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**Front cover:** *The cut stem of a fir tree in the forest around Vallombrosa Abbey in Reggello, in the Apennines east of Florence. The monastery was founded in 1038, and is surrounded by deep forests tended over several centuries. The concentric rings show the accumulating age of the tree, here symbolising how thought expands and accumulates over time, and how lines or schools of thought are interconnected and cut through periods.*

**Back cover:** *The forest floor covered by a deep blanket of leaves from past seasons, in the protected forests around Camaldoli Monastery in the Apennines east of Florence. Old leaves nourish new sprouts and growth: the new grows out of the old. We may see this as a metaphor for how thinkers of the past offer an attractive terrain to explore and may nourish contemporary foundational analysis.*

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## Hugo Grotius on War, Punishment, and the Difference Sovereignty Makes

Pablo Kalmanovitz\*

Hugo Grotius (1583–1645) has been variously portrayed as founding father of modern international law; one of the first, if not the very first, modern theorist of individual rights and of the social contract; the originator of a distinct conception of international society; and one of the most influential humanist defenders of Dutch republicanism.<sup>1</sup> However deceiving or inaccurate these labels may be, they nonetheless convey the range and depth of Grotius’ contributions to legal and political philosophy. The ‘miracle of Holland’ – as the French king Henri IV called Grotius while he was on a diplomatic mission in Paris at the age of fifteen – did make a remarkable number of path-breaking contributions to legal and political philosophy.<sup>2</sup>

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<sup>1</sup> See respectively Peter Haggemacher, “Hugo Grotius (1583–1645)”, in Bardo Fassbender and Anne Peters (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, Oxford, 2012; Martine Julia Van Ittersum, “Hugo Grotius: The Making of a Founding Father of International Law”, in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, Oxford University Press, Oxford, 2016; Richard Tuck, “The ‘Modern’ Theory of Natural Law”, in Anthony Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe*, Cambridge University Press, Cambridge, 1987; Knud Haakonssen, “Hugo Grotius and the History of Political Thought”, in *Political Theory*, 1985, vol. 13, no. 2; Hedley Bull, “The Grotian conception of international society”, in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations*, Harvard University Press, Cambridge (MA), 1966; Richard Tuck, *Philosophy and government 1572–1651*, Cambridge University Press, Cambridge, 1993, pp. 154–201.

<sup>2</sup> The secondary literature on Grotius is vast, but for overviews of his life and work, see Renée Jeffery, *Hugo Grotius in International Thought*, Palgrave Macmillan, London, 2006,

Grotius lived and worked in times of great upheaval and deep transformations in Europe, and a good deal of his writings tried to make sense of new emerging political realities. He died shortly before the Peace of Westphalia was agreed, which created a new order for Europe as it ended the appalling violence of the Thirty Years War, through which Grotius lived. Concerns with war and religious controversy are at the heart of his great work *De Iure Belli ac Pacis* (1625), as are also the legitimacy of nascent colonial enterprises and the rights of overseas trading companies, which at the end of the sixteenth century were building trade networks and transforming the world.<sup>3</sup> Grotius' first important commission as a lawyer had to do precisely with the coercive rights of the Dutch East India trading company on the open seas; his first widely acclaimed publication, *Mare Liberum* (1609), came out as a result of this commission.<sup>4</sup>

In this chapter, I want to discuss some of Grotius' ideas on war and punishment. Specifically, I want to examine the neglected concept of 'solemn war' that Grotius introduced in the third and last book of *De Iure Belli ac Pacis*. The concept, as will be seen in what follows, was presented as an alternative to the older and now more familiar concept of 'just war'. As Grotius himself was often keen to point out, the legal doctrine of solemn war is in fundamental respects inconsistent with that of just war, particularly regarding the application of punishment. Most notably, while just wars were typically punitive affairs, actions taken in the context of solemn wars, under the mandate of a sovereign ruler and following a formal declaration of war, should be left largely unpunished.

My central goal in what follows is to elucidate and comment on the reasons why Grotius thought it was necessary to introduce the concept of

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and Charles Edwards, *Hugo Grotius: The Miracle of Holland*, Nelson Hall, 1981. For a valuable recent comprehensive discussion and historical reappraisal of Grotius' ideas and sources, see Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law*, Cambridge University Press, Cambridge, 2015. Still useful is the eclectic set of perspectives contained in Hedley Bull, Benedict Kingsbury, and Adam Roberts (eds.), *Hugo Grotius and International Relations*, Oxford University Press, Oxford, 1990.

<sup>3</sup> See respectively Edward Keene, *Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics*, Cambridge University Press, Cambridge, 2004, and Martine Julia Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595–1615*, Brill, Leiden, 2006.

<sup>4</sup> Hugo Grotius, *Commentary on the Law of Prize and Booty*, Liberty Fund, Indianapolis, 2006, pp. xiii–xxi.

solemn war in his great work on the rights of war and peace. Specifically, I want to reconstruct Grotius' argument as to why 'impunities' were intrinsic to solemn warfare. I will show that Grotius introduced the solemn war concept in response to what he perceived to be fundamental problems in the doctrine of just war. Contrary to canonical interpretations of Grotius as a defender of just warfare and universal criminal jurisdiction, my claim will be that Grotius was in fact ambivalent and torn between two competing normative conceptions of war and punishment. I will further argue that Grotius' ambivalence reflects genuine value trade-offs in the project of regulating war in the law of nations, trade-offs that he identified and that are still with us in contemporary forms.

