

Studies in the History of Ethics

The Right to Punish as a Just Cause of War in Hugo Grotius’ Natural Law

**Benjamin Straumann
(Hauser Global Law School Program, New York University)**

(Published February 2006)

The prominent role of Hugo Grotius’ (1583-1645) thought in the history of the concept of natural rights is well known and has been thoroughly discussed in the research literature.¹ What is less well known, and has received considerably less scholarly attention, is the specific design of the various natural rights postulated by Grotius.² In Grotius’ natural law works, namely in the early *De iure praedae commentarius* (1604-1606, not published until 1868) and in *De iure belli ac pacis libri tres* (1625), Grotius developed a series of natural rights that corresponded to a system of just causes of war.³ According to Grotius, war can be a lawful means to enforce four distinct natural rights: the right to self-defense, the right to private property, the right to the restitution of debts, and the right to punish. These rights correspond to Grotius’ four just causes of war: defense, recovery of property, exaction of a debt, and punishment.⁴ This latter just cause of war—punishment—, which has not yet received very much scholarly treatment, shall be investigated in the present paper.⁵ Grotius’ conception of punishment as a natural right and as the corresponding just cause of war is significant to those who study the history of the ethics of war, and has also exerted a considerable influence in the realm of political theory.

This paper proceeds in three parts. The first part provides an introductory account of Grotius’ doctrine of natural rights in order to give the reader the necessary conceptual

framework. The second part explores Grotius' conception of a natural right to punish as developed in his early natural law work *De iure praedae*. Part three gives an account of the more differentiated doctrine of the right to punish as it can be gleaned from Grotius' mature work on natural law and the law of nations, the *De iure belli ac pacis*. By way of conclusion, I will then give a brief survey of the important historical as well as conceptual ramifications of Grotius' tenets.

1. Grotius' system of natural rights and just causes of war

Grotius introduces his notion of a subjective right in *De iure belli ac pacis*, in a chapter on the general notion of right. After explaining the term "right" (*ius*) in its objective sense, Grotius writes that

There is another meaning of law viewed as a body of rights, different from the one just defined⁶ but growing out of it, which has reference to the person. In this sense a right becomes a moral quality of a person, making it possible to have or to do something lawfully. Such a right attaches to a person, even if sometimes it may follow a thing, as in the case of servitudes over lands, which are called real rights, in contrast with other rights purely personal; not because such rights do not also attach to a person, but because they do not attach to any other person than the one who is entitled to a certain thing. When the moral quality is perfect we call it *facultas*, 'faculty'; when it is not perfect, *aptitudo*, 'aptitude'.⁷

Only that which Grotius terms "faculty" (*facultas*), i.e. a "perfect moral quality", is part of natural justice in the strict sense, not what he calls "aptitude" (*aptitudo*). Grotius, characterizing the subjective sense of right (*ius*), identifies the natural legal right in the subjective sense with

facultas, which is said to be composed of power (*potestas*), ownership (*dominium*) and the contractual rights of the creditor (*creditum*).⁸ Elucidating the element of power, he differentiates between power over oneself, which is conceived as freedom, and power over others, which can consist of the power of the patriarch or of the slaveholder.

For Grotius, freedom as power over oneself is just one part of *potestas*, and *potestas*, together with private property and contractual rights, forms one of the three elements that can constitute subjective rights (*facultates* or *iura*). The tortious violation of these rights, i.e. the unlawfully and culpably inflicted violation of the right to one's own person and freedom, of the right to private property, or of the right to exact a contractually stipulated debt, gives rise to a fourth subjective natural right, the right to punish, which by Grotius' account is modeled on the penal actions of the Roman law (*actiones poenales*).⁹

Grotius' doctrine of the just causes of war is predicated on his clarification of the notion of a subjective natural right, as described above. According to Grotius, a wrong (*iniuria*) constitutes the only possible cause for a just war.¹⁰ He writes: "No other just cause for undertaking war can there be excepting injury received."¹¹ Wrongs consist in the violation of a right, Grotius holds, and in the chapter on the causes of war (*De belli causis*) he points out the fundamental parallel between the remedies of Roman law, the *actiones*, and war:

It is evident that the sources from which wars arise are as numerous as those from which lawsuits [*actiones*] spring; for where judicial settlement [*iudicia*] fails, war begins.¹²

By equating the just causes of war with the wrongs (*iniuriae*) of private Roman law, Grotius attempts to solve the basic problem of the medieval law of war tradition which had consisted in determining all the relevant wrongs in a complete way and with sufficient precision.¹³ Using the

Roman law system of remedies to concretize the substantive content of the just causes of war, Grotius was able to develop a system of well-defined natural rights that are reflected in the basic liberal rights of the nineteenth century.

The most remarkable of these rights is the right to punish, onto which Grotius bestows, against the scholastic tradition,¹⁴ the dignity of being a natural right. This bold step has manifold consequences not only in the international sphere, where the existence of such a right can serve as a substitute for the sanctions that back the law in a centralized legal system, but also in the realm of political theory, where a residual natural right to punish, conceived as a right originally vested in every individual, can potentially unfold into a very explosive tool of political argument. In the following two sections, Grotius' conception of the right to punish shall be described first as it appears in the early *De iure praedae*, then as it is presented in *De iure belli ac pacis*.

