METHOD IN EARLY INTERNATIONAL LAW

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ABSTRACT

One of the most distinctive features of Modern thinkers is their concern with the method of investigation. In order to break with the past and, at the same time, build a solid system of thought, Modern authors turned their attention to the "hard" sciences and introduced their method in the study of Politics and Law. The authority of ancient texts, by itself, no longer has anything to teach. Much has been said about the membership of Hugo Grotius amongst Modernity, but if, on the one hand, the presence of a mathematical method in his thought is one of the main modern features, then this author joins the ranks of Modernity. On the other hand, the use of such a mathematical method in Grotius is so full of nuance that it induces the reader to question the seriousness of his choice. Regarding method, the Dutch jurist is 'more or less' modern, or 'more or less' medieval, depending on the point of view. Or perhaps the Modern Revolution was not so revolutionary and Hugo Grotius was a transitional author.

This present work is a qualitative study and has used the inductive method. Since the object of this study is a writer's thought, Grotius' oeuvres are the primary sources, and the secondary sources are the works of his commentators. As this is a text in the history of ideas, the methodology created by the 'school of Cambridge' (developed by authors such as Peter Laslett and Quentin Skinner) was deployed. Therefore, I have first outlined the intellectual context of the debate about method at the time of Grotius in order to unveil his influences. Then, I have compared the concept of the "mathematical method" created by Descartes and Galileo with the passages in which Grotius explains his own method. I reach the conclusion that a mathematical method in Grotius would be nothing short of an anachronism.

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I INTRODUCTION

The purpose of this paper is to verify the modernity of Hugo Grotius. One aspect of his work was chosen: the method employed by the author to determine natural law. In the early 17th century, amongst juridical and political writings, there was a widespread concern in developing solid knowledge, because everything that had been done by Medieval authors did not seem to stand up to examination by reason. Compared with the hard sciences, the social sciences (and law in particular) did not seem to have progressed at all, and they were still debating the big questions raised by Classical Antiquity. One of the reasons that modern authors attributed to this underdevelopment was the lack of a rigorous method in medieval authors.

At the age of 40, Hobbes accidentally discovered Euclid's Elements of Geometry. He opened the book on the forty-seventh proposition and considered it absurd. But the statement derives logically from the previous statement (that was still absurd), and this one to the one that came before, and so on until he reached a first axiom that is evident per se and incontestable. Hobbes was very impressed.

Philosophers like Hobbes, Galileo and Descartes believed that only the sciences that used this procedure from geometry would be able to develop. The perceived underdevelopment in the study of the Social Sciences was attributed to a defect of their method. Modern authors' main target of criticism was Aristotle. There were two reasons for this. The first related to the authority that his work acquired in the Middle Ages, such that his work was read uncritically, while dismissing the need to present any other evidence. Grotius shares this idea. In addition, Aristotle presented an epistemological realism which was considered

somewhat naive, since it does not question the existence of external entities to subjectivity. Skeptics like Pierre Charron asserted that one couldn't build a solid knowledge in physics, because human perception can be illusory and, in ethics, because of the diversity of customs, beliefs and behaviors in various locations. In the late 16th century, this attack that skeptics had launched on Aristotelianism seemed successful, but they only had deconstructed a philosophy and not yet presented any alternative. It was up to Modernity to find a way out.[1]

Jacobus Zabarella, Galileo's older colleague at the University of Padua, under the influence of Aristotle, Euclid and Averroes, began the research that would give rise to the modern method. He perceived it as a *regressus*: in order to obtain an accurate science of a phenomenon known imperfectly, one must return to its causes, and only after a reflection on these causes and their effects *in abstractu* may he then return to the initial phenomenon.[2]

There is however a certain vagueness over the name and the species of methods created by this school. It can be called the geometric method, because Euclid's *Elements* represent the paradigm of scientific demonstration. It could also be called a mathematical method, as geometry is a part of mathematics. Yet there is a subtle difference between the two. The geometric method comes from Euclid and the

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1 Richard Tuck, 'Grotius, Carneades and Hobbes' (1983) 4(1) *Grotiana* 43, 45.

