

Grotius's Sources of *Ius Gentium* Slavery

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Abstract

Grotius's discussion on slavery exhibits a dual character, as it is based on natural law on the one hand, and on *ius gentium* on the other. This article focuses on the sources used by Grotius in his search for the rules of *ius gentium* on war slavery, and compares Grotius's insights with the works of some of his contemporaries. After briefly discussing Grotius's introduction to *ius gentium* and its sources, his references to three themes concerning war slavery are analyzed. The research shows that, if need be, Grotius works according to his own rules even though it seems difficult for him to leave Greco-Roman antiquity and Europe behind; it also shows that he is content with flimsy evidence. In addition, analyzing his sources informs us about Grotius's personal input regarding the legitimacy of war and slavery. It turns out that with regard to one of the most far-reaching principles concerning war slavery, Grotius's insight is consistent with what seems to have been generally accepted among (European) scholars from antiquity to his own time. Another lesson learned: natural rights are not safe with Grotius, since *ius gentium* as presented by him is a serious threat to such rights.

Keywords

Grotius – *ius gentium* (law of nations) – law of war – war slavery – Eurocentrism

1 Introduction

Someone who only reads book III chapter 14 of *De iure belli ac pacis* (*IBP*) might conclude that Grotius is an anti-slavery author and a protagonist of a

most humane treatment of unfree persons. Yet the picture of war slavery that Grotius draws in chapter 7 of the same book is entirely different in character: it describes enslaved human beings as the property of their master, who has absolute power over the enslaved, including the right of life and death. This Janus-faced picture results from Grotius's twofold approach to slavery. The first approach is from natural law, whereas the second, brutal slavery picture is based on the law of nations, or *ius gentium*. More precisely: on Grotius's account of this law.

According to Grotius, by nature all men are free (*IBP* III.7.1), a principle that can only be deviated from on three grounds: generation (birth, children), consent, and crime (*IBP* II.5.1). If viewed from natural law alone, victory and defeat in war as such are insufficient for a master-slave relationship to arise.¹ But the laws of war, including war slavery, are not based on natural law but on *ius gentium*, that is, according to Grotius, the body of law that states have mutually consented to,² laws that 'originate as between all states (*civitates*), or a great many states' and have in view 'the advantage, not of particular states, but of the great society of states'.³ These laws of *ius gentium*, among them the laws of war, can be found in the 'unbroken custom and the testimony of those who are skilled in it'. Grotius finds such unbroken customs and testimonies in the works of philosophers, historians, poets and orators 'from different times, and in different places', in the texts of 'those who profess knowledge of the Roman law', and of some others, such as theologians. The premise thereby is that 'whatever cannot be deduced from certain principles by a sure process of reasoning, and yet is clearly observed everywhere, must have its origin in the free will of man', i.e. must be part of *ius gentium*.⁴

However, the fact that war slaves are still human beings pulls in natural law again. Based on his sources, Grotius concludes that *ius gentium* allows brutal slavery; but deduction from the aforementioned 'certain principles' teaches that war slavery is a wrong if viewed from natural law. Indeed, war slavery,

1 This does not imply that natural law opposes all forms of slavery; Grotius does make room for voluntary slavery and slavery as punishment based on natural law. See Gustaaf van Nifterik, 'Hugo Grotius on "Slavery"', in *Grotius and the Stoa*, ed. H.W. Blom and L.C. Winkel, Assen: Royal van Gorcum 2004, pp. 233–43 (also *Grotiana* 22/23 (2001–2002), 233–43). The focus in this article is on war slavery based on *ius gentium*.

2 For the non-voluntaristic interpretation of *consensus* see Francesca Iurlaro, 'Grotius, Dio Chrysostom and the 'Invention' of Customary *ius gentium*', *Grotiana* 39 (2018), 15–44.

3 *IBP* Prolegomena 17; also I.1.14.1.

4 *IBP* Prolegomena 40 ff. and I.1.14.2.

according to Grotius, is both a *ius* and a *non ius*, 'a right in respect to certain effects; a wrong if we regard its intrinsic nature' (*IBP* III.7.6.2 en 4).