2. *The right to punish in De iure praedae*

In 1604, the directors of the newly established Dutch East India Company (VOC) retained Hugo Grotius' services to draft a legal opinion on the capture of the Portuguese vessel *Santa Catarina* in the East Indies by a Dutch admiral acting on behalf of a forerunner of the VOC. The humanist scholar set to work and produced, between October 1604 and November 1606, a legal defense of the VOC's war against the Portuguese in Southeast Asia, *De iure praedae commentarius*, which contains an early version of Grotius' doctrine of natural rights.¹⁵

Freedom of trade with the East Indies and its necessary prerequisite, freedom of the sea, were the issues on which the legal debate over the legitimacy of Dutch privateering turned. If the seizure of the *Santa Catarina* could be shown to be part of a just war fought against the illegitimate Spanish and Portuguese claims to a monopoly of trade with the East Indies, then the

capture itself would be justified. To this end, Grotius adopted a two-pronged strategy, aiming to show, on the one hand, that the VOC's forerunner could be understood as the agent of a sovereign state engaged in a just war against Spain and Portugal, and that, on the other hand, the capture of the ship was justified under the law of nature even if the trading company had been acting on its own behalf as a private actor.¹⁶ It is this latter aspect of Grotius' strategy that made him develop a doctrine of a natural right to punish—the Portuguese, he argued, by monopolizing the high sea, had violated the law of nature, giving rise to the VOC's natural right to punish and providing the trading company with a just cause for war.

The right to punish arises out of a wrong. Since for Grotius such a wrong can—true to his Roman law terminology—be both a simple private delict and a behavior that is criminally relevant, the question arises whether the right inhering in everybody by nature is just a right to enforce obligations out of a private delict or whether it also constitutes a right, arising out of a crime, to mete out punishment. Grotius states that many authors before him had assumed the view that the power to punish (*puniendi potestas*) was vested in the polity alone, excluding therewith the private execution of punishment.

It is not so easy to decide the question of whether or not a private individual [*privatus*] may under any circumstances seek to impose punishment [*poena*] for a crime [*delictum*]. Indeed, since a great many persons maintain that the power to punish has been granted to the state [*res publica*] alone [...], it might seem that private application of force is ruled out entirely. The best method we can adopt for the discussion of this point will be found, however, in the consideration of what was permissible for individuals prior to the establishment of states [*ante respublicas ordinatas*].¹⁷

Grotius adduces Cicero as a warrantor and maintains that Cicero understood punishment as a manifestation of natural law, defining punishment as “that act by which, defensively or punitively, we repel violence and abuse from ourselves and from those close to us whom we should hold dear”, and as “that act whereby we inflict punishment for wrongdoing”.¹⁸ These Ciceronian views lead Grotius to the revolutionary notion of punishment as an institution of natural law, which was novel and which he could not have possibly taken from his scholastic predecessors¹⁹:

In the light of the foregoing discussion, it is clear that the causes for the infliction of punishment are natural [...]. Even so, is not the power to punish [*puniendi potestas*] essentially a power that pertains to the state? Not at all! On the contrary, just as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals; and similarly, the power of the state is the result of collective agreement [...]. Therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state.²⁰

Grotius adopts from the *Digest* Ulpian’s requirement for the transfer of property—“no one can transfer greater rights to someone else than he possesses himself”²¹—in order to apply it to the right to punish. Under the premise that any right that the magistrate possesses must have been transferred to him by the members of the polity, the members of the polity must have already possessed the right to punish, analogous to the Roman law rules for the transfer of ownership, which do not acknowledge the acquisition of ownership through somebody who is not the owner. According to Grotius, the right to punish must thus have already been vested in the individuals prior to the establishment of states.

Grotius corroborates his novel argument with another argument, which is, as Richard Tuck has noted,²² astonishingly identical to the one put forward in favor of a natural right to punish by John Locke:

[T]he state inflicts punishment for wrongs against itself, not only upon its own subjects [*subditi*] but also upon foreigners; yet it derives no power over the latter from civil law, which is binding upon citizens only because they have given their consent; and therefore, the law of nature, or law of nations, is the source from which the state receives the power in question.²³

Grotius' theory of a natural right to punish is really very similar to John Locke's "very strange doctrine" in his *Second Treatise of Government*, according to which "every Man hath a Right to punish the Offender, and be Executioner of the Law of Nature"²⁴. Because Grotius' argument is contained in a chapter of *De iure praedae* that was not to be published until the nineteenth century, the convergence with John Locke is indeed surprising. In *De iure belli ac pacis*, however, Grotius formulated a very similar argument,²⁵ and Locke did know Grotius' mature work.²⁶

There exists a further parallel with Locke's doctrine of punishment, namely the important fact that Grotius' right to punish is a right vested in *every* inhabitant of the state of nature, not only in the injured person herself. Grotius derives the natural right to punish from one of his axiomatic laws (*leges*)—"evil deeds must be corrected"²⁷—, a maxim pulled together with Aristotle's involuntary (*akousia*) legal transactions²⁸ and with the Roman law rules of obligations out of delicts (*obligationes ex delicto*).²⁹ Consistent with these sources, Grotius regards his doctrine of punishment to be a theory of compensatory justice (*iustitia compensatrix*) concerned with the "correction" of wrongs, as opposed to a theory of distributive justice. In order to assure

that the rules of corrective justice are being upheld and implemented, i.e. that wrongs that have occurred are being corrected, Grotius declares that “an injury inflicted even upon one individual is the concern of all”,³⁰ and draws from this the inference that the right to punish in the state of nature belongs not exclusively to the wronged person, but to everyone, thus paving the way for a very extensive interpretation of the right to punish.

