

Piracy, privateering and the United States of the Netherlands

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1. Introduction

The scenes from Baghdad during April of this year (2003) lead to the reflection whether looting may not stake a claim to being the oldest profession. Another hotly debated aspect of the war on Iraq was the question whether this was a just war. Of particular interest for legal historians is that both topics lead us to the renaissance man of Dutch legal history, Hugo de Groot, who is regarded to be one of the founding fathers of international law. Less well known is, however, the preliminary work leading to his *De Iure Belli ac Pacis* and it is this work, the *De Jure Praedae Commentarius* and the insights it provides into the Dutch 'state' and society, which will be the topic of this paper.

2. Ancient origins of looting

In the Old Testament the taking of spoils is a frequent occurrence which did not meet with condemnation.¹

The dramatic theme of the Iliad also revolves around booty.² In Roman history the seizure of booty is a common practice and Roman law dealt with the matter.³

Thus, from Abraham to Bagdad the practice of booty and the justification thereof during the history of mankind is outside the debate.

¹ *Genesis*, XIV, 11, 16, 21, 23, 24; *Numbers*, XXXI, 9; *Deuteronomy*, XX, 14; *Joshua*, VIII, 2, 27; XXII, 8; 1 *Samuel*, XXX, 20, 22, 26; 2 *Samuel*, VIII, 7, 8, 1 *Chronicles*, XVIII, 7, 8; 2 *Chronicles*, XIV, 13.

² HOMER, *The Iliad*, I, 160-348.

³ D.41.1.5.7; 41.2.1.1; 49.15.24; 49.15.28;

The observation by Tolstoy in his *War and Peace*⁴ deserves attention. He describes how the French army entered Moscow during September 1812 “a harassed and exhausted, yet still active and menacing army.”⁵ However, “As soon as the units of the various regiments started to disperse among the wealthy and deserted mansions, the army *qua* army ceased to exist, and something nondescript came into being, that was neither citizen nor soldier, but what is known as marauder.”⁶ He continues that five weeks later as the French left Moscow, they no longer formed an army, but were “a mob of marauders, each dragging away with him a quantity of articles which seemed to him valuable or useful.”⁷

The Dutch jurist Coren⁸, a member of the Hooge Raad⁹ refers in a post scriptum on the decision of the Hooge Raad¹⁰ of 11 December 1629 to a previous decision of the same court dated 31 July 1603.

The facts were the following. Two captains, Melchior van Kerckhoven and P vanden Hage took five ships on a voyage. During this voyage they captured a ship belonging to the Venetian Marco Viniero and partners. Viniero summoned van K and van den H before the Hooge Raad.¹¹

⁴ L.N.TOLSTOY, *War and Peace*, 1869, translated by Rosemary Edmonds, Penguin Books, 1957, 1978 repr.

⁵ Vol. 2, 1062f.

⁶ Vol. 2, 1063.

⁷ Ibid.

⁸ Jacob COREN (obit 1631) became a judge of the Supreme Court of Holland, Zeeland and West Friesland in 1621. A.A. ROBERTS, *A South African Bibliography*, 1942, 89; J.C. DE WET, *Die Ou Skrywers in Perspektief*, 1988, 133; H.R. HAHLO and E. KAHN, *The South African Legal System and its Background*, 1973, 545; D.H. VAN ZYL, *Geskiedenis van die Romeins-Hollandse Reg*, 1979, 374.

⁹ The supreme court of appeal in Holland and Zeeland, the Hooge Raad was the court of first instance for maritime matters not dealt with in the courts of admiralty. HAHLO and KAHN, 532, 542f.

¹⁰ COREN made a collection of decisions of the Hooge Raad, which was published after his death as *Observationes XLI rerum in Senatu Hollandiae, Zelandiae, Frisiae judicatarum; item consilia XXX quaedam*, Hagae Comitum, 1633. The 1642 edition was available, where the note is found on p. 321f.

¹¹ The court of first instance for maritime matters not dealt with in the courts of admiralty, cf. n.9. VAN ZURCK (cf. n.12), s.v. *Zeerovers*, § 3 states that matters of piracy were the jurisdiction of the courts of admiralty, but notes in N.1 that from

The defendants argued that the ship was 'van quade prinse' which is best explained as sailing under the flag of the enemy. However, this argument was proven to be false and the defendants were ordered to make restitution. As this was obviously not forthcoming, Viniero subsequently summoned Claes Seys and partners each *in solidum* for damages in their capacity as the charterers of the ships. Coren referred to this case because the Hooge Raad found in favour of Viniero, but limited the liability of the charterers to the value of the ships and goods.

This paper does not deal with limited liability of shipowner or charterer, but wishes to draw attention to another aspect of the case, namely piracy. Coren blandly states that the flotilla captured the ship belonging to Viniero and it is clear that this was a private vessel carrying cargo. Thus the first question must be whether the captains of the Dutch ships committed an act of piracy.

In the *Codex Batavus*, a law dictionary¹² it is found that pirates receive the death penalty and that their possessions are confiscated.¹³ The fact that the death penalty was the universal fate of captured pirates is confirmed by Sir Walter Scott in the Advertisement to the first edition of *The Pirate*. The author refers to an incident, which took place in 1724-5 in the Orkney Islands, but ended in London in the High Court of Admiralty. A certain John Gow commanding a vessel called the *Revenge*, was discovered to be a pirate and made prisoner. He refused to plead and his thumbs were broken, which he endured boldly. However, when he had seen the preparations for pressing him to death, his courage gave way and he told the Marshal of the Court that he would not have given so much trouble, had he been assured of not being hanged in chains.¹⁴

The above contrast between pressing to death and being summoned before the Hooge Raad for restitution raises the question whether Dutch pirates enjoyed a special position, and if so, why and how.

COREN, *Observ.*40 *in f.* it would appear that the courts of justice were also competent.

¹² Eduard VAN ZURCK, *Codex Batavus*, first published in 1711, the fourth edition, Rotterdam, 1758, was available.

¹³ S.v. *Zeerovers* p. 1232f.

¹⁴ Sir Walter SCOTT, *The Pirate*, vol. XIII Waverley Novels centenary edition, 1880, 6f.

3. *Privateering*

During the late Middle Ages the lack of judicial co-operation between different states and the resulting lack of judicial recourse and/or judicial execution led to the reintroduction of self-help which developed into the law of reprisals.¹⁵ Property taken by or outstanding debts against foreigners could be recovered, if judicial recourse was not available, by capturing goods from foreigners of the same nationality.¹⁶ Later, reprisals could only be performed after issue of a letter of reprisal by the ‘plaintiff’s’ own authorities.¹⁷ During the 16th century the practice of privateering evolved, which was a general, unlimited reprisal against the enemy in time of war.¹⁸

The question regarding the distinction between spoils of war and plunder, between soldiers and marauders, or at sea between the navy, privateers and pirates must have formed the topic of a heated debate in the recently formed United States of the Netherlands during the first years of the 17th century. This deduction is borne out by the fact that Hugo de Groot, at that stage a young man on the make was either instructed or motivated to devote his time and energy to this question. An unexplained aspect of outcome of his efforts was that publication was delayed until 1868.

¹⁵ J.P. VAN NIEKERK, *The Development of the Principles of Insurance Law in the Netherlands from 1500-1800*, 1998, vol. 1, 394; VAN ZURCK, s. v. *Represalien, Letteren van marque, Oorlog, Retorsie, Vrede, Decretum Gratiani, Causa 23*, q. 2, c. *dominus*; C.G. ROELOFSEN, “Grotius and State Practice of his day” in *Studies in the History of International Law (Studies)*, 1991, 143f, 144 n144.

