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Attached are the first two chapters from a book manuscript that I am writing with my colleague Oona Hathaway, tentatively titled “THE WORST CRIME OF ALL: THE PARIS PEACE PACT AND THE BEGINNING OF THE END OF WAR.” This cover note is meant to help situate the chapters in the broader project.

The first part describes what we call the Old World Order—a system that relied on war as the linchpin of law. The first two chapters center on Grotius and the legal order he helped establish. The subsequent chapters of this part show how war was a source of legal redress and legal rights. The legal rights to territory, people, and goods were decided by war—even ones that were entirely unjust.

The second part of the book—comprised of four chapters—tells the story of what we argue is a deep shift in the legal meaning of war—the end of the Old World Order and the beginning of something fundamentally new. This shift, we argue, has consequences not just for states’ recourse to war, but for international law and the international system as a whole. The chapter that begins this second part of the book examines the “war to outlaw war”—the global movement to reject the remedial conception of war that characterized the Old World Order. That chapter ends with the signing of the 1928 Kellogg-Briand Pact (also called the Paris Peace Pact or Briand-Kellogg Pact). The next chapter examines the consequences that flowed from the decision to reject the legal rules that underpinned the Old World Order without first sorting out the legal rules and institutions that would take their place. The two chapters that follow this one will focus on the reconstruction of the legal order after World War II—addressing Nuremberg, the 1949 Geneva Conventions and, of course, the United Nations.

The third part of the book will examine our modern international legal system and the ways in which international law can and cannot shape state behavior. This part of the book will draw, in part, on our article on “outcasting” as a mechanism for enforcing international law (Hathaway & Shapiro, *Outcasting: The Enforcement of Domestic and International Law*, *Yale Law Journal* (2012)).

I look forward to the conversation.

CHAPTER 1: HUGO THE GREAT

In the beginning, there were kings. And they were not good to each other. In their relentless pursuit of power and glory, they spent vast sums on armies who marauded and plundered their way through Europe and drenched the land with the blood of enemy soldiers and innocent civilians. But in the 17th Century there arose a great man, Hugo Grotius. Grotius was the most brilliant and righteous scholar of his generation and was repulsed by the wickedness of the world around him. Drawing on his astonishing erudition and prodigious wisdom, he heroically fathered a new set of rules to curb the horrors of his age. Indeed, his epic achievements are still with us in the modern laws of war. It is said that wherever there is peace, the spirit of Hugo Grotius is to be found.

Lawyers are not ordinarily the stuff of legends, but Grotius is the exception. Though few would recognize his name nowadays, Grotius was once known to all educated people and revered by them as one of the greatest minds of all time. Until the end of the 18th Century, in fact, he was cited more frequently than William Shakespeare. Even today, lawyers, diplomats and human rights advocates regard him as their hero, almost a secular saint. To them, Grotius is the “Father of International Law” and the first great humanitarian. His name graces societies, journals and professorships. His image adorns grand public monuments. A marble relief of Grotius hangs over a gallery door to the House Chamber in the United States Capitol, alongside Moses, Hammurabi and Thomas Jefferson. Grotius’ classic work on war is the Bible of international law and is

invoked time and again by those wishing to impart moral authority to their opinions and arguments.

The only problem with this inspirational story about the acclaimed father of international law is that it is completely false. Grotius was no saint, and curbing war was the furthest thing from his mind. A more faithful account of the facts might go something like this:

In the beginning, there were trading corporations. And they were not good to each other. In their relentless pursuit of money and merchandise, corporations spent a vast sum on fleets of warships that sailed into the East Indies and drenched its ports with the blood of rival merchants and native peoples. One of these corporations—the Dutch East India Company—hired an adventurer named Jacob van Heemskerck. On a mission for the company in 1604, Heemskerck attacked a Portuguese treasure ship and plundered the gold, porcelain, silk and spices in its cargo hold. The haul was so great that the Dutch East India Company urgently sought a highly skilled legal mind to defend Heemskerck against charges of piracy.

Then arose a young man named Hugo Grotius. Grotius was among the most brilliant and aggressive lawyers of his generation and the directors of the corporation offered to retain him. Grotius agreed, for the fee was handsome and Jacob van Heemskerck was family—his cousin, actually. Drawing on his astonishing erudition and prodigious ambition, Grotius fathered a new set of rules in order to exonerate his cousin the pirate and secure treasure for his new corporate client.

Sadly, this is not a saga of heroism and humanitarianism restraint. It is, rather, a tale of greed and global commerce. But though it may not be inspiring, it is nonetheless fascinating. It is the story of how a Dutch lawyer and philosopher cracked the great riddle of international capitalism, namely, how world commerce is possible without a world government. The answer Grotius developed was both undeniably brilliant and deeply disturbing. And it would shape the world for centuries.

A Man of a New Age

Jacob van Heemskerck was terrifying. Indeed, while in armor, he looked like a Renaissance-era Darth Vader. He had a hard face, framed by closely cropped hair and a long mustache, which exuded complete confidence and not a little malice. It would be difficult to imagine him smiling. Born into a prominent Amsterdam family, Jacob nevertheless chose the restless and precarious life of an explorer and trader. “He was less of a rough sailor, more of a Drake or a Cavendish, a gentleman adventurer, somewhat proud and lofty, but polished and afraid of naught. He was not always acceptable to the old sea-dogs, for he was a man of a new age.”¹ Though beloved by few, he was a natural leader and inspired loyalty in his men. “When Jacob van Heemskerck was on board, the sailors felt safe; they grappled light-heartedly with the foe, and called the battle a ‘Heemskerck fight.’”²

¹ Joris van Speilbergen’s “The East and West Indian Mirror,” xxiv (quoting de Jonge)

² Id.

Heemskerck had spent his life seeking to open up the East Indies to Dutch trade. His first attempts to reach the tropical climes, however, were unsuccessful. In fact, he almost died of frostbite trying.

To get to the Indies, Heemskerck first sailed north, in 1595, to the Arctic. This is not nearly as crazy as it sounds. When globes were first produced in the 1580's, the three-dimensional representation of the Earth showed that the shortest route to Asia from Holland was the northern one.³ Instead of sailing all the way down to the southern tip of Africa and back up to India, it seemed quickest for ships to set off in the opposite direction—northeast around Norway, through the Arctic sea at the North Pole, down through the Bering Straits, and then to China.

Heemskerck, however, did not reach the Indies. His fleet got caught in the ice on the northern tip of Novaya Zemlya, the extreme edge of Europe, and was stuck there for the entire winter.⁴ To ride out the cold, the marooned men dismantled one of their ships and built a small house from the timbers and scavenged driftwood. (The house was so well-made that parts of it would remain standing almost 300 years later when it was rediscovered by a Norwegian seal hunter.)⁵ It was not until the ice melted eight grueling eight months later that they were able to return home. Though they had failed miserably in their mission, they did make history: the group became the first Europeans to survive a polar winter.⁶

³ Masselman, 82.

⁴ Id., 101-04.

⁵ Louwrens Hacquebord, "In Search of Het Behouden Huys: A Survey of the Remains of the House of Willem Barentsz on Novaya Zemlya," *Arctic* 48, no. 3 (1995): 251.

⁶ Masselman, 104-05.

Fortunately for the Republic, the Dutch had not placed all their bets on the Polar route. As Heemskerck headed north on his first voyage in 1595, four other ships sailed south. By the time they returned two and a half years later, two-thirds of the crew had perished. The report from the wretched stragglers was mixed: they made it to the East Indies, but they failed to find the spice markets, returning home with nearly empty holds. The trip was a flop for the investors and a catastrophe for the crew, but the merchant community was nevertheless thrilled. The Dutch dream of direct contact with the rich trades had become a reality.⁷

A new expedition set out the next year. Meticulously planned to avoid the numerous mistakes of the previous voyages, it included a larger fleet of eight ships carrying more than 500 men⁸ Heemskerck captained one of the eight.

Instead of taking the direct path along the shoreline of Eastern Africa, the fleet failed into the Indian Ocean where the winds were more favorable. The leader of the expedition, Jacob van Neck, stopped to re-provision at Madagascar, but Heemskerck pulled into a previously uninhabited tropical island. Overjoyed to be in a lush oasis instead of the frozen tundra, he named the volcanic islet “Mauritius” after Prince Maurice of Nassau, the leader of the Dutch revolt.⁹ It was on Mauritius that he came upon the Dodo and was the first to pen a gastronomical review of the famously dimwitted bird. “There is a sort of bird as large as a goose, having the body of an ostrich, the feet of an eagle, with a very large beak like a... bird, with little feathers over the body, the wings the

⁷ Id., 91-109. Van Neck’s Journal (“In these aforesaid eight ships were some 560 men”)

⁸ Id., 110-11.

⁹ Jolyon C. Parish, *The Dodo and the Solitaire : A Natural History*, Life of the Past (Bloomington: Indiana University Press, 2013), 3.

size of [those of] a teal, very fat, when plucked apparently very good, yet tough skinned.”¹⁰ His assessment must have been accurate because the Dodo was eaten into extinction by the end of the century.

The ships arrived safely at the port of Bantam in Western Java and were able to take on roughly a million pounds of pepper and cloves. Heemskerck was sent on to the Moluccas, otherwise known as the “Spice Islands,” which were tucked away in the far eastern corner of the Indonesian archipelago. From the Moluccas, he pressed on further to locate the tiny islands known as the “Banda Group.” These miniscule specks of land formed the epicenter of the spice trade: they were the only place on Earth where mace and nutmeg grew.¹¹ Heemskerck managed to find the Banda Group but discovered that dealing with the inhabitants was harder even than finding their small islands in a vast sea. The natives were excellent jugglers and were able to swap lighter weights for those used at earlier weightings without detection. Only by threatening to leave if these shenanigans continued did he manage to complete his business. “A man needs seven eyes,” Heemskerck wrote, “if he does not want to be cheated. These people are so crooked and brazen that it is almost unbelievable.”¹²

Upon their return to Amsterdam, the sailors were hailed as heroes. Their success ignited an explosion in Dutch trading with the East Indies.¹³ By 1601, ten companies had formed in different Dutch cities and launched fourteen separate expeditions with a total

¹⁰ Id., 14.

¹¹ Masselman, *The Cradle of Colonialism*, 113-4.

¹² Id., 115-16.

¹³ Id., 114-17.

of sixty five ships.¹⁴ As the 17th Century began, the Dutch sensed that they were bound for greatness. They soon realized that they were also bound for war.

Collision Course

Today, Portugal may be smaller, both territorially and economically, than the state of Indiana.¹⁵ But once it was a global empire, arguably the most powerful nation in the world. Traces of its former glory are still visible around the globe. Portuguese is spoken by over a quarter of a billion people and is the official language of countries on four continents—Europe, South America, Asia and Africa.

The Portuguese built their global empire on two commodities: slaves and spices. Portugal was the first European nation to traffic in the African slave markets and then in the East Indian spice trade.¹⁶ Its dominance was achieved through sheer daring and tenacity. Portuguese sailors spent close to a century inching their way down the Western Coast of Africa, probing the uncharted shoreline and capturing slaves along the way.¹⁷ In 1488, Bartolomeu Dias finally rounded the Cape of Good Hope—the first European

¹⁴ Id., 133-34.

¹⁵"The World Factbook," Central Intelligence Agency, <https://www.cia.gov/library/publications/the-world-factbook/geos/po.html>. "U.S. Census Bureau: State and County Quickfacts," ed. U.S. Department of Commerce (Washington, DC: U.S. Census Bureau, 2013). Accessed June 22 2013. <http://quickfacts.census.gov/qfd/states/18000.html>. Indiana's manufacturing business in 2002, alone, was worth more than all of Portugal's exports in 2012 combined. From stats.indiana.edu above: Indiana manufacturing in 2002 = \$68,205,000,000 in 2005 USD, or \$80,191,798,000 in 2012 USD). CIA factbook: Portugal's exports in 2012 = ~\$57,800,000,000 in 2012 USD.

¹⁶ *The Portuguese Seaborne Empire, 1415-1825*, 1st American ed., The History of Human Society (New York,: A. A. Knopf, 1969), 20. Bailey W. Diffie and George D. Winius, *Foundations of the Portuguese Empire, 1415-1580*, Europe and the World in the Age of Expansion (Minneapolis: University of Minnesota Press, 1977), 77-8.

¹⁷ Boxer, *Portuguese Seaborne*, 26; Diffie and Winius, *Foundations of the Portuguese Empire, 1415-1580*, 77-88.

known to have done so—and set foot on the shores of Eastern Africa.¹⁸ He had at last reached the Indian Ocean, the gateway to the Indies.¹⁹

Francisco López de Gómara, a Spanish historian living in the 16th century, wrote that Portugal’s discovery of the water route to India was “the greatest event since the creation of the world, apart from the incarnation and death of him who created it.”²⁰ He likely spoke for many of his countrymen, who spent the next century monopolizing European trade with Asia.²¹ From their fortresses in Goa on the Indian Subcontinent and Malacca on the Malaysian peninsula, the Portuguese controlled the spice trade, buying cloves, nutmeg, cinnamon and pepper from Asian traders and transporting them back to Lisbon.²² Their dominance was so great that they supplied no less than 75% of the pepper in Europe.²³

As the power of Portugal was surging, the Netherlands was barely treading water, almost literally. The Netherlands—the “Low Countries”—lay on an estuary of three major European rivers and much of the country is at, or below, sea level. The Dutch fought a never-ending battle against the water, seeking to reclaim land while at the same

¹⁸ Id.

