

# **An ideology of war, not peace: *jus in bello* and the Grotian tradition of war**

KARMA NABULSI

*Nuffield College, Oxford, OX1 1NF*

**ABSTRACT** *The Grotian tradition of war developed in a particular manner in the last quarter of the nineteenth century in the context of the framing of the modern laws of war. This article will seek to trace the core elements of this tradition, which drew heavily on the writings of Hugo Grotius (1583–1645). Its important values were law, order, power, and an attachment to the sovereignty of the state. As the Grotian tradition of war was ‘index-linked’ to legitimate power, its central ambition was to limit the rights of belligerency to a particular class of participant (the soldier), and to exclude all others from the right to become actively involved in political or military action in times of war and military occupation in nineteenth century Europe.*

Grotianism is without doubt the strongest paradigm in current international political theory, incorporating the modern traditions of international law, international society, and just war, to name but a few. Yet, although Grotius himself is undergoing a remarkable revival in Western political thought, his most important contribution to the current debate appears to have been largely overlooked. This article will seek to show that Grotius’ main contribution lay in the methodological and ideological system which he introduced, and which all of the above-mentioned traditions employ. This system is drawn from his main work, *De Jure Belli et Pacis* (‘The Laws of War and Peace’), which is almost exclusively concerned with the rights, wrongs, and practices of war. Indeed, it is only by examining his ideas on war that this ideological approach becomes clear.

The object of this article is, accordingly, threefold: first, to set out Grotius’ complex views upon war, which drew from a wide range of legal and political systems. The point will be to illustrate that there is a distinctively Grotian ideological tradition of war, which differs quite dramatically both from the dominant interpretations of Grotius, and from the traditions he is claimed to have inspired. Second, to show that these ideas influenced the formulation of the laws

of war in the late 19th and early-to-mid 20th century, especially those provisions which favoured occupying armies and which penalized civilian resistance. The emphasis here will be on a number of Grotian properties: flexibility, elasticity, and adaptability were the tradition's strength and success and its defining qualities. The potency of this tradition of war is manifested in its covert quality. Grotian language not only defined the terms of the debate on the laws of war, but succeeded in concealing its ideological purposes in doing so. Finally (and more broadly), this article will stress the importance of examining the ideologies of thinkers such as Hugo Grotius, and equally, of placing and tracing the tradition he inspired in its historical context. Only by this type of endeavour can an understanding of concepts currently in use, such as *jus in bello*, and traditions such as just war, be understood.

This article will proceed as follows: first the inherently enigmatic qualities of Grotius and the numerous (and often conflicting) traditions which he inspired will be illustrated. Next, the distinct moral properties of this particular Grotian tradition of war are set out: they are seen to consist in a singular legal discourse, a pluralist method, and a strong attachment to order and power. These elements are shown to provide the necessary foundations of his conception of war, and in particular to inform the priority accorded to the rights of states and armies over those of civilian populations. Finally, I shall explore how this ideology informed the practices and beliefs of the founders of the modern laws of war. These ideological changes highlight the adaptability of this tradition as it developed at the end of the nineteenth century, and defined the dominant paradigm of the laws of war.

### The Grotian Enigmas

Grotius is legendary for his inexhaustible gift for mystification and obscurity—indeed, the abiding image of Grotius the man remains that of an intellectual escape artist, famous for getting out of many a tight spot by relying on a great number of books. The most striking image of his scholarship was the use put to his main work, *De Jure Belli ac Pacis* by the Swedish monarch Gustavus Adolphus, who (depending on the version one follows), used it either as a pillow, or as a fetish in his saddlebags as he laid waste and conquered Europe.<sup>1</sup>

The greatest enigma in the study of Grotius is the man himself. Here is an author who clearly desired to establish that law was a public authority, yet first wrote in defence of private and mercenary wars (on the charge that the interests of Grotius' clients shaped his convictions; the example usually cited is the contradiction between his diplomatic position when representing the Netherlands at the Colonial Conference of 1613, and the position he took in *Mare Liberum*).<sup>2</sup> Grotius is famed for his attempt to secularize natural law, but much of his work and interests were theological. As a polymath, his contribution to the fields of diplomacy, poetry, and law were all disputed, not least by Grotius himself on his deathbed: 'by undertaking many things I have accomplished little'.<sup>3</sup> Furthermore, the eclectic nature of his life seems to merge easily into the mystery of

his works.<sup>4</sup> Haggemacher remarks upon his 'intrinsic ambivalence'; Vaughan found his work riddled with 'perpetual confusion ... a nest of sophistries and contradictions'; and Lauterpacht points out in his authoritative account that Grotius' 'evasions and contradictions' are not even the most 'conspicuous defects ... which invite criticism'.<sup>5</sup>

Many have denied that he was the founder of any particular school or discipline. For example, Knight argues that *De Jure* was really 'no more than a restatement of principles which had already for generations been commonplaces of the schools, and particularly of the neo-scholastics of Spain'.<sup>6</sup> However, there is a long line of scholars who comfortably classify Grotius as the founder of the modern natural law tradition: 'his book is devoted to putting once again at unprecedented length the traditional case for saying that there is a law common to all men, the natural law ... the deepest layer of Grotius' thought ... is the natural law'.<sup>7</sup> This view is juxtaposed against other (and apparently equally meritorious) claims that natural law was the last thing on Grotius' mind: his whole *engagement* is seen by some as an attempt to jettison natural law in favour of positive law. As an eminent jurist maintained: 'Grotius' use of the practice and other evidence of Consensus of States, as distinct from the vague consensus of mankind, belongs to modern positivism'; or from another lawyer: 'Natural Law has in reality no function in the structure of his system'.<sup>8</sup> Still others suggest he managed to introduce both.<sup>9</sup> More familiar is the contention that he is the 'father' of international law, without being too precise about in which branches, if any.<sup>10</sup> Again, international relations theorists have claimed him as the source of the tradition of 'international society', 'solidarism', 'rationalism', 'progress', traditionalism, and even, according to more modern theorists, 'regime theory'.<sup>11</sup> Another aspect of this particular enigma arises over the methods deployed to support or deny his paternity of these various traditions. There are two schools noted by Willems in the Grotian literature: the historical, which offers a contextualization of 'the man in his time'; the second, commonly defined as the 'Grotian quest', is the introduction of Grotius' ideas into more current debates.<sup>12</sup> A minor offshoot of this second school endeavours to drag Grotius, like Banquo's ghost, into the very conference where they are speaking, or to find him a place at the very desk where they are writing. As one lawyer solemnly declared: 'If Grotius was present in spirit during the countless hours of the meetings of this Conference, he was silent, content to watch as a congress of nations such as he had foreseen, resolved conflicts ... he was content to observe reason and the sociableness of man interact as he had conceived they would'.<sup>13</sup> Another lawyer clearly found Grotius less silent with *him*, as he portentously reported to a gathering of experts: 'In closing this brief comment, may I express *my confidence* that Grotius would share the outlook of a modern Christian humanist'.<sup>14</sup> Although most writers on Grotius can be divided between the first two approaches (with a few cautiously incorporating both strands), this division does not resolve the primary question of Grotius' motives. So, amongst those who endeavour to situate him 'in his time', several do not agree on the nature of his contribution, whether it be natural law or international society, nor

on the interpretations of his character, nor indeed whether his aim was to defend order or justice, slavery or freedom, secularism or God. This incoherence is equally manifest in the writings of the ‘Grotian Quest’ school. A distinguished interpretation of Grotius’ ambitions can be found in the meticulously contextualized historical work by Peter Haggenmacher, *Grotius et la Doctrine de la Guerre Juste*. His thesis is that *De Jure Belli ac Pacis* cannot be seen as the precursor of the system of international law that developed subsequently; it is instead a much more scientifically rigid and limited work whose sole aim was to set out a general theory of the laws of war. He argues this persuasively (and I believe correctly) by situating *De Jure Belli ac Pacis* within what Tuck described as a ‘medieval technical debate’ continuing in Grotius’ time.<sup>15</sup> However, this historical approach still excludes the subsequent effect which the techniques and methods introduced (or believed be introduced) by Grotius had on political ideologies of succeeding generations of international lawyers and theorists, and could be said to create a ‘Grotian tradition of war’. Thus Haggenmacher’s approach acknowledges the singular methodology of Grotius without assigning any ‘heritage’ value to it.