On Grotius’ account, the right to punish is vested primarily in every individual in the state of nature, and in polities and their magistrates only in a secondary sense. Any wrong and any injury give cause to a just war, and in the absence of a central political authority even the private individual is competent to mete out punishment—after all, under the Roman law of the *Digest*, private individuals had been legally qualified to punish a delict, Grotius argues,³¹ preparing the ground for a benevolent judgment of the military acts of the Dutch East India Company even under the assumption that one is not willing to see the VOC as a mere agent of the public authority of the United Provinces.

Wrongs amounting to actual crimes evoke according to Grotius a natural right to punish, and give rise therewith to a just cause of war. In Grotius’ own historical context, the crime of the Portuguese consisted of violating the rules of the law nature. By appropriating the high sea, which under natural law according to Grotius belonged as a *res communis* to the whole of humanity, the Portuguese had established an illicit monopoly of trade. This violation of the law of nature amounted to a criminal offense that qualified as “particularly grave”, because “harm [was] inflicted upon the whole of human society”.³²

3. *The right to punish in De iure belli ac pacis*

Grotius wrote his treatise *De iure belli ac pacis* (1625) when he was in exile in Paris, having fled the United Provinces in 1621 after being imprisoned as a result of having taken sides in a major theological and constitutional conflict. Although this later work was written under fundamentally different circumstances, its main teachings, including the doctrine of the natural right to punish, can be understood as an elaborated version of the earlier work.

Unlike in *De iure praedae*, Grotius in *De iure belli ac pacis* differentiates clearly between private delicts that give rise to actions for damages, and criminal delicts that grant a right to punish, devoting a short chapter of *De iure belli ac pacis* to private delicts exclusively.³³ He distinguishes the private delict as an act that can be “repaired” (*reparare*) from the criminal delict as an act that can be punished (*punire*),³⁴ reserving the term *delictum* in the later work for the criminal delict,³⁵ thus allowing for a clarification of the conception of the right to punish, which in *De iure belli ac pacis* stands alone and does not have to bear the additional weight of addressing claims that arise out of tortuous, as opposed to criminal, acts. Apart from this distinction, which applies to the purpose and normative justification of punishment, the doctrine of the right to punish in *De iure belli ac pacis* is identical with the one expounded in *De iure praedae*. The discussion of the natural law character of punishment in the later work corresponds for the most part to the passages in *De iure praedae*, where Grotius had stated that the magistrate’s right to punish was a derivative of the natural right to punish vested originally in every individual.³⁶

In *De iure belli ac pacis* Grotius again cites from Cicero’s *De inventione* to show the natural law character of punishment, and illustrates the natural right to punish with an anecdote about Caesar, taken from the Roman historian Velleius Paterculus:

Nevertheless, the old natural liberty remains, especially in places where there are no courts, as, for example, on the sea. An example of this is perhaps the conduct of Julius Caesar. He, while yet a private citizen, with a hastily levied fleet pursued the pirates by whom he had been captured, sank some of their ships, and put the rest to flight. When the proconsul failed to punish the pirates who had been taken, he himself set out to sea and crucified them.³⁷

The historical example serves as an illustration (not a justification) of the rule that the natural right to punish remains available even for the citizen of a commonwealth such as the Roman republic with its municipal laws when the political authority fails, as in the anecdote about Caesar, or when a political authority does not exist, as on the high sea. But the right to punish, as already pronounced in *De iure praedae*, is inherent in *everyone*, not just in the injured person; the reason for this “very strange doctrine” has to be seen in the need to implement the norms of the natural legal order in a horizontal system without a central political authority.

Translated to a world where commonwealths have come into existence, the natural right to punish entitles every sovereign to punish severe violations of the natural legal order, even if neither the sovereign himself nor the citizens within his jurisdiction have been injured by the violation in question. In Grotius’ view, the purpose and normative justification of punishment are threefold: first, it is advantageous to the wrongdoer himself, in that it “corrects” him and thereby makes him better;³⁸ second, punishment is for the good of him who has been wronged, which is “the sort of punishment that Aristotle also attributes to the ‘justice’ which he himself calls ‘commutative’”;³⁹ and third, punishment serves what we may today call the consequentialist purpose of “prevent[ing] the man who has injured one person from injuring others”, or of “prevent[ing] others from being induced by a feeling of security to annoy any

persons whatsoever”, which is attained by “the infliction of outstanding penalties”.⁴⁰ While the third idea of punishment clearly has a consequentialist character, the first and the second purpose have a deontological or retributive as well as a consequentialist aspect to them.⁴¹ The natural right to punish, then, serves as a threat, allowing to “join force and law together”, in view of the fact that “law fails of its outward effect unless it has a sanction behind it”.⁴²

The implementation of the natural legal order on the international plane, the joining of “force and law together”, is of course made much easier by Grotius’ doctrine of a general natural right to punish, which recognized certain grave violations of the natural law as being such as to affect the interests of all humankind, and vested the right to punish these violations accordingly in every human being, and only derivatively in the sovereigns of commonwealths. Grotius describes these consequences of his doctrine with the utmost clarity:

