論　説

GROTIUS AND INTERNATIONAL LAW

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The subject of the present paper is the contribution made to the founding of the modern system of international law by the Dutch jurist and philosopher Hugo Grotius (1583–1645). The emergence of the modern system of international law was bound up with certain underlying processes of change that took place in Europe, and in the international sphere generally, during and after the period of the late fifteenth and sixteenth centuries. Chief among these was the formation of the modern states system that, following the social and political upheavals as brought about by the Renaissance and the Reformation, came to be established in Europe with the Peace of Westphalia that concluded the Thirty Years' War (1618–48). This is the system where states were understood to be sovereign and, as such, formally exempt from the sort of universal jurisdictional authorities that had earlier been claimed and exercised through the leading political institutional structures of the Middle Ages: the Holy Roman Empire and the Catholic Church. A further process of change impacting on the development of international law came with the penetration and conquest by the European powers of the newly discovered lands in Africa, the Americas and the Far East. For this compelled the search for a system of laws possessing application to the nations and peoples falling outside the confines of European Christendom, and one that would serve to regulate the ever increasing growth in international trade and commerce as brought about by the overseas expansion of the European powers.

Grotius was to construct an international jurisprudence that took full account of the changes within the international sphere as referred to here, and, in doing so, he identified and explained the substantive rules and principles that related to such subject-matters as state sovereignty and the freedom of the seas. In the event, however, the central importance of Grotius as a writer on international law is to do not only with his setting out of its substantive rules and principles. It is to do also with the systematic character of his statement of these substantive rules and principles, and as where the latter were expounded in derivation from, and in reference back to, what he presented as being the framework normative conceptualization that served as their foundation. The paper begins with the context for the discussion of Grotius being set through attention to the pre-modern modes of theorizing to do with matters of international law on which he was to draw, albeit while transforming them, in the elaboration of his international jurisprudence. After this, the positions of Grotius regarding the question of international law, as to its conceptual foundations and its substantive elements, are presented critically and in detail, and with this being followed by a final assessment of Grotius and the nature of his contribution to international law. The works of Grotius that are to be considered are the treatise on the law of prize written around 1604, *De Jure Praedae Commentarius*, and the celebrated treatise on the law of war and peace on which rests his reputation as a seminal writer on international law: *De Jure Belli ac Pacis Libri Tres* (1625). [1]

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1 Hugo Grotius: *De Jure Praedae Commentarius*, translation of the original manuscript of 1604 by Gwladys L. Williams with the collaboration of Walter H. Zeydel, The Classics of International Law, No. 22, Volume 1 (Oxford: Clarendon Press, 1950); *De Jure Belli ac Pacis Libri Tres* (1646 edition), trans. Francis W. Kelsey *et al*., The Classics of International Law, No. 3, Volume 2 (Oxford: Clarendon Press, 1925). Concerning Grotius and his contribution to international law, see: Hersch Lauterpacht, 'The Grotian Tradition in International Law', *British Year Book of International Law*, 23 (1946), pp. 1–53; A *Normative Approach to War: Peace, War, and Justice in Hugo Grotius*, ed. Yasuaki Onuma (Oxford: Clarendon Press, 1993). On Grotius in relation to modern natural law theorizing and, more generally, in relation to seventeenth-century political thought, see: Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979), Chapters 3 and 8; and his *Philosophy and Government 1572-1651* (Cambridge: Cambridge University Press, 1993), Chapter 5. For a discussion of Grotius of which the present paper is a modified version, and as where Grotius is considered with Vitoria, Suarez and Gentili as the founders of the modern international law system,

i.

With the pre-modern currents of theorizing as bearing on the law applying in the international sphere, there are two concepts that are of cardinal importance. These are the concept of natural law and the concept of the just war. The origins of the pre-modern tradition of natural law theory go back to the classical period, and to the great Greek thinkers Plato and Aristotle, the Stoic philosophers and the Roman jurists; whereas the essential conceptual framework of just war theory, in its specifically Christian form and tradition, was set out by the early Church father and theologian St Augustine of Hippo. However, the concepts of natural law and the just war were to receive their classic formulation in the thirteenth century with the work of the thinker who, for the purposes of the discussion here, is to be taken as providing the key point of reference: the Dominican theologian and philosopher St Thomas Aquinas (1224/5–74).

The pre-modern tradition of natural law, as regarding issues of political thought, involved a quite particular view as to the individual and the relation of individual men to state and society. Thus in specific terms, the state was understood to be founded in a normative order that was to be identified with the objectively given order of nature as such. In accordance with this, it was assumed that association in the state, and subjection to the legal and political order that it maintained, were natural to men in their status as rational beings. As concerning the state itself, this was presented as a moral, or ethical, form of association, and with its justification lying in its advancing the common good of its members, and, through this, the setting of the conditions for the realization of the good life by individual men within an organized political community. Further to this, the state was thought of as being prior to the individuals forming it, both as to the order of nature, and as to the political community and the forms of the good life that this embodied. It followed from this, as by implication, that the state was to be considered as exercising a direct, and naturally generated, authority as to its members that remained independent of any voluntary act or acts on their part such as involved, or presupposed, their explicit consent and agreement. These various ideas relating to the individual, state and society, as exemplary of the pre-modern natural law tradition, are present with Aristotle and to be found in the argument of his *Politics*.[2] They are also to be found present in the writings of Aquinas on law, the state and civil government, as is so, most notably, with the exposition of the principles of law that comes in the *Summa Theologiae* (c.1265–73).[3]

