Hugo Grotius: an Israeli Appreciation*

SHABTAI ROSENNE*

1. Grotius the Lawyer

Grotius' great works on international law — *De jure praedae commentarius, 1604* (first published only in 1868) and *De jure belli ac pacis libri III, 1625* — are both characterized by excessive abstraction, by prolixity and multiplication of irrelevant citations, and in general by a display of outdated scholasticism. Consequently, today they can be read only with difficulty, if indeed they are readable at all, thanks to their endless *obiter dicta*. They are not text-books, and their practical value is limited. Their importance and their greatness are to be found in the ideas they expound and in the spirit in which they are written. From one point of view, these were not the first works on international law to be written, and indeed Grotius himself acknowledges, in the prolegomena to *De jure belli ac pacis*, that he had learnt much from his "predecessors", without naming them. The secret of their enormous strength and influence on the very shape of international law lies in his all-embracing approach to that law and the deep moral sense with which they are imbued, all coupled with the reformulation of this branch of the law as a secular science separated from theology in general, and from Catholicism in particular. The difficulties of expression and the lack of systematization of *De jure belli* — and to some extent also of *De jure praedae* — are the consequence of two factors: (a) the absence of agreed accurate scientific terminology as jurisprudence in general began separating itself from theology; (b) the confusion resulting from the admixture of the source-material used by Grotius, itself the consequence of Grotius' own conception of the very nature of the law and from his deliberate intention of distancing himself from the controversies of the day.

The main expression of Grotius' philosophical approach is found in the two sets of prolegomena with which these two works open. In his words,

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* Fellow of the Jewish Academy of Arts and Sciences, member of the Institute of International Law, Honorary member of the American Society of International Law, former Ambassador of Israel.
Where should we begin, if not at the very beginning? Therefore, the first and pre-eminent rule is: What God has shown to be His will, that is law. ¹ That expresses the real reason for the law. Further rules are: What the common consent of mankind has shown to be the will of all, that is law. ² What each individual has indicated to be his will, that is law with respect to him. ³ Whatever the commonwealth (respublica) has indicated to be its will, that is law (jus) in regard to the whole body of citizens. ⁴ What the magistrate has indicated to be his will, that is law in regard to the whole body of citizens as individuals. ⁵ Whatever all states have indicated to be their will, that is law in regard to all of them. ⁶

There are two characteristic features of Grotius' theory: (a) the stress put on the element of “will”, whether of the collectivity or of the individual, as the basis for the law; (b) the unity of the law, which includes both the legal order existing between the States — international law — and the legal order existing within each State. The first element, jus gentium voluntarium, is directed towards the new political science which began to flourish with the strengthening of the national state, in which the equality of all sovereign states began to take root. This replaced the subjective will of the states for the objective ties of land and religion — especially Catholicism — which had been the mainstay of political and legal theory since the end of the Middle Ages. This new approach is essentially a Protestant and anti-Catholic one, and in denying the axioms and assumptions of his Catholic predecessors Grotius broke the ties with the past and opened up new directions for international law and for the philosophy of the law. At the same time, Grotius' writings are notably free of overt hostility towards Catholicism, and in his toleration we can find one explanation for his preference for ancient precedents over more recent ones.

The second element, the unity of all law, softens the somewhat harsh conclusions that could be derived from the first. Stressing the element of “will” leads to legal positivism, with its conclusion that the law is what the states have agreed should be the law. However, alongside that agreed law there lies also the law of nature (jus naturae), the social content of which is deeper since its purpose is to preserve the existence of human society. “The

² ib., p. 12.
³ ib., p. 18.
⁴ ib., p. 23.
⁵ ib., p. 26.
⁶ ib., p. 27.