LIBERTY UNIVERSITY

Liberty University Law Review

Volume 2 | Issue 3 Article 11

March 2008

Hugo Grotius, Hosti Humani Generis, and the Natural Law in Time Of War

Peter Judson Richards

HUGO GROTIUS, *HOSTI HUMANI GENERIS*, AND THE NATURAL LAW IN TIME OF WAR

Peter Judson Richards[†]

I. INTRODUCTION

As Protestants seek for theorists who can serve as able guides for thinking about the natural law, the figure of Hugo Grotius deserves serious attention. Grotius, "the legislator of modern Europe,"[1] and the founder of a "profoundly Christian" theory of international law,[2] continues to animate discussions over the application of natural law principles to questions of war and international affairs in particular.

In his recent acclaimed work on the subject of war crimes, the philosopher Larry May develops a "Grotian" humanitarian theory for dealing with the problems of war and of war crimes in the twenty-first century.[3] May identifies Grotius as "one of the first to discuss international law in terms of international humanitarian restraints."[4] The "Grotian account of the principle of humanity"

---

† Director of the Center for Theology and Law, and Associate Professor, Southern Baptist Theological Seminary, Louisville, Kentucky. L.L.M., J.S.D., Yale University; J.D., University of North Carolina; A.B., University of Michigan.

1. MICHEL VILLEY, LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE 597 (1968) (my translation).

2. CHRISTOPH A. STUMPF, THE GROTIAN THELOGY OF INTERNATIONAL LAW: HUGO GROTIUS AND THE MORAL FOUNDATIONS OF INTERNATIONAL RELATIONS 9 (2006). Stumpf's work is admirable for the unembarrassed clarity with which it links the strands of law and theology in Grotius's writings. The reigning tendency among many international law and relations scholars is to see the theological component in Grotius as so much discardable husk which, scraped away, reveals the still-useful secularist kernel beneath. As we shall see, the idea of Grotius in the minds of many turns out to look very like the projected image of modern skeptical rationalism. Stumpf rejoins:

> It is to be doubted whether such an interpretation of Grotius' theory of international relations can do justice to a jurist with such an immense theological interest. The interpretation of Grotius as an ethical minimalist contrasts strongly to Grotius' own dogmatic position in the theological controversies in the Netherlands between the Remonstrants and the Counter-Remonstrants. Moreover, it probably belies human nature to conceive of a scholar who is fully devoted to proposing a return to the fundamental dogmatics of the church fathers in elaborated theological treatises on one day, just to free himself of any such theological preconditioning in order to display himself as the avant-garde of a secular jurisprudence the next day.

Id. at 5.

3. LARRY MAY, WAR CRIMES AND JUST WAR (2007).

4. *Id.* at 33.

animates May's project for "humane treatment, as the cornerstone of international humanitarian law."[5] Grotius inspires a program of humane treatment that transcends the corrective justice of "mere" retribution. Larry May's account is rooted in a natural law understanding of the laws of war, an understanding he derives, in significant part, from his reading of Hugo Grotius, "surely [he says,] the most important figure to write on war in the last five hundred years."[6]

Other less favorable characterizations of the Grotian project have emerged in recent decades. For Richard Tuck,[7] in particular, Grotius is the "spring swallow" that announces the coming high summer of early modern rights talk,[8] the corrosive, skeptical, possessive individualism that emerges in the subsequent works of Thomas Hobbes and others. In this view, as a "Hobbist before Hobbes," Grotius holds much of the responsibility for the momentous seventeenth-century turn from natural law, conceived as an objective account of reality ordered according to divine ordinance, to natural *rights*, a view in which theories about nature clear the ground for the rule of autonomous human appetites. Among others still less sympathetic, the predominant view is that Grotius marks the decisive break to a rationalist, secularist account of natural law with a notorious five-word Latin phrase—for some, the only words for which Grotius is either known or remembered.[9] There is no doubt that a significant turn toward autonomous rationalism occurred in the seventeenth century, or that it changed the subsequent direction of natural law thought. But the better judgment of more recent scholarship has shown that the attribution of this modern and rationalist turn to Grotius as initiator needs to be heavily qualified.[10]

In the interest of brevity, this article cannot begin to weigh in on these long-standing debates. Rather, the purpose is to provide a brief summary of Grotius'

---

5. *Id.* at 298-99.

6. *Id.* at 28.

7. *See, e.g.*, RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT (1979) (especially ch. 3, "Hugo Grotius"); THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT (1999).

8. The expression is borrowed from Oliver O'Donovan, *The Justice of Assignment and Subjective Rights in Grotius*, *in* OLIVER O'DONOVAN & JOAN LOCKWOOD O'DONOVAN, BONDS OF IMPERFECTION: CHRISTIAN POLITICS, PAST AND PRESENT 167, 171 (2004) [hereinafter O'Donovan, *Justice of Assignment*]. O'Donovan's careful critique of Tuck's position provides a valuable correction.

9. *See infra* Part II.

10. *See, e.g.*, the account of the progress of this "secularization" thesis, *in* RENÉE JEFFREY, HUGO GROTIUS IN INTERNATIONAL THOUGHT 33-37 (2006); *see also* O'Donovan, *Justice of Assignment*, *supra* note 8, at 167-203.

teaching on the natural law, the foundation for his development of a comprehensive system of international law. The discussion will then turn to suggest one possible contemporary application of that teaching. The article begins with a short account of Grotius's life and circumstances, followed by an outline of his treatment of natural law as developed in two major works, the *Commentary on the Law of Prize and Booty*, (1609),[11] and *The Laws of War and Peace* (1625).[12] In the final section of the article, Grotius' natural law teaching, it is hoped, will assist in evaluating one of the more contentious contemporary questions of law and policy, the matter of the detention and trial of unlawful enemy combatants—a question to which Larry May seeks to give a "Grotian" treatment in the culminating chapter of his work on war crimes.

II. A TURBULENT LIFE AT THE BLOODY CROSSROADS BETWEEN LAW AND THEOLOGY

The polymath "father of international law" was a theologian as well as lawyer, politician, scholar and diplomat. Grotius was born in 1583, one hundred years after the birth of Martin Luther, and died in 1645, three years before the Peace of Westphalia brought a conclusion to the Thirty Year War that ravaged the continent of Europe throughout much of his adult life.[13]

It was a momentous period in the life of his native Netherlands as well. The Dutch people had recently thrown off the yoke of Spanish rule. The united provinces had become a Republic in the year 1588, when Grotius was five years old; his own family had been instrumental in the war for independence.[14] The new constitutional order in the United Provinces was a form of confederation in which Holland held political and cultural pre-eminence.[15]

---

11. HUGO GROTIUS, COMMENTARY ON THE LAW OF PRIZE AND BOOTY (*De Jure Praedae Commentarius*) (Martine Julia van Ittersum ed., 2006) [hereinafter, GROTIUS, LAW OF PRIZE AND BOOTY].

12. HUGO GROTIUS, THE LAWS OF WAR AND PEACE (Richard Tuck ed., 2005). [hereinafter, GROTIUS, LAWS OF WAR AND PEACE]. In this article, all citations to Grotius's work refer to this Liberty Fund edition, which uses the 1738 English translation of Jean Barbeyrac's acclaimed French edition. As commentators have remarked, all of the available English translations of Grotius contain serious flaws.

13. C.G. Roelofsen provides a helpful, detailed narrative account of Grotius's life and career as it unfolds within the context of politics, theological controversy and international relations in 17th century Netherlands. C.G. Roelofsen, *Grotius and the International Politics of the 17th Century*, *in* HEDLEY BULL, HUGO GROTIUS AND INTERNATIONAL RELATIONS 95 (Benedict Kingsbury & Adam Roberts eds., 1990).

