Attached is the first chapter of a book manuscript that I am writing with my colleague, Oona Hathaway.

The first three chapters of the book (tentatively titled “The Law of the World”) describe what we call the Old World Order—a system that relied on war as the linchpin of law. The first chapter centers on Grotius and the legal order he helped create. The second chapter shows that war was a source of legal redress and legal rights. The legal rights to territory, people, and goods were decided by war—even one that was entirely unjust. The third chapter examines what followed from the legality of war and of conquest and how those rules in turn shaped the international legal system that persisted for hundreds of years.

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 period from 1929-1941 and 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 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 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!
The Old World Order was set into motion in the early morning of February 25, 1603 off the eastern coast of Singapore when Jacob van Heemskerck, a Dutch explorer and trader, captured the Portuguese great ship *Santa Catarina* and claimed the gold, porcelain, silk and spices contained in its cargo hold. At auction in Amsterdam, the ship and its cargo yielded an astounding 3.5 million Dutch guilders, an amount roughly equal to three-quarters of the British Crown’s expenditures for that year. Heemskerck was awarded 1% of the sale for his efforts, with the bulk of the remainder going to his employer, the Dutch East India Company.\(^1\)

In order to defend Heemskerck from the charge of piracy, the directors of the Dutch East India Company hired the young polymath Hugo Grotius.\(^2\) Though only 20 years old, Grotius was already well known as the child prodigy whom, according to popular legend, Henry IV had dubbed the “Miracle of Holland.”\(^3\) Grotius was also the official historian for the State of Holland. The Company expected him to use his knowledge of the Dutch-Portuguese conflict over the East Indies to write a pamphlet defending Heemskerck’s actions to the public.

Much to the directors’ chagrin, Grotius gave them more than they bargained for. Instead of composing a suitably sized pamphlet, he spent the next two years composing a long treatise on the law of prize, a book that completely reworked the foundations of political theory and, in the process, changed the way that the world would look at war. Indeed, it would prove to be a vision so powerful that it that would hold sway among scholars and political leaders alike for more than three centuries.

If we want to understand the Old World Order, then, we need to understand why Jacob van Heemskerck attacked a Portuguese ship off the coast of Singapore, what strategy Hugo Grotius used to defend Heemskerck, and how his defense changed the course of history.

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\(^1\) 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. Heemskerck was actually given 31,000 guilders, or 0.89 percent. The surviving crew split 123,380 guilders. Id at 57. Enthoven p.208-9.

\(^2\) Boxer, *Fidalgos in the Far East, 1550-1770; Fact and Fancy in the History of Macao*, 51.

\(^3\) 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.
A Man of a New Age

Jacob van Heemskerck looked terrifying. In fact, while in armor, he bore a striking resemblance to 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 is difficult to imagine him smiling. Born into a prominent Dutch family, Jacob nevertheless chose the restless and precarious life of 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.” Though not beloved by all, 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.’”

Heemskerck had one purpose in life: 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 to the Arctic. This idea is not as mad as it might sound. When globes were first produced in the 1580’s, the three-dimensional representation of the Earth showed that the shortest route to Asia was in fact the northeastern one. Instead of heading all the way down South to round the tip of Africa and back up North again to India, it seemed best for ships to travel northeast around Norway, through the polar sea at the North Pole, down through the Bering Straits, and over to China. The Northern passage offered the promise of a voyage to the East Indies that would avoid the insufferable heat and deadly disease of the tropics.

Others had tried this route before. In June of 1594, a small squadron of Dutch ships had sailed north and brought back hopeful news by September: while they had not reached China, several made it through the Straits of Vaigach and found the Kara Sea free of ice. The next year a large expedition was assembled, this time with Heemskerck aboard, and set out to find the Northern passage. The fleet was so confident of success

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4 Joris van Speilbergen’s “The East and West Indian Mirror,” xxiv (quoting de Jonge)
5 Ibid.
6 Masselman, *The Cradle of Colonialism*, 82.
7 Ibid., 84-5.
that it left a full month later than the previous expedition.\textsuperscript{8} By then, however, the Kara Sea was full of ice and impassable.\textsuperscript{9}

Heemskerck, along with the famed navigator Willem Barentsz, who had been part of the previous two northern expeditions, set out yet again the following year.\textsuperscript{10} Despite their earlier start in May of 1596,\textsuperscript{11} the fleet got caught in the ice on the northern tip of Novaya Zemlya, the extreme edge of Europe, and they were stuck there for the entire winter.\textsuperscript{12} The house they built from scavenged driftwood and ship timbers to ride out the cold was small but sturdy, so sturdy in fact that parts of it would remain standing almost 300 years later when rediscovered by a Norwegian seal hunter.\textsuperscript{13} Heemskerck and his crew suffered through a grueling eight months, the first group of Europeans ever to survive a polar winter.\textsuperscript{14} In June the ice had melted enough for them to head back to the Netherlands.\textsuperscript{15} Tragically, Barentsz died on the way home.

Fortunately for the Republic, the Dutch had not placed all their bets on the Northern route. Even as the Heemskerck set out for the Arctic in the summer of 1595, four other ships sailed south, hugging the African and Asian coastlines the entire way.\textsuperscript{16} It took two and half years for the ships to return,\textsuperscript{17} by which point two-thirds of those who had set out had died. The cargo holds remained nearly empty, the ships having never made it to the Spice Islands.\textsuperscript{18} The trip was a commercial failure, but it held out the alluring promise of future profit.\textsuperscript{19}

A new expedition set out the next year to travel the southern route. Meticulously planned in an attempt to avoid the numerous mistakes of the previous voyages,\textsuperscript{20} it included a larger fleet of eight ships carrying more than 500 men.\textsuperscript{21} Heemskerck would captain one of the eight.

\textsuperscript{8} Ibid.
\textsuperscript{9} Ibid., 102.
\textsuperscript{10} Ibid., 103.
\textsuperscript{11} Ibid.
\textsuperscript{12} Ibid., 103-4.
\textsuperscript{14} Masselman, \textit{The Cradle of Colonialism}, 104-05.
\textsuperscript{15} Masselman, \textit{The Cradle of Colonialism}, 104.
\textsuperscript{16} Ibid., 91.
\textsuperscript{17} Ibid., 96.
\textsuperscript{18} Ibid., 96-7.
\textsuperscript{19} Ibid., 109. Van Neck’s Journal ("In these aforesaid eight ships were some 560 men")
\textsuperscript{20} Ibid., 110-11.
\textsuperscript{21} Ibid., 111.
The fleet, for example, did not take the direct path along the shoreline of Eastern Africa but instead sailed 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, who only a year earlier had suffered through the bitter cold of the Arctic with William Barentsz, pulled into a previously uninhabited tropical island, one he would name “Mauritius” after Prince Maurice of Nassau, the leader of the Dutch Republic.\textsuperscript{22} It was on Mauritius that he came upon the Dodo and was the first to pen a gastronomical description of the risible 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 size of [those of] a teal, very fat, when plucked apparently very good, yet tough skinned."\textsuperscript{23}

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 are hidden in the far eastern corner of the Indonesian archipelago and were the only place on Earth where mace and nutmeg grew.\textsuperscript{24} He tried to buy spices directly from the natives, but found them vexing. They 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,” Heemskerek wrote, “if he does not want to be cheated. These people are so crooked and brazen that it is almost unbelievable.”\textsuperscript{25}

Upon their return, these men of a new age were hailed as heroes and their success ignited an explosion in Dutch trading with the East Indies.\textsuperscript{26} By 1601, 10 companies had formed in different Dutch cities and launched 14 separate expeditions, a total of 65 ships.\textsuperscript{27} As the 17\textsuperscript{th} Century began, the Dutch sensed that they were bound for greatness. They would soon realize that they were also bound for war.

\textbf{Collision Course}

\textsuperscript{23} Ibid., 14.
\textsuperscript{24} Masselman, \textit{The Cradle of Colonialism}, 113-4.
\textsuperscript{25} Ibid., 115-16.
\textsuperscript{26} Ibid., 114-17.
\textsuperscript{27} Ibid., 133-34.
Today, Portugal may be smaller, both territorially and economically, than Indiana. But once it was a global empire, arguably the most powerful nation in the world. Indeed, traces of its former glory are still felt around the world: 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, Africa).

Portuguese power was built on slaves and spices: Portugal was the first European nation to traffic in the African slave markets and then the East Indian spice trade. In 1415, the Portuguese began their long trek eastward when ships crossed the Straits of Gibraltar and conquered Cueta, a Moorish fortress on the Northern Coast of Africa. It took almost another twenty years for their sailors to make it past Cape Bojador at the western edge of the Sahara. Bojador was a treacherous stretch of sea, with shallow waters, erratic winds and red dust storms that turned the water dark and caused compass needles to spin wildly. Once past what the Arab geographers called the “Green Sea of Darkness,” the Portuguese inched down the Western Coast of Africa, capturing slaves and establishing trading posts along the way. It took almost 50 more years of probing the shoreline to reach the Southern tip of Africa. In 1488, Bartolemeu Dias finally rounded the Cape of Good Hope—the first European known to have done so—and set foot on the shores of Eastern Africa. He had at last reached the Indian Ocean—and in doing so opened the door to Portuguese dominance of international trade between Europe and the East.

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31 Ibid., 5.

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

33 Boxer, The Portuguese Seaborne Empire, 1415-1825, 33.

34 Ibid.

35 Dias wanted to continue—perhaps press all the way to India—but his crew—sick, hungry, and frightened—refused. Dias returned to Lisbon with news that a passage to India, one that did not require slow, dangerous and expensive overland route across the Middle East, was at last possible. He had not completed the journey, but reaching the Indian Ocean was the hard part. The waters from the East Coast of
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.” He likely spoke for many of his countrymen, who spent the next century monopolizing European trade with the Indies. 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. Their dominance was so great, in fact, that they supplied no less than 75% of pepper to Europe. The Portuguese had the region all to themselves and were quite determined to keep it that way.

