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THE ORIGINS OF AMBIVALENCE IN TRANSNATIONAL NORMS

*Frederick O. Bonkovsky**

I. INTRODUCTION

Modern transnational theory began its emergence in the 17th century. As is so often the case with human achievement, this advancement is attributable primarily to the work of one man, the Dutch lawyer-scholar, Hugo Grotius. Like his predecessors, Grotius approached interstate politics with a particular concern for the norms relating to war. Within this context, he developed his ideas of international relations and law.

> Fully convinced . . . that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon this subject. Throughout the Christian world I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up there is no longer any respect for law, divine or human . . . .[1]

Grotius' magnum opus of 1625, *De Jure Belli ac Pacis*, represented the culmination and summary of Western international norms through the 17th century. But Grotius' explicit statement of international mores in legalized terms marked a departure from medieval thought. By secularizing natural law and, more importantly, by recognizing the new international system of the sovereign nation-states, Grotius made major alterations in transnational theory, thus earning the sobriquet, "father of international law."

As will be seen, however, a serious ambivalence marked Grotius' views. His modernity was demonstrated most notably in his recognition that international politics was the province of a number of sovereign nation-states, each of which defined its own values and purposes. Although this view diverged considerably from medieval conceptions, Grotius unfortunately retained many aspects of an earlier

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1. H. GROTIUS, DE JURE BELLI AC PACIS LIBRIS TRES, Prolegomena, para. 28 (Carnegie Institution of Washington 1925) [hereinafter cited as DE JURE with reference to the appropriate book, chapter and section].

"just war" theory that vitiated much of his innovative genius. This article examines these conflicting approaches to international norms developed by the first modern theorist of interstate relations.

II. The Problem of Jus and Lex

Grotius made no attempt to state an international "law" as that term is used today.[2] He set forth norms of international conduct based on the single standard of transcendent "justice" or "right." In the age of the rising nation-state and in an international milieu where states were becoming the recognized actors, Grotius separated the sphere of norms from the sphere of law and centered his study upon the former. In fact, Grotius specifically rejected the use of positive law as a basis for his work. "Let the laws [of the state] be silent, then, in the midst of arms,"[3] he said, and recognized the inapplicability of parochial domestic standards. Similarly, other elements of human law had to be disregarded:

> the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment, just as other notions of particular things are.[4]

Hence, treaties concluded between states were not a part of his theory of international norms. As a lawyer and a scholar influenced by medieval tradition, and in spite of what he understood and sought to do, Grotius unfortunately articulated his novel theory in legalistic medieval language, terming his standards the "law of nature" and the "law of nations."

By the term "law of nations," Grotius meant regularity in national practices. He held that nations in fact operated according to common standards of action. This playing by the "rules of the game" may be termed law in much the same way as one speaks of a "law of gravity." Certain forces, including ethical behavior and self-interest, produce regular behavior among states in the sense that gravity produces

2. *See* Pound, *Grotius in the Science of Law,* 19 AM. J. INT'L L. 685 (1925). *See generally* C. VON KALTENBORN, DIE VORLAEUFER DES HUGO GROTIUS (1848). Von Kaltenborn traces the sources and foundations of Grotius' thought in such writers as the Catholics Vasquez, Suarez and Molina. In addition, Reformation leaders including Luther, Melancthon and Johannes Olendorp had a considerable effect on Grotius' political thinking. It was the Catholics, however, who primarily posited ideas about international law.

3. DE JURE, Prolegomena, para. 26.

4. DE JURE, Prolegomena, para. 30.

predictable behavior among falling bodies.[5] International norm was dependent, therefore, not on the concept of an external lawgiver or judge, but on the interrelation of the actors. The theory thus allowed each state to be sovereign. The paradigm was not that of a transcendent and universal "natural law" nor that of an ethical structure imposed on the *Corpus Christianum* by the Roman church; rather, Grotius' "law of nations" operated in terms of policy decisions of national actors.

In the dedication, Grotius termed *De Jure Belli* a book "written on behalf of justice" and not a treatise on law or war.