¹⁹ The waters from the East Coast of Africa to India had been extensively explored by centuries of Asian and Arab navigation and trade. *Four Centuries of Portuguese Expansion, 1415-1825; a Succinct Survey*, Publications of the Ernest Oppenheimer Institute of Portuguese Studies of the University of the Witwatersrand, Johannesburg (1961), 12; George Masselman, *The Cradle of Colonialism* (1963), 193-4, 215. A. R. Disney, *A History of Portugal and the Portuguese Empire*, 2 vols., vol. 2 (2009), 120-22; Diffie and Winius, *Foundations of the Portuguese Empire, 1415-1580*, 176.

²⁰ Boxer, “Four Centuries of Portuguese Expansion, p.1; Francisco López de Gómara, *Primera y segunda parte de la historia general de las Indias*, Vol. I, p.4. (Note: Still looking within Gómara to ensure quote is actually there.) See also Adam Smith’s description of the importance of Portuguese discovery, in http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=200&chapter=217482&layout=html&Itemid=27

²¹ Disney, *A History of Portugal and the Portuguese Empire*, 2, 125-37, 65-67.

²² Boxer, *Four Centuries of Portuguese Expansion, 1415-1825; a Succinct Survey*, 14; Masselman, *The Cradle of Colonialism*, 217.

²³ Disney, 152.

time preventing it from being flooded by the tides. Hence, the iconic symbols of the Dutch are the Windmill and the Dyke: the first for pumping water, the second for containing it.

The water was a curse, but also a blessing. Because they enjoyed superior harbors and extensive inland access to Europe through its river systems, the Dutch specialized in transportation and trade. But for most of the 16th Century, the Low Countries did not fully exploit their geography. They played no role in the so-called “rich trades”—the sale of spices, porcelain and fine textiles—where the real money was made. Leaving these luxury goods to the Portuguese, the Dutch contented themselves with bulk transfers of grain on large barges to Northern Europe, which helps explain how the provinces became leading producers of beer.

The Dutch were not only engaged in a constant struggle with the sea, they were also fighting their Spanish overlord, the “Most Catholic King” Phillip II. In 1568, at the height of the Reformation, the Netherlands rebelled against the intolerant policies of Phillip, leading to a bloody religious war.²⁴ The revolt split the country in two, largely along confessional lines. The Southern, Catholic half—present day Belgium and Luxembourg—remained with the Spanish Empire while the Northern, Protestant part proclaimed independence in 1579. The following year Spain and Portugal united under a single crown, as Phillip II of Spain became Phillip I of Portugal as well. The fledgling Dutch republic now found itself engaged in a fight to the death with the two greatest empires of the world.

²⁴ Id., 28.

Ironically, it was the fanatical Spanish king Phillip who led the Dutch Republic to the Indies. For in 1590, he threw himself into another war of religion, this time against the French Huguenots. Needing the men, Phillip withdrew his armies from the Netherlands and sent them to France. Needing the money, he lifted a punitive trade embargo imposed on the Dutch Republic just a few years earlier. With the imperial troops gone and new markets open, the Dutch began to dabble in the rich trades by buying spices in Lisbon and selling them throughout Northern Europe. It didn't take the Dutch merchants long to figure out the enormous commercial potential of Asian goods. They soon resolved to cut out the middleman and trade directly with the East Indies.

When adventurers such as van Neck and Heemskerck achieved this goal only a few years later, the Portuguese were shocked and furious. After all, they had “discovered” the East Indies.²⁵ Not only had Dias found the water route and Vasco Da Gama, another countryman, made it to India, but the Pope had also “donated” this part of the world to Portugal in a series of Papal bulls.²⁶ The Portuguese were not about to give up their hard-won territory to anyone, least of all to Protestant rebels.

In response to the Dutch incursions into the East Indies, the Portuguese retaliated against local traders and potentates who did business with the competition. Bantam in Java was besieged in December of 1601 by Portuguese frigates. An armada was sent to the Moluccas by the Viceroy to punish the natives and expel the Dutch traders that had tried to set up concessions there. The Portuguese laid waste to Ambon, one of the most

²⁵ On the history of European spice trade before Da Gama, see Paul Freedman, *Out of the East*. On the role of “discovery” in 16th Century international law, see Carl Schmitt, *Nomos of the Earth*, Part II, Chapter 3.

²⁶ For the history of these papal donations, see James Muldoon, *Popes, Lawyers and Infidels*.

important of the Spice Islands, and built forts in the newly conquered territory.²⁷ “[T]hroughout the whole Orient the very name of Holland grew to be utterly abhorrent as the symbol of a loathsome curse,” Grotius would later write, “the fount and origin of every calamity for the natives.”²⁸

The Portuguese did not direct their fury solely at the natives. They went after the Dutch as well. Unlike the natives, however, these newcomers to the East Indies had the same weapons as Portuguese. And the legal defense Grotius later developed would give them license not only to fight back, but to get even.

The Taking of the *Santa Catarina*

Jacob van Heemskerck’s next voyage to the Indies would be nothing like the previous one. The days of peaceful trading in spices were over. The whole region had become a combat zone.

Heemskerck set out to the East Indies on April 23, 1601 as the leader of an eight ship fleet and almost immediately ran into trouble.²⁹ He was greeted off the Canary Islands by an armada of twelve Spanish galleons. One of his ships was badly damaged in the fight and was forced to return to Amsterdam. Another was separated from the pack and headed to Asia alone.

The remaining ships arrived safely in the East Indies, but they were unable to reach their destination, Aceh in Northern Sumatra, because of adverse winds. Instead,

²⁷ Van Ittersum, *Grotius in Context*, 515-16.

²⁸ Grotius, Hugo. *Commentary on the Law of Prize and Booty*, 288

²⁹ Martine Julia van Ittersum, *Profit and principle; Hugo Grotius, natural rights theories and the rise of Dutch power in the East Indies, 1595-1615* (Leiden: Brill’s Studies in Intellectual History, 2006), 7.

they called at Bantam in Western Java. The sight of six Dutch merchant ships in the harbor roiled the spice market and dramatically inflated the price of pepper. Heemskerck decided to leave two ships at Bantam and, as he had hoped, the prices eventually came back down. A few weeks later he sent two more ships back to Bantam and they too were able to buy spices at a reasonable price. The ship which had been separated near the Canaries finally arrived from Aceh half empty – it was the only member of the fleet to actually make it to the original destination – and it was also able to fill its remaining cargo holds at Bantam. In May, these five ships set sail to Amsterdam “richly laden with spices and other commodities” leaving Heemskerck with two ships, the *White Lion* and the *Alkmaar*, behind.³⁰

Heemskerck sailed eastward, stopping in Japara, a small trading town carved out of a thick forest of teak trees. Disaster struck when the overlord of the region, the ruler of Demak, arrested Heemskerck’s men as they came ashore to trade. Heemskerck frantically tried to secure their release, but he was only partially successful. Most were let go, but twelve were forced to remain in order to man the guns against Demak’s archenemy, the Mataram of Java, who ruled the island’s interior.³¹

Unable to free the rest of his crew, Heemskerck reluctantly traveled to the eastern tip of Java. He established a trading post there and journeyed further east to Bali. While Heemskerck was gone, his lieutenant he left in command of the post captured a Portuguese supply ship and discovered a shocking letter on board.

³⁰ Id., 7-8.

³¹ van Ittersum, *Profit and Principle*, 8. For Heemskerck’s offer to return the cargo and the ruler of Demak’s refusal to bargain, see Id., 18.

The letter described the first Dutch sojourn to a Chinese port. In November, 1601, Jacob van Neck, who led Heemskerck's first successful expedition to the East Indies, had pulled his fleet into the port of Macao, a market town located on the Pearl River Delta across from Hong Kong. Macao was the only site that the Chinese permitted foreign trade and the Portuguese had established a large presence there. Being unfamiliar with China, van Neck had sent out a small boat with eleven aboard to investigate the lay of the land. The Portuguese lured the boat "ashore by white flags of truce" and arrested the Dutch as soon as they landed. When the party did not return, a slightly larger expedition was sent out to discover its fate and these sailors were also arrested. All the captives were thrown in a cave and tortured. The Chinese governor in Canton asked that the Dutch be surrendered to him, but the Portuguese magistrate refused. Reports differ as to the Dutch sailors' fate. The letter claimed that seventeen captives were hung on the magistrate's orders, though Grotius would later allege that only six were hung while the remaining were taken to shore at night in iron fetters with weights attached to the chains and drowned.³²

Heemskerck was unable to reach Bali because of a monsoon and returned empty handed. When his lieutenant showed him the letter describing the grisly massacre of his countrymen, Heemskerck became enraged. "If it had not been for the Dutch captives in the Sultanate of Demak and the trading post I wanted to establish at Grisse, I would have hanged our remaining [Portuguese] prisoners from the bowsprit, in full sight of the

³² See Heemskerck's letter of July 1602, December 1602, and August 1603 to the United Amsterdam Company here in *Id.*; Grotius, *ROP*, Ch. XI.

Portuguese [merchants in Grisse].”³³ Heemskerck managed to restrain himself, but the fuse had been lit.

Heemskerck spent the next several months sailing the East Indies in search of spices to buy. The effort was futile, for the stocks had been decimated by the Portuguese attacks on the natives coupled with the increased competition from other Dutch traders. His luck, though, was about to change. In the port town of Patani, Heemskerck met a member of the Johore royal family, Raja Bongsu, who was there celebrating his wedding. Bongsu was described by the Dutch trader Matelieff de Jonge as “almost white, not the tallest, but intelligent, tempered, not choleric, far sighted, an enemy of the Portuguese.”³⁴ Aside from being capable and charismatic, Bongsu handled foreign affairs for Johore because his brother, the King, was an alcoholic. “The King of Johor is also a person of little ambition who is accustomed to sleeping until midday, then washes himself and proceeds to drink himself drunk. As a result, after noon it is not possible to negotiate with him [anymore], for one has to drink along with him and do the things drunken men do.”³⁵

Heemskerck and Bongsu struck up a quick friendship and talked about a possible business relationship aboard the *White Lion*.³⁶ Bongsu pointed out that Johore sat on the southern tip of the Malaysian peninsula—a region which includes the modern city-state of Singapore—and thus was an ideal location for a trading post. He also revealed that his brother hated the Portuguese even more than Heemskerck did. The Portuguese had

³³ van Ittersum, *Profit and Principle*, 8. For the letter detailing the massacre of van Neck’s crew and Heemskerck’s reaction, see *Id.*, 8-9.

³⁴ Matelieff de Jonge: Description of the Four Princes of Johor, 1606 (translation Peter Borschberg), 5 at http://www.borschberg.sg/index_files/Description%20Rulers.pdf

³⁵ *Id.* at 4.

³⁶ Peter Borschberg, *The Singapore and Melaka Straits: Violence, Security and Diplomacy in the 17th Century* (Singapore: NUS Press, 2010), 21, 59-62, 78, 85, 108, 122, 164

wrested the city of Malacca from Johore in 1511,³⁷ and his family still held a grudge almost a century later.³⁸ As far as his brother was concerned, the Dutch “could never damage the Portuguese enough.” Bongsu also explained that Johore was an ideal base from which to attack Portuguese cargo ships as they made their annual call to China between December 20th and 31st and returned to India through the Straits of Singapore.³⁹

The timing was right—it was early December. So Heemskerck met with his officers to discuss the possibility of capturing a Portuguese ship. The group of officers, known as the “Broad Council,” saw three benefits to this plan. First, it would avenge the outrage perpetrated by the Portuguese on van Neck’s crew in Macao.⁴⁰ Second, it would defend the Dutch right to trade in the area.⁴¹ Third, it would damage the Spanish campaign against the Dutch Republic by cutting into a crucial source of war funds.⁴² There was a fourth reason which was not reported in the Broad Council’s final resolution to attack but was undoubtedly discussed: their cargo holds were still empty and they had nothing to show for nearly two years at sea.⁴³ A Portuguese cargo ship would be laden with goods from China and its capture would turn their voyage from bust to boom.⁴⁴

³⁷ Paul H. Kratoska (gen. ed.), *South East Asia: Colonial History* (London: Routledge, 2001), Vol. 1, 151-178.

³⁸ Hugo Grotius, DJP, ed. and with an Introduction by Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006), 533-537.

³⁹ For Heemskerck’s disappointing trip for pepper, see van Ittersum, *Profit and Principle*, 11; For his new friendship and alliance with Ragu Bongsu, see Id., 13, 18-19; For Bongsu’s strategic advice, see Id., liii; Grotius, DJP, 296, 534.

⁴⁰ van Ittersum, *Profit and Principle*, 19-23; Peter Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies* (Singapore: NUS Press, 2011), 114.

⁴¹ van Ittersum, *Profit and Principle*, 21, 23.

⁴² Id., 20-21.

⁴³ Borschberg, *The Singapore and Melaka Straits*, 71.

⁴⁴ van Ittersum, *Profit and Principle*, 41.