The chapter begins with a discussion of the contrasting concepts of just war and solemn war and the role of punishment in each (Sections 7.1. and 7.2.). It then turns to reconstructing and discussing Grotius' reasons for introducing the concept of solemn war and why impunity had to be part of it (Section 7.3.). It concludes with some remarks on the extent to which Grotius' reasons for solemn war may be relevant today (Section 7.4.).

Before I proceed, a caveat is in order: there is no denying that *De Iure Belli ac Pacis* is a complex and rich book; its incomplete arguments and loose ends often allow for defensible yet conflicting interpretations. Nonetheless, in what follows I will argue that the solemn war concept was Grotius' solution to the value trade-offs he identified, and that *in this sense* he was a defender of solemn rather than just war.

## 7.1. Just War

Grotius is often read as a theorist of just war, and there is certainly ample textual evidence for that.<sup>5</sup> Like his distinguished predecessors, the Spanish scholastics (discussed in Chapter 5 above), Grotius argued that a war could be justified only as a proportional response to a serious violations of

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<sup>5</sup> By far the strongest case for Grotius' debt to the just war tradition, in particular to medieval canonists and early modern scholastic theologians, is Peter Haggemacher, *Grotius et la doctrine de la guerre juste*, Presses Universitaires de France, Paris, 1983. See additionally James Turner Johnson, *Ideology, Reason, and the Limitation of War: Religious and Secular Concepts, 1200–1740*, Princeton University Press, Princeton, 1975, pp. 223–31; Alex Bellamy, *Just wars: from Cicero to Iraq*, Polity, Cambridge, 2006, pp. 71–74; and Stephen Neff, *War and the Law of Nations: A General History*, Cambridge University Press, Cambridge, 2005, pp. 96–102.

right – to injuries imminent or received (II.i.2–6, II.ii.1).<sup>6</sup> He thought of just wars as forms of legal enforcement and means of judicial redress, and along these lines postulated three broad types of *iusta causa* in just warfare: “self-defence, recovery of property, and punishment” (II.ii.2, p. 171).<sup>7</sup> Book II of *De Iure Belli ac Pacis* contains a detailed catalogue of the injuries that would merit war. Arguably, one of Grotius’ central goals in writing his *magnum opus* was to build a complete doctrine of *ius ad bellum* around a full system of subjective rights.<sup>8</sup>

An important feature of this understanding of war is that warring parties stand in an unequal relationship: one is in the right and the other in the wrong. Before the *casus belli* – the injury that justifies the war – the parties stood as equals before the law of nature and nations. But after the injury, and by reason of the injury, the victim of aggression comes to have jurisdiction over the aggressor, including criminal jurisdiction. Following Francisco Vitoria, Grotius clarified that an ‘injurer’ in war need not always be at fault, notably not when he could not possibly have known that he was in the wrong. But even if the unjust side is faultless, his war remains objectively wrong, and consequently his enemy is just and entitled at least to reparations. Grotius’ careful line of argument is worth quoting in full:

We must distinguish various interpretations of the word ‘just’. Now a thing is called just either from its cause, or because of its effects; and again, if from its cause, either in the particular sense of justice or in the general sense in which all right conduct comes under this name. Further, the particular sense may cover either that which concerns the deed, or that which concerns the doer; for sometimes the doer himself is said to act justly so long as he does not act unjustly, even if that which he does is not just [...] In the particular sense and with reference to the thing itself, a war cannot be just on

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<sup>6</sup> All references to Grotius are to *De Iure Belli ac Pacis*. References indicate book number, chapter, and section number, so the first passage cited above is to sections 2–6 of chapter i of book II. When quoting, I include the page number of Francis Kelsey’s translation for the Carnegie Endowment for International Peace edition, although in some cases I have amended the translation. Hugo Grotius, *De Jure Belli ac Pacis Libri Tres* (Law of War and Peace), vol. 2, Francis W. Kelsey trans., Clarendon Press, Oxford, 1925 (1625).

<sup>7</sup> For a detailed discussion of this triad of causes for just war, with particular emphasis on their Roman sources, see Straumann, 2015, pp. 170–220, *supra* note 2.

<sup>8</sup> Peter Haggemacher, “On Assessing the Grotian Heritage”, in *International Law and the Grotian Heritage*, T.M.C. Asser Institute, The Hague, 1985.

both sides, just as a legal claim cannot; the reason is that by the very nature of the case a moral quality cannot be given to opposites as to doing and restraining. Yet it may actually happen that neither of the warring parties does wrong. No one acts unjustly without knowing that he is doing an unjust thing, but in this respect many are ignorant. Thus either party may justly, that is in good faith, plead his case. For both in law and in fact many things out of which a right arises ordinarily escape the notice of men. (II.xxiii.13, p. 565)

Notwithstanding the important caveat he took from Vitoria, Grotius argued that, as a matter of logic or “by the very nature of the case”, a war could be objectively just at most for one side. Actions by the injurer were unjust even if not done unjustly, that is, even if they lacked the required *mens rea* and could be excused in the eyes of criminal justice, and for that reason reparations must be paid to victims of injury. Culpable aggressors and their accomplices should be punished (II.xxiii.13; II.xxvi.4).

