

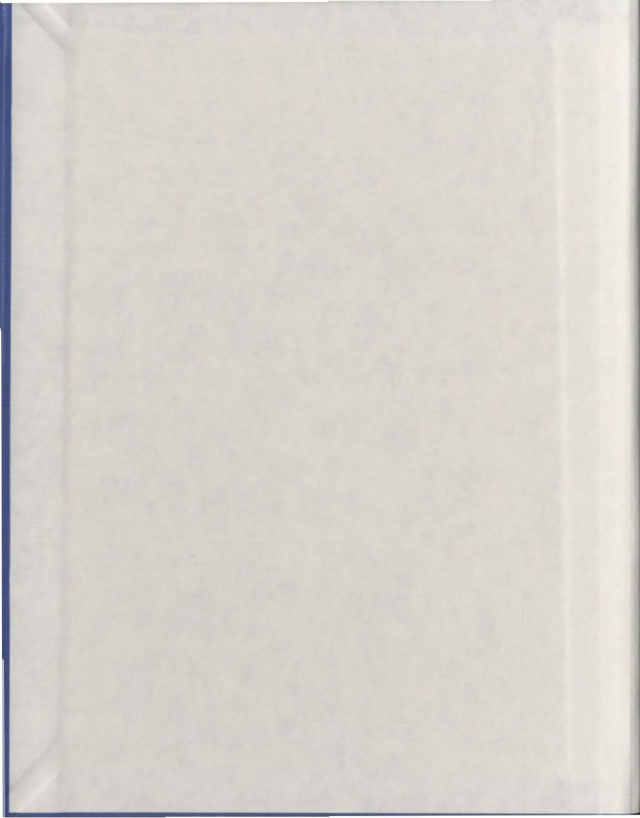
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RELATION TO NATURAL LAW IN HUGO
GROTIUS' DE JURE BELLI AC PACIS

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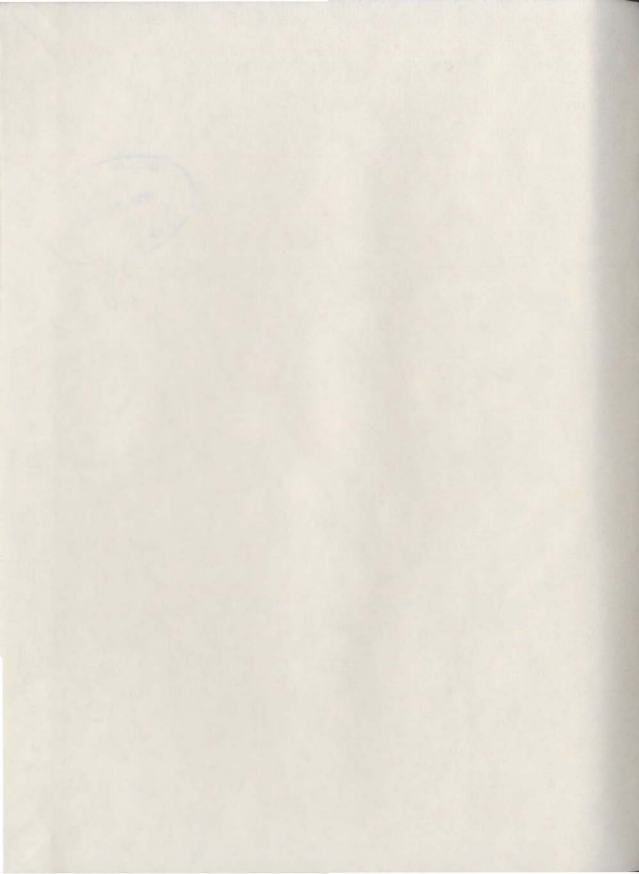
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THE CONCEPT OF SOVEREIGNTY AND ITS RELATION
TO NATURAL LAW IN HUGO GROTIIUS
DE JURE BELLI AC PACIS

by

©

Rosalind Luanne Leamon, B.A.

A thesis submitted to the School of Graduate
Studies in partial fulfillment of the
requirements for the degree of
Master of Arts

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ABSTRACT

The concept of sovereignty influences every problem in legal philosophy. As the modern doctrine of a determinate authority within the state, it has its origin in the sixteenth century. At the time of the rise of powerful post-Reformation states, and the destruction of the unity of Christendom, Grotius propounded a theory of sovereignty based on a doctrine of natural law independent of the will of God, and deriving its existence from the nature of man as a rational being who seeks a society consonant with his intelligence. Reason provided the basis for justice in the state and justice among states, both in peace and in war.

It is the purpose of this work to analyse the concept of sovereignty in Grotius' book De Jure Belli ac Pacis. It is argued that the concept, when denoting the legally supreme will within the state, means something different than when it denotes the sovereign state, externally considered, in its relation to other states. The difference is explored chiefly by using the doctrine of rebellion to explain the nature of sovereign authority within the state; and doctrine of the just war to explain the nature of the sovereignty of states. These divisions correspond to the second and third chapters of the work, respectively, and form the main body of the study. Special attention is given to the role of the individual in the two

orders (internal and external), and it is argued that the degree of freedom accorded the individual in each of the orders constitutes an inconsistency in Grotian theory.

It is concluded that sovereignty internally considered, and sovereignty externally considered, although of necessity, different in form (the first being defined by will, the second by consent) derive their content and meaning, and their force of obligation, from the same source in Grotian theory, the nature of man. Hence, the doctrine of sovereignty is rendered coherent by its foundation in the law of nature. The discussion is aided by an exploration, in the first chapter, of Grotius' method, his concept of sociability, and his scheme of laws and their relation to each other. Also, some problems with sovereignty itself, including the absence of an institutional sanction, are examined.

ACKNOWLEDGEMENTS

I am indebted to Dr. Michael Langford for his valuable advice and supervision throughout the course of this work. I also wish to thank the members of the Philosophy Department for their assistance and support during my graduate programme. A special thanks also to Brian Peckford and Alvin Hewlett for allowing me time off from my work to complete these studies, and to Mrs. Judy Brown whose expertise and patience in typing this thesis have been invaluable. I am grateful too to my family members for their help and encouragement. Finally, my deepest gratitude to my husband, David Taylor, who, by his practical and moral support, and especially by his faith in me, has made the completion of this work possible.

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Of a truth wisdom is the virtue characteristic of the ruler...; but justice is the virtue characteristic of a man....

JBP II, xxvi, iv.7.

CHAPTER I

AN INTRODUCTION TO GROTIUS' PHILOSOPHY AND METHOD

Introductory

The purpose of this thesis is to analyse the concept of sovereignty in Hugo Grotius' De Jure Belli ac Pacis both in the arrangement of the state internally, and in the state considered in its relations with other states or externally. I hope to do this chiefly by using, on the one hand, Grotius' teaching on rebellion against the internal sovereign and, on the other, his teaching about the right of the sovereign state (the sovereign externally considered) to make war.

I will show that his teaching on rebellion and the right of war seem to countenance two conflicting views of sovereign power; but that a closer analysis of several of the key concepts used by Grotius, as well as an appreciation of the overall aim of his work, serve to overcome these seeming inconsistencies and point to a coherent doctrine of sovereignty consistent with his philosophy of the nature of man and society, and supportive of his attempt to base international law in reason.

To this end I shall, in this first and introductory chapter, put Grotius and his thought in the context of their time, saying a little about the tradition from which he sprang and the new thought he heralded. I shall discuss some of the

chief difficulties in Grotius' work, some of which will be further analysed in the following chapters.

In the second chapter, I plan to discuss the doctrine of internal sovereignty, what Grotius means by the concept, the problems and inconsistencies in his treatment of it, and the special light which his teaching on rebellion throws on our understanding of the concept. I hope to show that the "absolute" sovereign which the doctrine of non-resistance would seem to support is in fact not such if the doctrine of internal sovereignty is considered in the context of Grotius' theory of the origin of society, and of the nature and structure of law.

In the third chapter, I shall discuss the doctrine of external sovereignty as Grotius does, by drawing an analogy between the internal sovereign and the sovereign state externally considered; and by examining the rights of those states in times of peace and, when those rights are violated, the just causes of war. I hope to show where the analogy between internal and external sovereignty must break down; and how a unified concept of sovereignty can nonetheless be achieved if the notion is considered as following logically and essentially from Grotius' theory of the nature of man, law, and the state.

The historical and philosophical context

Grotius' aim in writing *De Jure Belli ac Pacis* was to treat of that body of law "which is concerned with the mutual

relations among states or rulers of states,"¹ and to show that, even in war, such laws are not in abeyance.² That such law exists and commands obedience from nations is proven from the fact of justice in the world and man's ability to know its precepts.³ Such law, being immutable and timeless, is effective even in "the time for arms." War, in fact, is an instrument of law; it "ought not be undertaken except for the enforcement of rights; [and then] it should be carried on only within the bounds of law and good faith."⁴

Grotius wrote during the rise of the post-Reformation modern state and of the modern doctrine of sovereignty.⁵ The history of the world had evolved from the time when the church

¹ Hugo Grotius, De Jure Belli ac Pacis, trans. as The Law of War and Peace by Francis W. Kelsey, et al., with an Introduction by James Brown Scott, The Classics of International Law (Indianapolis: Bobbs-Merrill Company, Inc. of Howard W. Sams & Co., Inc. for the Carnegie Endowment for International Peace, 1925), p. 9. All references to De Jure Belli ac Pacis will be taken from this edition, and hereinafter references will be abbreviated as follows: JBP which is shorthand for the Latin title, followed by the book, chapter, section, and subsection numbers; or, for the Prologomena, Prol. followed by the section number. Thus the reference just given is Prol. 1.

² Prol. 25.

³ Prol. 6.

⁴ Prol. 25.

⁵ Just twenty-three years after the appearance of De Jure Belli ac Pacis in 1625, the Treaty of Westphalia marked the end of the Thirty Years' War and recognized the Dutch Netherlands as an independent state, an event which Grotius did not live to witness.

was closely related to the state, some say was the state,¹ to the present situation where religion was abandoned as a unifying factor in the state, and in its stead was placed the will of the sovereign authority. The growing size and economic importance of the state capital, and the emergence of the psychological bond of national feeling, contributed to the acceptance and entrenchment of a mighty head of state. The concept of sovereignty had evolved from its meaning as merely "superior" to denote "all powerful," "illimitable," "indivisible."

Similarly, Christianity could no longer serve to unite the independent sovereign states in their relation to one another. This, together with the decay of feudalism and the rise of military might, created a situation where, both within the state and among states, law was in danger of becoming identified with the unbridled will of the sovereign. Now, more than ever, "for the welfare of mankind,"² it was necessary to base both the authority of the sovereign within the state, and the relations of states to one another in the universal, unchangeable and binding rule of reason.

The dictates of this law of reason were directed towards the sovereign heads of the newly formed states, for this was the age of kings, and the concept of the state itself as possessing

¹John Neville Figgis, Political Thought from Gerson to Grotius: 1414-1625, with an Introduction by Garrett Mattingly (New York: Harper & Brothers, 1960), p. 5.

²Prol. 1.

a sovereign personality had not yet reached its heyday. When, after Hobbes had attempted to totally submerge the state in the sovereign, and Rousseau, through Locke, in the people, the social contract theory faded from view and the concept of sovereignty as resting in one or the other of the dual elements of the state was abandoned, modern thought directed its attention away from the nature of sovereignty (its composition, its attributes, what it ought to be), and concentrated on finding its location (who is sovereign) in the state. Both de jure and de facto. Similarly, the effort was directed towards defining law by turning its attention upon itself, by examining its source in the state and its sanctions. Who was obeyed and how became more important than what and why.¹

Happily, the heyday of positivism has passed. The modern jurist no longer contents himself with analysing, systematizing, looking at "what-is" and spurning "what-ought-to-be" (never thinking that his "what-is" was probably nothing more than what he thought it "ought to be").² As D'Entrèves points out, the Achilles' heel of legal positivism was easily exposed.³ Law, as he says, is an ethical proposition. Whether

¹ Bertrand de Jouvenal deals with this problem in Sovereignty: An Inquiry into the Political Good, trans. by J. F. Huntington (Chicago and London: University of Chicago Press, 1957), pp. 1-11.


² Roscoe Pound, "Philosophical Theory and International Law," Bibliotheca Visseriana, I (1923), 86, "The historic-analytical ideal of 'what-is' is as much a 'what-ought-to-be' as the juristic philosophical natural law."

³ A. [Ilesandro] P. [asserin] d'Entrèves, Natural Law: An Introduction to Legal Philosophy (London: Hutchinson University Library, 1970), p. 104.

one speaks of the "basic norm," the "Rule of Law," or even its "minimum content," the ultimate test of its validity and acceptance is beyond law itself.

The sovereign of Grotius' time in his individual glory can never hope to re-appear. Nevertheless the Grotian analysis of sovereignty remains valuable even today. Grotius clearly perceived that sovereignty and law are not self-sufficient concepts capable of neat definition. They can only hope to be understood in the context of the nature of man and of the nature of human society. It is his explanation of law in particular states and among states as a human institution, rational, acceptable, and dynamic, which makes his philosophy relevant today.

It is not the intent of this thesis to outline Grotius' many and valuable contributions to the philosophy of law, nor to trace his impact upon the development of modern international law. His belief that there is a law binding nations, in war as well as in peace, his practical guidelines for avoiding war, including negotiation and arbitration, and his respect for individual rights are not the least among his achievements. It is the intent of this thesis to examine his concept of sovereignty in the context of his philosophy, and I hope that during the course of this study, much of value in his thought will be brought to light.



"[That there is a law of nature which is binding] would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God."¹ This was the Copernican breakthrough of Grotian thought. Reason provided the foundation for justice in the state and justice among states; and hence made international law possible. As Lord Lloyd says, "It was the 'Golden Age of the law of nature';"² and while that age is now past, what it taught about the nature of law is timeless, and seeks now only to be applied to a new kind of state and an international order with changing needs.

Grotius' place in the history of natural law theory is secured by his separation of the divine origin of the law of nature from its existence and validity.³ As with any idea, however, its seed can be traced to a variety of sources.⁴ The belief in a fixed system of natural laws governing the universe can be traced back to earliest society, and of course we owe to the Greeks the idea of an intrinsic intelligent and intelligible principle in the order of things. Grotius shares

¹ Prol. 11.

² Dennis Lloyd, The Idea of Law (Harmondsworth, Middlesex: Penguin Books Limited, 1976), p. 82.

³ Prol. 11, 12.

⁴ D'Entreves, *op. cit.*, pp. 15-16, cautions against a "history" of natural law. The history of ideas is internal, not external.

Aristotle's dynamic view of nature as potential capable of development; and his division of law into natural and volitional¹ parallels Aristotle's distinction between nature and convention.

The Stoics were the first to propound the idea of the law of nature as universal. Their doctrine of the brotherhood of man united, and capable of being guided, by reason, spread with the growth of the Roman Empire, and joined with the Roman jus gentium (which meant the law of Rome as applied to all its peoples, and not the law governing peoples in their relations with one another, or actual international law),² to lend practical effect to the theory--an application which, it may be said, reached its perfection in Grotius' attempt to incorporate natural law principles into the law of the state and the law among nations. The Stoic natural law doctrine combined with early Christian thought to introduce the element of divine will into the natural law doctrine and at the same time, through Augustine, to separate natural law in its perfection from that natural law to which man in his laws can aspire (the distinction between "absolute" and "relative" natural law).

¹JBP Bk. I, ch. i, ix. Volitional law differs from the law of nature in that it doesn't enjoin or forbid those things which are in themselves obligatory or not permissible. Instead, it makes things unlawful by forbidding them; makes them obligatory by commanding them.

²H. F. Jolowicz, Historical Introduction to the Study of Roman Law (Cambridge: University Press, 1961), pp. 102-04, distinguishes two senses of jus gentium in Roman law. In the practical sense it was that law which Rome applied to its own citizens and to foreigners; in the theoretical sense the notion of law natural to all became associated with law common to all. Hence, Cicero identified the law of nature with jus gentium.

With Aquinas' famous dictum, "Grace does not abolish Nature but perfects it," natural law was reinstated as an attainable human ideal. Man, beloved of God, can, by his reason, achieve virtue. When, through Grotius, the rationalism of the Scholastics became the product of the very nature of man himself, the conditions were right, for the first time in the history of the idea, for natural law to become a truly universal principle. Reason, while perhaps not having made the complete break with faith in Grotius, yet no longer depended upon it for its very existence.

The Grotian method

The most striking feature of De Jure Belli ac Pacis is its dissimilarity with a typical philosophical treatise. Grotius is content for the most part to allow his ideas to be developed by quotations and examples from the vast body of knowledge of which he is possessed. It is sometimes unclear which of the many views of learned scholars he presents is his own, and his arguments are often lacking in clarification and exposition.

Grotius has often been accused of confusing "is" and "ought." I shall say a little more about this methodology in the third chapter, but what is important to keep in mind at the outset is that, for Grotius, the proof of the law of nature offered by the "testimony" of men¹ is as important a proof as the demonstration of the agreement of what is said with the rational and social nature of man. In fact, the former tends

¹Prol. 40.

to support the latter for it is generally true that what is commonly agreed upon is often that which can be deduced from nature by reasoning. Grotius' method is not one of asserting first principles; instead he does a survey of what is...and attempts to draw the truth about what ought to be from that. Nonetheless, like the modern scientist, he is looking for evidence to prove his theory. But if such evidence can be called upon to prove the law of nature, it is also true that such evidence is not equal to the law of nature. Grotius was proceeding in much the same manner as the Roman jurists. He was searching for the intrinsic character of the situation.

It is interesting to compare D'Entrèves' assessment of the rôle of jus naturale in Roman legal development. Jus naturale, for the Roman jurists, was a way of finding "the rule corresponding to the nature of things";¹ it was "not a complete and ready-made system of rules, but a means of interpretation."² Far from being the weak point of this theory, Grotius' method of looking at "what is" as a clue to "what ought to be" is a mark of his success, especially in expounding international law. His was a theory which explained the facts. It was not lost in the realm of idealism; neither did it accept wholesale "what is." As Tooke says, "Grotius is a middleman."³

¹D'Entrèves, op. cit., p. 33.

²Ibid.

³Joan D. Tooke, The Just War in Aquinas and Grotius (London: S.P.C.K., 1965), p. 33.

He looked at common practices because common practice, especially among the more advanced of nations, is often a good sign of what is reasonable;¹ but he did not stop there. There is clearly a difference in the law which is grounded in certain first principles, and that law which has its origin in the will of man.² For Grotius, the form alone does not constitute the law; its content must indicate a certain quality of action.

Some aspects of the theory

...Sociability

The origin of the Grotian state is the nature of man. While self-interest or expediency has a role to play in Grotius' formulation of the social contract theory, he finds the primary motivation towards society in man's social appetite, his "sociableness."³ In the next chapter, I shall discuss the importance of this concept in the Grotian theory. Meanwhile, some difficulties inherent in the concept must be exposed.

First and foremost, it is unclear whether sociability is an instinct or a product of reason. It is commonly described as an instinct, for it is an "appetite," an "impelling desire," a "disposition";⁴ it is natural to man and arises spontaneously.⁵

¹JBP Bk. I, ch. I, xii:2.

²Prol. 40.

³Prol. 6.

⁴Prol. 6 and 7.

⁵Ibid.

Furthermore, it is not exclusive to man, as many animals restrain their appetite for their own good and in favour of the good of their offspring or their own kind. Similarly children, who have not yet reached the age of reason, act out of concern for others.¹

This description of sociability is particularly confusing since it is our ability to reason which sets man apart from other animals,² yet it is an instinctive cause and not a rational one which impels us towards society. Our desire for society is, on the other hand, strongly associated with our reason--it is desire for society "consonant with our intelligence,"³ and it is precisely that faculty of "knowing and acting in accordance with general principles,"⁴ that is, of reasoning, which enables us to desire a society suited to our nature, and to achieve it.

Furthermore, although reason is a characteristic peculiar to man, the type of society which Grotius describes, especially as one born of instinct, would not seem to be exclusive to man. Surely animals, too, may be said to seek a life which is ordered for certain ends, with those of their own kind.