This article focusses on Grotius's sources of *ius gentium* rules on slavery. What did Grotius base his conclusions on, conclusions that gave license to do what was a wrong if viewed from natural law? In treating this question this article also contributes to the discussion on Grotius as either a hero of natural rights and international law and peace, or as war hawk and protagonist of slavery and colonialism based on white male supremacy.⁵ Was he, as he himself pretends, communicating the state of the art on the law of war (being a part of *ius gentium*) and on what this law allows to be done to prisoners of war?⁶ Or was he carefully selecting and deliberately projecting opinions in favor of brutal slavery, possibly with an eye to the interests of the East and West Indian Companies (VOC and WIC) or other investors and stake-holders in slavery and colonialism?⁷ And, related to these questions: was his (quasi) neutral position towards questions and issues of his own days a strategy to make brutal slavery all the more acceptable, as Nyquist claims?⁸ Or was his turn to the (Stoic) classics a conscious strategy to lay emphasis on a common humanity and on laws and

5 See the overview provided by Janne Nijman, 'Images of Grotius, or the International Rule of Law beyond Historiographical Oscillation', *Journal of the history of International Law* 17 (2015), 83–137, esp. section 2, positing Cornelis van Vollenhoven (the classic image of Grotius as 'the prophet of peace') in opposition to Richard Tuck (with Peter Borschberg, Martine van Ittersum and Ileana Porras; the relatively new image of Grotius as 'war hawk'). For a recent picture of Grotius as protagonist or opponent of racial slavery and colonialism, see Mikki Stelder, 'The Colonial Difference in Hugo Grotius: Rational Man, Slavery and Indigenous Dispossession', *Postcolonial Studies* 25:4 (2022), 564–83, versus Sharon Achinstein, 'A Common Humanity? From Poetry to Philosophy in Hugo Grotius', *Renaissance Quarterly* 76 (2023): 84–123.

6 See the suggestion in *IBP* III.10.1.1: 'I must retrace my steps, and must deprive those who wage war of nearly all the privileges which I seemed to grant, yet did not grant to them.'

7 Martti Koskenniemi, *To the Uttermost Parts of the Earth. Legal Imagination and International Power, 1300–1870* (Cambridge: Cambridge University Press, 2021), pp. 323–4 summarizes the insights of Peter Haggemacher, Martine van Ittersum and Jonathan Israel as follows: 'A perfect match existed between the Dutch governmental system, the legal role of the VOC and the horizontal character of Grotius' system of rights.' See also *ibidem*, p. 344 with a reference to Martine van Ittersum, 'The Long Goodbye. Hugo Grotius' Justification of Dutch Expansion Overseas 1613–1645', *History of European Ideas* 36 (2010), 386–411. Van Ittersum relates Grotius to both the VOC and the WIC.

8 Mary Nyquist, *Arbitrary Rule: Slavery, Tyranny, and the Power of Life and Death* (Chicago/London, 2013), p. 226: 'Unlike Vitoria, Bodin, and Gentili, in *Jure belli ac pacis*, Grotius theorizes as if at a studied, disinterested remove from recent and ongoing European colonial expansion. Regarding slavery, his points of reference are exclusively classical. By raising the positions he takes above the contemporary fray – including Bodin's condemnation of slavery, nowhere engaged – Grotius's classicizing makes them all the more acceptable.'

fate, not natural differences, as legitimation for slavery, as Achinstein claims?⁹ This article does not start from questions on how to evaluate Grotius and his work, but from Grotius's sources of *ius gentium*. Still, I hope the discussion below may offer some valuable insights to (re)consider such questions.

Again, the question this article tries to answer is: *ius gentium* – where does Grotius look for its content? I will discuss three topics that Grotius deals with within the context of war slavery: 1) who can be enslaved in war? 2) to whom does the war slave belong? 3) how far does the slaveholder's power extend? This selection of topics is limited; it aims at illuminating different aspects of Grotius's determination of the content of *ius gentium*.

Before we start our inquiry, it is necessary to emphasize the difference between *IBP* I.1.12.1 (on natural law) and I.1.14.1 (on *ius gentium*). For *a posteriori* proofs of a rule of natural law, Grotius looks to what is 'believed to be such among all nations, or among all those that are more advanced in civilization'. For *a posteriori* proofs of a *ius gentium* rule,¹⁰ the criterium is 'the will of all nations, or of many nations', not necessarily the nations more advanced in civilization.

