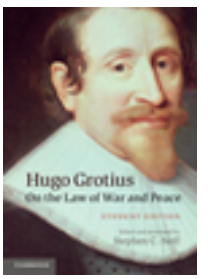

Hugo Grotius on the Law of War and Peace

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Chapter

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Prologue to the three books On the Law of War and Peace

The municipal law of Rome and of other states has been treated by many, who have undertaken to elucidate it by means of commentaries or to reduce it to a convenient digest. That body of law, however, which is concerned with the mutual relations among states or rulers of states (*inter populos plures aut populorum*), whether derived from nature, or established by divine ordinances, or having its origin in custom (*moribus*) and tacit agreement,[1] few have touched upon. Up to the present time, no one has treated it in a comprehensive and systematic manner; yet the welfare of mankind demands that this task be accomplished.

Such a work is all the more necessary because, in our day as in former times, there is no lack of men who view this branch of law with contempt as having no reality outside of an empty name. On the lips of men quite generally is the saying . . . that, in the case of a king or imperial city,[2] nothing is unjust which is expedient. Of like implication is the statement that, for those whom fortune favours, might makes right, and that the administration of a state cannot be carried on without injustice.

Furthermore, the controversies which arise between peoples or kings generally have Mars as their arbiter. That war is irreconcilable with all law is a view held not alone by the ignorant populace; expressions are often let slip by well-informed and thoughtful men which lend countenance to such a view. Nothing is more common than the assertion of antagonism between law and arms.

Since our discussion concerning law will have been undertaken in vain if there is no law, in order to open the way for a favourable reception of our work and at the same time to fortify it against attacks, this very serious error must be briefly refuted. In order that we may not be obliged to deal with a crowd of opponents, let us assign to them a pleader.

[1] By 'custom' should probably be understood the *ius gentium* proper; and by 'tacit agreement' the volitional law of nations. But Grotius is not explicit on this point. See the Introduction on these two concepts.

[2] By 'imperial city' is meant, basically, a self-governing, independent city or city-state, such as emerged in the Holy Roman Empire (in northern Italy) from the eleventh century.

Carneades,[3] then, having undertaken to hold a brief against justice, in particular against that phase of justice with which we are concerned, was able to muster no argument stronger than this, that, for reasons of expediency, men imposed upon themselves laws, which vary according to customs, and among the same peoples often undergo changes as times change; moreover that there is no law of nature, because all creatures, men as well as animals, are impelled by nature toward ends advantageous to themselves; that, consequently, there is no justice; or, if such there be, it is supreme folly, since one does violence to his own interests if he consults the advantage of others.

What the philosopher here says . . . must not for one moment be admitted. Man is, to be sure, an animal, but an animal of a superior kind, much farther removed from all other animals than the different kinds of animals are from one another. [E]vidence on this point may be found in the many traits peculiar to the human species. But among the traits characteristic of man is an impelling desire for society, that is, for the social life – not of any and every sort, but peaceful, and organised according to the measure of his intelligence, with those who are of his own kind; this social trend the Stoics called 'sociableness'.[4] Stated as a universal truth, therefore, the assertion that every animal is impelled by nature to seek only its own good cannot be conceded.[5]

Some of the other animals, in fact, do in a way restrain the [appetite] for that which is good for themselves alone, to the advantage, now of their offspring, now of other animals of the same species. This aspect of their behaviour has its origin, we believe, in some extrinsic intelligent principle,[6] because, with regard to other actions which involve no more difficulty than those referred to, a like degree of intelligence is not manifest in them. The same thing must be said of children. In children, even before their training has begun, some disposition to do good to others appears; . . . thus sympathy for others comes

[3] Carneades of Cyrene, active in the second century BC, was the leading figure of the sceptical school of philosophers in Hellenistic Greece. He was a popular lecturer but left no writings of his own. The core belief of scepticism was a denial of the possibility of attaining knowledge with absolute certainty. More specifically, the sceptics disbelieved in natural law and in the existence of universal moral principles, holding instead that all law was of merely human creation. The sceptical view-point is presented in Cicero's *Republic*, by the character Lucius Furius Philus.

[4] The Stoics, from the third century BC onwards, were the foremost expositors in the classical world of natural law. A part of their doctrine was a monistic outlook, in which the universe was seen, in basically organic terms, as a single gigantic organism, with all parts interconnected into a coherent whole. In political and social terms, this outlook took the form of a belief that the whole of human society formed, fundamentally, a single moral community.

[5] This passage shows Grotius's commitment to the belief in a fundamental principle of traditional natural-law thought: the inherent sociability of the human species.

[6] I.e., to some, the law of nature was imposed from outside, and then implanted in humans as a kind of instinct. On this view, the property of sociability would therefore not be something that humans devised for themselves by their own initiative.

out spontaneously at that age. The mature man in fact has knowledge which prompts him to similar actions under similar conditions, together with an impelling desire for society, for the gratification of which he alone among animals possesses a special instrument, speech. He has also been endowed with the faculty of knowing and of acting in accordance with general principles. Whatever accords with that faculty is not common to all animals, but peculiar to the nature of man.[7]

This maintenance of the social order, which we have roughly sketched, and which is consonant with human intelligence, is the source of law properly so called.[8] 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.

From this signification of the word law, there has flowed another and more extended meaning. Since over other animals, man has the advantage of possessing not only a strong bent towards social life, of which we have spoken, but also a power of discrimination which enables him to decide what things are agreeable or harmful (as to both things present and things to come), and what can lead to either alternative; in such things it is meet for the nature of man, within the limitations of human intelligence, to follow the direction of a well-tempered judgement, being neither led astray by fear or the allurement of immediate pleasure, nor carried away by rash impulse. Whatever is clearly at variance with such judgement is understood to be contrary also to the law of nature, that is, to the nature of man.