Aquinas identified and discussed four distinct forms of law: eternal law (*lex aeterna*), natural law (*lex naturalis*), human law (*lex humana*), and divine law (*lex divina*). As Aquinas explained the matter, the eternal law embodied God's conception of the final end of the entire created universe, and, as such, it stood as the ultimate metaphysical foundation of all other forms of law.[4] The natural law, for Aquinas, was a universal law that comprised the part of the eternal law that was transparent to human reason and that, as such, reflected the degree of involvement in the eternal law that was appropriate to men as rational beings.[5] The human law was the law brought into being by men for their government within the condition of social and political order. Thus did the human law comprise the sphere of positive law (*ius positivum*). There were two forms of human law as recognized by Aquinas: the civil law (*ius civile*) and the law of nations (*ius gentium*). The civil law was the law laid down in states for the common good, as through

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see: Charles Covell, *The Law of Nations in Political Thought: A Critical Survey from Vitoria to Hegel* (Basingstoke, Hampshire and New York: Palgrave Macmillan, 2009), Chapter 1.

2 Aristotle, *Politics*, trans. Benjamin Jowett, in *The Complete Works of Aristotle*, The Revised Oxford Translation, ed. Jonathan Barnes, 2 volumes (Princeton, New Jersey: Princeton University Press, 1984), Volume 2, pp. 1986–2129. See particularly Book 1, Chapters 1–2, for Aristotle on the state as founded in nature and established for the common good, and on the state as existing prior to the individuals comprising it.

3 Aquinas' discussion of law comes in Questions 90–97 of the first sub-part of the Second Part of the *Summa Theologiae* that is called the Prima Secundae. For the original Latin text of this with an English translation by Thomas Gilby, see: *Summa Theologiae*, Blackfriars edition, Volume 28: *Law and Political Theory* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1966).

4 Aquinas, *Summa Theologiae*, Prima Secundae, Question 91, Article 1; Question 93.

5 *Ibid*., Prima Secundae, 91.2; 94.

the stipulations of rulers. The law of nations was the law that pertained to the general norms of just conduct, such as those of justice in buying and selling, which, as established through natural reason, were followed on a common basis by all men and to the furtherance of their mutual society.[6] The divine law was the law contained in the word of God as revealed through the Scriptures, and, as such, it supplemented the natural law in directing human beings as to the meaning and implications of the eternal law.[7]

For Aquinas, the principles of human association in political society and the state, and the principles of the common good maintained therein, were universal principles comprehended within the natural law. In particular terms, the natural law embodied the first principles of practical reason as relating to the basic human goods, such as life, the procreation and nurture of offspring, knowledge of God, and participation in human communities, and as relating to the naturally determined inclinations of human beings to pursue these goods and to avoid what was opposed to them.[8] In addition, it was the natural law that Aquinas took to constitute the normative foundation for the state and the final ground of justification for the subjection of men to the rulers established within states. Crucially here, the natural law was assumed to ground the laws stipulated by rulers for the common good within political society. Thus, for example, the natural law stood as the basis for the derivation of human laws: and with the precepts of the law of nations being derived in the manner of conclusions deduced from natural law principles as their premises, and with the precepts of the civil law being derived in the manner of constructions placed on natural law principles in their aspect as general directions for human conduct.[9] At the same time, the justice of human laws was held by Aquinas to depend on their conformity with, or their lack of significant divergence from, the principles of natural law, and with this being to the effect that human laws that ran counter to the natural law were tainted with injustice, and not so much laws as outrages against law.[10]

The idea of international law was something that Aquinas gave recognition to formally in reference to the law of nations, which he held was human law, and hence a part of positive law, and, as such, distinct from natural law even though derived from it. As explained, the substance of the law of nations, for Aquinas, comprised general principles of just conduct, as with those to do with commercial transactions, which were observed in common among men such as to maintain their social interactions. However, there was nothing about this account of the law of nations that involved the modern view of international law as the law having application to the external relations among states and rulers. The context where Aquinas treated of law as something applying to the external relations of states and rulers in the international sphere was in discussion of the law concerning the principles of justice in war.

In the exposition of the principles of justice in war, Aquinas based himself on Augustine, who had before him identified and explained the three essential ideas that run through classic just war theorizing. Thus Augustine had held that state rulers had the authority to wage war, so as to preserve the natural order conducive to peace. In addition, war was to be waged by state rulers in response to wrong-doing, and hence with a view to the punishment of offences and the recovery of things unjustly appropriated by enemy parties. Finally, it was held that war was to be waged only as a matter of necessity, and then always for the end of bringing about the restoration and the maintenance of peace as the state of things natural to human beings. These ideas are to be found given expression to by Augustine, and most notably in his late fourth-century polemical work *Contra Faustum Manichaeum*.[11] They are also to be found present in the statement of the principles of the just war that Aquinas provided as part of his

6 *Ibid*., Prima Secundae, 91.3; 95–97.

7 *Ibid*., Prima Secundae, 91.4–5.

8 *Ibid*., Prima Secundae, 94.2, pp. 81–3.

9 *Ibid*., Prima Secundae, 95.2, pp. 105–7; 95.4, pp. 111–15.

10 *Ibid*., Prima Secundae, 96.4, pp. 131–3.

