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978-0-521-19778-6 - Hugo Grotius on the Law of War and Peace
Edited by Stephen C. Neff
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Hugo Grotius on the Law of War and Peace

Despite its significant influence on international law, international relations, natural law and political thought in general, Grotius's *Law of War and Peace* has been virtually unavailable for many decades.

Stephen C. Neff's edited and annotated version of the text rectifies this situation. Containing the substantive portion of the classic text, but shorn of extraneous material, this edition of one of the classic works of Western legal and political thought is intended for students and teachers in four primary areas: history of international law; history of political thought; history of international relations; and history of philosophy.

Stephen C. Neff is a reader in public international law at the School of Law, University of Edinburgh. His subject area is the history of public international law.

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For Nancy, once again (and always)

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Preface

Apart from the late Hugo Grotius, I am grateful to a number of people for assistance of various kinds in bringing this project to fruition. Finola O’Sullivan, from Cambridge University Press, was both supportive from the start, and patient at the end – a most welcome combination. For heroic labours at the word-processor, my greatest thanks go to Marie Armah-Kwantreng. Professor John Cairns and Dr Paul Duplessis, of the University of Edinburgh School of Law, kindly assisted with some Latin translation. For excellent work in editing, proof-reading, and general criticism (fortunately constructive), I am in deepest debt to Ashley Theunissen. For a splendid job of copy-editing, my heartiest thanks go to Kate Ollerenshaw.

Abbreviations

Aquinas, <i>Treatise on Law</i>	Thomas Aquinas, <i>The Treatise on Law</i> [being <i>Summa Theologiae</i> , I–II, QQ. 90–7], edited and translated by R. J. Henle (University of Notre Dame Press, 1993)
Aquinas, <i>Political Writings</i>	Thomas Aquinas, <i>Political Writings</i> , edited and translated by R. W. Dyson (Cambridge University Press, 2002)
Articles on State Responsibility (2001)	International Law Commission, Articles on State Responsibility (2001), in Malcolm D. Evans (ed.), <i>Blackstone's International Law Documents</i> (Oxford University Press, 10th edn, 2011), at pp. 556–64
<i>Consolato del Mare</i>	<i>Consulate of the Sea and Related Documents</i> , edited by Stanley S. Jados (University of Alabama Press, 1975)
<i>Digest</i>	<i>The Digest of Justinian</i> , translated by Alan Watson (Philadelphia, PA: University of Pennsylvania Press, 1998), 2 vols.
Hague Rules	Hague Rules on Land Warfare, Hague Convention IV, 18 October 1907, 205 <i>Consolidated Treaty Series</i> 277
Protocol I of 1977	Protocol I Additional to the Geneva Conventions of 1949, 8 June 1977, 1125 <i>UN Treaty Series</i> 3
Suárez, <i>Treatise on Laws</i>	Francisco Suárez, <i>A Treatise on Laws and God the Lawgiver</i> , in <i>Selections from Three Works of Francisco Suárez</i> , translated by Gwladys L. Williams, Ammi Brown, and John Waldron (Oxford: Clarendon Press, 1944 [1612])
Vienna Convention on the Law of Treaties	Vienna Convention on the Law of Treaties, 23 May 1969, 1155 <i>UN Treaty Series</i> 331

Introduction

Hugo Grotius's *On the Law of War and Peace* could be described as a stately circumnavigation of the juridical world. Like Tolstoy's later novel of similar name, it provides a teeming, sprawling overview of the richness of life – legal life, of course, in the case of Grotius. Unlike Tolstoy's novel (unfortunately), Grotius's treatise is excruciatingly pedantic. Grotius may have been a towering intellect, but he is no one's candidate for a great stylist. His substantive message comes perilously close to being drowned in a veritable torrent of intimidating – and often tedious – displays of classical and biblical learning. In this respect, the remorseless humanist maestro shows no mercy to his benumbed and beleaguered readers. In short, as a writer, he was his own worst enemy.

It is important, however, to rescue Grotius from his own shortcomings, as he had so much of substance to say – to our time as well as to his own. To that end, this edition of his great treatise ruthlessly prunes the dense overgrowth of classical and biblical display, to allow the substantive ideas of Grotius to be absorbed in straightforward (or at least relatively straightforward) form by modern readers. When the text is stripped of its vast array of baroque scholastic ornament, the present-day reader can discern a remarkable mind at work. It is a mind that soars high, but also burrows deep. It expounds the loftiest and most abstract general principles – but also applies them in the nooks and crannies of everyday life.

In large part – but far from entirely – this great work (duly shorn) can speak for itself. But copious notes are provided for the assistance of readers in the many instances in which Grotius's point is not fully or clearly expounded in the text. For more general guidance, the following introductory remarks should prove helpful.

A life in turbulent times

Hugh de Groot (invariably Latinised to 'Hugo Grotius') was born in Delft in the Northern Netherlands on 10 April 1583 to a prominent family.¹ At the time,

¹ The leading English-language biography of Grotius is still W. S. M. Knight, *The Life and Works of Hugo Grotius* (London: Sweet and Maxwell, 1925). The present biographical sketch relies strongly on it.

the Dutch War of Independence (from Spain) was in full swing. His father, Jan de Groot, was a staunch Protestant who held various posts in the city government and who was also friendly with a number of prominent people in the intellectual world. Grotius senior received a doctorate in law from the University of Leiden, which had been established in 1575 for the purpose of providing training in the latest humanist learning for the leaders of the new country. He also served as curator (or chief administrative officer) for the University, and later as counsellor to the Count of Hohenlohe. The family of Hugo's mother included persons active in trading with the East Indies, and later in the operation of the Dutch East India Company (which would have use for Grotius's legal knowledge).

Young Hugo very soon proved himself a child prodigy matched by few in the historical record. (In the 1920s, he even received the posthumous honour of tying for second place in a retrospective assessment of the IQs of three hundred noted geniuses in world history.)² By the age of eight, he was composing Latin verse. A legend grew up that he gave an early demonstration of advocacy skills by converting his mother from the Catholic faith to Protestantism.