To this exercise of judgement belongs, moreover, the rational allotment to each man, or to each social group, of those things which are properly theirs, in such a way as to give the preference now to him who is more wise over the less wise, now to a kinsman rather than to a stranger, now to a poor man rather than to a man of means, as the conduct of each or the nature of the thing suggests. Long ago, the view came to be held by many, that this discriminating allotment is a part of law, properly and strictly so called. [N]evertheless law, properly defined, has a far different nature, because its essence lies in leaving to another that which belongs to him, or in fulfilling our obligations to him.[9]

[7] A key feature of the rationalist stream of natural-law thought, to which Grotius adhered, is that humans are fundamentally distinct from all other animals, by virtue of their possession of reason – with reason also forming the basis of natural law.

[8] The rationalist approach to natural law held that law in the proper sense is applicable only to humans. Consequently, laws of nature, such as the 'laws' of physics or biology, applicable to inanimate objects or to non-human creatures, cannot be regarded as laws in the proper sense.

[9] In other words, the central feature of natural law is the principle of due fulfillment of obligations. It is therefore an error to regard the natural law of Grotius as being fundamentally a law of rights.

What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness: that there is no God, or that the affairs of men are of no concern to Him. The very opposite of this view has been implanted in us partly by reason, partly by unbroken tradition, and confirmed by many proofs as well as by miracles attested by all ages. Hence it follows that we must without exception render obedience to God as our Creator, to Whom we owe all that we are and have; especially since, in manifold ways, He has shown Himself supremely good and supremely powerful, so that, to those who obey Him, He is able to give supremely great rewards, even rewards that are eternal, since He Himself is eternal. We ought, moreover, to believe that He has willed to give rewards, and all the more should we cherish such a belief if He has so promised in plain words; that He has done this, we Christians believe, convinced by the indubitable assurance of testimonies.

Herein, then, is another source of law besides the source in nature, that is, the free will of God,[10] to which beyond all cavil our reason tells us we must render obedience. But the law of nature of which we have spoken, comprising alike that which relates to the social life of man and that which is so called in a larger sense, proceeding as it does from the essential traits implanted in man,[11] can nevertheless rightly be attributed to God, because of His having willed that such traits exist in us.[12]

There is an additional consideration in that, by means of the laws which He has given, God has made those fundamental traits more manifest, even to those who possess feebler reasoning powers; and He has forbidden us to yield to impulses drawing us in opposite directions – affecting now our own interest, now the interest of others – in an effort to control more effectively our more violent impulses and to restrain them within proper limits.

But sacred history, besides enjoining rules of conduct, in no slight degree reinforces man's inclination towards sociableness by teaching that all men are sprung from the same first parents. In this sense, we can rightly affirm also that . . . a blood-relationship has been established among us by nature; consequently, it is wrong for a man to set a snare for a fellow-man. Among mankind generally, one's parents are as it were divinities, and to them is owed an obedience which, if not unlimited, is nevertheless of an altogether special kind.

[10] The commands of God, emanating from God's free will, comprise divine law – a category of law quite distinct from natural law.

[11] It is conceded that natural law 'so called in a larger sense' arises from 'the essential traits implanted in man', i.e., from biological features of the human species. But natural law properly speaking is, for Grotius, a law whose basis is reason, not instinct.

[12] Because the existence of natural law itself must ultimately be attributed to the will of God, there cannot, strictly speaking, be a total separation of natural law from divine law. These two categories of law are therefore distinct not in their ultimate origin (since both are the creations of God), but rather in the means by which their contents are discerned by humans. The content of natural law is known by means of the human intellect, while divine law can only be known by revelation.

Again, since it is a rule of the law of nature to abide by pacts[13] (for it was necessary that among men there be some method of obligating themselves one to another, and no other natural method can be imagined), out of this source the bodies of municipal law have arisen. For those who had associated themselves with some group, or had subjected themselves to a man or to men, had either expressly promised, or from the nature of the transaction must be understood impliedly to have promised, that they would conform to that which should have been determined, in the one case by the majority, in the other by those upon whom authority had been conferred.[14]

What is said, therefore, in accordance with the view not only of Carneades but also of others, that

> Expediency is, as it were, the mother
> Of what is just and fair,[15]

is not true, if we wish to speak accurately. For the very nature of man, which, even if we had no lack of anything, would lead us into the mutual relations of society, is the mother of the law of nature. But the mother of municipal law is that obligation which arises from mutual consent; and since this obligation derives its force from the law of nature, nature may be considered, so to say, the great-grandmother of municipal law.

The law of nature nevertheless has the reinforcement of expediency; for the Author of nature willed that, as individuals, we should be weak, and should lack many things needed in order to live properly, to the end that we might be the more constrained to cultivate the social life. But expediency afforded an opportunity also for municipal law, since that kind of association of which we have spoken, and subjection to authority, have their roots in expediency. From this, it follows that those who prescribe laws for others, in so doing, are accustomed to have, or ought to have, some advantage in view.

But just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states. And this is what is called the [volitional] law of nations, whenever we distinguish that term from the law of nature.[16]

[13] For the full treatment of this subject, see p. 202 below.

[14] This passage indicates Grotius's commitment to the idea that human political authority derives, ultimately, from the consent of the governed. To this extent, Grotius is fairly grouped amongst social-contract theorists. For Grotius's fuller exposition of the source and nature of sovereignty, see p. 50 below.

[15] Horace, *Satires*, I.3.98.

[16] This is Grotius's first reference to the volitional law of nations, and to the distinction between it and natural law. Natural law is rooted, ultimately, in transcendental principles of right and wrong, instilled into the human psyche (or else discoverable by reason). The volitional law of nations is rooted in expediency – though

This division of law Carneades passed over altogether. For he divided all law into the law of nature and the law of particular countries. Nevertheless if undertaking to treat of the body of law which is maintained between states . . . he would surely have been obliged to make mention of this law.