> In giving to out treatise the title "The Law of War," we mean first of all . . . to inquire whether any war can be just, and then, what is just in war. For law in our use of the term here means nothing else than what is just . . . that being lawful which is not unjust.
>
> Now that is unjust which is in conflict with the nature of society of beings endowed with reason.[6]

The question of the "law of war" thus involved an inquiry into the question of what was just in war. Law, in this meaning, was "a rule of moral actions imposing obligation to what is right. . . . related to the matter not only of justice . . . but also of other virtues."[7]

Grotius' shorthand for normative standards in international politics was "the law of nature." He was concerned with the morality that prevailed on earth and believed that the rational, concientious and ethical actor could perceive what justice demanded in a given circumstance through the use of reason:

> The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined . . . .[8]

In this theory, the rational order of things is unalterable and eternal. For example, as to the proposition that murder is evil, the "law of nature . . . is unchangeable."[9] What constitutes murder, however, is open to consideration by right reason. "Furthermore, some things belong to the law of nature not through a simple relation but as a result of a particular combination of circumstances."[10] It cannot be

5. The analogy to the law of gravity is ours. For Grotius' discussion of the law of nations see DE JURE, Prolegomena, para. 17.

6. DE JURE, Book I, Ch. I, § III, para. 1.

7. DE JURE, Book I, Ch. I, § IX, para. 1.

8. DE JURE, Book I, Ch. I, § X, para. 1.

9. DE JURE, Book I, Ch. I, § X, para. 5.

10. DE JURE, Book I, Ch. I, § X, para. 7.

emphasized too strongly that Grotius allowed for this open-ended view of natural law.

In addition, he insisted that the law of nature, or the ethics of all mankind, would be known, valid and applicable even if "there is no God, or [if] the affairs of men are of no concern to Him." [11] Men can learn what is right and just from historical example, from customary practice and from Scriptural precedent. Such knowledge is gained through informed right reason. Whatever is at variance with the limitations imposed by human intelligence, a well-tempered judgment or the powers of discrimination that enable men to decide what things are agreeable or harmful is "contrary also to the law of nature, that is, to the nature of man." [12]

Conscience and expediency were the two operative touchstones for this normative system. Taking an associational view of mankind, much like that of Aristotle, Grotius argued that there is among men "an impelling desire for society, that is, for the social life . . . peaceful, and organized . . . ." [13] This "nature of man" that craves for sociability is the mother of universal norms. [14] For both individuals and states,

> justice brings peace of conscience, while injustice causes torments and anguish . . . . Justice is approved, and injustice condemned, by the common agreement of good men. [15]

Expediency undergirds the natural ethic. The law of nature binds the universal association together. It is precisely by agreeing on norms that mankind is made one.[16] Moreover, no state within the international community is so strong that it can go it alone. Each needs the "help of others outside itself, either for the purposes of trade, or even to ward off the forces of many foreign nations united against it." [17] This second element encourages even the strongest sovereign state to act in accordance with international norms. "[T]he state which transgresses the laws of nature and of nations cuts away also the bulwarks which safeguard its own future peace." [18] Expedience therefore dictates that alliances and international agreements be based implicitly on normative standards of honor, right and justice. [19] "No

11. DE JURE, Prolegomena, para. 11.
12. DE JURE, Prolegomena, para. 9.
13. DE JURE, Prolegomena, para. 6.
14. DE JURE, Prolegomena, para. 16.
15. DE JURE, Prolegomena, para. 20. This is not unlike the modern sociological assertion that shared values bind together a community.
16. DE JURE, Prolegomena, para. 23.
17. DE JURE, Prolegomena, para. 22.
18. DE JURE, Prolegomena, para. 18.
19. DE JURE, Prolegomena, para. 22.

one readily allies himself with those in whom he believes that there is only a slight regard for law, for the right, and for good faith."[20] What is determinative in international politics, therefore, is the moral relationship between the actors.

