

Early Modern Sovereignty and Its Limits

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My Article seeks to explore a few antecedents of the idea that sovereignty may be encumbered with some obligations and duties vis-à-vis non-sovereigns and even strangers. Theories about limitations on sovereignty and obligations on the part of sovereigns often arose out of the fertile conceptual ground of Roman private law, in particular rules of property law governing usufruct and rules of contract law, such as those governing mandate. Early modern thinkers, especially Hugo Grotius (1583-1645), built on these ideas and, in addition, developed an account of moral and legal obligations arising, independently of God's will, from a universal human nature. Building on Cicero, Grotius was among the first early-modern thinkers to elaborate the distinction between "perfect" duties of justice and "imperfect" duties of beneficence, an important idea that had wide influence through the work of Emer de Vattel (1714-1767). The Article closes by offering a few observations on the trajectories within which Professor Benvenisti's concept of "sovereigns as trustees of humanity" could be situated.

INTRODUCTION

In his stimulating article, Professor Eyal Benvenisti urges us to adapt the international-law concept of sovereignty to the needs of our conceptions of democracy and justice and to what he calls, in a captivating metaphor, "our shrinking global high-rise." This will involve "outlining the responsibilities

* New York University. I would like to thank the organizers and participants of the conference on Sovereignty as Trusteeship for Humanity, held in Tel Aviv on June 16-17, 2014. I am grateful to Eyal Benvenisti and Doreen Lustig for inviting me and for interesting comments and conversations. I would also like to thank my commentator, Uri Yiftach-Firanko, as well as David Dyzenhaus and Evan Fox-Decent for their helpful suggestions and criticism. Some of the material that appears in this Article also appears in my *ROMAN LAW IN THE STATE OF NATURE: THE CLASSICAL FOUNDATIONS OF HUGO GROTIUS' NATURAL LAW* (2015).

that sovereigns are inherently bound by,” Benvenisti writes, “regardless of their consent, and from which they cannot contract out.” The idea is to conceive of sovereigns as “agents of humanity” at large with obligations that hold by virtue of a principal-agent relationship, “even absent specific treaty obligations.”¹

On the face of it, this involves a rather radical re-conceptualization of a more or less familiar concept. Sovereignty, as we have come to know it, was defined by Hugo Grotius as follows: “That power [*potestas*] is called sovereign [*summa potestas*] 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.”² On the international plane, the subject of this sovereignty according to Grotius is the state (*civitas*); the subject of domestic sovereignty, however, is a matter of the constitutional arrangements of each state. It can be “one or more persons, according to the laws and customs of each nation.”³ What is oftentimes (if inaccurately) called Westphalian sovereignty amounts to legal authority over territory to the exclusion of outside actors.⁴ On Benvenisti’s account, however, outsiders may very well have claims against sovereigns. These claims are generated by “externalities,” which seem increasingly unavoidable as a consequence of the ever closer relationships between human beings worldwide. The right to exclude outsiders and strangers from, say, resources in a given territory should, according to Benvenisti, be mitigated by a set of other-regarding obligations beyond national boundaries, obligations that sovereign states are required to assume qua sovereigns. This, Benvenisti argues, is primarily a moral requirement.

The second point that deserves emphasis is that Benvenisti models the obligations that arise from properly re-conceptualized sovereignty on the duties as they accrue to sovereigns on the model of trusteeship. The law of trusts is part of private, rather than public, law. This is very much akin to the way early modern and even earlier European theorists conceptualized the idea of popular sovereignty: with the help of ideas taken from (private) Roman law such as property-law rules governing usufruct and servitudes, rules from contract law governing mandate, or fiduciary devices such as trusts (*fideicommissa*), writers

1 Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 AM. J. INT’L L. 295, 300 (2013).

2 HUGO GROTIUS, DE IURE BELLI AC PACIS [ON THE LAW OF WAR AND PEACE] 1.3.7.1 (Apud Nicolaum Buon 1625) [hereinafter GROTIUS, IBP]. The translation is taken from HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (Francis W. Kelsey trans., 1925).

3 *Id.*

4 On the Peace of Westphalia, see Benjamin Straumann, *The Peace of Westphalia as a Secular Constitution*, 15 CONSTELLATIONS 173 (2008).

such as Jean Bodin and Hugo Grotius formulated conceptions of sovereignty capable of retaining some rights *vis-à-vis* government, understood as the administration of sovereignty.⁵ The Roman private-law tradition of constraints on sovereignty does not yield anything in the way of sovereignty saddled with fiduciary duties towards mankind as a whole — the beneficiaries in these discussions are always (originally) Roman citizens and then, by analogy, the subjects of the emerging territorial states of early modern Europe. There is nothing, then, in this strand of thinking that speaks to the second aspect of Benvenisti's article — that of a trusteeship exercised for the benefit of all of humanity. There are, however, other historical predecessors for this second aspect, such as Hugo Grotius's concept of humanitarian intervention as discussed by Evan Criddle.⁶

In this Article, I shall try to discuss Hugo Grotius (1583-1645) as an important predecessor of Professor Benvenisti's views. I will discuss, in the first Part of this Article, Grotius's influential doctrine of the sources of "international," or at least natural, law; that is to say, we will in the first Part be concerned with the "sources" of law, not in the sense of historical influence, but rather in the formal sense of criteria bestowing legal validity on norms. It will become apparent that Grotius's largest debt in his doctrine of the sources of law is to Roman treatments of "nature," especially Cicero's, which appears in his *De legibus* as a formal legal source of all types of norms. Grotius's is an important and influential theory showing a) how legal obligations can arise out of a concept of a pre-political humanity or "human society," and his doctrine has a further advantage for us in that it encompasses both b) the use of private (Roman) law concepts as well as c) a distinction between "perfect" and "imperfect" rights and duties of justice. As we shall see, at least some of Grotius's "perfect" duties of justice are, at least in principle, global and may therefore lend themselves to being rethought in the framework of a theory of sovereignty as trusteeship of humanity.⁷

5 This usually depends on a distinction, made popular by Bodin, between sovereignty or the state on the one hand and government or the administration of sovereignty on the other. See Kinch Hoekstra, *A Lion in the House*, in *RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 198 (A. Brett et al. eds., 2006); see also Daniel Lee, 'Office Is a Thing Borrowed': *Jean Bodin on Offices and Seigneurial Government*, 41 *POL. THEORY* 409 (2013).

6 Evan J. Criddle, *Three Grotian Theories of Humanitarian Intervention*, 16 *THEORETICAL INQUIRIES L.* 473 (2015).

7 A further reason why I focus on Grotius is that I believe him to have laid the conceptual foundations on which later influential theorists such as Emer de Vattel built.

However, there is reason for skepticism; while the very intriguing influence of private-law notions on public legal theory has traditionally provided arguments for constraints on sovereignty, these private-law notions seem at the same time to have an inbuilt tendency to limit the scope of these constraints. Whether sovereignty can be constrained and obligated *vis-à-vis* all of humanity remains therefore dubious, at least when viewed from the vantage point of intellectual history. If one is not satisfied with the language of trusteeship as mere metaphor — and I suspect Professor Benvenisti is not — and adheres closely to the private-law model, it will be difficult to conceptualize sovereigns as trustees of humanity beyond their own populations. But there is still the option of conceptualizing the sovereign's duties along the lines of Grotius's imperfect duties, and this is a strand of thought Vattel outlined with some success, as I shall briefly argue in the Conclusion. Grotius's views allow for some natural-law duties that bind even the sovereign, but they require a natural-law justification which goes far beyond private-law ideas of trusteeship.

