NORTHWESTERN UNIVERSITY

STUDIES IN RUSSIAN PHILOSOPHY, LITERATURE, AND RELIGIOUS THOUGHT

Volume 2 (2025)

ISSN 3065-0755

Northwestern
UNIVERSITY LIBRARIES

Whose Right?

The Law of Nature and the Law of Nations in Grotian Legal Genealogy

by Megan Brand

Are there enduring natural rights that all leaders in international affairs are bound to uphold? If so, from where do they arise, and how are international actors held accountable to them? This article responds with Grotius' legal philosophy, which holds that the universal law of nature binds all together, that leaders should abide by agreements, and that all should pursue right action vis-à-vis other people because human sociability is intrinsic, universal, and enduring. For Grotius, state action should do right, not merely align with power, and doing right derives from humans' unique knowledge of good and evil. This article explains the difference between the law of nature and the law of nations through Grotius' analysis of state practice on poison, killing, and unequal alliances. As scholars question the durability of the international order, especially since Russia's 2022 invasion of Ukraine, the relationship between the law of nations and law of nature provides both practical and normative frameworks for ordered action in international affairs.

Keywords: law of nations, Grotius, natural law, international relations, human rights, constitutionalism, international order, Russia, legal philosophy, international society

NORTHWESTERN UNIVERSITY STUDIES IN RUSSIAN
PHILOSOPHY, LITERATURE, AND RELIGIOUS THOUGHT

Volume 2 (2025): 164–184
10.71521/e6ny-0131

Whose Right?

The Law of Nature and the Law of Nations in Grotian Legal Genealogy

Megan Brand

Russia's military invasion of Ukraine on February 24, 2022, initiated a land war in Europe that shocked much of the world. It was shocking not only because it violated a treaty and an independent state's international legal sovereignty, but also because it was an affront to the law of nations, to what was understood as acceptable action in the day-to-day affairs among countries, and in this case, specifically among great powers in Europe. A land war by a great power in Europe had come to be almost unthinkable after the fall of the Soviet Union and in the following decades, when new territorial boundaries were agreed upon by newly formed states as well as by Russia itself.[1] Russia's 2022 military aggression, bolstered by revisionist arguments that attempted to historically legitimize the redrawing of Russian borders,[2] challenges the order of the international state system in fundamental ways.[3] Treaty-based agreements recognized by states and institutionalized through observance by international organizations, civil society groups, and states themselves have become the mode of state recognition and provide a degree of stability to contentious issues of territorial borders. Yet when he launched the invasion, Vladimir Putin declared, "the old treaties and agreements are no longer effective."[4]

Russia's aggression and the international response raise, in dramatic form, the perennial question of might versus right in international affairs. The law of nations, which this article explicates in terms of Grotian legal philosophy, can be summarized simply as the way states conduct their affairs in the international sphere. But the law of nations is also linked to norms, which form broader ideas of constitutionalism, of acceptable

1. Treaty between Ukraine and the Russian Federation on the Ukrainian-Russian State Border, Concluded in Kiev, January 28, 2003, United Nations Treaty Series Vol. 3161, Registration No. 54132; Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation, Concluded in Kiev May 31, 1997, United Nations Treaty Series Vol. 3007, Registration No 52240.

2. Vladimir Putin, "On the Historical Unity of Russians and Ukrainians," July 12, 2021, http://en.kremlin.ru/events/president/news/66181.

3. Hathaway calls Russia's aggression "the most fundamental challenge to the modern international legal order since World War II." Oona Hathaway, "International Law Goes to War in Ukraine," *Emory International Law Review* 38, no. 3 (2024): 576.

4. Vladimir Putin, "Address by the President of the Russian Federation," February 24, 2022, http://en.kremlin.ru/events/president/news/67843.

practice of what makes the rules of the day operate and stick, beyond what is strictly and technically written in the words of a document. Documents leave room for interpretation, which is not limited to legal interpretation but moves beyond to construction, how actors in a constitutional system view their obligations, duties, and limits and how different institutions within a constitutional system resolve conflicts over these obligations, duties, and limits. In terms of constitutional theory, Keith Whittington argues for the importance of norms in shaping meaning, defining constitutional construction as "the method of elaborating constitutional meaning in this political realm" and where constructions "make normative appeals about what the Constitution should be."[5] What becomes constitutionally acceptable is what evolves out of practice. Extending the idea of constitutionalism to the society of states is not seamless, but scholars have long argued that different "international orders ... can indeed exhibit constitutional characteristics."[6] John Ikenberry further defines order as the "'governing' arrangements among a group of states, including its fundamental rules, principles, and institutions," which are not far off from Grotian conceptions of the law of nations.[7]

Russia's war in Ukraine forces us to think anew about what is and ought to be (im)permissible in international affairs between states. A Grotian legal philosophy would argue that the laws of nature apply to human action at war, and that these laws are unchanging. Because Hugo Grotius grounds his legal philosophy in what he sees as unwavering reality and truth, the law of nature continues to apply to contemporary international relations, including the war in Ukraine. The law of nature is not a social contract-based theory, requiring buy-in from parties on all sides of the issue at hand to apply. Rather, the law of nature is anthropological, embedded into humankind's very nature, and to which humans are bound by the author of nature and can observe this truth through facts of human sociability that necessitates relations with other humans. At the same time, Grotius is no idealist when it comes to law's application in the international sphere. For his legal theory, obligation arises from mutual consent, and his law of nations takes into account the actual day-to-day dealings and actions by states. He distinguishes the law of nations from the law of nature, which blends normative and descriptive approaches to analyzing human action. It could be that a commander orders an attack, say on children, that is against the law of nature. The fact that people act against the law of nature does not negate its existence. Or it could be that the positive law permits an action against the law of nature. Even if permitted by the positive law, the law of nature condemns said action. Perhaps the most relevant application of Grotius to contemporary conflict and war is his broad understanding of the law of nations. For Grotius, the law of nations ought to be the positive law working out of the law of nature. However, because humans err in this application, the law of nations is not always what it ought to be. The law of nations may turn into what states take to be

5. Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge, MA: Harvard University Press, 1999), 1, 121.

6. G. John Ikenberry, *After Victory: Institutions, Strategic Restraint, and the Rebuilding of Order after Major Wars* (Princeton: Princeton University Press, 2001), 6.

7. Ikenberry, *After Victory*, 23.

acceptable modes of interaction with each other, which, as this article discusses later, are often at odds with the law of nature.

Russia's war on Ukraine has potentially altered the law of nations. As Grotius argued, "a single people can change its determination without consulting others; and even this happens, that in different times and places a far different common custom, and, therefore, a different law of nations (improperly so called), might be introduced."[8] A land war in Europe, in direct violation of treaties agreed to by Russia, shook the foundations of a liberal order in Europe and the West. It has called into question the extent to which these territorial agreements apply. Each violation of previously understood limits on war alters the law of nations for today, especially when other states take the side of Russia. Relations between states is an iterative process, based in part on expectations and limits about each other's behavior. While the idea of sovereignty has limited when states will intervene in the domestic affairs of other states, there are exceptions to this—most notably genocide—that states worldwide have recognized. State practice has formed an expectation in the law of nations: if you annihilate a people group within your state, other countries might intervene to stop it. Russia's aggression undermines the previously understood international legal sovereignty wherein states agree to a set of borders and to the recognition of a state as pertaining to those borders.[9] Russia has violated territorial sovereignty by its military action. Even further, it has violated the idea of international legal sovereignty by historical revisionism, claiming Ukraine as its own and calling its aggression a "special military operation."[10]

Grotius in Russian Legal Thought

In light of recent events, it may seem paradoxical that Grotius exercised influence on the development of Russian legal thought, from philosophers of natural law like Pavel Novgorodtsev to the Soviet understanding of the law of the sea.[11] At the same time, important distinctions exist between Grotius' philosophy of international law, which emphasizes the universal, social nature of man, and historic Russian perspectives on international law. An enduring debate is the universality of the law of nature applied in international relations. Related to this question is how Eurocentric was and is the law

8. *De Jure Belli ac Pacis* (DJBP) 2.8.1.2. References to Hugo Grotius, *The Law of War and Peace*, unless otherwise noted, use the Francis W. Kelsey translation (1925), reprinted in James Brown Scott, ed., *The Classics of International Law* (Washington, D.C.: Carnegie Endowment for International Peace, 1984). It will be abbreviated as DJBP.

