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Grotius on the Use of Force: Perfect, Imperfect and Civil Wars. An Introduction

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In both of Hugo Grotius's major forays into the law of nations, the just war doctrine provided the backbone of the argument. Between 1604 and 1606, Grotius prepared a treatise in defence of the capture of the Portuguese ship *Santa Catarina* in the Strait of Singapore by a fleet of the Dutch East India Company. In the text, which became known as *De iure praedae commentarius* upon its publication in 1868, Grotius refashioned the just war doctrine in order to argue that the captured ship and cargo were good prize in a just war. According to Grotius, this was the case regardless of whether one considered the Company an agent of the Dutch Republic in a war between states, or a private actor. With his idiosyncratic reading of the just war doctrine, Grotius wanted to respond to the obvious contention of the Republic's Iberian enemies that the Dutch Republic, or the States of Holland whose agent the Company was, was a rebel force and lacked the authority to wage war. When Grotius returned to the theme of just war two decades later in *De iure belli ac pacis libri tres* (1625), he did so in the context of his construction of a general theory of the role of law – natural law as well as the volitional law of nations – in relation to war and peace-making. Grotius used the classical doctrine of just cause, in combination with the scheme of private rights and remedies of persons, property, contracts, debts and punishments, to structure his elaborate expositions of natural rights and obligations of both people and states. This scheme he took, in all probability, from the re-systematisation of Roman private law that the French humanist jurist, Hugo Donellus (1527–1591), professor at Leiden University, had proposed on the basis of the *Institutes* of Justinian.[1] Although the purpose and logic of systemisation of the two works were very different, Grotius did draw

1 Benjamin Straumann, *Roman Law in the State of Nature: The Classical Foundations of Hugo Grotius' Natural Law* (Cambridge: Cambridge University Press, 2015), pp. 157–206.

heavily on *De iure praedae* when writing *De iure belli ac pacis* for his understanding of just war as an instrument for the enforcement of subjective rights among states.[2]

Grotius's *De iure belli ac pacis* formed the second attempt at offering a systematic exposition of the laws of war and peace-making from early-modern Europe after the work of Alberico Gentili (1552–1608), Regius Professor of Civil Law, which was published as *De iure belli libri tres* in 1598. Like Gentili had done, Grotius's treatise covered what became the three branches of the laws of war *sensu lato* in modern international law scholarship: the body of rules which laid down under what conditions war was legitimate (use of force law); the body of rules which applied to actual warfare (law of war *sensu stricto*) and the bodies of rules which regulated the ending of war and the restoration of peace (law of peace-making). The Latin phrases that are now commonly used – *ius ad bellum, ius in bello, ius post bellum* – were only introduced around the turn of the twentieth century but the chronological sequence which they expressed formed an important part of the logic of both Gentili's and Grotius's theories: the legitimisation of a war, or lack thereof (*ius ad bellum*), dictated the rules that applied to it (*ius in bello*) and the fashion and legal implications of its completion (*ius post bellum*).[3]

For their discussions of these three branches of the laws of war and peace(-making), Gentili and Grotius drew on three traditions from late-medieval and sixteenth-century scholarship. Firstly, there was the discourse on the just war (*bellum justum*). Whereas the doctrine had roots in the writings of ancient scholars, in particular Cicero (103–43 BCE) and Saint Augustine (354–430), the doctrine was truly fleshed out first by canon lawyers and then theologians in the twelfth and thirteenth centuries. Under the doctrine, war was conceptualised as an instrument of forcible self-help in order to enforce a right after its injury. The doctrine achieved its classical form through the work of Saint Thomas Aquinas (c. 1225–74), who famously listed three conditions for a war to be just: authority,

2 The best exposition of Grotius's just war theory in both works, and their mutual relation, remains Peter Haggenmacher, *Grotius et la doctrine de la guerre juste* (Paris: Presses Universitaires de France, 1983).

