define what is modern. David Kennedy, for example, has identified primitive (pre-1648), traditional (1648-1900), and modern (1900-1980) periods in western international legal theory,<sup>348</sup> and he assigns Grotius to the primitive category. The category describes not simply a span of years but also a characteristic way of thinking about international law. According to Kennedy, primitive international legal theory includes not only an “evident faith in a universal moral order,”<sup>349</sup> but also an eclectic approach to legal authorities that can appear “incoherent and diffuse,” even as specific doctrines link up “unproblematically” with “authoritative propositions.”<sup>350</sup>

To some extent, Grotius exhibits these qualities. Yet Kennedy also notes that some commentators think of Grotius as “foreshadow[ing] ‘modern’ international legal scholarship.”<sup>351</sup> And Kennedy goes on to suggest that the traditional approach “sprang from the ruins of primitive scholarship—ruins stemming from the fragile tensions of Grotius and his difficulty in maintaining the assumption of social order which his primitive

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<sup>347</sup> For an interesting and useful recent discussion of founding-era engagement with international legal theory, and twentieth-century mythologization of that engagement, see generally Brian Richardson, *The Use of Vattel in the American Law of Nations*, 106 AM. J. INT’L L. 547 (2012).

<sup>348</sup> David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J. 1, 2-3 (1986). See also KOSKENNIEMI, *supra* note 346, at 95 (describing Grotius’s work as an example of “early” international law scholarship, a “discourse which shares the pre-liberal assumption of an objective, universally binding code which pre-exists the human being but is graspable by him through faith or *recta ratio*”).

<sup>349</sup> Kennedy, *supra* note 348, at 95. See also *id.* at 6 (“The distinctive style and method of primitive texts suggest a more uniform faith in universal principles than does the methodological argument of traditional work.”).

<sup>350</sup> *Id.* at 6. See also *id.* at 96 (“[T]he primitive lexicon parodies our eclectic confidence . . .”).

<sup>351</sup> *Id.* at 77.

mode of discourse demands.”<sup>352</sup> Without entering too deeply into the debate, it is worth considering whether the fight over Grotius’s place indicates that he does not fit neatly into one group or another, not because he is a late primitive, but because he is a transitional figure, perhaps even a bridge or gateway from an older style of thinking to one that is more recognizable—even if not particularly similar—to contemporary approaches.

Put differently, one could argue that Grotius is important for his place on the cusp, which required him to draw on existing patterns of thought while also reaching, unsteadily and perhaps even blindly, for another form of expression. He looked forward and backward at the same time.<sup>353</sup> As such, he arguably “initiate[d] a dialogue” with future writers.<sup>354</sup> Perhaps, too, he helped to set the stage for liberalism and enlightenment thinking even if neither he nor his writings were themselves liberal.<sup>355</sup>

But the point of this possible approach to Grotius is not to re-link him to the Grotian tradition. As someone who looked forward and backward, his commitments, methods, and conclusions would be inherently ambiguous. He would open up questions without resolving them, without always knowing that he was opening them, and would not necessarily reach—and perhaps not even suggest—conclusions that later writers would embrace. This version of Grotius has affinities with Falk’s view, but without the charged resonance of Grotius as an example or model. One could accept this approach, for example, while also maintaining that Grotius’s importance is primarily historical.

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<sup>352</sup> *Id.* at 97.

<sup>353</sup> *Cf.* Terry S. Kogan, *A Neo-Federalist Tale of Personal Jurisdiction*, 63 S. CAL. L. REV. 257, 332 (1990) (developing the idea of the “paradigm-seeking case” that “looks to the past, while allowing for growth and change in the future”).

<sup>354</sup> *Id.* (arguing the U.S. Supreme Court’s decision in *Pennoy v. Neff*, 95 U.S. 714 (1877), “is Janus faced” because “[i]t looks to the past, while allowing for growth and change in the future. *Pennoy* [thus] initiates a dialogue with future courts . . .”).

<sup>355</sup> To the extent this is a plausible suggestion, it runs into O’Connell’s concern that Grotius’s mixing of religious and secular foundations for natural law “contained the seeds of the ultimate challenge to the Grotian world view.” O’CONNELL, *supra* note 1, at 32.