This enigma is further complicated by those who see themselves as belonging to the Grotian tradition. Not only is there no consensus over the nature of the man, his work and how it is to be used, these divisions have often obscured the fact that there is no agreement over what it actually means to be a ‘Grotian’. Self-confessed members see themselves, and their tradition, in markedly distinct ways whilst claiming their often contradictory values to be quintessentially ‘Grotian’. In the words of one devotee, the three principles of the Grotian method were: ‘aporetic (leaving philosophical questions open), antinomic (not seeking to solve apparent contradictions) and anti-apodictic (avoiding firm statements)’.<sup>16</sup> Two typical examples are the disparities which emerge between Falk’s and Murphy’s interpretations of the role of a Grotian, as well as, for example, Hedley Bull’s and Martin Wight’s. A corollary of this problem is the apportioning and assigning of the ‘duties’ of membership of the tradition, over which, characteristically, there is immense controversy.<sup>17</sup> The sheer diversity of ‘the Grotian tradition’ can be a problem for Grotians themselves. Bull, for example, lost no time in removing himself from any club which welcomed members such as Van Vollenhoven. However, if the club could be limited to such pluralists as Oppenheim, Bull would have gladly renewed his subscription.<sup>18</sup> Lauterpacht’s definition of a Grotian is similar, although he believed that in order to be a true Grotian one needed to overlay ‘practice’ on the underpinnings of natural law. So he concluded that one cannot even ‘consider [Grotius] as what is usually described as a “Grotian”’.<sup>19</sup> This ubiquity captures the enigma of Grotianism the flexibility of which is such that it seems welcome under a plurality of theoretical roofs. This pluralism appears particularly strongly in the relationship between domestic and international political theory. For some, its commitment to international improvement and progress, mitigation, consensus and the rule of law marks Grotianism as a paradigmatic instance of liberalism. But domestic liberal political theory is also concerned with issues of democracy,

distributive justice, equality, and human rights.<sup>20</sup> The inclusion of these further values—in particular equality—into international discourse is a source of serious controversy within the Grotian tradition. As will be shown below, the publicist Francis Lieber held deeply conservative views on issues such as slavery in America, but nonetheless saw himself (and has been seen since) as part of the Grotian ‘humanizing’ tradition and a founder of the modern laws of war. A definition of his political stance was attempted by his friend and colleague, Bluntschli: ‘He is a *Liberal* both as a man and as a scholar. But he was in no wise a follower of Rousseau, and by no means captivated with those airy systems of the philosophical school in which unwary and unpractical men had allowed themselves to be caught, like flies in cobwebs.’<sup>21</sup> Finally, and conversely, a domestic liberal such as Kenneth Waltz eschews the possibility of introducing liberal principles into the international system.<sup>22</sup> The interface between liberalism and Grotianism is therefore complex, and not reducible to a simple formula.

### Grotius’ Enigmatic Ethics of War

This article intends to transcend the taxonomical confusion over how Grotians are classified and classify themselves by tracing the history of Grotian ideology of war through the late 19th century. It will emerge that ‘conservative’ and ‘progressive’ clusters have always co-existed within the Grotian ensemble, expressing contrasting patterns of internal values. More generally, the ranking of the internal values of the Grotian tradition has not been addressed by most international relations theorists and international lawyers; those who have tried have often come up with singularly unhappy results.<sup>23</sup> However, identifying the particular range of core, adjacent, and peripheral values within a tradition’s ideology can provide new insights not only into its shape, but also into the manner of its development over time. The values internal to an ideology are rarely static, but shift at different periods of time under the influence of internal and external pressures.<sup>24</sup>

This is clearly the case with the Grotian tradition of war. Furthermore, many of its values actually developed over time, acquiring a distinct shape in the process. The notion of consensus played a pivotal role here. Given that Grotians sought to define themselves as the *media res* between two extreme sets of values, it is those extremes that partly defined their identity as a tradition. But since those normative extremes necessarily changed over time (Erasmian values were not quite the same as Kantian ones, which in turn differed from Wilsonian), the content of the ‘Grotian middle’ shifted correspondingly. Another example of necessary change follows from the Grotian identification with order. For all Grotians, order remained one of the cardinal values in the international system; hence a tendency to situate themselves in relation to the dominant constellation of power in the states system. This approach is not only noted but celebrated by Bull:

one may also doubt whether it was a limitation of Grotius ... (like many of us in Europe now) that as a professional lawyer his views were affected by the interests of his clients, that in his early life in Holland he taught and wrote as a representative of a powerful state or that kings and governments thought highly of his views and were sometimes able to use them in support of his policies. It is not a weakness but a strength of Grotius' contribution to international law that he was no mere visionary but sought to found his views on the actual interests and policies' of states.<sup>25</sup>

The Grotian tradition was thus 'index-linked' to legitimate power, and its values always tended to exhibit strong affinities with the prevailing norms of any particular epoch. But dominant norms change: the notion of racial equality was not part of the international system's scheme of values in 1850 or even 1919, yet was becoming increasingly accepted by the end of the 1940s.<sup>26</sup> A 'Grotian' answer to the question of the justification of slavery in international law would therefore differ significantly depending on whether it was given in the mid-19th century or the mid-20th.

All these variations and differences notwithstanding, the ambition here is to identify a number of new and distinct elements of unity within Grotians' thought. These elements are methodological as much as substantive, and will become clearer as the argument unfolds. Firstly, it will be argued that the nature of Grotius' character is central: his reality as an intellectual Houdini and servant of the powerful is not a detail to be mentioned in biographical sketches.<sup>27</sup> Rather, this characteristic needs to be emphasized in order to present an authentic tradition which relies on moral, ideological, and intellectual ambivalence. Indeed, I will argue that a separation between what Schwarzenberger called his *persona* and his *fama*<sup>28</sup>—his personality and the body of his work—is not useful for setting out his central philosophy. Secondly, controversy over the methods used by orthodox approaches to Grotius ignore that the 'truth' of whether he was a naturalist or a positivist can be seen to be irrelevant, since the debate over whether he was the founder of natural law or its negator has concealed a more important point: Grotius founded a synthetic tradition which could encompass a variety of approaches within a single paradigm. One of the principal manifestations of this tradition will be seen to lie in the very style, language, and rhetoric of Grotians—a style which is always controlled and tempered, seeking to extricate itself from the meaningless 'passions' of the ideological universe; a language which is formalistic and technical, often derived from the conceptual reservoir of lawyers, which artificially 'closes' arguments by imposing their particular terms of reference upon the debates; and above all a rhetoric which borrows heavily from the canons of reactionary thinking to forestall the introduction of substantive change.<sup>29</sup>

### Grotius' Core Values

Grotius' conception of human nature, as defined in the *Prolegomena*, and derived from his concept of sociability, posited that man was perfectible, but not perfect. As Tuck noted of Grotius' views on sociability: 'The natural society of

men is one in which individuals pursue their own interests up to the point at which such a pursuit actually deprives another of something which they possess; it is not one of benevolence, as we would customarily understand the term'. He adds: 'it is this minimalist character of the principle of sociability which made it in Grotius' eyes a principle which a moral relativist could accept'.<sup>30</sup> In the Grotian scheme, man's social condition in effect had three distinct features. Firstly, perfectibility was conditional; the achievement of progress depended on certain social and institutional prerequisites. Secondly, any improvement in man's situation was reversible. Perfectibility was hypothetical in the sense that it was not certain; Grotius rejected a teleological approach to man's nature. Finally, the idea of progress was hypothetical rather than categorical: all improvements were therefore reversible because there was no divine or earthly guarantee that any positive changes would be of an enduring character.

The writings of Grotius indicate that he had contradictory views on the nature of the state. He saw himself as a man of progressive moral and political views, whereas to others (notably Rousseau) he appeared to favour despotism. Both the vagueness and incoherence of his views on government were derived from Grotius' focus on the *basis* for instituting the state, rather than its internal composition. By the particular tools he employed to define this rationale, he was vulnerable to charges of supporting tyrants, both in actuality and by default.<sup>31</sup> Yet this was not a flaw in Grotius' substantive political values, but rather a necessary consequence of his system of thought. His main intention in thinking about the state was to undermine the various doctrinal foundations upon which public institutions were established in his time, and to create different grounds from those provided hitherto. Although substantively different in their core values and institutional structures, in his view these state paradigms shared one common feature: they were all based on ideologically absolutist doctrines of ends. Erasmus' conception of communitarianism was grounded in an axiomatic faith in the benign and pacific attributes of human nature. Dante's imperialism was founded on his unshakeable conviction in the temporal and spiritual supremacy of the Roman Church. The central premise of Machiavelli's conception of *raison d'état* was an idea of the state unfettered by the bonds of law and society in its pursuit of power.<sup>32</sup>

In lieu of this ideological absolutism, Grotius offered an approach which could be termed ideological relativism. This relativism had several general features. The first was the rejection of the exclusivity of any one doctrine: neither realists, communitarians, nor religious imperialists could singly offer a comprehensive account of the world, or build a coherent normative foundation to state institutions. As shown above, Grotius demonstrated a willingness to choose from each of these paradigms in an eclectic fashion, using whichever aspects served his particular purposes. Furthermore, the range of doctrines from which he was prepared to draw was extremely broad, revealing a capacity to accommodate diversity and recognize the richness of different intellectual traditions. Yet recognition of this diversity was not an end in itself, but a means of contriving his own system of thought. By setting opposing doctrines and values alongside

each other, Grotius was able to carve out a middle ground for himself. Finally, there was a relativization of ideology itself: in other words, a willingness to minimize it (and even discard it entirely) when practical imperatives so demanded. Nonetheless, Grotius did not see himself as a complete relativist. His aim in attacking different ideological systems was to clear a path for a society (both domestic and international) governed by certain key values and procedures.

