Natural rights and just wars

unjust war. Failure to observe the norms of ususfructus on the part of princes, as discussed above, which could also give cause for lawful resistance, represented such a violation of natural law. The case of breach of contract was a special case of natural rights, which Grotius considered to result from contractual obligations, while violations of natural law were seen as analogous to violations of Roman property law, in which usurpation was viewed as unlawful expropriation of others' property or as violation of the provisions for usufruct. Grotius, analyzing constitutional arrangements in Roman law terms, is not willing to make any substantive normative commitment to a particular kind of constitutional setup — he cannot be described as an author in the civic tradition of republicanism in this regard, let alone as a proponent of “exclusive republicanism.” What he does put forward, as Daniel Lee has lucidly observed, is a view according to which “a people may remain free even while under the government of a prince.” This is so because if the prince holds sovereignty by usufruct, this will be perfectly compatible with popular liberty; surely a “significant departure from one of the longstanding assumptions of early modern republicanism, that popular liberty requires popular government.”


CHAPTER 9
Enforcing natural law
The right to punish

Grotius’ motivation to establish a natural right to punish which precedes the establishment of a commonwealth and which can be brought to bear against violations of natural law even in the state of nature can be explained by looking to the arguments with which his legal brief De iure praedae was originally concerned. Freedom of trade with the East Indies and its necessary prerequisite, freedom of the sea, were the issues on which the legal debate over the legitimacy of Dutch privateering turned. If the seizure of the Santa Catarina could be shown to be part of a just war fought against the illegitimate Spanish and Portuguese claims to a monopoly of trade with the East Indies, then the capture itself would be justified. To this end, Grotius in De iure praedae adopted a two-pronged strategy, aiming to show, on the one hand, that the VOC’s forerunner could be understood as the agent of a sovereign state engaged in a just war against Spain and Portugal, and that, on the other hand, the capture of the ship was justified under the law of nature even if the trading company had been acting on its own behalf as a private actor. It is this latter aspect of Grotius’ strategy that made him develop a doctrine of a natural right to punish: the Portuguese, he argued, by monopolizing the high sea, had violated the law of nature, giving rise to the VOC’s natural right to punish and providing the trading company with a just cause for war.

The right to punish arises out of an unlawful act. Because, however, such an unlawful act can, true to Grotius’ Roman law terminology, consist of either a simple private-law delict or criminally relevant behavior, the question arose for Grotius whether the right due to everyone in the state of nature was merely a right of enforcement arising from a private delict, or whether it constituted a right to execute a punishment, arising from a

1 See Happenmacher 1997, 88–99, who recognizes the dual character of the unlawful act, without addressing the Roman background.
crime. Grotius found that many scholars took the view that the power to punish (punendi potestas) was exclusively that of the organized political community, and that private exercise of force had thus to be rejected. To decide this question, however, according to Grotius, it was necessary to study the state of nature to determine what each individual was permitted to do before the polity was established (ante republucias ordinatas).

Once again, Grotius brought in Cicero as his source. Cicero, he said, quoting verbatim from De inventione, had seen punishment as a manifestation of natural law and defined it as something through which each person could deflect violence or mistreatment from himself and his loved ones, in order to defend oneself, and with which one punished offenses. This Ciceronian premise led Grotius to the radically novel view that punishment was an institution of natural law that could be derived from his first law, “It shall be permissible to defend [one’s own] life and to shun that which threatens to prove injurious.” To interpret the right to punish as a natural right was a revolutionary move which Grotius could not possibly have taken from his scholastic predecessors and which put him fundamentally at odds with them, as the Grotian scholar Peter Haggenmacher recognizes.