In the first Part of this Article I will discuss antecedents to Professor Benvenisti's view of humanity as the source of legal obligations, focusing especially on how Grotius thought legal obligations could arise from a universal human nature in the first place. This addresses the "humanity" part of the idea of a "trusteeship for humanity." In Part II, I will try to exemplify some of these obligations in the context of Grotius's thought on the right of resistance, where private-law language and the idea of fiduciary duties figure prominently; this Part could thus be said to shed some light on the constraints on sovereignty effectuated by fiduciary and other private-law devices. Part II is thus pertinent to the "trusteeship" part of "trusteeship for humanity." A further important aspect of Grotius's thought that bears on Eyal Benvenisti's project lies in the distinction between perfect and imperfect duties of justice (or of international law), which will be discussed in the third Part of this Article. Part III will thus show the limits traditionally perceived with regard to extending the reach of "perfect" duties of justice to all of humanity. The Article closes with some observations on the most promising historical tradition for Professor Benvenisti to situate himself in.

I. HUMAN NATURE AS A SOURCE OF LEGAL OBLIGATIONS: HUGO GROTIUS'S NATURALISM

A. Grotius's General Concept of Natural Law

In the first chapter of his *De iure praedae* (*IPC*), Grotius discusses the legal sources upon which the law obtaining among various peoples is based.

Although neither the Praetorian edict of ancient Rome nor the Twelve Tables were relevant, in Grotius's view, to the issue at hand, it was the legal scholars of Roman antiquity who had developed a correct doctrine of the sources of law. Grotius quoted from Cicero's natural-law treatise *De legibus*, and, linking the law of war and peace with Stoic natural law, put forward his view of the formal sources of the relevant legal rules:

The true way, then, has been prepared for us by those jurists of antiquity whose names we revere, and who repeatedly refer the art of civil government back to the very fount of nature [*naturae fontes*]. This is the course indicated also in the works of Cicero. For he declares that the science of law [*iuris disciplina*] must be derived, not from the Praetor's edict (the method adopted by the majority in Cicero's day), nor yet from the Twelve Tables (the method of his predecessors), but from the inmost heart of philosophy. Accordingly, we must concern ourselves primarily with the establishment of this natural derivation.⁸

The second chapter of *De iure praedae*, the Prolegomena, contains a list of various legal sources, formulated in a range of normative principles or rules (*regulae*), which present Grotius's doctrine of the formal pedigree of norms; the sources of natural law relevant to the present Article and the so-called primary law of nations (*ius gentium primum*) are put forward in the first two normative principles. Considered from the formal point of view of the doctrine of sources, the will of God represents the original source of the "law of war and peace" at issue. The first principle reads "What God has shown to be His Will, that is law." The will of God reveals itself in his creation, which illuminates the intention of the Creator, and from which natural law is derived.⁹ Such a derivation is possible because every individual creature is endowed with certain natural characteristics (*proprietates naturales*), which contribute to its self-preservation and lead each individual to his own good (*bonum*).¹⁰ Therefore, although God's will is the original source of law, natural law must derive from the natural characteristics of individual creatures — talk of natural law would make no sense without these natural characteristics. This ultimately secular, naturalist starting point is made clear through a

8 HUGO GROTIUS, *DE IURE PRAEDAE COMMENTARIUS* [COMMENTARY ON THE LAW OF PRIZE AND BOOTY] (1950) (1604-1606) [hereinafter GROTIUS, IPC]. Translations throughout the Article are taken from 2 *THE CLASSICS OF INTERNATIONAL LAW* (J.B. Scott ed., 1950). The quote is from MARCUS TULLIUS CICERO, *Treatise on the Laws*, in 2 *THE POLITICAL WORKS OF MARCUS TULLIUS CICERO* bk. 1, sec. 17 (Francis Barham trans., Edmund Spettigue 1841-1842).

9 GROTIUS, IPC, *supra* note 8, ch. 2, fols. 5f.

10 *Id.* ch. 2, fol. 5'.

reference to a passage in Cicero's *De finibus*, in which the anthropology of the Stoics is summarized¹¹ — the relevant formal source of natural law is thus found directly in some *universal human nature*. Human nature, according to Grotius, is therefore prior to divine will in terms of justification. God's will is a source of law only in the sense that the relevant body of law *originated* from the will of God.

This, of course, is not to say that Grotius, a devout Arminian himself, conceived of natural law in a theological vacuum; it is just to say that the *grounds of validity* of his natural law were established independently of God's will, following the scholastic rationalist mainstream in this regard. What set Grotius apart from this tradition, however, was that for Grotius, even the obligatory force of the precepts of the natural law were to be explained independently of God's will, deriving their capacity to oblige from their character as dictates of reason. Obligations to the authority of God are on this view *themselves* derived from the laws of nature, to which the basic obligations are owed.¹²

Grotius's natural law is justified and creates obligations by virtue of its being perceptible by reason and its suitability to human nature. This ties in with Grotius's later stance in the famous *etiamsi daremus* passage in his later magnum opus *De iure belli ac pacis*.¹³ Knud Haakonssen offers the following succinct observation regarding the important difference between Grotius and his scholastic predecessors in this regard: while for Grotius, the obligatory aspect of the law of nature arises independently of God's will, "the scholastic point was that human beings have the ability to understand what is good and bad even without invoking God but have no obligation proper to act accordingly without God's command."¹⁴ This goes hand in hand with Grotius's denial that natural law can be identified with either Old or New Testament, which contrasts with scholastics such as Suárez, for whom the Decalogue contained the natural law.¹⁵

The doctrine of legal sources from which Grotius developed his natural law in *De iure belli ac pacis* reveals strong similarities to the doctrine presented earlier in *De iure praedae*.¹⁶ Although Grotius no longer found himself under pressure to develop a new doctrine of legal sources in order to undermine

11 CICERO, *DE FINIBUS* [ON MORAL ENDS] bk. 4, sec. 25.

12 In this, Grotius's doctrine of obligation prefigures Hobbes's. See Thomas Nagel, *Hobbes's Concept of Obligation*, 68 *PHIL. REV.* 68 (1959).

13 GROTIUS, *IBP*, *supra* note 2, Prolegomena 11.

14 KNUD HAAKONSEN, *NATURAL LAW AND MORAL PHILOSOPHY: FROM GROTIUS TO THE SCOTTISH ENLIGHTENMENT* 29 (1996).

15 *Id.*

16 GROTIUS, *IPC*, *supra* note 8.

a concrete opponent's legal arguments, he in *De iure belli ac pacis* adhered to the same radical doctrine of sources. Grotius maintained the fundamental separation between unalterable natural law and the positive law of nations that he had introduced in his earlier work and that had formed the basis of his argument against Portuguese claims to a trade monopoly in East India.¹⁷

The main source of legal obligation for Grotius remains, as in *De iure praedae*, nature. This contrasted with the fluctuating norms arising from positive decrees, which resist a systematic approach. As in *De iure praedae*, the ultimate source of law in *De iure belli* is the will of God, in a genealogical sense, because God had willed the existence of human beings in the first place.¹⁸ As in *De iure praedae*, however, this caveat does not extend very far. A voluntarist interpretation is ruled out by the limitation that natural law cannot be changed even by God. The grounds of validity as well as the obligatory force of the law of nature are here, as in the earlier work, based on the dictates of reason and sociability.

