BRILL

GROTIANA 45 (2024) 291–316

GROTIANA
brill.com/grot

'Grotian Moments' in the Dutch East Indies? The Reception of Hugo Grotius's Ideas in Cornelis Van Vollenhoven's Writings on Customary Law and Colonialism

Cornelis Marinus (*Marco*) *in 't Veld* | ORCID: 0000-0003-1373-9165
Law School, Tilburg University, Tilburg, The Netherlands
C.M.intVeld@tilburguniversity.edu

Received 18 July 2024 | Accepted 4 November 2024 |
Published online 29 November 2024

Abstract

In this paper it is argued that Grotius views on customary law are compatible with the concept of a 'Grotian Moment'. However, the idea of accelerated customary international law is developed by Van Vollenhoven, who interpreted Grotius in a questionable way. Whereas Grotius qualifies as a thinker in the tradition of natural law, Van Vollenhoven should be seen as an interactionist. This is especially visible in his publications on adat law, in which he visibly belongs to a romantic, Germanist, and rather pluralist tradition of law. The idea of a Grotian Moment also fits better with this starting point than with natural law. For this reason, the 'Grotian Moment' should be renamed 'Van Vollenhoven's Moment'. It is argued that this legal theoretical position explains some of Van Vollenhoven's rather peculiar interpretations of Grotius.

Keywords

Grotian Moments – Van Vollenhoven – customary law – adat law – Romanticism – legal interactionism

1 Introduction

Coined by Richard Falk in 1985, the term 'Grotian Moment' signifies a pivotal period in which international customary law experiences acceleration and crystallization.[1] His designation may have been new, but the notion that customary international law can evolve rapidly is much older. In the early twentieth century, the Leiden professor of Public and Administrative Law of the Dutch Indies, Cornelis van Vollenhoven, identified so-called 'leaps in the development of customary law', and argued that 'the hour of Grotius' had arrived in international law.[2] Remarkably, both Falk and Van Vollenhoven referred not only to customary international law but also to Hugo Grotius. This contribution therefore focuses on how Van Vollenhoven writes about customary international law and how he includes Hugo Grotius in his reflections.

The way someone writes about customary law often reveals a lot about his fundamental conceptions of law and society. I will argue that this also applies to Van Vollenhoven. What are Van Vollenhoven's fundamental ideas on international law and society? The central thesis of this contribution is that Van Vollenhoven's interpretation of customary international law is difficult to reconcile with natural law, but fits better with legal interactionism.[3] On the one hand, this raises the question why Van Vollenhoven empathically aligns himself with the tradition of Grotius. After all, Grotius is regarded as a prominent representative of natural law thinking. On the other hand, it explains why Van

1 Much has been published on the concept of the 'Grotian Moment'. Early seeds of the concept can be found in R.A. Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order', in *The Future of the International Legal Order,* ed. by R.A. Falk & C.E. Black (Princeton: Princeton University Press, 1969), pp. 32–70. See also R.A. Falk, 'The Grotian Quest', in *International Law: A Contemporary Perspective*, ed. by R.A. Falk, F. Kratochwil, and S.H. Mendlovitz (Boulder: Westview, 1985), pp. 36–42. For a brief introduction of the concept see e.g. M.P. Scharf, 'The "Grotian Moment" Concept', *ILSA Quarterly,* 3, 19 (2011), 16–23 or T. Sparks & M. Somos, 'Grotian Moments: An Introduction', *Grotiana* 42 (2021), 179–91.

2 For the works of Van Vollenhoven, I will (unless specified otherwise) cite from his collected works. The concept of the 'leaps of customary law' is developed in C. van Vollenhoven, 'Sprongen in de ontwikkeling van het gewoontrecht (1912)', in *Mr. C. van Vollenhoven's Verspreide Geschriften* (vol. 1) ed. by M.F. van Asbeck (Haarlem: Tjeenk Willink, 1934), pp. 22–35. The 'hour of Grotius' is mentioned in C. van Vollenhoven, 'De drie treden van het volkenrecht (1918)', in *Mr. C. van Vollenhoven's Verspreide Geschriften* (vol. 2), ed. by M.F. van Asbeck (Haarlem: Tjeenk Willink, 1934), p. 438.

3 The best example of legal interactionism in international law is J. Brunnée and S. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press 2010) (hereafter cited as Brunnée & Toope). They are very much indebted to the legal theory of Lon Fuller.

Vollenhoven is so fiercely criticized for his reading of Grotius. Oudendijk and Kooijmans, for example, accused him of a very anachronistic interpretation of the work of Grotius.[4] However, if it is true that the idea of rapid crystallization of customary international law fits better with legal interactionism than natural law, we should perhaps also revise the term 'Grotian Moment'.

In this contribution I will first examine how Grotius himself thought about customary law. His conception is then compared to Van Vollenhoven's analysis of the leaps in the development of customary law (section 2). Grotius sees customary law as an expression of the collective consciousness of the community, which as such is susceptible to rapid change, but also can be judged for its justice on the basis of natural law. It will be argued that Van Vollenhoven fully exploits (and perhaps overstretches) the possibility of customary law formation. Section 3 makes the transition to international law and further scrutinizes Van Vollenhoven's interpretation of the work of Grotius. It is beyond doubt that Van Vollenhoven founded his views on international legal developments on Grotius's seminal work, *De iure belli ac pacis* (1625) (hereafter *IBP*). This section will also summarize and evaluate the criticisms of Van Vollenhoven's interpretation. A major weakness in these criticisms is that authors have restricted themselves to Van Vollenhoven's writings on international law and not included his writings on adat law of the Dutch East Indies. This is remarkable since Van Vollenhoven is widely praised for his efforts to recognize indigenous adat law, which was predominantly customary in nature. Van Vollenhoven can hardly be fully understood without involving his assessment of adat law. Section 4 therefore connects Van Vollenhoven's analysis of customary international law to his advocacy for the further recognition of adat law. This will lead to a new perspective on Van Vollenhoven's interpretation of Grotius: in section 5 it will be argued that Van Vollenhoven's interpretation of Grotius was not only anachronistic, but also influenced by romanticism and the Germanist historical school. Hence, Van Vollenhoven's ideas on customary law fits better with legal interactionism. Moreover, it was mainly his romanticism and interactionism that allowed him to support the relative autonomy of the Dutch East Indies and the appreciation of their indigenous laws and culture. This might be an important argument for Van Vollenhoven's anachronistic reading of Grotius.

4 J.K. Oudendijk, 'Van Vollenhoven's "The three stages in the evolution of the law of nations". A case of wishful thinking', *Tijdschrift voor Rechtsgeschiedenis* 48 (1980), 3–27 (hereafter cited as Oudendijk); P.H. Kooijmans, *How to Handle the Grotian Heritage. Grotius and Van Vollenhoven* (The Hague: Asser Instituut, 1983) (hereafter cited as Kooijmans).

2 Grotius and Van Vollenhoven on Customary Law

The nature, extent, and character of customary law have been subject of much debate since the Middle Ages. Modern authors generally define customary law as 'a body of legal customs that has acquired binding force within a particular group trough the repetition of public and peaceful acts over a relatively long period of time'.[5] In modern international law, the same two major elements are distinguished: custom has been formed by the 'extensive and virtually uniform' settled state practice, and by the belief in the binding force of the rule (*opinio iuris*).[6] From the perspective of the 'Grotian Moment', the primary problem lies in the criterion of the long standing *usus*. For instance, in international law, rapid developments (e.g. the Nuremberg Tribunals) sometimes lead to a new status quo within a short period of time.

Grotius himself acknowledged custom as a legal source in his *Inleidinge tot de Hollandsche regtsgeleerdheid* (written in 1619, first published in 1631) and considered customary law as a form of unwritten law as it concerns the tacit consent of a country or a place.[7] In this regard, he was building on the tradition of Bartolus of Sassoferato (1313–1357), who defined customary law as the repeated behaviour to which the majority of the community had tacitly consented. This tacit consent should not be understood contractually but rather as a collective legal consciousness in which morality and rationality are included.[8] As such, it was not required that practice was evidenced to establish a custom, but an opinion was sufficient if it was felt throughout the community. In this vein, the *Inleidinge* fails to determine the period over which customary law is established. The idea of *usus* has apparently faded into the background and given way to an essentially Aristotelian idea in which tacit consent was the *causa efficiens* of custom.