The Dutch Expeditions

As Portugal was rising as a world power over the course of the 16th Century, the Netherlands was barely treading water, almost literally. The “Low Countries” lay on an estuary of three major European rivers and much of it is at, or below, sea level. The Dutch fought a never-ending battle against the water, seeking to reclaim land while at the same time preventing it from being flooded by the tides. Hence, the iconic symbols 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, (Johannesburg:, Witwatersrand University Press, 1961), 12; George Masselman, The Cradle of Colonialism (New Haven:, Yale University Press, 1963), 193-4, 215.. Inspired by Dias’s success, Vasco da Gama set off to complete the journey. Da Gama left Lisbon in July of 1497, using Dias’ navigator to round the Cape. In Malindi (present-day Kenya), he hired a local pilot to guide him through the Arabian Sea, which was strewed with dangerous reefs and islands. Ten months after setting out, Da Gama reached Calcutta. A. R. Disney, A History of Portugal and the Portuguese Empire, 2 vols., vol. 2 (New York: Cambridge University Press, 2009), 120-22; Diffie and Winius, Foundations of the Portuguese Empire, 1415-1580, 176. According to Da Gama, the day after he landed, one of the natives came on board and shouted excitedly: “A lucky venture, a lucky venture! Plenty of rubies, plenty of emeralds! You owe great thanks to God, for having brought you to a country holding such riches!” Velho, da Gama Journal, referenced in Boxer, Portuguese Empire, p.37, and Diffie and Winius, p.181.

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 Boxer, Portuguese Empire, p.37; and Diffie and Winius, p.181.

37 Disney, A History of Portugal and the Portuguese Empire, 2, 125-37, 65-67.
38 Boxer, Four Centuries of Portuguese Expansion, 1415-1825; a Succinct Survey, 14; Masselman, The Cradle of Colonialism, 217.
39 Disney, 152
40 The Portuguese also had been awarded a monopoly on trade by the Pope in a series of papal bulls. For the history of these papal donations, see James Muldoon, Popes, Lawyers and Infidels. On the history of European spice trade before Da Gama, see Paul Freedman, Out of the East.
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 exploit their commercial position. They played no role in the so-called “rich trades”—the sale of spices, fine textiles, and porcelain—where the real money was made. 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.41

The Dutch were not only engaged in a constant struggle with the sea—they were also fighting their Spanish overlord. The Netherlands rebelled against the repressive policies of the Catholic Phillip II of Spain in 1568, leading to a bloody religious war.42 The Dutch revolt split the Netherlands in two: the Southern, predominantly Catholic half—present day Belgium and Luxembourg—remained with the Spanish Empire while the Northern, mostly Protestant part, whose main province was Holland, proclaimed independence in 1579. Matters became dire for the North—later known as the “Dutch Republic”—when, a year after it declared independence, Spain and Portugal united under a single crown, as Phillip II of Spain became Phillip I of Portugal. The fledgling republic was now engaged in a fight to the death with the two greatest empires of the world.

Ironically, it was the overzealous king who led the Dutch Republic to the Indies. For in 1590, Phillip threw himself into another war of religion, this time against the French Huguenots. Needing the men, he withdrew his armies from the Netherlands and sent them to France instead. Desperately seeking revenue for this new war, Phillip also lifted the embargo on the Dutch Republic. Though the increase in trade with the Dutch helped fill his coffers, it also helped the Dutch as well. Now they were able to participate in the rich trades by buying spices in Lisbon and selling them in Northern Europe, especially in the Baltics. The Dutch quickly realized the enormous profits that could be gained from Asian goods and resolved to bypass Lisbon and trade directly with the East Indies.43

When adventurers such as van Neck and Heemskerck so quickly achieved this goal a few years later, the Portuguese were surprised and angry. After all, they had

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42 Ibid., ch. 9.
43 Ibid., 316-21
“discovered” the East Indies. Not only had they gotten there first, but the Pope had “donated” this part of the world to them in a series of Papal bulls. The Portuguese were not about to give up their hard won territory to anyone, least of all to their enemy, the rebellious Protestants. In response to the Dutch incursions, 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 Heemskerck had left there. The Portuguese laid waste to Ambon and built forts in the newly conquered territory. “[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 say, “the fount and origin of every calamity for the natives.”

Perhaps the most notorious act of intimidation occurred on van Neck’s subsequent voyage. In September of 1601, his fleet pulled into Macao, the one market town in which the Chinese—which governed much of the region—permitted foreign trade. Because this expedition was the first Dutch sojourn to Chinese territory, van Neck sent out a small boat with 11 aboard to investigate the lay of the land. The Portuguese, which had established a trading mission on the island, lured the boat to shore with a white flag and then arrested the Dutch after they stepped ashore. A slightly larger expedition was later sent out to discover the fate of the first 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, Dom Paulo, ignored this request. Reports differ as to the Dutch sailors’ fate. Heemskerck reported that 17 captives were hung on Paulo’s orders, while Grotius alleged that only 6 were hung while the remaining were taken to shore at night in iron fetters with weights attached to the chains and drowned.

The Taking of the Santa Catarina

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45 For the history of these papal donations, see James Muldoon, *Popes, Lawyers and Infidels*.
46 Van Ittersum, *GROTIUS IN CONTEXT*, 515-16.
47 Grotius, Hugo. *COMMENTARY ON THE LAW OF PRIZE AND BOOTY*, 288
48 Ibid.
49 Ibid.
50 Ibid.
51 See Heemskerck’s letter of July 1602, December 1602, and August 1603 to the United Amsterdam Company here in Id.; Grotius, ROP, Ch. XI.
Jacob van Heemskerck’s next voyage to the Indies would be nothing like the previous success. He quickly discovered that the days of peaceful trading in spices were over.

Heemskerck set out to the East Indies on April 23, 1601 as the leader of an 8-ship fleet and almost immediately ran into trouble. He was greeted off the Canary Islands by an armada of 12 Spanish galleons. One of his ships – the Red Lion – was badly damaged in the fight and was forced to return to Amsterdam. Another – the Black Lion – was separated from the pack and headed to Asia alone.

The remaining fleet arrived safely in the East Indies, but was unable to reach their destination, Aceh in Northern Sumatra, because of the winds. Instead, it called at Bantam in Western Java. The sight of 6 Dutch merchant ships in the harbor roiled the spice market and dramatically drove up the prices. Heemskerck decided to leave only 2 ships at Bantam and, as he had hoped, the prices eventually came down. A few weeks later he sent 2 more ships back to Bantam and they too were able to buy spices at a reasonable price. The Black Lion finally arrived from Aceh half empty – it was the only member of the fleet to actually make it to the original destination – and it, too, was able to fill its remaining cargo holds at Bantam. In May, these five ships set sail to Amsterdam leaving the White Lion and the Alkmaar behind.

Looking for spices to fill his own ship, Heemskerck travelled eastward along Java’s North Coast and stopped in the port of Japara. Disaster struck when the overlord of Japara, the ruler of Demak, arrested the crew members who had come ashore. Heemskerck’s various attempts to secure the release of the prisoners failed. Offers of ransom were rebuffed. A blockade of the port had no effect. Desperate, Heemskerck captured a Malaysian junk from Johore and offered to return the cargo on the condition that the junk’s captain mediate the dispute with the ruler of Demak. Heemskerck sent the empty junk into the harbor with the captain aboard, but the ruler refused to bargain. Eventually, a number of sailors were let go, but 12 were forced to remain in order to man the guns against Demak’s archenemy, the Mataram of Java.

53 Ibid., 7-8.
54 For Heemskerck’s stop in the port of Japara, the crew members’ arrests, Heemskerck’s attempts to secure the prisoners’ release, the rebuffed ransom offers, the ineffective blockade, and the 12 remaining men, see van Ittersum, Profit and Principle, 8. For Heemskerck’s offer to return the cargo and the ruler of Demak’s refusal to bargain, see Ibid., 18.
Unable to free the rest of his crew, Heemskerck reluctantly sailed to Grissee on the eastern tip of Java. Spotting another junk from Johore in the harbor, Heemskerck set out to repair the diplomatic damage he had done in his desperate effort to free his crew. He was well aware that Johore, a strategically situated principality on the tip of Malaysia, would make an excellent trading partner. It helped that the Johoreans hated the Portuguese almost as much as did the Dutch. The Portuguese had wrested the city of Malacca from Johore in 1511, and the current Sultan of Johore still held a grudge. Shrewdly, Heemskerck composed a letter offering to compensate the Sultan of Johore for his capture of the Johorean junk at Japara and sent the letter off with the departing Johorean boat. The Sultan refused to accept compensation, but the gesture created good will on which Heemskerck would soon capitalize.

Heemskerck left the Alkmaar behind in Grissee and set out for Bali to buy spices. The monsoon was blowing in the wrong direction and his attempts to reach the island failed. In the meantime, the captain of the Alkmaar managed to capture a Portuguese frigate that had participated in the siege of Bantam the year before. A letter was discovered aboard the frigate that detailed the massacre of van Neck’s crew at Macao the previous year. Heemskerck was livid when he returned and read the letter. “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 Portuguese [merchants in Grisse].”

Still hoping to buy spices, Heemskerck waited for native trading boats to return from the Moluccas. They all arrived empty. The Portuguese assault on the Spice Islands had made it impossible for merchants to purchase any of the new crops.

With his cargo holds still empty, Heemskerck left for the Malay Peninsula to buy pepper at Patani. He again met with disappointment. Dutch ships had arrived three

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55 Ibid.
56 Ibid., 18-19.
61 Ibid., 19.
62 For Heemskerck’s setting out for Bali, the monsoon, and the capture of the Portuguese frigate, see van Ittersum, *Profit and Principle*, 8. For the letter detailing the massacre of van Neck’s crew and Heemskerck’s reaction, see Ibid., 8-9.
63 For Heemskerck’s desire to purchase spices and the empty Javanese junks, see van Ittersum, *Profit and Principle*, 10-11; For the Portuguese assault, see Ibid., 8, 11.
months before him and bought the entire pepper stocks. But his luck was about to change. The Sultan of Johore’s brother, Ragu Bongsu, was celebrating his wedding in Patani and visited Heemskerck on his ship. They struck up a friendship and talked about trading opportunities in Johore. In particular, Bongsu described the Sultan’s antipathy to the Portuguese and his desire to form an alliance with the Dutch. He also touted the strategic location of Johore along the Portuguese trade route and how he might use it as a base from which to attack Portuguese cargo ships returning from China.

Heemskerck met with his officers and discussed the possibility of capturing a Portuguese ship. The group of officers, known as the “Broad Council,” came to see three advantages to this strategy. First, it would avenge the outrage perpetrated by the Portuguese on van Neck’s crew in Macao. Second, it would defend the Dutch right to trade in the area. Third, it would damage the Spanish war effort against the Netherlands by cutting into a necessary stream of revenue. There was a fourth reason which was not reported in the Broad Council’s final resolution to attack but undoubtedly discussed: their cargo holds were still empty and they had nothing to show for their nearly two years at sea. A Portuguese cargo ship would be laden with goods from China and its capture would make their expedition very profitable indeed.