Wrongly, moreover, does Carneades ridicule justice as folly. For since, by his own admission, the national who in his own country obeys its laws is not foolish, even though, out of regard for that law, he may be obliged to forgo certain things advantageous for himself, so that nation is not foolish which does not press its own advantage to the point of disregarding the laws common to nations. The reason in either case is the same. For just as the national, who violates the law of his country in order to obtain an immediate advantage, breaks down that by which the advantages of himself and his posterity are for all future time assured, so the state which transgresses the laws of nature and of nations (*iura naturae gentiumque*) cuts away also the bulwarks which safeguard its own future peace. Even if no advantage were to be contemplated from the keeping of the law, it would be a mark of wisdom, not of folly, to allow ourselves to be drawn towards that to which we feel that our nature leads.

Wherefore, in general, it is by no means true that

> You must confess that laws were framed
> From fear of the unjust,[17]

a thought which, in Plato, someone explains thus, that laws were invented from fear of receiving injury, and that men are constrained by a kind of force to cultivate justice.[18] For that relates only to the institutions and laws which have been devised to facilitate the enforcement of right; as when many persons, in themselves weak, in order that they might not be overwhelmed by the more powerful, leagued themselves together to establish tribunals and by combined force to maintain these, that as a united whole they might prevail against those with whom as individuals they could not cope.[19]

And in this sense, we may readily admit also the truth of the saying that right is that which is acceptable to the stronger; so that we may understand that law fails of its outward effect unless it has a sanction behind it.[20]

Nevertheless law, even though without a sanction, is not entirely void of effect. For justice brings peace of conscience, while injustice causes torments

expediency must be understood to mean that which is expedient for 'the great society of states' in general, rather than for the interests of individual states.

[17] Horace, *Satires*, I.3.111. [18] Plato, *The Republic*, II.358–62; and *Gorgias*, 482–4.

[19] It is conceded that some laws are made by humans specifically for the purpose of coercing wicked persons into behaving lawfully. But these are laws which are ancillary or procedural in character rather than substantive – i.e., laws which institute enforcement mechanisms. The substantive law which is being enforced, in contrast, is (according to Grotius) natural law, which is not man-made.

[20] I.e., a sanction (meaning punishment meted out to law-breakers) is essential for the limited – though admittedly important – purpose of giving 'outward effect' to laws. But it is not a definitional component of law as such.

and anguish . . . in the breast of tyrants. Justice is approved, and injustice condemned, by the common agreement of good men. But, most important of all, in God injustice finds an enemy, justice a protector. He reserves His judgements for the life after this, yet in such a way that He often causes their effects to become manifest even in this life, as history teaches by numerous examples.

Many hold . . . that the standard of justice which they insist upon in the case of individuals within the state is inapplicable to a nation or the ruler of a nation. The reason for the error lies in this, first of all, that in respect to law, they have in view nothing except the advantage which accrues from it, such advantage being apparent in the case of citizens who, taken singly, are powerless to protect themselves. But great states, since they seem to contain in themselves all things required for the adequate protection of life, seem not to have need of that virtue which looks toward the outside, and is called justice.

But, not to repeat what I have said, that law is not founded on expediency alone, there is no state so powerful that it may not sometime need the help of others outside itself, either for purposes of trade, or even to ward off the forces of many foreign nations united against it. In consequence, we see that even the most powerful peoples and sovereigns seek alliances, which are quite devoid of significance according to the point of view of those who confine law within the boundaries of states. Most true is the saying, that all things are uncertain the moment men depart from law.

If no association of men can be maintained without law, . . . surely also that association which binds together the human race, or binds many nations together, has need of law. This was perceived by him who said that shameful deeds ought not to be committed even for the sake of one's country.[21]

Least of all should that be admitted which some people imagine, that in war all laws are in abeyance. On the contrary, war ought not to be undertaken except for the enforcement of rights;[22] when once undertaken, it should be carried on only within the bounds of law and good faith.[23] . . . For judgements are efficacious against those who feel that they are too weak to resist; against those who are equally strong, or think that they are, wars are undertaken. But in order that wars may be justified, they must be carried on with not less scrupulousness than judicial processes are wont to be.

Let the laws be silent, then, in the midst of arms, but only the laws of the state, those that the courts are concerned with, that are adapted only to a state of peace; not those other laws, which are of perpetual validity and suited to all times.[24]

[21] Cicero, *On Duties*, I.159.

[22] This is a capsule statement of just-war doctrine. For more extended treatment of the subject, see p. 81 below.

[23] For the detailed treatment of the law on the conduct of war, see p. 325 below.

[24] The reference is to a famous – and much misunderstood – passage of Cicero, in which it was stated that 'when swords are drawn the laws fall silent'. Cicero, *Pro Milo*, IV.10. Some have interpreted this to mean that, between belligerents in wartime, no law is in force. In fact, Cicero made the remark in the context of asserting a right of

The ancient Romans . . . were slow in undertaking war, and permitted themselves no licence in that matter, because they held the view that a war ought not to be waged except when free from reproach.

The historians in many a passage reveal how great in war is the influence of the consciousness that one has justice on his side; they often attribute victory chiefly to this cause. Hence the proverbs, that a soldier's strength is broken or increased by his cause; that he who has taken up arms unjustly rarely comes back in safety; that hope is the comrade of a good cause; and others of the same purport.

No one ought to be disturbed, furthermore, by the successful outcome of unjust enterprises. For it is enough that the fairness of the cause exerts a certain influence, even a strong influence upon actions, although the effect of that influence, as happens in human affairs, is often nullified by the interference of other causes. Even for winning friendships, of which for many reasons nations as well as individuals have need, a reputation for having undertaken war not rashly nor unjustly, and of having waged it in a manner above reproach, is exceedingly efficacious. No one readily allies himself with those in whom he believes that there is only a slight regard for law, for the right, and for good faith.