The supreme characteristic of this civilized society was law; it was the bedrock upon which all notions of order were constructed. Accordingly, his goal in disputing various forms of political autonomy was to establish the concept of sovereignty as indissociable from the law, no matter what teleological purposes lay behind the achievement of sovereignty. Law not only occupied a key position in Grotius' scheme of values, it was the essential procedural means to establish a stable system of domestic and international politics. As Grotius defined it, law was both the ends and means of sovereign power.<sup>33</sup> Grotius believed sovereign right was established through custom and practice, and his emphasis was on precedent rather than on principle: 'The opinion of those can never be assented to, who say that the power of the Dictator is not sovereign, because it was not permanent. For in the moral world the nature of things is known from their operations'.<sup>34</sup> By introducing a pluralistic approach, Grotius was able to establish new foundational principles for the sources of law. As Kingsbury explains: 'Grotius' account of sources is a theory of sources of law in general rather than a specific hierarchy of formal or material sources of the types found in modern international law'.<sup>35</sup> Focusing on the legitimacy of the state institutions themselves rather than the legal norms that underlay them, he was able to detach himself from ideological arguments about the foundations of state power. As Remec pointed out, it is 'possible that men consent to a wide range of possible systems of government, from the entirely democratic to the extreme absolutist one... There is no "best" form of government, according to Grotius'.<sup>36</sup> What mattered was not what the 'true' law or moral principle was, as we noted earlier, but simply that states were founded on laws, especially because these laws were expressions of agreement among dominant forces in society.<sup>37</sup>

This was an understanding of law which Grotius applied not only to the domestic sphere, but also (and especially) to interstate relations. An important feature of this understanding was an image of a hierarchical state formulated on the model of the domestic home, where a king occupied an analogous position to the head of a household.<sup>38</sup> The law of nations was not derived from abstract and absolute principles of justice, but from the agreements reached by the world's most powerful nations, as heads of their respective households. As Grotius himself put it: 'we may readily admit also the truth of the saying that right is that which is acceptable to the stronger, so that we may understand that law fails of its outwards effect unless it has a sanction behind it. In this way Solon accomplished very great results, as he himself used to declare: "By joining force and law together, Under a like bond"'.<sup>39</sup> This linkage of power to law, similar to the Hobbesian interpretation, was one of the central features of



Grotius' paradigm.<sup>40</sup> As we will see, this linkage identified order, power, law and sovereignty as the cluster of core values in Grotius' system.<sup>41</sup>

Among the adjacent (and at times even peripheral) notions in the Grotian ideology of war was liberty. In Grotius' vision liberty was viewed in non-essentialist terms; as a concept it was subsidiary, conditional, reversible, and finally, profoundly ambiguous. Far from believing that the purpose of history and political institutions was to actualize liberty, he instead rejected the idea that this virtue was an innate element in human nature at all. In his discourse, freedom was merely a contingent condition which simply meant that one was not subject to another's rule. But for Grotius, even slavery was not inconsistent with this interpretation of human freedom.<sup>42</sup> More important, liberty was ranked very low as a political value. It was, at best, a subsidiary principle which was always conditional upon achievement of the dual imperatives of authority and order.<sup>43</sup> Although he defined the state as 'a complete association of free men', the freedom of a people could come only after the formation of the state. In the beginning of *De Jure Belli ac Pacis*, he defined liberty as a subsidiary right to sovereign authority: 'This right comprehends the power, that we have over ourselves, which is called liberty, and the power, which we have over others, as that of a father over his children, or a master over his slaves... Thus the Regal authority is above that of a father and a master, and a Sovereign has a greater right over the property of his subjects.'<sup>44</sup>

His philosophy emphasized an association of law with order and authority (rather than giving expression to moral and political rights). This is again a function of the ambiguous position of liberty in Grotius' writings. He both accepts and rejects the notion of man's liberty as part of the laws of nature. Thus Grotius' approach to the question of obedience to sovereign power relied heavily on the principle that rebellion or resistance to tyrannical rule was illegal. As Onuma notes: 'Grotius stresses the virtue of obedience and thereby reveals his penchant for maintenance of the *status quo* between ruler and ruled ... Must one obey this law of non resistance even in cases of extreme danger? Despite hesitating at times, Grotius basically advises submission in this world, i.e. martyrdom, so that eternal salvation might be attained' and concludes that 'Grotius seeks to resolve the question of resistance against tyrants *quoad exercitium*, not through disobedience but through submission and eternal salvation'.<sup>45</sup> As noted earlier, his focus was on states' rights rather than those of individuals; accordingly, many of his limits on individual freedom were proposed to argue for the liberty of action of states. His rights of slavery within the state thus provided the foundation for the right of conquerors to enslave others.<sup>46</sup> Grotius wrote a great deal on the rights of slavery, a fact which many of his modern admirers are understandably reluctant to dwell upon. In a paragraph of Book II entitled 'The Right over Slaves', he presented voluntary subjection for basic necessities as one of the legitimate grounds for slavery.<sup>47</sup> In the Grotian law of nations, there is not even a requirement of consent on the part of a people in times of war in order to justify enslaving them.

## The Grotian Ethics of War

Much like Hobbes' *Leviathan*, the ambition of Grotius' *De Jure Belli ac Pacis* can be found in its title. His goal was not to establish whether there could be rules that governed war and peace, but to define what those rules were. In doing so he created a system of law which could offer bilateral rights to both belligerents in war, an additional principle to traditional *jus ad bellum*. Writers on the laws of war before Grotius had argued that either there could be bilateral rights in war (that is, each belligerent could have an equal right to make war on the other), or that there was only one just party. Grotius, unsurprisingly, took a position in between these two, and suggested an entirely new legal approach. He argued that, although sovereigns could *not* have bilateral rights, their subordinates *could*, so that belligerents in the field of battle could be both lawful and just. This was put forward as a custom of war, sourced in a type of contractual *jus gentium*. It allowed Grotius to advance a theory which claimed that states had tacitly agreed that, irrespective of the objective justice of their claims, their representatives in battle (commanders and soldiers) could be recognized as having mutual and legitimate rights against each other in war.<sup>48</sup>

Grotius' method of analysis was driven by both principal and subsidiary purposes. His principal goal was to counter what he believed were the two established theories of war and peace, thus advancing his own system in their place. He claimed the alternate philosophies of war and peace were both too excessive and too absolute in the extent and limits they sought to place upon war. In his defining statement in the introduction to his book on the laws of war and peace, the *Prolegomena*, Grotius set out his philosophy as a response to the problems encountered in each extreme view:

Confronted with such utter ruthlessness, many men who are the very furthest from being bad men, have come to a point of forbidding all use of arms to the Christian ... their purpose, as I take it, is, when things have gone in one direction, to force them in the opposite direction, as we are accustomed to do, that they may come back to a true middle ground. But the very effort at pressing too hard in the opposite direction is often so far from being helpful that it does harm, because in such arguments the detection of what is extreme is easy, and results in weakening the other statements which are well within the bounds of truth. For both extremes therefore a remedy must be found, that men may not believe either that nothing is allowable, or that everything is.<sup>49</sup>

His subsidiary purpose was to introduce a concept of 'moderation' into the practice of warfare. His appeal for the application of this virtue formed several chapter headings of Book III of *De Jure Belli ac Pacis*, which was concerned chiefly with the customs and practices of war. The manner in which Grotius introduced the notion of *temperamenta* was typical. After listing a particularly brutal range of customs which he described as acceptable under various types of law, he added 'I must retrace my steps, and must deprive those who wage war of nearly all the privileges which I seem to grant them'.<sup>50</sup> Indeed, his system of introducing improvements was to illustrate the possibility and limits of change. His method of seeking moderation, *temperamenta*, was crucial, and laid a

foundational stone for the Grotian tradition. Although it was the last phrase in his quotation about finding the middle way which is most remembered, it was his method of introducing change which was much more consequential: the search for a *media res* between the 'extremes' which he believed so disastrous.

Here Grotius anticipates an approach, which was aptly captured in Hirschman's later notions of perversity and jeopardy. The first posits the idea that any substantive change was dangerous, because it either has the reverse effect to that intended, or endangers the positive values already achieved. The jeopardy thesis argues that the cost of any proposed change or reform is too high if it 'endangers some previous, precious accomplishment'.<sup>51</sup> Grotius maintained this method of seeking change by 'pressing too hard in the opposite direction', actually undermined various customs which ought to be maintained; this amounted to a belief on his part that the more utilitarian and harsh practices of war had a recognized place *within* the law. Accordingly, Grotius' system defined all customs and practices as legitimate in wartime, but advanced a more normative claim to moderate these customs. Both the normative claim and the customary practices could, according to Grotius, be sourced from divine law, natural law, the law of nations or volitional law. This skill (but not its ideological purpose) was noticed by Lauterpacht:

'The fact seems to be that on most subjects which he discusses in his treatise it is impossible to say what is Grotius' view of the legal position. He will tell us, often with regard to the same question, what is the law of nature, the law of nations, divine law, Mosaic law, the law of the Gospel; Roman law, the law of charity, the obligations of charity, the obligations of honour, or considerations of charity. But we often look in vain for a statement as to what is *the* law governing the matter ... there is almost a touch of levity in this indiscriminating and confusing eclecticism in the use of sources'.<sup>52</sup>

His method in establishing a theory using this eclectic procedure represented his distinct contribution to the foundations of a new school of thought on war. Five features of this Grotian system are particularly worthy of mention. The first of these concerns his way of defining what were customary practices of war, searching for illustrations of these customs in ancient history and examples from his own century. He explained the reasons for adopting this procedure:

History in relation to our subject is useful in two ways; it supplies both illustrations and judgements. The illustrations have greater weight in proportion as they are taken from better times and better peoples. Thus we have preferred ancient examples, Greek and Roman, to the rest. And judgements are not to be slighted, especially when they are in agreement with one another; for by such statements the existence of the laws of nature, as we have said, is in a measure proved, *and by no other means, in fact, is it possible to establish the law of nations.*<sup>53</sup>

His selection at first may appear simply arbitrary; on a complete reading of his work, however, it is apparent that the examples used are purposely and selectively chosen. Rather than 'better times and better people' an examination of his selections shows that he was devoted to Livy's more violent illustrations of man's inhumanity to man. The second theoretical feature concerned the

artificial contrivance which Grotius deemed necessary to achieve his desired *media res*. As he included a wide collection of the more excessive practices of war, a structural imbalance developed within his system. As the pillar supporting barbaric practices at one end of his edifice was so heavily loaded, it outweighed the more normative and progressive pillar which he had constructed to embody the other end, destabilizing the neutrality claim, and thus abandoning a true middle ground. The hypothetical *media res* was not merely conjectural, it was not even close to the centre. Accordingly, Grotius' work drew more heavily from the conservative view of history than the progressive in constructing this ersatz 'middle'.