One should note, however, that in De iure praedae Grotius derives the right to punish also from a concept that belongs to the Roman just war doctrine, namely from the demand for redress (rerum repetitio), which in the Roman doctrine constitutes a necessary condition for a just war. Grotius states his novel view thus:

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

Here Grotius adopted from the Digest the Roman jurist Ulpian’s private-law requirement for the transfer of property that "no one can transfer greater rights to someone else than he possesses himself," in order to apply it to the right to punish. On the premise that every right of magistrates had been assigned to them by the members of the polity, the members must already have had the right to punish, for otherwise the magistrates could have no such right — analogous to the transfer of ownership in Roman law, which allowed no transfer of property by those without title. Consequently, the right to punish had to belong to the individual in the state of nature prior to the establishment of states (ante republucias ordinatas). Grotius supported this revolutionary argument with an additional one that, as Richard Tuck has pointed out, is surprisingly identical to the argument eventually made by John Locke for the natural right to punish. A polity punishes not merely its own subjects for unlawful acts, but also foreigners — in regard to them, however, the state has no power from positive law, as positive law binds one’s own citizens only, because they have agreed to that law through consent. Consequently, the right to punish exercised by a state against foreigners must be an institution of natural law.

Grotius’ theory of a natural right to punish is conspicuously similar indeed to the “very strange doctrine” developed by John Locke in his Second Treatise of Government, under which “every Man hath a Right to...”

1 For an overview of the right to punish in IPC and JBP, see Straumann 2006.
2 IPC, fol. 23: "Cum enim dicitur: plebs puniendi possit si soli republicae concessum, unde est publica iudicia decerni, videi potest privata manus omnino exclusi. Sed hoc comandum exptandi non potest quem si videamus, quid licetur unitate ante republicas ordinatas."
3 IPC, fol. 19: "Et ipse Cicero... cum ius naturae esse divisit, id quod nobis non opinio, sed in sacra vis affirmat, inter ius exemplar sumus vindicationem quam gratioso opprimit... definit vindicationem, per quam visi et consummum defendendo, aut ulterius proprio propulsamus a nobis, et a nostris qui nobis cedere debent, et per quam peccata puniuntur." Grotius quoted verbatim Cic. Inv. 2.66.
4 See Haggenmacher 1997, 89: “En reconnaissant au particulier une competence pénale naturelle il prêda subreptice le contre-pied de l’opinion courante qui associe le droit pénal par definition avec l’autorité établie: ce ne serait là, que l’effet du transfert d’un pouvoir d’origine naturelle et donc préétablie.”
5 IPC, fol. 25: "VITAM TUERI ET DECLINARE NOCTURNA LICEAT.”
6 Haggenmacher 1997, 98: “Oh, comme on ne reconnaissait la compétence pénale qu’aux pouvoirs publicques, c’est à elles qu’on réservait aussi la guerre punitive.”
7 See IPC, fol. 44.
punish the Offender, and be Executioner of the Law of Nature." Locke was going on to present Grotius' argument, when he wrote, in the Second Treatise (§ 9): "And therefore if by the Law of Nature, every Man hath not a Power to punish Offences against it, as he soberly judges the Case to require, I see not how the Magistrates of any Community, can punish an Alien of another Country, since in reference to him, they can have no more Power, than what every Man naturally may have over another."66 Given the fact that Grotius' argument is found in chapter 8 of De iure praedae which was not published until the nineteenth century and could not have been known to Locke, Richard Tuck notes that this "must count as one of the most striking examples of intellectual convergence"67 a very surprising convergence indeed. Although Grotius in De iure bellorum pacis was to formulate a very similar position (and John Locke was of course familiar with De iure bellorum), he did not there base his position on the "alien argument."68

There exists a further parallel with Locke's doctrine of punishment, namely the important fact that Grotius' right to punish is a right vested in every inhabitant of the state of nature, not merely in the person harmed. Grotius derived the natural right to punish from one of his axiomatic laws, "evil deeds must be corrected."69 This is combined with Aristotle's involuntary (akousia) legal transactions70 and the Roman-law obligations (obligationes) arising from delicts.71 This right was enjoyed by everyone in the state of nature - for Grotius, this is so because an unlawful act (iniuria) affects everyone, more or less, even if it is only done to one person.72 The groundwork is thus laid for a very broad interpretation of the right to punish, which would, for example, permit the Dutch to avenge any breach of natural rights by the Portuguese, even if the Dutch were not directly affected by the unlawful act - which was relevant, given the Portuguese attacks on local rulers who were seen as allies by the Dutch.

