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# Jus Gentium, Natural Law, and Grotius' Treatise: International Law's Classical Heritage Impact on Today's Enforcement Dilemma

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## Abstract

Although international law only entered the common vernacular in the nineteenth century, international norms have guided intergovernmental action for hundreds of years. Beginning with the ancient laws that guided Greek and Roman interactions with foreigners, progressing to Hugo Grotius' enunciation of international law as a science, and arriving at the enforcement dilemma which now plagues international law—this is a multi-faceted, oft-debated field with a rich history. Ascertained from this study's literature review of its leading theorists, some would argue that international law is a direct threat to national sovereignty and a hinderance to true protection of the citizenry's rights. Others would argue that international law is man's primed path to the future, one in which there is an all-encompassing legal code that guides all action. The former perspective often overlooks the benefit that can be found in international law as a tool if not a moral framework, and the latter approach skews too idealistic when national self-interest is weighed into the equation. This study accordingly unpacks international law's ancient roots, juxtaposes the secularism of Grotius with the moral grounding of Aquinas in the realm of natural law, and answers the research question of whether international law is enforceable by showing how it can maximize its potential if state actors were more consistent in their approach and embraced a more pragmatic power stance rather than waiting for globalized bodies like the United Nations or the World Trade Organization to spring into any kind of effective action.


*Keywords:* international law, sovereignty, law of nations, natural law, classical liberalism

**Jus Gentium, Natural Law, and Grotius' Treatise: International Law's Classical Heritage and Today's Enforcement Dilemma**

Beginning centuries ago with the ancient Greeks and Romans, norms and customs have long influenced societal interactions with foreigners since the beginning of governed community. Though these interactions were not typically government against government, the ancient legal codes enunciated much of how their citizens were supposed to navigate conflict, ownership of their property and treatment of foreigners. Then in the seventeenth century, jurist Hugo Grotius built on this ancient foundation to craft a new discipline—international law. He made it into a science and developed it by separating antiquities convergence of natural law and the law of nations—to Grotius, they were two separate things, thus he inadvertently secularized the field. Finally, the third most recent international law development is today's enforcement dilemma. This encompasses the issue of sovereignty, use of force, ethical action, and globalization. Thus, international law is a field with many disparate opinions. To some individuals, international law is man's best hope at objective justice being administered across the globe; to others, it is the vehicle by which man will reach his highest self by pressing into global community, where there are no borders or distinctions. Both these hopes are idealistic, yet international law still serves a purpose on the world stage because of its grounding in natural law and thus it can be utilized even more than it currently is, to help alleviate the enforcement dilemma.

As for methods used in this study, the research was largely normative as a large variety of respected international law written sources were consulted to ascertain the field's history. Further, the study benefitted from Biblical wisdom which speaks into issues like government's foundation as an institution given by God, the importance of correcting oppression, and God's heart for proper justice. Finally, it was key for this study to expand beyond the thinkers which are classically associated with international law, and to also examine historical figures like Aristotle and Aquinas whose philosophical thought has been used to build out the moral motivations for and potential of international law. Each scholarly source was read thoroughly and carefully examined before being utilized in this study—as a result, no information has been taken out of context or inappropriately used, giving the research a chance to stand on its own.

To begin, a historical survey of classical civilizations is paramount to understanding international law's credibility. As Greek philosopher Aristotle once wrote, "There really is…a natural justice and injustice that is binding on all men, even on those who have no association or covenant with each other."[1] In a similar vein to the personal responsibility that Aristotle alludes to, the ancient Roman empire established the earliest beginnings of international law with its *jus gentium* code. This touched on treaty making, diplomatic relations, and warfare. In treaty making, the Romans had an early legal expectation that accepted treaties would be adhered to. Diplomatically, they granted certain privileges and immunities to representatives of foreign powers. Finally, though warfare happened somewhat often, there was a general understanding that there ought to be a just cause for it, and in some cases, there were expectations of restrictions on violence.[2] This all impacted international law later on, particularly the Roman belief that *jus gentium* was universal.

[1] Stephen C. Neff, *Justice Among Nations: A History of International Law* (Cambridge, MA: Harvard University Press, 2014), 7

[2] Neff, *Justice Among Nations,* 8.

However, this legal code was constrained to impacting the interactions of individuals and not of states. It would not gain expansion until the 14th and 15th centuries.[3]

Roman citizen and thinker Bartolus of Saxoferatto mused that the law of nations, or *jus gentium*, consisted of two parts—natural reason and the customs of various nations. It is from this dual distinction that Dutch jurist Hugo Grotius built on in the seventeenth century. To Grotius, it was critical to separate reason in accordance with divine will from a universal consensus of all nations—one is absolute and binding, the other is flexible and an increasing impossibility.[4] To Grotius, a globe of state actors would join together not a as result of violence but from a system of laws, customs, and mutual agreements. In his key publication *On the Law of War and Peace*, Grotius theorized that this system of principles, built on natural law and man's reason, would seamlessly bind all nations together regardless of their cultures, customs, or creeds. But as a historian would note much later, if natural law is largely determined by the world's norms and the reason that the divine has gifted man, it is very dependent on one's worldview; so this scholar writes that when natural law expectations differ, "only religion could provide certainty; where religions differed, unity was impossible…[are we to have] different law of nations for different parts of the globe?[5] Nevertheless, though Grotius theories open up many questions that had previously seemed settled, he is credited as the 'father of the science of international law' because of how he trailblazed forward in humanism and secularism while rejecting the universal empires that had dazzled the ancients."[6]