Given this idea, it was perfectly possible to think of a sovereign tolerating (or even declaring or fixing) customary law because it was legitimated through the population's acknowledgment.[9] It is precisely this argument that Grotius was referring to in his *IBP* when he argued that customary law 'can be introduced by a subject people in consequence of the fact that it is tolerated by the one who

5 E.g. J. Gilissen, *Historische inleiding tot het recht* (Antwerpen, Kluwer, 1981), p. 251.

6 Sparks & Somos, 'Grotian Moments', p. 182 with particular reference to the ICJ North Sea Continental Shelf Case of 1967.

7 Grotius, *Inleidinge tot de Hollandsche rechts-geleerdheid*, ed. by F. Dovring et al (Leiden: Universitaire Pers Leiden 1952), pp. 5–7, 144–5.

8 D. De ruysscher, 'Customs and Municipal Law: The Symbolic Authority of the Past', *Dutch Crossing. Journal of Low Country Studies* 46 (2020), 95–114, at p. 103.

9 De ruysscher, 'Custom and Municipal Law', p. 103.

holds the sovereignty. But the time within which a custom receives the effect of law is not definitely fixed, but arbitrary, to wit, whatever length of time is sufficient to accord with the implied consent'.[10] Thomas Aquinas, whose work probably inspired this passage, suggested that when something is 'frequently repeated', it results from a considered and reasonable judgement.[11] It seems that Grotius did abandon this requirement, which opened the door to consent that can potentially be very quickly established.

This would suggest that Grotius himself was open to the idea of the 'Grotian Moment' as a moment in which customary law experiences acceleration and breakthrough. Later interpreters of Grotius, such as Simon van Leeuwen (1626–1682), have overstretched the combination of customary law and tacit consent by equating customary law and Roman law. Van Leeuwen argues that everyone has gradually and tacitly consented that Roman law is the ultimate example of wisdom and equity – and therefore it deserves to count as law. Roman law is then seen as the 'common law of nations nearly everywhere and among all peoples', and other laws and customs should be 'restrained and bound' in order to conform with Roman law.[12]

Grotius, however, was much more reserved. He admits that Roman law was an exemplary model of wisdom and equity but at the same time regards it as merely the law of a particular society in a particular era.[13] He acknowledges that customary law may differ from Roman law and that in such cases the customary law prevails. Both Roman and customary law can be rejected whenever their rules conflict with the conclusions of natural law: 'National customs are not to be taken for the law of nature, although they have been received on reasonable grounds among many people'.[14]

Although Grotius is known as a natural law theoretician, he leaves room for customary law to develop in different ways at varying speeds. Precisely this

10 Grotius, *De iure belli ac pacis libri tres,* transl. Francis W. Kelsey (Classics of International Law: Oxford/London: Clarendon Press 1925), 1.4.5.2 (p. 223) (hereafter cited as Grotius, *IBP*).

11 Thomas Aquinas, *Summa Theologiae* I-II, q. 90.1, 91.2, 93.3, 97.3 ed. and transl. by M. Buijsen, *Over de Wet* (Zoetermeer: Meinema, 2004), pp. 36–37, 49–50, 79, 149–150.

12 S. van Leeuwen, *Het Roomsch-Hollands regt* (Amsterdam: Hendrik Boom, 1678), p. 2.

13 S.C. Neff, 'Introduction', in *Hugo Grotius On the Law of War and Peace,* ed. by S.C. Neff (Cambridge: Cambridge University Press, 2012), p. xxiii.

14 Grotius, *IBP*, II.20.41 (p. 507). At this point Grotius shows similarity with Jacques de Revigny, who argues that customary law is about the convictions of the community which, in practice, seems to be only limited by the *ius gentium.* See L. Waelkens, *La théorie de la coutume chez Jacques de Révigny. Edition et analyse de sa répétition sur la loi De quibus* (*D.1.3.32*) (Leiden: Brill, 1984) and K. Bezemer, 'French Customs in the Commentaries of Jacques de Révigny', *Tijdschrift voor rechtsgeschiedenis* 62 (1994), 101–7.

possibility for local customs to develop and accelerate is fully exploited by Van Vollenhoven, who emphatically points out that Grotius 'often confessed himself dissatisfied with the method of applying the Justinian system to every part of law'.[15] He stressed the fact that Grotius himself also showed interest in the legal systems of various peoples in different periods, such as ancient Dutch law, Hebrew law, Phoenician law, Gothic law, and ancient Swedish law. In this way Grotius harbored 'the idea of seeing law as a phenomenon developing itself differently in different countries and in the course of history, and as showing in this development striking parallelisms'.[16] This precisely indicates, according to Van Vollenhoven, the mission for the legal sciences in the twentieth century. Even international law must be situated within the framework of historical jurisprudence to be fruitfully studied. It was in this vein that Van Vollenhoven considered himself, until his death, a follower of Grotius. Less than a year before his demise on 29 April 1933, he still enthusiastically initiated a lecture series on comparative legal history.[17]

In Van Vollenhoven's comparative legal historical analysis, a pivotal role is ascribed to local customs. In his 1912 publication titled *'Sprongen in de ontwikkeling van het gewoonterecht'* ('Leaps in the development of customary law'), he posits, with reference to various examples, that legal transformations are not solely engendered through slow evolutionary shifts in customary practices nor by direct legislative interventions, but also through 'a purely natural change, but one that occurs by leaps, shocks, a kind of 'mutation' in the realm of the humanities'.[18] Drawing parallels, he juxtaposes the uncodified adat law prevalent in the Dutch East Indies with modern international law. Notably, in the province of Kedoe, the transition of communal land use rights into proprietary rights of individual villagers, transmissible through sale, pledge, or inheritance, occurred swiftly around 1875. Traditionally, international law was construed as a framework governing relations solely among sovereign states, with individuals occupying a peripheral role (as legal subjects of those states only). However, the decades following 1870 witnessed a rapid paradigm shift, whereby individuals, particularly as arbitrators, were acknowledged as autonomous bearers of international legal duties and prerogatives.

15 C. van Vollenhoven, 'Grotius and the Study of Law' (1925), in *Mr. C. van Vollenhoven's Verspreide Geschriften* (vol. 1) ed. by M.F. van Asbeck (Haarlem: Tjeenk Willink, 1934), p. 394 (see also p. 41) (hereafter cited as Van Vollenhoven).

16 Van Vollenhoven, vol. 1, p. 395.

17 N.H.M. Roos, 'Cornelis van Vollenhoven (1874–1933)' in *Zestig juristen* ed. by T.J. Veen & P.C. Kop (Zwolle: Tjeenk Willink, 1987), p. 380 (herafter cited as Roos).

18 Van Vollenhoven, vol. 1, p. 23.

Consequently, treaties and arbitral verdicts gained not only binding force through the principle of good faith, but also through legal enforceability.

Van Vollenhoven was reluctant to attribute these transformations to external influences alone. While conceding the role of moral and economic factors, he asserted that a comprehensive understanding of the phenomenon necessitates a holistic approach, incorporating the entirety of historical developments.[19] The explanation of these leaps of customary law often remains elusive, beyond the grasp of human comprehension.[20] Contextualizing this publication within his broader work, particularly including his inaugural lecture *'Exacte rechtswetenschap'* ('Exact Legal Science') (1901) and his rectoral address on *'Het onbaatzuchtige in recht en staat'* ('The selfless in law and state') (1917), reveals his anticipation of legal progress originating from societal dynamics rather than top-down governmental interventions. He explicitly cautioned against endeavors to foster progress through the imposition of an intricate legal framework inspired by Roman law (which he called 'the Justinian white brush').[21] By doing so, he seems to have departed from the early modern focus on a form of tacit consent that can be represented by a sovereign, natural law, or Roman law.

3 Van Vollenhoven's Contested Interpretation of Grotius

Van Vollenhoven's framework concerning the evolution of customary law surpasses that of Grotius. Where the latter merely allowed room for the possibility of rapid developments in customary law, Van Vollenhoven elaborated on this notion in greater depth. In this section, we scrutinize Van Vollenhoven's interpretation of Grotius and investigate the way this interpretation is criticized. Van Vollenhoven is widely known for his distinct and controversial approach to Grotius, although it is evident that his interpretation has undergone a discernible evolution.