The Broad Council was well aware that taking the offensive was not within their mandate. 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. The Broad Council judged, however, that the facts on the ground had changed and drastic action should be taken. They had a new plan: they were going rogue.

_The Santa Catarina_

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64 Ibid., 11.
65 For Heemskerck’s disappointing trip for pepper, see van Ittersum, _Profit and Principle_, 11; For his new friendship and alliance with Ragu Bongsu, see Ibid., 13, 18-19; For Bongsu’s strategic advice, see Ibid., liii; Grotius, _Commentary on the Law of Prize and Booty_, 296, 534.
67 van Ittersum, _Profit and Principle_, 21, 23.
68 Ibid., 20-21.
69 Borschberg, _The Singapore and Melaka Straits_, 71.
70 van Ittersum, _Profit and Principle_, 41.
71 Ibid., 20-25.
72 Ibid., 10; Grotius, _Commentary on the Law of Prize and Booty_, 422-424.
73 Ibid., 168-182; van Ittersum, _Profit and Principle_, 21.
The White Lion and the Alkmaar left on their new mission in the middle of November but decided against accepting Bongsu’s invitation. They laid in wait instead on the eastern side of Tiuman Island, about 100 miles from Johore. Portuguese ships returning from China were bound to pass by the island and van Heemskerk could intercept them at this point.

The two Dutch ships managed to capture a small Portuguese vessel returning from Cochin, China. They took its cargo and refitted the ship as a yacht (“jacht,” in Dutch, means “hunt”) to join their fleet. A German who had been on the captured boat informed Heemskerck that he had sailed to Macao with the Viceroy of Malacca on a large Portuguese vessel and that this ship was due back to Malacca any time now. Even more tantalizing was his report of another, even larger ship that was travelling along with the Viceroy’s ship and would be returning soon as well.74

After several more weeks of waiting, Heemskerck learned that a large cargo ship had slipped by unnoticed several days earlier and realized that declining Bongsu’s invitation to use Johore as a base had been a mistake. The fleet of three ships quickly pulled their anchors and reached the mouth of the Johore River on February 24, 1603. They awoke the next morning to an astonishing sight: the Santa Catarina had arrived during the night and was anchored before them in full view.75

By standards of the day, the Santa Catarina was an enormous ship.76 It was a newly built “carrack,” a U-shaped boat with a huge fore- and aft-castle, designed to be impregnable by smaller ships.77 It rode high in the water but its massive size made it stable enough for many canons and gave it ample room for cargo.78 Magellan’s carrack that circumnavigated the world, the Victoria, was 85 tons; the Santa Catarina was close to 1500 tons.79 The carrack was so large that it transported nearly a thousand people: 700 soldiers, 100 women and child (probably to be sold as slaves in Malacca) and

74 Grotius, Commentary on the Law of Prize and Booty, 531-537; van Ittersum, Profit and Principle, 30-31; For Heemskerck’s realization, arrival at the Johore River, and encounter with the Santa Catarina, see van Ittersum, Profit and Principle, 34-35.
77 Audrey Elizabeth Wells, "Virtual Reconstruction of a Seventeenth Century Portuguese Nau" (M.S. thesis., Texas A&M University, 2008), 12.
assorted crew. The Chamber of Goa, writing to the King of India, said the Santa Catarina was “the richest and most powerful ship that ever left China, which was bringing the means of subsistence for the whole of India.”

At 8 AM, the fleet opened fire on the carrack. Heemskerck instructed his crew to aim for the sails, not wanting to sink the boat but merely to immobilize it. 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 very difficult to maneuver. The carrack was also transporting too many people and the confusion on the decks made coordination virtually impossible. Lastly, the Catarina’s crew was not highly skilled in naval warfare. The Portuguese auctioned off the office of constable and bombardier to the highest bidder, a practice that, to say the least, did not attract sailors with the best fighting skills.

By the end of the day, the battle was over. The Catarina’s sails were in taters and the carrack was in danger of crashing into the shallows rocks by the Singapore shore. It wisely surrendered to Heemskerck. The Dutch crew boarded the carrack and transferred the prisoners and cargo to their own boats. The carrack’s holds were used to load pepper and cloves that Heemskerck bought in Bantam and the carrack was hauled all the way back to the Netherlands.

Amsterdam was amazed to discover the richness of the capture. The auction attracted attention from merchants all over Europe. The ship’s legendary contents included: “1,200 bales of raw Chinese silk; chests filled with coloured damask, atlas (a type of polished silk), tafettas and silk; large amounts of gold thread or spun gold; cloth woven with gold thread; robes and bed canopies spun with gold; silk bedcovers and bedspreads; linen and cotton cloth, thirty last (approximately sixty tonnes) of porcelain comprising dishes ‘of every sort and kind’; substantial quantities of sugar, spices, gum,
musk (also known as bisem); wooden beds and boxes, some of them beautifully ornate with gold; and a ‘thousand other things, that are produced in China’.87

The total proceeds came in at 3.5 million guilders—more than three times the total capital of the United Amsterdam Company.88 The expedition had earned a staggering rate of return. 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 by trading with China.89

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 rather by trading corporations seeking to maximize profits for the benefit of their shareholders.90 First, however, it would take a brilliant legal mind to justify Heemskerk’s richly rewarded 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.91

**On The Law of Prize and Booty**

By the time Heemskerck made it back to the Netherlands, his previous employer, the United Amsterdam Company, no longer existed.92 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 first hand.93 The VOC took over the assets of the United Amsterdam Company and claimed the Santa Catarina as its own.94 Following standard procedure, the VOC brought suit within the Admiralty Court and in September of 1604 was awarded the ship and cargo as its prize.95

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87 Ibid.
90 van Ittersum, *Profit and Principle*, lii-iii, lvii.
Given the enormous value of the prize, the VOC sought a lawyer who could justify 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. The job was offered to Grotius and he readily accepted.

Why the Apology?

Before discussing Grotius’ defense of Heemskerck, however, we should first address an obvious question, namely, why did the VOC feel the need to defend the capture? After all, the company had won the rights to the ship and its cargo in Admiralty Court and was indisputably legally entitled to the proceeds. Moreover, the Santa Catarina was not the first ship seized by a foreign power. Capturing ships as prizes was common. Just a year before Heemskerck’s attack, James Lancaster seized a Portuguese carrack off the Straits of Singapore and dragged it back to England. The British East India Company, Lancaster’s employer, felt no pressure or inclination to defend Lancaster. When Francis Drake captured a string of Spanish galleons in 1581, Queen Elizabeth actually went to the London dock herself and knighted Drake on the deck of his ship. What was so problematic about the seizure of the Santa Catarina?

The standard answer is the one proposed by the great Dutch historian Robert Fruin: an apology was commissioned as part of a public relations campaign to quell a shareholder revolt. As Fruin argued, some of the VOC shareholders were Mennonites and ideologically opposed to profiting from violence. One major shareholder in particular, Pieter Lijntgens, threatened to divest himself of his shares in the company because of the capture. In support of this hypothesis, Fruin cited the opening sentences of Grotius’ apology: “A situation has arisen that is truly novel, and scarcely credible to foreign observers, namely: that those men who have been so long at war with the Spaniards and who have furthermore suffered the most grievous personal injuries, are debating as to whether or not, in a just war and with public authorization, they can

96 Grotius, Commentary on the Law of Prize and Booty, xiv-xv; van Ittersum, Profit and Principle, 24;  
97 van Ittersum, Profit and Principle, 26.  
98 van Ittersum, Profit and Principle, 25.  
99 van Ittersum, Profit and Principle, xiii.  
100 Ibid.  
101 Mary E. Hazard, Elizabethan Silent Language (University of Nebraska Press, 2000), 251.  
103 Fruin, An Unpublished Work of Hugo Grotius’s, 32.  
104 Fruin, An Unpublished Work of Hugo Grotius’s, 33-34.
rightfully despoil an exceedingly cruel enemy who has already violated the rules of international commerce.\textsuperscript{105}

Others have cast serious doubt on this explanation, however. Martine van Ittersum points out that by the time Grotius was asked to write his defense, most of the Mennonites had already sold their shares.\textsuperscript{106} Moreover, though Lijntgens was a professed pacifist, he was also a well-known arms dealer.\textsuperscript{107} No one would have taken his protests seriously.

Van Ittersum argues instead that the defense of the capture was directed primarily not at shareholders but at politicians.\textsuperscript{108} From the VOC’s perspective, the capture of the Santa Catarina was the first volley in a new militant corporate strategy.\textsuperscript{109} The company was determined to pursue trade in the East Indies by all means necessary, violent ones included.\textsuperscript{110} The VOC would not back down in the face of Portuguese intimidation: they would respond with an eye for an eye. Heemskerck’s victory in the Singapore Straits was clear evidence that the fight could be taken to the Spanish Empire in their own colonial backyard.

There was only one flaw in the business strategy, however: war is a very expensive enterprise. The VOC could not finance its fight against the Portuguese by itself and still turn a profit. It needed the help of the States-General.\textsuperscript{111} Thus, it wanted special tax breaks, such as exemptions from import and export duties, legal protections from shareholders demanding dividends and, perhaps most of all, military assistance such as ships, cannons and soldiers.\textsuperscript{112}

In modern day terms, the VOC was a multinational, monopolistic publicly traded corporation and Heemskerck was a private military 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.

Grotius was the perfect person for the job. Born of a patrician family in Delft, Grotius – the family name in Dutch is de Groot (literally, “the Great”), but he preferred

\begin{itemize}
\item Grotius, \textit{Commentary on the Law of Prize and Booty}, 9.
\item van Ittersum, \textit{Profit and Principle}, 119-122.
\item van Ittersum, \textit{Profit and Principle}, 120.
\item van Ittersum, \textit{Profit and Principle}, 25-26, 122.
\item van Ittersum, \textit{Profit and Principle}, 124.
\item van Ittersum, \textit{Profit and Principle}, 178.
\item van Ittersum, \textit{Profit and Principle}, 26.
\item van Ittersum, \textit{Profit and Principle}, 168, 181.
\end{itemize}
the Latinized “Grotius”—was regarded as a child prodigy. By age 8, he was composing publishable verse in Latin and, by 11, he matriculated at Leiden College (soon to be Leiden University). Grotius received a doctorate in law at the University of Orlean at age 15, though most scholars now believe that he simply bought the degree. By age 18, he was named official historian for the State of Holland. He was a rising star in the Dutch political scene, with powerful friends and an even more powerful mind.