The right to punish, for Grotius, was only secondarily that of the political community and its magistrates, but was primarily that of every individual in the state of nature. Every wrongful act (maleficium) could be the cause of a just war; every unlawful act (iniuria) represented a just cause of war;73 and in the absence of a central political authority even a private person could be the one to impose punishment for unlawful acts; after all, under Roman law, private persons were permitted to execute punishments as a consequence of a delict.74 Thus Grotius once more laid the groundwork for a favorable assessment of the military acts of the VOC, even if one was unwilling to view the VOC as an organ of a sovereign state.

Unlawful acts that actually amounted to crimes were thus, according to Grotius, capable of eliciting a natural right to punishment and counted as just causes of war. In Grotius' historical context, the crimes of the Portuguese consisted concretely in acting counter to the natural requirement that things belonging to another could not be made private property: they had attempted to make possession of the sea, which was the common right of all humankind (res communis), and thus establish an illicit trade monopoly. This behavior had been all the more criminal - "particularly grave" - because "harm [was] inflicted upon the whole of human society," to which each person was obligated and subjected.75 All these offenses had originated in one central unlawful action - the unvarnished Portuguese trade ban.76 The Dutch right to punish the Portuguese did not, however, take first place in Grotius' system of just causes of war, as the trade prohibition and other Portuguese crimes far exceeded the VOC's ability to punish.77 The Dutch claims that had arisen from the private-law delicts of the Portuguese alone went far beyond the booty in question - the cargo of the captured Portuguese ship. Here, too, the trade ban, or the losses suffered by the Dutch as a result, played the most prominent part. According to Grotius, the Portuguese had prevented the Dutch from conducting free trade with any East Indian nations they chose, and were thus obligated to make restitution of all the profits the Netherlanders had lost as a result.78

Grotius treated private and public delicts similarly, which once again reveals the extent to which he relied on Roman legal doctrine.79 The

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69 See, e.g., Buckland 1965, 376-369.
70 See, e.g., Buckland 1965, 376-369.
71 See, e.g., Buckland 1965, 376-369.
72 See, e.g., Buckland 1965, 376-369.
73 See, e.g., Buckland 1965, 376-369.
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78 See, e.g., Buckland 1965, 376-369.
79 See, e.g., Buckland 1965, 376-369.
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subjective natural rights of the victim — for Grotius, the VOC — strongly resemble the so-called penal actions of Roman law, the *actiones poneales*, aimed equally at payment of fines and restitution, which in the Digest could also address both harm to property and punishment of the perpetrator.  

The rights from contractual obligations discussed previously at first played only a subordinate role in *De iure praedae*, although here, too, they are already referred to in order to explain the constitution of legally created polities through the social contract and the validity of positive law. That Grotius nevertheless dealt with them comes first of all from his commitment to the Roman law tradition, where, as Gaius had explained, a *summa divisio* of debtor relations consists of *ex contractu* and *ex delicio*. On the other hand, Grotius had probably already recognized that, given the Dutch Republic's emerging strong position in East India, rights stemming from contractual responsibility were certainly apt to justify this position; the VOC pursued policies that would ensure their market share by contractually binding the autochthonous rulers of East India. Four years after the publication of *Mare liberum*, these policies began to look to the English suspiciously like a monopoly, but Grotius and the Dutch delegation at the Colonial Conference in London in 1613 defended them as simply the consequence of the freedom of contract underwritten by natural law.