2 Ibid 68. Grotius sent a letter to Galileo in which he confessed to be an admirer: Hugo Grotius, 'Letter to D Galilaeo Galilaei' in *Epistolae quotquot reperiri potuerunt; in quibus praeter hactenus Editas, plurimae Theologici, Iuridici, Philologici, Historici & Politici argumenti occurrunt* (Amstelodami: P & I Blaev, 1687) 266 [654]. Although, some works from Galileo – Saggiatore (1623), Dialogue concerning the two chief world systems (1632) and Discorsi su due nuove scienze (1638) – were written much later than the De Jure Praedae Commentarius. Thence, however interested, Grotius could not have seen the entire method revolution in Modernity.

mathematical method (used by Galileo and Newton) is more related to modern physics than mathematics. One is more concerned with explanation of the axioms, the clarity of the concepts and the accuracy of the statement, while the other deals with observation and measurement of data in mathematical language.[3] As will be seen, in the *De Jure Praedae Commentarius*, Grotius compares his procedure with that of a mathematician, which seems to evoke the latter method.

In the history of modernity, this subtle distinction creates two important methods. The geometric method was employed by Descartes and became known as 'Resolutive-compositive'. It involves the decomposition (or resolution) of a phenomenon to its most simple elements, so that a few relations (such as speed, space and time) can be isolated and, finally, a principle or general law in which the phenomenon fits can be formulated. This method was employed by Hobbes. The mathematical method, in its turn, originated from the Paduan School and focuses more on demonstration rather than invention. Zabarella began to develop it, but it was Galileo that best explains it. Demonstration is twofold: analysis and synthesis. The analysis shows how the phenomenon was assembled and how the effects depend on the cause. Then the synthesis examines the causes by the effects, ponders the validity of the conclusions and proposes definitions, axioms and theorems.[4]

In addition, modernity has also developed other methods. Since the two already described represent direct ancestors of the hypothetical-deductive method of today physics – and physics is paradigm of science – sometimes other methodological formulations, more empirical and less

[3] Alfred Dufour, L'influence de la méthodologie des sciences physiques et mathématiques sur les Fondateurs de l'École du Droit naturel moderne (Grotius, Hobbes, Pufendorf)' (1980) 1(1) *Grotiana* 33, 37.

[4] Ibid 38-9.

abstract, are neglected. One must recall, however, the work of the British empiricists like Bacon, Locke and Hume. In the late 16th century and in the following one, method became a widespread concern.

II METHOD IN THE *DE JURE PRAEDAE COMMENTARIUS*

The first chapter of Grotius' *De Jure Praedae Commentarius*, titled *Exordium, Argumentum, Distributio, Methodus, Ordo Operis*, contains a passage that apparently adheres to Modernity:

> It is necessary for our purposes to organize the discussion as follows: first, we will establish what is universal as a general proposition; then we will gradually break down this generalization, adapting it to the specific nature of the case under review. As well as mathematicians especially secure before any demonstration a preliminary statement of certain axioms on which all people agree, in order to be a fixed departure point from which one can draw the following proof, then we will also point out certain rules and laws of a general nature, presenting them as general assumptions that should be reviewed and demonstrated again in order to create a foundation on which other statements can safely derive from.[5]

It sounds like a description that only a modern writer could conceive. In the next paragraph, Grotius apologizes to the reader for any gaffe that he might possibly commit, due to the originality of its intent. In fact, if the author intended to transpose the method of the natural sciences to moral philosophy, he anteceded Descartes by more than three decades.

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5 Ibid 6. 'Ordo autem instituto hic convenit, ut initio quid universim atque in genere verum sit videamus, idque ipsum contrahamus paulatim ad propositam facti speciem. Sed quemadmodum mathematici, priusquam ipsas demonstrationes aggrediantur, communes quasdam solent notiones, de quibus inter omnes facile constat praescribere, ut fixum aliquid sit, in quo retro desinat sequentium probatio, ita nos quo fundamentum positum habeamus, cui tuto superstruantur caetera, regulas quasdam et leges maxime generales indicabimus, velut anticipationes, quas non tam discere aliquis, quam reminisci debeat'.