III. The Nature of War

A. *New Presumptions*

In taking up the question put by Thomas Aquinas, "whether it is ever lawful to wage war," Grotius reversed the medieval presumption. Concerning this basic "principle of nature," he maintained that "all points are in [war's] favor" because war is aimed at the preservation of life and things useful to life.[21] Right reason surely does not prohibit war. History, both Scriptural and secular, proves its validity.[22] In one splendid paragraph, Grotius dealt with opponents from the left and the right. The left, pacifists like Erasmus, insisted that war was immoral. The right, advocates of the secular prince like Machiavelli, held that *raison d'état* was an ethic unto itself. Both are wrong, said Grotius, for war is essentially an "enforcement of rights."[23]

Grotius supported the Calvinist position that the magistrate's duty before God is to protect the innocent.[24] To this end, war was primarily a procedure for the assertion of justice and right and, as such, it became a positive moral act. Grotius thus refuted the Christian tradition of pacifism found in leftist Protestant sects and the apparent prohibitions of the New Testament.

Grotius wanted only to reverse the medieval presumption, not to justify holy crusades against "immoral enemies." To the contrary, he insisted that most wars are fought for doubtful causes. In his view, the undertaking of war raised a problem of ethics to which rigid legal standards were inapplicable. Like Aristotle, he held that "certainty is not found in moral questions in the same degree as in mathematical science."[25] An absolute standard is rarely applicable since "even trifling circumstances alter the substance [of the matter] . . . ."[26]

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20. De Jure, Prolegomena, para. 27.
21. De Jure, Book I, Ch. II, § I, para. 4.
22. *See* De Jure, Book I, Ch. II, § I, para. 5; Book I, Ch. II, § II, para. 2; Book I, Ch. II, §§ III, IV.
23. De Jure, Prolegomena, para. 25.
24. De Jure, Book I, Ch. II, §§ VIII, IX.
25. De Jure, Book II, Ch. XXIII, § I.
26. In this part of *De Jure,* Grotius followed rather closely the categories of Aristotle's *Nichomachean Ethics.* De Jure, Book II, Ch. XXIII.

While reversing the presumption, Grotius insisted that war should not be undertaken when the slightest doubt of any kind existed. Here, as elsewhere, he echoed Augustine, who insisted that war be engaged in reluctantly, even when the cause was just. "Often a right should be given up in order to avoid war." [27] States should renounce the right of punishment in particular. At best, "war is not to be undertaken save from a most weighty cause at a most opportune time." [28] Thus, while recognizing the Augustinian view that war, not peace, is the usual situation, Grotius desired that it be otherwise, especially among Christian princes. [29]

B. *War and the Nation-State*

The idea of a nation as an independent sovereign state, and hence as a unique and self-sufficient society, was foreign to all medieval understanding. In that view, the only society was that of Christendom, a supranational union of which kingdoms were dependent members. Allegiance to the faith and its standards was the overriding and universal obligation. It is important to realize that for most of its history, and surely in the later Middle Ages, Western Christianity had no visible leader who exercised de facto sovereignty. Hence the unity and obligation of Christendom were theoretical or ideological, rather than formal or organizational. The international system was built upon common values, goals and ideas of legitimacy—that is, upon accepted international norms and agreement on principle. It was not an institutionalized unity nor one guaranteed by centralized political power.

In his description of international society and the nation-state, Grotius fell between two schools: on the one hand, he recognized the new nation-states as the appropriate units in international action; but on the other, he attempted to hold to a concept of a unified international society. In his view of the nation, Grotius reversed the medieval concepts. In his theories of international society, he clung to tradition.

It was Grotius who theorized and legitimized the new national state arrangement and thereby destroyed the assumed unity of medieval society. At the same time, however, he tried to preserve some kind of universal international society. He legitimized national sovereignty in part by giving to the princes the sole authority to wage

27. DE JURE, Book II, Ch. XXIV, § IX.
28. DE JURE, Book II, Ch. XXIV, § IX.
29. DE JURE, Book III, Ch. XXV.

war. For a war to be a justified public contest, it had to be waged on both sides "under the authority of the one who holds the sovereign power in the state."[30] Hence, war was the *ultima ratio regnum.* Grotius' *jus ad bellum* and *jus in bello* strictures were intended to govern only the military operations between sovereign princes. These heads of state alone possessed the *jus belli ac pacis.*[31]

Almost no check on sovereign authority was posited. An immoral command could be opposed by passive resistance only; rebellion was not allowable in such circumstances.[32] The people could turn against their sovereign only in the Hobbist circumstance when the king "openly shows himself the enemy of the whole people."[33]

Where international politics was concerned, Grotius insisted that nations be viewed as integrals. In a kind of consent theory that foreshadowed Locke, subjects and princes were held responsible for each other's actions. A nation, though a large number of people, had a "single essential character" or a "'single spirit."[34] Thus, it was appropriate that all men be comprehended under the single name and central authority of a nation-state.