The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right [*ius*] of demanding punishments not only on account of injuries [*iniuriae*] committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate [*immaniter violare*] the law of nature or of nations in regard to any persons whatsoever [*quaevis personae*]. For liberty [*libertas*] to serve the interests of human society [*humana societas*] through punishments, which originally [*initio*], as we have said, rested with individuals [*singuli*], now after the organization of states and courts of law is in the hands of the highest authorities, not, properly speaking, in so far as they rule over others but in so far as they are themselves subject to no one. For subjection has taken this right away from others.⁴³

With this general right to punish, which is modeled upon a class of Roman penal actions, the *actiones populares*, open to any citizen in virtue of the public interest and not just to the injured party,⁴⁴ Grotius turned self-consciously against his Spanish predecessors, the late scholastics of the school of Salamanca. While this had of course already been the case in *De iure praedae*, in the context of the earlier work it had seemed opportune to Grotius to adduce the Spaniards in favor of his own argument and to suppress any disagreement. In *De iure belli ac pacis*, Grotius openly spoke out against the Salamancan stance:

The contrary view is held by Victoria, Vázquez, Azor, Molina, and others, who in justification of war seem to demand that he who undertakes it should have suffered injury either in his person or his state, or that he should have jurisdiction over him who is attacked. For they claim that the power of punishing is the proper effect of civil jurisdiction, while we hold that it also is derived from the law of nature [...]. And in truth, if we accept the view of those from whom we differ, no enemy will have the right to punish another, even after a war that has been undertaken for another reason than that of inflicting punishment. Nevertheless, many persons admit this right, which is confirmed also by the usage of all nations, [...] not on the basis of any civil jurisdiction, but of that law of nature which existed before states were organized, and is even now enforced, in places where men live in family groups and not in states.⁴⁵

Grotius saw clearly that if a right to war for the purpose of punishment should be upheld, and if just wars should not merely result out of self-defense, the enforcement of property or of contractual rights, then a penal power under the law of nature had to be embraced. Grotius was able to model his theory of a natural right to punish on Cicero's definition of

punishment in *De inventione*, and could fall back on the Roman law institution of a penal action open to all, the *actio popularis*, for his stance that the natural right to punish is originally inherent in everyone.

4. Conclusion

The revolutionary potential of Grotius' doctrine was to become obvious in John Locke's use of the theory against the absolutist tenets of Robert Filmer. For Locke, as for Grotius, the natural legal order, if it was to prevail in the international sphere, had to be backed up by the threat of force, and required therefore a natural right to punish vested in every subject of the law of nature. It was John Locke who enunciated the chief conceptual consequence of Grotius' teachings in his *Second Treatise of Government*:

And that all Men may be restrained from invading others Rights, and from doing hurt to one another, and the Law of Nature be observed, which willeth the Peace and *Preservation of all Mankind*, the *Execution* of the Law of Nature is in that State, put into every Mans hands, whereby every one has a right to punish the transgressors of that Law to such a Degree, as may hinder its Violation. For the *Law of Nature* would, as all other Laws that concern Men in this World, be in vain, if there were no body that in the State of Nature, had a *Power to Execute* that Law, and thereby preserve the innocent and restrain offenders, and if any one in the State of Nature may punish another, for any evil he has done, every one may do so.⁴⁶

Grotius had developed his doctrine of a natural right to punish against the backdrop of the need to show that the Dutch East India Company, even if acting on its own behalf as a private actor, had the right to wage a war of punishment against the Portuguese fleet in Southeast Asia. John

Locke carried the doctrine further and made it the basis of his theory of government by predicating the right as well as the power to govern on the delegated natural right to punish, with well-known anti-absolutist ramifications. It is fair to say that the notion of a natural right to punish vested in each person provided a criterion to distinguish between more or less legitimate forms of government, between absolute monarchy on the one hand and civil government on the other, enabling Locke to declare that the state of nature is to be preferred compared to that of absolute monarchy. In the latter, the subjects had to give up their natural right to punish without at the same time enjoying the advantages of civil government, namely the enforcement of the law of nature through magistrates. Locke's civil society comes about by a delegation of the individual right to punish to the commonwealth, and by the creation of an authority to appeal to "upon any Injury received", yet such an authority cannot exist under an absolute prince.⁴⁷

Conceptually, Grotius' natural right to punish can be analyzed in Hohfeldian terms both as a privilege and a power.⁴⁸ The bearer of Grotius' right to punish is not under a duty to refrain from exercising it, thus having the liberty to punish, and also having the power of altering existing legal circumstances, i.e. he is not under a duty to refrain from altering the legal status of the person which is to be punished. Furthermore, drawing on Jeremy Waldron's useful distinctions between general, special, absolute, and relative rights, it can be said that Grotius' natural right to punish fits the description of a general right *in personam*.⁴⁹ The right is general in that it inheres in everyone qua human being *ab initio*, which means that there is no contingent transaction required in order to become the bearer of the right, and it is *in personam* in that it is a right not against everyone else, but only against the perpetrator of a violation of the law of nature, i.e. the right corresponds to a duty incumbent just on a particular person, but owed by that particular person to all the subjects of the law of nature.