A third feature was the moral relativism in Grotius' vision of war which, along with the ideological relativism set out earlier, remained unresolved both in his work and the later tradition. This was a conflict between procedural and substantive conceptions of pluralism. The normative pillar, which held up one end of Grotius' theoretical edifice, claimed to need the more 'realist' positivist pillar in order to constitute a balanced structure. This was perceived as the only means of finding the just route: the gate at the centre of Grotius' edifice through which one had to pass in order to navigate a true middle path between the absolutist claims of any single ideology. These discourses embodied a mechanism which allowed different moral visions to coexist, making exclusive adherence to any one ethical claim near impossible.<sup>54</sup>

The fourth feature lay in his declared attempt to make a moral claim for moderation in warfare, using the techniques of inclusivity. The contradiction between making a moral claim, based on Christian law, the law of nature, or any other law, whilst simultaneously maintaining the ability to detach from any ethical scheme whatsoever, created irreconcilable tensions. Yet the uniqueness of this approach had to do with Grotius' ability to cite ethical claims within the same system (and alongside others) which denied other moral claims: these precepts could equally be claimed by the humanitarian, 'normative' Grotian tradition, or the more 'realist' Grotian lawyers.

And finally, a notable feature in Grotius' theory of moderation in war was his audience. The appeal for moderation was made specifically to rulers and princes in authority. His entire argument rested on the fact that only by writing for, and about, power and powerful leaders, could incremental change be brought about. By sustaining, and indeed constructing, legitimizing arguments which endorsed rulers' actions, the entire body of the work assumed an asymmetrical character, seeming to offer an endless range of rights to rulers, and mere obligations for subjects and slaves. As one biographer remarked: 'He himself was not, and never had been, merely a philosopher of the armchair in disposition and fact. By nature he loved, and was most comfortable in, association with people of rank and importance, negotiating either their business or that of a ruling class'.<sup>55</sup>

Indeed this was the essence of the Grotian legacy to the founding of the laws of war. At the heart of the Grotian system was an essential dichotomy between the rights of states and armies on the one hand, and the position of ordinary members of society on the other. Although he devoted some effort to justifying

private wars, the thrust of Grotius' writings was to concentrate the legitimate recourse to war in public hands. Within these limits, however, states and armies were given an open field to visit destruction and mayhem upon each other; these actions were justified by the hallowed principles of practice and custom. On the other side of the equation lay the hapless subjects of their respective states, condemned to wallow in the private sphere, enjoying no political or civic rights either in war or peace, and with the peculiar formulation of Grotian charity as their only hope for salvation. Between the public sphere of the state and the private realm of the subject, there was no question in Grotius' mind as to which enjoyed the primary position. Sown by Grotius, the seeds of the distinction between the rights of states and armies and the subordinate position of civilians—expressed in the legal dichotomy between lawful and unlawful combatant—germinated in the later nineteenth century. The remainder of this article will be devoted to examining how this development occurred, who were its principal agents, and what it revealed about Grotian ideology of war itself.

### The Grotian Tradition of War

The Grotian tradition of war developed in a particular manner in the later 19th and early 20th centuries in the context of the framing of the laws of war. It was during this period, as noted earlier, that an international jurisprudence emerged, largely through debates, discussions, and conferences at Brussels in 1874 and at the Hague in 1899 and 1907. Grotian ideas played a crucial role in constructing the modern notion of *jus in bello*, in particular the principle upon which the conception of *jus in bello* relied, the distinction between combatant and non-combatant. This concept also has been recognized as the fundamental principle upon which the entire notion of 'humanity in warfare' rests, equally it has been acknowledged as the most fragile.<sup>56</sup>

Central to the Grotian position was the ambition to limit the rights of belligerency to a particular class of participant (the soldier), and to exclude all others from the right to become actively involved in war. In order to understand exactly how the tradition developed internally, in both its core and peripheral values, and externally, in the way the tradition adapted itself to the prevailing norms during that era, it will be useful to explore some of the characteristics and works of the main agents and bearers of the Grotian tradition of war. It will emerge that the legal tradition played a central role not only in shaping the general framework of the laws of war, but also in excluding all views, principles, and actors who threatened its vision.<sup>57</sup> Their general personalities and demeanour, the language and method of the discipline (which they themselves largely constructed), and, above all, their political ideology will be traced in relation to Grotius' contributions to the laws of war outlined above.

Although many personalities among the publicists of the era could be classified (or classified themselves) as 'Grotian', there were three pivotal members, Fedor Fedorovich de Martens, Johann Caspar Bluntschli, and Francis Lieber, who were collectively responsible for structuring both the discourse and

the actual texts on the laws of war in the second half of the 19th century.<sup>58</sup> These men had many features similar to Grotius himself; indeed Geoffrey Best described Grotius as ‘the prime proto-publicist’.<sup>59</sup> Often overlooked are the more personal aspects of their careers, and how these influenced their views of the world.

As noted earlier, the broad 19th century doctrine of international law, both in its structure and practitioners, was liberal in its political assumptions and underpinnings. Many liberal political concepts can be described as conservative in nature, notably the attachment to law, order, political stability, hierarchy, continuity, and tempered progress.<sup>60</sup> Yet within the early Grotian tradition of war there appears evidence of strong reactionary principles as well, similar in their formulation and core values to Grotius’ own; and these were generally reflected in much of the consensual thinking about the laws of war during the 1860s, 70s, and 80s.

Of the three, Francis Lieber was the most influential. A Prussian by birth, his legal contribution, *Instructions for the Government Armies in the Field, issued as General Orders No. 100 of 24 April 1863* commonly known as the ‘Lieber Code’ (or to his intimates and himself, ‘The Old One Hundred’) was written while in America, and was designed for their civil war.<sup>61</sup> However, he never lost his association and love for all the glory of Prussia. As one biographer wrote: ‘he was delighted, in his old age, with the German conquest of France’, and another biographer, on reading his letters, noted that ‘his spirits soared’ on hearing of the Prussian invasion of France.<sup>62</sup> He held an anti-abolitionist stance on slavery while holding a professorship in the American South: ‘Lieber felt he could not speak out publicly on the issue of slavery’, and in any case ‘he believed that immediate emancipation would solve nothing; it would only lead to social equality and consequent intermarriage and amalgamation’, an idea which was ‘repugnant to Lieber’s Anglo-Saxon mind’. Accordingly, he believed the only ethical approach was to ‘reduce the number of Negroes in the population by having the state legislatures carry out a program of colonization ... In 1835, when he came to South Carolina, he had to demonstrate that he was not an abolitionist, for he believed that only states could deal with slavery’.<sup>63</sup> He also held a deep love of war which was based on his belief that, among many other virtues it possessed, it was a means of development of civilization. As he declared to General Halleck: ‘Blood is occasionally the rich dew of History’.<sup>64</sup> Equally, his desire for fame and recognition all offered strong echoes of Grotius’ *persona*. He wrote to his patient friend Charles Sumner: ‘I will not rest until I *force* the political and legal world to quote me’, and to another friend: ‘I know that my work belongs to the list which begins with Aristotle, and in which we find the names of Thomas More, Hobbes, Hugo Grotius, and Pufendorf’. Unlike Grotius, however, who questioned his contribution on his deathbed, Lieber, on the other hand, ‘died firmly convinced of his own greatness’.<sup>65</sup>

Fedor Martens was an ardent servant of the Russian Emperor. Best, in describing Martens as ‘a jurist in the service of the Tsar’ quite rightly wonders ‘the extent to which de Martens was his own man or the Tsar’s’.<sup>66</sup> He was

instrumental in convening, (and more importantly, devising the political and legal rules at) the first international diplomatic conference on the laws of war in 1874 in Brussels, and carried a reputation for being as much a self-publicist as a publicist. Marten's book on the conference at Brussels, *La Paix et La Guerre*, begins his account with the declaration: 'Toute une légende s'est formée en Europe au sujet de l'origine de la conférence de Bruxelles et des causes qui l'ont provoquée'. In setting out his own authoritative version of the Brussels and Hague Conferences, where he played a pivotal role, the legend he constructed about the purposes of the conference clearly betrayed his own political inclinations.<sup>67</sup> He was deeply disliked by diplomats of all political persuasions (the Belgian and German delegates, separated by a yawning ideological gulf, drew together only in their mutual dislike of Martens), but was tireless in promoting his essential vision of the laws of war based extensively on Lieber's Code.<sup>68</sup> His bullying behaviour towards delegates of lesser powers at Brussels in 1874, and especially the Hague in 1899, (the diplomatic archives in Brussels and Nantes abound with examples of his arrogance and petulance towards what they considered their own vital concerns of self-defence) includes a particularly unpleasant episode of legal plagiarism on a grand scale at the Hague.<sup>69</sup>