Thus natural law (*ius naturale*), in perfectly Stoic fashion, can be described as

a command of right reason; it is the Rule and Dictate of Right Reason [*recta ratio*], shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature, and consequently, that such an Act is either forbid or commanded by God, the Author of Nature.¹⁹

This Stoic definition of natural law as the dictate of right reason is taken from Cicero. As Malcolm Schofield writes, "Cicero does not tell us that this is Stoic material he is producing . . ., although it is clearly a reworking of basically Stoic material." Most importantly, "the proposition that law is simply right reason employed in prescribing what should be done and forbidding what should not be done is a securely Stoic . . . thesis."²⁰

The way Grotius identifies his natural law with the dictates of right reason is deeply indebted to Cicero's formulation of this Stoic doctrine. Grotius's rationalist conception of the relationship between God's free will and natural law, too, can be found prefigured in Cicero's rendering of right reason as the primary bond between humans and the divinity: "reason forms the first bond

17 BENJAMIN STRAUMANN, *ROMAN LAW IN THE STATE OF NATURE: THE CLASSICAL FOUNDATIONS OF HUGO GROTIUS' NATURAL LAW* 24-32, 40-41, 53-55 (2015).

18 *Id.* Prolegomena 12 (ascribing this view to the Stoic Chrysippus).

19 GROTIUS, *IBP*, *supra* note 2, at 1.1.10.1. Translations are taken from HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 150 (Richard Tuck & Jean Barbeyrac eds., 2005) [hereinafter GROTIUS, RWP].

20 MALCOLM SCHOFIELD, *THE STOIC IDEA OF THE CITY* 68-69 (1991).

between human and god.”²¹ In Cicero’s Greek Stoic models, the argument about right reason being an attribute of the gods and of the Stoic sage was “probably originally framed with gods and sages in mind and then adapted to human beings generally.”²² It is noteworthy that Cicero, when talking about the dictates of right reason constituting natural law, goes on to apply this doctrine to human beings alone.²³ The view lends itself to Grotius’s rationalist conception of natural law as a dictate of right reason curbing God’s free will, and it is easy to see how it could later prove amenable to deism.²⁴

For Cicero as for Grotius, everything now depended on the characteristics of human nature. Is human nature indeed, as Grotius suggested, typified by some “concern for society” (*societatis custodia*)?²⁵ Or is expediency or interest more basic, as ancient Skeptics like Carneades and Epicureans like Horace tended to claim? It seems reasonably clear that what Grotius seeks to advance, first and foremost, is an epistemological point of view; being rational, human beings are in a position to discover through reason the rules of natural law, what it is that natural law requires from them. So far, this seems consistent not only with Grotius’s Stoic sources, but also with a Thomist framework. Furthermore, Grotius’s natural law is also natural due to the fact that its content makes it suitable to humans by virtue of the kind of beings they happen to be; natural law is “the Rule and Dictate of Right Reason [*recta ratio*], shewing the Moral Deformity or Moral Necessity there is in any Act, according to its Suitableness or Unsuitableness to a reasonable Nature”²⁶

B. The Novelty of Grotius’s Approach

The nature in question is thus *human nature*, and certain objective facts about human nature provide standards for natural law. It can therefore be said that Grotius’s conception of natural law seeks an answer both to the epistemological question of how to identify natural law — through right reason — as well

21 Cic. *Leg.* 1.23.

22 ANDREW R. DYCK, A COMMENTARY ON CICERO, DE LEGIBUS 109, 125 (2004).

23 Cic. *Leg.* 1.33.

24 See DYCK, *supra* note 22, at 7, 35. It was this affinity which would later lead to allegations of atheism by the Huguenot theologian Pierre Jurieu. See PIERRE JURIEU, L’ESPRIT DE MONSIEUR ARNAULD [THE SPIRIT OF MR. ARNAULD] (Deventer: Les héritiers de J. Colombius 1684); PIERRE BAYLE, 2 DICTIONNAIRE HISTORIQUE ET CRITIQUE [HISTORICAL AND CRITICAL DICTIONARY] 617 (Utrecht La Haye et al. eds., 5th ed. Leyde 1740).

25 GROTIUS, IBP, *supra* note 2, Prolegomena 8.

26 GROTIUS, RWP, *supra* note 19, at 150; GROTIUS, IBP, *supra* note 2, at 1.1.10.1.

as to doubts regarding the objectivity of the natural legal norms — through reference to natural facts which are independent of arbitrary conventions.²⁷

However, there is a crucial departure from the Aristotelian tradition (as well as from the earlier Greek Stoic tradition) to be found in Grotius's work, in that the principles underlying Grotius's natural law are not, as they are in Aristotle and the Stoa, justified by an eudaimonist account of the final human good. Rather, Grotius's natural law is a practical ethics couched in legal terminology that is (to deploy anachronistic language) not of a teleological, but of a deontological nature. Although the norms of Grotius's natural law do "suit" or "fit" human nature, they *oblige* us by their *moral necessity* rather than simply motivating us through reference to the final end that is wellbeing (*eudaimonia*). A further essential feature of Grotius's naturalism lies in his rules having validity in a pre-political or extra-political state of nature. Grotius's is thus a natural law in the sense that it holds outside of established polities; in the sense that we can discover it by virtue of having right reason qua human beings (*recta ratio* — notice the built-in normative tendency); and in the sense that we can plausibly be motivated to follow it by our antecedently given natural social instinct, our *appetitus societatis*.

In an illuminating and characteristically fine-grained and balanced discussion, Terence Irwin has pondered whether or not Grotius deserves to be called, with Barbeyrac, a pioneer. Irwin draws on Henry Sidgwick's fruitful distinction between "a more ancient view of Ethics"²⁸ as an "inquiry into the nature of the Good, the intrinsically preferable and desirable, the true end of action," on the one hand, and the more modern view of ethics as "an investigation of the Right, the true rules of conduct, Duty, the Moral Law, &c.,"²⁹ on the other. Irwin concludes that Grotius's is a natural law doctrine still very closely related to Scholastic naturalism, albeit with some non-Scholastic features.³⁰ These features, in Irwin's view, are that Grotius's exposition of natural law is "not embedded in the moral and metaphysical context of Aquinas' Treatise on Law."³¹ Irwin cautions that this does not amount to a pioneering role, since Grotius holds on to a Scholastic naturalism in that "he takes morality to consist in observance of what is naturally right" and in that Grotius, in his

27 See Gisela Striker, *Origins of the Concept of Natural Law*, in *ESSAYS ON HELLENISTIC EPISTEMOLOGY AND ETHICS* 209, 211 (1996) (discussing objectivity as a crucial motivation for the development of a concept of natural justice and, eventually, natural law).

28 HENRY SIDGWICK, *THE METHODS OF ETHICS* 93 (Macmillan and Co. 1874).

29 *Id.* at 7, fol. 2f.

30 2 TERENCE IRWIN, *DEVELOPMENT OF ETHICS* 70-99 (2008).

31 *Id.* at 98.

reply to Carneades's skepticism, "does not reduce justice to utility, but sticks to a Stoic and Peripatetic naturalist conception."³² This, according to Irwin, amounts to a rejection of what Sidgwick had called the "jural" or "quasi-jural" outlook of the "modern view of ethics" and seems thus to refute Barbeyrac's claim that Grotius was a pioneer.