#### 4.2.4. Grotius as Distant Architect

Another option is to see Grotius as the forerunner of the contemporary treaty-based structure of international law. Although *The Rights of War and Peace* focuses on international law rules derived from reason and the law of nature, Grotius's concern for commerce and his stress on the need to keep promises ensured that treaties play a critical role in his scheme. Further, alongside his claims about the importance of treaties, Grotius also conceived of sovereignty as divisible, and he explicitly stated that treaties could dilute a country's sovereignty (albeit often through unequal treaties).<sup>356</sup>

All of this is important to contemporary international law, because, for example, the multiple and overlapping international conventions drafted since World War II use the assumption of compliance to create a system of diluted sovereignty. In this sense, contemporary international law arguably does rest on a Grotian foundation. Of course, the problem of unequal treaties persists in this system, for powerful countries have greater control over the content of treaty terms, and weaker countries face pressure to sign such treaties in order to be full members of the international community. With respect to human rights treaties in particular, this dynamic has led to charges of cultural and legal imperialism. To the extent those charges hit home, they mirror the effects of the legal system that Grotius fostered in his own day.

Importantly, with this possibility, my claim is neither that Grotius intended any of the contemporary structure nor that there is anything necessarily wrong with that structure.<sup>357</sup> If he is an architect, he is similar to an early member of a shifting team whose work culminates over centuries in the construction of a building that might differ greatly from its original plans. That is to say, this claim is ultimately historical as well. Perhaps Grotius's ideas helped lay the foundation for the contemporary international system, but that does not mean they have any further contemporary resonance beyond that fact.

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<sup>356</sup> 1 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 305-35; 2 GROTIUS, RIGHTS OF WAR AND PEACE, *supra* note 17, at 826.

<sup>357</sup> Note that, unlike Kant, Grotius did not look forward to a federation of states. For Kant's argument in favor of a "federation of free states," see Kant, *supra* note 93, at 102-05.

#### 4.2.5. *Grotius as International Lawyer?*

The last possibility that I will discuss is to see Grotius as a foundational figure for contemporary international legal practice. Grotius, one might argue, symbolizes a method that is constantly attentive to law as an act of interpretation and to the tensions between pragmatic and normative arguments. In this view, Grotius's eclectic use of sources, historical and scholarly, does not represent primitivism. Combined with his minimalist conception of natural law, Grotius's method exemplifies a lawyerly willingness to use the materials at hand to construct arguments about what the law is or could be, with few claims about overarching moral law, while also holding skepticism at arm's length. Indeed, seen from this perspective, the Grotian *tradition* betrays an anxiety about foundations that leads it to reject the creative engagement—the mix of pragmatism and commitment, of idealism tempered by realism—that characterized Grotius himself. By rejecting the Grotian tradition, one might argue, we could embrace a different image of Grotius as a flawed but still worthy example for contemporary international theorists and lawyers.

This approach fits neatly with the uncomfortable realities of international law. Although enforcement structures exist for international law, it remains true that much of international law rests on persuasion and voluntary compliance.<sup>358</sup> And international law frequently validates positions that frustrate activists and reformers.<sup>359</sup> The international lawyer (or perhaps at least the non-managerial international lawyer) must constantly argue, must constantly adjust the relationship between ideals and possibilities. He or she must also accept that the resulting distances between goals and arguments, and between arguments and achievements, are a defining aspect of international legal practice and professionalism. Grotius can be interpreted as a powerful prototype for this stance. Importantly, though, the kind of distance or detachment that a self-consciously interpretive role requires is not the normative detachment of realism; it is precisely a *professional* detachment that reflects a disciplined commitment to

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<sup>358</sup> For an excellent discussion of enforcement in international law, see generally O'CONNELL, *supra* note 1.

<sup>359</sup> See, e.g., KOSKENNIEMI, *supra* note 346, at 615 (“[I]nternational law is always already complicit in the actual system of distribution of material and spiritual values in the world.”).

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the discourse and possibilities of international law over time in addition to acceptance of the realities of international legal practice.

Koskenniemi's "culture of formalism" helps illuminate the approach that I am trying to articulate. According to Koskenniemi,

The culture of formalism . . . may be characterized in a familiar way as a practice that builds on formal arguments that are available to all under conditions of equality. It seeks to persuade the protagonists (lawyers, decision-makers) to take a momentary distance from their preferences and to enter a terrain where these preferences should be justified, instead of taken for granted, by reference to standards that are independent from their particular positions or interests.<sup>360</sup>

Koskenniemi recognizes that this is not a neutral position. He suggests, at the risk of "banality," that the culture of formalism advances the following views:

[T]hat there must be limits to the exercise of power, . . . that those who are weak must be heard and protected, and that when professional men and women engage in an argument about what is lawful and what is not, they are engaged in a politics that imagines the possibility of a community overriding particular alliances and preferences and allowing a meaningful distinction between lawful constraint and the application of naked power.<sup>361</sup>

Finally, Koskenniemi recognizes the dangers of his claim. He insists his is a post-critical perspective, that it does not require particular substantive outcomes or commitments "whether imperial or particular" and that it "represents the possibility of the universal . . . by remaining 'empty,' a negative instead of a positive datum, and thus avoids the danger of imperialism."<sup>362</sup>

At the risk of over-simplifying, Koskenniemi suggests the possibility of a discourse that insists on the value of legal claims and arguments and is not satisfied merely with preferred outcomes. Even more, this discourse has to be critical even as it

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<sup>360</sup> KOSKENNIEMI, *supra* note 68, at 501.