In 1901, he referred to the 'law of nations phantasms of Grotius's, which, he asserted, could only be effectively studied within the historical context of a community's developmental trajectory.[22] Similarly, in 1912 Van Vollenhoven depicted Grotius as emblematic of a private law perspective on international law, wherein only states played a role. Grotius's envisioned international law

19 Van Vollenhoven, vol. 1, p. 35.
20 Van Vollenhoven, vol 1, p. 32.
21 E.g. Van Vollenhoven, vol. 1, p. 46.
22 Van Vollenhoven, vol. 1, p. 11.

court failed to materialize for this reason: states were acting only in their own self-interest.[23] However, by 1917, Van Vollenhoven had discovered evidence in Grotius's *Historia Gothorum, Vandalorum, et Longobardorum* (1655) that suggested that Grotius, in his final years, expressed reservations regarding Justinian's law and a judiciary that relied solely on internal legal systematics.[24] Furthermore, for his book, *De drie treden in de ontwikkeling van het Volkenrecht* ('Three Stages in the Development of the Law of Nations') (1919), and in the 1920s, Van Vollenhoven further revisited *IBP* from this perspective.

What distinguishes Grotius as the seminal author he has become? Van Vollenhoven offered various responses to this question that all coalesce around one common theme. Essentially, according to Van Vollenhoven, *IBP* diverged from the *Inleidinge tot de Hollandsche rechtsgeleerdheid* by eschewing Roman legal structures and engaging with the pressing issues of its time.[25] In a world fraught with conflict, Grotius remained optimistic, believing in further improvements facilitated by international law, rather than viewing international law as a mere extension of municipal law.[26] The essence of *IBP* can be summarized in the declaration of states 'that aggressive war is an international crime and severally undertake that no one of them will be guilty of perpetrating it'.[27] This central message is worked out in four directions.[28] First, Grotius evaluated the conduct of nations among themselves analogously with individual conduct. 'If a nation feels bound to comply with the dictates of law in its internal, municipal affairs, it is bound in exactly the same manner in its international relations.' Second, he aimed to curtail lawlessness globally, not only between nations, but also among creeds, races, parties in civil war, and pirates. Third, Grotius extended his principles universally, without discrimination based on ethnicity, religion, or grade of civilization. Fourth, he emphasized the detrimental consequences of selfish greed, advocating for principles conducive to social harmony: '(…) in the long run selfish greed brings even the mightiest commonwealths to ruin and despair (…)'.[29]

Van Vollenhoven did not hide the fact that he interpreted Grotius through a twentieth-century lens. He repeatedly emphasized that he did not purport to discuss *IBP* in the light of the past, but rather in the context of the present.[30]

23 Van Vollenhoven, vol. 1, pp. 30–1.
24 Van Vollenhoven, vol. 1, p. 41 (see also p. 394).
25 Van Vollenhoven, vol. 1, pp. 378, 393.
26 Van Vollenhoven, vol. 1, pp. 406, 409–410.
27 Van Vollenhoven, vol. 1, p. 379. See also Van Vollenhoven, vol. 2, p. 422.
28 Van Vollenhoven, vol. 1, pp. 412–5 (see also pp. 30–1.)
29 See also Van Vollenhoven, vol. 2, pp. 417–8.
30 Van Vollenhoven, vol. 1, pp. 288, 327, 379, 384, 397 (with reference to Thorbecke), 420, 427–8.

The book was 'written in 1625, written for 1925'.[31] In this regard, the timing of Van Vollenhoven's appreciation for Grotius, roughly after 1917, is striking. He himself points out that events such as the Geneva Convention of 1906, the Hague Peace Conferences of 1899 and 1907, the outbreak of World War I, and the establishment of the League of Nations, have illuminated the relevance of Grotius's ideas.[32] During the later decades of the nineteenth and the first decades of the twentieth century, many publications sought to investigate the historical origins of the rising discipline of international law crediting Grotius as the founder of its science.[33] This reputation was furthered by the peace movement and the marketing for The Hague as international capital of international law and peace.[34] In this context, Van Vollenhoven must have felt obliged to relate to Grotius and abandon his initial skepticism.[35]

He does so by declaring Grotius's theorem the core of his entire work. Grotius's theorem posited that aggressors can be held accountable for their actions, even by entities beyond the direct victims.[36] There are only two exceptions: (1) a citizen or subject is never allowed to punish his own superior, and (2) one can never be punished by a fellow-human or fellow-nation who is guilty of a similar crime (the doctrine of 'dirty hands').[37] This principle underpinned Van Vollenhoven's advocacy for an international police force and the imposition of strict sanctions on aggressive nations (as a consequence of which he praised the Versailles Treaty). This way, the significance of Grotius's ideas is underscored, marking 'the hour of Grotius's as the era when effective measures against the crime of conquest could be implemented.

Van Vollenhoven also supported his point for an 'hour of Grotius' by pointing out the neglect and disapproval that *IBP* faced for nearly three centuries. The first 'Grotian Moment' was not the Peace of Westphalia of 1648, but the outbreak of WWI in 1914: 'At that time, people opened their eyes and looked around, at war as a crime, at alliances as a crime, at a world praying for

31 Van Vollenhoven, vol. 1, p. 428.

32 Van Vollenhoven, vol. 1, p. 379.

33 I. de la Rasilla, 'Grotian Revivals in the Theory and History of International Law', in *The Cambridge Companion to Hugo Grotius*, ed. by R. Lesaffer and J.E. Nijman (Cambridge: Cambridge University Press, 2021), p. 581 (hereafter cited as De la Rasilla).

34 De la Rasilla, pp. 581–3; M.J. van Ittersum, 'Hugo Grotius. The Making of a Founding Father of International Law', in *The Oxford Handbook of the Theory of International Law* (Oxford: Oxford University Press, 2016), pp. 84–93 (hereafter cited as Van Ittersum).

35 See also W.J.M. van Eysinga, *Geschiedenis van de Nederlandsche wetenschap van het volkenrecht* (Amsterdam: Noord-Hollandsche Uitgeversmaatschappij, 1950), p. 37 who frames Van Vollenhoven as the re-inventor of the true meaning of *IBP*.

36 Van Vollenhoven, vol. 1, pp. 424, 463–5.

37 Van Vollenhoven, vol. 1, p. 424.

protection against this devastating crime – and behold, it was the international law of Grotius.'[38] Following Van Vollenhoven, the enumeration of the merits of the Peace of Westphalia misses the point Grotius attempted to make, namely that aggressive war by belligerent states should be punished by other states – and that in this respect, they are not sovereign, but bound by international law. Grotius, according to Van Vollenhoven, is not concerned with political power equilibria and their associated alliances. These only lead to war. What was needed was a comprehensive, consistent set of international duties. The international law of this period, however, as laid down in the treaties of the early modern period, only subjected states to 'a few sparse and insignificant' duties, 'which hang together like loose sand'.[39]

According to Van Vollenhoven, this point was overlooked for three centuries, which raises the question of how Van Vollenhoven assessed the reception of Grotius. Van Vollenhoven answered this question in his *De drie treden in de ontwikkeling van het volkenrecht* (1919). As the title suggest, Van Vollenhoven distinguished three stages in the development of international law. The first ran from 1570 to 1770. Despite the work of Grotius, Van Vollenhoven concludes for this period: 'Looking over the jumble of rules, fragmentary and unsystematic, sober and sparse, accidental and unstable, with elegant rules for minor matters ['rules on sea warfare, contraband, blockade, right of search, prize law, neutral trade, colonial navigation in wartime, and the like'[40]] but leaving the main issue of war and destruction untouched, it is indeed not uplifting, that first

38 Van Vollenhoven, vol. 2, p. 438. In this regard, Van Vollenhoven would disagree with authors such as Richard Falk and Michael Scharf, who argue that the Peace of Westphalia 'marked a fundamental turning point for international law'. Aside from establishing fixed territorial boundaries for many of the countries involved in the conflict, the important provisions of the Westphalian treaties, according to Scharf, were 'the recognition of the independent sovereignty of the states of Europe, their right to exercise exclusive jurisdiction within their own territories, the establishment of religious toleration, the right of each state to negotiate its own treaties, and the recognition that such treaties were binding'. Since Grotius laid down the intellectual groundwork for the treaty, it is called 'Grotian Moment' in international law. See M.P. Scharf, 'Hugo Grotius and the Concept of Grotian Moments in International Law', *Case Western Reserve Journal of International Law* 17, p. 27–9. The precise importance of the Peace of Westphalia is widely debated, and sometimes downplayed. See e.g. H. Steiger, 'Der Westfälische Frieden – Grundgesetz für Europa?' in *Der Westfälische Friede: Diplomatie, politische Zäsur, kulturelles Umfeld, Rezeptionsgeschichte,* ed. by. H. Duchhardt (München: Oldenbourg, 1998), pp. 33–80; A. Osiander, 'Sovereignty, International Relations, and the Westphalian Myth', *International Organization,* 55, 2, 2001, pp. 251–87.