Nevertheless, the thesis that Grotius develops a modern method needs to overcome a major obstacle: the allusion to the craft of mathematicians is described in the section that Grotius calls *Ordo*, not in the section that he calls exactly *Methodus*. This is quite relevant. For modern writers, this was a matter of method, not of simple organization. The Dutch jurist sought only an original – and, certainly, more "orderly" – way to explain very old contents; like a good lawyer, he sought a more didactic and convincing way of exposing his arguments. This allusion is but a single comparison, and not the transposition of a method of the hard sciences to jurisprudence. The fact that this comparison is found in the *Ordo* section, not in the *Methodus*, implies that for the author, despite appearances, method does not constitute in itself an independent object of thought. The method, the order, and the apologies in advance to the reader are all at the same level of abstraction; they are all *prolegomena*, an introduction to the rest of the book, and do not address the central issue, which is the law of booty. There is no doubt that, in comparison to earlier works that dealt with the law of war, the general system of *De Jure Praedae* introduces something new. And the novelty is the way it is exhibited, just like a mathematician would. But this is very different from how mathematicians think.[6]

What Grotius called method are two other institutions: the derivation of law from *ractio naturalis* and its confirmation by the *auctoritates*. Grotius here reacted not against Aristotle, but against the traditional method common to Italian Jurists of transposing, without the slightest care, rules and principles of civil and canon law to a sphere (the law of war) in which they lose their validity. This domain, in Grotius, is

6 Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Presses Universitaires de France, 1983) 69 n 15.

characterized not only by its "internationality", but by the lack of judicial courts. Thus, without the possibility of having any legal review, institutions of hierarchical legal systems, such as those from canon Law and civil law are not valid.

Therefore, one cannot proceed as lawyers usually do and apply civil law or canon law institutions to the Law of War. Grotius finds a very interesting solution to this problem:

> (...) no positive law is valid between enemies; However, there are customs that are observed by everyone, even between those who display extreme hatred. In the passage quoted, the word 'Customs' is equivalent to the concept of Cicero in the phrase 'unwritten law, law that sprouts of nature' (...).[7]

Between enemies, people who nourish a mutual distrust, one must appeal to an unwritten law, created by its agreement with the mores of the most diverse peoples. This is natural law derived from natural reason. Only this kind of law is valid even between enemies. And, since natural law constitutes one of the sources of the Law of War, it is necessary to devise a way to unveil it. Whereas natural law is rational, it can be discovered *a priori*, by the intellectual mechanisms of reason itself that all men enjoy. The method *a posteriori*, the testimonies of the Sacred Scripture or other human authorities, serves only to confirm what reason has already discovered: when everyone agrees on a particular fact, it is likely that it comes from a common cause.

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[7] Grotius, above n 2, 6 n 19 : '(…) 'Eorum sane quae scripta sunt nihil inter hostes valet; mores autem servantur ab omnibus, etiam cum ad extremum odii processerint.' Ubi mores idem sunt, quod apud Tullium 'non scripta sed nata lex' (…)'.

The appeal to authority is more than enough argument to cause some discomfort in blindly labeling Grotius as modern. So then what would the intellectual affiliation of Grotius be?

