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Tikvah Working Paper 04/12

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and of nations in early modern Europe**

NYU School of Law • New York, NY 10011
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**ISSN 2160-8229 (print)
ISSN 2160-8253 (online)
Copy Editor: Danielle Leeds Kim
© Charles Leben 2012
New York University School of Law
New York, NY 10011
USA**

**Publications in the Series should be cited as:
AUTHOR, TITLE, TIKVAH CENTER WORKING PAPER NO./YEAR [URL]**

**THE REFERENCE TO HEBREW SOURCES IN THE DOCTRINE OF THE LAW OF NATURE
AND OF NATIONS IN EARLY MODERN EUROPE**

By Charles Leben *

Abstract

The generous invitation from New York University's Straus Institute for the Advanced Study of Law & Justice and the Tikvah Center for Law & Jewish Civilization has enabled me to investigate a subject I had long been thinking about but had never had the time to work on seriously.¹ The subject is rooted in both the history of international law and in the history of political ideas.

As regards the history of international law, my attention was drawn several decades ago by a paper by the late Shabtaï Rosenne in the *Netherlands Review of International Law* in 1958 on "The Influence of Judaism on the Development of International Law: a Preliminary Assessment".² It was a paper that, with just a single exception, was not to be followed up on and which, it seems, has largely been forgotten. In that paper, the eminent Israeli international law scholar examined the authors who had written around the late sixteenth and early seventeenth centuries on issues that are generally thought to be specific to international law, such as the law of the sea (Grotius, Selden), diplomatic law (Gentili), or the law of war (Ayala, Gentili, Grotius, Zouche and Rachel), or that contained developments on the law of nature and nations (*de jure naturae et gentium*) in works of general legal and philosophical scope (Selden, Pufendorf and Rachel).³

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¹ Need it be said how grateful I am to the director of the two centers (and also Jean Monnet), professor JHH Weiler for an invitation that enables scholars to work in material and spiritual conditions of which they can generally only dream.

² Shabtaï Rosenne, "The Influence of Judaism on the Development of International Law. A Preliminary Assessment", *Nederlands Tijdschrift Voor Internationaal Recht*, 1958 p. 119-149. Rosenne wrote that "the contribution of Jewish thought to the development of the very concept of international law has been completely neglected by modern scholars, except for some routine and on the whole unconvincing references to some of the more salient and obvious features of the biblical passages" (p. 147).

³ For all these authors see the old but not outdated *Les fondateurs du droit international* (introduction A. Pillet), Paris, Giard & Brière, 1904. For the works cited, reference is to the Carnegie Classics of International Law. Selden does not generally feature on the list of founding fathers, but his *Mare Clausum* is incontrovertibly a work on international law and his *De Jure Naturali et Gentium* sets him alongside

What Rosenne's study revealed was that the commentators of the time, in thinking about law governing states, did not refer just to natural law, Roman law, and the positive law of the various states, but also to Hebrew law as it arose from readings of the Bible and of post-biblical Jewish sources, either because they acknowledged that this source of law had some religious legitimacy which they accepted or because they thought that a part of this law (that on the so called *Noahide* laws) was the most accurate expression of natural law, as shall be seen below. In studying Gentili, Grotius, Selden and Pufendorf, Rosenne showed how much those authors, who were among the leading founders of international law, had taken Hebrew sources into consideration in thinking out their discipline.

This reading of Rosenne was to be supplemented some years later by the course Prosper Weil gave at the Hague Academy of International Law on "Judaism and international law" as part of a series of courses on religions and international law.⁴ In the second chapter of his course, P. Weil examined "Judaism's contribution to the development of international law" and sought what could have been "[the input] of Jewish thought to international law as the Christian writers of a few centuries ago forged it—that is, when all is said and done, the thought of the Jewish sources of this discipline".⁵

The second root of my inquiry was the development over twenty years or so of what is called the school of *Political Hebraism*. Various scholars (Israeli, American, and British) have decided to take seriously the Jewish references (biblical, talmudic, rabbinic) that are scattered through the works of many seventeenth-century authors, whether jurists (Gentili, Grotius and Selden), philosophers (Cunaeus, Harrington and Locke), or poets (Milton). From the eighteenth century onwards, these references had lost all interest for lawyers, historians, and philosophers who saw them as vague

scholars like Pufendorf, for whom it is one of the leading references. By "Hebrew sources", I mean the Bible, Philo of Alexandria (Philo Judaeus), Flavius Josephus, the talmudic literature and its commentators, biblical exegetists, and the codifiers of Hebrew law. "Jewish sources" is here used synonymously.

⁴ Weil (Prosper), "Le judaïsme et le développement du droit international", *Hague Academy Collected Courses*, 1973/III, vol. 151, p. 253-335.

⁵ P. Weil, "[l'apport] de la pensée juive au droit international tel que l'ont forge les auteurs chrétiens d'il y a quelques siècles – c'est-à-dire, en définitive, celle des sources juives de cette discipline." "Le judaïsme et le développement du droit international", op. cit. p. 312.

concessions required by the beliefs of the time but that were fundamentally worthless. Very often, when one consults the index of the works published by these authors there is not even an entry for Bible, Hebrew law, Talmud, Maimonides, etc., although the books often contain numerous passages on those texts or authors.

The proponents of the school of *Political Hebraism* argue that the Hebrew references were not purely for decoration but corresponded to a specific political philosophy that some call the doctrine of *Hebraica veritas*, a doctrine that sought the solution to the political and legal problems of their age in the Hebrew texts.⁶

Most of the supporters of the doctrine were Protestants (English, Dutch and Germans) and lived in part or in full in the seventeenth century. They set themselves the objective of building a political doctrine that went beyond the traditional Roman Catholic doctrines of medieval scholasticism or of the second Spanish scholasticism of the sixteenth century with Vitoria, Suarez, and Vasquez.⁷

And so it seemed the time was ripe to connect up the new school of *Political Hebraism* and the works of Rosenne and Weil on seventeenth-century international lawyers. This was particularly justified as both authors were aware that their studies were only a first step, only a “preliminary assessment which could itself point the way to further research”.⁸ P. Weil also hoped to see “closer studies [...] to precisely evaluate the scale of the Jewish contribution to international law”. While warning against “simplistic views”, he was surprised “that some of the best informed historians of international law could have failed to such a point to recognize one of the essential sources of their disciplines...”.⁹

So it is this renewed examination of Hebrew sources in the doctrine of the law of nations of the seventeenth century, from Gentili's *De Jure Belli Libri Tres* (even if it still

⁶ See A.P. Coudert and J.S. Shoulson (ed), *Hebraica Veritas? Christian Hebraists and the Study of Judaism in Early Modern Europe*, Philadelphia, University of Pennsylvania, 2004, and see infra n. 14.

⁷ For a close study of the complex relations between the scholastics and Grotius, see P. Haggemacher, *Grotius et la doctrine de la guerre juste*, Paris, Geneva, PUF, IUHEI, 1983, especially p. 462-525.

⁸ Rosenne, “The Influence of Judaism”, op. cit. supra n2, p. 122.

⁹ P. Weil, “Le judaïsme et le développement du droit international”, op. cit., supra n.4, p. 321. “[il est surprenant] que les historiens parmi les plus avertis du droit international aient pu méconnaître à ce point l'une des sources essentielles de leur discipline...”.

strictly belongs to the sixteenth century since it was first published in 1598) to Pufendorf's *De Jure Naturae et Gentium* (1672) that is to be undertaken. It will incontrovertibly confirm the importance of Jewish sources in the general intellectual education of the founding fathers of international law and in their general political philosophy while limiting their role as concerns the construction of international law in the strict and contemporaneous sense of the term. However, before dealing with the specific theme just set out, we must recall, however fleetingly, certain characteristics of the intellectual world in which these authors on the law of nature and nations did their thinking and constructed their doctrine. It is in reference to that world and that age that historians have spoken of a *Hebrew revival*.

1. The Hebrew revival of sixteenth- and seventeenth-century Europe

The study of Hebrew and of Jewish texts never vanished from the intellectual world of medieval Europe,¹⁰ but what happened in the sixteenth and seventeenth centuries was incomparable with anything that had gone before. That era saw the unprecedented development of Hebrew studies and the appearance of a political ideology prompted by a return to the Bible.

1.1. The blossoming of Hebrew studies

Something crucial occurred in the history of thought between the mid-sixteenth and mid-seventeenth centuries in Europe: the secession of a new religion from an ancient one leading to a radical reappraisal of its sources and authorities compared with the religion from which it emanated.¹¹ The commentators, who were mostly Protestants, were to relate again, beyond the Middle Ages and beyond the scholastic Roman Catholic tradition,¹² to the biblical heritage not just to the Old Law in the narrow sense of the Pentateuch but also to the historical and prophetic books.¹³ The “New Israel” of the

¹⁰ See G. Dahan, *Les intellectuels chrétiens et les juifs au Moyen-Âge*, Paris, Cerf, 1990.

¹¹ For a general study, see Harold J. Berman, *Law and Revolution. The Formation of the Western Legal Tradition*, Cambridge, Harvard University Press, 1983.

¹² Without forgetting it, of course. See for example the master work of Peter Haggenmacher, *Grotius et la doctrine de la guerre juste*, Paris, Geneva, PUF, IUHEI, 1983.

¹³ See Nelson, who notes that “Luther’s clarion call of *sola scriptura* made the study of the Bible a Christian duty and led Protestants back to the original texts of the Hebrew Bible and the New Testament to an unprecedented degree”, *The Hebrew Republic. Jewish Sources and the Transformation of European Political Thought*, Cambridge (MA), Harvard University Press, 2010, op. p. 13.

Protestant theologians and of the Protestant states such as the Netherlands, established contact with the Israel of history¹⁴ which was reflected, in most of the works already cited by a wealth of biblical references, to the New Testament, naturally enough, but also and often abundantly to almost all of the Old Testament, to which we must add for all those authors the very many references to Philo of Alexandria and Flavius Josephus.¹⁵

That this was a reversal of former practice is apparent from the fact that the authors felt the need to explain their common use of biblical sources. Gentili wrote:

The words which are written in the sacred books of God will properly be given special weight since it is evident that they were uttered not merely for the Hebrews, but for all men, for all nations and for all times. For these words are of a true nature, that is to say, one which is blameless and just, is most certain.¹⁶

Grotius for his part warned in the *Prolegomena* to his *De Jure Belli et Pacis* where he listed his authorities:

The Authority of those Books which Men inspired by God, either writ or approved of, I often use, but with a Difference of the Old and New Law. Some there are who urge the Old Law for the very Law of Nature, but they are undoubtedly in the wrong : For many Things in it proceed from the Free Will of God which yet is never repugnant to the Law of Nature itself; and so far an Argument may be rightly drawn from it, provided we carefully distinguish the Rights of God, which God sometimes exercises by the Minsitry of Men, from the Rights of Men among themselves. We have therefore avoided, as much as we

¹⁴ A. Eyffinger, “‘How Wondrously Moses Goes Along With The House of Orange!’ Hugo Grotius’ ‘De Republica Emendanda’ in the Context of the Dutch Revolt”, *Hebraic Political Studies*, Fall 2005, p. 71-109. The paper is reprinted in G. Schochet (G.), F. Oz-Salzberger and M. Jones, eds, *Political Hebraism. Judaic Sources in Early Modern Political Thought*, Jerusalem and New York, Shalem Press, 2008, p. 107-147. See also in that book M. Bodian, “The Biblical ‘Jewish Republic’ and the Dutch ‘New Israel’ in Seventeenth-Century Dutch Thought”, p. 148-166. The book has many articles of great interest for our subject. See also J. Jacobs, *Judaic Sources and Western Thought. Jerusalem’s Enduring Presence*, Oxford, Oxford University Press, 2011.

¹⁵ For this, see M. Hadas-Lebel, “La lecture de Flavius Josèphe aux XVIIe et XVIIIe siècle” in Ch. Grell and F. Laplanche, *La République des lettres et l’histoire du judaïsme antique XVIe-XVIIIe siècles*, Paris, Presses de l’Université de Paris-Sorbonne, 1992, p. 101.

¹⁶ A. Gentili, *Three Books on the Law of War*, Oxford, Clarendon Press, 1933, Carnegie Classics of International Law, p. 11. See also G.H.J. Van der Molen, *Alberico Gentili and The Development of International Law. His Life, Work and Time*, Amsterdam, H. J. Paris, 1937 (2d ed. Leyden, A. W. Sijthoff, 1968), who notes that all Gentili’s works “testify to his extensive knowledge both of the Old and New Testaments”, p. 248. The study of Gentili and of international law has experienced a remarkable upsurge. See B. Kingsbury and B. Straumann (eds), *The Roman Foundations of the Law of Nations. Alberico Gentili and the Justice of Empire*, Oxford, Oxford University Press, 2010 and also B. Kingsbury, B. Straumann and D. Luper, *The Wars of the Romans: A Critical Edition and Translation of De Armis Romanis by Alberico Gentili*, Oxford, Oxford University Press, 2011.

could, both this Error, and also another contrary to it, viz, that since the Promulgation of the New Testament the Old one is of no Use. We are of a contrary opinion....¹⁷

This form of reasoning from the biblical heritage changed the outlook of jurists, theologians, and philosophers on the main political and religious problems confronting the scholars of the period 1570–1670.

As Eric Nelson observes in his *Hebrew Republic*, this Hebrew revival that marked the late sixteenth century

changed what it was possible for Europeans to argue, either by making available an argument that was simply foreign to previous generations of political theorists (...) or by taking a disreputable political position and rendering it suddenly respectable.¹⁸

But the most remarkable thing, because it was virtually unprecedented in the past centuries of Christianity, was the inclusion in the references to be taken into account, and among the authors whose opinion is to be sought out and discussed, of the most part of the rabbinic Jewish tradition, from the two Talmud, the Codes of the Law (that of Maimonides, 1138–1204, of course, but also of R. Moïse de Coucy, 13th century), the exegetists of the Middle Ages (Rachi 1040–1105, ibn Ezra 1092–1105) to contemporaries like Leon of Modena (1571–1648) and Manasse ben Israël (1604–1657).

¹⁷ Hugo Grotius, *The Rights of War and Peace*, edited with an introduction by Richard Tuck, from the edition by Jean Barbeyrac (1674–1744), Indianapolis, Liberty Fund, 2005, “The Preliminary Discourse” (Prolegomena), XLIX, vol. 1, p. 124 (in the French translation of Pradier-Fodéré it is number XLVIII: *Le droit de la guerre et de la paix*, Paris, Presses universitaires de France, 1999, p.25). See also the Carnegie Classics of International Law edition: *On the Law of War and Peace, Three Books*, Washington, D.C. - Carnegie Institution 1913 Oxford: Clarendon Press; London: Humphrey Milford 1925. For those who think that the Old Law is the very Law of Nature, Barbeyrac cites one author (Gronovius) for whom Grotius supposedly referred to “Bodin and other Judaizing” philosophers (op. cit. p. 123 n. 1). One can also cite Althusius in a declaration similar to those of Gentili and Grotius: “I have used examples from the Holy Scriptures more frequently, since they were done either by God or pious men, and because I believe that no state has been established since the beginning of the world, which was more wisely and more perfectly, organised than the Jewish state”. Cited by Lea Campos Boralevi, “Classical Foundational Myths of European Republicanism: The Jewish Commonwealth”, in Martin van Gelderen, Quentin Skinner, (eds), *Republicanism: A Shared European Heritage*, West Nyack (USA), Cambridge University Press, 2002, p. 256-257.

¹⁸ E. Nelson *The Hebrew Republic Jewish Sources and the Transformation of European Political Thought*, op.cit. n.13 p. 6.

This was made possible only by the development of Jewish studies in the great European universities and by the appearance of the idea that the study of Hebrew was as vital as the study of Latin and Greek for serious studies of law, theology, or philosophy.¹⁹ Grotius is a typical “trilingual gentleman-scholar”²⁰ in this respect in having followed the course in Leiden of the great Dutch Hebrew scholar Joseph Scaliger (1540–1609).²¹ This movement towards Jewish studies gave rise to a body of learned men, the *Hebraei*, who played a considerable part in the evolution of ideas in seventeenth-century Europe. We owe to them a huge work of translation into Latin of everything of importance in the Jewish tradition, including the talmudic texts, the *Mishneh Torah* of Maimonides, the medieval biblical commentaries, the grammarians, philosophers, kabbalists, and so forth.²²

All of the books of the Jewish tradition, once translated into Latin were to be fervently read by the likes of Hobbes, Harrington, Milton,²³ and Locke and many others who were not Hebrew speakers but could make the biblical and rabbinic heritage their own for use in their analyses and polemics. In this way, for Nelson it was common “in

¹⁹ On the ideology of the three cultures, see Steven Grosby, “Hebraism: The Third Culture”, in Jonathan A. Jacobs, *Judaic Sources and Western Thought. Jerusalem's Enduring Presence*, Oxford, Oxford University Press, 2011, p. 73-96.

²⁰ See J. Jacobs, *Judaic Sources and Western Thought*. op. cit. p. 79. There is an abundant literature on Grotius, the Jews, Judaism and Hebrew. See, for example, E. Rabbie, “Hugo Grotius and Judaism” in H.J.M. Nellen and E. Rabbie, *Hugo Grotius Theologian. Essays in Honour of G.H.M. Posthumus Meyjes*, Leiden, Brill, 1994, p. 99-120, A.W. Rosenberg, “Hugo Grotius as Hebraist”, *Studia Rosenthaliana*, vol. XII no. 1, 2, 1978, p. 62-90, A.K. Kuhn, “Hugo Grotius and the Emancipation of The Jews in Holland”, *Publications of the American Jewish Historical Society, AJHS Journal*, 1928, p. 173-180.