11 St Augustine, *Contra Faustum Manichaeum*, Libri XXXIII, trans. Richard Stothert, in St Augustine, *The Writings Against the Manichaeans and Against the Donatists*, ed. Philip Schaff (Grand Rapids, Michigan, 1887), pp. 155–345, and especially Book XXII, Sections 74–79. See also: Letters CLXXXIX, CCXXIX, in *Letters of Saint Augustine*, trans. J.G. Cunningham, 2 Volumes (Edinburgh, 1872, 1875), Volume 2, pp. 366–71, 435–7.

consideration of the effects of charity in the *Summa Theologiae*.[12]

According to Aquinas, war was permissible, but only subject to certain conditions that served to determine its justice or lawfulness. The conditions that Aquinas focused on in this respect were ones falling within the part of just war doctrine that is referred to as the *ius ad bellum*, and with the principles relating to this setting out the conditions for the justice of war as to the circumstances of, and the objectives for, the resort to the waging of it. The *ius ad bellum* conditions were fundamental within just war theorizing, although they were closely bound up with the principles pertaining to the part of just war doctrine known as the *ius in bello*. The principles at issue here were such as to set out the conditions for justice as in the actual conduct of war by the belligerent parties.

The first condition that Aquinas picked out for justice in war was that of lawful authority, and with this concerning the authority of the sovereign rulers on whose command war was waged. For Aquinas, the authority to wage war was an authority that belonged exclusively to sovereign rulers. Hence private individuals were not authorized to wage war, as given that they were able to secure redress for wrongs done to them through their having recourse to the laws enforced by their political superiors. It fell to sovereign rulers to exercise the authority to wage war for the reason that they were entrusted with the care of the states subject to their jurisdiction. For this trust was such that rulers were required to apply force not only to preserve states from internal domestic crime and disorder; but there was also the requirement, as carried within their trust, that rulers were to defend states against external attacks, and as in line with the position of Augustine that the right of war served to maintain the condition of peace as the natural order of human affairs.

The second condition for justice in war was that a just cause for war was required to be present. Essential to this condition was the principle that war was to be waged against parties guilty of wrong-doing and as in line with their deserts, and with Aquinas here citing Augustine explicitly as to punishment and recovery of property being the causes at issue in regard to wars waged on account of wrongs perpetrated. The third condition for justice in war was that of right intention, and with this providing that the parties to war were required to act such that they intended through their actions to promote the good and to avoid evil. The right intention principle Aquinas explained with reference to the as stated view of Augustine that wars were to be waged to secure peace, and to suppress evil and to uphold the good. It followed from this that wars could be contrary to justice by reason of flawed intention, and with this being so, and as Aquinas quoted Augustine direct, when wars were embarked upon from the desire to injure people, the pursuit of cruel revenge or the lust for the domination of others. The overriding consideration with this for Aquinas, as it had been for Augustine, was that parties waging a just war were to have peace as their aim and were to conduct themselves in war, as mindful of the end of peace, such that they might bring their enemies back to the condition of peace.[13]

In regard to the question of Aquinas on natural law and the just war in relation to the idea of international law, it is to be noted, first, that the natural law conceptualization, as he formulated this, was highly serviceable for the development of a system of international law. Thus the natural law, as Aquinas explained it, was a law based in principles of human reason that were universal, and directed towards universally applicable principles of justice and political morality. This aspect of universality, as attaching to natural law, was such as to point to the possibility of a system of law, as in conformity with the essential idea of international law, which could be thought of as involving a jurisdiction with a universal reach and application. Again, Aquinas took the natural law to stand as the normative basis for the laws enacted by state rulers, and with it thereby constituting the containing normative framework for the

12 Aquinas set out the conditions necessary for the just war in Question 40 of the second sub-part of the Second Part of the *Summa Theologiae* that is called the Secunda Secundae. For the original Latin text with an English translation by Thomas R. Heath, see: *Summa Theologiae*, Blackfriars edition, Volume 35: *Consequences of Charity* (New York: McGraw-Hill; London: Eyre and Spottiswoode, 1972).

13 Aquinas, *Summa Theologiae*, Secunda Secundae, Question 40, Article 1, pp. 81–5. On Aquinas and justice in war, see: William V. O'Brien, *The Conduct of Just and Limited War* (New York: Praeger, 1981), Chapter 2.

acts and engagements of states and rulers. Here, also, did the natural law conceptualization point to the possibility of a system of international law. For there was thus implied the possibility of a body of law, as conforming with the international law ideal, that would establish normative constraints and limitations on states, and on the rights and powers of their rulers, and that would possess a binding normative force for states and rulers which remained independent of their own consent and agreement to be bound.

As to the subject of the just war, it is evident that the tradition of just war theorizing, as in the form that Aquinas represents it, contributed to the setting of the framework principles for the modern system of international law. For central to the tradition was the idea that the relations between states and rulers were not only determined by considerations of power, but were also to be regulated through law such that the exercise of power by states and rulers could always be thought of as standing in need of some legal basis and justification. This meant that law applied to the relations between states and rulers in the sense that war involved the enforcement of law, and, through this, the maintenance of an order of justice among states in the international sphere as where their rights and interests would receive recognition, and objective validation, within a self-sufficient normative system embodying the rule of international law. More specifically, the connections between just war theorizing and modern international law are brought out with the conditions for justice in war, as Aquinas identified them. Thus the condition of lawful authority confirmed that the right of war was a monopoly right or power of states, as in line with the privileged juridical status accorded to states as the subjects of international law; whereas the condition of just cause confirmed the necessity of the distinction, as cardinal to international law, between the lawful and the unlawful exercise of power by states and rulers. As for the condition of right intention, this is notable for the reason, among others, that it confirmed that the law of war was to include constraints and limitations applying to the belligerent parties in the prosecution of war: and with the right intention principle looking forward to such central core principles of modern international humanitarian law as the principle of proportionality, and the principle of discrimination as providing for the due and conventional non-combatant immunities and protections.