The Broad Council was well aware that taking the offensive was not within their mandate.⁴⁵ Both Heemskerck's commission from Prince Maurice and the instructions from the United Amsterdam Company were quite explicit: the fleet was to use force only in "self-defense or for the reparation of injuries."⁴⁶ But the Council decided that the facts on the ground had overtaken the previous instructions and extreme measures were now warranted.⁴⁷ The Council was unanimous: They were out for revenge.

The Santa Catarina

Heemskerck's flotilla reached the mouth of the Johore River in the Straits of Singapore on February 24, 1603. As the sun rose the next morning, the crew awoke to an astonishing sight: their quarry, the Portuguese great-ship *Santa Catarina*, had arrived during the night and was anchored before them in full view.⁴⁸

By standards of the day, the *Santa Catarina* was enormous.⁴⁹ It was a newly built "carrack," a U-shaped boat with a huge fore- and aft-castle, designed to be impregnable by smaller ships.⁵⁰ It rode high in the water but its massive size made it stable enough for many canons and gave it ample room for cargo.⁵¹ Magellan's carrack that

⁴⁵ Id., 20-25.

⁴⁶ Id., 10; Grotius, DJP, 422-424.

⁴⁷ Id., 168-182; van Ittersum, *Profit and Principle*, 21.

⁴⁸ For Heemskerck's realization, arrival at the Johore River, and encounter with the *Santa Catarina*, see van Ittersum, *Profit and Principle*, 34-35.

⁴⁹ Peter Borschberg, "The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch Johor Alliance (1602 – c.1616)," *Journal of Southeast Asian Studies* 33.1 (2002): 35.

⁵⁰ C. R. Boxer, *The Portuguese Seaborne Empire, 1415-1825* (New York: A. A., 1969), 207; Grotius, DJP, 14; Alexander Dean Hazlett, "The *Nau* of the *Livro Nautico*: Reconstructing a Sixteenth-Century Indiaman from Texts" (PhD diss., Texas A&M University, 2007), 4, 30.

⁵¹ Audrey Elizabeth Wells, "Virtual Reconstruction of a Seventeenth Century Portuguese *Nau*" (M.S. thesis., Texas A&M University, 2008), 12.

circumnavigated the world, the *Victoria*, was 85 tons; the *Santa Catarina* was close to 1500 tons.⁵² The carrack was so large that it transported nearly a thousand people: 700 soldiers, 100 women and children (probably to be sold as slaves in Malacca) and assorted crew.⁵³ The Portuguese Chamber of Goa, writing to the King of India, said the *Santa Catarina* was “the richest and most powerful ship that ever left China.”⁵⁴

At 8 AM, Heemskerck ordered an attack on the carrack. Heemskerck instructed his crew to aim for the sails, not wanting to sink the boat but merely to immobilize it.⁵⁵ As it would turn out, the fight was entirely one-sided. Though the *Santa Catarina* was nearly three times larger than any of Heemskerck’s ships, its large size made it cumbersome to maneuver. The carrack was also transporting too many people and the confusion on the decks made coordination virtually impossible. Making matters worse, the carrack’s crew was not skilled in the art of naval warfare. The Portuguese auctioned the office of constable and bombardier off to the highest bidder, which is a great way to make money, but a terrible way to keep it.⁵⁶

By 6 PM, the battle was over. The *Santa Catarina*’s sails were in tatters and the carrack was in danger of crashing into the shallow rocks by the eastern entrance of the Singapore Straits. It wisely surrendered to Heemskerck. The Dutch crew boarded the

⁵² Scott M. Fitzpatrick and Richard Callaghan, “Magellan’s Crossing of the Pacific,” *The Journal of Pacific History* 43.2 (2008): 148; van Ittersum, *Profit and Principle*, 35.

⁵³ Grotius, DJP, 538.

⁵⁴ Boxer, Japan, 15, referencing the Archivo Portuguez Oriental. Both Chang (112) and Boxer (Fidalgos, 51) say the capture brought so much porcelain into Holland that for many years in Holland, Chinese pottery was known as *Kraakporselein*, or “Carrack-porcelain.”

⁵⁵ Id.

⁵⁶ For Heemskerck’s attack, see van Ittersum, *Profit and Principle*, 35; For the *Santa Catarina*’s ill-equipped traits, see Borschberg, *The Singapore and Melaka Straits*, 73-75, van Ittersum, *Profit and Principle*, 38; For the Portuguese auctioning offices, see Borschberg, “The Seizure of the Sta. Catarina Revisited,” 47.

carrack and transferred the prisoners and cargo to their own boats. The carrack's now-empty holds were used to load pepper and cloves that Heemskerck bought on the return voyage in Bantam. Heemskerck's ships hauled the vessel all the way back to the Netherlands.⁵⁷

News of the incident quickly circulated and the auction of the cargo attracted interest from all over Europe.⁵⁸ At the public sale in Amsterdam, merchants were amazed to discover the richness of the capture.⁵⁹ The ship's legendary contents included over a thousand bales of raw Chinese silk, chests filled with colored damask, atlas (a type of polished silk), tafettas and silk, large amounts of gold thread, robes and bed canopies spun with gold, silk bedcovers and bedspreads, sixty tons of porcelain dishes, substantial quantities of sugar, spices, gum and musk, wooden beds and boxes and a 'thousand other things that are produced in China.'⁶⁰

The total proceeds came in at 3,500,000 silver guilders—more than double the total capital of the United Amsterdam Company.⁶¹ The expedition had earned a staggering rate of return. More impressive still was the sum itself. 3,500,000 guilders converted to 300,000 pounds sterling, which amounted to roughly 75% of the total

⁵⁷ For the *Santa Catarina*'s capture, see van Ittersum, *Profit and Principle*, 35, 37; For the transfer of its prisoners and cargo, see Id., Grotius, DJP, 538; For the carrack's return trip, see van Ittersum, *Profit and Principle*, 36, 114-115.

⁵⁸ Borschberg, "The Seizure of the Sta. Catarina Revisited," 37-38.

⁵⁹ van Ittersum, *Profit and Principle*, 114.

⁶⁰ Levinus Hulsius, *Achte Schiffart, oder Kurtze Beschreibung etlicher Reysen so die Holländer und Seeländer in die Ost-Indien von Anno 1599 bis Anno 1604 gethan...* (Frankfurt/Main: Matthis Beckern, 1608); in Fruin, 'Onuitgegeven werk', 388 note 3. A list of products purveyed by the Portuguese in China is in *Documentação Ultramarina Portuguesa* (henceforth *DUP*), Vol. II (Lisbon: Centro de Estudos Históricos Ultramarinos, 1962), 114–15.

⁶¹ Borschberg, "The Seizure of the Sta. Catarina Revisited," 35; van Ittersum, *Profit and Principle*, 36.

expenditures of the British government for that fiscal year.⁶² The successful auction alerted the Dutch to the enormous profits to be gained from the East Indies, not simply from spices, but from the silk and porcelain that could be procured from China.⁶³

The auction, and the capture that made it possible, was also the harbinger of something more sinister: a new form of warfare fought not by sovereign states, ambitious nobles or the Catholic Church, but by trading corporations seeking to maximize profits for the benefit of their shareholders.⁶⁴ First, however, it would take a brilliant legal mind to justify Heemskerck's brazen attack on the *Santa Catarina*—a task that would take two years and hundreds of pages and that would in the process reimagine the very legal foundations and meaning of war.⁶⁵

Hugo Grotius, Corporate Lawyer

By the time Heemskerck made it back to the Netherlands, his previous employer, the United Amsterdam Company, no longer existed.⁶⁶ The States-General, the supreme legislative body for the Republic, decided to grant a monopoly to the newly formed Dutch East India Company (commonly called the “VOC” for the *Vereenigde Oost-Indische Compagnie*, or United East India Company) in order to put an end to the ruinous competition among Dutch traders—which Heemskerck had experienced firsthand.⁶⁷ The

⁶² Richard Tuck, *Rights of War and Peace*, Chapter 4.

⁶³ van Ittersum, *Profit and Principle*, 36-39, 114-117.

⁶⁴ van Ittersum, *Profit and Principle*, lii-iii, lvii.

⁶⁵ Grotius, *DJP*, xiv-xx.

⁶⁶ Robert Fruin, *De Jure Pradae Commentarius - An Unpublished Work of Hugo Grotius's* (New Jersey: The Lawbook Exchange LTD, 2003), 18.

⁶⁷ van Ittersum, *Profit and Principle*, 1, 116, 158-59.

VOC took over the assets of the United Amsterdam Company and claimed the *Santa Catarina* as its own.⁶⁸ Following standard procedure, a lawsuit was brought in Admiralty Court to secure rights to the prize.

The VOC and Heemskerck appeared as the plaintiffs. They petitioned the court to summon all those who might claim the property as their own. The court obliged and sent out notices every two weeks for the next six weeks. Nobody appeared, of course—the Portuguese owners were licking their wounds halfway around the world. On September 9th, 1604, the plaintiffs received the desired verdict and “the carack, together with all the goods which came out of it, were declared forfeited and confiscated.”⁶⁹

Given the enormous value of the capture, the VOC sought a lawyer who could defend the verdict. A brother of a VOC director had been roommates with an ambitious, young lawyer named Hugo Grotius and recommended him for the assignment.⁷⁰ The job was offered to Grotius and he jumped at the opportunity.⁷¹

It is reasonable to ask why Grotius was hired in the first place. After all, the Admiralty Court had awarded the rights to the ship and its cargo to the VOC.⁷² A client usually hires its lawyer *before* it wins, not afterward.

The most plausible explanation has been suggested by the historian Martine van Ittersum.⁷³ She argues that the defense of the capture was addressed not to the Dutch courts but instead to Dutch politicians—the “States-General.” From the VOC’s

⁶⁸ Fruin, *An Unpublished Work of Hugo Grotius’s*, 18.

⁶⁹ *Id.*, 18-23.

⁷⁰ Grotius, DJP, xiv-xv; van Ittersum, *Profit and Principle*, 24;

⁷¹ van Ittersum, *Profit and Principle*, 26.

⁷² van Ittersum, *Profit and Principle*, 25.

⁷³ The following relies on van Ittersum, *Profit and Principle*, 25-26, 122, 124, 168 178, 181, who disagrees with the traditional account set out in Fruin, *An Unpublished Work of Hugo Grotius’s*, 32-36.

perspective, the capture of the *Santa Catarina* was the first volley in a new militant corporate strategy. The company was determined to pursue trade in the East Indies by all means necessary, violent ones included.⁷⁴ Heemskerck's victory in the Singapore Straits was clear evidence that the fight could be taken to the Iberian Empire in its colonial backyard.

But there was a major drawback to this business strategy: war is not cheap. The fight against the Portuguese could not be prosecuted without hurting the VOC's bottom line. The VOC needed help from the States-General. It wanted special tax breaks, such as exemptions from import and export duties. It needed legal protections from shareholders demanding dividends. And it coveted, perhaps most of all, military aid such as ships, cannons and soldiers.

In modern day terms, the VOC was a monopolistic publicly traded corporation and Heemskerck was a private security contractor. Globalization was driving costs up and the company directors were desperately seeking various forms of corporate welfare in order to compete. What they needed, in other words, was a good lobbyist.

Hugo Grotius was the perfect man for the job. Born in Delft on Easter Sunday 1583, Grotius—the family name in Dutch is de Groot (literally, “the Great”), but he preferred the Latinized “Grotius”—was a renowned child prodigy. When only eight, he had written such expert Latin verse that one of his poems was presented to Prince Maurice as a gift.⁷⁵ By eleven, he matriculated at Leiden College (soon to be Leiden University). His teachers were so impressed that one professor penned a poem in which

⁷⁴ van Ittersum, *Profit and Principle*, 178.

⁷⁵ Vreeland, 10.

he compares the adolescent Grotius to the famous Erasmus. “Am I deceived?”, the professor gushed. “Or was our Erasmus even so great?”⁷⁶ At age fifteen, he was invited on a diplomatic mission to the French court. According to the oft-told story, Henry IV of France was so overwhelmed by Grotius’ erudition that he presented the boy a gold pendant bearing the royal likeness as a gift and dubbed him “the Miracle of Holland.”⁷⁷ Grotius stayed in Paris and soon thereafter was awarded a doctorate in Law from the University of Orleans.⁷⁸ He returned to Holland and was called to the Bar. A silverpoint drawing by Jacques de Gheyn commemorates the event.⁷⁹ The caption states that Grotius is fifteen, but he looks no more than twelve, frowning his brow in a desperate attempt to look thoughtful. De Gheyn was clearly aiming to capture his subject’s legendary precocity, but the effect is more comic than dramatic: picture a Dutch Doogie Howser.⁸⁰ His friend Daniel Heinsius later noted that Hugo never had a childhood. “Others were men after a long time, but Grotius was born a man.”⁸¹

A portrait painted only a few months later shows a very different person. Jan van Ravesteyn’s circular panel depicts a handsome teenager, elfin in appearance, with blue eyes, light brown hair and a long, elegant nose. He is clean shaven, still too young for the

⁷⁶ Brandt, “Het Leven van Huig de Groot,” Bk I, 7 (“*Fallor? an et talis noster Erasmus erat?*”)

⁷⁷ The story, however, may be apocryphal. The earliest mention of Grotius as the “Miracle of Holland” comes from Bruginy’s “The Life of the Truly Eminent and Learned Hugo Grotius” (1754 English trans.), but according to Bruginy, it is Gerrard Vossius, not Henry IV, that graces Grotius with that title. See p. 138. In Caspar Brandt’s *Verlog der Historie van het Leven des Heeren Huig de Groot* (1727), 451, the playwright Joost van den Vondel pens a verse where he also refers to Grotius as the “miracle of Holland.” Grotius himself, in his account of his encounters with Henry IV, never mentions this compliment supposedly paid to him.