At the tender age of eleven, he enrolled in the Law Faculty at the University of Leiden. Amongst his fellow students was Frederick Henry of Nassau, the future stadtholder of the Netherlands. Although he was enrolled in the Law Faculty, Grotius's actual studies were in the liberal arts. He was placed in the particular care of Joseph Justus Scaliger, a prominent historian, classical scholar, and anti-Jesuit polemicist. During his period at Leiden (which lasted for three years), he continued to compose poetry. He is also said to have been something of an art critic and (later) an admirer of Rubens.

His first exposure to public service came in 1598 (at age fifteen), when he formed part of a Dutch diplomatic mission to King Henry IV of France. The purpose of the mission was to persuade Henry to continue his support of the Dutch insurgency against Spain. Grotius had no official role, but went as the protégé of Johan van Oldenbarnevelt, the most prominent civilian political leader of the Netherlands (since the assassination of William the Silent in 1584). These remonstrations proved unsuccessful, as Henry proceeded to make a separate peace with Spain (the Treaty of Vervins of 2 May 1598). For young Grotius, the journey marked the start of his role as protégé and loyal supporter of Oldenbarnevelt – a relationship which continued, at some considerable cost to himself, up to Oldenbarnevelt's death.

The journey to France was momentous for Grotius in another way, and more relevant to his future fame. He enrolled at the University of Orléans for a

² See Catherine Morris Cox, *Genetic Studies of Genius: The Early Mental Traits of Three Hundred Geniuses* (Stanford University Press, 1926), at pp. 153–5, 161–2. In this assessment, Grotius tied for second place with the German polymath Gottfried Leibniz. First place (for the record) went to the German literary giant Wolfgang von Goethe.

doctorate in law. It is interesting that the one year that he spent there was the only period of formal law study in his life. It clearly made a very great impression on him.

On his return to the Netherlands, Grotius was admitted to the bar for the province of Holland (the largest and most prominent of the United Provinces of the Netherlands). Immediately thereafter, he was admitted to the bar of the High Council of the two provinces of Holland and Zeeland. His first important literary work was an edition, in 1599, of the *Satyricon* by the fifth-century classical author Martianus Capella (sometimes called *On the Seven Disciplines*, with reference to the *trivium* and *quadrivium* of medieval liberal arts education). The following year, he published an edition of *Phenomena*, an astronomical work in verse by Aratus, a Hellenistic Greek poet of the third century bc.

Scientific concerns occupied Grotius's attention at this stage of his life in other ways too, in the form of service under his father's friend Simon Stevin. Stevin was a multifaceted person – entrepreneur, social reformer, and political writer, as well as mathematician and scientist. In mathematics, he is remembered as the inventor of modern decimal notation. He was also interested in hydrostatics and formulated the theory of the inclined plane, as well as the concept of the parallelogram of forces, which became a mainstay of the study of physics. He wrote a handbook on nautical science for mariners, for which young Grotius supplied the introduction. In 1600, Grotius assisted with one of Stevin's more ambitious projects: a land ship, i.e., a wind-propelled vehicle for land travel. A prototype of the craft was actually built, carrying twenty-eight persons on a trial journey of fourteen leagues in two hours. This triumph elicited a further three poems from Stevin's assistant.

In 1601, Grotius published his first major original poetic work, 'Adamus Exul', on the biblical story of Adam and Eve. This poem proved widely popular and brought his name before the general public for the first time (he was not yet twenty). Two years later, he received his first continuous government employment, as historiographer of the United Provinces. In this, his chief task was the preparation of an official history of the War of Independence, which was still raging. It was largely complete by 1611, but was only published posthumously, in 1657, as *Annales et Historiae de Rebus Belgicis*. He made a more immediate, if rather modest, contribution to the Dutch cause, in the form of a poem 'Prosopopoeia', all of eleven lines long, on the protracted Spanish siege of Ostend (1601–4).

His serious legal work appears to have begun in 1604, when he was employed by the Dutch East India Company to present its case in a controversy arising from the capture of some Portuguese ships in the Indian Ocean by Dutch vessels. At that time, Portugal claimed a monopoly on Indian Ocean trading, insisting that ships involved in trade could only do so if they carried a licence (or 'carteza') issued by the Portuguese government. The Dutch resisted this – to the point of using armed force to capture Portuguese ships. Grotius's task was to defend the legality of these seizures, essentially on the basis that the

Dutch were protecting their basic natural-law right to trade with other states without molestation by third parties (i.e., Portugal). Central to this thesis was the position that the claimed Portuguese monopoly on East Indies trading was invalid.

In pursuance of this assigned task, Grotius drafted what was, for all intents and purposes, a detailed and systematic treatise, in the period 1604–5, which he entitled *De Indis*. For those who seek to follow the evolution of Grotius's legal and political thought, this is an essential text. It went unpublished – save for one chapter – during Grotius's lifetime. It only reached the general public in 1868, when it was discovered and published by the Dutch publisher Martinus Nijhoff under the title *De Iure Praedae (On the Law of Prize and Booty)*.³

In 1607 came his first important appointment: as Advocate-General of the Fisc of the three provinces of Holland, Zeeland, and Friesland, apparently on the basis of his reputation as a legal advocate. The task involved the zealous guardianship of the rights of the Count of Holland in the three provinces. In 1608, he married a woman from a prominent Zeeland family. The union appears to have been a happy one, producing three sons and three daughters. That same year, Grotius published 'Christus Patiens', a verse tragedy on the death of Christ, in five acts. (It was translated into English in 1640.) Two years later, he published his first historical work, *De Antiquitate Republicae Batavae*, a patriotic (and largely speculative) pre-history of the Dutch people.

At this time, he became involved in diplomatic negotiations with Spain for a truce in the War of Independence. Grotius himself was of the war party, pressing for the continuation of the armed struggle; but he nonetheless played a role in the truce discussions, again on the subject of freedom of the seas and freedom of trade. This time, the object was to contest Spain's claim to trading monopolies in the East and West Indies. These negotiations were the occasion for the publication, in March 1609, of the one chapter of *De Indis* that appeared during Grotius's lifetime. It took the form of a short book entitled *Mare Liberum (Freedom of the Seas)*, in which the core argument against Portugal's monopoly claim was discussed and refuted.⁴ In the event, a twelve-year truce with Spain was successfully concluded the following month.