14. Richard Tuck, intro., in GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at xii-xiii.

15. EDWARD DUMBAULD, THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS 11 (1969).

From the standpoint of religious confession, the seat of Arminian theology was a minority in the Calvinist Netherlands. Grotius and his colleagues feared that a kind of confessional particularism, such as that represented by the Synod of Dort (1618-19),[16] threatened to push the provinces back under a new form of tyranny. Grotius failed in his efforts to foster a minimalist confession that all provinces in the Republic could abide.[17] At the height of the Remonstrant controversy, Grotius along with his patron was arrested and arraigned for treason.[18] Grotius received a life sentence, and spent two years in prison at Louvestein castle. He ended up reaching freedom through the efforts of his courageous and resourceful wife.[19] An exile for much of the remainder of his life, Grotius eventually landed in the court of Louis XIII and later managed to serve for a period as the ambassador of Sweden in the French court.[20] It was in Paris that he composed the massive treatise for which he is most well known, *The Laws of War and Peace.*

It is the aspect of his experience as a lawyer as well as legal theorist[21] that makes Grotius an interesting prospect for Protestants thinking about the natural law. To be sure, Luther, Calvin and many other Protestant theologians of the sixteenth and seventeenth centuries left important, occasional affirmations of the natural law scattered throughout their writings and sermons—albeit unjustly neglected and frequently misunderstood. By contrast, Grotius produced a treatise outlining an international regime of law, systematized upon natural law foundations, that continues to shape the world.[22] Though many of his works deal with the topic of natural law, his most mature and elaborate treatment

---

16. *Id.* at 12.

17. Richard Tuck, intro., in GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at xiii-xv.

18. *Id.*

19. *Id.* at xv.

20. *Id.*

21.

> Un large secteur de la pensee juridique de l'Europe moderne trouve son origine chez Grotius. Grotius est l'un des médiateurs les plus efficaces que l'histoire ait jamais connus entre une vision philosophique du monde et la science du droit. Plus juriste que philosophe, sensible aux problèmes de son temps, surtout ambitieux de leur donner une solution pratique; mais un de ces juristes dégagés des routines professionnelles et pourvus d'une si large culture, si audacieux et clairvoyant qu'ils sont capables de solutions neuves.

VILLEY, *supra* note 1, at 598.

22. "Certain fundamental facets underlying the Grotian system—especially the doctrines of legal equality, territorial sovereignty, and independence of states—remain cardinal principles of international law today . . . . For all his contributions, Grotius is usually remembered as the 'father of international law.'" CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE 17 (2005).

appears in the *Laws of War and Peace.*

Yet, the very comprehensive nature of the Grotian project renders it more problematic from the standpoint of natural law. The historical context of Grotius's writings is critical[23]—the experience of a series of devastating religious wars prompted the search for a bedrock of consensus on which to lay solid foundations for a durable peace.[24] As had been the case in the Netherlands, the particularistic tenets of confessional religion had only produced tensions and frictions that too frequently sparked the flames of outright war. For better or worse, Grotius sought to pierce beneath the layers of theological confessionalism to discover demonstrable, unassailable principles of moral right[25]—principles which would furnish a natural law foundation for regulating the conduct of war and peace.

Grotius indicated early the difficult moral conditions prompting him to write:

> Now for my Part, being fully assured . . . that there is some Right common to all Nations, which takes place both in the Preparations and in the Course of War, I had many and weighty Reasons inducing me to write a Treatise upon it. I observed throughout the Christian World a Licentiousness in regard to War, which even barbarous Nations ought to be ashamed of: a Running to Arms upon very frivolous or rather no Occasions; which being once taken up, there remained no longer any Reverence for Right, either Divine or Human, just as if from that Time Men were authorized and firmly resolved to commit all manner of Crimes without Restraint.[26]

Yet in steering clear of the degrading idea that anything goes in war, there was another danger to be avoided, one that arose from the opposite attraction of condemning all war as unjust and illegitimate:

---

23. "[W]hile it would be an exaggeration to describe Grotius' interest in international law as merely incidental to his role in Dutch and international politics, there would be rather more truth in that than in the converse position, namely, of considering the 'sage of Delft' as the impartial jurisconsult of mankind in accordance with his declaration in the Prolegomena." C.G. Roelofsen, *Grotius and the International Politics of the 17th Century, in* BULL, *supra* note 13, at 95, 97-98.

24. The dilemma has been called "the Grotian problematic." Stephen Darwall, *The Foundations of Morality: Virtue, Law and Obligation, in* THE CAMBRIDGE COMPANION TO EARLY MODERN PHILOSOPHY 221, 223 (Donald Rutherford ed., 2006) (quoting J.B. SCHNEEWIND, THE INVENTION OF AUTONOMY: A HISTORY OF MODERN MORAL PHILOSOPHY (1998)).

25. As Christoph Stumpf shows, this hardly made it an anti-theological work. *See generally* STUMPF, *supra* note 2.

26. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1:106.

> The Spectacle of which monstrous Barbarity worked many, and those in no wise bad Men, up into an Opinion, that a Christian, whose Duty consists principally in loving all Men without Exception, ought not at all to bear Arms; [men such as Grotius' countryman, Erasmus, for example]; Men that were great Lovers of Peace both Ecclesiastical and Civil; but, I suppose, they had the same View, as those have who in order to make Things that are crooked straight, usually bend them as much the other Way. But this very Endeavor of inclining too much to the opposite Extreme, is so far from doing Good, that it often does Hurt, because Men readily discovering Things that are urged too far by them, are apt to slight their Authority in other Matters, which perhaps are more reasonable. A Cure therefore was to be applied to both these, as well to prevent believing that Nothing, as that all Things are lawful.[27]

The evidence of a tendency to move from worse to worse in war, all too apparent even within the jurisdictions of Christendom, did not give cause for resignation or despair. Rather, it provided the impetus for engaging in "the proper business of Justice," securing effective means of resistance against the kinds of "Temptations" that lead to the degradation of relations and outright hostility among nations— "for the preserving of Human Society inviolable."[28] Such means Grotius sought to find within the middle way between a jingoist amorality in war, and pacifism.

In the Prolegomenon to the *Laws of War and Peace*, Grotius squared up against the claim that war is a human activity that somehow falls outside the boundaries delineated by the laws of nature. In its extreme form, the perennial argument denied the very existence of a right (*ius*) of nature, unless it be the instinctual law of "interest" that drives men to seek and snatch up whatever they desire—the law of the passions. Grotius, significantly, identified the position with the ancient radical skeptic philosopher, Carneades.

> Laws (says he) were instituted by Men for the sake of Interest; and hence it is that they are different, not only in different Countries, according to the Diversity of their Manners, but often in the same Country, according to the Times. As to that which is called NATURAL RIGHT, it is a mere Chimera. Nature prompts all Men, and in general all Animals to seek their own particular Advantage: So that either there is no Justice at all, or if there is any, it is extreme Folly, because it engages us to procure the Good of others, to our

27. *Id.* at 1:106.
28. *Id.* at 1:121.

own Prejudice."[29]

The integrity of the Grotian project rested on the premise that even in the violent, bloody, chaotic activity of war itself, there exist universal, discernable boundaries prescribed through the human recognition of what is fitting, right and in accordance with the nature of beings created in the image of God. The times required him to undertake the hazardous search for a principled mean that would give due recognition to the legitimacy of just belligerent action, while identifying sensible, defined limits upon the potent proclivities of interest.[30] The quest required a forthright exposition of principle in the face of powerful visceral attractions; "a base Thing ought not to be done, even for the Sake of ones Country."[31] At the same time, it should not amount to the frustrating and futile exercise of a perpetual cross-grained, upstream struggle against the deep abiding current of interest. "Interest," (like "nature") it seemed, was susceptible to a wider range of meanings than the simple condemnation or commendation of interest-based arguments could acknowledge.

> For as he that violates the Laws of his Country for the Sake of some present Advantage to himself, thereby saps the Foundation of his own perpetual Interest, and at the same Time that of his Posterity: So that People which violate the Laws of Nature and Nations, break down the Bulwarks of their future Happiness and Tranquillity.[32]

The good perceived in the recognition of interest was not, at its core, incompatible with the good of the commonalty, expressed as community, nation or world.[33]

---

29. *Id.* at 1:79.