⁷⁸ Knight, 36-39. Knight suggests that Grotius bought the degree.

⁷⁹ Ger Luijten and Ariane van Suchtelen, *Dawn of the Golden Age*, 398-99.

⁸⁰ The artist commissioned Grotius to pen verses for a series of paintings when Grotius was only thirteen. *Id.*, 399.

⁸¹ Vreeland, 15 (“*Namque reliqui viri/tandem fuere, Grotius vir natus est.*”)

fashionable Van Dyke beard that he would later grow. He is turned three quarters, relaxed, full of hope and promise. But Grotius quickly discovered, like so many others, that practicing law was not all that much fun. In a letter to his friend, he writes: “You know not, my worthy Heinsius, how much time the ungrateful practice robs me of. In no case has the fruit repaid the cost of the work done.”⁸² He would have rather have spent his time on literary pursuits. When he was eighteen, he managed to complete a biblical play, “Adam the Exile,” which was a critical hit and, indeed, would go on to inspire John Milton to write *Paradise Lost*. Milton considered Grotius one of his heroes.

Grotius got his big break when, in the same year, he was named official historian for the State of Holland. The eighteen year old beat out Dominicus Baudius, a prominent scholar more than twice his age who, after losing to Grotius, was appointed as extraordinary professor of rhetoric at Leiden.⁸³ Baudius probably did not object to finishing second to Grotius. In a letter written five years later, Baudius related that Grotius unexpectedly came to one of his lectures. Baudius was so intimidated by the prodigy’s presence that he got lockjaw.⁸⁴ Afterwards, Baudius begged Grotius’ forgiveness for having given such a poor performance.

Hugo the Great was a rising star in the Dutch political scene, with powerful friends and an even more powerful mind.⁸⁵ The VOC would be served well by hiring the illustrious and connected polymath. Grotius had much to gain as well. A high profile case would increase his public standing and accelerate his political career. And, as his

⁸² Vreeland, 40.

⁸³ Resolution of the States of Holland, November 9th, 1601. See also Vreeland, 39-40.

⁸⁴ In Vreeland, 43 (quoting Brandt, Bk I, 23.)

⁸⁵ Grotius, DJP, xiv; van Ittersum, *Profit and Principle*, xxv.

biographer noted, Grotius was nothing if not ambitious. “By nature he loved, and was most comfortable in, association with people of rank and importance, negotiating either their business or that of a ruling class. His eyes and affections always fastened and reposed on the heights.”⁸⁶

Grotius had a personal interest in the case as well. The maiden name of Grotius’ grandmother on his father side was “Elseling van Heemskerck.”⁸⁷ In justifying the capture of the *Santa Catarina*, Grotius was not only defending a trading company. He was protecting his cousin.

Pirates and Privateers

The VOC thought that they only had a political problem on their hands. And so they probably expected that Grotius would write a short pamphlet pleading the company’s case.⁸⁸ The opinion of the Admiralty Court awarding the *Santa Catarina* to the Dutch East India Company was very brief, a few paragraphs in length. Surely, it wouldn’t take Grotius that much longer to explain why the capture was legitimate.

Unbeknownst to the Directors, however, the matter was not nearly so simple. The Dutch East India Company did have a legal problem with their case—several in fact, and they were quite serious. Grotius quickly realized that a short defense of his cousin and his employer could not be written.⁸⁹ Instead of a small pamphlet, he spent the next two

⁸⁶ W.M.S. Knight, *The Life and Work of Hugo Grotius*, 191-92

⁸⁷ Knight, 6.

⁸⁸ Grotius, DJP, xv.

⁸⁹ Grotius, DJP, xvii; Martine Julia van Ittersum, “Hugo Grotius in Context: Heemskerck’s Capture of the *Santa Catarina* and its Justification in *De Jure Praedae* (1604–1606),” *Asian Journal of Social Science* 31.3 (2003): 542; van Ittersum, *Profit and Principle*, 4.

years composing a lengthy treatise on the laws of war, totaling one hundred and sixty three folios of neatly written, concise Latin. (The English translation runs just shy of five hundred pages).

The problem Grotius confronted was simple: why wasn't Heemskerck a pirate? After all, he ruthlessly attacked a foreign ship that did him no harm. Having overpowered the ship, he plundered its treasure and kidnapped its passengers. Isn't this *exactly* what pirates do? And if Heemskerck was a pirate, then the capture was not a lawful prize—the riches would have been stolen goods and the VOC would have been obligated to return them to the Portuguese.

Though we often think of pirates as sailors with peg legs, parrots and eye patches, “pirate” is actually a technical legal term. What distinguishes pirates from soldiers is not how they look or even what they do, but their legal status. Piracy is governed by an elaborate set of rules that are part of international law, or as it was called at the time, “the law of nations.” In order to appreciate the enormity of the task Grotius faced, we need to introduce some of these rules now.

Traditionally, “pirates” were contrasted with “enemies.” According to the classical definition set out by the Roman jurist Pomponius: “‘Enemies’ (*hostes*) are those who declare war against us, or those against whom we declare war; the rest are ‘brigands’ or ‘pirates.’”⁹⁰ An enemy, in other words, is a group fighting on behalf of a ruler. Only groups with rulers can go to war—no one else has the legal power to do so. Those who are not part of such a group cannot be an “enemy.” Rather, they are “brigands” or

⁹⁰ Digest, 50.16.118 (“*‘hostes’ hi sunt, qui nobis aut quibus nos publice bellum decrevimus: ceteri ‘latrones’ aut ‘praedones’ sunt.*”)

“pirates.” Because pirates lack the legal power to wage war, they do not enjoy its special legal protections. In particular, pirates are not legally permitted to kill or take property. If they do, they can be prosecuted for murder and theft. Indeed, a pirate is considered *hostis humani generis* (“an enemy of all mankind”) and can be punished severely not only by his victims, but by any state in the world.

Unlike pirates, certain members of the enemy enjoy the legal protections of war.⁹¹ In order to be entitled to these protections in naval warfare, the commander of a ship must receive a “commission” from a sovereign. By virtue of this commission, the commander and crew are legally permitted to harm members of another state against whom war had been declared. If captured, the commander and crew are not criminals and thus cannot be prosecuted for murder, theft or trespass. Without a commission, however, these sailors would be considered pirates because they would not be deemed to be fighting for a particular sovereign.⁹²

A commission was not the only way an individual could gain access to special legal protections in war. A sovereign could grant a special license to a private individual allowing him to attack enemy vessels and capture their ships and cargo. This license is called a “letter of marque.” A letter of marque essentially deputized the private individual to act as a naval officer and converted what would ordinarily be piracy into legally sanctioned behavior. Those granted letters of marque are called “privateers” and

⁹¹ Who was allowed to kill and take property from whom is a complicated legal question, one that we will be taking up in later chapters. For now, we will focus on the rules that applied to warfare on the sea, the rules that applied to land being very different.

⁹² These sailors were subject to the rules of the sovereign under whose commission they fought—the sovereign’s “Articles of War.”

their captures “prizes.”⁹³ In order to acquire the right to a prize, the privateer had to bring a “condemnation” action in Admiralty Court and show that the seizure occurred within the terms of the letter of marque and other technicalities of maritime law.

Only sovereigns could issue letters of marque—only they could legally transform a “pirate” into a “privateer.” Queen Elizabeth, for example, authorized many privateers to attack her Spanish and Portuguese enemies. This is why she treated Francis Drake as a hero and knighted him on the deck of his ship. The United States Constitution grants the right to issue letters of marque to Congress, though that power has not been exercised for nearly two centuries.⁹⁴

But here was the first problem with the van Heemskerck’s case: In contrast to Queen Elizabeth and the U.S. Congress, Prince Maurice was not obviously a sovereign.⁹⁵ The Dutch Republic was engaged in a *civil* war against its Spanish overlord and Maurice was the leader of the rebellion.⁹⁶ Much to his chagrin, no European state recognized him as a sovereign. Indeed, the English and the French, the Republic’s two closest allies, would not even receive Maurice’s ambassadors in their courts.⁹⁷ It was not clear, to say the least, that a rebel leader had the legal power to issue letters of marque.⁹⁸ And if

⁹³ Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies*, 162.

⁹⁴ US Constitution, Art 1, Sec 8.

⁹⁵ Grotius, DJP, xviii

⁹⁶ Grotius, DJP, xiii.

⁹⁷ van Ittersum, *Profit and Principle*, 54.

⁹⁸ Grotius, DJP, xiii. The legal status of prize-taking in civil wars would remain unsettled for several more centuries. It wasn’t even clear by the middle of the 19th Century whether President Lincoln had the power to authorize *his own navy* to capture rebel Confederate ships. In the Prize Cases of 1863, the Supreme Court would finally conclude that as matter of international law “it is not necessary to constitute war, that both parties should be acknowledged as independent nations or sovereign States.” The Brig Amy Warwick; The Schooner Crenshaw; The Barque Hiawatha; The Schooner Brilliante (The Prize Cases), 67 U.S. 635 (1863).

Maurice did not have such power, then Heemskerck was a pirate, not a privateer, and the *Santa Catarina* was stolen property, not a lawful prize.

But there was another, perhaps even more serious, problem with the Company's case: Maurice's commission to Heemskerck permitted him to use force only in self-defense or for the reparation of injuries.⁹⁹ But remember that the *Santa Catarina* was not the aggressor.¹⁰⁰ To the contrary, Heemskerck's fleet had gone looking for a fight. Even if Maurice's commission was a valid letter of marque, Heemskerck's actions did not seem to fall within its terms.¹⁰¹

Grotius did not write the pamphlet, therefore, because he knew it would not serve its purpose. The Company's case was utterly unpersuasive. Like any good lawyer, Grotius did make an attempt. In his treatise, he argued that Maurice had the power to issue letters of marque, Heemskerck's commission was a valid letter of marque and Heemskerck acted within its terms and so was a legal privateer.¹⁰² But Grotius' heart was not behind it, nor, indeed, was the law.

Grotius thus found himself driven to extreme measures in order to justify the capture and, more importantly for the VOC, to legitimize the new corporate strategy of militant trade in the Indies: he had to invent a new moral and political philosophy. Grotius did not have a name for this new theory, but later writers would coin one. They would call it "liberalism."

⁹⁹ van Ittersum, *Profit and Principle*, 22.

¹⁰⁰ van Ittersum, *Hugo Grotius in Context*, 521-22; van Ittersum, *Profit and Principle*, 23;

¹⁰¹ van Ittersum, *Hugo Grotius in Context*, 522.

¹⁰² Accord van Ittersum, *Profit and Principle*, 26-30.

War as Legal Remedy

In his classic 1969 protest song, Edwin Starr asks, “War—what is it good for?” then belts out the answer to his own question, “Absolutely nothing!” Most would still agree with the sentiment, even if not with its sweep. The modern attitude is to regard wars as uncontroversially bad, moral catastrophes to be avoided at almost all costs. We recognize that some wars may be just—even necessary—but they are to be entered only for the sake of great causes.

Grotius would have given a different answer to Starr’s question. He would have said that war is good for many things. It is good for defending lives, of course. But it is also good for defending property. If territory or goods are threatened, war is a permissible way by which to stop their seizure. War is also good for collecting debts. If loans are not repaid, then war is a morally permissible way for getting the money back. War is also good for restitution: if property is taken without permission, then it may be recovered by force of arms. War is also good for securing compensation. If an injury has not been repaired, then the military may be used to collect compensation. War is also useful for punishing criminals. If someone has engaged in egregious wrongdoing and is evading justice, then war may be used to obtain retribution.

For Grotius, then, war is neither evil nor tragic. Rather, it is a morally acceptable way in which to remedy the violation of rights. Though it does not go particularly well to music, Grotius expressed this conception of war as follows: “Armed execution against an

armed adversary is designated by the term ‘war.’ A war is said to be ‘just’ if it consists in the execution of a right, ‘unjust’ if it consists in the execution of an injury.”¹⁰³

War may be good for many things, but not all wars are good. As the passage indicates, war is “just” only when it is prosecuted “in the execution of a right.” War must be used to enforce a right, or right a wrong. Wars which do not, which are “in the execution of an injury,” are unjust.

Because just wars are waged in the execution of a right, property seized in the name of that right belong to the captor. Prize, booty and conquest are merely the recovery of property already owed to the attacker—who is, after all, simply seeking to right a wrong. “[W]ar is just for the very reason that it tends toward the attainment of rights; and in seizing prize or booty, we are attaining through war that which is rightfully ours.”¹⁰⁴

Because a just war is the legitimate response by the aggressor to the violation of rights, the reasons to go to war are the same as those that prompt law suits. The subject matter “is the same in warfare and in judicial trials.”¹⁰⁵ According to Grotius, then, the *casus belli*—the justified causes of war—are what lawyers today call “causes of action,” namely, those violations which may be remedied by a court. These causes not only include self-defense and the punishment of crimes, but also matters of a completely commercial nature, such as the repayment of debts, restitution of seized property, and the reparation of injuries.