First, it should be noted that Grotius was a lawyer, and a good one. The debate about method was beginning to matter not only to philosophers; jurists were also beginning to feel that need. The so called *mos italicus*, the Medieval civil law jurisprudence was displaying signs of exhaustion. It can be characterized by extensive text books on nearly every legal matter, by the use of rhetoric and the conditioning imposed by Roman institutions. But, gradually, there began to arise books on specific topics, such as the Law of embassies and the Law of War. In consequence, it became necessary to ponder a new systematization of law different from that of the Justinian Codex. However, a classification *ratione materiae* did not seem obvious, and systematization on the basis of the Roman *actio* was still tantalizing.[8]

Medieval thinking would still continue to dominate civil law in the region of Italy and in several German States, in addition to canon law. However, in France, humanism would create a new trend: the so called *mos gallicus*, the French way of doing jurisprudence. Its main proponents were jurists such as Ulrich Zasius, Guillaume Budé and Andreas Alciatus. In the Law of War, one must include Connan, Le Douaren and Doneau. This school of thought developed at the University of Bourges, but also obtained good reception in the Netherlands, especially in Louvain and in Leyden. Grotius studied at Leyden, and it is significant that he earned his PhD in Orléans. The *mos gallicus* displayed two major strands: one dominated by history and philology, and the other by a

[8] Alain Wijffels, 'Early-Modern Literature on International Law and the Usus Modernus' (1995) 16(1) *Grotiana*, 38–9.

dogmatic, systematic and methodological concern. These two trends were sometimes combined, such as in the case of Grotius. The systematization effort did not exclude the intrusion of history and philology in jurisprudence. Moreover, there was no opposition to the *mos itallicus*; the *mos gallicus* was more an enlargement and transformation of its predecessor rather than a rejection of it.[9]

When comparing the *magna opus* of Alberico Gentili, a typical pre-modern legal humanist writer, with Hugo Grotius, Professor Peter Haggenmacher points out the close proximity between the two: the same theme, structure and similar topics, among other similarities. Still, there is a fundamental difference. In Gentili, 'what may at times look like a system is hardly more than a skilful, often quite elegant, discussion of the topical questions as raised and formulated by successive generations of lawyers and theologians in the particular field of the law of war'.[10] His method consists of displaying *topoi*, and is well inserted into the Medieval tradition of *disputatio*. Gentili studied in Perugia and was a spiritual descendant of Bartolists, the Italian Medieval school of jurisprudence. He identified himself consciously with this tradition. Grotius, in turn, despite his profound knowledge of the Italian masters, was a genuine creature of the *mos gallicus*. 'What the French systematizers had done for Roman civil law – an orderly reconstruction of the materials afforded by the *Corpus Juris Civilis* according to logical

9 Haggenmacher, *Grotius et la doctrine de la guerre*, above n 6, 47–48.

10 Peter Haggenmacher, 'Grotius and Gentili: a Reassessment of Thomas E. Holland's Inaugural Lecture' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (Clarendon Press, 2002) 160-161 n 13.

principles – he was to accomplish for the whole field lying beyond the ken of civil law, that is, the *jus belli ac pacis* (…)'.[11]

Grotius appears more orderly, but that does not mean he was affiliated with the mathematical method. This imprecision in the reference to mathematicians reveals that Grotius, although aware of the discussions on the method of his time, did not enjoy a direct contact with the debates at the Paduan School. According to Vermeulen, it seems likely that the source of this method/mathematical comparison of Grotius stems not from Galileo or Zabarella, but from the physicist Simon Stevin, a close friend of the De Groot family.[12]

Hence, Grotius does not break with Medieval legal tradition. He is just a different kind of lawyer.

III METHOD IN THE *DE IURE BELLI AC PACIS*

In Grotius's *De Jure Belli ac Pacis*, the treatment method enjoys in his previous work survives only as a residual recollection. There are few sparse references in the *prolegomena*. Grotius begins the whole discussion of his intent by affirming that, in the domain of the Law of the Peoples, 'few writers have attempted to enter this field and, until now, no one has tried to investigate it completely and orderly'.[13] This statement may seem rather self-praising and even uncalled for since the author himself was aware that his purpose was not original. Yet his emphasis was in the words 'completely' and 'orderly'. In paragraphs 36 and 37 of

11 Ibid 161.

12 Ben Vermeulen, 'Simon Stevin and the Geometrical Method in De jure praedae' (1983) 4(1) *Grotiana* 63, 64.

13 '(...) attigeunt pauci, universum ac certo ordinem tractavit hactenus nemo (...)': Hugo Grotius, *De Iure Belli ac Pacis libri tres, In quibus ius naturae et Gentium: item iuris publici praecipua explicantur* (Clarendon Press, first published 1646, 1925 ed) prolegomenum 1.