²¹ See on this the indication in G.G. Stroumsa, *A New Science: The Discovery of Religion in The Age of Reason*, Cambridge MA, London, Cambridge University Press, 2010, p. 39 ff with the bibliography. He notes that what had begun with the return to the Bible and to Hebrew and continued with the study of Middle-Eastern religions, then religions in general, was the start of a new scientific discipline, that of critical religious studies (op.cit. p. 43).

²² Many fascinating studies have been made of the Christian Hebraists. See especially A.L. Katchen, (ed) *Christian Hebraists and Dutch Rabbis. Seventeenth Century Apologetics and the Study of Maimonides' Mishneh Torah*, Cambridge MA, Harvard University Press, 1984, A.P. Coudert, J.S. Shoulson (ed), *Hebraica Veritas? Christian Hebraists and the Study of Judaism in Early Modern Europe*, Philadelphia, University of Pennsylvania Press, 2004, F. Laplanche, “L'érudition chrétienne aux XVIe et XVIIe siècles et l'Etat des Hébreux”, in Groupe de recherches spinozistes, *L'écriture sainte au temps de Spinoza et dans le système spinoziste*, Paris, Presses de l'Université de Paris Sorbonne, 1995, p. 133-147, P.T. van Rooden, “Constantijn l'Empereur contacts with Amsterdam Jews and his confutation of Judaism”, in *Jewish-Christian Relations in the Seventeenth Century. Studies and documents*, ed. by J. van den Berg and E.G.E. van der Wall, Dordrecht/Boston/London, 1988, p. 51-72.

²³ On Milton there is the impressive study by Jeffrey S. Shoulson, *Milton and the Rabbis. Hebraism, Hellenism and Christianity*, New York, Columbia University Press, 2001.

the midst of the English Revolution, for defenders of the regicide to cite a ruling of Maimonides's that kings may be judged and even whipped, if they commit crimes".²⁴

1.2. A founding myth: the *Republica Hebraeorum*

This movement towards the *Hebraica Veritas* was to give rise to a foundational political myth in European thought, that of the *Republica hebraica*, an ideal political entity constructed not only on the basis of biblical texts (for that the Christian tradition would have sufficed) but from specifically Jewish sources such as the Talmud and the later rabbinic texts and especially Maimonides and his great legal code (the *Mishneh Torah*).

All of that accompanied the birth of a republican, antimonarchist political myth that could be counted as one of the founding myths of European thought, the myth of the Hebrew Republic. What could be more normal for people who believed in the truth of the biblical writings than to refer to them to construct their model of society? As Peter Cunaeus (1586–1638), the great Dutch orientalist, one of the fathers of the republican ideology and a close friend of Grotius, put it in a statement to the Estates of Holland, the Commonwealth of the Hebrews should be regarded as “the most holy and most

²⁴ Nelson amusingly calls the republicans versed in biblical and rabbinic references the “Talmudic Commonwealthsmen”, *The Hebrew Republic*, op. cit. supra n.13 p. 23. See also p. 6. The *halakha* on this subject (the judgment of kings) is more complex. On the basis of the talmudic treatise *Sanhedrin* 19a Maimonides codifies the following rule: “Although the Kings of the House of David may not be given seats on the Sanhedrin, they judge others and are judged in a suit against them. But the kings of Israel may neither judge nor be judged, because they do not submit to the discipline of the *Torah*. [To sit in judgment on them] might lead to untoward consequences.” (*The Code of Maimonides* Book Fourteen, *The Book of Judges*, New Haven and London, Yale University Press, 1949, p. 8). The rule is repeated by Maimonides in Treatise V of the *Book of Judges*: “Laws concerning Kings and Wars” III, 7 (and not III, 2 as indicated), op. cit. p. 213. So the rule that a king can be judged applies to the descendants of King David only. The Kings of Israel (reference to the kings of the northern kingdom after the split following Solomon's death and by extension to the Hasmonean kings) can neither be judges nor judged as they do not submit to the law of the *Torah* and that may lead to “untoward consequences”. This refers to a dramatic episode related by the *Talmud* T.B. *Sanhedrin* 19a and implicating the king Alexander Yannai of the Hasmonean dynasty. Questioned further to a murder by one of his slaves, he went to the Sanhedrin and so intimidated the Assembly that except for Chimon ben Chata'h it did not dare ask him to stand when his slave was questioned. To avoid any repetition of the humiliation, it was decided that “The king may neither judge nor be judged, testify nor be testified” (*Mishnah Sanhedrin* II, 2, BT *Sanhedrin* 19a). As for the possibility of whipping the king in the event of an infringement of the obligations in Deuteronomy XVII, 14-17, see Grotius *The Rights of War and Peace*, op. cit. supra n.17, L. I. Ch. III §20, II, p. 312), Barbeyrac writes: “This is a mere Fable, as has been most evidently proved by several Authors” and refers back to Selden (*The Rights of War and Peace*, op. cit. n.17, p. 312 n. 10 It seems Barbeyrac is right here. See also Rosenblatt, *Renaissance England's Chief Rabbi: John Selden*, Oxford, Oxford University Press, 2006, p. 197.

exemplary in the whole world [...] because it had not any mortall man for its Author and founder, but the immortall God [...].²⁵

Gentili, for his part, wrote that the biblical texts “were uttered not merely for the Hebrews”, they provide a valid political model for all peoples. The thing is to understand them properly, hence the need to resort to Jewish sources, for while the Jews were blinded to the announcement of the Good News, their doctors were still the best placed to “give light to the ordinances of Moses touching the externall practice of them in the commonwealth of Israel [...] and without whose help, many of those legall rites (especially in Exodus and Leviticus) will not easily be understood”.²⁶

From 1574 to 1724 several works were to be published on the description and examination of the *Republica Hebraeorum*: Cornélius Bonnaventure Bertram *De Republica Ebraeorum, sive De Politia Judaica, tam Civili quam Ecclesiastica* (Geneva 1574), Carlo Sigonio, *De Republica Hebraeorum Libri VII* (Bologne 1582), and Petrus Cunaeus, *De Republica Hebraeorum* (Leyden 1617).²⁷ Those were the most famous authors,²⁸ but there were others throughout the seventeenth century and even through to the late eighteenth century.²⁹

²⁵ Text cited by Nelson, *The Hebrew Republic*, op. cit. supra n.13 p. 107. See note 90 referring to the seventeenth-century English translation: Petrus Cunaeus *Of the Commonwealth of the Hebrews*, trans. Clement Barksdale, London 1653. See the current translation: Petrus Cunaeus, *The Hebrew Republic*, Jerusalem, Shalem Center, 2007. For an example of a “republican” reading of the Bible, see George M. Gross, “Notes for Reading the Bible with John Locke”, *Jewish Political Studies Review*, 1997 n° 3-4, p. 5-18. In English there is a whole literature on the readings of the Bible by the great seventeenth- and eighteenth-century English, Dutch, and German philosophers for which there is almost no equivalent in French, with very few exceptions such as J.B. Bossuet, *Politique tirée des propres paroles de l’Ecriture sainte*, Paris, Dalloz, 2003.

²⁶ Ainsworth (Henry), *Annotations upon the five bookes, the Booke of Psalmes, and the Song of Songs, or Canticles* (London, 1627), cited by E. Nelson, *The Hebrew Republic*, op. cit. supra n.13 p. 17. And similarly Grotius writes: “But to understand the Sense of the Books of the Old Testament, the Hebrew Writers may afford us no little Assistance, those especially who were thoroughly acquainted with the Language and Manners of their Country.” *The Rights of War and Peace, Prolegomena* L, op. cit. p.125; which drew bitter criticism from Barbeyrac (p. 125 n. 1).

²⁷ Petrus Cunaeus, *The Hebrew Republic*, op. cit. supra n.25.

²⁸ For a closer examination of these authors and some others, see F. Laplanche, op. cit. supra n. 22 that lists nine works published before 1670. The author also notes that “that these books were successful in their time is attested to twice over: first by the number of new editions and translations; then by the fact that the curricula of theological studies proposed in the late seventeenth century for Catholics (Mabillon) and Protestants (Gaussen) alike made them recommended reading for the *studiosi*.” (p. 133-134). In his conclusion, F. Laplanche notes that “this new reading [by the writers he has examined] deciphers the Old Testament less in terms of prophecy than of law, less in terms of theology than of politics. Might Judaism thus interpreted have served as a mold for the religion of the Enlightenment? It is an issue worth

Some, as is the case of the book by Sigonio, had as their main purpose to advertise the institutions of the past that were little known if at all to their contemporaries.³⁰ Others, on the contrary, were designed to derive from the Hebrew Republic a political model that could be transposed to the new Europe (See Bertram and above all Cunaeus).³¹ Selden (1584–1654), for his part, while he did not write a separate work on the Hebrew Republic, thought out much of the legal and political domain in terms of Jewish law. That is how he came to publish *The Historie of Tithes*, for the issue of church tithes was the subject of great discussion in seventeenth-century England, and also his studies of the status of women (*Uxor Ebraica*),³² political assemblies (*De Synedriis*) and more generally his *De Jure Naturali et Gentium Juxta Disciplinam Ebraeorum* of 1640.

Naturally this whole reconstruction of a Hebrew Republic presented as a political model in the sixteenth and seventeenth centuries was hardly appropriate for dealing with the political, legal, and religious problems of modern Europe and was largely a matter of myth, but of a founding myth, as said, of European political consciousness.³³ This myth was to be superseded by another myth, that of the state of nature and of the social contract.

raising...”, op. cit. p. 146. Generally see J. Jacobs, *Judaic Sources and Western Thought*, op. cit. supra n. 14. See also G.G. Stroumsa, *A New Science: The Discovery of Religion in The Age of Reason*, Cambridge MA, London, Cambridge University Press, 2010, and especially chapter II “Respublica Hebraeorum: Biblical Religion and European Culture”, p. 39-61. The attitude of the Christian Hebraists towards actual Jews living with them in the same kingdom was not always free from ambiguity. See A.P. Coudert, “Seventeenth-Century Christian Hebraists: Philosemites or Antisemites?”, in A.P. Coudert, S. Hutton, R.H. Popkin, G.M. Weiner, *Judaean-Christian Intellectual Culture in the Seventeenth Century*, Dordrecht, Kuwer, 1999, p. 43-69, and more generally, R.H. Popkin, “The Image of Judaism in The Seventeenth Century Europe”, in R. Crocker, *Religion, Reason and Nature in Early Modern Europe*, Dordrecht, Kluwer, p.181-197. On the crisis of Hebraic learning as meaningful for global intellectual society, see A. Sutcliffe, *Judaism and Enlightenment*, Cambridge, Cambridge University Press, 2003, p. 23-41.

²⁹ See H. Conring (1648), J. Reimer (1657), M. Leydeker (1704), Th. Lewis (1724), *The Antiquities of the Hebraic Republic in four Books* (1724, reprint Gale Ecco, Print Editions, 2010, J.F.F. Finetti, *De Principiis juris naturae et Gentium adversus hobbesium, Pufendorfium, Thomasium, Wolfium et alios : libri XII*, Venice, 1764.

³⁰ See J.R. Ziskind, Cornelius Bertram and Carlo Sigogno: “Christian Hebraism’s First Political Scientists”, *Journal of Ecumenical Studies*, 2000, p. 381-400.

³¹ On the intellectual fascination of seventeenth-century authors like Hobbes and Harrington for the Hebraic political model, see A. Sutcliffe, *Judaism and Enlightenment*, op. cit. supra n.28 p. 49-57.

³² See J.R. Ziskind, *John Selden on Jewish Marriage Law: The Uxor Hebraica*, Leiden, Brill, 1991. The introduction to the book is interesting as it gives an overview of Selden’s work with Jewish themes and their relevance to the political and religious issues in England in the first half of the seventeenth century.

³³ See L. Boralevi, supra n. 17.

After this presentation of the great movement of ideas that developed in this period astride the sixteenth and seventeenth centuries, I now come to the heart of my research on the Jewish sources in the birth of what historians call “the school of the law of nature and nations”, an expression that is found in Selden (*De Jure Naturali & Gentium, Iuxta Disciplinam Ebraeorum*, 1640),³⁴ Pufendorf (*De Jure Naturae et Gentium. Libri Octo*, 1672),³⁵ and Rachel (*De Jure Naturae et Gentium*, 1676).

The two questions, the law of nature and the law of nations, are connected for at least two reasons. Historically the law of nations has to do with the law of nature. Originally, the concept of *jus gentium* (law of nations) was a category of Roman law that covered the relations between Roman and non-Roman citizens (or between non-Roman citizens), which could not therefore be governed by Roman *jus civile*. Other rules had to apply that could originate in natural law.

Further to a long and complex development involving Roman law, the Church Fathers (especially Augustine) and medieval and sixteenth-century theologians and jurists, the concept of *jus gentium* was to come, belatedly, to refer to a law that was applicable to sovereign human communities.³⁶ In this, the commentators saw it as a complex of rules of natural law and of positive law, in degrees that varied with the age and with the author. When the Protestant authors undertook studies of what we would nowadays call international law, especially Gentili and Grotius and their works on the law of war or on diplomatic law, the law of nature played a considerable part insofar as the positive aspect of this law was still very limited.

If one reasons in terms of what are nowadays thought of as the sources of international law—treaties, custom, the general principles of law, possibly case law—it has to be observed that these sources were only beginning to produce rules and that it was not until the nineteenth century at least and even later that there was a large

³⁴ G.J. Toomer translates the Latin title: *On Natural Law and [the Law] of Nations, according to the Teaching of the Jews*. He chooses to render *Ebraei* by *Jews* and *Disciplinam* by *Teaching*. See Toomer, *John Selden: A Life in Scholarship*, Oxford, Oxford-Warburg Studies, 2009 p. 490-562, p. 491. And see also, ch. 13 n. 3.

³⁵ See also Samuel Rachel, *De Jure Naturae et Gentium*, 1676.

³⁶ For an in-depth study of the concept of *jus gentium* and its evolution, see Peter Haggemacher, *Grotius et la doctrine de la guerre juste*, op. cit. supra n.7 p. 311-358, and see also Jeremy Waldron, *Partly Laws Common to All Mankind: Foreign Law in American Courts*, New Haven, Yale University Press, 2012, p. 24-47.

enough body of norms (but still with so many shortcomings) capable of governing relations among states. In the seventeenth century, it would have been impossible to build anything with the least claim to govern relations among the nascent states of modern Europe if jurists and philosophers had not had recourse to this inexhaustible source of natural law.³⁷

As E. Jouannet underscores “the *consensus gentium* that lies at the origin of the rules of the law of nations did not as then [in the seventeenth century] truly reflect a positive meeting of wills but was much more the outcome of rational and reasoned opinion”.³⁸ Subsequently, when the sources of positive law were to become more substantial, the law of nature and the law of nations could be more readily distinguished and almost all reference to natural law disappeared from nineteenth-century books on international law. There thus occurred a transition from the law of nations maintaining some links with natural law to a positive “international law” (the expression supposedly being Bentham’s). But for our study period (sixteenth and seventeenth centuries), the connection was still strong and warrants us examining both the doctrine of the law of nature, with regard to the occurrence of Jewish sources, and then the doctrine of the law of nations in a narrower sense.

2. Jewish sources in the school of natural law of early modern Europe

Of all the questions in which some influence of the Jewish tradition of law and morality might be detected, that of natural law might seem the most improbable. Improbable because the Greco-Roman tradition is so strong and present in Western philosophy of law and ethics that any outside intervention seems doubtful because pointless.

³⁷ P. Haggemacher considers that “the umbilical cord connecting the law of nations to natural law” was cut by Vitoria as it was he who made tacit convention an “autonomous constituent principle”. (*Grotius et la doctrine de la guerre juste*, op. cit. p. 336, our translation). I would say rather began to be cut for the reading of the Founding Fathers does not bear evidence of such a “sharp” separation. And what of Pufendorf who rejects any positive law of nations, especially any based on an express or tacit agreement because it would amount to a body of law manipulated by states on the basis of their own self-interest. See E. Jouannet, *Emer de Vattel et l’émergence doctrinale du droit international classique*, Paris, Pedone, 1998, p. 52-56. And on the emergence of a doctrine of a positive law of nations, p. 58-68.

³⁸ E. Jouannet, op. cit. p. 465 (our translation). P. Haggemacher notes that Gentili tries to demonstrate there is a *jus gentium* that is “independent of all human legislation, [that] it derives from nature; and that it is reflected by near-universal customs”. But he adds that Gentili fails to prove his arguments that he “asserts [...] as postulates” (op. cit. p. 353, our translation). In fact, most authors of the time proceeded in this way.

Improbable too because the existence of any conception of natural law in Judaism has been contested by some.³⁹

However, if one conceives of natural law as the expression of reason and consequently as a law of universal application, a conception that is, with nuances, that of the authors we are discussing,⁴⁰ it can be noticed that they (or some of them) looked to the Jewish tradition for confirmation of their doctrine on this subject.

This contribution is not the place for a complete demonstration of what has been said. But an example can be chosen that is significant enough to illustrate our meaning. It shall bear on the ethical-legal principles of any system of law that Christian tradition situates, for a large part, in the Ten Commandments (the Decalogue) as set out in the Pentateuch. This identification was contested in the late middle ages by Duns Scott and rejected astonishingly by some seventeenth-century writers (Grotius and Selden). Those commentators preferred the doctrine of the *Noahide* Laws set out in the Talmud to the Ten Commandments of the Bible. It shall thus be observed that on the issue of the ultimate founding principles of the legal system, there was a transition from the biblical paradigm to a talmudic paradigm.