39 Van Vollenhoven, vol. 2, p. 420.

40 Van Vollenhoven, vol. 2, p. 420.

international law (…)'.[41] The academic study of Grotius in this period wrongly focused on 'his natural law; on his connection between religion and reason; on his criminal law theory; on his interpretation of the gospel'.[42]

The second phase ran from 1770 to 1914. According to Van Vollenhoven, this period was dominated by Emeric de Vattel (1714–1767). Unlike *IBP*, Vattel's emphasis was on the perspective of the sovereign state: 'For Grotius, sovereignty is the supreme authority in a country's internal affairs and over its direction over life, but by no means a license to commit crimes or other injustices; for what remains of international law that binds states then? For Vattel, no one may judge whether a state may be committing crimes or other injustices, except the sovereign state itself'.[43] With World War I, the third phase was definitively started. Van Vollenhoven criticized the attitude of neutral states as they tolerated aggressive war by invoking international or bilateral treaties: such treaties should 'be replaced as soon as possible by a new international law that fits the conscience of contemporary humanity'.[44] Alliances only lead to escalation as they draw allies into war when one of them starts a war of aggression. With World War I, millions of Europeans have witnessed how things got only worse this way. They have therefore wholeheartedly adopted Grotius's fundamental theorem as their lodestar.[45]

It is Johanna Oudendijk, with authors such as Haggenmacher and Roelofsen following in her footsteps, who opposed this interpretation of Grotius and Vattel. She acknowledged World War I as the trigger for Van Vollenhoven's way of reading Grotius.[46] From that moment he depicted unauthorized war as a *crimen iuris gentium* instead of a delinquency.[47] In his preface to a new edition of IBP in 1918, Van Vollenhoven added the intrinsic counterpart of a crime, namely punishment, to this on the basis of the close connection with Grotius's *De iure praedae commentarius* (herafter IPC) of 1605. The result is that the principle that 'war was a means to obtain redress and to punish' came to occupy such a central position in Van Vollenhoven's *De drie treden in de ontwikkeling van het volkenrecht* that, according to Oudendijk, the concepts

41 Van Vollenhoven, vol. 2, p. 414.
42 Van Vollenhoven, vol. 2, p. 423.
43 Van Vollenhoven, vol. 2, p. 424.
44 Van Vollenhoven, vol. 2, p. 439.
45 Van Vollenhoven, vol. 2, p. 442.
46 P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris, PUF, 1983), pp. 554–6 (hereafter cited as Haggenmacher); C.G. Roelofsen, 'Grotius and the 'Grotian heritage' in International law and International Relations: The Quatercentenary and its Aftermath (circa 1980–1990)', *Grotiana* 11 (1990), 6–28 (hereafter cited as Roelofsen).
47 Oudendijk, p. 5.

of just and lawful war were lumped together and legal war was almost entirely ignored.[48]

Van Vollenhoven wrongly identified *bellum iniustum* with *crimen* and read into Grotius's work 'an obligation of assisting an injured state in its punitive warfare'.[49] In the words of Haggenmacher, this idea should be rebaptised as the 'Theorem of Van Vollenhoven'.[50] After all, Grotius only said that from the standpoint of natural law, a state may assist a just party if it can do so easily and without risk to itself. No nation is bound to defend another from injustice when danger is manifest.[51] This ultimately leads to three major errors in Van Vollenhoven's interpretation of Grotius. Firstly, he mixed up the rules for dealing with neutral trade with Grotius's remarks on the direct actions of belligerents in a just or lawful war. Secondly, Van Vollenhoven's reproduction of Grotius's neutrality rules is highly colored and partly incorrect. Thirdly, the direct connection made between the beginning of book III and war coalitions, even with suggestions for a league of nations, is anomalous. Because of his own construction of crime and punishment, Van Vollenhoven 'saw Grotius as the apostle of the law of nations, perhaps the prophet of an ultimate League of Nations'.[52]

Oudendijk also criticizes Van Vollenhoven's interpretation of Vattel, whom he sees as the betrayer of Grotius. This is a false dichotomy. The quotation on which Van Vollenhoven based his accusation that Vattel, under the cover of praise for Grotius, left it completely to the sovereign state to judge its own behavior, is instead a description of a deplorable situation rather than a normative rule. Furthermore, Van Vollenhoven allegedly applied remarks by Vattel which refer to the customs of primitive tribes to civilized states. In doing so, he not only misinterpreted the legacy of Grotius, but also that of Vattel.

The question is whether Oudendijk's critique is justified. Regarding the relationship between *IPC* and *IBP*, scholars still fundamentally disagree with each other.[53] Most important is probably the reaction of Kooijmans in his inaugural lecture of 1983. In this lecture he partly agrees with Oudendijk: 'Van Vollenhoven did neglect the different types of law, which are of tremendous importance for a good understanding of Grotius's thinking. His notion of state

48 Oudendijk, pp. 7–8.
49 Oudendijk, p. 9.
50 Haggenmacher, pp. 554–6.
51 Oudendijk, p. 10.
52 Oudendijk, p. 13.
53 See e.g. L.C. Winkel, 'Problems of Legal Systematization from De iure praedae to De iure belli ac pacis' in *Property, Piracy and Punishment: Hugo Grotius on War and Booty in De iure praedae* ed. by Hans Blom (Leiden: Brill, 2009), pp. 61–78.

crime is hardly reconcilable with Grotian views on the delinquent conduct of sovereigns and princes. (…) But does this mean that he mishandled the Grotian heritage?'[54] Kooijmans answers this question negatively. According to him, Van Vollenhoven had a correct understanding of the contrast between Grotius and Vattel in the sense that Vattel, in spite of the fact that he accepted natural law as the final standard for state behavior, deprived it of its actual validity by the introduction of his concept of the equality of states. He forbade one state to pass judgment on the intrinsic justice of another state's conduct. This obstructs, according to Kooijmans, the application of natural law. 'Basically, Van Vollenhoven was right; while Grotius did his utmost to bring sovereigns under the rule of law, Vattel, in a very subtle way, ended up by placing them above the law'.[55] Moreover, according to Kooijmans, Van Vollenhoven was very clear about his purpose to deal with Grotius in the light of the present.[56] The hour of Grotius, however, arrived too late, because of the veto right in the Security Council that provided the five Permanent Members with the authority to prevent punitive actions against themselves.[57]

4 The Significance of Adat Law in the Dutch East Indies

In my opinion this defense by Kooijmans, although it contains valuable arguments, missed a crucial point. Not in the sense that justifying the anachronistic reading of Grotius risks building castles in the air which vanish at the touch of the critical observer.[58] This is certainly true, but it seems that Van Vollenhoven's critics handled Van Vollenhoven the same way as he did Grotius since they took Van Vollenhoven's remarks on Grotius and international law out of context of his many other publications, mainly on legal theory and Indonesian adat law. As especially Gerretson's contribution to the debate after the publication of Belzer's foreword to the Dutch translation of Grotius's *Prolegomena* in 1952 shows, the assessment of Grotius's value is closely linked to one's view on colonial matters.[59] Even Van Vollenhoven himself started his *Staatsrecht overzee* ('State law overseas') (1934) in a Grotian fashion, stressing

54 Kooijmans, p. 5.
55 Kooijmans, p. 6.
56 Kooijmans, p. 6.
57 Kooijmans, p. 9.
58 Roelofsen, p. 11–13.
59 H.J.M. Nellen, '"Het Leidse haylichje" Hugo Grotius in de twintigste eeuw', *Jaarboek van de Maatschappij der Nederlandse Letterkunde* (1995), pp. 37–59 (on Gerretson, see pp. 51–54) (hereafter cited as Nellen).

the fact that the Indies were never a *res nullius* but always governed by their own institutions and legal systems.[60] My argument is that Van Vollenhoven's perspective on the Dutch East Indies clarifies the true similarities and differences between him and Grotius.