However, my sense is that Sidgwick, whose interpretation of the history of ethics is indeed very helpful in this context, would have agreed with Barbeyrac. It seems to me that Sidgwick's view of the modern, "jural" or rather "quasi-jural" conception of ethics does not imply, against Irwin, a view of moral principles as legislated, prescriptive laws which derive their validity from their source. Rather, a quasi-jural conception of moral rules is also consistent with a view of moral principles as indicative laws independent of will, deriving their validity from their content rather than their source. The distinction *vis-à-vis* the "non-jural," ancient Greek view lies rather in the fact that the jural conception formulates moral principles as rules rather than virtues; rules that have to be followed by virtue of their inherent (natural) rightness, not by virtue of their fulfilling human nature and being the final good for human beings. It is in this sense, then, that Grotius, albeit indeed a naturalist, seems to part company with Aquinas and Suárez — and it is these features of his doctrine which would have made it rather difficult for him to embed his exposition of natural law in a Thomist metaphysical framework. Grotius should thus indeed be seen as one of the thinkers who provoked the "great separation" between natural law and Aristotelian metaphysics.³³

C. Human Nature as a Source of Corrective Obligations

It is therefore important to note that the thoroughgoing rationality of the natural law norms guarantees Grotius's confidence in their content, but that the content of these norms does not tell us anything about the highest good for humans, or about the ends they should pursue — Grotius's natural law is thus stripped of its Aristotelian and Thomist metaphysical framework and may, from a systematical point of view, best be described as a protoliberal theory, where the right is prior to the good and where the requirements of

32 *Id.*

33 To borrow Mark Lilla's term from another context. For the view that Grotius was novel in clearly separating scholastic theology and ethics from moral philosophy, compare GERSHOM CARMICHAEL, *NATURAL RIGHTS ON THE THRESHOLD OF THE SCOTTISH ENLIGHTENMENT: THE WRITINGS OF GERSHOM CARMICHAEL* (James Moore & Michael Silverthorne eds., Michael Silverthorne trans., Liberty Fund 2002) (1707).

natural law do not ultimately depend on a teleological account of human nature. This might be so, I suggest, because Grotius lacks the confidence of both his immediate Stoic sources and his Aristotelian predecessors to extend rational evaluation from the sphere of justice and natural law to the sphere of ethics broadly understood, to the *summum bonum*. His is thus not an eudaimonist doctrine,³⁴ and he seems agnostic when it comes to choices made in this regard. His natural law does not provide criteria to give content to the ultimate end or happiness, any more than it seeks to differentiate between constitutional arrangements³⁵ — it is all subject to freedom of contract:

But as there are several Ways of Living, some better than others, and every one may chuse which he pleases of all those Sorts; so a People may choose what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers Opinions, but by the Extent of the Will of those who conferred it upon him.³⁶

The necessary fit between justice and nature, then, does not intrude into the sphere of ethics understood as the discipline to do with our final or ultimate end. It only extends to rules to do with justice, narrowly understood as corrective justice, and does not aim at the sort of Aristotelian virtue education which is the true aim of Peripatetic political science. The reason for Grotius's appeal to a natural social instinct, the (Stoic) *appetitus societatis*, lies in his attempt to show that there is a natural motivational basis for cooperation and adherence to a pre-political set of norms in the state of nature — that is to say, that it is possible for human beings to be motivated to follow the natural legal norms accessible to them through their reason. This does not mean that humans necessarily are so motivated, but simply that it is not implausible, given their rational, social nature, that they can be. Conversely, it is apt to shed doubt on a Hobbesian account of motivation framed exclusively in terms of self-interest narrowly understood.

For our purposes, Grotius's arguments concerning human nature as a source of moral and legal obligation provide a framework for imputing some obligations on sovereigns; Grotius himself famously required sovereigns to refrain from “occupying” the high seas and from encroaching on the freedom of commerce.³⁷ As we shall see in the following Part, his views entailed some

34 At least not in his natural law treatises.

35 See J.B. SCHNEEWIND, *THE INVENTION OF AUTONOMY* 175 (1998).

36 GROTIUS, RWP, *supra* note 19, at 262; GROTIUS, IBP, *supra* note 2, at 1.3.8.2.

37 HUGO GROTIUS, *THE FREE SEA* ch. 5 (David Armitage ed., Richard Hakluyt trans., Liberty Fund 2004) [hereinafter GROTIUS, *THE FREE SEA*].

important consequences for internal sovereignty as well, consequences he spelled out by resorting to concepts from Roman private law.

II. PRIVATE ROMAN LAW CONSTRAINTS ON SOVEREIGNTY: THE EXAMPLE OF THE RIGHT TO RESISTANCE

Grotius was widely criticized for his conservative attitude toward resistance to established authority. In *De iure praedae*,³⁸ the question of a right to resistance played no major role, which can easily be explained by the international, or rather extra-state, context of the work: its main concern was the behavior of the subjects of natural law on the high seas, understood as the state of nature. In *De iure belli ac pacis*, Grotius devoted an entire chapter, *De bello subditorum in superiores*, to the question whether, after the creation of a state authority, there remains a natural right to resistance. The right of resistance was interpreted by Grotius as a right to private war against the authorities.

Indeed all Men have naturally a Right to secure themselves from Injuries by Resistance [*ius resistendi*], as we said before. But civil Society [*civilis societas*] being instituted for the Preservation of Peace [*tranquillitas*], there immediately arises a superior Right [*ius maius*] in the State over us and ours, so far as is necessary for that End.³⁹

At first it seems as though according to Grotius the natural right of resistance was the first right to fall victim to the creation of the polity and the superordinate rights of the state authorities. So far, so Hobbesian. However, Grotius permitted some exceptions to this rule — cases in which the natural right to resist had not disappeared even in the context of the established polity. In contrast to the Calvinist monarchomachs of the sixteenth century, who had rejected a right of resistance on the part of private individuals against state authority, Grotius did fall back in exceptional cases on a natural-law right to resistance on the part of the private individual (*privatus*).⁴⁰

For Grotius, the right of resistance arose either from a breach of contract or from an unlawful act by the ruler. Grotius distinguished between resistance to legal holders of power and resistance to those who had unlawfully acquired power. In the first case, Grotius thought of the right to resistance in Roman law terms, as the result of a breach of the ruler's contractual obligations. A

38 Grotius, IPC, *supra* note 8.

39 Grotius, IBP, *supra* note 2, at 1.4.2.1; Grotius, RWP, *supra* note 19, at 338.

40 Grotius explicitly denies lower-level magistrates a right to resist. See Grotius, IBP, *supra* note 2, at 1.4.6.

possible right to resistance against legal holders of the sovereign power was based on the original contract or promise in which the form of authority was determined. Because Grotius saw the sovereign contract as a promise by the person holding the highest sovereign power to his subjects, subjective rights could arise from such a promise. The Roman emperors Trajan and Hadrian had made such promises,⁴¹ Grotius writes, in order to explain the consequences that arose from it:

Yet I must confess, where such Promises are made, Sovereignty [*imperium*] is thereby somewhat confined, whether the Obligation only concerns the Exercise of the Power, or falls directly on the Power itself. In the former Case, whatever is done contrary to Promise, is unjust; because, as we shall show elsewhere, every true Promise gives a Right [*ius*] to him to whom it is made. In the latter, the Act is unjust, and void at the same Time, through the Defect of Power.⁴²

Sovereignty (*summum imperium*) could, according to Grotius, be divided at the time of the original establishment of the form of government: “So also it may happen, that the People in chusing a King, may reserve certain Acts of Sovereignty to themselves, and confer others on the King absolutely and without Restriction.”⁴³ A free people can “require certain Things of the King, whom they are chusing, by way of a perpetual Ordinance” or can add something to the contract “whereby it is implied, that the King may be compelled or punished.”⁴⁴

Grotius also conceded a right to resistance in the case of a ruler who had gained his authority by election or heredity and then alienated his power. Such a ruler enjoyed sovereignty only by usufruct (*usufructuarius*), and it was therefore not transferable.⁴⁵ A ruler who, in opposition to the provisions of the Roman law on *usufructus*, transferred his power could thus be lawfully resisted, according to Grotius.⁴⁶ In this context, the right to resistance apparently did not arise primarily from a breach of contract by the ruler; there was, instead, a violation of the norms of Roman property law on usufruct, which in Grotius’s view formed the basis for certain forms of political power and

41 *Id.* at 1.3.16.1 n.15.