Finally, many commentators have pointed out that Grotius' assessment of the faculty of reason in man makes the

¹ Prol. 7.

² Prol. 7 and 9.

³ Prol. 6.

⁴ Prol. 7.



mistake of claiming for rationality all that is good in man; whereas in Grotius' own time the Thirty Years' War was damning proof of where man's thought about his desires, his reasoning from particulars, could lead. As Tooke points out, "The ~~fact~~ distinctively bad is often the distinctively human, for human nature is not a mere joining of animal nature and reason."¹

Perhaps the explanation of all this can be found not in Grotius' discussion of sociability, but in his discussion of the law of nature, and of the principles which arise therefrom. In his discussion of whether war is ever permitted by the law of nature, Grotius distinguishes between those principles which are "first according to nature" and those which follow later, but are even more valuable.² That to which nature first directs us may be called the principles of self-preservation. Self-preservation is the first natural instinct of all animals, including man.³

But man is different from other animals in that nature also directs him, once those actions which preserve life have been considered, to act in accordance with reason. The object of this principle of nature for man is the achievement of moral

¹Tooke, op. cit., p. 212.

²JBP Bk. I, ch. ii, i. 1 and 2.

³Ibid. They are "those in accordance with which every animal from the moment of its birth has regard for itself and is impelled to preserve itself, to have zealous consideration for its own condition and for those things which tend to preserve it, and also shrinks from destruction and things which appear likely to cause destruction."

goodness which "ought to be accounted of higher import than the things to which alone instinct first directed itself, because...right reason ought to be more dear to us than those things through whose instrumentality we have been brought to it."¹

Such an analysis is totally consistent with Grotian philosophy. By nature, all things are directed to achieve their highest potentiality. For man, perfection is found in moral goodness, and reason is the means to this end. Hence the meaning of the concept of sociability becomes clear. Sociability is in part an instinct. Man, like other animals, is directed towards that society in which the life suitable to him is preserved. The life suitable to man alone, however, is the life of reason. Hence man is directed towards a particular kind of society, a society "organized according to the measure of his intelligence."²

The same analysis will serve to meet the charge that Grotius claims for rationality all that is good in man. It is not that reason is always and everywhere with each individual and in each particular case directed toward the good. Instead, what Grotius is saying is that man has a capacity for right reason; or that moral sense, which is consonant with his intelligence, and directs him towards society. It is this right

¹ Ibid. Grotius is quoting Cicero.

² Prol. 6.

reason which dictates to what extent the passions must be controlled,¹ and it is this same right reason which is the source of all law.² It is surely a distinctly human characteristic.

Nor does Grotius ever underestimate its importance. If society is born of the nature of man, it is clear that the nature of man is such that he is impelled towards it by both instinct and reason. In fact instinct alone would not be sufficient to create human society. "In nature there is much less regard for society than concern for the preservation of the individual."³ The reason natural to man leads him to create a society which secures the conditions whereby his rational nature can be developed.⁴ Man seeks his own good, instinctively and rationally, and man's good is reason.⁵

¹Prdl. 45. "Right reason, which virtue everywhere follows, in some things prescribes the pursuing of a middle course, in others stimulates to the utmost degree."

²Prdl. 8.

³JBP Bk. II, ch. i, iv.1.

⁴On the importance of society to the fulfillment of man's end, Grotius quotes with approval Chrysostom, "If there were no rulers of state, we should be living a life more wild than the life of wild beasts, not only biting one another, but devouring one another." Bk. I, ch. iv, iv.2.

⁵Grotius quotes Seneca, "That to which each creature is born, and on account of which it is esteemed, is the best thing in it. What is the best thing in man? Reason." JBP Bk. I, ch. ii, i.2., n.2.

...The law of nature

The law of nature plays a primary role in Grotian philosophy, but it is an ambiguous concept. It is defined as "a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God."¹ Its general use is, however, negative.² One of Grotius' first definitions of law, for example, is what is just, but justice is defined as that which is not "in conflict with the nature of society of beings endowed with reason."³ Furthermore, it is far more concerned with the permissible than with the morally necessary or forbidden, and often leaves to volitional law, whether human or divine, the task of expressing as dictates what it merely permits.⁴

¹ JBP Bk. I, ch. i, x. 1.

² Tooke, *op. cit.*, p. 213, draws our attention to this aspect, and bids us compare JBP Bk. II, ch. xvii.1. where Grotius calls wrong "every fault, whether of commission or of omission, which is in conflict with what men ought to do." Of course Grotius often distinguishes between what men ought to do and what is required of them by strict justice.

³ JBP Bk. I, ch. i, iii.1.

⁴ For example, JBP Bk. II, ch. iii, v.: "[The right to acquire movable things through occupation] exists, in fact, by permission of the law of nature, not by a positive provision that such permission should always be granted"; or Bk. II, ch. iii, vi.: "Human laws indisputably have it in their province to go further than nature in regard to many points, but never to go contrary to nature"; or, Bk. II, ch. iii, x:3.: "Many things...permitted by nature, universal, customary law, by a kind of common understanding, has been able to prohibit"; or finally, Bk. II, ch. viii, v.: "[Certain rules] are not a part of the law of nature absolutely,

This is so despite the fact that Grötius considers the permissible to be, in a strict sense, outside the law of nature.¹

Nonetheless its emphasis on permissibility is perhaps that very characteristic which secures its survival and effectiveness in the theory of law. The law of nature does not change,² but its content does evolve.³ It deals not only with things outside the domain of human will, but also with things which may result from an act of human will.⁴

It is perhaps for this reason that its exact relation to both divine law and human law, and the exclusive domain of each, is far from clear. Of the divine volitional law and the law of nature, for example, which is the "higher"? Divine law

but are such only under a certain condition, that is, if no provision has otherwise been made."

¹JBP Bk I, ch. i, ix. 1.

²God himself cannot change it. JBP, Bk. I, ch. i, x.5.

³JBP Bk. I, ch. i. x. 7. It is interesting that Grötius may be said to anticipate what has been called the "modern" concept of natural law with a variable content.

⁴JBP Bk. I, ch. i, x.4. The example given is ownership: "Thus ownership, such as now obtains, was introduced by the will of man; but, once introduced, the law of nature points out that it is wrong for me, against your will, to take away that which is subject to your ownership." And later, at Bk. II, ch. x, i.5: "As regards the nature of ownership, it makes no difference whether ownership arises from the universal principles of law or from the law of a particular country. Ownership, in fact, always carries with it its natural implications." Of course the most striking example of the changing content of natural law in Grötius is the limitation on the use of force to obtain and protect one's own once laws are created.

is often spoken of as enjoining us to do more, but natural law is in one sense divine law;¹ and how could God not enjoin us to do anything but what is best (as opposed to ^{to} good), most equitable (as opposed to equitable).²

However, I would not go as far as Tooke who contends that Grotius' belief that God could command "homicide" or "theft"³ shows "that the intrinsic goodness of an act is its conformity with the will of God."⁴ "Reason," she continues, "is thus dependent on the will of God."⁵ In the passage cited, Grotius is concerned to show that God's acts do not thereby denote a change in natural law. The two must clearly be separated. It is an essential tenet of Grotian philosophy that the law of nature is dependent upon the will of God only in the sense that man is created by God;⁶ otherwise, and of

¹JBP Bk. I, ch. i, xv. 1. Also Prol. 12.: "Herein, then, is another source of law besides the source in nature, that is, the free will of God."

²JBP Bk. III, ch. x, i.1.: "Many things are said to be 'lawful' or 'permissible'...which, nevertheless,...deviate from the rule of right." Grotius enjoins us to follow the latter; can God do less? And Bk. II, ch. xiii, vii.1.: "In truth we are under obligation to God to advance in goodness in such a way that we have not the power to cut off from ourselves the opportunity of growth in grace."

³JBP Bk. I, ch i, x. 6.

⁴Tooke, op. cit., p. 196.

⁵Tooke, op. cit., p. 197.

⁶Prol. 12.

necessity, its existence is free, and its precepts different.¹
God himself cannot change it,² its validity is assured.

Perhaps the best answer to Tooke is the passage from Justin Martyr which she quotes Grotius as approving: "To live according to nature is the condition of him who has not yet come to believe."³ It is not at all inconsistent to say that the law stemming from our nature should be somewhat different from divine law which is perfect, nor that God should enjoin us ever to strive for what is perfect, in so far as this is within our power.

If the law of nature and volitional divine law are distinct, however, natural law, being in a sense also divine law, can never be contradicted by it. "For since the law of nature...is perpetual and unchangeable, nothing contrary to that law could be enjoined by God, who is never unjust."⁴ This is not to say, however, that natural law is necessarily the "higher" law, or indeed that volitional law, divine or human, is not as effective. We learn later that not all acts

¹Prol. 11.

²JBP Bk. I, ch. i, x.5.

³Tooke, *op. cit.*, p. 202. See also JBP Bk. I, ch. i, xv. where Grotius says that the three bodies of divine law (universal divine law, divine law peculiar to a single people, and natural law) are "binding upon all men, so far as they have become adequately known to men." I shall discuss this matter in greater detail in Chapter III under the "law of love."

⁴JBP Bk. I, ch. i, xvii.2.

contrary to natural law are rendered invalid by it, but only those acts in which the essential principle is missing, namely the aptitude for right, "the moral capacity for action, joined with a will sufficiently free."¹

This is possible because there is a difference in what the law of nature demands, and what it permits. In regard to what it demands, human laws (and divine law) may go further than the law of nature, but may never go contrary to it.² However, in regard to what it permits, the permissible being outside the law of nature in the strict sense, human laws can prohibit what the law of nature permits.³

Perhaps one of the most interesting illustrations of the conflict between different types of law in De Jure Belli ac Pacis is found in the right of the sovereign, either by power of eminent domain, or by punishment, to take away from a subject either those rights gained by natural law, or those conferred

¹JBP Bk. II, ch. v, x.1. This is said in the context of a discussion of certain marriages which are not void by the law of nature. Another example is that of the extravagant gift. Similarly, not all acts which would normally be binding by natural law are entrenched by it, but only those in which the essential principle is present, for example, when someone promises something that is illegal, that is, not in his power (JBP Bk. II, ch. xi, viii.).

²JBP Bk. II, ch. iii, vi.

³JBP Bk. II, ch. iii, v. (as, for example, when the natural right to acquire movable things through occupation is denied by municipal law). The natural right is permitted, but not as it were, guaranteed. See also Bk. II, ch. ii, v.: "When, however, municipal law has laid down a different rule, the law of nature itself prescribes that this must be obeyed....Municipal law...can...set limits to natural liberty, and forbid what by nature was permitted."

by municipal law, on the grounds that there is no distinction between them. This is a case both where volitional law, the law of the state or the sovereign as head, can take away (municipal or) natural rights; and, since it is a natural law tenet that the rights of the subject cannot be taken from him without just cause, a case where natural law can take away natural rights. Such a situation is clearly indicative of the hierarchy of rights within natural law, and can only be explained if one considers some of its tenets as merely permitting, and others as strictly binding.

Grotius is fully aware that the distinction between what is and what is not, in a strict sense, part of the law of nature, is often difficult. "Certain things are said to be according to this law not in a proper sense but...by reduction, the law of nature not being in conflict with them."² Similarly, that which reason declares honourable is often said to be according to the law of nature, although in fact it is not obligatory.³

Tooke takes issue with the permissibility aspect of Grotius' theory of the law of nature by contending that the permissible cannot be separated from the body proper of natural law. "That which is permissible to natural law must be

¹ JBP Bk. II, ch. xiv, viii.

² JBP Bk. I, ch. i, x.3.

³ Ibid.

the logical-consequential child of its prohibitions and commands."¹ This is an equivocal expression of the relationship, for the permissible doesn't owe its existence to natural law, and is therefore not a child, nor a logical or causal effect, of it. Instead, what is permitted can be said to owe its existence to natural law only in the negative sense of not being denied existence by it. The permissible is, then, more the hostage of natural law than it is the child. If in truth natural law often seems more concerned with its hostage than with its prohibitions or commands, as, for example, when the lawful is defined as what is not unjust,² yet this broad area is more properly the domain of divine and human laws.³

...The divine sanction

In the next chapter, I shall discuss⁴ in detail the nature of that authority which is sovereign in the Grotian state. It will be seen that Grotius defines sovereignty in terms of a legally supreme will.⁴ Despite his superiority to the law of the state, however, Grotius' sovereign, as sovereign, is bound by the law of nature, and must keep his promises and honour his contracts including the founding contract or constitution of the state. In this respect, his situation may be compared to

¹Tooke, op. cit., p. 198.

²JBF Bk. I, ch. i, iii, 1.

³JBF Bk. I, ch. ii, i.3.

⁴JBF Bk. I, ch. iii, vii.1.

that of God who is at once both supreme and limited. God is omnipotent; nonetheless, the law of nature is not dependent upon his will for its validity.¹ God, then, is supreme, but limited, for he can no more make evil good, than make two and two not equal four.² The sovereign, too, may be truly superior, and yet limited by the law of nature.

It is immediately evident that, for the citizen, this distinction is applied with greater urgency to the power of the sovereign than to the power of God, for the nature of the latter is such that it is inconceivable that he could will anything contrary to reason or the law of nature. (It is precisely for this reason that Grotius finds a source of law in his free will).³ The sovereign, on the other hand, is capable of injustice.

One of the main differences between volitional law and the law of nature is that the former, within the state, is backed up by sanctions. Grotius distinguishes clearly between a natural right and a legal right proper, and is adamant that a natural right does not confer a right to act. Positive law is necessary to perfect the moral quality.⁴ The sovereign

¹ Prol. 11.

² JBP Bk. I, ch. i, x.5.

³ Prol. 12.

⁴ JBP, Bk. I, ch. i, iv. Of course, Grotius believed that all volitional law should be just, should conform with right reason. At Bk. I, ch. i, ix, his third definition of law is "a rule of moral actions imposing obligation to what is right."

as sovereign, then, being above civil law and bound only by the law of nature and the law of God, cannot be held accountable by the state or its citizens for his wrongdoing, except in the extreme circumstance where the sovereign breaks the contract of the state which it is a natural law tenet for him to obey. Indeed, even though a "perfect promise"¹ obligates a king, and confers a right upon his subjects,² still "it is not permissible for subjects to compel the one to whom they are subject."³

Hence it is clear that while natural law may be divorced from the will of God, yet its ultimate sanction is in him.⁴ Sovereigns are accountable to God for their actions;⁵ only he can assure that complete justice is realized. It would seem just that the state should be able to take away a subject's right (even one acquired by contract or promise) when he has committed a wrong.⁶ Surely it is also necessary to justice

¹That is, one which is both complete and unconditional; confers both an obligation and a right. JBP Bk. II, ch. xi, iv. and Bk. II, ch. xiv, iv.

²JBP Bk. II, ch. xiv, vi.2: "Such is the nature of promises and contracts...; and this holds even between God and man."

³Ibid.

⁴ProL. 20.

⁵JBP Bk. I, ch. iii, viii. 14 and 15.

⁶JBP Bk. II, ch. xiv, vii.

that a bad sovereign be punished.¹ If this can be done only by God, then surely God, and therefore his existence, play a far more important role in natural law than he who would divorce it from the will of God had intended. Besides the necessity of positing God's existence, the failure of an institutional guarantee against injustice of the sovereign authority in the state also creates a situation which is dangerously close to the subordination of justice to order, of law to the will of the law-maker.

...The law of nature and the law of nations

There will be ample opportunity in the course of this thesis to discuss the relationship between the law of nature and the law of nations in De Jure Belli ac Pacis. The law of nations is originally classified as volitional law,² but Grotius, in keeping with his method, seems as much concerned to discuss what it ought to be as what it is fact is. When he discusses the law of nations as it ought to be he is clearly, at times, not thinking principally of jus gentium as a volitional law that can be discovered by observation, even of the customs of the "best" nations, but as a species of natural

¹The logical explanation for the state's inability to punish the sovereign is that "punishment and coercion can proceed only from different wills" (JBP Bk. II, Ch. xiv, 11.2.). This presents further evidence of Grotius' failure to separate the state from the sovereign, and perhaps explains his inability to find a sanction for sovereign wrongdoing within the state.

²I have dealt with this at the beginning of the third chapter.

law.¹ Despite his distinction of the two on the grounds that the law of nature can be deduced from certain principles by a process of correct reasoning whereas the law of nations has its origin in the free will of man and common consent,² there still exists a great deal of uncertainty as to the relation of the law of nature to the law of nations, and indeed common acceptance among nations is considered one of the proofs (if an imperfect one) of the law of nature.³

Grotius distinguishes two senses of the law of nature, the original and that which followed the introduction of property ownership and preceded all civil law;⁴ and two senses of the law of nations, that which is commonly upheld by several nations separately, and that which deals with the mutual society of nations in relation to one another, and has the force of agreement among them--the true international law.⁵ As for the relationship between the true jus gentium

¹Cf. Hugo Grotius, De Jure Praedae Commentarius, trans. as Commentary on the Law of Prize and Booty by Gwladys L. Williams and Walter H. Zeydel, The Classics of International Law (2 vols. Oxford: Clarendon Press for the Carnegie Endowment for International Peace, 1950), I, 26, 120. Michael J. Langford, in "Natural Law and Rebellion: A Study in Seventeenth Century Thought" (Ph.D. thesis, University of London, 1966), p. 312-13, suggests that the classification in De Jure Praedae of the law of nations as, in its primary sense, a part of the law of nature, and in its secondary sense positive law, slips into De Jure Belli ac Pacis, and helps to explain the confusion there of the law of nations and the law of nature in usage, despite their stated difference.

²Prol. 40.

³JBP Bk. I, ch. i, xii.1.

⁴JBP Bk. II, ch. viii, i.1.

⁵JBP Bk. II, ch. viii, i.2. and Bk. II, ch. iii, iv.

and the law of nature, certain provisions of the former are said to be part of the law of nature not absolutely, but only on condition that no other provision or statute has been made to the contrary.¹ And at times the jus gentium is upheld despite a natural right to the contrary, as when contracts with an inequality of terms are binding,² or a promise extracted through fear of war is considered just.³ And on the rights which impose obligation by the law of nations, it is said that "although [they] are in some degree derived from the law of nature, yet from human law they acquire a kind of support, either against the uncertainties of conjecture, or against certain exceptions which otherwise natural reason seems to suggest."⁴ (Emphasis mine.)

Yet, lest one should think that Grotius is content to base jus gentium in the mutual agreement of nations concerning their rules of interaction, it must always be kept in view that his aim was to ground international law in the law of nature now that (in the conditions pertaining in 1625) its basis in Christian principles had been removed; and to restrain the will of the sovereign states by an appeal to it. Despite

¹JBP Bk. II, ch. viii, v.

²JBP Bk. II, ch. xii, xxvi. 3 and 4. Such contracts are permitted by law, but destroy justice.

³JBP Bk. II, ch. xvii, xix. (Normally, if one extorts a promise through unjust fear, he is obliged to free the promisor. Bk. II, ch. xi, vii.2.) That the fear of war is the only exception to this confirms Grotius' love of peace.

⁴JBP Bk. II, ch. xix, vi.

inconsistencies in the interpretation of this relationship, Grotius was not content to divorce positive law from justice.

3. Sovereignty

Finally, sovereignty itself must be counted among the most perplexing of Grotius' concepts. It is defined as that will to which no other is legally superior.¹ Yet in the same chapter in which this definition is put forward, Grotius proceeds to talk about sovereigns who are bound (by unequal alliances, by the duty to pay tribute, and, in the internal state, by feudal law).² Hence the meaning immediately shifts from illimitable to merely superior.³ Further, there is throughout the work evidence that the sovereign is also bound by the law of God, the law of nature, and the law of nations, but the practical effect of the superiority of these laws to sovereign power is not always easy to discern.

The doctrine of non-resistance in Grotius is especially helpful in evaluating his restrictions on sovereign power. The concept is ambiguous, and has left commentators claiming both that Grotius advocated a theory of absolute sovereignty, and that he favoured limited sovereignty. It will be examined in detail in the following chapter.

