CHAPTER 6

Grotius' concept of the state of nature

The idea of a pre-political state of nature, devoid of any of the conventions created by political community, had been an essential premise of modern natural law thinking since the seventeenth century. The outstanding importance of the theory of the state of nature for the development of early modern natural law doctrine is generally recognized in the literature; the prevailing view can still be well encapsulated in Leo Strauss' assessment that the philosophical doctrine of natural law has been, since Thomas Hobbes, essentially a doctrine of the state of nature. In addition, the communitas opinio in the scholarly literature agrees that the concept of the state of nature was made usable for political philosophy by Hobbes after it had served medieval Christian theology as an antithesis to the state of grace. In Thomas Aquinas, status legis naturae describes the state in which humanity found itself before the revelation of Mosaic law. This use can also be found in the late Spanish scholastics, and it establishes a fundamental dichotomy between status naturae on the one hand and status legis Christianae on the other. "State of nature" in this sense can also describe a political community, specifically a pagan one, and need not refer exclusively to pre-political conditions.

Fernando Vázquez de Mencachia (1532–69), the Spanish legal scholar and advisor to Philip II, then formulated a dichotomy between original, natural freedom, which is absolute, and life in a political community based on convention, where the original natural freedom has been limited by contract for the benefit of its members. This sharp differentiation anticipated Hobbes, for whom the term "state of nature" applied exclusively to the pre-political situation of humanity outside of states (a "conditio

hominum extra societatem civilem"). The two authors both developed their concepts of the state of nature with an eye to the problem of legitimizing rules; the theory of the state of nature "must convey the 'exeundium e statu naturali' insight, must provide proof that a condition that lacks all government order and security functions, and in which each pursues his own interests by any means that appear proper and available to him, must lead to a virtual war of all against all, and thus must be equally unbearable to everyone." In Richard Tuck's view, the use of the concept of the state of nature is typical of natural law scholars of the seventeenth and eighteenth centuries; these conceptions of a state of nature, he says, were characterized above all by the fact that individuals placed in the state of nature were granted a very limited number of rights and duties. According to Tuck, they drew on the contemporary experience of international relations in the world of the early seventeenth century. The behavior of early modern sovereign states among themselves served as a model for the idea of individuals in a pre-political situation: "There is a real and imaginatively vivid example of just such agents interacting with each other in the domain of international relations. We can conceive of ourselves as natural individuals behaving like sovereign states..."

It will become clear from the following analysis that, in regard to Grotius, it was not so much the contemporary world and the relations of emerging states among themselves that influenced his concept of the individual in the state of nature, and thus of his doctrine of subjective natural rights; on the contrary, for Grotius it was primarily private-law doctrines and classical ideas of a state of nature that were applied to inter-state relations of the early modern era. Here it was mainly Roman law, Cicero, and classical doctrines of the origin of society and culture formation that played a major role. The contemporary international world, with its state practice favoring Iberian monopoly claims and creating customary law in East India, could have no particular normative attractiveness for Grotius, who sought to undermine

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1 For a survey, see Kingsbury and Szirmae 1992.
2 Strauss 1953, 184.
3 See the overview in Strauss 1975, 184ff.
4 See Beitz 1979, 940 even ascribe to Hobbes the invention of the concept of the state of nature itself.
5 On his life, see Sedmann 1979, 35–30.
6 On Vázquez, see Bretch 1975, 169–204.
7 Kenting 1994, 15.
8 Tuck 1999, 6, who wrongly ascribes to Hobbes the invention of the term "state of nature", aside from the earlier use of status nature of the by the scholars as well as by the late scholastics of Salamanca, the concept had also already been used by Grotius himself, see IBP 2, 5, 15, 21, 3, 7, 11. See also above, 113ff.
9 Tuck 1999, 8-9.
precisely these prevailing legal conditions. Also, for Grotius’ concept of the state of nature, the problem of legitimizing rule, which informs the doctrines of both Vázquez and Hobbes, was unimportant – Grotius dealt with natural norms applied to the state of nature in order to judge disputes in this state of nature, not in order to find a criterion for the legitimacy of existing political orders. In this sense, his doctrine was not a political theory in the narrow sense at all.