3 On this logic in Gentili's work, Randall Lesaffer, 'Alberico Gentili's *Jus post Bellum* and Early Modern Peace Treaties', in *The Roman Foundations of the Law of Nations. Alberico Gentili and the Justice of Empire*, ed. by Benjamin Straumann and Benedict Kingsbury (Oxford: Oxford University Press, 2010), pp. 210–40; also see Carsten Stahn, 'Jus ad Bellum, Jus in Bello … Jus post Bellum? Rethinking the Conception of the Law of Armed Force', *European Journal of International Law* 17 (2007), 921–43, at pp. 933–5. Also see Francisco Suárez, *Disputationes Metaphysicae* (Coimbra: Nicolaus Carvalhus, 1621), Q. XIII *De bello* 7. Grotius spoke of 'ad bella' and 'in bellis' in *Prolegomena* 28 of *De iure belli ac pacis*.

just cause and righteous intention. For a ruler to have authority to wage or command war, he had to be supreme in the sense that he recognised no higher, secular authority. Just cause implied that the war had to be waged in reaction to prior injury, whereas righteous intention referred to the purpose of doing justice through the achievement of a just peace. The just war also found its way into the discourse of late-medieval civilians.[4] Secondly, Gentili and Grotius referred to the discourse of these civilians with regards to the *iura belli*, the rights that emerged from warfare such as plunder, ransom or conquest, and which formed the hard core of the later *ius in bello*.[5] The civilian literature, particularly of the fourteenth century onwards, stood in close relation to the professional literature and practice of the code of chivalry.[6] Thirdly, there was the literature of commentaries and treatises by canon lawyers and theologians on the title 'De treuga et pace' from the *Liber Extra* (1234) which provided a *sedes materiae* for lawyers and theologians to discuss truce, peace and peace-making.[7]

For Grotius, the just war doctrine formed the foundation and central plank to the structure of his theory of the laws of war and peace. He made, however, a few innovative intellectual moves, which through the fame and reputation his treatise gained, left a deep imprint on the further development of the laws of war and peace in particular, and the law of nature and of nations in general during the later seventeenth and eighteenth centuries.

Firstly, whereas Grotius basically adhered to the scheme of Aquinas, he put the just war doctrine in a different key by securely locking it into the ambit of his version of natural law. He drew from the works of some of the neo-scholastic theologians on the relation between divine and natural law, but also on that of humanist civilians on Roman rights and remedies.[8] Grotius's particular understanding of natural law as a category which was distinct and separate from divine law and as a body of law generating subjective rights which individuals and individual states could enforce under the aegis of expletive – commutative – justice cast the concern for the common good into the shadows. Grotius ostracised deliberations of

4 Gregory M. Reichberg, *Thomas Aquinas on War and Peace* (Cambridge: Cambridge University Press, 2017); Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge: Cambridge University Press, 1975).

5 Peter Haggenmacher, 'On the Doctrinal Origins of *Ius in Bello*: From Rights of War to the Laws of War', in *Universality and Continuity in International Law*, ed. by Thilo Marauhn and Heinhard Steiger (The Hague: Eleven International Publishing, 2011), pp. 325–58.

6 Maurice H. Keen, *The Laws of War in the Late Middle Ages* (London: Routledge and Keagan, 1965).

7 *Liber Extra*, X. 1.34.

8 Wim Decock, *Theologians and Contract Law. The Moral Transformation of the Ius Commune (ca. 1500–1650)* (Leiden and Boston: Brill/Nijhoff, 2013), pp. 21–104; James Gordley, *The Jurists. A Critical History* (Oxford: Oxford University Press, 2013), pp. 82–127.

the righteousness of intention from the realm of natural law and the *justum* and banned these into that of divine law – for Christians, the Law of the Gospel – and the *honestum*. This move was crucial for Grotius's strategy to justify the capture of the hugely rich cargo of the *Santa Catarina* and form an ulterior line of defence against claims of strict proportionality or against the impositions of the common interest of the Dutch Republic on the interests of the captors. While these concrete considerations were not of significance in the context of writing *De iure belli ac pacis*, the original formulation of just war as the enforcement of a single state's subjective rights from the earlier work lingered on in Grotius's theory of the laws of war and peace, and remains a backbone of the Western understanding of international law to this day.[9]

Secondly, Grotius brought together the canonist-theological conception of just war with the civilian conception of legal war (*bellum publicum, bellum legale, bellum licitum*) into his system. Building on some fragments from the *Digest*, late-medieval civilians had started to conceive of war in terms of a contest between equal parties who both could benefit from the *iura belli* and thus gain legal title on the basis of war. This clashed with the essentially discriminating nature of the just war, wherein a just belligerent confronted the unjust perpetrator of an injury. In a consequential reading of the just war doctrine – as did most canon lawyers and theologians whose concern was to assess the effects of injustice in war on the immortal soul – only the just side could benefit from the *iura belli* while the unjust side had to compensate the just belligerent for the original injury and all the costs and damages of the war. Both Balthasar de Ayala (1548–1584) and Gentili had elaborated this idea of war as a contention between legally equal sides into an alternative conception of war, that of legal war. For a war to be legal, it needed to be waged among sovereigns and to be formally declared. It implied that both sides had, regardless of the sincerity and veracity of their claims to just cause and righteous intention, the right to wage war and that they held equal rights under the *iura belli*.[10]