42 GROTIUS, RWP, *supra* note 19, at fol. 301f; GROTIUS, IBP, *supra* note 2, at 1.3.16.2.

43 GROTIUS, RWP, *supra* note 19, at 306; GROTIUS, IBP, *supra* note 2, at 1.3.17.1.

44 GROTIUS, RWP, *supra* note 19, at 306; GROTIUS, IBP, *supra* note 2, at 1.3.17.1

45 For a lucid discussion of Grotius’s use of the idea of usufruct, with due attention to the importance of Roman law, see Daniel Lee, *Popular Liberty, Princely Government, and the Roman Law in Hugo Grotius’s De Jure Belli Ac Pacis*, 72 J. HIST. IDEAS 371 (2011).

46 GROTIUS, IBP, *supra* note 2, at 1.4.10.

were conceived of as natural law norms that preceded any sovereign contract. This is obviously akin to Professor Benvenisti's use of the private-law device of trusteeship to constrain sovereigns.

Finally, the natural right to resistance could, according to Grotius, be reserved by contract:

If in the conferring of the Crown [*delatio imperii*], it be expressly stipulated, *that in some certain Cases* the King may be resisted; even though that Clause [*pactum*] does not imply any Division of the Sovereignty, yet certainly some Part of natural Liberty is reserved to the People, and exempted from the Power of the King.⁴⁷

While the right to resist a lawful ruler arose, as a rule, from a breach of the contractual agreement (*pactum*) upon which his authority was based, the right to resist an unlawful holder of authority arose from the absence of a legal basis for that authority. Such an "invader of authority" (*invasor imperii*)⁴⁸ could, under certain circumstances, be resisted; any private person could use force against someone who had gained his power through an unjust war. Finally, a general right of resistance had to be supposed for polities in which laws were in force that permitted tyrannicide. Anyone who usurped power over such a polity could, under the positive law of the state in question, be killed by any citizen without legal process.⁴⁹

According to Grotius, therefore, the natural right of resistance was revived in cases of breach of contract or violation of natural-law norms by a ruler. Failure to observe the norms of *ususfructus* on the part of princes, as discussed above, which could give cause for lawful resistance, represented such a violation of natural law. Such violations were seen as analogous to violations of Roman property law, in which usurpation was viewed as unlawful expropriation of others' property or as violation of the provisions for usufruct.⁵⁰ Grotius, analyzing constitutional arrangements in Roman law terms, is not willing to make any substantive normative commitment to a particular kind of constitutional setup

47 Grotius, RWP, *supra* note 19, at 377; Grotius, IBP, *supra* note 2, at 1.4.14.

48 Grotius, IBP, *supra* note 2, at 1.4.15 (translated by the author).

49 Grotius, RWP, *supra* note 19, at 379-80.

50 Incidentally, it seems to me that Professor Benvenisti is not quite right to say that for Grotius ownership "must be limited to 'supreme necessity.'" Benvenisti, *supra* note 1, at 309. Rather, extreme necessity may allow for use-rights by the suffering non-owner, without however changing existing property-relations; granting such use-rights merely allays the hardship of private property (*rigor domini*). In the case of equal need, the possessor wins out.

— he cannot be described as an author in the civic tradition of republicanism in this regard, let alone as a proponent of “exclusive republicanism.”⁵¹

What he does put forward, as Daniel Lee has lucidly observed, is a view according to which “a people may remain free even while under the government of a prince.”⁵² This is so because if the prince holds sovereignty by usufruct, this will be perfectly compatible with popular liberty; surely a “significant departure from one of the longstanding assumptions of early modern republicanism, that popular liberty requires popular government.”⁵³ It also follows that — as in the case of Professor Benvenisti’s trusteeship — certain private-law rules seem, if only by way of analogy, to become hierarchically superior to other lawmaking and thus immune to the essential sovereign power, legislation.⁵⁴

Of course, the question arises as to the status of these private Roman-law rules — why should they be privileged? In Grotius’s case, they are privileged *qua* natural-law rules. But for both Grotius and Benvenisti, the use of notions taken from private law invites a further question — are these private-law devices used merely as metaphors? Or do their fine-grained legal specifics carry any weight? For Grotius, the inbuilt legal precision was an important reason to reach for concepts from private Roman law, and it seems to me that the legal concept of trusteeship is no mere metaphor for Benvenisti either. But why should these private-law ideas have any validity in the realm of public law? Grotius’s answer was that at least some Roman-law rules have the status of natural law,⁵⁵ and it seems that this, at least in part, should be Benvenisti’s answer as to the status of his own fiduciary device, trusteeship, as well.⁵⁶ But it may not carry us far enough to show why trusteeship should be in a position to encumber sovereigns with duties *vis-à-vis* all of humankind.

51 James Hankins, *Exclusivist Republicanism and the Non-Monarchical Republic*, 38 POL. THEORY 452 (2010).

52 Lee, *supra* note 45, at 373.

53 *Id.* at 391.

54 Jean Bodin, who is most often associated with legislation as the essential “mark of sovereignty,” acknowledges natural-law limits on sovereign legislation as well; some of the limits he accepts are also modeled on ideas from private Roman law, especially from rules concerning fiduciary devices. See Lee, *supra* note 5.

55 This, as I argue elsewhere, was also Alberico Gentili’s argument in favor of (private) Roman-law rules that bind sovereigns. See Benjamin Straumann, *The Corpus iuris as a Source of Law Between Sovereigns in Alberico Gentili’s Thought*, in THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS 101 (Benedict Kingsbury & Benjamin Straumann eds., 2010).

56 Benvenisti, *supra* note 1, at 301. Of course, the other part of the answer is supplied by what Benvenisti intriguingly argues is already implicitly contained in the international-law concept of sovereignty.

As we will see in Part III, Grotius *did* offer an account of legal obligations, based on the Roman law of property and obligations, which were supposed to hold outside of established polities and across sovereign states. However, this account provides only a very narrow normative basis for constraints on sovereigns, precisely because of the limited nature of the underlying private-law foundations. By adhering too closely to ideas taken from private law, Professor Benvenisti may run the danger of limiting the scope of the sovereign duties he proposes in a similar fashion.

III. “PERFECT” AND “IMPERFECT” RIGHTS AND DUTIES OF JUSTICE

A. Grotius’s Theory of Justice vs. Aristotle’s

Let us consider Grotius’s account of duties outside established polities. Grotius relies on a distinction between “perfect” and “imperfect” justice. This was to become an influential dichotomy, especially in (and via) eighteenth century Scottish thought. It allowed Grotius to conceptualize (perfect) rights that hold in the state of nature, potentially across sovereign states, and certainly between private individuals and sovereigns when interacting on the high seas (which Grotius perceived as an actually existing state of nature).⁵⁷ These rights could be claimed and, if necessary, *enforced* by means of a natural right to punish (not unlike the right to punish acknowledged by John Locke⁵⁸ — who most likely took it from Grotius). In the absence of such a natural right to punish, perfect duties of justice in the state of nature are more difficult to conceive.⁵⁹

Grotius’s lack of interest in the kind of justice that presupposes a context of established political communities is shown in the use he made of Aristotle’s theory of justice in the *Nicomachean Ethics*. In *De iure praedae*, Grotius adopted the Aristotelian dichotomy between distributive and corrective justice;⁶⁰ but

57 See GROTIUS, *THE FREE SEA*, *supra* note 37, ch. 5.

58 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 272-73 (Peter Laslett ed., 1967) (1689).