The arguments of *Freedom of the Seas* did not go unchallenged. A principal opponent was William Welwood of the University of St Andrews in Scotland, who was a professor first of mathematics and then of civil law. In 1613, Welwood published *An Abridgement of All Sea Laws*, which contained a chapter asserting (on the authority of the fourteenth-century lawyer Bartolus of Sassoferrato) that coastal states possessed sovereignty over the seas for at least one hundred

³ For an English translation, see Hugo Grotius, *Commentary on the Law of Prize and Booty*, translated by Gwladys Williams (Oxford: Clarendon Press, 1950).

⁴ For an English translation, see Hugo Grotius, *Freedom of the Sea; or, The Right Which Belongs to the Dutch to Take Part in the East Indian Trade*, translated by Ralph van Deman Magoffin (New York: Oxford University Press, 1916).

miles offshore. Welwood agreed with Grotius, though, that the high seas beyond that limit were free to all and not subject to the sovereignty of any state. Grotius wrote a response to Welwood, *In Defence of Chapter V of Mare Liberum* – but it went unpublished until 1872.⁵ A more famous attack on Grotius's thesis was published by John Selden, though only much later (in 1635), in a work entitled *Mare Clausum seu de Dominio Maris*. By that time, Grotius had little interest in the subject, so did not trouble to reply.

Grotius's short book was put to further use soon after publication, in opposition to yet another monopoly claimant. The government of England, during the reign of James I, was claiming exclusive rights to fisheries off the shores of England. In 1610, a Dutch diplomatic embassy was sent to England in 1610, armed with Grotius's *Freedom of the Seas*, with a view to arriving at a settlement of the question. They were at least partially successful, in that James I was induced to postpone, for an indefinite period, the execution of his proclamation.

In 1613, Grotius became Pensionary of Rotterdam, which was basically the chief administrative position in the city council. One of his tasks in this new post was to revisit the vexed question of trading monopolies – this time as a defender. The Dutch were now being accused of illegal monopolistic practices by other governments, particularly that of England. The grievance concerned treaties that the Dutch had entered into with various local rulers in the East Indies, which provided that trade was to be exclusively with the Dutch.

In connexion with this dispute, Grotius travelled to England in 1613 with a diplomatic mission. He defended his country against the accusations, arguing that the native rulers were within their rights to enter into such agreements. His previous arguments, against Portugal, Spain, and England, had been that monopolies could not be imposed from 'outside', as it were, by unilateral fiat. Monopoly arrangements founded on treaties, freely consented to by both parties, were (in Grotius's view) entirely different.⁶

It appears that, during his time in England, Grotius attempted to entice that country into re-entering the hostilities over the independence of the Netherlands on the Dutch side. England had made a separate peace with Spain in 1604 – and the Netherlands itself was even at peace with Spain at the time, following the conclusion of a nine-year truce agreement in 1609. Specifically, Grotius offered the English government £4 million in gold if it would mount an attack on Spain in the Philippines. In return, the Dutch would assist the English in expelling the Spanish from the West Indies. These interesting offers were, however, declined.

During this period, the religious controversies were brewing which were to change Grotius's life very drastically. In 1603, Jacob Arminius was appointed Professor of Theology at the University of Leiden (with Grotius's father, as

⁵ For the texts of these works, see David Armitage (ed.), *The Free Sea* (Indianapolis: Liberty Fund, 2004).

⁶ A matter touched on in *On the Law of War and Peace*. See pp. 103 below.

University Curator, on the selection committee). His ‘Arminian’ doctrine (as it came to be known) was, briefly, a departure from the teaching of John Calvin. Where Calvin had taught that God had the sole and exclusive choice as to who was amongst the elect and who was not, Arminius contended that God, in effect, only determined eligibility for membership of the elect. A person designated by God had the power to ‘refuse’ the divine gift by devoting himself or herself to a life of wickedness. Grotius was never an Arminian himself, nor was he much concerned with theology at this stage of his life. But he vigorously supported his patron Oldenbarnevelt in pressing for toleration of Arminius’s views.

The controversy came to a climax after the conversion of the principal military leader of the country, Maurice of Nassau, to the anti-Arminian cause. In 1619, the Synod of Dort condemned the teachings of Arminius. Oldenbarnevelt, now in disgrace, made an attempt to raise an armed force against Maurice but was apprehended, tried for treason, convicted, and put to death. Grotius could easily have followed him, as a prominent supporter. But he was fortunate in receiving only a sentence of life imprisonment in the Castle of Loevestein.

The period of captivity was not an unfruitful one for our cerebral hero. He put his enforced leisure to work composing, in Dutch verse, a treatise *On the Truth of the Christian Religion*, his first major foray into the subject of theology. He also drafted a private textbook for the assistance of his sons in their study of Dutch law. Then in 1621, two years into his term of imprisonment, he managed to escape. It was commonly said that he was smuggled out of captivity in – all too appropriately – a crate of books. (The crate is on display in the Rijksmuseum in Amsterdam to the present day.)

After the escape from Loevestein, Grotius made his way to France, where he was fortunate to receive a modest pension from King Louis XIII (although payment of it proved to be inconveniently irregular). Nearly the whole of his remaining life would be spent outside his native Netherlands. But his homeland links were not entirely severed. He remained in the good graces of the Dutch East India Company for his past services to them. He also retained his friendship, from student days, with Maurice of Nassau’s brother, Frederick Henry, who became stadtholder himself on his brother’s death in 1625.

The year 1622 saw the publication of *On the Truth of the Christian Religion*. But Grotius’s principal project in these first years abroad was the writing of his famous treatise *On the Law of War and Peace*, on which his principal modern fame rests. He began working on it in late 1622 and published it in Paris in 1625, in Latin, as *De Iure Belli ac Pacis*, with an effusive dedication to King Louis XIII. The book was an immediate success in some quarters at least, most notably in Protestant countries and France. It was paid the compliment of being pirated in Frankfurt the year after it came out. Somewhat less welcome was the placement, that same year, of Book III of the treatise onto the Catholic Church’s Index of Forbidden Books (where it remained until 1896). Nevertheless, it found some admiring readers among prelates high in Church circles.