However, sometimes consensus among the most civilized nations can already be decisive for answering the question whether a rule belongs to *ius gentium* (see for instance *IBP* III.4.15.1 and 16.1), without consideration whether it meets the criterion related to '[the will of] all, or of many nations'. On the other hand, often Christian nations are bound by stricter (moral) rules than what *ius gentium* allows for (see, for example, *IBP* III.4.19.2; another example is the ban on enslavement of Christians by Christians, *IBP* III.7.9), proof that not always the most civilized nations (i.e. in Grotius's perception) are decisive in determining the rules of *ius gentium*. Both Straumann¹¹ and Iurlaro¹² make clear that Grotius looks especially to the Greco-Roman world when he seeks civilization and civilized nations; the research below makes clear that he looks to other nations also when he seeks the rules of *ius gentium*.

9 Achinstein, 'A Common Humanity?'. See also her reference in fn 123 to Anthony Pagden, 'Stoicism, Cosmopolitanism, and the Legacy of European Imperialism', *Constellations* 7.1 (2000), 3–22, who, in Achinstein's words, 'takes such universalism as masking the European projects of empire'.

10 Iurlaro, 'Grotius, Dio Chrysostom and the 'Invention' of Customary *Ius Gentium*', p. 22 rightly says that 'the law of nations can only be proved *a posteriori*'.

11 Benjamin Straumann, *Roman Law in the State of Nature: the Classical Foundation of Hugo Grotius' Natural Law* (Cambridge: Cambridge University Press, 2015), chapter 3, especially p. 81 with a reference to *IBP* Prolegomena 46.

12 Iurlaro, 'Grotius, Dio Chrysostom and the 'Invention' of Customary *Ius Gentium*', 30 ff.

2 Who Can be Enslaved in War? *IBP* III.7.1

To frame our first question with an eye to the actual dispute in Grotius's days, the question is whether *ius gentium* permits only that the vanquished combatants be enslaved, or other persons also, such as women, children, and elderly people? The question could also be framed as follows: Who may be killed after victory? After all, the idea of enslaving war prisoners was based on the *ius gentium* license to kill the vanquished, a topic discussed in *IBP* III.4.5 and 10 (see *IBP* III.11 on moral justice concerning this subject). If it is allowed to kill a captive, as it was according to *ius gentium*, it is all the more allowed, so ran the argument, to enslave him/her, since enslavement is a milder treatment than killing.¹³

Grotius gives the broadest possible answer to our question in *IBP* III.4.5 and 6, and III.7.1: according to the law of nations, he says, all persons captured in a war can be enslaved. The only requisite is that the war is 'just', that is 'solemn', that is: in accordance with the rules of *ius gentium* regarding public authority and declaration. Robbers and pirates don't make legitimate slaves. Otherwise (*IBP* III.7.1)

all without exception who have been captured in a formal public war become slaves from the time when they are brought within the lines, as Pomponius says. And no crime is requisite, but the fate of all is the same, even of those who by their ill-fortune, as we have said, are caught in the enemy's territory when war has suddenly broken out.

Of course, the legitimacy of enslavement not only of vanquished combatants, but also of women and children, makes the issue of war slavery much more interesting for anyone interested in buying, trading and/or using slaves. Where did Grotius track this rule of *ius gentium* from?

Apart from the second-century Roman jurist Pomponius mentioned in the quotation above,¹⁴ Grotius refers to D. 49.15.12pr (a text by the Roman jurist Claudius Tryphoninus from the third century AD), the Greek historian Polybius (second century BC),¹⁵ the Italian author Servius [the Grammarian] from the

13 This line of argument can already be found in Roman law, D. 1.5.4, D. 50.16.239.1 and Inst. 1.3.3.

14 Pomponius, D 49.15.5.1; the reference seems to relate first of all to the words 'brought within the lines' (*intra praesidia*).

15 *Histories* 11.58: 'If one suggests that they would be rightly served by being sold into slavery, with their wives and children, as soon as they were beaten in war; it may be answered that this much is only what, by the laws of warfare, awaits even those who have been guilty of no special act of impiety.'

fourth/fifth century AD,¹⁶ the Roman/Jewish historian Flavius Josephus (ca. 37–100 AD),¹⁷ the Greek/Jewish author Philo [of Alexandria or Philo Judaeus] (ca. 20 BC – 50 AD),¹⁸ the first-century Greek orator, philosopher and historian of the Roman Empire Dio [of Prusa, or Dio Chrysostomus],¹⁹ the Greek/Roman poet Oppianus [of Anazarbus, or Corycus, or Cilicia] (second century AD),²⁰ and the authors mentioned in our second topic below. Philosophers, historians, poets, orators and jurists indeed, but the ones mentioned here are not exactly from ‘different times’ and ‘different places’, which is Grotius’s own criteria for the existence of a *ius gentium* rule. They are from the Greco-Roman world of Antiquity.