Although *De iure belli ac pacis* was written under fundamentally different circumstances from *De iure praedae*, its main teachings, including the doctrine of the natural right to punish, can be understood as an elaborated version of the earlier work. In contrast to *De iure praedae*, Grotius distinguished in *De iure belli ac pacis* clearly between private delicts, which gave rise to actions for compensation, and criminal delicts, which granted a right to punishment; in the later work, he devoted a short chapter of its own to private delicts (*De damna per iniuriam dato, et obligatione quae inde ortur*). The title itself indicates that Grotius based this additional distinction largely on the compensation law of the Roman *lex Aquilia*, to which he referred in a note starting in the 1642 edition. Grotius first defined the private delict (*maleficium*) as any fault (*culpa*),

whether of Commission or Omission, that is contrary to a Man's Duty, either in respect of his common Humanity, or of a certain particular Quality, an

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36 The so-called mixed penal action; see Kast 1971/72, §§ 217, II. The principle is comparable to punitive damages in US tort law.
37 Gal. Inst. 3.88.
38 *IBP* 2.17. The differentiation can be traced back to Grotius' *Inleiding tot de Hollandsche Rechtsgeleerdheid* 3:32-7.
39 *IBP* 2.17.213 (wrongly as 22 in the text). The citation is to *Dig* 9.2, *Ad legem Aquilia*.
40 *IBP* 2.17.211: "Maleficium est appellationus culpae omnem, sine in faciendo, sine in non faciendo, pugnantes cum eo quod aut homines communitur, aut pro ratione certae praeterea facere debent. Ex tali culpa obligatio naturaliter ortur, nisi damnum datum est, si non res recurratur." See on the effect of this definition of culpa on the doctrine of state responsibility in international law Laserpach 1927, 135-36.
41 *IBP* 2.17.211: "Damnum intelligi quod pugnans cum iure utriusque dietro."  
42 *IBP* 2.20.11: "Sapere cum de causis ex quibus bella suscipiuntur agere coepimus, facta distinctas duplici modo considerari aut ut reparari possunt aut ut puniri." See also *IBP* 2.20.38.
44 *IBP* 2.17.211: "Maleficium est appellationus culpae omnem, sine in faciendo, sine in non faciendo, pugnantes cum eo quod aut homines communitur, aut pro ratione certae praeterea facere debent. Ex tali culpa obligatio naturaliter ortur, nisi damnum datum est, si non res recurratur." See on the effect of this definition of culpa on the doctrine of state responsibility in international law Laserpach 1927, 135-36.
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upon the Sea. Hereunto may perhaps be referred Action of Julius Caesar, yet a private Man [privatus], when he pursued with a Fleet, equipped all on a sudden, those Pyrates by whom he had been taken Prisoner, dispersing some of their Ships and sinking others, and when he found the Proconsul negligent in punishing the Captives, he returned to the Sea and crucified them himself.\(^4\)

This historical example served as an illustration (not a justification) of the norm that the natural right to punish was even open to citizens of established polities, such as the Roman republic, when political authority broke down, as in the anecdote of Caesar and the proconsul, or when none at all existed, as on the high seas. As in De jure praedae, under these circumstances the natural right to punish was granted to everyone, not only those who suffered from injustice, like Caesar in the example offered. The reason for this "very strange doctrine" has to be seen in the need to implement the norms of the legal order in a horizontal system without a central political authority.\(^5\)

Transferred to the condition prevailing since the creation of political communities, this meant that every sovereign had the right to punish grave breaches of natural law, even if neither he himself, nor citizens subject to his jurisdiction, had been harmed by this wrong. In Grotius' view, the purpose and normative justification of punishment are threefold: first, it is advantageous to the wrongdoer himself, in that it "corrects" him and thereby makes him better;\(^6\) second, punishment is for the good of him who has been wronged, which is what "Aristotle has placed under that Part of Justice which he calls Commutative";\(^4\) and third, punishment serves what our contemporary moral philosophers would call the consequentialist purpose "that either he who injured one, may not injure another, or "that others may not be encouraged, by the Hopes of Impunity, to be alike injurious," which is "to be prevented by putting him to Death, or by disabling him, or by imprisoning him, or by correcting and reclaiming him ..."\(^4\) While the third idea of punishment clearly has a consequentialist character, resorting to anachronistic, contemporary language one might say that the first and the second purpose have a deontological or retributive as well as a consequentialist aspect to them.\(^4\) The natural right to punish, then, serves as a threat, allowing the "linking [of] Force in the same Yoke with Law," in view of the fact that law "has not its Effect externally, unless it be supported by Force."\(^7\)