¹ JBP. Bk. I, ch. iii, vii.1.

² Ibid., sections xxi., xxii., and xxiii., respectively.

³ James Leslie Brierly, The Basis of Obligation in International Law and Other Papers, selected and ed. by Sir Hersch Lauterpacht and C. H. M. Waldock (Oxford: Clarendon Press, 1958), p. 20, sees these examples as evidence of Grotius' return to the feudalistic conception of the sovereign.

One of the chief difficulties with Grotius' work is his tendency to regard sovereignty as a patrimony, a right of the sovereign.¹ Indeed, even when sovereignty is not possessed absolutely, the king is given special consideration. In alienation of sovereignty by the people, for example, the king, as one possessing a "kind of life interest," must give his consent;² even in cases where we are released from the law of non-resistance due to "extreme and in other respects unavoidable necessity," the person of the king must be spared.³

While sovereignty is at times presented as a patrimony, the private possession of a personal monarch, at other times it is spoken of as pervading the whole state with the people as common, and the king as the special, subject of sovereignty.⁴ Consequently, the people is sometimes seen as opposed to the sovereign, sometimes as one community, including the personal monarch, the totality of which is the sovereign state or the body politic. Similarly, in its external relations with other states, the concept most often used is that of the state as

¹JBP, Bk. I, ch. iii, xi. 1 and vii. 1.

²JBP, Bk. II, ch. vi, iii.

³JBP, Bk. I, ch. iv, vii. 6.7. The reason given is that the office of the sovereign is a hazardous one, and he who holds it must be protected. Elsewhere (Bk. II, ch. i, ix.) we learn that this right is due to the law of nature in so far as it also encompasses the law of love. It is interesting that Grotius does not consider sovereignty as lost through wrong-doing.

⁴JBP, Bk. I, ch. iii, vii. 1. and Bk. II, ch. ix, iii. 1.

represented by and in the personal sovereign of the internal state. There is, in Grotius, no developed idea of the state itself as possessing a corporate personality. In his presentation of international law, it is sometimes the state (usually as represented by the sovereign), and sometimes the individual as citizen of the world community, who is subject of its rights and duties.

With any great work, inconsistencies and ambiguities are likely. While it is the duty of every scholar to expose and explain them, the greatest value will be attained by entering into the spirit of what is said, and attempting to discover the significance of the parts in the context of the whole. Despite his invaluable contribution to the natural law theory in general, and in particular to that body of international law which in his day was still in embryonic form, Grotius' aim and his greatest legacy was to show that in the relations of men, in peace and in war, certain laws, stemming from the nature of man and ascertainable by reason, are at all times and in all places binding.

CHAPTER II

SOVEREIGNTY WITHIN THE STATE

PART A: Exposition

The concept of sovereignty and the theory of rebellion

With the rise of modern states, sovereignty has come to have two meanings, the one referring to the state as a whole in its relationship with other states, and the other referring to that power or authority within the state which is called sovereign, either in the political sense of possessing supreme power or in the legal sense of being the supreme law-making authority. It is in the latter or "internal" sense that sovereignty will be discussed in this chapter, and with particular emphasis on the extent to which those subject to the sovereign authority within the state may justly wage war against it.

In *De Jure Belli ac Pacis*, Grotius defines sovereignty as "that power...whose actions are not subject to the legal control of another, so that they cannot be rendered void by the operation of another human will."¹ It must be noted that the distinction between political sovereignty and legal

¹ JBP. Bk. I, ch. III, vii.

sovereignty, popular among modern philosophers of law, was a distinction unknown to Grotius and natural law theorists. For Grotius to whom the state itself is characterized by people in legal relation to one another, the concept of sovereignty can be none other than a legal concept. Further, not only is it the supreme power in the state, but it is the only legal power. "Sovereignty resides in the corporate body as in a subject which is entirely filled."¹ As Otto von Gierke puts it, in natural law theory, "the original negative conception of sovereignty--the conception of a power which is not externally subject to any superior--is made to assume a positive form by being as it were turned 'outside in', and used to denote the relation of the state to everything which is within itself."²

It is interesting that the history of the notion of absolute sovereignty comprises two radically different attitudes towards it. According to de Jouvenal, the adjective "absolute" translates the Latin phrase "legisbus solutus"--"freed from the laws."³ During the Medieval period of feudalism, every man had a "sovereign" which simply meant "superior"; hence there was a hierarchy of power, a "great chain of duties." With

¹JBP Bk. II, ch. vi, vii.

²Otto von Gierke, Natural Law and Theory of Society: 1500 to 1800, trans. with an Introduction by Ernest Barker (Cambridge: University Press, 1958), p. 41.

³de Jouvenal, op. cit., p. 90.

increasing concentration of power in the governing bodies of the local kingdoms, however, the notion came to mean "the monopoly of the king."¹ According to de Jouvenal, L'Oyseau, a jurist of the time of Henry IV, recognized only two types of authority (which correspond to Grotius' two divisions of primary acquisition by occupation): that of the individual over his property (Grotius' "ownership"), and sovereignty (also Grotius') by which L'Oyseau meant "summit of authority," "entirely inseparable" from the state, the form which causes the state to exist.² With this may be compared Grotius' statement that the "spirit or 'essential character' in a people is the full and perfect union of civic life, the first product of which is a sovereign power."³ Grotius is also careful to point out that the chief difference between sovereignty (as such) and ownership is that the latter carries with it the unrestricted right of alienation,⁴ whereas, in the former, the right of alienation is restricted by the very definition of the state and the exact way sovereignty exists in a body--as in a subject which is entirely filled.

In order to understand Grotius' theory of rebellion,⁵ it is necessary to understand that sovereignty within the

¹ de Jouvenal, op. cit., pp. 169-82, passim.

² de Jouvenal, op. cit., pp. 180-82.

³ JBP Bk. II, ch. ix, iii.1.

⁴ JBP Bk. II, ch. vi, vi.

⁵ In discussing Grotius' theory of rebellion, I shall not make mention of the distinction so important in the *Vindiciae Contra Tyrannos* (circa 1579, probably written by Du Plessis-Mornay)

state is a right which derives from a social contract. Grotius believes that man by nature desires society, not, it is true, of any kind "but peaceful, and organized according to the measure of his intelligence."¹

This natural desire to enter into mutual relations with one another implies an obligation both to one another (in a legally established order) and to the first point of that order (for all order is possible only in relation to a first point).² "Those who had associated themselves with some group, or had subjected themselves to a man or to men, had either expressly promised, or from the nature of the transaction must be understood by implication to have promised, that they

between the matter considered from the point of view of the private individual, and from that of a subordinate authority in the state (e.g. magistrates). Grotius himself deals only passingly with the idea at Bk. I, ch. iv, vi, and considers that both being in a position subordinate to the one holding supreme power, a distinction cannot validly be made. (From the point of view of the genus, even an intermediate species is a species.) This notion of order being possible "only in relation to a first point" is a recurring theme in Grotius' thought. It may be conceded that had he paid more attention to the role of subordinate officials, his theory of resistance may have been rendered without some of the real and seeming difficulties which attend it. Nonetheless, to attempt to explain Grotius' theories of sovereignty and of resistance by following this particular tangent will be to impose a distinction in Grotian thought which he clearly did not intend. Even though intermediate governmental authority may be held absolutely (Bk. I, ch. iii, xiv.), Grotius insists on distinguishing rights from the manner of possessing them, and maintains that sovereignty as such is indivisible, and is the highest authority in the state (xvii). Accordingly, from the point of view of the sovereign, an intermediate official is simply a private person.

¹ Prol. 6.

² JBP Bk. I, ch. iv, vi.1.

would conform to that which should have been determined, in the one case by the majority, in the other by those upon whom authority had been conferred."¹

Hence it is clear in Grotius' philosophy that once the contracting parties have passed from a state of nature into civil society, the state forthwith acquires the right to limit their natural and primitive rights. The most basic of all primitive rights is of course the right to resist injury. Yet Grotius is adamant that the very character of the state exists in its right to limit the right of resistance. Had it not this right, it would not possess the means of achieving its purpose which is the peaceful ordering of societal life. Essential to a proper understanding of Grotius' philosophy is his contention that both the right of governing in the state and the law of non-resistance derive their validity from the same source, "the will of those who associate themselves together in the first place to form a civil society."²

But the matter is not as simple as would first appear. I suggest that Grotius is concerned to choose his words carefully when discussing this acquired right of the sovereign power within the state. The state's right is clearly a right of limitation³

¹ Prol. 15.

² JBP Bk. I, ch. iv, vii.2.

³ JBP Bk. I, ch. iv, ii.1.

instead of an exclusive right. The primitive right of the new citizen is severely restricted, but it is not destroyed. The social individual is not, as it were, an annihilation of the natural individual; by society one's nature is not destroyed, but fulfilled. What makes Grotius' theory of non-resistance worthy of closer analysis is the basic contention that "among all good men one principle at any rate is established beyond controversy, that if the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out:"¹ Here resistance--or at least passive resistance--would seem to be encouraged, and indeed not simply as a right, but as a duty of "good men," if the authorities' order contravene divine law or the law of nature.

However, further analysis of the grounds for such resistance and the manner of resisting which Grotius finds permissible, would seem to be disappointing in its failure to allow the citizen effective judgement of matters of state by an appeal to either the law of nature or the laws of God. For the most part, resistance seems to be justified elsewhere only if what is called "extreme and imminent" peril dictates--as for example in the case of danger to one's life² (but only then if a victory for the right be not too disruptive to

¹JBP Bk. I, ch. iv, i.3.

²JBP Bk. I, ch. iv, vii.1.

the state)¹ or when a king declares himself an "enemy of the whole people"² (which however is likely only when a king rules over several peoples, and not in the normal situation of a unitary state), or when a king has abdicated sovereign power (but neglect is not abandonment),³ and always on condition that "the person of the king" be spared.⁴ Similarly, resistance is permitted if a sovereign violates or oversteps any agreement between him and the people which specifically defines the limits of the sovereign power.⁵ In this set of conditions, it is clear that the grounds for resistance are different from an

¹JBP Bk. I, ch. iv, vii.2.

²JBP Bk. I, ch. iv, xi.

³In Bk. II, ch. iv, viii., Grotius rejects the contention that one must never be assumed to have abandoned a right, on the grounds that it portrays men as evil and selfish. Under this heading, Grotius also discusses the exercise of sovereign power. One might have expected a discussion in terms of that neglect of duty which constitutes abandonment. Instead, Grotius is content to rest abandonment on indifference over time (xiv.) rather than on a misuse or abuse of sovereign power and strongly berates those who would attempt to determine where the true sovereign right in the state lies at the risk of great disturbance (which one might assume is commonly inevitable in determinations of this sort) to the established order. Two things, then, are clear from this treatment: 1) that abandonment of sovereign right is not dependent on an action of the sovereign (albeit an action contrary to the law of nature or the law of God), but on his inaction (indifference over time); 2) the abandonment of sovereign right which permits a people to regain liberty is in no way attributed to their judgement of the sovereign duties by appeal to a "higher" law of nature or law of God. The people are passive--their right merely occupies a void created by the abandonment of right by the sovereign.

⁴JBP Bk. I, ch. iv, vii.6.

⁵JBP Bk. I, ch. iv, vii. x. xii. xiii. xiv.

appeal to the law of nature or divine law, being derived from the particular contract which constitutes the particular state (which, however, it is a dictate of the law of nature that we must obey).

Furthermore, not only is the right to resist severely limited in these cases, but also the manner of resisting. Grotius cites the example of the Maccabees' right of resistance as limited to self-defense;¹ and for Christians what is granted is the "right to flee."² Indeed almost without exception, we are enjoined most strongly to forgo resistance and instead to endure the "caprice" of the sovereign authority--an enjoiner perhaps most striking as following immediately³ upon the statement of that "principle established beyond controversy" which justifies resistance by all good men when the law of nature, or divine law, is contravened.

Grotius' insistence on the law of non-resistance often places the subject in a ludicrous situation. Noting that subjects are often punished for the sins of their kings, Grotius says that this is due not to their failure to restrain him, but instead because the people "connived with him in his offences, at least through silence."⁴ Hence it would seem the people are guilty by association with a sovereign from whom

¹JBP Bk. I, ch. iv, vii.5.

²JBP Bk. I, ch. iv, i.3.

⁴JBP Bk. I, ch. iv, viii.8.

⁵JBP Bk. I, ch. iii, viii.16.

disassociation is not allowed! Earlier in this section, Grotius emphasized the hardships which any people may have to endure once it concedes power to a governing authority, by quoting from a comedy:

Have this with that, then, if you choose,

Or that with this together lose.

It is clear then that from Grotius' citizen, much is taken. How much abides remains to be seen.

It would seem that the appeal to the law of nature by which a subject may judge the actions of a sovereign authority is a virtually ineffective concept within Grotius' state; and is as far removed from real resistance as the stones of the Sabaeans are from their king who, inside his palace, is accountable to no one.¹ Grotius views resistance as the enemy of society. According to his theory of the state, once men have entered into society the rights of the subject are subordinate to and qualified by the greater right of the state to accomplish this end, namely, public tranquility: "An association in which many fathers of families unite into a single people and state gives the greatest right to the corporate body over its members"; and, "but as a civil society was instituted in order to maintain public tranquility, the state forthwith acquires over us and our possessions a greater right, to the extent necessary to accomplish this end."²

¹ A story of Agatharchides used by Grotius at Bk. I, ch. iii, xvi.4 to show that sovereign power is not restricted by the promises of the one who holds it.

² JBP Bk. I, ch. iv, ii.1.

In the light of such evidence, it is difficult to see what role is reserved for the law of nature in the social arrangement and the designation of sovereign power by that arrangement. Perhaps we must agree with Tooke that this respect for society is itself "a qualifying principle of natural law."¹ If this is so then it would seem that the laws of the state take precedence over the law of nature. Indeed the evidence for this is overwhelming if we interpret in this light Grotius' great concern to deny both that sovereignty always resides in the people,² and indeed that it is for the benefit of those governed.³

Even in cases where the benefit of the governed is a consideration, Grotius contends that this in no way affects sovereign power. He compares the sovereign to a guardian who has "both a right and a power over the ward," with the important difference that whereas the guardian who administers his trust badly can be removed, the sovereign, having no superior except God, cannot. The sovereign is the end point of both power and the law within the state. We come now to the question which must answer the true nature of the internal sovereign within the Grotian scheme: is sovereignty for Grotius a matter of will or of law? Is the law of nature necessarily absent from the scheme of things after the social contract? Are the rights of the people as one of the founding parties

¹ Tooke, op. cit., p. 210.

² JBP Bk. I, ch. iii, viii.

³ JBP Bk. I, ch. iii, viii.14.

to the contract of state to be submerged in the will of that party to whom sovereign authority is delegated?

As has been demonstrated, evidence for contrary answers can be found in De Jure Belli ac Pacis. It is my contention that a proper understanding of Grotius' meaning of sovereignty can only be had by placing the concept in the context of his philosophy of society. Only after an analysis of this sort can one make internally compatible the several notions of limited and unlimited sovereignty; a right of resistance and a law of non-resistance; and the origin of sovereign power in both the law of nature and the law of the state.

The state of nature.

For Grotius, the state has its origin in the nature of man. Conversely, man is by nature a social being. Central to Grotius' philosophy is his denial of Carneades' contention that man everywhere seeks his own good; and consequently, that expediency is the mother of society. Instead, there are discernible in Grotius' philosophy three characteristics of man in the state of nature which equip him for life in society.

The first, and by far the most important, is his appetite for society. Grotius revives the Stoic principle of socialitas and makes it the cornerstone of his theory of man. Many critics deny the importance of this concept in Grotius' thought either as being "a mere cloak for self-interest,"¹

¹ Tooke, op. cit., p. 208.

or a concept which, through promising, was later abandoned by Grotius in his failure to resolve the duality of sovereign power on the one hand and the people on the other into a concept of the state as an organic whole.¹ In my view, however, unless sociability is always kept in view, there is an ever present risk of making Grotius' theory of society coherent only by distorting its individual components.

That sociability is the motivating factor for social life is evidenced by Grotius' assertion that "even if we had no lack of anything the very nature of man would lead us into the mutual relations of society."² This assertion is the more important for being made in the context of a discussion of the expediency of social life. Grotius believes that the fact of our weakness as individuals is an additional incentive for association, but there is no doubt that (unlike Hobbes) it is for Grotius a subordinate factor, a prop, as it were, in the state of nature which reinforces the natural tendency in man for the social life.

The concept of sociability is not without ambiguities. I have already discussed in the first chapter³ the special problems which its characterization as an instinct, and one which is peculiar to man, present. Nonetheless, I think these

¹F. H. Hinsley, Sovereignty (London: C. A. Watts & Co. Ltd., 1966), pp. 138-43.

²Prol. 16.

³Supra, p. 11.

problems are peripheral to its essential meaning. Regardless of whether or not animals may share with man a tendency to seek the advantage of others, Grotius makes it clear that what distinguishes man from other animals and makes him a fit candidate for that particular form of social life which is characteristic of him is that "faculty of knowing and acting in accordance with general principles"¹ which makes it possible for him to posit certain social aims or ends² and to discern how to achieve them. Furthermore, and this is the third characteristic which fits man for the pursuit of that society in which his nature can be truly realized, man is endowed with the power to discriminate between ends which are good and those which are not.³ It is for this reason that he can resist the pull of the appetites (fear, immediate pleasure, impulse) and make decisions in accordance with a well-tempered judgement. In other words, Grotius posits for man some kind of "moral sense."⁴ He possesses not only the ability to pursue

¹Prol. 7.

²The society proper to man is that "peaceful, and organized according to the measure of his intelligence, with those who are of his own kind." Prol. 6.

³Prol. 9.

⁴It is one of the chief faults of Grotius' treatise, from a philosophical point of view, that the "moral sense" is never fully analysed or even defined. We know it is not Aristotle's mean (Prol. 43-45.), for "the passions...may be feeble in the greatest crime, and very violent without leading to crime." For the most part Grotius seems to consider the moral nature of man as self-evident. The principles of natural law are those which no one can deny "without doing violence to himself." Grotius

ends, but the ability to choose ends in accordance with right reason. The society which is born of his nature, then, must be concerned not only with his intelligence, but with reason. "Whatever is clearly at variance with such judgement is understood to be contrary also to the law of nature, that is, to the nature of man."¹

Hence the Grotian principle of sociability is comparable to the Aristotelian principle that "man is by nature a political animal." The breakthrough of such a principle is that in the Grotian theory, as it was in the Aristotelian, civil society is the natural evolution from the state of nature, not the antithesis of it. As Gierke points out, the principle of sociability was the means of reconciling status naturalis and status socialis which natural law thought had commonly felt it necessary to oppose.² Even in the state of nature man exhibits, if not civilization, at least sociability; and in the civil society his natural tendency finds its fulfillment.

The social contract

For Grotius then, the end of civil society is the fulfillment of man's rational nature. It is in light of this end of society and of its origin in natural law, that the social contract in Grotian philosophy must be interpreted. Two

lets Euripides' Polynices speak for him: "The rules of justice and of good, are plain alike to simple and to wise."

¹ Prol. 9.

² Gierke, op. cit., p. 100.

conclusions follow immediately from the principle: first, that civil society is inevitable in Grotius' scheme, being as it were the logical and consequential child of the state of nature, a further step in the societal evolution of man; secondly, it is clear that the state is entered into freely, the only compulsion to enter society coming internally from man's quest to fulfill himself. Unlike Hobbes' man, that of Grotius does not find himself in civil society by happy accident. Further, as a societal arrangement is born of his nature, it is not necessary, as again it is for Hobbes' man, to attribute every good thing to the sovereign authority in the state. The sovereign in Grotius' state is merely the first point in relation to which order is possible. He is the guarantor only, and not the creator, of peace.

Hobbes' description of the life of man as "nasty, brutish and short" has been compared with Grotius' description of the condition of contention among people or states.¹ The telling difference, however, is that Hobbes is writing of a state of nature, whereas Grotius uses such terms not of his state of nature but of a state of warfare.² Strife is certainly possible in Grotius' scheme, but it is the result of the failure of volitional law; not the occasion for its institution. There is a world of difference between Hobbes' state of nature and

¹Donald Clark Hodges, "Grotius on the Law of War," The Modern Schoolman, XXXIV (November, 1956), 37.