9. Stephen Krasner defines international legal sovereignty as, "the practices associated with mutual recognition, usually between territorial entities, that have formal, juridical independence." Stephen Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999), 3.

10. On the term "special military operation," see Vladimir Putin, "Address by the President of the Russian Federation," February 24, 2022, http://en.kremlin.ru/events/president/news/67843. Putin described Ukraine's sovereignty as possible "only in partnership with Russia." See Vladimir Putin, "On the Historical Unity of Russians and Ukrainians," July 12, 2021, http://en.kremlin.ru/events/president/news/66181.

11. Randall A. Poole, "Pavel Novgorodtsev and the Concept of Legal Consciousness in Russian Philosophy of Law," *Istoriko-filosofskii ezhegodnik* (*History of Philosophy Yearbook*) (Institute of Philosophy, Russian Academy of Sciences, Moscow) 37 (2022): 84–123, esp. 92; W. E. Butler, "Grotius' Influence in Russia," in *Hugo Grotius and International Relations*, ed. Hedley Bull, Benedict Kingsbury, and Adam Roberts (Oxford University Press, 1992), 266, https://doi.org/10.1093/0198277717.003.0009.

of nations. Building on that question is the debate about Russia's place in the law of nations: to what extent is Russia European? If the law of nations is seen as an exclusive marker of "civilized nations," as the Russian legal theorists Peter Shafirov and Friedrich Martens maintained, rather than a universal idea applicable to all, where does Russia fit?[12] Was the law of nations applicable only in Europe, and if so, has Russia ever counted as European in legal tradition? Beyond geography is the religious dimension of different theories of the law of nations. Was the law of nations as put forward by theorists like Grotius merely applicable to Christian rulers, and if so, did that apply across Catholic, Protestant, and Orthodox traditions, or was it siloed into one of them? While this article restricts itself to the Grotian legal genealogy that explains the emergence of the law of nations, the significance of this Grotian approach and universality matters for the historic and continuing debates about the place of Russia in the society of states.

Grotius' *On the Law of War and Peace* did not appear in full in Russian until 1956, which might seem to preclude centuries of influence, but Russian intellectuals had access to his writings in Latin and French.[13] The study of natural law had early support in the late 17th and early 18th centuries under Peter the Great, but for political, religious, economic, and social reasons, it did not become embedded in practice during that period in Russia as it had in other parts of Europe, although it took root at a theoretical level by the late 19th century.[14] Russian international law held varying perspectives on the universality of natural law, a question that played into debates about Russia's in-group or out-group belonging to Europe. The question of the universality of natural law also had religious variation that separated Russia from Europe. While just war positions are not monolithic, it is fair to say that just war theories generally argue that just war requires justice in going to war and just actions in war. A consequence of the idea of justice within war is limited atrocities; even when hostilities are entered into for just causes, in theory, actions must abide by certain principles, such as proportional responses. By contrast, Russian theorists like Mikhail Taube, chair of international law at Imperial St. Petersburg University before his 1917 exile, characterized Russian approaches to war as Caesaropapist, where "all wars by Byzantium were legitimate," with a consequence that such wars "were among the cruelest and there

12. Peter Shafirov wrote on just war theory in relation to Russia's early 18th century war with Sweden: Peter Shafirov, *A discourse concerning the just causes of the war between Sweden and Russia: 1700–1721*, intro. William E. Butler (Dobbs Ferry, NY: Oceana Publications, 1973). Friedrich Martens was a legal theorist, professor, and diplomat to the Hague, for which the 1899 Martens Clause is named. L. Malksoo summarizes Shafirov and Martens' views in "The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe," *European Journal of International Law* 19, no. 1 (February 1, 2008): 216–219, 220–222. Grotius' universal claims about human nature also diverge from claims by theorists like Fyodor Ivanovich Kozhevnikov (1893–1998), a Moscow State University Law Dean and International Court of Justice judge. See L. Malksoo, "The History of International Legal Theory in Russia," 226– 228.

13. Butler, "Grotius' Influence in Russia," 258–61.

14. Randall A. Poole, "Introduction: A Russian Conception of Legal Consciousness," in *Law and the Christian Tradition in Modern Russia*, ed. Paul Valliere and Randall A. Poole (London and New York: Routledge, 2022), 1–20. For summary of natural law reception in Russia in the 17th–18th centuries see Dmitry Poldnikov, "The Legacy of Classical Natural Law in Russian Dogmatic Jurisprudence in the Late 19th Century," *Journal on European History of Law* 4 (2013): 73.

were no constraints of law with respect to the enemy."[15] Grotius enters into this conversation in an interesting way; his law of nature is normative, arguing for limits on war. However, his description of actual practice across nations acknowledges many situations under which cruelty and atrocities occur. Grotius' claimed objectivity of human moral knowledge, combined with his analysis of actual state practice, carves out its own space in theories of war. Understanding Grotian legal genealogy is therefore productive for teasing out similarities and differences with Russian approaches to the law of nations and for setting the stakes for when the law of nations changes.

By the early 20th century, natural law's objectivism proved a generative response to legal positivism, leading to renewed interest by Russian scholars like Pavel Novgorodtsev and Evgeny Trubetskoi.[16] Around this time, a Russian publication summarized *On the Law of War and Peace*, critiquing Grotius' theological perspective.[17] Grotian legal thought flows from his human anthropology grounded in theological perspectives, which the present article examines in the area of the meaning of the law of nature and the law of nations. Russian critiques of Grotian theology carry over to legal thought because theological presuppositions ground Grotius' legal philosophy. Analysis of Grotian legal thought that neglects to factor in Grotius' presuppositions about human nature, right reason, and the sociability of man arising from the author of nature will fail to accurately apply his philosophy of law. This article explains how these distinctions across levels of law (laws of nature and positive law) interact in Grotian legal philosophy and demonstrates how these frameworks apply to Grotian thought on poison, killing, and unequal alliances.

The early 20th century Russian interest in natural law dwindled when the state persecuted intellectuals whose views diverged too far from Marxism.[18] Yet decades later, the Soviet Union took up arguments on the world stage that were reminiscent of Grotian arguments. Specifically, during negotiations on the Law of the Sea Convention, the Soviet Union's position on free navigation through straits rested on the idea of "international navigation as immutable, almost natural, laws regulating international relations and trade at sea."[19] In some ways, the ebbs and flows of Russian interest in natural law generally and in Grotius specifically speak to the enduring relevance of Grotian thought in international relations. At times of negotiation across the shared global resources, like the sea, and in considering questions of enduring moral import, like killing in war, Grotius' writings continue to offer arguments that states find useful and compelling. When and why states take up Grotian arguments may indicate a deep interest in cooperation in a certain issue area, which is one reason why articulating the difference between the law of nature and the law of nations in Grotian thought is foundational to understanding the application of his many arguments.

