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GROTIUS *NUNC PRO TUNC*

A NORMATIVE APPROACH TO WAR: PEACE, WAR AND JUSTICE IN HUGO GROTIUS (Yasuaki Onuma ed.) Oxford: Clarendon Press, 1993. xviii + 421 pp.

*Reviewed by Alfred P. Rubin**

Under the guidance of Professor Yasuaki Onuma of the University of Tokyo, a group of seven Japanese experts in international legal history, assisted by a professional translator, two collaborating scholars, and a consulting editor, has produced this collection of eleven essays on the seminal work of Hugo Grotius, *De Iure Belli ac Pacis* (*BP*), which was first published in 1625. A final essay by Professor Onuma, not directly related to *BP*, explains how 17th century European conceptions of the nation-state and sovereign equality came to dominate the international legal order, that “[i]t was not naked power alone, but the combination of physical and economic power and the power of ideas, that consolidated European dominance.”¹ The result is the current international legal order, with its grand ideals of equality and its capacity to justify domination and misery. Onuma points out, fairly enough, that criticisms could as well have been directed against the Chinese Confucian ideals or Islamic notions of “jihad” had they dominated the current legal order, but that as a matter of history, Europe has defined “civilization” as we know it, and must have the credit and discredit that goes with domination.

The eleven chapters that form the direct investigation into the “original intent” of *BP* begin with an essay by the late Tadashi Tanaka (Professor of International Law, Daito Bunka University) on what he calls “Grotius’s Method.” In dealing with Grotius’s concept of “law,” the essay shows a fundamental break from the Roman Catholic scholastic philosophers’ assumptions and a multi-order approach to the question of what is “just.” Under that approach, Grotius considers that “natural law,” “divine volitional law,” and the “law of nations” (i.e., the *jus gentium* — the laws common to many municipal legal orders and by analogy to the international legal order) are different legal orders themselves, each with its own conception of “justice,” all of which must be satisfied before a recourse to “war” can be said to be “just.”

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1. A NORMATIVE APPROACH TO WAR: PEACE, WAR, AND JUSTICE IN HUGO GROTIUS 378 (Yasuaki Onuma ed., 1993).

Professor Tanaka carries on this argument in Chapter 2, a detailed analysis of Grotius's concept of law. It involves picking apart three uses of the word "*jus*" in renaissance Latin writings, as explained by Grotius himself: *jus* as "justice" in action, with "justice" being defined as the absence of "injustice" and injustice being defined as action contrary to the social nature of man; *jus* as a moral quality of a person independently of abstractions concerning the "social nature" of mankind as a whole; and *jus* as a binding norm, positive law incorporating moral rectitude. Amoral positive law (human volitional law) is thus dismissed from the conception of *jus* (usually translated "law," but so is *lex*, and the two Latin words are not the same) as used in Grotius's Latin text. Tanaka's analysis is technical and not always clear, but then so is Grotius's.

Chapter 3, "War," is by the learned editor of the volume, Yasuaki Onuma (Professor of International Law, University of Tokyo). Here, too, is found Grotius's distinction among "natural law," the "law of nations," and "divine law," none of which by itself can properly be translated as "international law."² But the bulk of the essay is concerned with Grotius's notion of "*bellum justum*," which depends on the justice of the causes of war: defense of legal rights, restitution of things wrongly taken or withheld, and punishment of those who have done an injury to the party resorting to war.³ It is notable that war is not justifiable to right a wrong in the abstract; wars of "liberation" are not necessarily "just" if slavery was legitimately caused, as by punishment for an earlier fault. It could have been argued that restitution of "liberty" as a property right might have justified a war of liberation, but Grotius did not go that far, and his defense of the Dutch wars of independence from Spain during his lifetime was based on denial of Spanish rights to the degree that the Spanish assertions rested on divine law pretexts. Grotius, like the Catholic jurists Vitoria and Suarez before him, considered divine law to be the order that governs religious matters but not to be binding with regard to secular matters. Thus, to Grotius, divine law could import no right to govern property or limit individual liberty. Grotius also denied Spanish assertions of a right to rule when premised on natural law notions about the "good of the ruled." By the law of nature as understood by Grotius, no person can be by nature a slave, and thus the application of Spanish positive law in the Netherlands, to the degree it deprived Dutch people of their natural liberty, violated natural law.