²Of course Hobbes' state of nature is also for him a state of warfare.

"a mob confused."¹ Hence, the sovereign authority which is called upon to maintain that environment of tranquility essential to the fulfillment of man's nature is different from the sovereign authority called upon to destroy nature.

The civil state is the free creation, in obedience to natural law, of that order necessary for the enjoyment of rights and the pursuit of common interests. Consonant with the original act of state creation² and stemming from the same source--the law of nature--is the obligation to abide by the social contract.

As the state is to the nature of man--namely, the condition for its realization--so too is the sovereign to the state. All order is possible only in relation to a first point. Sovereignty, as the first point of the social order, is thereby created simultaneously with the state upon the mutual consent of the contracting members. Mutual consent, which gives rise to the obligation to obey the laws of that order, also gives rise to the obligation to obey the authority by whose power that order is maintained. Hence not only the state, but the laws of the state, and the right of the law-maker to make laws all derive from the law of nature. Sovereignty, then, is a right, and a right "given and inherent in the very conception of the state."³

¹Grotius' (borrowed) description of a non-social horde at Bk. I, ch. iv, ii.1.

²JBP Bk. I, ch. i, xiv.1.

³Gierke, op. cit., p. 41.

It is essential to appreciate the exact nature of the obligation to the sovereign authority incumbent on those who enter society. Such obligation cannot derive from the power of the sovereign authority taken in itself, as it arises at the same time as the right of sovereignty, and derives its force from the same source from which that right derives. Even Hobbes appreciated that power alone cannot secure the obligation suitable to a subject.¹ External compulsion is neither a necessary nor sufficient cause of a subject's obedience; instead a true subject will recognize an internal obligation to obey authority. Indeed, as de Jouvenal expresses it, "Authority is the faculty of gaining another man's assent."² In the Grotian scheme the grounds of assent are built into the concept of sovereignty. The sovereign is owed allegiance precisely because his right to authority derives from the nature of man itself. We may express it in Aristotelian terms: the laws of the civil state, the power of the sovereign and, what is unique and central in Grotius, thought the social contract itself, are the efficient causes; the final cause is the full realization of the nature of man.

As the obligation to obey the sovereign derives from his role as the one who secures that social order necessary to man's growth and development as a rational being, the obverse of this principle is that the end of the state and the

¹D. D. Raphael, *Problems of Political Philosophy* (London: MacMillan and Co. Ltd., 1970), p. 61, points out that for Hobbes "dominion" equals power plus submission.

²de Jouvenal, *op. cit.*, p. 29.

end of sovereign authority within the state is the end of man. Hence it is wrong to interpret Grotius' societal being as having lost either rights or freedom upon his consent to subject himself to sovereign authority; rather he has secured the condition of their attainment. To assert otherwise is to apply an anachronistic concept of "rights" to the citizens of the Grotian state. It is correct to view Grotian philosophy as the culmination of the Scholastic natural law tradition in its emphasis on natural law rather than on natural rights; and "the restoration of the right order of things rather than the perilous experiment of revolution."¹ Nonetheless, Grotius earns the title of the father of the modern theory of natural law not only because natural law is divorced from its dependency on the will of God, but also because his theory anticipates the modern doctrine's emphasis on the rights of man. The full meaning and power of such a "body of rights" was not to be felt for generations, but the seed of its power is contained in Grotius' philosophy precisely because the state is perceived as that organ which alone provides the condition for the individual's possession of rights proper, his ability "to have or to do something lawfully."²

The system of laws in Grotian theory

"The law of nature is a dictate of right reason,
which points out that an act, according as it is or is not in

¹ A. P. D'Entrèves, op. cit., p. 48-49.

² JBP Bk. I, ch. i, iv.

conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.¹ Such is Grotius' definition of the law of nature. Man is by nature a rational being and, even in the state of nature, is guided by the Law of Reason. As civil society was shown to be an outgrowth of natural society, so too the positive law of civil society stems from the law of nature which is born of the nature of man.²

One of the chief breakthroughs of Grotius' thought was his success in presenting a purely rational basis of ethics. The law of nature depends on the will of God only in so far as God is the author of nature, and can therefore be understood not to desire anything contrary to it.³ The law of nature would be valid even if there were no God;⁴ and "God Himself suffers Himself to be judged according to this standard."⁵ Grotius heralded the new age with his scientific approach to the matter at hand. Law, in theory, could be deduced logically from a set of self-evident first principles.⁶ So great is the power of the

¹ JBP Bk. I, ch. i, x.1.

² Prol. 16.

³ JBP Bk. I, ch. i, x.2.

⁴ Prol. 11.

⁵ JBP Bk. I, ch. i, x.5.

⁶ Prol. 39.: "First of all, I have made it my concern to refer the proofs of things touching the law of nature to certain

Rational Law that God himself cannot cause that which is intrinsically evil be not evil, any more than he can cause that two times two should not make four.¹

It is in the rational law of nature then that every man has a sure guide to that behaviour which is most fitting to his nature. The civil state to which man is impelled for the securement of his end has its source in the same law. Law, both in the state of nature and in the civil state is first and foremost that which is just, and what is just is precisely that which is not "in conflict with the nature of society of beings endowed with reason."² That positive law has its source in natural law is a basic tenet of Grotian philosophy, and one without which his theory of society cannot be understood. "The maintenance of the social order...which is consistent with human intelligence is the source of law properly so called."³ It is from this source, and this source alone, that the rules governing men in their relations with one another, in society, are deduced. "To this sphere of law belong the abstaining from that which is another's, the restoration to another of

fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses." (Of course, Grotius' own method was also to rely heavily upon a posteriori proofs.)

¹ JBP Bk. I, ch. i, x.5.

² JBP Bk. I, ch. i, iii.1.

³ Prol. 8.

anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfill promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts."¹ Such are principles of all social life; they are rational, self-evident and, what is therefore most important, discoverable prior to their actualization in any civil state. As the law of nature is divorced from the will of God, so the basic laws of social relations derived from the law of nature are in this sense divorced from the will of the sovereign authority within the state.

Grotius divides justice into expletive and attributive justice.² Expletive justice rights wrongs. It is concerned with those proper legal rights (powers, property rights, contractual rights) by which a citizen of the state has the strict (or perfected) right "to have or to do something."³ It may make allotment either by a simple or a comparative formula⁴ and has as its field both private and public rights, the latter being the rights of the state over individuals, of a community over its members.⁵

¹ Ibid.

² JBP Bk. I, ch. i, vii.

³ JBP Bk. I, ch. i, iv.

⁴ JBP Bk. I, ch. i, vii.2. Grotius differs from Aristotle on this point.

⁵ JBP Bk. I, ch. i, vi.

But expletive justice is not arbitrary. The legal rights, proper, to do and to have, are conferred on the citizen because by nature he possesses that moral quality (or aptitude) which makes it possible for him to have or to do something lawfully. This aptitude, which is a quality of man in nature and inalienable from him, exists in potential until such time as the law of the state can actualize or perfect it.

In the state of nature which exists before the civil state this moral quality is sufficient of itself to confer a natural right on man. The justice concerned with this moral quality, or aptitude is called attributive justice. It is this justice which exists in the state of nature and is concerned with the good. It distributes according to desert. Whereas expletive justice seeks only to establish the proper relation demanded by the respective legal rights of parties, distributive justice takes all conditions into account in an attempt to make a fair and equitable decision judged by reason to be appropriate to the particular case at hand.¹ Legal rights or rights proper (with which expletive justice is concerned) are of course only possible in a legal situation, only possible, then, in the civil state. They must be conferred by the authority in the state, and hence are the domain proper of volitional law, or law based in will. Once such rights are conferred by the state, however, it is a principle of distributive

¹The example of the allotment of the "tunics" at Bk. I, ch. i, viii.3. illustrates the difference.

justice, as being concerned with that moral quality which imposes an obligation to what is right, that they should be respected. Hence, once again, the same principle is manifest in Grotian theory: as the civil state is born of the natural state, as the obligation to obey the sovereign is born of the natural evolution of the state as the vehicle for man's fulfillment, so too the positive law of the civil society is born of the law of nature.

PART B: Interpretation

Another look at sovereignty

At the beginning of this chapter in the discussion of sovereignty and of the rights of the citizen against the sovereign in the state, evidence was brought forward to show that Grotius severely limited the subject's right of resistance to the internal sovereign. The question became whether this theory of non-resistance was indicative of a theory of sovereignty as a power unlimited, of the state as the creation of the sovereign authority and dependent upon it for its existence, and of the laws of the state as the product of the sovereign will. Our analyses of the concept of the law of nature and its fundamental role in Grotian philosophy, of the origin of the civil state and the right of sovereignty in the law of nature, and of the Grotian system of laws whereby all law is a product of reason, have shown beyond doubt that law is not simply the command of the sovereign, and that for Grotius the state is

necessarily a just state. Grotius twice vindicated natural law by removing law from will--both from the will of God and from the will of the sovereign or the sovereign state.¹ The essence of law is reason. Law, in essence, is concerned with a particular quality of action; "it is a logical as well as a practical proposition."²

As we have seen, Grotius defined sovereignty as that power which is not subject to another will. The subject or owner of that power is the state as a perfect association; its special or particular subject is a person or persons, according to the arrangement peculiar to each state; the "first power."³

In its capacity as sovereign, the "first power" is above the law. But this is not to say that law is essentially that which emanates from the will of the sovereign, nor is it to say that the sovereign knows no law. Or, to put it differently, the proposition that the sovereign is the creator of law in the state is not a qualitative statement about the nature of law or the nature of sovereignty, but a logical statement about the condition of their existence. Volitional law is by definition dependent upon volition. It makes things unlawful by forbidding them; makes them obligatory by commanding them.⁴ Nonetheless, it derives

¹D'Entrèves, op. cit., p. 72.

²D'Entrèves, op. cit., p. 78.

³JBP Bk. I, ch. i, vii.

⁴Prol. 30.

its validity from the law of nature in that what it forbids or commands must be within the realm of that which nature permits, must be consistent then with the idea of law as expressing that which is not in conflict with rational or just society.¹ Similarly, by definition the power that is sovereign in the state must not be subject to another will else that will become by definition sovereign. Sovereignty, as a legal concept, is born with the legally organized community and takes its particular form from the nature of that community. Nonetheless it was conceived in the state of nature; it is a moral faculty,² and the body of which it is head, is a moral body.³

Not to take anything away from the above argument, however, I contend that the brilliance of the Grotian theory is its assertion that the state is nonetheless very much a self-contained entity. There is no doubt that the individual, and the natural society both concede "a greater right" to the state by the social compact.⁴ The constitution unique to each particular state is evidence that the state in a very real sense sets the terms of its own existence, declares its laws and their sanctions, establishes its legal order. Unless that order is adhered to, then, and the special sovereign

¹ JBP Bk. I, ch. i, iii.1.

² JBP Bk. I, ch. i, vi.1.

³ JBP Bk. I, ch. i, vii.2.

⁴ JBP Bk. I, ch. iv, ii.1.

authority to whose keeping that order is entrusted is obeyed, there is no state.¹

Far from disturbing the modern legal positivists in their Herculean efforts to define the state in terms of itself, or, to put the problem in its older form of expression, to separate the legal from the moral order (or indeed to make them one--the legal), Grotius admits that there is a degree of truth and of logical necessity to this arrangement. This is precisely the difference that is expressed by expletive and attributive justice, by volitional and natural law.² Volitional human law either within the state or among states exists solely to secure that internal or international order through which medium alone justice can be perfected. Expletive justice is the vehicle for attributive justice and its hallmark is order. This is the primary reason why there can be only one sovereign in the state, and why his commands must be obeyed.

For Grotius, rights by contract³ are conferred either by association or subjection. The state is described as the "most perfect" form of association, and one which gives the greatest right to the corporate body over its members.⁴ This

¹Ibid.

²The legal positivist would of course deny their necessary connection which for Grotius is an aspect at least equally as important as their difference.

³In chapter v of Book II, rights over persons are said to have their acquisition in three sources: generation, contract or crime.

⁴JBP-Bk. II, ch. v, xxiii.

is the essence of the social contract. There are, however, many different forms of state, many different forms of government; and in enumerating how many ways a free people may select a particular form of government, it is necessary only to say what is legally possible.¹ Hence, it is legally possible that a people may completely renounce its rights to govern,² and that the right of the sovereign may be acquired by voluntary subjection.³

In the case of total renunciation the sovereign right acquired by subjection is complete.. In all forms of the civil state, legal authority is conceded to a greater or lesser extent. Hence the right of the Ruler over subjects in the civil state is classified by public law as a right of contract arising by subjection. The relationship between subjects and the special subject (i.e. owner) of sovereign power in the state, then, is a relationship between those who are not equal, and is characterized by Grotius as similar to that between master and slave, parent and child, God and man.⁴ It is the concern of rectorial law (denoting a relationship of inequality) and attributive justice (which apportions according to desert).

¹JBP Bk. I, ch. iii, viii.2.

²JBP Bk. I, ch. iii, viii.3.

³JBP Bk. II, ch. v, xxxi.

⁴JBP Bk. I, ch. i, iii.2.

Grotius is careful to distinguish between the character of the sovereign as sovereign (and hence as superior) and the character of the sovereign as a member of the state.¹ In his latter capacity, the sovereign is as equal, and as such he is governed by equatorial law and expletive justice or the justice proper of the state. In his private capacity, then, he has the same rights and obligations which other individual members of the state have by virtue of private law.²

It is in the light of this understanding of sovereignty and the legal order in the Grotian state that the law of non-resistance must be re-examined. First and foremost, the law of non-resistance in the Grotian state is justified because order is the means whereby the state can achieve its end.³ Order does not create a just state, but without order, there is no state at all.

One might well argue, of course, that order is in danger of replacing justice in a state where sovereignty is neither lost nor limited by wrongdoing or neglect. But this would be to ignore an equally important tenet of Grotius'

¹JBP Bk. II, ch. xiv, i.2.; and ii.2.: "The private acts of a king...ought to be considered as acts not of the state, but of a part of the state, and therefore done with the intention that they should follow the common rule of the laws."

²Ibid. In Bk. I, ch. i, vi. Grotius had divided legal rights or faculties into private (of individuals) and public (of state over individuals, or community over its members). The sovereign is subject to the law as citizen, providing that as sovereign he has not exempted himself as citizen.

³JBP Bk. I, ch. i, ii.1.

political philosophy, namely that in every human law there is a "benign reservation" in favour of natural right when extreme necessity demands.¹ The sovereign may be the supreme law-making authority in the state, but the law of nature, in the last resort, is the supreme law.

Furthermore, upon the formation of the state, the greatest right may attach to the corporate body over its members,² but sovereignty as such exists in that body as an entirety and hence cannot be taken away from any of the component parts without their consent.³ The right of the whole over the part, then, is a right conferred or created at civil society's inception; a right, then, conferred by the parts which, in uniting, become more than their mere sum, and hence create a new right. The original right of each part before society, however, being a natural right, is inseparable from it. For this reason, the right of the parts which unite to form a sovereign body remains with them as a prior right and cannot be taken away by the whole no matter how great the need.

It is clear from these statements that the right which is granted by necessity is not a right created by necessity. Instead, it is a right created by nature, and

¹ JBP Bk. I, ch. iv, vii. and Bk. II, ch. ii, vi.2.

² JBP Bk. II, ch. v, xxiii.

³ JBP Bk. II, ch. vi, vi.

restored by necessity. The superiority of such a right, then, is a moral quality which attaches to it by virtue of having been granted by the law of nature. How little power the law of the state has, then, if as soon as it fails in the fulfillment of its natural duty, the law of nature takes over. It would be illogical in the extreme to consider Grotius' concept of sovereignty as sufficiently defined in terms of the state alone and of the unlimited power which it there enjoys.

As for the admonition to protect the power of the sovereign, even when necessity may justify resistance to his authority, this is a clear indication of the prestige and majesty which must always attach to his office.¹ The office is so clearly attached to the state rather than its individual subject or owner that to revile it would do harm to the state. Further, the matter of government, being necessarily concerned with the common good, is open to much criticism, and hence care must be taken to ensure that it be protected at least insofar as to enable it to function.

As we have seen, one of the chief grounds of resistance, and even death,² to the sovereign is his violation of the contract of state between sovereign and subjects. It is of primary importance to remember that the contract is sacred in Grotian theory precisely because it is a dictate of natural

¹JBP Bk. I, ch. iv, vii.6.7.

²JBP Bk. I, ch. iv, viii. This despite the fact that elsewhere he has said the sovereign should be spared. See supra, p. 37, n. 4.

law that contracts must be obeyed.¹ As we saw, the binding force of all positive law is derived from natural law.² It is a principle of natural law that rights legally established ought not to be violated,³ and included under legal rights or faculties are contractual rights and, correspondingly, contractual obligations.⁴

Besides limiting the right of resistance, Grotius also limited the manner of resisting. For the most part, even with just cause, resistance is limited to self-defense or a passive execution. This is thoroughly consistent with Grotian theory, and serves primarily to indicate the real conflict in which a citizen faced with an unjust sovereign finds himself.

The state, after all, is the means to his realization as a rational being; and order and obedience to sovereign authority, as constitutive of the state, are a means to that end. Grotius agrees with the ancients that "kings received authority in order that men might enjoy justice."⁵ It is also happily true that, in general, rulers do promote public tranquility, their deviations from this "straight road" being

¹Prol. 15. It is reasonable that men should require some means of obligating themselves one to another, and the pact is "the most natural method imaginable."

²Prol. 16.

³JBP Bk. I, ch. i, iv.

⁴JBP Bk. I, ch. i, v.

⁵JBP Bk. I, ch. iii, viii.14.

so infrequent as hardly to warrant notice, especially from the law, the law deeming it well to deal with generalities and admit its inability to deal with all cases.¹

Further, the state is a product of man's will, born of his need for society, and reinforced by his weakness as an individual.² It is a voluntary association whereby we may achieve collectively what individually would be beyond our grasp. The good of the individual is comprised in the public good.³ We ourselves have authorized the sovereign's authority and "the acts to which we have given our authorization we make our own."⁴ Further, the constituted order is approved by God himself.⁵

It is clear, then, what an "exceedingly weighty question"⁶ it is whether to offer resistance to the sovereign authority, for "no one wishes to bring harm upon himself";⁷ still less to bring harm to others.⁸ The constituted order contributes to our good.⁹

¹JBP Bk. I, ch. iv.3. And Bk. II, ch. i, ix.2. on sovereign wrongdoing: "A thing whose usefulness is impaired only in part does not at once cease to be of use."

²Prol. 16.

³JBP Bk. I, ch. iv, iv.4.

⁴JBP Bk. I, ch. iv, iv.1.

⁵Ibid.

⁶JBP Bk. I, ch. iv, xix.2.

⁷JBP Bk. I, ch. iv, iv.2.

⁸JBP Bk. II, ch. i, ix.2.

⁹JBP Bk. I, ch. iv, iv.1.

To state the matter of the obedience appropriate to the special subject of sovereign authority in its simplest form, then, kings are superior to people, and no one acquires a legal right against a superior.¹ But kings themselves are bound by the law of nature, and as such are answerable to God.² Nonetheless, as surely as injustice on the part of the sovereign in no way diminishes his power or curtails his right to exercise authority, so too it is equally clear that it would be morally wrong for any subject to obey any command of the king which is "manifestly wrong."³ Such a truth Grotius considers as proven both a priori and a posteriori.⁴ A subject may not be permitted to stand in moral judgement of his superior, but as surely as that superior is answerable to the law of nature, as sanctioned by God, so too is the subject answerable, even if this means disobeying the commands of him to whom obedience is owed and against whom no right can be acquired. To shed a different light on the passage already quoted,⁵ why else would a subject be held morally culpable for having "connived with [the king] in his offences... through silence." The obligation incumbent on the citizen as a result of the social contract cannot diminish the obligation

¹ JBP Bk. II, ch. xiv, vi.2.