Grotius was not the first to come up with the idea of governing an actually existing state of nature with rules of Roman law which were taken to be declaratory of, and to a certain extent identical with, natural law. For the civilian jurist Alberico Gentili (1552–1608), an important predecessor of Grotius, it seemed already plausible to apply rules taken from the Roman law of the Institutes and the Digest to the relations between different polities both within and beyond Europe. This was something the Spanish scholastics from Soto and Francisco de Vitoria onwards had already tried to do, if only to the limited extent that they were versed in Justinian’s law code, drawing on the Roman law concepts of natural law and the law of nations (ius gentium) in order to apply them to the behavior of Spain overseas, effectively using the universality of these legal ideas against the jurisdictional claims of the old universalist powers, the pope and the emperor. Before Gentili, one of the first to apply Roman law to the state of nature in a more sustained fashion was Vázquez de Mendoza in his Controversiae illustres (1564).

Gentili then explicitly put forward the claim that Roman law was valid in the extra-European domain and between sovereign polities and empires, on the ground that Justinian’s rules, or at least some of them, were declaratory of the ius naturale and gentium: “It is also an absurd statement... that it is inadmissible to appeal to jurists in the case of such differences among sovereigns, because these disputes must be decided by the laws of nations and not by the subtleties and fictions of the civil law of Justinian, which was later established by the emperors for the disputes of private individuals alone.” Quite to the contrary, Gentili held, “the law which is written in those books of Justinian is not merely that of the state, but also that of the nations and of nature; and with this last it is all so in accord, that if the [Roman] empire were destroyed, the law itself, although long buried, would yet rise again and diffuse itself among all the nations of mankind. This law therefore holds for sovereigns also, although it was established by Justinian for private individuals...”

To what extent does the humanist vs. scholastic distinction matter?

The identification of Justinian’s corpus of Roman law with the law of nature was to have a major impact on how this key concept of early modern political thought, the state of nature, was construed. In the historiography of political thought, it has become common to distinguish sharply between “scholastic” and “humanist” accounts of international relations in the early modern epoch, with the latter demonstrating a well developed taste for self-preservation and imperialist aggression, and the former insisting on a richer sphere of moral and legal constraints that reach beyond the established polities. While Aristotelian and Thomist accounts of justice are said to have nourished the scholastic tradition from Aquinas to the Spanish scholastics of Salamanca, the humanists, breaking with the scholastics, allegedly combined a fresh account of natural rights with a classical Roman tradition of reason of state, drawing on Cicero and Tacitus and acknowledging to a large degree the force of skeptical anti-realist and subjectivist arguments in the domain of morals. This humanist tradition is the one that is said to have led from Gentili and especially Grotius up to its most radical representative, Thomas Hobbes.

But what distinguished the various early modern writers from each other was less the different traditions of scholasticism and humanism than the view they put forward of rights and obligations in the realm external to established polities – the state of nature. This is not to deny the importance of the humanist or scholastic traditions for the content of the various doctrines. It is merely to say that the distinction may explain less than it is often asked to explain and that the traditions these writers were drawing upon did not determine the content of their doctrines, especially not with regard to their views on self-interest and imperial expansion. For example, the humanist Vázquez de Mendoza, quoting extensively from Roman literature and Roman law, was among the most ardent critics of the Spanish imperial endeavor, more critical in fact than any of the Spanish theologians. Affirming a firm belief in the natural liberty of all human beings, Vázquez rejected any arguments designed to bestow title to overseas territories based on religious or civilizational superiority. Such arguments had on the

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10 IB 1.3.16-17.

11 See, e.g., Tuck 1999; Piirotate 2003; see on this distinction the introduction in Kingsbury and Strauss 2006 as well as Noel Malcolm’s and my own contribution therein.