30. *Id.* at 1:108-10. As Grotius put it in the earlier work, De Jure Praedae, "virtue, at both extremes, borders on vice." GROTIUS, LAW OF PRIZE AND BOOTY, *supra* note 11, at 10.

31. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1:98-99.

32. *Id.* at 1:94-95; *see also* para. 9:

> By reason that Man above all other Creatures is endued . . . with Judgment to discern Things pleasant or hurtful, and those not only present but future, and such as may prove to be so in their Consequences; it must therefore be agreeable to human Nature, that according to the Measure of our Understanding we should in these Things follow the Dictates of a right and sound Judgment, and not be corrupted by Fear, or the Allurements of present Pleasure, nor be carried away violently by blind Passion. And whatsoever is contrary to such a Judgment is likewise understood to be contrary to Natural Right, that is, the Laws of our Nature.

Id. at 1:87.

33. As Grotius argued in the Prolegomenon to the *Commentary on the Law of Prize and Booty*, there was a reciprocity, a process at work here that was "mutual and alternating."

For Grotius, war and the decision to go to war, was a kind of juridical law-enforcement procedure, undertaken for the purpose of securing a better, more lasting peace:

> . . . War is made against those who cannot be restrained in a judicial Way. For judicial Proceedings are of Force against those who are sensible of their Inability to oppose them; but against those who are or think themselves of equal Strength, Wars are undertaken; but yet certainly to render Wars just, they are to be waged with no less care and Integrity than judicial Proceedings are usually carried on.[34]

These practical concerns relate back to Grotius's conception of natural right. Given the stated scope of the project, he asks: How is it possible to prove that something is of natural right? And: How does one determine the content of this right order of things? Grotius framed his answer grounding natural law in human sociability. To the charge that humans share this sociable quality with many of the lower animals, Grotius elaborated:

> Now amongst the Things peculiar to Man, is his Desire of Society, that is, a certain Inclination to live with those of his own Kind, not in any Manner whatever, but peaceably, and in a Community regulated according to the best of his Understanding; which Disposition the Stoicks termed "*oikeiōsis*."[35]

Thus, it is not correct to say that the comprehensive counsel of nature simply leads men to fulfill the instinct for self-preservation alone. As Grotius described it in his first major work on the subject of natural law, the *Commentary on the Law of Prize and Booty*, "men agree most emphatically upon the proposition that it behoves us to have a care for the welfare of others; for the acceptance of this obligation might almost be termed a distinguishing characteristic of man." Indeed, this quality of "looking outwards" was the very "starting point of justice."[36]

The mere non-rational satiation of immediate interest does not provide a satisfactory account of human nature. Alongside the natural desire of society, for the fulfilling of which humankind received the gift of speech—there is a corresponding faculty of knowing and acting "according to some general

---

GROTIUS, LAW OF PRIZE AND BOOTY, *supra* note 11, at 29.

34. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1:101-02.

35. *Id.* at 1:79-81.

36. GROTIUS, PRIZE AND BOOTY, *supra* note 11, at 26. Although Grotius cited classical sources to establish the point, the obvious Biblical parallel in Christ's summary of the second table of the law as love of neighbor, was clearly apparent.

principles"—and what "relates to this Faculty" "properly and peculiarly agrees to Mankind."[37] Human rationality, the capacity for knowing and acting according to general principles, with the quality of sociability, form the essential components of human nature. He restates in the following paragraph: "this care of maintaining Society in a Manner conformable to the Light of human Understanding"—this "is the Fountain of Right, properly so called."[38]

The reasoning that accords with natural law proceeds "by Arguments drawn from the very nature of [a] Thing," adducing that Thing's "necessary Fitness or Unfitness ... with a reasonable and sociable Nature."[39] Working outward from the basic principles of human nature, it is possible to discern right means of action for attaining a particular kind of human community, as Grotius put it in the Prolegomena to the first edition of the work, "not a community of any kind, but one at peace, and with a rational order."[40] At its various levels of aggregation, the created order seeks out a peace that consists in the right ordering of relationships.[41]

As examples of the care of maintaining society in the light of human understanding, Grotius cited a non-exhaustive list, comprehending in large part the commercial virtues of respect for property, honoring agreements, making restitution for damages, and, most importantly for our purposes here, "the Merit of Punishment among Men."[42] The point about punishment as a feature of the natural human order requires some explanation.

Aristotle had introduced a two-fold distinction that had framed all subsequent discussions of justice.[43] The first distinction had to do with the quality of justice as the sum of all the virtues, as "complete virtue or excellence."[44] The second distinction proceeded to examine two other prevalent understandings of justice. The examples Grotius listed at this point in

37. GROTIUS, LAWS OF WAR AND PEACE *supra* note 12, at 1:85

38. *Id.* at 1:84-86.

39. *Id.* at 1:159.

40. *Id.* at 3:1747.

41. Although Grotius clearly relies most heavily on the Stoics for demonstrating this "exquisite Desire of society" (*Id.* at 1:84), here as elsewhere, there are clear echoes of Augustine, who famously argued in Book xix of the *City of God* that all things seek out a kind of peace, from the peace of the individual human body and soul; to the household, to cities and nations, culminating in the perfect peace of the Heavenly city itself. AUGUSTINE, THE CITY OF GOD AGAINST THE PAGANS 938-39 (R.W. Dyson ed., 1998).

42. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1: 86. The examples carry over the polemical thrust of the *Commentary on Prize and Booty*, written in part as a piece of advocacy on behalf of the United Dutch East India Company.

43. ARISTOTLE, NICOMACHEAN ETHICS 111-16 (Martin Ostwald ed., 1999). My brief summary here follows O'Donovan, *Justice of Assignment*, *supra* note 8, at 167-70.

44. ARISTOTLE, *supra* note 43, at 114.

his argument correspond to the notion of justice in the "strict" sense, or "compensatory justice," one variety within Aristotle's second distinction, summarized in the classical formula "render unto each that which is his due" (*suum cuique tribuere*).[45] Grotius followed by appending another category of justice, the second category within Aristotle's so-called second distinction, or "distributive justice,"

> to this belongs a prudent Management in the gratuitous Distribution of Things that properly belong to each particular Person or Society, so as to prefer sometimes one of greater before one of less Merit, a Relation before a Stranger, a poor Man before one that is rich, and that according as each Man's Actions, and the Nature of the Thing require.[46]

As Oliver O'Donovan demonstrates, Grotius' realignment of the traditional Aristotelian categories of commutative and distributive justice, modified in Book I as "expletive" and "attributive" justice, respectively, marks one of the most significant and helpful achievements of his theoretical project.[47]

It is at this stage of the argument that Grotius makes the claim to which so much notoriety has attached. It is helpful to set the comment in its context:

> And indeed, all we have now said would take place, *though we should grant*, what without the greatest Wickedness cannot be granted, *that there is no God*, (*etsi daremus . . . Deum non esse*) or that he takes no Care of human Affairs. The contrary of which appearing to us, partly from Reason, partly from a perpetual Tradition, which many Arguments and Miracles, attested by all Ages, fully confirm; it hence follows, that God, as being our Creator, and to whom we owe our Being, and all that we have, ought to be obeyed by us in all Things without Exception, especially since he has so many Ways shewn his infinite Goodness and Almighty Power; whence we have Room to conclude that he is able to bestow, upon those that obey him, the greatest Rewards, and those eternal too, since he himself is eternal; and that he is willing so to do ought even to be believed, especially if he has in express Words promised it; as we Christians, convinced by undoubted Testimonies, believe he has.

---

45. *Id.* at 120-23. Grotius elaborates and amends the two categories of Aristotle's second distinction in Book I. *See* GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1:136-54.

46. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1:87-88.