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Grotius was to take up, develop and in some respects radically transform the established lines of theorizing as directed towards the concepts of natural law and the just war. In doing so, Grotius constructed a general jurisprudence that was to prove to be a formative influence on the system of international law in its distinctively modern form. At the heart of this jurisprudence was the exposition of what Grotius identified as the law of war and peace, as this is to be found set out in the treatise *De Jure Belli ac Pacis*. The law of war and peace, as Grotius expounded it, comprised a complex and multi-source-based body of law and legal doctrine that comprehended the law that applied to individual persons, as well as the law that applied to the internal domestic political organization of states. It also comprehended, and with this being Grotius' principal and declared concern, the law that had application to states, and to the rulers of states, in the sphere of their mutual external relations.

The attention that Grotius directed towards the matter of the law governing the external relations among states and rulers is central in understanding his general acceptance as one of the founders of the modern system of international law. Even so, Grotius is also to be understood as an heir to the already established just war tradition, and it is key to his pivotal importance in the development of modern international law that his work everywhere underlines its origins in just war theorizing. As to this, it is to be emphasized that the exposition of the law of war and peace in the three books that comprise *De Jure Belli ac Pacis* is organized, in thematic terms, as in accordance with the basic *ius ad bellum* principles of lawful authority, just cause and right intention that, as has been explained, were identified by Aquinas as the fundamental conditions for justice in war. Thus in Book 1, Grotius addressed the subject-matters pertaining to lawful authority, such as the rights of states and rulers in the initiation of war and the basis and structure of the sovereign power within states. In Book 2, he addressed the subject-matters pertaining to just cause,

such as property and ownership, promissory agreements and contracts, and wrong and punishment, and with the discussion being focused on the rights to do with the person and property whose violation occasioned and provided justification for the resort to war. In Book 3, he addressed the subject-matters pertaining to right intention in war, and with this extending crucially to the treatment of issues relating to the *ius in bello* principle of discrimination. Of particular note among the subject-matters as here considered were the rights of war, the normative constraints and limitations on states and rulers in the exercise of the rights of war, and the principles of good faith that were to be observed by the parties to war such as to maintain the possibility of the restoration of peace among themselves.

While Grotius followed the terms of just war doctrine in the organization and presentation of the law of war and peace, it was through reference to the concept of natural law that he established its normative dimension and its systematic character. With this, Grotius played a decisive role in developing the conceptual framework for the modern secular form of natural law theorizing that was to be adhered to by the later prominent writers on international law. Thus it was that, for Grotius, the law of nature, or the *jus naturale*, stood as foundational in his statement and explanation of the elements of the law of war and peace, and that, as such, it was to be distinguished from state municipal law, or the *ius civile*, and the law of nations, or the *ius gentium*, as the principal forms of positive or voluntary law. This law of nature was a law of universal reason, and, as Grotius famously characterized it in the Prolegomena to *De Jure Belli ac Pacis*, it was a law based directly in the actual condition of human nature, as this was expressed through the natural inclination of human beings towards sociability. So also was the law of nature a law that remained independent of all theistic argument or presupposition, as in the respect that the validity of the claims made for it was to be accepted as compelling even in conditions where there was a denial made as to the existence of God.[14]

As regarding the substantive principles of the law of nature, these Grotius conceived of in terms that were to have a profound significance for subsequent jurisprudence and political thought. Thus Grotius presented the law of nature as embodying certain first-order principles of justice and political morality that related to the rights and obligations of individual men. At the same time, the normative principles as embodied in the law of nature were presented as setting out the minimum conditions of peaceful association essential for the security of men within political society, and for the protecting of their rights and the enforcement of their obligations therein. As Grotius explained it in specific terms, the law of nature was based in the right of men to act to defend and preserve themselves. This right of self-defence or self-preservation was fundamental; and it was by reference to it that Grotius derived the rights and obligations of individual men, as relating to the person and to property, and the principles relating to the form of social order as subject to law and institutions of governments that obtained within the civil state.

The particular view that Grotius took of the substance of the law of nature is apparent with the elaboration of the principles of natural law that he provided in the Prolegomena to *De Jure Praedae*. The first and second of the laws of nature that were there set down stated that men were permitted to defend themselves and permitted to acquire, and to hold, such things as were necessary for the maintenance of life. In conformity with the provisions of these primary laws, Grotius proceeded to state additional laws of nature, and with these identifying the principles of just conduct among men that served to impose normative constraints and limitations on their actions in furtherance of the ends of self-defence and self-preservation. Thus the third and fourth laws of nature required that men were to refrain from doing injury to one another and from appropriating one another's property, while the fifth and sixth laws of nature required that evil acts were to be punished and good acts to be rewarded. In turn, it was provided with the ninth and twelfth laws of nature that the enforcement of rights among men as within political society, and among men and states as within the international sphere, was to take place only through the application of a judicial procedure.[15]

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14 Grotius, *De Jure Belli ac Pacis*, Prolegomena, Sections 6, 11.

15 Grotius, *De Jure Praedae*, II: Prolegomena, pp. 10–11, 13–14, 15–18, 24–5, 27.

There is, further to this, the discussion of the law of nature that comes in the Prolegomena to *De Jure Belli ac Pacis*. Here, Grotius presented the principles of justice and political morality, as contained in the law of nature, as principles relating to the duties laid on men to respect one another's personal, property and contractual rights and to fulfil the obligations correlative to these rights, and with this to include the liability to make restitution for losses caused and the enforcement of punishments on men as where these were deserved. It was in such terms that Grotius described the elements of the law applying to the form of normative order that he considered to derive from, and to have its basis in, the naturally determined inclination of men to associate together as within organized society.