In this conception of just war, punishment has a role to play beyond being one of the just causes for war. In arguing for the expansion of punitive justice in war contexts, Grotius explicitly parted ways with most Spanish scholastics and in effect justified what today would be called universal criminal jurisdiction and humanitarian intervention (see II.xx.40 and II.xxv.1–8 respectively). Not only did the just side in war have criminal jurisdiction over the aggressor, but every sovereign power had it too, and in some cases, private actors with a clean criminal record could have it as well.<sup>9</sup> As was famously the case for Locke later on, for Grotius a private right to punish had to exist because only in this way could sovereign powers have come to have it. It was a matter of principle that anyone had the right to punish violations of perfect natural rights in virtue of natural law, at any rate “anyone who is not subject to vices of the same kind” as the aggressor (II.xx.3, p. 465, also II.xx.6).<sup>10</sup>

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<sup>9</sup> Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant*, Oxford University Press, Oxford, 1999, pp. 78–108; Straumann, 2015, pp. 208–18, see *supra* note 2.

<sup>10</sup> According to Straumann, this novel argumentative move by Grotius came as an adaptation of Ulpian’s private law dictum that no one can transfer greater rights than he possesses, see *ibid.*, pp. 208–09. On Grotius and the right to punish, see further Benjamin Straumann, “The Right to Punish as a Just Cause of War in Hugo Grotius’ Natural Law”, in *Studies in the History of Ethics*, February 2006, and Gustaaf van Nifterik, “Grotius and the Origin of the Ruler’s Right to Punish”, in *Grotiana*, 2007, vol. 26, no. 1. On Grotius and humanitarian intervention, see Raymond John Vincent, “Grotius, Human Rights, and Intervention”, in

Grotius' expansive views on punishment in effect turned aggressors into universal criminals. Criminal jurisdiction was for him by no means a matter of just desserts – and certainly not a privilege of revenge in the victim of aggression – but a global public good. In chapter xx of book II of *De Iure Belli ac Pacis*, the long chapter on punishment, Grotius justified punishment from the perspectives of the wrongdoer, the victim, and the community of mankind. Punishment could serve to correct and rehabilitate aggressors, and as such it was inflicted for their own good (II.xx.6.2); it could protect the victim from renewed attacks by incapacitating the aggressor; and it could also serve to protect all potential victims of that aggressor. In addition, by being exemplary, “public and conspicuous”, punishment could deter all potential aggressors (II.xx.8, p. 472).

This normative understanding of war and punishment relies on a strong analogy with the domestic legal order. Since in international society there is no supra-national authority that could have exclusive criminal jurisdiction, all public authorities are called on to judge and determine the wrongfulness of an aggressor's actions, and to exact punishment accordingly. For Grotius, universal criminal jurisdiction was in effect a decentralised substitute for State criminal jurisdiction in international society. Despite their important differences, punishment within the State and in international society shared analogous fundamental goals: deterrence of prospective wrongdoers and enforcement of the law of nature and nations. Just war itself is seen as a form of law enforcement analogous to police action within a State.

## 7.2. Solemn War

In book III of *De Iure Belli ac Pacis*, this expansive use of the domestic analogy and its concomitant robust understanding of universal criminal jurisdiction, were essentially rescinded. A different picture of war and punishment emerges in that book, one that raises questions regarding the extent to which Grotius was really a just war theorist and an advocate of universal criminal jurisdiction.<sup>11</sup> While Grotius' views on just war were

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Hedley Bull, Benedict Kingsbury and Adam Roberts (eds.), *Hugo Grotius and International Relations*, Oxford University Press, Oxford, 1990, and Peter Pavel Remeč, *The Position of the Individual in International Law According to Grotius and Vattel*, Martinus Nijhoff, Leiden, 1960, pp. 221–25.

<sup>11</sup> Hedley Bull characterises Grotius' position as “hesitant”, oscillating between two extremes. On the one hand, there is Grotius' strong reliance on the domestic analogy, on the basis of which the doctrine of just war was articulated, but on the other hand, there are his arguments



indebted to a great deal of scholastic thinking, the idea of solemn war was arguably novel in the natural law tradition and alien to scholasticism. Solemn wars are rooted in State practice, as established by Grotius mostly on the basis of ancient sources and, more importantly, based on the logic of reason of State (*raison d'état*) which Grotius drew from humanist sources and translated into the modern language of natural law and the law of nations.<sup>12</sup>

But not only do the concepts of solemn war and just war have different genealogies, they also had markedly different historical impacts. While the revival of the doctrine of just war is a relatively recent phenomenon, the concept of solemn war – and subsequent variations, including ‘regular’ and ‘lawful’ war – had a profound impact on the evolution, form, and content of public international law generally, and of the laws of war in particular. The conceptual apparatus developed by Grotius around the concept of solemn war was subsequently picked up and elaborated further by the most influential early publicists of the modern law of nations, including Samuel Pufendorf, Christian Wolff, and Emer de Vattel, and eventually provided some of the intellectual foundations for the codification of the laws of war in the nineteenth and early twentieth century.<sup>13</sup>

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emphasising the dangers of treating a pluralist international society as a centralised State, on the basis of which the alternative concept of solemn war was introduced. There is no denying that Grotius was hesitant, but I would argue that ultimately, for all his caveats and seeming ambivalences, he was a defender of the prerogatives of sovereign States and as such willing to suspend fundamental tenets of just war doctrine. But cf. Hedley Bull, “The Grotian conception of international society”, in Herbert Butterfield and Martin Wight (eds.), *Diplomatic Investigations: Essays in the Theory of International Politics*, Harvard University Press, Cambridge (MA), 1966, pp. 64–65.