the *prolegomena*, Grotius recalls that several writers have preceded him in his intent of investigating the laws of war, but 'these authors had so little to say about such a broad subject and most did so by mixing or confusing *without any order* that which is relative to Natural Law, Divine Law, the Law of the Peoples, Civil Law, or Canon Law'[14]. What Grotius considers his own original contribution is the manner in which he deals with the subject: in comparison to his predecessors, Grotius' treatise is far more complete and orderly.

Although both the *De Iure Praedae Commentarius* ('DIPC') and the *De Iure Belli ac Pacis* ('DIBP') addresses the *materia belli*, the difference in purpose between the two works is tantamount. In the latter, the Dutch jurist aspired to completeness. This intention could not have been present twenty years earlier because the DIPC was not the work of a philosopher, but that of a lawyer, someone who stood for a cause. On the other hand, the DIBP is a scientific paper. It is quite suggestive that, in the epilogue of the first book, the author pleads to God to exalt his homeland and thwart the cruel intentions of its enemies, and, in the final paragraph of the other oeuvre, his appeal to God is an intercession for all mankind.[15]

This scientific commitment makes the DIBP a text of pure theory. Only in the light of this information can one understand the next reference to the mathematicians:

> It would be outrageous to think that I have not bothered to tackle any of the controversies of our century: those that have already emerged or the ones that may still arise and be predicted. In fact, I

[14] '(...) sed ni omnes de uberrimo argumento paucissima dixerunt, et ita plerique ut sine ordine quae naturalis sunt iuris, quae divini, quae gentium, quae civilis, quae ex canonibus veniunt, permiscerent atque confunderent': Ibid prolegomenum 37.

[15] DIPC n 19 and DIBP n 28, 25 e 8.

> would like to say that, as well as mathematicians consider [geometrical] figures, abstracted from real bodies, similarly, in studying the Law, I have departed from any particular event.[16]

The DIBP is an essentially theoretical text: it has no practical goal and is abstracted from all concrete facts, like mathematicians abstract geometric figures from real bodies. The methodological purposes of this comparison – should they exist – are far simpler than one might think: here, Grotius justifies the absence of any contemporary historical event. This comparison with geometry does not imply the use of the mathematical method, and it does not even introduce a mathematical order, as appeared in the DIPC.

The effort of systematization, which was already present in the monograph of youth, in the DIBP acquires new contours. Axiomatic-deductive structure, which appeared in the second chapter of another work, no longer exists. Instead:

> Throughout this work I set out mainly three things: to present my reasons of deciding, and presenting them so evident as possible, to display in good order the themes that had to be dealt, and to distinguish clearly the things that might look alike, compared with each other, but that in reality are quite distinct.[17]

Hence, throughout his work, Grotius observes three methodological maxims: to base, as much as possible, the institutions of the Law of War in evidence; to present the subjects in a quite orderly disposition; and to

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16 '(...) sed ni omnes de uberrimo argumento paucissima dixerunt, et ita plerique ut sine ordine quae naturalis sunt iuris, quae divini, quae gentium, quae civilis, quae ex canonibus veniunt, permiscerent atque confunderent': Grotius, above n 13, prolegomenum 37.