The primary product of the national character or spirit was sovereign power, which played a central role in holding the state together.[35] The bond itself could be in accord with justice or injustice. In this regard, Grotius disagreed with Cicero concerning the necessity for justice to constitute a state.[36]

Grotius insisted that a distinction should be made between the private and public acts of the sovereign. For his public acts, the entire state is responsible. "For whatever the king does in acts belonging to his kingly office should be considered in the same way as if the state did them."[37] Hence, guilt for an unjust act (particularly in regard to warfare) "passes to rulers from subjects, whether these are subjects of long standing or recent. Conversely, guilt will pass from the highest authority to those subject to it . . . ."[38] However, there was no moral

30. DE JURE, Book I, Ch. III, § IV, para. 1.

31. *See* L. KOTZSCH, THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW 38 (1956).

32. Grotius clearly followed the Calvinist tradition in its conservative form. DE JURE, Book I, Ch. IV, § I, para. 3.

33. DE JURE, Book I, Ch. IV, § XI.

34. DE JURE, Book II, Ch. IX, § III, para. 1.

35. *Id.*

36. *Id.* Cicero's position is discussed more fully in his *De re Publica* and *De Officiis.*

37. DE JURE, Book II, Ch. XIV, § I, para. 2.

38. DE JURE, Book II, Ch. XXI, § VII, para. 1.

culpability involved in opposing the national action. Either active or tacit consent was necessary for responsibility to apply.[39]

All of this was of great importance, for it reversed the major medieval doctrine of non-combatant immunity in war. The medieval picture of war, which is recreated by many contempory theorists, was that of a prince making war with a few advisors and a mercenary force. Most of the population was not involved; hence it was immune from the violence. For Grotius the picture was quite different. The citizenry was normally as responsible for national action as was the sovereign. Hence, it would be appropriate that the entire state be endangered by war. This laid the basis for a theory of total warfare. The modern Western fact and theory of the nation-state in international affairs is quite in accord with the scenario described by Grotius.

C. *War and the International Milieu*

Grotius had a voluntarist view of international society which held that its standards were established by man and not by some higher force. The actors in international society, asserted Grotius, are nation-states and particularly their sovereigns. In the same way that bishops were "in some way . . . 'entrusted with the care of the Universal Church,' so kings, in addition to the particular care of their own state, are also burdened with responsibility for human society."[40]

National actors were charged with the care of international life. Grotius compared the international sphere to an unorganized region. He recognized that statutory law was absent. But the "general law of mankind," the law that reigns on earth, applies. Even in wartime, a good faith requirement controlled the belligerent conduct of enemies.[41]

It would be especially useful for international society to have a common morality, said Grotius. Were there such agreement, war would be necessary only when it was clearly violated. This, in fact, was Grotius' view of what international society ought to be and, to some degree, was. He envisioned a nonrevolutionary international system in which actors agreed upon the ethic or general law that constituted the human community. In this context, war was the assertion of a right against an unjustice.

39. DE JURE, Book II, Ch. XXI, § § XVII, XVIII.
40. DE JURE, Book II, Ch. XX, § XLIV, para. 1.
41. DE JURE, Book III, Ch. XIX discusses "good faith."

Although the period in which Grotius wrote was fraught with international violence, he continued to insist that war served to regain, establish or defend justice. When he escaped to France in 1621, civil wars raged—grandees against the Crown, Catholics against Huguenots. Grotius' home country, the United Provinces, was asking for French aid in its conflict with Spain. Foreign armies ravaged Germany. In the background, the conflict between the Islamic Turks and the West brewed and simmered. Hence conflict, international and civil, was common. Nevertheless, Grotius insisted that men and nations knew a common standard, the law of mankind, and that just wars could be waged only under that banner.