In 1631, finances became a problem, with the halting of his pension from the French government. This was apparently at the instigation of Cardinal Richelieu, who had taken a dislike to Grotius. That year, he made a visit to the Netherlands. He remained there for about six months but found the atmosphere to be hostile. There were even warrants issued for his arrest, although they were not executed. He managed to put his time in the country to good use. The legal textbook that he had written for his sons during his imprisonment was published, as *The Jurisprudence of Holland*.⁷ In addition, a second edition of *On the Law of War and Peace* came out in Amsterdam in December 1631. A so-called third edition came out shortly afterwards, by a different publisher; but Grotius denounced it as unauthorised and full of errors.

He departed the Netherlands for Hamburg in 1632, where he remained for two difficult years. It was there that his connexion with Sweden began. Grotius already stood in high repute in that country, with King Gustavus Adolphus said to have been a great admirer of his famous treatise. It was even claimed that he carried a copy of it with him throughout his military campaigns in Germany during the Thirty Years' War. Be that as it may, the king expressed a wish to have the illustrious author in his service.

Gustavus himself would not be the one to bring that about, however, as he was killed in 1632 in the Battle of Lützen (near Leipzig). Fortunately for Grotius, the king's wish was known to Swedish Chancellor Axel Oxenstierna, the effective ruler of the country after Gustavus's death. Oxenstierna summoned Grotius from Hamburg to Frankfurt for a meeting in February 1633, which resulted in an offer of employment as Sweden's ambassador to France, although the distractions of the war prevented Grotius from taking up the position immediately. He eventually arrived in Paris early in 1635, where he remained until nearly the end of his life.⁸ It was a highly important post, since Sweden and France were, at the time, co-operating against the Habsburgs in the Thirty Years' War.

Grotius was not, however, a notable success in this position. Although friendly with King Louis XIII, he was disliked by Richelieu, the real power in the land. He failed in his first important task, which was to persuade France to declare war against the Holy Roman Empire and thereby enter the Thirty Years' War fully and officially (instead of supporting Sweden from behind the scenes). Oxenstierna had to go to Paris to plead the Swedish case himself, finally eliciting the desired French declaration of war in March 1636.⁹ Grotius's ambassadorial

⁷ For an English translation of this work, see Hugo Grotius, *The Jurisprudence of Holland*, vol. 1, translated by R. W. Lee (Oxford: Clarendon Press, 1926). A second volume (published in 1936) is a commentary.

⁸ For an informative account of this final period of Grotius's life, see R. Warden Lee, 'Grotius – The Last Phase, 1635–45' (1945) 31 *Transactions of the Grotius Society* 193–215.

⁹ See Geoffrey Parker, *The Thirty Years' War* (London: Routledge and Kegan Paul, 1984), at pp. 144–8.

life was also made uncomfortable by factions at the Swedish court which, out of jealousy, worked actively to undermine his position. He constantly complained of not being kept sufficiently informed of the policies that he was meant to be executing, and of arrears in the payment of his salary and expenses. His hopes of playing a part in the peace negotiations in Westphalia also went unrealised.

On the positive side, his diplomatic duties appear to have left him with substantial spare time, since his written output during this last phase of his life was very large. It included an anthology of Greek epigrams, as well as a history of the Goths and Vandals, which was published posthumously in 1665 as *Historia Gothorum Vandalorum et Langobardorum*. His most prominent work in this period was in the area of theology. In this connexion, it is worth noting, if only briefly, that his theological work was, in many respects, more modern in outlook than his legal and political writings. He was a major pioneer of modern biblical scholarship, in which the Bible is treated in its historical context. His purpose in taking this controversial approach was to help promote the reunion of the Christian churches, on the basis of an agreed interpretation of the Bible arrived at through historical and critical study, rather than through the lens of pre-existing dogmata.¹⁰ It was in this spirit that he wrote a set of *Annotationes* on the Old and New Testaments (which were only published in full in 1679, after his death). Also of note was a treatise on the Antichrist, written in 1640, which argued against the idea (widespread in Protestant circles at the time) that the pope was the Antichrist. Not surprisingly, these writings made him many enemies in zealous Protestant circles.

Grotius did not neglect his major secular work, since he oversaw the publication of a fourth edition of *On the Law of War and Peace* in 1642 (with which he was dissatisfied, as it contained many errors). It differed from the previous ones in including, for the first time, some illustrations from medieval, and even modern, history, to accompany the copious biblical and classical references already present. He also made a brief, and rather unfortunate, foray into anthropology, in a short work on the origin of the American Indian peoples. In it, he argued for a Norwegian origin of the North American peoples, and for a Chinese and East Indian origin for the South Americans. His reputation, clearly, does not rest on this work. His thesis was strongly criticised – and strongly defended by Grotius too, in an ill-tempered polemic.

In 1645, his ambassadorial services were terminated, ostensibly because the relations between Sweden and France were now being placed in the hands of the two countries' respective representatives at the Westphalia peace negotiations. Grotius apparently sought to obtain employment from the English government, although this initiative did not bear fruit. Instead, he then travelled to Sweden to discuss further service for that government. He went by way of the Netherlands

¹⁰ Jonathan I. Israel, *Radical Enlightenment: Philosophy and the Making of Modernity 1650–1750* (Oxford University Press, 2001), at p. 447.

for his final, and brief, visit to his native land. It was a happy parting, as he was received with great honour in Rotterdam and Amsterdam.

On arrival in Sweden, he was again treated with honour – only to find, to his dismay, that any further work for the government would have to be in Sweden, where the climate was not to his liking. He was therefore at rather a loose end when he set sail for Lübeck. He failed to arrive there, however, as his ship was wrecked in a storm off the north coast of Germany. Grotius survived the disaster, but not for long. He was taken to Rostock, where he died on 26 August 1645, at the age of sixty-two. Legend has it that his final words were: ‘By undertaking many things, I have accomplished nothing.’ His body was taken to his native town of Delft and buried in the Nieuwe Kirche. The following year, the fifth and final edition of his famous treatise came out, albeit with no significant changes from the previous one.