17 Ibid, prolegomenum 56. 'In toto opere tria maxime mihi proposui, ut definiendi rationes redderem quam maxime evidentes, et ut quae erant tractanda ordine certo disponerem, et ut quae cadem inter se videri poterant necerant, perspicue distinguerem.'

distinguish similar yet different institutes. Haggenmacher asserts that this methodological proposal refers, in particular, to the classification of the sources of law (natural and voluntary law, divine law, civil law, the Law of the Peoples and the so-called 'smaller than the civil law') that the Dutch jurist exposed in the first chapter of the DIBP.[18]

According to the first maxim, Grotius attempts to lay the sources of law on principles so fundamental that they may become irrefutable. Regarding natural law, this is emblematic. The author establishes it in 'notions so solid that nobody could deny, unless he lies to himself. Indeed, if given proper care, the principles of that law are almost as clear and evident as the things we perceive by our senses'.[19] Apparently, what the author perceives as evidence in this *ius* is the fact that it is reasonable. This is correct, yet incomplete. For Grotius, 'evidence' is not only a rational deduction and merely intellectual, but also what can be perceived by our senses. Therefore, natural law – which is based on reason – is as evident as civil law, because the latter can be read in a legal codex or be heard from the mouth of the sovereign. Both are evident alike.

Likewise, the Law of the Peoples is evident. To prove the existence of this law – which is also an auxiliary proof of natural law – Grotius returns to the testimony of ancient authorities (philosophers, historians, poets and orators). He does not trust them without reservation – since, according to the author himself, some had the habit of twisting the truth in the light of their own interests – but argues the agreement of so many individuals, in different times and places, could only stem from a universal cause. And this can be both a consequence of natural principles and a common

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18 Haggenmacher, Grotius et la doctrine de la guerre juste, above n 6, 452 n 13.

19 DIBP n 28, prolegomenum 39. '(...) notiones quasdam tam certas ut eas nemo negare possit, nisi sibi vim inferat. Principia enim eius iuris per se patent atque evidentia sunt, multo magis quam quae sensibus externis percibimus (...)'.

consensus. The first alternative unveils natural law and the second the *jus gentium*.[20]

It is important to observe that this notion of evidence also covers the data collected by the senses, which means that either Grotius disagreed with the attacks of Charron on Aristotelian epistemological realism, or he was not aware of it. Both scenarios *evidence* that Grotius was not fond of *a priori* and purely rational conceptions found in the mathematical method.

On the other hand, the theme of the *Ordo*, because of its continued recurrence, seems far more significant to Grotius. In the DIPC, he intended to be as orderly as a mathematician and, in the other book, in *prolegomenum* 37, he berated his predecessors for their lack of completeness and order. The reason for this emphasis lies in the fact that the author sought to draw up a systematic and full text on the Law of War, with an appropriate classification of the *ius belli* sources right at the beginning. It is this classification that allows one to distinguish what in the Law of War is proper to natural law, divine law and the Law of the Peoples. The authors who preceded Grotius 'had so little to say about such a broad subject and most did so by mixing or confusing *without any order* that which is relative to Natural Law, Divine Law, the Law of the Peoples, Civil Law, or Canon Law'.[21] The reference to the absence of order in the just war writers previous to Grotius appears within the same context in which he claims they mingled the sources of the *ius belli*. That is the importance of the *Ordo* for the Grotian system: because of it, Grotius surpasses the conceptual framework of the Roman notion of *ius*

[20] Ibid prolegomenum 40.

[21] '(...) sed ni omnes de uberrimo argumento paucissima dixerunt, et ita plerique ut sine ordine quae naturalis sunt iuris, quae divini, quae gentium, quae civilis, quae ex canonibus veniunt, permiscerent atque confunderent': Ibid prolegomenum 37.

gentium (a national law that was applied within the Empire between foreigners and was confused with natural law), which persisted in all of Grotius' predecessors.[22]

The third methodological maxim, the distinction between heterogeneous things, refers once again to the classification of sources. In addition to separating *ius gentium* from natural law, Grotius distinguishes natural law from voluntary law. This also corresponds to the first and greatest distinction when the author introduces the sources.[23]

That is worthy of note. In the Protestant cultural universe, voluntarism prevailed and, in the Catholic and Iberian World, Thomistic intellectualism dominated the study of law. In the first, all kinds of law stem from the will of a legislator; regarding natural law, the legislator is God Himself. In the latter, law was depicted as a measure of righteousness, a principle of organization. Thus, intelligence, a rational and orderly design, would constitute the essential element of law. In natural law, the main element was the Divine intellect. Therefore, for the Calvinist environment in which Grotius has emerged, natural law itself

