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**DOI**

[10.1163/15718050-12340094](https://doi.org/10.1163/15718050-12340094)

**Publication date**

2019

**Document Version**

Final published version

**Published in**

Journal of the History of International Law

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**Citation for published version (APA):**

de Wilde, M. (2019). Seeking Refuge: Grotius on Exile, Expulsion and Asylum. *Journal of the History of International Law*, 20(4), 471-500. <https://doi.org/10.1163/15718050-12340094>

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# Seeking Refuge: Grotius on Exile, Expulsion and Asylum

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Received: 26 July 2017; Revised: 02 February 2018; Accepted: 16 February 2018

## Abstract

Hugo Grotius is often identified as the founder of the modern concept of asylum. This article argues that Grotius's most innovative contribution was not his theory of asylum, but his concept of expulsion, and more particularly, his notion that a permanent refuge should be offered to foreigners who had been collectively expelled on religious grounds. The article shows that Grotius's notion was informed by his own experiences as a lawyer advocating the admission of Sephardi Jews, who had been expelled from Spain and Portugal, to the Dutch provinces. More particularly, it was based on a reinterpretation of Francisco de Vitoria's concept of the 'law of hospitality' and the duty to admit foreigners irrespective of their religious beliefs. Reinterpreting Vitoria's concept, Grotius was the first to formulate a theory regarding the state's responsibility to offer a permanent refuge to victims of (religious) persecution.

## Keywords

Grotius – Vitoria – natural law – asylum – exile – the law of hospitality

## Introduction

The legal concept of asylum has a long history that can be traced back via medieval practices of church asylum to antiquity and beyond.<sup>1</sup> On the traditional understanding of asylum, those threatened with punishment, whether guilty or innocent of crimes, were offered a temporary refuge in churches or holy places, where they could not be seized by those who laid claim to them. They were handed over to their claimants only after church authorities (often a bishop) had negotiated a milder punishment and ensured that due process would take place.<sup>2</sup> By contrast, the modern concept of asylum consists of a legal duty for states (rather than the church) to offer protection to foreigners (rather than their own citizens) who are persecuted for political or religious reasons (rather than ordinary crimes).<sup>3</sup> This modern concept of asylum first emerged in the seventeenth century, in response to large-scale persecutions of religious minorities during the wars of religion. In this context, the Dutch natural lawyer

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- 1 Dreher, Martin, ed. *Das antike Asyl: Kultische Grundlagen, rechtliche Ausgestaltung und politische Funktion* (Köln: Böhlau, 2003); Gamauf, Richard. *Ad statum licet confugere: Untersuchungen zum Asylrecht im römischen Prinzipat* (Frankfurt am Main: Lang, 1992); Babo, Markus. *Kirchenasyl – Kirchenhikese: Zur Relevanz eines historischen Modells im Hinblick auf das Asylrecht der Bundesrepublik Deutschland* (Münster: Lit Verlag, 2001); Siems, Harald. 'Zur Entwicklung des Kirchenasyls zwischen Spätantike und Mittelalter', in *Libertas: Grundrechtliche und rechtsstaatliche Gewährungen in Antike und Gegenwart: Symposium aus Anlass des 80. Geburtstag von Franz Wieacker*, eds. Okko Behrends and Malte Diesselhorst (Ebelsbach: Rolf Gremer, 1991), 139–186; Ducloux, Anne. *Ad ecclesiam confugere: Naissance du droit d'asile dans les églises (IV<sup>e</sup> – milieu du Ve s.)* (Paris: Brocard, 1994); Timbal Duclaux de Martin, Pierre. *Le Droit d'Asile* (Paris: Sirey, 1939).
  - 2 Dreher, *Asyl in der Antike* 2003 (n. 1), 94.
  - 3 A standard definition of modern asylum is the one adopted by the Institute of Public International Law at its 1950 Bath Conference: 'the term asylum denotes the protection that a State grants on its territory or in some other place under the control of certain of its organs to a person who comes to seek it'. As Alte Grahl-Madsen explains, in this definition, the term 'asylum' refers to the 'protection accorded by a State (...) against another State, acting though its lawful, duly accredited, and duly authorized organs'. More particularly, it refers to the protection accorded to foreigners. As Hemme Battjes points out, by restricting 'asylum' to the protection accorded by a state, the Bath definition excludes 'protection by a church or other non-state actors'. Moreover, under international law and national constitutions, the right to asylum is limited to those who are persecuted (e.g., on political or religious grounds), excluding those who are prosecuted for non-political crimes (see, for instance, art. 14 of the Universal Declaration of Human Rights). For references to the Bath definition see, inter alia, Grahl-Madsen, Alte. *The Status of Refugees in International Law* (Leiden: Sijthoff, 1972), 3; Noll, Gregor. *Negotiating Asylum* (Leiden; Sijthoff, 2000), 15; Battjes, Hemme. *European Asylum Law and International Law* (Leiden: Martinus Nijhoff, 2006), 5; Gil-Bazo, María-Teresa. 'Asylum as a General Principle of International Law'. *International Journal of Refugee Studies* 27 (1) (2015), 3.

Hugo Grotius (1583–1645) is often identified as its founding father. Thus, in his influential study *Le droit d'asile* (1938), Egidio Reale observed that Grotius was the first to consider it not only a right, but a duty of states to offer a refuge to foreigners who had fled from persecution.<sup>4</sup> To support his interpretation, Reale quoted a passage from Grotius's magnum opus *De iure belli ac pacis* [On the Laws of War and Peace, 1625], where he argued that 'permanent residence ought not to be denied to foreigners who, expelled from their homes [*sedibus suis expulsi*], are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes'.<sup>5</sup>

Reale's identification of Grotius as the founder of the modern concept of asylum has become a standard interpretation in the literature. Thus, most scholars agree that Grotius was the first to recognize that states have a duty to offer asylum to foreigners who are innocently persecuted, provided that they do not harm the state that offers them a refuge.<sup>6</sup> Some even claim that Grotius recognized a subjective right to asylum based on the natural law principle that those in need have a right to use someone else's possessions (i.e., to dwell on another people's territory), so long as they do not harm them.<sup>7</sup> These scholars tend to relate Grotius's defence of a right to asylum to his own background as a political refugee from Holland, who spent most of his life in exile abroad.<sup>8</sup> However, this interpretation has been contested by Elke Tiessler-Marenda. In her detailed and careful study on Grotius, migration and asylum, she argues

4 Reale, Egidio. *Le droit d'asile* (Paris: Sirey, 1939 [1938]), 41.

5 Grotius, Hugo. *De iure belli ac pacis libri tres*, eds. Robert Feenstra and Bernadina Johanna Aritia de Kanter van Hettinga Tromp (Aalen: Scientia Verlag, 1993), 2.2.16: 'Sed et perpetua habitatio his qui sedibus suis expulsi receptum quaerunt deneganda non est externis, dum et imperium quod constitutum est subeant, et quae alia ad vitandas seditiones sunt necessaria.' Translated as Grotius, Hugo. *On the Law of War and Peace*, trans. Francis Willey Kelsey (Oxford: Clarendon Press, 1913), vol. 2, 2.2.16.

6 García-Mora, Manuel. *International Law and Asylum as a Human Right* (Washington: Public Affairs Press, 1959), 25–30; Kimminich, Otto. *Grundprobleme des Asylrechts* (Darmstadt: Wissenschaftliche Buchgesellschaft, 1983), 21; Landau, Peter. 'Rechtsphilosophische und rechtshistorische Überlegungen zum Asylgedanken', in *Wissenschaft und Philosophie: Interdisziplinäre Studien*, vol. 19: *Fremde, Migration und Asyl*, ed. Venanz Schubert (St. Ottilien, 1999), 317–319; Reuter, Hans-Richard. 'Kirchenasyl und staatliches Asylrecht', in *Das Recht der Kirche*, vol. 3: *Zur Praxis des Kirchenrechts*, eds. Gerhard Rau, Hans-Richard Reuter and Klaus Schlaich (Gütersloh: Kaiser Verlagshaus, 1994), 584–587.

7 Landau, 'Überlegungen' 1999 (n. 6), 317. Hans-Richard Reuter concludes that the *ius innoxiae utilitatis* implies 'something like a natural right of the refugee to asylum, of which one may say that it goes beyond a merely humanitarian duty'. Reuter, 'Kirchenasyl' 1994 (n. 6), 585.

8 Reale, *Asile* 1939 (n. 4), 40; García-Mora, *International Law* 1959 (n. 6), 25; Kimminich, *Grundprobleme* 1983 (n. 6), 21.

that the *expulsi* to which Grotius refers cannot be regarded as asylum-seekers and that the passage from *De iure belli* quoted by Reale and others does not relate to asylum at all.<sup>9</sup> Interpreting the examples mentioned by Grotius in *De iure belli*, she concludes that the *expulsi* are foreigners who have been driven from their homes by war, rather than those who fled from religious or political persecution.<sup>10</sup> Indeed, as she points out, Grotius expressly excludes those guilty of crimes against the state, i.e., political crimes, from the right to asylum. This implies that political refugees should either be punished or extradited.<sup>11</sup> 'Therefore', Tiessler-Marenda concludes, 'Grotius is not a precursor of modern political asylum, let alone of a subjective right to asylum'.<sup>12</sup> Rather, the very persons to which the modern concept of asylum applies, i.e., those who are persecuted on political or religious grounds, seem to fall outside the scope of Grotius's concept of asylum.