² JBP Bk. I, ch. iii, viii.14.

³ JBP Bk. I, ch. iii, ix.1.

⁴ *Ibid.* "They would be saying what is true and is acknowledged among all good men."

⁵ *Supra*, p. 38, n.4.

placed on him by the law of nature. Society does not destroy nature; it fulfills it; and volitional law can only command or prohibit what the law of nature permits. Of course, resistance is not to be encouraged, nor is it legally permissible against a sovereign who has not broken the terms of his contract with the people. But it is always morally permissible--and indeed, demanded, in certain circumstances.

Furthermore, the right of resistance does not always remain at the passive stage in the Grotian state. Gierke points out that even natural law theories which (when discussing the rights of the sovereign as an entity separate from the people) vest absolute power in the sovereign body, reserve for the people both the right to the fulfillment of the contract of government and the right of regaining sovereignty upon alienation.¹ Grotius' theory does no less, the people reserving even the legal right to resist a sovereign by force and if necessary with death if he violates the specific constitution of the state whereby his power is conferred and defined.² It is a tenet of natural law that the constitution be binding. In fact, for Grotius, all human laws have a "benign reservation" in favour of natural necessity.³

¹Gierke, op. cit., pp. 44-45.

²JBP Bk. I, ch. iv, viii. And Bk. II, ch. xiv, ii.1.: "If a people has placed a king in power...subject to certain laws, his acts contrary to those laws can be rendered void by them, either wholly or in part, because to that extent the people has preserved its own right."

³JBP Bk. II, ch. ii, vi.4, and 2: "In direst need the primitive right of user revives, as if community of ownership

Far from remaining forever passive, then, our right may become an active legal right when a legal contract deriving its binding force from natural law is violated; or a moral right permitted to impact upon the legal order when "a greater necessity," a necessity in favour of natural law, demands.

How then is resistance to be viewed? It is a serious undertaking, not to be entered into lightly; a powerful right but one in the exercise thereof one must truly assess whether or not the "purpose of society" will be better served by long suffering or upheaval. The matter must always be assessed from the point of view of the reason for society's existence, and of our having limited our freedom voluntarily, and for the sake of a better end. One could regain the unrestrained freedom of the state of nature, but one would still be compelled (through expediency) and impelled (through sociability) to seek society. The choice is indeed difficult.

It is in the light of this understanding of Grotius' work too that his denial of popular sovereignty and indeed of government as existing "for the sake of those governed"¹ can be explained. The end of society is the creation of that order and tranquility, that soundness of legal structure, which alone can confer the right to do and the right to act. There are many different arrangements of society, and many

had remained, since in respect to all human laws--the law of ownership included--supreme necessity seems to have been excepted." And JBP Bk. II, ch. xviii, iv.6.: "All human laws have been so adjusted that in case of dire necessity they are not binding."

¹JBP Bk. I, ch. iii, viii.

different forms of state, some more efficacious than others. Obviously those that work best in Grotius' view (and I think this ought not to be taken as anything more than a personal preference of the jurist Grotius) are those in which power is consolidated. As is his wont, Grotius has decided the matter by examining both what is and what ought to be. Who can deny his finding about "what is"?¹ As for what ought to be, if some sort of autooracy is simply a personal choice of Grotius, yet his insistence that even when government is for the benefit of the governed the sovereign authority is not thereby affected, is a statement which must be accepted as logically and causally true if the state is both to exist and be effective.

Peace and order, then, are valuable; and Grotius is hardly a defender of the "Rights of Man" as unchanged by the state and forever giving him a claim against it. But his philosophy is not one of political quietism. If order is the means to the end, the end is society "not of any and every sort, but peaceful, and organized according to the manner of [man's] intelligence."² The question whether to resist is a serious one, and one whose answer may not be conducive to peace; but it is a course which may have to be taken if what

¹JBP Bk. I, ch. iii, viii.6. "What shall I say of this fact, that no republic has ever been found to be so democratic that in it there were not some persons, either very poor people or foreigners, also women and youths, who were excluded from public deliberations?"

²Prol. 6.

we have to gain is certain to outweigh what we will lose.¹ The state may indeed have the "greater right" over us; but it is not the only right, and the greatest right of all is that which stems from our very nature as rational beings, the right of the law of nature itself. The law of the state cannot possibly take precedence over the law from which it springs and in which it has its validity.

PART C: Some Problems Remaining

It remains to be seen whether Grotius' theory of sovereignty enjoys practical success within De Jure Belli ac Pacis. It has been shown that illimitability (as opposed to limitation by another will) and indivisibility (as opposed to division among wills) are characteristics which follow logically from the definition of sovereignty as a power not subject to another will. Similarly it follows, if not logically then at least in order that the state be effective, that such sovereign power ought to be obeyed. In other words, the establishment of the law of non-resistance is coincidental with the origin of the state, as its efficient cause. Grotius also makes the important distinction between rights and the manner of possessing them.² Sovereignty, as a right of the state, must be understood apart from the many and varied ways

¹ JBP Bk. I, ch. iv, vii.2. and 4. Elsewhere (Bk. II, ch. ii, viii.10.), in speaking of whether Christians should go to war, Grotius says that both capital punishment and just wars have their origin in "the love of innocent men," and Christian principles of loving one's fellow men ought to be obeyed unless "a greater and more just love stand in the way."

² JBP Bk. I, ch. iii, xi.

in which it is held and exercised in particular states, and hence in essence is not to be affected by these accidental attributes. Hence, sovereignty as such may be conferred either by election or succession;¹ for a short or indefinite period of time;² and as a right of use, temporary or permanent, or of full ownership.³ The particular mode and conditions of its existence are dependent upon the particular contract of society operative in the state.

The extreme importance of the societal contract⁴ for Grotius is evident in his detailed discussion of the exact nature of sovereign power under the headings of promise,⁵ divisibility,⁶ and alienation.⁷ In so far as the matter is not to be judged by the law of nature, all three serve to limit or characterize sovereign power only in so far as they are clearly included in the founding contract of the state. The promises of sovereigns as sovereign, for example, are to

¹ JBP Bk. I, ch. iii, x.5.

² JBP Bk. I, ch. i, xi.2.

³ JBP Bk. I, ch. i, xi.1.

⁴ I here use the term to refer to the particular contract denoting the character of a particular state or society, as opposed to the original contract of society denoting the transition from the state of nature to the social state.

⁵ JBP Bk. I, ch. iii, xvi. and Bk. II, chs. xi and xiv.

⁶ JBP Bk. I, ch. iii, xvii. - xx.

⁷ JBP Bk. II, ch. vi.

be judged by the law of nature,¹ but they do not limit the exercise of sovereign right (in a strict sense)² unless the right has been originally conferred with limitations.³ Furthermore, the sovereign power cannot be divided, even by the sovereign himself,⁴ unless that division is strictly provided for at the inception of the state.⁵ As for the right of alienation, this does not attach to sovereignty in the same way it does to ownership,⁶ and the sovereign right exists with the full power of transfer only if it is possessed absolutely;⁷ only, then, if the founding contract constituting the manner of possession of sovereign authority has so decreed. In fact, alienation is not a natural right, but one introduced by man. As such it cannot attach itself to a subject without being conferred, and must always defer to natural right in times of extreme necessity.⁸

Grotius' tendency to describe the workings of the state in terms of a particular contract governing it leads

¹JBP Bk. I, ch. iii, xvi.1. and Bk. II, ch. xi, v.3.

²JBP Bk. I, ch. iii, xvi.2.

³JBP Bk. II, ch. xiv, ii.1. and Bk. I, ch. iii, xvi.4.

⁴JBP Bk. I, ch. iii, xvii.1. and xviii.

⁵JBP Bk. I, ch. iii, xvii.1..

⁶JBP Bk. II, ch. vi, i.1. and vi.

⁷JBP Bk. II, ch. vi, iii.

⁸JBP Bk. II, ch. vi, vi.

to several major problems with his work. Otto von Gierke points out that it is a serious problem with any social contract theory which posits a pact between society and those in whom society vests authority that it must necessarily view the people as an entity independent from the sovereign.¹ Without going as far as Gierke, it can be said that this is a flaw in Grotius' theory which is particularly disappointing given his definition of sovereignty as existing in the state as the common and the ruler as the special subject of power.² As Gierke contends, Grotius never fully achieves the notion, so promising in his original definition, of sovereignty existing in the state as in a corporate whole,³ a body "entirely filled."⁴ Having its origin in the individual and agreement among individuals, the state never achieves a personality beyond the collection of individuals in relation to one another.⁵ As such,

¹Gierke, op. cit., p. 53.

²JBP Bk. I, ch. iii, vii.2.

³Gierke, op. cit., p. 45, distinguishes between a corporate body, a true unity (*universitas*) and a collective body or partnership (*societas*) where the members remain distinct despite their connection. There is much textual evidence to show that Grotius uses the term in both senses, but in his overall philosophy, he fails to develop adequately the nature of the state as a real juristic person. I do not wish to suggest, of course, that the Gierkian theory is itself without problems, but I do think it is valuable in helping articulate that notion of the state as a corporate unity which Grotius seemed to promise, but never developed.

⁴JBP Bk. II, ch. ix, iii. and ch. vi, vi.

⁵This is not less evident in Grotius' derivation of international law and rules governing the relations of states from private law and rules governing the relations of individuals within the state.

then, the people retains a unity and personality only in a superficial, external sense. As a result, the true cause of justice in the state is lost. The state itself as founded on justice is no longer unified by it. The people possess no rights inherently and by nature as a true subject of sovereignty for they are unified only in form.

What tends to happen in Grotian theory, then, is that the only true subject of sovereignty is the only true individual (or collection of individuals acting as one). In other words, only the special subject of sovereignty truly retains the sovereign right. The people continue to enjoy many rights in the Grotian state, but this is not the same as saying that they share sovereignty. Their rights do not limit the sovereign authority as such. Of course the people may share sovereignty, and share it most fully when the particular constitution of the state has retained that authority for them. But this is quite by accident. It is the result of a particular constitution, and not an inherent right vested in them by virtue of their role as "common subject."

This is why Grotius fails to realize that the real problem in a divided sovereignty is not to precipitate agreement among the two subjective wills,¹ but to precipitate the conformity of both subjective wills with what may be called the "objective will" of society, understood as the rule of right reason; or, in other words, with the notion of society

¹ JBP Bk. I, ch. iii, xx

as rational. Grotius was right to fear a situation in which "the king on the one side, and the people on the other...should be trying to take cognizance of the same matter, each by virtue of its power,"¹ but it is a major flaw in this theory that he failed to resolve the duality of ruler and people into a unity of the sovereign state.

The greatest problem resulting from Grotius' failure fully to develop the concept of sovereignty as existing in the full body of the state is that it becomes possible for the special subject of sovereign power to own it exclusively, as a patrimony, with full right of transfer.² In this particular instance, sovereignty would seem hardly to be different from the possession of it. The full sovereign right is vested in the individual (or individuals) who possesses absolute power. Grotius did, of course, attempt to differentiate between the sovereign, as sovereign, and the sovereign as private person, but the latter was subject to the laws of the state only in so far as he had not been released from them by the sovereign as sovereign; and never so that he could be punished for his wrongdoings.³

More important than this, though, this particular manner of holding sovereign power (as a patrimony) would seem altogether to exclude the people as a subject of sovereign power,

¹JBP Bk. I, ch. iii, ix.2.

²JBP Bk. I, ch. iii, xii. and viii.6. and Bk. III, ch. xx, v.3.

³JBP Bk. II, ch. xiv, ii.2. and v.

and even though this may be a perfectly acceptable form of the state in Grotian theory (it being necessary to say only what is legally possible); yet such an arrangement would seem to stand in glaring opposition to what is intended by the expression of sovereignty as a right born with the state itself as a product of the free will of man in accordance with his nature and his reason. Grotius speaks of the state as that sort of whole to which the parts are integral and hence cannot be alienated without their consent.¹ It is a body unlike a natural body (whose parts cannot exist without it) precisely because it is formed by voluntary compact. As such "the right of the whole over its parts must be measured from the original intent, which we ought not to believe was such that the body should have the right to cut off parts from itself and give them into the power of another."²

If the state is composed thus, it is inconsistent to imagine its component parts or the parties to the compact (be they individuals or groups of individuals) having renounced completely their interest in the government or the state as a whole. This is of course a legal possibility in the Grotian theory, but surely it is not the "original intention" of those entering society any more than the parts may have been supposed to have originally intended that sovereignty over them could be alienated without their consent. Further, sovereignty as a

¹ JBP Bk. II, ch. vi, iv.

² Ibid.

patrimonial right would seem far removed from the original notion of sovereignty as the "first product" of that "essential character" in a people which is "the full and perfect union of civic life."¹ To reduce the roll of the people to that of simply having made the original choice of either society or even the particular form of government within the state² (without appeal or change) is to alienate them from that very medium through which their meaningful existence is to be realized.

This is the exact danger involved in separating so completely the compact of state from the particular manifestation of that compact. It is only in the light of this significant failure in Grotius' theory that one can interpret such strange notions as the "honour" of obeying a king by whose act unworthy things become worthy;³ or that of "manifest wrong" failing to curtail the sovereign power;⁴ or the need for subjects cheerfully to endure the injustice inflicted upon them by the caprice of him who holds the sovereign power.⁵ Grotius attributes man with reason, but in such a situation it seems that this reason, as in Hobbesian theory, is useful only at the point

¹ JBP Bk. II, ch. ix, iii.

² And at times this would seem to be hardly a real choice at all. (JBP Bk. I, ch. iii, viii.3, 4, and 5.)

³ JBP Bk. I, ch. iv, ii.2.

⁴ JBP Bk. I, ch. iii, ix.

⁵ JBP Bk. I, ch. iv, i.3.

where man perceives society to be a better course than each-for-himself. Man, however, and man-in-society continues to be rational, and the nature of his commitment to the state is not that of a final surrendering of power to a governing body, but instead, a continuing reaffirmation of that original commitment. As de Jouvenal theorizes, the subject is part of an "aggregate" group;¹ the support he offers the sovereign authority is not that of a will merely "added" for some once-for-all purpose; rather it is the continuing support of a will which has made the aims of the sovereign his own. Grotius never fully appreciates the state as a dynamic institution (with conflict in human interaction a necessary part of its life), or the subject as a concerned member of de Jouvenal's "aggregate" of wills, or indeed the ruler as "entrusted" in Locke's sense, and hence of the relation between ruler and subject as one of compact based on such trust; and all this because his exposition of sovereignty in its day to day life fails to develop the notion of "the sovereign power as residing in the king as head, and remaining in the people as the whole body, of which the head is a part."²

How far, then, are the particular forms of state removed from its original ideal? In patrimony, sovereignty is possessed by the ruler as a property right, thus excluding both the people and the state as an organic whole from its enjoyment. In

¹de Jouvenal, op. cit., p. 19.

²JBP Bk. I, ch. iv, i.3.

usurpation, those who have not acquired a legitimate right by long possession are due obedience in essential matters in order that the state not be disturbed.¹ Since disobedience is permitted in non-essential matters,² especially if the usurper is attempting to establish a legitimate right thereby, the matter would seem to be decided solely in terms of the internal tranquility of the state, with no attention paid to the legitimacy of the right or, more important, the consent of the people. In tyranny, despite the necessity of basing the legal order of the state in justice, Grotius' ruler may guarantee order and relative peace, but do nothing for the good life and justice within the state. A tyrant, after all, may keep the contract, and still be a tyrant. Again, the form is not adequate to the expression of the necessary content--that of reason of which the law must be a voice.

But the saving grace of Grotian theory is that at least the matter doesn't rest with rights granted by contract. There is always a benign reservation in favour of natural right when circumstances warrant.³ We may think of it in terms of the original contract overriding the societal contract when necessity demands.

Grotius is at fault in not insisting that the particular social contract be more indicative of the founding or original

¹JBP Bk. I, ch. iv, xv.1.

²JBP Bk. I, ch. iv, xv.2.

³JBP Bk. I, ch. iv, ix. and xi. and Bk. II, ch. vi, vi.

contract of state. He is at fault in reserving for the people a right akin to the right of sovereignty¹ only when necessity makes it clear that what was originally intended in the formulation of the state is being thwarted. Otherwise, the people as subjectum commune is never understood to be the real subject of sovereign right.

Yet, in the end, Grotius is not unfaithful to his theory of state. His sovereign is not Hobbes' sovereign, "as great as possibly men can be imagined to make it";² at once both the protector and the creator of the people who know no existence except in him. Grotius retains for the people, as individuals, a large body of rights. Furthermore, his sovereign, even though possessed of sovereignty as a patrimonial right, is the guarantor of our well-being; and while he is not in fact "powerless to do wrong," is accountable to God for his adherence to natural law and divine law. And justice, not consent or contract, is still the basis of the state. To quote Tooke, "It would seem, then, that Grotius' position was in many ways realistic. He took notice of the individual and the corporate aspects of a political community, and as

¹Sovereignty is so definitely a legal concept in Grotius that I think it would be a misnomer to apply it to the right of the people in the state of nature, although Gierke cites Schmier, Boeckler, van der Mullen, Kulpis, Hert and Iskstatt as going so far as to suggest that what Grotius means by subjectum commune is nothing more than the original or inherent majesty of the people (Gierke, *op. cit.*, p. 334, n.4.). I cannot hold this view as I think Grotius clearly meant subjectum commune to refer to a right of the people to sovereignty after the social contract, although as I have shown, Grotius doesn't succeed in developing this concept.

²Thomas Hobbes, *Leviathan*, ed. and abridged with an Introduction by John Plamenatz, Fontana Philosophy Classics (London and Glasgow: Collins, 1962), ch. xx, p. 203.

cleanliness is next to godliness, he accepted common consent as next to justice... In the context of community decisions and life, he was concerned to allow the fullest individual liberty, freedom of conscience, and respect for individual rights.¹ After all, the social contract signifies that the state is formed by a voluntary act of free and rational individuals in a state of nature. It is not simply that we are by nature social; we have by a deliberate act of will chosen that order which is consonant with our intelligence, and contributes to our good. Both the right to govern and the law of non-resistance spring from this source; but as the nature and purpose of society is the development of good and reasonable communal life, any act truly contrary to this purpose cannot, by the law of nature, be sanctioned.

¹ Tooke, op. cit., p. 226.

CHAPTER III

THE SOVEREIGN STATE IN INTERNATIONAL RELATIONS

The law of nations and external sovereignty

In his division of law into natural and volitional,¹ Grotius sub-divides the latter into either human or divine.² Human law is then further divided into municipal law (the law of the state), that which is narrower in scope than municipal law (as the commands of a father), and that which is broader in scope than municipal law, namely the law of nations. I have already discussed the different senses in which Grotius uses the terms "law of nations" and "law of nature"; and the relation between the two. It is sufficient here to say that for Grotius, the operative jus gentium is that law which governs states in their relation to one another,⁴ and derives its force from agreement between nations.⁵ Although the exact relationship of the law of nations to the law of nature in Grotius is a matter for debate, the former would seem to coincide with the latter at the point where what has

¹JBP Bk. I, ch. i, ix. (See supra, p. 8, n. 1.)

²JBP Bk. I, ch. i, xiii.

³Supra, p. 25.

⁴JBP Bk. II, ch. viii, i.2.

⁵JBP Bk. I, ch. i, xiv; Bk. II, ch. viii, i.2.; and Bk. II, ch. iii, v. (Grotius wants to make the distinction that it is agreement and not simply coincidence.)

obligatory force among nations is also that which is in accord with rational and social nature,¹ and is therefore part of the law of nature in the strict sense of being either commanded or forbidden by it, as opposed to being merely permitted.² Of course, Grotius was concerned to show that much law which has its origin in the will of nations is not "truly and in all respects law,"³ being consonant with the law of nature in external appearances only.

The chief difference between the legal arrangement of the internal order and the legal arrangement of states in their external relations with one another is immediately evident. Whereas in the internal order, law is easily attributable to a first point, the highest authority in the state, a sovereign will; in the external arrangement there is clearly no superior power from whose will such law emanates and by whose power it is enforced. States exist, as it were, only in a natural arrangement. There is no single authority over all, and the sanctions used to ensure compliance are not nearly as well organized or effective as in the internal order. It

¹JBP Bk. I, ch. xiii, and Prol. 41.