If we look for the same topic in the works of some authors from Grotius’s own time and intellectual context (sixteenth/seventeenth-century Europe), we find various views, but agreement on the main point.²¹ Let us turn to four contemporary authorities on the law of war: Francisco de Vitoria (1483–1546, *De indis et iure belli relectiones*, published posthumously as part of the *Relectiones theologicae* 1557), Pierino Belli (1502–1575, *De re militari et bello tractatus* 1563), Balthasar Ayala (1548–1584, *De iure et officiis bellicis et disciplina militari* 1582) and Alberico Gentili (1552–1608, *De iure belli* 1598); to Leonardus Lessius (1554–1623; *De iustitia et iure* 1605) and Francisco Suárez (1548–1617; *De triplice virtute theologica, fide, spe, et charitate* 1621/2), two famous theologians of Grotius’s days that he frequently refers to;²² and to Samuel von Pufendorf (1632–1694), whose influential *De iure naturae et gentium* was first published in 1672, 27 years after Grotius’s death.

16 *On the Aeneid* 1.619: ‘... and his daughter, Hesione, was carried off in accordance with the law of war.’

17 The reference is to *Antiquities of the Jews* XIV.12.2, but XII.6.2 seems more to the point: ‘using them according to the law of war.’

18 *That every man is free*, iii. This is a stoic text on slavery (and freedom) of body and mind, and on the ‘changes of fortune’ that can affect anyone, including ‘men of the highest virtue.’

19 *Orations or Discourses*, 15, 25.

20 *Halieutica (On Fishery)*, II.316 (not seen). Oppianus is not included (under that name) in the list of sources in the edition of *IBP* edited by Robert Feenstra (Scientia Verlag Aalen, 1993).

21 The more general contributions on war slavery of the authors mentioned here (with the exception of Lessius) are discussed in Jean Allain, *Slavery in International Law. Of Human Exploitation and Trafficking* (Leiden/Boston, 2013), pp. 20–53.

22 Grotius’s (sparse) references to Suárez are to his *De legibus ac Deo legislatore*; for my questions his *De triplice virtute theologica* turned out to be most informative.

Vitoria, Belli, Ayala, Lessius and Pufendorf on the whole agree with Grotius. The theologians, Vitoria and Lessius,²³ seem to have the Book of Deuteronomy as their main source, saying (in short): smite every male with the edge of the sword, but concerning the women, children ‘and all that is in the city’ take as prize unto yourself.²⁴ The main difference from Grotius is that according to the Book of Deuteronomy it is apparently not allowed to kill women, children and elderly people, but only to enslave them. Ayala without much ado says that also women and children may be taken prisoners of war.²⁵ Belli extends the right to enslave even to situations apart from times of war. This is, according to Allain, a reference to ‘the epochal events of his lifetime’, i.e. the enslavement of the indigenous people of the Americas.²⁶ A glimpse into Pufendorf’s work at this point does not add much to Grotius, since Pufendorf seems to have had Grotius as his main source.²⁷

Suárez has a somewhat more nuanced view than his fellow theologians just mentioned.²⁸ Only assault women and children, he says, in case the male prisoners are insufficient for full restitution and satisfaction. Something similar can, by the way, be found in chapter VIII of Grotius’s other work on the law of war, his *De iure praedae*, written around 1606.²⁹ Just as Vitoria et Lessius, Suárez states that it is not allowed to kill the women and children.

Gentili offers a rather detailed and extensively argued discussion, leading to a personal opinion that conflicts with what he takes for the commonly accepted

23 Vitoria, *De iure belli* par 42; Lessius, *De iustitia et iure* II.5.4.

24 Book of Deuteronomy 20:13–4.

25 Ayala, *De jure et officiis bellicis* I.5.25.

26 Allain, *Slavery*, pp. 31–32. Belli, *De re militari* II.12: ‘And not only in war does enslavement take place, but also apart from it. For if a person should go among a people with whom his countrymen had no ties of hospitality or friendship, or if any one from such a place should come amongst us, he would be the slave of the person seizing him. With good right, therefore, the Spaniards enslaved those Indians of the West’ (translation Herbert C. Nutting, Oxford: Clarendon Press / London: Milford, 1936, in the series *Classics of International Law*).