Grotius also had a personal interest in the case. Jacob van Heemskerck was not simply his client—he was also his cousin. The maiden name of Grotius’ grandmother on his father side was “Elseling van Heemskerck.” In justifying the capture of the Santa Catarina, therefore, Grotius was not merely defending a trading company. He was defending his family.

Complications

The VOC probably expected Grotius to write a short pamphlet pleading the company’s case. He would briefly explain that the Dutch came to the Indies in peace merely wishing to do honest business with the natives, but the Portuguese ruthlessly responded with aggression and treachery denying them their right to trade. It took Grotius over two years, however, to complete the assignment and the resulting document definitely could not be published as a pamphlet. He composed a long treatise that set out an original system of morality and political theory, contained a detailed history of the Dutch-Portuguese conflict in the East Indies, and applied the facts to the law in order to defend the seizure of the Santa Catarina. Though Grotius would choose to publish only one chapter out of the original fifteen, the book—usually called De Jure Praedae

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113 Borschberg, Hugo Grotius, the Portuguese, and Free Trade in the East Indies, 3; van Ittersum, Profit and Principle, xxiv, 26.
114 Borschberg, Hugo Grotius, the Portuguese, and Free Trade in the East Indies, 22, 36; van Ittersum, Profit and Principle, xxiv.
115 Borschberg, Hugo Grotius, the Portuguese, and Free Trade in the East Indies, 22; Grotius, Commentary on the Law of Prize and Booty, xiv.
116 Borschberg, Hugo Grotius, the Portuguese, and Free Trade in the East Indies, 25; van Ittersum, Profit and Principle, xxv.
117 Grotius, Commentary on the Law of Prize and Booty, xiv; van Ittersum, Profit and Principle, xxv.
118 W.M.S. Knight, The Life and Work of Hugo Grotius, 6.
119 Grotius, Commentary on the Law of Prize and Booty, xv.
120 Ibid., xvi-xvii.
Commentarius or “Commentary on the Right of Plunder”—would prove to be one of the most important ever written.122

To understand what led Grotius to produce a treatise instead of the desired pamphlet, we have to delve briefly into the technicalities of the arcane and archaic practice known as “privateering.” Though it has been defunct for well over 150 years—privateering was outlawed in Europe in 1856 by the Declaration of Paris and the U.S. has not licensed a privateer since 1815—it was once a fact of nautical life and its rules were well-known and of great importance to inter-state relations.123

Let us begin with the basic distinction between “enemies” and “pirates.” According to the classic definition of 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.’”124 An enemy, in other words, was a group fighting on behalf of a ruler. Only groups with rulers could go to war—no one else had the legal power to do so. If someone was not part of such a group, they could not be an “enemy.” Rather, they were “brigands” or “pirates.” Because pirates did not have the legal power to go to war, they were not legally permitted to kill or take property. If they did, they could be prosecuted for murder and theft. Indeed, a pirate was considered an “enemy of all mankind” (hostis humani generis) and could be punished severely not only by their victims, but by anyone in the world.

Unlike pirates, certain members of the enemy were legally permitted to kill others and take their property.125 In order to be entitled to engage in naval warfare, for instance, the commander of a ship had to have a “commission” from a sovereign. By virtue of this commission, the commander and crew had the legal permission to harm members of another state against whom war had been declared. If captured, they could not be treated as criminals and thus not prosecuted for murder, theft or trespass. Without this commission, however, these sailors were considered pirates because they were not deemed to be fighting for a particular sovereign.

122 Fruin, An Unpublished Work of Hugo Grotius’s, 40-42; Grotius, Commentary on the Law of Prize and Booty, xx.
124 Digest, 50.16.118 (“‘hostes’ hi sunt, qui nobis aut quibus nos publice bellum decrevimus: ceteri ‘latrones’ aut ‘praedones’ sunt.”)
125 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.
Most of those who received these commissions were naval officers. But some who enjoyed the legal protections of an enemy were not members of the navy. 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 was 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 a letter of marque were “privateers” and their captures “prizes.” 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 issued letters of marque—only they could legally transform a “pirate” into a “privateer.” Queen Elizabeth, for example, commissioned both Francis Drake and James Lancaster to engage in privateering against her Spanish and Portuguese enemies. The United States Constitution grants the right to issue letters of marque to Congress.

In contrast to Queen Elizabeth and the Congress, Prince Maurice was not obviously a sovereign. The Dutch Republic was engaged in a civil war against its Spanish overlord and Maurice was the leader of the rebellion. The English and the French, its two closest allies, would not even recognize the Dutch ambassadors in their courts. It was not clear, therefore, that a rebel leader had the legal power to issue letters of marque. And if 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.

There was another legal problem. Maurice’s commission to Heemskerck permitted him to use force only in self-defense or for the reparation of injuries. But the Santa Catarina had not attacked the White Lion or the Alkmaar. To the contrary, the White Lion and Alkmaar had gone looking for a fight. While the Portuguese had certainly injured the Dutch in the East Indies, Sebatiano Serrao, the captain of the Santa

126 These sailors were subject to the rules of the sovereign under whose commission they fought—the sovereign’s “Articles of War.”
127 Borschberg, Hugo Grotius, the Portuguese, and Free Trade in the East Indies, 162.
128 US Constitution, Art 1, Sec 8.
129 Grotius, Commentary on the Law of Prize and Booty, xviii
130 Grotius, Commentary on the Law of Prize and Booty, xiii.
131 van Ittersum, Profit and Principle, 54.
132 Grotius, Commentary on the Law of Prize and Booty, xiii.
133 van Ittersum, Profit and Principle, 22.
134 van Ittersum, Hugo Grotius in Context, 522; van Ittersum, Profit and Principle, 23;
135 van Ittersum, Hugo Grotius in Context, 521.
Catarina, had never wronged Jacob van Heemskerck or his ship.\footnote{Borschberg, *The Singapore and Melaka Straits*, 73; van Ittersum, *Profit and Principle*, 35.} Even if Maurice’s commission was a valid letter of marque, Heemskerck’s actions did not seem to fall within its terms.\footnote{van Ittersum, Hugo Grotius in Context, 522.}

To be sure, the Dutch Admiralty Court was undaunted by these complications. Its decision, however, was an embarrassing jumble of legal arguments, a string of conclusions masquerading as analysis.\footnote{Ibid.; Grotius, *Commentary on the Law of Prize and Booty*, xx; van Ittersum, *Profit and Principle*, 53.} The verdict, for example, simply declared that the capture was “permitted by natural law, *jus gentium* [i.e., the law of nations] and the commission of his Princely Excellency” without ever attempting to justify these claims.\footnote{van Ittersum, Hugo Grotius in Context, 522.} In truth, the legal status of prize-taking in civil war contexts was extremely murky and would remain so 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.”\footnote{The Brig Amy Warwick; The Schooner Crenshaw; The Barque Hiawatha; The Schooner Brilliante (The Prize Cases), 67 U.S. 635 (1863).}

Grotius did not write the pamphlet, therefore, because he knew it would not serve its purpose. The case was utterly unpersuasive. Like any good lawyer, Grotius did make an attempt: in “The Right of Plunder,” he argued that Heemskerck was a privateer. Maurice had the power to issue letters of marque, his commission was a valid letter of marque and Heemskerck acted within its terms.\footnote{Accord van Ittersum, *Profit and Principle*, 26-30.} 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.

**Heemskerck’s Private War**

Grotius’ new argument was both brilliant and original. He argued that Heemskerck could attack the *Santa Catarina* because he was prosecuting a just war...
against the Portuguese. 142 Heemskerck was neither a privateer nor a pirate—*he was a soldier in his own private war.* 143 And because his war was just, his employer, the VOC, could keep the prize in compensation for the cause for which he was fighting. 144

But how could Heemskerck go to war *by himself*? Wasn’t the power to wage war—the right to designate a group as an “enemy”—reserved exclusively to sovereigns? At this point, Grotius made his most radical claim: states are not the only ones who have the right to use force against others—individuals have this right as well. 145 All humans are born with the right to defend themselves and their property against unjustified invasion. 146 In Grotius’ terminology, individuals have the natural rights to take actions necessary for self-preservation and to punish violations of the laws of nature. 147 When individuals enforced their rights, they were at war and doing justice. 148

Grotius conceded, of course, that citizens of the same state are not allowed to wage war with each other. 149 They give over their natural right of waging war to the state and consent to use the courts instead as a way to enforce their legal claims. 150 But where there are no courts—such as off the coast of Singapore—individuals have the right to use force to defend themselves and punish crimes against others. 151 He argued that Heemskerck had no choice but to go to war with the Portuguese and, in war, to the victor goes the spoils. 152

It is difficult to overstate how novel these ideas were at the time. Grotius’ claim that an individual could go to war by himself—that he could transform *himself* from a pirate into an enemy—would have been virtually unintelligible to his contemporaries. The classical understanding of “enemy” was political: an enemy, as we said before, was a *group* authorized by a ruler to fight against another. This fact is unfortunately obscured by the translation of Pomponius, because “enemy” is singular in English but in Latin the

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142 Grotius, *Commentary on the Law of Prize and Booty*, 388.
143 van Ittersum, *Profit and Principle*, 46.
144 Grotius, *Commentary on the Law of Prize and Booty*, 388.
145 Grotius, *Commentary on the Law of Prize and Booty*, xix, 377, 383-384, 388; van Ittersum, Hugo
Grotius in Context, 535.
147 Grotius, *Commentary on the Law of Prize and Booty*, 20-33.
150 Grotius, *Commentary on the Law of Prize and Booty*, 42.
151 Grotius, *Commentary on the Law of Prize and Booty*, 388.
152 Ibid.
corresponding word “hostes” is plural. On the conventional understanding, then, Heemskerck could not be an enemy because he was a “he,” not a “they.”