²JBP Bk. II, ch. viii, v. and Bk. II, ch. iii, v. and vi. Of course human law, including the law of nations, may go further than nature, but never contrary to it. What nature permits is, strictly speaking, outside the law of nature proper.

³Prol. 41. As I interpret this passage, Grotius is referring to laws which are in force by custom or common usage, but do not possess the quality of moral baseness or necessity as dictated by right reason.

is for just such reasons that many modern day legal positivists deny to international law the name of law.

If law is defined solely in terms of the highest will in the state, and that will is defined as that whose actions are not subject to the legal control of another, then it will indeed be a "logical impossibility"¹ for the state to subject itself to a higher authority. I have already shown that, within the state, even though law is defined by Grotius as a product of sovereign will, command is not alone sufficient to characterize it. Since law is first and foremost what is just, positive law must always be judged by the law of nature. This is not to say that the latter always justifies the overthrow of the former for positive law, as the cement of the state, is still the means to the fulfillment of our nature, and that which gives practical effect to those rights to which nature entitles us. But the fact that we can and must continue to make the law of the state ever approximate to natural law is significant in Grotius' theory.

The difficulty in the internal scheme was to show how both command and reason characterize law. In the external order, since law cannot be characterized as command, the role of the law of nature is more easily discernible. But before we discuss the content of international law, let us look once again at its form, and assume for a moment that the international

¹Edward Dumbauld, "The Place of Philosophy in International Law," University of Pennsylvania Law Review, LXXXIII, No. 5 (1935), 596.

order could be arranged in such a way as to define it in terms of a sovereign will similar to that operative internally in the state. As leading jurists have pointed out, this would really mean positing a system of law that is supernational rather than international,¹ but since many legal theorists clearly view this arrangement as a desirable solution, to many of the problems posed when international law is not expressed in terms of command, and since law as command plays a significant role in Grotius' concept of internal sovereignty, it is interesting to examine the notion in terms of international relations.

It is a simple matter, perhaps too simple, to draw an analogy between individuals in the state of nature and individual states in relation to one another. Those who would do so must conceive of states submitting themselves to a central authority in much the same way individuals in a state of nature agree to a social contract investing a sovereign with supreme power. The problem with this is, as Hobbes perceived,² that states are simply not as weak in isolation as are individuals (and hence, by implication, are not equal) or, in other words, that the international order is not as essential to the well-being of states as the state itself is

¹Found, *op. cit.*, p. 80; and Edward Dumbauld, "Hugo Grotius: The Father of International Law," Journal of Public Law, I, No. 1 (1952), 137.

²Hobbes, Leviathan, ch. xiv, as cited by Hersch Lauterpacht in "The Grotian Tradition in International Law," British Year Book of International Law, XXIII (1946), p. 26.

to the individual. States are different from individuals.¹ They are more powerful, a variety of political forces and influences are at work within them, and their order consists of individuals already subject to a supreme authority, the sovereign authority within the state.

Besides the practical inefficacy of controlling powerful organisms, any supernational law-keeping force would, as so constituted, posit a threat to the internal sovereignty of the state. Furthermore, whereas the bond between individuals in a state stems from a host of other sources besides weakness, Grotius having already emphasized sociability, and modern psychology and sociology continually asserting new theories about social bonding, the new supernational authority as an entity not born of the needs or nature of individuals, but existing to monitor and control entities already sovereign in their own right, would fall prey to the same problems inherent in any institution primarily characterized by pure force. Just as command alone was not sufficient to define and maintain the legal order in the state considered internally, so it is even less adequate to explain the binding force of law among states considered externally, as sovereign entities in relation to one another. Indeed whereas a sovereignty of pure force, although unjust, may enjoy limited

¹ Pound, *op. cit.*, pp. 73-90, *passim*, cites the failure to recognize this important fact as one of the chief reasons why modern international law failed to provide a theory as suited to the facts of modern international life as classical international law was to the facts of seventeenth and eighteenth century international life.

success in the internal state, it is contrary to the very notion of sovereignty among sovereign states.

If the internal sovereign is a will illimitable by another will, then it is logically and consequentially inconceivable that states organized internally in relation to a first point of sovereign power could subject themselves to a supernational sovereign. The authority of the sovereign entity would be continually dependent on the will of consenting states. The situation would be analogous to that at Bk. I, ch. iii, viii, 13, where Grotius rejects the contention that they who invest authority in another are superior to him on the grounds that this would necessitate a relationship the effect of which is continually dependent on the will of the constituent authority. Such a relationship, according to Grotius, cannot constitute a situation whereby sovereign authority is conferred.

The factor of consent in international law

One of the main contributions of Grotius' work and the basis for his reputation as the father of international law is his insistence that states in international relations must not be allowed merely to seek their own interest;¹ and his belief that a rational and binding system of law among

¹ The denial of international actions based on will (or "reasons of state" as we would term it today) is strongly supported by his refusal to allow a state to attack a neighbouring state whose power threatens that state's existence (JBP Bk. II, ch. i, xvii.). The same point is exhibited generally in his exposition of the unjust causes of war (JBP Bk. II, ch. xxii.).

states can be achieved. In other words, Grotius believes that international law and hence world peace are possible. Such is his reason for writing De Jure Belli ac Pacis: "Fully convinced, by the considerations which I have advanced, that there is a common law among nations, which is valid alike for war and in war, I have had many and weighty reasons for undertaking to write upon the subject. Throughout the Christian world, I observed a lack of restraint in relation to war, such as even barbarous races should be ashamed of; I observed that men rush to arms for slight causes, or no cause at all, and that when arms have once been taken up, there is no longer any respect for law."¹

Within the state, law was made possible by an internal structure ordered in relation to the first point of sovereign power. If a supernational sovereign will is an inconceivable (perhaps even undesirable) entity, how then is international law possible?

Grotius characterizes volitional international law as that which receives the consent of nations. Just as law in the internal state secures rights and creates obligations for individuals in their relations with one another, so in international relations, law serves to outline the rights and obligations of states in interaction. It provides the framework, then, as it did within the state, for rational and ordered life. When such rights are infringed or

¹Prol. 28.

obligations unmet, the injured party has the right to demand redress. When the sanctions established by law are themselves insufficient to provide redress for injuries suffered or threatened, resort may justly be made to arms. It is for this reason that Grotius, before proceeding to the just causes of war in Book II, outlines in some detail the rights and obligations of individuals and societies, including sovereign societies, as ordained by law, for it is precisely at the point where judicial settlement fails that war begins, and may properly begin.¹

The consensual basis of international law in the Grotian scheme is stated best in the form that contracts between states must be honoured, and promises kept.² For Grotius promises are a matter for the law of nature, the subject matter of natural justice for "nothing is so in harmony with the good faith of mankind as that persons should keep the agreements which they have made with one another."³ A parallel is drawn between the right to property ownership (the right to own something) and the right to promise (the right to do something).⁴ For Grotius, a promise confers a

¹JBP Bk. II, ch. i, ii.1.

²This is comparable to the pacta sunt servanda which has been called the "basic norm" of modern international law.

³JBP Bk. II, ch. xi, i.4.

⁴JBP Bk. II, ch. xi, i.3.

natural right;¹ and if perfected, if made according to the requirements of civil law, a legal right, on the promisee.

Many treaties or contracts between states have their force simply by virtue of the consent of the parties; and their content may either establish the same rights as the law of nature, or add something beyond it.² Grotius makes it clear, however, that regardless of the content of such agreements, that is, regardless of whether the content of such law is the same as or goes further than natural law, the obligation to keep them cannot arise solely from consent. We need only to refer once again to the "grandmother passage":³ mutual consent (the same mutual consent which also made the contract of state possible) is born of the law of nature which is born of the nature of man. Brierly is correct in saying of Grotius; "His jus gentium had by no means lost its original sense of a common law of mankind."⁴

Grotius' point is really quite simple. Consent alone cannot provide the basis for obligation in international law.⁵

¹ JBP Bk. II, ch. xi, iv.1. "From this it follows that the obligation to perform promises arises from the nature of immutable justice, which in its own fashion is common to God and to all beings possessed of reason."

² JBP Bk. II, ch. xv, v, and vi.

³ Prol. 16.

⁴ Brierly, op. cit., p. 22.

⁵ In his book entitled Natural Law, A.P. D'Entrèves makes for our time the same point which Grotius made. His theme is that both the obligation to obey the sovereign (the

The obligation to obey that to which one has consented is itself a natural law-tenet. "It is a rule of the law of nature to abide by pacts (for it was necessary that among men there be some method of obligating themselves to one another, and no other natural method can be imagined)."¹ Promises have an inherent moral force. They bind universally because they are universally binding. The propositions that contracts ought to be honoured and promises kept are proven a priori by the necessary agreement of such statements with the rational and social nature of man. They are also commonly accepted by good individuals and "healthy" nations as a reasonable and dependable way of ordering relations.²

It is the role which the law of nature plays in defining both concepts which provides the link between internal and external sovereignty. Just as within the state the civil laws and the sovereign as the law-maker provide the efficient cause for obedience, so in international relations consent is the efficient cause of obedience to jus gentium. In both cases,

basic norm of national law) and the rule that contracts must be kept (*pacta sunt servanda*: the basic norm of international law) remain at the hypothetical stage unless they are actually the case. The test of their validity, then, must lie beyond them; but the recognition that the ultimate test of the validity of law lies beyond itself is nothing but a natural law proposition. In an amusing word of caution to H. L. A. Hart, d'Entreves points out that the game analogy is all very well for defining the form of law; but, unlike cricket, in law one needs to know not only how to play the game, but why. Law after all is more important to us than cricket; it is not a game!

¹ Prol. 15.

² Prol. 46.

the final cause is the achievement of a legal order which is consonant with the nature of a society of individuals or nations endowed with reason. Law, then, both within the state and within the world, must be just.

It is precisely because volitional law, whether municipal law or the law of nations, is just, that the law of nations properly deserves the name law. One may compare a quote from Hooker: "They who are thus accustomed to speak apply the name of Law unto that only rule of working which superior authority imposeth; whereas we somewhat more enlarging the sense thereof term any kind of rule or canon, whereby actions are framed, a law."¹ In other words, neither a supreme law-maker nor an effective sanction are necessary to the creation of law. Natural law dictates that there be legal order among nations. It is for this reason that whereas within the state the will of the sovereign must be incapable of limit by another will, in international relations the same sovereign can be bound by the law of nations.² It is a tenet of natural law that the law of nations which is properly and truly in all respects law³ is obligatory.⁴ It is as Figgis says: "The

¹Hooker Of the Laws of Ecclesiastical Polity 1.3.1.

²This explains, for example, why sovereignty may be vested in one who is bound by an unequal alliance. JBP Bk. I, ch. iii, xxi.

³That is, as I have said, the jus gentium which is not contrary to jus naturale. Supra, p. 80, n.3.

⁴JBP Bk. I, ch. iii, xvi.1.

fundamental basis of the whole system of Grotius is the claim that men are in a society bound together by a natural law which makes promises binding.¹ At its inception, then, international law was the expression of morality in the world.²

Grotius makes it clear that in the international as well as the national scheme, the law of nature commands sociable behaviour. This is not to deny that states may sometimes find it expedient to bond together under a single international law. "Just as the national who violates the law of his country in order to obtain an immediate advantage breaks down that by which the advantage of himself and his posterity are for all future time assured, so the state which transgresses the law of nature and of nations cuts away also the bulwarks which safeguard its own future peace."³ But Grotius is not Hobbes; he is as little a pessimist about the nature of states as he is about the nature of individuals. Hence even powerful states which, under the Hobbesian scheme, would have no need of union to survive, must submit themselves to international law. He continues, "Even if no advantage were to be contemplated from the keeping of the law, it would be a mark of wisdom, not

¹Figgis, *Die Verfassung des Völkerrechtsgemeinschaft*, as quoted in Edward Dumbauld, *op. cit.*, p. 136, n. 138.

²I owe this formulation of the spirit of Grotian philosophy to Pound, *op. cit.*, who views modern international law as differing from classical international law in that the former attempts "to put morals in terms of law, not law in terms of morals" (p. 79).

³Prol. 18.

of folly, to allow ourselves to be drawn toward that to which we feel that our nature leads.¹ As in the national scheme, so in the international, expediency is not the reason for the obligation to obey the law, but the reinforcement of that reason.²

Only an international law based on justice can compel the acceptance of it by nations.³ The pacta sunt servanda, the basic rule of international law, cannot itself be consensual, cannot itself provide the basis for obligation. Reason alone can make it valid and the Rule of Law itself is derived from the law of nature.

It is only as a rational law that a law of nations in Grotius' time and in our time is possible. The unity of Christendom having been dissolved, Grotius sought the only remaining ground for agreement among nations in natural reason.⁴ But just as the Grotian theory provided a solution to the problem of international relations among newly emerging states in the seventeenth century, so in our day it enables us to avoid many of the pitfalls which threaten international law. As reason was the source of international law, so too international law cannot exist without it. The cause of justice

¹ Ibid.

² Prin. 16.

³ As Tooke, op. cit., p. 219, points out, common consent alone could sanction such immoral acts as devil worship or massacre.

⁴ This is why Figgis, in Political Thought From Gerson to Grotius, argues generally that Protestantism was the necessary condition for the rise of international law.

in international relations cannot be served by basing jus gentium in the will of a supreme authority. This is precisely why a supernational agency, even if it were feasible, could not by itself constitute a just international order. Such is the Grotian legacy.

The character of the sovereign externally considered

It was argued that the notion of the Ruler as an individual or collection of individuals versus the People in the international state diminished the concept of the sovereignty of the people and ruler considered as a corporate unity. Similarly, when the international forum is considered, the same fault makes it difficult to comprehend how sovereign states can be the subjects of international law. Just as Grotius failed to develop the concept of the state as a whole when considering its internal structure, so in international relations he failed to make states themselves, as corporate entities, the true subjects of international law. As Gierke argues, "Wherever Grotius referred to a "subject" of public or international rights, he specified as such either the princeps or else the populus in the sense of the collective community,"¹ and he often used the two terms interchangeably. Just as the subjectum commune had failed to win its bid for sovereignty in the internal state, so too it failed to become the sovereign in external relations.

¹ Otto von Gierke, The Development of Political Theory, trans. by Bernard Freyd (London: George Allen & Unwin Ltd., 1939), p. 167.

Given that the concept of the state as a fundamental, self-contained whole is so important to international law today, the absence of such a notion in Grotian theory marks a significant difference between that theory and the modern. For Grotius, as for most other natural law theorists of that day, the sovereign state in international relations is represented by the same sovereign who heads the internal state. In fact, for Grotius, the subject of international rights and duties is most often the person¹ of the special subject of sovereignty within the state. And in expounding the laws governing nations, Grotius' method is to transfer the laws governing individuals to individual states.²

Despite the problems which this presented in the internal theory of sovereignty, Grotius' tendency to regard the special subject of sovereign authority in the internal state as its same representative in international relations was perhaps the very factor, so alien to modern philosophical thought about the relations of sovereign states, which made international law possible. I say this simply because for natural law theory of the seventeenth century, the individual--his duties, rights, ability to do and to have--is the basic unit. If a natural law theory could be expounded to treat of individuals

¹...or a group of individuals, but since the problem is the same in either, I will use "individual" for simplicity's sake.

²Evidence for this abounds in Book II, where a parallel is drawn between the sources from which lawsuits arise and the causes of wars. Also at Bk. II, ch. i, xvi. Grotius moves easily from the rules governing private wars to those governing public wars taking into account only a certain "difference in conditions."

in society, then it was a simple step to transfer this same body of just and reasonable rules to states represented by individuals in international society. After all, the sovereign as the person in whom the interests and activities of the state are embodied was already an individual familiar with the moral and rational restraints of natural law, divine law, and the law of nations. Even in the internal state, a definition of sovereignty by power alone was inadmissible.

In the international forum, the importance of developing the concept of sovereignty as a moral as well as a legal concept becomes even more evident. Independent sovereign states, knowing no common superior, could behave toward one another, in peace and in war, with total lawlessness. The new national states, fortified by wealth from taxes and strength from armies, could only be restrained in their might by a common, reasonable rule of law agreeable to all; or rather by natural reason as known and applied by the individual or individuals who constituted the ruler of the state. The ruler of the internal state was already subject to the law of nature. Reason demanded that this same individual, as the representative of the state in international relations, continue to be guided by natural reason.

Such was the Grotian concept of the sovereign externally considered. The state is not an entity like a person (and hence susceptible, as all such organisms, to becoming a machine, a great Leviathan). Instead the state is composed of

persons,¹ and represented by a person. The sovereign is not an abstraction, but a real individual, a rational and moral entity, capable of being guided by reason in the world. As such, and this is essential to understanding the Grotian theory, his will and his consent are alone not sufficient to create international law. That which he does and that to which he consents must, as always, be in accordance with the rational and social nature of man.

Grotius' tendency to avoid the view of the state as an organic unity with a personality transcending both Ruler and People, also enabled him to have more regard for individuals as individuals in the international order. We have already seen how, even when the ruler possessed sovereignty as a property right, municipal law retained a significant body of rights for the people as an entity separate from the ruler. Due regard was always given to the individual and the family as true "organic" entities; and international law growing out of municipal law, being the same law with a "broader scope,"² retained this respect for the individual member of the state.³ Perhaps the

¹Lauterpacht, op. cit., p. 27, uses these words in describing the significance of Grotius' identification of the state with the individual. He also indicates the importance of remembering today that "behind the metaphysical state there are the actual subjects of rights and duties...individual human beings." He quotes from the proceedings of the Nuremberg trials: "Crimes against international law are committed by men, not by abstract entities."

²JBP Ek. I, ch. i, xiv.

³Dumbauld, op. cit., p. 118, n. 8, points out that whereas international law prior to the World Wars dealt only

most striking example of this is Grotius' contention that, even in war, retribution should be sought only against those individuals who have themselves done wrong, it not being sufficient "that by a sort of fiction the enemy may be conceived as forming a single body."¹

Differences in internal and external orders in regard to individual rights

Despite this emphasis on the individual, and the fact that both civil law and international law are derived from natural law as it pertains to individuals, the freedom of action which belongs to the individual as a moral agent would seem to be given broader scope and effect in matters concerning the state in its external relations, rather than internally. This probably stems from the fact that self-defence, as one of the primary causes of just war, is also one of the basic natural rights of the individual.² Hence an innocent subject is not bound by law to sacrifice himself to the enemy for the greater good of the state.³ Also, hostages ought not to be

with relations of states inter sese, the more modern trend which recognizes that individuals have rights or duties under international law regardless of their state of origin, represents a "recurrence to Grotius."

¹JBP Bk. III, ch. xi, xvi.2. and another example: that individuals who did not vote for a decision carried by the majority should not be responsible for that decision, JBP Bk. II, ch. xxi, vii.2.

²JBP Bk. II, ch. i, iv.1. "In nature there is much less regard for society than concern for the preservation of the individual." And at Bk. II, ch. xxvi, vi. subjects are allowed to take up arms to defend themselves even in a war that is unjust.

³JBP Bk. II, ch. xxv, iii.

put to death unless they themselves have done wrong. Grotius says that to hold the opposite view would be to assume what is false, namely that the individual's right over his own life passes, by tacit or expressed consent, from him to the state.¹ Furthermore, and even more surprising, Grotius allows to the individual citizen the right of conscientious objection.²

Now it is clear, especially from the last example, that the subject does not enjoy the same degree of freedom in the internal state. It is interesting to compare the right of the citizen to disobey the sovereign's call to arms with Grotius' treatment of the law of non-resistance in the state. As we saw there, unless the sovereign completely disregarded the law of nature, divine law or the law of nations, obedience was owed him, even to the point of considerable suffering, for the interest of peace and order within the state. On the other hand, subjects are not bound to obey the sovereign if they truly believe the cause of the war to be unjust.³ Within the state, however, subjects are powerless to enforce a right against the sovereign, even though their cause be just.⁴

In arguing for conscientious objection, Grotius first offers the argument⁵ that superiors bear responsibility for

¹ JBP Bk. III, ch. xi, xviii.1. Grotius continues that the right over one's life can't be transferred because our lives are owned by God.