12 IB 1.0.4-5. This belief was taken from Roman law, see Inst. 1.3.

13 Ibid. 1.10.9–11; 1.20.30-32; 2.20.37. See for Vázquez’ political and legal thought Brett 1997, 169–204; for his stance on empire and the law of nations, see Paglen 1995, 58–62.
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other hand been supported both by humanists, such as Sepúlveda, and theologians in the medieval tradition, such as Suárez.

Gentili, while in some sense a humanist and influenced in his De legationibus liber tres (1585) by Machiavelli’s account of statecraft, in De iure belli (1598) eschewed the humanist practice of justifying wars by reference to “imperial power and glory.”6 Gentili’s doctrine of just war instead relies on more or less orthodox criteria for just war supplemented with reasoning from Roman law. In his Wars of the Romans (1599), a work in two books putting forward, in a Carneadean vein, first an accusation of the Roman empire and then a defense, Gentili defends the justice of the Roman empire and its imperial wars on grounds of natural law, precisely as Cicero had made Laelius do in the Republic.67 Interestingly, and in line with the passage quoted above from his De iure belli, Gentili in this work presents Roman law as the most important legacy of Roman imperialism because it is declaratory of natural law and thus a source for norms that are binding even between sovereign states in the state of nature.

Indeed, a feature of both De iure belli and The Wars of the Romans is that Gentili, like Grotius after him, endeavored to give a specifically legal answer to the problems of the content, applicability, and validity of norms in the pre- and extra-political state of nature.68 A key element of Gentili’s defense of Roman imperialism in the second book of The Wars of the Romans is that the Roman empire provided not only civilizing peace but, most importantly, the advantages of a high-quality and durable system of law which was potentially binding in a natural state. While the defender of Roman imperialism takes pride in the fact that the Romans had as a matter of policy left many particular laws and customs of the conquered populations untouched,69 the unifying role of Roman law is praised both in a Christian and in a pagan register. God is said to have given Rome the “scepter of the world” so that “the customs, the reverence, the languages, the minds, and the sacred rites of diverse peoples” could be brought under “one set of laws.”70 Similarly, citing the pagan Claudian’s panegyric of

Stilicho, Rome, the “parent of arms and law,” is said to have “offered the cradle of the beginnings of law.”71 This leads to an account of a state of nature ruled by those rules of Roman law which can be said to be indicative of natural law.72 Gentili’s relatively rich natural legal order is not exclusively based on prudential norms of utility but depends, as does Grotius’, on a more substantive moral vision. Gentili’s arguments for subjective natural rights,74 including a natural right to punish, further attest to this. Gentili’s treatment of punishment as a just cause for war – present in De iure belli and further affirmed in The Wars of the Romans – necessarily presupposes an objective natural-law framework of norms against which the claims of punishment can be measured and justified. The argument for the right to punish is not merely a prudential argument based on self-preservation such as self-defense. The right to punish presupposes an offence against natural law, a violation of duties under some natural legal order – something unthinkable in a state of nature conceived along Hobbesian lines, where there are no moral duties whatsoever,75 just prudential grounds of obligation, and where there is consequently no natural right to punish either. Such a right implies a more substantive natural legal order, and Gentili in this regard belongs to a tradition stretching ahead to Grotius and then Locke, who, not surprisingly, also acknowledge a right to punish in the state of nature.76

The state of nature as a moral and legal order: Grotius vs. Hobbes

In a series of important studies, Richard Tuck has drawn a tight connection between Grotius’ doctrine of natural law and Thomas Hobbes’ natural law, and sees in Grotius a precursor of Hobbes. According to Tuck, both Grotius and Hobbes had declared self-preservation to be the highest principle in their universal moral philosophy: “For Grotius, Hobbes, and their followers, self-preservation was a paramount principle, and the basis for whatever universal morality there was . . .”77 The most important

65 Although Gentili certainly did not start out as a legal humanist, but as a rather explicit follower of the max Laelius and Barrosus.
66 Tuck 1999, 53.
67 See Heggenheimer 1990, 139–76.
68 See the introduction in Kingsbury and staunton 2003.
69 See on Gis also the introduction in Kingsbury and Staunton 2003 and Staunton 2010.
70 See, e.g., WR 2.13, 137: “And the city-states of Sicily we received into our friendship and protection in such a way that, after they were subjigated in war, they lived under the same laws as they had before.”
71 WR 2.13, 262.
conceptual instrument for these authors, in his view, was the idea of the state of nature, "a state of nature, in which agents defined in minimal terms—that is, possessing an extremely narrow set of rights and duties—engage in dealings with one another which lead to the creation of a civil society." The comparison of Grotius with Hobbes suggested by Tuck is very helpful to more clearly delineate the characteristics of Grotius' conception of the state of nature.