<sup>12</sup> Grotius’ sympathy and indebtedness to Renaissance republican ideas have been amply documented and emphasised by Richard Tuck in Tuck, 1993, pp. 154–201, see *supra* note 1, and also Tuck, 1999, pp. 1–15, see *supra* note 9. Drawing on Tuck and on his own work on the history of reason of State, Istvan Hont has suggestively characterised Grotius’ jurisprudence as a form of “juridically reformatted reason of state” in which the universal imperative of State protection comes to shape decisively the form of international law, in Istvan Hont, *Jealousy of Trade*, Harvard University Press, Cambridge (MA), 2005, pp. 14–15. Compare Peter Haggemacher’s somewhat forced attempt to unearth the scholastic roots of Grotius’ solemn war concept in Haggemacher, 1983, pp. 426–37, 595, see *supra* note 5.

<sup>13</sup> So I argue in my forthcoming book (see *supra* biographical note). For overviews of the development of this tradition of international legal thinking, see Peter Haggemacher, “Mutations du concept de guerre juste de Grotius à Kant”, in *Cahiers de Philosophie Politique et Juridique*, 1986, vol. 10; Pablo Kalmanovitz, “Early Modern Sources of the Regu-

In the introduction of *De Iure Belli ac Pacis*, Grotius described book III on solemn wars as a book on “what is done with impunity” in war (*Prolegomena*, 35, p. 22). Indeed, in solemn wars, punishment has a very limited role to play; such wars are, said Grotius, largely constituted by impunities, that is, exemptions from punishment in principle deserved. If a defining aspect of just wars is that culpable aggressors and their accomplices must be punished, a defining aspect of solemn wars is that fighters under the command of a sovereign ruler must be immune to punishment. In solemn wars, Grotius wrote,

it is permissible to harm an enemy, both in his person and in his property, not merely for him who wages war for a just cause, and who injures within that limit, a permission which is granted by the law of nature, but for either side indiscriminately. As a consequence, he who happens to be caught in another’s territory cannot for that reason be punished as a murderer or thief, and war cannot be waged upon him by another on the pretext of such an act. (III.iv.3, pp. 643–44).

In this crucial passage, Grotius decouples the doctrines of *ius in bello* and *ius ad bellum*, and makes the former symmetrical. In solemn wars, enemy States stand as legal equals, as equal belligerents rather than aggressor and victim. Moreover, the *ius in bello solenne* includes not only symmetrical privileges to harm and kill enemies, but also correlative obligations in third parties to abstain from punitive justice. The universal criminal jurisdiction that accompanies just wars, Grotius tells us here, must be suspended in solemn wars. In addition to immunity from criminal jurisdiction, solemn wars have other, more active legal effects, which Grotius argued had to be “defended as lawful” in domestic courts, in particular with regard to the enforcement of property and territorial rights acquired during war (III.vii.7, p. 695). So solemn wars are characterised not only by widespread ‘impunities’ but also by the sanction of certain particular ‘legal effects’.

*What, then, are these solemn wars? They are essentially wars fought among sovereign States, formally and publicly declared as such; they are regulated by the positive law of nations, not nature; and their special regulations in a sense suspend obligations derived from the law of nature in virtue of the belligerents’ status as sovereigns.*

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lar War Tradition: Grotius to Vattel”, in Seth Lazar and Helen Frowe (eds.), *Oxford Handbook of Ethics and War*, Oxford University Press, Oxford, 2016.

For each normative period of war, there are important contrasts between the doctrines of solemn and just war. First, regarding the doctrine of *ius ad bellum*, from the principle of sovereign equality follows the principle of belligerent equality: enemies stand as equals before the law, as formal enemies rather than as aggressor and victim of aggression. Aside from having the standing of sovereignty, the most important *ad bellum* obligation in solemn wars is to publicly declare the reasons for resorting to war in formal ‘war manifestoes,’ which serve the two-fold purpose of showing that it is indeed a sovereign that declares the war and of explaining and trying to persuade “the whole human race” of the justice of the war (II.xxvi.4; III.i.5).

However, the fact that solemn wars have to be publicly declared and justified does not mean that the belligerents would have to prove beyond doubt to others that they are just and their enemies unjust. In this respect, solemn and just wars differ fundamentally. While public declarations must contain the reasons why war is waged – and while presumably Grotius expected sovereigns to follow the canon of *casus belli* that he articulated in book II of *De Iure Belli ac Pacis* – both sides in a solemn war could present plausible reasons for war. The doctrine of solemn war in fact *assumes* that both sides will be able to offer plausible reasons for war, and that the law of nations allows sovereigns to make such contradictory claims. Plausibility of public reasons is a weaker standard than objective justice, which means that a war could be objectively unjust and yet solemn. Aggressors with the skill to present valid public reasons, even if in bad faith, pass the test of solemn warfare, and consequently must be treated as belligerent equals and given immunity to punishment.

Secondly, from equality *ad bellum* follows equality *in bello*: all sides in solemn wars have equal privileges and obligations in the conduct of warfare. Consistent with the priority assigned to the status of sovereignty in the practice of publicly declaring war, Grotius construed the doctrine of *ius in bello solemne* on the basis of (what he determined to be) recorded State practice. Indeed, the rules that govern solemn warfare belong not to natural law but to the “voluntary law of nations”, which emanates not from right reason but from the will and practice of States, or “of many states” (I.i.14, p. 44). Apparently conceiving of the voluntary law of solemn wars as a sort of lowest common denominator in State practice,

Grotius described shockingly broad privileges and meagre restrictions, though oft-qualified and somewhat limited in subsequent commentary.<sup>14</sup>