2. A NORMATIVE APPROACH TO WAR, *supra* note 1, at 121.

3. *Id.* at 78-79.

Chapter 4, "State and Governing Power," is by the author of Chapters 1 and 2, Professor Tanaka. The most interesting part of the chapter is the clear exposition of Grotius's difficulty in denying a right of resistance to unjust rule, preferring peace as ordained by the law of nature and divine law to the breakup of civil society, even though civil society, being based on human law, can be changed by superseding human law. Grotius was a loyal Dutchman and Protestant, however, politically bound to support the revolt of the Netherlands against the hereditary and divine law rights of the King of Spain. Therefore, he grounded his support for that rebellion in denying that it was a rebellion under human law, instead categorizing it as a war of secession based on necessity under the law of nature and divine law. This chapter also introduces Grotius's distinctions between "*imperium*" and "*dominium*."

A detailed discussion of those complex notions forms the majority of Chapter 5 by Masaharu Yanagihara (Professor of International Law, Kyushu University). In the period when theories of an implied social contract were replacing the literal contracts of feudalism as the intellectual basis for authority, the distinctions between property rights (*dominium*) and abstract authority (*imperium*) were even less clear than they are today. Feudal *imperium* rested on *dominium*. To Grotius, *dominium* implied rights over things (property rights) and *imperium* rights over people. There is some sense in this. But in some cases, such as the rights of parents over children and husbands over wives, natural law as expounded by Aristotle implied elements of *dominium*. Also, as the right to legislate began to be conceived as based on territory, including the territorial and other seas, the overlap of conceptions seemed to lie at the root of many international disputes.

It is perhaps because of unclarities in Grotius's own thought that I found this chapter probably the least satisfying in the book. For example, there seems to be a contradiction between the assertion that Grotius categorized the sea as by nature not subject to *dominium*⁴ and the assertion that *imperium* can be acquired over parts of the sea by occupation.⁵ If *imperium* can be acquired, cannot the exercise of the law-making authority of the *imperator* create *dominium* in whatever persons the law-maker chooses to designate as holders of property rights within that area of *imperium*? Professor Yanagihara seems unduly deferential to those who would try to harmonize Grotius's argumentative juvenile tract on freedom of the seas with his more mature views expressed in *BP*.

4. *Id.* at 149 n.18.

5. *Id.* at 153.

Chapter 6, "Agreement," by Professor Onuma, deals with Grotius's concept of the binding force of promises and oaths. Professor Onuma's analysis is long and detailed, showing Grotius's conception of the binding force of promises to be qualified by scholastic notions of equity (*aequalitas*) and right reason (*recta ratio*), as parts of natural law, while oaths are binding because based on divine law.⁶ Onuma reviews the writings of many modern scholars to conclude that it is a common error to read *BP* as a startlingly modern work. Rather, in historical context and with some knowledge of Roman law and the legal conceptions of the time, it can be seen that Grotius was a transitional figure in the evolution of legal conceptions relating to the bindingness of promises; he formulated a modern theory based upon traditional notions and patterns of argumentation. In my opinion, Professor Onuma is right.⁷

Chapter 7, by Terumi Furukawa (Professor of International Law, Hosei University) is titled "Punishment." Professor Furukawa explains that to Grotius, war instituted as "punishment" for a prior injury wrought in violation of law is an aspect of "just war" theory, but it also has deeper implications. An "equal" before the law has no authority to punish an equal; the imposition of punishment implies superiority within the system. Thus Grotius finds three categories of "punishment" justifiable: punishment that works to the advantage of the wrongdoer (reflecting Plato's view that wrongdoing is the result of the misuse of reason, or poor education); punishment that redresses the wrong done to the victim; and punishment that protects the general social order and promotes the good of mankind. All three categories reflect natural law assumptions and imply various natural law limits to the right to inflict punishment. Various additional limits are found in divine law. In sum, the right to have recourse to force in order to "punish" a wrongdoer turns out to be limited indeed, and the punishment is justified by factors other than retribution, thus avoiding the pitfall of reprisals which would cause escalation of conflict rather than peace.