While the importance of the concept of the state of nature to natural law scholars in the seventeenth century is unquestionable, Tuck's assessment of Grotius' conception of natural law, as well as of the close connection between Grotius and Hobbes, must be disputed—in regard to both the role of self-preservation as the supposed basis of Grotius' natural law and the rights and duties that prove relevant in Grotius' state of nature. The contrast between Grotius and Hobbes is based primarily in the fact that Grotius, unlike Hobbes, did not describe his state of nature as a hypothetical pre-political condition in relation to the "creation of a civil society"; instead, he sought to transpose his conception of the state of nature, and the accompanying normative rules, onto the high seas leading to East India. Great differences result from this in each author's portrayal of the conditions that prevail in the state of nature, especially in regard to the status of self-preservation.

Unlike Hobbes, Grotius equipped the state of nature with a comprehensive system of rights and duties that can hardly be characterized as "extremely narrow." While for Hobbes, no moral, let alone legal, problems arose from self-interested behavior in the state of nature, Grotius argued that behavior aimed exclusively at self-interest and self-preservation in the state of nature was not only immoral, but also unlawful. Hobbes did recognize certain pre-political norms that promote each person's unlimited freedom in the state of nature and which he calls "moral," but are these norms in fact of a moral or even legal nature?

In stark contrast to Grotius' conception, Hobbes' natural state is characterized by norms that are legal only in a metaphorical sense and moral only by name. It is characteristic that Hobbes does not acknowledge a natural right to punish: "A Punishment, is an Evil inflicted by public Authority," defines Hobbes, because the "Right which the Common-wealth... hath to Punish, is not grounded on any concession, or gift of the Subjects." This follows straight from Hobbes' conception of the state of nature, where "every man had a right to every thing," that is to say, people in the natural state did not have, on Hobbes' account, claim-rights of any sort, but rather Hohfeldian privileges, which cannot give rise to any duties on anybody else's part. Consequently, there is nothing, no possible violation, that could possibly trigger a right to punish.

In an important contribution, Noel Malcolm has argued that Hobbes' state of nature is, with regard to international relations, a much more regulated place than has hitherto been thought, with the dictates of natural law being applicable at the international level. While Richard Tuck has interpreted Grotius and Gentili to be much more akin to Hobbes as traditionally understood, Malcolm presents a Hobbesian view of international relations much closer to Grotius, as traditionally understood. Malcolm maintains that Hobbes, in terms of what behavior his take on international relations prescribed, was guarding against imperialism and therefore far from being a Machiavellian.

Furthermore, in terms of the jurisprudential justification of his normative outlook, Hobbes was, to speak anachronistically in the idiom of today's jurisprudential disputes, a "naturalist," and his state of nature "not a realm of sheer amorality" according to Malcolm. But this is as misleading as Richard Tuck's qualification of Grotius' natural law as based ultimately on self-preservation and consisting only in "an extremely narrow set of rights and duties." As the example of Hobbes' stance on the right to punish shows, there are in Hobbes' natural state not only no legal rights and duties, but also no moral ones, at least not if one is to understand by "moral" anything going beyond prudential self-interest. There are no legal ones because according to Hobbes' legal theory, natural laws are called "by the name of Laws, but improperly; for they are but Conclusions," dictates of reason, to
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which the basic obligation of the subjects in the state of nature, to preserve themselves, is owed. And there are moral ones only if one is willing to buy into Hobbes' exercise in renaming purely prudential grounds of obligation as moral ones.