Fully convinced by the considerations which I have advanced, that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world, I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human; it is as if, in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes.[25]

Confronted with such utter ruthlessness, many men, who are the very furthest from being bad men, have come to the point of forbidding all use of arms to the Christian, whose rule of conduct above everything else comprises the duty of loving all men. . . . [T]heir purpose, as I take it, is [that] when things have gone in one direction, to force them in the opposite direction, as we are accustomed to do, that they may come back to a true middle ground. But the very effort of pressing too hard in the opposite direction is often so far from being helpful

individual self-defence against an assailant, making the point that, in such an emergency, it is not possible to mobilise the normal forces of the state against the criminal. It is therefore necessary for the law to allow self-help in such an emergency. Cicero was making no reference to war between states. Grotius therefore rightly points out that the laws which are silent, in Cicero's statement, are the ordinary civil laws applicable *within* a state (i.e., the law forbidding forcible self-help by individuals) and not the law of nature, which is of permanent and eternal validity, even between enemy belligerents in time of war.

[25] It will be recalled that these words were written as the Thirty Years' War was raging.

that it does harm, because in such arguments the detection of what is extreme is easy, and results in weakening the influence of other statements which are well within the bounds of truth. For both extremes, therefore, a remedy must be found, that men may not believe either that nothing is allowable, or that everything is.

At the same time, through devotion to study in private life, I have wished – as the only course now open to me, undeservedly forced out from my native land, which had been graced by so many of my labours – to contribute somewhat to the philosophy of the law, which previously, in public service, I practised with the utmost degree of probity of which I was capable. Many heretofore have purposed to give to this subject a well-ordered presentation; no one has succeeded. And in fact, such a result cannot be accomplished unless – a point which until now has not been sufficiently kept in view – those elements which come from positive law[26] are properly separated from those which arise from nature. For the principles of the law of nature, since they are always the same, can easily be brought into a systematic form;[27] but the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment, just as other notions of particular things are.

If now, those who have consecrated themselves to true justice should undertake to treat the parts of the natural and unchangeable philosophy of law, after having removed all that has its origin in the free will of man; if one, for example, should treat legislation, another taxation, another the administration of justice, another the determination of motives, another the proving of facts, then by assembling all these parts a body of jurisprudence could be made up.

What procedure we think should be followed we have shown by deed rather than by words in this work, which treats by far the noblest part of jurisprudence.

In the first book, having by way of introduction spoken of the origin of law, we have examined the general question, whether there is any such thing as a just war; then, in order to determine the differences between public war and private war, we found it necessary to explain the nature of sovereignty – what nations, what kings possess complete sovereignty; who possess sovereignty only in part, who with right of alienation, who otherwise; then it was necessary to speak also concerning the duty of subjects to their superiors.

The second book, having for its object to set forth all the causes from which war can arise, undertakes to explain fully what things are held in common, what may be owned in severalty; what rights persons have over persons, what obligation arises from ownership; what is the rule governing royal successions; what right is established by a pact or a contract; what is the force of treaties of

[26] I.e., man-made law.

[27] The second major purpose of this work (along with an exposition of international law relating to war) is announced: the systematic exposition of natural law. This occurs in Chapters 2–21 of Book II.

alliance; what of an oath private or public, and how it is necessary to interpret these; what is due in reparation for damage done; in what the inviolability of ambassadors consists; what law controls the burial of the dead; and what is the nature of punishments.

The third book has for its subject, first, what is permissible in war. Having distinguished that which is done with impunity, or even that which among foreign peoples is defended as lawful, from that which actually is free from fault, it proceeds to the different kinds of peace, and all compacts relating to war.

The undertaking seemed to me all the more worthwhile because, as I have said, no one has dealt with the subject-matter as a whole, and those who have treated portions of it have done so in a way to leave much to the labours of others. Of the ancient philosophers nothing in this field remains; either of the Greeks . . . or – what was especially to be desired – of those who gave their allegiance to the young Christianity. Even the books of the ancient Romans on fetial law[28] have transmitted to us nothing of themselves except the title. Those who have made collections of the cases which are called 'cases of conscience' have merely written chapters on war, promises, oaths, and reprisals, just as on other subjects.

I have seen also special books on the law of war, some by theologians, as Franciscus de Vitoria,[29] Henry of Gorkum,[30] [Wilelmus Mahiae];[31] others by doctors of law, as John Lupus,[32] Franciscus Arias,[33] Giovanni da Legnano,[34]

[28] This was the law and procedure relating to declarations of war.

[29] Francisco de Vitoria (c. 1480–1546) was a Spanish Dominican who taught theology at the University of Salamanca. His most noted works were compiled from lectures given there. Three of these are referred to by Grotius in this treatise: *On Civil Power* (1528), *On the American Indians* (1539), and *On the Law of War* (1539). They are available in Vitoria, *Political Writings*, edited by Anthony Pagden and Jeremy Lawrance (Cambridge University Press, 1991).

[30] Henry of Gorkum (c. 1386–1431) was a noted Thomist writer who taught philosophy at the University of Cologne and apparently founded a school of his own in Cologne. He later became a canon of the Basilica of St Ursula and pro-chancellor of the University of Cologne.

[31] Wilelmus Mahiae, a highly obscure figure, was the author of a book entitled *Libellus de Bello Justo et Liceto*, published in Antwerp in 1514.

[32] John Lupus, or Juan López (d. 1496), was a now obscure Spanish writer who travelled to Italy, where he became vicar of the Archbishop of Siena, the future Pope Pius III (who reigned for twenty-seven days in 1503). Lupus wrote a book entitled *De Bello et Bellatoribus*.

[33] Franciscus Arias de Valderas was a native of Spain and member (c. 1530) of the Spanish College at Bologna. In 1533, in Rome, he published a book entitled *De Bello et Eius Iustitia*.