¹⁶ VAN NIEKERK, 394. ROELOFSEN, “State Practice”, 144 n144 views the ‘automatic’ solidarity between the members of close-knit communities like the Italian city-states or the guild of Hanseatic merchants as the original functional basis of reprisals.

¹⁷ ROELOFSEN, “State Practice” 144 n 144 argues for a shift in the functional basis towards “State responsibility”. At 143 he describes reprisals as “a crucial instrument of mutual control by States on the others’ behaviour towards their subjects.”

¹⁸ VAN NIEKERK, 395. In Holland, accordingly, only enemy goods, and enemy ships are good prize. ROELOFSEN, “State Practice” 141. This Hollandic practice is traced back to a sentence of the Court of Holland in 1438. However, this approach ignores the aspect of privateering relative to the property of neutrals, which appears to have been rather the rule. See C. G. ROELOFSEN, “Early Dutch Prize Laws: Some Thoughts on a case before the Court of Holland and the Grand Council of Mechelen (1477-1482)” in *Studies*, 1-10 and “State Practice” 124ff.

4. *Catherine*

From 1595 onwards the Dutch had ventured into the East Indies in an attempt to eliminate the Portuguese middle men. The Portuguese defended their monopoly in various ways and eventually hostilities became the order of the day. Both parties resorted to arms and capture of enemy ships and personnel. The cause célèbre became the seizure of the Portuguese merchant vessel, the *Catherine*, by ‘admiral’ van Heemskerck, an employee of an Amsterdam trading company.¹⁹

5. *De Groot’s de jure praedae*

The traditional opinion on *De Jure Praedae* by Hugo de Groot appears to be that the young advocate had been involved in the case of the *Catherine* before the ‘prize court’ and was subsequently instructed to write a legal opinion defending the position of the newly formed Dutch East Indies Company.²⁰ The success of the company was, however, such that publication of this, de Groot’s first legal work dealing with the law of prize, became superfluous.²¹ One chapter was published in 1609 under the title *Mare liberum*.²² The manuscript was rediscovered in 1864 and published in 1868.²³ After initial enthusiasm, especially from the Dutch historian Fruin,²⁴ the latter’s opinion that this was the forerunner to *De Jure Belli ac Pacis* was accepted and in consequence the work received minor attention.

This narrative raises several questions; Why request a legal opinion after winning the case? Why order a legal opinion for a

¹⁹ For detailed expositions of Hugo GROTIUS, *De Jure Praedae Commentarius*, chapter 11; R. FRUIN, “Een onuitgegeven werk van Hugo de Groot” in *Verspreide geschriften*, Deel 3, *Historische Opstellen*, eds P. J. BLOK, P. L. MULLER en S. MULLER, 1901, 372-399.

²⁰ FRUIN, 403. This view has been rebutted by P. C. MOLHUYSEN, “Over Grotius’ *De Jure Praedae Commentarius*” 1926,(4) *Bijdragen voor de Vaderlandsche Geschiedenis en Oudheidkunde* (5e Reeks), 275-282; C. G. ROELOFSEN, “The Sources of *Mare Liberum*; The Contested Origins of the Doctrine of the Freedom of the Seas” in *Studies*, 42ff and “Grotius and the International Politics of the Seventeenth Century” in *Studies*, 84.

²¹ G. A. FINCH, Preface to *Commentary on the law of Prize and Booty*, 1960, XV.

²² FRUIN, 369, 408, 412f; HAHLO and KAHN, 550; ROELOFSEN, “Sources of *Mare Liberum*” in *Studies*, 42ff and “Grotius and the International Politics of the Seventeenth Century” in *Studies*, 84ff.

²³ FRUIN, 367ff.

²⁴ Fruin prefers de Groot’s younger work; cf. 429, 441f.

public relation exercise? Wasn't a 280 page ms²⁵ not overdoing it? What is the relation between the Dutch law of prize, freedom of the seas, and public international law? And why was the manuscript not published?

This paper does not purport to provide definite answers to these questions, but discusses Grotius' first law book and the light this manuscript sheds on the early Dutch state and society.

6. *De Jure praedae reconsidered*

The first striking characteristic is that the work does not resemble a legal opinion. De Groot did not follow a positivistic, legalistic approach, concentrating on the law of reprisals and the later development of privateering and the reception thereof in the law of Holland.²⁶ He made the absence of jurisdiction and the applicability of international law *a prioris*²⁷ and in the first part of the work developed his own system²⁸ of international law by deduction from 13 laws and 9 rules of natural law.²⁹ On the basis of

²⁵ FRUIN, 367 reproduces catalogue no. 72 of the 1864 public auction by Martinus Nijhoff: *H Grotii opus de jure praedae in XVI capita divisum*, 280 pag. - Mscr autographe inédit. Seulement une partie du chapitre XII a été publié en 1609, sous le titre *Mare Liberum*.

²⁶ For old prize law cf. ROELOFSEN "Early Dutch Prize law" in *Studies*, 1-9; "L'Amirauté à Veere, considérée dans ses attributions judiciaires (XV^{ème}-XVI^{ème} siècles)" in *Studies*, 11-24; "La relation entre le droit romain et le droit coutumier dans quelques procès de prise maritime devant la Cour de Hollande et le Grand Conseil de Malines" in *Studies*, 27-39; "State Practice" in *Studies*, 124-138. In "Sources of Mare Liberum" in *Studies*, 41-72 at 43 Roelofsen warns against overrating Grotius and describes him as a self-taught lawyer; at 44f he marvels at the omission of contemporary state practice and in particular the famous Anglo/Burgundian treaty of 1496, the *Magnus Intercursus*.

²⁷ Hugonis GROTII, *De Jure Praedae Commentarius (DJP)*, ed. H. G. Hamaker, 1868, C.1, p.5: *Ad hanc autem illa naturae, quam dixi, ratio vel maxime pertinet. Nam illi quidem operam mihi ludere videntur, qui res non inter cives sed populos diversos gestas, idque non pace sed bello, ex scriptis duntaxat legibus dijudicant.* (p.6)... *aut Baldum suum audire debuerant, qui sapienter docuit inter eos, qui supremam imperii potestatem sibi vindicant, si quid inciderit contentione, non alium dari judicem, quam naturalem rationem, bonorum atque malorum arbitram: ... Melius aliquanto illi et certius, qui ex sacris litteris malunt disceptari.. Veram igitur nobis viam munierunt veteres illi jurisconsulti, quorum nomina reveremur, qui saepissime artem civilem ad ipsos naturae fontes revocant. Quod et apud Tullium (p.7) est: dicit enim non a praetoris edicto, ut tunc plerique faciebant, neque a XII tabulis, ut superiores, sed penitus ex intima philosophia hauriendum juris disciplinam;* Cf. C.10, p.129.

²⁸ Cf. Max KASER, "Zur Methode der römischen Rechtsfindung" in *Ausgewählte Schriften I*, 1976, 7.