¹⁰³ DJP, 30

¹⁰⁴ Id. at 68.

¹⁰⁵ Id. at 30.

On Grotius' theory, wars and courts have the same function. They are both used to achieve justice, though the former may only be used as a last resort. When courts are available, victims are obligated to go them for redress; taking the law into one's own hands when judicial remedies are available is to engage in criminal behavior. But "ordinary remedies do not serve in an extraordinary situation" and "when one recourse fails, we turn to another."¹⁰⁶ Thus, if a judicial procedure is not available—for example, it is an emergency and there is no time to go to court, or the defendant is in a territory that will not accept its jurisdiction, or the parties are on the high seas half way around the world—then the injured party is entitled to redress by any means possible. Having been wronged, the victim has the right to go to war precisely because he *cannot* go to court.

This simple idea—that wars are substitutes for courts—is the key to Grotius' defense of Heemskerck. For on this conception of war, Heemskerck did not actually need a *letter of marque*. In fact, Heemskerck did not need any authorization from a sovereign to attack. He had the right to declare war all by himself—to wage his own "private" war on the *Santa Catarina*. And he had this right because there were no courts in which to prosecute the Portuguese for their offenses against Heemskerck's countrymen. The Portuguese had committed terrible atrocities against the Dutch and Heemskerck was simply meting out the punishment they deserved.¹⁰⁷

On Grotius' theory, then, states are not the only ones who have the right to wage war—individuals have this right as well.¹⁰⁸ All humans have the right to defend

¹⁰⁶ DJP, 42.

¹⁰⁷ Grotius, DJP, 388.

¹⁰⁸ Grotius, DJP, xix, 377, 383-384, 388; van Ittersum, Hugo Grotius in Context, 535.

themselves and their property against unjustified invasion and to punish wrongdoing.¹⁰⁹ In Grotius' terminology, individuals have the natural rights to take actions necessary for self-preservation and to punish violations of the laws of nature.¹¹⁰ In contrast to Pomponius' definition, Grotius claimed that individuals, as well as groups, can be "enemies."

Treating wars as a substitute for courts not only justified Heemskerck's private war; it also explained why states themselves are allowed to wage public wars. States engaged in an international dispute have the right to wage war because they have no courts to which they can appeal. They are like sailors on the high seas, unable to petition a higher authority for justice. Without a supreme court of the world, they have no choice but to go to war in order to right wrongs done to them or their citizens.

Thus far, Grotius showed brilliant lawyering skills in defense of his cousin against charges of piracy. Heemskerck is not a pirate because he had no access to a court and thus had no other choice but to take matters into his own hands if he wanted to see justice done.

But Grotius pushed his defense one step further, in a move that exhibited philosophical genius. For he not only claimed that war is a substitute for courts, but he also provide an explanation for his bold claim: war is a substitute for courts, he argued, because *courts are the original substitutes for war*.¹¹¹

¹⁰⁹ Grotius, DJP, 23-24, 102-03, 333.

¹¹⁰ Grotius, DJP, 20-33.

¹¹¹ Grotius, DJP, 180-181.

According to Grotius, all human beings are born with the natural entitlement to defend their rights and punish wrongs with violence. War is the primordial response to injustice. But, Grotius continued, living in an anarchic world proved to be extremely dangerous. Thus, individuals came together to form governments with effective judicial systems. They transferred their natural right of waging war to the state and consented to use the courts instead as a way to enforce their legal claims.¹¹²

In what would amount to the beginning of the liberal political tradition, Grotius claimed that human beings are the ultimate source of political authority and coercive power. Sovereigns derive the power to use violence from individuals who have consented to be ruled by them, forming an agreement philosophers would later call the “social contract.” The social contract regulated the terms of this transfer of power, legitimizing the exercise of violence for, and in place of, the individual.

Grotius’ liberalism provided him with a deeper and more powerful explanation for why Heemskerck could attack the *Santa Catarina*. Individuals are normally forbidden from waging private war because, in forming the social contract, they transferred this right to states to exercise it for them. But the social contract only covered cases where sovereigns could respond effectively to violations of right. Where sovereigns were unable to step in and do their job, the social contract was silent and individuals were free to exercise their original entitlement to enforce rights and punish wrongs. When on the high seas, then, Heemskerck was operating outside the terms of the

¹¹² Grotius, DJP, 42.

social contract and exercising his natural rights to wage war. He was back in the “state of nature” and acted with the primordial right of war with which all human beings are born.

By asserting the right of all individuals to use force to defend themselves and their property, Grotius sought to rehabilitate the institution of private war that had fallen out of favor by the beginning of the 17th Century. After all, it was 1605, the very year Grotius was toiling away on his defense of Heemskerck, that Miguel de Cervantes published his comic novel *Don Quixote*, the tale of a minor aristocrat who seeks the life of the knight-errant, pretentiously roaming the countryside looking for adventure. In its most famous scene, Don Quixote tries to wage a private war with “thirty or forty monsters,” only to be corrected by his sidekick, Sancho Panza, that he is tilting at windmills. “With the spoils from this adventure we shall take our first step towards enriching ourselves,” Don Quixote cries out, “because this is a just war, and it is a great service to God to sweep such bad seed from the face of the Earth.”

Don Quixote is a sad, demented soul out of step with his times. By contrast, Grotius casts Heemskerck in the role of the new knight-errant, sailing the trade routes seeking to protect his employer from a new kind of monster—the Portuguese Empire. Heemskerck has the right to wage private war not because of aristocratic birth. In Grotius’ liberal philosophy, humanity is the new nobility. And Grotian war is not for glory, adventure or the cultivation of chivalric virtues. It is a legal institution and may only be exercised as a last resort, when courts are not available for the righting of wrongs—which, of course, was true throughout the East Indies.

By resurrecting the institution of private war, Grotius sought to transform his cousin from a pirate seeking treasure into a hero enforcing the law. Though Jacob van Heemskerck may not have been waging a war on behalf of a state, he was nonetheless a just warrior. Grotius, in other words, had produced the first modern defense of the practice we now call “guerrilla warfare.” Indeed, Grotius was even more prescient. For Heemskerck wasn’t the only civilian involved: his victims were as well. Thus, Grotius’ defense of his cousin turned out also to be a defense of “freedom fighters” who attack civilian populations. Or as we now call them—terrorists.

CHAPTER 2: THE RIGHTS OF WAR AND PEACE

Though Grotius worked on his apology for two years and revised it for two more, he never published it.¹ Given the amount of time he spent on the draft, the decision to keep it in the drawer is surprising.

Martine van Ittersum has offered a plausible explanation: by the time Grotius finally finished, the VOC no longer needed his defense.² The company had figured out that they could weather the financial expense of war because their shareholders had nowhere else to go. They were a trading monopoly and Dutch merchants were a captive audience.

There may have been another reason as well. Grotius may have realized that the conception of war he had developed, though astonishingly brilliant, was also extraordinarily dangerous—not only to his employer, but for the entire global economy.

The Legal Fog of War

At one level, of course, the danger is obvious: if individuals can decide to wage war to avenge any perceived wrong against not only themselves but their countrymen as well, war is likely to spring up at the drop of a hat. The trading lanes would turn into war zones, as traders declared private war upon each other for alleged “just causes.” Anarchy would reign in the name of law enforcement.

¹ See Martine van Ittersum, ‘Dating the Manuscript of *De Jure Praedae* (1604-1608): What Watermarks, Foliation and Quire Divisions Can Tell Us About Hugo Grotius’ Development as a Natural Rights and Natural Law Theorist’, *History of European Ideas* 35 (2009) pp. 125-193.

² van Ittersum, *Profit and Principle*, 188.

A world of private wars sounds risky and dangerous, but it is even worse than it sounds, especially from the perspective of a trading company. For this world is one of extreme *legal* uncertainty, insecurity so great as to threaten the entire global economy. This is particularly true because of the rules that governed 17th Century commercial interactions. At the time Grotius was writing, the laws of property were very strict, much harsher than they are nowadays. The basic rule of Roman law—*nemo dat quod non habet* (“one cannot give that which one does not have”)—stated that one no one can get legal title from a thief.³ No matter how many different hands through which property passed, no matter how innocent those transactions were, if the property had been stolen at some point, no subsequent transactions involving that property were valid sales.⁴ The original owner had the legal right to get his property back. He did not even have to compensate the person who had innocently bought it. Ownership was indestructible and always defeated possession.

Now we can see why Grotius’s solution to his cousin’s legal dilemma has the potential to create terrible problems for the VOC. If individuals could wage war and take what they wished to right wrongs, then whenever the VOC bought goods, it could never be 100% certain that the seller had the right to sell the goods. Perhaps the seller had seized the goods in an unjust war. Indeed, anyone buying from the VOC would have the same problem, namely, ensuring that the VOC had the right to sell them the goods.

³ The Digest. 50.17.54, quotes Ulpian: “*Nemo plus iuris ad alium transferre potest, quam ipse habet*” (“One cannot transfer to another more right than one has oneself.”)

⁴ See, e.g., Grotius, DJB, BK II, 10. I, 2-3. The Common Law had a less severe rule, which allowed good faith purchasers to acquire ownership when bought in an open market (*market overt*). See Peter M. Smith, “Valediction to Market Overt,” *The American Journal of Legal History* Vol. 41, No. 2 (Apr., 1997), pp. 225-249.

Perhaps the VOC had seized the goods in an unjust war, or bought them from sellers who seized them in an unjust war.

This uncertainty may have not been such a big problem when markets were local—when you knew the person you bought from, his family, his village. But it was an immense problem when trade took place across the globe. One could never know whether the true owner—whoever that may be—would show up one day demanding his goods back and, perhaps, suing in a local court for recovery. One could lose one's entire investment through an adverse ruling. Knowing this risk, traders would be very hesitant to buy goods seized in war. At the very least, the goods would be heavily discounted to account for the risk—perhaps so much so that it would make no sense to go to the trouble to transport them in the first place.

But the problem of legal uncertainty didn't simply affect goods seized in war—it affected *all* goods in the international stream of commerce. In a world in which war is legal, merchants had to worry that goods *might* have been procured in war in order for the contagion of uncertainty to creep into the transaction. And when goods came from Goa, Ambon, Japara, Bantam, Patani, Macao or, for that matter, Manhattan, Boston, Quebec, Havana or Sao Paulo, how could one ever say for sure that the seller had the right to the goods he was peddling?

These serious problems were papered over in Grotius' defense of Heemskerck because there was a court judgment in that case. Since the *Santa Catarina* was captured in naval warfare, it was brought to an admiralty court for condemnation. And because the VOC won a favorable verdict, there was no doubt about who owned the prize. But

there were no judges who could pronounce on the fruits of land warfare—Europe had prize courts but no “booty” or “conquest” courts. As it would happen, the VOC’s business model quickly moved in this terrestrial direction.⁵ In 1612, the company began shipping settlers to populate the East Indies and, by the end of the decade, it started to conquer native territories. The Dutch West India Company was created in 1621 charged with “the peopling of those fruitful and unsettled parts.”⁶ The first families arrived on Manhattan Island in 1624. As war shifted to land, disputes over property could not be adjudicated in court. As a result, these disputes had the potential to create grave complications for Dutch traders.

All of this may sound like a bunch of legal technicalities—and indeed they are. But the fact that they are legal technicalities does not mean that they don’t matter. To the contrary, commerce runs on technicalities. People can do business with one another only if they share a set of rules that clearly specify rights and duties. Businesses have to know what they own, what they owe, how much they can demand of others, who bears the risk of loss in case of mishap, and where to go for enforcement if these claims are ignored or disputed. When the stakes are considerable and the deals complicated, the rules have to be technical. Without shared technical rules, businesses cannot predict the future and won’t invest their money in any significant commercial activity. Technicalities are the grease that allows commerce to run smoothly.

And herein lay the rub for Grotius. Grotius was the lawyer for a global trading company and he knew that commerce is impossible without nations sharing rules for how

⁵ See Richard Tuck, *Rights of War and Peace*, 102-03.

⁶ Charter of June 3, 1621 at http://avalon.law.yale.edu/17th_century/westind.asp

to do business with one another. He understood the urgent need for a law of the world. But he also had to grapple with the obvious fact that the world does not have an effective court system. The world needs shared rules to conduct business, but it doesn't have anyone who can interpret and enforce these rules. How is a law of the world possible when there is no supreme court of the world?

Grotius' answer in his defense of Heemskerck was simple: war. Each state would have the legal right to interpret and enforce the rules using violence as they saw fit.

But this solution merely created a new problem: if each state could take the law into its own hands, these states would no longer be operating according to the same rules. What are bystanders supposed to do as the belligerents fight it out? The *nemo dat* rule required them to choose the just side or else they would be wasting their money. But which side was that? Even if they picked the just side, the loser might not agree, nor might a judge in whose courtroom the case would be heard when ownership was challenged sometime in the future. Who would risk their money in such a chaotic and uncertain environment?

In his defense of Heemskerck, then, Grotius had created a wild predator in a fragile ecosystem. His client was building a system of global trade, on land as well as the sea, and Grotius desperately wanted to nurture it. But the cure threatened to be worse than the disease. The system needed predictability, but war would be unpredictable. War would taint chains of title by injecting the poison of uncertainty into the stream of commerce. Grotius had to come up with a new solution, one that would not undermine the long term interests of his client and, indeed, of the global system of commerce.