[34] John of Legnano (c. 1320–83) was a distinguished doctor of civil and canon law at the University of Bologna. His principal contribution to international law was the treatise *Tractatus de Bello, de Represaliis et du Duello* (c. 1360). An English translation was published by Oxford University Press in 1917.

Martinus Laudensis.[35] All of these, however, have said next to nothing upon a most fertile subject. [M]ost of them have done their work without system, and in such a way as to intermingle and utterly confuse what belongs to the law of nature, to divine law, to the law of nations, to civil law, and to the body of law which is found in the canons.

What all these writers especially lacked [was] the illumination of history. . . . [Attempts in this direction were made] by Balthazar Ayala[36] and, still more fully, by Alberico Gentili.[37] Knowing that others can derive profit from Gentili's painstaking, as I acknowledge that I have, I leave it to his readers to pass judgement on the shortcomings of his work as regards method of exposition, arrangement of matter, delimitation of inquiries, and distinctions between the various kinds of law. This only I shall say, that in treating controversial questions, it is his frequent practice to base his conclusions on a few examples, which are not in all cases worthy of approval, or even to follow the opinions of modern jurists, formulated in arguments of which not a few were accommodated to the special interests of clients, not to the nature of that which is equitable and upright.

The causes which determine the characterisation of a war as lawful or unlawful Ayala did not touch upon. Gentili outlined certain general classes, in the manner which seemed to him best; but he did not so much as refer to many topics which have come up in notable and frequent controversies.

We have taken all pains that nothing of this sort escape us; and we have also indicated the sources from which conclusions are drawn, whence it would be an easy matter to verify them, even if any point has been omitted by us. It remains to explain briefly with what helps, and with what care, I have attacked this task.

First of all, I have made it my concern to refer the proofs of things touching the law of nature to certain fundamental conceptions which are beyond question, so

[35] Martinus Garatus (d. 1443, sometimes called Laudensis, or Martin of Lodi, after his birthplace of Lodi) was a professor of law in the fifteenth century, at the Universities of Pavia and Siena. He wrote a treatise on war, and also one of the earliest works on the law of treaties.

[36] Balthasar de Ayala (1548–84), from the Southern Netherlands, served as judge advocate general to the Spanish armies in the Netherlands during the Dutch War of Independence. He was the author of *On the Law of War and on the Duties Connected with War and on Military Discipline* (1581). An English translation was published by the Carnegie Institution of Washington in 1912.

[37] Alberico Gentili (1552–1608) was an Italian Protestant lawyer whose principal career was in England, as Professor of Civil Law at the University of Oxford. His book *On the Law of War* (1598) was an important contribution to international law (with an English translation in 1933 by the Clarendon Press). He also did works on diplomatic law (*De Legationibus* in 1582, with an English translation by the Carnegie Endowment for International Peace in 1924), on various aspects of prize law (published posthumously as *Hispanicae Advocationis* in 1613, with an English translation by Oxford University Press in 1921) and a historical study of *The Wars of the Romans* in 1599 (with an English translation by Oxford University Press in 2011).

that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses; and the senses do not err if the organs of perception are properly formed and if the other conditions requisite to perception are present.

In order to prove the existence of this law of nature, I have, furthermore, availed myself of the testimony of philosophers, historians, poets, finally also of orators. Not that confidence is to be reposed in them without discrimination; for they were accustomed to serve the interests of their sect, their subject, or their cause. But when many at different times, and in different places, affirm the same thing as certain, that ought to be referred to a universal cause; and this cause, in the lines of inquiry which we are following, must be either a correct conclusion drawn from the principles of nature, or common consent. The former points to the law of nature; the latter, to the law of nations (*ius gentium*).

The distinction between these kinds of law is not to be drawn from the testimonies themselves (for writers everywhere confuse the terms law of nature and law of nations), but from the character of the matter. For whatever cannot be deduced from certain principles by a sure process of reasoning, and yet is clearly observed everywhere, must have its origin in the free will of man.[38]

These two kinds of law, therefore, I have always particularly sought to distinguish from each other, and from municipal law. Furthermore, in the law of nations, I have distinguished between that which is truly and in all respects law, and that which produces merely a kind of outward effect simulating that primitive law.[39]

With no less pains we have separated those things which are strictly and properly legal, out of which the obligation of restitution arises, from those things which are called legal because any other classification of them conflicts with some other stated rule of right reason [such as moral obligations]. In regard to this distinction of law, we have already said something above.[40]

Among the philosophers, Aristotle deservedly holds the foremost place, whether you take into account his order of treatment, or the subtlety of his distinctions, or the weight of his reasons. Would that this pre-eminence had

[38] Natural law is, in a hypothetico-deductive manner, 'deduced from certain principles by a sure process of reasoning'. In contrast to this is law which is 'clearly observed everywhere', which is most clearly the *ius gentium* proper, law adopted by each state in the world as a matter of its own independent choice.

[39] This probably refers to the distinction between two possible effects that the law of nations can have. First, things which are permissible according to natural law can be made either mandatory or forbidden by the law of nations. Second, there are things which natural law itself commands or forbids, but for which the law of nations provides no punishment in the event of disobedience. This second group of acts will have only the outward appearance of true lawfulness.

[40] See p. 3 above.

not, for some centuries back, been turned into a tyranny, so that Truth, to whom Aristotle devoted faithful service, was by no instrumentality more repressed than by Aristotle's name!

For my part, both here and elsewhere I avail myself of the liberty of the early Christians, who had sworn allegiance to the sect of no one of the philosophers, not because they were in agreement with those who said that nothing can be known – than which nothing is more foolish – but because they thought that there was no philosophic sect whose vision had encompassed all truth, and none which had not perceived some aspect of truth. Thus they believed that to gather up into a whole the truth which was scattered among the different philosophers and dispersed among the sects, was in reality to establish a body of teaching truly Christian.