47. O'Donovan, *Justice of Assignment*, *supra* note 8.

> And this now is another Original of Right, besides that of Nature, being that which proceeds from the free Will of God, to which our Understanding infallibly assures us, we ought to be subject: And even the Law of Nature itself, whether it be that which consists in the Maintenance of Society, or that which in a looser Sense is so called, thought it flows from the internal Principles of Man, may notwithstanding be justly ascribed to God, because it was his Pleasure that these Principles should be in us. And in this Sense Chrysippus and the Stoicks said, that the Original of Right is to be derived from no other than *Jupiter* himself; from which Word *Jupiter* it is probable the *Latins* gave it the Name *Jus*.[48]

To the question of the meaning of "nature," given the central Christian teaching of the Fall of Man, Grotius appended a pithy response in a footnote to this passage, citing the 4th century church father Chrysostom, "'When I speak of Nature,' says St. Chrysostom, on I Cor. Xi 3. 'I mean God; for he is the Author of Nature.'"[49] To be sure, the statement hardly eliminates all the attendant ambiguities. Nevertheless, it assists in lining up the overall thrust of Grotius's intended meaning. He continued with another hint at the doctrine of the Fall and its consequences:

> There is yet this farther Reason for ascribing it to God, that God by the Laws which he has given, has made these very Principles more clear and evident, even to those who are less capable of strict Reasoning, and has forbid us to give way to those impetuous Passions, which, contrary to our own Interest, and that of others, divert us from following the Rules of Reason and Nature; for as they are exceedingly unruly, it was necessary to keep a strict Hand over them, and to confine them within certain narrow Bounds.[50]

The context of the "*etsi daremus*" statement helps define Grotius's intention, and adds weight to the settled understanding among his most careful readers: Grotius introduces here what amounts to "a scholastic saw,"[51] a statement that had become a formulaic commonplace of scholastic argumentation in the late middle Ages and early modern period.[52] The reference to divine will in the

---

48. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1:89-91 (emphasis added).

49. *Id.* at 91 n.2.

50. *Id.* at 91-92.

51. NORBERTO BOBBIO, THOMAS HOBBES AND THE NATURAL LAW TRADITION 153 (1993).

52. Despite continuing repetition of the contrary "saw" that views Grotius's "*etsi daremus*" statement operating as the thin end of the wedge of atheistic rationalism, this conclusion is shared by authors as diverse as VILLEY, *supra* note 1, at 612; JEFFREY, *supra* note 10, at 36-37;

passage provides an important further clue.[53] Jeffrey cites the conclusion of Vermeulen and Van Der Wal:

> the impious hypothesis therefore had "nothing to do with a secularisation of natural law . . . [but] expresses that the content of this law is not contingent, that it does not depend on arbitrary will—not even on Divine Will—but consists of an immutable system of rules with autonomous validity."[54]

Thus Grotius was being careful to distance himself from a radically voluntarist view of law as the arbitrary expression of divine will, the view positing that God could prohibit, say, murder at one point in time and then change his decree to pronounce it good at some later point.[55]

O'Donovan, *Justice of Assignment*, *supra* note 8; JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 44 (1980) ("Grotius is standardly said to have inaugurated a new, modern and secular era in natural law theorizing by his '*etiamsi daremus* . . . .' But this standard reading of Grotius is a mere misunderstanding. Grotius must be assumed to have known (if only from his reading of Suarez) that, for the purpose of discussing the roots of obligation, the hypothesis of God's non-existence (or indifference) had been a commonplace of theological debate since, at the latest, the mid-fourteenth century. And very many of the scholastics used the hypothesis to just the same effect as Grotius. Nevertheless, for Finnis, at least, the fact does not obviate the abiding connections in Grotius' thought to incipient 17th century rationalism and voluntarism.

53. The emphasis on the will of God as the source of natural law receives more extended treatment in Book I. Thus, in further discussion of the law of nature as emanation of divine will, Grotius continues,

> As for the Rest, the Law of Nature is so unalterable, that God himself cannot change it. For tho' the Power of God be infinite, yet we may say, that there are some Things to which this infinite Power does not extend, because they cannot be expressed by Propositions that contain any Sense, but manifestly imply a Contradiction. For Instance then, as God himself cannot effect, that twice two should not be four; so neither can he, that what is intrinsically evil should not be Evil.

GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1:155-6.

54. JEFFREY, *supra* note 10, at 37 (quoting B.P. Vermeulen and G.A. Van Der Wal, *Grotius, Aquinas and Hobbes: Grotian Natural Law Between Lex Aeterna and Natural Law*, *in* GROTIANA, 16/17:71 (1995-96).

55. A complex point is merely noted here at considerable risk of over-simplification. Grotius was not setting out to write a work of scholastic theology. The point makes some sense of a decision not to introduce elaborate discussions of *potentia ordinata*, *potentia absoluta* and divine command theory into a preliminary introduction to natural law principles. For two recent, more subtle descriptions of the issues surrounding the so-called "power distinction" in late medieval and reformed scholasticism, see STEPHEN J. GRABILL, REDISCOVERING THE NATURAL LAW IN REFORMED THEOLOGICAL ETHICS 54-69 (2006), and PAUL HELM, JOHN CALVIN'S IDEAS 312-46 (2004).

This being said, it must be added that the time was ripe for such an idea to gain new traction. In a period of mounting despair and exhaustion from a century of religious wars, Grotius was hardly the only early modern writer who sought what was hoped would provide a more stable basis for ethics and law. J.M. Kelly's pronouncement remains valid: the formula enunciated by the celebrated Grotius, in the eyes of successors seeking just such an opening,

> however qualified, was to be decisive in unhooking the doctrine of natural law—in the ethical sense, not as a prudential derivative of desire to cure a savage state of nature—from theology . . . Grotius's famous formula . . . served to make harmless later essays in his own century towards elaborating what he has been credited with inaugurating, namely, an entirely secular natural law.[56]

III. *SOLIDARISM* AND THE BONDS OF LAW

Emphasizing a feature that is perhaps most clearly apparent on the relational level of the family,[57] Grotius argues that recognition of the reality of self-regarding interest does not cause the idea of a law of human nature to collapse into myopic solipsism. On the contrary, it is at this very point of identification of the law of natural human interdependence that an opening emerges to provide uplift to the powerful instinctual pull of self-interest. Thus Grotius acknowledges the plain and obvious reality that human beings are not self-sufficient. "But to the Law of Nature Profit (*utilitas*) is annexed: For the Author of Nature was pleased, that every Man in particular should be weak of himself, and in Want of many Things necessary for living commodiously, to the

---

56. J.M. KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 226 (1992).

57. "The most natural Association is that of Marriage . . . ." GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 2:513-14. Families form the basic building blocks of natural order, on the basis of which then, larger communities are formed and preserved. On this foundational level, Grotius aligns with another important and under appreciated Protestant natural law thinker, his contemporary, the northern German, Johannes Althusius. Like Althusius, Grotius emphasizes the primacy of the family as the institution through which humankind lives out its social nature. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 2:508-45. The comment of Oliver O'Donovan is apposite: "Grotius's recurrent instance of natural authority is the paterfamilias." O'Donovan, *The Justice of Assignment*, *supra* note 8, at 185. Althusius coins the term *symbiosis* as a way of capturing the relational quality of the natural human condition—the first sentence of his magnum opus *Politica* (1610), discloses this symbiosis as the animating principle of his political thought: "Politics is the art of associating men for the purpose of establishing, cultivating and conserving social life among them." JOHANNES ALTHUSIUS, POLITICA 17 (Fredrick S. Carney ed., 1995).