> To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.[16]

The obligation in natural law as providing that men were to enforce rights through judicial procedures underlines how the laws of nature, as Grotius thought of them, comprehended within themselves principles of social order that were to be made effective through the containing institutions of law and government specific to the state. It is with the natural law foundation for the state, as Grotius argued for it, that there is brought out the contrast between the pre-modern natural law tradition, as represented by Aristotle and Aquinas, and the modern secular natural law tradition of Grotius and his successors such as Hobbes, Pufendorf, Locke, Wolff and Vattel. For Aristotle and Aquinas, the state had been taken to originate with, and to be based in, a normative order that was understood as being identified with, and as subsisting in, the order of nature. For the modern natural law thinkers, on the other hand, the origin and foundation of the state, and of the authority that it exercised, were to be explained not only in terms of a normative order embodied in nature in a direct sense, but also in terms of a normative order that was understood as being based in principles of will and agreement, and thus as standing as something which was distinct from the sphere of the natural order in and of itself. This voluntaristic view of the state, and of its authority, was a crucial element in the reconceptualization of natural law, as a law relating to individual rights, which Grotius brought about. For as in accordance with this viewpoint, the state was thought of as originating with, and the powers belonging to rulers as being generated through, certain acts on the part of men that involved the exercise and the transfer of their rights. In this connection, it is to be observed that, as a modern natural law thinker, Grotius took principles of voluntary agreement to lie at the foundations of the state. Thus it was that in the relevant passages in *De Jure Praedae* and *De Jure Belli ac Pacis*, he referred to the form of the act of agreement establishing political society, and the municipal legal order that it supported, as being that of contract or pacts, and with the binding normative force of this agreement being bound up with what he picked out as the principle of the law of nature which provided that men were to abide by the terms of their pacts.[17]

In Grotius' exposition of it, the law of nature was not only law that described the first-order principles of just conduct among men, and the first-order principles of their association within political society. It was also law that, as part of the law of war and peace, possessed direct application to states and rulers. For example, it was in terms of the principles of justice and political morality as contained within the law of nature that Grotius, in *De Jure Belli ac Pacis*, identified the essential just causes for war as the defence against actual or threatened injury, the recovery of property, and the punishment of wrong-doing. To be sure, the natural law-grounded justifications for war were taken by Grotius to establish just cause for individual men to exercise the right of war in a private capacity, as in the defence and securing of their person and property as in the face of attack. However, these justifications were also

16 Grotius, *De Jure Belli ac Pacis*, Prolegomena, 8, pp. 12–13.

17 For Grotius on the natural law principle of pacts as basing municipal legal orders, see particularly: *De Jure Belli ac Pacis*, Prolegomena, 15. Concerning pacts as the basis of political society generally, see: *De Jure Praedae*, II: Prolegomena, pp. 18–20.

appealed to directly by Grotius in his explanation for the just causes of public wars, and with these being the wars waged by states and at the instigation of the state authorities.[18]

Going beyond the law of nature, there was the law of nations. This was the body of laws applying to states in the sphere of their mutual external relations and that Grotius wrote of as coming into being through their mutual consent, and as being directed towards the well-being of the greater society formed by all states.[19] In its status as law based in the consent of states, the law of nations was a form of positive or voluntary law, and it was as such that Grotius distinguished it from the law of nature as within the classification of the different types of law that he set out in Book 1 of *De Jure Belli ac Pacis*. It was with this classificatory scheme that the law of nature was presented by Grotius as a universal law of reason, as in the sense that the principles that it stated were to be thought of as being self-evident to men in their natural condition as rational beings. Thus the law of nature was a dictate of right reason, which served to determine the moral necessity, or the moral baseness, of human acts as corresponding to their agreement, or their disagreement, with the ideal normative standard of rational nature. Set in opposition to the law of nature, there was the sphere of law that Grotius presented not as law based in reason in and of itself, but as law that originated with the will. This was the volitional law, the *ius voluntarium*, and with the part of the volitional law whose origins lay in the will of men being the volitional human law: the *ius voluntarium humanum*. One form of volitional human law was the municipal law, and with this being the law that was brought into being through the will and agency of the sovereign authorities established within states. The other principal form of volitional human law was the positive or voluntary law of nations. As Grotius explained it, the law of nations comprised a form of volitional human law in that it was law that originated in the will of nations and that derived its binding normative force from the will of nations standing as its origin. As to the evidence for the law of nations as in its status as a form of volitional human law, this Grotius maintained was to be found embodied in the customary practice of the nations and recorded in the testimony of the writers who were learned in it.[20]

It is to be emphasized that, for Grotius, the law of nature was bound up intimately with the law of nations as a form of volitional human law. This was so in the crucial respect that it was the law of nature that provided, from within itself, the underlying normative foundation for the law of nations. Thus it was that, for Grotius, the law of nature included a general principle of just conduct whose observance by nations and states was something that stood as the precondition for the possibility of their being able to bring into being, through their own will and consent, a body of laws for the regulation of their mutual external relations. The principle of natural law at issue, here, is the one that Grotius referenced in his explanation of the formation of the separate states. This was the principle of pacts, and with this involving the general requirement that the terms of voluntary agreements were to be fulfilled by the parties to them. Grotius everywhere appealed to the principle of pacts in his exposition of the specifically international elements of the law of war and peace. This is so most particularly with his statement of the rules of good faith to be observed by the parties to war. With this, Grotius reviewed the forms of good faith among enemies, peace treaties and other instruments for the ending of war, truces, safe conducts and prisoner ransoms in the course of war, as well as the good faith rules binding on subordinate agencies and private individuals. These various relationships, instruments and procedures as prerequisite for the maintenance of good faith pertained for the most part to the law of nations; and, as in line with the sense of Grotius' presentation of them, they were such that they presupposed the natural law principle of pacts, as in the regard that they were presented by him as being conditional on the promissory undertakings of parties at war for their being effective and brought into operation.[21]