The third Grotian was Johann Bluntschli who, although by birth and legal training a Swiss national, made his way across the border to his natural political home in Prussia. Besides his legal and scholarly activities at the University of Heidelberg, he was an active member of the First Chamber in Germany, a representative of a party which sought 'l'unité allemande et l'hégémonie prussienne' from 1862.<sup>70</sup> It was Bluntschli who established the highly political parameters of the Institute for International Law, involving his friend, Rolin-Jacquemyns. Bluntschli wrote to Jacquemyns in 1872: 'L'idée d'une conférence de juristes du droit international m'a souvent préoccupé ... Le point capital me paraît être de créer une institution permanente, durable, qui insensiblement puisse et doit devenir une autorité pour le monde'.<sup>71</sup> It was Bluntschli who plagued delegates at Brussels with his pedantic manner. Baron Lambermont, the Belgian delegate and the conference's host noted in his diary: 'The arrival of Bluntschli has, of course, gotten on the nerves of all the other delegates. We all foresee endless pontificating and ceaseless harangues ... it seems they have understood in Berlin that the Russian project harmonizes perfectly with Prussian military practices'.<sup>72</sup> And it was Bluntschli who took the failed Brussels project under his wing at the Institute, and pushed through, practically single-handedly, the creation of a Manual on the Laws of War in 1880 (commonly known as the 'Oxford Code'), which subsequently provoked such a violent response from his political masters.<sup>73</sup> These three Grotians, instruments and promoters of a particular view of the laws of war, shared a distinct political ideology, which was similar in many instances to conservative liberalism, also offering striking anticipations of Hirschman's notions of perversity, jeopardy, and futility.<sup>74</sup>

The first clearly Grotian element of the political ideology of these three men was the cardinal position they assigned to the notion of order. As noted above, Grotius was seen to be a 'man of peace', exactly in the same way as Hobbes

desired the preservation of order.<sup>75</sup> Lieber's notion of order was so absolute that it appeared to be reified. As one author noted: 'Lieber believed that the preservation of the Union was more important than the extinction of slavery'.<sup>76</sup> Similarly, both de Martens and Bluntschli argued in their works on the laws of war that regularizing armies was the best means of preserving order. Bluntschli, in citing the purpose of the distinction between lawful and unlawful combatant, recognized that keeping war the preserve of professional soldiers served the interests of conquerors. This argument could be seen to be advanced to appeal to the interests of the military in an attempt to stop them slaughtering civilians. Yet, there is also a direct lineage from this argument back to a medieval concept of the rights which accrued to those privileged to bear arms—the rights of conquest.<sup>77</sup> This notion of order was as much a central belief of Grotius as it was a highly Vattelian one; it viewed states as the primary locus of legitimacy and law.<sup>78</sup> Interestingly, however, Lieber dismissed Vattel because of his 'moderate' views, complaining 'it makes me impatient to find old Vattel so often quoted', later describing Vattel as 'Father Namby-pamby' for restricting some methods of warfare, such as the use of poison, and favoured the retention of all means of destruction in order wage war.<sup>79</sup> Martens, on the other hand, adored Vattel. Indeed, in the preface to the 1916 edition of Marten's *La Paix et la Guerre*, the jurist La Pradelle notes that Martens reminds him of Vattel as he is 'clear-minded but slightly superficial'.<sup>80</sup> This is confirmed by the Vattelian comments Martens makes in the work, such as: 'Les rapports entre les Etats reposent sur le principe d'une complète indépendance. Les Etats ne reconnaissent aucun pouvoir, ni souveraineté législatif, ni judiciaire. Ils sont omnipotents et ne se soumettent à aucune autorité étrangère'.<sup>81</sup>

Another strain running through each of the publicists is a similar understanding of the harmony of interests of the Great Powers in the second half of the 19th century, which reflected the hegemonic nature of the two Empires of Bluntschli and Martens, and Lieber's Prussian views. Martens believed that others, too, would come eventually to see that this hegemony (which buttressed his conception of 'international law') was the only means of preserving international peace.<sup>82</sup> A third shared core value was their elitism, which informed their view of the world around them and their place within it. Martens, like Grotius before him, believed that the peoples outside Europe were too uncivilized to meet the standards of his 'universalist' conception of international law. Laws, in his lofty estimation, could only apply to, and between 'nations parvenues plus ou moins au même niveau de civilisation et qui ne diffèrent pas notablement dans leurs idées sur le droit et la morale. Voilà pourquoi il serait impossible d'attendre des Turcs ou des Chinois l'observation des règles et des usages de la guerre'.<sup>83</sup> Lieber's own views on the matter have already been illustrated with reference to the question of slavery.

Elitism also shaped the way they perceived their own function and role in society. Bluntschli wrote that one of the purposes of his *Droit International Codifié* was to conform to the 'needs of the age'.<sup>84</sup> Additionally, as the founder of the International Institute of International Law, he believed that the correct



method of influencing state policy was to create an exclusive body of men like himself: 'What would be necessary today and what we are about to propose would be the intimate meeting of a *select* group of men already known in the sciences of international law through their writings or their deeds ... This meeting would attempt to fix the first landmarks of collective scientific action ... by adopting the constitution of an academy or international institute of the law of nations'.<sup>85</sup> Disguised under the notion of 'public opinion', all three developed a concept which in effect empowered a select group of unaccountable servants of state like themselves.<sup>86</sup> Lieber declared that his personal ambition was to emulate Grotius: 'Hugo Grotius was quoted as authority at the Congress of the European nations at Vienna; but he was thus quoted above monarchs, ministers, and nations, *because* he was an unofficial man, absent from the strife'.<sup>87</sup> Grotius' contention that the only means of moderating states' behaviour was to appeal to rulers found enthusiastic disciples over two hundred years later.

Such ideological values were underpinned by an essential part of their political *animae*: a deep fixation with power. It was the strongest link that united them with a central aspect of Grotius' own neglected *persona* and hidden heritage which was highlighted earlier in this article. An examination of the private worlds of these three men, and indeed that of their mentor, invites two important conclusions about the nature of Grotian ideology. First, the symbiosis between more private politics and public *personas* illustrates the fact that their personal political ideologies and convictions were deeply embedded in their written works. Secondly, it highlights the importance of linking the notions of the good life inside the state with the good life outside it. For Grotius as with Lieber, Bluntschli and de Martens, these two facets of political philosophy were indissociable. Bluntschli, Martens, and Lieber played a decisive role in the founding of the modern laws of war for two reasons. Firstly, these individuals were both best placed, and used their positions, to advance their own formulations on the legal agenda of war with their respective rulers at international conferences and with their Institute colleagues. Secondly, although there were many other works about the laws of war before and during their time, much like Grotius they demonstrated a supreme talent for synthesizing these legal rules into a particular framework. This intellectual construction involved five elements, each of which represented a central tenet in the modern Grotian tradition of war: the elaboration of a distinct language and methodology of law; the standardization of ideological relativism; the institutionalization of moral relativism; the manner of introducing moderation in war; and the affirmation of the centrality of order. All these elements came together to justify the Grotian emphasis on denying all rights of belligerency to civilians, even in situations of self-defence.

The language of law is perhaps one of the most difficult of all disciplines to penetrate.<sup>88</sup> The founding agents of the Grotian tradition were part of a wider discipline of international law which used a particular language not only to map out their distinct concerns, but also as a vehicle for certain political ends. Through the language used to construct the laws of war, several Grotian

innovations in methodology were advanced, which introduced restrictions in the discourse itself. The first was the introduction of specific customs which were imbued with particular (in this case conservative) ideological tenets. A central criticism of Grotius' method mentioned by both Voltaire and Rousseau was the inclusion (indeed selection) of barbaric Roman customs as examples of precedent ('history as fact'). This method was also used by Martens, Lieber, and Bluntschli when describing existing customs, thus defining the 'correct' manner of selecting history in the structuring of laws of war.<sup>89</sup> On the question of civilian uprisings at the Brussels conference, Martens chose to quote the historian Napier, who gave a famously prejudiced account of the *guerrilla* war against Napoleon's occupying army.<sup>90</sup> Lieber also used Napier to achieve the same effect. He was also partial, like Grotius, to quoting Roman practices as inscribed by Cicero and the Roman historian Livy. Another aspect was how this language became restricted by the establishment of value-laden concepts in accepted 'neutral' legal terminology. For example, 'innocent' civilians, a term used invariably by the three synthesizers to classify the category of passive civilians under occupation, had a moral rather than merely descriptive connotation. 'Innocent' if passive implied, of course 'guilty' if politically or militarily active.<sup>91</sup>

Also standardized was the notion of ideological relativism. Indeed eclecticism was heralded as the cornerstone of the Grotian system: in the words of Schwarzenberger, the Grotian approach 'offers splendid opportunities *for arguments either way*'.<sup>92</sup> This captures the essence of Grotius' contribution to the Grotian tradition of war—the notion of different legal arguments being advanced from a single methodological blueprint. Eclecticism laid the cornerstone of the concept of pluralism in the construction of the laws of war. As illustrated above, early Grotians used this method to entrench the hegemonic position of the Concert of Europe. Later Grotians, of a rather more progressive disposition, were able to draw on the methodology to argue for progressive ethical and juridical norms. Accordingly, the method clearly instituted a system which was based on a flexible ranking of values.