Among the few restrictions in solemn wars discussed by Grotius are proscriptions on the use of poison during war (III.iv.15); the use of undercover or ‘treasonous’ assassins (III.iv.18); rape (III.iv.19); and the killing of enemies in neutral territories (III.iv.8). None of these but rape, Grotius noted, are forbidden in the course of just wars, so in these respects solemn wars are more restrictive. Overall, however, solemn wars in Grotius are far more permissive than just wars.<sup>15</sup> Drawing on biblical and classical Greek and Roman sources, he construed the category of lawful enmity and legitimate force very broadly. While in just wars only those who were in some way morally responsible for violations of right can be targeted – force should be directed only at aggressors and their accomplices – in solemn wars, the *whole State* constitutes an enemy and legitimate target following a declaration of war. Grotius’ long catalogue of permissions in solemn wars includes a denial of the applicability of the rule of proportionality (III.iii.9) as well as the principle of distinction: all members of the enemy State, including women and children, are legitimate targets in solemn wars (III.iv.6, III.iv.9). It is permissible in such wars to injure or kill those who surrender and depose arms as well as prisoners of war (III.iv.11, III.iv.10). There is neither an obligation to give quarter nor a prohibition of torture in solemn warfare (III.iv.18). The property of all subjects of an enemy State, as well as public property, can be taken, spoiled, or destroyed (III.v.1).

Finally, regarding the doctrine of *ius post bellum*, solemn wars conclude on the basis of a negotiated peace treaty, not with the vindication of a violated pre-existing right, as in just wars. In fact, Grotius argued that peace treaties should be free of any necessary connections with matters of *ius ad bellum* and *ius in bello*, as such connections could play out as obstacles in peace negotiations (III.xix.19). Peace treaties should be assumed to include blanket amnesties, unless the parties explicitly stipulated oth-

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<sup>14</sup> On the sources of the laws of solemn war and Grotius’ ambivalence, see Remec, 1960, pp. 114–15, see *supra* note 10.

<sup>15</sup> Later sources and publicists, including Christian Wolff and Emer de Vattel, were to deplore Grotius’ broad permissions and to deny any weight of precedent to his humanist sources. Nonetheless, and explicitly following Grotius, both Wolff and Vattel embraced the basic structure of belligerent equality and restricted legitimate force to official armies or militia under the command of sovereign rulers.

erwise. Property and territory taken in the course of solemn wars should be recognised as the legitimate property of their takers, unless peace negotiations stipulated otherwise (III.vi.2; III.vi.8). Third parties should recognise such property and territorial acquisitions, which is to say that they should recognise the right of conquest in the law of nations and sanction it in domestic courts if disputes over property or territory arose (III.vi.25).

### 7.3. Why Solemn Wars

So how could these morally appalling legal effects ever be justified – the impunities, the indiscriminate killings of innocent people, the theft and destruction, the enslavement of the vanquished? To begin with, it is important to be clear that Grotius did not justify these wrongs or those fighting unjust wars under the guise of solemnity, *pace* Jean-Jacques Rousseau’s famous denunciations in the first chapters of *On the Social Contract*.<sup>16</sup> On the contrary, Grotius repeatedly condemned and expressed dismay at the appalling effects of solemn warfare. Thus, when in the Prolegomena of *De Iure Belli ac Pacis* he characterised the third book as a book on impunities, he emphasised that, in his argumentation, he always tried to distinguish clearly between the legal effects of solemn wars and moral rightness or “freedom from fault” (§35, p. 22). He states repeatedly in book III that the legal effects of solemn wars are valid only in ‘external’ relations, not binding as a matter of conscience. On the contrary, as he often clarifies, conscience dictates against taking full advantage of the external legal privileges of solemn warfare (for example, III.iv.5, III.x.1).

And yet, Grotius did offer some reasons and indeed provided a novel conceptual apparatus, to show why the impunities and legal effects associated with solemn wars should be recognised in the law of nations. Grotius’ reasons contributed to creating and upholding a system of legal rights and obligations that was certain to have the regrettable feature of permitting and sanctioning moral wrongs. Grotius’ ambivalence between the normative framings of just war and solemn war reflects real value trade-offs in the project of regulating war in the law of nations, trade-offs that became ingrained in the constitutive fabric of public international law.

Grotius’ defence of the principle of belligerent equality gives a good sense of the motivation for his apparent change of mind in the third book

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<sup>16</sup> Jean-Jacques Rousseau, *The Social Contract and The First and Second Discourses*, Yale University Press, New Haven, 2002 (1762), pp. 156–62.

of *De Iure Belli ac Pacis*. In solemn wars, he wrote, both sides should be treated as if they were justified in waging war. As we have seen, this means that third parties should abstain from punishing aggressors. But why should aggressors be immune to punishment? Grotius reasoned as follows:

To undertake to decide the justice of a war between two peoples had been dangerous for other peoples, who were on this account involved in a foreign war [...] Furthermore, even in a just war, from external indications it can hardly be adequately known what is the just limit of self-defence, of recovering what is one's own, or of inflicting punishments; in consequence, it has seemed altogether preferable to leave decisions in regard to such matters to the scruples of the belligerents rather than to have recourse to the judgment of others. (III.iv.4, p. 644).

There are two separate strands of argument in this far-reaching passage; one has to do with the adjudication of *casus belli*, the other with political prudence, the first and foremost virtue of sovereign rulers. I discuss each in turn.