The intellectual world of Hugo Grotius

One of the intriguing things about Grotius is the extent to which he stands so delicately poised between the Middle Ages and modernity. On the side of modernity, his literary education was in the humanist mode, which entailed the application of critical historical methods to the study of classical and biblical texts. The era he lived in, however, is now most commonly seen (if only through the benefit of hindsight) as one in which much of the inheritance of the past was being ostentatiously cast off and new intellectual worlds boldly explored. In this connexion, it may be noted that Grotius was a contemporary of three of the foremost pioneers of this new modern world: Francis Bacon (1561–1626), the English Lord Chancellor, essayist, and scientific visionary; René Descartes (1596–1650), the founder of modern philosophy and noted mathematician; and Galileo (1564–1642), the seminal figure in modern physics and astronomy.

To some extent, Grotius was a participant in this intellectual ferment. It was noted above that he had some contact with the early stages of what came to be called the Scientific Revolution, in the form of his work with Simon Stevin. We know, in addition, that he was acquainted with Descartes’s *Discourse on Method*, published in 1637. He had some awareness of Galileo’s legal problems, if not of the substance of his scientific ideas. In the mid-1630s, shortly after arriving in Paris for his diplomatic duties, he sought to provide some assistance to the beleaguered Galileo, by urging friends in the Netherlands to offer him employment in Amsterdam to remove him from the clutches of the Church – a mission of mercy that did not bear fruit.¹¹ Grotius also had some familiarity with the early writing of Thomas Hobbes.¹²

¹¹ Lee, ‘Grotius’, at 206.

¹² Johann Sommerville, ‘Lofty Science and Local Politics’, in Tom Sorell (ed.), *The Cambridge Companion to Hobbes* (Cambridge University Press, 1996), pp. 246–73, at 247.

On the whole, though, Grotius is to be ranked amongst the conservatives of his time, rather than the modernisers. Instead of breaking radically with the past, in the manner of Bacon, Descartes, Galileo, or Hobbes, he sought to take the best knowledge of the past and to make it relevant to the conditions of the modern world. For present purposes, it will be helpful to take particular note of two aspects of his general intellectual armoury: first, of the three major intellectual traditions with which he worked and, second, of the general contours of his legal universe.

A triple inheritance

Three of the foremost systems of thought in the European tradition constituted Grotius's principal intellectual inheritance: Roman law, Aristotelian philosophy, and natural law. It should immediately be noted that all three of these were ultimately legacies not even of the medieval world, but of the ancient one. This reverence for the ancient past was a key indication that Grotius's basic intellectual bent was humanistic.

Loyalty to Aristotelian philosophy was perhaps the most conspicuous sign of Grotius as a conservative rather than an innovator. For the one feature that markedly distinguished such contemporary modernisers as Bacon, Galileo, and Descartes (and Hobbes later on) was their explicit – and even contemptuous – repudiation of the venerable sage of Stagira. Grotius, in contrast, hailed Aristotle (in the Prologue of his book) as holding ‘the foremost place’ amongst philosophers. The influence of Aristotle is immediately apparent in Grotius's discussion (p. 26) of the two basic kinds of justice, labelled ‘expletive’ and ‘attributive’ (though Aristotle called them ‘commutative’ and ‘distributive’). Aristotle's presence is also apparent in Grotius's political philosophy, as will be pointed out below.

The second major heritage of Grotius was Roman law. So deeply was most of European scholarship in thrall to Roman law in Grotius's time (and for long before and long after as well) that it was well-nigh impossible for any legal writer to avoid thinking in terms of that received framework. In this, Grotius was no exception. Considerations of Roman law are most apparent in his discussions of the acquisition and extinction of title to property, as well as in his expositions of promises and contracts in Book II. On the laws of war, the phenomenon of postliminy (Chapter 9 of Book III) is drawn practically entirely from Roman law. Perhaps most significant of all – though not very apparent on the surface – is the influence of Roman law on his treatment of the nature of political sovereignty, discussed below.

Finally, and most of all, there was natural law, which, even in Grotius's time, had the distinction (perhaps a dubious one) of having the lengthiest and most continuous intellectual pedigree of any major element of Western European thought.¹³ It pre-dated Christianity by several centuries, going back at least to

¹³ For a broad survey of at least a major part of the history of natural-law thought, see Clarence J. Glacken, *Traces on the Rhodian Shore: Nature and Culture in Western*

the writings of various Greek philosophers of the fifth and fourth centuries BC. Most outstandingly, though, natural law formed a major component of the writing of the Stoic philosophers of the Hellenistic period. From there, it won acceptance from the Christian Church, under whose auspices it was preserved, and enriched, in the Middle Ages. Grotius is sometimes regarded, quite wrongly, as a pioneer of natural-law thought. In fact, he was the heir of a very long tradition, as will be explained further below.

Two major points about this triple intellectual heritage should be noted. The first is that none of these three streams of thought was of Christian origin. It is true that Christianity embraced all three, to varying extents, in its capacious grasp. Roman law, for example, was put to some use in the development of the canon law of the Catholic Church. Aristotelian philosophy was an important inspiration for the writing of Thomas Aquinas in the thirteenth century, and of his many followers.¹⁴ And natural law received the approbation of a host of scholastic writers and theologians in the Middle Ages. Nevertheless, all three of these systems of thought were fundamentally secular in character. We must therefore withhold from Grotius any praise (which he has sometimes been accorded) of being a leading ‘seculariser’ of medieval religious thought (in particular of natural law).

The second major point about this triple heritage is that Grotius would be of little interest if he were *only* a legatee of the traditions of the past. On the contrary, if he was a respectful heir, he could also be a critical one; and his esteem for received wisdom fell well short of slavishness. He repeatedly showed his willingness to depart from his models when he believed them to be in error. Regarding Aristotle, for example, immediately after according him the foremost place amongst philosophers, Grotius lost no time in regretting that the Master’s pre-eminence had degenerated into a tyranny – and also in pointedly announcing (p. 14) that he (Grotius) would reserve to himself ‘the same liberty which [Aristotle], in his devotion to truth, allowed himself with respect to his teachers’. He felt similarly free to reject the rules of Roman law whenever they conflicted with his conclusions about natural law. Here, his humanistic training showed through, with its perception of Roman law as ‘merely’ the law of a particular society in a particular era.