9 Peter Haggenmacher, 'Génèse et signification du concept de "ius gentium" chez Grotius', *Grotiana* 2 (1981), 44–102; Benjamin Straumann, 'Ancient Caesarian Lawyers in a State of Nature. Roman Tradition and Natural Rights in Hugo Grotius's *De iure praedae*,' *Political Theory* 34 (2006), 328–50; Id., 'Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius's Early Work on Natural Law', *Law and History Review* 27 (2009), 55–85; Francesco Todescan, '*Sequuntur Dogmatica De Iure Praedae*: Law and Theology in Grotius's Use of Sources in *De Iure Praedae*', *Grotiana* 26–28 (2005–7), 281–309.

10 Randall Lesaffer, 'Aggression before Versailles', *European Journal of International* Law 29 (2018), 773–808, at pp. 778–80; James Q. Whitman, *The Verdict of Battle. The Law of Victory and the Making of Modern Law* (Cambridge, MA and London: Harvard University Press, 2012).

Grotius adopted this alternative conception, and named it *bellum solemne,* which can best be translated after Emer de Vattel (1714–67) as 'war in due form' (*la guerre en forme*), or regular war. Grotius's most important contribution to the later development of the laws of war and peace arose from the fact that he placed both just and regular war within his system, and located them in different legal spheres. Whereas the justice of war was a matter of natural law, which applied *in foro interno*, regular war was a matter of the volitional law of nations, which dealt with the effects of war in the temporal sphere of human, external relations with one another (*in foro externo*). Grotius's dualist reading of war became a hallmark of the literature of *ius naturae et gentium* of the seventeenth and eighteenth centuries and gained a powerful further articulation in the work of Vattel. To this day, it lingers on in the discussions between justice/legitimacy and legality that colour international use of force law. It also reflected the practice of early-modern Europe where claims to the justice of war coexisted with an undiscriminating application of the *ius in bello*.[11]

Thirdly, Grotius contravened established tradition where he broke with the equation between authority to wage war, Aquinas' first condition, and sovereignty and licensed private warfare under certain circumstances. For this, he articulated the theory that, after the establishment of states and positive law, individuals could revert to their natural right of the violent enforcement of their rights – just war – in case state enforcement was not available, as in dire need (self-defence) or in places not covered by state jurisdiction (the high seas). Private warfare was a central concern in *De iure praedae*. In *De iure belli ac pacis*, Grotius largely swept the notion under the carpet, but let it stand in principle. His theory of reversion to natural rights allowed for the recognition of civil war and was utilised by Grotius to justify insurgency against a prince who stepped beyond the constraints of a contractual government.

The interplay between just and regular war and between public and private war opened a mental space wherein categories of use of force could emerge that did not amount to full regular war, but were nevertheless just. The writers of the early-modern law of nature and of nations, and the writers of modern international law from the nineteenth and early twentieth centuries, would explore and fill these spaces.

On the one hand, they would indicate and define categories of use of force that were irregular because war had not been declared, but were nevertheless

11 Randall Lesaffer, 'Too Much History: From War as Sanction to the Sanctioning of War', in *The Oxford Handbook of the Use of Force in International Law*, ed. by Marc Weller (Oxford: Oxford University Press, 2015), pp. 35–55; Walter Rech, *Enemies of Mankind. Vattel's Theory of Collective Security* (Leiden and Boston: Martinus Nijhoff, 2013).

just, such as self-defence, reprisal or auxiliary force. These became known as imperfect wars, or later in the nineteenth century, as measures short of war. Their emergence was aided by the conceptualisation of war as a legal state. From the state of peace, wherein the normal laws of interstate relations applied, a state of war was demarcated, to which the laws of war, and for third parties, the laws of neutrality, applied. Grotius did not articulate such a distinction in these terms, but it was lurking behind much of his discussions on the laws of war and was present in his definition of war as a 'condition' ('status per vim certantium').[12]

On the other hand, use of force could be just but not regular because one or more of the belligerents lacked authority as a sovereign. This covered categories of private and corporate use of force, but also, potentially, civil war. The latter category gained significance in international law in the era of the American revolutions, when third states struggled to determine their position with regards to trade, navigation and privateering in relation to rebels/insurgents and their mother states.[13]