End we might more eagerly affect Society."[58]

It is this reticulated interconnectedness of human community, a "solidarism"[59] that forms the basis of political order and the justification and validation for states in Grotius' scheme. In this way, Grotius opened his three-fold exposition of "Human Voluntary Right":

> We will begin with the Human, as more generally known; and this is either a *Civil*, a *less extensive*, or a *more extensive Right than the Civil*. The *Civil* Right is that which results from the Civil Power. The Civil Power is that which governs the *State*. The State is a compleat Body of free persons, associated together to enjoy peaceably their Rights, and for their common Benefit. The *less extensive* Right, and which is not derived from the Civil Power, though subject to it, is various, including in it the Commands of a Father to his Child, of a Master to his Servant and the like. But the *more extensive* Right, is the *Right of Nations*, which derives its Authority from the Will of all, or at least of many, Nations. I say *of many*, because there is scarce any Right found, except that of Nature, which is also called the Right of Nations, common to all Nations.[60]

The description denotes a stepped progression from familial relationships and civil associations of various types, to the nation and then to the community of nations. This structural order made sense of what would otherwise seem a strange anomaly in a work on the law of war and peace: the extended treatment of familial, household and other relationships (those falling in the category of "less extensive right") in chapter five of Book two.[61] As with Althusius, no one combination within the network of interlocking relationships was independent

---

58. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1: 93-94; *see also* Althusius, in a corresponding passage:

> Truly, in living this life no man is self-sufficient (*autarkies*), or adequately endowed by nature .... Nor in his adulthood is able to obtain in and by himself those outward goods he needs for a comfortable and holy life, or to provide by his own energies all the requirements of life. The energies and industry of many men are expended to procure and supply these things. Therefore, as long as he remains isolated and does not mingle in the society of men, he cannot live at all comfortably and well while lacking so many necessary and useful things.

ALTHUSIUS, *supra* note 57, at 17-18.

59. I borrow the term coined by Hedley Bull, "solidarism" to express this idea, though Bull uses the term in a slightly different sense than I am using it here. BULL, *supra* note 13, at 65, 87.

60. GROTIUS, LAW OF WAR AND PEACE, *supra* note 12, at 1:162-63.

61. *Id.* at 2:508-65.

and self-sustaining. "Public peace" sustained and "comprehended that also of every particular Person;" while "the Happiness of the Prince depends on the Happiness of his Subjects."[62]

It was on the basis of this acknowledged human interdependence that the lawfulness of belligerent action on behalf of others in need was to be grounded and justified.

> But it is not only lawful for us, as far as we are able, to be beneficial to another, but also commendable. They who write of Offices, justly say that there is nothing so useful to one Man, as another Man. Now there are several particular Ties, which engage Men mutually to assist each other. Kinsmen assemble to help one another: Neighbors and Fellow-Citizens call for the Aid one of the other . . . . But tho' there were no other Obligations, it is enough that we are allied by a common Humanity. For every Man ought to interest himself in what regards other Men . . . .[63]

Even at the international level, a similar interdependence prevails, Grotius argues:

> there is no State so strong or well provided, but what may sometimes stand in need of Foreign Assistance, either in the Business of Commerce, or to repel the joint Forces of several Foreign Nations Confederate against it. For which Reason we see Alliances desired by the most powerful Nations and Princes, the whole Force of which is destroyed by those that confine Right within the Limits of each State. So true is it, that the Moment we recede from Right, we can depend upon nothing.[64]

It was the hierarchical ordering of interdependent relationships that identified roles, rights and responsibilities after the manner of parts ordered to the whole.[65]

---

62. *Id.* at 1:345.

63. *Id.* at 1:384.

64. *Id.* at 1:97. Such seventeenth-century observations "provide the seeds for contemporary discussions of humanitarian intervention, which likewise emphasizes securing justice as a natural right." Richard B. Miller, *Christian Attitudes toward Boundaries: Metaphysical and Geographical*, *in* CHRISTIAN POLITICAL ETHICS 67, 84 (John A. Coleman ed., 2008).

65. GROTIUS, LAW OF WAR AND PEACE, *supra* note 12, at 1:386. The notion forms an important theme within Grotius's Prolegomena to the earlier Commentary on Prize and Booty—carrying on to shape the entire work as well as the *Laws of War and Peace*. GROTIUS, LAW OF PRIZE AND BOOTY, *supra* note 11, at 19-50.

This Stoic principle of "*oikeiōsis*" and which I am calling "solidarism," here frames the Grotian conception of natural law, and points to an important difference in the way that international law is increasingly understood currently, and in particular, in recent debates over the treatment of enemy combatants. What we see going on in our day is a hollowing of the intermediate space that traditionally existed between the solitary individual and the relative abstraction of "the international community"—so that individuals are now increasingly seen to be the subjects of international law, to a degree and extent that Grotius and the other natural law thinkers never recognized.[66]

Of course, this is not to say that Grotius failed to see the importance of the individual. But to leave the thread of argument there is to neglect the importance Grotius gives to the intermediate networks of relationship that mediate between individual and the conglomerate mass. Of course, the most important intermediate aggregation for Grotius in his treatment of the law of war and peace was the nation-state. It was the peace treaty of 1648 inaugurating the so-called "Westphalian System" that gave prominent place to the modern nation-state in the maintenance of international order. It has become something of a cliché that with the rise of globalism, mankind enters a new "post-Westphalian" order that tolls the demise of the nation-state.[67] But such a prognosis fails to account for the legitimate and indispensable role of states in maintaining international order and security. As Michael Ignatieff observes,

> In the western antiwar tradition, we are so used to thinking of the state as an agent of violence, as the instigator of war, that we forget the state's other historical role in our own development, which was to confiscate weaponry from the militias and retinues of the medieval warrior barons and to secure to a single authority the monopoly over the legitimate use of force. However paradoxical it may sound, the police and the armies of the nation-state remain the only available institutions we have ever developed with the capacity to control and channel large-scale human violence.[68]

IV. UNLAWFUL ENEMY COMBATANTS: A "NEO-CON" INVENTION?

---

66. *See* JEREMY RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES 158-92 (2005).

67. A. Claire Cutler, *Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy*, 27 REV. OF INT'L STUDIES 133-50 (2001).

68. MICHAEL IGNATIEFF, THE WARRIOR'S HONOR: ETHNIC WAR AND THE MODERN CONSCIENCE 160 (1997).

The prominence Grotius gives to "solidarism" in his natural law account of the foundations of international law renders all the more striking his treatment of a particularly thorny problem in the seventeenth century, the problem posed by pirates and marauders, those who do not act as representatives of any nation but who operate in a kind of nebulous, sub-national and transnational nether region. The problem resurfaces again, in a different form, with international terrorism. What, then, is to be done with such people?

The response of international law, as articulated by Grotius in the seventeenth century—though hardly invented by him—and reiterated in later formulations, was that such actors were outlaws, and enemies of all humankind (*hostis humani generis*). As the standard texts explain, this is still the case in international law today, and thus, "Piracy *jure gentium* (under the law of nations) is the first international crime warranting universal jurisdiction, a concept that permits any state to bring a pirate to justice at any time, anywhere."[69]

At initial glance, the idea of an expanded range of punishment options for a particular type of combatant seems to cut against the grain of the theme of solidarism that is so important to Grotius's account. In identifying a class of persons who remain outside "the mutual tie of kinship among men" does this aspect of the Grotian system disclose a lapse of coherence? Is it perhaps a regrettable residue of illiberal primitivism? This seems to be the implication of Larry May's argument. In the final chapter of his work on war crimes, May seeks to apply "Grotian" humanitarian principles to the question of how terrorists ought to be treated. Despite the argument that such actors were subject to private punitive action, May urges, Grotius exercised commendable judicial caution in finally giving advice on how to deal with pirates. These drastic private measures were to be a rare occurrence in cases of necessity.[70]

Surely, the exhortation to "Grotian" judiciousness is unimpeachable. Yet, May ultimately argues for more than a generalized prudential circumspection. The overarching humanitarian principle controls. Thus, merely "legalistic" attempts to make distinctions between lawful combatants and unlawful combatants, i.e., terrorists, neglects the higher approach rooted in "honor and conscience." The choice, lying before those authorized to make such decisions, is given in terms of either: a) the "unrestrained" view that because they are "somehow 'illegal,'" terrorists "can be assaulted and otherwise abused with impunity;"[71] or, b) terrorists deserve the same humane treatment across the board as any other combatants on the battlefield—"terrorists, like everyone

69. JOYNER, *supra* note 22, at 137.

70. MAY, *supra* note 3, at 301-23.

71. *Id.* at 315.

else, are owed a minimum amount of compassion, mercy, and justice, at least procedural justice as epitomized in rule of law considerations."[72] If these are the options, little question remains as to the outcome. May concludes that "terrorists who are imprisoned are no less human and vulnerable than non-terrorists. Terrorists should be treated humanely for their own sake but also, at least as importantly for the sake of the soldiers who have to treat them."[73] Anything less promotes a degradation of the humanity of the captives, those who are "just fellow humans,"[74] along with a degradation of the humanity of their captors. As stated in the abstract, of course, these proposals, seem hardly controversial. Yet the question must be asked: Is this an accurate way of setting up the problem? (If it is, one wonders, why there should be any controversy on the topic?) Moreover, taking the matter out of the realm of abstraction to fold in the consequences that are likely to follow upon its full-bodied application, a further question presents itself: Is the proposed solution truly humane?