So it was that the sovereignty and dominance Grotius granted the nation-state with the one hand, he took away with the other. Realistically, he admitted the rise and power of sovereign princes. He granted that wars were waged between them and their kingdoms. But Grotius was unwilling to take the idea of a world of nation-states to its pluralist conclusion. Instead, he desired the voluntary maintenance of a medieval international society with its stated rules and shared values. In that context war could be a juridical process. But, as he realized, that world had already passed, if indeed it ever had existed.

IV. Grotius' Contradictory Views of Justified War

The fundamental incongruity in Grotius' international theory was demonstrated most clearly in his attempt to legalize international norms. In the process of stating "laws of war," Grotius weakened both strands of his thought. He bastardized medieval morality and at the same time contradicted his brilliant insights of an international milieu comprised of sovereign states. Theories of international law and transnational norms have continued to suffer from this unresolved discord.

A. *"Realist" Guidelines*

As a theorist of the new international politics, Grotius recognized that nations will judge their own causes and set their own rules. International circumstances are variable and conflict common. Thus the theorist is unable either to describe universally binding international treaty or organization or to set rules for warfare. Grotius instead repeatedly and fervently appealed to the state for proper policy. He urged it to yield minor rights, forget punishment in some

cases and query others for advice.[42] Since no one could tell nations how they were to act, states had to be careful in their own decision-making to insure that war was waged for valid reasons and in accord with rational policy.[43]

The modernizing Grotius was aware that medieval rules did not apply in the new situation. The doctrine that "innocents must always be spared" was rejected as based on an antiquated view of warfare. In the nation state, all citizens are responsible for warfare. Grotius held princes and subjects alike "guilty" and hence susceptible to punishment.

> The right of killing enemies in a public war and other violence against the person extends not only to these who actually bear arms, or are subjects to him that stirs up the war, but in addition to all persons who are in the enemy's territory.[44]

Under this view of warfare, all who are members of the enemy state may be "lawfully injured in any place whatsoever. . . . For when war is declared upon any one it is at the same time declared upon the men of his people . . . ."[45] In presenting this "modern" view of total warfare, Grotius specifically noted that the reversal of the medieval tradition was based on a new understanding of sovereignty and hence of international politics. Only where a different political situation applied, as in a neutral country, were different norms applicable.[46]

The standards derived from the law of both nature and nations were quite lax, permitting even the killing of women and children.[47] The restrictions of *jus in bello* which Grotius maintained, such as the prohibition of poison and rape, were those necessary for future peacemaking. National policy, detailed on the level of *jus ad bellum*, was determinative. To insure that the question of policy was uppermost, the "military," charged with the day-by-day practice of war and concerning themselves with *jus in bello*, were excluded from fundamental policy-making. "Generals do not have the power to make peace. . . . [T]he terminating of war is, in fact, not a part of the waging of it."[48]

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42. DE JURE, Book II, Chs. XX, XXIV.
43. *See, e.g.*, DE JURE, Book II, Ch. I.
44. DE JURE, Book II, Ch. IV, § VI.
45. DE JURE, Book III, Ch. IV, § VIII, para. 1.
46. DE JURE, Book III, Ch. IV, § VIII, para. 3.
47. *See* Chapters IV and IX of Book III. *See also* the extensive treatment in the first four Chapters of Book III.
48. DE JURE, Book III, Ch. XXII, § VII.

Fully four centuries before its American espousal, the Dutch scholar pre-shadowed the contours of contemporary norms of warfare. When the sovereign state proclaims a just war (*jus ad bellum*), everything is lawful which is necessary to attain the war's end. When the cause is just "we must strive with all our strength to win."[49] Such is the first guideline. Other norms that would be practiced by twentieth-century belligerents included that "he who wages a lawful war has a right over the captured subjects of the enemy . . . ."[50] Similarly, enemy property may be acquired in a lawful war in keeping with the justice of the cause.[51]

It is the sovereign prince who determines his own cause. Thus the fundamental rule is: "In war things which are necessary to attain the end in view are permissible. . . . [W]e are understood to have a right to those things which are necessary for the purpose of securing a right . . . ."[52] The national definition of necessity is determinative; *jus ad bellum* regulates *jus in bello.*

Having followed his own logic so impeccably and stated his conclusions so unambiguously, Grotius retreated. His ideas were too bold and revolutionary. They would have resulted in an overthrow of the entire medieval just war doctrine. The new international situation and the implications of the modern nation-state system were not yet so overwhelmingly clear. Grotius returned, therefore, to the security of medieval formulations. Unfortunately, most normative theory since has followed this lead in refusing to take account of hard international realities.