---

15. Malksoo, "The History of International Legal Theory in Russia," 214, 223.

16. Poldnikov, "The Legacy of Classical Natural Law in Russian Dogmatic Jurisprudence in the Late 19th Century," 74.

17. Butler, "Grotius' Influence in Russia," 260.

18. Poldnikov, "The Legacy of Classical Natural Law in Russian Dogmatic Jurisprudence in the Late 19th Century," 74.

19. Pierre Thevenin, "A Liberal Maritime Power as Any Other? The Soviet Union during the Negotiations of the Law of the Sea Convention," *Ocean Development and International Law* 52, no. 2 (2021): 215.

This article distinguishes between the law of nature and the law of nations in Grotius' legal genealogy, which is necessary to be able to interpret his arguments on actions in international affairs. For Grotius, an act may be in accord with the law of nature but not the law of nations, in accord with the law of nations but not the law of nature, or in accord with both or neither. Grotius' discussions of war, killing by poison, and alliances all require understanding which form of right he is referencing. The Grotian law of nature is rooted in the social nature of man, stemming from a divine creator. The law of nations is the practice of states and the positive law working out of the law of nature between states, several steps removed, and like other areas of positive law, may or may not accord with a view of the law of nature. Grotian law of nations should be understood as state practice, which will look different today from his own international relations context, yet to remain true to his legal philosophy, it should remain grounded in a law of nature that is underlaid with principles of right, justice, and mutual sociability. This article references the rights turn that Grotius' legal theory facilitated, analyzes Grotius' legal genealogy in the Prolegomena of his *On the Law of War and Peace*, and demonstrates the distinction Grotius maintains between the law of nature and law of nations by reviving Grotius' commentary on poison, killing, and unequal alliances.

The Grotian Rights Turn in International Legal Thought

Grotius, known as the "father of modern international law" or the "Miracle of Holland," was a Dutch lawyer who wrote about a hundred years after Martin Luther's posting of the Ninety-five Theses. He wrote extensively on laws between nations, his most well-known work being the massive, *On the Law of War and Peace*.[20] A learned person with gifts and interests in many areas, he also wrote on theology and was embroiled in theological controversies that even landed him in prison and in exile.

Grotius was born in 1583 and lived until 1645. Early in his career, he wrote on the law of the sea and trade.[21] He became a public prosecutor in 1607, giving him a foray into the civil and criminal legal system in Holland at the time. He transitioned from the judicial branch to the executive branch in 1613 when he became a legal advisor.[22] He worked at conferences between the English and the Dutch on issues related to the East Indies.[23] In fact, his boss, Oldenbarnevelt, was instrumental in founding the Dutch East

20. See note 8 above. See also Randall Lesaffer and Janne E. Nijman, eds., *The Cambridge Companion to Hugo Grotius* (Cambridge: Cambridge University Press, 2021), xix.

21. These include *De jure praedae commentarius*, available today as Hugo Grotius, *De Jure Praedae Commentarius: Ex Auctoris Codice Descripsit Et Vulgavit Hendrik Gerard Hamaker With an Unpublished Work of Hugo Grotius's* (Lawbook Exchange Ltd, 2015), and *Mare liberum* (1609), English edition Hugo Grotius, *The Free Sea*, trans. Richard Hakluyt (Indianapolis: Liberty Fund, 2004). See historical background in Edward Gordon, "Grotius and the Freedom of the Seas in the Seventeenth Century," *Willamette Journal of International Law and Dispute Resolution* 16, no. 2 (2008): 252–69.

22. Henk Nellen, "Life and Intellectual Development: An Introductory Biographical Sketch," in *The Cambridge Companion to Hugo Grotius*, ed. Randall Lesaffer and Janne E. Nijman (Cambridge: Cambridge University Press, 2021), 23.

23. Nellen, "Life and Intellectual Development: An Introductory Biographical Sketch," 23. Also see Peter Borschberg, "Grotius and the East Indies," in *The Cambridge Companion to Hugo Grotius,* ed. Randall Lesaffer and Janne E. Nijman (Cambridge: Cambridge University Press, 2021), 65–87.

India Company. Through unfortunate theological differences over predestination related to larger church-state issues, Oldenbarnevelt and Grotius found themselves imprisoned in The Hague. Oldenbarnevelt was beheaded in 1619; Grotius received a sentence of "life imprisonment and confiscation of his property."[24] He, like other famous prisoners throughout history such as Samuel Pufendorf, Fyodor Dostoevsky, and Aleksandr Solzhenitsyn, developed ideas while incarcerated that would become part of later masterpieces. In prison, Grotius drafted what may have been an early version of his *On the Law of War and Peace*, as well as poetry and commentary on private law.[25] After several years in prison, in 1621, he escaped in a chest meant for books. Now in exile, he eventually made his way through parts of Europe and became Sweden's ambassador to France, where he spent most of his life. He continually tried to cultivate the unity of the church, an important background concept that informs his legal scholarship.[26]

Grotius is a foundational theorist in the history of modern political thought.[27] He is frequently remembered for his assertion that natural law exists "even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him."[28] This one phrase, out of a large treatise on law and war, has been taken to be a turning point in the history of political thought, moving human rights and law into the area of human rather than divine origin, although even this assertion is debated. This emphasis is misplaced, as this article argues, given Grotius' presuppositions about where human beings originate from and how their created beings are bound by nature and sociability.[29] Some schol-

24. Nellen, "Life and Intellectual Development: An Introductory Biographical Sketch," 27.

25. Nellen, "Life and Intellectual Development: An Introductory Biographical Sketch," 27–28.

26. Nellen, "Life and Intellectual Development: An Introductory Biographical Sketch," 20. Also see Harm-Jan van Dam, "Church and State," in *The Cambridge Companion to Hugo Grotius*, ed. Randall Lesaffer and Janne E. Nijman (Cambridge: Cambridge University Press, 2021), 203.

27. Space does not allow a full accounting of the influence of Grotius on political thought, which would span several volumes. Nevertheless, a few examples or recent scholars who have engaged him in similar areas as this article follow: Hedley Bull, "The Importance of Grotius in the Study of International Relations," in *Hugo Grotius and the Study of International Relations* (New York: Oxford University Press, 1992), 23; Charles Edwards, "The Law of Nature in the Thought of Hugo Grotius," *The Journal of Politics* 32, no. 4 (1970): 784–807, https://doi.org/10.2307/2128383; William P. George, "Grotius, Theology, and International Law: Overcoming Textbook Bias," *Journal of Law and Religion* 14, no. 2 (1999): 605–31, https://doi.org/10.2307/3556583; Janne E. Nijman, "Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium," in *International Law and Religion: Historical and Contemporary Perspectives*, ed. Martti Koskenniemi, Monica Garcia-Salmones Rovira, and Paolo Amorosa (Oxford: Oxford University Press, 2017); Christoph A. Stumpf, *The Grotian Theology of International Law: Hugo Grotius and the Moral Foundations of International Relations* (Berlin/Boston: Walter de Gruyter GmbH, 2006); Oliver O'Donovan, "Theological Writings," in *The Cambridge Companion to Hugo Grotius*, ed. Randall Lesaffer and Janne E. Nijman (Cambridge: Cambridge University Press, 2021), 339–63; Oliver O'Donovan and Joan Lockwood O'Donovan, eds., *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100–1625* (Grand Rapids: Eerdmans, 1999); Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 2001); Ursula Vollerthun and James L. Richardson, *The Idea of International Society: Erasmus, Vitoria, Gentili and Grotius* (Cambridge: Cambridge University Press, 2017); H. J. M. Boukema, "Grotius' Concept of Law," *ARSP: Archiv Für Rechts-Und Sozialphilosophie / Archives for Philosophy of Law and Social Philosophy* 69, no. 1 (1983): 68–73.