The papers in this focus section 'Grotius on the use of force: perfect, imperfect and civil wars' map the space between just and legal war in Grotius's thought, the intellectual antecedents of these ideas and their impact on later scholarship and international practice. The papers were first presented at a conference, organised by the Department of Roman Law and Legal History at KU Leuven on 16 November 2016. Viktorija Jakjimoska (KU Leuven) was co-convener of the conference. The conference is part of a series of international meetings, organised under the auspices of the *Stichting Grotiana* in preparation of the 400th anniversary of the first publication of *De iure belli ac pacis* in 2025. These events aim to put the spotlight on the legal-doctrinal aspect of Grotius's major legal treatises. For each subject, the analysis of Grotius's legal thought is paired with a study of his intellectual sources and his legacy in later legal development.

The eight papers in this special issue fall into three parts. The first part, 'Perfect and imperfect war', explores the dual conceptualisation of war in terms

12 Grotius, IBP I.1.2.1; Stephen C. Neff, *War and the Law of Nations. A General History* (Cambridge: Cambridge University Press, 2005), pp. 96–130 and 215–49.

13 Mikulas Fabry, *Recognizing States. International Society & the Establishment of New States since 1776* (Oxford: Oxford University Press, 2010), pp. 23–78; Inge Van Hulle, 'Britain's Recognition of the Spanish American Republics', *Legal History Review* 82 (2016), 284–322; Viktorija Jakjimovska, 'Uneasy Neutrality: Britain and the Greek War of Independence', in *International Law in the Long Nineteenth Century (1776–1914). From the Public Law of Europe to Global International Law?*, ed. by Inge Van Hulle and Randall Lesaffer (Leiden and Boston: Brill/Nijhoff, 2019), pp. 45–72.

of regular and irregular, just and unjust. Valentina Vadi discusses Gentili's definition of legal war as an instrument of dispute settlement between equal parties rather than law enforcement. She argues that in the agile construction of Gentili this was used with effect to delegitimise civil war and insurrection but did not stop him from operating categories of self-defence and even intervention in the context of empire. Camilla Boisen's paper looks at the declaration of war not only from the perspective of procedure under the volitional law of nations, but also as a ploy to allow belligerents to deliberate on their claims of justice in the case of punitive war. She hereby discloses the inherent connection between the different categories of war and of law – positive law, natural law, divine law – under Grotius's holistic approach to war and interstate relations.

The first two papers in the part, 'Imperfect war: reprisal and corporate warfare' concern reprisal. Historic reprisal, in the sense of an authorisation to a private person to enact – possibly forcible – retribution in order to achieve compensation for an injury by a foreign national against any compatriot of that national, hover on the fringe between imperfect and private warfare. Philippine Christina van den Brande analyses some major treatises and texts on reprisal from the late-medieval *ius commune*. She traces how this commercial practice found its way into the literature on (just) war as a means to overcome moral hesitations about liability for another person's actions. She indicates how this aided Grotius's thought. Whereas Grotius did not treat reprisal in any depth in any of his two major treatises on the laws of war, his novel framing of the just war doctrine did give the practices both of particular reprisal and general reprisal, as well as privateering, a powerful legal foothold in the early-modern laws of war and peace, as it is argued in the paper, 'Grotius on reprisal'. Rotem Giladi uses Grotius's conception of private war to reduce the mainstream understanding of war as the preserve of sovereign, Western-style states to a limited, historically contingent theory that fails to catch the breadth of international law's intellectual pedigree and of both historic and current international practice.

Just as reprisal, civil war is a theme that Grotius did not write about in any real depth or with system in *De iure belli ac pacis* but whose further development was nevertheless deeply impacted by the overall argument of the treatise. Dante Fedele confronts Grotius's distinction between rebellion and civil war with that of his predecessors of the late-medieval *ius commune*. In doing so, he highlights the novelty of his quantitative criterion – the importance and extent of support – for a rebellion to amount to a civil war and to generate international recognition, which became a key feature of modern international law. Raymond Kubben unearths the roots of Grotius's dual strategy of

justification of the Dutch Revolt versus the prevention of civil unrest in the Republic in the literature on the right of resistance from that revolt. He shows how Grotius translated Holland's mainstream position of a right of resistance against a contractual ruler into the embryonic core of a doctrine of legal recognition of insurgency under the laws of war. Ville Kari moves this latter theme forward in time. He argues that Grotius's concept of legitimate insurgency returned in different places in his discussions on the *ius in bello,* making it into a rich source for later writers and practitioners to deal with the legal consequences of civil unrest, in particular with relation to navigation, commerce and maritime warfare.