The undertakings to which Grotius refers – “the just limit of self-defence, of recovering what is one's own, or of inflicting punishments” – are of the essence of just wars. Grotius says in this passage, and reiterates elsewhere in *De Iure Belli ac Pacis*, that for any given war, one should expect that accurately establishing the *ad bellum* justice will be difficult. Not only may external indications be insufficient, but also the law of nature, which governs just wars, is inherently intricate, sometimes as intricate as advanced mathematics.<sup>17</sup> Furthermore, the decisions of statesmen are typically contested internally and subject to disagreement:

[t]he moral goodness or badness of an action, especially in matters relating to the state, is not suited to a division into parts; such qualities frequently are obscure, and difficult to analyse. In consequence the utmost confusion would prevail in case the king on the one side, and the people on the other, under the pretext that an act is good or bad, should be trying to take cognizance of the same matter, each by virtue of its

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<sup>17</sup> As in mathematics, the law of nature contains basic principles that should be evident to any intelligent being, but also complex theorems that only few are equipped to grasp (II.xx.63).

power. To introduce so complete disorder into its affairs has not, so far as I know, occurred to any people. (I.iii.9, p. 111)

Clearly, similar if not more acute contestation must be expected in foreign affairs among sovereign rulers.<sup>18</sup>

Adjudication being so demanding epistemically, it follows that it would be excessive, dangerous, and unfair to require third parties to adjudicate foreign wars. It would expose them to the moral risk of fighting on the basis of mistaken beliefs about a disputed right, and in this way force them to add to the injustice of war. If third parties lack the moral confidence to ascertain the justice of a foreign conflict, their best response is to abstain from judgment.

Furthermore, and this is the second strand of Grotius' argument, it would be excessive to ask third parties to adjudicate foreign wars because doing so would put them in physical danger and cause wars to spread. Even if third-party States could accurately adjudicate a given war, they should be allowed to declare their neutrality if it were in their best interest to do so (III.i.5, III.iv.8, III.xvii.1–3). Since the defining vocation of sovereign rulers is to protect the lives and well-being of their own subjects, they cannot be asked to take the risks involved in crossing a powerful aggressor. In such cases, writes Grotius, "it was not safe for those who desired to preserve peace to intervene" and therefore they were "unable to do better than to accept the outcome [of an unjust war] as right" (III.ix.4, p. 704).<sup>19</sup>

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<sup>18</sup> It is not the case then, as Hedley Bull has argued, that "the distinction between just and unjust causes of war is one which Grotius takes to be apparent to all men, by virtue of their endowment with reason". While a great deal of Grotius' discussion of just wars does seem to depend on the assumption of epistemic accessibility, his discussion of solemn wars shows that he was well aware of the intricate and contested nature of applied *ius ad bellum*. Compare Hedley Bull, "The Importance of Grotius in the study of international relations", in Hedley Bull, Benedict Kingsbury, and Adam Roberts (eds.), *Hugo Grotius and International Relations*, Oxford University Press, 1990, p. 87.

<sup>19</sup> In shifting to this form of prudential thinking, Grotius in effect moved away from the predominantly deontological normativism of scholastic natural law and embraced a form of rule-consequentialism commonly associated with the reason of State tradition. For insightful discussions of the novelty and significance of this move, see Friedrich Meinecke, *Machiavellism: The Doctrine of Raison d'État and its Place in Modern History*, Westview Press, Boulder, 1984, pp. 208–10; Tuck, 1987, see *supra* note 1; and David Armitage, *Foundations of Modern International Thought*, Cambridge University Press, Cambridge, 2012, pp. 156–58.

This, I would argue, is for Grotius the fundamental difference that sovereignty makes. Sovereigns are for him first and foremost in charge of their own subjects' security and well-being, not of international justice or the safety and well-being of mankind. This is the source of the moral value of sovereignty and the basis for sovereign authority. Political prudence can dictate that in some cases the "good of the people" may require that a sovereign not interfere or judge in a foreign war: *salus populi*, not international justice, is the sovereign's *suprema lex*.<sup>20</sup> Sovereign States arose out of the social need for co-ordinated and coercive action; centralised decision-making in a sovereign is valuable and necessary for effective collective action. And just as it is important that decisions on the merits of defensive force rest in a single decision maker (I.iii.4–5), it is also important that sovereigns be able to avoid foreign armed conflicts by declaring their neutrality. Both are instances in which sovereign judgment may override disputed claims of justice.

To be clear: Grotius is not saying that States should always be agnostic about the justice of armed conflicts. On the contrary, in *De Iure Belli ac Pacis* he justified humanitarian interventions, as noted above. But what the passage quoted above indicates is that, when it comes to adjudication, each State should have the power to decide autonomously on how to judge foreign wars, and indeed should decide whether or not to make a judgment in the first place.

By contrast, the just war framework in effect requires third parties to take sides in armed conflicts. As Grotius himself often notes, there is a duty in natural law to take the side of justice, and to make reasonable sacrifices in order to realise justice. Minimally, third parties should not recognise property or territory acquired by aggressors, and if they have the necessary means, they should actively take action to end and revert wrongful states of affairs, notably unjust occupation. Furthermore, if the law of nations gave the right to use force exclusively to the just side, then all *in bello* and *post bellum* rights would have to be made conditional on that right. The unjust side would be criminally liable for wrongful killings and materially liable for property destruction and takings, and third-party States would have the obligation to enforce or minimally not obstruct the enforcement of these liabilities. However, and this is Grotius' central point,

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<sup>20</sup> To use Cicero's famous phrase. On Cicero's large influence on Grotius, see Straumann, 2015, pp. 76–77, see *supra* note 2.



when the *ad bellum* justice of a war is unclear or disputed, which it often should be expected to be, then the dispute would spill over to matters of *ius in bello* and *ius post bellum*, which would then necessarily drag third parties in virtue of their obligations of justice. Disputes over *ius ad bellum* would infect criminal liability and the validity of property transactions and of territorial rights. This potential spread of conflict is something Grotius sought to avoid by turning to the solemn war framework.