It could be said that, broadly speaking, in classical Greek ethics there was a prevailing attempt to identify prudential with moral reasons for action by showing that to act morally is in one's own self-interest, that is to say by changing the meaning of and effectively re-defining "self-interest" such that other-regarding, moral reasons become a requirement for acting in one's "self-interest." Hobbes, on the other hand, engaged in a re-definition of "moral," so that self-interested action becomes a requirement of Hobbes' changed meaning of "moral." As in classical ethics, self-interest and morality in Hobbes thus do not seem to be in conflict — yet once Hobbes' exercise in renaming is understood, it becomes clear that Hobbes' position really amounts to framing the moral in terms of what prudence requires.

For Thomas Nagel, "Hobbes's feeling that no man can ever act voluntarily without having as an object his own personal good is the ruin of any attempt to put a truly moral construction on Hobbes's concept of obligation. It in a way excludes the meaningfulness of any talk about moral obligation... Nothing could be called a moral obligation which in principle never conflicted with self-interest." The reason why there are no moral duties in the state of nature is thus that for Hobbes there simply are no such duties tout court.

Noel Malcolm is of course correct in pointing out Hobbes' strong reservations against imperialism — but these reservations are based on mere prudence, not on anything resembling a notion of legal, let alone moral, obligation. Similarly, the breakdown of the analogy between states and individuals in Hobbes, the fact that the parallel between the interpersonal and international state of nature does not go all the way, might diminish the "moral" duty of self-preservation as far as polities are concerned; but, again, this is so simply for prudential reasons. If individuals were any less secure in commonwealths than they contingently happen to be, commonwealths would not exist in the first place. Hobbes' state of nature, void of both moral and legal norms, proves to be a continuing inspiration for so-called realist views, i.e. skepticism regarding international law and the

37 Unlike the classical identification of the beneficial ex prudens (suites) with the morally right and just (honestum et iustum), where a re-definition of the beneficial does take place. However, there is usually an attempt to show how that re-definition at a deeper level is in accord with the conventional understanding of expediency or prudence. Cf. Dyck 1965, 492-94.
38 Nagel 1993, 74.
40 Malcolm 2000, 448.

applicability of moral standards to international affairs. In contrast, in Grotius' state of nature, certain norms apply that underwrite legal claims which significantly differ from Hobbes' natural freedom. As we have just seen, Hobbes' "natural right of every man to every thing" comes closest to Hofstadte's privilege in that it does not correspond to any duties on anybody else's part. The rights Grotius had in mind, on the other hand, which we shall treat in some detail below, are best described as Hofstadtean claim-rights in that they establish corresponding duties on one or more counterparties. Although not all of Grotius' claim-rights are presented as natural in origin, once established, they all enjoy the protection of natural law and can be enforced by any subject of natural law in the state of nature. The state of nature, for Grotius, is a condition subject to obligatory norms enforceable, as we shall see, by a universal right to punish.

The difference between Grotius and Hobbes with regard to their respective conceptions of the state of nature can be explained, at least in part, by the diverging purposes that the doctrines were at first supposed to serve. Whereas Grotius had developed his doctrine of a state of nature and the 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, Hobbes' theory was a political one in a much narrower sense. Hobbes' state of nature served the primary purpose of explaining political authority; Grotius' had the purpose of exhibiting the norms governing the high seas. Whereas Hobbes sought to justify a strong form of political authority, Grotius wanted to theorize an environment in which a strong overarching authority was ex hypothesi lacking.

When it comes to their conception of the state of nature, however, the crucial difference between Grotius and Hobbes remains in their sharply diverging anthropological assumptions. Both deem it necessary to appeal to an element of human nature which motivates human beings and which is antecedent to any normative ethical and political theory they will then erect on its foundation. In Hobbes' case, this antecedently motivating factor is, of course, self-preservation, and for Grotius, as we have seen, it is the social instinct (appetitus societatis) which guarantees that the subjects of Grotius' natural law can be motivated to abide by it. This crucial difference is something which was not lost on Grotius himself. As soon as he had read Hobbes' De cive, he wrote to his brother that although he did