As to the role of the natural right to punish in Hugo Grotius' overall theory of natural justice, it appears that to the extent that this theory of justice is indebted to Aristotle's account of involuntary compensatory justice,⁵⁰ it has a strong retributive and therewith deontological thrust. This comes to bear in Grotius' first and partly in his second justification of the right to punish—punishment is good for the wrongdoer as well as for the victim, it “corrects” the unjust deed and brings about compensatory justness, irrespective of matters of distributive justice. The rationale is entirely in line with Grotius' general reception of Aristotle's theory of justice, which does not concern itself with the distributive aspect of that theory whatsoever, but confines itself—both in *De iure praedae* and in *De iure belli ac pacis*—to that part of Aristotle's particular justice which does not require any distributing authority, thereby implanting part of Aristotle's *polis*-justice into the state of nature, as it were. But Grotius' right to punish is also a secondary right of sorts, derivative of the primary rights of self-defense, property and exaction of debt, and designed to prevent these rights from being invaded by being available to everyone, as was the Roman *actio popularis*.⁵¹ In this regard, Grotius' justification of punishment is obviously of a consequentialist character.

This latter consequentialist element of prevention has a further important implication. By backing up certain rights with the threat of force rather than others, these rights are being distinguished and the norms protecting them are granted a privileged, preemptory character. In Grotius' case, that means that self-defense, property and the exaction of debt become firmly entrenched rights that assume a non-derogable quality. In the realm of domestic political theory, such a doctrine may lead to the limitation of government power and to the entrenchment of certain privileged rights, a tendency that has made itself felt, on a conceptual level, already in

Grotius' own teachings on the right to resistance, and historically in the tradition of constitutionalism commonly associated with John Locke and Montesquieu.

On the international plane, the conceptual consequences of a Grotian natural right to punish go beyond the establishment of certain non-derogable rights and rules, of, in other words, an international *ius cogens*. Given the general quality of Grotius' right to punish, such a right implies not only the nowadays highly contested notion of an international crime, but also the recognition of certain obligations that a state has towards the international community as a whole, i.e. obligations *erga omnes*. Taken together, these implications amount to a rather robust doctrine of unilateral reprisals that can include the use of force, taken by *any* state against a state that offends the above-mentioned entrenched non-derogable *ius cogens* rights, which potentially could justify the use of force in what today is called a humanitarian intervention, since the offense in question could consist in a violation of citizens' rights by their own state.⁵²

It is safe to say that contemporary international law and the United Nations Charter (with its far-reaching prohibition on the use of force and its very narrowly construed permission of force to self-defense)⁵³ would assess Grotius' natural right to punish unfavorably. However, the legality of reprisals, taken by non-injured states against states which violate certain obligations *erga omnes* is an issue of discussion in contemporary international law,⁵⁴ and even the term "international crime" has made a short appearance in 1996 in the *Draft Articles on State Responsibility* of the International Law Commission,⁵⁵ betraying a noteworthy interest in some sort of general right to punish which might be able to strengthen compliance with some basic rules of conduct. Grotius' conception of a natural right to punish might very well be worth another look. *

NOTES

¹ See M. Villey, “Les origines de la notion de droit subjectif”, in id., *Leçons d’histoire de la philosophie du droit*, 2nd ed. (Paris, 1962), 221-250; R. Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge, 1979), 58-81; B. Tierney, *The Idea of Natural Rights* (Cambridge, 1997), 316-342; P. Haggenmacher, “Droits subjectifs et système juridique chez Grotius”, in L. Foisneau (ed.), *Politique, droit et théologie chez Bodin, Grotius et Hobbes* (Paris, 1997), 73-130.

² See, however, for Grotius’ right to property R. Brandt, *Eigentumstheorien von Grotius bis Kant* (Stuttgart, 1974); S. Buckle, *Natural Law and the Theory of Property. Grotius to Hume* (Oxford, 1991); for rights out of contract, see M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (Köln, 1959); for Grotius’ doctrine of the just war in general, see P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983). For Grotius’ early conception of rights, with a discussion of the hitherto unpublished manuscript *Theses LVI*, see B. Straumann, “Natural Rights and Roman Remedies in Hugo Grotius’ Early Natural Law Works”, forthcoming with Van Gorcum, Assen in the proceedings of a 2005 conference on *Hugo Grotius and De iure praedae* held at the Netherlands Institute for Advanced Study.

³ See P. Haggenmacher, “Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture”, in H. Bull, B. Kingsbury, A. Roberts (eds.), *Hugo Grotius and International Relations* (Oxford, 1990), 133-176, at 166.

⁴ It is noteworthy that Grotius, in a number of works that are not specifically treatises on natural law, explicitly does not acknowledge a natural right to punish. See his *Defensio fidei catholicae de satisfactione Christi*, the *De imperio summarum potestatum circa sacra* as well as the early *Commentarius in theses XI*, where the right to punish is vested only in the sovereign.

⁵ See L. J. C. Beaufort, *La guerre comme instrument de secours ou de punition* (The Hague, 1933), 156-177; W. C. L. van der Grinten, “De opvatting van Grotius over straf”, *Tijdschrift voor Strafrecht* 51 (1941), 155-176; G. Simson, “Hugo Grotius und die Funktion der Strafe”, in H.-D. Schwind (ed.), *Festschrift Günter Blau* (Berlin, 1985), 651-663; and the important remarks on Grotius’ right to punish in R. Tuck, *The Rights of War and Peace* (Oxford, 1999), 81f., 88f., 102f., 108. See also G. van Nifterik, “Grotius and the Origin of the Ruler’s Right to Punish”, a paper to be published with Van Gorcum, Assen in the proceedings of a 2005 conference on Hugo Grotius and *De iure praedae* held at the Netherlands Institute for Advanced Study. I am grateful to Dr. Nifterik for sharing a draft of his paper.