<sup>361</sup> *Id.* at 502.

<sup>362</sup> *Id.* at 504.

affirms a minimalist commitment to inclusion and to opposing “naked power.”<sup>363</sup> The rights or claims at issue have little fixed content, and the boundaries of argument remain open to debate.<sup>364</sup> In some sense, it is argument that goes nearly all the way down, where the focus is on reasons as much or more as on outcomes.

The position I am sketching is not identical to Koskenniemi’s vision. Koskenniemi comes closer to an anti-foundational approach to law (if one agrees that the stance in favor of inclusion and against naked power is critical and structural rather than substantive).<sup>365</sup> But if the point is to find a place for Grotius, then there must be something more than inclusion and opposition to “naked power,” albeit something still minimalist. If Grotius supports an interpretive approach to law, it is one that exists in relation to external moral rules and in which existing legal rules and doctrines, and certain types of arguments, would have assumed weight, even if one remained open to reinterpreting them. Perhaps it is possible to reduce all of this to a variation of the Wight/Bull middle path between idealism and realism, but what I have attempted to outline is something more critically self-conscious,<sup>366</sup> even if it shades closer to the status quo than Koskenniemi might accept.<sup>367</sup> Grotius might stand today, in other words, for an international law that rests on natural law, but on a

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<sup>363</sup> *d.* at 502.

<sup>364</sup> *See id.* at 508 (“[F]ormalism projects the universal community as a standard—but always as an unachieved one. . . . Thus every decision process with an aspiration to inclusiveness must constantly negotiate its own boundaries as it is challenged by new claims or surrounded by new silences. Yet because it is unachieved, it can sustain (radical) democracy and political progress, and resist accepting as universal the claims it has done most to recognize in the past.”).

<sup>365</sup> The parenthetical in the text may suggest too much. *See* Koskenniemi, *supra* note 345, at 30 (referring to “international law as a kind of secular faith”: “When powerful states engage in imperial wars, globalisation dislocates communities or transnational companies wreck havoc on the environment, and where national governments show themselves corrupt or ineffective, one often hears an appeal to international law. International law appears here less as this rule or that institution than a placeholder for the vocabularies of justice and goodness, solidarity, responsibility and—faith”).

<sup>366</sup> Thus, I am trying to advance a position that goes beyond Kingsbury’s suggestion that, for many people, “Grotius and Grotianism have come to stand for both the challenging and the reproduction of . . . ‘ambivalence’ or, in the same way, for pragmatism or eclecticism.” Kingsbury, *supra* note 81, at 16.

<sup>367</sup> The argument has been made, however, that the culture of formalism accommodates the status quo. *See generally* Paavo Kotiaho, *A Return to Koskenniemi, or the Disconcerting Co-optation of Rupture*, 13 GERMAN L.J. 483 (2012).

natural law that relies more on reason than foundations, that builds on moral and legal traditions but is open to new language and different perspectives.

This approach asserts that Grotius is relevant to contemporary international law practice. But what if—as the other approaches I sketched suggest—Grotius’s place is simply not important? Imagining international law without Grotius can be a radical act, for it easily could symbolize the deliberate unmooring of international law from tradition and even, as much as possible, from history and from the valorization of state sovereignty—in favor of a law that could focus relentlessly on the present and future.<sup>368</sup> This version of international law, in which Grotius—and, even more, the Grotian tradition—are absent, might unfold within a culture of formalism or perhaps even within a more radical idea of law as unbounded interpretation, in which everything is at stake and everything is in play. Perhaps this last possibility would discard too much. It is difficult to imagine law as truly unbounded. And even if Grotius has no necessary place in international law, good reasons may still exist for ongoing critical engagement with claims of traditions and foundations.

In the end, I am not trying to chart the course of international law argument, and I surely have not exhausted the possible options, with or without Grotius. But deciding what to do with Grotius—to keep him as a constant reference point for an imagined past and future of international law, to retain him in a diminished capacity, or to discard him altogether—is an act that resonates beyond historical debate. It is also a decision about international law’s character: its foundations, if any; its substantive commitments, if any; its responsibility to and for its past, if any; and its aspirations, again, if any.

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<sup>368</sup> Of course, many writers have noted that history has a lot to do with who has power, who can speak, and whose voices count.