As if suddenly aware of where his logic was taking him, Grotius made a dramatic reversal in Book III, Chapter 10: "I must retrace my steps, and must deprive those who wage war of nearly all the privileges which I seemed to grant. . . ."[53] On "higher" grounds, those of honor, he returned the discussion to more traditional channels.

B. *The Juridical View*

Instead of positing an international system comprised of separate and sovereign nations, other legalistic and domestic categories were employed. The two broad "causes" justifying war were defense and

49. DE JURE, Book III, Ch. XX, § XLIII, para. 3. *See* R. TUCKER, THE JUST WAR (1960) (very similar statement of the modern American view).

50. DE JURE, Book III, Ch. XIV, § I, para. 1.

51. DE JURE, Book III, Ch. XIII.

52. DE JURE, Book III, Ch. I, § II.

53. DE JURE, Book III, Ch. X, § I.

punishment.[54] A nation was presumed to possess certain rights which it could justifiably defend or seek to regain. Thus arose Grotius' traditional definition of war: "the right to use force in obtaining one's own."[55] In spite of the conflicts around him, Grotius assumed a stable international system in which national "rights" were existent and universally recognized.

The political actor who violated rights was characterized as criminal, reprobate or at least misguided. Any war, even offensive and pre-emptive, was appropriate as long as fought to regain rights. War was an instrument of reparation.[56]

Grotius' juristic view of international politics was manifest in the legalistic and domestic parallels he employed.

> [W]ar is directed against those who cannot be held in check by judicial processes. . . . [I]n order that wars be justified, they must be carried on with not less scrupulousness than judicial processes are wont to be.[57]

Various torts and crimes that states commit against one another were enumerated. In spite of his view of sovereignty, Grotius seems never to have considered the fact that under his definition sovereign states could commit no crimes in *legal* terms if they were in fact sovereign and did not consider their actions wrong. In other words, Grotius either overlooked or avoided what Hobbes would later specify as the meaning of sovereignty.

The second major just cause for war was punishment of evil-doers.[58] The idea of war as punishment and the right to wage a punitive war are regularly termed the culmination of Grotius' thought. It had been a central concern in his *De Jure Praedae* of 1604 and was clearly restated in 1625. Following Augustine, just wars were defined as those which avenge injuries. Plato had sanctioned warlike measures until the guilty had been compelled to pay the penalty. An absolute declaration of war was therefore legitimately made, in Grotius' view, when one party has "committed crimes that call for punishment."[59] This schema ascribed absolute legitimacy to the status quo. That which disturbed was a priori wrong. The task of warfare was to restore the status quo ante when judicial settlement fails.

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54. The title of Book II, Ch. I, § II is: "Justifiable causes include defence, the obtaining of that which belongs to us or is our due, and the inflicting of punishment."

55. DE JURE, Book I, Ch. I, § X, para. 7.

56. DE JURE, Book II *passim.*

57. DE JURE, Book II, Ch. XVII, § I; Book II, Chs. XX, XXI *passim.*

58. DE JURE, Book II, Ch. I, § II, para. 2.

59. DE JURE, Book III, Ch. III, § VI, para. 1.

Not only the international and domestic levels of politics but also the national and the personal were confused. When a state engages in unjust war, Grotius said, the ruler and subjects are guilty of crime. [60] The issue is distinctly personal. "Guilt, however, attaches to the individuals who have agreed to the crime . . . ."[61]