In an early chapter of the *City of God*, Augustine makes a rather controversial, much quoted, and perhaps cynical remark to the effect that nations are merely bands of brigands writ large.[75] A small group of thieves comes together, controlling a limited area of turf, and it is called a gang. If the same group of thieves gains control over a much larger area and over an entire people, it becomes an empire.[76] Grotius lodges his disagreement early on in the work: "If there is no Community which can be preserved without some sort of Right"—Plato and Cicero make it clear that this is true even in the "remarkable" case of thieves and pirates—then "certainly the Society of Mankind, or of several Nations, cannot be without it."[77] Right serves as an indispensable ordering principle of communities all the way down from the community of nations even, in a qualified sense, in the instance of those who are organized for the sake of wrongdoing.

But this does not nullify the perduring distinctions that must be made between gangs and nations. In the course of an important discussion of the nature of sovereignty, Grotius expands on the argument opened in the prologue: "A state does not immediately cease to be a state, if it commits some acts of injustice, even by publick Deliberation; nor is a company of pirates and robbers to be reputed a State—'tho perhaps they may observe some kind of Equity

72. *Id.* at 312.
73. *Id.* at 318.
74. *Id.* at 322.
75. AUGUSTINE, *supra* note 41, at 147-48.
76. *Id.*
77. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1:98.

among themselves, without which no Body"—no human assemblage of any type—"can long subsist."[78] An important difference remains, consisting not primarily as a matter of order vs. lack of order; or even as justice vs. injustice, *per se*. The difference, Grotius argues, is in the purpose, the end for which these societies exist. Robbers and pirates are associated, he says, "on account of their crimes"—nations, on the other hand, "tho' sometimes not wholly guiltless, do associate for the peaceable enjoyment of their own rights, and to do right to foreigners, if not in all things according to the law of nature, which . . . among many Nations, is in part forgotten . . . ."[79] Thus, a people's ability to suppress the natural law to greater or lesser degree was not tantamount to an argument for that law's ultimate illegitimacy or lack of value. Realism required the candid acknowledgment that the law of nature, as borne out in the practices of nations, "is in part forgotten." But this was not to eliminate its value as a standard to which nations could be held to account. Nor did such failings remove a people from the community of nations and push it over to the category of pirates and brigands. "A sick body is yet a body."[80]

At the same time, the fact that even criminals in their associations with one another observed a rudimentary kind of equity—i.e., in the simple capacity for functioning as a going concern—"without which no Body can long subsist," gave the lie to the cynical contention that the natural law is an ultimately meaningless, because infinitely malleable abstraction. Such criminal associations honored the natural law even as they organized for the sake of violating it.[81] Nevertheless, the distinction made a difference; "those who are confederated in order to do mischief" are not to be accorded the identical panoply of rights and privileges as nations and their lawful constituents. It is at this point that it is critical to keep in mind an important doctrinal feature of the Grotian system, the natural law basis for punishment. In the earlier work on the Christian doctrine of the atonement, *The Satisfaction of Christ*, Grotius remarks, "anyone may kill an outlaw,"[82] referring to his teaching on a primitive

78. *Id.* at 3:1247.

79. *Id.* at 3:1247-48.

80. *Id.* at 3:1249.

81. Similarly, J. Budziszewski responds to the commonplace objection that the regularity of empirical evidence of grave moral wrongdoing undermines arguments for natural law:

> Evil has been done in the name of every good; lies have been propounded in the name of every truth. That is how sin works. Having nothing in itself by which to convince, on what other resources but good and truth can it draw to make itself attractive and plausible? We must use the natural law to recognize the abuse of the natural law; there is nothing else to use.

J. BUDZISZEWSKI, WHAT WE CAN'T NOT KNOW: A GUIDE 109 (2003).

82. GROTIUS, THE SATISFACTION OF CHRIST (1617) [hereinafter GROTIUS, THE SATISFACTION

natural right of punishment that pre-exists the formation of civil society, a doctrine that first appears in the *Commentary on Prize and Booty*, and receives further elaboration in the *Laws of War and Peace*. On this account, it is everyone's "natural right to revenge himself; and therefore were Hands given us."[83] As Grotius stated it, a transfer of the primitive power of punishment assisted in furnishing the consensus that led to the origination of governments:

> Is not the power to punish essentially a power that pertains to the state? Not at all! On the contrary, just as the right of the magistrate comes to him from the state, so has the same right come to the state from private individuals . . . Therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state . . . .[84]

It is on this point that Grotius receives criticism for his focus on the self-interested, individual subjective bearer of rights as the essential element in the social composition. The original right of enforcement extrapolated out to nation-states in the international arena justifies the right to use of force. There emerges a prospect in which nations are seen to act just as individuals in the nasty and brutish conditions of the state of nature that presides in the anarchic international arena.[85]

OF CHRIST], excerpted in FROM IRENAEUS TO GROTIUS: A SOURCEBOOK IN CHRISTIAN POLITICAL THOUGHT 816 (Oliver O'Donovan & Joan Lockwood O'Donovan eds., 1999) [hereinafter FROM IRENAEUS TO GROTIUS].

83. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1:384.

84. GROTIUS, LAW OF PRIZE AND BOOTY, *supra* note 11, at 136-37. Significantly, for Grotius the clinching biblical text providing support for this primitive right of punishment was found in the pre-Mosaic Noahic covenant of *Genesis* 9: "Who sheddeth man's blood, by man shall his blood be shed." *Id.* at 135.

> This is not a formulation of the *lex talionis* as a determination of penalty; it is, rather, an expression of the basis of retributive practice itself. We are all mortal, and our life has a limited expectancy. That fact gives all crime and all punishment its meaning. . . . Every serious injury is an assault, directly or indirectly, on the victim's life; so every punishment, too, is an assault on the offender's life.

OLIVER O'DONOVAN, THE WAYS OF JUDGMENT 122 (2005) [hereinafter O'DONOVAN, THE WAYS OF JUDGMENT].

85.

> Having taken this view of punishment, Grotius was committed to a much more individualistic theory of the state than any of his Protestant contemporaries. The rights enjoyed by atomic individuals in the Grotian state of nature filled out the moral world: the state possessed no rights which those individuals had not formerly possessed, and it was the same kind of moral entity as them.