28. DJBP Prolegomena, 11.

29. See, for example, John D. Haskell, "Hugo Grotius in the Contemporary Memory of International Law: Secularism, Liberalism, and the Politics of Restatement and Denial," *Emory International Law Review* 25,

ars use this passage from Grotius in the voluntarist and rationalist debates.[30] Other scholarship focuses on the meaning of the law of nations and the development of the law of nations in political and legal thought.[31]

As this article articulates through analysis of the Prolegomena, Grotius' legal philosophy rests on the idea of a creator and enduring natural order, the truth of which he references over and over throughout DJBP. Rather than being seen as a secular turn in rights, this phrase can be understood in several ways. First, for Grotius, human existence is bound in a moral order that is evident; the social relations that follow from this morally ordered existence are true, full stop. While Grotius himself believes in a creator of this order, the existence of the order is demonstrable from human experience, without appealing to religious texts. Secondly, Grotius is putting forward an argument for universality that transcends the Catholic, Calvinist, and Arminian controversies of his day. For his part, Grotius explains that he wrote his treatise on law, war, and peace in part as a response to two extremes: war mongering with little or no cause and, once in war, to act without restraint toward law, whether eternal or human.[32] The other extreme manifests itself as the tendency, of "above everything else ... the duty of loving all men."[33] Grotius suggests that a middle legal road exists such that "men may not believe either that nothing is allowable, or that everything is."[34] He is particularly concerned that "men rush to arms for slight causes or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human."[35] He hopes to articulate how war might be "carried on only within the bounds of law and good faith."[36]

Hathaway and Shapiro, in their historical overview of war, right, and legality, attribute to Grotius the principle of "Might is Right," citing a passage from Grotius' DJBP 3.9.4.2 on postliminy.[37] However, they fail to mention that a few pages later, Grotius comments in DJBP 3.9.10.1, "From the preceding discussion the nature of postliminy may be understood according to the law of nations," meaning his discussion was not a normative claim from the law of nature about might making right.[38] In fact, he denies a might principle without limits when he argues, "that nation is not foolish which does

no. 269 (2011); George, "Grotius, Theology, and International Law"; O'Donovan and O'Donovan, *From Irenaeus to Grotius*, 787–92.

30. Edwards, "The Law of Nature in the Thought of Hugo Grotius," 785–96.

31. A few examples include Edward Dumbauld, "John Marshall and the Law of Nations," *University of Pennsylvania Law Review* 104, no. 1 (1955): 38–56; Paul W. Kahn, "The Law of Nations at the Origin of American Law," in *International Law and Religion: Historical and Contemporary Perspectives*, ed. Martti Koskenniemi, Monica Garcia-Salmones Rovira, and Paolo Amorosa (Oxford: Oxford University Press, 2017); Brian Richardson, "The Use of Vattel in the American Law of Nations," *The American Journal of International Law* 106, no. 3 (2012): 547–71.

32. DJBP Prolegomena, 28.

33. DJBP Prolegomena, 29.

34. DJBP Prolegomena, 29.

35. DJBP Prolegomena, 28.

36. DJBP Prolegomena, 25.

37. Oona Hathaway and Scott Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Made the World* (New York: Simon and Schuster, 2017), 41–42, citing DJBP 3.9.4.2.

38. DJBP 3.9.10.1.

not press its own advantage to the point of disregarding the laws common to nations," and "so the state which transgresses the laws of nature and of nations cuts away also the bulwarks which safeguard its own future peace."[39] These texts show, first, that the law of nations and the law of nature are not the same. More to the point about the "Might is Right" principle is that Grotius, here and in other passages, maintains that because the law of nature is unchanging and universal, its limits apply to all, even to the strong. He argues that just as a person could violate a domestic law in a way that would benefit himself does not mean that he should, so nations should abide by the unchanging law of nature.[40] Reviving Grotius' distinction between the law of nature and the law of nations, as this article does, corrects scholarship that uses Grotian legal philosophy as the foundation for the position that might makes right in the international sphere. Grotius' commentary is extensive and long; not attending to the full meaning and implications of various passages and to his theological presuppositions result in misinterpretation and misapplication of his legal philosophy.[41]

Today, economic trade, specialization of labor, globalism, technology, and inexpensive travel have all contributed to a world that in many ways is integrated across nation states, making Grotian international legal thought relevant now more than ever. However, to understand his commentary on law and war, one must first understand the difference between his law of nature and law of nations, which affects whether his commentary in specific areas should be read as normative, descriptive, or a combination of the two. To summarize the position of this article, Grotius should be read normatively when discussing what is required by the law of nature and be read more descriptively, according to his own political and temporal context, when discussing what is permitted by the law of nations, although even here, the positive law grounding in the law of nature means the law of nations is never too far from normative analysis, especially when it finds a more practice-based norm.[42]

Legal Genealogy

Grotius wrote extensively on the law and war and offers guidance for navigating how to think about right action in international affairs. The very first book of his major treatise offers a philosophy of law, going extensively through the question of what is law? Grotius offers three meanings of law: 1) rule of action toward what is just which he divides into rectorial and equatorial law; 2) body of rights with reference to the person, also expressed as a moral quality toward justice such as powers, property rights, and contracts; 3) law as a rule of moral action that implies obligation, which he further divides into natural law and statutory law (also called established law).[43]

---

39. DJBP 3.9.10.1; DJBP Prolegomena 18.

40. DJBP Prolegomena, 18.

41. O'Donovan and O'Donovan warn of this issue with scholarship on Grotius, noting he is "a dangerous person to quote." Oliver O'Donovan and Joan Lockwood O'Donovan, eds., *From Irenaeus to Grotius*, 788.

42. For scholarship on Grotius' distinction between the law of nature and the law of nations, see Nijman, "Grotius' Imago Dei Anthropology: Grounding Ius Naturae et Gentium."

43. DJBP 1.1.3, 1.1.4, 1.1.9.

Legal genealogy, according to Grotius, relates human nature and law to a family tree analogy.[44] First, there is the nature of man, which enters into the mutual relations of society and which he calls the great grandmother. This nature of man is very social, where, for Grotius, humans would choose to interact with each other even if they did not need to. The sociability aspect underlies his philosophy of law. After the social nature of man is the grandmother in the legal genealogy, the law of nature, which is unique to humankind, rooted in a true reality, and created by God, the author of nature. From the law of nature comes an obligation that arises from mutual consent, the mother in the genealogy. And finally, the positive law, or municipal law, the child, results from this obligation based in consent. The figure below visually represents these relationships.