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

We must also know, that Kings, and those who are invested with a Power equal to that of Kings, have a Right [ius] to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for those which do not peculiarly concern them, but which are, in any Person whatsoever [quaevi personae], grievous Violations of the Law of Nature or Nations. For the Liberty [libertas] of consulting the Benefit of human Society, by Punishments, which at first, as we have said, was in every particular Person [singuli], does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are possessed of the supreme Power, and that properly, not as they have an Authority over others, but as they are in Subjection to none. For, as for others, their Subjection has taken from them this Right.\(^4\)

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\(^{4}\) RWP, 1:972; IBP 2:209.91.
\(^{5}\) The first justification, the good of the wrongdoer, implies a reformatory and therefore consequentialist view of punishment (as it can be found in Plato), as well as a retributive, deontological view (testing equality). The second justification, the good of him who has been wronged, contains the consequentialist element of prevention in that he who has been wronged "may not suffer any such thing from the same man or from others"; IBP 2:208.1. It also contains, however, the purely retributive element of corrective justice. These three aspects of the right to punish are already adumbrated in IBC 2, fol. 8'-9.

\(^{6}\) IBP 2:209.10; 2:209.61.

\(^{7}\) "Sedendum quoque est egerit et qui patessur ius ob ejus obstanti iussu habere poenas posse non turrem ob iurias in se aut subdito suo commissas, sed et ob eam quae ipsa peculatione non tangat, sed in quibuss reperit ius naturae aut gentium imminere violentia. Nam libertas humanae societatis per poenas consulenda, quae iniquo ut diximus poenas singulos fuerat, cleritibus ac judicibus instituta poenas summae potestates resedit, non prope quia alius imperat, sed quod nemini parent. Nam subjectus aliis in ipso abominari."
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In postulating a general right to punish, modeled upon a class of Roman penal actions, the so-called popular actions (actiones populares), open to any citizen in virtue of the public interest and not just to the injured party, Grotius turned self-consciously against his Spanish predecessors, the late scholastics of the school of Salamanca. In terms of content, this had of course already been the case in De iure praedae, except that at the time it seemed opportune to Grotius to invoke the Spanish scholastics whenever possible in favor of his own position and to omit the differences. In De iure belli ac pacis, he turned openly against the Salamancaans, saying that his view was contrary to the Opinion of Victoria, Vasquez, Acurio, Molina, and others, who seem to require, towards making a War just, that he who undertakes it be injured in himself, or in his State, or that he has some Jurisdiction over the Person against whom the War is made. For they assert, that the Power of Punishing (punendi potestas) is properly an Effect of Civil Jurisdiction, whereas our Opinion is, that it proceeds from the Law of Nature. And certainly, if the Opinion of those from whom we differ be admitted, the Consequence is, that one Enemy shall have no Right to punish another, even after the War is begun, upon the Account of any Cause that has no Relation to Punishment, which yet is a Right that most allow of, and the Practice of all Nations confirms, and that not only after the Enemy is subdued, but likewise during the War; not on Account of any Civil Jurisdiction, but of that natural Right which was both before the Foundation of Governments, and even is now still in Force in those Places, where Men live in Tribes or Families, and are not incorporated into States. Grotius saw clearly that, if a right to wage war for purposes of punishment was to be maintained and just wars were to result not merely from

49 For an actio populaire, see, e.g., the action against the violation of a tomb. Dig. 43.12.21 pr: "The prosecutor says: Where it be said that a tomb has been violated... I will give an actio in faction against him so that he be condemned for what is right and fitting to the person affected. If there be no such person or if he does not wish to sue, I will give an actio pro centum gold pieces in anyone who does wish to take action [itacis minis]."