Among other things – to mention in passing a point not foreign to my subject – it seems to me that, not without reason, some of the Platonists and early Christians departed from the teachings of Aristotle in this, that he considered the very nature of virtue as a mean in passions and actions.[41] That principle, once adopted, led him to unite distinct virtues, as generosity and frugality, into one; to assign to truth extremes between which, on any fair premise, there is no possible co-ordination, boastfulness, and dissimulation; and to apply the designation of vice to certain things which either do not exist, or are not in themselves vices, such as contempt for pleasure and for honours, and freedom from anger against men.[42]

That this basic principle,[43] when broadly stated, is unsound, becomes clear even from the case of justice. For, being unable to find in passions and acts resulting therefrom the too much and the too little opposed to that virtue, Aristotle sought each extreme in the things themselves with which justice is concerned. Now in the first place, this is simply to leap from one class of things over into another class, a fault which he rightly censures in others. . . . [F]or a

[41] See Aristotle, *The Nicomachean Ethics*, II.6.

[42] The point (not very clearly expressed) is that Grotius disagrees with Aristotle's view of virtue as a medium between extremes. According to Grotius, this rigid view of virtue often had the perverse effect of compelling Aristotle artificially to contrive two extremes between which to encase (so to speak) any virtue – and that sometimes the two extremes actually had little real relation to one another. Instead of searching for extremes and means, the proper method, in Grotius's view, is to analyse acts and attitudes in their own right, according to the principles of natural law. Moreover, Grotius maintains, it is sometimes the case that extreme attitudes are actually virtuous (or at least are not vices), e.g., contempt for pleasure and honours, or a stout refusal to become angry at others even in situations where most persons would do so. Another example is the virtue of justice, as Grotius immediately goes on to explain. Grotius is actually not being very fair to Aristotle here. Aristotle did recognise that some characteristics, such as spite, shamelessness, and envy, are evil per se, so that his general theory of virtue as a mean between extremes would not apply to them. See *ibid.*

[43] I.e., Aristotle's view of virtue as a mean between extremes.

person to accept less than belongs to him may in fact, under unusual conditions, constitute a fault, in view of that which, according to the circumstances, he owes to himself and to those dependent on him; but in any case the act cannot be at variance with justice, the essence of which lies in abstaining from that which belongs to another.[44]

By equally faulty reasoning, Aristotle tries to make out that adultery committed in a burst of passion, or a murder due to anger, is not properly an injustice.[45] [The true position is that] injustice has no other essential quality than the unlawful seizure of that which belongs to another; and it does not matter whether injustice arises from avarice, from lust, from anger, or from ill-advised compassion; or from an overmastering desire to achieve eminence, out of which instances of the gravest injustice constantly arise. For to disparage such incitements, with the sole purpose in view that human society may not receive injury, is in truth the concern of justice.[46]

To return to the point whence I started, the truth is that some virtues do tend to keep passions under control; but that is not because such control is a proper and essential characteristic of every virtue. Rather, it is because right reason, which virtue everywhere follows, in some things prescribes the pursuing of a middle course, in others stimulates to the utmost degree. We cannot, for example, worship God too much; for superstition errs not by worshipping God too much, but by worshipping in a perverse way. Neither can we too much seek after the blessings that shall abide for ever, nor fear too much the everlasting evils, nor have too great hatred for sin.

Our purpose is to make much account of Aristotle, but reserving in regard to him the same liberty which he, in his devotion to truth, allowed himself with respect to his teachers.

[44] The contention is that the virtue of justice illustrates with particular clarity the error of Aristotle's view of virtue. To be extremely just is clearly better than to fall mid-way between justice and injustice. Aristotle attempted to avoid this problem (Grotius asserts) by shifting the focus away from justice itself, and concentrating instead on the material goods that are at stake in a dispute to which justice is to be brought to bear. The party acts justly, on Aristotle's argument, when he accepts a quantity of the disputed goods which is midway between the two possible extremes (i.e., between the one extreme of receiving nothing at all and the other extreme of receiving everything). Grotius is critical of this approach of focusing on the subject-matter of a dispute rather than on the virtue of justice as such. According to Grotius, the just solution is not to divide the property between the claimants, but rather to grant the whole of it to one party (the true owner) and none of it to the other.

[45] Aristotle, *The Nicomachean Ethics*, V.6. Aristotle made a distinction, which Grotius rejects, between an unjust *act* and an unjust *person*. A person who is personally just might nonetheless commit an unjust act out of passion, such as murder or adultery – but the person would not thereby cease to be personally just. Grotius rejects the whole concept of a just person, holding instead that injustice is entirely a feature of conduct.

[46] It is asserted that justice is a strictly objective matter – in essence, scrupulously refraining from infringing the rights of others. The motives behind such infringements ('incitements', as Grotius calls them) are irrelevant.

History in relation to our subject is useful in two ways: it supplies both illustrations and judgements. The illustrations have greater weight in proportion as they are taken from better times and better peoples; thus we have preferred ancient examples, Greek and Roman, to the rest. And judgements are not to be slighted, especially when they are in agreement with one another; for by such statements the existence of the law of nature, as we have said, is in a measure proved, and by no other means, in fact, is it possible to establish the law of nations.[47]

The views of poets and of orators do not have so great weight; and we make frequent use of them not so much for the purpose of gaining acceptance by that means for our argument, as of adding, from their words, some embellishment to that which we wished to say.