⁶ See *De iure belli ac pacis* (hereafter cited as *IBP*) 1, 1, 3, 1: “For law in our use of the term here means nothing else than what is just, [...] that being lawful which is not unjust. Now that is unjust which is in conflict with the nature of society of beings endowed with reason.” Translations are from Hugo Grotius, *De Jure Belli ac Pacis Libri Tres*, trans. F. W. Kelsey, ed. J. B. Scott, *The Classics of International Law* 3, vol. 2 (Oxford, 1925).

⁷ *IBP* 1, 1, 4: *Ab hac iuris significatione diversa est altera, sed ab hac veniens, quae ad personam refertur; quo sensu ius est Qualitas moralis personae competens ad aliquid iuste habendum vel agendum. Personae competit hoc ius, etiam si rem interdum sequatur, ut servitutes praediorum quae iura realia dicuntur comparatione facta ad alia mere personalia: non quia non ipsa quoque personae competant, sed quia non alii competunt quam qui rem certam habeat. Qualitas autem moralis perfecta, Facultas nobis dicitur; minus perfecta, Aptitudo [...].* The following edition has been used: Hugo Grotius, *De iure belli ac pacis libri tres, in quibus ius*

naturae et gentium item iuris publici praecipua explicantur, curavit B. J. A. de Kanter-van Hettinga Tromp, with additional notes by R. Feenstra and C. E. Persenaire (Lugduni Batavorum, 1939, reprint Aalen, 1993).

⁸ *IBP* 1, 1, 5.

⁹ For the Roman law differentiation between actions for a penalty and actions for the adjustment of property relations, see, e.g., the penal *actio furti* in Ulp. *Dig.* 13, 1, 7, 1.

¹⁰ In *IBP* 3, 10, Grotius describes the consequences that arise under natural law (*iustitia interna*) when a war has been waged on unjust grounds, especially with regard to the things permissible in war (*ius in bello*). A war waged without a just cause is different from a just war in its legal effect—things taken in an unjust war, e.g., have to be restored under the law of nature; see *IBP* 3, 10, 5f. An unjust war may of course in turn give rise to a just cause of war for the other warring party. This is not to say that for Grotius everything was permissible under the natural law of the *ius in bello* when the war had been waged with a just cause; see *IBP* 3, 11 for the limitations imposed; see also Haggenmacher, *Grotius et la doctrine*, 579ff. for the notion of *iustitia interna*.

¹¹ *IBP* 2, 1, 1, 4: *Causa iusta belli suscipiendi nulla esse alia potest, nisi iniuria*.

¹² *IBP* 2, 1, 2, 1: *Ac plane quot actionum forensium sunt fontes, totidem sunt belli: nam ubi iudicia deficiunt incipit bellum*.

¹³ See Haggenmacher, “Grotius and Gentili”, 164f.

¹⁴ See Thomas Aquinas, *Summa theologiae*, IIa-IIae, q. 64, a. 3. See also Haggenmacher, *Grotius et la doctrine*, 228.

¹⁵ For the capture of the Portuguese ship *Santa Catarina*, see M. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615* (Ph.D. diss., Harvard, 2002), 26-79; P. Borschberg, “The Seizure of the *Santa Catarina* Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602-c.1616)”, *Journal of Southeast Asian Studies* 33 (2002), 31-62; R. Fruin, “An Unpublished Work of Hugo Grotius’s”, trans. from an essay in Dutch (1868), *Bibliotheca Visseriana* 5 (1925). For the dating of *De iure praedae* as well as a careful examination of the historical circumstances out of which the work arose, see Ittersum, *Profit and Principle*, 140-244, 634.

¹⁶ For Grotius’ conception of the high seas as a state of nature and his dependency on a Roman tradition in establishing the rules relevant in that natural state, see B. Straumann, “‘Ancient Caesarian Lawyers’ in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius’ *De iure praedae*”, *Political Theory* (forthcoming).

¹⁷ *De iure praedae* (hereafter cited as *IPC*) 8, fol. 39: *Cum enim doceant plerique puniendi potestatem soli reipublicae concessam, unde et publica iudicia dicuntur, videri potest privata manus omnino excludi. Sed hoc commodius expediri non potest quam si videamus, quid licuerit unicuique ante respublicas ordinatas*. The following facsimile edition of *De iure praedae commentarius* has been used: Hugo Grotius, *De iure praedae commentarius. A Collotype Reproduction of the Original Manuscript of 1604 in the Handwriting of Grotius belonging to the State University of Leyden*, ed. J. B. Scott, *The Classics of International Law* 22, vol. 2 (Oxford, 1950). The translation is taken from Hugo Grotius, *De iure praedae commentarius. Commentary on the Law of Prize and Booty*, A Translation of the Original Manuscript of 1604 by G. L. Williams, with W. H. Zeydel, ed. J. B. Scott, *The Classics of International Law* 22, vol. 1 (Oxford, 1950).

¹⁸ *IPC* 8, foll. 39f.: *Et ipse Cicero, [...] cum ius naturae esse dixisset, id quod nobis non opinio, sed innata vis afferat, inter eius exempla statuit vindicationem quam gratiae opponit: [...] definit vindicationem, per quam vim et contumeliam defendendo, aut ulciscendo propulsamus a nobis, et a nostris qui nobis cari esse debent, et per quam peccata punimus.* Grotius is citing verbatim Cicero, *De inventione* 2, 66.

