Images of Grotius, or the International Rule of Law beyond Historiographical Oscillation

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1 Introduction

One of the premises underlying the current debate on the International Rule of Law (IRoL) and the struggle of public international law scholars today in working with the concept, further to its use in UN statements and programmes, seems to be that it is an idea without a history of its own. It appears the IRoL has no origins independent from the Rule of Law as it developed in relation to the domestic level and that in order to conceptualise the IRoL today, we need to transpose this home-grown concept – most notably in the Dicey version – to the international level. Crawford points to the difficulties of this exercise and expresses ‘initial doubt’ when he turns to international law to look for

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the rule of law idea operating there. He throws in: ‘So we might say that the rule of law is a singularly domestic or internal virtue, one for home consumption only, that what international law is and what it tries to do does not and cannot engage the values of the rule of law’.\(^3\)

This article starts from a different premise; it is part of the argument that the international rule of law idea has a history of its own. It examines the ‘international rule of law’ idea, or rather: a rule of law for international society,\(^4\) in the writings of one of the most important early modern thinkers in the history of the law of nations Hugo Grotius (1583–1645). As such, it makes two claims. One, it claims that in Europe the history of the idea of a rule of law in international society dates back to at least the early modern times, when natural law was still one of the sources of the law of nations.\(^5\) Two, related to the first claim: contrary to what the increasingly dominant image of Grotius as a VOC\(^6\) apologist and proto-Hobbesian thinker may suggest, Grotius is a prominent thinker in the history of this idea.

A proto-Hobbesian reading of Grotius’ theory of the law of nations forecloses a role for Grotius in the history of the IRoL idea – since it implies a most minimalist account of his conception of the law of nature and nations: coming down to nothing more than the natural right to pre-emptive strike to defend oneself and one’s interests. This account points to a denial or ultrathin concept of rule of law in international society. The present paper however aims to demonstrate that Grotius proceeds from a different understanding of the law of nature and nations, which incorporates an idea of a rule of law in international society. That is, an idea of the supremacy of the law of nature and nations in the international society capable of guiding and constraining the conduct of sovereigns and states. This does not mean that we will read him anachronistically in a modern, contemporary context or assign Grotius merely to the context of today’s debate on the international rule of law. I side with those who


\(^{4}\) To avoid a too anachronistic use of terms.

\(^{5}\) This is not to say we do not find the idea of a rule of law earlier, e.g. in the work of Francisco de Vitoria. In his *Relectio* ‘On the Indians’, the idea features in his arguments that ‘lordship’ cannot come to Emperor or Pope unless by law, ‘by natural law or by divine law or by human law’. *On the Indians*, para. 352 in ‘Franciscus de Victoria De Indis et de ivre Belli Relectiones’, James Scott Brown (ed), Classics of international law series 1917, 135. The idea of a rule of law for international society is moreover the idea behind his whole argument in the third section, which is aimed at developing a universal legal system that is binding upon both Indians and Spaniards.

\(^{6}\) VOC is the Dutch acronym for the Dutch East India Company.