² JBP Bk. II, ch. xxvi, iii, v.

³ JBP Bk. II, ch. xxvi, iii.

⁴ JBP Bk. I, ch. iv and Bk. III, ch. xix, vi.

⁵ JBP Bk. II, ch. xxvi, iv.

the decision to make war and the role of the subject is not to "wonder why" but simply to obey. He then presents the contrary view, with which he agrees, and the reason given is that, when there is doubt, one is bound to take the safer course, and in this case the safer course is not to fight.¹ For this reason, too, the charge that disobedience to the sovereign is a dangerous course is dismissed on the grounds that disobedience in this case is the lesser of two evils. And to the argument that such a principle may precipitate the state's ruin since it is not always possible for the sovereign to make the cause of war public, Grotius answers that whereas the persuasive cause may need to be hidden, the justifiable cause ought always to be made clear to those from whom it expects obedience.² Wisdom may be the virtue characteristic of a ruler; "but justice is the virtue characteristic of a man, in so far as he is a man."³

This argument is curious precisely because both obedience to the sovereign and the well-being of the state are sacrificed for the freedom of the subject to decide individually, and according to his sense of justice, on a matter of extreme importance to the state. In the internal order, however, not only is the individual given very little say in matters

¹Grotius probably means the morally as opposed to the practically safer course, although in many of his teachings, of course, the practically expedient often supports the morally right.

²JBP Bk. II, ch. xxii.1. outlines the difference in persuasive and justifiable causes of war.

³JBP Bk. II, ch. xxvi, iv.7.

of state,¹ and especially in regard to judging the justness or otherwise of the sovereign's actions, but he is enjoined to endure the caprice of an evil ruler,² and it is categorically stated that his basic natural right to ward off injury is severely limited upon his entrance into society.³

Furthermore, Grotius contends that it is permissible according to justice to wage war in order to free an oppressed people from an unjust ruler.⁴ Those who are themselves oppressed, however, do not have the same right to regain liberty.⁵ This would appear to be a blatant inconsistency in Grotius' treatment of the state considered internally and externally. It is not, however, an inadvertent inconsistency. Grotius clearly states that "subjects cannot justifiably take up arms," but that, "nevertheless it will not follow that others may not take up arms on their behalf."⁶ In commenting on the liberty or autonomy of individuals or states, Grotius says that liberty is not a natural attribute of a person or a people in the sense that it cannot be taken away from them. It is a natural quality in the sense

¹ JBP Bk. I, ch. iii, viii.

² JBP Bk. I, ch. iv, 1.3.

³ JBP Bk. I, ch. iv, ii.1. Compare my statement (supra, p. 97) that Grotius says it is false to assume that the individual's right over his own life passes by...consent, from him to the state.

⁴ JBP Bk. II, ch. xxv, viii.

⁵ JBP Bk. II, ch. xxii, xi.

⁶ JBP Bk. II, ch. xxv, viii.3.

that all are, in the state of nature, born free, but it is not a quality which one carries into the state so that it is permissible for him to oppose authority in order to regain freedom.¹

I think that the reason for this difference, and of Grotius' insistence on the difference, can be found in the distinction between the sovereign considered internally and considered externally. I have already stated, of course, that the same sovereign (and usually an individual or individuals, and always an entity contrasted with the people as a separate entity) which constitutes the supreme authority in the state is also the subject of international relations. Nonetheless, the emphasis on will is much more pronounced in Grotian theory when the sovereign is considered internally. In external relations, however, the supremacy of will, that is its illimitability, is not a factor. The tie in international relations among sovereign states is more clearly the natural justice which all promote and enjoy than it is within the state where that same justice tends to be treated as though it were a product of the order which is possible only through a sovereign who is supreme. Hence I return to my point at the beginning of this chapter that the role of the law of nature is more easily discernible in international relations than it is in civil relations, since the matter of will which

¹ JBP Bk. II⁸ ch. xxiii, xi. Elsewhere Grotius distinguishes between civil and personal liberty.

is so essential an underpinning of the civil order does not cloud the issue.

Lest I be mistaken, however, I still think that natural justice is the source of the civil bond as surely as it is the source of the bond between states in Grotian theory, and this precisely because neither in the world at large nor within the state can the individual, either by the authority of the sovereign or of arms, be forced to do¹ or avoid responsibility for doing,² that which is manifestly wrong.³ It is this principle, and this principle alone, which renders Grotius' treatment of sovereignty consistent despite the necessary technical and superficial differences in presentation which accompany the doctrine when it is approached from an internal and from an external standpoint.

It is necessary within the state that the individual be subject to the sovereign authority; it is essential to the existence of the state that the sovereign will not be limited by another will. In matters international, the individual, including the individual sovereign, has rights and duties which, given the nature of the order, are not defined in terms of will. It is important to remember, however, that jus gentium is not a different sort of law from jus civile, but the same

¹ JBP Bk. III, ch. i, xxi.

² JBP Bk. II, ch. xxi, viii.2. "Guilt...attaches to the individuals who have agreed to the crime."

³ JBP Bk. I, ch. iv, i.3. specifically.

sort, writ large. Consequently, it is the same sovereign who is head of the state, and the same individual who is member of the state, who is at the same time the subject of international law. And as surely as the individual must take upon himself the responsibility for participating in a war he believes unjust, so the same individual is morally responsible for conniving with an unjust ruler through silence. In both cases, the law of nature gives him the personal freedom of action necessary to do what is right. In both cases, too, the matter is not to be decided lightly. Both rebellion and war are serious undertakings, and order within the state and peace within the world may well be the best way to achieve true justice.

The just war

Strong evidence to support the thesis that individual natural law is the basis of both the law of the state and the law among states is found in the just causes of war. In general, just cause for war arises from the violation of those natural rights which adhere to individuals and to states as perfected by law. War arises from injury,¹ and the three just causes of war are defence of life and property, recovery of that which belongs to us, and punishment for wrongs done. These are the same sources for lawsuits between individuals and states, and the securement of these rights by war is permissible only where law fails.² War ought only to be undertaken for the

¹JBP Bk. II, ch. 1, i.4:

²JBP Bk. II, ch. 1, ii,

enforcement of rights, and then "within the bounds of law and good faith."¹ As van Vollenhoven notes, Grotius did not consider the law of peace and the law of war as separate halves of a whole called international law. Instead, the former outlined the law of duties pertaining to mankind, and the latter the law whereby such duties are enforced.²

Hinsley, in discussing Grotius' contribution to international law, says that Grotius was the first to realize the necessity of propounding "a body of positive international law, separate from natural law and deriving from the will and practice of states."³ He goes on to say that in so doing Grotius "was recognizing that the natural law was inadequate as a means of regulating the international conduct of sovereign states." Tooke, too, points out that Grotius was so anxious to promote the acceptance of a law governing conduct among nations that he was quick to uphold what currently existed as international law wherever it occurred.⁴

I contend that it is wrong to assume, however, that such procedure belies the importance of jus naturale to

¹Prol. 25. And Prol. 26.: only the laws of the state are to be silent in war, that is, only those laws which are adapted to peace. Those other laws, of nature and of nations, "which are of perpetual validity and suited to all times" must ever remain in force.

²Cornelis van Vollenhoven, The Framework of Grotius' Book De Jure Belli ac Pacis (1625) (Amsterdam: Uitgave van de N.V. Noord-Hollandsche Uitgeversmaatschappij, 1931), p. 101.

³Hinsley, op. cit., p. 189-90.

⁴Tooke, op. cit., p. 226.

jus gentium in the Grotian scheme. Instead, what it does is serve to emphasize the extreme importance which Grotius placed on the system of positive law as creating the order in the state and peace in the world necessary to the achievement of justice. Nonetheless, positive law, as the operation of expletive justice, is the realization of distributive justice; the perfection in law of those natural rights which adhere to individuals and, by analogy, to states. Just as consent alone, as I have shown, was not enough to command obligation, so too the positive law extant among states, with all its defects, could not be accepted wholesale. Some laws of this sort were, after all, positively unjust.

The charge commonly laid against Grotius that he never fully clarifies whether natural law is to become a binding legal or to remain a purely moral principle is in one respect fair, but in another respect an unfair formulation of the problem. It is fair in that the law of nations and the law of nature are often confused in content, and in the superiority of the one over the other. It is an unfair charge, however, in that it fails to appreciate that for Grotius positive law is a process, an evolution towards justice. Grotius is not a revolutionary. The fact of the injustice of volitional law, of the state or of nations, cannot justify its overthrow. Just as in the state, to overthrow a sovereign, even though he be unjust, may be to destroy that very order by which alone justice may eventually be realized, in other words, to do more harm than

good; so also among nations to deny the validity of an unjust law which has received common consent, will most certainly serve to undermine the respect for a legal system among nations which is absolutely essential since such a legal system is the only vehicle available for the achievement of justice between states.

It is in this sense only that Hinsley is right in saying that Grotius recognized natural law was inadequate as a means of regulating international conduct. Natural law by itself does not perfect rights; only positive law can do that. But positive law must ever approximate to natural law if justice is to be achieved. This is the connection between the internal and external orders. The form of internal law is will; the form of external law, consent. The content of both, in their perfection, is natural law. Grotius was too little of a philosopher to say exactly how the content of positive law was to become natural law, to achieve rationality; but he was also too much a jurist to deny that the content could ever be achieved without the form.

The role of the law of nature in the law of war is emphasized by Grotius' insistence that a war cannot be just on both sides.¹ Even parties outside the conflict have a duty to take account of the justness of the cause of war among

¹JBP Bk. II, ch. xxiii, xiii.2. "In the particular sense and with reference to the thing itself, a war cannot be just on both sides, just as a legal claim cannot; the reason is that by the very nature of the case a moral quality cannot be given to opposites as to doing and restraining." (Note again the parallel between the causes of legal disputes and the causes of war.)

belligerents, and must do nothing either to hinder the party whose cause is just, or to assist the party whose cause is unjust.¹ A Grotian state only occupies what we today would call a truly neutral position if there is doubt about which side has the just cause; then it is to remain impartial, but certainly not from a contention that this really is a neutral matter, that is, one not conducive to moral judgement. The matter of what side justice is on can of course only be decided by reference to the just causes of war as dictated by the law of nature.

Yet once again Hinsley's point that Grotius was not content to let the law of nature alone govern international conduct is proven by the careful distinction which Grotius makes between a war that is just and a war that is legal and hence just in external appearances only. Strictly speaking, a legal war is simply one which is declared by the appropriate legal authority, the sovereign head of state, and in which certain formalities are observed.² If we consider justice from the point of view of certain legal effects, then a war may be "just" on both sides.³ If we consider not the effects, but the cause of war in the general sense which includes all right conduct, then from this point of view it is also possible that justice may belong to both sides, for one may act wrongly without being guilty as, for example, when one acts in ignorance. The

¹ JBP Bk. II, ch. xvii, iii.1.

² JBP Bk. I, ch. iii, iv.7.

³ JBP Bk. II, ch. xxiii, xiii.5.

same is true in regard to the particular cause of war concerning the doer. In regard to the act itself, however, the particular cause of war cannot be just on both sides, as I have said above, for morality cannot both condone and disapprove of the particular cause. And Grotius makes it clear that public wars, formally declared and having certain legal effect "are not on that account more free from wrong if they are undertaken without cause."¹

Hence Nussbaum's contention that "this [that is, formally declared wars conferring upon parties the right to fight the enemy] amounts practically almost to ejecting the justa causa from international law"² cannot be accepted. Once again, Grotius is simply being practical and conservative. The reason why such legal effects were introduced, he tells us,³ is that it may often be difficult for other nations to judge concerning the justice of the cause of either of the antagonists. Furthermore, an outside nation may place itself in considerable danger by attempting to make such a decision. This treatment of the matter is consistent with the point of view of Grotius the peace-maker, Grotius the lawyer and, for the same reasons Hinsley's charge that Grotius abandoned natural law as a means of regulating international conduct was proven false, cannot be seen as an abandonment of the "just cause" in war.

¹ JBP Bk. II, ch. 1, 1.3.

² Arthur Nussbaum, "Just War - A Legal Concept?", Michigan Law Review, XLII, No. 3 (1943), p. 464.

³ JBP Bk. III, ch. iv, iv.

Two eminent philosophers of international law, however, have made a similar charge which bears closer analysis. J. L. Brierly in particular, as I interpret him, finds fault with Grotius for not clearly having made the matter of the justness or otherwise of the cause of war an issue referable to the body of strict international law and able to be decided by it.¹ This, he claims, has led to the admission "that international law does not make the most elementary of all legal distinctions, that between the lawful and the unlawful use of force."²

If Grotius failed to permit an active right of war in cases where the injustice committed was not a violation of a legal right strictly so established,³ yet he also distinguished

¹Brierly, "The Prohibition of War by International Law," in The Basis of Obligation in International Law, pp. 281-82.

²Ibid. I find this a compelling argument, perhaps not in the least because it is indicative of the age-old problem of the a priori and the a posteriori, of the relation of theory to fact, of ought to is. If natural law cannot play a more concrete role in international law in particular, then the future of the world may well be dim, and indeed, that very goal lost which Grotius sought, namely peace, but, if war, then war for a just cause and justly fought. Westlake laments that Grotius did not plead for the admission of Christian principles into international law and denied to third parties the right to interfere "to restrain the use of unconscientious methods in exacting a debt of justice." (The Collected Papers of John Westlake on Public International Law, ed. by L. Oppenheim [Cambridge: University Press, 1914], p. 50.) Elements of the same fear of practical failure can be seen in the writings of Lauterpacht and D'Entrèves, optimists though they are. There are, of course, many ways of explaining Grotius' approach and I have attempted one such in this paper. However, the real challenge for the Grotian scholar and indeed the test of Grotian philosophy in general may be an analysis of the extent to which natural law, even within the confines of *De Jure Belli ac Pacis*, is a practical, effective principle in that body of law which we now know as international law.

³JBP BK, II, ch. xxii, xvi.

between what is lawful because done with impunity and what is lawful because it is right or just.¹ Having outlined what is permissible in war according to the law of nations, he says, "I must retrace my steps, and must deprive those who wage war of nearly all the privileges which I seemed to grant, yet did not grant to them."² This "higher ground" of action Grotius calls "internal justice" as opposed to "external justice" which is the province of law strictly so called.³ It is a quality akin to a sense of honour,⁴ and is that "common law of living things"⁵ which enjoins absolute justice as opposed to that justice which is merely legal.⁶ Throughout the work, too, Christians are enjoined to act always in accordance with that

¹ JBP Bk. III, ch. x, i.1.

² Ibid.

³ JBP Bk. III, ch. x, i.3.

⁴ JBP Bk. III, ch. x, i.2.

⁵ JBP Bk. III, ch. x, i.3.

⁶ Langford, *op. cit.*, pp. 327-30, calls this a second extended sense of natural law in Grotius, the first referring to what is part of natural law by not being in conflict with it, and the second, though by misuse of the term, referring to things "which reason declares are honourable, or better than their opposites" (JBP Bk. I, ch. i, x.3.). It is in keeping with Grotius' third and "broadest" definition of law as "imposing obligation to what is right" (JBP Bk. I, ch. i, ix.1.) and, since this law corresponds to what is just, in its broader sense, may be compared with his earlier and rather limited definition of justice as the "abstaining from that which belongs to another" (Prol. 44); or of injustice as that which is "in conflict with the nature of society" (JBP Bk. I, ch. i, iii.1.). Both these

"law of love"¹ which is greater even than justice, and bids us not to pursue our rights unnecessarily,² and to be quick to forgive those wrongs and injuries which are bearable.³

That this greater principle of absolute justice, or love, or humanity is of extreme importance in Grotian philosophy is proven by the frequent references to the role it can play in all human relations, and especially in war. It is this principle which bids us to treat even our enemy as also our fellow-man,⁴ to have mercy on the innocent,⁵ to cause no more waste and destruction than is necessary,⁶ to temper our strength

extended senses are distinguished from natural law proper, or in its strict sense. Grotius himself refers to an "extended meaning" at Prol. 9. where he says that whatever is at variance with a well-tempered judgement is contrary to the law of nature. In its second extended meaning, Langford says that natural law is concerned with virtues other than justice, and not simply as honourable but also in some circumstances as obligatory (JBP Bk. II, ch. i, ix.1.). He notes that this is in contradiction to Grotius' earlier account of the second extended sense where such virtues are said not to be obligatory (JBP Bk. I, ch. i, x.3.) as indeed it is to Grotius' later account of such virtues as honourable but "not due by nature" (JBP Bk. III, ch. iii, vi.1.) a passage also cited by Langford, but to defend a different point.

¹Strictly speaking, it is classified as ius voluntarium divinum (JBP Bk. I, ch. i, xiii), and in almost every topic for discussion the matter is considered from the point of view of what (Christian) love demands (JBP Bk. I, ch. ii, viii; Bk. II, ch. xii, ix.2.; Bk. III, ch. xviii, iv.).

²JBP Bk. I, ch. ii, viii.4.

³JBP Bk. I, ch. ii, viii.7.

⁴JBP Bk. III, ch. xiv.

⁵JBP Bk. III, ch. xi, viii - xii.

⁶JBP Bk. III, ch. xii. In section viii.1. Grotius, ever one to urge a just cause by expediency, points out that moderation

both in the course of war and in victory,¹ and even to forbear to go to war for a just cause if the price to be paid in human suffering and death does not warrant the pressing of our right.² Tooke describes Grotius' return to this principle mid-way through the third book as a "confession of faith"³ for Grotius the lawyer, and there is little doubt in De Jure Belli ac Pacis that, if Grotius could order the world to his liking, that order would be based on Christian principles, and "the choice of the better among the things permitted."⁴

Despite Grotius' keen desire to have Christian principles unify mankind, or perhaps because of it, he was extremely careful in his teachings to separate morality from law. If higher principles are enjoined, only legally established principles can with right properly be pursued. Or, as Westlake puts the matter, "Although strict natural law was not in [Grotius'] view the final measure of duty by which a man ought to regulate his own conduct, it was in his view the measure of the conduct which a man is entitled to require from others."⁵ Things may be owed us by moral obligation, but Grotius is quite concerned to insist "deprives the enemy of a great weapon, despair."

¹JBP Bk. III, ch. xi, i. and Bk. III, chs. xlii. and xv.

²JBP Bk. II, ch. xxiv, i.

³Tooke, op. cit., p. 218.

⁴JBP Bk. III, ch. xii, viii.1.

⁵Westlake, op. cit., p. 45.

that morality alone does not constitute a perfect right.¹ This principle is more important in war than anywhere else. A war of punishment, for example, can only be undertaken for the violation of a right among nations which is legally established.² Grotius desired a Christian world, but he must have been only too aware of the injustice of many religious wars; and he loved justice too much to have its very existence threatened by the overthrow of law.

This principle tenet of Grotian philosophy, this "confession of faith" which is given so little practical effect, may indeed be the source of many frustrations with Grotian philosophy, but it is not inconsistent with either his theory or his method; and certainly not with his ultimate aim. Grotius does tend to confuse the law of nations and the law of nature and, especially in his teaching on war in the third book, shows a definite inclination not only to abide by the strict law of nature, but also to enjoin mercy, moderation and humanity which strictly would be precepts of the law of love.

Perhaps this difficulty could have been foreseen as early as the Prolegomena where he states that "when many at different times and in different places affirm the same thing as certain, that ought to be referred to a universal cause; and this cause...must be either a correct conclusion drawn from the

¹JBP Bk. II, ch. xxii, xvi.