³⁹ L. Strauss, *Natural Right and History*, Chicago, The University of Chicago Press, 1999, p. 81 ff. See also similarly E. Weil, "De la nature" in *Essai sur la nature, l'histoire et la politique*, Lille, Presses universitaires du Septentrion, 1999, p. 11-114, part. p.15-16. But in a favorable sense, see, D. Novak *Natural Law in Judaism*, Cambridge, Cambridge University Press, 1998, Ch. Leben, "La question du droit naturel dans le judaïsme", in *Libertés, justice, tolérance. Mélanges offerts à G. Cohen-Jonathan*, Brussels, Bruylant, 2004, p. 1109-1123 and also Ch. Leben, "Droit, éthique et religion dans le judaïsme", in B. Feuillet-Liger, Ph. Portier, *Droit, éthique et religion : de l'âge théologique à l'âge bioéthique*, Brussels, Bruylant, 2012, p. 81-97. For a recent analysis of the question, see T. Rudavsky, "Natural Law in Judaism. A reconsideration" in J.J. Jacobs, *Reason, Religion and Natural Law*, New York, Oxford University Press, 2012, p. 83-105 (favorably) and J.J. Jacobs, "The Reasons of the Commandments. Rational Tradition without Natural Law", in *Reason, Religion and Natural Law* op. cit. p.106-129 (more reserved). For other sources See infra n.48.

⁴⁰ See R. Tuck, *Natural Rights Theories: Their Origin and Developments*, Cambridge, Cambridge University Press, 1979. See Toomer (op. cit. n. 34 "Selden takes it as axiomatic that natural law is a synonym for the law which is common to all mankind", p. 492. It is self-evident that Grotius' conception of natural law that would be the same even if there were no God (Prol. XI, *The Rights of War and Peace*, op. cit. n.17 p. 89), strictly supposes the universal character of that law.

2.1. The biblical paradigm: the Ten Commandments as a statement of natural law

On the question of the Decalogue and of natural law, Christian theology in general and Roman Catholic theology in particular is extraordinarily rich and complex. Here I can only present a few elements of this theology as I see it.⁴¹ The earliest Church Fathers (Irenaeus, Justin, Ambrose, Tertullian, Augustine, Basil of Caesarea) held that the precepts of the Ten Commandments set out in the Old Law were taken up in full in the New Law.⁴² This identity of views presupposes that these precepts belong to natural law. Whatever the conception one has of natural law, in Christian theology, it is recognized that the precepts of the Decalogue are related to natural law.

The idea that the precepts of the Decalogue were first engraved in the hearts of men, an idea common to various authors like Augustine, reinforces the idea of universal and unchanging precepts (how can what God himself engraved in their hearts be altered) and therefore belong incontrovertibly to natural law.

However, it shall be noted that Thomas Aquinas considers that not all of the precepts of the Decalogue belong to natural law in the same way. Some can be readily apprehended by reason and are therefore easily imposed as part of natural law. This is the case of the prohibitions on killing or stealing or the requirement to honor one's parents. Other precepts are discovered by the wise and by theologians from what are plainly natural precepts and are points of departure for practical reason. Finally some precepts owe their justification to divine revelation and could not have been established without its aid. All of these precepts are natural, though, and all are originally precepts of the Decalogue.⁴³

⁴¹ For the whole of this theological passage I am indebted to A. Vacant, E. Mangenot and E. Amann (eds.), *Dictionnaire de théologie catholique*, Paris, Librairie Letouzey et Ané, 2nd ed. 1920. See also "Decalogue" and "Ten commandments" in *Catholic Encyclopedia*, The New Advent CD-ROM.

⁴² See A. Vacant et al., *Dictionnaire de théologie catholique*, op. cit. p. 167-168.

⁴³ On the Decalogue in Thomas Aquinas, see *Summa Theologica*, Christian Classics Ethereal Library (www.ccel.org/cce/aquinas/summa.pdf) I-II Q 100 a. 3-8, p. 2369-2383. See also L. Charette, "Droit naturel et droit positif chez saint Thomas d'Aquin", *Philosophiques*, vol. 8 no 1, 1981, p. 113-130, especially 117-121. For a rather curious summary of the identification of natural law with the Decalogue by J. Bodin in his work titled *Heptaplomeres*, see S. Pines, "The Jewish Religion after the Destruction of Temple and State: The Views of Bodin and Spinoza", in S. Stein, R. Loewe, *Studies in Jewish Religious and Intellectual History Presented to Alexander Altmann*, Alabama, The University of Alabama Press, 1979,

It might be imagined that not all of natural law is expressed in the Decalogue, but possibly just a part of it. However, this hypothesis is dismissed by Thomas Aquinas who teaches that all of the precepts of natural law have their counterpart in the Ten Commandments.⁴⁴ And indeed the natural precepts of the Decalogue presuppose or contain all of the obligations required by natural law because those precepts are necessary logical principles prior to the duties set out in the Decalogue. Thus the precepts of the Decalogue contain, at least implicitly, all of the conclusions more or less obviously deduced from natural law.⁴⁵

Although the Thomist version was largely predominant throughout the Middle Ages and up to the eve of the Renaissance, a contrary opinion to that of the “angelic doctor” arose as early as the thirteenth century with Duns Scot (1266-1308). It seems he was the first to doubt that the precepts of the Ten Commandments were the same as natural law. As concerns the requirements of the second table of the Decalogue (*Thou shalt not kill, thou shalt not steal*, etc.), Duns Scot declines to see in them either precepts of unchanging natural law or precepts of universal value given the exceptions that are found in the Bible or in dispensations that Christian theology accepts as to their mandatory character.⁴⁶ This doubt as to the nature of the precepts of the Decalogue was

p. 215-234. Grotius, for his part, declares that “the Law of the antient Hebrews serves to assure us, that nothing is enjoined there contrary to the Law of Nature”. *The Rights of War and Peace*, L. I, ch. 1, §17, op. cit. p. 175. This law was not binding on Christians but there was nothing to stop a sovereign from adopting laws with the same substance as Jewish law (L. I, ch. 1, §17, op. cit. p. 178).

⁴⁴ See *Summa Theologica* I-II Q 100 a. 3 “Question: Whether all the moral precepts of the Old Law are reducible to the ten precepts of the Decalogue?” In answer to the objection that some moral precepts seemed not to be present in the Decalogue, Thomas said “two kinds of precepts are not reckoned among the precepts of the decalogue: viz. first general principles, for they need no further promulgation after being once imprinted on the natural reason to which they are self-evident; as, for instance, that one should do evil to no man, and other similar principles: and again those which the careful reflection of wise men shows to be in accord with reason; since the people receive these principles from God, through being taught by wise men. Nevertheless both kinds of precepts are contained in the precepts of the Decalogue; yet in different ways. For the first general principles are contained in them, as principles in their proximate conclusions; while those which are known through wise men are contained, conversely, as conclusions in their principles”, op. cit. p. 2369.

⁴⁵ See DECALOGUE, *Dictionnaire de théologie catholique*, op. cit. p. 169-170. And *Summa Theologica* I-II Q 100 a. 11: “Whether it is right to distinguish other moral precepts of the law besides the Decalogue?”, op. cit. p. 2388-2390.

⁴⁶ For Duns Scot and the Decalogue, see P. Hagenmacher, *Grotius et la doctrine de la guerre juste*, op. cit. n.7, p. 480: “the commandments of the second table of the Decalogue not being natural law proper, with the result that God could, without contradiction, allow several dispensations with respect to them” (our translation). However, the commandments of the second table of the Decalogue might be considered to be natural law in a broader sense. See also M. Villey, *La formation de la pensée juridique moderne*,

to manifest itself again in the seventeenth century and lead to the rejection of the idea that the Decalogue and the natural law are the same. This was the work of two major authors and perfect contemporaries, Grotius (1583–1645) and Selden (1584–1654).⁴⁷

2.2. The talmudic paradigm

The transition by Grotius (cautiously) and Selden (forthright) from the Bible to the Talmud is quite remarkable. However, before considering the contributions by these two commentators, it must be recalled that the Jewish tradition came up with an equivalent to natural law (equivalent but not identical) that is expressed in the conception of the *M. J. Broyde* Laws, which are valid for the whole of humankind.

2.2.1. The *Noa'h*ide Laws in the Jewish tradition

The Talmud contains the idea that alongside Jewish law (*halakha*) stands another specific law that derives from an alliance between God and Noah (in Hebrew *Noa'h*, the ancestor of humanity after the Flood) and that sets out a small number of rules of law and morality (which, with a single exception, had been given first to Adam) that are of universal application and that any human group must abide by if it is to fulfill its duties towards God. These are the *Noa'h*ide Laws that are a sort of minimum

Paris, PUF, 2003, p. 206. On the question of dispensation from the precepts of the Decalogue, see Thomas Aquinas, *Summa Theologica*, I-II Q 100 a. 8 op. cit. p. 2380-2383.

⁴⁷ In Pufendorf there is an ambiguous passage on the characterization of the commandments of the Decalogue. He begins by rejecting Hobbes' opinion (*De Cive*, XIV, §9) that "the precepts of the Decalogue are 'civil' and not 'natural' precepts", i.e. laws instituted within a state under the circumstances provided for by that state. Not killing means not killing under circumstances prohibited by the state, but that it is lawful to kill in accordance with the authorizations accepted by the state (executioner, soldier at war, etc.). And so on for each commandment. Pufendorf dismisses this view, explaining that Hobbes depends upon an utterly false hypothesis, "that, before the founding of states, nothing belonged to one man, or another, there was no such a thing as marriage, and men were free to do anything whatsoever to one another." He argues, on the contrary, that the precepts of the Decalogue on these matters "obligate those who live, not under a common government, but in a state of nature, and observe mere natural law in their relations to one another..." (*De Jure Naturae et Gentium. Libri Octo (Of the Law of Nature and Nations. Eight Books)*, Carnegie Classics of International Law, vol. II, Oxford, Clarendon Press, London, Humphrey Milford, 1934, Book VIII, ch. I §4 p. 1137-1138). He adds, however, that insofar as these commandments were given to the Israelites by Moses and engraved on the two Tables, they are also civil laws of that people "or rather the chief heads of the civil Law of that people" (*ibid.* p.1138). But in any event it is God and God alone who is the ultimate foundation of natural law: "the obligation of natural Law is of God, the Creator and final governor of mankind who by His authority has bound men, His creatures, to observe it. And this assertion can be proved by the Light of reason", *Of the Law of Nature and Nations, op. cit.* Book II, ch. III §XX, vol. II p. 217).

requirement for any human society. The reference text is in the *Babylonian Talmud* (BT), *Sanhedrin* treatise, 56a:

Our Rabbis taught: Seven precepts were the sons of Noah commanded: to establish courts of justice, to refrain for blasphemy, idolatry, adultery, bloodshed, robbery, and eating flesh cut from a living animal.⁴⁸

These *Noa'hide* Laws contain six prohibitions and one positive commandment (to set up courts). Two of the commandments concern relations between mankind and God (prohibition on blasphemy and prohibition on idolatry), four commandments governing relations among humans (setting up courts, prohibition on unlawful unions, murder and theft) and on dietary commandment, the prohibition on taking flesh (to eat) from a live animal.

There is no space here to go into the detail of the commandments but two observations shall be made. These commandments are rational. By this I mean that they are amenable to a rational explanation, which is necessary if they are to be universal in their vocation. In the phraseology of the Talmud and of the Jewish philosophers of the Middle Ages, they are *michpatim*, rules that can be understood and that are found in all

⁴⁸ BT *Tractate Sanhedrin*, London, The Soncino Press, 1969, 56a. In Maimonides the order of the rules is different and they are first addressed to Adam: "Six precepts were given to Adam: prohibition of idolatry, of blasphemy, of murder, of adultery, and the command to establish courts of justice. [...] An additional commandment was given to Noah: prohibition of (eating) a limb from a living animal..." *The Code of Maimonides (Mishneh Torah), The Book of Judges*, Treatise Five, "Laws Concerning Kings and Wars", vol. XIV, chapt. IX §1, op. cit. p. 230-231. And see the article "Ben Noa'h" in *Encyclopedia Talmudica* with a list of other *Noa'hide* rules from various sources (*Encyclopedia Talmudica*, Jerusalem, Talmudic Encyclopedia Institute, 1992, vol. IV, p. 360-379. It may be found surprising there should be in the Jewish talmudic tradition a conception of salvation that is valid for non-Jews. This comes paradoxically from the fact that Jewish faith is a concrete universal (to speak like Hegel). Not being a pure universalism like Christian faith or Islam, which accordingly cannot conceive there can be salvation outside of themselves ("no salvation outside of the Church"), the Jewish faith can accept that pious non-Jews might achieve salvation. But being a universalism, it asks that non Jewish humanity respect a minimum foundation of values that come from its own Jewish foundation. On the *Noa'hide* Laws, see D. Novak, *The Image of the Non-Jew in Judaism. An Historical and Constructive Study of the Noa'hide Laws*, New York and Toronto, The Edwin Mellen Press, 1983 and by the same author *Natural Law in Judaism*, Cambridge, Cambridge University Press, 1998. See also B.S. Jackson, "The Jewish View of Natural law", *Journal of Jewish Studies*, spring 2001, p. 136-145, Suzanne Lost Stone, "Sinaitic and Noa'hide Laws: Legal pluralism in Jewish Law", *Cardozo Law Review* 12 (1990-1991): 1157-1214, M.J. Broyde, "The Obligation of Jews to Seek Observance of Noahide Laws by Gentiles : A Theoretical Review", in D. Shatz, Ch. I. Waxman & N.J. Diamant (eds), *Tikkun Olam. Social Responsibility in Jewish Thought and Law*, Northvale, London, Jason Aronson Inc, 1997, and See also E. Benamozegh, *Israël et l'Humanité*, Paris, Albin Michel, 1961, Ch. Leben, "La question du droit naturel dans le judaïsme" op. cit. n.39 And see supra n. 39 the articles by T. Rudavsky and J.J. Jacobs.

human societies,⁴⁹ and not *'houkim*, that is, rules the meaning of which eludes us, as for example the rules on sacrifices which are specific to Judaism. Even the dietary law has a rational basis. The underlying idea is that if God after the Flood accepted an imperfect and carnivorous humanity (in the Garden of Eden only plants were offered for human consumption, See *Genesis* I, 29-30), He asks humans not to behave like beasts that rip their prey apart.⁵⁰

The same is true for the requirement to set up courts, the term used, in Hebrew, for this commandment, *dinim*, is equivocal in point of fact and may mean both a requirement to set up courts or to legislate, or both. Thus one of the great commentators of the Bible in the Middle Ages, Na'hmanide (Spain, 1194–1270), wrote:

⁴⁹ See for example, the explanation by Judah Halevi (1075–1141, Spain) to the King of the Khazars evoking the Bible and the obligations arising from what the prophet Micah says (VI, 8) “He has told you, O man, what is good, and what the Lord requires of you: Only to do justice and to love goodness, and to walk modestly with your God” without having to submit to the specific commandments of the Jews (*The Jewish Study Bible*, New York, Oxford University Press, 2004, p. 1215). To which the Rabbi replies: “These are the rational laws, being the basis and preamble of the divine law, preceding it in character and time, and being indispensable in the administration of every human society. Even a gang of robbers must have a kind of justice among them if their confederacy is to last”, Judah Halevi, *The Kuzari*, tr. Hartwig Hirschfeld, New York, E.P. Dutton, 2nd ed. 1905, Book II §48.

⁵⁰ On the issue of rational laws/religious laws among medieval Jewish philosophers, see Ch. Leben “La question du droit naturel dans le judaïsme” op. cit. supra n.39, p. 1116-1119. On the existence of two separate schools as to the way to consider the question of the place of Gentiles in the divine arrangement of things (that of R. Akiva and that of R. Ishmael), see M. Hirshman, “Rabbinic Universalism in the Second and Third Centuries”, *Harvard Theological Review*, 2000, 101-115. See also on the *Noahide* Laws, Sh. Trigano, *Le judaïsme et l'esprit du monde*, Grasset, Paris, p. 477-483. The author insists that these are divine and not natural laws, since they are not “the product of reason but of the divine order of things” p. 478. This was a form of reasoning already used in the Middle Ages and the modern period. For rationalists, the reason at work in determining natural law cannot be anything other than what it is, and God himself cannot go against it. Reason in God is superior to his will. This means that natural law can only be universal and unchanging. On the contrary, the voluntarists like Duns Scot and William of Occam argue that the will of God is free from all constraint and could conceive of moral laws other than those we know. See on this a good general presentation by D.P. O'Connell, “Rationalism and Voluntarism in The Fathers of International Law”, *The Indian Year Book of International Affairs*, 1964 (Part II), p. 3-32, and by the same author, “The Rational Foundations of International Law: Francisco Suarez and The Concept of *jus gentium*”, *Sydney Law Review*, 1956-1958, p. 253-270. For an in-depth study, see also P. Haggemacher, *Grotius et la doctrine de la guerre juste*, op. cit. supra n.7 p. 462-529. Ch. Edwards, “The Law of Nature in the Thought of Hugo Grotius”, *The Journal of Politics*, 1970, p. 784-807 refutes the idea that Grotius was a pure rationalist, which seems to be the majority opinion among contemporary scholars. See also A.H. Chroust, “Hugo Grotius and The Scholastic Natural Law Tradition” *The New Scholasticism*, April 1943 (XVII, no 2), p. 101-133. It is also interesting to see the doctrine of Barbeyrac, who was not just the translator and commentator of Grotius and Pufendorf but also a jurist and philosopher in his own right. See T. Hochstrasser, “Conscience and reason: The Natural Law of Jean Barbeyrac”, *The Historical Journal*, June 1993 p. 289-308.