²⁹ Lex 1. *Vitam tueri et declinare nocitura liceat;*

these axiomata he analysed the justness of war,³⁰ the seizure of spoils and the acquisition of ownership thereof depending on the cause of war.³¹

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2. *Adjungere sibi quae ad vivendum sunt utilia eaque retinere liceat;*
 3. *Ne quis alterum laedat;*
 4. *Ne quis occupet alteri occupata;*
 5. *Malefacta corrigenda;*
 6. *Benefacta reprehensanda;*
 7. *Ut singuli cives caeteros tum universos, tum singulos non modo non laederent, verum etiam tuerentur;*
 8. *Ut cives non modo alter alteri privatim aut in commune possessa non eriperent, verum etiam singuli tum quae singulis, tum quae universis necessaria conferrent;*
 9. *Ne civis adversus civem jus suum nisi iudicio exsequatur;*
 10. *Ut magistratus omnia gerat e bono reipublica;*
 11. *Ut quidquid magistratus gessit respublica ratum habeat;*
 12. *Ne respublica neu civis in alterum rempublicam alteriusve civem jus suum nisi iudicio exsequatur.*

Regula 1. *Quod Deus se velle significarit, id jus est;*

2. *Quod consensus hominum velle cunctos significaverit, id jus est;*
3. *Quod se quisque velle significaverit, id in eum jus est;*
4. *Quidquid respublica se velle significaverit, id in cives universos jus est;*
5. *Quidquid res publica se velle significaverit, id inter cives singulos jus est;*
6. *Quod se magistratus velle significaverit id in cives universos jus est;*
7. *Quod se magistratus velle significaverit id in cives singulos jus est;*
8. *Quidquid omnes reipublicae significarunt se velle, id in omnes jus est;*
9. *In iudicando priores sint partes ejus reipublicae, unde cujusve a cive petitur. Quod si hujus officium cesset, tum respublica, quae ipsa cujusve civis petit, eam rem iudicet.*

The rules deal with the sources of law, save rule 9, which deals with jurisdiction; the laws represent substantive law. Cf. *De Jure Belli ac Pacis*, III. 1. 5.

³⁰ *DJP*, C.3, quaestio I. *An bellum aliquod justum sit*; C.5, quaestio IV. *Quod bellum justum sit*; C.6, p.58 ... *si bellum ad summa quatuor causarum genera revocemus*. Grotius refers here to Aristotle *Metaphysics* IV(V).2; Cf. also A.J.M.KUNST, *Historische Ontwikkeling van het Recht*, 1967, Deel 1, 50 who explains that Ramus (Pierre de la Ramée 1515-1571) distinguished four *causae* in each problem: la cause efficiente, la cause materielle, la cause formelle, et la cause finale, after the example of the scholastic method. Cf. *DJP*, C.6. *De causa belli efficiente*; C.7. *De materia belli*; C.8. *De forma belli suscipiendi gerendique*; C.9. *De fine belli*. ROELOFSEN, "Grotius and the International Politics of the Seventeenth Century", in *Studies*, 87.

³¹ *DJP*, C.4. *An praedam capere aliquando justum sit*; C.5. quaestio III. *quae praeda justa sit*; quaestio IV. *quod bellum justum sit*; C.8. quaestio VII. Cor. II. *An detur depraedatio utrimque justa respectu subditorum et quatenus*; cor. III. *An praedae acquisitio justa utrimque detur et quatenus*; C.10. quaestio IX. *Cui praeda acquiratur*; p.138. Concl. IX, artic. I, pars I. *belli privati auctor principalis praedam acquirit usque ad juris satisfactionem*; p.139. Pars II. *aut is cui praedam acquirendam assignavit*; p.151. Conc. IX, artic. II, pars I. *Belli publici susceprix respublica*

Grotius compared war to a lawsuit.³² Thus the causes of just wars are identical to the causes of just lawsuits,³³ i.e. the execution of a right.³⁴ Just war is a legal method of pursuing a just claim in the absence of courts.³⁵ This means that according to Grotius individuals can also justly wage war and to this effect the concept of a private war is introduced.³⁶

praedam acquirit usque ad juris sui satisfactionem; p.152. pars II. *aut is cui praedam acquirendam illa assignavit.*

³² *DJP*, C.4, p.43. *Ubi enim justum est aliquid, quatenus ad finem tendit, multo magis finis ipse justus est. Bellum autem justum idcirco est, quia ad juris adeptionem tendit*; C.7, p.69. *Totidem enim esse debent exsecutionem, quot sunt actionum genera, quod ad materiam attinet, quae in bello et judiciis eadem est. p.70. Sicut autem in lite sic et in bello quae causae, si verae essent, justum facerent actum petitoris...* C.8, p.85. *Bellum exsecutionem esse diximus*; C.8, p.111. *Neque enim alio fine bella gerimus, quam ut jus nostrum victoria consequamur*; C.9, p.122. *Justitiae fruendae causa belli a piis geruntur*; C.12, p.263.

³³ *DJP*, C.7, p.70. *Conclusio VI, articulum 1. Quare his qui gerunt voluntarie, id bellum justam habet causam, quo vitam aut res defendunt aut recuperatum eunt, idve quod debetur aut poenas maleficii expetunt*; C.7, p.67. *Prima est sui defensio, ex lege prima ... Altera est ob rem suam, ex lege secunda ... Tertia ..ob debitum ex contractu aut simili ratione...* p.68. *Quarta est ob maleficium injuriamque omnem, quae iniquo animo tam facto quam verbis infertur*; also C.4, p.46. *Primum si ad rem nostram recuperandam arma moveantur, quin a detentore armato possessionem injustam recte avocem manu militari, dubium non est. p.47. Quod si etiam delicta bello ulciscamur, certum est poenam non in corpora duntaxat, sed in facultates etiam dirigi, quae in forensibus etiam judiciis injuriam passo addici solent.*

³⁴ *DJP*, C.2, p.30. *Armata in armatum exsecutio bellum dicitur*; C.7, p.67. *Cum igitur bellum justum juris sit exsecutio...*; C.7, p.68. *Et tamen privatum efficiente et forma differt, materia non differt. Ad defensionem tutelamque corporis sui privata vis justa est omnium animantium exemplo. Quin ad rerum etiam suarum defensionem aut recuperationem. Neque minus ad consequendum id quod nobis debetur. Etiam expeditio poenae ex delicto privatim permittitur, ut in adulterum certis casibus, in raptos, in desertores et transfugas*; C.9, p.125. *Concl. VIII, artic. I. hi qui voluntarie agunt justo animo bellum gerunt, quod juris adipiscendi gratia gerunt.*

³⁵ *DJP*, C.8, p.95. *Eatenus juste bellum privatum suscipitur, quatenus iudicium deficit*; p.86. *necessitas ... quae tum esse intellegitur cum ad consequendum jus nostrum iudicia deficiunt. Quatenus enim ista deficiunt eatenus vis, hoc est privata secundum naturam exsecutio, justa est. Grotius distinguishes between defects in judicial recourse of brief duration and of a more continuous nature p.86ff. In the latter event the pre-state situation is reverted to and each individual becomes the executor of his own right*; C.8, p.101. *Bellum publicum juste suscipitur quatenus iudicium deficit, aut rebus repetitis et ex decreto reipublicae suscipientis*; Cf. C.8, p.95ff; C.12, p.260.

³⁶ *DJP*, C.2, p.30. *Armata in armatum exsecutio bellum dicitur, ...: publicum, quod ex voluntate reipublicae fit, quibus verbis etiam magistratus, puta principis voluntas comprehenditur. .. Privatum, quod aliter. Id autem alii non tam bellum,*

In a just war enemy property may be seized,³⁷ even from innocent civilians,³⁸ to the extent of the due debt.³⁹ Damages for property lost,⁴⁰ outstanding debts,⁴¹ lost profits, costs⁴² as well as punitive damages⁴³ must also be included in the total amount. A major consideration to which de Groot will refer time and again is the expense and loss of waging war, which must be regarded as debts, just as legal costs.⁴⁴

quam rixam dicere maluerunt. C.6, p.62. Plerumque enim auctores bellum cum dicunt non privatum sed publicum intelligunt, cuius frequentior consideratio est. .. Sicut privatim belli gerendi est penes singulos...; Cf. also C.8, p.85ff; C.10, p.129ff. Application is found in C.12.