By the same standard, individuals may remove themselves from the state and its action by dissenting from national policy. [62] The final example of Grotius' viewing war as akin to domestic legal processes despite apparent recognition of the new nationalism was his equating killing in wars and capital punishment. In a regularly repeated theme Grotius insisted that both have the same genesis:

> Now it is in the love of innocent men that both capital punishment and just wars have their origin. . . . [Both the Old Testament and the teachings of Christ attest to this fact.] Familiar is the old saying: "It is as much a cruelty to spare all as to spare none."[63]

Similarly, repeated parallels were drawn between norms of conduct for individuals and for states. Nations were referred to as thieves, robbers and pirates. [64]

Grotius' failure to distinguish levels of political activity was not simply a fault in illustration or an occasional lapse. Although in many instances he did recognize international politics as sui generis, ultimately he continued the medieval practice of equating the personal and the national, the domestic and the international. So he could state, ". . . just as this principle [of love] applies to individuals, so also it is applicable to peoples as such, and to kings as such." [65]

States were judged to have the same kind of moral qualities as persons. They were expected to adhere to mores similar to those of domestic actors. It was taken as a principle of international politics that only those free from like offenses may exact punishment and that the guilty party could not be punished by another equally guilty. [66]

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60. DE JURE, Book II, Ch. XXI, § VII.

61. DE JURE, Book II, Ch. XXI, § VII, para. 2.

62. DE JURE, Book II, Ch. XXI, § § XVII-XIX. Grotius thus assumed a rigid consent theory which did not take account of the more usual forms of tacit consent and lack of participation common in actual democratic nation-states, much less in other political arrangements. It seems that Grotius felt that subjects in less than consensual systems simply are not responsible for national action. This dramatic consent theory is a point almost entirely overlooked in the literature on Grotius.

63. DE JURE, Book I, Ch. II, § VIII, para. 10.

64. DE JURE, Book II, Ch. I, § I, para. 3.

65. DE JURE, Book II, Ch. XX, § III.

66. DE JURE, Book II, Ch. XX, § VII, para. 1.

The basis of international moralism was grounded in the idea that only those who are "not subject to vices of the same kind or of equal seriousness" are legitimate actors.[67] Thus, the theoretical basis was laid for the necessity of seeing war in absolutist terms—a conflict between the forces of light and those of darkness.

Grotius specifically rejected any other right to wage war. His attempts to recognize the new nation-state and the international situation as it actually was did not prevail. International norms were equated to personal norms by the use of faulty paradigms. War was legitimated as a defense of an imagined stable and constant status quo that was implicitly assumed to be just.

V. Conclusion

In the first part of the *De Jure Belli*, Grotius came very close to espousing a revolutionary doctrine. In the second half, he relapsed into a statement of rules and legal codes that largely repeated medieval strictures. Little recognition was given to the changing milieu. Grotius thereby trapped himself, and succeeding theorists who copied him, into theorizing international norms in terms of rigid and formalistic prescriptions.

The later Grotius viewed war in terms of killing. He repeated medieval prohibitions on involving noncombatants.

> It is bidding of mercy, if not of justice, that, except for reasons which are weighty and will affect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction.[68]

Grotius previously had treated primarily the "weighty" facts of politics and the larger societies of men and their safety. Now he called for mercy and disregarded justice, the political virtue. Thus he became involved in the convoluted vagaries of intention and double effect.[69]

The implications of an international milieu comprised of sovereign nation-states were forgotten. Before his retreat, Grotius was coming to terms with the impact of multi national sovereignty on standards of transnational action. But by restating medieval concepts and returning to that framework, Grotius allowed succeeding theorists to avoid the dilemmas that he had made plain in the first half of his work.

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67. *Id.*

68. De Jure, Book III, Ch. XI, § VIII.

69. The attempt at rule specification and extended considerations of specific cases are discussed throughout Book III, especially at Chapter XI, § II, Chapter VIII and Chapter XI.

The result has been that for over four centuries international normative theory has been unable to take account of the radical implications of national sovereignty. Tenets of international community have been yoked unequally with those informed by solipcist national sovereignty. Formal morality has been pulled in the former direction; practice has been guided in terms of the latter. In general, normative theory has remained unable to comprehend the ramifications of national sovereignty in transnational politics.