By granting to Heemskerck the right to make himself the enemy of another, Grotius was making a profound, and amazingly modern, point. In denying that only sovereigns can wage war, he was in effect claiming that everyone is a sovereign: the state has the powers it does because it gets them from individuals over whom it governs. Sovereigns are entitled to go to war, in other words, because individuals agreed to transfer this power to them—an agreement philosophers would later call the “social contract.” The social contract regulated the terms of this transfer of rights, legitimizing the exercise of violence for, and in place of, the individual. The social contract, however, only covered cases where the sovereign could respond to violations of right. Where sovereigns are unable to step in and do their job, the social contract ends and individuals are free to exercise their original entitlement to enforce rights and punish wrongs.

Though parts of Grotius’ theory are incredibly modern, other aspects are actually quite antiquated and alien to current sensibilities. Consider our conception of war. We tend to understand wars as violent struggles between states. We also regard them as being uncontroversially bad, as human catastrophes to be avoided at all costs. We recognize that some wars may be just, but when they are, they are necessary evils, to be entered only for the sake of great causes such as repelling brutal aggression or protecting victims from massive human rights violations. The idea that a corporate employee could go to war on his own say-so over spices sounds positively preposterous.

Grotius did not, however, see war as we do. For him, war is not necessarily evil. Rather, it is a morally permissible way in which individuals remedy the violation of natural rights. “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.” Wars are legitimately fought because the human body is feeble and requires arms in order to repel the wrongful invasion of others. “But man has been given a body that is weak and infirm, wherefore extracorporeal instruments have also been provided for its service. We call these

153 Latin does have a word for a private enemy—*inimicus*—but that simply implied personal enmity and had no legal implications.
155 Grotius, *Commentary on the Law of Prize and Booty*, 50.
156 Ibid.
instruments ‘arms.’ They are used by the just man for defence and [lawful] acquisition.”

On Grotius’ view, then, war is the attempt to remedy an alleged wrong. One side claims that the other has violated their rights and demands reparations. If these reparations are not forthcoming, the victim may exercise their natural right to extract compensation for themselves by force. In a just war, booty (property seized on land) and prize (property seized on the sea) go to those who seize it because they are merely recovering property that they are owed. “[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.”

Because a just war is the attempt to remedy 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 war as in judicial trials.” In other words, the casus belli – the justified causes of war – are what lawyers call “causes of action,” namely, those violations which may be remedied by a court. Grotius lists four main causes of war – self-defense, defense of property, non-satisfaction of obligations and malicious wrongdoing – corresponding to the four main kinds of legal actions – injunctions against attacks, restitution of property, collection of debts and criminal punishment.

To be sure, if a party can gain redress from a court, that party is obligated to go to the court. Taking the law into one’s own hands when judicial remedies are available, Grotius grants, is to engage in piracy. But “ordinary remedies do not serve in extraordinary circumstances” and “when one recourse fails, we turn to another.” Thus, if a judicial procedure is not available – for example, there is no time to seek legal intervention, or the defendant is a state that will not accept the jurisdiction of another court, or the parties are on the high seas half way around the world – then the injured

157 Ibid.
158 Grotius, Commentary on the Law of Prize and Booty, 29-30.
159 Grotius, Commentary on the Law of Prize and Booty, 198-199.
160 Grotius, Commentary on the Law of Prize and Booty, 68.
161 Ibid.
162 Grotius, Commentary on the Law of Prize and Booty, 106.
163 Grotius, Commentary on the Law of Prize and Booty, 68.
164 Grotius, Commentary on the Law of Prize and Booty, 102-104.
165 Grotius, Commentary on the Law of Prize and Booty, 43.
166 Grotius, Commentary on the Law of Prize and Booty, 447.
167 Grotius, Commentary on the Law of Prize and Booty, 141.
party is entitled to redress by any means possible. Having been wronged, the victim is permitted to go to war.

Grotius could not, and emphatically did not, claim credit for this conception of war. As he pointed out numerous times throughout “Right of Plunder,” the idea that war is the ultimate remedy for a wrong is at least as old as the Roman Republic. When Rome went to war, Grotius pointed out, an envoy would first demand restitution through a declaration called a *clarigatio* that reads like a complaint of a law suit. “When the envoy reaches the boundaries of the people from whom restitution is sought … he says, ‘Hear Jupiter; hear you boundaries’ – he names of which people – ‘Let righteousness hear. I am the public messenger of the Roman people. Duly and righteously commissioned, I come. Let faith be given to my words.’ He recites his demands. Then he makes Jupiter judge: ‘If I am wrongfully and contrary to religion demand that those men and those things be surrendered to me, then let me never enjoy my land.’”

After 33 days, if the demands were not met, the fetial priests would declare: “‘Hear, Jupiter, and you Janus Quirinus, and hear all heavenly gods, and you, gods of earth, and you of the lower world; I call you to judge that his people’ – naming whatever people it is – ‘is unjust, and does not make just reparation. But of these matters we will take counsel of the elders in our country, how we may obtain our right.’” If the Senate approved war, an envoy would be sent to the edge of the enemy territory and throw a bloody spear across the border. The war would then commence.

Grotius’ humanistic education was steeped in the Roman tradition and it is no wonder that he found its understanding of war cogenial. But as we will see, Grotius had more work to do in his defense of Heemskerck. For this classical conception of war presented a formidable obstacle for his client and forced him to engage in ever more creative theorizing. And as we will also see, the theory he ultimately put forward would have enormous consequences for the practice of war.

*Atrocities*

The first half of Grotius’ apology in “Right of Plunder” is a work of abstract moral theory. As he explained in the Prolegomena, he sought to ground the laws of war

168 Grotius, *Commentary on the Law of Prize and Booty*, 142, 199, 380-381.
169 Grotius, *Commentary on the Law of Prize and Booty*, 54-56.
170 Grotius, *Commentary on the Law of Prize and Booty*, 146. The text that follows is from Livy, *Ab Urbe Condita*, 1.32.6
171 Grotius, *Commentary on the Law of Prize and Booty*, 147-149.
and his defense of Heemskerck in “the inmost heart of philosophy.” The style is self-consciously mathematical, starting with general axioms about moral rights and obligations and deriving specific conclusions from them about the proper conduct for, and in, war. “Just as the mathematicians customarily prefix to any concrete demonstration a preliminary statement of certain broad axioms on which all persons are easily agreed, in order that there may be some fixed point from which to trace the proof of what follows, so shall we point out certain rules and laws of the most general nature, presenting them as preliminary assumptions which need to be recalled rather than learned for the first time, with the purpose of laying a foundation upon which our other conclusions may safely rest.” The text is tough-going and Grotius knew it. He apologized to the reader but hoped that the “accuracy of the arguments” would compensate for the “tedium” of the presentation.

In Chapter 11, however, the subject-matter and tone change dramatically. Grotius called the chapter “the historical account” but it is far from a work of objective history. It is an exercise in what classical scholars call “forensic oratory,” or what modern day lawyers label “the presentation of the case,” namely, a one-sided discussion of the facts designed to present one’s position in the best possible light and the other side in its worst.

No one expected Grotius to be even-handed in his defense of his client, but the “historical” chapter is an exercise in overkill. It is vile propaganda, a screed against the Portuguese filled with paranoid assertions about multiple conspiracies, wild allegations of atrocities and duplicity and hysterical imputations of evil intentions and wrongdoing. For example, Grotius claims to lay out “the instances of unparalleled treachery, the mangling of women and children belonging to the households of native potentates, the disturbance of [East Indian] kingdoms through the poisonous activities of the Portuguese and the abominable cruelty displayed toward both subject and allied peoples.” The Portuguese are filled with “uncontrollable hatred” and “an insane greed for gain,” their “madness (for no other term will describe their attitude) flamed out with incredible force against the Dutch,” a “savagery … that far exceeds the bounds customary between

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172 Grotius, Commentary on the Law of Prize and Booty, 17.
173 Ibid., 18.
174 Grotius, Commentary on the Law of Prize and Booty, 18.
175 Ibid.
176 Grotius, Commentary on the Law of Prize and Booty, 243.
177 Ibid.
178 Ibid.
179 Grotius, Commentary on the Law of Prize and Booty, 259.
The Portuguese are “men of bad faith, assassins, poisoners, and betrayers.” Attempting to tar them with the brush of the Spanish Inquisition and the Black Legends of the Conquistadors, Grotius describes cruelty as “characteristically Iberian.” The Dutch, on the other hand, conducted trade “by an exceedingly peaceful manner,” pursued “a policy of patience” against hostility and even granted to the Portuguese “admittance to our ships and banquets.” In contrast to Iberian malice, “the singularly humane qualities of the Dutch, like their extraordinary fortitude, have been apparent at all times.”

The chapter contains story after story of Portuguese aggression, brutality and betrayal. It provides long gory descriptions, for example, of the siege of Bantam, the attack on the Moluccas and the execution of the van Neck’s crew in Macao. The aim of these dastardly deeds, Grotius claimed, was to deter the Dutch from trading in the East Indies. “Our chief crime lay in the fact that, instead of being crushed by want, we vied with the Portuguese in seeking those benefits to which nature has given all men free access.”

Grotius’ allegations are so over-the-top that we can safely discount much of what he says. But let us, for the sake of the argument, accept them as true. Even if the Portuguese committed the evil acts of which they are accused, the question remains: what entitled Heemskerck to go to war with Sebatiano Serrao, the Portuguese captain of the Santa Catarina, and take the ship and cargo as his prize?

Remember that for Grotius one party may go to war with another only if the attacker could sue the target. War was a substitute for courts when judges were unavailable. But could Heemskerck sue Serrao in court for the Santa Catarina?