³⁷ Grotius does not deal with the law of prize relative to the property of neutrals, since he concluded in *DJP*, C.8, p.111f that they who supply the enemy with means of prolonging the conflict are to be regarded as enemies.

³⁸ *DJP*, C.8, p.107. *Et num recte Tacitus dictum: in pace causas et merita spectari, ubi bellum innocentes ac noxias juxta cadere. Ex hac enim similitudine jus praedae apertius fiet. C.8, p.111. at bonis nemo non hostium nobis nocet, ut maxime non velit. Sin ad jus crediti convertimur, obligata sunt pro republica subditorum bona, non autem corpora.*

³⁹ *DJP*, .8, p.115. *praeda autem juste capitur ab omnibus et semper usque ad debiti summam. p.111. dum tamen amplius nihil sumatur, quam nobis debitum est...*

⁴⁰ *DJP*, C.4, p.46. *Quodsi rem ipsam consequi non possim, tantum tamen ille mihi, quanti res fuit obligatus est. Permittendum igitur mihi est ut quantum ille mihi debet, tantum ego ex bonis ejus consequar. p.111. (i)n quo et damnorum restitutio et sumtuum continentur.*

⁴¹ *DJP*, C.4, p.46. *(i)demque erit si ab initio non rem meam vindicaverim, sed debitum persecutus sim. (I)psa autem natura ab eo, per quem re mea careo, tantumdem me quovis modo recipere permittit, resque eo modo recepta fit mea...*

⁴² *DJP*, C.4, p.47f. *Jus autem rem acquirendi hostilem sive ob rem, sive ob debitum simplex aut etiam poenarium, non necessario bellum praecedit, interdum etiam comitatur; C.10, p.130. Si procinctis quae nobis debentur, utique et pro damnis et impensis ad juris consecutionem factis; imo pro periculis etiam lucroque cessanti, sive damno extrinseco et omni quod interest... p.131. Immo etiam pro his, quae ex delicto debentur.*

⁴³ *DJP*, C.4, p.47. *Quod si etiam delicta bello ulciscamur, certum est poenam non in corpora duntaxat, sed in facultates etiam dirigi, quae in forensibus etiam judiciis injuriam passo addici solent... p.48f. Postremo certum est eum, qui justo bello sciens resistat graviter delinquere. Atque adeo si quid ille feliciter gerat, fur est et raptor. Sunt autem haec peccata ejusmodi, ut reum facultatibus omnibus, aut parte mulctari faciant: quae ei apponi debent, in quem peccatum est, aut homini aut reipublicae.*

⁴⁴ *DJP*, C.4, p.48. *Alterum, quod nunc dicam, perpetuum est, nec a bello potest abesse. Quod enim bellum geritur sine sumtu et sine damno? Ut enim caetera omnia ex voto succedant, quod numquam accidit, interim tamen qui bellum gerere cogitur, a rei domesticae procuratore avocatur. Atque is qui justa arma induit, jus habet et*

Other building blocks of de Groot's construction are the prevalence of natural law over civil law,⁴⁵ the separation between state and prince, the linkage of ownership and possession,⁴⁶ the theory of reprisals, ie that citizens can bind the state,⁴⁷ while the state binds (other) citizens,⁴⁸ freedom of the seas and freedom of trade.

In the second part de Groot describes the historical events leading to the Dutch revolt and the present conflicts in the East,⁴⁹ while in the last section he analyses the position of the VOC in a

damna et impensas, ut sibi debita recuperandi: quemadmodum in judiciis forensibus et dispendia et sumtus non litis modo, sed ex executionis ab eo sarciri aequum est, qui sponte juri non paruit. Hinc illud est: impensas belli lege victi suscepturus; C.10, p.132; C.12, p.254f.

⁴⁵ *DJP, C.2, p.29. Hoc ipsum vero, quae dignior sit, tum ex origine, tum ex fine intellegi potest. Ex origine enim jus divinum juri humano, jus humanum juri civili praestat. Ex fine id, quod ad bonum cuique suum pertinet, ei quod ad alienum praefertur, et bonum majus minori et mali majoris remotio minori bono; C.3, p.34. quae autem naturae vel gentium jure praecipuntur, lege civili tolli ne possunt quidem; Cf. Grotius' rejection of prescription between states; C.12. Nam prescriptio a iure est civili, unde locum habere non potest inter reges aut inter populos liberos. Cf. also C.10 where he sets out to clear the mind of the false belief enemy property would be *res nullius* (D.41.2.1.1).*

⁴⁶ *DJP, C.4, p.43. Ut igitur videamus quomodo praeda divinae voluntati secundum leges respondeat, sciendum est duas ab ea partes contineri, privationem scilicet prioris possessionem et acquisitionem dominii novi. At 44ff. Grotius sets out that it is as necessary to take away the possessions of the enemy, which are instruments for our destruction, as it is to wrest a sword from a madman. He rejects D.41.2.1.1 that the spoils are *res nullius*, since this would make reclaiming of captured possessions after peace possible. He holds that mere possession suffices for acquisition of *res nullius*, but that acquisition of another's property requires not only possession, but also a *causa*, which he finds in his second law. Cf. C.10, p.129, 136f, C.12, p.208, 216, 218.*

⁴⁷ *DJP, C.8, p.104f. Deinde vero obligatur respublica ex facto civis, non quidem simpliciter, sed si ipsa jus non reddat; ita enim litem facit suam; nam et ratum habendo non minus quam mandando obligamur; Cf. also C.13, p.278.*

⁴⁸ *DJP, C.8, p.106. Praeterea vero ex facto reipublicae cives singuli obligantur. Est enim illud naturali aequitati consentaneum, ut cum ea societate commoda captemus, etiam incommoda patiamur. p.107. Et haec est sola ratio quae repressalias sustinet, non proximis duntaxat saeculis, sed priscis, etiam gentibus usurpatis, pignorationum, et androlepsion vocabulo: quod enim civis mihi debet, hos debet respublica jus non reddens, et quod respublica, hoc cives singuli; C.12, p.261.*

⁴⁹ *DJP, C.11. ROELOFSEN "Sources of Mare Liberum" in Studies 44 mentions that de Groot relied exclusively on affidavits of VOC officials.*

private war, and thereafter in a public war on the basis of the doctrines developed in the first part.⁵⁰

7. *Private war*⁵¹

De Groot argues that the Portuguese prohibition of trade was in violation of nature, the system of exchange and the fellowship of man.⁵² Barring someone from commerce provides a just cause for war.⁵³ The ocean is a *res extra commercium*⁵⁴ and no one has jurisdiction on the ocean.⁵⁵ In consequence the VOC was entitled to wage war to exercise its rights,⁵⁶ recover its property, losses, expenses, lost profits⁵⁷ and to exact punishment for the misdeeds committed against it, its personnel, property and good name.⁵⁸ This debt owed by the Portuguese state may be exacted from Portuguese individuals, even innocent merchants.⁵⁹ The captured spoils become the property of the author of the war to the amount of the debt.⁶⁰

⁵⁰ *DJP*, C.12, 13, 14 and 15. The last two chapters deal with what is honorable and what is beneficial relative to the prize in question.