Downfall

There are just so many times one can engage in risky behavior without getting burned. And in Seventeenth Century Europe, there was nothing more dangerous than naval battles and confessional politics. Our protagonists' luck was about to run out.

Being the consummate risk-taker, Heemskerck was the first to come up short. The *Santa Catarina* incident made him a rich man—he was awarded 1% of the auction proceeds (31,000 silver guilders) for his efforts—and brought him a promotion.⁷ In April of 1607 he was appointed an admiral of the Dutch navy and given command of a fleet to destroy the Spanish armada at Gibraltar.⁸

The mission succeeded brilliantly. The fleet obliterated the armada and sent every galleon to the bottom of the Bay of Gibraltar, though Admiral Heemskerck did not live to see his victory.⁹ His armor presently on display at the Rijksmuseum in Amsterdam reveals how he was killed. The metal suit is conspicuously missing the left *cuisse*, the thigh defense: a Spanish cannonball ripped into his left leg at the hip and he quickly bled to death.¹⁰

April of 1607 also saw a temporary armistice between Spain and the Dutch Republic. Once again, Spain became embroiled in a fight with France and desperately wanted to withdraw its forces from the Netherlands. The armistice – first declared on

⁷ Borschberg, "The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, Voc Politics and the Origins of the Dutch-Johor Alliance (1602-C.1616)," 37-8. The surviving crew split 123,380 guilders. Id at 57. Enthoven p.208-9.

⁸ van Ittersum, *Profit and Principle*, 218-220.

⁹ Id., 207.

¹⁰ Id., 219-220. For the armor, see www.flickr.com/photos/roelipilami/2047595350/in/photostream/

land, then extended to the sea after the Battle of Gibraltar – was the occasion for vigorous negotiations over the terms of a more durable truce.¹¹

Grotius played no direct role in the negotiations, but he continued to work behind the scenes for the VOC in order to protect its commercial interests. The directors were particularly worried about the insistent demands by the Spanish Empire that the Dutch cease trading in the Indies. In order to bolster the Dutch company's negotiating position Grotius revised Chapter Twelve of the defense of his now deceased cousin as a separate pamphlet and called it *Mare Liberum* – “The Free Sea.” The pamphlet argued that navigation and trade on the high seas is a natural right that cannot be taken away by any power. So as not to antagonize the Spanish, Grotius carefully deleted the incendiary references to Portuguese atrocities and the right of private war that had been the cornerstone of his defense of Heemskerck.¹²

The Dutch position on trade in the Indies ultimately prevailed. In the final truce agreement, Spain agreed to recognize the political independence of the Dutch Republic and gave up its demand to end Dutch trade in the Indies.¹³ The VOC's trading interests were now secure.

Grotius's *Mare Liberum* played no role in the negotiations, as it came out six weeks after a truce deal was sealed.¹⁴ But unlike his earlier defense of his cousin from which it was drawn, it would not slide into oblivion. It became the touchstone for the law

¹¹ Id., 222-223.

¹² Id., 177, 191-192, 235-330, 339.

¹³ Id., 250, 282, 345.

¹⁴ Id., 282, 338.

governing the growing sea trade. Indeed, it is the only part of Grotius's original text published in his lifetime.

Grotius himself spent the next decade as the faithful servant of the VOC.¹⁵ He continued to lobby on behalf of the company and acted as one of the main Dutch negotiators in diplomatic disputes involving Spain, France and England.¹⁶ By some accounts, he was more talented as a scholar than as a diplomat. George Abbot, the Archbishop of Canterbury, vividly describes the first meeting between Grotius and King James of England: "At his first coming to the King by reason of his good Latin tongue, he was so tedious and full of tittle tattle that the King's Judgment was of him that he was some pedant full of words and of no great Judgment."¹⁷ (Conversation was conducted in Latin because Grotius did not speak, or even read, English, which is indicative of the low opinion in which European men of letters held English culture. Grotius, after all, was a famous polyglot who was fluent in Latin, Greek, Hebrew, French and, of course, Dutch). The King wasn't the only person to regard Grotius as a serious gasbag and bore. At another dinner, Grotius held forth to such an extent that his host sat dumbfounded and wondered "what a man he had there who never being in the place or company before could overwhelm them so with talk for so long a time."¹⁸

Grotius seems to have suffered from the occupational hazard of the child prodigy, which is an oppressive sense of entitlement. When everyone is dazzled by the pearls that come pouring from your mouth, you never learn to shut up and let someone else have a

¹⁵ Grotius, DJP, xx.

¹⁶ Grotius, DJP, xxi; van Ittersum, *Profit and Principle*, 189-190, 268, 282-283, 288-289.

¹⁷ Memorials of affairs of state in the reigns of Q. Elizabeth and K. James I., Vol 3, 459.

¹⁸ Id.

turn. The *wunderkind* had grown into an *enfant terrible*. Archbishop Abbot captured his obnoxiousness best when he described Grotius as someone who “did imagine that every man was bound to hear him so long as he would talk.”¹⁹ But it is a testament to Grotius’ brilliance that, despite his overbearing narcissism and Latin logorrhea, his political career continued to advance. In 1607, he was selected by Prince Maurice to be the advocate-fiscal (a kind of attorney-general) for the states of Holland, Zeeland and Friesland, and a few years later, was appointed the Pensioner (i.e., general counsel) of Rotterdam and a member of the States-General.²⁰ Grotius also became involved in the Arminian movement, a liberal form of Calvinism that denied the orthodox doctrine of predestination and preached religious toleration.²¹

Tragically, this open-mindedness was his undoing. In 1618, Prince Maurice teamed up with Calvinist hardliners and arrested Grotius and his patron, Johan Oldenbarnevelt. Both men were quickly convicted of heresy and treason in a show trial. Oldenbarnevelt was beheaded, but Grotius was spared, receiving the more lenient sentence of life imprisonment.²²

De Jure Belli ac Pacis

¹⁹ Id.

²⁰ Grotius, DJP, *xiv*; van Ittersum, *Profit and Principle*, *xxv*.

²¹ Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies*, 31, 33.

²² For Prince Maurice’s putsch, the arrest and conviction of Grotius and Oldenbarnevelt, and their respective imprisonment and execution, see Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies*, 16, 25, 33-34; C.G. Roelofsen, “Grotius and the Development of International Relations Theory: The Long Seventeenth Century and the Elaboration of a European States System,” *Quinnipiac Law Review* 17.1 (1997): 44.

The next chapter of the story is famous in the history of the Netherlands and, in fact, is still told to Dutch school children.

Grotius was sent to serve his life sentence at Loevenstein Castle, which had by then abandoned by its owners for a less drafty and more comfortable home, and which, with its moat and high walls, turned out to be the ideal place to hold political prisoners and religious leaders—of which there was now a swelling number. Soon after Grotius arrived, his wife and two children, ages 6 and 8, were allowed to join him, for their house and all their possessions had been seized and they had no other place to live.²³ Together they shared two small rooms, each just over ten paces across, with small barred windows.

Grotius used one of the two rooms as a study, where he continued his work. He used the time well, writing a defense of his religious views and a treatise on Dutch jurisprudence. He also continued his earlier research on the laws of war. Though he was able to work and was accompanied by his family, Grotius was desperate to escape. For a man used to holding forth at Court and enjoying the adulation of other scholars, the isolation was undoubtedly suffocating. And the lack of fresh air and small, damp castle rooms had taken their toll on his health.

Grotius's extensive library had been confiscated as part of the treason conviction, but his friends lent him the books he requested.²⁴ These books were delivered in large chests, and when Grotius was finished with them, they were returned in these chests,

²³ For how Grotius spent his imprisonment, Hamilton Vreeland, Hugo Grotius: Father of the Modern Science of International Law, 124-29; R.W. Lee, "The Family Life of Grotius," *Transactions of the Grotius Society* 20 (1934): 13-14.

²⁴ On Grotius' library, see Edwin Rabbie, "The History of Reconstruction of Grotius' Library: A Survey of the Results of Former Studies with an Indication of New Lines of Approach," *Bibliothecae Selectae da Cusano a Leopardi*, edited by Eugenio Canone. Leo S. Olscki (Firenze, 1993).

along with his dirty laundry. After twenty months of examining books and dirty laundry, the guards had stopped checking the contents of the chests. This gave Grotius and his wife a ridiculous but brilliant idea: He could take the place of the books inside a chest on its return trip, escaping the prison along with his dirty laundry.

In his famously deliberate way, with his wife's help, he began practicing lying quietly inside the chest until he could remain inside without moving long enough for the chest to be delivered far from the castle. In 1621, Grotius climbed into a chest, with his head resting on a bible but without shoes on his feet, for there was no room. The preposterous plan worked: Unaware that Grotius was wedged within, the guards allowed the chest to be whisked out of prison by his maid. Once the chest was delivered to the home of a friend, he emerged, embraced the loyal friend, and left by the back door dressed as a mason, bound for Paris.²⁵ When his escape was discovered, his wife and children were initially kept under close confinement, but as there was no basis for keeping them—and Grotius was unlikely to pose a political threat in exile—they were soon released and allowed to rejoin him abroad.

Grotius spent the next several years in Paris preparing a new treatise on the laws of war for press.²⁶ He rushed to finish it so that it could be sold at the Frankfurt book fair in 1625, under the title *De Jure Belli ac Pacis* or “On the Rights of War and Peace.” It was a hit and quickly became *the* textbook on the laws of war. By the Eighteenth Century, for example, “Right of War and Peace” had gone through fifty editions in Latin

²⁵ For Grotius' escape, see W.M.S. Knight, *The Life and Work of Hugo Grotius*, 162-63; Hamilton Vreeland, *Hugo Grotius: The Father of the Modern Science of International Law*, Chapter 6.

²⁶ See generally, Jesse S. Reeves, 'The First Edition of Grotius's *De Iure Belli ac Pacis*, 1625' 19 *American Journal of International Law* 12-22 (1925).

alone.²⁷ Gustavus Adolphus, the King of Sweden and the great Protestant hero of the Thirty Years War, is said to have constantly carried Grotius' treatise in his saddlebag.²⁸

“The Rights of War and Peace” is unlike any work that had been written until that point, and perhaps since as well. It attempted for the first time to reduce all of international law to a single treatise. Grotius' tome covered an astonishing diverse range of legal topics—the definition, permissibility and causes of war, delineation of state boundaries, common use of land, rivers and seas, procedures for making treaties, rights of burial and diplomacy, division of booty, use of hostages, transfer of sovereignty upon conquest, proper treatment of prisoners of war, acceptability of rape, assassination and use of poison in battle, duties of allies, rights of neutrals, making of truces and negotiation of peace treaties.

The encyclopedic coverage of the treatise was matched only by its philosophical ambition. Grotius plumbed deeper than any thinker before him in an effort to justify war. Because he treated war as a permissible response to the violation of rights, he audaciously attempted to catalog every right that any person could possess. Grotius wanted to know what rights people have, in other words, because he wanted to know when they could go to war over them. “The Rights of War and Peace,” therefore, was not only the first great work in international law, but of modern political philosophy as well. The revolutionary nature of the work was not lost on his successors. The renowned authority Samuel von Pufendorf referred to the author of “Rights of War and Peace” as

²⁷ See Jesse S. Reeves , 'Grotius, De Jure Belli ac Pacis: A Bibliographic Account' 19 American Journal of International Law 251, 261-62 (1925).

²⁸ Borschberg, *Hugo Grotius, the Portuguese, and Free Trade in the East Indies*, 3, 34; van Ittersum, *Profit and Principle*, xxvii.

“the incomparable Hugo Grotius” who “set out to construct a work wherein he was not ruled by the influence of his predecessors.”²⁹ His translator Jean Barbeyrac credited Grotius with raising “the Science of Morality ... again from the Dead.”³⁰ That Grotius had raised the Science of Morality from the dead in order to produce more dead was an irony apparently lost on Barbeyrac.

What made Grotius’ work so modern was that, unlike his medieval predecessors, he did not limit his moral focus to Christians. He wanted to discover the rights of *all* people, irrespective of race, creed or religion. The law of nature governs the behavior of every human being on Earth—not just Protestants and Catholics, but Jews, Moslems, Hindus, barbarians and savages as well. Grotius thus postulated that the entire world has a law, namely, the law of nature.

Grotius’ discussion of private property is a case in point. Because it is permissible to wage war to recover property, Grotius wanted to know when people have rights over their property. To answer this question, he began at the very beginning: “Soon after the creation of the world, and a second time after the Flood, God conferred upon the human race a general right over things of a lower nature.” Grotius not only claimed that all human beings have a natural right to property, but that this right comes directly from God and was conferred on man at the genesis of the universe. This divine right is “universal” and “whatever each had thus taken for his own needs another could

²⁹ *Eris Scandica und andere polemische Schriften über das Naturrecht*, F. Palladini (ed.), (Series: *Samuel Pufendorf: Gesammelte Werke*, W. Schmidt-Biggemann[ed.], Volume 5), Berlin: Akademie Verlag, 126.