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18 As to Grotius on the right of men under natural law to defend themselves, as in relation to the right of private war, see: *De Jure Belli ac Pacis*, Book I, Chapter II, Section I and Chapter III, Sections I-II. For Grotius on self-defence, the recovery of property and the punishment of wrong-doing as the principal just causes for war, see: *De Jure Belli ac Pacis*, II.I.I-II.

19 Grotius, *De Jure Belli ac Pacis*, Prolegomena, 17.

20 *Ibid*., I.I.X, XIII-XIV. It is to be noted that Grotius divided volitional law into volitional human law and volitional divine law, the *ius voluntarium divinum*, and with the latter being understood to have its origin in the will of God. *De Jure Belli ac Pacis*, I.I.XV.

21 Grotius, *De Jure Belli ac Pacis*, III.XIX-XXIV.

There is the further consideration that, as has been explained, the law of nature included principles of justice and political morality that Grotius thought of as having direct application to nations and states. This was so, to take one central case, with the fundamental right of war and with the principles that related to the cause and justification for the waging of war. Despite this, however, it remains the case that the part of the law of war and peace that Grotius wrote of as applying essentially to states and rulers, as in the context of their mutual external relations, was the law of nations in its character as a form of volitional human law. Thus it was that a substantial part of *De Jure Belli ac Pacis* was given over to the exposition of the elements of the positive or voluntary law of nations, and with this the law of nations proper being treated as something that was fully distinguishable from the law of nature as such. This was true, for example, of the law relating to the conditions for public war, and especially so with the principle of sovereign authority and with the form and procedures for the declaration of war by states.[22] Among the other component parts of the law of nations that merit particular referencing, here, are the following: the law of embassies; the law of burial; the law relating to the appropriation of the goods of subjects, as in order to meet the just liabilities of rulers; the law relating to the rights of belligerent parties arising as the effects of public war, and with this including the rights as pertaining to the killing of enemies, plunder, prisoners of war, and the exercise of rulership over vanquished peoples.[23]

As it will be clear, Grotius' discussion of natural law and the law of nations confirms the fact of his alignment with the established just war tradition. Even so, it is to be underlined that the law of war and peace that Grotius expounded went far beyond the terms of received just war theorizing itself. For Grotius also recognized principles that were to be developed by later writers on the law of nations, and that, in the course of this, were to come to form an essential part of the core substantive elements of the modern system of international law. Nevertheless, there are still some salient caveats to be entered as to claims for the forward-looking modernity of Grotius as in regard to the concerns of international jurisprudence. As an example of this, it is to be observed that Grotius fell short of providing a fully satisfactory determination of the principles of statehood, as in accordance with what would become established as the leading conceptualization of the internal organizational form and structure of states as the subjects of the law applying in the international sphere.

As to this question, it is true that Grotius was in certain key respects in agreement with the subsequent lines of argument about the state, as these were to be taken forward by such mainstream political thinkers as Hobbes, Pufendorf, Locke, Rousseau, Kant and Hegel. Thus Grotius argued that the state was based in consent, in that it originated in pacts, and that its concern lay with giving effect to the rights of the individuals who were associated together within it. He likewise defined the civil power in the state, as in conformity with his own specification of the principles of public war, in terms of the conventional functions of government, as relating to legislation, the issues of war and peace, the making of treaties, and the adjudication of disputes. Moreover, he explained the sovereignty, such as attached to the civil power, in terms of its being a power that was not subject to the legal control and limitation as exercised by any will or agency external to itself.24

To set against this, though, it is to be observed that Grotius stood not a little opposed to such of the later developments in theorizing on the state that involved the commitment to the principles of constitutional government and the rule of law. This was so, most particularly, with the openly absolutist thrust of his position as to the essentials of state sovereignty. Thus it was that he maintained in *De Jure Belli ac Pacis* that sovereignty was not always to be considered as residing in the people. For as he maintained, among various lines of argument that he put forward: a people might submit and enslave themselves to a ruler, and as where this involved the complete transfer of their right of self-government to another power or agency; they might renounce the right of self-government for reasons to do with their defence; and some forms of government were in fact established not for the benefit of their subjects, but

22 *Ibid*., I.III.I, IV; III.III.

23 For Grotius on these various subject-matters of the law of nations, see: *De Jure Belli ac Pacis*, II.XVIII-XIX; III.II, IV-IX.