⁵¹ *DJP*, C.12, p.204–267. *In quo ostenditur, etiam si bellum privatum fuisset, justum fore, justeque partam praedam indicae Hollandorum societati*. This chapter was published anonymously under the title *Mare liberum* in 1609. Grotius repeats the arguments in favour of a private war at p.205, 260.

⁵² *DJP*, C.12, p.205ff, 242ff.

⁵³ *DJP*, C.12, p.249. *Cum igitur supra Victoriae auctoritate et exemplis demonstratum sit justam esse belli causam, cum libertas commerciorum vindicatur adversus prohibentes, sequitur Batavis justam belli causam in Lusitanos fuisse... Justae bellorum causae sunt rerum aut defensio aut recuperatio, debiti et poenae exactio.*

⁵⁴ *DJP*, C.12, p.214ff. Grotius held that nature commands that the sea shall be held in common and devotes many pages explaining various Digest texts away as well as the Glossators and Canonists who held different opinions.

⁵⁵ *DJP*, C.12, p.260. *In oceano autem nullam esse propriam respectu loci jurisdictionem recte, ut arbitror, affirmavimus. Tum si qua esset, ea esset Indorum Principum, qui nec volunt causae immisceri, nec a Lusitanis ut iudices agnoscuntur. Loci igitur ratione qua jure, qua facto iudicium deficit.*

⁵⁶ *DJP*, C.12, p.249. *Ita Pomponius eum, qui rem omnibus communem cum incommodo caeterorum usurpet, manu prohibendum dicit. Nam quoties in judiciis interdicta competunt prohibitoria, toties extra judicia prohibitio competit armata.*

⁵⁷ *DJP*, C.12, p.250, 261.

⁵⁸ *DJP*, C.12, p.251ff, 255ff.

⁵⁹ *DJP*, C.12, p.258ff, 262.

⁶⁰ On the basis of the theory set out in C.10, p.130ff; Cf. C.12, p.266.

8. *Public war*

To lay claim to public war, Grotius had to prove the existence of the Dutch state. He held that Holland constituted a whole state,⁶¹ that all power resided in the state and that the prince derived his power from the state.⁶² Thus the state may change one prince for another.⁶³ If the prince injures the state, the state assembly may resist and declare war, in analogy of the council of the Catholic church resisting the pope.⁶⁴ Thus the States General had the duty to defend the rights, lives and property of their citizens against the foreign arms of the Duke of Alba.⁶⁵ As the prince neglected to defend his subjects, the latter were entitled to break away. The Dutch defence of their rights, life, property and liberty constituted a just cause for war.⁶⁶ Until 1581 this was a civil war,⁶⁷ but

⁶¹ *DJP*, C.11, p.164. *Hollandia quae justa jam a septem saeculis respublica est*, C.13, p.268. *Sic et Hollandiae comitatus tota per se respublica est.*

⁶² *DJP*, C.13, p.269. *(p)otestas tota civilis in republica residet, cui de se competit gubernare se ipsam et administrare et omnes potestates suas in commune bonum dirigere. Principum vero potestas nulla justa est, nisi quatenus a reipublicae potestate derivata est*; p.283. *Princeps enim est per et propter rempublicam, non respublica per aut propter Principem.*

⁶³ *DJP*, C.13, p.269. *Manet ergo etiam constituto Principatu integra potestas reipublicae, adeo quidem ut idem ille theologus Hispanus posse a Republica, mutari Principes et Principatum de genere in genus transferri Gallorum exemplo probet*; p.272.

⁶⁴ *DJP*, C.13, p.270. *Si ob absentiam vel neglectum Principis inferioribus magistratibus bellum suscipere permissum est, quanto magis si ipse Princeps injuriam faciat reipublicae, quae nisi armis reprimi non possit? Theologi non illi tantum, qui Papam, Concilio subjiunt, sed alterius factionis, qui supra Concilium Pontificiam ponunt auctoritatem, addunt tamen, si Pontifex Ecclesiam destruat, posse convocari Concilium contra ejus voluntatem, ejusque Concilii auctoritate etiam vi, si opus esset, resisti Pontifici, et mandatorum executionem impediri*; C.13, p.273.

⁶⁵ *DJP*, C.13, p.271f. *Cum itaque pertineret ad Ordines ut summos magistratus et jus reipublicae et civium tueri, officium illorum fuit defendere rempublicam adversus eam vim, quam externa arma contra leges inducta rebus pacatis intulerant: deinde vitam civium et possessiones tueri adversus iudicia illegitima contra formam juris communis et mores patrios admittis hominibus peregrinis exercita: liberare etiam rempublicam et cives singulos ab exactionibus ejusmodi, quae non tantum legibus directe obstabant, sed et communi hominum libertati...: imprimis vero operam dare ut diligenter servarentur pacta a majoribus tradita, Principum juramento sancita et formam imperii continentia, ne his violatis*, p.272. *quibus multa per saecula respublica steterat, eadem in provinciae modum Hispanorum libidini subjiceretur.*

⁶⁶ *DJP*, C.13, p.274. *(f)uit ex Hollandorum parte justissima belli causa, vitae ac rerum et legitimae libertatis defensio.*

⁶⁷ *DJP*, C.13, p.277.

thereafter a foreign war.⁶⁸ The Dutch state was entitled to the spoils in compensation for losses, expenses and crimes⁶⁹ suffered and undertaken by itself and its citizens.⁷⁰ However, the State can grant the ownership of the seized enemy property to its subjects, *in casu* the VOC.⁷¹

Although the argumentation is based on the author's system of public international law as derived from the principles of natural law, he feels himself nevertheless compelled to support the argument step by step with a wealth, maybe overabundance of authority.⁷² This he finds in the Bible,⁷³ patristic literature, classic philosophy and history, Roman law both in its Justinianic, late medieval and more recent form, canon law and in particular the Spanish moral philosophers, theologians and jurists.⁷⁴

9. *De jure praedae as a source reflecting Dutch state and society*

From the outset the author was facing a mammoth task. Although belonging to the first generation born during independence of the Dutch republic, he was well aware of the fact

⁶⁸ *DJP*, C.8, p.96. Thus no formal declaration of war had been required.

⁶⁹ *DJP*, C.13, p.274. *Primum ob immensa damna, quae Hispani immerito Hollandis intulerunt,.. Secundum ob impensas belli, quas tantas fuisse et esse quotidie, ut vix ullae ullius temporis conferri possint, .. Tertium ob delicta:...*; C.13, p.278f.

⁷⁰ *DJP*, C.13, p.278. (*qui et illa ipsa damna exigere potuerunt, et alia omnia, qui cives sui totum per orbem ac praecipue navium in Lusitania apprehensionibus passi sunt, et praeterea mulctare condigne tot malorum artifices...*)

⁷¹ On the basis of the theory set out in C.10, p.139ff; Cf. C.13, p.296.

⁷² De Groot argues that this only serves as confirmation; *DJP* C.1, p.7: *nec parum tamen ad confirmandam fidem valet, si quod jam nobis naturali ratione persuasum est, sacra auctoritate comprobetur, aut idem videamus sapientibus quondam viris et laudatissimis nationibus placuisse.*

⁷³ Cf. n. 1.