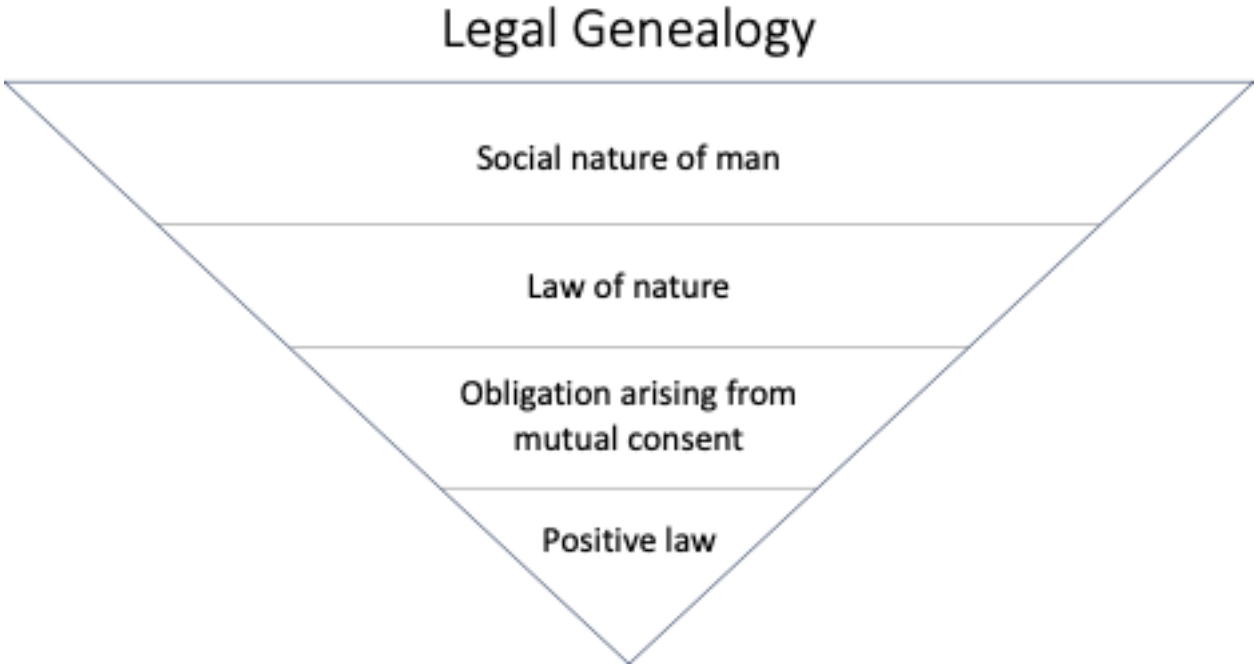

Figure 1.

Grotius takes great care to articulate the existence of the law of nature. He begins by stating, "the law of nature is a dictate of right reason ... and ... inconsequence, such an act is either forbidden or enjoined by the author of nature, God."[45] He goes on to assert that the law of nature is unchangeable, even by God, making an analogy to the truth of mathematical calculations.[46] That said, he suggests that while the law of nature is unchangeable, circumstances may change which alter the way the law of nature applies, similar to the difference between concept and conceptions of rights. He offers the example of common ownership, which could be in accordance with the law of nature, but once a law of ownership is promulgated, one cannot claim a neighbor's

44. DJBP Prolegomena, 16.

45. DJBP 1.1.10.1.

46. DJBP 1.1.10.5.

property.[47] For Grotius, what separates the law of nature for man from more general laws of nature such as those that apply to beasts is doing right, even when it brings harm to oneself; this direction to do right derives from mankind's unique "knowledge of good and evil."[48] This assertion has striking implications in all aspects of life. Grotius does not let people off the hook for knowing good and evil by looking within a domestic legal system. Humankind's knowledge of good and evil even extends to how states, which are made up of people with reason and sociability, interact with other states. From a Grotian perspective, international affairs, because they fall within the social nature that God gives to man, are also subject to right and wrong.

If one is bound by doing what is right, and one knows the difference between good and evil, to will anything other than good is to deviate from the law of nature and descend to the level of the beasts of the earth. In fact, Grotius quotes Plutarch's *Life of Pompey*, "but man becomes brutelike when, contrary to nature, he cultivates the habit of doing wrong."[49] To extend this notion of doing right according to the law of nature, when states act against the law of nature, they lose an aspect of their own humanity. This Grotian idea that when a state's leaders cultivate wrong by habit, they become brutelike, is in conflict with the might makes right idea of the Melian dialogue.

Rewritten, Grotius' legal genealogy applies to international relations. It starts with human nature, the great grandmother, which enters into mutual relations of international society. The law of nature, the grandmother, puts forward knowledge of right action. From this law of nature arises an obligation from the mutual consent of states, what Grotius terms the mother. And from this mutual obligation comes the law of nations, the child.

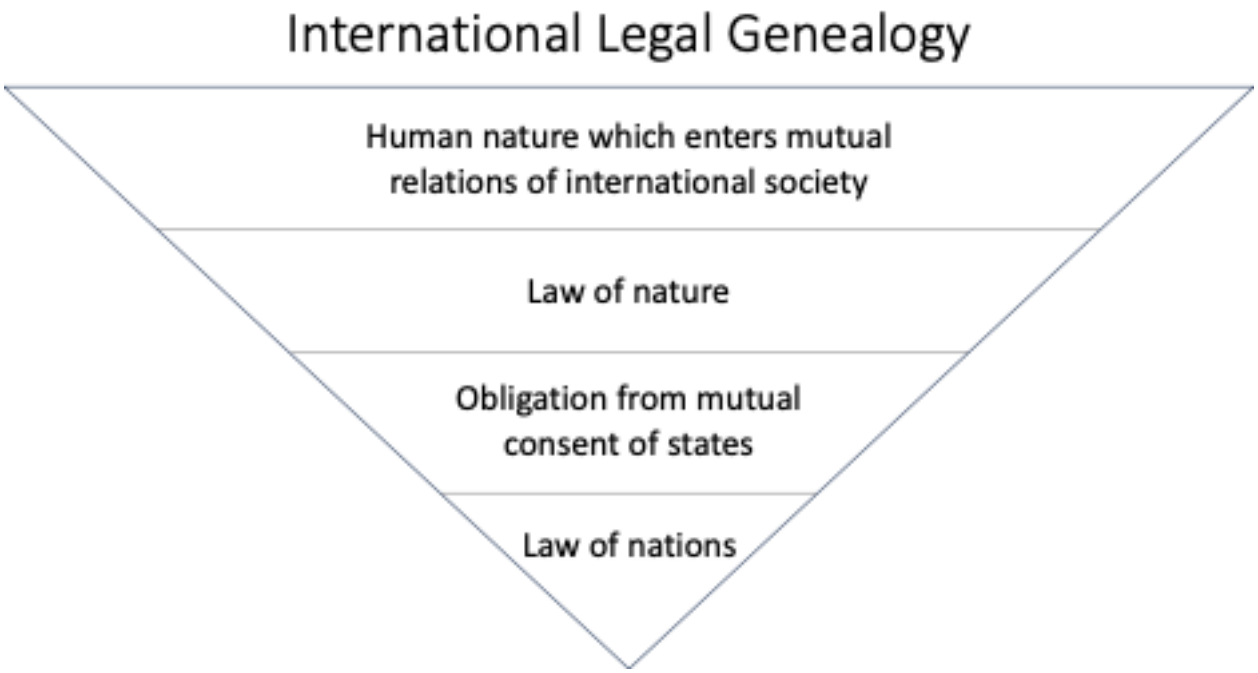

Figure 2.