Grotius is particularly famous for his view on natural law. Summarized succinctly, he replaced a voluntaristic approach to the origin of morality (as still presented in *IPC*) with the standpoint that human nature itself produces the natural law: 'The law of nature is a dictate of right reason, which points out that an act, according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined'.[61] Therefore, the content of natural law is primarily traced through the study of human nature, which is construed by two essential properties: the desire for self-preservation and the need for society. This is also why we must obey natural law: it obliges us to perform actions which are conducive to our rationality, sociability, and need for self-preservation. Natural law, therefore, 'applies to all rational and social beings as such. It does not matter what they think or believe: if they are rational and social, they are bound by the law of nature'.[62]

For Van Vollenhoven, this idea of equality was of the utmost importance. It is not without reason that he explicitly applied Grotius's anti-discrimination principle to the relationships 'between orientals and occidentals, colored men and white men, uncivilized people and civilized people, non-Christians and Christians, non-Europeans and Europeans'.[63] Elsewhere, he criticized the fact that for centuries international law 'has been European international law, which establishes no bond with pagans and abominable Mohammedans'.[64] The idea of equality, however, can manifest in two ways. It can work exclusively or inclusively. It can try to impose 'Western rationality' as universal on others. Alternatively, it can use equality as a starting point, not restricting itself to a 'Western worldview' but including other kinds of rationality as well.

It is precisely this dilemma that was at the bottom of Dutch politics in the Dutch East Indies, as of 1816. There was a fundamental difference of opinion on

60 C. Van Vollenhoven, *Staatsrecht overzee* (Leiden: Kroese 1934), p. 1; Grotius, *The Free Sea*, ed. by D. Armitage (Indianapolis: Liberty Fund 2004), p. 11. J.A. Somers, *Nederlands-Indië. Staatkundige ontwikkelingen binnen een koloniale relatie* (Zutphen: Walburg Pers 2005), p. 13.

61 Grotius, *IBP*, I.1.10.1 (pp. 38–9).

62 J. Miller, 'Hugo Grotius' in *The Stanford Encyclopedia of Philosophy*, ed. by E.N. Zalta (online public), with reference to Grotius, *IBP*, II.20.44 (pp. 508–10).

63 Van Vollenhoven, vol. 1, p. 414.

64 Van Vollenhoven, vol. 3, p. 361.

how to best care for the indigenous population.[65] On the one hand, there was the view that in order to improve their fate, it was necessary to break away from local customs and practices, as they were seen as uncivilized, oppressive, and childlike. On the other hand, there was the view that caring for the indigenous population should involve refraining from intervention with the domestic and religious institutions and governing them as much as possible according to their own principles. This means that their customs and practices should be respected and maintained as much as possible.

This tension continued to exist well into the twentieth century, as evidenced by the so-called 'ethical policy' that became politically dominant around the turn of the century. Inspired by Eduard Douwes Dekker's groundbreaking novel on Dutch policy in the Indies, the *Max Havelaar* (1860), various 'pioneers of progress and civilization' had emerged in the 1860s, with young Dutch people in particular striving for the development of the local population. However, it was the jurist C.Th. van Deventer, who, with his article '*Een Eereschuld*' (1899), not only profoundly influenced the young Van Vollenhoven, but also ushered in a period 'in which the East Indies were no longer regarded as a possession, but as a self-standing entity, co-equal and not primarily serving the motherland'.[66] This attitude, affirmed by Queen Wilhelmina in her 1901 speech in which she stated that the Netherlands, as a Christian Nation, had a 'moral calling' to fulfill, was supposed to gradually lead to greater self-governance in the colony. However, the process would have to take place under Dutch leadership, with Western values at the center.

In hindsight, this policy can be characterized as rather paternalistic. Nevertheless, the new policy bore fruit, particularly in the field of education. Literacy among the indigenous population increased. Although Van Vollenhoven can be seen as an exponent of the ethical policy, he criticized several aspects of it. According to him, 'the main form of emancipation in the Indies is one in which Eastern institutions and organizations, which have long existed – regent government and the administration of district and sub-district chiefs, village administration, village union administration, self-government of regions, indigenous judiciary – learn to stand on their own economically and politically, and in which such institutions receive real responsibility and real authority'.[67] From this quotation, the two pillars of emancipation are

65 N.S. Efthymiou, *De organisatie van regelgeving voor Nederlands Oost-Indië: Stelsels en opvattingen (1602–1942)* (Amsterdam: Dissertatie UvA, 2005), p. 249 (hereafter cited as Efthymiou).

66 W. van den Doel, *Zo ver de wereld strekt. De geschiedenis van Nederland overzee vanaf 1800* (Amsterdam, Bert Bakker, 2011), p. 151.

67 Van Vollenhoven, vol. 3, pp. 256–7.

clear: the development of local institutions, and the granting of authority to these institutions. It is precisely on those two points that Van Vollenhoven criticized the ethical policy of the Dutch government.

Firstly, Van Vollenhoven, in the context of the Dutch constitutional reform of 1922, accused the Dutch government of hypocrisy in implementing the ethical policy.[68] In principle, they confessed that they wanted to educate the colony to eventually stand on its own, but in practice, they did everything to delay or even reverse that process. Van Vollenhoven compared Dutch policy to that of the Spanish king Philip II, who sent letters from Segovia to accommodate the wishes of the early modern Netherlands only to do the opposite. Governor-General Van Limburg Stirum had promised a revised constitution for the Indies in 1918, granting significant powers to the inhabitants of the colony. This idea was elaborated by the revision committee. The Dutch government reacted lukewarmly but not disapprovingly, thus giving hope to the colony. In 1921, the explanatory memorandum to the legislative proposals mentioned that legislation and administration regarding internal affairs should be placed, as much as possible, in the hands of bodies and authorities in the Indies themselves. Subsequently however, and to the anger of Van Vollenhoven, the government withdrew its support. The minister remarked that a comprehensive overhaul of the Indies government regulations, as proposed by the revision committee, 'was never his intention'. 'Whoever can discover a trace of candor in this will get a country estate as reward', Van Vollenhoven cynically noted.[69]

According to him, the Dutch government did not keep its promises. Autonomy for the East Indies remained out of reach. For Van Vollenhoven, this all was a matter of good faith. 'By opening up the opportunity for autonomy with the intention of using it only sparingly for the time being, by opening up the opportunity for autonomy with the thought of implementing it only 'in the future', we do more harm and provoke more bitterness than any language of fanatics, demagogues, agitators, and troublemakers could ever do'.[70] Such 'mockery, belittlement, and contempt' of the indigenous people only provokes

68 On the broader implications of this constitutional reform on the Dutch Indies, see: J.A. Somers, *Nederlands-Indië. Staatkundige ontwikkelingen binnen een koloniale relatie* (Zutphen, Walburg Pers, 2005), pp. 135–56.

69 Van Vollenhoven, vol. 3, p. 364.

70 Van Vollenhoven, vol. 3, p. 366. One recognizes almost a prelude to what Martin Luther King, *Letter from Birmingham Jail,* 16 April 1963, p. 3 (online public) would write: 'For years now I have heard the word "Wait"! It rings in the ear of every negro with piercing familiarity. This "wait" has almost always meant "never". We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied"'.

distrust and hatred.[71] Trust, once lost, is difficult to regain. In this regard, the Dutch Indies are superior in faith, hope, civilization, and self-control.