⁷⁴ ROELOFSEN, "Grotius and the International Politics of the Seventeenth Century" in *Studies* 105: "Classical antiquity and Holy Writ still enjoyed prime authority as 'sources' of law"; In the opinion of Roelofsen (105) Grotius reasons 'by quotation'. The index of authors cited in the *Classics of International law* translation commencing with Abbas and ending with Zuarius Hispanus contains nearly three hundred names. As regards the more recent authorities Grotius relied in particular on Franciscus DE VICTORIA, (1480-1546), *De Indis noviter inventis, De Jure Belli*; Diego DE COVARRUVIAS y Leyva, (1512-1577, *Relectio on c peccatum in VI de reg iur*; and Fernandus VASQUIUS (ob 1559), *Illustrium Controversiarum Aliarumque Usu Frequentium Libri Sex*; Cf. FRUIN, 431ff; ROELOFSEN, 69ff.

that the Dutch state was far from general recognition.⁷⁵ Thus the legitimacy of the Dutch revolt⁷⁶ and the consequent state are the real central argument of the work.

10. *The Dutch revolt*⁷⁷

The causes of the Dutch revolt were multiple;⁷⁸ the success surprising and the result a republic, which could be labelled the United States of the Netherlands.⁷⁹ Resistance against the Hapsburg efforts to create a centralised state⁸⁰ led to the loose federal organisation of the Dutch republic.⁸¹ Resistance against the religious policy of Philip 2⁸² led to the religious tolerance of the Dutch.⁸³ Resistance against central and increased taxation⁸⁴ and efforts to homologise the laws⁸⁵ were responsible for the character of the Dutch state, which combined the medieval past⁸⁶ with proto-capitalist privatisation.

⁷⁵ ROELOFSEN, "Grotius and the International Politics of the Seventeenth Century" in *Studies*, 80ff; R.C. VAN CAENEGEM, *Historical considerations on judicial review and federalism in the United States of America, with special reference to England and the Dutch Republic*, 2003, 26; Jan & Annie ROMEIN, *De lage landen bij de zee*, 1979, 235; Jan & Annie ROMEIN, "Johan van Oldenbarnevelt" in *Erflaters van onze beschaving*, 1979, 172.

⁷⁶ Geoffrey PARKER, *The Dutch Revolt*, 1979, 180ff on the illegality of the revolutionary States General of 1577.

⁷⁷ PARKER, 69-199 distinguishes between three revolts.

⁷⁸ PARKER, 30ff. The seeds of discontent.

⁷⁹ At the time this was the common way of referring to the Dutch state in Great Britain; cf Sir Walter SCOTT, *The Fortunes of Nigel*, vol XIV *The Waverley Novels* centenary edition, 1880. Recently van Caenegem has drawn attention to the similarities between the constitutional model of the Dutch republic and the United States of America; VAN CAENEGEM, 26-34; C. R. BOXER, *The Dutch Seaborne Empire 1600-1800*, 1988, 15, 31; PARKER, 199ff for a description of the attempts by the States General to find another sovereign, and the provincial particularism.

⁸⁰ PARKER, 44ff, 105ff. The duke of Alva's new order; ROMEIN, *De lage landen*, 226.

⁸¹ Cf. BOXER, 11-15.

⁸² PARKER, 47ff. The new bishoprics scheme, 106ff, 113. The Council of Troubles; ROMEIN, *De lage landen*, 220.

⁸³ PARKER, 144, 151, 190, 201ff, 240. Romein, "Johan van Oldenbarnevelt" in *Erflaters*, 163.

⁸⁴ PARKER, 114ff. The Tenth, Twentieth and Hundredth Pennies, a once-for-all tax of 1 per cent on all capital, a 5 per cent levy on sales of immovables, and a 10 per cent sales tax; also PARKER, 129f.

⁸⁵ PARKER, 107, 113f.

⁸⁶ FRUIN, 386ff. describes the allocation of the prize and remarks that the wrangling and quarreling were representative of the fragmentarisation of the

In *De Jure Praedae* de Groot glossed over the religious troubles.⁸⁷ He devoted more attention to the constitutional aspects of the Spanish policies, i.e. the non-recognition of the old privileges,⁸⁸ but his argument concentrated on the commercial grievances.⁸⁹

11. Dutch commerce

The success of the Dutch revolt and the resulting republic must be attributed to the success of Dutch commerce, which was closely linked to Dutch shipping.⁹⁰ Indeed Dutch commercial interests are

power of the Dutch state. The admiralty of Dokkum impounded the barges transporting the prize from Emden to Amsterdam. After intervention by the States General, the goods were placed in storage in Amsterdam, where the directors of the VOC came into conflict with the admiralty over the keeping of the keys. The States General authorised a premature early auction of the perishable goods. The admiralty pasted posters announcing the sale, but the sheriff of Amsterdam had these removed as diminishing the city's jurisdiction. However, the burgomasters did not support him and posters were repasted.

⁸⁷ *DJP*, C.11, p.163f. (*cum ante ejus adventum in sacris turbatum esset; in quo facto etiam peccatum volunt, perpaucorum tamen culpam agnoscunt, cum certissimum sit non magistratum modo, verum et civium maxima parte invita ad ipsum contigisse*; C.13, p.271. Cf. also PARKER, 68ff who finds opposition against the inquisition to have been the cause of the 'first' revolt, but confirms that the iconoclastic fury in the southern provinces was mainly the work of the same gang (78) "of between fifty and a hundred strong, many of them newly returned from exile abroad, recruited and paid by the Calvinist consistories of Antwerp and the other great towns." ROMEIN, *De lage landen* 223f. BOXER, 10 mentions the figure of 12 302 victims condemned by the Conseils des Troubles between 1567 and 1573.

⁸⁸ *DJP*, C.11, p.164. (*hoc uno obtentu jura, judicia, tributorum ordinem mutatum ivit, contra leges Principibus juratas, quae rara inter principatum ac libertatem temperatione imperii modum status Belgici fundamentum continebant. p.165. (unde imperium legitimo majus per arma affectare videbatur, telum illud ultimum oppressae libertatis, quod Belgicae leges diserte concedunt, ut domesticae insidiae vitarentur necessario usurpatum est*; C.13, p.271. *Manifestum est Albanum et Hispanos illud palam praedicasse imo lata sententia pronuntiasse, leges omnes et jura patria nationum Belgicarum velut commissa Principi*; C.13, p.272f., p.285. Cf. PARKER, 39, 115ff. ROMEIN, *De lage landen*, 226.

⁸⁹ *DJP*, C.11, p.164. (*bona in fiscum aut tributum adversus eas, quas dixi, leges patrias trahebantur, quibus et rapinis et contra impensis exhausta fuerit Belgica, (fuerunt autem impensae tales, quibus, si justa ratio ponatur, nullam unquam aetate gens ulla pares tullit)... p.170. Damnum recte ad multa millies millia aestimarem, nisi plures essent tormenta, poenae, cruciatus ingenuorum corporum, quae aestimari non possunt*; C.15, p.320ff.