I frequently appeal to the authority of the books which men inspired by God have either written or approved, nevertheless with a distinction between the Old Testament and the New. There are some who urge that the Old Testament sets forth the law of nature. Without doubt they are in error, for many of its rules come from the free will of God. And yet this is never in conflict with the true law of nature; and up to this point the Old Testament can be used as a source of the law of nature, provided we carefully distinguish between the law of God, which God sometimes executes through men, and the law of men in their relations with one another.[48]

This error we have, so far as possible, avoided, and also another opposed to it, which supposes that, after the coming of the New Testament, the Old Testament in this respect was no longer of use. We believe the contrary, partly for the reasons which we have already given, partly because the character of the New Testament is such that, in its teachings respecting the moral virtues, it enjoins the same as the Old Testament or even enjoins greater precepts. In this way, we see that the early Christian writers used the witnesses of the Old Testament.

The Hebrew writers, moreover, most of all those who have thoroughly understood the speech and customs of their people, are able to contribute not a little to our understanding of the thought of the books which belong to the Old Testament.

The New Testament I use in order to explain – and this cannot be learned from any other source – what is permissible to Christians. This, however – contrary to the practice of most men – I have distinguished from the law of

[47] This is the first indication – made almost in passing – of the important point, that the volitional law of nations can only be discerned by empirical means, by actually surveying the practices of states. Notice the contrast made (though not very emphatically) with the law of nature. In the case of the law of nature, history provides merely the *proof* – i.e., the evidence. But the law *itself* (i.e., the content of the law) derives from reason. In the case of the volitional law of nations, in contrast, history plays an importantly different role: it actually *establishes* the rules of this body of law.

[48] 'The law of men in their relations with one another' is natural law, which should be carefully distinguished from divine law.

nature, considering it as certain that, in that most holy law, a greater degree of moral perfection is enjoined upon us than the law of nature, alone and by itself, would require.[49] And nevertheless I have not omitted to note the things that are recommended to us rather than enjoined, that we may know that, while the turning aside from what has been enjoined is wrong and involves the risk of punishment, a striving for the highest excellence implies a noble purpose and will not fail of its reward.[50]

The authentic synodical canons are collections embodying the general principles of divine law as applied to cases which come up. [T]hey either show what the divine law enjoins, or urge us to that which God would fain persuade. And this truly is the mission of the Christian Church, to transmit those things which were transmitted to it by God, and in the way in which they were transmitted.

Furthermore, customs which were current, or were considered praiseworthy, among the early Christians and those who rose to the measure of so great a name, deservedly have the force of canons.

Next after these comes the authority of those who, each in his own time, have been distinguished among Christians for their piety and learning, and have not been charged with any serious error; for what these declare with great positiveness, and as if definitely ascertained, ought to have no slight weight for the interpretation of passages in Holy Writ which seem obscure. Their authority is the greater the more there are of them in agreement, and as we approach nearer to the times of pristine purity, when neither desire for domination nor any conspiracy of interests had as yet been able to corrupt the primitive truth.

The Schoolmen,[51] who succeeded these writers, often show how strong they are in natural ability. But their lot was cast in an unhappy age, which was ignorant of the liberal arts; wherefore it is less to be wondered at if, among many things worthy of praise, there are also some things which we should

[49] The distinction is between morality and natural law – with morality guided by the New Testament and natural law by reason. Some later positivists claim Grotius as a precursor on this basis. It should be noted, though, that Grotius is only asserting that morality goes beyond natural law in its demands. He is not claiming (as later positivists inclined to do) that law and morality have no intrinsic relation at all to one another. Grotius's view is better characterised as holding natural law to be a sort of sub-category of morality. It comprises the rules that are necessary for harmonious human sociability, and which give rise to enforceable obligations. It is not concerned (as moral rules are) with ensuring the saving of the soul in the after-life.

[50] I.e., natural law may be said to be negative in character, in that it imposes obligations onto persons and exposes them to punishments for infractions. Morality is positive, in that it carries the promise of the reward of eternal life. By obeying natural law, a person provides against punishment on earth. By obeying divine law (or morality), he or she obtains salvation of the soul.

[51] The scholastic philosophers of the Middle Ages. Foremost amongst these was Thomas Aquinas (1225–74), the leading figure in the rationalist school of natural-law thought, to which Grotius belonged. Francisco Suárez (1548–1617), the Spanish Jesuit writer, was another important figure in this tradition.

receive with indulgence. Nevertheless, when the Schoolmen agree on a point of morals, it rarely happens that they are wrong, since they are especially keen in seeing what may be open to criticism in the statements of others. And yet in the very ardour of their defence of themselves against opposing views, they furnish a praiseworthy example of moderation; they contend with one another by means of arguments – not, in accordance with the practice which has lately begun to disgrace the calling of letters, with personal abuse, base offspring of a spirit lacking self-mastery.

Of those who profess knowledge of the Roman law there are three classes.

The first consists of those whose work appears in the Pandects,[52] the Codes of Theodosius and Justinian,[53] and the Imperial Constitutions called Novellae.[54]

To the second class belong the successors of Irnerius,[55] that is Accursius,[56] Bartolus,[57] and so many other names of those who long ruled the bar.

The third class comprises those who have combined the study of classical literature with that of law.[58]

To the first class, I attribute great weight. For they frequently give the very best reasons in order to establish what belongs to the law of nature, and they often furnish evidence in favour of this law and of the law of nations. Nevertheless

[52] The Pandects (from a Greek expression meaning 'complete law') refers to what was called the *usus modernus Pandectarum*, which was the modernised form of Roman law taught in European universities in the fourteenth and fifteenth centuries. This form of Roman law was heavily influenced by the canon law of the Catholic Church.

[53] The Code of Theodosius (named for Roman Emperor Theodosius II) was promulgated in AD 438. It was a collection of imperial enactments over the previous century (since the reign of Emperor Constantine). The Code of Justinian, or *Corpus Iuris Civilis*, in contrast, purported to be a complete codification of Roman law, in three parts: the *Institutes*, a short textbook summary of Roman law (AD 533); the *Digest*, a collection of extracts from legal writers covering basically the whole of Roman law (AD 533); and the *Codex* (AD 529), which was a collection of imperial enactments from the second century AD.