A complete response to the question of the magnitude of Grotius's deviation from an Aristotelian account of justice would extend us far beyond the scope of this article. It is sufficient for our purposes to register Oliver O'Donovan's helpful corrective insight, in calling into question Tuck's characterization of the negligible quality of community in the Grotian natural society. To the question, how far did the Grotian principle of sociability extend? O'Donovan answers:

> [Q]uite far. Natural society *foreshadows* civil society .... Nature .. . leaves the subject of the right to punish indeterminate, but indicates that "most appropriately" it is a superior, which is to say, it anticipates a structured social context in which representative authority arises. (Grotius's recurrent instance of natural authority is the *paterfamilias*.) Punishment can never be administered by one human being on another without some social utility in view, and can never be undertaken for the sake of simple retaliation alone. The substantive account of punishment places it wholly within the context of responsible government. The point of rooting it in nature is not to belittle the sociality of pre-civil society (which includes the relations of sovereign states) but to magnify it, showing, as Grotius is always concerned to do, that the whole content of civil jurisprudence derives from the natural terms on which human beings relate to one another.[86]

O'Donovan's rehabilitation of Grotius, if accurate, connects the teaching on punishment to the central theme of solidarism, which as we have seen, forms the core of Grotius's account of natural right. The organic metaphor of society, common among Christian political thinkers,[87] as Grotius himself acknowledged,[88] provided the context for making sense of the seemingly drastic quality of the proposed remedy. It must be candidly admitted that it also exposed one of the more illiberal elements of Grotius' teaching.

> When the theologians inquire into the origins of punishments, they avail themselves of an argument based upon comparison, as follows:

TUCK, *supra* note 7, at 63.

86. O'Donovan, *Justice of Assignment*, *supra* note 8, at 185.

87. Thus, John of Salisbury spoke of the need to cut off rotten members of the body politic—"if they give offence to ... public security, ... they are to be destroyed utterly so that the security of the corporate community may be procured by the extermination of the one member;" such drastic curative measures become necessary "when the well-being of the entire soul is in jeopardy." John of Salibury, *Policraticus*, *in* FROM IRENAEUS TO GROTIUS, *supra* note 82, at 292.

88. GROTIUS, LAW OF PRIZE AND BOOTY, *supra* note 11, at 31.

> all less worthy creatures are destined for the use of the most worthy; thus, despite the fact that the beasts were indeed created by God, it is nevertheless right that man should slay them, either in order to convert them to use as his own property, or in order to destroy them as harmful, both of these purposes being mentioned in the Scriptural passage to which I have referred [i.e., Genesis ix. 6: "Whoso sheddeth man's blood, by man shall his blood be shed."]; similarly, so the theologians contend, men of deplorable wickedness, for the very reason that they are of such a character—stripped, as it were, of all likeness to God or humanity—are thrust down into a lower order and assigned to the service of the virtuous, changing in a sense from persons into things, a process which constitutes the origin of slavery in the natural order, too; and therefore, it is permissible to destroy such men, either in order that they may be prevented from doing harm or in order that they may be useful as examples.[89]

Larry May's contention as to the higher priority of the general principle, over against particular applications, is a sound reading of Grotius. It aligns with how Grotius stated his own method: "[F]irst, let us see what is true universally and as a general proposition; then, let us gradually narrow this generalization, adapting it to the special nature of the case under consideration."[90] For Grotius recognized that the greater the level of particularity of application, the greater the corresponding movement from first principles of natural law to matters of prudential judgment, the outcomes of which are seen to vary according to time and circumstance.[91]

Here, the controlling principle was to be found not at the abstract level of a vague "humanitarian principle" but in the nature of punishment as an outworking of "natural [solidarist] terms on which human beings relate to one another . . . ."[92] In the Prolegomenon to the same work, Grotius introduced the various forms of punishment, including, most importantly, "chastisement" and "exemplary punishment."[93] "The first kind of punishment has as its aim the correction of one individual; the second kind is aimed at the correction of all other persons, in addition to that one. The attainment of these two objectives

---

89. *Id.* at 135.

90. *Id.* at 17.

91. The point came across as Grotius's main subject of argument unfolded in the COMMENTARY; the laws regarding prize and booty needed to be assessed carefully, for one's interpretation of that body of law could vary substantially according to the level of abstraction at which one approached and sought to apply it. *Id.* at 207.

92. *Id.*

93. GROTIUS, LAW OF PRIZE AND BOOTY, *supra* note 11, at 31.

leads to a third: universal security."[94] These ends of punishment coincided "to such an extent, indeed, that even capital punishment . . . is in a sense beneficial to the guilty parties, whenever there is no other remedy for their incurably diseased spirits."[95] Even in this extreme case, then, it remained true as Plato had said that "'No legal punishment has evil as its aim.'"[96] In the more extended treatment of the subject of punishment, in Book two of the *Laws of War and Peace*,[97] the intransigence of human sin meant that the "humanitarian" approach, represented for instance by those Christians who would argue for abolishing capital punishment, finally could not be sustained. The persistent "general corruption and depravity of mankind"—"even since the Times of the Gospel"—required the ongoing administration of the death penalty, as "the Doctrine of the Apostle [Paul]" confirmed.[98]

The essence of these arguments lies not in the direction of legitimizing slavery or in the crude degradation "from persons into things" but in the solidarist emphasis on the organic, interdependent character of human society. The common good, and "universal security," not the private lust for vengeance, controlled the punishment of the outlaw, identified its underlying purpose, and justified its application in the specific case.

> It sometimes happens, however, that things properly pertaining to the parts tend to affect the whole, even though they are not directed toward the whole as such. In these circumstances, one must weigh, not the merits of persons, but the value of the things or the force of the actions involved. This is the basis of rewards and punishments. For the whole world should be grateful to him who has bestowed a universal benefit. The devisers of useful inventions, for example, have received praise and honour from all mankind. Conversely, those persons who have inflicted universal injury, no less than those who have injured a single individual ought to give proportionate satisfaction. In a sense, however, an injury inflicted even upon one individual is the concern of all, and this is true primarily because of the example set; just as it is the concern of the whole body that its various members should be sound, particularly as a guard against

94. *Id.* at 32.

95. *Id.*

96. *Id.* at 31-32.

97. *See* GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 3:949-1052.

98. Thus, Grotius candidly observed that "the Death of some" afforded the means of restraining "the Audaciousness of others." *Id.* at 3:986.

contagion.[99]

Grotius was wrestling with the reconfiguration of the categories of justice that would eventually take form in the *Rights of War and Peace*. "In almost any context, he believes, the two types of justice [i.e., what he eventually calls "expletive" and "attributive"] must be coordinated."[100] The compensatory activity of punishment must be flexibly indexed to the larger context—fixation upon the binary pairing, perpetrator-victim, or defendant-plaintiff, the parts at the expense of the whole, would yield distortion and injustice.

> In the justice of war . . . "mere expletive justice" is always a bad guide. Consideration of rights must be supplemented with consideration of prudence, the need of populations for peace and welfare. Yet expletive justice may not simply be overridden; it is not sufficient but it is necessary, and attributive justice is secondary to the satisfaction of its demands.[101]

The durability of organic human society depended on the resilience of the natural ties connecting men with one another in communal bonds of society. The just rendering of judgment must not fail to register this dynamic assessment of "the value of things or the force of actions involved."[102]

Recognition of these abiding tensions allowed for the resolution of an apparent paradox. The resolution was found at the point of balanced, rightly tuned modulation between the interests of individual and community:

> Now it may seem strange, inasmuch as punishment is hurtful to the person on whom it is inflicted, that justice, which is motivated by solicitude for all, should be directed to the harm of any individual. In order to throw light on this point, it may be observed that no art ever sets up evil as its ultimate goal, and that nevertheless there are times when an art makes use of evil—though only in cases of necessity—as an intermediate measure without which good cannot be attained. Doctors will never inflict pain upon the sick, unless considerations of health demand that they do so; nor will they amputate any part of the body, save in the interest of the body as a whole. Thus pain and mutilation, originally evil in themselves, may assume the quality of goodness because they lead to a good greater

---

99. GROTIUS, LAW OF PRIZE AND BOOTY, *supra* note 11, at 30.

100. O'DONOVAN, WAYS OF JUDGMENT, *supra* note 84, at 39.

101. *Id.*

102. *See supra* note 89 and accompanying text.

than the one to which as evils they were diametrically opposed.[103]

On the question of punishment, the medical metaphor indicated the frequency and severity of treatment was to be apportioned to the seriousness of the disease. In their deliberate violation of an essential element of the natural law, marauders who would deliberately "inflict a universal injury" in wrecking the ties of common humanity sought to undo the very thing on which all—civilization, law, peace, prosperity—depended. Their violent and destructive self-removal from the reticulated framework of civil society rendered them subject to severe punishment, for the sake of "that common good toward which, as we have said, all punishments are directed in nature's plan."[104] Thus, Grotius threaded the two arguments together. The basis for just punishment was discovered in solidarism: "the right of punishment is not for the sake of the one who punishes, but for the sake of some community. For all punishment aims at the common good, and particularly at the preservation of order and deterrence."[105]

Ultimately, the argument for a wider range of punishment options in the case of *hosti humani generis* was not meant as a justification for torture, for punishment was to be administered according to "that most sacred of natural precepts which declares that man must not be prodigally misused by his fellow man."[106] Rather it was an argument that sought to limit, and contain, the violence that occurs in war. On this basis, the laws of armed conflict have always sought to preserve the basic distinction between lawful and unlawful combatants.