59 See Alexis Blane & Benedict Kingsbury, *Punishment and the ius post bellum*, in *THE ROMAN FOUNDATIONS OF THE LAW OF NATIONS*, *supra* note 55, at 241; Benjamin Straumann, *The Right to Punish as a Just Cause of War in Hugo Grotius’ Natural Law*, 2 *STUD. HIST. ETHICS* 1 (2006). Grotius’s argument for humanitarian intervention is closely linked to the right to punish. See GROTIUS, *IBP*, *supra* note 2, at 2.25.8.4.

60 ARISTOTLE, *NICOMACHEAN ETHICS* bk. 5, at 1130b30ff. Both types are, in Aristotle, parts of particular justice, which is contrasted with universal justice. The latter,

unlike Aristotle himself, he devoted his main attention to corrective justice,⁶¹ which alone he identified with natural law.⁶² Grotius referred to Aristotle's *Politics*, and quoted the characterization of justice there as virtues affecting the social sphere, which must be understood in Aristotle as an essential element of the polity and of the good life of the city-state (*polis*).⁶³ The distinction made in the *Nicomachean Ethics* between proportional and arithmetic justice⁶⁴ is also adapted by Grotius.⁶⁵ However, in Grotius, Aristotle's proportional or distributive justice is reinterpreted, in an anti-Aristotelian way, to be limited in effect to the household.⁶⁶ In Aristotle, both types of justice are connected to the state and have no applicability to the household, which knows no justice in the actual sense and is structured as a monarchy: actual justice on the other hand is political and belongs to the sphere of the sovereign state.⁶⁷ In contrast to Aristotle, Grotius applies only corrective justice to the sphere of the free, equal subject of law. This follows from the purpose of the theory of justice in *De iure praedae*: to be of use to Grotius, this theory of justice had to be first of all transferable to a *theory of law*.⁶⁸

This one-sided concentration on Aristotle's corrective justice is thus determined by a number of factors. Apart from the fact that the state of nature for Grotius presupposes the absence of a distributive authority and thus simply rules out distributive justice,⁶⁹ the concentration on corrective justice allows

broad sense of justice is identical with the whole of virtue, when virtue is expressed towards other people. See ARISTOTLE, *supra*, bk. 5, at 1130a10ff. On Aristotle's concept of justice, see TERENCE IRWIN, ARISTOTLE'S FIRST PRINCIPLES 424-38 (1988); RICHARD KRAUT, ARISTOTLE: POLITICAL PHILOSOPHY 98-177 (2002); and FRED D. MILLER, NATURE, JUSTICE, AND RIGHTS IN ARISTOTLE'S POLITICS 66-86 (1995).

- 61 The status of reciprocal or commercial justice, ARISTOTLE, *supra* note 60, bk. 5, at 1232b21, as a further kind of particular justice in Aristotle is unclear; Grotius clearly thought of it as a part of corrective justice. See *infra* footnotes 89, 90.
- 62 If not yet with law in general, as he later would in *De iure belli ac pacis*. See Peter Haggemacher, *Droits subjectifs et système juridique chez Grotius* [*Subjective Rights and Juridical System in Grotius*], in POLITIQUE, DROIT ET THÉOLOGIE CHEZ BODIN, GROTIUS ET HOBBS [POLITICS, LAW AND THEOLOGY IN BODIN, GROTIUS AND HOBBS] 73, 89 (Luc Foisneau ed., 1997).
- 63 GROTIUS, IPC, *supra* note 8, fol. 8; ARISTOTLE, POLITICS bk. 3, at 1283a37ff.
- 64 ARISTOTLE, *supra* note 60, bk. 5, at 1131a29ff., 1132a1ff.
- 65 GROTIUS, IPC, *supra* note 8, fol. 8.
- 66 *Id.*
- 67 ARISTOTLE, *supra* note 60, bk. 1, at 1253a38.
- 68 Apart from the historical eleventh chapter and chapters 14 and 15, all the chapters of GROTIUS, IPC, *supra* note 8, have a specifically legal character.
- 69 See Haggemacher, *supra* note 62, at 122.

the formulation of a rule-based ethics. Such a “legalized,” juridical ethics need not depend on an ethics of virtue.

The identification of Aristotle’s corrective justice with the doctrine of obligations in the Roman law of the *Digest* constitutes the crucial move to gear the Aristotelian framework of justice towards a theory of justice ultimately inspired by Cicero and the Roman jurists that has nothing in common with Aristotle’s eudaimonistic concerns. Grotius uses the elements of Aristotelian ethics suited to adaptation to the obligation and property-law categories of Roman private law, neglecting the doctrine of distributive justice that plays an incomparably greater role than corrective justice does for Aristotle, both in the *Nicomachean Ethics* and very much so in the *Politics*.⁷⁰ Grotius thus foists the theory of justice developed by Aristotle for the context of the sovereign city-state onto a property-oriented theory of justice of Roman provenance, which he then transfers to the sphere of the high seas, understood as the state of nature, and has them develop their full legal effect there.⁷¹

As opposed to the Aristotelians, Grotius was attracted to a conception of justice that could be transposed from Aristotle’s *polis* context to the pre-political and interstate sphere, a conception that did not necessarily presuppose a legally constituted polity. In *De iure belli ac pacis* he thoroughly criticized Aristotle’s conception of justice.⁷² Grotius found it plausible to contrast the virtue of justice with *pleonexia*, the desire to have too much, or greed, especially as justice to him “consists wholly in abstaining from that which is another Man’s.”⁷³ In Grotius’s view, the “very Nature of Injustice” consisted exclusively of “the Violation of another’s Rights.”⁷⁴

70 This neglect of distributive justice seems ultimately to be the reason for Michel Villey’s criticism that Aristotle’s legal philosophy was “deformed” in legal humanism, especially in Grotius. See Michel Villey, *Déformations de la philosophie du droit d’Aristote entre Vitoria et Grotius* [*Deformations of Aristotle’s Philosophy of Law Between Vitoria and Grotius*], in PLATON ET ARISTOTE À LA RENAISSANCE [FROM PLATO AND ARISTOTLE TO THE RENAISSANCE] 201, 212 (1976). Villey fails to note, however, that this “deformation” is ultimately based upon the reception of Roman private law.

71 See RICHARD TUCK, *NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT* 63 (1979) (emphasizing the “unAristotelian character of all this”).

72 Rejecting in particular the idea of embedding justice in Aristotle’s *mesotes*-structure of the virtues. See GROTIUS, *IBP*, *supra* note 2, Prolegomena 43-45; ARISTOTLE, *supra* note 60, at 5.1132a29f.