¹⁹ See Haggemacher, “Droits subjectifs”, 88f. Note, however, that Grotius in *IPC* derives the right to punish also from a concept that belongs to the Roman just war doctrine, namely from the demand for redress (*rerum repetitio*), which in the Roman doctrine constitutes a necessary condition for a just war; see *IPC* 8, fol. 44’.

²⁰ *IPC* 8, fol. 40: *Ex his apparet puniendi causas esse naturales [...]. Quid ergo, nonne puniendi potestas reipublicae propria est? Imo vero ut a republica ad magistratum, ita ad rempublicam ius omne a singulis devenit, collatoque consensu [...] potestas publica constituta est. Quare cum transferre nemo possit, quod non habuit, ius illud antiquius penes privatos fuisse quam penes rempublicam necesse videtur.*

²¹ Ulp. *Dig.* 50, 17, 54: *nemo plus iuris ad alium transferre potest quam ipse habet.* Translations of the *Digest* are taken from A. Watson (ed.), *The Digest of Justinian* (Philadelphia, 1998).

²² See Tuck, *Natural Rights Theories*, 63; id., *Rights of War*, 82.

²³ *IPC* 8, fol. 40’: *Respublica non tantum subditos sibi ob maleficium punit, sed etiam extraneos. In hos autem potestatem non habet iure civili, ut quod cives tantum ex consensu obliget: Habet igitur ex iure Naturae seu Gentium.* John Locke’s argument runs as follows: “And therefore if by the Law of Nature, every Man hath not a Power to punish Offences against it, as he soberly judges the Case to require, I see not how the Magistrates of any Community, can *punish an Alien* of another Country, since in reference to him, they can have no more Power, than what every Man naturally may have over another [italics Locke].” John Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge, 1967), 273, § 9.

²⁴ Locke, *Two Treatises*, 272, § 8f.

²⁵ *IBP* 2, 20, 40, 4.

²⁶ See P. Laslett, “Introduction”, in Locke, *Two Treatises*, 22, 87.

²⁷ *IPC* 2, fol. 8: *MALEFACTA CORRIGENDA.*

²⁸ Aristotle, *Nicomachean Ethics* 5, 1131a1ff.

²⁹ See, e.g., W. W. Buckland, *A Textbook of Roman Law*, 2nd ed. (Cambridge, 1932), 576ff.

³⁰ *IPC* 2, fol. 8’: *Pertinet autem ad omnes quodammodo iniuria etiam uni illata [...].*

³¹ *IPC* 7, fol. 30a: *Etiam expetitio poenae ex delicto privatim permittitur [...].* Grotius adduces the following passages out of the *Codex Iustinianus*: *Cod.* 9, 9, 4; 1, 3, 54 and 3, 27.

³² *IPC* 12, fol. 119’: *Praecipue autem grave est peccatum, quo tota laeditur humana societas, cui vinculo antiquissimo obstricti et obnoxii sumus.*

³³ *IBP* 2, 17. The differentiation can be traced back to Grotius’ *Inleidinge tot de Hollandsche Rechts-Geleerdheid* 3, 32, 7.

³⁴ *IBP* 2, 20, 1, 1: *Supra cum de causis ex quibus bella suscipiuntur agere coepimus, facta diximus duplici modo considerari aut ut reparari possunt aut ut puniri.* See also *IBP* 2, 20, 38.

³⁵ See Haggemacher, *Grotius et la doctrine*, 554.

³⁶ *IPC* 8, foll. 39-41’ correspond to *IBP* 2, 20, 8.

³⁷ *IBP* 2, 20, 8, 5: *Manet tamen vetus naturalis libertas, primum in locis ubi iudicia sunt nulla, ut in mari. Quo forte referri potest, quod Caius Caesar privatus adhuc piratas a quibus captus fuerat classe tumultuaria persecutus est, ipsorumque naves partim fugavit, partim mersit, et cum*

proconsul negligeret animadvertere in captos piratas, ipse eos in mare reversus cruci suffixit. Grotius paraphrases the same passage from Velleius Paterculus (Vell. 2, 42) in *IPC* 8, fol. 41'. Grotius knew the anecdote also from Plutarch's biography of Caesar (2, 708), but follows Velleius more closely.

³⁸ *IBP* 2, 20, 7.

³⁹ *IBP* 2, 20, 8; 2, 20, 6, 1. By Aristotle's "commutative" or "expletive justice" (*iustitia commutatrix* or *expletrix*, translating *dikaiousune sunallaktike*) Grotius means what he in *IPC* had called *iustitia compensatrix*, compensatory justice, as opposed to Aristotle's distributive justice. See *IBP* 2, 20, 2 for the attribution of punishment to the realm of expletive justice.

⁴⁰ *IBP* 2, 20, 9.

⁴¹ The first justification, the good of the wrongdoer, implies a reformative and therefore consequentialist view of punishment (as it can be found in Plato), as well as a retributive, deontological view (restoring equality). The second justification, the good of him who has been wronged, contains the consequentialist element of prevention in that he who has been wronged "may not suffer any such thing from the same man or from others"; *IBP* 2, 20, 8, 1. It also contains, however, the purely retributive element of corrective justice. These three aspects of the right to punish are already adumbrated in *IPC* 2, foll. 8'f.

⁴² *IBP* prol. 19.