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22 The Roman Law of the Peoples regulated the relations amongst foreigners (*peregrini*) and foreigners between the Roman *cives* within the Empire. It was taught by a *praetor peregrinus*, an itinerant magistrate, a factor that allowed his edicts to harmonize different legal traditions and cultural proposals. It was therefore a positive law, but quite distinct from the *ius civile* that regulated the relations between the Romans. It turns out that the Romans were not good philosophers and found it hard to justify the *ius gentium* as a positive law in the light of the binary division of law that they inherited from Aristotle. One must observe that even the great jurists compilers Gaius and Ulpian (Emperor Justinian, 'Digest' in Paul Krueger and Theodor Mommsen (eds), *Corpus Iuris Civilis*, (Weidmann Berlin, first published 529, 1908 ed) 1, 1, 1, 4 and 1, 1, 9) and a philosopher such as Cicero (Marco Túlio Cícero, *Dos Deveres* (Martins Fontes, 1999) 136, 157) either find a natural basis for the Law of the Peoples or treat it as synonymous to natural law. This confusion remains throughout the entire Medieval period and persists even in a modern author such as Francisco de Vitoria (Paulo Emilio Borges de Macedo, 'O mito de Francisco de Vitória: defensor dos direitos dos índios ou patriota espanhol?' (2013) 1 *Boletim da Sociedade Basileira de Direito Internacional* 90-110.

23 DIBP n 28, I, 1, 9.

was voluntary. Protestant authors could not describe only positive law as voluntary, because every other law was too. Here, the Dutch jurist seems far closer to the Spanish Scholastic tradition. According to Grotius, the main characteristic of positive law lies in its voluntariness, not in being written (because that definition would exclude customs as positive law). The natural law and voluntary law dualism plays a key role in the development of the DIBP. Should one not be distinguished from the other, the task of producing a science of law would fail:

> Many have intended so far to craft the Law of War in all its contours. Nobody has succeeded. This cannot be achieved unless – and about this there is still enough concern – the things that come from Positive Law and those which arise from nature are properly distinguished. The precepts of Natural Law, being always the same, may easily be assembled into a systematic ruling, but the provisions that come from Positive Law, everchanging and varying according to different places, are beyond a methodical system, like the other notions of singular things.[24]

Grotius intended to write a theoretical text and, to this end, it is necessary to observe the regular and constant phenomena. However, only natural law is universal and invariant: positive law varies according to each country and is based on opinion, *doxa*. The predecessors of Grotius were not able to write a theoretical work because they would mingle positive with natural elements.

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[24] 'Artis formam ei imponere multi ante hac destinarunt: perfecit nemo: neque vero fieri potest nisi, quod non fatis curatum est hactenus, ea quae ex constituto veniunt a naturalibus recte separentur. nam naturalia cum semper eadem sint facille possunt in artem colligi: illa autem quae ex constituto veniunt, cum et mutentur saepe et alibi alia sint, extra artem posita sunt, ut aliae rerum singularium perceptiones.': Ibid prolegomenum 30.

Therefore, Grotius' three methodological rules are not related to the geometric method, but they are an effort towards completeness and systematization in the composition of the DIBP. They are methodological concerns – no doubt – but not such as those of a Descartes or of a Galileo. Rather, they are efforts of systematization on jurisprudence undertaken by the French jurists, adequate to the precepts of *mos gallicus*. The attention that these jurists dispensed to method was part of the spirit of the time, but it never reached the levels or the sophistication of the Paduan School.

Finally, that which Grotius in the DIPC considered method resurged as 'evidence' twenty years later. Natural law is proven *a priori* by its adequacy to rational and social nature, and *a posteriori* by an agreement of all nations (or all of the most civilized) on a certain subject.[25] The opinion of the ancient texts, the Bible and the wise men provide 'historical evidence'. So, also in his mature oeuvre, Grotius prefers the first manner of proof and reserves to the second a merely confirmatory function. However, one should not assume inferiority, since, as mentioned above, it is only in this manner that one can prove the Law of the Peoples.