73 GROTIUS, *RWP*, *supra* note 19, at 120; GROTIUS, *IBP*, *supra* note 2, Prolegomena 44.

74 GROTIUS, *RWP*, *supra* note 19, at 121; GROTIUS, *IBP*, *supra* note 2, Prolegomena 44.

In *De iure belli ac pacis*, Grotius explicitly narrowed corrective justice down to natural, subjective *rights*. Only *ius* in the sense of a subjective right was viewed by Grotius as “Right properly, and strictly taken” (*ius proprie aut stricte dictum*).⁷⁵ Such subjective rights fulfilled the conditions of precisely that justice defined as “justice in the actual or narrow sense,” that is, Aristotle’s corrective justice, which Grotius termed *iustitia Expletrix* and contrasted with distributive justice:

‘Tis expletive Justice, Justice properly and strictly taken, which respects the *Faculty* [*facultas*] or *perfect Right*, and is called by *Aristotle* συναλλακτικῆ, *Justice of Contracts*, but this does not give us an adequate Idea of that Sort of Justice. For, if I have a Right to demand Restitution of my Goods, which are in the Possession of another, it is not by virtue of any *Contract*, and yet it is the Justice in question that gives me such a Right. Wherefore he also calls it more properly ἐπανορθωτικῆν, *corrective Justice*. *Attributive Justice*, stiled by *Aristotle* διανεμητικῆ *Distributive*, respects *Aptitude* or *imperfect Right*, the attendant of those Virtues that are beneficial to others, as *Liberality*, *Mercy*, and prudent Administration of Government.⁷⁶

Grotius’s conception deviates in some minor ways from Aristotle’s corrective justice, as defined in the *Nicomachean Ethics*. Thus Grotius wrongly alleged that corrective justice for Aristotle had meant merely voluntary contractual relations. Aristotle’s corrective justice no longer referred, as in *De iure praedae*, merely to matters affecting individuals,⁷⁷ but was interpreted as capable of being applied to the behavior of governments: “when the State repays out of the publick Funds what some of the Citizens had advanced for the Service of the Publick, it only performs an Act of *Expletive Justice*.”⁷⁸ This opens up the possibility of certain natural rights of citizens *vis-à-vis* the state, and therefore represents a potential limitation on sovereignty and state power. The question of the relationship between natural justice and the state can thus be raised, at least in principle.

B. Perfect or Imperfect Duties?

The most important and subsequently influential result of Grotius’s discussion is that *only* corrective justice can be called justice or natural law in the

75 GROTIVS, RWP, *supra* note 19, at 138; GROTIVS, IBP, *supra* note 2, at 1.1.5.

76 GROTIVS, RWP, *supra* note 19, at 142; GROTIVS, IBP, *supra* note 2, at 1.1.8.1.

77 See GROTIVS, IPC, *supra* note 8, at 2, fol. 8.

78 GROTIVS, RWP, *supra* note 19, at 146; GROTIVS, IBP, *supra* note 2, at 1.1.8.3.

narrow and proper sense. Distributive justice, the object of which is imperfect right or aptitude (*aptitudo*), has no part in this. The virtue that accompanies distributive justice is accordingly not justice in the narrow sense (*iustitia*), but beneficence (*liberalitas*). This type of justice is at best “by the wrong Use of the Word . . . said to belong to this Natural Law.”⁷⁹ It becomes clear here that, in *De iure belli ac pacis*, Grotius adapted the distinction between corrective and distributive justice to a distinction undertaken in Cicero in the first book of *De officiis*. Cicero had differentiated between justice in the broader sense (*beneficentia*) and actual justice (*iustitia*), which deals with private property and obligatory rights *in personam*: “There are two parts of this: justice [*iustitia*], the most illustrious of the virtues, on account of which men are called ‘good’; and the beneficence [*beneficentia*] connected with it, which may be called either kindness or liberality.”⁸⁰

For Cicero, justice in the narrow sense (*iustitia*) concentrated on property and contractual rights.⁸¹ *Liberalitas*, in contrast, “is bestowed upon each person according to his standing.”⁸² It becomes clear that Grotius was indeed following Cicero’s *De officiis* not only from the terminology, but from a reference added to the editions after 1642. To explain the object of distributive justice (*aptitudo*), Grotius used a quote from *De officiis* in which Cicero created a hierarchy of various addressees of liberties (*liberalitas*) and completed his portrayal of beneficence.⁸³ Grotius’s postulates of distributive justice resemble Cicero’s *beneficentia* — they are not part of natural law, *iustitia* in the actual sense, and are not really owed. In contrast, as for Cicero, the subjective rights, or *facultates*, which make up the actual object of natural law, are those rights protected by private (Roman) property law and the law of obligations.⁸⁴ What Julia Annas has observed with regard to Cicero holds for Grotius as well: “[I]t can be shown that justice proper is concerned with what we could call matters of legal obligation and rights, while benevolence is concerned with moral duties which we have towards others as fellow human beings.”⁸⁵

It is important to emphasize that Grotius adopted and made explicit Cicero’s implied distinction between essentially *legal* claims, arising from property, contracts, and wrongdoing (delicts), and moral duties, which were not legally

79 GROTIUS, RWP, *supra* note 19, at 154; GROTIUS, IBP, *supra* note 2, at 1.1.10.3.

80 CICERO, DE OFFICIIS [ON DUTIES] bk. 1, sec. 20.

81 *Id.* bk. 1, secs. 21-41.

82 *Id.* bk. 1, sec. 42.

83 *Id.* bk. 1, sec. 58.

84 Julia Annas, *Cicero on Stoic Moral Philosophy and Private Property*, in PHILOSOPHIA TOGATA: ESSAYS ON PHILOSOPHY AND ROMAN SOCIETY 151 (Miriam T. Griffin & Jonathan Barnes eds., 1989).

85 *Id.* at 168 (discussing the difference between *iustitia* and *liberalitas*).

sanctioned. Applied to the Aristotelian theory of justice, this means that for Grotius, only corrective justice enjoyed moral and legal protection outside of sovereign states, while Aristotle's distributive justice was denied any specifically legal character. Thus in Grotius's *De iure belli*, corrective justice gained a very prominent position indeed and, as in *De iure praedae*, was expressed in the terminology of private Roman law.

Corrective justice, as opposed to the virtue of distributive justice, lends itself to being expressed, with a high degree of precision, as rules. Adam Smith, an important follower of Grotius in this regard, explained this as follows. As opposed to generosity of prudence, the rules of justice are "accurate in the highest degree," Smith writes. "If I owe a man ten pounds, justice requires that I should precisely pay him ten pounds," and in this the "rules of justice" resemble "the rules of grammar," being equally "precise, accurate, and indispensable."⁸⁶ Smith's view of the history of this outlook is instructive: "In none of the ancient moralists, do we find any attempt towards a particular enumeration of the rules of justice." By contrast, "Grotius seems to have been the first who attempted to give the world any thing like a system of those principles which ought to run through, and be the foundation for the laws of all nations."⁸⁷

The same distinction between the perfect claims from corrective justice and the imperfect claims from distributive justice can be found in some of Grotius's successors, especially and most influentially in Emer de Vattel, as I will try to sketch briefly in the Conclusion. While Grotius's perfect duties seem too narrow to underwrite the kinds of duties Benvenisti has in mind, Vattel's imperfect duties may offer a more congenial model for the notion of sovereignty as trusteeship. Vattel's elaboration of imperfect duties offers a broader, if weaker, basis for such a notion. As Vattel knew, such a basis would, however, still need to be argued for on a natural-law basis.

CONCLUSION

One state owes to another state whatever it owes to itself, so far as that other stands in real need of its assistance, and the former can grant it without neglecting the duties it owes to itself. Such is the eternal and immutable law of nature.⁸⁸

86 ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 175 secs. 3.6.10-11 (D.D. Raphael & A.L. Macfie eds., 1976).

87 *Id.* at 341 sec. 7.4.37. This stance Smith probably owes to Barbeyrac.