Despite these various caveats, however, the conclusion must stand that Grotius was fundamentally a conservative – nearer to being the last of the medieval writers than the first of the moderns. There was nothing in him of the self-conscious rebel, in the manner of Bacon or Descartes. Although he stood ever prepared to purge his three intellectual heritages of errors and

Thought from Ancient Times to the End of the Eighteenth Century (Berkeley: University of California Press, 1967).

¹⁴ For a stimulating history of the impact of Aristotelianism in medieval Europe, see Richard E. Rubenstein, *Aristotle’s Children: How Christians, Muslims, and Jews Rediscovered Ancient Wisdom and Illuminated the Middle Ages* (Orlando, FL: Harvest, 2003).

misunderstandings, his fundamental goal was, in the final analysis, to clarify and systematise, not to overthrow.

An overview of Grotius's legal universe

A quick summary of the legal universe in which Grotius operated is in order. At the highest or broadest level was a divide between law and ethics. Law, broadly speaking, concerns what persons owe to other persons. By extension, it deals with rights and obligations, which are enforceable (at least potentially) by magistrates or courts of law or in exceptional cases by means of self-help. Ethics – or ‘the law of love’, as Grotius sometimes called it – is a rather broader field, encompassing actions which enhance the quality of life of one’s fellow humans, or the harmoniousness of social life generally. Ethical obligations (unless they are at the same time rules of law) are left to be enforced by God in the life hereafter, rather than by human agents on earth.

The realm of law then falls into two major divisions: natural law and positive, or ‘volitional’, law. Natural law is eternal and unchangeable, founded on reason and on the nature of things. Positive, or volitional, law is an expression not of reason but of will. Positive law, in turn, comes in two kinds: human, and divine. As the names imply, human laws are enacted by people, while divine law comprises the commands of God. Natural law either commands or forbids various things, while leaving a range of matters in between these two extremes – i.e., as neither mandatory nor prohibited. It is in this middle region that human law is free to operate.

Human laws are then divided into three groups: laws applicable to the whole of a state; laws applicable to entities which are smaller than states; and laws applicable to entities that are larger than states. Laws of states are known as civil law – with the civil law *par excellence* being, of course, that of Rome (i.e., the *ius civile*). Entities smaller than states are provinces, cities, and the like. They will have various local laws dealing with, say, market regulation, liability to public service, and the like. By entities larger than states is meant the international community. Laws applicable to this larger community comprise the law of nations, about which more will be said below.

With these broad introductory remarks in mind, we may proceed to say a bit more about the three great contributions made by Grotius in *On the Law of War and Peace*: in the areas of natural law, of political theory, and of international law.

Grotius the natural lawyer

A very large portion of the treatise – some 40 per cent – comprises an extended treatment of natural law. For it was one of the primary purposes of *On the Law of War and Peace* to provide a systematic exposition of that subject. The detailed exposition of natural law in the main body of the text appears, however, almost by stealth, when Grotius begins discussing the second of his three just

causes of war, which is a response to ‘an injury to that which belongs to us’. (The first just cause of war is defence against an impending injury, and the third is punishment for past misdeeds.) In order to have a full appreciation of this second class of just war, it is necessary, in Grotius’s opinion, to have a clear idea of exactly what it is that ‘belongs to us’, and why. Basically, what belongs to us falls into two broad categories: property rights, and benefits of obligations owed to us by others.

For the most part, Grotius’s exposition of natural law can speak for itself. For the full appreciation of that exposition, however, it is well to provide some background on two particular points: the rationalist tradition of natural law (the one to which Grotius subscribed) and the nature of rights in natural law.

The rationalist view of natural law

There are, broadly speaking, three different streams of thought to which the label ‘natural law’ could be, and has been, attached. The first of these could be called the voluntarist position. It regards natural law as being of divine origin. Its content comprises commands issued by God to the human race at large. The second stream of thought could be called the organicist. It regards natural law as, in essence, the species character, or biological nature, of the creature now labelled as *homo sapiens* – as well as, by extension, the biological features of other animals as well. Natural law, on this view, is regarded, basically, as instinct, ‘hard-wired’ in some way into each and every member of the human race – or ‘written in the hearts of men’, as was often said.

The third stream of natural-law thought may be termed the rationalist one. It regards natural law as being basically a hypothetico-deductive system, in the nature of a mathematical system, in which conclusions are arrived at logically, by an objective process of reasoning from basic axioms or first principles. This approach to natural law was relatively late in arising, receiving its first major exposition from Thomas Aquinas in the thirteenth century.¹⁵ It then underwent something of a renaissance with the revival of interest in Thomist thought in Catholic circles in the sixteenth century, reaching its apogee with the writing of the Spanish Jesuit writer Francisco Suárez (1548–1617).¹⁶

Grotius was squarely within the rationalist tradition. Some of its more salient features may be briefly noted here, as they find reflection – but not always a very explicit exposition – in his treatise. Two of its most important features should be particularly borne in mind. The first is that natural law speaks only to rational beings, i.e., to humankind. That is to say, the rationalist tradition rejected the idea, inherited from Roman law, of natural law as applicable to the whole of the animal world, including humans.¹⁷ (This was an early expression of the organicist view of natural law mentioned above.) Natural law, to the rationalists, was a law about social relations between people.

¹⁵ See generally Aquinas, *Treatise on Law*, at pp. 235–74.

¹⁶ On Suárez, see generally Suárez, *Treatise on Laws*. ¹⁷ See *Digest* 1.1.3 (Ulpian).