24 Grotius, *De Jure Belli ac Pacis*, I.III.VI-VII.

only for the benefit of rulers.[25] And most notable of all, Grotius was to argue to the effect of bringing into question the specifically representative character of the sovereign power in the state on which the line of successor political philosophers from Hobbes through to Kant and Hegel were all to focus attention. Grotius did this in the respect that he accepted that, in some circumstances, the sovereign power was to be thought of as being held absolutely as through the right of transfer, and with this meaning that the sovereign power as in regard to the people might be held and exercised by the ruler with full proprietary right, that is, in patrimony, and so might be legitimately alienated by the ruler.[26]

With all of this granted as to the limitations of Grotius as to his views on the state, there is still much to underscore as to his positive endorsement of principles that are entirely recognizable as in reference to the modern system of international law, as this was to develop after him. In some contexts, the principles concerned stood as principles pertaining to international law in its character as the law of peace, and they were, as such, exemplary of the enlargement in scope of the subject-matters addressed by Grotius as coming under the law of nations, as relative to earlier writers on international jurisprudence. Thus it was that in *De Jure Praedae*, he famously affirmed the freedom of the seas as a fundamental legal principle, which principle he explained as in its relation to the right that he saw as belonging to nations and peoples to engage in mutual trade and commerce in the international sphere.[27] Then again in *De Jure Belli ac Pacis*, he set out in detail the principles pertaining to the law of treaties, considered as public conventions made on the lawful authority of rulers, and to the interpretation of treaties.[28] He likewise set out the principles pertaining to the law of embassies, as where he affirmed the inviolability of ambassadors and their representative status as in relation to the sovereign power authorizing them to act.[29]

As further proof of the modernity of Grotius in his relation to international law, there is what he wrote on the law pertaining to war itself. For with this he affirmed core substantive principles of law while also bringing out, and so upholding, the universality, and hence the non-arbitrary character, of the law applying in the international sphere. In this connection, it is to be emphasized that Grotius did not only limit the just causes for war to self-defence, the recovery of property and the punishment of wrong-doing. He also excluded certain alleged causes for war as being defective through their injustice, and with this being such as to underline how the protections of the law of war and peace extended to nations and peoples, and to their rights, as without regard for considerations to do with religion or material power or to do with the asserted rights and powers of any higher institutional authorities. So, for example, he insisted that war could not justly be waged against those who were unwilling to accept the Christian religion, or against those who erred in their interpretation of the divine law.[30]

Grotius also insisted that there could be no justice attaching to wars aimed at the conquest of richer lands, or to wars based in some claimed right of discovery asserted in respect of lands subject to existing settled occupation. The same applied to wars supported through the claim to rule over others for their own benefit and even contrary to their will and consent, as well as to wars based in the universal jurisdictional claims as were associated with the Holy Roman Empire and with the Church.[31] Finally, the universality, and non-arbitrary character, of the law of war and peace are underlined with the acceptance by Grotius that justice might attach to both parties to a war, and with this being such as to secure to the parties the full protection of the laws applicable to them. Thus he held that while a war could not be just on both sides as to its essential cause, it was nevertheless still possible for neither of the parties to do wrong, as in the course of it, and with it following from this that a war might be thought of as being just on both

25 *Ibid*., I.III.VIII, and particularly sub-sections 1, 2–4, 14.

26 *Ibid*., I.III.XI-XII.

27 For Grotius on the freedom of the seas and as concerning international trade and commerce, see: *De Jure Praedae,* Chapter XII, and especially so at pp. 218–19.

28 Grotius, *De Jure Belli ac Pacis*, II.XV-XVI.

29 *Ibid*., II.XVIII.

30 *Ibid*., II.XX.XLVIII, L.

31 *Ibid*., II.XXII.VIII-IX, XII-XIV.

sides as in respect of its legal effects.[32]

In the matter of Grotius on the question of war, there are the additional anticipations of modern international law to be considered, such as those that come with his specification of the principles relating to moderation in the exercise, as by belligerent parties, of the lawful rights that he took to belong to them as the effects of public war. As to these rights, Grotius allowed that belligerents had more or less unlimited rights under the law, as in respect of the killing of enemies, persons residing in the territory of the enemy, women and children, persons held captive, persons willing to surrender, persons who offered unconditional surrender, and persons taken and held as hostages in wartime.[33] There were equally unlimited rights conferred in law as to the destruction and the appropriating of enemy property, the treatment of prisoners of war, and the acquisition and exercise of the powers of civil rulership over defeated peoples.[34]

Nevertheless, the lawful rights of war at issue here were, for Grotius, subject to principles of a moral character that were such as to provide for moderation in the application of the said rights. It is to be understood that the principles enjoining moderation in war were moral principles, and that, as Grotius explained them, the principles concerned lacked the strict legal standing that they would eventually come to be assigned by later writers on international law. However, it is evident that the principles of moderation in war, as to their substance, relate to the *ius in bello* requirements on discrimination; and, as such, the principles relate also in a direct sense to the considerations to do with the immunities and protections due to non-combatant parties in war, and to parties such as prisoners of war, that are embodied in principles that are central to modern international humanitarian law. Thus it was that Grotius held that there was to be moderation in the killing of enemies, as where acts of killing would be devoid of moral justice: punishment was to be remitted even for enemies deserving of death; care was to be taken to protect the lives of the innocent; children, women (save where guilty of serious offences) and the elderly were to be spared, and likewise scholars and persons in religious orders, farmers and merchants, prisoners of war, those prepared to surrender and those surrendering unconditionally, and hostages except where they had been involved in wrong-doing.[35] In addition, there was to be moderation with the destruction and capture of enemy property, with the treatment of prisoners of war, and with the taking and wielding of civil rulership powers over the enemy.[36]

iii.