³⁰ Barbeyrac, “An Historical and Critical Account of the Science of Morality, And the Progress it has made in the World, from the earliest Times ...,” Mr. [George] Carew (trans.), or Prefatory Discourse to Samuel Pufendorf, *Of the Law of Nature and Nations*, B. Kennett (trans.), 4th ed., Buffalo, NY, William S. Hein; reprint of London, S. Aris, 1729, §28, p.78. Barbeyrac credits Francis Bacon as well.

not take from him except by an unjust act.”³¹ The legal implications were earth-shattering: if Christians took property from heathens, heathens would have a just cause of war against Christians.

Grotius made the same startling claim about contracts and treaties. All human beings are able to create binding contracts and every nation can enter valid treaties. “[N]othing is so in harmony with the good faith of mankind as that persons should keep the agreements which they have made with one another.”³² In recognizing such universal rights, Grotius was bucking the dominant position among his fellow Protestants, who maintained that Christians did not have any obligation to respect agreements made with non-Christians. But Grotius insisted that the law of nature required everyone to keep their agreements; otherwise, they would be liable to attack in a just war. He expressed this unorthodox position even more forcefully in his defense of Heemskerck: “Do we perhaps believe that we have nothing in common with persons who have not accepted the Christian faith?”³³ Even barbarians have Reason and thus enjoy the rights granted by God through the law of nature.

It is tempting to see Grotius as a courageous critic of bigotry and racism, even an early champion of the idea of human rights. No doubt, Grotius’ sterling moral reputation today is due, at least in part, to these progressive passages in his writings. But before we get too excited, we should recognize how congenial these enlightened views were to his client’s commercial interests. After all, if heathens can own property, they can sell it to

³¹ Hugo Grotius, *Rights of War and Peace In Three Books*, trans. Francis W. Kelsey (Oxford University Press: 1925) [henceforth, DJB] BK 2, Ch 2, Sec II, 1.

³² DJB, BK 2, Ch 11, Sec I, 4.

³³ DJP, 315.

the Dutch. More importantly and insidiously, if heathens can enter valid contracts and treaties, then the VOC can negotiate exclusive trading deals with native peoples of the Indies.³⁴ Since these treaties would be valid, they would be enforceable not only against the natives themselves, but against other European countries as well.

For all of Grotius' talk about the freedom of the seas and the right to trade, he helped negotiate monopolistic trading agreements with East Indian nations and pressed these legal claims against the VOC's European competitors. Grotius actually negotiated such a deal with the Sultan of Johore in 1606. The hypocrisy did not go unnoticed. During trade negotiations with the English East India Company, Grotius cited the agreement with the Sultan as evidence of the VOC's legal monopoly over trade with Jahore. The English were stunned to hear the author of *Mare Liberum* deny them the right to freely trade. In the margins of one of Grotius' position papers insisting on Portuguese-style monopolies for the VOC, an English delegate scribbled: "We think it very honest to defend oppressed people ... against their will."

Might is Right

As its title suggests, the moral world Grotius describes in the "Rights of War and Peace" is teeming with rights. Individuals have rights; states have rights; native peoples have rights; trading companies have rights. But though moral, this world is not peaceful. For among the entitlements that Grotius' liberalism recognizes, of course, is the right of war to defend all these other rights.

³⁴ See, e.g., DJB, II, 2, 24.

Like his earlier defense of Heemskerck, the “Rights of War and Peace,” is a full-throated and unabashed defense of martial liberalism. Grotius argued the law of nature does not forbid individuals and states from using deadly force to prosecute their rights. Indeed, *any* right that could be enforced in court could be enforced by war. “It is evident that the sources from which war arise are as numerous as those from which lawsuits spring.”³⁵ When either party claims an injury against another – an injury that could be decided by a court – these parties have the legal right to satisfy that claim by force, provided of course that judicial recourse is unavailable. “Where judicial settlement fails,” Grotius claimed, “war begins.”³⁶

By the time he wrote “Rights of War and Peace,” however, Grotius understood that matters were more complicated than he originally thought. For the liberal world he imagined is not only one in which the right of war existed—it was also one in which the *nemo dat* rule governed. In such a world, owners never lose their claims to their property. If property had been unjustly taken from the owner, the owner was entitled to take it back. But, as we saw at the beginning of the chapter, war wreaks havoc in a *nemo dat* world. If everyone has the right to enforce their rights as they see fit, no one would ever be secure in their rights. For how could one know whether the true owner would eventually show up and demand his stuff back? The great achievement of the new treatise was the development and presentation of the solution to this new problem. Grotius had finally figured out how there could be a law of the world in a world where war is permissible.

³⁵ DJB, II.1.ii.

³⁶ Id.

Grotius' solution begins with identifying the true scope of the problem. It is true that goods seized in private land wars would be difficult to sell, because no one would take the risk in buying them. But is that such a terrible result? Heemskerck made private war look attractive, but subsequent events suggested otherwise. In 1618, a war had broken out in the Holy Roman Empire when local German princes claimed the right of private war against the Emperor. Every two bit noble who could raise an army went to battle. Catastrophe ensued, engulfing most of Europe in a war lasting thirty years causing untold death and suffering. By the 1620's, in other words, private war no longer seemed like such a hot idea. Perhaps it would not be such a bad thing, then, if merchants who tried to sell stolen property were unable to do so. Maybe that would deter them from engaging in private war in the first place. All things considered, this result actually seems spot-on: the unprofitability of private war is not so much a bug in the system, but a feature that could nip private war in the bud, leaving interstate wars as the only option.

The problem that Grotius faced, however, did not disappear in the case of interstate war—it merely shifted up one level. For if states are the main agents of law enforcement and the main method of law enforcement is war, then states *must* be able to benefit from victory or the whole system he had so painstakingly constructed for righting wrongs would collapse.

But there was a problem with giving states the right to what they won in a just war: As in the case of private war, the *nemo dat* rule placed impossible demands on third-parties. A merchant could not be sure that a state-run trading company like the VOC had the right to the goods it sought to sell because its rights to the goods turned on whether

the goods had been won in a *just* war. But to know whether the goods had been won in a just war, the merchant had to know which side was the just side in a war. Of course, both sides would claim that their side was just; no state goes to war trumpeting its unjust cause. As a result, the system required merchants to discriminate between just and unjust belligerents, putting them in the middle of fights, discouraging them from trading and ultimately sowing so much legal confusion that no trader could be sure who had the right to what. Even worse: no matter which side they chose, the other side would undoubtedly regard the goods as ill-gotten gains that could be reclaimed. It wouldn't matter if the sellers were private traders, soldiers fighting for a state, or the state itself: buyers would be in the same pickle, leading to a similar breakdown in the market.

Notice, however, that the statement of the problem suggests the solution. If merchants cannot know who is in the right, then the law should not require them to figure that out. The law should relieve them of the burden of discrimination and allow them to treat the status quo as legitimate. Merchants should, in other words, be entitled to regard possession as tantamount to ownership. In this way, they can remain neutral about the dispute while also engaging in trade.

Call this the "Might is Right" Principle. The "Might is Right" Principle states that war creates legal rights: if a belligerent performs some act, it acquires the legal power to perform that act. Thus, if a state seizes property in war, then that state acquires legal title to that property and has the right to sell it to neutral parties. Those not engaged in the fight, therefore, have no need to discriminate between belligerents. They should simply let the war decide who has the right to what and proceed accordingly.

This is precisely the solution that Grotius devised. Even though the Law of Nature decrees that only *Right* is Right, the Law of Nations requires everyone to act otherwise. According to international law, everyone must act as though *Might* is Right.

[K]ings and peoples who undertake war wish that their reasons for so doing should be believed to be just, and that, on the other hand, those who bear arms against them are doing wrong. Now since each party wished this to be believed, and it was not safe for those who desired to preserve peace to intervene, peoples at peace were unable to do better than to accept the outcome as right.³⁷

Because each side of the war would claim that they had justice on their side, neutrals could do no better than to “accept the outcome as right.” Third-parties could now avoid discriminating between belligerents and simply treat the status quo as legitimate. As a result, wars would be contained and not spread past the immediate belligerents—no one would have a legal right to reclaim goods taken in war. “Neither slaves nor things taken in war are restored with peace... . To controvert this principle would in truth be to make wars to spring up from wars.”³⁸

Formal War

For someone so concerned with morality and rights, Grotius had managed to construct a system that has a perverse logic. After all, “Might is Right” is a deeply troubling principle: If war creates legal rights, then wrongdoers can profit from their wrongdoing. Capture, not justice, determines rights. Grotius referred to such consequences as the *peculiares effectus*—the “peculiar effects”—of war.³⁹

³⁷ Grotius, DJB, III.9.iv.2.

³⁸ Grotius, DJB, III.9.iv.3.

³⁹ DJB, III.3.i.1.

Peculiar though they might be, he concluded that these effects simply could not be avoided. A world where war is a permissible means for protecting rights is also a world in which possession gained in war, even an unjust war, must be respected by all. Protecting third-parties was essential to enabling victims to profit from their victories in a just war. Unless victims have merchants to whom they can sell their seizures—merchants who can buy without deciding which side in the war was just—then victims will not be able to right wrongs done to them. Protecting traders turns the spoils of war into money. And this money is essential to ensuring that war will enforce the rights of victims.

Grotius sought to contain the perverse effects by granting the power to wipe the slate clean only to some wars—what he called “formal” wars. Formal wars are ones that meet two conditions: first, they are state-on-state conflicts, and, second, they begin with formal declarations of war. Formal wars are the familiar kind of armed struggle, for example, the War of the Spanish Succession, Seven Years War, Franco-Prussian War, World Wars I and II. All others conflicts are informal wars. Public wars that do not begin with a declaration of war are informal because they fail the second condition. Private wars, such as Heemskerck’s attack on the *Santa Catarina*, are informal because they fail the first. In this revised account, then, the VOC’s claim to the goods Heemskerck seized rested solely on the fact that they had been taken at sea and therefore adjudicated in Admiralty Court. Had the same seizure happened on land, the VOC would have been duty bound to return the untold riches to Portugal.

Only formal wars had the power to grant goods taken a clean bill of health.⁴⁰ Even if the attacking sovereign did not have the right to the property before the seizure—even if the property was seized illegally—he acquires rights to the booty after the seizure. Victory in formal wars creates legal rights. Capture on land transfers ownership and capture of land confers sovereignty. “By the law of nations not merely he who wages war for a just cause, but in a public war also any one at all becomes owner, without limit or restriction, of what he has taken from the enemy. ... [B]oth the possessor of such booty, and those who hold title from him, are to be protected in their possession by all nations.”⁴¹ Informal wars, by contrast, only granted the right to resell goods that were justly taken. At least this would prevent every two-bit noble from going to war and taking advantage of the “Might is Right” principle. And the requirement of a declaration of war would give the other side a chance to repair the wrong before war was unleashed.

The “Might is Right” Principle not only explains why all belligerents have the legal rights to booty and conquest. It also explains why soldiers can never be prosecuted for fighting in a war, even an unjust one. “He who happens to be caught in another’s territory cannot for that reason be punished as a murderer or a thief.”⁴² As Grotius explains, if soldiers could be treated as criminals, third parties would have to decide whether to prosecute them, thereby putting them in a terribly awkward position. No belligerent wants to be told that they are waging an unjust war and may lash out at those who decide to prosecute their soldiers. “To undertake to decide regarding the justice of a

⁴⁰ DJB, III.3.v.

⁴¹ Grotius, DJB, III, 6, II, 1.

⁴² Grotius, DJB, III.4.iii.

war between two peoples had been dangerous for other peoples.”⁴³ Not only is such a decision dangerous for a third-party, it is an inherently difficult one to make. “[E]ven, in a lawful war, from external indications it can hardly be adequately known what is the just limit of self-defense, or recovering what is one’s own, or of inflicting punishments; in consequence it has seemed altogether preferable to leave decisions in regard to such matters to the scruples of the belligerents rather than to have recourse to the judgments of others.”⁴⁴

Belligerents have immunity from criminal prosecution not simply to protect third parties from the awkwardness of deciding which soldiers to prosecute. It also protects them from having to determine whether the goods they want to buy can be bought. For if someone can be “punished as a murderer or a thief,” then the goods they possess may not be legally their goods to sell.

As perverse as it might seem, allowing the state to lay legal claim to the spoils of formal war oiled the cogs of global commerce. Since capture in a formal war required all others to recognize the rights of captors, sellers in a war zone could legitimately claim the power to trade what they held. Legal confusion would be avoided and chains of title would remain secure. The contagion of risk would be contained by the peculiar effects of formal war.

⁴³ Grotius, DJB, III.4.iv.

⁴⁴ Id.

The Second Social Contract

Grotius had finally figured out how to tame war so that it could be used to defend, rather than derail, the great engine of Dutch prosperity. Formal war, with its special rules decoupling legal rights to goods and land from just causes, allowed the Dutch Republic to use deadly violence in order to enforce their rights without tainting them in the process. War might destroy lives, but not profits. It would produce death and destruction abroad but it would not bring the pestilence back home. Or at least that was the plan.

Grotius made a further claim. In the “Rights of War and Peace,” Grotius argued that the rules of formal war had been accepted by states. These rules weren’t simply useful—states consented to them as well. Indeed, states consented to them because they were useful. The “peculiar effects” of formal war had “met with the approval of nations.”⁴⁵

The rights of formal war, therefore, are generated by *two* social contracts. The first social contract constructs the state: each individual cedes his or her natural right to use force to legal authorities. The second social contract is an agreement between states which constructs the society of nations. “[J]ust as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states.”⁴⁶ States have the rights of booty and conquest, and their soldiers enjoy immunity to prosecution, because they recognized that it is in

⁴⁵ Grotius, DJB, III.4.iv

⁴⁶ Grotius, DJB, Prolegomena, XVII.

their interest to have them.⁴⁷ The law of nations is the collective attempt of states to construct a workable law of the world without a world government.