47. DJBP 1.1.10.7.

48. DJBP 1.1.11.1.

49. DJBP 1.1.12.2.

For Grotius, the law of nations "is the law which has received its obligatory force from the will of all nations, or of many nations ... found in unbroken custom and the testimony of those who are skilled in it."[50] Just as municipal law arises out of obligation from consent because humans by nature need society, in the society of states, laws arise not for the singular interest of one state but for the benefit of the "great society of states."[51] For Grotius, the law of nations is similar to the positive law that seeks to approximate the law of nature that arises out of mutual consent. This theoretical move opens up the possibility of applying the analytical tools used for domestic legal systems to interactions with other states. In other words, because the social nature of man that precedes the law of nature is applicable, for Grotius, to all humankind, similar legal analysis can be used for theorizing and applying law between states (the law of nations) as can be used to apply and theorize law within states (the positive law). Interactions between states are not a mere power calculation because, regardless of one's view of the existence or absence of God, the reality of human existence necessitates mutual interactions with others that are bounded by the law of nature and give rise to obligations. In other words, the human nature of man has, within it, knowledge of right and wrong, and this knowledge pervades human interactions with others, from the local society to the area of international society where states interact with other states. A central power is not necessary for enforcing right, for it is within human nature to know and act on right. Grotius critiques the assertion that man's nature is incapable of distinguishing right from wrong, stating that humans, as distinct from animals, exercise judgment and desire a peaceful, organized, rational society with other humans, and part of this society is international.[52] Grotius critiques a view of law as merely coming from fear of the unjust, in essence containing only a punitive aspect. Grotius suggests that right and justice produce clear consciences that point beyond the mere order of criminal restraint to the flourishing that occurs when humans, in relation to each other, are acting according to laws of nature. Grotius believes justice has the protection of God.[53] As much as Grotius is known as the father of international law, he holds an explicitly Christian view of law and its origins. This religious commitment might make some commentators uncomfortable, but it is weaved obviously throughout his writings, with citations from church fathers and the Bible.[54] But again, even if one left God to the side for the purposes of justice, for Grotius, the law of nature is part of the reality of a human.

Power enters into the equation of right, for without it, enforcing right is difficult. For Grotian legal philosophy, the material capability to enact and enforce right action normatively obligates powerful states. In other words, states that are more materially capable of right action ought to act according to the law of nature rather than taking advantage of weaker states that "suffer what they must" when the "strong do what they

50. DJBP 1.1.14.2.

51. DJBP Prolegomena, 17.

52. DJBP Prolegomena, 8–10.

53. DJBP Prolegomena, 20.

54. The text is replete with references, but see, for example, DJBP 1.1.11.1 citing Romans and Chrysostom; also 1.1.10.5–6.

can."[55] The Grotian obligation to act in accordance with the moral order flips the Melian dialogue on its head. Rather than material power enabling capriciousness and tyranny, in Grotian thought, power ought to enable right action. The much-repeated quote from Thucydides ignores the fact that strong states *can* act rightly; they can act for mutual flourishing. Strength does not necessitate abuse. We would not give a free moral pass to a strong kid on the playground, bloodying his classmates, or a company that was so rich and clever that it could keep slaves for workers without detection by authorities. Likewise, strong states are bound by the law of nature and have more responsibility for acting for the flourishing of human society at the international level precisely because they are more capable of doing so. From this Grotian perspective, might makes right only in the sense of entailing a greater responsibility to do what is right according to the law of nature.

Observing agreements is a principle of the law of nature, which is necessary for a society to have order.[56] Grotius puts this necessity of society first in his genealogy, preceding the law of nature. This sequencing points to the importance that Grotius places on mutual social relations. Individual humans, as well as states, exist in a world where interaction with others is part of reality. This is a social view of the law, with the sociability aspect being foundational to what becomes the positive law. The positive law, whether domestic or international, derives its meaning from its "great grandmother," the social nature of humankind. To have an agreement that is broken adds confusion and undermines trust. This emphasis on knowability and trust arguably finds later expression in Fuller's inner morality of law, which considers morality as coming from the consistency and predictability that all legal systems have.[57]

Grotius extends the importance of agreement beyond private contracts and national governments to agreements between states. To violate the rights of nations erodes future peace.[58] But even if this instrumental reason for not violating the rights of nations does not exist, Grotius still cautions that wisdom would guide us to a policy that is aligned with nature, since nature in the ideal form is ordered toward the supreme good of God.[59] He finds divine law, which he takes to be given to humankind three times (at creation, after the Flood, and through Christ), binding on all as long as it is known to them.[60] This aspect of divine law for those who know it, adds an even higher standard for action.

This discussion of the origins of the law of nature demonstrates that Grotius finds both useful and principled reasons for adhering to natural rights even in international relations. At first glance, justice between nations may not appear a priority, especially for large, prosperous states that seem self-sufficient. According to an interest-based idea of international relations, states will only act virtuously toward other states when it is

55. Thucydides, "The Melian Dialogue," in *Complete Writings: The Peloponnesian War*, trans. Richard Crawley (New York: Modern Library, 1951), Book 5, Chapter 17.

56. DJBP Prolegomena, 15.

57. Lon Fuller, *The Morality of Law*, revised ed. (New Haven: Yale University Press, 1969).

58. DJBP Prolegomena, 18.

59. DJBP Prolegomena, 11–12.

60. DJBP 1.1.15.2.

useful for them to do so. But Grotius reminds his readers that no state is entirely independent, even large, strong states. Following this observation, he argues that powerful states enter into treaties because they will almost certainly need the help of others at some point.[61]

Grotius offers two proofs for the idea of the law of nature among nations. The first is that man's rational and social nature is an antecedent cause that demands this. Grotius' genealogy of law starts with the nature of man, entering into mutual relations of society. According to Grotius, humans are not solitary but are born into society. Similarly, states interact with other states in international society. We cannot escape the idea of borders, which necessitate interactions with those on the other side. These interactions generate mutual relations, which lead to a society of states. In today's world, even more than in Grotius' world, where our economic systems are deeply ingrained with international trade, travel across borders is relatively cheap and easy, and we can obtain information from all over the world, the idea of man's rational and social nature in the international realm seems all too obvious.

The second proof of the law of nature existing within nations is that the law of nature is accepted by most nations.[62] Especially since the postwar era, when states have signed numerous international agreements governing areas as diverse as patents to war, the ubiquitous existence of international law is a fact, even if its effect is not. We can gather that these agreements across states do compose an accepted law of nations rooted in some idea of a law of nature, of the social relations that occur between states. The table below summarizes the legal genealogy for domestic and international law according to Grotius' maternal legal lines.

Legal Genealogy	**Domestic Law**	**International Law**
Great Grandmother	Social Nature of Man	Human nature which enters mutual relations of international society
Grandmother	Law of nature	Law of nature
Mother	Obligation arising from mutual consent	Obligation from mutual consent of states
Child	Positive law	Law of nations

Figure 3.

61. DJBP Prolegomena, 22.

62. DJBP 1.1.12.

Law of Nature and Law of Nations in Practice

As argued above, in Grotian thought, the law of nature and law of nations are not synonymous. Returning to his legal genealogy, the obligation that arises from mutual consent is the bridge between the law of nature and the law of nations. The law of nature puts forward normative and obligatory bounds on human action in international affairs, whereas the law of nations is more descriptive, grounded in what state practice permits or forbids at particular times, which may or may not be in accord with the law of nature. In other words, how states act is not the same as how they ought to act. Grotius explains:

> law of nations is not international law, strictly speaking, for it does not affect the mutual society of nations in relation to one another; it affects only each particular people in a state of peace. For this reason, a single people can change its determination without consulting others; and even this happens, that in different times and places a far different common custom, and therefore a different law of nations (improperly so called), might be introduced.[63]

Grotius' point in this passage is that custom can vary across states and across time periods. What is interesting, however, is the use of "improperly," which reminds the reader of his view that the law of nations, properly understood, should derive from the law of nature, given by the author of nature, which means not all custom is right.[64] Taken to the next step, not all "law of nations" is right law, if unmoored from an idea of human nature grounded in sociability given by God and from the obligation that arises from mutual consent. To explain further, this section will show how Grotius differentiates the law of nature and the law of nations in the areas of poison, killing, and unequal alliances.