In my opinion, “the administration of justice” that [the Sages] counted among the seven commandments of [the *Noahides*], does not mean only that they are required to set up judges in every district. Rather, [God] commanded them concerning the laws of theft, overcharging, withholding wages, the laws of bailees and of the rapist or the seducer of minors, the various categories of damages, personal injury, the laws of creditors and debtors, the laws of buying and selling etc comparable to the civil laws about which Israel was commanded. (commentary on Genesis XXXIV,13)⁵¹

It can be seen that this commandment relates in fact to a general obligation to set up a legal order for a rule-governed, fair, and honest social life, which is an eminently rational requirement and is universal in its scope.⁵² This commandment of *dinim* might put one in mind of Hobbes when he considers that the first rule of natural law that is incumbent on humanity in the state of nature is that they escape from that state.⁵³

The question of the *Noahide* Laws was addressed by various medieval Jewish philosophers and especially Maimonides who gave the theory a particular twist entailing controversies that ran on for centuries. But for the matter at hand, there is no need to go into the details of the doctrine of the “Eagle of the Synagogue”.⁵⁴

⁵¹ See R.Y. Blinder, *The Torah with Ramban's Commentary*, New York, Mesorah Publications, 2004, vol. 2 p. 224.

⁵² As Suzanne L. Stone observes: “each Noahide principle is the subject of extensive rabbinic juridical elaboration so that Noahide law potentially covers a large variety of topics, including international human rights, euthanasia, abortion and capital punishment”, “Judaism and Civil Society”, in M. Walzer, (ed.), *Law, Politics and Morality in Judaism*, Princeton, Princeton University Press, 2006, p. 12-33, p. 28.

⁵³ See Norberto Bobbio, *Thomas Hobbes and the Natural Law Tradition*, Chicago, The University of Chicago Press, 1993, p. 122.

⁵⁴ Maimonides' position on the natural law has caused controversy from Spinoza down to Hermann Cohen. In the late 20th century, the controversy was refueled by the famous article by Marvin Fox “Maimonides and Aquinas on Natural Law”, in *Interpreting Maimonides. Studies in Methodology, Metaphysics, and Moral Philosophy*, Chicago and London, The University of Chicago Press, 1990, p. 124-151. However, eminent the author's character, I think his analysis of Maimonides was misguided on this question. See, as a first approach, my “La question du droit naturel dans le judaïsme” supra n.39 and the bibliography given. And See the articles by T. Rudavski and J.J. Jacobs supra n.39, as well as M. Kellner, *Maimonides' Confrontation with Mysticism*, Oxford, The Littman Library of Jewish Civilization, 2006, p. 241-263, Steven Schwarzschild, “Do Noachites have to believe in Revelation? (A passage in dispute between Spinoza, Mendelssohn, and Hermann Cohen). A Contribution to a Jewish view of Natural Law” in M. Kellner (ed.), *The Pursuit of the Ideal. Jewish Writings of Steven Schwarzschild*, Albany, State University of New York Press, 1990, p. 29-59. And See G.G. Stroumsa, *A New Science: The Discovery of Religion in The Age of Reason*, Cambridge MA, London, Cambridge University Press, 2010. On seventeenth-century Europe, he notes, p.45 that “All of sudden, and for a century, the *Noahide* laws became a central concept in the history of religions. They offered a thread of Ariane, as it were, through which one could retrace the early religious history of humankind and the place of religion in ancient polytheistic societies as reflected in the Hebrew Bible”.

2.2.2. The *Noa'hide* Laws in Grotius and Selden

These two authors were to break with an age-old Roman Catholic tradition by dismissing the Decalogue as the most eminent expression of law with universal vocation given by God himself to all of humanity with the revelation on Mount Sinai. They were to replace it with the *Noa'hide* Laws of the talmudic tradition. It seems they were not the first to do so. But more research would be required to get to the roots of their doctrinal choice. It can be observed, though, that one of the first great theologians of the Church of England, Richard Hooker (1554–1600, an author of a generation before that of Grotius and Selden, considered in *The Lawes of Ecclesiastical Politie* (1593), the Apostolic Decree in Acts 15: 28-29 contains a remnant of the *Noa'hide* Laws.⁵⁵

In any event, both Grotius and Selden⁵⁶ (and the latter more explicitly, significantly and systematically⁵⁷), were to pull the Decalogue down from its place and replace it with the talmudic idea of “the laws of Noah’s children” (*Noa'hide* Laws) and the seven commandments as they are mentioned in the treatise of the Babylonian Talmud (*Sanhedrin* 56a see above). The change is a quite remarkable one, replacing a

⁵⁵ “For it has seemed good to the Holy Spirit and to us to impose on you no further burden than these essentials: that you abstain from what has been sacrificed to idols and from blood and from what is strangled and from fornication.” (New Revised Standard Version Bible) These are not the *Noa'hide* commandments, but there is a family resemblance. See also J. Rosenblatt, “Natural Law and Noachide Precepts: Grotius, Selden, Milton, and Barbeyrac” in J. Rosenblatt, *Renaissance England’s Chief Rabbi: John Selden*, op. cit. supra n. 24, p. 135-157, p. 111. It might be wondered whether in the abandoning of the preeminence of the Decalogue there is not something due to the Protestant or Church of England Reform. It is interesting to observe that the Council of Trent (Sess. VI, can. xix) condemns those who deny that the Ten Commandments are binding on Christians. See New Advent, *The Catholic Encyclopedia* on CD-Rom, verbo Commandments of God.

⁵⁶ On the mutual respect between the two authors despite the question of the status of the sea, see R. Tuck, “Grotius and Selden”, in J.H. Burns and M. Goldie *The Cambridge History of Political Thought 1450–1700*, Cambridge University Press, 2008, p. 499-529, and see the two chapters on these authors by R. Tuck in *Natural Rights Theories. Their Origin and Development*, op. cit. supra n. 40, p. 58-100 and J.P. Sommerville, “Selden, Grotius, and the Seventeenth-Century Intellectual Revolution in Moral and Political Theory”, in V. Kahn, L. Hutson, *Rhetoric and Law in Early Modern Europe*, New Haven, Yale University Press, 2001, p. 318-344.

⁵⁷ G.J. Toomer, writes that Selden’s *De Jure Naturali et Gentium Disciplinam Ebraeorum* (1640) “develops something only hinted at by Grotius, that Jews too had a concept of natural law...”, in *John Selden. A Life in Scholarship*, Oxford, Oxford University Press, 2009, vol. 2 p. 491. Barbeyrac had not been mistaken. In a somewhat enigmatic passage, Grotius (*The Rights of War and Peace*, Book I, ch. I §15 op. cit. p. 164) writes of Divine voluntary Law: “And this Law was given either to all Mankind or to one People only: We find that God gave it to all Mankind at three different Times...”. Barbeyrac states he does not rightly understand what Grotius means but adds it is probably about the “six Commandments, which he, with the Rabbies, supposes were given to Adam and Noah (...) as is also the Seventh, concerning Abstinence from blood...”. Barbeyrac is plainly skeptical and considers it to be a “very uncertain Tradition”, *ibid* p. 164 n. 3

text of the Pentateuch by a passage from the Talmud, whereas there was a more than a thousand-year tradition of Christian hostility to this book which was held to be the receptacle of Jewish error and filled with all manner of blasphemous fables.⁵⁸

For Grotius and Selden on the contrary, the Decalogue was given specifically to the Jews and contains commandments concerning them alone like that relating to observance of the Sabbath.⁵⁹ Conversely, the *Noahide* Laws that concerned all of humankind before the revelation on Mount Sinai relate more specifically to the nations of the world after the gift of the Law to the Jews.⁶⁰ For the Jews, it is true that this idea is not presented as such by Grotius, as it was to be by Selden. But a careful reading of *De jure belli ac pacis* reveals its author's position on the issue.

First of all, nowhere in the book does Grotius proclaim—as was commonplace at the time and as it had been in the past—that the Decalogue is the expression of natural law and is mandatory for all of humankind. Indeed, Divine voluntary law “was given either to all Mankind, or to one People”.⁶¹ This last hypothesis is that of the laws of Moses, including the laws in the Decalogue, and there are no others. In addition, although it is not excluded that some laws of Moses might also be mandatory for the entire human race, and in this case the text of the Pentateuch prescribes that the law

⁵⁸ See the various autodafés of the Talmud down the centuries and, for example, Gilbert Dahan (ed.), *Le brûlement du Talmud à Paris, 1242–1244*, Paris, Cerf, 1999. See also J.P. Rosenblatt, “John Selden's *De Jure Naturali ... Juxta Disciplinam Ebraeorum* and Religious Toleration” in J.P. Rosenblatt, *Renaissance England's Chief Rabbi: John Selden*, op. cit. supra n.24, p.179 who writes: “Most Christians of the early modern period contrast the ‘Hebrew truth’ (*Hebraica veritas*) of the Bible with the rabbinical fables of the Talmud”. And See more generally, A. Raz-Krakotzkin, “Censorship, Editing, and the Reshaping of Jewish Identity : The Catholic Church and Hebrew Literature in the Sixteenth Century”, in A.P. Coudert and J.S. Shoulson, “*Hebraica Veritas?*... op. cit. supra n.6, 125-155.

⁵⁹ Grotius emphasizes the idea that “a law obliges only those to whom it was given” and [that] it is clear in the actual text of the Pentateuch that the law was given to the Hebrews, which is what Maimonides also states (*The Rights of War and Peace*, op. cit. vol. I, p. 168-169). J.P. Sommerville, however, claims that Grotius never defended the line that the Ten Commandments were binding only on Jews. And he argues that if it had been the case, Christians and Muslims would be free to kill, steal, commit adultery and so on. That argument (there are others) is unacceptable since such acts are prohibited by the laws of Noah. See J.P. Sommerville, “Selden, Grotius, and the Seventeenth-Century Intellectual Revolution in Moral and Political Theory”, op. cit. supra n. 56, p. 331 .

⁶⁰ See J.P. Rosenblatt, “Natural Law and Noahide Precepts: Grotius, Selden, Milton and Barbeyrac”, in J. Rosenblatt, *Renaissance England's Chief Rabbi: John Selden*, op. cit. supra n.24 p. 135-157, and in the same book, “John Selden's *De Jure Naturali ... Juxta Disciplinam Ebraeorum* and Religious Toleration”, op. cit. supra n.24. Rosenblatt shows how, for Grotius and Selden, the *Noahide* Laws came to replace the Decalogue.

⁶¹ *The Rights of War and Peace*, Book I, ch. I, §XV, op. cit. p. 164.

shall be the same for Jew and non-Jew alike, generally “the Law of Moses obliged only the Israelites”.⁶²

Hebrew law does not therefore express natural law, even if it is not contrary to it. Nowhere does Grotius state that the Decalogue escapes from this analysis and his contemporaries were not mistaken on this. Barbeyrac cites Gronovius (1611–1671, German scholar) who argues against Grotius that “the Laws of the Decalogue are universally obligatory”, which is the Catholic doctrine reasserted at the Council of Trent.⁶³ To which Barbeyrac responds in defense of Grotius that the Sabbath was given to the Jews alone and that even the fifth commandment (*Honor thy father and thy mother*) is presented in a particularistic way.⁶⁴

Under these circumstances, there would supposedly be nothing more in the divine law proclaimed on Mount Sinai of interest to the remainder of the human race. But that would be without counting with the category of the *Noa’hide* Laws. Grotius introduces the idea in Chapter II of Book I of *The Rights of War and Peace*.

Hither we may refer that antient Tradition among the Hebrews, that God gave more Laws to the Sons of Noah, which were not all recorded by Moses, as thinking it enough to include them afterwards in the peculiar Laws of the Hebrews.⁶⁵ [...] Among those Commands of God to the sons of Noah, they say this was one, that not only Murders, but also Adultaries, Incests, and Rapines, should be punished with Death...⁶⁶

This is indeed about the *Noa’hide* Laws, even if the institution of courts and the dietary commandment are missing. Further proof of this is that Grotius introduces here a discussion about the pious among the Nations, by correctly citing the Hebrew

⁶² *The Rights of War and Peace*, op. cit. Book I, ch. I §XVI, op. cit. p. 171 and see also *ibid.* p.174 “it cannot be made appear that it was the Will of God, that any other People, beside the Israelites, should be bound by that Law”.

⁶³ V. supra n. 55

⁶⁴ *The Rights of War and Peace*, op. cit. Book I, ch. I §XVI, op. cit. p. 167. This issue opposes J.P. Sommerville and R. Tuck. See supra n. 59.

⁶⁵ *The Rights of War and Peace*, op. cit. Book I, ch. II §5, p. 193.

⁶⁶ *ibid.* p. 194. So there are *Noa’hide* laws beyond the seven commandments set out above, even if they may all be brought down to those seven. Grotius invokes Selden, *De Jure Naturali et Gentium Juxta Disciplinam Ebraeorum* without any precise reference. Notice that in the talmudic tradition, whenever an obligation is examined in terms of Hebrew law it is common to ask what the position is in terms of the law applying to the descendants of Noah. We thus end up with a list of commandments that extends beyond the seven best known ones. See *Encyclopedia Talmudica*, vol. 4 op. cit. p. 374-375.

expression (*hassidei oumot haolam*⁶⁷) who “as the Hebrew Rabbins say, were obliged to keep the Precepts given to Adam and Noah to abstain from Idols and Blood, and from other Things...”.⁶⁸ He adds that these *Noa’hide Laws*, that are the law of divine will for all Nations, were given “to all Mankind at three different Times. First, Immediately after the Creation of Man, Secondly, Upon the Restoration of Mankind after the Flood. And thirdly, under yhe Gospel, in that more perfect re-establishment by Christ”.⁶⁹ Which drew a scathing and skeptical comment from Barbeyrac.⁷⁰

He considers this is a “very uncertain tradition” but he understands what Grotius is alluding to and what these positive laws are “which God delivered at the beginning of the world [...] and which are still obligatory” and which he speaks of as “divine voluntary law [...] distinguished from the Natural Law”. They are indeed, he tells us, laws of the children of Noah as conceived by the Jewish tradition.⁷¹

Selden, for his part, was to take up very systematically and closely Grotius’ ideas in defending the line that the *Noa’hide Laws* and not the Decalogue provide the basic principles for any society both legally and morally.⁷² Thus he writes:

[the] precepts of Noachidae (by which they [the Jews] meant the whole human race), were enjoined upon Adam, the first parent. So they [the Jews] maintain

⁶⁷ In the R. Tuck edition of *The Rights of War and Peace*, op. cit. the translation of the expression (*hassidei oumot haolam* given in Hebrew characters but with a misprint is “the Righteous amongst the Gentiles”, which seems inaccurate to me. The Hebrew speaks of *hassidim* (pious) and not of *tsadikim* (righteous). Selden speaks of the “pious”: “*Piis ex gentibus mundi pars seu sors est in futuro seculo*”. V.J.P. Rosenblatt, “John Selden’s *De Jure Naturali ... Juxta Disciplinam Ebraeorum* and Religious Toleration” p. 107. For the status of “a Stranger and a Sojourner” (*guer tochav*), Grotius refers to Maimonides’ *Mishneh Torah, Laws Concerning Idolatry and the Ordinances of the Heathens*. This is the fourth section of the *Book of Knowledge*, ch. X §6. See Maimonides, *Mishneh Torah. The Book of Knowledge*, tr. Moses Hyamson, New York, Feldheim Publishers, 1981, p. 78b. Grotius makes a mistake (as Barbeyrac observes) by attributing to the Talmud, the *Treatise concerning kings*, which is one of the treatises of Maimonides’ *Mishneh Torah*. Let he who has never sinned, etc.

⁶⁸ *The Rights of War and Peace*, op. cit. Book I, ch. I § 16, p. 169.

⁶⁹ *The Rights of War and Peace*, op. cit. Book I, ch. I §15, p. 164-166.

⁷⁰ *ibid.* p. 164 n. 3.

⁷¹ *The Rights of War and Peace*, op. cit. p. 164 n. 3. “I do not understand what positive Laws the Author means, which God delivered at the beginning of the World.” But he immediately specifies that he probably meant the “six Commandments, which he [Grotius], with the Rabbies, suppose were given to Adam and Noah” and a seventh “concerning Abstinence from Blood, which we find prescribed to Noah”.

⁷² See J.P. Sommerville, “The Law of Nature and the Origins of Government”, *The Historical Journal*, 1984, p. 437-447, p. 438-439 with citations from Selden in Latin. Notice a slip in the interesting book by P. Laurent, *Pufendorf et la loi naturelle*, Paris, Vrin, 1982, who writes, p. 29: “Selden [...] abandoned the idea of dealing with a universal natural law to turn to the law of the Decalogue, vested with the authority that God himself had given to it” (our translation). Not the Decalogue but the *Noa’hide Laws*.

that these precepts always oblige. [The first six of the seven precepts] “were ordained by God at the very beginning of things” while only the seventh, forbidding the eating of live animals, dated from after the Flood.⁷³

This is the carefully argued position of Selden (under the influence of Grotius for some commentators),⁷⁴ and his thesis set out at great length in his celebrated and voluminous *De Jure Naturali et Gentium Juxta Disciplinam Ebraeorum* of 1640, which had considerable impact on European thinkers up until the eighteenth century.⁷⁵ The study is organized so as to devote a book to each *Noahide* Law. Selden shows each time that the *Noahide* Law examined is one of the principles of natural law and that anything that is natural law is included in one of the seven *Noahide* Laws.