Like the scholars she criticizes, Tiessler-Marenda focuses on Grotius's discussion of asylum in *De iure belli*. Strikingly, none of these scholars relates Grotius's remarks to his earlier work as a lawyer advocating the admission of religious refugees to Holland. By contrast, in this article, I intend to show that the general principle formulated by Grotius in *De iure belli*, that permanent residence ought not to be denied to foreigners who have been expelled from their homes, goes back to arguments which he had already developed in 1615, when he was commissioned by the States of Holland and West-Friesland to draft a set of legal regulations for Sephardi Jews who had been expelled from Spain and Portugal and taken refuge in the Dutch provinces. In the introduction to his draft, entitled *Remonstrantie*,<sup>13</sup> Grotius argued that the States of

9 Tiessler-Marenda, Elke. *Einwanderung und Asyl bei Hugo Grotius* (Berlin: Duncker und Humblot, 2002), 205.

10 She observes that the 'prototype of the *expulsus* is a refugee from war [*Kriegsvertriebene*]. Grotius has in mind whole peoples, which he clearly says in *De iure belli*, 2.2.21. This is the reason why he emphasizes the duty of foreigners to submit to the given authority of the state [*imperium*']. *Ibid.*, 247.

11 *Ibid.*, 235.

12 *Ibid.*, 241.

13 De Groot, Hugo. *Remonstrantie nopen de ordre dije in de landen van Hollandt ende Westvrieslandt dijnt gestelt op de joden* [Remonstrance concerning the regulations to be imposed upon the Jews in the lands of Holland and West-Friesland, ca. 1615], Ets Haim Library Amsterdam, livraria D. Montezinos, MS EH 48 A 02. The manuscript is accessible online at <http://etshaimmanuscripts.nl/manuscripts/eh-48-a-02/>. A Dutch transcription of the text was published by Jaap Meijer in de Groot, Hugo. *Remonstrantie*, ed. Jaap Meijer (Amsterdam, 1949), 107–132. At the initiative of the Morasha Foundation, a new facsimile edition of Grotius's manuscript is currently being prepared by David Kromhout and Adri Offenbergh. This edition will also include a historical introduction, a Dutch transcription and an English translation of the manuscript. It is scheduled to appear in 2019 with Brill

Holland and West-Friesland had a duty under natural law to offer hospitality to the Jews, irrespective of their religious background. This implied that they should be allowed to settle in the Dutch provinces on the condition that they submitted to local regulations (i.e., Grotius's draft regulations). Tracing Grotius's remarks regarding expulsion and asylum in *De iure belli* back to arguments he had developed in the *Remonstrantie* will enable us to identify the *expulsi* as foreigners who have fled from religious persecution. Moreover, it will allow us to better understand the duties of states towards these *expulsi* as well as the conditions for their admission and settlement.

The central question addressed in this article is whether Grotius should be regarded as the founder of the modern concept of asylum. I believe that Tiessler-Marenda is right to conclude that he is not a precursor of modern *political* asylum. He thus expressly excludes those who have committed crimes against the state, that is, political crimes, from the right to asylum. However, this does not mean that Grotius denies legal protection to victims of *religious* persecution. Instead, in his *Remonstrantie*, he invokes the law of hospitality to justify admission of the Jews, who have been collectively expelled for religious reasons. Grotius does not regard these Jews as asylum-seekers, but as *expulsi*: they should not be offered asylum in the traditional sense of immunity from extradition (as no government demands their extradition), but collective settlement privileges. While *asylum-seekers* should be provided with a *temporary* refuge, until a milder punishment or due process has been negotiated, *expulsi* should be offered *permanent* residence, as they cannot return to the communities from which they have been expelled. By comparing Grotius's views on the duties of hospitality to those of the Spanish jurist-theologian Francisco de Vitoria (1483–1546), I intend to show that Grotius is the first to argue that under the law of nature, states have an obligation to offer *permanent* residence to those who have been *collectively* expelled for *religious reasons*. Although he does not relate the protection of these *expulsi* to the concept of asylum – relating it instead to the concepts of ‘exile’ and ‘expulsion’ – he does anticipate the modern view that legal protection should be offered to victims of (religious) persecution.

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publishers in Leiden. For a detailed analysis of the 49 articles of Grotius's draft regulations and its underlying justifications: see de Wilde, Marc. ‘Offering Hospitality to Strangers: Hugo Grotius's Draft Regulations for the Jews’. *Tijdschrift voor rechtsgeschiedenis* 85 (3–4) (2017), 391–433.

## 1 Hospitality as an Argument for Colonial Expansion

It was Vitoria who first introduced the concept of a natural duty to offer hospitality to strangers as an argument for justifying the Spanish colonization of the Americas. In his first lecture on the American Indians [*De Indis insularis relectio prior*, 1537], he criticized existing justifications of the Spanish conquest of Indian lands.<sup>14</sup> Amongst other things, he rejected the claim that, prior to the arrival of the *conquistadores*, the Indians had lacked the private and public dominion of their lands. This implied that the Spaniards could not claim their lands by right of discovery. More particularly, Vitoria held that the Indians could not be deprived of their lands on the mere ground of their unbelief; nor could they be dispossessed for their refusal to accept the Christian faith.<sup>15</sup> Having rejected these and other justifications of Spanish conquest, Vitoria turned to the 'just titles by which the barbarians of the New World passed under the rule of the Spaniards'.<sup>16</sup> The first of these was the 'title of natural partnership and communication [*titulus naturalis societatis et communicationis*]: the Spaniards had a right to travel and dwell in the Americas, so long as they did not harm the Indians.<sup>17</sup> To prove the existence of this right, Vitoria invoked the law of hospitality, observing that '[a]mongst all nations it is considered inhuman to treat strangers and travelers badly without some special cause, [and] humane and dutiful to behave hospitable to strangers'.<sup>18</sup> According to Vitoria, the duty to offer hospitality to strangers was part of the *ius gentium* which, in turn, was either part of, or derived from, the *ius naturale* – therefore,

14 Surviving manuscripts of the lecture have different titles: *Relectio de Indis*, *De Indis insularis prior* and *De Indis recenter inventis relectio prior*. I have used the first printed edition: de Vitoria, Francisco. 'De Indis insularis relectio prior', in Francisco de Vitoria, *Relectiones theologiae XII* (Lyon: Jacob Boyerius, 1557), vol. 2, 282–374. Translated as de Vitoria, Francisco. 'De Indis', in Francisco de Vitoria, *Political Writings*, ed. and trans. Anthony Pagden and Jeremy Lawrance (Cambridge: Cambridge University Press, 1991), 231–292. I have quoted Vitoria's *De Indis* after the 1557 edition, because it was the edition used by Grotius. See Robert Feenstra's additional notes in Grotius, *De iure belli* 1993 (n. 5), 940 (note 77) and 1068.

15 Vitoria, *De Indis* 1557 (n. 14), 1.3 and Grotius, *De iure belli* 1993 (n. 5), 1.3. For a more detailed account of Vitoria's rejection of unbelief as a ground for dispossessing the Indians, see Deckers, Daniel. *Gerechtigkeit und Recht: Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483–1546)* (Freiburg: Verlag Herder, 1991), 218–226 and 230–231.

16 Vitoria, *De Indis* 1557 (n. 14), 3.

17 *Ibid.*, 3.1.1.

18 *Ibid.*, 3.1.2: 'Sic enim apud omnes nationes habetur inhumanum sine aliqua speciali causa hospites & peregrinos male accipere: e contrario autem humanum, & officiosum, se habere bene erga hospites'.



it was binding for Christians as well as Indians. As Vitoria suggested, by refusing to allow 'harmless' Spanish merchants and missionaries to travel and dwell in their lands, the Indians had violated their natural duty to offer hospitality to strangers. In his view, this even constituted a just cause for war if the Indians continued to refuse admission and 'deny the Spaniards what is theirs by the law of nations'.<sup>19</sup>

As Georg Cavallar explains in his monograph on *The Rights of Strangers*, for Vitoria, the law of hospitality implied various entitlements, including a right to travel (*ius perigrinandi*) and to dwell in the Americas, a right to trade with the Indians, a right to use their 'common property' (including seas, shores, harbours and rivers), a right of children born in the Americas to become citizens of local communities, and a right not to be expelled without a just cause.<sup>20</sup> For Vitoria, these rights were interdependent: for instance, the right to trade required a right to visit and this, in turn, required a right to navigate the seas and rivers and use local ports. Moreover, for merchants and missionaries visiting the Americas in the sixteenth century, it was almost inevitable that they stayed there for extended tracts of time, as the change of seasons or winds prevented them from returning home: hence, for Vitoria, the right to visit required a right to dwell in Indian lands as well.<sup>21</sup> In other words, the law of hospitality, which originated from nature, implied not only a right to travel to foreign lands, but a whole set of interdependent rights, including a right to trade, to use common resources, and to dwell in these lands, at least temporarily, as well as a right not to be expelled without a just cause.