Poison

In Book 3, Grotius gives a clear difference between the law of nature and the law of nations by discussing the use of killing by poison. In this case, poison is permitted by the law of nature but not by the law of nations. He explains, "just as the law of nations ... permits many things which are forbidden by the law of nature, so it forbids certain things which are permissible by the law of nature."[65] This passage claims that the law of nature and the law of nations are not the same. Recalling Grotius' legal genealogy, the law of nature is the grandmother of the positive law. From the law of nature arises an obligation that becomes expressed in the form of positive law.

International positive law approximates the practice of the law of nations. However, just as a domestic legal system may end up with provisions that do not exactly accord with the law of nature, so too can international state practice result in customs that diverge from the law of nature. It is not that the law of nations, however, cannot be normative. In fact, Grotius argues that by the law of nature, if a person deserves death,

63. DJBP 2.8.1.2.

64. He cites God as "the author of nature" at DJBP 1.1.10.1.

65. DJBP 3.4.15.1.

it makes no difference if this is by the sword or by poison.[66] The result is the same. If you deserve to die by the law of nature, you have no claim to choose how to die. To reiterate, there is no law of nature against poisoning, according to Grotius. By contrast, he argues that killing an enemy by poison is not permissible under the law of nations.[67] The question then becomes, permissible by whose standard? And for the law of nations, the standard is what is acceptable among other nations. The standard for the law of nature, by contrast, is what is acceptable from the social nature of man. Where the law of nations comes out of obligation from consent to others in society, the law of nature comes out of the social nature of man, which enters into mutual relations of society.

The argument is not that there is nothing normative in the law of nations, rather the normative is what is commonly accepted among nations, a practice-based norm rather than a philosophically based norm of what we derive from the law of nature. For the proof of poisoning being against the law of nations, Grotius lists historical examples from Livy to Cicero. He speculates that the agreement to avoid poison in war arose from kings who were uniquely situated to be victims of poisoning. He does not reveal where this comes from, but he does note that avoiding poison is a commonly accepted practice and is part of the law of nations. This law of nations norm may continue today. We have seen this with international condemnation of Russia's poisoning of people abroad. For example, in 2006, Alexander Litvinenko, a Russian defector, drank tea in London that unbeknownst to him had been poisoned by polonium-210, which caused his death.[68] There have been several other alleged cases of Russian poisoning in recent years that have been condemned by the international community.[69] Taboo against chemical weapons today represents a more widespread use of harmful substances that could be seen as an extension of Grotius' argument that poisoning goes against the law of nations. Chemical weapons have been widely condemned when used. For example, world leaders widely condemned the use of chemical weapons by the Assad regime in Syria.[70] Even when state leaders have chemical weapons in their possession, they frequently choose not to use them, leading some scholars to call the chemical weapons taboo "a genuine moral rejection of a means of modern warfare that arose at a particular historical juncture."[71] A generally agreed-upon idea across states that chemical weapons should not be used may constitute a part of today's law of nations.

---

66. DJBP 3.4.15.1.

67. DJBP 3.4.15.1–2.

68. Scott Neuman, "Russia Fatally Poisoned A Prominent Defector In London, A Court Concludes," *National Public Radio*, September 22, 2021, https://www.npr.org/2021/09/21/1039224996/russia-alexander-litvinenko-european-court-human-rights-putin.

69. Patrick Reevel, "Before Navalny, A Long History of Russian Poisonings," August 26, 2020, https://abcnews.go.com/International/navalny-long-history-russian-poisonings/story?id=72579648.

70. For Syria's chemical weapons, including a summary of Asad's use, see Gregory D. Koblentz and Natasha Hall, "Syria Still Has Chemical Weapons," *Foreign Affairs*, December 19, 2024, https://www.foreignaffairs.com/syria/syria-still-has-chemical-weapons; Christophe Wasinski, "Politique Internationale de La Souffrance in/Acceptable et Usage d'armes Chimiques En Syrie," *Cultures et Conflits*, no. 93 (2014): 151–55.

71. See especially Richard Price, "A Genealogy of the Chemical Weapons Taboo," *International Organization* 49, no. 1 (1995): 102. For more on the chemical weapons taboo see Richard M. Price, *The Chemical Weapons Taboo*, 1st edition (Ithaca, NY: Cornell University Press, 2007).

Killing

This section turns to Grotius' discussion of killing in war to elucidate how his legal philosophy differentiates the law of nature and the law of nations. In Book 3, Grotius discusses lawful killing. He points out that what is permitted is not the same as what is right, meaning that someone may do something and not get punished, which in a sense makes an action permissible, even if not moral.[72] He is very careful to contextualize the difficult idea of taking a human life. Although "killing is called a right of war," he recognizes that even in a lawful war, knowing the "just limit of self-defence, of recovering what is one's own, or of inflicting punishments" is difficult.[73] In what we think of as "the fog of war" he cites Tacitus, who says, "when war breaks out, innocent and guilty fall together."[74] Grotius then goes through the vast "law of war" that gives a wide permission to belligerents to kill an enemy in any territory, even veering into discussion of the slaughter of infants and women as a commonly accepted practice among nations, citing the Psalms, Homer, Thucydides, and others.[75]

But Grotius then distinguishes who can be killed according to moral justice, indicating that killing must only be as "a just penalty or in case we are able in no other way to protect our life and property."[76] Even when killing is just, he cautions that killing may not be "in harmony with the law of love."[77] Grotius goes through a list of people who ought not be killed, even in a public war. These include children, old men and women (unless guilty of a serious offense); priests and academics whose "literary pursuits ... are honorable and useful to the human race;"[78] also farmers, merchants, prisoners of war, and hostages. He later admonishes that even those who deserve death may receive a pardon, and that this is an act of high-mindedness "in conformity with goodness."[79] While he recognizes killing as part of war and that killing can be justified to protect life and property if there is no alternative, he is reticent to call it right.

Rights in Unequal Alliances: Is Power All That Matters?

To return to the idea of might making right, this section looks at what Grotius says about unequal alliances. First, what does Grotius mean by an unequal alliance? He means a treaty in which one contracting party gains a permanent advantage over the other.[80] Four controversies arise for him from unequal alliances, for which he gives his responses.[81]

---

72. DJBP 3.4.2.3.
73. DJBP 3.4.4.
74. DJBP 3.4.5.2.
75. DJBP 3.4.5-14.
76. DJBP 3.11.2.
77. DJBP 3.11.2.
78. DJBP 3.11.10.
79. DJBP 3.11. 7.
80. DJBP 1.3.21.1
81. DJBP 1.3.21.4–7.

First, subjects violate the treaty of alliance. For this example, think of an individual, rogue citizen who aids the other side. What should be done? Grotius says that the state should punish him or turn him over to those he wronged.[82]

Second, states themselves are accused of violating a treaty. What should be done? One ally has the right to compel adherence to the treaty and to punish violators.[83] We do see power entering into the equation here, but it is power to enforce right, not usurp it. This is an important distinction about using power within the bounds of and for the purposes of law, rather than using law as an instrument of power.

Third, allies under the protection of one state have differences amongst themselves. What should be done? Grotius suggests that a conference of allies should be held, or that the disputing allies should refer the case to arbitrators.[84] This approach is consistent with Grotius' idea of mutuality, where the positive law comes out of obligation from mutual consent. If there is a discrepancy about what this obligation is or what it requires by whom, Grotius unsurprisingly points to a sociable means of resolution, whether amongst allies conferencing together or with the help of arbitration. An alternative theory based in power determinants like economic and military statistics might instead say that the state offering protection to disputing allies should make the decision. However, Grotius' view of the social nature of humans and the mutual nature of obligation points instead to a collegial resolution rather than a unilateral determination.[85]

Fourth, subjects assert they have suffered wrong by their own state. Here, Grotius says there is no right to intervention. He references Aristotle in arguing that the purpose of an alliance is to prevent wrongdoing between the states, not within them, which is an argument for state sovereignty. He finally argues that "the right on the part of the leading ally to hold command, that is hegemony, does not take away the independence of the others."[86] We see this ongoing respect for a weaker state as its own sovereign.