The third feature of the Grotian tradition of war was the relativism of its ethical and legal reasoning. This was not a complete form of relativism. It was established by Grotius that in order to define his philosophy as the *media res* between two extremes, certain ideologies which threatened the position of his philosophy as the true middle ground had to be challenged. This was done by classifying them as perverse, or dangerous, or indeed simply by dismissing them as 'ideologies'. Once the paradigmatic theory was adequately established as the middle way, however, it was then possible to include certain features which could encompass both progressive and conservative strands of Grotian thought. As a professor of law at Yale remarked dryly: 'rules, as Grotius presented them, ordinarily travelled in pairs of opposites'.<sup>93</sup> This pluralism confirmed the practice of moral relativism and gave a semblance of coherence to the rhetorical language of neutrality.

Equally noteworthy was the means of controlling the parameters of the legal

discourse on moderation in war. The notion of *temperamenta* was extremely limited in the Grotian tradition of war in the late nineteenth century. Accordingly, the concept of futility was introduced to highlight the limited nature of moderation. Grotius made use of the notion of 'inevitability of war' (which was 'in perfect accord with the first principles of nature') in order to justify the futility of banning it.<sup>94</sup> Lieber not only thought war was inevitable, but was half in love with it, denouncing as sacrilegious those who sought to outlaw it. In his *La Paix et La Guerre*, de Martens also deployed the concept of the futility of banning war on the grounds of its inevitability. Equally, he adopted the Grotian method of arguing for the middle way in the introduction of limited moderation. Many 20th-century Grotians of the more conservative school adopted both these methods, highlighting the inevitability of war and the middle way approach. The more progressive Grotians focused on the 'middle way' approach almost exclusively.

The final element in the Grotian tradition of war which united both conservative and progressive strands was the central notion of order. The threats of disorder to the Grotian system of rules in general (and rules on war in particular) were countered by two arguments: perversity and jeopardy. In the first case, Grotian lawyers repeatedly argued that any concession to the rights of civilian belligerency would merely serve to exacerbate the condition of occupied populations; the remedy was in this sense nothing but an aggravation of the disease. The Grotian founders also sought to safeguard the sanctity of the existing system of legal rules by reference to the notion of jeopardy: the threat to all existing benefits and virtues. As a loyal imperialist, Martens strongly opposed the republican notions of popular sovereignty and mass participation in civic life. From this perspective, he was also strongly opposed to any effort to involve citizens in the defence of their country. Such efforts were seen as having the potential effect of endangering all forms of civilization. He offered the example of the Paris Commune in 1871:

Vu les perfectionnements des armées modernes, on peut juger facilement de quel secours peuvent être pour la patrie les masses populaires non organisées. D'autre part, l'histoire de la Commune de Paris est un exemple destiné à rappeler à jamais à toutes les nations cette vérité qu'il est plus facile de distribuer les armes que de les reprendre.<sup>95</sup>

Ideologically dangerous terms such as patriotism, and notions of just war also threatened the existing order of states. De Leer, the Russian military delegate at Brussels in 1874 used this approach when trying to promote a strict limitation on who could qualify as legitimate belligerents. He declared: 'Il y a deux sortes de patriotisme, celui qui est réglé et celui qui ne l'est pas. Quel est celui qui est préférable pour la défense? C'est évidemment celui qui est réglé'.<sup>96</sup> In the words of a Grotian lawyer, popular expressions of patriotism only served to make wars harsher and more intractable: 'on a même à redouter les initiatives individuelles qui pourraient se développer sous l'empire de ce sentiment très beau et très noble: le patriotisme. Lorsque cela se produit, l'effet nécessaire, l'effet fatal est de rendre la guerre plus sauvage et plus dure'.<sup>97</sup> Of importance here is that both

the substance and the method of these traditionalists can be seen to be replicated in the works of later Grotian theorists on war, most particularly Michael Walzer and Hedley Bull.<sup>98</sup>

## Conclusion

This article has outlined the contours of a particular ideology derived from the writings of Grotius, and traced its later development as a tradition in the laws of war. It is an ideology that borrowed heavily from Grotius' writings on international relations and international law, yet was distinct from both of them. This Grotian tradition of war was based on a hierarchical reading of the notion of sociability; a dualist positioning of natural law both as progressive and regressive guides for human action; an overriding concern with state sovereignty and law; a subordination of the demands of liberty to those of order; the occupation of a middle path between two contending political ideologies; and a claim to neutrality which concealed an ideological *parti pris*. From the perspective of the laws of war, whose terms of reference it defined, this Grotian tradition was strongly attached to the notion of maintaining a clear distinction between lawful and unlawful combatants.

As an ideological construct, this tradition of war had a number of strengths and weaknesses. On the positive side, one of its greatest assets was its sheer discursive power; its capacity to articulate the proper frontiers of legitimate discourse in the field, and, in so doing, to represent the political interests of hegemonic powers. Grotian ideology performed this function with notable skill and consummate elegance. This sensitivity was also apparent in the tradition's flexibility and adaptability, ensuring that its principles were always attuned to the needs of the times (as defined at least by the dominant powers). Finally, it accurately captured the ambivalent nature of military occupation itself. But if this ambivalence was a source of the tradition's strength, paradoxically it was its certainties which exposed many of its weaknesses. The power of Grotian language (rhetorically but not substantively universalist) actually excluded ideologies and groups which did not conform to its conception of the status quo, thus giving the lie to its claims of inclusivity.

Finally, it has been shown that excluding the *persona* and *fama* of Grotius has vitiated a proper understanding of the substance of his philosophy on war. These two factors are also essential for appreciating the *Weltanschauung* of subsequent generations of Grotians, and the practical and intellectual methodology they acquired from him. This point has a wider bearing on the manner in which Grotian traditions of thought have usually been systematized. Contrary to convention, it has been argued here that personal political values and preferences exercised a significant influence on the construction of the Grotian paradigm; in other words, individual political convictions and published output were inexorably intertwined. Further, recapturing their political world view highlights the importance of linking the notions of the good life inside the state with the good life outside it. How Grotians situated themselves in domestic politics had a

crucial bearing on how they theorised about and practised international law and international relations.

## Acknowledgement

I would like to express my absolute gratitude to Sudhir Hazareesingh, Balliol College, for his many astute observations, patient editing, and for convincingly feigning an interest in obscure principles of the laws of war.

## Notes and references

1. J. De Burigny, *La Vie de Grotius: avec l'Histoire de ses Ouvrages* (Paris: Debure l'Ainé, 1752), I, pp. 135–6; Bull, 'The Importance of Grotius in the Study of International Relations', in H. Bull, B. Kingsbury and A. Roberts, (eds) *Hugo Grotius and International Relations* (Oxford: Clarendon, 1990), p. 75.
2. The best analysis (which also offers an unusual defence of this charge) is by Judge G. Ladriet de Lacharrière, 'The Controversy Surrounding the Consistency of the Position adopted by Grotius', in *International Law and the Grotian Heritage* (The Hague: T. M. Asser Institute, 1985), pp. 207–213. See also Richard Tuck: 'Peter Haggemacher, Grotius et la Doctrine de la Guerre Juste', *Grotiana*, 7 (1986), pp. 89–92.
3. Cited in W. Knight, *The Life and Works of Hugo Grotius* (London: Grotius Society Publications, 1925), p. 289. On his poetry, an extremely charitable interpretation can be found in 'The Minor Poetry of Hugo Grotius', *Transactions of the Grotius Society*, London, 13 (1928), p. 128.
4. See J. C. Willems, 'How to Handle Grotian Ambivalence?: A Guidance Towards some Recent Guides', *Grotiana*, 6 (1985), p. 106.
5. P. Haggemacher, *Grotius et la Doctrine de La Guerre Juste* (Paris: Presses Universitaires de France, 1983), p. 623; C. E. Vaughan, *Studies in the History of Political Philosophy before and after Rousseau* (New York: Russell and Russell, 1960), I, p. 22; H. Lauterpacht, 'The Grotian Tradition in International Law', *British Yearbook of International Law*, 23 (1946), p. 12.
6. See Knight, *op. cit.*, Ref. 3, p. 202.
7. Michael Donelan, 'Grotius and the Image of War', *Millennium*, 12 (1983), pp. 235, 239. See also E. B. Midgley, *The Natural Law Tradition and the Theory of International Relations* (London: Elek, 1975), pp. 154–167 and V. Hrabec, 'Le rôle de Grotius dans le Développement Scientifique du Droit International', *Revue de Droit International et de Législation Comparée*, VI (1925), p. 549.
8. J. Stone, *Legal Controls of International Conflict: A Treatise on the Dynamics of Disputes and War-Law* (London: Stevens, 1959), p. 10; Di Vecchio, 'Grotius and the Foundation of International Law', *New York University Law Review*, 37 (1962), p. 263.
9. See, for example, C. Murphy's 'The Grotian Vision of World Order', *American Journal of International Law*, 76, (1982), pp. 00–00.
10. J. Basdevant, 'Hugo Grotius', in *Les Fondateurs du Droit International* (Paris: A. Pillet, 1904), p. 238. Lauterpacht, *op. cit.*, Ref. 5, pp. 18, 19, 22, 30, and esp. 51. For a review of the debate concerning Grotius' responsibility in the 'fathering' of international law see Edwards, *Hugo Grotius, The Miracle of Holland: a Study in Political and Legal Thought* (Chicago: Chicago University Press, 1981), chap. 2. For additional citations see Ben Kingsbury's: 'Grotius, Law, and Moral Scepticism: Theory and Practice in the Thought of Hedley Bull', in Clark and Neumann, (Eds), *Classical Theories of International Relations* (London: Macmillan, 1996), p. 44, fn. 16.
11. Bull is the most commonly cited author who classifies Grotius as the founder of both international society and solidarism. For the former, see H. Bull, 'The Grotian Conception of International Society', in Butterfield and Wight, (Eds). *Diplomatic Investigations*, Cambridge, Mass., 1968, pp. 51–73; for the latter view, see 'The Importance of Grotius in the Study of International Relations', *op. cit.* Ref. 1. For aspects of both views see *The Anarchical Society: A Study of Order in World Politics* (London: Macmillan, 1977), pp. 24, 27, 152, and 153. Cutler notes that Bull does not himself use natural law to underpin his concept of international society. C. Cutler, 'The "Grotian Tradition" in International Relations', *Review of International Studies*, 17 (1991), p. 54, M. Wight, *International Theory: The Three Traditions* (London: Leicester University Press, 1996), pp. 13–15; Lauterpacht's eleventh feature marking Grotius as the founder of international law is 'The Tradition of Idealism and Progress', *op. cit.* Ref. 5, p. 48; E. Balogh, 'The Traditional Element in Grotius' Conception of International Law', *New York University Law*