For Vitoria, these hospitality rights were justified by the doctrine of canon law that the world had originally belonged to men in common.<sup>22</sup> According to this doctrine, private property had only been introduced as part of man-made law and, more particularly, the *ius gentium*, yet it did not apply to things that could not be divided, such as the ocean and flowing waters. More importantly, private property was believed to be in accordance with natural law only to the extent that it benefitted mankind as a whole: this implied that, in spite of the *divisio rerum*, trade and commerce should remain possible to facilitate

19 Ibid., 3.1.6: 'Sed barbari prohibentes iure gentium Hispanos, faciunt eis iniuriam: ergo si necesse sit ad obtinendum ius suum bellum gerere, possunt hoc licite facere.'

20 Cavallar, Georg. *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice since Vitoria* (Aldershot: Ashgate, 2002), 108.

21 Ibid., 108.

22 The most influential medieval accounts of this doctrine can be found in Gratianus, *Decretum* [ca. 1140], in *Corpus iuris canonici*, ed. Emil Friedberg (Graz: Akademische Druck- u. Verlagsanstalt, 1959), D. 1, c. 7 and Aquinas, Thomas. *Summa theologiae*, ed. and trans. Thomas Gilby (London: Blackfriars, 1975), 2 2ae, q.66, art. 2.



the exchange of goods which were superfluous to some and scarce to others. As Vitoria explained: '[T]his right [to travel and visit foreign lands, MdW] was clearly not taken away by the division of property: it was never the intention of nations to prevent men's free mutual intercourse with one another by this division'.<sup>23</sup> Crucially, Vitoria argued that the natural duty to offer hospitality to strangers, which served as a precondition for commerce and trade, did not depend on the consent of local populations: hence, it could not be limited, or revoked, by the Indians.<sup>24</sup> The only exception was if the Spaniards intended evil or caused harm, but for the moment, Vitoria was willing to assume that this was not the case. He thus concluded that, '[s]ince travels of the Spaniards are (as we may for the moment assume) neither harmful nor detrimental to the barbarians, they are lawful'.<sup>25</sup>

It was by reading Vitoria's *De Indis* that Grotius first became aware of the natural duty to offer hospitality to strangers and its importance for justifying colonial expansion. In his *De iure praedae commentarius* [*Commentary on the Law of Prize and Booty*, 1606], written on commission for the Dutch East India Company (VOC), Grotius gave a detailed account of Vitoria's lecture on the American Indians, focusing on what he called the 'sacrosanct law of hospitality

23 Vitoria, *De Indis* 1557 (n. 14), 3.1.2: 'Non autem videtur hoc demptum per rerum divisionem numquam enim fuit intentio gentium per illam divisionem tollere hominum invicem communicationem'.

24 *Ibid.*, 3.1.2. By contrast, some of Vitoria's pupils and successors, including Bartolomé de Caranza, Diego de Covarrubias, Bartolomé de las Casas and Domingo de Soto, concluded that under the *ius gentium*, hospitality rights *did* depend on the consent of local communities. For instance, Soto argued that foreigners were not allowed to seize the common possessions of a community, even if they were not used, 'without the consent of those who live there'. de Soto, Domingo. *De iustitia et iure* (Salamanca: Ioannes Baptista, 1569) 5.3.3. Trans. in Pagden, Anthony. *Lords of All the World: Ideologies of Empire in Spain, Britain and France, c. 1500 – c. 1800* (New Haven: Yale University Press, 1995), 52. Quoted in Cavallar, *Rights of Strangers* 2002 (n. 20), 111.

25 Vitoria, *De Indis* 1557 (n. 14), 3.1.2: 'Sed (ut supponimus) talis peregrinatio Hispanorum est sine iniuria aut damno barbarorum: ergo est licitum'. As Cavallar observes, the words between brackets are decisive: in view of the actual behavior of the Spaniards in the New World, the assumption that they had come as harmless travellers was of course open to debate. It would be contested by one of Vitoria's pupils, Melchor Cano, who somewhat ironically suggested that '[w]e would not be prepared to describe Alexander the Great as a "traveler" either'. Melchor Cano, *De domino Indorum*, Bibliotheca Vaticana MS Lat. 4648, fol. 39v. Translation in Pagden, Anthony. 'Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians', in *Theories of Empire, 1450–1800*, ed. David Armitage (Aldershot: Ashgate, 1998), 169. Cf. Cavallar, *Rights of Strangers* 2002 (n. 20), 112 and 114.

[*ius hospitale sanctissimum*].<sup>26</sup> Even more straightforwardly than Vitoria, he emphasized the commercial roots of hospitality:

Vitoria holds that, if the Spaniards should be prohibited by the American Indians from travelling or residing among the latter, or if they should be prevented from sharing in those things which are common property under the law of nations or by custom – if, in short, they should be debarred from the practice of commerce – these causes might serve them as just grounds for war against the Indians; and, indeed, as grounds more plausible than others.<sup>27</sup>

Like Vitoria, Grotius argued that the *divisio rerum* had made trade and commerce a necessity, as natural resources were unequally distributed among the nations. He also accepted Vitoria's argument that the law of hospitality and the right to engage in commerce did not depend on the local ruler's consent:

The right to engage in commerce pertains equally to all peoples; and jurisconsults of the greatest renown extend the application of this principle to the point where they deny that any state or prince has the power to issue a general prohibition forbidding others to enjoy access to or trade with the subjects of that state or prince.<sup>28</sup>

However, unlike Vitoria, Grotius extended the scope of the law of hospitality to include not only the host community (e.g., the Indians), but also potential competitors (e.g., the Portuguese for the Dutch). For Grotius, the 'sacrosanct law of hospitality' thus implied a universal right to engage in trade and commerce, which, according to custom and the law of nations, could not be limited or prohibited by anyone, provided that foreign merchants arrived in good faith and intended no harm.

26 Grotius, Hugo. *De iure praedae commentarius*, ed. Hendrik Gerard Hamaker (The Hague: Martinus Nijhoff, 1868), 206. Translated as: Grotius, Hugo. *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum (Indianapolis: Liberty Fund, 2006), 304.

27 *Ibid.*, 206–207/304–305: 'Castellanis etiam in Americanos has justas potuisse belli causas esse et caeteris probabiliores Victoria putat, si peregrinari et degere apud illos prohiberentur, si arcerentur a participatione earum rerum, quae jure gentium aut moribus communia sunt, si denique ad commercia non admitterentur'.

28 *Ibid.*, 206/305: 'Hoc igitur jus ad cunctas gentes aequaliter pertinet: quod clarissimi jurisconsulti eousque producunt, ut negent ullam rempublicam aut Principem prohibere in universum posse, quominus alii ad subditos suos accedant et cum illis negotientur'.

For both Grotius and Vitoria, the law of hospitality served particular strategic purposes which were related to colonial contexts: for Vitoria, it served to legitimize the Church's project of evangelization of the Indians in the New World; for Grotius, it served to justify the economic struggle of the Dutch against their competitors in the East Indies. In both cases, it required that the law of hospitality and the commercial rights it implied were confirmed on the basis of the law of nature and made independent of religious belief. More particularly, it rested on the assumption that native populations – whether American Indians or the populations of the East Indies – had public and private dominion of their lands, of which they could not be deprived on the sole ground of their unbelief, as well as a right (and duty) to engage in commerce and trade with foreigners. However, by projecting the law of hospitality onto different contexts, Grotius gave it a new meaning, exploring its potential for being reinterpreted in unexpected ways. Thus, unlike Vitoria, Grotius came to recognize it as legal ground for offering a refuge to foreigners who had been expelled from their communities for religious reasons. More particularly, it enabled him to argue that these foreigners had a right to be admitted and dwell in Christian lands, provided that they did not cause harm to the Christian religion or the state. It was thus almost a decade after completing *De iure praedae* that Grotius returned to Vitoria's law of hospitality in his *Remonstrantie*, this time invoking it to advocate the admission of Sephardi Jews to the provinces of Holland and West-Friesland.

Contrary to the interpretation I propose in this paper, Richard Tuck has argued that it is a mistake to regard Grotius as an heir to the tradition of Vitoria. Instead, in Tuck's view, Grotius was 'an heir to the tradition Vitoria most mistrusted, that of humanist jurisprudence'.<sup>29</sup> More particularly, Tuck contends that in *De iure praedae* and *De iure belli*, Grotius 'took the old humanist account of the pursuit of self-interest by individuals or cities, and made it the foundation of an account of rights'.<sup>30</sup> On Tuck's reading, Grotius was therefore at 'pains to stress that self-preservation was the prior obligation' and this meant that 'it was only if one's own preservation was secured that one would be obliged to care about the preservation of another person'.<sup>31</sup> Hence, according to Tuck, Grotius defended a 'thin notion of human sociability' which 'extended only as far as was necessary to justify the right of punishment' and, more par-

29 Tuck, Richard. *The Rights of War and Peace: Political Thought in the International Order From Grotius to Kant* (Oxford: Oxford University Press, 2009), 108.