In retrospect, Van Vollenhoven's writings in 1922 coincided with a gradual policy shift as greater emphasis was placed on respecting the indigenous population.[72] This aligns with the other pillar of Van Vollenhoven's emancipation idea: the development of local institutions, which means abstaining from imposing Western thinking, but cultivating indigenous institutions. This is clearly evident from his comments in the founding phase of the Batavia Law School (1924). Van Vollenhoven advocated that in the selection of curriculum, language, method, and personnel, the Western perspective should not be dominant.[73] Van Vollenhoven elaborated this idea for the historical law courses: 'How can the study of Indonesian law be provided with the historical background that has been sought for a century in Holland trough Roman law, and now through both Roman and Germanic Law?'[74] According to Van Vollenhoven, Asian legal sources are unsuitable, since they are neither comprehensive, rich in legal instruction, nor scientifically developed. Hence, there is no other option than to look for Western material. However, 'Roman law is certainly not indicated. (…) The history of Roman private law would present the sharpest possible contrast with all Indonesian law, thereby causing more confusion than clarification (…)'.[75] He particularly advocated for the study of Frankish law, French legal history up to the Revolution, and Netherlandish regulations before the Dutch Revolt. Such study would benefit the solidity and depth of Indonesian public law and adat law.[76]

Van Vollenhoven himself is widely regarded as one of the principal founders ('the cornerstone of the past, the foundation for the future'[77]) of the study of adat law.[78] He defined adat law as 'the system of behavioral rules applicable to

71 Van Vollenhoven, vol. 3, p. 368.

72 Efthimiou, p. 626.

73 Van Vollenhoven, vol. 3, p. 454.

74 Van Vollenhoven, vol. 3, p. 532.

75 Van Vollenhoven, vol. 3, p. 532.

76 Van Vollenhoven, vol. 3, p. 533. See on the relation between Van Vollenhoven and Paul Scholten with regard to the establishment of the Batavia Law School: R. Chorus, *Om recht en gerechtigheid. Paul Scholten (1875–1946) Een biografie* (Zutphen: Walburg Pers, 2022), pp. 79–132.

77 B. ter Haar, *Beginselen en Stelsel van het Adatrecht* (Groningen-Batavia: Wolters, 1939), p. 239. Also affirmatively cited in A.K.J.M. Strijbosch, *Juristen en de studie van het volksrecht in Nederlands-Indië en Anglofoon Afrika* (Nijmegen, diss. Radboud University, 1980), p. 52.

78 E.g. F.D.E. van Ossenbruggen, 'Prof. mr. Cornelis van Vollenhoven als ontdekker van het adatrecht', *Bijdragen tot de taal-, land- en volkenkunde / Journal of the Humanities and Social Sciences of Southeast Asia* 90 (1933), pp. 2–41. P. Burns, *The Leiden Legacy: Concepts of Law in Indonesia* (Leiden: KITLV Press 2004) (hereafter cited as Burns) sees Van Vollenhoven as

natives and foreign Orientals, which on the one hand can be sanctioned (hence 'law'), and on the other hand exist in an uncodified state (hence 'adat')'.[79] The question for this contribution is what we gain from this for international law. In other words, what theoretical presuppositions does Van Vollenhoven's reflection on adat law expose that are also relevant to international law?

The definition of adat law, firstly, indicates that Van Vollenhoven, concurrently with the mainstream of legal thinking of his time, included the sanctioning of rules in his definition of law.[80] This explains why Van Vollenhoven advocated for an international police force and stressed the importance of sanctioning violations of international law. However, this positivist theory of law only provides a picture of the 'law as a product', not of the 'law as practice'.[81] Van Vollenhoven used the metaphor of a train riding a track according to a timetable. The element of sanctioning forms the rails over which the various trains of international, national, local and religious law run according to a guaranteed schedule.[82]

However, it seems that Van Vollenhoven with regard to adat law could ultimately not hold on to the positivist concept of law. He admitted that law can hardly be distinguished from the non-legal parts of popular customs and concepts, and even argues that law should not be strictly separated from custom or morality.[83] Moreover, he insisted that it was not always possible to determine if a rule was sanctioned and what behavior could be interpreted as sanction.[84] Van Vollenhoven saw gradual transitions rather than hard divisions. Adat law, like other living law, was not static but highly flexible. It was not only

---

the founding scholar of the adat law myth that was later dismantled. Other publications review Van Vollenhoven's contributions more positively. The most prominent defender is perhaps K. von Benda-Beckman, 'Anachronism, Agency, and the Contextualisation of Adat: Van Vollenhoven's Analyses in Light of Struggles over Resources', *The Asia Pacific Journal of Anthropology* 20 (2019), 397–415 (hereafter cited as Von Benda-Beckman).

79 C. van Vollenhoven, *Het adatrecht van Nederlandsch-Indië,* vol. 1 (Leiden: Brill, 1918), p. 14. See also Van Vollenhoven, vol. 1, p. 5 (hereafter cited as Van Vollenhoven, *Het adatrecht*).

80 Most prominently J. Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995 [1832]), pp. 21–4. The same goes for Van Vollenhoven's contemporary Hans Kelsen (1881–1973). His Pure Theory of Law can best be summarized as 'The law is an order of force or violence'. See C. Kletzer, *The Idea of a Pure Theory of Law* (London: Hart Publishing, 2018), pp. 5–6.

81 W. van der Burg, 'Two Models of Law and Morality', *Associations* (1999), 61–82. C. Kletzer, 'Custom and Primitivity: On the Unity of the Legal Technique' in *Spaces of Law and Custom* ed. by E. Frezet et al (New York: Routledge, 2022) pp. 13–26 argues, on the contrary, for the compatibility of Kelsen's legal positivism and changeable norms as customary law.

82 Van Vollenhoven, vol. 1, p. 7.

83 Van Vollenhoven, *Het adatrecht,* vol. 1, p. 5; Van Vollenhoven, vol. 1, p. 9.

84 Von Benda-Beckman, p. 400.

used in courts (their decisions were often ignored or reversed in everyday life), but in many different contexts, leading to different forms of adat: lawyer's adat, the government's interpretation, and the understanding of it by local people.[85] While carefully studying the source material, Van Vollenhoven developed some core concepts that structured his understanding of adat law. Examples of such concepts are adat jural community, right of avail, the overarching right of a community, and the native right of possession.[86] Van Vollenhoven argued that these concepts were more suitable for understanding local legal orders than Dutch or Roman legal terminology.

This observation led to one of Van Vollenhoven's most fundamental convictions, namely that using legal terminology from one legal system to describe a very different system distorts its internal logic and meaning.[87] For this reason Van Vollenhoven stressed the importance of comparative legal history. In this context, he warned against hasty generalizations, such as younger rules being always more complicated than older ones, or that rules of the more primitive society represent the past rules of the more modern society.[88] History does not mean linear progress. The great art of comparative legal history is to neglect the familiar.[89] Moreover, one must beware of foreign insertions, mostly Hindu and Islamic influences on adat law. Due to the lack of sources and the necessary accuracy, a synchronically oriented Indonesian legal history is out of reach; at most, fragmented histories of parts of adat law can be achieved.[90] In such comparative legal history of adat law, Justinian and French legal codes are useless and even harmful when used as a basis for legal reform.[91]

In this context Van Vollenhoven appears more as a proponent of legal pluralism than natural law (as the latter uses a quite monolithic concept of unity between people, countries and culture). While it is true that all law over the world has in common that it is enforced, there is less substantive commonality. Instead of the unity of natural law, Van Vollenhoven prefers the concept of family resemblance, according to which legal systems are connected by a series of overlapping similarities without having one common feature.[92] For instance, Van Vollenhoven distinguishes eighteen 'legal circles' within the Dutch East Indies where adat law differed significantly. The same

85 Von Benda-Beckman, p. 401.
86 Von Benda-Beckman, p. 399.
87 Von Benda-Beckman, p. 398.
88 Van Vollenhoven, *Het adatrecht,* vol. 2, pp. 764–70.
89 Van Vollenhoven, *Het adatrecht,* vol. 2, p. 770.
90 Van Vollenhoven, *Het adatrecht,* vol. 2, p. 763.
91 Van Vollenhoven, *Het adatrecht,* vol. 1, 36.
92 Van Vollenhoven, vol. 1, pp. 51–6. See Burns, pp. 26–7 on the relation with Wittgenstein.

goes for the legal families in the world. Indo-Celtic, Roman, or Chinese families may overlap, but have hardly any common ground. This explains why Van Vollenhoven points at the poetry in law (i.e. the concordance between law and the world order), illustrating it by examples not of the sort 'thou shalt not kill', but rather of the sort that 'thou shalt not sell this specific rice crop'.[93] The universal lies not in substantive agreement, but in a deeply personal experience of the sublime which he also calls 'the selfless' in law.[94] This is not reserved for lawyers, theologians and ministers, but is placed in the heart of the people.[95]

5 Poetry of Law: Grotius Through Romanticist Eyes

Van Vollenhoven's assessment of adat law reveals his foundational concepts of law. Nowadays Van Vollenhoven's legal theoretical account would be qualified as 'legal interactionism' or 'cultural law'.[96] The roots of it can be traced back to romanticism and the (Germanist) historical school as a reaction against natural law and the Enlightenment.[97] Although Romanticism may appear somewhat unscientific to modern readers, we must remember that it influenced a large number of eminent legal scholars and anthropologists in the nineteenth and early twentieth centuries. Their work often accounts for a close study of the sources. The same goes for Van Vollenhoven. Despite the many publications on Van Vollenhoven, the Romantic and Germanist influence has remained under the radar. My contention is that including this influence ensures that aspects of Van Vollenhoven's Grotius interpretation can be better explained.