- Quarterly Review*, VII (1929), p. 270; S. Krasner (Ed.), *International Regimes* (London: Cornell University Press, 1983), p. ix.
- 12 Willems, *op. cit.*, Ref. 4, p. 106. A more incisive analysis of these trends is C. Roelofsen, 'Grotius and the "Grotian Heritage"' in *International Law and International Relations; the Quartercentenary and its Aftermath*, *Grotiana*, vol. 11 (1990), pp. 6–29. The term 'Grotian Quest' was created by Falk in his seminal introduction to Edwards' *Hugo Grotius*, entitled 'The Grotian Quest', *op. cit.*, Ref. 15, pp. xiii–xxi.
  - 13 M. Pinto, 'The New Law of the Sea and the Grotian Heritage' in *International Law and the Grotian Heritage*, *op. cit.*, Ref. 2, p. 92.
  - 14 Murphy, *op. cit.*, Ref. 9, p. 27; emphasis added.
  - 15 R. Tuck, *op. cit.*, Ref. 2, p. 87.
  - 16 Under such guiding principles, little wonder that Grotianism often comes across as an *auberge espagnole*. Willems, 'Grotius and International Law', in *Hugo Grotius 1583–1983* (Assen: Maastricht Colloquium, 1983), pp. 42–54.
  - 17 Sec L. van Holk and C. Roelofsen (Eds), *Grotius: A Reader for Students of International Law and Legal History* (The Hague: T.M.C. Asser Institute, 1983), pp. 3–21. See also C. Edwards, *op. cit.*, Ref. 15, and P. Kooijmans, 'How to Handle the Grotian Heritage; Grotius and Van Vollenhoven', *Netherlands Journal of International Law*, 81, (1983), p. 91.
  - 18 Bull, *op. cit.*, Ref. 11, p. 52.
  - 19 Lauterpacht, *op. cit.*, Ref. 5, p. 5.
  - 20 Koskienniemi's study of international legal history argues that liberalism provides the doctrinal underpinning of international law; *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Lakimiesliiton Kustannus, 1989), pp. 53–130. Michael Freedon argues that an adherence to seven distinct core values identifies a (domestic) liberal; see Freedon, 'The Family of Liberalisms: a Morphological Analysis' in J. Meadowcroft (Ed.) *The Liberal Political Tradition* (Cheltenham: Edward Edgar, 1996), pp. 14–39.
  - 21 Francis Lieber, *Miscellaneous Writings*, Introduction, II (Philadelphia: Lippincott and Co., 1881), p. iv. Emphasis in text. A more thorough analysis of Lieber's political thought can be found in B. Brown's *American Conservatives: The Political Thought of Francis Lieber and John W. Burgess* (New York: AMS Press, 1967).
  - 22 On the inherently conflictual properties of his 'third image', see K. Waltz, *Man, The State, and War: A Theoretical Analysis* (New York: Columbia University Press, 1960), pp. 159–186.
  - 23 A typical example is this piece of *galimatias* by de Aréchaga: 'when an act is permitted by natural law and forbidden by positive law or conversely permitted by positive law but forbidden by natural law, there is in fact no conflict which would determine a hierarchy between the two legal systems'. *Op. cit.*, Ref. 2, p. 18.
  - 24 For a definition of an ideology's morphology and synchronic movement across time see Michael Freedon, *Ideologies and Political Theory* (Oxford: Oxford University Press, 1996), chaps. 2 and 3, pp. 48–138.
  - 25 Bull *op. cit.*, Ref. 1, p. 137.
  - 26 On this theme see R. J. Vincent, 'Racial Equality', in Bull and Watson (Eds), *The Expansion of International Society* (Oxford: Clarendon Press, 1984), pp. 239–254.
  - 27 Lauterpacht pays tribute to his textual acrobatics thus: 'but here, once more, he retreats from his position by an ingenious piece of dialectics', *op. cit.*, Ref. 5, p. 8.
  - 28 G. Schwarzenberger, 'The Grotius Factor in International Law and International Relations: A Functional Approach', in Bull, Kingsbury and Roberts, (Eds), *op. cit.*, Ref. 1, p. 303.
  - 29 On this particular theme see A. O. Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy* (Cambridge: Harvard University Press, 1991).
  - 30 R. Tuck, 'Grotius, Carneades, and Hobbes', *Grotiana*, IV (1983), p. 53.
  - 31 See, in particular, chapters one to four in Book One of Rousseau's *Contrat Social*, in B Gagnebin and M. Raymond (Eds) *Oeuvres Complètes* (Paris: Pléiade, 1959), Vol. III, pp. 351–358.
  - 32 On the political doctrines prevailing in Grotius' time, see Haggenmacher, *op. cit.*, Ref. 5; See also, more generally, Q. Skinner's *The Foundations of Modern Political Thought* (Cambridge: Cambridge University Press), 1978.
  - 33 Grotius, *De Jure Belli ac Pacis*, transl. A. Campbell (London: Hyperion Press, 1990), p. 71.
  - 34 *Ibid.*, p. 72.
  - 35 Kingsbury, *op. cit.*, Ref. 10, p. 47.
  - 36 P. Remec, *The Position of the Individual in International Law According to Grotius and Vattel* (The Hague: Martinus Nijhoff, 1960), p. 75.
  - 37 Grotius, *op. cit.*, Ref. 33, p. 67.
  - 38 Grotius, *ibid.*, p. 75.