27 Pufendorf *DJN&G* VI.3.5: ‘Once having been introduced it was extended, even on a relatively slight excuse, also to the children of such captives, or to such as had been acquired by purchase. Yet in some states it was later restricted, and in others entirely removed’ (translation C.H. Oldfather and W.A. Oldfather, Oxford: Clarendon Press / London: Milford, 1934, in the series *Classics of International Law*). No references.

28 Suárez, *De triplici virtute theologica* XIII.17.11–19.

29 See on pp. 162 and 167 of the translation *Commentary on the law of prize and booty* by Martine van Ittersum (Liberty Fund, 2006), with reference to the theologians just mentioned.

rule concerning this question.³⁰ Whatever is said by many authors and by civil (i.e. Roman) law, he says, leave women, children and old-of-days alone, unless they participate in the hostilities or form a threat to your victory or peace in any other way. He comes to his opinion using sources similar to those we find in Grotius (Cicero, Plutarch, Seneca, Tertullian, and many more; we also find Philo Judaeus, here pointing in another direction than in Grotius's text), but Gentili's sources are more diverse in terms of time and place, and include also Aquinas, Bartolus and Baldus, and Alciatus. Gentili quotes the Prophet Micah (Michaeas), censuring Israel because it led women and children into captivity, concluding the passage with the exclamation: 'Let the Christians hear'. In the context of this article it is particularly important to point out that even Gentili, in search for arguments to strengthen his opinion that one should let go free and unharmed the harmless women, children and elderly people, in the end comes no further than an appeal for lenience, decency, honor, etc. Indeed, Gentili also concludes that according to the laws of war it is legitimate to kill and thus enslave them.

On this subject it seems that Grotius derived the generally accepted *ius gentium* law of war in his time from his sources. This law is as broad as Grotius depicts it. The sources are found in European history and law and Christian theology, most of them dating from Antiquity and the first centuries AD. Even Gentili with his dissenting personal opinion and his call for leniency could not find sufficient proof of a *ius gentium* rule pointing in another direction. We find a similar call for leniency in *IBP* III.11, based on moral justice.

3 To Whom do the Spoils, Including Enslaved Prisoners of War, Belong? *IBP* III.6.8-21

Interestingly, Grotius is quite comprehensive on our second question: to whom belong the spoils of war? The reason for his approach is that he believes that the common opinion formed by 'recent interpreters of the law' goes astray and does not reflect the actual *ius gentium* rules.³¹ He presents the topic as an example 'of how little trust (...) is to be placed in such authorities'; Bartolus, Alexander, Jason, Angelus, Panormitanus, Thomas Grammaticus and Martinus Laudensis have the questionable honor of being mentioned in this context (*IBP* III.6.8). According to Grotius, they incorrectly say that the *ius gentium* rule on the matter is a combination of the Roman law that the goods taken

³⁰ Gentili, *De jure belli* 11.21.

³¹ Similar in *De iure praedae*, ch x.

in war belong to the soldier who took them, and of canon law that says that these goods are to be assigned to the commander for distribution among the soldiers. What follows is a rich discussion in which Grotius himself says he ‘must cite proofs more fully than usual from the examples of outstanding peoples’ (*IBP* III.6.14). The discussion in *IBP* III.6.8 ff. is on ‘goods’; III.7.5.4 declares the outcome of the discussion also valid for prisoners of war.

So the question is to whom the spoils of war fall according to *ius gentium*: to the individual captor, to the commander of the army, or to the sovereign (Emperor, king) or the people whose war it is? Grotius’s answer can be found in *IBP* III.6.21: ‘what is captured in acts of war becomes the property of the people or of the king who wages the war’. But he only comes to this answer after visiting the ancient world of the Greeks and Romans, the continents of Asia³² and Africa,³³ and the lands of the Franks,³⁴ the Swedes and Goths,³⁵ and Switzerland (III.6.14).³⁶