30 Ibid., 90.

31 Ibid., 86. See also Tuck, Richard. *Philosophy and Government, 1572–1651* (Cambridge: Cambridge University Press, 1993), 174.

ticularly, the right of the Dutch to punish their colonial competitors as well as local authorities in the East Indies that prevented them from trading with native populations.<sup>32</sup> Despite the merits of Tuck's interpretation for drawing out the colonialist implications of Grotius's theory, my impression is that he underestimates both the influence of Vitoria and the extent to which Grotius's theory could, in other contexts, serve as an argument for aiding, rather than dispossessing, foreigners. More particularly, as I intend to show in this paper, Grotius would use Vitoria's concept of hospitality to advocate the admission of foreigners who had been expelled for religious reasons and were seeking a new place to live.<sup>33</sup> Thus, rather than providing an 'extremely minimal picture of the natural moral life', as Tuck contends, Grotius's theory of hospitality had two sides: it could serve both as a justification for colonial expansion and as an argument for aiding religious refugees who had been collectively expelled.

## 2 Grotius's Arguments for Admission of the Jews

From the 1590s on, Sephardi Jews from Spain and Portugal had settled in the provinces of Holland and West-Friesland, in particular, in Amsterdam.<sup>34</sup> They included many so-called 'new Christians', whose ancestors had been forced to convert to Christianity, but who had maintained the stigma of being Jews. Suspected of being insincere Christians, who had secretly kept their Jewish faith, they were persecuted by the Spanish and Portuguese Inquisition. Fleeing from persecution, and attracted by economic opportunity, many sought refuge in Holland, which, in previous decades, had successfully revolted against Spain.<sup>35</sup>

32 Tuck, *The Rights of War and Peace* 2009 (n. 29), 88–89.

33 Indeed, the very 'duty to permit exiles to settle', to which Tuck refers (*ibid.*, 104), does not fit into a one-sided colonialist narrative: of course, the Dutch could not be regarded as 'exiles' who had a 'right to settle' in the East Indies. Instead, as I will argue, Grotius was referring to a duty of states (including the States of Holland and West-Friesland) to offer hospitality to those who had been collectively expelled.

34 This section summarizes the more extensive analysis of Grotius's *Remonstrantie* and its historical backgrounds, which I provide in my 'Offering Hospitality to Strangers' 2017 (n. 13). See also: Fuks-Mansfeld, Renate Gertrud. *De Sefardim in Amsterdam tot 1795: Aspecten van een joodse minderheid in een Hollandse stad* (Hilversum: Verloren, 1989), 38.

35 In his *Nederlandsche Jaerboeken en Historiën*, Grotius refers to the arrival of Portuguese Jews in the year 1598: 'refugees from Portugal, being part of the remaining Jews in that realm, led by fear for inquisition of their ancestral religion, and others by hope for more profit, have also preferred the greatness of the city of Amsterdam above others'. De Groot, Hugo. *Nederlandsche Jaerboeken en Historiën* (Amsterdam: Weduwe van Johan van Someren etc., 1681), 330.

Although they were initially admitted to the Dutch cities on the presumption that they were Christians,<sup>36</sup> they soon began to manifest themselves openly as Jews. True to the freedom of conscience, which had been laid down in the Union of Utrecht,<sup>37</sup> the Dutch authorities did not actively prevent them from returning to their ancestral faith.<sup>38</sup> However, in 1615, fears about Dutch Christians (Mennonites) converting to Judaism prompted the States of Holland and West-Friesland to specify the conditions for their admission and settlement. The States therefore commissioned the pensionaries of Rotterdam and Amsterdam, Hugo Grotius and Adriaan Pauw, to draft a 'set of regulations [*reglement*] with which the Jews (residing in these lands) will have to comply for the prevention of all scandals, offences and sanctions [*tot weeringhe van alle schandalen, ergernissen ende sancties*]'.<sup>39</sup>

In the extensive introduction to his draft regulations, Grotius gives several arguments for allowing the Jews to settle in the Dutch provinces. His main argument is that under natural law, states have a duty to offer hospitality to strangers. Quoting from the *Digest*,<sup>40</sup> he explains that a 'certain kinship is established between all human beings by nature' (fol. 6r, 110). From this natural community among men follows the duty to offer hospitality to strangers, which is confirmed by Christian and pagan sources:

From this natural community, which exists between all human beings, originates the hospitality, which is recommended to us not only by Scripture, but also by pagan writers, which consists in receiving foreigners and treating [them] well. Nations that have refused to receive foreigners are denounced everywhere as barbarians and unnatural men (fol. 6r–6v, 110–111).<sup>41</sup>

36 Thus, in 1598, Amsterdam granted Portuguese merchants the right to purchase citizenship rights (poortersrecht), on the condition that 'they are Christians and will live an honest life as good burghers'. Resolution of the City Council of 4 September 1598, in: Bontemantel, Hans. *De Regeeringe van Amsterdam, soo in 't civiel als crimineel en militaire, 1653–1672*, ed. Gerhard Wilhelm Kernkamp (The Hague: Nijhoff, 1897), vol. 1, cxxxii.

37 Article 13 of the Union of Utrecht prescribed that 'every private person shall be allowed to remain free in his religion and no one shall be seized or examined because of his religion'.

38 Swetschinski, Daniel. *Reluctant Cosmopolitans: The Portuguese Jews of Seventeenth-Century Amsterdam* (Oxford: The Littmann Library of Jewish Civilization, 2004), 4.

39 *Register van Holland en West Vriesland van de jaaren 1613–1619*, 4 March 1615. For a more extensive analysis of the developments that led to the States' resolution, see de Wilde. 'Offering Hospitality to Strangers' 2017 (n. 13).

40 D. 1, 1, 3 (Florentinus): 'cum inter nos cognationem quandam natura constituit'.

41 'Vuijt dese natuerlijcke gemeenschap, dije tusschen alle menschen is, spruijt mede de hospitaliteit, dije ons nijet alleen bij de Schriftuijre, maer oock bij de Heijdensche

As Grotius explains, the duty to offer hospitality to strangers consists of the obligation to receive foreigners and to treat them well. By contrast, those nations that refuse to receive foreigners without some special cause are denounced as barbarians and unnatural men, because they violate their obligations under natural law. To prove the existence of a natural duty to offer hospitality to strangers, Grotius quotes Cicero<sup>42</sup> and Virgil<sup>43</sup> and refers *in margine* to several passages in Scripture,<sup>44</sup> including Hebrews 13:2: 'Do not neglect to show hospitality to strangers, for thereby some have entertained angels unawares'. However, he also emphasizes that the natural duty to offer hospitality to strangers does not depend on religious belief: 'Belief, which is above nature, does not take away that which belongs to nature' (fol. 6r, 110).<sup>45</sup> In other words: the duty to offer hospitality to strangers, which is part of the law of nature, exists irrespective of religious belief (even if it is confirmed by Christian sources).<sup>46</sup>

Grotius's assertion that the duty to offer hospitality to strangers applies irrespective of religious belief is crucial, for it implies that hospitality should be offered, not only to Christians, but also to non-Christians such as Jews. According to Grotius, this is confirmed by Scripture:

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Schrijvers werdt gerecommandeert, de welcke bestaet in het ontfangen ende wel tracteren van Vremdelingen. De natien, dije de Vremdelingen van haer hebben geweest, werden over alle gescholden voor Barbaren ende onnatuijrljcke menschen'.

42 Cicero, *De officiis*, I, 9, 30: 'Homo sum humani a me nihil alienum puto [nothing that concerns man is foreign to him]'.

43 Virgil, *Aeneid*, I, 539–540: 'Quod genus hoc hominum, quaeve hunc tam barbara morem. Permittit patria? Hospitio prohibemur harenae [What race of men is this? What land is so barbarous as to allow this custom? We are debarred the welcome of the beach]'. As Annabel Brett has showed, the same verses from Virgil had been applied within the Dominican tradition in the context of migration of the poor. For instance, in the sixteenth century, Dominicans at Ypres had protested against new regulations (*Forma*) prescribing that the native or 'internal' poor should be preferred to foreigners on the grounds that it was impossible to satisfy the needs of all. Protesting against this rule, the prior of Ypres Dominicans invoked the verses from Virgil to argue that 'keeping the poor away from the gates and forbidding them air and water (as the saying goes) like public enemies' seemed to 'accord little with the sacred laws'. Quoted in Brett, Annabel. *Changes of State* (Princeton: Princeton University Press, 2011), 19.

44 The manuscript contains a marginal note referring to Deut. 10:19, Rom. 12:13 and Hebr. 13:2.

45 Citing the same passage from the *Digest* (D.1.1.3), Grotius will later explain in *De iure belli ac pacis* that man is by nature invested with an *appetitus societatis*, an inclination to live in well-ordered communities with others, from which the laws of nature originate. In this context, he famously argues that the laws of nature would remain valid even if God would not exist or would not take care of human affairs, adding that the latter cannot be asserted without the greatest wickedness. Grotius, *De iure belli* 1993 (n. 5), prol. 11.