6. Although Onuma notes Grotius's dependence on Cicero as the restater of Roman conceptions of the binding nature of promises, he overlooked my favorite passage, where Grotius directly criticized Cicero's assertion that promises to "*pirata*" are not binding. Grotius points out that promises supported by oaths are indeed binding because the promise supported by an oath is made to God, not to the pirates, and the promisor's soul is imperiled by bad faith no matter who the beneficiary of the promise. See *infra* note 13.

7. My own research indicates the evolution of conceptions to have been well-established by the time *BP* was written. The key transition period seems to have been in the early 16th century, when the authority of the Pope as the principal exponent of divine law in pre-Protestant Europe was superseded by the secular authority of heads of state. See Alfred P. Rubin, *International Law in the Age of Columbus*, 39(1) NETHERLANDS INT'L L. REV. 5 (1992) esp. 11-19.

Grotius's views on the just causes of war having been analyzed in the earlier chapters, Naoya (Okuwaki) Kasai (Professor of International Law, Rikkyo University) addresses "The Laws of War" directly in Chapter 8. While the *jus ad bellum* might not be satisfied by one or the other party to an exchange of arms subject to the laws of war, the *jus in bello* applies by definition. Scholastic and earlier philosophers had difficulties in finding equal rights in both parties to the ongoing conflict when they perceived unequal justice in their causes for fighting. Grotius overcomes these difficulties by shifting from the scholastic focus on natural law and divine law to customary law and the "law of nations." Thus, he suggests that the victor in an "unjust" war should, of his own volition, make reparation and return to the original owner any booty captured during the war, on the ground that legality under the human law does not imply legality under natural law or the moral values reflected in that law.⁸ Thus "internal justice," the moral law perceived by introspection, requires restitution and postliminy even though the human law of war might allow the victor to keep his spoils.

Grotius divides "war" into two parts: a reprisal or local war, and "formal" or general war. It is a division that survives today.⁹ An inconsistency appears between Grotius's views of the illegitimacy of Spanish dominance in the Netherlands based upon the natural law under which slavery is forbidden, and Grotius's defense of slavery as a legally justifiable result of capture in war. Grotius's argument in favor of slavery as a result of war rests on slavery being, by natural law, a lesser evil than the likely alternative, death. Although Professor Kasai does not go deeply into the topic, I would suggest that Grotius's logic was more persuasive to his European contemporaries than it would be to us. They knew of the relations analogous to enslavement that accompanied Spanish and Dutch activities in the New World and the Spice Islands.¹⁰

Chapter 9, "*Temperamenta* (Moderation)," is by Tadashi Tanaka, the author also of Chapters 1, 2, and 4. The larger part of the chapter is merely an expansion of the distinctions drawn in Chapter 8 between

8. A NORMATIVE APPROACH TO WAR, *supra* note 1, at 274.

9. In the United States, it was a division accepted by Chief Justice Marshall as soon as the issue arose. See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801): "[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed."

10. On the Spanish practices and their legal rationales, well-known to Grotius and his contemporaries, see Rubin, *supra* note 7, esp. pp. 32-35. On the Dutch activities in the Spice Islands, see ALFRED P. RUBIN, *THE INTERNATIONAL PERSONALITY OF THE MALAY PENINSULA: A STUDY OF THE INTERNATIONAL LAW OF IMPERIALISM* 42-45, 55-59 and 65-93 (1974).