Selden excels in this exercise and demonstrates a near talmudic skill. An example can be given from a passage of Grotius’ *De jure belli*. Grotius writes on the question of the exact number of *Noahide* Laws (seven or more?): “Among those Commands of God to the Sons of Noah, they say this was one, that not only Murders, but also Adulteries, Incests, and Rapines should be punished with Death” and he adds “which the Words of

⁷³ J.P. Sommerville, “The Law of Nature and the Origins of Government”, op. cit. supra n.72, p. 439. The citations given by Sommerville are from J. Selden, *De Jure Naturali et Gentium Juxta Disciplinam Ebraeorum, Libri Septem*, London, 1640, p. 109 and 119. For valuable insight into Selden’s book, See G.J. Toomer, *John Selden. A Life in Scholarship*, New York, Oxford University Press, 2009, vol. 2 p. 490-562 and on the presentation of the *Noahide* Laws p. 493-506. The definition of natural law is the subject of the entire first book of Selden’s *De Jure Naturali*. The determination of this law as the law commanded by God and as it is known to the Jews as the laws of the children of Noah comprising seven precepts are the subject of the final two chapters of Book 1.

⁷⁴ In the seventeenth century, Selden was thought of as a continuator of Grotius. See R. Tuck, *Philosophy and Government 1572–1651 (Ideas in Context)*, Cambridge, Cambridge University Press, 1993, p. 214-215. But Sommerville disagrees on this. See *Selden, Grotius, and the Seventeenth-Century Intellectual Revolution in Moral and Political Theory*, op. cit. supra n.56 p. 335 ff.

⁷⁵ There are many leading authors (Newton, Lightfoot, Harrington, Stube, Toland, Pufendorf, Milton, Hobbes, etc.) who cite and seriously discuss Selden’s arguments. See J.P. Rosenblatt, “John Selden’s *De Jure Naturali ... Juxta Disciplina Ebraeorum* and Religious Toleration”, op. cit. n. 55, p. 168-176. But something very strange happened to Selden: while several authors of his century who wrote in Latin were translated into one of the major European languages in the eighteenth century (Grotius and Pufendorf, obviously), his Latin work remained untranslated with the sole exception in the seventeenth century of his book on the closed sea (*Mare clausum: Of the Dominion, or, Ownership of the Sea. Two Books*, London, 1652 which has been very handsomely republished, The Lawbook Exchange, Clark, New Jersey, 2004). Recently his work on Jewish matrimonial law has been translated: see J.R. Ziskind, *John Selden on Jewish Marriage Law: The Uxor Hebraica*, Leiden, Brill, 1991. But nothing else, and especially not his *De Jure Naturali et Gentium*. It will be noticed too that the Carnegie endowment that in the early twentieth century financed the publication and translation of some forty books in the *Classics of International Law* collection did not include Selden, not even the *Mare clausum* which had already been translated in the seventeenth century and is indisputably a book of international law. However, one can at present read a digest of Selden’s main Latin works thanks to the publication of the impressive erudition of G.J. Toomer, *John Selden. A Life in Scholarship*, 2 vol, Oxford, Oxford University Press, 2009.

Job [Job XXXI, II] seem to confirm ...”, without any further explanation, although some would be required as this passage from Job does not seem to refer to the *Noa'hide* Laws at all (as Barbeyrac observes).⁷⁶ In it Job proclaims his innocence and pleads not guilty to the various trespasses for which man may be brought to account before God. Selden shows that Job was not Jewish but a Gentile (which is consistent with a part of Jewish tradition and is taken up by Maimonides),⁷⁷ and that he was a pious person within the meaning of *Sanhedrin* 56a and that, through his pleading, the *Noa'hide* Laws can be reconstructed, each of his protests being designed to show that he had infringed none of the seven laws.⁷⁸

A further point is about the conception Grotius and Selden held of the origin of the *Noa'hide* Laws. It is known that for Grotius there was a controversy over the nature of natural laws, a controversy raised by the text of *De Jure Belli*. In a famous but not unprecedented passage, Grotius writes that “all we have now said would take place, though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human affairs”.⁷⁹ A little further on in his *De jure belli* he writes: “[T]he Law of Nature is so unalterable, that God himself cannot change it”.⁸⁰

Some have inferred from this that when it came to fundamental values Grotius was a pure rationalist who maintained that human reason was capable of discovering

⁷⁶ Grotius, *The Rights of War and Peace*, Book I, ch. II, §V, op. cit. p. 194.

⁷⁷ Maimonides, *The Guide of the Perplexed*, Chicago, (tr. Shlomo Pines) The University of Chicago Press, 1974, vol. II, Book III, ch. 22 p. 486. Maimonides is favorable to the idea in the Talmud (BT, *Baba Batra* 15a) that the Book of Job is simply a parable and does not tell about someone who actually lived.

⁷⁸ J. P. Rosenblatt, *Renaissance England's Chief Rabbi. John Selden*, op. cit. supra n.24, p.154-155

⁷⁹ *The Rights of War and Peace*, op. cit. “The Preliminary Discourse” (Prolegomena) XI p. 89, (*etiamsi daremus non esse Deum aut non curaria eo negotia humana*). All the commentators note that in invoking this “impious” hypothesis, Grotius is not being innovative and remains in the strand that runs through Suarez, Gregory of Rimini (14th century) back to the Decree of Gratian and its commentators (12th century). See P. Haggemacher, *Grotius et la doctrine de la guerre juste*, op. cit. supra n.7 p. 482 ff and 501 ff. See also A. Dufour, *Le mariage dans l'école allemande du droit naturel moderne au XVIIIème siècle*, Paris, LGDJ, 1972, p. 94, n. 76. B. Tierney, *The Idea of Natural Rights*, Grand Rapids, Michigan/Cambridge UK, Emory University Press, 1997, p. 327 ff., A. Sériaux, *Le droit naturel*, Paris, PUF, QJSJ, 1993, (2nd ed), p. 83 ff.

⁸⁰ *The Rights of War and Peace*, Book I, ch. I §X.5, op. cit. p. 155. This is the position of A. Sériaux, op. cit. p. 83. However, Haggemacher, Dufour and Tierney, all consider that Grotius' position remains marked by the pre-eminence granted to the divine will which is a source of law (Prolegomena XII). See also R. Tuck, *Natural Rights Theories: Their Origin and Development*, Cambridge, Cambridge University Press, 1979, p. 58-81, especially p. 76 ff.

these values, even without resort to God. The fact is that there are divergent opinions of Grotius' thought. Some defend the idea of an author who evolved from a voluntaristic position in his youthful work *De jure praedae*, to a more strictly rationalist stance as indicated by the formula *etiamsi daremus* ("the impious hypothesis") or by the definition of natural law as a "Dictate of Right Reason".⁸¹

It seems, though, - and this is the position of the majority of scholars - that while for Grotius there were rules of natural law deriving from "the internal Principles of Man" (and so principles of natural law), those rules could also be attributed to divine will "because it was his [God's] Pleasure that these Principles should be in us".⁸² Ultimately, as Dufour observes: "the scholastic idea that Law holds independently of the existence of God finds [...] a favorable reception in his thought, but it does not give him leverage to remove divine command from the legal system".⁸³

As for Selden, he gives a clearly voluntaristic turn to the doctrine of *Noahide* Laws. He considers, and quite clearly so, that the precepts presented in the Talmud (*Sanhedrin* 56a) bearing on the *Noahide* Laws are the full statement of natural laws. Now Selden does not present these laws as being simply discovered by the use of right reason (Grotius) but as universally valid because they are divine revelation to Adam or

⁸¹ *The Rights of War and Peace*, Book I, ch. I §X.1, op. cit. p. 150.

⁸² *ibid.* Prolegomena XII, p. 91. See the very detailed analyses of P. Haggemacher on the intellectualist and voluntarist strands in the natural law doctrine from the Middle Ages to the modern era, op. cit. supra n.7, p. 462-529. On the position of Grotius and the *etiamsi daremus*, see M. Villey, *La formation de la pensée juridique moderne*, Paris, PUF (Léviathan), 2003, p. 539-558. Villey mentions several works including a formulation like that of Grotius, especially Suarez, *De legibus*, II, 6 n. 17. P. Haggemacher argues that "the *etiamsi daremus* hypothesis is for Grotius, as for his scholastic predecessors [...] a mere hypothesis, posited from the outset as absurd" (our translation), op. cit. p. 502. A. Dufour, *Le mariage dans l'Ecole allemande du droit naturel moderne au XVIIIème siècle*, Paris, LGDJ, 1972, p. 94. A. Sériaux considers that Grotius founds absolute rationalism and that his reference to God is of no consequence because it does not change that fact that it is "human reason [which] thus subtly becomes the ultimate cause of natural law", *Le droit naturel*, Paris, PUF, QSJ, 2nd ed. 1999, p. 83. Villey thinks the formula of the *etiamsi daremus* should not be taken too literally. True, Grotius abandoned the voluntarist position he held in his *De jure praedae*. But the Reason he invokes "is a Christianized reason, an alliance between Christianity and humanist culture", (op. cit. p. 539). Grotian rationalism therefore maintains a voluntaristic dimension. See also E. Jouannet, *Emer de Vattel et l'émergence doctrinale du droit international classique*, op. cit. supra n.37, p. 41; Ch. Edwards, "The Law of Nature in the Thought of Hugo Grotius", *The Journal of Politics*, 1970, p. 784-807, I. Husik, "The Law of Nature, Hugo Grotius and the Bible", *Hebrew Union College Annual*, vol. II, 1925, p. 381-417, J.P. Rosenblatt, "Natural Law and Noahide Precepts: Grotius, Selden, Milton and Barbeyrac", op. cit. supra n.55, p. 135-157.

⁸³ Dufour op. cit. p. 94. Dufour shows the proximity of Grotius' doctrine to that of Suarez, who writes: "Even if it is natural reason that says what is right or wrong for the reasonable nature, it is no less God, as the creator and Regent of that nature, who orders to do or to avoid what reasons prescribes to do or to avoid", *De Legibus* II, VI, 8 (cited by Dufour op. cit. p. 95, our translation).

to Noah or to Moses on Mount Sinai. For Selden as for Grotius, while some principles seem to follow “by logical necessity”, they are attributable ultimately to God “because it was his pleasure that these principles should be in us”. When all is said and done, with Selden “there is no universal law apart from the divine revelation”.⁸⁴ In that he follows a voluntaristic concept of the law that is far removed from what is expected of a jusnaturalist. Only the commandment of a superior, and in the end of the Ultimate Superior, can produce and enforce law. Thus in his *Table talk*, he writes:

I cannot fancy to myself what the law of nature means, but the law of God. How should I know I ought not to steal, I ought not to commit adultery, unless somebody had told me so. 'Tis not because I think I ought not to do them, nor because you think I ought not; if so, our minds change: whence then comes the restraint? From a higher power; nothing else can bind. I cannot bind myself, for I may untie myself again; nor an equal cannot bind me, for we may untie one another. It must be a superior, even God Almighty.⁸⁵

3. The presence of Jewish sources in the doctrine of the law of nations of early modern Europe: the example of the law of the sea.

Before addressing the subject matter proper, some clarification is required about the nature and origin of influences that might have affected early seventeenth-century authors on international law, or, to put it another way, we must clarify how the authors of the time reasoned in order to understand what kind of influences they may have been open to.

⁸⁴ J.P. Rosenblatt, op. cit. p. 114.

⁸⁵ J.P. Rosenblatt, “John Selden’s *De Jure Naturali (...) Juxta Disciplinam Ebraeorum* and Religious Toleration” in Coudert and Shoulson, *Hebraica Veritas?* op. cit. 114. And see what Selden says in *Mare Clausum*: “whatever is obligatorie in either of these [the Universal Law of nations, or the Common law of mankind], either out of the nature of the thing it self, or rather from the autoritie of the father of nature, is reputed by men to bee unchangable”, *Of the Dominion or, Ownership of the Sea Two Books*, op. cit. n.75 p. 13.

3.1. On the way the authors of the law of nations went about things

One must be aware, when we speak of the law of nations in the seventeenth century, of what can be found in works on the subject, whether the law of war and peace, the law of nature and of nations, the law of the sea, or diplomatic law, etc. These books, which we think of as works on international law, contain very little of what might be identified since the late 18th or early 19th centuries as arguments of international law, that is, arguments having recourse to rules of international law as established from sources of international law (custom and treaties) and to their organization as well as to the study of state practice. In the sixteenth and seventeenth centuries, authors generally did not reason by invoking, say, some treaty as the expression of the state of international law, particularly as the technique of the multilateral treaty was not to be invented until the nineteenth century. International custom was seldom invoked as expressing international law in any particular domain, and even less the general principles of law, which had not yet been “invented” in their modern sense; as for international case law, it existed only (if at all) in an embryonic form.⁸⁶

So, how did the “founding fathers of international law” reason then? In a way that totally unsettles the contemporary reader, as P. Haggenmacher points out about Grotius.⁸⁷ Their reasoning was purely “literary”. The authors of the time drew on anything that West European literature could provide as an opinion on a particular issue. They appealed first to the ancient writers who, whatever their field (philosophy, history, poetry, law) were supposed to contain a degree of wisdom that was guaranteed by their antiquity.⁸⁸ Plato and Aristotle held pride of place, but alongside them were a

⁸⁶ P. Haggenmacher speaking of Grotius' *De jure belli* observes that this book is not a treatise on the law of nature or on the law of nations “conceived (...) as a sector of some yet nonexistent international law”, and he denounces the fact that many authors have attributed to Grotius “a modern type of international law...”, which is meaningless, See *Grotius et la doctrine de la guerre juste*, op. cit. p. 8 (our translation).

⁸⁷ P. Haggenmacher *Grotius et la doctrine de la guerre juste*, op. cit. p. 3. The author notes the “confusion” of readers who feel “awkward with a work that will appear so strange to them that they will doubt [...] its current relevance” (our translation). Haggenmacher is not referring here (or not only) to the “literary” aspect of *The Rights of War and Peace* although his remark is valid for that aspect too. He explains that his work on Grotius belongs to a special genre, which he calls “the literary history of the law of nations” (op. cit. p. XI). He emphasizes that Grotius “like most of his predecessors [...] thought above all in terms of texts and authorities” and not of facts and practices. And he adds “The ‘positive’ proof of his law of war and peace he sought preferably in ancient literature”, (op. cit. p. XII). Things not very different for Gentili, Selden, and Pufendorf.

⁸⁸ It is not known to what extent such a belief was furthered by ideas first developed by Marsilio Ficino (1433–1499) and Pico della Mirandola (1463–1494) and common in Europe in the 16th century about a

host of Latin writers, whether lawyers and philosophers (Cicero), historians, especially because they were the memory and practice of cities and kingdoms (Plutarch, Thucydides, Pliny, Sallust, Livy, Tacitus, Suetonius and the Greek speakers Appian, Polybius, Cassius Dio, and Dionysius of Halicarnassus), poets (Horace, Virgil, Ovid), philosophers (Seneca), the great juriconsults of Roman law and the compilation of Roman law in the Digest, Institutes, Novellae and so on, as well as the medieval lawyers and canon law scholars (Baldus, etc.), not forgetting the Church Fathers and theologians of the ancient world (Augustine, Jerome, etc.) and of the Middle Ages.

As for the authority of the authors that were referred to, it seems to have been equally shared all round: Virgil can confirm or counter Cicero, who might confirm or counter Plato, who might be contradicted by Tacitus, who might counter or confirm a passage from Scripture. That is one of the most striking things in the international law doctrine of the seventeenth century: authors appealed to other writers of the past, whether Greco-Roman or Judeo-Christian, being equally open to all.⁸⁹

The reasoning of these internationalists was therefore almost always based on authorities whose *dictum*, more often than not, had nothing to do with international law. From an individual basis, their statement was then raised to the level of the law of nations.⁹⁰ For example, chapter II of Book II of Grotius' *The Rights of War and Peace*, "Of Things which belong in common to all Men",⁹¹ takes as its starting point for the

prisca theologia, an ancient and esoteric pre-Christian theology but one influenced by biblical scripture, that made it possible to have "a past without breaks, a past that included and connected together the Christian and Jewish Worlds, Greece and Rome, ancient Gaul, and, for some, medieval France". See D.P. Walker, "The *Prisca Theologia* in France", *Journal of the Warburg and Courtauld Institutes*, 1954, p. 204-259, p. 258.

⁸⁹ An early English critic (1613) of Grotius' *Mare Liberum*, William Welwod, emphasizes that it is pointless for Grotius to cite all those "Grecian and Roman writers, poets, orators, philosophers, and juriconsults", for what authority could they have compared with the "great Creator and author of all..." who spoke in the Holy Scriptures and said the opposite of what Grotius defends. The text, translated from Latin, is from Welwod, *An Abridgement of All Sea-Laws* (1613), ch. XXVI, "Of Fishers, fishing, and trafiquers therwith". It is reprinted in the recent edition of *Natural Law and Enlightenment Classics: Hugo Grotius, The Free Sea*, edited by David Armitage, Indianapolis, Liberty Fund, 2004, p. 65-74, p. 67. The text is followed by a lengthy and previously unpublished response from Grotius, p. 77-130.

⁹⁰ For example, on the question of the appropriation of the sea, Grotius writes: "(...) in all Parts of the Sea that were known in the Time of the Roman Empire, from the first Ages, even down to the Time of the Emperor Justinian, 'twas the Law of Nations, that no People whatever should claim a Property in the Sea..." (Book II, ch. III, §IX, op. cit. vol. II p. 460) What is the issue here? A universal custom? A principle of Roman law? A principle of the law of nations?

⁹¹ *The Rights of War and Peace*, op. cit. vol. II p. 420

study of the origin and development of property, the creation of the world by God as described in the Bible, then the evolution of the human condition as described there, the community of the earliest times, the loss of innocence that the Greek and Roman authors also describe, the sharing of things that were common in the early times, and what the result of it is for the legal status of land and then of the sea with many examples drawn from scripture, from Philo of Alexandria, Greek and Latin historians, Roman jurisconsults, and so on.