Hence, the conclusion that Grotius arrives, in *prolegomenum* 38, of his predecessors about the absence of the 'light of History', amounts to their rejection on a methodological level. They lack enough evidence to support their arguments. To address this mistake, they compensated by elevating Aristotle's ideas to the level of absolute truth, which Grotius claimed to be harmful, despite his own style being quite ornamental. The author returns to ancient writers not only as an appeal to authority, but as historical evidence. One should notice that this use of history is not even

25 DIBP I, 1, 12.

remotely close to the research effort of a contemporary historian. It is nothing more than a reference to events of Classical Antiquity, the older, the better. Still, it is an indirect reference, always mediated by the Bible or by Classical writers. Nonetheless, for the jurist of Delft, History provides for a methodologically better argument.

The methodological debate that Grotius witnessed, in his time, was a widespread reaction to the Medieval tradition. Some strands were incorporated to Modernity, while others were lost in time. Yet, broadly speaking, method is not so important in Grotius as it is in Descartes. According to Haggenmacher, Grotius' epistemology still seems somewhat "naïve", typical of a pre-Modern cultural universe.[26] However, in this respect, it is necessary to produce a semantic agreement about what the Modern method really is. If one regards only those of Descartes and Galileo, then indeed, Grotius is but a legitimate representative of the *mos gallicus* in the Law of War. But this interpretation excludes from Modernity even British empiricists.

IV CONCLUDING REMARKS

Finally, Grotius also descends from another tradition apparently quite strange for a Calvinist Dutchman: Scholasticism.

The Scholastic concern for method – even Spanish Scholasticism – has no epistemological basis. The so-called 'Scholastic method' was just a way to display complex issues more didactically. It begins by presenting a theological or philosophical proposition, followed by an objection or a questioning. The argument concludes with the solution of the problem and the answer to the objection. It was not employed in every work, only

[26] Haggenmacher, *Grotius et la doctrine de la guerre*, above n 6, 69 n 15.

those that were aimed at students. Thomas Aquinas himself did not use this method outside the two *Summas*.

However, in comparison with the works of pre modern jurists, Scholastics seemed to develop a more accurate knowledge, but that is due to the assumption of Aristotelian logic instead of rhetoric. Practical sciences, such as ethics and jurisprudence, which aimed at the good life, were not expressed according to the tenets of formal logic, but were made for convincing and persuasion. Rhetoric was the civil art of humanism, the art of the citizen who influences the politics of his city with his oratory. Most Medieval Italian lawyers, such as Bartolo, Baldo or Paulus Castrensis, of which Grotius descends at least indirectly, employed a method based on persuasion and casuistry.

Grotius does not use the Scholastic method, but even Thomas Aquinas did not employ it in all his writings. The Grotian method (the *recta ratio* and the appeal to authority) strongly resembles Scholasticism in another way. Unlike the Protestant tradition of an Alberico Gentili, to the Scholastics, original sin has not corrupted man absolutely. He could still perceive natural law through reason. The first principles of natural law are evident, even prior to any experience, because they are embedded in the human intellect. The problem is how to derive from these first principles practical guidance for everyday human life. For this venture, it is necessary to observe what the wise men of the past had said on the subject. To know what intelligent men of the past have spoken about natural law is a measure of prudence. Aquinas said that tradition is a hill that the researcher needs to climb to see farther. Hence, the use of reason and the authority of the ancient texts have always been an investigative procedure of the Scholastics.

Furthermore, in the works of Grotius, references to Aquinas, Francisco de Vitoria and other Scholastics abound. I wrote a doctoral thesis to prove the influence of Francisco Suárez *ius gentium* on Grotius. Therefore, the Scholastics' conscientious effort towards systematization and didactics is no stranger to the jurist from Delft. Amongst Dutch Calvinists, Grotius is the most 'Latin Catholic'.