Concerning the classical Roman world, Grotius implicitly rejects the opinion of Gaius in D. 41.1.5.7-41.1.7.1, who mistakenly takes the rule that the goods fall to the captor as a rule of *ius gentium*.³⁷ Given Grotius’s remarks in Prolegomena 53, this rejection of Gaius should not surprise us too much: ‘[the Roman jurists whose works appear in the Digests], no less than the others, often confuse these terms, frequently calling that the law of nations which is only the law of certain peoples.’³⁸ Grotius’s references in search of the law of the Romans themselves on this matter (*IBP* III.6.14 ff.) are mostly to the republican period, taking his examples from Dionysius of Halicarnassus (60 – after 7 BC) and Livy (ca 59 BC – 17 AD).³⁹ Grotius’s conclusion concerning the law of the Romans

32 That is: the world of the Trojans. Citing Virgil, Homer, Pliny and Plutarch.

33 Citing Diodorus of Sicily (1st century BC) and Livy.

34 References to Gregory of Tours (ca. 538–594), *Decem libri historiarum* or *Historia Francorum*; Aimoin de Fleury or Aimoinus Floriacensis (ca 965 – after 1008), *Historiae Francorum Libri IV* or *Libri v de Gestis Francorum*; the *Gesta regum Francorum epitomata* as can be found in Marquard Freher (1565 – 1614), *Corpus Franciae Historiae*; and Servius, *On the Aeneid* (see above).

35 Reference to Johan Magnus or Johan Månsson (1488 – 1544), presumably his *Historia de omnibus Gothorum Sueonumque regibus*.

36 Reference to Josiah Simmler or Iosias Simlerus (1530 – 1576), *De Republica Helvetiorum libri duo*.

37 *Item quae ex hostibus capiuntur, iure gentium statim capientium fiunt; ... adeo quidem, ut et liberi homines in servitutem deducantur*. Compare Inst. 2.1.17 that has *nostra fiunt* (‘become ours’) instead of *capientium fiunt* (‘becomes the property of him who takes it’).

38 This does not alter the fact that Roman law is crucial in Grotius’s search for the rules of natural law; see Straumann, *Roman Law in the State of Nature*, pp. 73 and 78.

39 Livy according to Straumann, *Roman Law in the State of Nature*, p. 73 being the ‘the most cited individual author from Greco-Roman antiquity in *De iure belli ac pacis*’.

(*IBP* III.6.15): 'While it was true that the people were the owners of the spoil, it was not less true that, in the time of the free republic, the commanders were entrusted with the decision in regard to its disposal.' For the period 'after the fall of the Republic', Grotius in *IBP* III.6.17.5 refers to C. 8.53(54).36.1.⁴⁰

Of course, the examples given in Grotius's overview of the nations of the globe are very limited and highly Eurocentric, the evidence is thin, while it is hardly justifiable to base a conclusion regarding 'Africa' on the insights of two classical authors from the Roman world, Diodorus of Sicily and Livy. But still, his approach shows that, if deemed necessary, Grotius does look further than the Greco-Roman world, and looks to other times and places also in order to get a more accurate picture of the laws that 'originate as between all states, or a great many states'.

The discussion also sheds some light on *IBP* Prolegomena 54. It is clear that Grotius does not consider the *ius commune* jurists very reliable on this topic, despite his statement that 'they are to be listened to (...) when they bear witness to the existence of the usage which constitutes the law of nations of today'. Probably we are here facing the 'handicap which prevented their complete understanding of those [Roman] laws' (*idem*): they tried to combine their interpretations of Roman and canon law, and in doing so missed the point of what *ius gentium* (according to Grotius) really states.

Let us shortly consider what Grotius's contemporaries have to say on the subject.

Full support for Grotius's position comes – again – from Pufendorf in *De iure naturae et gentium* VIII.6.21, slightly correcting Grotius with regard to private and public actions of war.⁴¹ Somewhat different in outlook are Vitoria (*De iure belli*, 50–53) and Suárez (*De triplici virtute theologica* XIII.7.7), who both stress the right of an individual combatant to seek compensation for his losses. However, they also say that express or at least implied authorization of the prince or superiors is requisite to keeping what had been taken from the enemy.

Belli in his *De re militari* devotes two chapters to the subject (II.12 and 18). Things captured in war become the property of the (individual) captor, but should be handed over to the army commander, who is to divide the spoils among the soldiers. A part should also be offered to God. Immovables fall to the Emperor or king. Gentili in *De iure belli* does not pose the question explicitly, and in his discussions on taking goods and slaves after victory he talks about

⁴⁰ Saying 'property (...), which our distinguished generals may bestow upon our brave soldiers, whether derived from their own estates, or from the spoils of the enemy'.