⁴³ *IBP* 2, 20, 40, 1: *Sciendum quoque est reges et qui par regibus ius obtinent ius habere poenas poscendi non tantum ob iniurias in se aut subditos suos commissas, sed et ob eas quae ipsos peculiariter non tangunt, sed in quibusvis personis ius naturae aut gentium immaniter violant. Nam libertas humanae societati per poenas consulendi, quae initio ut diximus penes singulos fuerat, civitatibus ac iudiciis institutis penes summas potestates resedit, non proprie qua alii imperant, sed qua nemini parent. Nam subiectio aliis id ius abstulit.*

⁴⁴ For an *actio popularis*, see, e.g., the action against the violation of a tomb, *Digest* 47, 12, 3 pr.: "The praetor says: 'Where it be said that a tomb has been violated [...], I will give an *actio in factum* against him so that he be condemned for what is right and fitting to the person affected. If there be no such person or if he does not wish to sue, I will give an action for a hundred gold pieces to anyone who does wish to take action [italics mine].'"

⁴⁵ *IBP* 2, 20, 40, 4: *contra quam sentiunt Victoria, Vasquius, Azorius, Molina, alii, qui ad iustitiam belli requirere videntur, ut qui suscipit aut laesus sit in se aut republica sua, aut ut in eum qui bello impetitur iurisdictionem habeat. Ponunt enim illi puniendi potestatem esse effectum proprium iurisdictionis civilis, cum nos eam sentiamus venire etiam ex iure naturali [...]. Et sane si illorum a quibus dissentimus admittatur sententia, iam hostis in hostem puniendi ius non habebit, etiam post susceptum bellum ex causa non punitiva: quod tamen ius plerique concedunt et usus omnium gentium confirmat, [...] non ex ulla iurisdictione civili, sed ex illo iure naturali quod et ante institutas civitates fuit, et nunc etiam viget, quibus in locis homines vivunt in familias non in civitates distributi.* For a very lucid reading of this passage, see P. Haggemacher, "Sur un passage obscur de Grotius", *The Legal History Review* 51 (1983), 295-315, who maintains (at 304) that Grotius' interpretation of the Spaniards is correct only in his first sentence, not in the too narrow second sentence. For our purpose it suffices to say that Grotius was certainly correct in claiming that the Spaniards had not acknowledged a natural right to punish vested in everyone.

⁴⁶ Locke, *Two Treatises*, 271f., § 7 (italics Locke).

⁴⁷ Locke, *Two Treatises*, 326, § 90.

⁴⁸ See W. Hohfeld, *Fundamental Legal Conceptions, as Applied in Judicial Reasoning, and Other Legal Essays*, ed. W. W. Cook (New Haven, 1919); for a summary, see J. Feinberg, *Social Philosophy* (Englewood Cliffs, 1973), chapter 4.

⁴⁹ See J. Waldron, *The Right to Private Property* (Oxford, 1988), 106-109.

⁵⁰ See Aristotle, *Nicomachean Ethics* 5, 1131b25ff.

⁵¹ Grotius' whole doctrine of rights bespeaks a distinct Roman law influence, and it is clear that the Aristotelian theory of justice is used by Grotius only in those parts that are susceptible to being adapted to a Roman framework. Rather than testifying to an "inability" of modern moral philosophers to understand the fragments of a lost Aristotelian tradition, as Alasdair MacIntyre has maintained, Grotius' case seems to suggest that in fact modern moral philosophy is based on quite conscious a destruction of the Peripatetic tradition and on an equally conscious orientation towards a perfectly intelligible Roman tradition; see A. MacIntyre, *After Virtue*, 2nd ed. (Notre Dame, 1984), 257. For Grotius' dependency on a Roman tradition, see Straumann, "'Ancient Caesarian Lawyers'".

⁵² See P. P. Remec, *The Position of the Individual in International Law according to Grotius and Vattel* (The Hague, 1960), 206-225; Haggemacher, "Sur un passage", 313f.

⁵³ UN Charter, Art. 2(4), Art. 51.

⁵⁴ The discussion about the use of counter-measures or reprisals by non-injured states focuses mainly on the interpretation of articles 48 and 54 of the *Articles on Responsibility of States for Internationally Wrongful Acts*, adopted by the International Law Commission in 2001, which does not constitute treaty law and can only partly be seen as declaratory of customary international law. Even the Roman law concept of an *actio popularis*, bestowing legal standing to non-injured states in judicial proceedings, has for a while enjoyed some popularity with international lawyers; see the influential article by E. Schwelb, "The Actio Popularis and International Law", *Israel Yearbook on Human Rights* 2 (1972), 46ff.

⁵⁵ See Art. 19 of the *Draft Articles on State Responsibility Provisionally Adopted by the International Law Commission on First Reading*, printed in J. Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge, 2002), 352f.; see also the contributions in J. Weiler, A. Cassese, M. Spinedi (eds.), *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Berlin, 1989). Art. 19 and the concept of international crimes were rejected on the second reading of the Draft Articles and replaced by the final Art. 41 and the notion of "serious breaches" of peremptory obligations; see Crawford, *Articles*, 16-20.

* The author is Alberico Gentili Fellow in the Program in the History and Theory of International Law and Global Research Fellow in the Hauser Global Law School Program at New York University School of Law. The author would like to thank Benedict Kingsbury and Gustaaf van Nifterik for their help. Many thanks to Ossai Miazad for her keen editorial eye.