⁹⁰ *DJP*, C.15, p.327. (*cum pecuniam nervum esse belli notissimum sit, quam ut sibi comparare maximum habet momentum, ita huic proximum est eandem hosti*

the Leitmotiv of the author. Thus de Groot mentions that the Dutch carried on trading with their Spanish opponents;⁹¹ how, after Portugal had been added to the Spanish crown, special rules were introduced to accommodate the Portuguese trade.⁹² He explains the Dutch expansion towards the East Indies trade as the necessary cause of the cut-off of the Iberian trade, the latter being a Spanish attempt to subjugate the Dutch through hunger and want.⁹³

*avertere; Cf. C.11, p.165f. Inter alia nemo nescit eum esse orae situm, eam sedulitatem Batavorum, ut cunctis e locis in quaevis alia merces hinc commodissime transportentur, facto quodammodo ad res maritimas populi ingenio, cui quaestus hic omnium dulcissimus videtur, ut qui humanitati adjumento sit et mutuis gentium commodi, sine cujusquam damno facile sustentetur; C.15, p.319 Quis autem rerum Batavicarum adeo ignarus est, qui unicum illarum columen, decus ac praesidium esse nesciat navigationem et mercaturam? Inter omnes autem negotiationes Indica et dignitate et magnitudine et utilitate facile primas obtinet. Cf. P.J. BOUMAN, "Hollands welvaren", Hoofstuk 12 in Romein, *De lage landen*, 265ff.*

⁹¹ *DJP, C.11, p.165. (t)um vero quaecunque salva republica esse possunt belli, ut ita dicam, commercia, ea religiosissime observarunt... p.166. ita Batavi non eos tantum qui per Belgicam in partibus adversis erant, sed et ipsos auctores belli Hispanos in Hispania sua commeatu juverunt, quod ut horum mercatoribus utile fuit, ita illos gravi interdum fame liberavit... p.167. Quod modo dicebamus mercaturam inter hostes non necessario tolli, id sane causam nusquam habere potuit justiore quam inter hos populos, quorum res summa utrimque in navigationibus consistit et quos jamdudum usus commerciorum conciliaverat. Cf. also Boxer, 23f; ROELOFSEN, "State Practice" in *Studies*, 124ff. describes how the Dutch attempted to control trade with the Southern Netherlands by granting against consideration permission (called passports or licenses) to trade with Dutch territory occupied by the enemy. *Groot Placaet Boek*, I. 1088, 1092ff. Free trade with Spain and Portugal was enjoyed by implicit permission of the Spanish and Portuguese authorities, ROELOFSEN, 130. ROMEIN, *De lage landen* 234. ROMEIN, "Johan van Oldenbarnevelt" in *Erflaters*, 164.*

⁹² *DJP, C.11, p.173ff. Grotius refers to a series of rescripts of the States General granting Portugese safe conduct and freedom to carry on trade in the Low Countries, dated 22 October 1577 (Brussels); 19 June 1581 (Amsterdam); 11 February 1588 (The Hague); 30 July 1592 (The Hague); 2 October 1600 (The Hague).*

⁹³ *DJP, C.11, p.168ff, 171. Nam exinde, cum appareret hostes eam viam ingressos ut, quod armis non potuerant, fame atque inopia subigere vellent, praecisa scilicet Hispaniensi mercatione, in qua hactenus populi vita erat constituta, paulatim Batavi longinquas navigationes proculque positas gentes, cognitae Lusitanis sed non subditas, respicere et ipso coeperunt; Cf. also C.11, p.198. BOXER, 24: "Memories of the Iberian embargo of 1585, and anticipation of that to come in 1595-6, may well have made the Dutch realize that their use of Lisbon as a spice-mart was becoming increasingly precarious. However that may have been, in March 1594 nine north Netherlands merchants found sufficient inducements and funds to organize a 'Company of Far Lands' at Amsterdam, with*

The subsidiary argument revolves around the justification of military operations and the seizure of spoils by private individuals.

Although support for the latter phenomenon could be found in the medieval development of reprisals and the more recent derivative form of privateering,⁹⁴ de Groot hardly mentions this aspect of the case. Instead he develops the concept of a private war, for which he relies heavily on the Old Testament for authority to justify military operations and seizure of spoils by individuals. He peruses Roman history and the incident of Caesar and the pirates is raised from historical event to rule of law.⁹⁵

This approach sheds light on the ambivalent attitude of the Dutch relative to piracy. The first real success in the Dutch struggle for independence was the taking of den Briel by the so-called Watergeuzen or Sea Beggars.⁹⁶ The latter were little more than pirates,⁹⁷ whose status had been raised by the granting of kaperbrieven by William of Orange,⁹⁸ which was possible since the Father of the Nation was the sovereign of the principality of Orange.⁹⁹ However, where the authority to grant such letters resided

the object of sending two fleets to Indonesia for spices." Cf. also BOXER, 23. ROELOFSEN, "State Practice" in *Studies*, 130ff for a description of the 1599 total prohibition of trade enacted by both Dutch and Spain and the failure of such embargo's.

⁹⁴ In the prize court (ie the college of admiralty, HAHLO and KAHN, 532, n. 35) the advocaat-fiscaal of the Hof van Holland, the original company and van Heemskerck appeared as plaintiffs. They cited the instruction given by Prince Maurits as admiraal-generaal to van Heemskerck, the attack by Spanish ships, the ill-treatment by Portugese to the friends of the Dutch, and the massacre of Dutch personnel as grounds for allocation of the prize. In the absence of defendents the carack and all goods therein were confiscated. However, the question relative to the ownership was not solved yet. The advocaat-fiscaal advised the States of Holland that the prize belonged to Holland, but the States renounced this (putative) right. The directors of the VOC invoked a decision of the States General, which came on 10 March 1605, allocating 4 percent of the net to captain and crew, the remainder to the VOC.

⁹⁵ *DJP*, C.8, p.94; C 10 p 134.

⁹⁶ BOXER, 8f., 15f., 130; PARKER, 117ff., 126f., 132f.

⁹⁷ BOXER, 8, 130; PARKER, 121f., 131.

⁹⁸ PARKER, 121f. In 1568 in La Rochelle, ROMEIN, *De lage landen*, 227.

⁹⁹ PARKER, 108: "As a sovereign ruler he (William of Orange) was technically entitled to make war on his enemies- and Alva, who had confiscated the prince's estates..., was clearly an enemy." ROMEIN, *De lage landen*, 227.

after 1584 remains unclear in view of the uncertainty relative to question of the sovereignty.¹⁰⁰

Apart from the historical debt to the Watergeuzen, privateering had developed into a profitable business.¹⁰¹ On the other hand foreign privateers were considered pirates¹⁰² and the damage to Dutch maritime trade caused by the Dunkerque pirates led to the expedition of 1600 resulting in the battle of Nieuwpoort.¹⁰³

The underlying problem as unveiled by Grotius was of course that the fledgling state did not have a professional navy¹⁰⁴ and balked at the costs. Several remarks by Grotius make clear that this

¹⁰⁰ *DJP*, C.13, p.281 states that the sovereignty vests with the States General. Grotius glosses over the matter of kaperbrieven; C.11, p.203 *Unde etiam codicillos sive mandata bellicae potestatis, quae nemini apud Batavos negari solent, priores navarchi nulla acceperunt: posteriores, etiam qui acceperunt, haud facile usurparunt*. However on p.289ff. he *obiter* discusses the kaperbrieven of Heemskerck and reveals that these had been granted by prince Maurice, which rather confuses the matter. Cf. ROELOFSEN, 83: "The counts of Holland, according to Grotius, had never been "monarchs" in the real sense, but only the hereditary executive officers of the republic, appointed by the States." PARKER, 243 mentions *Corte Verthoninge*, 1587, by Francois Vranck (pensionary of Gouda) as the first publication arguing that the sovereignty resides with the States as under the rule of the former princes. The resolution of the States General on 25 July 1590 endorsed this view. ROMEIN, *De lage landen*, 232. ROMEIN, *Erflaters*, 166. BOXER, 12.

¹⁰¹ PARKER, 149 lists the prizes captured by the Sea Beggars as revenue for the Dutch cause. BOUMAN, 267: "Nog winstgevender dan de koloniale handel was de kaapvaart waarvoor de Staten op ruime schaal kaperbrieven uitreikten. In maart 1606 bij voorbeeld verlieten honderddertig kaperschepen onze havens. In 1607 verklaarde de vroedschap van Amsterdam, dat de kaapvaart in de voorafgaande jaren de kurk was geweest waar de stedelijke financiën op dreven." ROMEIN, "Michiel Adriaensz de Ruyter" in *Erflaters*, 350.