The law of nations threads through all of this in filigree only. It is the author, Grotius in this instance, who, through the way he pieces together the various sources of Jewish scripture, of the New Testament writings, of the authors of Greek and Latin Antiquity, says or simply suggests that such or such a practice corresponds to a rule that is supposed to be applicable as a rule of the law of nations.

As for the Jewish sources and their use by seventeenth-century international lawyers, they belong to the corpus of the Jewish legal world, namely the Bible and post-biblical sources (Talmud, *midrachim*, biblical commentators, codifiers, etc.). They were just as influential as the authors of Ancient Greece and Rome. They contributed to intellectual operations leading international lawyers to formulate the rules of the law of nations, which was strictly doctrinal so long as state practice had not provided authors with material from which to elaborate positive international law (which was not until the late eighteenth and the nineteenth centuries).⁹²

To illustrate our point about the recourse by masters of international law to Hebrew sources, we shall take the case of the law of the sea since it is amply dealt with by the main writers in the discipline (Grotius, Selden, and Pufendorf). More specifically,

⁹² Not counting an author like Pufendorf, who objected to the very idea of a positive international law because it would be at the mercy of state manipulation. See below. With regard to Grotius, there is a very fine study by Ph. S. Lachs, "Hugo Grotius' Use of Jewish Sources in In the Law of War and Peace", *Renaissance Quarterly*, 1977 p. 181-200. Lachs does not just compile all the references but he searches in which works Grotius found them (in Hebrew or in Latin) and the way he understood or sometimes misunderstood them. It is amazing how many authors were cited and used by him in his argument from the Ancient World, the Middle Ages, and the modern era no less than Selden, even though Grotius did not have Selden's command of Hebrew.

we shall examine our authors on one of the essential questions on which they are at loggerheads, namely the freedom of the seas and their potential appropriation.⁹³

3.2. On the freedom of the seas or the appropriation of the seas: three authors, three readings.

Maritime connections, whether for the transport of goods and passengers or for the navigation of warships, were by the nature of things a matter of concern for the law of nations at the time the discipline was being created. The main point of discord for authors was the freedom of the seas. Is the sea a space that is open for all of humanity, to which anyone has free access, or is it a space over which states may establish rights similar to those over dry land, rights of ownership (*dominium*) or of sovereignty (*imperium*).⁹⁴ In the discussion among the foremost authors of the time, are there arguments that involve factors from Jewish (biblical, or rabbinic) sources? By examining our authors, a line of argument can be reconstructed that was developed in three stages: (1) Grotius makes his argument for the freedom of the seas with resort to an argument starting from the book of Genesis. (2) Selden answers by drawing on both biblical and talmudic sources. He bases much of his reasoning for states having the possibility of having rights over marine areas on these sources. (3) Pufendorf dismisses Selden's arguments and establishes that there is no biblical argument to contradict the idea of the freedom of the seas.

⁹³ The references to Jewish sources in these three authors are quite remarkable for all the question of law they discuss. This is most striking for Selden, who is wholly immersed in Hebrew law. It is true for Grotius, as there is scarcely a chapter of *The Rights of War and Peace* that does not contain significant references to Hebrew law. It is true, too, for Pufendorf, even if Hebrew law for him is mostly biblical. But as explained above, the topics discussed by these authors about the law of nations do not correspond to what we recognize to be international law in the narrow contemporary sense of the term. Hence the interest in examining these authors on a point that is plainly about international law like the freedom of the seas.

⁹⁴ On the origin of these concepts in Roman law, see Jean Gaudemet, "Dominium-Imperium. Les deux pouvoirs dans la Rome ancienne", *Droits*, 22/1995, p. 3-17 and the other articles in that issue on the concepts of sovereignty and ownership.

3.2.1. The biblical justification of Grotius' argument: "by the law of nations any man may sail freely to whomsoever"

Grotius was not the first to defend the principle of the freedom of the sea, the freedom of navigation, and the freedom of trade. Gentili had gone before him in this area as in others to argue that the sea, like the air, was by its nature open to all men; that this freedom was recognized in Justinian law which "contains much that is drawn from natural law and the law of nations..."; that the attitude of the Venetians who proclaimed themselves lords of the portion of the sea close to their territory and took upon themselves the right to prohibit entry to and use of this part of the sea was contrary to the law of nature and of nations, "For if the sea has been opened to all by nature, it ought to be closed to no one".⁹⁵ It will be noticed that, while Gentili often refers to the Bible, he does not do so here, but simply says that the sea is open to all "by nature", a secular formula, where Grotius speaks of divine origin.

Grotius' first claim to glory was with the 1609 publication (which was made anonymously at the time) of a short work titled *Mare liberum*⁹⁶ that was just a chapter of a large work on the law of prizes, the *De jure praedae*⁹⁷ which for obscure reasons was not published by its author.⁹⁸ Grotius' books is like a lawyer's brief, very

⁹⁵ See A. Gentili, *De Iure Belli Libri Tres*. Bilingual edition, translation of the 1612 edition, Carnegie Classics of International Law, Oxford, Clarendon Press, 1933, p. 90-91. See the examples given by Selden, *Mare Clausum. Of the Dominion, or, Ownership of the Sea*, London, 1652, op. cit. n.75, Book I, chapter XVI, p. 99-107.

⁹⁶ See the Latin-English bilingual edition of the Carnegie Classics of International Law: *The Freedom of the Seas*, New York, Oxford University Press, 1916, reprint by The Law Book Exchange Ltd, 2001 (hereinafter referred to as the Carnegie edition). There are two recent editions in English: Hugo Grotius, *The Free Sea*, Indianapolis, Liberty fund 2004 (with an introduction by David Armitage) (hereinafter the Liberty Fund edition); Hugo Grotius, *Mare Liberum 1609-2009*. Original Latin text and English translation by Robert Feenstra, introduction by Jeroen Vervliet, Martinus Nijhoff/Brill, 2009. The matter over which the Dutch East India Company consulted Grotius was the seizure by a Dutch vessel of a Portuguese carrack. The ship was carrying a "fabulously wealthy cargo" worth more than three million guilders, "a sum equivalent to just less than the annual revenue of the English government at the time and more than double the capital of the English East India Company", *The Free Sea*, op. cit. Introduction by D. Armitage, p. XII. And see also the very interesting details given by P. Borschberg "The Seizure of the Sta Catarina Revisited: The Portuguese Empire in Asia. VOC Politics and the Origins of the Dutch-Johor Alliance (1602 ca.1616)", *Journal of Southeast Asian Studies*, 2002, p. 31-62; R. Tuck, *The Rights of War and Peace. Political Thought and the International Order from Grotius to Kant*, Oxford, Oxford University Press, 1999, p. 79 ff.

⁹⁷ Hugo Grotius, *Commentary on the Law of Prize and Booty*, Edited and with an Introduction by Martine Julia van Ittersum, Indianapolis, Liberty Fund, 2006 (a reproduction of the 1950 Carnegie Classics edition).

⁹⁸ But the reasons are perhaps not that obscure. The argument defended by Karl Zemanek, that Grotius came to completely change his line of argument in the negotiations with the English of 1613 and 1615 on

systematically presented, in which the author argues point by point and each chapter states the argument that the author defends against the opponent.

One of the conclusions Grotius came to at the end of his demonstration, in which he reasoned according to the law of nations and of nature, is that

“[T]he sea [...] is in the number of those things which are not in merchandise and trading, that is to say, which cannot be made proper. With the result that “neither the people nor any private man can have any property in the sea (for we excepted a creek), seeing neither the consideration of public use nor nature permitted occupation”.⁹⁹ Consequently, Ulpian says that the party might even be bound to pay damages.¹⁰⁰

It might be because of the “professional” character of Grotius’ dissertation as a text to be used as an argument for a client that the references and learned citations are very scarce compared with works of legal scholarship. As for those that are given, they are all taken either from the literary tradition of Ancient Greece and Rome, or from Roman law, or from the Church Fathers, with almost no reference to the Bible¹⁰¹ or to other sources of the Jewish tradition.

Things were different in *The Rights of War and Peace*, a work with an asserted doctrinal ambition and that was to secure Grotius’ glory in the history of international law. In his great work, two chapters of Book II concern the law of the sea. These were chapter II: *Of Things which belong in common to all Men* and chapter III: *Of the Original Acquisition of Things; where also is treated of the Sea and Rivers*. In fact, only chapter II contains developments in which biblical sources play an important part. Chapter III is a study of the natural and original way of acquiring what was ownerless

the spice trade in the Moluccas seems quite convincing. Whereas Grotius, a member of the Dutch delegation, supported opinions close to those he had dismissed in 1609, the English negotiators used as a counterargument his own text of *Mare liberum* sometimes *verbatim*. K. Zemanek, “Was Hugo Grotius Really in Favour of the Freedom of the Seas?” *Journal of the History of International Law*, 1999, p. 48-60, spec. p. 56-59.

⁹⁹ *The Free Sea*, op. cit. ch. V p. 32, *The freedom of the sea* (Carnegie edition), p. 36-37.

¹⁰⁰ *The Free Sea*, op. cit. ch. V p. 37, *The freedom of the sea* (Carnegie edition), p. 44.

¹⁰¹ With two or three exceptions, such as the refusal of innocent passage to the Hebrews by the King of Edom (Nb XX, 14-21), and by Sihon, King of the Amorrheans (Nb XXI, 21-23). See *The Rights of War and Peace*, Book II, ch. II §13 no 2, op. cit. p. 440.

property. From this point of view, Grotius writes “there are two Things which one may take Possession of, Jurisdiction and the Right of Property”.¹⁰²

The aim here is not to give an account of these two chapters but merely to appraise them with respect to our question of the influence of Jewish sources for internationalists of sixteenth- and seventeenth-century Europe. These two chapters contain the wealth of references and citations that were missing from the *Mare liberum* and provide us with a clearer view of Grotius’ ideas. As regards our question, the two chapters are remarkably different from one another: while the first draws on many biblical sources, the second hardly does so at all.

In chapter II (Book II), Grotius looks into the status of *Things which belong in common to all Men*. The question, as shall be seen, is whether things that were held in common at one time in the history of humankind can subsequently be appropriated. And naturally the sea is one such thing. To answer the question, the author traces a scheme of the evolution of the human race combining the biblical story and that of other Greek and Latin authors of the ancient world. In the Bible, he starts with the Creation of the world and the fact that “Almighty God at the Creation, and again after the Deluge, gave to Mankind in general a Dominion over Things of this inferior World”.¹⁰³ And he provides the classical references of *Genesis* I, 29-30 and IX, 2. This right was bestowed on man indivisibly and was sufficient for humanity so long as it maintained entirely simple mores or perfect friendship, a practice he ascribed to the Essenians and to the “Pythagoreans, who sprung from them”¹⁰⁴ as well as to the “primitive Christians at Jerusalem”.¹⁰⁵ To assert this vision of early humankind, Grotius calls on the Roman

¹⁰² *The Rights of War and Peace*, Book II, ch. III, §IV.1, op. cit. vol. II p. 456. The formula seems curious to me. I would say there are two legal connections that may arise from an occupation: jurisdiction (meaning here sovereignty) over a territory over which the power of a state is exercised and ownership in the relation of a thing with its holder, a private person. In this regard, it may come as a surprise that the controversy between *Mare liberum* (Grotius) and *Mare clausum* (Selden) relates to the ownership of the sea (*dominium*) and not to sovereignty over it (*imperium* or *jurisdictio*). This is a point that calls for further investigation.

¹⁰³ *The Rights of War and Peace*, Book II, ch. II §II.1.

¹⁰⁴ *The Rights of War and Peace*, Book II, ch. II §II.1 n. 4, p. 421.

¹⁰⁵ “and many who now live in religious Societies”, *ibid.* p. 422.

authors (Cicero, Tacitus, Macrobius, Virgil, etc.) and on the apostle Paul and “the antient Jewish Doctors, confirmed by a Passage in the Apocalypse”.¹⁰⁶

For the “antient Hebrews” he refers to the Bible (Proverbs III, 18), to the Wisdom of Solomon and to the Ecclesiastes (two Old Testament books in the Roman Catholic canon) to Philo (*De mundo creato Apocaly.* XXII, 2) and to Flavius Josephus.¹⁰⁷ Subsequently, he resorts many times to Philo of Alexandria, whom we have said was a considerable source for the intellectuals of Europe of the age.

The subsequent evolution of humankind, which was to break the common equality and the non appropriation of things, was then described with the help of stories in Genesis like that of the Tower of Babel (*Genesis* X and XI) where the ambition of men was demonstrated, who after their failure “divided the Lands amongst them” and possessed them for themselves.¹⁰⁸ And Grotius concluded: “This is what we learn from the Sacred History, and is agreeable to what both Poets and Philosophers have spoken of the early State of Things, when all was common, and of the Divisions that followed”.¹⁰⁹

At this point Grotius was to show that this move away from universal common ownership must have been effected either by an express agreement, with peoples dividing up and appropriating areas, or by tacit convention, i.e. by undisputed ancestral occupation.¹¹⁰ But, and this is the strategic point for an author who pleads for the freedom of the seas, this is valid only for land areas; for as concerns the sea, “none can have a Property in the Sea, whether taken in the Whole, or in Respect to its principal Branches”.¹¹¹ One of the reasons is that what forced men to share out the land comes

¹⁰⁶ *ibid.* p. 423

¹⁰⁷ These references are given in the French Pradier-Fodéré edition (supra n.17, p.180) but not in Richard Tuck’s English edition.

¹⁰⁸ *The Rights of War and Peace*, Book II, ch. II §II.3, op. cit. p. 425.

¹⁰⁹ *ibid.* p. 426. Evidence that poets carry as much weight as philosophers! And see *Mare liberum* where Grotius notes that in the law of nations, the sea is called a thing with no master, or a common thing or a public thing and he adds: “what these words signify shall be most fitly declared if, following all poets from Hesodius and philosophers and ancient civilians...”, *The Free Sea*, op. cit. ch. V, p. 20; *The Freedom of the Seas* (Carnegie edition), ch. V, p. 22.

¹¹⁰ On this point Grotius adds the note: “See the passages of the Talmud and the Alcoran, quoted by Selden, the Glory of England in his *Mare Clausum*”. *The Rights of War and Peace*, Book II, ch. II §II.5, op. cit. p. 426 n. 28. Selden returns the compliment in *Mare clausum* op. cit. supra n. p. 23 “the most excellent Grotius”, and p. 171 Grotius: “a man of great learning, and extraordinarie knowledge in things both Divine and Humane... ”.

¹¹¹ *The Rights of War and Peace*, Book II, ch. II §III.1, op. cit. p. 428. §III.1, éd Pradier Fodéré p. 183.

from the fact that what is occupied by one cannot be occupied by the other, and if one has claims that the other dismisses, there may be conflict that will be settled by force of arms. So it is as well to recognize the institution of property where each knows what belongs to him and what belongs to the other.¹¹² But, for the seas, things are completely different: “For the Sea is of so vast an Extent, that it is sufficient for all the Uses that Nations can draw from thence, either as to Water, Fishing, or Navigation”. From this point of view, the sea is to be compared not with the land but with the air.¹¹³ One person’s use of it does not exclude another’s. With the result that the seas were not divided up at the time of the great apportionment among humanity.

Grotius adds two further arguments to exclude any appropriation. Appropriation, outside of any division that might be agreed to by parties, presupposes some form of occupancy:

[T]he taking of Possession obtains only in Things that are limited [...]; but Liquids having no Bounds of their own (...) can never be possessed unless they are inclosed by something else, as Lakes and Ponds; and also Rivers are subject to Property, because confined within their Banks.¹¹⁴

A second reason is that “when the Lands began to be divided the Ocean, at least the major Part of it, was undiscovered; and therefore it cannot be conceived, that People so distant from each other should agree about any such Partition”.¹¹⁵ Grotius concludes from this:

Wherefore those Things that remained undivided after the first Partition, and were in common to all Mankind, begin now to belong to one, not by vertue of a Division, but by Right of First-Possession, and they are not divided till after they are become a Property.¹¹⁶

Assuming, however, that some areas of the sea might become the property of some people, the same would be as true for sea as for land: any foreigner must enjoy unimpeded innocent passage for legitimate reasons. The rule of innocent passage, which

¹¹² *The Rights of War and Peace*, Book II, ch. II §II.5, op. cit. p. 426 ff.

¹¹³ *The Rights of War and Peace*, Book II, ch. II §III.1, op. cit. p. 428. Gentili makes the same comparison. See *De Iure Belli Libri Tres*, Carnegie Classics, Oxford, Clarendon Press, 1933, vol. 2 (translation) p. 90.

¹¹⁴ *The Rights of War and Peace*, Book II, ch. II §III.2, op. cit. p. 430.

¹¹⁵ *ibid.* p. 412.

¹¹⁶ *The Rights of War and Peace*, Book II, ch. II §III.3, op. cit. p. 432.

is recalled several times in *The Rights of War and Peace* (and previously in *The Free Sea*), takes as its first point, among all the sixteenth- and seventeenth-century authors, the biblical episode where Moses asks the Amorrheans and Idumeans for free passage across their territory keeping strictly to the royal road and compensating individuals for any damage.¹¹⁷ This request having been rejected, the war that ensued with the Amorrheans was legitimate.¹¹⁸ Subsequently, the biblical reference to the right of innocent passage is supplemented by citations from Plutarch.

Grotius, mindful that one of the main issues about the sea in his time was the maritime trade which the Dutch, contrary to the Spanish and Portuguese, wanted to keep free, asserts that “Neither is this Liberty of Passing due to Persons only, but also to Goods and Merchandise; for no Body has a Right to hinder one Nation from trading with another distant Nation”.¹¹⁹ In support of this argument, he provides a fine quote from Philo:

Under a good Government, Merchant Ships sail securely on every Sea, in order to carry on Trade, whereby different Countries, from the natural Desire of Society, mutually communicate what each affords peculiar to itself.¹²⁰

It is only afterwards that Grotius refers, for a similar idea, to various Greek and Latin authors.