Heemskerck would have a civil claim against Serrao (or the merchants on the ship) only if they wrongfully injured Heemskerck. But there is little reason to think

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181 Grotius, *Commentary on the Law of Prize and Booty*, 284.
182 Grotius, *Commentary on the Law of Prize and Booty*, 277.
185 Grotius, *Commentary on the Law of Prize and Booty*, 262-263.
186 van Ittersum, *Profit and Principle*, 56.
187 Grotius, *Commentary on the Law of Prize and Booty*, 256.
188 Grotius, *Commentary on the Law of Prize and Booty*, 112.
that Serrao or any of these merchants were involved in any wrongdoing against the Dutch.190

Heemskerck did have a claim against *someone*, as he was unjustifiably harmed several times during the voyage. He was a victim, to be sure, but he wasn’t *Serrao’s* victim. The *Red Lion* was attacked and damaged by the Spanish off the Canary Islands.191 Heemskerck’s crew was taken captive on Japara by the Ruler of Demak. As far as he knew, the captain and merchants of the *Santa Catarina* were entirely innocent of these attacks.192

Because there seems to have been no direct connection between Serrao and Heemskerck before the encounter off the Singapore Straits, the subsequent capture could not be justified as a substitute for civil damages in court. If there had been a civil suit, Heemskerck would certainly have lost. Grotius, therefore, had no choice but to justify the capture by reference to the criminal law. On this line of defense, which is set out in Chapter 12, the Portuguese nation had committed numerous atrocities against the Dutch and thus deserved severe punishment.193 The capture of the prize was the financial penalty due for such horrible crimes.194

Grotius was right, of course, that the ones responsible for the atrocities deserved punishment.195 But Serrao and the merchants did not commit these crimes. Why were they made to pay? Grotius claimed that they deserve punishment because they associated with the evildoers.196 They were citizens of a state whose officials carried out atrocities.197 The executions in Macao, for example, were carried out by a Portuguese magistrate.198 Likewise, the siege at Bantam and the attack on the Moluccas were

190 Grotius, *Commentary on the Law of Prize and Booty*, 383, 513. At one point, Grotius slyly suggests otherwise when he notes that the clothing of the van Neck crew murdered in Macao were found aboard the *Santa Catarina*. This is circumstantial evidence of complicity in the atrocity, perhaps, but weak evidence, at best, and ultimately irrelevant because they would not be liable to Heemskerck for that act even if they had committed it.

192 Grotius, *Commentary on the Law of Prize and Booty*, 385-386; van Ittersum, *Profit and Principle*, 18. Grotius intimates that the Portuguese were ultimately to blame, though he fully admits that their involvement is “insufficiently established.” Id. at 427.
196 van Ittersum, Hugo Grotius in Context, 537.
197 Ibid., Grotius, *Commentary on the Law of Prize and Booty*, 114, 151, 377-378.
198 van Ittersum, Hugo Grotius in Context, 38.
ordered and carried out by the Viceroy of Malacca.\textsuperscript{199} Simply by virtue of their political allegiance, these Portuguese citizens were liable for the wrongs committed in their name.\textsuperscript{200}

But why does citizenship imply responsibility? How can mere political affiliation require innocent people to be punished for someone else mistakes? In order to explain this, Grotius turned again to the Social Contract.

\textit{The Social Contract}

Grotius’ defense of Heemskerck’s capture of the \textit{Santa Catarina} is predicated on the conception of war as a permissible remedy for a wrong.\textsuperscript{201} The function of a war is to correct an injustice when a court is unavailable. But as we have just seen, this conception of war did not seem very helpful to his case. For according to it, war can only be fought between two potential litigants. One party can attack another only if the attacker has the right in court to remedy a wrong committed by the target. But Serrao hadn’t harmed Heemskerck and so Heemskerck wasn’t allowed to attack Serrao.

It is here that the Social Contract reemerges. The Social Contract—the idea that “[h]uman society does indeed have its origin in nature but civil society as such is derived from deliberate design”—establishes the right legal relationship between Serrao and Heemskerck.\textsuperscript{202} Serrao could be punished for the wrongdoing of Portuguese officials because he had \textit{consented} to Portuguese rule and was thus responsible for their actions.\textsuperscript{203} “For those persons are liable, who have transferred authority over themselves to such representatives as might prove to be the source of injury to others, since he who has put his trust in an unworthy individual would seem to be involved, so to speak, in the fraudulence [of the latter].”\textsuperscript{204} Serrao was liable for the actions of his rulers, in other words, because he authorized their rule and they acted in his name. They were parties to the same social contract.

\begin{footnotesize}
\begin{enumerate}
\item Grotius, \textit{Commentary on the Law of Prize and Booty}, 289-290, 272, 292; van Ittersum, Hugo Grotius in Context, 515-516.
\item Grotius, \textit{Commentary on the Law of Prize and Booty}, 427-428; van Ittersum, Hugo Grotius in Context, 536.
\item Grotius, \textit{Commentary on the Law of Prize and Booty}, 54-55.
\item Grotius, \textit{Commentary on the Law of Prize and Booty}, 137.
\item Grotius, \textit{Commentary on the Law of Prize and Booty}, 39-40, 376-381.
\item Grotius, \textit{Commentary on the Law of Prize and Booty}, 156.
\end{enumerate}
\end{footnotesize}
By the same token, Heemskerck could punish Serrao because they both were not parties to the same Social Contract. Since they were not part of the same legal unit, Heemskerck was not obligated to rely on the state to punish him. Vis-à-vis Serrao, Heemskerck retained his original entitlement to punish violations of the laws of nature. In this case, he was his own sovereign, fighting a private just war against Serrao, and was thus entitled to the booty he seized as a penalty for atrocities committed.

Grotius use of the Social Contract was a brilliant piece of creative lawyering because it not only justified Heemskerck’s capture of the Santa Catarina, but the general military strategy of the VOC. The classical conception of war as a legal remedy required the attacker to be the victim and to attack the victimizer. But the odds that the victim would find the right person on the high seas were bound to be exceedingly small. The Social Contract solved this problem by simultaneously tying all the Portuguese together and cutting the civil bonds between them and the Dutch. It held all Portuguese collectively responsible and then enabled the Dutch corporation to play the role of private avenger, exercising its natural rights of punishment against all those who associated with the evil empire.

The Rights of War and Peace

The idea of the Social Contract is usually celebrated as a great triumph of freedom over tyranny. That every individual has natural rights to life and property and consents to the authority of the state in order to protect these rights has been the mantra of revolutionaries seeking to overthrow despotic rulers who violate the terms of the contractual relationship between governors and governed. In the words of the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.---That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.”

But there is a dark side to the Social Contract and “Right of Plunder” illustrates one terrifying aspect of it. By democratizing the sovereign power to punish through the imputation of natural rights, it democratizes war as well. Revolutionaries are not the only
ones who seek to exercise their natural rights. Rapacious individuals and corporations also want to cloak themselves in its protections and then use it as a sword to wage war on its competitors and native populations.

The Social Contract, unfortunately, has an even darker side—one that would become fully realized only in Grotius’ later work. The Social Contract is a contract and, like all contracts, it is capable of granting enormous powers, provided that all the parties consent. Grotius would eventually figure out how to exploit this feature of consent and, in the process, turn the just war tradition on its head. Through the mutual consent of nations, he would later claim, states have dispensed with the need for a just cause. Thus, they granted themselves legal rights to conquer territory, seize booty, kill the enemy and even enslave them regardless of the legal merits of their position.

Remedies, Privileges and Powers

Though Grotius worked on “Right of Plunder” for two years and revised it for two more, he never published it.209 Given the amount of work he put into the manuscript, his decision is something of a mystery. One hypothesis advanced by van Ittersum is plausible: by the time “Right of Plunder” was finished in 1606, much of the danger to the VOC had passed.210 In particular, the States-General had convinced Henry IV not to create a French East India Company.211 The VOC could maintain its military campaign against the Portuguese without fear that its shareholders would flee to a more profitable competitor.212

There may be another reason why Grotius decided not to publish “Right of Plunder”: he might have realized that the conception of war that he used in his early work was badly flawed. It treated war as an instrument, but the instrument was very poorly designed. War was supposed to remedy wrongs, but it could not do so, or at least, it could not do so if the victim happened to be a trading company.

A simple example will help show its failings: Suppose Hugo, a Dutchman trader, and Sebastian, a Portuguese sailor, are fighting over cloves. Hugo knows that Sebastian has a container of cloves on his ship. Seeing his ship off the coast of Singapore, he attacks it and takes the cloves by force. Having control over these cloves, he proceeds to sell them to his regular customers.

209 Grotius, Commentary on the Law of Prize and Booty, xx.
210 van Ittersum, Profit and Principle, 188.
211 van Ittersum, Profit and Principle, 187.
212 Ibid.
It’s unlikely, however, that the hostilities will stop there. For if Sebastian really
believes that he doesn’t owe Hugo the cloves, he will think that his rights have been
violated. He will not only demand the cloves back from Hugo, but also from those who
have bought the “hot goods.” The conflict will now widen and threaten to spin out of
control, as customers protect themselves and perhaps retaliate in response.

Grotius himself recognized the problem. On the logic of the conception of war he
was using, the taking of booty and prize was justified only if seizers believed they had a
just cause.213 “[T]he seizure and detention of captured goods is conceded to be just for
subjects of both belligerent parties, always provided that a command has first been given
which is not repugnant to reason after the probabilities have been weighed.”214 But if one
side had no credible legal claim, they would not be entitled to the property. It followed,
of course, that if one side judged that the other one had no credible claim – a conclusion
that each side would inevitably reach – then they did not have to respect the seizure. The
war, therefore, would never end.

Potentially endless conflict is bad enough. But there is an even more problematic
consequence of the classical conception of war, one that is absolutely unacceptable for a
trading company: uncertainty. Let’s return to the dispute over the cloves and the sale
from Hugo to his customers. If the customers know about the dispute over the cloves,
they will be reluctant to buy them. They will worry that Sebastian will demand the
cloves back after the sale and use force if refused.

Put bluntly, seizure of booty and prize is not a useful remedy for trading
companies if they cannot trade the property after the seizure. Possession is not good
enough for them – what they really need is secure title.

The problem with the classical conception of war can best be put in the abstract
language of legal theory. The classical conception merely gives the victim a privilege to
use force in order to enforce his rights. But some victims need more than a privilege –
they need a power. They need the legal power to acquire rights over the property
claimed. By acquiring rights, they not only resolve the dispute with the target of the
attack. They are able to transfer those rights to neutral third parties.

Courts possess this power to resolve disputes. If I sue you for the cloves and the
court awards them to me, you cannot withhold them or try to take them back after the
sheriff seizes them. You are not allowed to seize them from my customers by arguing
that my claim is unfounded. Once the court speaks, once it rules in my favor, the dispute

213 Grotius, Commentary on the Law of Prize and Booty, 69.
214 Grotius, Commentary on the Law of Prize and Booty, 177.
is *res judicata*: the matter is judged and the dispute over. My customers can buy the cloves safe in the knowledge that I own them and have the power to transfer title.

The classical conception was defective because it treated war like an instrument, but one that didn’t work so well. War could only remedy wrongs if it functioned like a lawsuit, where victory resolves the dispute and confers a power on the victor. Ever the resourceful lawyer, Grotius developed just such a conception.