- 39 Grotius, *ibid.*, p. 15.
- 40 R. Tuck, *op. cit.*, Ref. 30, p. 54.
- 41 D. Kennedy notes that Grotius conflates sovereignty with natural natural justice and adds: 'To Grotius, sovereignty is a type of power within the natural order'. 'Primitive Legal Scholarship', *Harvard International Law Journal*, 27 (1986), pp. 85, 90.
- 42 Grotius, *op. cit.*, Ref. 33, Book I, Ch. I, pp. 19–20.
- 43 On this point see T. Tadashi, 'State and Governing Power', in *A Normative Approach to War: Peace, War, and Justice in Hugo Grotius* (Oxford: Clarendon Press, 1993), p. 143.
- 44 Grotius, *op. cit.*, Ref. 33, pp. 19–20.
- 45 Onuma, *op. cit.*, Ref. 43, p. 102.
- 46 See the illuminating Naoya's 'The Laws of War', *op. cit.*, Ref. 43, pp. 267–8.
- 47 Grotius, *op. cit.*, Ref. 33, pp. 719–720.
- 48 Haggemacher, *op. cit.*, Ref. 5, pp. 397–399.
- 49 Grotius, *op. cit.*, Ref. 33, p. 21. Emphasis added.
- 50 Grotius, *op. cit.*, Ref. 33, p. 716. Unfortunately, this remark introduces the chapter which gives legal grounds for extensive rights over slaves.
- 51 Hirschman, *op. cit.*, Ref. 29, p. 7.
- 52 Lauterpacht, *op. cit.*, Ref. 5, p. 5.
- 53 Grotius, *op. cit.*, Ref. 33, p. 30. Emphasis added.
- 54 Adapting a model from Hans Kuhn, Koskienniemi has set out a similar analysis of international law in general, positing 'descending and ascending patterns of arguing about international order'. *Op. cit.*, Ref 20, p. 84.
- 55 Knight, *op. cit.*, Ref. 3, pp. 191–2.
- 56 See G. Best, *War and Law Since 1945* (Clarendon Press: Oxford, 1994) especially pp. 32–34, 44–46; also A. Roberts, 'The Laws of War: Problems of Contemporary Conflicts', where the laws of war are described as 'a body of law with an impressive and admirable superstructure built on insecure foundations, of which perhaps the shakiest is the central, critical distinction between the soldier and the civilian'. *Law in Humanitarian Crisis* (Brussels: European Commission, 1995), I, p. 19.
- 57 A notable exception was the distinguished French republican lawyer Charles Lucas, a member of the Institute of International Law, and its sole dissenting voice. His works include *La Conférence Internationale de Bruxelles sur les Lois et Coutumes de Guerre* (Paris: A. Durand, 1874); *Les Actes de la Conférence de Bruxelles Considérés au Double Point de Vue de la Civilisation de la Guerre et de la Codification Graduelle du Droit des Gens* (Orléans: E. Colas, 1875); *Civilisation de la Guerre, Observations sur les Lois de la Guerre et l'Arbitrage International* (Paris: Cotillon, 1881).
- 58 Another powerful agent was the conservative Belgian publicist and first head of the Institute of International Law, Rolin-Jacquemyns. However, his role was more that of a supporter and consolidator of the views of the three men cited above.
- 59 G. Best, *Humanity in Warfare* (Methuen: London, 1983), p. 53.
- 60 For further discussion see M. Freedon, *op. cit.*, Ref. 24, and P. Manent, *An Intellectual History of Liberalism* (Princeton: Princeton University Press, 1994).
- 61 J. Childress, Francis Lieber's Interpretation of the Laws of War: General Orders No. 100 in the Context of his Life and Thought', *American Journal of Jurisprudence*, 21 (1976), p. 40.
- 62 Brown, *op. cit.*, Ref. 21, p. 17; Frank Freidel, *Francis Lieber: Nineteenth Century Liberal* (Baton Rouge: Louisiana University Press, 1947), pp. 408–9.
- 63 Brown, *op. cit.*, Ref. 21, pp. 20–21; Freidel, *ibid.*, p. 235. See also Freidel's half-hearted and ambivalent attempt to justify Lieber's buying and using of house slaves (one of whom became pregnant and died in childbirth) in 'Francis Lieber, Charles Sumner, and Slavery', *Journal of Southern History*, IX (1943), pp. 76–9.
- 64 For a comprehensive account of this Darwinian explanation of war by Lieber, and its other virtues, see J. Childress, *op. cit.*, Ref. 61, p. 44.
- 65 T. Perry, *The Life and Letters of Francis Lieber* (Boston: Osgood, 1882), pp. 17, 18; emphasis in text; Freidel, *op. cit.*, Ref. 62, p. 417.
- 66 Best, *op. cit.*, Ref. 59, 163. For details of the conservative liberalism of a branch of the Russian legal school from which his political philosophy was based, see A. Walicki, *Legal Philosophies of Russian Liberalism* (Oxford: Clarendon Press, 1987), pp. 214–227.
- 67 Martens, *La Paix et La Guerre* (Paris: A. Rousseau, 1901), p. 99.
- 68 On the German delegate's impression at the Hague see Best, *op. cit.*, Ref. 59, p. 164.
- 69 The famous Preamble to the Hague Regulations, the 'Martens' Clause' was actually written by Baron Lambertmont, a Belgian diplomat. Martens, not to put too fine a point on it, pinched it—as one witness to this grand theft recorded: 'M. de Martens présentait la déclaration comme étant sienne et ne fit aucune

- allusion à son origine'. Brussels, Ministry of Foreign Affairs, Direction P, No. 6120, Annexe 3, 24 July 1899. For a full account, see chapter 5 of K. Nabulsi's forthcoming, *Traditions of War: Occupation, Resistance, and the Law* (Oxford: Clarendon Press, 1999).
- 70 Rolin-Jacquemyns, R. A., 'Bluntschli—Nécrologie', *RDILC*, XIII (1881), p. 626. J. K. Bluntschli is better known as the author of *The Theory of the State* (Oxford: Clarendon Press, 1885).
- 71 *Annuaire de l'Institut*, I (1873), 11–28.
- 72 July 29, 1874, Dossier B 748.4, Brussels, Archives of Ministry of Foreign Affairs.
- 73 His correspondence over the Manual became something of a legal scandal, with both Field Marshal Moltke and the head of the German General Staff Hartmann repudiating his Manual on the laws of war in a famous exchange of letters and articles. (i.e. Von Moltke: 'Perpetual peace is a dream, and it is not even a beautiful dream'. Cited in C. Andler's *Frightfulness in Theory and Practice* (London: T. Fisher Unwin, 1913), p. 46.
- 74 Indeed, Hirschman noted that his arguments are not the exclusive property of 'reactionaries': 'they can be invoked by any group that opposes or criticizes new policy proposals or newly enacted policies'. Hirschman adds that nonetheless these arguments are used 'most typically' by conservatives, *op. cit.*, Ref. 29, pp. 7, 8.
- 75 Roelofsen cites Tuck as the foremost exponent of the similarity of Hobbes and Grotius' philosophy. C. Roelofsen, *op. cit.*, Ref. 12, p. 20.
- 76 Brown, *op. cit.*, Ref. 21, p. 21.
- 77 J. Bluntschli, *Le Droit International Codifié* (Paris: Guillaumin et Cie., 1870), p. 300. See also G. Draper, 'Combatant Status in Historical Perspective', *Military Law and Law of War Review*, IV (1976), p. 56.
- 78 Childress, *op. cit.*, Ref. 61, p. 59, and fn. 82.
- 79 Perry, *op. cit.*, Ref. 65, p. 59, and fn. 82.
- 80 La Pradelle cited in Best, *op. cit.*, Ref. 59, p. 164.
- 81 Martens, *op. cit.*, Ref. 61, p. 47.
- 82 Martens, *ibid.*, p. 83.
- 83 Martens, *ibid.*, p. 47. That Russia was then involved in a war with Turkey (and would be released from adhering to laws if it could claim the other side couldn't adhere to them) would perhaps seem relevant to Martens' position.
- 84 In a letter to Lieber describing his task in writing his book about the laws of nations, Rolin-Jacquemyns, *op. cit.*, Ref. 70, p. 625.
- 85 Cited in J. B. Scott, (Ed.) *Resolutions of the Institute of International Law* (New York: Oxford University Press, 1916), p. xvii. He wrote the same to Lieber, who concurred. Emphasis in text.
- 86 Bluntschli in particular developed the theoretical notion of 'public conscience' in international law. This notion however, did not imply grounding law in popular norms; rather, its purpose was to justify the central role of publicists in the formation of law. G. Sperduti, 'The Heritage of Grotius and the Modern Concept of Law and State', *op. cit.*, Ref. 2, p. 33.
- 87 Lieber in a letter to Halleck, 1863; emphasis in text. Cited in Freidel, *op. cit.* Ref. 62, p. 39; emphasis in text. Lieber's dream was to come true at Brussels in 1874, when the Russian delegate Baron Jomini made several references to his code in the opening address, acknowledging it as the basis of the draft text, 'Actes de la Conférence Réunie à Bruxelles, du 27 Juillet au 27 Août 1874, pour Régler les Lois et Coutumes de la Guerre', *Nouveau Recueil Général de Traités*, Second series, IV (1879–1880).
- 88 J. Boyle, 'Ideals and Things: International Legal Scholarship and the Prison-house of Language', *Harvard International Law Journal*, 26 (1985), pp. 327–359. See also Martin Krygier, 'Law as Tradition', in *Law and Philosophy*, 5 (1986), in particular p. 244.
- 89 See especially Lieber's: 'Guerrilla Parties Considered with Reference to the Law and Usages of War', in Lieber, *op. cit.*, Ref. 21, II, p. 282.
- 90 He also quoted an anonymous tome entitled '*L'Angleterre et les petits Etats*, where the author 'General T' (Brialmont) stated that there had never been such a thing as a *levée en masse* in Europe during the 'christian era', Martens, *op. cit.*, Ref. 61, pp. 377–8, 376.
- 91 See the arguments of G. Mavrodes, 'Conventions and the Morality of War', *Philosophy and Public Affairs*, 4, 2 (1975), and two replies to his article: R. Fullinwider, 'War and Innocence', *Philosophy and Public Affairs*, 5, 1, (1975), and L. Alexander, 'Self-Defence and the Killing of Non-combatants: A Reply to Fullinwider', *Philosophy and Public Affairs*, 5, 4 (1976), where all three accepted the Grotian definition of 'innocence'. For further discussion see M. Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge, MA: Harvard University Press, 1970).
- 92 Schwarzenberger, *op. cit.*, Ref. 1, p. 306, fn. 14.
- 93 M. McDougal, *op. cit.*, Ref. 1, p. 166.
- 94 Hence his main criticism of the Erasman approach. Grotius, *op. cit.*, Ref. 33, p. 52; see especially *Prolegomena*, p. viii. Basdevant noted 'Grotius prend la société internationale telle qu'elle existe ... il ne



prétend pas imaginer une organisation qui fasse disparaître la guerre ... il ne prétend pas supprimer la guerre mais la régler', Basdevant, *op. cit.*, Ref 10, pp. 256, 257.

95 Martens, *op. cit.*, Ref. 61, p. 381.

96 'Actes de la Conférence', *op. cit.*, Ref. 87, p. 99.

97 A. Rolin, *Le Droit Moderne de la Guerre* (Brussels: Seycourt, 1920), p. 267.

98 The ethical debate surrounding the foundational principles of Michael Walzer's *Just and Unjust Wars* (New York: Basic Books, 1992) is having a remarkable resurrection, witness the 1997 edition of *Ethics and International Affairs*, which is largely devoted to it.