46 See de Wilde. 'Offering Hospitality to Strangers' 2017 (n. 13), 410–411.



If the Apostle Paul wants us to do good to all persons, in particular to those belonging to the same Faith [*de huijsgenoten des Gelooffs*], he demands a higher level of love between the believers, yet he does not exclude unbelievers from this love. Our Lord himself, where he reprimands the Jews, gives us instruction as to what we ought to do, teaching us by the example of the Samaritan that all human beings, those of other religions as well, are equally dear to us. 'Act like your Father, who lets his sun shine and his rain fall on the good and the evil' (fol. 6v, 111).<sup>47</sup>

According to Grotius, Scripture itself demands that the faithful should demonstrate their 'natural love' not only to their fellow believers, but also to those with different religious beliefs. In an early treatise *De societate publica cum infidelibus* [On the Public Community with Infidels, undated autograph], Grotius had invoked the same combination of biblical verses to argue that Christians should confer their charity on unbelievers, although 'greater charity should be demonstrated to believers than to unbelievers'.<sup>48</sup> In his *Remonstrantie*, he concludes that Christians should 'demonstrate to all persons the common works of natural love, without excluding anyone' (fol. 6v–7r, 111). This implies that Christians have a duty to offer hospitality, not only to Christians, but also to non-Christians, like the Jews.

Although Grotius invokes biblical and classical sources to prove the existence of a duty to offer hospitality to strangers, a more direct source seems to have been Vitoria's lecture on the American Indians. In his *Remonstrantie*, Grotius does not mention Vitoria. However, to justify the existence of the natural duty to offer hospitality to strangers, he does refer to the same sources as Vitoria. He quotes the same verses from Virgil's *Aeneid* (1, 539–540), the same fragment from the *Digest* (D.1.1.3) and refers to the same passages from Scripture, including the parable of the Samaritan (Luke 10:29–37) and the verses from Matthew (Matt. 5:45).<sup>49</sup> This suggests that he borrowed these references directly from Vitoria's lecture.<sup>50</sup> Grotius follows Vitoria in arguing that the duty to

47 Ibid. 411. Cf. Matt. 5:45 and Luke 10:29–37.

48 Grotius, Hugo. *De societate publica cum infidelibus*, Leiden University Library, Rare Book Department, MS. BPL, 922, fol. 315r: 'Maior charitas erga fideles quam erga infideles demonstranda est'.

49 Grotius, *Remonstrantie* 1615 (n. 13), fol. 6r–6v, 110–111 and Vitoria, *De Indis* 1557 (n.14), 1.2.6, 3.1.2 and 3.1.3.

50 The alternative possibility that Grotius used another secondary source seems less likely, since he had also referred to these sources in *De iure praedae* in the context of his discussion of Vitoria's *De Indis* (see, for instance, Grotius's references to Vitoria and Virgil in *De iure praedae*, 206/304). Moreover, it is important to note that the manuscripts of the *Remonstrantie* and *De iure praedae* (as well as *De societate publica* and other texts)



offer hospitality to strangers is part of the law of nations, which in turn is either part of, or derives from, natural law. Like Vitoria, he suggests that amongst all nations, it is considered unnatural and inhuman to refuse to receive strangers and travellers or to treat them badly without some special cause. Moreover, he emphasizes that the law of hospitality exists independently of religious belief (even though it is confirmed by Scripture). However, while Vitoria had used this argument to claim that the Indians as non-Christians had a natural duty to admit the 'harmless' Spanish traders and missionaries to their lands, Grotius suggests that the Dutch as Christians have a natural duty to offer hospitality to the Jews, irrespective of their religious belief. What used to be an argument for asserting the legal duties of non-Christian peoples (e.g., the Indians) is thereby turned into an argument for asserting the legal duties of Christian communities (e.g., the Dutch provinces) towards non-Christian peoples (e.g., the Jews).

Even more striking is Grotius's reinterpretation of Vitoria's law of hospitality in relation to the concept of exile. In *De Indis*, Vitoria had briefly discussed exile as a counterexample of hospitality: 'Exile is counted amongst the punishments for capital crimes, and therefore it is not lawful to banish visitors who are innocent of any crimes'.<sup>51</sup> He thereby referred to the expulsion of Spanish missionaries and merchants from Indian lands. Since exile was considered a capital punishment, it could not be imposed without a capital crime. Hence, if the Indians had expelled innocent Spanish travellers and visitors from their lands, they had violated the natural law of hospitality, for which they could be punished by the seizure of their lands. In his *Remonstrantie*, Grotius follows Vitoria in relating the law of hospitality to the concept of exile: 'exile conflicts with nature, as cutting off the community which nature establishes, and is therefore a punishment which should not be imposed without a prior crime'.<sup>52</sup>

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were originally bound together as one volume, entitled *Collectanea juridica et politica*. This volume was preserved intact until its contents were auctioned separately in 1864. Although we do not know why these texts from different periods were bound together, it is not unlikely that Grotius believed they belonged together because of their (related) content. This implies that the *Remonstrantie* should be read and interpreted against the background of *De iure praedae*, that is, against the background of Grotius's attempt to justify Dutch colonial expansion in the East Indies, and the natural rights to hospitality, commerce and trade it entailed. Van Eysinga, Willem Jan Mari and L.J. Noordhoff, eds. *Catalogue de manuscrits autographes de Hugo Grotius* (The Hague: Nijhoff, 1952), 25, lots 72 (*De iure praedae*) and 73 (*Remonstrantie*).

51 Vitoria, *De Indis* 1557 (n. 14), 3.1.2: 'Exilium est poena etiam inter capitales, ergo non licet relegare hospites sine culpa'.

52 De Groot, *Remonstrantie* 1615 (n. 13), fol. 7r, 111: 'Bannissement strijft met de natuijre, als affsnijddende de gemeenschap dije de natuijre instelt, ende is daerom een straffe, dije nijet en behoort te geschijeden dan nae voorgaende delict'.

Like Vitoria, Grotius suggests that exile is a punishment which may not be imposed without a prior crime. However, while Vitoria had invoked this argument to denounce the expulsion of 'harmless' Spanish merchants and missionaries from Indian lands, Grotius uses it to criticize the expulsion of innocent Jews from Spain and Portugal. More particularly, he criticizes the fact that the Jews had been *collectively* expelled for religious reasons, without *individual* offences being proved before a court of law, which he considers a violation of natural law (fol. 8r–8v, 112). He therefore concludes that the law of hospitality demands that the Jews be admitted to the provinces of Holland and West-Friesland, so that they are once again included in the natural community of men, from which they have been unlawfully expelled.

In his *Remonstrantie*, Grotius identifies the Jews as victims of religious persecution, arguing that the States of Holland and West-Friesland have a duty to offer them hospitality because they have been collectively expelled for religious reasons. Grotius observes that the Jews have fallen prey to the 'avarice of Princes' and the 'blind zeal of the people' who, 'without form of Justice, having deprived [them] of life and goods, have thereupon looked for a pretext to cover it up'.<sup>53</sup> He criticizes these 'Christian Princes' for regarding the Jews as their 'slaves' and freely disposing of their persons and possessions. In particular, he blames them for allowing the Jews to engage in usury before 'squeezing [them] like sponges' – apparently a reference to practices of discriminatory taxation (fol. 8r, 112). Grotius's reference to the 'blind zeal of the people [*den blinden ijver van 't volck*]' relates to the people's accusation that the Jews as a 'nation' were harming Christians, which served as a 'pretext [*couleur*]' for depriving them of their lives and goods. Although Grotius is not free of anti-Jewish prejudice himself, blaming the Jews for their 'hatred of Christians' (fol. 3r, 108), he suggests that Christian authorities, by allowing the Jews to be maltreated, have contributed to their hatred:

Let God grant that the Christians were not partly the cause of the hatred which the Jews bear against them. It is known how they are treated in many places. They are mocked, abused, pulled at, beaten, thrown at, not only with knowledge, but to a certain extent with approval of the authorities.<sup>54</sup>

53 Ibid., fol. 8v, 113: 'Dat op eenige plaetsen dije gijericheijt van de Princen op anderen den blinden ijver van t' volck de Joden, sonder forme van Justitie, van leven ofte goedt berooft hebbende, daernaec den couleur heeft gesocht om t' selve te bedecken'.

54 Ibid., fol. 7v–8r, 112: 'Godt gave, dat nijet de Christenen ten deele oorsaeck waeren van den haet dije de Joden hemluiden toedraegen. Men weet, hoe zij op veele plaetsen werden getracteert. Men bespot haer, men beschimpt haer, men treckt haer, men slaet haer,

Most importantly, Grotius criticizes the fact that the Jews have been deprived of their lives and possessions ‘without form of Justice [*sonder forme van Justitie*]’: he is particularly critical of the fact that they have been *collectively persecuted*, rather than *individually prosecuted*. Although Grotius concedes that the Jews have done the Christians a ‘great deal of harm’, he also suggests that ‘the Christians being masters, this can be prevented by good laws and close supervision, without it being necessary to expel the Jews altogether for offences which cannot be attributed to each individually, but only to their race’.<sup>55</sup> Thus, criticizing the *collective* expulsion of the Jews on grounds of religion, Grotius concludes that the States of Holland and West-Friesland have a duty to offer them hospitality, provided that they observe local regulations meant to prevent them from causing harm to the Christian religion and state.