⁴¹ See Grotius in *IBP* III.6.10.

captor and *victor* to whom the spoils fall. These terms can point all three directions: the individual soldier, the commander, or the victorious sovereign of people. Throughout the book, the examples given by Gentili of such *victors* include Alexander the Great, Brasidas, Caesar and other great commanders. Gentili stays very close to Roman law, which need not surprise us, since he, as Koskenniemi puts it, uses ‘the resources of Roman law as evidence of universal principles.’⁴²

To conclude this topic: the most obvious contemporary sources and the *ius commune* jurists do not give an unambiguous answer to the question to whom the spoils after victory fall. Most authors favor the position that the captor should hand the spoils over to the commander for distribution among the soldiers. But Grotius regards this view as a mistake and delves deeper into the sources of *ius gentium*, this time drawing on sources from different times and different places indeed. All in all, Grotius’s view is still very Eurocentric, even though his aim is to cover also Africa and Asia. In Grotius’s days there was certainly information available concerning the indigenous peoples of the Americas, such as the works of Pedro Cieza de León on Peru, and José de Acosta’s *Historia natural y moral de las Indias*, which includes some chapters on warfare. I am not certain whether Grotius had such sources at hand at the time of writing or (re)editing *De jure belli ac pacis*. But his controversy with Johannes de Laet on the origin of the American peoples makes it plausible that he might have neglected such works, even if he had.⁴³

The question as to whom the spoils fall is probably not the topic that stirs modern minds the most. But the discussion is interesting, since it shows that Grotius is prepared to go beyond the Greco-Roman world in order to find an accurate picture of *ius gentium*. In the end, this picture shows that the spoils fall to the sovereign or the people whose war it is.

4 How Far does the Slaveholder’s Power Extend? *IBP* III.7.3

Grotius’s answer to our third question can be briefly stated: the slave owner has limitless power over the enslaved, including the right of life and death; war slavery, thus viewed, is little more than death postponed.

42 Koskenniemi, *To the Uttermost*, p. 282.

43 Henk Nellen, *Hugo Grotius. A Lifelong Struggle for Peace in Church and State, 1583–1645* (Leiden/Boston: Brill, 2015), pp. 683–90. De Laet had sent Grotius a copy of De Acosta’s *Historia*, but Grotius refrained from using this and other reliable eyewitnesses when he worked on his *De origine gentium Americanarum* in the early 1640.

The reason to focus on this topic in this article is Grotius's basis for this conclusion. As presented by Grotius, the conquerors who, according to the rules of *ius gentium*, were in their full right to kill their prisoners of war, had to be persuaded to spare the lives of such captives (*IBP* III.7.5). Since no victor can be forced to do so, the alternative, namely the enslavement of the prisoners, had to be framed as the more advantageous course to take. Notice that this time the answer to our question is not deduced from textual evidence of a generally consented custom, but from the *ratio* behind the whole idea of war slavery; no profound substantiation detracted from sources from different times and places is needed here.⁴⁴

Another reason why this topic is interesting in the context of this article is the relationship between *ius gentium* and natural law as interpreted by Grotius that this discussion reveals. The first thing to mention is the title of the paragraph that deals with our question (*IBP* III.7.3): 'What may be done to prisoners of war with impunity'. The addition 'with impunity' (*impune*) is significant. To grasp its meaning in full we must turn to chapter *IBP* III.14, where the natural law picture of war slavery is drawn. Chapter III.14 starts with references to Vitoria, Lessius, Molina and others, famous theologians from whose works we learn the content of the natural law. Concerning our question, these theologians focus on just punishment and on satisfaction and reimbursement for the losses suffered; they accept cruelty towards the (defeated) enemy only when it serves (future) peace or security. This is, says Grotius, what moral justice demands from us. Now it becomes clear that '(w)hat may be done to prisoners of war with impunity' merely points to what may be done without the risk of being punished for acting contrary to moral justice. *Ius gentium* grants impunity for acts contrary to natural law, not moral approval.⁴⁵

It is exciting to read what Gentili writes on this topic (*De jure belli* III.9). Right from the start he follows a route quite different from Grotius. The notion that we find in Seneca (i.e. *Major*, the elder or father), namely that the master can do with slaves whatever (s)he pleases,⁴⁶ is, says Gentili, a 'common,

44 Except for one reference to Plutarch, all references to substantiate Grotius's position in III.7.5 are to Roman law.

45 See also *IBP* III.4.2.2 and III.4.3. Daniel Schwartz, 'Grotius on the Moral Standing of the Society of Nations', *Journal of the History of International Law* 14 (2012), 123–46 discusses the question of how *ius gentium* (the law of nations) might legitimate immoral acts and still be the law of the great society of nations. Schwartz's answer in short (p. 141): provisions of *ius gentium* that conflict with the natural law still emerge from agreement, and aim at the goal of securing the rights of the members.