50 RBP. 1.2.20.4: "contra quam sententiam victoria, vasqui, acrius, molina, ali, qui ad jus inmediatis belli requisitum erat, postquam acta fuerant in se aut republica sua, aut in iure, aut in iure que bello impeditam jurisdictionem habeat. Postquam enim illi puniendo postresse esse effecum proprium jurisdictionis civilis, cum non eas sententias venire tamen ex iure naturali... In aequi illius ius quisque ponderare esse constitutionem, et sigillum in loco homines vivant in familias non in civitates distribuere." For a very lucid reading of this passage, see Hagenmacher 1931b, 304, who maintains that Grotius' interpretation of the Spaniards is correct only in its first sentence, not in the too narrow second sentence. For our purpose it suffices to say that Grotius was certainly correct in claiming that the Spaniards had not acknowledged a natural right to punish vested in everyone.

Grotius had developed his doctrine of a natural right to punish against the backdrop of the need to show that the Dutch East India Company, even if acting on its own behalf as a private actor, had the right to wage a war of punishment against the Portuguese fleet in Southeast Asia. John Locke carried the doctrine further and made it the basis of his theory of government by predicating the right as well as the power to govern on the delegated natural right to punish, with well-known anti-absolutist ramifications. It is fair to say that the notion of a natural right to punish vested in each person provided a criterion to distinguish between more or less legitimate forms of government, between absolute monarchy on the one hand and civil government on the other, enabling Locke to declare that the state of nature is to be preferred compared to that of absolute monarchy. In the latter, the subjects had to give up their natural right to punish...
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without at the same time enjoying the advantages of civil government, namely the enforcement of the law of nature through magistrates. Locke's civil society comes about by a delegation of the individual right to punish to the commonwealth, and by the creation of an authority to appeal to "upon any Injury received," yet such an authority cannot exist under an absolute prince. 55

Conceptually, Grotius' natural right to punish can be analyzed in Hohfeldian terms both as a privilege and a power. 56 The bearer of Grotius' right to punish is not under a duty to refrain from exercising it, thus having the liberty to punish, and also having the power of altering existing legal circumstances, i.e., he is not under a duty to refrain from altering the legal status of the person who is to be punished. Furthermore, drawing on Jeremy Waldron's useful distinctions between general, special, absolute, and relative rights, it can be said that Grotius' natural right to punish fits the description of a general right in personam. 57 The right is general in that it inheres in everyone qua human being ab initio, which means that there is no contingent transaction required in order to become the bearer of the right, and it is in personam in that it is a right not against everyone else, but only against the perpetrator of a violation of the law of nature, i.e. the right corresponds to a duty incumbent not just on a particular person, but owed by that particular person to all the subjects of the law of nature.

As to the role of the natural right to punish in Hugo Grotius' overall theory of natural justice, it appears that to the extent that this theory of justice is indebted to Aristotle's account of involuntary compensatory justice, 58 it has a strong retributive and therewith deontological thrust. This comes to the fore in Grotius' first and partly in his second justification of the right to punish: punishment is good for the wrongdoer as well as for the victim, it "corrects" the unjust deed and brings about compensatory justness, without reference to matters of distributive justice. The rationale is entirely in line with Grotius' general reception of Aristotle's theory of justice, which does not concern itself with the distributive aspect of that theory whatsoever, but confines itself - both in De ture praedae and in De ture bellii ac pacis - to that part of Aristotle's particular justice which does not require any distributing authority, thereby implanting only a part of Aristotle's polis-justice into the state of nature, as it were. But Grotius' right to punish is also a secondary right of sorts, derivative of the primary rights of self-defense, property, and exaction of debt, and designed to prevent these rights from being violated by being available to everyone, as was the Roman actio popularis. Grotius' justification of punishment is thus obviously of a consequentialist character.