But if the states of the world have already entered into a social contract to treat Might as Right, whose rules are they? Did Grotius develop them, or did the world? In a sense, they both did. Grotius was observing and recording international practice. He was trying to discern the rules that states followed in war and in peace. But he wasn't merely describing the events in the world—he was *interpreting* them as well. He was trying to explain their rationality, to make sense of why states were acting as they were. In so doing, he was putting his own spin on the emerging practices. Grotius was laying the intellectual foundation for the new law of nations, a system in which war was used, and in his view, justifiably used by sovereign states to right wrongs. By presenting the emerging practice in this way, he sought to influence the law of nations, to ensure that the “Might is Right” Principle became firmly entrenched and influenced the other rules of international relations.

There is no doubt that there was an element of self-interest involved in Grotius' interpretation. It is far from a coincidence that he would rely so heavily on Social Contract theory at exactly the time that his homeland achieved legal recognition as a sovereign state. The Twelve Years Truce granted the Dutch Republic independence in 1609 and, with it, admission to the international community. The fledgling nation was now a legitimate party to the international social contract and could take full advantage of its benefits. Thus, when the Twelve Year Truce ended in 1621, the Dutch Republic *was*

⁴⁷ Grotius, DJB, III.6.xxvii.

*fighting a formal war.*⁴⁸ Prince Maurice and the States-General now had the unambiguous legal power to grant letters of marque to the VOC and the VOC could carry on their business using formal war as their weapon. Grotius could throw private war, as it were, overboard because he didn't need it anymore.

In "Rights of War and Peace," Grotius was clearly responding to the change in the legal status of the Netherlands and its implications for the VOC. Sovereigns (and their corporations) do much better in the new theory than in the old one. No doubt, Grotius expected his pro-Dutch writings would put him in good stead back home and help him repatriate. He actually returned to the Republic incognito for a few months in 1631, when the second edition of his treatise was published, to test out the waters, but his hopes were quickly dashed. Grotius realized that he would not be accepted back then, or ever, and was forced to flee his homeland yet again. The celebrated prodigy of the Dutch Republic, the so-called "Miracle of Holland," was forever barred from his country in its Golden Age, the glorious period of Rembrandt, Vermeer, Huygens and Descartes. He would die in 1645, after being injured in a shipwreck, a broken and lonely exile.⁴⁹

It would be a mistake, however, to conclude from this transparent opportunism that Grotius was *merely* attempting to curry favor with powerful corporate and political interests. The changes he introduced in "Rights of War and Peace" were sensible; indeed, they were indispensable. For in the brave new world of international capitalism, his old theory was simply a non-starter. Discriminatory war is the proverbial bull in the legal china shop. Discriminatory war is commercially destructive because it forces third-

⁴⁸ van Ittersum, *Profit and Principle*, 209, 330, 369.

⁴⁹ *Id.* at xxvii.

parties to choose which state has the just cause. Trading corporations, therefore, could never be sure they could trade what they seized or stop what they started. Legal chaos would inevitably take over. After a while, no one would know whose rights they should recognize and what they could buy or sell.

Grotius understood that global commerce was the lifeblood of the Dutch Republic. “The welfare of Holland,” he wrote in 1631, “depends principally upon its foreign trade.”⁵⁰ And, as the lawyer for the VOC, he appreciated how destructive legal uncertainty is to global commerce. Thus, he developed a set of rules that aimed to reduce that risk as much as possible. Formal war didn’t just enforce rights, it created them as well. By establishing legal recognition for the fruits of war, he shielded chains of title from the toxicity of uncertainty. Grotius showed the states of the world that they did not need a supreme court of the world in order to do their business. All they needed was formal war.

Hugo Grotius, War Monger

On July 4th, 1899, the United States contingent to the First Hague Convention on the Laws of War commemorated Independence Day by publicly celebrating the life of Hugo Grotius. The State Department paid the Crown jeweler in Berlin to fabricate a large silver wreath that would be laid on Grotius’ tomb. The wreath was a magnificent creation: a large garland of frosted silver, one side of oak, with acorns in silver gilt, and on the other of laurel, with berries, also in silver gilt. The stems at the base were held

⁵⁰ Grotius, Introduction to the Laws of Holland, 3 B. 20 D. S. 1.

together by a large silver ribbon and bow with an inscription on blue enamel. The plaque read:

"To the Memory of Hugo Grotius / In
Reverence and Gratitude / From the United
States of America / on the occasion
of the International Peace Conference of
The Hague / July 4th, 1899."

The celebration took place in the New Church in Delft where Grotius was buried. After the diplomats from the other delegations took their seats, the proceedings began with the choir singing Mendelsohn's "How Lovely are the Messengers that Bring us Good Tidings of Peace." In his tribute to Grotius, Andrew Dickson White, the leader of the American group and organizer of the event, said of "Right of War and Peace": "Of all works not claiming divine inspiration, that book, written by a man proscribed and hated both for his politics and his religion, has proved the greatest blessing of humanity. More than any other it has prevented unmerited suffering, misery, and sorrow; more than any other it has ennobled the military profession; more than any other it has promoted the blessings of peace and diminished the horrors of war."⁵¹

Read in light of Grotius' advocacy in the *Santa Catarina* case and his extensive lobbying efforts on behalf of the VOC, White's description of "Rights of War and Peace" can only be described as Orwellian. White made Grotius sound like a humanitarian

⁵¹ For an account of the celebration, see Martinus Nijhoff, *Hugo Grotius Celebration, Delft: Proceedings at the laying of a wreath on the tomb of Hugo Grotius in the Nieuwe Kerk, in the City of Delft July 4th 1899 by the Commission of the United States of America to the International Peace Conference of the Hague, The Hague, 1899*; For Ambassador White's tribute, see *Id.*, 14.

pacifist, when he was in fact the chief spokesman for the right of trading companies to wage war around the globe.⁵²

White was no empty suit. He was an authority on German history, the first President of Cornell University and the founder of the American Historical Association. White was also an avid collector of scholarly books and possessed the largest personal library in the United States. He owned many of Grotius' works. He lectured on Grotius to his students. When White first visited Grotius' tomb as a student, he was so moved that he sent an artist to have the two best portraits of Grotius copied, one of which still hangs in the Cornell Law School library. He made a pilgrimage the day after the celebration to the Cornet de Groot family, Grotius' lineal descendants and looked through family memorabilia. Grotius was White's hero and he planned the celebration as a tribute to the person who inspired the Peace Conference. How could he have gotten Grotius so wrong?

The answer is simple: Grotius' defense of Heemskerck was lost for several centuries. Since Grotius never prepared the manuscript for publication, the handwritten sheaves were left in a pile of old letters and other materials and passed down through his descendants. When the last male Cornet de Groot died, his belongings were sold off to the public and the bookseller Martin Nijhoff auctioned the papers in 1864. Simon Vissering, a law professor at Leiden University, recognized the significance of the manuscript and conjectured, correctly as it would turn out, that it was the original source

⁵² For a definitive discussion of Grotius' lifelong service and commitment to Dutch corporate imperialism and the VOC, see van Ittersum, 'The Long Goodbye: Hugo Grotius and the Justification of Dutch Expansion Overseas (1604-1645)', *History of European Ideas* 36 (2010) pp. 386-411.

for “The Free Sea.”⁵³ He petitioned the trustees of Leiden University to purchase the manuscript, which they did and where it still remains, the sole remaining copy.

When the historian Robert Fruin first inspected the manuscript, he was astonished. He quickly concurred with Vissering that the manuscript was a first draft of “Rights of War and Peace” and that much of the latter had simply been “cut-and-pasted” from the former.⁵⁴ But he also came to a more startling conclusion. Until then, he had assumed that Grotius was primarily an anti-war writer. Now, he finally understood Grotius’ true aim in becoming embroiled in matters of international law. “Not, as he assures us, to set bounds to warfare in general, but on the contrary to vindicate the trade of his compatriots with the Indies and the capturing of Portuguese monopolists, did he occupy himself with the nature of the law of nations.”⁵⁵

The defense of Heemskerck was finally published in 1868, under the title *De Jure Praedae* (“On the Rights of Prize and Booty”), but only in Latin, and would not be translated into English until 1950. Consequently, generations of scholars never read this work and got their information from those who never read it either. Like Fruin before reading the lost manuscript, they interpreted Grotius through their own humanitarian eyes. Not only is Grotius still revered today as the father of Modern International Law, he is, incredibly, the patron saint of the “Peace Palace”—the name of the building that houses the International Court of Justice—and its library possesses the greatest collection of Grotiana in the world.

⁵³ van Ittersum, *Profit and Principle*, 4, 114.

⁵⁴ Fruin, *Unpublished Manuscript*, 56-9.

⁵⁵ *Id* at 7-8.

Anti-war writers of the 18th Century, however, understood Grotius all too well, even without having read his defense of Heemskerck. Kant famously called Grotius a “miserable comforter” of warmongers.⁵⁶ Rousseau thought that Grotius “could not be more favorable to tyrants” and saw no difference between him and Thomas Hobbes, who thought that there were no rules of justice that governed war.⁵⁷ These theorists appreciated Grotius’ message because they saw its impact, how often it had “been cited in justification for war.”⁵⁸

Kant and Rousseau were right. “Rights of War and Peace,” like its long-lost first draft, is an unapologetic defense of war and the right of sovereigns and corporations to wage it. Grotius did not denounce war as an act of barbarism or describe it as a necessary evil. He hailed it as a natural way, indeed *the* natural way, for resolving disputes. In fact, he presents litigation in court as the artificial procedure for enforcing rights, an expedient replacement for private war among citizens. Grotius was the anti-Clausewitz: law, on the Grotian view, was the continuation of war by other means.

Grotius’ admirers are fond of citing the famous passage from the beginning of “Right of War and Peace”: “Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous nations should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that arms have once been taken up there is no longer any respect for law, divine or human.”⁵⁹ The standard assumption—one made, for example, by White in his tribute—is that Grotius was referring to the

⁵⁶ Kant, *Perpetual Peace*, Second Definite Article.

⁵⁷ Rousseau, *The Social Contract*, I.2

⁵⁸ Kant, *Perpetual Peace*, id.

⁵⁹ Grotius, DJB, Prolegomena, XXVIII.

Thirty Years War that began in 1618 and would ultimately devastate Europe and kill roughly a fifth of the German population.⁶⁰ The aim of “Rights of War and Peace,” on this benign reading, was to lower the number of wars and to render the remaining conflicts more humane and less destructive.

While it is true that Grotius wrote “Rights of War and Peace” during the Thirty Years War, it is important to bear in mind that at the time Grotius did not know that it was the *Thirty Years War*. He composed the famous passage towards the beginning of the conflict, when it was only the Five, or Six, Years War, long before France or Sweden entered the conflict. Grotius was almost certainly not referring to the confessional battles between Protestants and Catholics in Northern Europe. His preoccupation was the colonial struggles between the Spanish, Portuguese, English and Dutch in the East Indies.

Indeed, the book’s aim becomes clear in the very next passage: “Confronted with such utter ruthlessness many men, who are the very farthest from being bad men, have come to point of forbidding all use of arms to the Christian ... But the very effort of pressing too hard in the opposite direction is often so far from being helpful that it does harm.”⁶¹ This text from “Rights of War and Peace” sounds exactly like the comparable one from the beginning of his defense of Heemskerck. Grotius’ main concern in both works was not to halt the proliferation and destructiveness of war. Rather, he was worried that the conflicts in the East Indies were giving war a bad name and that the pacifists would win the political battle to shut them down. Grotius’ mission was to

⁶⁰ Nijhoff, *Hugo Grotius Celebration, Delft*, 21.

⁶¹ Grotius, DJB, Prolegomena, XXIX.

rehabilitate war, to place it on a firm moral and legal footing, to show that it was an ethically acceptable means of enforcing rights and settling disputes.

Grotius not only normalized war as a moral phenomenon. He also gave states a new framework and language for legitimizing wars to their population. Rulers could now deny that they were fighting for their own honor, glory or profit: they were simply enforcing the natural rights of their citizens. They were just doing the job delegated to them by consent of the governed.

Grotius had found a way to sell war to the public, and his efforts were lamentably successful. For the next few centuries, war would be seen as a legitimate method for resolving disputes, justified by the will of the governed and the mutual consent of nations. Thus, the ideological foundations of the Old World Order turned out to be remarkably modern: rather than appealing in a top-down fashion to Divine law or aristocratic privilege, the violence of war was justified from the bottom-up, starting with the natural rights of individuals and working its way upwards through various acts of consent.

The celebration in Delft is sadly ironic not only because Hugo Grotius actually stood for everything that Andrew Dickson White hated and fought to change. But the ideas first set out in Grotius's defense of Heemskerck, and then in "Rights of War and Peace," were also extremely influential. The laws formulated by Hugo the Great would determine how states went to war and made peace, and they would transform not only the international system, but also the states that comprised it. As our story unfolds, we will

see Grotius' fingerprints everywhere and how impossible it is to imagine the world in which we live without him.