[54] The *Novellae* were laws newly promulgated by Justinian after the publication of the *Corpus Iuris* in 529–33.

[55] Irnerius (c. 1050–c. 1130), originally a grammarian, was traditionally regarded as the founder of the famous school of Roman-law scholars at the University of Bologna in the eleventh century.

[56] Accursius (1185–1263), from Florence, was one of the foremost Roman-law scholars of the Middle Ages. His chief monument was the *Glossa Ordinaria* (or Standard Gloss), which was a massive commentary on Justinian's *Corpus Iuris*, and the principal basis for the medieval study of Roman law.

[57] Bartolus of Sassoferrato (c.1313–57) was one of the most eminent legal scholars of the fourteenth century, learned in many branches of law, including Roman law and the constitutional law of the Holy Roman Empire.

[58] This third group are the humanists, who saw Roman law not as a kind of disembodied statement of the general principles of law – i.e., as a codification of natural law – but instead as the product of a particular society in a particular historical context. An early figure in this tradition was the Italian Alciatus (Andrea Alciato, 1492–1550), who taught at the University of Bourges in France.

they, no less than the others, often confuse these terms, frequently calling that the law of nations which is only the law of certain peoples, and that, too, not as established by assent, but perchance taken over through imitation of others or by pure accident.[59] But those provisions which really belong to the law of nations they often treat, without distinction or discrimination, along with those which belong to the Roman law. . . . We have . . . endeavoured to distinguish these matters from each other.[60]

The second class, paying no heed to the divine law or to ancient history, sought to adjust all controversies of kings and peoples by application of the laws of the Romans, with occasional use of the canons. But in the case of these men also, the unfortunate condition of their times was frequently a handicap which prevented their complete understanding of those laws, though, for the rest, they were skilful enough in tracing out the nature of that which is fair and good. The result is that, while they are often very successful in establishing the basis of law, they are at the same time bad interpreters of existing law. But they are to be listened to with the utmost attention when they bear witness to the existence of the usage which constitutes the law of nations in our day.

The masters of the third class, who confine themselves within the limits of the Roman law and deal either not at all, or only slightly, with the common law of nations (*ius illud commune*) are of hardly any use in relation to our subject. They combine the subtlety of the Schoolmen with a knowledge of laws and of canons.

The French have tried rather to introduce history into their study of laws. Among them Bodin[61] and Hotman[62] have gained a great name, the former by an extensive treatise, the latter by separate questions; their statements and lines of reasoning will frequently supply us with material in searching out the truth.

In my work as a whole, I have, above all else, aimed at three things: to make the reasons for my conclusions as evident as possible; to set forth in a definite

[59] The distinction made – though only by implication – is between the volitional law of nations and the *ius gentium* proper. The volitional law of nations is a law between nations created by actual (even if only tacit) agreement amongst the nations. The *ius gentium* comprises those domestic laws of various states which resemble one another and which therefore have a wide field of application – but which are created by each state individually as a matter of its own free will. The rules of this *ius gentium* therefore resemble one another, in Grotius's words, 'through imitation of others or by pure accident', rather than by 'assent' (i.e., agreement with other states).

[60] Grotius is announcing his determination not to confuse or conflate the three different bodies of law to which he has just referred: the volitional law of nations, the *ius gentium* proper, and Roman law.

[61] Jean Bodin (c.1530–96) was a French lawyer and champion of royal prerogatives, in opposition to local and feudal vested interests. He is chiefly famous for his exposition on sovereignty in *The Six Books on the Commonwealth* (1576).

[62] François Hotman (1524–90) was a French lawyer who was chiefly known for his opposition to the use of Roman law and canon law in France, in favour of a native French legal tradition (including the use of the vernacular rather than Latin in legal actions). He was a Protestant and spent the later part of his life in Switzerland.

order the matters which needed to be treated; and to distinguish clearly between things which seemed to be the same and were not.

I have refrained from discussing topics which belong to another subject, such as those that teach what may be advantageous in practice.[63] For such topics have their own special field, that of politics, which Aristotle rightly treats by itself, without introducing extraneous matter into it.[64] . . . In some places, nevertheless, I have made mention of that which is expedient, but only in passing, and in order to distinguish it more clearly from what is lawful.

If anyone thinks that I have had in view any controversies of our own times, either those that have arisen or those which can be foreseen as likely to arise, he will do me an injustice. With all truthfulness I aver that, just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact.

As regards manner of expression, I wished not to disgust the reader, whose interests I continually had in mind, by adding prolixity of words to the multiplicity of matters needing to be treated. I have therefore followed, so far as I could, a mode of speaking at the same time concise and suitable for exposition,[65] in order that those who deal with public affairs may have, as it were, in a single view both the kinds of controversies which are wont to arise and the principles by reference to which they may be decided. These points being known, it will be easy to adapt one's argument to the matter at issue, and expand it at one's pleasure.

I have now and then quoted the very words of ancient writers, where they seemed to carry weight or to have unusual charm of expression.

I beg and adjure all those into whose hands this work shall come, that they assume towards me the same liberty which I have assumed in passing upon the opinions and writings of others. They who shall find me in error will not be more quick to advise me than I to avail myself of their advice.

And now if anything has here been said by me inconsistent with piety, with good morals, with Holy Writ, with the concord of the Christian Church, or with any aspect of truth, let it be as if unsaid.

[63] This is a disclaimer of any intention of taking a utilitarian or consequentialist approach, i.e., explaining the content of a body of law in terms of the effects that it produces. Grotius's concern is to expound the content of law – whether natural law or the volitional law of nations – without regard to the material consequences that flow from obedience to that law.

[64] See generally Aristotle, *Politics*.

[65] This is a remarkably disingenuous claim.