Another way that the ancients influenced man's more modern perception of international law—as built on natural law in part—is the concept of duties as opposed to mandates or rights. According to Aristotle and Plato, the chief fundamental principle of natural law is one's obligation to give other what they are due, and vice versa: the person owed can compel the debtor to pay-up. In this way, duties are deemed more foundational than rights, particularly in Grotius' rationalism school of thought.[7] This would relate to things like property rights and contractual rights.[8] At the time, Grotius also enunciated a pivotal theory of modern sovereignty. Trying to build beyond the traditional labels of subjective or objective rights, Grotius asserted that the natural right to life is primary and includes self-preservation as well—though man has a duty not to do harm to others anyways. To accomplish this, he believed that "self-preservation and peaceful sociability is best maintained if individuals submit to a third party – the state – to protect their natural rights."[9] This is one of the ways that he modernized the international laws of antiquity from merely governing individuals to defining how states would interact—for, to Grotius, since property was a natural right, it had to be protected and it was the state's role to do so. Political scholar Kochi explains that,

> Grotius' account envisages a global set of individual human rights to life and private property sitting alongside the rights of states which are treated as if they are human individuals with rights and duties. Individual and corporate rights to life (self-preservation,

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[3] Bardo Fassbender and Anne Peters, eds., *The Oxford Handbook of the History of International Law* (Oxford, UK: Oxford University Press, 2012), 74.

[4] Ibid., 946.

[5] Ibid., 951

[6] Ibid., 955

[7] Hugo Grotius, *Hugo Grotius on the Law of War and Peace*, edited by Stephen C. Neff, (Cambridge, MA: Cambridge University Press, 2012), xxvii.

[8] Tarik Kochi, "Conflicting Lineages of International Law: Cicero, Hugo Grotius and Adam Smith on Global Property Relations," *Jurisprudence* 8 no. 2 (2017): 267.

[9] Ibid., 268.

> sovereignty) and to property, as well as jointly held rights over the commons (oceans), are to be guaranteed by international law, and when infringed are to be defended by force via 'just war.'[10]

And so, Grotius effectively brought states into the international law dialogue by ascribing monitoring responsibilities to the government in an attempt to broaden each citizen's security, rather than his independence—because, to Grotius, government could morally be as tyrannical as the citizens agreed to, with no line or boundary kept in mind.[11]

Similarly, though with a moral bent rather than a secular one, theologian Thomas Aquinas was similarly inspired by Aristotle to explore the character of the laws of nature. Aristotle did not believe that the gods or religion controlled the world, but instead that the human experience was impacted by natural laws which governed his environment—and that these laws were discernable with human reason.[12] Thomas Aquinas picked up on this idea and asserted that human reason was not only compatible but elevated by Christian faith. Of natural law he said, "the light of reason is placed by nature [and thus by God] in every man to guide him in his acts."[13]And so man is guided by natural law in his daily life. Further, Aquinas believed that government could utilize the bounds of natural law to work towards a common good that would benefit the whole of society—such as the protection of life, preservation of the state, and the promotion of peace. To these ends, Aquinas connected his belief that just war could be pursued if this common good was threatened by outside influence. And so, Grotius and Aquinas converge here, since both men believed that governmental interactions ought to center on the common good and could utilize just war if outside forces threatened those aims—similar to how ancient Roman *jus gentium* allowed for war if there was sufficient cause.

This brief overview of international law's heritage leads the study to today's enforcement dilemma: whether it can be enforced and if so, why it often is not. As legal scholar Stephen Neff puts it, "Rights without remedies are no rights at all."[14] However, the issue is complicated. International organizations, like the United Nations or the International Criminal Court, which are supposed to enforce the international law norms and customs that have accumulated over time, ask for nations to give up portions of their sovereignty in order to participate in a global legal system. This not only threatens the autonomy of national government, leading to instances where a state might have to go against the needs of its people for a vague international goal, but it also fails to offer any incentive for state actors to participate when they do not directly benefit. However, scholar Jeremy Rabkin notes that this is a modern problem, for the law of nations, as the Founders understood it, simply referred to the "body of background understandings regarding the rights and duties of sovereign states. The new term 'international law' which gained currency in the 19th cent. did not imply anything more ambitious."[15] As mentioned previously, each nation was to pursue the common good for its citizens, establish norms for its interactions with foreign bodies, and pursue just war if need arose. But, the emergence of a more globalized world in the past two hundred years has complicated the international law arena and created an expectation of

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[10] Ibid., 272.

[11] Grotius, *Hugo Grotius,* xxxiii.