¹⁰² ROELOFSEN, "Sources of Mare Liberum", in *Studies*, 51 mentions that the aggression of the VOC in the Indonesian archipelago quickly earned the Dutch the reputation of pirates. Cf. also ROELOFSEN, "State Practice", in *Studies*, 128ff.

¹⁰³ PARKER, 234; ROMEIN, *Erflaters*, 169.

¹⁰⁴ BOXER, 4; at 24, he refers to the five admiralties, which maintained the Dutch warships, most of which were hired or converted merchant-men; at 76f.: "As early as 1588 there were reportedly over 2 000 sizeable Dutch merchantmen suitable for service as warships."; ROMEIN, "Michiel Adriaensz de Ruyter" in *Erflaters*, 353f. describe the changes in naval warfare which took place during the 17th century. Armed merchantmen, manned by undisciplined and untrained crews, whose prime interests was prize and saving the ship, were replaced with warships by the English with the result that the Dutch were by the time of the first English war at a disadvantage.

privatised navy, or privateers or state commissioned piracy was an economic solution to a costly problem.¹⁰⁵

This approach recurs when the author indicates that the spoils were acquired at no costs to the state, that the treasury was exhausted from the costs of war, how the spoils of the conquest of Macedonia were such that the financial burdens of the Roman citizens were ended, and that the Dutch could also finance the war from the resources of the enemy rather than from those of their citizens.¹⁰⁶

12. Conclusion

It is suggested that the matter addressed by Hugo de Groot in his *De Jure Praedae* was of much wider scope than the capture of the Catherine and the interests of the Dutch East Indies Company. De Groot dealt with the legitimacy of the Dutch revolt, the legitimacy of the Dutch state, the legitimacy of the Dutch practice of privatisation of warfare. Thus, the author virtually ignored the domestic law dealing with the practice of privateering, but concentrates on and further develops the customary international law of warfare. To achieve the above objectives the author sketched an enormous canvass, drawing upon Biblical, philosophic, patristic and legal authority. In particular late medieval Roman law, canon law and more recent Spanish legal science had built up a body of work on the topics of warfare, captives, ransom and spoils of war as the result of the virtually continuous state of war these emerging states had been involved in. In this respect the Dutch were newcomers and a considerable part of Grotius' work is a compilation. However, *nova* are the elevation of self-interest as a law unto its own¹⁰⁷ and the elevation of free trade to the highest

¹⁰⁵ *DJP*, C.8, p.119. *Diligentius enim rempublicam defendunt cives bellique onera promtiores sustinent rei privatae vinculo, cum spes quodammodo praecisa est semel amissa recuperandi. Nec reipublicae quidquam abscedit...*; C.10, p.156. *Operae autem bellicae praemium nulla ex re utilius, quam ex praeda dissolvitur. Nam ita et respublica sumtum non facit et hostis depauperatur, flagrantiore ad cuncta milite, qui sciat etiam sibi se vincere*; p.161. *ut respublica, contenta hostes sine suo sumtu mactasse infortunio, jus suum in res hostiles illi resignaret, qui vicissim in se id omne recepisset, quod ipsa deberet praestare*; C.15, p.318. *Tum quatenus pars praedae ad rempublicam pervenit nullo ejus sumtu, utilissimum hoc est istis maxime aerarii quod tam gravi bello atteritur difficultatibus*; p 328, 332. Cf. PARKER, 237 on the costs of the war for the Dutch. ROMEIN, *De lage landen*, 227 refers to the ruling of the waves by the watergeuzen in 1570; BOUMAN, 267.

¹⁰⁶ *DJP*, C.15, p.318.

good, which make Grotius one of the precursors of Jeremy Bentham and Adam Smith. There are other aspects of the work which show de Groot to have been an innovator: his secularisation of the relationship between prince and subjects¹⁰⁸ into a contractual constitutional theory;¹⁰⁹ his advocacy of free markets and seas in order to gain access to the overseas discoveries of the Portuguese and Spanish; his recognition that not only states but also individuals have rights under international law and his realisation that a restatement of the law of war was opportune. All these factors relate to the character of the Dutch state and society, the welfare and survival of both was resting on the success of its trade, which in its turn depended on ruling the waves as economically as possible.

There were, however, the necessary contradictions in this multifaceted, complex work: advocacy of free trade did not prevent the granting of a monopoly to the VOC,¹¹⁰ *mare liberum* did not exclude *mare clausum*,¹¹¹ justification of the abjuration of the prince does not prevent de Groot demanding blind obedience by the subjects to the magistrates,¹¹² while the division in Dutch politics

¹⁰⁷ *DJP*, C.2, p.9. *Unde principium totius naturalis ordinis recte poetae et philosophi veteres amorem statuerunt, cujus prima vis primaque actio reciproca est in se ipsum. Qua ratione culpandum non est quod secutus Academicos Horatius utilitatem justi et aequi prope matrem dixit. Omnis enim natura, ut plurimis locis Cicero inculcat, diligens est sui seque salvam ac beatam vult ... : justo enim summam sui esse curam*, p.21. *Quamquam igitur ordo legum primo loco et deinceps positarum ostenderit bonum suum prius esse alieno, h e ita natura comparatum, sibi ut quisque melius esse velit quam alteri*; C.3, p.36. *Nam qui diligere nos proximum sicut nosmet ipsos iubet, verum nostri amorem primo loco ponit....*; Cf. also C.14, and 15 *passim*.

¹⁰⁸ Cf. However *DJP*, C.7, p.76f. where Grotius uses Tacitus *Principi summum rerum iudicium Dii dederunt, subditis obsequii gloria relicta est* (*Annales*, VI. 8) and Seneca (*De Benef.*, III. 20) *quae servi est in dominum, eam esse militis in ducem et in regem subditi rationem to support obedience to the state*.

¹⁰⁹ *DJP*, C.8, p.91. *(i)ta ad rempublicam jus omne a singulis devenit, collatoque consensu, ut ad regulam tertiam ostendimus* (C.2, p.19ff.), *potestas publica constituta est*.

¹¹⁰ ROELOFSEN, "Sources of Mare Liberum", in *Studies*, 105; G. MILTON, *Nathaniel's Nutmeg*, 1999, 245-343 deals with the defence of this monopoly against the English East India Company.

¹¹¹ BOXER, 94-126. Cf. Roelofsen's description of the so-called Colonial Conferences between the Dutch and the English in 1613 and 1615 in *Studies* 54ff.

¹¹² Rule 6; *DJP*, C.7, p.79. *(m)axime nos ratio et divinae litterae vetant magistratum esse detractores. Cumque nihil sit quod obstet, quomodo non inferiores leges cum superioribus convenire et idem esse, quod magistratus et quod Deus praecipit, par sit credere?* p.80. *Quod autem in subditis sub republica aut magistratu constitutis, idem in filiis et servis obtinet, qui in sacris paternis aut dominica sunt*

between the hawks and the doves may have been the obstacle to publication.¹¹³

potestate. In C.3, p.37 Grotius explains the sanctity of magistrates because they are ordained of God; Cf. also C.9, p.123. (*in subditis vero adversus imperantes promptum obsequium*).

¹¹³ For an analysis of the political situation ROELOFSEN "Grotius and the International Politics of the Seventeenth Century" in *Studies*, 88ff. ROMEIN, *Erflaters*, 170f.