It would take Grotius, however, a long time to produce it. For he would find himself extremely busy over the next decade lobbying on behalf of the VOC and playing an active role in political and religious affairs. 215 He also had to wait for the international status of the Dutch Republic to change. Grotius would finally find the time to contemplate philosophical matters of war and peace and reduce them to writing, though not by his own free choice. His brilliant career in Dutch politics would soon come to a tragic end, one from which he would never recover.

*The Twelve Year Truce*

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

Being the ultimate risk-taker, Heemskerck was the first to come up short. The *Santa Catarina* incident made him a rich man and brought a promotion. In April, 1607 he was appointed an admiral of the Dutch navy and given command of a fleet to destroy the Spanish armada at Gibraltar. 216 The mission succeeded brilliantly – the fleet managed to sink every Iberian vessel in the harbor – though Heemskerck did not live to see his victory. 217 A Spanish cannonball ripped into his left thigh at the hip and he quickly bled to death. 218

April 1607 also saw the beginning of a temporary armistice between Spain and the Netherlands. 219 Once again, Spain became embroiled in a fight with France and desperately wanted to withdraw its forces from the Netherlands. The armistice – first

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218 Ibid., 219-220.
declared on 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.220

Grotius played no direct role in the negotiations with the Spanish, but continued to work behind the scenes for the VOC in order to protect their commercial interests.221 The directors were particularly worried about one demand being made by the Spanish, namely, that the truce mark the end of the Dutch trade in the Indies.222 In order to bolster their negotiating position, Grotius revised Chapter 12 of “Right of Plunder” as a separate pamphlet and called it *Mare Liberum* – the “Freedom of the Sea.”223 The pamphlet argued that navigation and trade on the high seas was a natural right that could not be taken away by any power.224 So as not to unduly antagonize the Spanish, Grotius carefully deleted the incendiary references to Portuguese atrocities and the right of private war.225

In 1609, Spain and the Netherlands agreed to a cessation of hostilities for 12 years.226 Grotius’ position in the negotiations ultimately prevailed, though his pamphlet played no role, as it came out 6 weeks after the truce deal was sealed.227 In addition to agreeing to recognize the political independence of the Dutch Republic, Spain did not demand the end to the Dutch trade in the Indies.228 The VOC’s trading interests were now secure.

Grotius spent the next decade as the faithful servant of the VOC and the Netherlands.229 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.230 By some accounts, he was a much better scholar than 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. And I myself discovering that to be his habit as if he did imagine that every man was bound to hear him so long as he would

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221 van Ittersum, *Profit and Principle*, 177, 191.
229 Grotius, *Commentary on the Law of Prize and Booty*, xx.
talk.”

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.”

Despite not being to everyone’s taste, Grotius’ political career progressed. He was appointed the pensioner (i.e., mayor) of Rotterdam and, in the process, became a member of the States General. He also became involved in the Arminian movement, a liberal form of Calvinism that denied the orthodox doctrine of predestination and preached religious toleration.

In 1618, however, he suffered a serious reversal of fortune. In a putsch orchestrated by Prince Maurice, Grotius and his patron, Johan Oldenbarnevelt, were arrested for religious heresy. Both men were quickly convicted of treason in a show trial. Oldenbarnevelt was decapitated, but Grotius was spared, receiving the more lenient sentence of life imprisonment at Loevenstein Castle. Soon after he arrived at his cell, his wife and two children, ages 6 and 8, joined him and they lived together as a family in captivity.

War as Dispute Resolution

Grotius used his time in prison productively, spending the next several years writing a defense of his religious views and a treatise on Dutch law. He also continued his earlier research on the laws of war. His friends loaned him books he requested, as his extensive library had been confiscated as part of the treason conviction. He read the

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232 Id.
233 Grotius, Commentary on the Law of Prize and Booty, xiv; van Ittersum, Profit and Principle, xxv.
234 Borschberg, Hugo Grotius, the Portuguese, and Free Trade in the East Indies, 31, 33.
books delivered in large chests, taking copious notes, and when he finished, they were returned in these chests, along with his dirty laundry.\textsuperscript{238}

The next chapter of the story is famous in the history of the Netherlands and is in fact known to all Dutch school children. In 1621, Grotius had a chest of books delivered to his cell. He emptied it and climbed inside, with his head resting on a bible but without shoes on his feet, for there was no room. Since these chests had always contained books and laundry, the guards stopped checking its contents and were thus unaware that Grotius was wedged within. The comical rouse worked: he was carried out of the prison and eventually fled to Paris.\textsuperscript{239}

Grotius spent the next four years preparing a new treatise on the laws of war for press.\textsuperscript{240} He published it in 1625 under the title \textit{De Jure Belli et Pacis} or “On the Right of War and Peace.” The book was a bestseller 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 alone.\textsuperscript{241} Gustav Adolphus, the King of Sweden and the great Protestant hero of the Thirty Years War, is said to have constantly carried Grotius’ book in his saddlebag.\textsuperscript{242}

“Right of War and Peace”, like “Right of Plunder,” is a systematic work, though it is nowhere as tedious as its predecessor. It sets out in an orderly fashion the natural rights of human beings, their rights to their bodies, their property and to have their contracts performed. It also carefully distinguishes between different types of rule systems. It differentiates, for example, between divine law and natural law. God created both sets of rules but divine law is known through revelation while natural law is known through reason.\textsuperscript{243} Grotius also distinguishes between the law of nations and municipal law. The law of nations – what we now call “international law” – is the set of rules upon which all (or nearly all) nations agree. Municipal law is the domestic law of each individual nation.

\textsuperscript{238} For how Grotius spent his imprisonment, Grotius, \textit{Commentary on the Law of Prize and Booty}, xiv; van Ittersum, \textit{Profit and Principle}, xxvi.
\textsuperscript{242} Borschberg, \textit{Hugo Grotius, the Portuguese, and Free Trade in the East Indies}, 3, 34; van Ittersum, \textit{Profit and Principle}, xxvii.
\textsuperscript{243} Fruin, \textit{An Unpublished Work of Hugo Grotius’s}, 64-66.
Like “Right of Plunder,” Grotius’ philosophical system was developed in the service of determining the laws of war. 244 “Right of War and Peace” covers an astonishing range of issues: whether war is permissible, when war is just, how boundaries of states are to be determined, the procedures by which treaties are formed, the rights of burial and diplomacy, when booty can be seized, whether prisoners of war can be prosecuted, when the enemy may be enslaved, whether rape is allowed during wartime, the duties of allies, whether one may kill the enemy using poison, how truces are declared, whether neutrals may trade with belligerents, when peace treaties are binding and so on. Grotius was particularly careful not only to lay out the answer to these questions, but also to specify whether the answers were part of divine, natural, international, or municipal law.

Much of “Right of War and Peace” is familiar from “Right of Plunder.” Grotius goes to great length in order to demonstrate that war is neither an immoral nor a lawless activity. It is a permissible way in which individual and states enforce their natural rights. Indeed, any right that could be enforced in court could be enforced as a matter of law by war. 245 “It is evident,” he writes in a passage that could easily have come from “Right of Plunder,” “that the sources from which war arise are as numerous as those from which lawsuits spring.” 246

Just as in the earlier work, Grotius extends the right of war to individuals as well as states. 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. 247 “Where judicial settlement fails,” Grotius claims, “war begins.” 248

Though in many ways “Right of War and Peace” is a more comprehensive and systematic restatement of “Right of Plunder,” there is one significant change in doctrine that would have profound implications for the history of the laws of war. The burden of the earlier “The Right of Plunder,” insofar as it was a defense of Heemskerck’s attack on the Santa Catarina, was to show that private wars are just as legitimate as public wars. Individuals have the right to use force to respond to wrongs because all legitimate force

244 Fruin, An Unpublished Work of Hugo Grotius’s, 56.
245 For the ROP and “RIGHT OF WAR AND PEACE” s similarities regarding permissibility of war, see Fruin, An Unpublished Work of Hugo Grotius’s, 58-59, 64.
247 van Ittersum, Profit and Principle, 329, 362, 482, 487.
248 Ibid.
ultimately derives from the natural rights of individuals to respond to violations of natural law.\textsuperscript{249}

Not only are private wars just as legitimate as public ones, the early Grotius held that there is no legal difference between them. Both need a just cause in order to be waged. And rights to property and territory could only be acquired if they likely backed by such a just cause.\textsuperscript{250} Private wars differed from public ones only in degree, not in kind.\textsuperscript{251}

In the later book, however, Grotius denied that all wars are created equal. Individuals and states did not possess the same powers.\textsuperscript{252} With respect to private wars, Grotius claimed, individuals have the right to acquire booty only if they are entitled to that property before the war began. If a private war does not have a just cause, it is not a just war and unjust wars cannot be used to acquire rights in property.

By contrast, public wars that begin with formal declarations by sovereigns are necessarily just.\textsuperscript{253} States, in other words, can wage just wars even without just causes. And since their wars are just, booty and territory seized during these wars become the rightful property of the state doing the seizing. To be sure, if the state declaring war does not have a rightful claim to the property being seized, they are acting wrongly. But they nevertheless acquire a right to the property they wrongfully seize.

Though this doctrine may initially seem paradoxical—how can a state acquire a right by committing a wrong?—we have already encountered the reason why such a law of war was needed. According to Grotius, “kings 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 peace to intervene, people at peace were unable to do better than to accept the outcome as right.”\textsuperscript{254}

In other words, if states could claim title to property seized only when they had a just cause, third parties would be put in an impossible situation. They would have to decide which side had the just cause and which did not. Neutrals want to stay neutral, but

\textsuperscript{249} For ROP’s argument regarding public and private war and the individual’s use of force derived from their natural rights, see Fruin, \textit{An Unpublished Work of Hugo Grotius’s}, 56-59; van Ittersum, \textit{Profit and Principle}, xxii, xxxviii, lv, 28-30, 43-46, 53-54, 233, 487.

\textsuperscript{250} Ibid.

\textsuperscript{251} Grotius, \textit{Commentary on the Law of Prize and Booty}, 105, 195-200.

\textsuperscript{252} Fruin, \textit{An Unpublished Work of Hugo Grotius’s}, 59.

\textsuperscript{253} Grotius, \textit{Rights of War and Peace}, III.3.v.

\textsuperscript{254} Grotius, \textit{Rights of War and Peace}, III.9.iv.2.
forcing them to decide questions of justice makes them partial. Wars limited to two parties would quickly expand, sucking everyone into its ferocious maw. “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.”