Even with these controversies, Grotius notices the reality that if one state is vastly superior in power relative to others, it will gradually usurp their sovereignty, especially without limits to the time within the treaty. This brings us to the question of the right exercise of sovereignty. Grotius distinguishes between right and exercise, where a person might have a right by virtue of a political system to use power but be unable to actually exercise it at any given moment. An example is a legislator traveling to a foreign country. He will not be able to exercise his political authority there. This corresponds to a right to sovereignty that cannot be exercised because it is thwarted by powerful states.

---

82. DJBP 1.3.21.4–7.

83. DJBP 1.3.21.4–7.

84. DJBP 1.3.21.4–7.

85. John Jay, having read Grotius' treatise on war and peace, suggested mixed commissions to resolve lingering disputes between the newly formed United States and Britain in 1780s. James Brown Scott, "John Jay, First Chief Justice of the United States," *Columbia Law Review* 6, no. 5 (1906): 289–325, https://doi.org/10.2307/1109004; James Brown Scott, "Introduction," in *On the Law of War and Peace*, trans. Francis Kelsey (Birmingham: The Legal Classics Library, 1984), xxxix–xl.

86. DJBP 1.3.8.

Even so, using the law of nature rather than only the practice of the law of nations makes room for an enduring justice based on human nature and moral knowledge, an attribute that distinguishes man from beasts. And here Grotius cautions against destroying our own enduring peace by prioritizing an immediate gain, offering a caution especially to those stronger states that are in a position to usurp the sovereignty of others: "If a citizen who breaches civil Right for his own immediate interest destroys the fabric which protects the enduring interests of himself and his posterity, so a people that violates natural Rights and the Rights of nations, undermines the supports of its own future tranquility."[87] Indeed, the ongoing and future peace requires that people work in international affairs with the long game in mind. Immediate interest ought to be subjected to a standard of natural right, which supports long-term interest by tranquility.

To the point about unequal alliances, the idea of the shifting of power and changing of types of international order is relevant. Grotius explains, "there is no state so powerful that it may not some time need the help of others outside itself, either for purposes of trade, or even to ward off the forces of many foreign nations united against it," which is why "even the most powerful peoples and sovereigns seek alliances, which are quite devoid of significance ... to ... those who confine law within the boundaries of states."[88] This early idea about the need for mutual cooperation is that states cannot predetermine when they will need the assistance of friendly nations. A state powerful now may not forever be so. At some point—and no state knows when this will be—even the most powerful state will need the help of others. What kind of international order it has built and upheld through international agreements and domestic application of them, with transparent, due process, might influence how other states respond in its time of need.

Justice enters the analysis of state-to-state interaction in two main ways. The first is how one state treats other states: even when in power, a stronger state's actions will have consequences for the future when it may no longer enjoy a superior position, or even if it does, when it might need assistance. In this self-interested way, states ought to consider and act on the law of nature because their actions shape the disposition that other states will have in a future, undetermined time of need. If a state is trustworthy and follows through on its commitments, it will be able to count on the aid of others who share this reciprocity. On the other hand, for states that extract every bit of concession in overbearing ways on weaker states, we should not be surprised to have other states relish the chance to exploit them at a moment of weakness.

The second way to consider justice in moderating the idea of might makes right is that might should enable right. For as much as Grotius is hailed or derided for his brief comment that there would be "the maintenance of social order" as the "source of law" with obligations to each other "even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs

87. From Hugo Grotius, *The Right of War and Peace,* Prolegomena, reproduced in Oliver O'Donovan and Joan Lockwood O'Donovan, eds., *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought 100–1625*, 795.

88. DJBP Prolegomena 22.

of men are of no concern to him,"[89] his writings demonstrate that he does in fact believe God is watching and judging human actions. Where the first sense of justice is enforced by self-interested state concern with how other states will treat it in the future, this second sense of justice is enforced by the idea of a divine being to whom humans are accountable, the being who gave people reason and sociability, leading to the law of nature, obligation, and the law of nations. Grotius holds Christian rulers, diplomats, and statesmen to the standard that the creation of law based on the nature of man does not stop within the borders of a state. He argues that rulers should be held accountable, especially for "useless shedding of blood."[90] For Grotius, the law of nature extends to all peoples, and the fact that the law of nations has emerged from state practice that implicitly takes account of human limits means that it is both descriptive and prescriptive.

Theorizing A Law of Nations Rooted in the Law of Nature

This article has argued that the distinction between the law of nature and the law of nations in Grotian thought is necessary for understanding his analysis of the permissibility of actions in international affairs. His law of nature is rooted in human sociability that obligates right action. The law of nations comes through mutual consent of states and is similar to, although not identical to, the positive law application of municipal law between states. Because the law of nations is, by definition, linked to state practice, it changes over time within the generally accepted conditions and actions put forward by states interacting with each other.

Grotius' discussion of practical aspects of war and peace, including poison, killing in war, and unequal alliances, must be understood in each case as to whether he is discussing the law of nature or the law of nations. While in an ideal world, actions according to the law of nature and law of nations would converge, Grotius' diplomatic, real-world experience taught him that this is not always the case. When reading Grotius' on permissibility of actions between states, analysis must distinguish when he is speaking of the law of nature, which is less changeable and more normative, and the law of nations, which does change according to the practice of the international order at any particular time, although they should not be wholly unmoored from their foundations in mutual consent and obligation, right, and sociability. Formulating a theory of what constitutes the law of nations today, which will be informed by public international law and state practice, should not stray far from the underlying sociability principles of the law of nature that promise trust, good faith, and reliability.

For international affairs today, our own society of states will have a law of nations that looks different from Grotius' time, as state practice and technology have evolved. This means that Russia's aggression in Ukraine, if followed by other nations, may alter the day-to-day expectations and ways of interacting across states. The more other states buy into Russian historical revisionism and use of force, the more the law of nations changes toward those means. On the other hand, the more states counter Russia's ac-

89. DJBP Prolegomena, 8–11.

90. DJBP 3.11.19.

tions and unite against the illegitimate use of force (e.g., in violation of agreed upon border treaties), the more the existing law of nations will hold. It is still too early to tell what the lasting consequences of the Russia-Ukraine war will be. The liberal international order may be strengthened if the end result is Russian failure—a weaker, more isolated Russia that is worse off for having pursued aggression. The message to other states considering revisionism would be clear: act against the principles of the existing law of nations, of existing treaties outlining boundaries of state sovereignty, and you will fail. However, if Russia ultimately gains ground, in terms of actual territory, or in terms of alliances, partners, and world opinion, the opposite will be true, and other states may use force to attempt to extract territorial and political gains. Grotius' legal philosophy would recognize these facts on the ground while reminding leaders of all nations that the universal law of nature binds all and benefits all together, that leaders should abide by agreements within the society of states, and that all should pursue right action vis-à-vis other people because human sociability is intrinsic, universal, and enduring, and because right action is knowable.

Megan Brand is an Assistant Professor in the School of Civic and Economic Thought and Leadership at Arizona State University, where she teaches civics and researches international security and comparative public law. She received her PhD from Princeton University and has degrees from the University of Oxford, where she studied as a Marshall Scholar, the School of Oriental and African Studies, and Arizona State University. She has held recent fellowships with Princeton's James Madison Program, the University of Pennsylvania's Christopher Browne Center, and Notre Dame's International Security Center.