The right of free passage, however, does not prohibit the state whose territory is crossed from imposing a right of passage “provided it be not higher than the Reason for exacting it require”, for it is on that that the fairness of taxation as of tribute depends.¹²¹ The first example of this assertion is that of King Solomon levying a right of passage for horses crossing the isthmus of Syria (I Kings X, 29).¹²²

¹¹⁷ See Numbers XX, 14-21 and XXI, 21-23.

¹¹⁸ *The Rights of War and Peace*, Book II, ch. II § XIII.2, op. cit. p. 440.

¹¹⁹ *The Rights of War and Peace*, Book II, ch. II § XIII.5, op. cit. p. 443.

¹²⁰ *The Rights of War and Peace*, Book II, ch. II § XIII.5, op. cit. p. 444 (the quotation is from Philo’s *De Legatione, ad Cajum*).

¹²¹ *The Rights of War and Peace*, Book II, ch. II § XIV.2, op. cit. p. 445.

¹²² *ibid.* The biblical text hardly says what Grotius reads into it.

3.2.2. Selden: “That the Law of God, or the Divine Oracles of holy Scripture, do allow a private Dominion of the Sea”¹²³

Grotius’ (initial) argument on the *Freedom of the Seas* was necessarily to entail objections from authors defending the interests of nations with claims over the seas and eager to ensure exclusive trade. This was the case as early as 1613 when an English specialist of the law of the sea, William Welwod, devoted a chapter of one of his works to refuting Grotius’ arguments.¹²⁴

This was the case also of the Iberians (Spanish and Portuguese united under one crown from 1580 to 1640), whose scholarly defense was taken up by the Portuguese Serafim de Freitas, professor at the University of Valladolid.¹²⁵ This was also true of England, which had long claimed control over a part of the seas surrounding the country at least. The defense of English arguments was taken up (in addition to Welwod) by the man who was commonly described by his fellow citizens as the nation’s most learned scholar and by Grotius himself as “the glory of England”.¹²⁶ John Selden, who was the person in question, was to publish his *MARE CLAUSUM seu De Dominio Maris* in 1635, which was translated into English in 1652 as *Of the DOMINION, or Ownership of the SEA Two Books*.¹²⁷

¹²³ *Mare Clausum*, op. cit. supra n.75, p. 27.

¹²⁴ William Welwod, *An Abridgement of All Sea-Lawes*, ch. XXVI, “Of Fishers, fishing, and Trafiquers”. This chapter is reproduced in David Armitage’s edition of *The Free Sea*, op. cit. supra n.89 p. 65-74 with a long, previously unpublished reply by Grotius p. 77-130.

¹²⁵ See Serafim de Freitas, *De justo imperio Lusitanorum Asiatico*, 1625 (the same year as the publication of Grotius’ *De jure belli*). There is a French translation of the work by the French translator of Grotius, Alfred Guichon de Grandpont: *Freitas contre Grotius sur la question de la liberté des mers : justification de la domination portugaise en Asie*, Paris, J.P. Aillaud, Guillard et Cie, 1882. The work was republished recently by Kessinger Publishing 2010. Also cited is the Spaniard Juan de Solórzano Pereira (1575–1655), in a work titled *Disputationem de Indiarum Jure* that I have been unable to consult. See Yale Law Library. Rare Books Blog, notes of Ed. Gordon. And See Vieira (Monica Brito), “*Mare Liberum vs Mare Clausum: Grotius, Freitas, and Selden’s Debate on Dominion over the Seas*”, *Journal of the History of Ideas*, 2003, p. 361-377.

¹²⁶ See above note 110

¹²⁷ Selden’s *Mare Clausum* has not been republished although it could have found its place in the Carnegie Classics of International Law. There is, though, a fine reprint of the 17th century English translation of *Mare Clausum. Of the DOMINION, or Ownership of the SEA Two Books*, with an introduction dating from the time by Marchamont Nedham, The Lawbook Exchange, Ltd, Clark, New Jersey, 2004, 537 p. The book will be cited as *Mare Clausum* 1652. For a general understanding of the book, see G.J. TOOMER, *John Selden. A Life in Scholarship*, Oxford, Oxford University Press, 2009 p. 388-437.

What is of interest to us here is not the substance of the discussion between the two authors¹²⁸ but what the discussion reveals about how Jewish, biblical or rabbinic sources pervaded their arguments. For Selden, we have already seen he was his country's leading Hebraic scholar and one of the greatest, in his contemporaries' opinion, of Europe.¹²⁹ It has also been seen that he had published several legal and philosophical works in which he renewed the study of many subjects starting from a basis in Hebrew law. This was also true of his defense of the possibility of appropriating the sea, where the starting point of his demonstration is that this possibility was asserted, he claimed, by the biblical texts and the Law of God. He was to pursue this with testimony from Ancient Greece and Rome and then by customs from both Christian (especially the Italians—Venice, Genoa, Tuscany, the Church of Rome—but also Portuguese, Spanish, French, Scandinavian, etc.) and non-Christian (Turks) nations.

He wrote: “by the Customs of almost all and the more noble Nations that are known to us, such a Dominion of the Sea is every where admitted”.¹³⁰ And the correct use of reason must necessarily allow for this near universal practice among Christians and Muslims alike, both in the past (including the mythical past) and in Selden's time, both in the Orient and in the West.

Moreover, his second book of *Mare Clausum* is entirely about the possession and claims over the centuries of the various rulers of the British Isles (even before the Roman occupation!) proving, for Selden, that the British Sea in its various parts was considered as the property (*dominion*) of the various sovereigns of the British Isles.

From this standpoint, Selden's demonstration, which does not rely solely on ancient literature and the assertion that this or that rule is a rule of natural law, but also

¹²⁸ All of Book I of *Mare Clausum* can be read as a general dismissal of Grotius' arguments, “a man of great learning, and extraordinarie knowledge both Divine and Humane” (p. 171) but he is also the subject of a special development in chapter XXVI (p. 171-179). Selden suggests that Grotius' stance can be explained less for scientific reasons than by the defense of his country's interests and those of the East India Company. Which is naturally true, but also true of Selden and the position he defends. And See supra n.98.

¹²⁹ See J.P. Rosenblatt, *Renaissance England's Chief Rabbi John Selden*, op. cit. supra n.24 and also G.J. Toomer, *John Selden. A Life in Scholarship*, op. cit. supra n.34

¹³⁰ See Selden, *Mare Clausum*, op. cit. p. 42-43.

on practice, both ancient and recent, of nations, has a more modern resonance being about determining the existence of a customary rule of the law of nations and its precise content.

The biblical references are numerous for the first chapters of the *Mare clausum*, but we shall concentrate here on Chapter VI, which is entirely about supporting Selden's argument using biblical and post-biblical sources from the Jewish tradition. He writes: "As to what concern's here the Law of God, wee finde very plain passages therein, which do not a little favor a Dominion of the Sea".¹³¹

The starting point, which is not very remote from that of Grotius, is God's gift to mankind. But where Grotius is hazy about the type of right conferred on humanity, Selden speaks plainly of a gift made to Noah and his descendants.

In that first and most antient Donation of things after the Flood, whereby God invested Noah and his posteritie, in the Dominion of the whole Earth (of which Globe the Seas themselves are a part) and the conterminous Aër...¹³²

Through this donation, humanity receives the right to use and take benefit of these things at the same time as ownership of them (*dominion*¹³³). Up to that point, Selden's position looks similar to Grotius' when he writes:

"Almighty God at the Creation, and again after the Deluge, gave to Mankind in general a Dominion over Things of this inferior World. (*Genesis* I, 29, 30 ; IX, 2)".¹³⁴

¹³¹ *Mare clausum* 1652, op. cit. p. 27.

¹³² *ibid.*

¹³³ In Grotius too *dominium* (*dominion* in English) means *ownership*. See *The Rights of War and Peace*, Bk. II, ch. III, §IV.1: "there are two Things which one may take Possession of, Jurisdiction, and the Right of Property" (op. cit. p. 456) (in the French Pradier-Fodéré edition, *jurisdictio* is translated by "souveraineté" op. cit. p. 198. And likewise in English *Mare clausum* gives *Dominion* and *Ownership* as synonyms. I am surprised, as said, that the discussion is about ownership of the seas and not sovereignty over them. It may be this uneasiness that impelled Pradier-Fodéré to translate Selden's work by "*l'Empire de la mer*" (B. II, ch. II, §II.5 note 2 Pradier-Fodéré p. 182). Even so, *dominium*/*dominion* means ownership. See also Pufendorf: "Sunt enim dominium & proprietates nobis unum & idem", *De Jure Naturae et Gentium Libri Octo*, Libri IV Caput IV, p. 363, Carnegie translation, "For dominium and proprietorship mean to us one and the same thing", Book IV, ch. IV §2 p. 533.

¹³⁴ *The Rights of War and Peace*, op. cit. Book II, ch. II, §II.1, p. 420. Barbeyrac writes: "donna au Genre humain en général un droit sur toutes les choses de la terre..." (t.1 p. 223) and Tuck: "(...) gave to Mankind in general a Dominion over Things of this inferior World", (t.II, p. 420).

But he stands apart in specifying the nature of the gift made to humanity (a *dominium*) and above all by stating that the gift made by God after the Flood concerns not only the land but also the sea (and even the air). Selden defends this capital position for his argument, for it must undermine Grotius' position that the sea could not be appropriated. He came up with a wealth of biblical and rabbinic references to this end, aimed at showing not only that this appropriation was possible but that it was desired by God himself. Selden shows first of all, by citing several verses from Genesis, that the Bible deals at the same time with the land and sea and that it therefore appears that:

the Earth and Sea did so pass together at first, and after the same manner, into the common enjoiment of mankinde, that from this Donation or Grant of God, wee may well conclude; that their condition as being both but one Globe, must needs bee alike, at the pleasure of men, in the future distribution of Things, or the introducing of private Dominion therein. Neither is the Proprietie, nor the Communitie of either appointed but both seem equally permitted by the very form of Donation.¹³⁵

He goes on to refute arguments from certain other verses (Ps CXV, 16 and Ps XCV, 5, Ps XXIV, etc.). He sets against them various biblical texts which he interprets as recognizing that the various peoples of biblical times held sway over certain parts of the seas. This was the case of the Phoenicians as far as Tyr, of the Egyptians in the "sea of Alexandria", of the Tyrians, Phoenicians and Syrians over "a great part of the main or Western Sea".¹³⁶

He resorts to the great medieval Jewish exegetist Abraham Ibn Ezra (Andalucia, twelfth century) who supposedly confirms his views: "God Almighty assigned the Dominion of the Sea there unto King David, *That hee might rule over those that sailed either through the Sea or the Rivers*".¹³⁷

Then he cites Esdras, and Esther X,1 saying of Assuerus "That hee made not onely the land, but all the Isles of the sea to become tributarie", which he interprets as applying also to the sea itself and evidence for this is in the Greek version of

¹³⁵ *Mare Clausum*, op. cit. p. 28.

¹³⁶ *Mare Clausum*, op. cit. p. 29-30.

¹³⁷ *Mare Clausum*, op. cit. p. 30. But no reference is given for the text cited from Ibn Ezra.

Esther which includes the lesson “The King wrote to his Kingdom of the Land and the Sea”.¹³⁸

On this basis, and on yet others that need not be cited here, he argues that the sea is accepted to be like the land “both by the Jewish Lawyers and Divines, that they [the borders of the holy Land] would either the great or *Phœnician* Sea itself, or at least some adjoining part of it to be assigned also by God unto the *Israelites* as Lords of it for ever”.¹³⁹

Selden devotes much of Chapter VI to determining the boundary of the Holy Land to the west (the Mediterranean Sea). He cites a large number of biblical verses and when the Hebrew text is not clear enough in favor of his argument, he resorts to various translations that come close to his ideas. He thus draws on the Greek, Spanish and Aramaic (Onkelos, an Aramaic version with almost canonical standing for the Jews) and Arabic translations¹⁴⁰ (p. 32-33). He calls on the “Jewish Commentaries” and the “Jewish Targum”¹⁴¹ and others (“Salomon Jarchius” who is none other than Rachi,¹⁴² the greatest Jewish commentator on the Bible and the Talmud).

To determine the boundaries of the land of Israel to the west, i.e. on the Mediterranean side, he uses the discussion in the Talmud as to the category of commandments that apply only to the land of Israel (e.g. tithes on harvests, Sabbath years and jubilees) and for which boundaries to the land of Israel had to be determined.¹⁴³ Selden takes as the basic text a discussion that is found in the Babylonian Talmud, in the *Gittin* treatise on divorce.¹⁴⁴ The question of the limits of the territory of

¹³⁸ *Mare Clausum*, op. cit. p. 31. *The Jewish Study Bible* (Oxford University Press, 2004) translates “King Ahasuerus imposed tribute on the mainland and the islands”.

¹³⁹ *Mare Clausum*, op. cit. p. 32.

¹⁴⁰ *Mare Clausum*, op. cit. p. 32-33.

¹⁴¹ I do not know what Selden calls the *Jewish Targum* if we exclude *Targum Onkelos*. Could it be *Targum Jonathan* or *Pseudo Jonathan*?

¹⁴² The identification is confirmed by the Thesaurus of the Consortium of European Research Libraries (CERL, <http://thesaurus.cerl.org/record/cnp01270510>).

¹⁴³ See Sh. Rosenne, op. cit. p. 145 who uses this same method to delimit the territorial sea of Israel according to the Talmud. See also *Encyclopedia Talmudica*, verbo “Erets Israël”, Jerusalem, Talmudic Encyclopedia Institute, 1978, vol. 3 p. 15 ff.

¹⁴⁴ Selden cites both the Babylonian Talmud, *Gittin* 8a and the Jerusalem Talmud *Cheviit* on the sabbath year, ch. 6, fol. 36, col. 4.

Israel is important, in this domain too, to determine from what time a woman might seek divorce because her husband has abandoned the land of Israel.

Selden presents the two theses that confront one another in the Talmud. The first is that of Rabbi Yehuda (*Gittin* 8a), one of the great sages (*tana'im*) of the Mishnah (second century) who argues for what is in the least an extreme opinion. He considers, interpreting the passages of Numbers XXXIV.6, *For the western boundary you shall have the coast of the Great Sea; that shall serve as your western boundary*, as meaning that the islands of the sea that face Israel as far as the meeting with the shores of Europe¹⁴⁵ are part of the territory of Israel, with respect to the commandments about the land of Israel and of the right to petition for divorce. Selden argues that this talmudic interpretation implies that the sea in which these islands counted as being the territory of Israel lie must be considered as part of the same territory.

The second opinion, which he tells us is “much more agreeable to reason”, and which is the accepted rule,¹⁴⁶ gives a much narrower interpretation which leads to something close to what one might call a territorial sea.¹⁴⁷ But in this case as in the other, Selden argues that the different texts he cites at length lead to the idea that the sea can be appropriated. And for this, he draws on just about everything of note in the Jewish tradition: the various books of the Bible (Pentateuch, Prophets, Psalms, etc.), the two Talmud in several of the treatises (*Gittin*, *Terumoth*), the biblical commentators (Solomon Jarchius i.e. Rachi, R. ibn Ezra, R. Bechai, Maimonides, Moses of Coucy (the author of the thirteenth-century codification *Sefer Mitzvot Gadol*), whom he calls Cotzenfis, Rabbenu Nissim (a fourteenth-century Spanish talmudic authority), R.

¹⁴⁵ Selden cites two reputed medieval Jewish commentators—ibn Ezra (twelfth century, Aben Ezra as he spells it) and R. Bechai (probably R. Bachya ben Asher, Saragossa, 14th century)—who notes that the sea washing the Spanish coasts is called “(haYam) haSefaradi” (the Spanish coast) and uses this as an argument to consider that the entire sea between the shores of the land of Israel and the Spanish coast should be considered as the land of Israel (note a slip for the Hebrew “haSefarari” instead of “haSefaradi”).

¹⁴⁶ See *Encyclopedia Talmudica*, vol.3 verbo Erets Israël, op. cit. p. 15, 2nd column, which states that the *halakha* follows the opponents of R. Yehudah.

¹⁴⁷ See *Mare Clausum*, p. 38-41, and *Encyclopedia Talmudica*, op. cit. p.15.

Obadia de Bertinoro (the classical commentator on the *Mishnah*, Italy fifteenth/sixteenth century) and R. “Jom Tov” (Yom Tov).¹⁴⁸

All of these names were (and still are) probably unknown in general culture but all are great names of the Jewish tradition and to see them cited by a seventeenth-century Christian author in support of an argument on the status of the sea in the law of nations is impressive indeed. And it was only after addressing the question in the context of the Jewish tradition that Selden tackled, from Chapter VII of the book onward, Greek and Latin literature to show that the thesis of private appropriation of the sea “is to be derived out the Customs and Constitutions of the more civilized and more noble Nations, both antient and modern”.¹⁴⁹

Such a liking for Jewish sources combined with a remarkable knowledge of their content¹⁵⁰ was not to be found after Selden. However, Pufendorf provides further evidence of substantial use of biblical sources, in particular to object to Selden’s views (and to a lesser degree to those of Grotius).