Sovereigns fighting in public wars, therefore, not only have the privilege to enforce rightful claims, they also have the power to settle disputes involving these claims. Regardless of whether they have a just cause, a state acquires title to what they seize and are able to transfer that title to third parties without drawing those neutrals into the fight.

The concern for neutral third parties also explains the enemy’s immunity to prosecution. “He who happens to be caught in another’s territory cannot for that reason be punished as a murderer or a thief, and war cannot be waged by him by another on the pretext of such an act.” For if prosecution of conduct committed during wartime were permissible, third parties would have to decide whether to prosecute, thereby compromising their neutrality. “To undertake to decide regarding the justice of a war between two peoples had been dangerous for other peoples.” Not only is such a decision dangerous for neutral 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.”

These new rules were not only designed to protect neutral third parties. They also sought to protect the victims themselves, those who had to resort to force because they possessed no other options. For Grotius, war is a legal remedy for a wrong and, as such, had to be a useful one. Only by giving the victim the power to acquire legal rights over the territory and goods seized would the seizure right the wrong. The rights of conquest and booty, in other words, had to be independent of the question of who was the victim in order for the victim to be made whole. Otherwise, third parties would not know which authorities to follow, which goods they could buy, and the conquest and booty would be next to worthless.

255 Grotius, Rights of War and Peace, III.9.iv.3.
256 Grotius, Rights of War and Peace, III.4.iii.
257 Grotius, Rights of War and Peace, III.4.iv.
258 Ibid.
In his later work, then, Grotius accords sovereigns enormous power. Unlike individuals, they are empowered to wage just wars without just causes. “[A] war is often called lawful not from the cause from which it arises … but because of its certain peculiar legal effects (peculiares ... effectus).”

Among the legal consequences of formal declarations of war by sovereigns are the powers to acquire booty and the immunity to prosecution. These two rights generate further “peculiar” rights. If soldiers can kill the enemy, they can enslave them and their families as well. According to Grotius, this barbaric policy has a surprising “humanitarian” justification: if states can kill the enemy with impunity, it is imperative that they be given incentives to treat the enemy in a less severe way. “[T]he captors, mollified by so many advantages, might willingly refrain from recourse to the utmost degree of severity, in accordance with which they could have slain the captives.”

And if states can acquire booty, enslave the enemy or even kill them, surely they can conquer territory, annex it and exercise authority over its population. “It is not at all strange if he, who can subject individuals to himself in personal servitude, is able to subject to himself an aggregation of men – whether they formed a state, or a part of a state.” All states, in other words, have the rights of conquest.

It is far from a coincidence, of course, that Grotius accords tremendous powers to sovereign states at exactly the time that the Netherlands achieves international legal recognition. The Twelve Years Truce granted the Dutch Republic independence in 1609 and the resumption of the war in 1621 meant that the Netherlands was engaged in a public war. Prince Maurice and the States-General now had the unambiguous legal power to grant letters of marque and the VOC would have good legal title to the prize they caught.

Grotius’ views of war were obviously responsive to the change in the legal status of the Netherlands and its implications for the VOC. Sovereigns (and their corporations) do better in the new theory than in the old, a change in perspective likely influenced by the new status of the Netherlands as an independent sovereign state. No doubt Grotius expected his pro-Dutch writings would put him in good stead back home and help him

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259 Grotius, Rights of War and Peace, III.3.i.1.
261 Grotius, Rights of War and Peace, III.7.v.1.
262 Grotius, Rights of War and Peace, III.8.i.1.
263 van Ittersum, Profit and Principle, 209, 330, 369.
repatriate. He would not be so fortunate, however. He died in exile in 1645, after being injured in a shipwreck.264

But it would be a mistake to conclude that Grotius was merely attempting to curry favor with powerful corporate and political interests. The changes he introduced into his theory were, after all, sensible ones – one might even say that his later book worked out the implications of the classical conception of war accepted in the early book. For once one accepts that states with just causes should be permitted to use force in order resolve disputes with others, then one will be compelled to accord every state with the power to resolve those disputes. For if war is a legal remedy, then the law should ensure that wars actually rights wrongs. Giving everyone the power of conquest and booty and shielding them from prosecution does just that: it not only prevents third parties from getting sucked into the fight, but also enhances the value to the victims of what they win in battle. The new rules simultaneously lowered the costs of the war remedy, while also greatly increasing its value.

Grotius was at pains to show that he wasn’t the only who thought that states should have these terrifying powers of war. He spent a large part of “Right of War and Peace” trying to prove that states thought so as well. Indeed, he argued that the distinction between public and private wars is one of the great innovations of the law of nations.

Seen purely from the perspective of the natural law, Grotius claimed, there is no difference between public and private wars.265 Without a just cause, no one can acquire property rights or shield themselves from punishment. In this sense, Grotius agreed with the just war tradition most famously associated with St. Thomas Aquinas.266

He broke from this tradition, however, by claiming that a just cause is not essential from the perspective of the law of nations.267 Under international law, states have legal powers and immunities that private individuals do not have. “By the law of nations not merely he who wages 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.”268 The law of nations also permits states to kill the enemy not only “for a just cause, … a permission we said at the beginning of this book was granted by the law of nature,” but

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264 van Ittersum, Profit and Principle, xxvii.
265 Grotius, Commentary on the Law of Prize and Booty, 104-105, 195-200.
266 Grotius, Commentary on the Law of Prize and Booty, 182-187.
267 Grotius, Rights of War and Peace, III.6.ii.1.; III.4.iii.
268 Grotius, Rights of War and Peace, III.6.ii.1.
“either side indiscriminately.” States have these powers and immunities under the law of nations because states found them useful. The “peculiar effects” of public wars, as Grotius calls them, have “met with the approval of nations.”

The rights of conquest, therefore, are generated by two social contracts. The first social contract constructs the state: each individual cedes their 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.” States have the rights of conquest and the immunity to prosecution because they recognized that it is in their interest to have them. The law of nations is the result of states contracting around the laws of nature and allocating legal rights in the manner that they see fit.

As Grotius himself admitted, the terms of this second social contract did have some very “peculiar” consequences. But as he argued, and which the story of the Old World will soon confirm, there really was no alternative. In a world where states are sovereign and war is legal, it is impossible to adjudicate between just and unjust wars. Once the law allowed victim states to use force to redress their injuries or punish crimes, it had no choice but to permit false victim states to profit from their wrongs as well—for to penalize those with unjust causes would have penalized many other people as well. It would have put neutral third parties in terrible positions, forcing them to take sides, and threatening to draw them into the fight. It would also have penalized those with just causes as well. If the false victim cannot collect, the true victim cannot do so either—because there is no way to authoritatively tell one from the other. Abuse was possible—indeed, as we will soon see, inevitable—in such a system. But that was simply the cost of doing business under the rules of the Old World Order.

**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

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269 Grotius, *Rights of War and Peace*, III.4.iii.
270 Grotius, *Rights of War and Peace*, III.3.1, III.3.xi. See also III.3.xi.1 (“peculiar institutions of certain peoples”).
271 Grotius, *Rights of War and Peace*, III.4.iv
272 Grotius, *Rights of War and Peace*, Prolegomena, XVII.
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 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.”

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 “Right of War and Peace” can only be described as offensive. White made Grotius sound like a humanitarian pacifist, when he was in fact the chief spokesman for the right of trading companies to wage war around the globe!

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 was the American ambassador to Germany, he sent an eminent American artist to Holland to copy the two best portraits of Grotius, one of

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274 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 Ibid., 14.
which still hangs in the Cornell Law School library. 275 He made a pilgrimage the day after the celebration to the Cornelts de Groot family, Grotius’ lineal descendants and looked through family memorabilia. 276 Grotius was White’s hero—“an object of idolatry” in his words—and he planned the celebration as a tribute to the person who inspired the Peace Conference. 277 How could he have gotten Grotius so wrong?

The answer is simple. “Right of Plunder”—the defense of Heemskerck and the clearest statement of Grotius’ defense of war—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 Cornelts 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 “Right of Plunder” and conjectured, correctly as it would turn out, that it was the original source for “The Freedom of the Sea.” 278 He petitioned the trustees of Leiden University to purchase the manuscript, which they did. The papers remain at the University even today.

When the historian Robert Fruin first inspected the manuscript, he was astonished. He quickly figured out that “Right of Plunder” was a first draft of “Right of War and Peace” and that much of the latter had simply been “cut-and-pasted” from the former. 279 But he also came to a more startling conclusion. Until that time, 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.” 280

“Right of Plunder” was published in 1868, 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

275 See Andrew Dickson White, Autobiography, Vol 2, Entry for June 22, 1899.
276 Ibid, Entry for July 5, 1899.
277 Ibid, entry for June 22, 1899
278 van Ittersum, Profit and Principle, 4, 114.
280 Id at 7-8.
houses the International Court of Justice—and its library possesses the greatest collection of Grotiana in the world.

Anti-war writers of the 18th Century, however, understood Grotius all too well, even without having read “Right of Plunder.” Kant famously called Grotius a “miserable comforter” of warmongers. 281 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. 282 These theorists appreciated Grotius’ message because they saw its impact, how often it had “been cited in justification for war.” 283

Kant and Rousseau were right. “Right of War and Peace,” like its first draft “Right of Plunder,” 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.” 284 The standard assumption—one made, for example, by White in his tribute—is that Grotius was referring to the Thirty Years War that began in 1618 and would ultimately devastate Europe and kill roughly a fifth of the German population. 285 The aim of “Right of War and Peace,” on this benign reading, was to reduce the number of wars and to render the remaining conflicts more humane and less destructive.

While it is true that Grotius wrote “Right 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

283 Kant, *Perpetual Peace*, id.
284 Grotius, *Rights of War and Peace*, Prolegomena, XXVIII.
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.”

Grotius’ main concern in both works was not 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 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’ Social Contract, therefore, became the philosophical key for unlocking the destructive potential of the state. The consent of the governed legitimized the concentration and monopolization of force in sovereigns and provided them the license to deploy that violence in the name of their charges. And the consent of states ratified the rights of conquest, granting states the powers to act in unjust ways.

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

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286 Grotius, Rights of War and Peace, Prolegomena, XXIX.
ideas first set out in “Right of Plunder” and “Right 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 transform not only the international system, but the states that comprised it. As our story unfolds, we will see Grotius’ fingerprints everywhere and how difficult it is to understand the world in which we live without him.