41 For the latter, see the criticism of Hobbes' position in Beitz 1979, 17-66.
42 Lettres-State, p. 18.
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appreciate some of Hobbes' conclusions, he could not at all agree on
the foundations on which Hobbes had constructed his political theory: that
is to say, Hobbes' state of nature with its war of all against all was deeply
antagonistic to Grotius' own view of the natural condition.43

As Grotius' references show, when explicating the features of this natural
state he operated to a certain extent in the tradition of Cicero44 – the
state of nature in De iure praedae is based on the model of the dissolv-
ing Roman republic, which Grotius took mainly from Cicero's forensic
speech Pro Milone. In his forensic speeches in the fifties of the first century
BC, Cicero had repeatedly justified the unlawful behavior of his political
friends with the natural right of the private citizen to assert and enforce
his claims himself in the face of failing state institutions: "The argument
won... natural-law support when Cicero suggests that, in cases of blan-
tant failure by magistrates, a virtual pre-political condition is restored, in
which force may be resisted by force."45 In the speech Pro Milone, written
in 52 BC at a time of general lawlessness and shortly before the civil war,
Cicero justified the right to lawful self-help by referring to a law that was
not written, but created by nature (non scripta, sed nata lex). This descrip-
tion of natural law was cited by Grotius in De iure praedae and applied to
his concept of the state of nature.46

For Grotius, it is true, the reason to leave the state of nature was not
entirely unrelated to the prudential benefits and the utility (utilitas) offered
by political communities. However, unlike the Epicureans, skeptics such as
Carneades, or Hobbes, he did not perceive this as being mutually exclusive
with justice. Legal norms in general, both the positive ones of the polity
and the natural ones, could not be reduced to a prudential utilitarian core,
according to Grotius; it is not exclusively the advantages and utility that
they bring that makes them desirable. Moreover, if justice were really striven
for only because of its utility, this would make the application of moral
and legal norms to the sphere of inter-state dealings seem impossible:

But whereas many that require justice [institutia] in private Citizens, make
no Account of it in a whole Nation or its Rulers; The Cause of this Error is,
first, that they regard nothing in Right but the Profit [utilitas] arising from

43 BHG, 14, n. 6666, letter to his brother Willem from April 11, 1643: "Ilum de Civ. vidi. Placent quae pro regionibus dictam. Fandamenta sunt in pulchra mais sententiae superlati, probant non possum.\nAurum later hominum ovnis a natura eadem bella ex ali quaem animar nostris non comprehendit."
46 IPC 1, fol. 4v: "et nos ad apud Tullium non scripta, sed nata lex..." See Gic. Mil. 26, where the passage is
found in the context of an appeal to the judges: Est legitur hanc, indicat, non scripta, sed nata lex; quae non dictaminum, accipiamus, legemus, verum ex natura ipsa adverbio, huminum, expressimus...
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taken this motivational cue from texts by Cicero, such as Pro Sestio or De
inventione.\[5\]

The war of the VOC in Southeast Asia and the
Roman tradition of just war

Approximately two years before Cicero wrote the speech for Titus Annius
Milo, he had begun working on his dialogue De re publica on the ideal polit-
cal system, which he published in the year 51 BC. While still working on
De re publica, Cicero must have already begun writing the never-completed
dialogue De legibus, which was something of a sequel to De re publica and
showed some continuity with the speeches of the 50s.\[3\] As we have already
seen, in the third book of De re publica, in a passage known to Grotius
only through Laerantius' Divinae institutiones and Isidore of Seville's
Etymologiae, Cicero reproduced the two famous speeches by Carneades,
held in Rome in the year 155 BC. One speech exalted justice, while the
other, equally convincingly, sought to demonstrate the incompatibility of
political authority and justice. Although Carneades' speeches were proba-
bly only concerned with internal justice within a state and not with justice
in regard to a polity's external affairs, Cicero — as we have seen — had
turned this speech against the possibilities of justice into an indictment
of the justice of Roman expansion and rule. In Cicero, this indictment
was then rejected and rebutted by one of the interlocutors of the dialogue,
Laelius, notably with a natural-law argument, in a speech that should be
viewed as the first surviving philosophical justification of Rome's imperi-
alist expansion.\[4\]