46 Seneca the Elder, *Controversiae* x.5.19; Seneca labels the notion 'unsophisticated'. Grotius refers to the same text in *IBP* III.7.3. The other Seneca, Seneca *Minor* or the Younger, *On Clemency* 1.18, is referred to by Grotius in *IBP* III.14.2.3 to substantiate the natural law position on (war) slavery.

but false, belief'. With reference to Jean Bodin he summarizes the 'view (...) accepted by the laws and usage of nearly all nations' (!) that one should act towards captives like a 'good householder'. Many references pave Gentili's way, such as Deuteronomy 25:4: 'You shall not muzzle an ox when it treads out grain', and no one, not even your ox or any of your animals, shall work on Sundays (Deuteronomy 5:14); D. 1.6.2 (Emperor Antonius Pius' famous rescript concerning cruel treatment of slaves) and D. 1.12.1.1 (on slaves that run to statues); and many more. All this is complemented by an appeal to the master's self-interest ('slaves driven to desperation will kill either themselves or their masters') and to the interest of the state ('that no one should abuse his property').

What Grotius labels moral justice towards slaves, Gentili considers to be the pure 'laws of slavery' (thus at the beginning of his discussion of his third point in this chapter). This indicates the impact of Grotius's rational deduction from the very idea of war slavery as based on *ius gentium*, keeping in mind the aim of seducing the victor to spare the lives of the vanquished and to enslave them instead. After the first step had been taken (legitimation of enslavement of captives), Grotius is prepared to take the second step: enslavement of captives should be attractive to victors, and therefore the master's power should be limitless.

Pufendorf again adds little or nothing to Grotius, discussing the topic as follows: 'How far in particular many peoples commonly extend the license of war on the persons of enemies, is shown in detail by Grotius, Bk. III, chap. iv' (*De jure naturae et gentium*, VIII.6.17).

5 Conclusions

The sources Grotius uses in search for the rules of *ius gentium* are from different times and different places indeed, but he has a clear preference for the classics from Greece and Rome. This need not surprise us for 'a famous humanist deeply versed in the classical authors'.⁴⁷ However, if need be, Grotius also looks to other peoples and countries. But his view remains very limited and Eurocentric after all.

According to his statements in the Prolegomena (53 ff.), *ius commune* and humanist jurists do not play an important role in his search for the content of *ius gentium*. Our second topic even urged Grotius to correct their views.

⁴⁷ Nellen, *Hugo Grotius*, p. 690.

Theologians such as Vitoria and Lessius (and to a lesser degree Suárez) function to indicate the rules of moral justice, more than rules of *ius gentium*.

Concerning the first topic discussed here, Grotius seems to restate the rule generally accepted in European history and Christian theology. Gentili, who disapproves of the rule, has not been able to find evidence for or consensus on a *ius gentium* rule pointing in the opposite direction.

Our second topic shows that for Grotius the texts of Roman law not always function as evidence of universal principles and that the Roman jurists in the *Digest* sometimes mistakenly present the laws of the Romans for rules of *ius gentium*. The topic also shows that Grotius's worldview is somewhat broader than just Europe: Asia and Africa do matter, even if Grotius seems content with a picture drawn from the European perspective. He settles for very thin textual evidence.

Grotius's view on the third topic is based on a logical deduction from the very idea of war slavery. Given Gentili's account, it is at least questionable what the 'unbroken custom and the testimony of those who are skilled in it' has to say on the question. But Grotius has no need to delve into these testimonies; reason had done the job for him.

Is Grotius a hero of natural rights, or rather a protagonist of brutal slavery? The scary truth is that he might be both. It is, however, clear that natural rights are not safe with him, since *ius gentium* is a threat to such rights on a global level, a threat backed up by the society of states. Instead of natural rights setting limits on the law of war, we find the law of war setting limits on natural rights.