The conflict between the Enlightenment and Romanticism was initiated by Jean-Jacques Rousseau (1712–1778). He understood himself as a person with a complex emotional inner life, as evidenced by his *Julie ou la nouvelle Héloïse* (1761) and *Les Confessions* (1770). Strong expressions of the sense of

93 Van Vollenhoven, vol. 1, p. 119.

94 Van Vollenhoven, vol. 1, pp. 36–50.

95 Van Vollenhoven, vol. 1, p. 50.

96 'Interactionism' is a term coined by Willem Witteveen and Wibren van der Burg as a qualification of the legal theory in the tradition of Lon Fuller. See e.g. W.J. Witteveen, 'Zes redenen om Fuller te herlezen', *RM Themis* 160 (1999), 319–29 (hereafter cited as Witteveen); W. van der Burg, 'Wat is juridisch interactionisme', *Netherlands Journal of Legal Philosophy* 43 (2014), 27–42. 'Cultural law' is a term with a more conservative timbre, used mainly by Paul Cliteur: P.B. Cliteur, *Conservatisme en cultuurrecht* (Amsterdam: Cliteur, 1989) (hereafter cited as Cliteur).

97 The most elaborated is Burns. However, he did not work out the relationship with romanticism very much (p. 45) and restricted himself mainly to Von Savigny with regard to the Historical School (pp. 232–7).

justice are cultivated in this atmosphere. Contrary to the belief in societal progress, Rousseau emphasized the tension between the emotional life of the individual on the one hand and the requirements of the process of civilization on the other.[98] Unlike this Rousseau-inspired individualistic romanticism, Johann Gottfried von Herder (1744–1803) sought to reconcile the diversity of individuals and the dynamics of the civilizing process. Cultural dynamism can be seen as an amplification of the individual inner life. In other words, societal pluralism is a result of individualism or personalism.[99] Not surprisingly, early German Romanticism gave rise to a cult of the genius: 'often exaggerated and pretentious, but also full of vigor and self-confidence. The spirit of the Sturm und Drang wants to be the midwife for the genius, which as a better talent slumbers in everyone and is only waiting to finally come into the world'.[100]

In this context, it is indicative that Van Vollenhoven was both meticulously studying Grotius in an academic way as well as overloading him with praise. He portrayed Grotius as a genius and tragic hero, admired particularly for his solitary path (fleeing the Dutch Republic, disregarded by Richelieu, dying at sea, and misinterpreted for centuries).[101] Despite everything that happened after the *IPC*, Grotius did not dilute his principles in IBP: 'not a single drop of water in his wine, he does not retreat an inch from what the young man of twenty-one had set up'.[102] Grotius is characterized as 'a completely honest man, who always serves the cause rather than himself, never diminutive in his actions or thoughts, full of energy, and full of love for his country'.[103] When Knight portrayed Grotius as an ambitious individual whose success was largely dependent on his father and family connections, Van Vollenhoven saw this as a damaging caricature.[104] Grotius is authentic, exceptional, and admirable. The hero-worship of Grotius's escape in the book chest is therefore completely justified: 'it brings us closer to an unblemished man in an inspiring time, a man who thus becomes flesh and blood, a natural, lively, cheerful, affable man'.[105]

98 R. Boomkens, *Erfenissen van de Verlichting* (Amsterdam: Boom 2011), p. 40 (hereafter cited as Boomkens).

99 R. Safranski, *Romantiek, een Duitse affaire* (Amsterdam: Atlas Contact 2022), p. 25 (hereafter cited as Safranski). This trait of Romanticism is also stressed by A. Kinneging, *De onzichtbare maat. Archeologie van goed en kwaad* (Amsterdam: Prometheus 2020), pp. 176–7 (hereafter cited as Kinneging).

100 Safranski, p. 21.

101 Many have been surprised by Van Vollenhoven's limitless admiration for Grotius, see e.g. Nellen (with further references).

102 Van Vollenhoven, vol. 2, p. 417.

103 Van Vollenhoven, vol. 1, p. 403.

104 Van Vollenhoven, vol. 1, pp. 404–5.

105 Van Vollenhoven, vol. 1, pp. 223–4.

The praise for Grotius fits into the nationalist spirit of the moment. Earlier in this contribution it was mentioned that at the end of the nineteenth century, scholars of international law hoisted Grotius on their shield as 'founding father' of their science and standard point of theoretical reference. Besides this rise of international law as a science, according to Van Ittersum, the attention and praise for Grotius can also be related to Dutch nationalism.[106] Through various commemorations, he became a national symbol of tolerance that bridged and overcame the old contradictions of the Dutch Republic. Moreover, the Netherlands had an interest in Grotius being regarded as the father of international law because it hoped that in this way it could expand its influence in international politics. It seems that Van Vollenhoven was also touched by this nationalism – which aligned well with his pluralist ideas.

Nationalism is an offshoot of Romanticism. It seeks the uniqueness of a people or country. In this context, Herder is widely considered as the founder of a modern cultural philosophy based on differentiation: cultures derive their identity from their difference with other cultures. In this context, he introduced the notion of the 'history of mankind'.[107] Nature is the living force that is both creative and destructive, which we see reflected in history which does not exhibit linear progress but a vigorous 'back-and-forth'.[108] Progress is possible, but only when individual and community are in harmony. For Herder, the individual was embedded within the community, conceived as a series of concentric circles, from families, tribes, peoples, nations, to the community of nations, each forming a spiritual synthesis at its level.[109] Herder called this spiritual synthesis the *Volksgeist.*

The concepts of differentiation and the *Volksgeist* are the key to understanding Van Vollenhoven's Grotius interpretation. Firstly, it explains why Van Vollenhoven stressed the fact that Grotius himself paid attention to ancient Hellenic, Hebrew, Netherlandish, Swedish, and Gothic law. Grotius was clearly aware of legal diversity. Legal communities produce and maintain their own legal systems which are valuable in their own right. 'It will be realized what Grotius wrote about his old Gothic law: 'this will not count with those who have an eye only for Roman law''.[110] For this reason, adat law should not be simply replaced by Western (Roman or Napoleonic-inspired) law. Secondly, it explains why Van Vollenhoven put so much emphasis on Grotius's theorem that

106 Van Ittersum, pp. 94–5.
107 See J.G. von Herder, *Ideen zu einer Philosophie der Geschichte der Menschheit* (4 vols.) (Riga/Leipzig: Hartknoch, 1784–1791).
108 Boomkens, p. 41.
109 Safranski, p. 25; Boomkens, p. 42.
110 Van Vollenhoven, vol. 1, p. 45.

wars of aggression must be punished. Originally Grotius writings ran contrary to the *Volksgeist;* in the twentieth century, however, for Van Vollenhoven they expressed the spirit of the international community. World War I made virtually everyone realize that this Grotius's theorem was the highest justice. For this reason, international judges or arbiters (as Bijnkershoek had replied to Grotius) are redundant. The justness of the punishment of a belligerent state will be obvious to all.[111]