To make a final assessment of the contribution of Grotius to the advancement of international law, it is essential to recognize the central importance of the appeal that he made to the concept of natural law in the exposition of the law of war and peace and in the identification of its normative foundations. Here, it is to be emphasized, once again, that Grotius broke with the sort of natural law conceptualization associated with the thought of Aquinas, and instead provided his own specific formulation of the idea of the law of nature. This was the formulation where the law of nature was presented as the law stating the fundamental principles of justice and political morality that related to the basic rights of individuals as to their self-defence and self-preservation, as focused on their person, property and contracts. It was also the law that stated the fundamental principles of social and political order whose concrete embodiment within the state was to be understood as being most conducive to the defence and preservation of men and to the effective securing of their rights. This distinctively rights-based natural law conceptualization was to prove influential with the thinkers who followed Grotius, among whom, as has been pointed to, were Hobbes, Pufendorf, Locke, Wolff and Vattel.

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32 *Ibid*., II.XXIII.XIII.
33 *Ibid*., III.IV.III-IV, VI, IX-XII, XIV.
34 *Ibid*., III.V-VIII.
35 *Ibid*., III.XI.VII-XV, XVIII.
36 *Ibid*., III.XII-XIII, XIV.III-IV, XV.

It is because Grotius incorporated principles of natural law within his exposition of the law of war and peace that he is to be set apart from the line of positivist writers proper in the tradition of international law: and with these being the writers who saw international law as being embodied exclusively in its conventional sources, such as state custom, treaties and adjudicative decisions. Nevertheless, it has still to be emphasized that Grotius did recognize the law of nations as a form of positive or voluntary law, and that while he saw the natural law as being foundational in relation to it, the law of nations and the law of nature were for all that distinguished by him as one from the other. The positive or voluntary law of nations, as Grotius understood this, was distinct and separate from the law of nature as on account of two of its principal characteristics. The first of these was that the origin and foundation of the law of nations were to be explained as lying not in some normative order supposedly inherent in nature, but rather in the will and agreement of states and rulers, and with the will and agreement of states and rulers standing to the law of nations as the source of its binding normative force.

The second characteristic of the law of nations to be reckoned with, as in Grotius' sense and understanding of it, is that the law of nations was law whose primary and essential sphere of application lay with the external relations obtaining among states and rulers. However, this was not true with the law of nature. For the latter was something that Grotius saw as the body of law that applied in the first case to individual men, and to states and rulers only in a secondary and derivative sense. Hence the law of nature was such that the paradigm form of war to which it related was private war: that is, war where individual men adopted the means of war, in a private status, as in the exercise of the natural right of self-defence. As against the law of nature, the positive or voluntary law of nations was law that Grotius presented as having application, primarily and essentially, to states and rulers in their mutual external relations. Indeed, the law of nations was not only law that applied to states and rulers; it was also law that presupposed as the condition for its own generation, and as the condition for its having application to human affairs as such, the association of men in states and their subjection to rulers possessing the authorities integral to sovereignty. For the law of nations, as Grotius explained it, was law that served to define, and to regulate, the public rights that belonged to states as the bearers of sovereign power. The rights at issue here included the rights exercised by states with respect to one another; and this was so, most particularly, with the public rights that were bound up with the waging of war by states as in accordance with their sovereign authority. Thus it was that Grotius presented the form of war that pertained specifically to the sphere of the law of nations as being not private war, but public war. In other words, the law of nations related to war waged by states on the authority of the sovereign power, and in compliance with such formal conditions as, for example, the condition that war was to follow on from a declaration of war by the state rulers concerned, and so through the exercise of the rights that were exclusive to public war as the effects thereof.

The characterization that Grotius provided as to the positive or voluntary law of nations, and his differentiating of it from the law of nature, carried with it one vitally important implication for the law of nations considered as the body of laws that applied to states and rulers in the international sphere. This was that the principles of the law of nations were to be thought of as principles that reflected, and that were congruent with, the defining condition and attributes of states and rulers in their juridical status as the subjects of the law of nations. At the same time, it was implied with this that the principles of the law of nations were also to be thought of as principles that were to be distinguished from the principles of the law of nature as these were to be thought of as having application to individual men in respect of their specifically natural condition and attributes. All that was carried here by implication in what Grotius had to say about natural law and the law of nations was to be of great significance for the evolution of the general theory of international law. This was so especially as the theory of international law was to be taken forward, as in accordance with the basic and essential terms of the natural law conceptualization as set out and argued for by Grotius. It was also, more broadly, an implication that was to be of great significance for the eventual delineation of international law as in its character as a form of public law, and, as such, as having determinate application to states and rulers and to their particular and distinctive juridical situation. To be sure, this delineating of

international law was to be left short of full and proper realization in the work of Hobbes and Pufendorf, as Grotius' most notable seventeenth-century successors in the natural law tradition. Despite this, Wolff and Vattel in the eighteenth century were to go on to complete and perfect the delineation of international law as from the natural law standpoint; and it is to be noted, as by way of a concluding observation, that in this respect, as in others, Wolff and Vattel with their classic treatises on the law of nations served to underline the seminal contribution made by Grotius to the development of the modern system of international law. [37]

37　A full discussion of Wolff and Vattel lies outside the scope of the present paper. However, it may be observed, here, that Wolff and Vattel are the true heirs and successors to Grotius, within the tradition of international law, in the respect that they saw the law of nations as comprising elements of both natural law and positive or voluntary law. For the principal treatises of the two writers, see: Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1764 edition), trans. Joseph H. Drake, The Classics of International Law, No. 13, Volume 2 (Oxford: Clarendon Press, 1934); Emmerich de Vattel, *Le Droit des Gens, ou Principes de la Loi Naturelle, appliqués à la Conduite et aux Affaires des Nations et des Souverains* (1758 edition), trans. Charles G. Fenwick, The Classics of International Law, No. 4, Volume 3 (Washington, DC: Carnegie Institution of Washington, 1916).