### 3 The State’s Duties towards Foreigners

Grotius’s draft regulations for the Jews were never formally adopted by the States of Holland and West-Friesland, and it was ultimately left to the cities to regulate the conditions for their admission and settlement.<sup>56</sup> However, Grotius’s reflections on the rights of the Jews were crucial for the development of his own views on exile and asylum in his later writings. Thus, in *De iure belli ac pacis*, Grotius returned to the question of whether foreigners who had been expelled from their communities should be admitted. The context is a chapter on ‘things belonging to men in common’.<sup>57</sup> Revisiting arguments from *De iure praedae*, Grotius explains that, although the world originally belonged to men in common, it has become subject to private ownership by a ‘kind of agreement, either expressed, as by division, or implied, as by occupation’.<sup>58</sup> However, certain parts of the world, such as the open seas, cannot become subject to private ownership. To support his thesis, Grotius invokes moral grounds, i.e., that the ocean is so great that it suffices for any possible use on the part of all

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men werptse nae, nijet alleen met conniventie, maer eenichsins met approbatie van de Overheijt’.

55 Ibid., fol. 8r–8v, 112: ‘Maer daer de Christenen meesters zijn can het selve met goede wetten ende scharpe toesichte belet werden, sonder dat van noode is de Joden allegader te bannen om delicten dije nijet ijdere persoon maer alleen haere natie raecken’.

56 Huussen, Arend. ‘Legislation on the Position of the Jews in the Dutch Republic, c. 1590–1796’. *Tijdschrift voor rechtsgeschiedenis* 69 (1–2) (2001), 50. See also de Wilde. ‘Offering Hospitality to Strangers’ 2017 (n. 14), 429–431.

57 Grotius, *De iure belli* 1993 (n. 5), 2.2: ‘De his, quae hominibus communiter competunt’.

58 Ibid., 2.2.2.5: ‘sed pacto quodam aut expresso, ut per divisionem, aut tacito, ut per occupationem’.

peoples, and 'natural reasons', i.e., that the sea cannot be divided or occupied (unlike lakes, ponds and rivers).<sup>59</sup> Moreover, he explains that private ownership has been introduced into human law with the reservation that it should depart as little as possible from the natural commonality of things.<sup>60</sup> This implies that foreigners have a right to cross lands, rivers, and any part of the sea that belongs to another people, so long as they cause no harm to the local population.<sup>61</sup> It also means that 'no one, in fact, has the right to hinder any nation from carrying on commerce with any other nation at distance'.<sup>62</sup> Invoking both Vitoria and Virgil,<sup>63</sup> Grotius explains that, under natural law, foreigners have a right to sojourn 'for the sake of health, or for any other good reason', provided that their presence is not detrimental to the local population.<sup>64</sup>

However, Grotius goes beyond Vitoria in suggesting that under certain conditions, the law of nature (i.e., the natural commonality of things) may imply a right, not only to *temporary* sojourn, but also to *permanent* residence for foreigners. He thus argues that:

permanent residence [*perpetua habitatio*] ought not to be denied to foreigners who, expelled from their homes [*sedibus suis expulsi*], are seeking a refuge, provided that they submit themselves to the established government and observe any regulations which are necessary in order to avoid strifes.<sup>65</sup>

As we have seen, in his *Remonstrantie*, Grotius had already argued that the Jews should be allowed to settle in the provinces of Holland and West-Friesland on the condition that they submitted to local regulations meant to prevent their

59 Ibid., 2.2.3.1–2.

60 Ibid., 2.2.6.

61 Ibid., 2.2.13. As Annabel Brett has pointed out, Grotius presents a positive perspective on the division of ownership as 'paradoxically fostering community': she explains that '[i]n this perspective, the things that were left in common – most prominently the sea (...) and the highways that connect different places – become a necessity of sociability, something that reinstates a lost communication that is nevertheless natural to man'. In this context, Brett emphasizes the theological connotation of restoring the lost communication, whereby trade, commerce and travel acquire significance as a *remedium peccati*. Brett, *Changes of State* 2011 (n. 43), 199.

62 Grotius, *De iure belli* 1993 (n. 5), 2.2.13.5: 'Nam quominus gens quaeque cum quavis gente seposita commercium colat, impediendi nemini ius est'.

63 Virgil, *Aeneid*, I. 543 et seq. and Vitoria, *De Indis* 1557 (n. 14), 3.1.2.

64 Grotius, *De iure belli* 1993 (n. 5), 2.2.15: 'valetudinis, aut alia qua justa de causa'.

65 Ibid., 2.2.16: 'Sed et perpetua habitatio his qui sedibus suis expulsi receptum quaerunt deneganda non est externis, dum et imperium quod constitutum est subeant, et quae alia ad vitandas seditiones sunt necessaria'.

presence from harming the Christian religion and the state. Moreover, Grotius had specifically related the duty of the States to admit the Jews to their predicament as exiles, and, more particularly, the fact that they had been *collectively* expelled for religious reasons, without any form of justice. In *De iure belli*, Grotius proposes a similar duty for *all* states towards *all expulsi*: permanent residence ought not to be denied to foreigners who have been expelled from their homes, on the condition that they submit to the established government and regulations meant to prevent strifes. What used to be an argument for justifying the admission of a particular group, i.e., Jews in the provinces of Holland and West-Friesland, is thereby turned into a general principle that, under the law of nations, permanent residence ought not to be denied to those who have been expelled, provided that they cause no harm to the state that offers them a refuge.

In *De iure belli*, the main criterion for offering permanent residence to *expulsi* seems to be their urgent need: permanent residence ought not to be denied to foreigners who have been expelled from their homes, because for them, there is an urgent necessity to be admitted. Here Grotius adopts the traditional doctrine of canon law that ‘in times of necessity all things become common [*in tempore necessitatis omnia sunt communia*]: ‘[h]ence it follows (...) that in direst need [*in gravissima necessitate*] the primitive right of user revives, as if community of ownership had remained, since in respect to all human laws – the law of ownership included – supreme necessity seems to have been excepted.’<sup>66</sup> This implies that states may not refuse foreigners from taking refuge in their lands (on the basis of a primitive right of user, which temporarily revives in times of necessity) if they have been expelled from their homes.<sup>67</sup> To prove this principle, Grotius refers to several examples of ancient peoples who were driven from their homes by war and allowed to settle among other peoples, including Aeneas and the Trojans.<sup>68</sup> He also quotes Strabo that

66 Ibid., 2.2.6: ‘Hinc primo sequitur, in gravissima necessitate reviviscere ius illud pristinum rebus utendi tanquam si communes mansissent: quia in omnibus legibus humanis, ac proinde et in lege domini, summa illa necessitas videtur excepta.’

67 Cf. Tiessler-Marenda, *Einwanderung 2002* (n. 9), 186: ‘They [the *expulsi*] are not persons who have left their fatherland more or less “voluntarily”, but rather those who have been expelled by war.’

68 Grotius, *De iure belli* 1993 (n. 5), 2.2.16. Brett recognizes in these passages from *De iure belli* a ‘deliberatively civilizing project’ and, more particularly, an attempt to restore the norms of hospitality that were characteristic of ancient civilizations: ‘This ancient cultural sensibility is one in which place is central, but also in which for that very reason persons of their own place, away from home, have to be treated as *hospites*, “guests”, with peculiar respect. Hospitality is a situated practice, a moral requirement of a world of place and displacement’. Brett, *Changes of State* 2011 (n. 43), 199.

'[i]t is characteristic of barbarians to drive away strangers' – a quote which may have inspired his own observation in the *Remonstrantie* that 'nations that have refused to receive foreigners are denounced everywhere as barbarians and unnatural men' (fol. 6v, 111). However, in this context, Grotius emphasizes that the duty to admit foreigners exists only to the extent that they do not cause harm to the state that offers them a refuge. To demonstrate this, he refers to the example of Aeneas and the Trojans who were allowed to settle in Italy only after recognizing the 'inviolable' sovereignty of king Latinus.<sup>69</sup> As a negative example he mentions the Minyae, who demanded a share in government after being admitted by the Lacedaemonians: as Grotius suggests, they were rightly expelled, as they had returned a kindness with an injury.<sup>70</sup>

Moreover, Grotius now argues that, once admitted, foreigners have particular rights based on natural law. If they ask to have 'any deserted or unproductive soil', their request should be granted.<sup>71</sup> Moreover, they have the right to obtain means of subsistence, such as food, clothing and medicines, and even things 'without which life cannot be comfortably lived'.<sup>72</sup> Indeed, according to Grotius, scarcity can never justify the expulsion of foreigners once they have been admitted: 'Not even in circumstances of so great need [i.e., extreme scarcity of grain, MdW], however, can foreigners, who have once been admitted to a country, be expelled'.<sup>73</sup> Nor can they be denied the right to marry within the local population if they lack marriage partners of their own: 'as, for example, in case a large number of men has been expelled from one place and has come to another'.<sup>74</sup> Here, Grotius even seems to go beyond the *Remonstrantie*, where he had proposed to prohibit intermarriage between Jews and Christians (fol. 17r, 119). Moreover, invoking Vitoria's *De Indis*,<sup>75</sup> Grotius claims that foreigners have a common right to engage in all acts which are also permitted to other foreigners, for 'if a single people is excluded, a wrong is done to it'.<sup>76</sup> This implies, among other things, that they should be permitted without distinction to use

69 Grotius, *De iure belli* 1993 (n. 5), 2.2.16. Grotius quotes Virgil's *Aeneid* (12.192–193), presenting Aeneas as offering the following terms to the king of Latium: 'Latinus, as my sire, his arms shall keep / And as my sire his sovereign sway shall hold / Inviolable'.