88 EMER DE VATTEL, *THE LAW OF NATIONS, OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, WITH THREE*

Professor Benvenisti's aim to impose a more taxing set of duties on sovereigns may indeed require, as he himself points out, more sovereignty rather than less, or at least the recognition of its "crucial role"⁸⁹ in the model of sovereignty as trusteeship. For sovereigns to be able to discharge these further-reaching duties, and to assume a certain amount of accountability *vis-à-vis* the principal — a principal Cicero, Seneca and Grotius would have called the "society of mankind" — these sovereigns' *own* agency may stand in need, paradoxically, of a certain amount of Hobbesian strengthening. It need not be in tension with the spirit of Hobbes if this is achieved by endowing certain rules from private (Roman) law with the dignity of hierarchically superior natural law.⁹⁰

Misgivings about sovereigns relying on principles of a shared human nature as mere pretexts for expansion and domination have already been voiced by Vattel, who argued against Grotius's doctrine of humanitarian intervention in a chapter on "the Common Duties of a Nation towards others, or of the Offices of Humanity between Nations." Vattel wrote that it

is strange to hear the learned and judicious Grotius assert, that a sovereign may justly take up arms to chastise nations which are guilty of enormous transgressions of the law of nature Could it escape Grotius, that, notwithstanding all the precautions added by him in the following paragraphs, his opinion opens a door to all the ravages of enthusiasm and fanaticism, and furnishes ambition with numberless pretexts?⁹¹

Grotius himself had been perfectly aware of this line of argument, and pointed out that

Antient and modern History indeed informs us, that Avarice and Ambition do frequently lay hold on such Excuses; but the Use that wicked Men make of a Thing, does not always hinder it from being just in itself. *Pirates too sail on the Seas, and Thieves wear Swords, as well as others.*⁹²

EARLY ESSAYS ON THE ORIGIN AND NATURE OF NATURAL LAW AND ON LUXURY 262 bk. 2, ch. 1, sec.3 (Liberty Fund 2008) (1797).

89 Benvenisti, *supra* note 1, at 301.

90 See Daniel Lee, *Hobbes and the Civil Law*, in *HOBBS AND THE LAW* 210 (David Dyzenhaus & Thomas Poole eds., 2013); *cf. also* M. BRITO VIEIRA, *THE ELEMENTS OF REPRESENTATION IN HOBBS* 163 (2009); Kinch Hoekstra, *A Lion in the House*, in *RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 191, 205 n.74 (James Tully & Annabel Brett eds., 2006).

91 VATTEL, *supra* note 88, at 265, bk. 2, ch. 1, sec. 7.

92 GROTIUS, RWP, *supra* note 19, at 1162; GROTIUS, IBP, *supra* note 2, at 1.1.10.3, at 2.25.8.4.

The same argument could be made against those who point to the susceptibility of Vattel's own arguments to being put to imperialist uses. Vattel would indeed seem to be the most fruitful predecessor to Professor Benvenisti's sovereignty as trusteeship. In Vattel's vein, one can plausibly attribute "imperfect" duties to sovereigns, relying on a concept of international commercial society arising out of the mutual assistance required by the natural society of mankind.⁹³ This is what Professor Benvenisti seems to have in mind when he alludes to Christian Wolff's conception of imperfect obligations,⁹⁴ and it is clear that something like Vitoria's first just title, the duty to allow trade ("communication"), is too "perfect" a duty to be accepted.⁹⁵ But the idea of an (imperfect) duty of mutual assistance realized in commerce in conjunction with a robust duty to loosen sovereignty's grip on natural resources in the face of scarcity does have a distinctly Vattelian flavor to it. For Wolff and Kant, occupation, very broadly understood (i.e., not only effective occupation), was sufficient for sovereign claims. For Vattel, effective occupation and use were needed to establish exclusive sovereign claims, and for Benvenisti, the cosmopolitan purpose of Vattel's concept of sovereignty

93 While the idea of this as a perfect duty can be seen in Vitoria, Gentili and Grotius, there is a general, if not quite as pronounced, appreciation of trade even in the theorist who is usually seen as the strongest advocate of sovereignty, Bodin. See JEAN BODIN, *THE SIX BOOKES OF A COMMONWEALE* 660, 708 (Kenneth Douglas McRae ed., Richard Knolles trans., 1962) (1606); *RESPONSE TO THE PARADOXES OF MALESTROIT* 85-93 (Henry Tudor & R.W. Dyson eds., Henry Tudor trans., 1997) (displaying a consistently favorable attitude to trade).

94 Benvenisti, *supra* note 1, at 317. Stopping short of a Wolffian *civitas maxima*, 2 CHRISTIAN WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PERTRACTATUM* 15, para. 9 (Joseph H. Drake trans., 1934) (1749), he could join Vattel in his two broad qualifications of the duty to practice mutual aid:

1. Social bodies or sovereign states are much more capable of supplying all their wants than individual men are; and mutual assistance is not so necessary among them, nor so frequently required. Now, in those particulars which a nation can itself perform, no succour is due to it from others. 2. The duties of a nation towards itself, and chiefly the care of its own safety, require much more circumspection and reserve, than need be observed by an individual in giving assistance to others.

VATTEL, *supra* note 88, at 262 bk. 2, ch.1, sec.3.

95 FRANCISCO DE VITORIA, *On the American Indians*, in VITORIA, *POLITICAL WRITINGS* 231, 278 (Anthony Pagden & Jeremy Lawrance eds., 1991). Vattel, too, rejected Vitoria's first just title, which does not in his view give equal sovereign rights their due; rights to engage in commerce are imperfect and can be rendered perfect only by treaty. See VATTEL, *supra* note 88, at 132-35 bk. 1, ch. 8, secs. 87-94.

is further strengthened by “deliberative obligations.”⁹⁶ Sovereigns who are trustees of humanity do seem modeled in broad analogy with Vattel’s moral obligation to use natural resources efficiently,⁹⁷ but at the same time there is an understandable reluctance to press the analogy too hard — the specter of the justification of colonialism looms.⁹⁸ However, as Béla Kapossy and Richard Whatmore correctly point out, for Vattel,

the perfect right of preservation of a potential donor nation was bound to clash with the equally perfect right of preservation of a state on the brink of starvation. It is in this context that one needs to read Vattel’s often-cited justification of the appropriation of uncultivated land by European settlers in America.⁹⁹

There is, in other words, a real conflict that cannot simply be assumed away by referring to the potentially dangerous ends Vattel’s reasoning may be put in service for. Vattel’s principle may still contain some normative pull.

In addition to these moral considerations, enlightened self-interest and prudence in the form of self-serving utility calculations as recommended to sovereigns by Vattel may complement and additionally strengthen the concept of sovereignty as trusteeship usefully. As Isaac Nakhimovsky in an elucidating article reminds us, “Vattel sought to formalize the notion of an enlightened self-interest, which held that justice was the best policy.” This “entailed defining the role of commerce in the state in order to impose boundaries on appeals to reason of state with respect to trade,” and amounted to a theory of obligation that was based on utility and enlightened self-interest.¹⁰⁰ Sovereigns — even if conceived merely as mandataries of their own peoples — may thus be convinced under Vattelian premises that they are well advised to give some consideration to interstate externalities in the global condominium and to noncitizens and people beyond their borders.

96 Benvenisti, *supra* note 1, at 318.

97 *Id.* at 309.

98 *Id.* at 328 n.183.

99 Béla Kapossy & Richard Whatmore, *Introduction to Vattel*, *supra* note 88, at xv.

100 Issac Nakhimovsky, *Vattel’s Theory of the International Order: Commerce and the Balance of Power in the Law of Nations*, 33 *HIST. EUR. IDEAS* 157, 162 & n.17 (2007).