what the positive law permits (including the fruits of victory in an unjust war) and what the moral law and divine law permit, explaining that "moderation" must be exercised even by fighters in a just cause, lest they violate the natural law which requires it. Professor Tanaka seems to lose his way slightly in this, identifying the natural moral ("internal") law with the law of nations in places, but reflecting what might be obscurity in Grotius's own language read in isolation. The chapter ends with Professor Tanaka suggesting (not entirely convincingly) that Grotius's notions of moderation with regard to captives in war developed into the modern notion of the rights of prisoners of war.¹¹ On the other hand, Professor Tanaka is certainly correct in noting that attempts to apply Grotian conclusions directly to the modern laws of war are unconvincing, usually being mere arguments based on authority usually taken out of context. He points out, for example, that attempts after the First World War to abolish resort to force in international affairs are not based on Grotian or scholastic "just war" ideas, but on policy grounds.¹²

Chapter 10, "Agreements between Nations: Treaties and Good Faith with Enemies," by Makoto Kimura (Professor of International Law, Saitama University), deals with the fate of international promises in time of war. The problem Grotius addressed was that "*fides*," good faith, is not a positive law obligation owed to enemies, nor was it universally conceived in Christendom as a divine law obligation when dealing with people of a different religion.¹³ Nonetheless, he found a basis for the

11. In one passage Professor Tanaka says "it was not until 1929 that the protection provided by the Geneva Convention was expanded to include prisoners of war. Until then, prisoners of war were treated, at best, according to domestic instructions modelled after the Hague Regulations of Land Warfare." A NORMATIVE APPROACH TO WAR, *supra* note 1, at 305. This is hard to reconcile not only with the language of articles 4-20 of the Hague Regulations of 1899/1907 cited in the 1929 Convention, Convention Relating to the Treatment of Prisoners of War, 47 Stat. 2021, 2061-62 (1929), but with cases such as the Union Military Commission's conviction in 1865 for "murder in violation of the laws and customs of war" of Captain Henry Wirz, the Confederate officer responsible for the notorious Andersonville prisoner of war camp during the American Civil War.

12. A NORMATIVE APPROACH TO WAR, *supra* note 1, at 307.

13. Grotius actually finds a basis in divine law for a continuing obligation of good faith between Christians and non-Christians, and, as pointed out in note 6 above, criticizes Cicero for saying that a promise to "pirates" is not binding. The basis for obligation under divine law is that a promise made in the form of an oath to God is binding between the promisor and God whatever the bad faith of the beneficiary of the promise. See *BP* II, xiii, 15. For an analysis of Cicero's political situation at the time he tried to free the political order of Rome from its treaties with "*pirata*," and the inapplicability of the Roman word to current conceptions of "piracy," see ALFRED P. RUBIN, *THE LAW OF PIRACY* 10-11, 54 n.50-54 (1988). Professor Kimura's evidence for the assertion that "the Roman Church prohibited Christians from entering into treaties with non-Christians, and denied their binding force" is two twentieth century secondary works. A NORMATIVE APPROACH TO WAR, *supra* note 1, at 311. No doubt some Christian publicists, and perhaps even the Church organization as a whole,

continuing obligation of good faith in natural law, the source of the law that makes (or does not make) treaties binding. Thus, to Grotius, treaties are not a source of law, but are promises made binding by law; in modern terms, the notion is similar to the assertion that treaties are a source of obligation, not of law.¹⁴

Chapter 11, the conclusion by Professor Onuma, is worth the purchase of the entire book. It bluntly criticizes the tendency of many modern scholars to attribute their own preferred meanings to texts written in other times with other than modern situations in the mind of the writer. Onuma finds the key to Grotius's normative approach to be a "secularized" natural law" that actually embraced many aspects of Christian ethics that were presented as non-religious societal norms.¹⁵ It is an insight that will surely surprise many European scholars and others of Christian or Jewish heritage, but is undoubtedly true. Onuma tackles the gigantic figure of Sir Hersch Lauterpacht directly, finding many of Sir Hersch's assertions regarding the "Grotian tradition," particularly those relating to human rights and piercing the state veil to get at individual actors, to be "inappropriate in understanding Grotius."¹⁶ The criticism is barely tempered with praise of Sir Hersch's assertion that Grotius addressed ethics as part of statecraft and linked the notion of a "universal moral code" to the notion of law. Reading Onuma's praise carefully, and with knowledge of this volume's essays' meticulous