70 *Ibid.*, 2.2.16.

71 *Ibid.*, 2.2.17. As Grotius suggests, they may even take possession of such land without a formal request, because such occupation does not affect the sovereignty of the local population.

72 *Ibid.*, 2.2.18: 'sine quibus vita commode duci nequit'.

73 *Ibid.*, 2.2.19: 'Et tamen ne in tali quidem necessitate expelli posse admissos semel pelegrinos'.

74 *Ibid.*, 2.2.21: 'si virorum populus aliunde expulsus alio advenerit'.

75 Vitoria, *De Indis* 1557 (n. 14), 3.1.4.

76 Grotius, *De iure belli* 1993 (n. 5), 2.2.22: 'Nam tunc si unus populus excludatur, ei fit iniuria'.



common resources, to inherit by will, to sell property, and ‘even to contract marriages in case there is no scarcity of women’.<sup>77</sup> These rights can only be limited on account of previous wrongdoing.<sup>78</sup> Thus, according to Grotius, once admitted, foreigners have a wide range of rights, and should be treated legally on a par with the local population, provided that they cause no harm.

#### 4 Asylum or Exile?

To understand Grotius’s position on the admission of foreigners it is necessary to distinguish between the concepts of asylum and exile.<sup>79</sup> In the case of asylum, states offer a temporary refuge to foreigners who are persecuted by their own government. Asylum thus consists of the state of refuge providing asylum-seekers with legal (or, more precisely: jurisdictional) immunity from being seized by, or extradited to, their own government.<sup>80</sup> More particularly, it offers *temporary* protection to asylum-seekers until a milder punishment or due process has been negotiated. By contrast, in case of exile, foreigners are expelled by their own government, often as punishment for certain crimes (e.g., crimes against religion or the state). Unlike asylum-seekers, exiles are not claimed back by their own government. Instead, by expelling them, their government has given up any claim to them: it no longer claims to have any jurisdictional authority over them. Hence, if another state offers a refuge to exiles, it does not violate the rights of the state from which they were expelled. Indeed, as Grotius argues, the punishment of exile can only be effective if states are willing to mutually offer a refuge to each other’s exiles: it is thus beneficial to the larger community of states if exiles are admitted and allowed to settle in other states. Moreover, since exile is a sentence for life, exiles should be offered *permanent* residence: what they need is not the temporary protection of asylum, but a new place to live. Hence, unlike asylum, which consists of *temporary* immunity from extradition, exiles should be offered *permanent* residence, for they cannot return to the state from which they were expelled.

77 Ibid., 2.2.22: ‘si etiam extra penuriam feminarum coniugia contrahere’.

78 Ibid., 2.2.22. Interestingly, here Grotius refers to the example of the Jews who took away the right of intermarriage from members of the tribe of Benjamin on account of their previous wrongdoing.

79 I am grateful to Bas Schotel for bringing the differences between asylum and exile to my attention. See Schotel, Bas. ‘Legal Protection as Competition for Jurisdiction: The Case of Refugee Protection through Law in the Past and at Present’. *Leiden Journal of International Law* 31 (1) (2018), 9–32.

80 Cf. Tiessler-Marenda, *Einwanderung* 2002 (n. 9), 22.



It is important to note that Grotius, while discussing the right to asylum in *De iure belli*,<sup>81</sup> refers to the right of states to admit asylum-seekers, not the right of asylum-seekers to be admitted. Moreover, on Grotius's account, states have a right to grant asylum only to individuals who are *innocently* persecuted, i.e., who are falsely accused of crimes or whose guilt has not (yet) been proved before a court of law.<sup>82</sup> As he puts it, asylum is 'for the benefit of those who suffer from *undeserved* enmity, not those who have done something that is injurious to human society or to other men'.<sup>83</sup> Thus, if individuals seek to escape a just punishment by taking refuge in another state, they should be denied asylum. In those cases, the state of refuge has two options: it should either punish the criminal, or surrender him to the state where he committed the crime.<sup>84</sup> More particularly, Grotius suggests that asylum should be available only to those who *unintentionally* injured others:

Accordingly in that most wise law places of asylum were available for those from whose hands a chance missile had slain a man, and a refuge was provided also for slaves; but those who had deliberately slain an innocent man, or who had disturbed the peace of the state, were not protected even by the most holy altar of God himself.<sup>85</sup>

The reference to those 'who disturbed the peace of the state' is of course crucial: according to Grotius, asylum should be denied to foreigners who have committed crimes against the state, i.e., political crimes, for instance, by rebelling against their own government. He also suggests that the right to demand extradition of criminals should be exercised only 'with respect to crimes that affect the public weal [*crimina quae statum publicum tangent*] or that manifest extraordinary wickedness'.<sup>86</sup> By contrast, in case of lesser crimes, extradi-

81 Grotius, *De iure belli* 1993 (n. 5), 2.21.5 and 6.

82 In this respect, Grotius's account differs from the medieval understanding of church asylum, which was available irrespective of whether the asylum-seeker was guilty or not (its purpose being to negotiate a milder punishment or due process).

83 Grotius, *De iure belli* 1993 (n. 5), 2.21.5.1: 'Haec enim illis prosunt qui *immerito* odio laborant, non qui commiserunt quod societati humanae aut hominibus aliis sit iniuriosum' (my italics).

84 *Ibid.*, 2.21.4.1.

85 *Ibid.*, 2.21.5.1: 'Sic in sapientissima lege quibus telum manu fugisset, quo interfectus esset homo, asyla patebant: servis quoque per fugium dabatur: at qui deliberato hominem innocentem occidissent, qui civitatis turbassent statum, his ne ipsum sanctissimum Dei altare patrocina-batur'.

86 *Ibid.*, 2.21.5.5: 'circa ea demum crimina usurpatur, quae statum publicum tangunt, aut quae eximiam habent facinoris atrocitatem'.

tion is usually not demanded, unless it is prescribed by some specific treaty obligation.<sup>87</sup>

For Grotius, the aim and rationale of exile differ from those of asylum: while asylum may potentially harm the interests of other states (e.g., if it enables criminals to escape a just punishment), offering a refuge to exiles is in the interest of *all* states. As Grotius explains, by expelling their own subjects, states give up any jurisdictional claim over them: such exiles are, strictly speaking, no longer subjects of that state.<sup>88</sup> Since they cannot be claimed back as subjects, there can be no legal obligation for the state of refuge to surrender these exiles. Indeed, the punishment of exiles can only be effective if other states are willing to admit exiles and allow them to settle on their territory. Grotius quotes Livy's account of Perseus inquiring '[w]hat is accomplished by sending any one into exile, if there is not going to be a place anywhere for the person exiled?'<sup>89</sup> Moreover, unlike the right to asylum, which is premised on the innocence of the asylum-seeker, it does not matter whether an exile is innocent or guilty. Since exiles have been 'given up' by their own government, the state of refuge does not harm the rights of other states by offering them a refuge, whether or not they are guilty of crimes. Thus, unlike asylum, which may be offered only to those who are *innocently* persecuted, exiles may be offered a refuge even if their guilt has been proved before a court of law. Indeed, as Grotius concludes, quoting Aristides, '[i]t is a common right of mankind to admit exiles.'<sup>90</sup>

This raises the question of whether the *expulsi* to which Grotius refers in IBP 2.2.16 should be considered as exiles [*exules*] or asylum-seekers. Tiessler-Marenda has observed that, in being expelled from their homes, the '*exules* and *expulsi* are finding themselves in a similar situation. The *exules* may therefore belong to the *expulsi* in the sense of §16, for which reason they may not be denied a *perpetua habitio*'.<sup>91</sup> Indeed, both the *expulsi* and the *exules* have been driven from their homes; since their own government has given up any claim to them, other states may offer them a refuge, irrespective of whether they are innocent or not. Even those who are exiled for crimes against the state (i.e., political crimes) may be offered a 'refuge [*perflugium*]', for their own state no longer claims them back. Moreover, what is needed in both cases is not the *temporary* protection of asylum (i.e., from extradition), but *permanent* residence: what both *expulsi* and *exules* need is a new place to live. Hence, Grotius

87 Ibid., 2.21.5.5.

88 Ibid., 2.5.25.

89 Ibid., 3.20.41: 'Quid attinet cuiquam exsilium patere, si nusquam exsuli futurus est locus?'

90 Ibid., 3.20.41: 'commune ius hominum exsules recipere'.

91 Tiessler-Marenda, *Eindwanderung* 2002 (n. 9), 211.

claims that *permanent* residence may not be denied to *expulsi*, provided that they submit to the established government and regulations meant to protect the state. The same is true of *exules*: permanent residence may not be denied to them, for otherwise the punishment of exile would remain ineffective. More particularly, what is proposed in both cases is not an individual or subjective right to asylum, but a right and duty of states to offer *permanent* residence to *exules* and *expulsi*, based on the principle of natural law that in case of direst need, assistance should be provided, so long as it does not cause harm to oneself or others.

