

Review Essay

On Roman Ethics, Rhetoric and Law in Grotius: *Hugo Grotius und die Antike. Römisches Recht und römische Ethik im frühneuzeitlichen Naturrecht,* Benjamin Straumann*

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The expanding interest in the history of international law during the last decade has somewhat lessened the one-sided focus on a few key events, and outstanding thinkers, chief among whom Hugo Grotius (1583-1645) has long since ranked. This has not, however, quelled the stream of publications on the Dutch humanist's contribution to natural law and the law of nations. To the contrary, Grotian studies have benefited from the enhanced interest in the history of international law and the emergence of a somewhat more truly historical discourse. Over the last few years, several important books which highlight the historical setting of Grotius's life and work have reached the shelves.

In 2006, Martine Julia van Ittersum came out with an impressively detailed account of the younger Grotius's political and diplomatic involvements and

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their significance for his earlier work (*Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies 1595-1615*, Brill's Studies in Intellectual History 139, Leyden: Brill, 2006). The year after, Henk Nellen published his long-awaited full-length biography of Grotius (*Hugo de Groot, Een Leven in Strijd om de Vrede*, Amsterdam: Balans, 2007). The book, which so far has only appeared in Dutch, is largely based on Grotius's correspondence – on the edition of which Nellen worked – and focuses on his work as a humanist man of letters, text editor and theologian.

A third significant contribution to the historical debate on Grotius, if from an entirely different angle, is Benjamin Straumann's study on the impact of ancient Roman sources and thought on Grotius. The book is based on the author's thesis written for his Ph.D., which he obtained at Zürich. Readers who prefer to sample Straumann's ideas in English can refer to some of the papers he extracted from the book and which are to be found in the working papers series of the Institute for International Law and Justice at New York University (<www.iilj.org>), where Straumann has worked as a researcher for three years now.

The many references to Roman philosophical, rhetorical and juridical sources as well as to historical *exempla* which abound in Grotius's main works on the laws of war and peace have not been the object of many serious scholarly analyses, with few exceptions. Often, they have been judged substantially irrelevant as the inevitable intellectual ornaments of the humanist. Straumann argues that, much to the contrary, they constitute the backbones of Grotius's discourse and that they account for the originality of his theory of natural law and international relations.

Straumann's book falls into two main parts. The first covers Grotius's earlier work, in particular *De iure praedae commentarius* (1604-1605), the chapter extracted from it and published in 1609 as *Mare liberum, Theses sive Quaestiones LVI de iure hominis in actiones et res suas* (possibly between 1602-1606) and *Defensio capitis quinti Maris Liberi opugnati a Guilielmo Welwodo* (c. 1615); the second covers Grotius's *opus magnum* on the laws of war and peace, *De iure belli ac pacis libri tres* (1625). As the basic intellectual outlay and the main moves which Grotius made in *De iure belli ac pacis* came from his earlier work, and particularly *De iure praedae*, it is in this oldest work that the intellectual roots of Grotius's construction must be sought.

As is well known, Grotius wrote his *De iure praedae* to justify the capture of the Portuguese ship *Santa Catarina* by a Dutch captain in the East Indies

(1603). Straumann argues that it was the need to reject the Portuguese claims to an exclusive right of navigation and commerce in the Indies that drove him to devise a doctrine not set on traditional sources such a custom, papal authority, treaties and arguments derived from traditional civilian jurisprudence. For this, Grotius, a humanist man of letters and historian, directly referred to ancient Roman sources and thought.

Grotius's main original move was to separate a sphere of natural law and natural law of nations (*ius naturae primum* and *ius naturae secundarium*, also called *ius gentium primum*) from a sphere of the positive law of nations (*ius gentium secundarium*). Grotius did not think solely in terms of a chronological shift from the state of nature to the state of the civil society as Thomas Hobbes and John Locke would. What made the distinction crucial was that it allowed him to distinguish between two geographical spheres. To the Indies and the oceans, which were still in a state of nature, he could apply the rules of natural law which he could now argue and mould to his needs. On this point, Straumann rejects Richard Tucks's close association of Grotius with Hobbes and his claims about the moral and juridical shallowness of Grotius's natural law (R. Tuck, *The Rights of War and Peace: Political Thought and International Order from Grotius to Kant*, Oxford: Oxford University Press, 1999).