The second principal feature of the rationalist tradition was the idea that the content of natural law arises out of reason itself, independently of will. That natural law is not a product of *human* will is obvious enough. Less obvious is that it is not a product of *divine* will either. The content of natural law is no more changeable by God than are the laws of mathematics. Indeed, as Grotius famously pointed out in the Prologue (p. 4), even if there were no such thing as God, there would still be natural law precisely as we now have it. Grotius has sometimes been hailed as an innovator by virtue of his articulation of this point – as the person who ‘secularised’ natural-law thought by cutting it loose from theology. Such a view is simply incorrect. Grotius was merely reiterating a long-held tenet of the rationalist stream of natural-law thought extending back to Aquinas.

To the adherents of the rationalist tradition, the lure of mathematics, as the most rational and indubitable of all the sciences, was difficult to resist. And Grotius was among the non-resisters. His treatise, though, is a far cry from being an exercise in rigorous mathematical demonstration (along the lines of Spinoza’s *Ethics*). But in one respect, the mathematical spirit is apparent. That is, that, just as mathematics deals with eternal truths, so does natural law – with the immediate consequence that there is no need for topical or contemporary illustrations. Examples of natural law in action can come from any era of history and any culture. Grotius took advantage of this by loftily forswearing, at the outset, any intention to comment on contemporary events. ‘[J]ust as mathematicians treat their figures as abstracted from bodies,’ Grotius averred in the Prologue (p. 19), ‘so in treating law I have withdrawn my mind from every particular fact’.

It should not be thought, however, that Grotius provided no illustrations of his various assertions about natural law. On the contrary, he practically drowns his hapless reader in a torrent of them. But practically all of his illustrations are from classical and biblical sources, rather from contemporary (or anything resembling contemporary) history. Only with the publication of the fourth edition of the treatise, in 1642, did he relent even slightly from this self-abnegation. The principal area in which contemporary matters are discussed is the law of neutrality – and only because, in Grotius’s candid confession, there was a paucity of classical material on that particular topic.

In sum, Grotius should be regarded as a thoroughgoing conservative in his treatment of natural law generally. The value of the book in this regard, therefore, lies in the way in which it provides a wide-ranging summation of natural-law thought across the board, rather than in any major innovations. Even if he was no innovator, however, he was certainly not without influence. The major natural-law writers of the following centuries took Grotius as their starting point – probably in large part because most of these writers were Protestant, like Grotius, and hence loath to appeal too overtly to medieval Catholic traditions. In all events, if Grotius is to be seen as an innovator, it is to other areas of his thought that we must look.

On rights

Great care must be taken to refrain from equating natural *law* with natural *rights*. To be sure, the rationalist natural-law tradition that Grotius inherited from the Middle Ages did recognise certain important inherent rights of persons – most outstandingly the right of self-preservation. For the most part, however, Grotius deals with rights in very different terms.

To appreciate Grotius's conception of rights, it should be noted that the term may be employed in either of two basic ways, a broad and a narrow. The broad meaning refers to what might be called 'free-standing' or inherent rights – prerogatives possessed by each person independently of any other person. This is the usage typically employed in modern civil-libertarian discourse, with reference to freedom of speech, freedom of religion, and the like. The narrow meaning refers, more specifically, to the ability to obtain something from someone else, or to perform some kind of task. An example is the right of a creditor to receive due payment from a debtor; or the right of a person to cross over the land of another at will. Rights in this narrow sense, in other words, concern entitlements vis-à-vis some other person, with respect to some identifiable transaction or relationship. Rights in the narrow sense are therefore intimately connected with duties – when one person (such as a creditor) has a right, some other person (i.e., a debtor) must be under a corresponding duty.¹⁸

For the overwhelming part, Grotius's conception of rights is the narrow kind. But we can go further than this and say that, in the natural-law tradition in which Grotius thought and wrote, duties were more fundamental than rights. The single fundamental principle of natural law, in Grotius's view – inherited from the writings of Plato and Aristotle on justice – is the obligation to give to others what is due to them. This fundamental obligation gives rise, in turn, to a right on the part of those others to compel the performance of the duty in the event of recalcitrance on the part of the person subject to it. This 'right' to compel the performance of obligations is in fact the basis of Grotius's principal category of just war (p. 82).

Grotius did not actually speak in terms of rights. Instead, he spoke of 'faculties', by which he meant, basically, the power to perform some act or to achieve some end (p. 24). For example, making a will and thereby disposing of one's property after death is a faculty. The ability of a creditor to compel his debtor to pay him money that is owed is also a faculty. In sum, rights are many and varied in the legal universe of Hugo Grotius – but they are, for the overwhelming part,

¹⁸ This two-fold classification of rights essentially replicates what the American legal philosopher Wesley Hohfeld would later call 'rights' and 'privileges' – with rights being what are here termed rights in the narrow sense, and privileges being rights in the broader, civil-libertarian sense. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, edited by David Campbell and Philip Thomas (Aldershot: Ashgate, 2001), at pp. 75–80.

the epiphenomena of the duties of others, rather than free-standing inherent rights of the modern civil-libertarian kind.

Grotius the political theorist

The political-theory discussion forms only a very modest portion of Grotius's compendious treatise (in the order of one-tenth), although it has attracted much attention. In this area too, his discussion in the book can largely speak for itself. But some background remarks may be helpful.

In the area of political theory, natural law was of little (if any) relevance to Grotius. In the political sphere, we are in the realm of free human choice. Natural law was a pre-political system of norms, governing relations between persons in a 'state of nature' rather than in an organised political community. For the intellectual backdrop of Grotius's political ideas, we need to look to the other two streams of his heritage: Aristotelian thought, and Roman law. The more salient elements of these will be pointed out presently.

Grotius did not present (or pretend to present) a comprehensive political theory in his treatise. His concern was chiefly with sovereignty – or, more strictly, with what Grotius termed 'sovereign power' or 'sovereign authority'. His discussion is therefore, not surprisingly, strongly legalistic. Two principal expressions were employed in connexion with sovereignty: *summa potestas* and *imperium*. *Summa potestas* was a medieval concept, meaning basically that the political authority in question was not legally subject to the will of any superior, i.e., was under no legal obligation to execute the commands of another. It was consequently the highest power in the land, possessing (crucially) the power to legislate. *Imperium* was a Roman-law concept, referring to the right to exercise coercive power in the enforcement of laws. It was therefore, in essence, executive power. Both of these concepts are to be distinguished from *dominium* – also from Roman law – which referred to absolute ownership of property in private law.