As I have suggested above, for Grotius, the paradigmatic example of *expulsi* were the Jews who had been collectively expelled from Spain and Portugal. As *expulsi*, they were not claimed back by their government. Indeed, after 1601, an edict of Philip III expressly allowed the Jews to emigrate from the Iberian peninsula: they were 'expelled', in the sense of being allowed to leave, while being simultaneously threatened with persecution. Hence, the Jews were not offered asylum in the traditional sense of legal (or jurisdictional) immunity from being seized by their own government. Nor was their refuge meant to be temporary, in the sense that it ended once a milder punishment or due process had been negotiated. Instead, Grotius proposed to grant the Jews *permanent* residence: they were offered a new place to live. Moreover, unlike asylum, which was granted to individuals, Grotius had in mind groups of refugees, or 'nations' (e.g., 'Jews of the Portuguese nation'), who had been *collectively* expelled (e.g., for religious reasons), and who were granted *collective* settlement privileges (e.g., in the Dutch provinces). Finally, for Grotius, it did not matter whether the Jews were innocent or not, for even if they were proved guilty, it would not violate the rights of other states if they were allowed to settle in the Dutch provinces. As he had observed in his *Remonstrantie*, 'Apparently, God wants them to stay somewhere. Then why not here [e.g., in the Dutch provinces], as well as elsewhere, as elsewhere the same reason applies which may be asserted here' (fol. 8v, 113). It was thus not by claiming their innocence, but by considering the natural duties of states towards *expulsi* that Grotius proposed substantive protections for the Jews, including permanent residence in the Dutch provinces.

### Conclusion

In this article, I have addressed the question of whether Grotius can be considered as the founder of the modern concept of asylum. Although Grotius does anticipate the concept of *interstate* asylum for those who are *innocently*

persecuted, his understanding of asylum is in many respects traditional, rather than modern. Most importantly, he excludes those who have committed crimes against the state from the right to asylum. Tiessler-Marenda therefore convincingly argues that Grotius is not a precursor of modern *political* asylum. However, as I have tried to show in this paper, Grotius's most innovative contribution does not relate to his theory of *asylum*, but to his theory of *expulsion*, and, more particularly, his understanding of the legal duties of states towards foreigners who have been *collectively* expelled for religious reasons. While asylum-seekers are *individually* prosecuted by their own governments and offered *temporary* protection until a milder punishment and due process are negotiated, those who are *collectively* expelled should be offered a *permanent* refuge: what they need is not the temporary protection of asylum, but a new place to live. By comparing Grotius's views to those of Vitoria, I have tried to show that Grotius was the first to consider it not only a right, but a duty of states, under the law of nations, to offer *permanent* residence to victims of religious persecution, provided that they submitted to local regulations necessary to prevent civil strife. While Vitoria had argued that states had a natural duty to offer hospitality to strangers, which implied, among other things, that foreigners had a right to *temporary* sojourn, it was Grotius who first recognized that the law of hospitality also implied a legal duty for states to offer *permanent* residence to those who had been collectively expelled. And, while Vitoria was still thinking of merchants and missionaries who had a right to travel and dwell in foreign lands, from which they could not be expelled without a just cause, Grotius had in mind those who had fled from religious persecution and were seeking a new place to live, like the Jews.

As we have seen, it was Vitoria who first developed the law of hospitality in *De Indis* as an argument for justifying Spanish colonization of the New World: if the Indians expelled Spanish merchants and missionaries without a just cause, they violated their duty under the law of nations to offer hospitality to strangers, for which they could be punished by the seizure of their lands. Recognizing its relevance for colonial expansion, Grotius adopted Vitoria's doctrine of hospitality in *De iure praedae* (1606) to argue that the commercial competitors of the Dutch in the East Indies were not allowed to prevent them from engaging in peaceful trade with local populations. If they prevented such trade, they violated the law of hospitality, for which they could be punished by the seizure of their possessions. Grotius returned to the law of hospitality in his *Remonstrantie* (1615), where he used it as an argument for justifying the admission of Sephardi Jews to the Provinces of Holland and West-Friesland. Since the law of hospitality originated from the natural community of men, it applied irrespective of religious belief. Therefore, the States of Holland and West-Friesland had

a natural duty to offer hospitality to Christians as well as non-Christians, including the Jews. Moreover, since the Jews had been expelled from their homes without a just cause (i.e., without any crime being proved before a court of law), they should be allowed to settle in the Dutch provinces, provided that they submitted to local regulations that were necessary to protect the Christian religion and the state. Finally, in *De iure belli* (1625), Grotius developed the law of hospitality into a *general* duty for states to offer *permanent* residence to foreigners who had been expelled from their homes, provided that they did not harm the state that offered them a refuge. By projecting the law of hospitality onto new contexts, and employing it for different strategic purposes, Grotius developed a new understanding of the state's responsibility for providing victims of religious persecution with a permanent refuge, even if he did not yet include political refugees, nor recognized a subjective right to asylum.

Grotius's theory of hospitality may well have critical implications for the present-day debate on the rights of asylum-seekers and refugees.<sup>92</sup> Today, the distinction between exile and asylum, which was crucial to Grotius's theory, is no longer made. This blurring of distinctions has led to a situation in which temporary protection has become the rule, and permanent protection the exception. For instance, under the Common European Asylum System, EU member states are obliged to grant asylum-seekers a *temporary* residence permit for at least three years.<sup>93</sup> After five years of residence, in which their safe return has proved impossible, they should have the opportunity to apply for long-term resident status.<sup>94</sup> Moreover, the present-day trend is to limit, rather than to extend, the residence permits of asylum-seekers: for instance, the European Commission has recently proposed to reduce the minimum length of resi-

92 In the present-day debate, the terms 'asylum-seekers' and 'refugees' are often used interchangeably. However, it is important to note that, from a legal perspective, these terms should be distinguished. As María-Teresa Gil-Bazo explains, '[a]sylum is different from refugee status, as the former constitutes the institution for protection while the latter refers to one of the categories of individuals – among others – who benefit from such protection'. This implies that states may legally grant asylum to persons who lack a refugee status. Most importantly, individuals who are denied a refugee status under art. 1F of the 1951 Refugee Convention (which excludes, *inter alia*, those who have committed crimes against peace, war crimes, crimes against humanity, or 'serious *non*-political crimes') may still successfully apply for asylum. The right of EU member states to grant asylum to those who have been denied a refugee status under art. 1F has been reconfirmed by the Court of Justice of the European Union: 'Member States may grant asylum under their national law to a person who is excluded from refugee status'. CFEU, Joined Cases C57/09 and C101/09, *Bundesrepublik Deutschland v. B & D* (2010), ECR I-10979, para. 121. See Gil-Bazo, 'Asylum as a General Principle of International Law' 2015 (n. 3), 5.

93 Directive 2011/95 of the European Parliament and Council of 13 December 2011, art. 24 (1).

94 Council Directive 2003/109/EC, of 25 November 2003, arts. 4 and 8.

dence permits from three years to one.<sup>95</sup> The increasing unwillingness of states to regard refugees and asylum-seekers as permanent residents is not without risks: it ‘effectively disempowers refugees to make a new beginning and build their lives anew, turning countries of “asylum” into waiting rooms where the lives of refugees are suspended.’<sup>96</sup> Indeed, the one-sided focus on temporary protection may even be counterproductive, as it prevents refugees from starting a new life in their host societies, from which they may be deported once their safe return has become possible. In this context, Grotius’s theory of hospitality may contribute to clarifying the limitations of the existing system of asylum and refugee protection. More particularly, it may help us to distinguish between two kinds of foreigners in need: on the one hand, *individual* asylum-seekers, who are in need of *temporary* protection (from extradition or expulsion), and, on the other, those who have been *collectively* expelled and who are in need of *permanent* protection (as their country of origin proves unwilling to take them back). Thus, Grotius’s conclusion that *permanent* residence ought not to be denied to foreigners who have been *collectively* expelled testifies to the realistic assumption that what many refugees need is not the temporary protection of asylum, but a new place to live.

### Acknowledgements

The author would like to thank Maarten den Heijer and Bas Schotel as well as two anonymous reviewers for their valuable comments on an earlier version of the text.

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