The idea of the *Volksgeist* was the cornerstone of the German Historical School. While Friedrich Carl von Savigny (1779–1861) saw the *Volksgeist* expressed in the reception of Roman law, Van Vollenhoven instead adopted the methodology and concepts of the Germanist direction of the Historical School.[112] He cited many Germanist authors, like Karl Friedrich Eichhorn (1781–1851), Jacob Grimm (1785–1863) and Georg Beseler (1809–1888), and paid explicit homage to the Dutch romantic poet and jurist Willem Bilderdijk (1756–1831). The Germanists distill guiding principles from sources of Germanic legal history which could serve as the basis of a scientifically founded private law.[113] Such principles could, for instance, lie in *'der gemeinsamen Nationaleigentumlichkeit und Volkssitte'* (Eichhorn) or in the law generated directly by the people (Beseler). Van Vollenhoven applied this methodology to adat law, thus taking a different path than contemporary anthropologists such as Albert Hermann Post (1838–1895) and Joseph Kohler (1849–1919).[114] Especially Beseler's idea of a *Volksrecht* – neither represented nor expressed by jurists – is employed for the study of adat law. Just as the Germanists resisted the domination of legal science by Roman law, Van Vollenhoven drew the parallel between Netherlandish law being surpassed by Roman law, and adat law being increasingly in danger of being replaced by Western law.[115]

People do not only differ from place to place, but also across periods. For this reason, Van Vollenhoven emphasized the role of comparative legal history for both international and adat law. With regard to historical development, Van Vollenhoven was faithful to the Romanticist position that societal developments occur at different speeds.[116] This was clearly noticeable in his idea of leaps of customary law. *Volksrecht* is a phenomenon of the 'constantly flowing society, with other phenomena in restless interaction of thrust and counterthrust'.[117]

111 Van Vollenhoven, vol. 2, pp. 442–4.
112 Cf. Roos, p. 383 and Burns, p. 236.
113 S. Meder, *Rechtsgeschichte* (Köln: Böhlau Verlag 2017), p. 312.
114 Cf. Von Benda-Beckmann, p. 399. Burns, pp. 227–51 has argued that Van Vollenhoven's conception of adat law was therefore essentially European.
115 Roos, p. 383.
116 Cf. Roos, p. 383.
117 Van Vollenhoven, *Adatrecht,* p. 773.

Elsewhere, Van Vollenhoven cited Von Jhering's assertion that law arises from conflicting societal opposites, albeit with the important caveat that law can also change 'gradually, without hustle or bustle'.[118] The connection between Romanticism and Marx deserves a study on its own, but Marx's economic ideal in which the laborer, like an artist, realizes his own idea is very similar to what Friedrich von Schlegel (1772–1829) meant with 'progressive universal poetry'.[119] It is precisely this ideal of an anti-capitalist, better order of production and distribution of capital, that is appraised by Van Vollenhoven.[120] One recognizes a similar reasoning in the Germanist idea of *Volksrecht,* according to which the people produce their own law (often through usage), without representation by jurists.[121]

From these Romanticist and Germanist traditions, Van Vollenhoven arrived at a legal theoretical position which nowadays would be labelled as interactionist or cultural law. Against traditions of natural law and legal positivism, a theory emerged, according to which human interaction or culture is sought as the normative basis for law. It is unfortunate that Van Vollenhoven paid less attention to the practice side (as opposed to the product side) of law in his writings on international law. However, he certainly drew parallels between international and adat law. We may therefore recognize him as a forerunner of the interactionist theory of international law as developed by Brunnée and Toope.[122] Their approach is based on two key ideas borrowed from Lon Fuller (1902–1978): 'the generation of social norms through interaction, and the sense of responsibility that arises only from the human ability to reason with norms'.[123] International law can best be seen as internalized commitment, called fidelity, which is generated because law is legitimate in the eyes of persons to whom it is addressed.

In legal interactionist theories, a sharp distinction between 'is' and 'ought' cannot be made. The legal principles are rooted in a 'sense of appropriateness developed in the profession and the public over time'.[124] Culture represents something of value, something lofty touching upon 'our most sacred goods', and therefore is normative, meaning that there are good reasons to accept the

118 Van Vollenhoven, vol. 1, p. 9.

119 See for this interpretation of Schlegel's idea of a 'universal poetry' Safranski, pp. 57–58. For the connection with Marx, see e.g. Kinneging, p. 172.

120 Van Vollenhoven, vol. 1, p. 12.

121 There is a close connection that deserves further study between the *Volksgeist* (in Germanist sense) and the *Volonté-Générale* of Rousseau, which also cannot be represented.

122 See Brunnée & Toope.

123 Brunnée & Toope, p. 20.

124 Cliteur, pp. 407–8.

principles as normative basis.[125] Interestingly, Cliteur appealed to the same distinction Van Vollenhoven made for his leaps in the development of customary law: law consciously made by humans versus law resulting from human actions without specific goals, which arises through spontaneous, organic growth. This latter part can be accepted as the normative basis for the legal system. Not all law is customary, but the principles of law rest on evolutionary growth. As Cliteur mentioned Charles Darwin, Van Vollenhoven uses the term 'mutation' to indicate that this evolution occurs at varying speeds.[126]

What Cliteur tends to gloss over, but other interactionists like Van der Burg rather embrace, is that this position endorses legal pluralism.[127] Legal pluralism not only has an American tradition, but also has strong roots in the Germanist Historical School.[128] This pluralism challenges the state as the only source of law. Beseler, for example, never explicitly used the term 'pluralism', but he put the state on an equal footing with all other fellowships (*Genossenschaften*) in society.[129] This idea was later worked out by Otto von Gierke (1841–1921) who contrasted the *Genossenschaftsrecht* with natural law. Moreover, legal pluralism also acknowledges that law – as result of human interaction and culture – is principally bound by time and place. The legal organization of society is congruent with its social organization.[130] If any common characteristics among legal systems can be construed at all, in the light of the great diversity of legal systems they will be insufficiently substantial to be of real interest. In order to avoid the pyramidal structure of higher and lower law, legal pluralism necessarily treats the different legal systems on an equal basis.

Given all this, I would argue that Van Vollenhoven's thinking fits well within the interactionist approach to law and exudes an scent of Romanticism and Germanist legal thinking. He stressed the importance of culture, societal connections, development, and history as the foundation of law. Cliteur, interestingly, specifically mentioned Grotius as an example of someone one who derived his legal principles from human nature rather than human culture.[131] Grotius deduced his legal principles *a priori* – independent of

125 Cliteur, pp. 415–6.

126 Cliteur would acknowledge this, since he also positively mentioned Von Jhering (as opposed to Von Savigny and Puchta).

127 W. van der Burg, *The dynamics of law and morality: a pluralist account of legal interactionism* (Farnham, Ashgate: 2014), pp. 77–93.

128 M. Dreyer, 'German Roots of the Theory of Pluralism', *Constitutional Political Economy* 4 (1993), 7–39 (hereafter cited as Dreyer).

129 Dreyer, p. 17.

130 J. Griffiths, 'What is Legal Pluralism?', *The Journal of Legal Pluralism and Unofficial Law* 18 (1986), 38.

131 Cliteur, pp. 488–91.

experience or practice. This is the naturalist side of Grotius's thinking. However, at the same time Grotius allowed for a secondary, *a posteriori* method of deriving legal principles from the common convictions of nations.[132] This is the rather humanistic side of the work of Grotius. It is this humanism in the work of Grotius, and its associated method, that was put on the forefront by Van Vollenhoven – at the expense of natural law. As such, Van Vollenhoven appreciated the abundance of cultural-historical examples in Grotius work. It was his romantic, Germanic, and pluralistic perspective that caused the exaggeration of this aspect.

6 Conclusion: The Grotian Moment as an Interactionist Concept

International law has always been complicated from the perspective of legal positivism, given the absence of a centralized global government. Therefore, the approaches of natural law and interactionism have proven more fruitful starting points for the study of international law. While natural law tends to be quite statically founded in the nature of man, the idea of a 'Grotian Moment', an acceleration in customary international law, with its emphasis on international legal culture and legal change fits better with the interactionist approach. It is therefore not surprising that it was actually Van Vollenhoven who first came up with the bottom line of the concept. Especially in his study of adat law, he proves to stand in a Romantic, Germanist, and rather pluralist tradition of law. Grotius, on the contrary, is widely regarded as one of the major contributors to natural law theory, testing positive laws for their fairness in the light of universal reason. This difference forms an important yet often overlooked explanation for the distortions in Van Vollenhoven's interpretation of Grotius. Haggenmacher is right to argue that the 'Grotius theorem' should be renamed 'Van Vollenhoven's theorem'. However, it could just as properly be argued that the term 'Grotian Moment' should be changed into 'Van Vollenhoven's Moment'.

132 Cliteur, pp. 453–554; also stressed by Burns, pp. 44–5, 227–8.