Three major aspects of sovereignty are discussed in the book: the basic nature of sovereignty; the question of resistance by subjects against sovereigns; and the question of resistance against usurpers of sovereignty. A few words on each of these (but especially the first) are in order.

The nature of sovereignty

The exposition of sovereignty, like that of natural law, makes a somewhat furtive appearance in Grotius's text. Its relevance derives from one of the basic principles of medieval just-war theory: that of *auctoritas*. This states, in brief, that war can only be waged justly if, *inter alia*, it is done with the permission of the relevant authority, i.e., of the political superior of the person waging the conflict. In the case of a person who has no political superior – i.e., a sovereign – the sovereign can (and must necessarily) self-authorise the resort to armed

force. But, in any case, it then becomes necessary to determine, in Grotius's words, 'what sovereignty (*summa potestas*) is, and who hold it' (p. 49).

Grotius contends, in clear allegiance to the Aristotelian view, that the people as a whole are the ultimate sovereigns – with the immediate consequence that 'a people can select the form of government which it wishes' (p. 52). He further makes clear that the decision as to the form of government is a matter of free choice on the people's part. His writing, in short, gives no shred of support to theories of the divine right of kings. The acceptance of this basic principle might incline a reader to place Grotius amongst the radical democratic writers, or amongst the social-contract theorists. Great caution, however, is in order on both of these counts.

Regarding Grotius as a supporter of democracy, it should be appreciated that he goes no further than to credit the people with being the ultimate *source* of sovereignty. He does not contend that the people actually *exercise* that sovereignty. He therefore makes a careful distinction between sovereignty as such, and the exercise of that sovereignty. The exercise of the sovereignty is commonly entrusted to a government of some kind, typically to a king. A people, as Grotius explained, when making itself subject to a king, 'retains its sovereignty over itself, although this must now be exercised not by the body, but by the head' (p. 173). As will be explained below, Grotius did not hold that there was a general right on the part of a people to recover their sovereignty from a ruler who acted oppressively.

Regarding Grotius's connexion to social-contract theory, it is important to avoid confusing the two distinct phenomena of contract and conveyance. In brief, contract refers to a commitment to do something in the future (e.g., to repay a debt, to deliver goods, to perform some task, and so forth). Conveyance refers to the actual performance of a specific kind of act, i.e., the transfer of legal title to something from one party to another. A conveyance may be effectuated in exchange for money, in which case it is a sale. But it may also take the form of a gratuitous transfer. Or it may fall between these two, with legal title to the object being transferred without any *explicit quid pro quo*, but nonetheless on a general hope or expectation of receiving, at some point, a favour of some kind in return.

A contract, it is true, may consist of a commitment to convey legal title to some object at some future point, and perhaps subject to the occurrence of certain conditions. But it still remains the case that there is a conceptual distinction – particularly to a lawyer – between a commitment to convey something in the future, and the actual *act* of conveying something in the present. In the example just posited, the conveyance of the property, when it occurred, would constitute the performance (or discharge) of the contract.

The principal model for this conveyance – as opposed to contract – perspective was one that Grotius must surely have had in mind: that of ancient Rome. It was held in Roman law that the legislative prerogative of the emperor originated from a transfer by the Roman people of its residual sovereign power onto

the emperors, beginning with Augustus in the first century BC. It was believed that this transfer of power was effectuated by a statute known as the *lex Regia*, adopted by the people in their political assembly.¹⁹

This reputed *lex Regia* was, in all probability, fiction rather than fact. But it was a most useful fiction, particularly to lawyers, in that it explained, with the utmost clarity and efficiency, how sovereignty could be transferred from one holder to another. Grotius's position, in line with this Roman-law theory, was that, in the typical case, an originally sovereign people transfers the exercise of that sovereignty to a ruling body of some kind. Furthermore, that sovereignty, once so transferred, is gone, in the manner of property sold or given away.

Several points about this basic theory may be pointed out, which Grotius does not deal with very forthrightly. Most outstandingly, the question of what authority is actually exercised by a given sovereign in a given case can only be determined empirically – by considering the actual terms of the particular conveyance of powers. This is to say, that in a given transfer of sovereignty, certain rights or powers might be withheld by the grantors (i.e., by the people), or certain conditions imposed onto the grantee. This point was appreciated by Grotius, and formed the basis of some qualifications to the basic thesis (discussed below) that there is no right of revolt on the part of the people.

Even if there can be no absolute general rule as to how much power, or what sort of power, people decide to transfer to their rulers, or subject to what conditions, Grotius nevertheless makes it clear that, in the majority of cases, the people choose to transfer the right of exercise of the *whole* of their sovereign powers to a ruler, without retaining anything for themselves. What is transferred, however, is not – at least in the usual case – absolute 'ownership' of the sovereign rights. Instead, what is given to the ruler is a usufructuary right to exercise sovereignty. This betrays, yet again, Grotius's allegiance to the thought categories of Roman law. A usufructuary, briefly, possesses only a right to *use* or exercise the sovereign power. He is therefore a kind of tenant of the sovereign powers rather than an absolute owner. The 'tenant' or usufructuary typically possesses a tenancy that extends indefinitely through time and is heritable – but it is, strictly speaking, a right to use or to exercise sovereignty, with ultimate ownership still lying in the hands of the people.

It only remains to mention several limitations which Grotius places onto sovereignty as such, and onto its transfer and exercise. The lawyer within him (never far from the surface) appreciates that, by the nature of things – i.e., according to natural law – a people cannot transfer to a ruler powers which they themselves did not possess originally. As a consequence, a sovereign cannot have, or be given, a right to kill his subjects because the people never had a right of self-killing (i.e., of suicide) to begin with.

More generally, Grotius held that sovereigns must necessarily be subject to three highly important limitations – not because the people withheld certain

¹⁹ See Justinian, *Institutes*, 1.3.4; and *Digest* 1.4.1 (Ulpian).