The connection Cicero drew between natural justice and Roman impe-
rialism was based primarily on two conceptions of very different origin —
Stoic natural law doctrine on the one hand and the Roman doctrine of
just war on the other. Cicero adapted the Greek concept of natural law
to Roman conditions and made it usable for Roman purposes by seeking
to show that Rome was acting in accordance with natural law and that
natural and Roman law essentially coincided. This model of a legal and
philosophical justification of Rome's military expansion was obviously very
attractive to Grotius the humanist, who was expertly able to utilize this
Roman tradition.

\[5\] See e.g., Cic. Sen. 91–92; Cic. Inv. 1.2–3.
\[3\] For the dating and the relationship to the speeches, see Dyck 2004, 7.17–18.
\[4\] For the relationship between Cicero's account and the speeches given by the historical Carneades,
see Zettel 1996.

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In De iure belli ac pacis, Grotius presented Carneades the Skeptic as his
main adversary, which led in the scholarly literature to an understanding
of Grotius' treatises on natural law primarily as attempts to refute the early
modern moral skepticism of those such as Montaigne or Charron.\[5\] But as I
have shown above, Carneades was interpreted by Grotius first and foremost
as the representative of a rhetorical tradition. Substantively, Grotius saw
Carneades not as a moral skeptic, but rather as an orator who expressed
criticism of Rome's imperialism and sought to counter arguments based on
the Roman theory of just war. This Roman theory of just war already played
a central role in De iure praedae. When the young historian, philologist,
and jurist Grotius was confronted in the early seventeenth century with
the task of writing his apologetic legal brief on behalf of the VOC to
prove the justice as well as lawfulness of the Company's behavior in East
Indian waters, he needed criteria to define as a just war the action that the
VOC had been waging in Southeast Asia against Portugal — an action that
operated in the gray area between privateering and the fringes of piracy.

The Roman doctrine of just war (bellum iustum) was essentially a formal
legal procedure that was, however, also distinguished by certain substantive
aspects, subjecting the justification of war to certain necessary conditions.\[6\]
The concept originated in the ius fetiale of the early Roman republic and
should be seen as a specifically Roman invention, tailored to the needs
of the Roman city-state and firmly tied to its institutions, especially the
priestly college of fetiales (fetiales),\[7\] and to the senate and the people.\[8\]
The necessary conditions imposed by the ius fetiale on the waging of war
are preserved in certain passages in Cicero, in Isidore of Seville, who based
his views on Cicero, and in Livy, in a historiographic context.\[9\] These
conditions were the denunciation of an alleged wrongdoing and the demand
for redress from the potential enemy (reatum repetitum), a notification, thirty

on Grotius' treatment of Carneades' arguments, see below, 55–64.
\[6\] For a more skeptical, anti-Carneadean assessment of the Roman just-war theory in the context of
Roman imperialism, see Hnilik 1991, 175–78.
\[7\] On the fetials, see Albert 1980, 12–16; on early fetial law, with great trust in the annalist tradition,
see Watson 1993. For a skeptical view, see Saulnier 1980, who sees the college of the Fetiales — not ius
fetiale itself — as the creation of the Augustan period. Ando 2010 is skeptical even with regard to the
ius fetiale itself and interprets it as a backward projection from Augustan times into the republic;
see also Wiedemann 1986. On Roman international law in general, see Fleiss 1931; Duhem 1931.
\[8\] See Barnes 1986, 46: "Les lois de la guerre, les iure bellorum, ne sont nées ni dans la philosophie grecque ni
dans la théologie chrétienne: leur paternité doit être attribuée à la politique de Rome, et précisément
t à un rite païen et scholaïque de la République romaine."
\[9\] The main passages are Cic. Rep. 1.31; 3.32; Off. 1.16. Livy 1.33. 5ff. For an excellent discussion of, in
particular, the passages in Cicero and their tradition, see Barnes 1986.