When articulating the doctrine of solemn war, Grotius recognised that conflict spill-over was a serious danger, and consequently that there are fundamental trade-offs between the values of justice and international order based on sovereign States. The pursuit of justice, in particular of criminal justice, could exacerbate conflict and spread war. Conversely, the cost of containing war, and of preserving the freedom of States to decide whether or not to get involved in war, is to let injustices pass, even to let manifest but powerful aggressors get away with their crimes.

Similar trade-offs can be detected in Grotius' discussion of peace treaties and of the right of conquest. In both cases, the basic normative thesis is that, for the sake of peace and the rule of international law, sheer power must be allowed to dissolve and reconstitute rights. Ideally, a contract signed under coercion should be null and void, but not, Grotius argued, in the case of peace treaties. For if duress were an exemption to the obligations of peace treaties, then the very institution of peace treaties would dissolve. "[U]nless this rule had been adopted [the exclusion of a duress exemption], no limit nor termination could have been fixed for these wars [solemn wars] which are extremely frequent. Yet it is to the interest of mankind that such bounds be set" (III.xix.11, p. 799). If the strong party knew that the weak party would later renege on the terms of peace, it would continue fighting until a bitter unconditional surrender rather than negotiate the terms of peace.

For Grotius, the closure function of peace treaties had the additional implication that they should not be made conditional on the satisfaction of the belligerents' *ius ad bellum* claims. Peace treaties must set aside the reasons why the war was waged, as well as any liabilities stemming from the costs and harms of war-making (III.xix.19). Claims for damages incurred during war should be presumed forgone and punishment for wrongs remitted, for "a peace will be no peace if the old causes for war are left standing" (III.xix.17, p. 811; also III.xix.15). Amnesties are of the essence in peace treaties.

In the case of conquest, aggressors unjustly occupying foreign territory should ideally be expelled by coalitions of law-enforcing States, instead of being given recognition for their unjust territorial acquisitions. But if no coalition is forthcoming, recognition is the only way to reinstate the rule of international law and get on with life. Relative to territorial and property rights, Grotius argued that the default principle should be *uti possidetis*: things remain as they were *de facto* upon signature of the peace treaty, except if the treaty stipulates otherwise (III.ix.4; III.ix.10–11). As unsatisfactory as this solution may be, essentially might must be allowed to make right for the sake of the restoration of an international rule of law.

In both coerced peace treaties and the right of conquest, the law of nations must confront two realities: that the justice of a war may be hard to establish, and that victory in war may favour the unjust side. Insisting on justice in the face of the crushing victory of an aggressor would be ill-fitting to the practical project of ruling nations by law. The law of nations must recognise the status of the parties and their actual relationship of power, as revealed partly through war, and allow them to freely contract the terms of future peace, recognising these terms regardless of previous claims of justice. For similar reasons, the law of nations must be ready to recognise *de facto* possessions when there is no foreseeable challenge from an altruistic law-enforcing power. The first imperative of *ius post bellum* in the law of nations is to re-establish the rule of law while upholding the formal consent and status of the parties.

To reiterate the initial observation I made in this section: Grotius was torn and agonised over these fundamental dilemmas. It is admittedly hard to tell from what he says in *De Iure Belli ac Pacis* which one of the two normative frameworks he proposed was supposed to apply as the law of armed conflicts, as he did not integrate the different frames and competing concepts and principles in a clear and systematic legal theory. One may argue, as Hersch Lauterpacht famously did, that Grotius left open the fundamental question of what the law *is*, and in this sense, he belongs to a pre-classical era of international law.<sup>21</sup> But I would nonetheless argue that the concept of solemn war is Grotius' somewhat ambivalent solution to the dilemmas he recognised.

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<sup>21</sup> Hersch Lauterpacht, "The Grotian Tradition in International Law", in *British Yearbook of International Law*, 1946, vol. 23.

A fundamental premise implicit in solemn war doctrine is that peace and deference to sovereign judgment should be allowed to prevail over justice in international society, in particular over criminal justice. Put differently: in international affairs, impunity (and worse) is the cost to pay for deference to sovereign judgment and political prudence. Furthermore, the driving imperative behind the arguments for belligerent equality, the right of conquest, and the validity of coerced peace treaties is that conflict and violence must be contained in space and time. For the sake of peace, or at least the mitigation of war, the law of nations should not keep records of old wrongs and grievances. Losses must be forgone, amnesties granted.

#### **7.4. Grotius and the Criminalisation of Aggression**

To what extent are these arguments relevant today? Analogous predicaments are evidently still with us, if in contemporary clothing, as readers familiar with the dilemma between peace and justice in transitional justice would immediately recognise.<sup>22</sup> For purposes of this volume, perhaps one valuable ‘teaching’ we can gain from Grotius is to recover a sense of the fundamental value trade-offs and dilemmas that are constitutive of the project of judging war in international criminal justice.

I have argued that Grotius recognised that the very logic of State sovereignty may often have to exclude imperatives of criminal and international justice. He faced a fundamental predicament between two ways of seeing war and punishment. On the one hand, through the just war lens, it is assumed that the justice of a *casus belli* can be established, and that there is a universal duty to support the just side and to condemn and prosecute aggressors. On the other hand, through the solemn war lens, it is seen that both sides in war can offer plausible reasons to fight, and that the justice of a war, in particular criminal justice *vis-à-vis* alleged aggressors, may be either indeterminate or have to be sacrificed for the sake of war containment and deference to sovereign power.