²Ibid. and Bk. II, ch. xx, ii: "Punishment is related to expletive justice."

principles of nature, or common consent.¹ A little later, in the first book, he says that there are two ways of proving the existence of the law of nature, one by demonstrating the necessary agreement of something with a rational and social nature, the other (a probable proof only) by demonstrating that something is believed to be according to the law of nature by many nations, by common acceptance.²

Clearly these passages point to a confusion between "what ought to be" and "what is" at the very outset of the work, before either the laws of peace or the laws of war are subjected to close scrutiny in terms of what they are and what they ought to be. The problem is compounded when Grotius attempts to separate the law of nature from the will of God,³ while retaining the will of God as an alternative source of it.⁴ Grotius was serious in his effort to claim for the law of nature an existence "even if there is no God,"⁵ but that God should not exist was clearly not possible to him, and that the law of God should not continue to play a key rôle in the relations of men clearly not acceptable.

What can be the meaning of all this? It is my contention

¹ Prol. 40.

² JBP Bk. I, ch. 1, xii.

³ Prol. 11.

⁴ Prol. 12.

⁵ Prol. 11.

that the three types of law in Grotius, volitional human law, natural law, and volitional divine law, indicate three stages in the development of law. The first is important as having secured a respect for the institution. It is the beginning of law; it secures order in the world. It is here that sovereignty in the internal order and consent in the external order play their parts. The second is that to which law strictly so called can aspire. In its perfection it would mean the identity of expletive and distributive justice.¹ It is the manifestation of natural law in external justice. It is not out of reach of mankind because all men are by nature rational, and the nature of man is the mother of reason. The third stage represents the perfection of justice internally. For Grotius it is nothing other than the good. It is potentially achievable by all for all are creatures of God. Strictly speaking, however, it goes beyond absolute justice, and I think for Grotius remains an ideal.

I suggest that if this is a proper interpretation of Grotius, then it also serves as an explanation of why we are enjoined to judge a matter at one point by the law of nature, at another by the law of nations or municipal law, and at yet another by the law of love. It also serves to explain why Grotius demands respect for existing law while at the same time urging its conformity with the law of nature or true

¹In this context, one may place Aquinas' statement that only the wicked, and not the virtuous or just, are subject to the law. Summa Theologica, Quest. 96, art. 5.

justice, and praising as most desirable those who do not insist upon their legal deserts nor perform only their legal duties, but act out of a greater love which, although not strictly commanded by law or even justice, is certainly enjoined by God.

I think this explains too why Grotius' main concern in expounding the law of war was to achieve peace. If war is necessary (and it is truly necessary, and permissible even by the law of God, when a "greater and more just love," "the love of innocent men,"¹ commands) then it is essential that it be fought in such a manner as to retain a respect for justice and thus, what is even more important, to be the means of achieving peace.

Grotius' insight was to perceive that without the law, justice could not hope to be achieved. This is why even the bad sovereign, within the state, and the law of nations which holds much that is not good, ought still to be respected. But true justice, the law of nature, is not relegated to the position of an ineffective ideal. As the law is but the means to justice, justice demands a certain conformity. When the sovereign head of the state or the law commonly observed among nations commands something which is manifestly wrong according to strict justice, then they ought not to be obeyed, especially, too, if the law of love dictates that the price in human suffering will not outweigh the goal and a "greater good" is at stake.

¹ JBP Bk. I, ch. ii, viii.10.

CONCLUSION

In De Jure Belli Ac Pacis Grotius has presented a detailed and effective concept of sovereignty. It is a concept defined by law, not by will, and its particular form in each state is determined by the founding contract of that state, a contract which, by the law of nature, must be kept by him in whom sovereign authority is vested.

From the definition of sovereignty as that to which there is no will legally superior, it follows that sovereignty as such is not affected by how the sovereign power is conferred, how long it lasts, or even how it is held, be that absolutely (with right of transfer), in trust, or with restrictions. For the same reason, a sovereign is not limited by promises he makes, for he cannot limit himself. Such conditions may affect the exercise of power, or even the power itself, and in the former, may result in an unjust act (since a promise confers a legal right upon the promisee), in the latter in an act null and void (since made without power); but it does not thereby follow that sovereignty itself is limited, for these conditions and restrictions are of the law and not of a superior power. Of course, observance of the law of nature, divine law, and, in so far as it is not contrary to natural law, the law of nations, is morally binding upon all sovereigns.

Grotius' definition is a successful attempt to expound a concept of sovereignty which is both logically complete given the concept of the state as a legal entity, and generative of justice. Law is first and foremost what is right. It perfects the moral quality, and imposes an obligation to what is right. There is no justice in anarchy. The security of the state, both internally and externally, and the freedom of the individual are possible only by respect for law. Law secures that order in the state and peace in the world which is essential if man is to live that reasonable and intelligent life which is suited to his nature. Even the just war is for the sake of peace. It is necessary, and permissible, only when the legal process fails. Just as the institution of law put an end to private war (except where recourse to law is not possible) in the internal state, so it is called upon to put an end to the unbridled flight of will of international relations.

It is because man is capable by nature of reasoning correctly from certain first principles that order and peace must always serve their end--justice, or a rational society. Any legal order entails restraints upon the individual or state, just as any legal order, any peace, is also born of advantage. Even the law of love, which is ultimately binding on every human being, is backed by expediency. But just as it is true that certain rational principles would be binding even if there were no God, so also it is true that these same principles are binding even if immediate advantage is not to be gained.

And lest anyone think that order and peace take precedence over justice and morality in the Grotian scheme, in times of necessity the primitive right prevails even to the extent of permitting resistance to the established order within the state; and in regard to the relation of states to one another, when every peaceful effort towards justice fails, states must go to war.

Grotius' philosophy is one based on natural law as it pertains to the individual. Even when sovereignty is held as a patrimony, the people, as an entity separate from the sovereign, retains a large body of rights. The sovereign himself, as an individual or group of individuals, is subject to the law of nature and divine law; and it is the sovereign as individual who, in the external relations of the state, is enjoined to render obedience to that law of nations which is not contrary to the law of nature.

Within the state, the social contract which vests authority in the sovereign severely curtails the rights previously enjoyed by the citizen in the state of nature. Civil society is, however, the fulfillment of man's nature and not the antithesis of it. He consents to the social arrangement, and thereby to the law. Nonetheless, if the state is the fulfillment of nature, nature is not thereby destroyed. In extreme circumstances, the individual is free to assert his natural rights even to the point of resistance to the unjust sovereign.

Perhaps because the order of states in relation to one another takes the form of consent among sovereign states, whereas the internal order is defined in terms of the will of the sovereign, the individual is given greater scope for moral judgement in external matters than in matters concerning the internal affairs of the state. This may partly be explained by Grotius' identification of the sovereign state with the sovereign head of the internal state; and partly because the just causes of war correspond to a violation of the basic natural rights of man, the rights of defense of life and property.

At any rate, in regard to the former (the identification of the sovereign state with the sovereign head of the internal state), the individual as citizen of the state is more clearly regarded as part of a whole defined in terms of its relation to a first will, the sovereign, than is that same individual considered as the subject of international rights and duties. In external matters, there being no first point or will in relation to which an order may be drawn, the appeal is to the individual himself, including the individual sovereign heads of states, to abide by the dictates of natural law. Within the state, these same rights are preserved but with the qualifications and restrictions suitable to the preservation of the state as a legal order in relation to a sovereign whose will is legally supreme. Hence the primitive right is asserted only in extreme and otherwise unavoidable circumstances.

It is the recognition that justice must be the heart of any legal order that provides the link between internal and external sovereignty, and renders Grotius' philosophy of the state and of international relations coherent. Peaceful, legal order, made possible by a sovereign within the state and consent among nations, is to be pursued, and is not easily abandoned. The greater justice, which after all includes what is best for human beings, may be to suffer injustice rather than destroy that society by which ultimately the life suitable to our well-being is secured. But the social pact is after all a human one, and arises out of man's need to live by certain rational and moral standards. The question of when to resist, when to make war, is a weighty one, but not one removed from the capacity of human beings.

At a time when the changing face of the world created the dangerous potential for the miscarriage of justice, Grotius turned natural law on its head by asserting its validity independent of any will, sovereign or divine, and thus put law in its proper perspective as an ethical proposition, and created the conditions, both in the civil and international orders, for the achievement of justice.

POSTSCRIPT

In the light of potential criticisms or misunderstandings of the foregoing argument, the following points benefit from amplification.

The relation of natural law to the social contract in the formation of civil society is of central importance in the Grotian theory of sovereignty and the state, and bears the unique stamp of his philosophy. It might be argued that the social contract plays the primary role in the state's existence and hence that the content, the way sovereignty is exercised, and the nature of the holder of sovereignty are determined not by the nature of man but by the particular contract of state.

I do not wish to deny (and indeed have not denied) the importance of the contract in the Grotian scheme. Without contract, there is no state. As I have argued at p. 55: "The constitution unique to each participating state in a very real sense sets the terms of its own existence, declares its law and their sanctions, establishes its legal order." The citizen, in entering into the contract of state, concedes to it the greater right.¹ Hence the social contract plays a part in defining the nature of the state, the nature of the sovereign and, even more important, the nature of the citizen's obligation to the sovereign authority.

¹ JBP Bk. I, ch. iv, ii.1.

But if contract is a necessary condition for effecting society and the citizen's obligation thereto, it is not a sufficient condition. For all its emphasis on the particular forms the social contract many take, the brilliance of the Grotian theory is that the social state is not the antithesis of the state of nature. To understand the Grotian scheme, one must not make too strong a contrast between nature and contract, and their respective rôles in effecting society. In a passage central to his work, Grotius says that "the mother of municipal law is that obligation which arises from mutual consent; and since this obligation derives its force from the law of nature, nature may be considered... the great grandmother of municipal law."¹

It is the intent of this thesis not to deny the importance of contract, but to emphasize the importance of natural law not only in the obvious sense of supplying the moral tenet that contracts must be kept, but also in the less obvious but fundamental sense of providing the touchstone whereby the justice or injustice of the social order, and hence extent of the citizen's obligation to it, may be judged. Man desires society "not of any and every sort, but peaceful, and organized according to the measure of his intelligence."²

The key to the connection between nature and society, and thus to the source of law in nature, is sociability. Man both instinctively (through his appetite for society, his

¹Prol. 16.

²Prol. 6.

sociableness, and rationally chooses the social contract as that tool whereby his nature, as a rational, social being, is truly developed. Hence the matter is misrepresented by insisting on either obligation by nature or obligation by contract. In Grotian theory the two are interlocked. A clue to the link is found in his discussion of the law of nature. As I have stated at p. 13, Grotius distinguishes between those principles which are "first according to nature" and those which follow later, but are even more valuable. The first natural instinct of all animals, including man, is self-preservation. The final goal of man is moral goodness which "ought to be accounted of higher import than the things to which alone instinct first directed itself, because...right reason ought to be more dear to us than those things through whose instrumentality we have been brought to it."¹

The central theme of this thesis is that Grotius appears to remain more faithful to the just social arrangement in his exposition of the larger social order of states in relation to one another than in the state in its internal organization. This is especially noticeable in terms of the degree of freedom accorded the individual in each of the orders. It is argued, however, that these differences are attributable to the difference in form or structure of the two orders and that they become less important in light of the more fundamental evidence that both orders are grounded in natural

¹JBP Bk. I, ch. ii, 1.2. Grotius is quoting Cicero.

law. The grounding is more evident in the external order since the latter has no formalized contract with proven sanctions. It is just as crucial, although less evident, in the internal order since, in times of moral crisis, there is clearly a "benign reservation" in favour of natural right. In both cases, reason provides the source of human obligation, and the social order exists for the fulfillment of man's nature as a rational being.

The social contract is important in defining the state. In practice, since rebellion is a rare and last resort--or, to take evidence from "what is," since sovereigns are hardly ever thoroughly unjust¹--natural law is rarely called upon to assert its influence against the state. It is often sufficient to define the state only in terms of the social contract. The contract becomes sufficient, however, only because it is not contrary to the law of nature. The efficient cause is emphasized because the final cause is inherent.

The variety of forms of state at once points to the importance of the social contract (as defining the state) and to its secondary role: there are as many forms of state as there are societal compacts, but the particular form is, as it were, an accidental attribute. Grotius differentiates between rights and the manner of possessing them. As I explain at pp. 67-68, the manner of possessing sovereignty does not suffice to explain its essence. In this same passage,

¹ JBP Bk. I, ch. iv, iv.3.

I emphasize the importance of the social contract in Grotian theory. This is not inconsistent with recognizing the primary role of natural law. The particular social contract may lay down the rules for the citizen's obligation, but the law of nature provides their proof. In the most repressive of social orders where the sovereign possesses the supreme legal authority absolutely, i.e. with right of alienation, there are bounds, dictated by natural law, beyond which he may not go. Hence, it is clear that natural law not only provides the grounds of obligation to the social contract, but also supplies it with a necessary minimum content.

In the section entitled "Some Problems Remaining," I have briefly touched upon Grotius' failure to develop a notion of the corporate state. The point is invoked primarily to emphasize what I consider to be problematic in Grotius' philosophy, namely his lodging of the sovereign right with the individual or individuals who comprise the recognized authority in the state. This problem is significant not only because the people are thereby relegated to the role of a separate and opposing entity, a non-participant in sovereignty, but also because it is contrary to Grotius' previously stated definition of sovereignty as existing in the state as the common and the ruler as the special subject of power.¹

¹JBF Bk. I, ch. iii, vii.1.

Gierke is helpful in delineating this problem because he perceives the divided and dual subject of sovereignty to be a necessary consequence of any explanation of civil society which invokes a contract between people and ruler. As far as it goes, this criticism may aptly be applied to Grotius. In Grotius' development of the concept, sovereignty is not seen as the "first product" of that "spirit or essential character" in a people which is "the full and perfect union of civic life."¹ Nor is it seen to reside "in a corporate body as in a subject which is entirely filled, and not divisible into several bodies."² Both of these definitions would come close to Gierke's definition of a corporate body as a true entity as opposed to a partnership--in short, a juristic person.³ In fact, Grotius not only divides the subject of sovereignty in the state, but he commits the even more serious error of permitting the specific subject of sovereignty, the ruler, to retain the sovereign right exclusively.

In lesser theories this may well have portended the exclusion of the people from a meaningful role in the state. The Grotian scheme is saved from this flaw, then, not because it develops the notion of the state as a corporate entity (Gierke's solution) but precisely because the emphasis on the individual (that same emphasis which perhaps thwarted the

¹JBP Bk. II, ch. ix, iii.

²JBP Bk. II, ch. vi, vi.

³Gierke, Natural Law, p. 45.

development of the notion of the corporate state) championed the idea of the individual as possessing rights according to natural law. Upon the individual's entrance into society, the state acquires a greater right, but it is a right of limitation, not of exclusion, and it may be exercised only in so far as the end which it thereby achieves is just.

This is a far more exciting concept in Grotius than is his failure to develop the notion of the corporate state promised in earlier definitions. Nonetheless, in another or larger work on the social nature of man, Grotius' attraction to aspects of the corporate state theory may well provide interesting study. The contention in this thesis that Grotian theory in some respects may have benefitted and in others suffered from adopting the notion of the corporate state is deliberate. Grotius develops the notion in some passages, in others abandons it with the result that he both at times elaborates upon some features of the corporate state theory hinted at in previous definitions, at times avoids its pitfalls. Gierke's value lies in his presentation of the problematic nature of social contract theories in general. Grotius' success lies in his ability to avoid these problems not, as does Gierke, with an extreme and frontal attack on social contract theories of society, but by providing common ground for the rights of ruler and ruled in natural law.

The matter of the separation of the functions of law-making and executive authorities is generally important in

political philosophy, but is peripheral to the topic of the thesis, and not in the least because Grotius himself has very little to say about it. JBP Bk. I, ch. iii, vi. ("In what the civil power consists") is the main passage, but it is clear from an overview of his philosophy that for Grotius the sovereign is the supreme law-maker and chief executive in the state. Subordinate officials hold their authority by virtue of the will of the sovereign. From the point of view of the genus, even an intermediate species is a species.

The doctrine of resistance provides that invaluable touchstone whereby the nature of sovereign authority, both internally and externally, is judged. The contention of the thesis is that sovereignty in each of the two orders, although different in form, is in essence the same, since it can be understood only in terms of its grounding in natural law, just as the right of resistance to both an unjust sovereign and an unjust war is ultimately understood as a natural or primitive right.

Grotius' account of the right to resist is inconsistent when examined in the context of the internal state, on the one hand, and the state in its external relations on the other. Special attention is given to the freedom of the individual in each of the orders. Copious textual evidence is cited to expose the tension between the severely limited right of the citizen to rebel against the sovereign, and the more liberal

right of the citizen to refuse to participate in an unjust war. Specifically, in the section entitled "Differences in internal and external orders in regard to individual rights" (pp. 96-102), pertinent passages are referenced, often with contrasting passages offered and comments provided.

In terms of its general presentation in the Grotian scheme, I do not consider the doctrine of resistance, especially in the internal order, to be a liberal one. Scholarly research can, of course, support the opposing view but, especially among his contemporaries, Grotius' would largely not have been regarded as a liberal theory of the right to resist an unjust sovereign. The Jesuits Juan de Mariana, who approved of tyrannicide as a way of ridding oneself of political oppression, and Francisco Suarez, who believed political authority always to be in the hands of the community, held far more radical views which were not uncommon among other writers. The Vindiciae Contra Tyrannos, which appeared around 1579, became, as Sabine says, "one of the landmarks of revolutionary literature."¹

As I have stated on p. 65, Grotius denies both that sovereignty resides in the people, and even that government exists "for the sake of those governed."² There is throughout his work great respect for the sovereign who, as the first point in relation to which order is possible, secures the

¹George H. Sabine, A History of Political Theory (3rd ed.; London: George G. Harrap & Co. Ltd., 1951), p. 322.

²JBP Bk. I, ch. iii, viii.

social structure whereby (and whereby alone according to Grotius) man's true nature can be fulfilled. While extreme necessity always demands a reservation in favour of natural right, Grotius is adamant that rebellion is not to be undertaken lightly. Long-suffering is encouraged, and forbearance in pressing one's rights. The passive nature of resistance and the extent and occasion of its permissibility have been dealt with extensively and with examples from the text (see especially pp. 36-38).

It may correctly be argued that in Grotian theory the social contract itself often specifies the terms and conditions, and therefore the limits, of the subject's obligation to the sovereign, but I contend that this does not point to a liberal theory of resistance. Firstly, Grotius acknowledges several conservative and even repressive forms of government as fulfilling the conditions of social contract. In fact, he himself tends to favour patrimony which as I have discussed (pp. 72-76), is a manner of holding sovereignty which altogether excludes the people as having an interest in the state, and hence would seem contrary to the notion of sovereignty as a right conferred freely by man in accordance with his nature and his reason. It is a poor freedom which allows only an initial choice, and then demands that reason remain forever silent. It is a poor existence which must find its rational fulfillment in such a scheme.

Secondly, and more importantly, to rest the case for the liberality of Grotian theory with the matter of contract is to mistake the means for the end. The social order which is unjust cannot serve the end for which it is intended. The question of whether the subject has the right to rebel is answerable only by reference to the absolute justice or injustice of the sovereign's commands. In times of moral dilemma, the problem of rebellion is a natural law problem, not a contractual problem. "Among all good men one principle at any rate is established beyond controversy, that if the authorities issue any order that is contrary to the law of nature or to the commandments of God, the order should not be carried out."¹ While there is always a "benign reservation" in favour of primitive right, this reservation is invokable only under extreme and otherwise unavoidable conditions. At all other times, the primitive right of resistance to injury is so severely limited by the social contract and thereby by the right of the sovereign authority that a strong case is made by Grotius for a definite law of non-resistance (pp. 34-35).

This is not of course to say that Grotius was not a liberal thinker. The scope and intent of his work point to a humanitarian who liberated philosophy from the bonds of theology and believed that reason could and must prevail in human relations and institutions. His efforts to establish

¹ JBP Bk. I, ch. iv, 1.3.

a rational jus gentium which would bring war itself under legal order were not paralleled by efforts to rid the citizen of similar oppression within his own state. But the seed of justice never disappears. It is the virtue characteristic of man, and it is to the end of men that the state exists. "This maintenance of the social order...which is consonant with human intelligence, is the source of law properly so called."¹

¹ Prol. 8.

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