To construe his natural law, Grotius drew from four Roman intellectual traditions and combined them. First, there was Stoic ethics, with its idea of natural society and the natural sociability of man. For this, Grotius mainly referred to Cicero. Second, there was the Roman rhetoric tradition. Cicero again and Quintilian – the latter in particular for *De iure belli ac pacis* – were the Dutch humanist's guides here. According to Straumann, *De iure praedae* and the argument in there were largely construed according to the demands of classical rhetoric. The rhetorical distinction between deductive (*ratiocinatio*) and inductive argumentation not only drove Grotius's multi-layered defence of his interpretation of natural law, but also helped inspire the dichotomy between the primary and secondary law of nations, with their respective spheres of application. Third, Grotius used the Roman concept of just war, mainly as it appeared from the works of Cicero and Livy. And, fourth, he brought Roman private law to bear. Cicero too had already used concepts and institutions from the Roman *ius civile* and *ius praetorium* in the context of his philosophical treatises, particularly in relation to war. Moreover, as underscored in recent scholarship, Stoicism and

rhetoric certainly played an important role in the so-called classical Roman jurisprudence of the final stages of the Republic and the Principate.

Using these sources, Grotius made two fundamental moves with relation to the doctrine of just war, on which he ultimately based his defence of the Dutch capture of the *Santa Catarina*. First, natural law applied as much to individuals as to sovereign political bodies. As it was far from a given that the Dutch captain had acted in the name of the Dutch Republic, the sovereignty of which was disputed, this was a useful step. Second, this allowed Grotius to operate rules of Roman private law for the construction of his natural law. More particularly, the fourfold structure of Grotius's theory of just causes – defence, recovery of property, enforcement of contractual obligations and punishment – was determined by the logic of Roman law. The enforcement of contract was certainly an addition to the traditional threefold division of *causae iustae* from medieval and 16th century just war thought. Moreover, Grotius perceived of war – for the individual as well as for the State – in terms of the enforcement of a subjective right: an *executio iuris*. For this, according to Straumann, he drew on analogy with the Roman system of actions and interdicts. Straumann here sides with Alan Gewirth and Charles Donahue who hold, against the majority of modern scholars, that the Roman system of remedies indicates that the Roman jurists held a concept of subjective right. The argument for this remains unpersuasive as it foregoes the ritual and formalistic character of Roman law. Nevertheless, it is correct that Grotius used the Roman remedy system in this context.

Straumann's analysis of Grotius's Roman sources and his use thereof offers a deep insight into the intellectual moves which the Dutch humanist made to construe his doctrine of natural law, just war and the freedom of the seas. It is also very helpful to identify and explain the novel elements of his system.

The reader of *Hugo Grotius und die Antike* should, however, beware not to be seduced into editing out the mediating role of medieval jurisprudence and theology – with their use of ancient Roman philosophical, rhetorical and above all juridical sources – in Grotius's work. Grotius was above all a humanist scholar and was keen – regardless of the additional political inducements the circumstances of 1604 gave him – to highlight his direct engagement with classical sources and underplay his dependency on medieval and 16th century scholastic jurisprudence, philosophy and theology. Nevertheless, regardless of his criticism of them in the *Prolegomena* of *De iure*

belli ac pacis, Grotius himself did not shy from citing medieval civilians and drawing on this work. The same went for canon lawyers and theologians. This too, was much more than intellectual ornament. Even where and when Grotius preferred directly to refer to the *Digest* and other Roman sources, and to directly return to Ciceronian interpretations and uses of pre-classical Roman law and legal thought, one cannot efface the fact that much of his views stemmed from his more direct predecessors. Nor should one overlook that Roman private law and just war thought had been part and parcel of the civilian, canonist and theological debate on the laws of war and peace since the Late Middle Ages. Grotius knew this and depended on it. Grotius took many concepts and ideas from medieval and 16th century scholarship, but tuned them to the key of a different text canon and a different ethical-philosophical tradition. Just to give two examples, the conception of just war as *executio iuris* and the distinction between private and public warfare were already present in medieval doctrine (e.g. Bartolus *Ad Digestum novum* 49.15.24; see more generally Peter Haggemacher, *Grotius et la doctrine de la guerre juste*, Paris: Presses Universitaires de France, 1983). The 14th century commentators such as Bartolus and Baldus had had no need expressly to argue the use of Roman private law to matters of war and peace as Grotius had done. As there was as yet no autonomous *ius gentium* and the authority of Roman law, the embodiment of ideal justice, was universal and total, this was self-evident. Finally, these and other commentators had used classical philosophy – albeit not stoicism – and rhetoric. All this does not undercut Straumann's main argument – the impact of Stoicism in connection with rhetoric and Roman law – nor does he deny any of this. But he very sparingly acknowledges it.

With *Hugo Grotius und die Antike* Benjamin Straumann has entered upon the expanding scene of the intellectual history of international law centre-stage. He has convincingly argued the substantial impact of the Ciceronian discourse of ethics and rhetoric on Grotius's intellectual construction. In view of his intake, one cannot fault the author for focusing on one part of Grotius's sources. But one should not let oneself be distracted from the fact that the Roman tradition constituted but part of the Dutch humanist's inspiration.