The tension between these two ways of understanding the relationship between war and punishment is of course particularly acute today in the project of codifying the crime of aggression in the Rome Statute of the

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<sup>22</sup> See, for example, Jon Elster, “Justice, Truth, Peace”, in Melissa Williams, Rosemary Nagy and Jon Elster (eds.), *Transitional Justice*, New York University Press, New York, 2012; Mark Kersten, *Justice in Conflict*, Oxford University Press, Oxford, 2016, pp. 19–36.

International Criminal Court, which came into effect in 2018. This project is arguably inscribed within the just war framework, according to which it should be possible to establish which side is the aggressor in any given war, and aggressors should be punished so that, progressively, aggression ceases to happen in international society.

Grotius would not have opposed the aspiration to codify the crime of aggression, as he was very much involved in a somewhat similar enterprise. But he may have been very cautious about the actual prospects of applying any definition of aggression in a centralised manner, and hence about the prospects of an international court to effectively pursue criminal justice for aggression in a society of sovereign States. In this respect, Grotius may be aligned with some contemporary scholars who have been sceptical of the project of criminalising aggression in international law.

Contemporary critics have emphasised the fact of widespread disagreement with regard to the legal status of actual cases of resort to force. To be enforceable in practice, any workable definition of the crime of aggression would have to rely on a general consensus which appears to be lacking in the world today. Furthermore, the inherent complexity of political crises that can potentially escalate to war would seem to necessarily exceed the conceptual boundaries of any definition suitable for criminal prosecutions. Political crises that lead to war are too unique and complex, and typically too deeply important for the parties involved, for a criminal statute or court to be able to determine fairly and impartially the lawfulness of, or responsibility for, actions taken in the midst of crisis.<sup>23</sup>

Neither these critics nor Grotius would deny that certain uses of force by States are manifestly unjust or aggressive, nor would they oppose the project of broadly defining what such unlawful uses are, but they would be very cautious when it comes to designating a third party to adjudicate matters of *ius ad bellum* in a centralised fashion, all the more if

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<sup>23</sup> See Martti Koskeniemi, “‘A Trap for the Innocent ...’”, in Claus Kress and Stefan Barriga (eds.), *The Crime of Aggression: A Commentary*, Cambridge University Press, Cambridge, 2017, pp. 1360–70; also Andreas Paulus, “Second Thoughts on the Crime of Aggression”, in *European Journal of International Law*, 2009, vol. 20, no. 4; and Michael Reisman, “Reflections on the Judicialization of the Crime of Aggression”, in *The Yale Journal of International Law Online*, 2014, vol. 39. For an older but still valuable critique of the 1974 General Assembly Definition of Aggression, Resolution 3314 (XXIX) of 14 December ([www.legal-tools.org/doc/752c30/](http://www.legal-tools.org/doc/752c30/)), which provided the basis for the Kampala process, see Julius Stone, *Conflict through Consensus: United Nations Approaches to Aggression*, Johns Hopkins University Press, Baltimore, 1977.

this is done with the intent of criminally prosecuting individuals. The reasons for this caution have to do not only with the need for widespread international consensus to proceed jointly in such sensitive matters, but also with the logic of State sovereignty and the nature of decisions about war and peace.

The imperatives of state sovereignty, as we have seen, were at the heart of Grotius' reluctance to fully embrace the just war approach. It is in the very nature of sovereignty that states should have the prerogative to decide on the necessity of resort to armed force. Prosecuting the crime of aggression at the International Criminal Court would directly confront this old (Grotian) imperative. The outcome of an eventual clash between the Court and a State on the lawfulness of force is hard to predict, but the very prospect raises hard questions. As Martti Koskeniemi has put them,

Are we ready to accept the superiority of 'general law-obedience' to a preference so important that we would normally go to war over it? In fact *is there any case where we would be inclined to endorse the Court's verdict on aggression that would differ from our own view of the matter?* I find it hard to think of any case where we would be inclined to think that the scandal of failing to comply with the Court's determination of aggression were greater than the scandal of somebody suffering innocently from such determination. Following our own determination of the nature of the act – whether or not it was aggression – is always more important than obeying the Court.<sup>24</sup>

There are passages in *De Iure Belli ac Pacis* that resonate with this line of questioning and critique. Grotius was preoccupied in particular with one implication, namely, that States cannot and should not be forced to align behind any determination of aggression in concrete cases. Thus, not only may favouritism for one's cause over a court's ruling be understandable, but also political reluctance on the part of third parties to stand by a court's determination. If Grotius were really a 'solidarist', as he has often been portrayed by members of the English School of International Relations, he would perhaps have full-heartedly supported a centralised international criminal court. But, as we have seen, Grotius was much more of a pluralist than is usually recognised. A plural world that values

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<sup>24</sup> Koskeniemi, 2017, p. 1377, see *supra* note 23, emphasis in the original.

State sovereignty is still the very constraining political stage within which the International Criminal Court has to operate.

Much has been written about the political entanglements of the International Criminal Court, often in the spirit of regret if not despair. Grotius may have been ambivalent about this regret. On the one hand, it would be a good thing if States could align behind an eventual determination by the International Criminal Court on the crime of aggression. But, on the other hand, it was valuable and important for Grotius that States retain the freedom to decide whether or not to support any such determination. I think Grotius would have argued that this choice cannot and should not be taken away from States.

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