As international legal specialists regularly observe, the laws of armed conflict seek to structure proper, desirable incentives into the practices of nations and peoples. The very existence of a *law* of armed conflict arises out of the recognition and expectation that people will tend to order their behavior and practice to accord with what the law allows or disallows. The projection of a "Grotian" principle of humaneness that would seek to lift the level of treatment afforded to *all* captive combatants, regular or irregular, quite transparently seeks to influence the conduct of nations in their treatment of combatants. It ignores the influence that such measures will have upon the practices of those who may one day become the subjects of such treatment. For all its purported humaneness, the obliteration of long-standing distinctions on combatant identification unwittingly sets in motion a counter-productive, even perverse set

103. GROTIUS, LAW OF PRIZE AND BOOTY, *supra* note 11, at 30-31.

104. *Id.* at 139.

105. GROTIUS, SATISFACTION OF CHRIST, *supra* note 82, at 820.

106. GROTIUS, LAW OF PRIZE AND BOOTY, *supra* note 11, at 162.

of incentives. If no serious penalties attach to the violation of standards established for determining regular combatant status, at least some combatants will see no reason to adhere to such standards. Indeed, the recognition that equal treatment will be required as a matter of law in the event of capture and detention will tend to foster the corresponding recognition that lawless methods and means provide an excellent device for attaining asymmetric advantage over one's declared enemies in war.[107] Consider now a combatant, simply wearing cut off jeans and tee-shirt—without any apparent accountability to properly recognized authority, and offering no way of identifying him as such. If such a person uses deadly force and may still receive all the protections afforded to regular combatants *as a matter of international law*, then there is every likelihood that conflicts will escalate, and spread with greater rapidity to affect innocent civilians.

Yet the limitation of violence and the reduction of collateral damage are two of the most important reasons for making the attempt to regulate armed conflict in the first place. These reasons formed the framework for a law among nations that would be responsive to the interdependent character of human community, for they recognized the important place of innumerable, voiceless third parties, non-combatant civilians who would not particularly represent the prosecution or the defense in a putative international criminal justice action. Indeed, this Grotian principle of solidarism, with its focus on the reticulated ordering of communities and the responsibilities of states for maintaining such order, exposes the dangers of our singular contemporary fixation upon individual offenses against the laws of war. By isolating individual cases in the manner of domestic criminal adjudication, the international law system erodes the intermediate structures of order that remain so critical to the preservation and maintenance of that very system. It would also risk moving the spotlight of the law's protections away from innocent noncombatant civilian populations and on to the individual recipients of "international criminal justice." In 1943, George Orwell warned that this kind of domestication of international affairs ran the danger of producing further ugly and undesirable evidences of the law of unintended consequences.[108] What our current experts in international relations and law aspire to establish, Orwell strongly discouraged: ". . . above all, no solemn hypocritical 'trial of war criminals,' with all the slow cruel pageantry of the law, which after a lapse of time has so strange a way of

---

107. Jefferson D. Reynolds, *Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict, and the Struggle for a Moral High Ground*, 56 A.F. L. REV. 1 (2005).

108. George Orwell, *Who are the War Criminals?*, *in* 2 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 319 (Sonia Orwell & Ian Angus eds., 1955).

focusing a romantic light on the accused and turning a scoundrel into a hero."[109]

As Alan Dershowitz recently argued, the suppression and denial of the basic filaments of the fabric of natural law, i.e., that life is better than death, that the good is to be pursued and evil to be avoided, forces new and difficult questions on the nations of the west who are primary targets of Jihadist hatred:

> Combatants can easily be distinguished from noncombatants. Has [the Lebanese mother who exhorts her son to become a suicide bomber in effect] "become a combatant . . . ? Have the religious leaders who preach a culture of death lost their status as noncombatants? What about "civilians" who willingly allow themselves to be used as human shields? Or their homes as launching pads for terrorist rockets? The traditional sharp distinction between soldiers in uniform and civilians in nonmilitary garb has given way to a continuum. At the more civilian end are babies and true noncombatants; at the more military end are the religious leaders who incite mass murder; in the middle are ordinary citizens who facilitate, finance or encourage terrorism. There are no hard and fast lines of demarcation, and mistakes are inevitable—as the terrorists well understand.[110]

Much of the confusion and the turmoil that has been stirring over Guantanamo and over the treatment of unlawful enemy combatants has come about because contemporary discourse in international law is now impoverished and stripped of the natural law underpinnings of that body of law, as articulated in the works of natural law thinkers like Grotius. Or rather, it has exploded one subset of its principles out of proportion to the prudential ordering that made such protective measures even viable. Grotius sought to establish that the fabric of an international law that binds the nations in a loose kind of community, held together by the strong fibers of the natural law. This natural law fabric was woven with the threads of our rational social nature, with the recognition that the human capacity for sustaining a just order among nations depends in significant part upon the same kinds of qualities that make for friendships, "which Nations, as well as private Persons stand in need of upon many Occasions."[111] Following this same line of analogy, Grotius could see as a matter of common sense what many modern-day champions of international human rights acknowledge only with disordered selectivity, that is, that "no Man readily associates with those who have Justice, Equity and Fidelity in

109. *Id.* at 325.

110. Alan Dershowitz, *Worshippers of Death*, WALL ST. J., Mar. 3, 2008, at A17.

111. GROTIUS, LAWS OF WAR AND PEACE, *supra* note 12, at 1:105.

Contempt."[112]

V. CONCLUSION

Whether the legacy of Grotius itself represented a subtle degradation and impoverishment of that natural law tradition, remains a question that cannot be resolved in this limited space. On the more particular and immediate question of "unlawful enemy combatants," this much remains clear. Grotius sought out a workable mean that would lift the treatment of such questions on to the level of decency and justice, while candidly acknowledging the requirement for unflinching severity in confronting severe and implacable threats.

> [L]et us not imagine that to be vicious which is devoid of vice; and let us not be unjust to ourselves while shunning injustice toward others. The weapon that flies far past the target, misses the mark no less than the weapon that falls short of its aim. Both extremes are blameworthy; both are tainted by error . . . . Justice consists in taking a middle course. It is wrong to inflict injury, but it is also wrong to endure injury. The former is, of course, the graver misdeed, but the latter is also to be avoided.[113]

It is finally incorrect to frame the options in terms of a simple either/or proposition: *either* afford to terrorists all the rights and privileges given to those who adhere to the laws of war—as if they were fully integrated members of the communities of peoples; *or* descend into an ever-coarsening bestial cruelty. Those who would destroy the very basis for the existence of international law—its respect for life, and for the communities that make it possible to sustain that life—force difficult moral choices upon those whom they seek to kill; it is a simple truth. All the more reason, for the sake of the innocent, for the sake of the continuation of decent civilization, that discernment and clarity characterize the response. In his natural law teaching Grotius demonstrated the balanced discipline we seek.

---

112. *Id.* at 1:105-06.

113. GROTIUS, LAW OF PRIZE AND BOOTY, *supra* note 11, at 11-12.