[12] "Bria 22 4 C St. Thomas Aquinas Natural Law and the Common Good," Constitutional Rights Foundation, Last modified 2006, https://www.crf-usa.org/bill-of-rights-in-action/bria-22-4-c-st-thomas-aquinas-natural-law-and-the-common-good.

[13] Ibid.

[14] Neff, *Justice Among Nations,* 34.

[15] Jeremy A. Rabkin, *Law Without Nations? Why Constitutional Government Requires Sovereign States* (Princeton, NJ: Princeton University Press, 2005), 25.

sovereignty surrendered to international organizations. Unfortunately, the bodies who seek this added power have not often shown themselves up for the task. The United Nations, who touts its commitment to human rights and world peace, can seemingly at best only administer soft laws built on non-binding norms, and allows the most brutal aggressors against human rights to sit on the Human Right Commission and make decisions about the globe's direction.[16] These kinds of decisions have gradually stripped the UN of its credibility over the years, when it could be a powerful international law tool if utilized wisely, and left the organization crippled to enforce anything with any real force.

Rather than the UN's reliance on condemnations and powerless statements, a proper view of human nature is that man does not naturally agree with others, and that in a true state of nature—where everyone acts as they desire—it would be chaos.[17] As biblical wisdom instructs in Jeremiah 17:9, the human heart is wicked above all things. And so, in our context, enforcement looks less like Woodrow Wilson's idealistic hope in an international league which powerfully maintains peace, and more like individual state actors stepping in when a nation breaks natural law—universally-recognized good and evil—since that nation then has a right to be punished, and if the nation's civil laws do not provide otherwise, any actor has the authority to do that duty.[18] As Stephen Neff puts it, "Throughout history, international law has been critically dependent on a general willingness of governments to abide by it. And so, while national law is constantly at work to instill an ethic of obedience…international law is necessarily more dependent on voluntary, uncoerced cooperation by its subjects" or by the actions of the motivated to enforce against wrongdoing.[19] Modern scholars have discerned other paths for enforcement of international law's norms, treaties, and customs.

These two primary avenues for enforcement are: by authoritative states formed by treaty regimes and by non-government actors.[20] In ideal world, the latter would include things like the UN, the World Trade Organization, et cetera, since these organizations have members who have committed themselves to following the rules that these organizations pass. It would work more often than it does now if there was not such widespread veto power, corruption, and moral bankruptcy. In the past, these bodies have tried economic sanctions, cultural embargos, criminal tribunals, asset freezes, and more.[21] Sometimes they work, but often the acts do not sufficiently harm the state in question, and since the international arena is largely governed by reciprocity and dominance, a state's lack of self-interest in punishment that does not target it harshly means that it will not be inclined to act. According to studies, state actors are shown to act when there is "coincidence of interest, coercion, bilateral repeated prisoner's dilemma, and bilateral coordination," since each of these maximize interest by increasing loss to the nation. As legal scholar Fairi Muhammadin puts it, "the idea of enforcement in any case is to construct the situation in such a way that it is no longer in the state's best interest to break the rules."[22] And so, when governing bodies like the UN claim they will address a human rights abuse, in accordance with their charter, often they are not able or willing to make the penalty appropriately punitive. The other enforcement option is for individual state actors to take action or for the international community at large to enact pressure on the

[16] Ibid., 34.
[17] Ibid., 37.
[18] Ibid., 76
[19] Neff, *Justice Among Nations,* 477.
[20] Fajri Muhammadin, "Can International Law Be Enforced Towards Its Subjects within the International Legal Order?" *Ius Quia Iustum Law Journal* 2 no. 21 (April 2014): 175. https://ssrn.com/abstract=3032347.
[21] Ibid., 179.
[22] Ibid., 109.

offender to change its ways. It is common for nations to question the moral place for this, as Grotius and Aquinas wrestled with as well, but ultimately—those who have power to correct oppression and wrongdoing have a moral responsibility to do so, as it says in Micah 6:8.

Though one could debate the difference of individual and collective moral duties, nations can be secure in the fact that international law is not an arbitrary or modern idea. It is grounded in transcendent natural law which speaks to the inherent dignity of every individual, the property rights of each person, and the necessity for no actor's action to harm the rights of another. Though international law has become muddled with global initiatives and grabs for state sovereignty in recent years, at its best, it is at the Founders saw it—and as those in antiquity saw it—a concept which suggests that some issues are worth taking action over if they threaten your people, and that some actions outside your nations ought not be allowed to continue if you have the power to do something about it. In a world of dominance and reciprocity, there is always a measure of pressure that powerful states can exact in enforcing the international expectations that are built on natural law, with or without the United Nations' help. The globe will not soon reach an international legal code, individual cultures are too entrenched for that and the needs of each people group are too diverse, but international law remains a tool for those who wish to exercise their own sovereignty and use it.

"Bria 22 4 C St. Thomas Aquinas Natural Law and the Common Good." Constitutional Rights Foundation. Last modified 2006. https://www.crf-usa.org/bill-of-rights-in-action/bria-22-4-c-st-thomas-aquinas-natural-law-and-the-common-good.

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