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

On the international plane, the conceptual consequences of a Grotian natural right to punish go beyond the establishment of certain non-derogable rights and rules, of, in other words, an international ius cogens. Given the general quality of Grotius' right to punish, such a right implies not only the nowadays highly contested notion of an international crime, but also the recognition of certain obligations that a state has towards the international community as a whole, i.e. obligations erga omnes. Taken together, these implications amount to a rather robust doctrine of unilateral reprisals that can include the use of force, taken by any state against a state that offends against the above-mentioned entrenched non-derogable ius cogens rights, which potentially could justify the use of force in what today is called a humanitarian intervention, since the offense in question could consist in a violation of citizens' rights by their own state. 59

It is safe to say that contemporary international law and the United Nations Charter (with its far-reaching prohibition on the use of force and its very narrowly construed permission of force to self-defense) 60 would assess Grotius' natural right to punish unfavorably. However, the legality of reprisals, taken by non-injured states against states which violate certain obligations erga omnes is an issue under discussion in contemporary international law, 61 and even the term "international crime" made a short

55 See Hohfeld 1945; for a useful summary, see Feinberg 1973, chapter 4.
57 See Aristotle, Eth. Nic. 1.4, 1149b1ff.
59 UN Charter, Art. 51, Art. 53.
60 The discussion on the use of countermeasures or reprisals by non-injured states focuses mainly on the interpretation of articles 48 and 54 of the Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission in 2001, which does not constitute treaty law and can only partly be seen as declaratory of customary international law. Even the
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appearance in 1996 in the Draft Articles on State Responsibility of the International Law Commission,\(^9\) betraying a noteworthy interest in some sort of general right to punish which might be able to strengthen compliance with some basic rules of conduct.

\(^9\) See Art. 19 of the Draft Articles on State Responsibility Provisionally Adopted by the International Law Commission on First Reading, printed in Crawford 2002, 131–35; see also the contributions in Weiler, Cassese, and Spinvius 1989. Art. 19 and the concept of international crimes were rejected on the second reading of the Draft Articles and replaced by the final Art. 41 and the notion of "serious breaches" of peremptory obligations; see Crawford 2002, 16-30.

Epilogue

The commission from the VOC to develop a legal argument in favor of Dutch actions in Southeast Asia confronted Grotius first of all with a problem: what doctrine of the sources of law to adopt? On what legal basis could he threaten war by the VOC against Portugal when the prevailing doctrine, as well as applicable state practice, and thus customary law, turned out to be very unfavorable to free shipping and free trade? As Grotius' contemporary opponents Welwod and Selden clearly recognized, in his search for norms that could regulate, in a way amenable to Dutch concerns, the behavior of the seafaring powers on the trade routes to East India, Grotius relied largely on the Roman civil law tradition and on Cicero's ethics of natural law.\(^1\)

As we have seen, Grotius used these two Roman traditions in order to portray the legal situation in which the world found itself before the establishment of states. In conformity with Roman property law, Grotius defined the high seas as a part of the world that continued to find itself in a pre-political state of nature and was thus subject to the rules of natural law. To Grotius, these natural law norms, true to their provenance in private law and Roman ethics, applied to both individuals and private trading companies in the state of nature, as well as to established sovereign polities among themselves. This analogous treatment of natural and legal persons on the one hand, and states on the other, resulted from Grotius' strategy of defining the VOC's war simultaneously as both a just private war and a just public war. This, together with the reception of the private-law norms of the Digest, led to a new doctrine of just war, which now, building on the formulas of Roman fœtal law passed down by Cicero, was adapted to the structure of Roman private law. The legal remedies of the Romans, the

\(^1\) See Gelderen 1993/94, who sees in Cicero Grotius' "leading classical source" (51) and finds (51) that the colonial expansion of the Dutch Republic caused Grotius to turn to natural law, which had been inspired by certain Roman legal scholars, but does not directly address these traditions or the tradition of bellum iuris.