took that view from time to time over the millennia, but in light of flourishing Mediterranean trade and even various armistice and other agreements during and after the Crusader period, as well as the existence of the Kingdom of Jerusalem, the statement cannot possibly be true. Indeed, for a compilation of treaties between the Christian princes of the northern Mediterranean and the Muslim authorities in the Maghreb, see M.L. DE MAS LATRIE, *TRAITÉS DE PAIX ET DE COMMERCE ET DOCUMENTS DIVERS CONCERNANT LES RELATIONS DES CHRÉTIENS AVEC LES ARABES DE L'AFRIQUE SEPTENTRIONALE AU MOYEN AGE* (Burt Franklin, no date) (Paris 1866).

14. See Sir Gerald G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, in *SYMBOLAE VERZIIL* 153, 156 (1958). Professor Kimura does not mention this evidence of the continuing vitality of the approach taken by Grotius, but does strongly criticize Sir Hersch Lauterpacht's interpretation of *BP* (Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 *BR. Y.B. INT'L L.* 1 (1946), reprinted in 2 *INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCHE LAUTERPACHT* 307 (Elihu Lauterpacht ed., 1975)), where, in his opinion, Sir Hersch attributes an excessively positivist slant to Grotius's legal model. A *NORMATIVE APPROACH TO WAR*, *supra* note 1, at 314. In my opinion, Lauterpacht's interpretation of Grotius has been very influential on the current generation of scholars, but is mistaken in almost every way. See Alfred P. Rubin, *Enforcing the Rules of International Law*, 34 *HARV. INT'L L.J.* 149, 149 n.1 (1993). The note making the same point in rather stronger language appears also in the simultaneous publication of the same article in *FESTSKRIFT TILL JACOB W.F. SUNDBERG* 267-83 (Juristförlaget, Stockholm 1993).

15. *A NORMATIVE APPROACH TO WAR*, *supra* note 1, at 338-39.

16. *Id.* at 362. Lauterpacht's deeply influential essay that is the subject of Onuma's criticism is that cited *supra* note 14.

analysis of what Grotius actually wrote, it seems clear that Sir Hersch was right only in a very limited way; to Grotius, morality was indeed part of law, but only one part — divine law, positive law, and customary codes, such as chivalry, were also parts of “law” and would remain “law” even if amoral. That is a far different model of the international legal order than the model urged on us by Sir Hersch. Onuma concludes that the Grotian model of the international legal order does not lie between “naturalists” and “positivists” as if combining the virtues of both ends of a wide spectrum of jurisprudential thought, but rather that the Grotian model recognizes discrete positions in that spectrum as valid but incomplete. Thus, Onuma finds little or nothing significant in the writings of Pufendorf that Grotius would have disagreed with, and he finds misleading the conventional categorization of Pufendorf as the first great modern “naturalist” as distinct from Grotius. The Lauterpacht version of “Grotian” seems more “Pufendorffian” than Grotian, in that it emphasizes the natural law end of the spectrum while Grotius distinguished among the various sources of law, attributing influence to each and dominance to none in the overall system. Some readers might find particularly useful the diagram on pages 342–43 of *A Normative Approach to War* of the many different categories of “law” referred to by Grotius in *BP* as part of what today would be called the international legal order. To my mind, Onuma’s essay replaces Lauterpacht’s as the persuasive interpretation of Grotius for our time and possibly for generations to come.

In sum, this is a magnificent study, particularly useful for its freedom from European biases, placing Grotius in historical and jurisprudential context in a way that frees us from the burdens of tendentious misinterpretations. It gives us a deeper appreciation of the humanity, originality, good sense and perceptiveness that have made *BP* a classic and preserved its author’s name and reputation for almost four centuries.