3.2.3 Pufendorf: it is for men to choose the legal system for the sea

The Bible is a constant reference in Pufendorf’s great work *De Jure Naturae et Gentium*¹⁵¹ (with nearly four columns of closely spaced references in the index to the Carnegie Classics of International Law edition). Those references are particularly important for everything relating to the great institutions of law: matrimonial law (marriage and divorce, incestuous relationships), civil liability, reparation of damage, theft and its punishment, the validity of contracts, the law of succession, the rules of

¹⁴⁸ Who is either R. Yom Tov ben Abraham Ishbili (Ritva), a famous 13th-century Spanish talmud scholar or, what would be remarkable and surprising, R. Yom Tov Lipman Heller, Bohemia, 1578–1654, one of the great commentators of the *Mishnah*. See *Mare Clausum*, op. cit. p. 40.

¹⁴⁹ See the direct discussion of Grotius’ line of argument by Selden in *Mare Clausum* p. 171 ff.

¹⁵⁰ The former grand rabbi of Ireland and then of Israel, I. Herzog (1888-1959) and a specialist in Jewish law, was highly critical of Selden’s analyses in this domain. See I. Herzog, “John Selden and Jewish Law” 13 *J. Comp. Legis. & Int’l L.* 3d ser. 236 (1931). Clearly Selden was not a talmudic scholar who spent his whole life from his childhood on the Talmud and the codes. That said, his knowledge was sound, even if not compared only with the widespread ignorance of the non-Jewish world in this matter.

¹⁵¹ Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, 2 vol., translation in vol. II: *On the Law of Nature and Nations*, Publications of the Carnegie endowment for international peace. The Classics of International Law, Oxford at the Clarendon Press, 1934. This is the edition cited from in this paper. And See the French translation by Jean Barbeyrac, *Le droit de la nature et des gens*, ed. Bâle 1732, tome 1, p. 490 (reprint Caen, Fontes & Paginae, Presses Universitaires de Caen, 2009).

testimony, the mechanism of talion and reprisals, the acquisition of property by occupation, paternal authority, etc. On all of these questions and others, Pufendorf reserves a place for biblical law, either in his own specific interpretation of it or in connection with what Philo of Alexandria (who is very much present in the book) has to say, or in conjunction with what Selden says of it in *De Jure Naturali* which is also often cited. This is one way for Pufendorf to integrate what post-biblical Hebrew law says, as he had no first-hand knowledge of it. Thus he cites Maimonides at least twice, once referring expressly to Selden¹⁵² and once without saying so¹⁵³, but it is in both cases in the chapter on marriage and it is likely the information was taken from Selden's *Uxor Hebraica*. Again it seems that he cites the Talmud just once, the *Baba Kama* treatise, which relates to issues of liability, a work he knew and cited in the Latin translation of Constantijn L'Empereur, a famous Dutch orientalist and slightly younger contemporary.¹⁵⁴

The question of the right exercised by men over the sea is addressed by Pufendorf in Chapter V of Book IV of his *On the Law of Nature and Nations*,¹⁵⁵ but relies heavily on the basis set out in Chapter IV *On the Origin of Dominion*. To determine whether the sea can be appropriated, Pufendorf constructs an argument by starting, like Grotius and Selden, from a law bestowed by God on Adam and his descendants. From this point of view, the influence of the biblical text is as strong in Pufendorf as in Grotius and Selden, even if the rabbinic references have become scarce. The whole of Pufendorf's discussion turns on the meaning of the law granted at the time of the Creation by God to Adam and then of the transfer of this right to the offspring of Adam and from them to their

¹⁵² *On the Law of Nature and Nations*, op. cit. supra n.151, op. cit. p.843

¹⁵³ *ibid* p.885

¹⁵⁴ *ibid* p.324-325. On Constantijn l'Empereur see P.T. van Rooden, *Theology, Biblical Scholarship and Rabbinical Studies in the Seventeenth Century: Constantijn l'Empereur (1591–1648)*, Leiden, Brill, 1989. Oddly, in the two excellent indices of the English edition of *De Jure Naturae et Gentium* (Carnegie Classics) there is no entry for Talmud, *Baba Kama*, or even Constantijn l'Empereur. Under "Injury" (which is the problem addressed in the reference to the *Baba Kama* treatise, there are seventeen references, but none corresponding to the citation of *Baba Kama*.

¹⁵⁵ See *On the Law of Nature and Nations* op. cit. p. 558 ff, especially p. 560 §5 ff. In beginning to deal with the question of the right of ownership of the sea, Pufendorf warns: "In connexion with question it has been easy to observe that many of the disputants hold their zeal for their own country before their eyes rather than truth", op. cit. p. 560.

descendants.¹⁵⁶ The discussion is long and complex and only the gist of it can be given here.

Pufendorf does not deny, first of all, that there was a divine gift and that it bore on the land and the sea alike:

Now it is obvious that the gift of God, whereby man was given the right to assume sovereignty (*imperium*) over the land included also the sea. A twofold command was given: Have dominion over the fish of the sea and over the beasts of the land. But sovereignty over animals is inconceivable without the right as well of controlling the element which they inhabit, so far as its nature allows.¹⁵⁷

Pufendorf, however, construes the divine gift differently from his predecessors. True, Adam did receive *dominium* over the things of this world and in principle *dominium* is nothing other than ownership.¹⁵⁸ But this was not the case with regard to Adam. He had the possibility of taking all things and doing what he wanted with them, but this possibility did not follow from a right of ownership he had over everything but from the simple fact that he was alone and that no one could claim a right over the things he took. Consequently, Pufendorf writes:

Therefore, the right of Adam to things was different from that dominion, which is now established among men; one may call it indefinite dominion not formally established, but only conceded, not actually, but potentially so. It has the same effect as dominion now has that, namely, of using things at one's own pleasure; but it was not, properly speaking, dominion, because no other man was then on earth to whom it could oppose its effect; although, upon the increase of men, it could pass into dominion.¹⁵⁹

Thus, it is not possible from the gift that God made to Adam to infer the ownership that men may exercise over things and places for any "dominion presupposes absolutely an

¹⁵⁶ See *On the Law of Nature and Nations* op. cit. p. 547-557.

¹⁵⁷ *On the Law of Nature and Nations*, op. cit. Book. IV, ch. V§5, op. cit. p. 560. The Latin text reads: "Illud igitur manifestum, concessioni divinae, qua homini jus in terram capessendi imperium fuit indultum, etiam mare adjungi. Aequae dicitur : dominamini, picibus maris, quam animalibus terrestribus. In animalia autem imperium intelligi non potest, ni simul jus sit elementum, quod illa inhabitant, prout ejus admittit natura, usurpandi", *De Jure Naturae et Gentium*, Carnegie edition, op. cit. vol. I, p. 382.

¹⁵⁸ "For dominion and proprietorship mean to us one and the same thing", *On the Law of Nature and Nations* op. cit. LIV, ch. IV, §2 p. 533 (Sunt enim dominium & proprietates nobis unum & idem." (*De Jure Naturae et Gentium* op. cit. vol I p. 363).

¹⁵⁹ *On the Law of Nature and Nations* Book IV, ch. IV §3, op. cit. p. 535-536.

act of man and an agreement, whether tacit or express”.¹⁶⁰ God did indeed give a general right to mankind to take the things of nature, but the ways and means by which they were taken and the limits are defined by mankind himself.

From this it is further understood, that the law of nature approves all conventions which have been introduced about things by men, provided they involve no contradiction or do not overturn society. Therefore, the proprietorship of things has resulted immediately from the convention of men, either tacit or express.¹⁶¹

All of Selden’s fine demonstration about Adam, Noah, his sons and descendants is worthless then. As are the discussions about whether God gave the first couple ownership of everything inasmuch as the couple personified the human race, or as each member of the couple held the property individually, or if the things that were created to be appropriated by individuals or to be held in common because things “were created neither proper nor common (...) by any express command of God, but these distinctions were later created by men as the peace of human society demanded...”.¹⁶²

It can be seen that by proceeding in this way, Pufendorf was free to address the question of the ownership of the sea, which he was to do in Chapter V of Book IV,¹⁶³ without being constrained by religious considerations pre-empting the solution he wanted to reach. This does not mean he freed himself entirely of these considerations. He examined at length the question of “the origin of dominion according to the Sacred Writ” and the question of the apparent contradiction between the gift from God to all of humankind and the state of extreme division of this nature as it was to be established later.¹⁶⁴

It is in Chapter V on the *Object of Dominion* that Pufendorf recalls that: “the question as to whether the sea is capable of ownership (*proprietas*) has been subject for debate in our day by the most distinguished minds”.¹⁶⁵ Taking up the conclusions he

¹⁶⁰ *Ibid.* p. 536.

¹⁶¹ *Ibid.* p.537. And see Book IV, ch. IV “On the Origin of Dominion” (op. cit. p. 532).

¹⁶² *On the Law of Nature and Nations* Book IV, ch. IV §4 p. 536-537.

¹⁶³ *ibid.* p. 558-568.

¹⁶⁴ *On the Law of Nature and Nations* Book IV, ch. IV p. 551 with a lengthy discussion with an author on the life of Adam, his children and ownership.

¹⁶⁵ *On the Law of Nature and Nations* Book IV, ch. V§5 op. cit. p. 560

reached in the previous chapter, he asserts both that the gift from God to mankind was the right to exercise sovereignty (*imperium*) over both land and sea but that this gift was not such that it immediately established sovereignty for men, in other words a political and legal system):

“it was left to their judgement, whether they wanted to put the sea, like nearly all the land, under ownership, or to leave it in its original state, so that it should belong no more to one man than to another”.¹⁶⁶

In the remainder of the chapter, Pufendorf examines in a purely secular manner, with no reference to religious sources the question of “whether certain reasons are to be found in the case of the sea to render it unable to pass under ownership”.¹⁶⁷ He refuted some of the arguments made, especially those by Grotius, against the possibility of exercising a right of ownership over the sea. In this way he dismissed the idea of it being physically impossible to control the sea, which, being a fluid, could not be controlled (one of Grotius’ arguments).¹⁶⁸ Rivers too were fluids but they could be mastered. Moreover, a state could control a narrow portion of the sea (bay, strait) within a canon’s shot. He attached great store to warships as mobile fortresses that enabled effective control over the sea and noted that “the art of navigation has been brought to a very high degree of development”.¹⁶⁹

He then examined the argument about the protection of fish stocks made by some states (including England) to appropriate and reserve the maritime areas around their shores. He accepted the idea that it might be necessary to restrict fishing to protect resources and that a coastal state was perfectly entitled to do so.¹⁷⁰ He also accepted the argument that a state was entitled to claim a space off its coastline so as to ensure

¹⁶⁶ *ibid.*

¹⁶⁷ *On the Law of Nature and Nations* Book IV, ch. V §6, p. 561. (*Quaestio igitur est, utrum certae inveniantur causae in mari, quare illud proprietatem subire nequeat?*) (op. cit. vol I p. 382).

¹⁶⁸ See *The Free Sea*, op. cit. n.89, p. 25 where Grotius cites Cicero on many occasions (e.g.: “what is so common as the sea to them that float thereon and the shore for them that are cast out”) but also Virgil, who says that “the air, the water and the shore lie open unto all” and Ovid: “Why do you deny me water? The enjoyment of water is a common right. Nature has not made the sun private to any, nor the air, nor soft water: the common right I seek”. (Ovid *Metamorphoses*, VI, 349-351)

¹⁶⁹ *On the Law of Nature and Nations* Book IV, ch. V, §8, p. 565.

¹⁷⁰ *On the Law of Nature and Nations* Book IV, ch. V §6 p. 561-562.

protection against an attack from offshore.¹⁷¹ He approved Jean Bodin's claim that 60 miles was a feasible range to impose on foreign vessels approaching the coast.¹⁷²

He concluded that

“there have been weighty reasons for a people making a certain part of the sea their own, to the extent that all other nations were obligated to recognize uses of it as a kindness on the part of its sovereigns”.¹⁷³

Did that mean that men can appropriate huge areas of ocean, though: “what shall we say of the vast ocean, placed between great continents, Europe, Africa, Asia, America, the territory of Australia, and the unknown coast?”¹⁷⁴ That was what the Spanish and Portuguese claimed in the sixteenth and seventeenth centuries, of course. To this “foolish ambition” Pufendorf opposed a factual argument. What state could have a large enough war fleet to ensure control of the space between the oceans and to what avail? And he answers:

“I do not believe a nation which wished to maintain fleets over all parts of the ocean so as to keep others from fishing, would find that they were repaid for the expense”.¹⁷⁵

But what if nations should engage in such folly? Pufendorf then returned to his theological assumption that derived from the Bible:

To all this [what if some people, for a foolish ambition to be called the Master of the Oceans, or upon the urge of avarice] we reply that it is, indeed, within the power of men to make by occupancy unoccupied spaces their own, but on the condition that they bear in mind that God gave the world not to one man or another, but to all mankind, and that men are at the same time by nature equal.¹⁷⁶

Having dismissed the idea that an unspoken pact among the first men who shared out the land might have led to this “foolish ambition”, he concluded:

¹⁷¹ *On the Law of Nature and Nations* Book IV, ch. V §7 p. 563.

¹⁷² *On the Law of Nature and Nations* Book IV, ch. V §8 p. 565.

¹⁷³ *On the Law of Nature and Nations* Book IV, ch. V, §7 p. 563.

¹⁷⁴ *On the Law of Nature and Nations* Book IV, ch. V, §9 p. 565.

¹⁷⁵ *On the Law of Nature and Nations* Book IV, ch. V, §9, p. 566.

¹⁷⁶ *ibid.*

Therefore no good excuse can be advanced for any one nation wishing to claim dominion over the entire ocean, with the effect that it also desires to prevent all others from sailing upon it. Not a single one of those reasons which led to the introduction of proprietorship in things can be applied to the open ocean.¹⁷⁷

Even if in his discussion of the opposing arguments (in particular those of Grotius and Selden) Pufendorf has recourse in a broad manner to literature, philosophy, theology, and to Roman law, the theological-biblical underpinning of his position is incontrovertible (even if his reading of the Bible depends on a prior stance more than on any interpretation of the text, but he is not alone in that).

Conclusion

By way of conclusion, I would like to make two remarks: one to dispel any misunderstanding and one to call for a broader view of the subject.

By looking for Hebrew references (biblical and post-biblical) in the works of the masters of the school of the law of nature and of nations, the aim was not to claim that these references were the proof of a preeminent influence of Hebrew sources in Grotius, Pufendorf, or Selden (although for Selden it might be possible to assert this). It is self-evident that the Greco-Roman world and its lawyers, philosophers, historians, and poets was foremost in the *Weltanschauung* of these authors, not to speak of the Christian tradition. Even so, in their intellectual universe, among the sources that led them to think the way they did, were Hebrew sources which have been ignored and that should be taken into account to better understand these authors who played a decisive role in the intellectual development of modern Europe.

Now, if one reflects on the history of culture and civilization and more especially on the founding encounter of the West between Jerusalem, Athens, and Rome, it can be noted that what happened in the sixteenth and seventeenth centuries in Europe was the third such encounter. The first occurred in Alexandria with its most representative figure Philo of Alexandria, and we have spoken of his importance for the authors under

¹⁷⁷ *ibid.*

study here.¹⁷⁸ The second took place in the Mediterranean area where Greco-Arabic culture flourished, in Cordoba and Cairo as well as Languedoc-Roussillon,¹⁷⁹ the most representative figure being Maimonides obviously. His importance for the Christian Hebraists, scholars and intellectuals in general was such that G. Stroumsa was recently to write that the seventeenth century might be called the century of Maimonides.

It can be observed that, in the first two encounters, it was Jerusalem that had to adapt to the world of Athens. In the sixteenth and seventeenth centuries, it was the world of European thought in its Athenian dimension (philosophy) and Roman dimension (law) that sought to take into account and sometimes integrate the heritage of Jerusalem. In that third encounter also Maimonides' importance was such that G. Stroumsa was recently to write that the seventeenth century might be called the century of Maimonides.¹⁸⁰

All of that lasted only a very brief time in history. From the late seventeenth century the advancement of critical thinking and of skepticism was to rapidly infiltrate this intellectual universe that the enormous work of the Christian Hebraists had constructed and offered to Europe. A. Sutcliffe notes that "In the decades around 1700, rabbinic scholarship was widely caricatured as the quintessence of useless learning".¹⁸¹ And what was said of Pufendorf can also be said of all these authors (especially Selden): "Pufendorf [...] was one of those writers who died at the same time as the idiom they used, with the distance between them and the following generations being increased by the distance of language".¹⁸²

We may now be in a new era. The work on philosophers and jurists in seventeenth-century Europe is thriving, especially the works on Jewish thought and the

¹⁷⁸ For a book devoted fully to this founding encounter of the Western world and including a substantial bibliography, see J. Méléze Modrzejewski, *Un peuple de philosophes. Aux origines de la condition juive*, Paris, Fayard, 2011.

¹⁷⁹ On the extraordinary importance of this little known area of thought between the 12th and 15th centuries, see Gregg Stern, *Philosophy and Rabbinic Culture. Jewish Interpretation and Controversy in Medieval Languedoc*, Routledge, London and New York, 2010.

¹⁸⁰ G.G. Stroumsa, *A New Science: The Discovery of Religion in the Age of Reason*, op. cit. supra n.28, p.92-95 and Amos Funkenstein cited p.94 n.50

¹⁸¹ A. Sutcliffe, *Judaism and Enlightenment*, op. cit. supra n.28, p. 32.

¹⁸² "Pufendorf [...] compte au nombre de ces auteurs qui moururent en même temps que la langue dont ils usaient, la distance entre eux et les générations postérieures s'accroissant de celle du langage.", P. Laurent, *Pufendorf et la loi naturelle*, op. cit. supra n.72 (our translation).

translations of Hebrew or Aramaic (in English obviously, but not only). Might we not dream of a new encounter among the three historical capitals of the Mediterranean?