GROTIUS LECTURE—DISCUSSANT'S COMMENTS[1]

*By Rosalyn Higgins**

I begin by saying how much I have appreciated and admired the lecture just delivered by Judge Keith. As with all his work on the bench of the International Court of Justice, it was scholarly, deep in its thinking, intellectually rigorous, and a remarkable sweep through geography and time. We have heard a real tour de force.

I fully agree that Grotius's work has to be understood in its context, and by reference to where things stood at the time. And I fully agree with what Judge Keith has said on the wearing of different hats in life.

Judge Keith commented that ''Grotius would . . . have been intrigued by the use of the word 'approach,' as opposed to a rule, principle or even standard.'' Yes, indeed. Where Grotius, to whom we frequently turn today, finds the ''rule'' he enunciated is not clear. All said and done, as the originator of these great ideas, hitherto unknown, such views curtailing just causes for war, cannot of course be found in treaties, custom, or the practice of states. His importance precisely lies in how he articulated these thoughts *as the first to do so*.

I have long thought that to hold opinions, and make confident pronouncements, that are not dependent on the ideas of others, information proffered by others, is indeed the mark of greatness. As the Cold War was showing its first signs of softening, Andrei Sakharov was allowed to visit London in a carefully controlled visit. I was among the lucky few invited to a private meeting to hear him speak. He had lived through long years in total isolation. He heard no views other than the state-speak of the Soviet Union. He had no access to ideas in the world outside. He was not able to read works of philosophy or developing ideas of human rights. For all his information, he was dependent on what the state provided. Listening to him, I had a strong realization of how dependent I myself was, for the formulation of ideas, on what I was freely allowed to know. And from then onwards I have thought that *greatness* lies exactly in the ability to know right from wrong, decency from inhumanity, in almost total absence of information, facts, and ideas of others.

And there has to be something extraordinary about a man who wrote in Latin in the early seventeenth century, who definitionally could not benefit from reliance on the sources of international law, and holds our attention today.

Grotius himself bases the ideas that he so timely expounded, and their underlying liberalism, on natural law. However ''natural law'' is so subjective, so much in the eye of the beholder. But he had to begin somewhere.

Judge Keith has mentioned how, having become involved in the great religious controversy over pre-determination, Grotius was arrested for sedition. He was imprisoned in Loevestein Castle and there wrote important religious studies and works on Roman law and Dutch jurisprudence. It was a few years after his famous escape in the tea chest that he published *De Jure Belli ac Pacis*, Book III. Thereafter his life was an extraordinary literary output, while forced to live abroad.

In 1983, there was a great gathering of international lawyers in The Hague to commemorate Grotius's four hundredth birthday. I had the great good fortune to be present. Among all the learned papers there given, I remember two things. A marvelous epic poem, composed and read by Ambassador Pinto of Sri Lanka (these days the Registrar of the Iran-U.S. Claims

[1] This draws on thoughts published in R. Higgins, *Grotius and the United Nations*, 37 INT'L SOC. SCI. J. 122 (1985).

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Tribunal), recalled the life and death of Grotius (at Rostock in 1645). It was rather in the style of Coleridge's *Ancient Mariner*, felicitously crossed with Tennyson's *The Lady of Shalott*. It imagines the reaction of the kindly innkeeper of Rostock to the gradual realization of the stature and genius of the sick man whom he tended in his last dying days. This wonderful poem gave me a vicarious sense of pride in the fact that not all international lawyers were Philistines.

The second thing I clearly remember is a service, four hours long, in Latin and Old Dutch in a church of bone-numbing coldness. I remember Queen Juliana arriving at the church in the most enormous, heavy fur coat and my husband whispering to me, ''I think she may know something that we don't.'' How right he was.

So we have to remember the context in which Grotius prepared his astonishing works—astonishing above all because of their originality and humanity.

What does it mean when we speak of Grotius as the founding father of international law, when we recall his insistence upon the freedom of the seas, believing fishing resources were infinite, and new limits to the authority of states to act as they wish? Have not times changed so as to make the legal sentiments with which he is particularly associated obsolete?

The United Nations Charter contains important clauses on the curtailment and limitation of the use of force by states which reflect the idea that states may use unilateral force only for the purpose of self-defense and not to the pursuit of foreign policy objectives. The road back from this precept to the ideas of Grotius is a long one indeed, with many intervening landmarks on the way. But the lineage is real enough, and the starting point on this journey merits brief recalling.

On the lawfulness of recourse to war—*jus ad bellum*—the forthright views of Hugo Grotius marked a break with the past, and the beginning of the contemporary formulation of international law. He wrote in Book II of *De Jure Belli ac Pacis*: ''No other just cause for undertaking war can there be except injury received.''[2] He further elaborated three justifiable causes ''defence, recovery of property and punishment.''[3] It is evident that although this placed constraints upon states, it did not limit the use of force to self-defense as we understand it today. In Grotius's opinion, his formulation included ''the obtaining of that which belongs to us or is our due''[4]—a general expression of the entitlement to use force in self-help. The concept of ''that which is our due'' was said by Grotius specifically to include the right to free navigation and trade.

This is not, of course, what the United Nations Charter provides. The prohibition on the unilateral use of force laid down in Articles 2(4) and 51 makes clear that self-defense is the only exception; and the International Court of Justice confirmed in the *Corfu Channel* case in 1949 that it was not right to use force to ensure freedom of passage through the Corfu Channel—even though that freedom was certainly ''our due'' and acknowledged as such.

For Grotius, his formulated doctrine of ''just war'' was a method of controlling the unbridled power of states to act as they chose. The Kellogg-Briand Pact of 1928 outlawing war as an instrument of national policy echoed the Grotian view, and represented further progress. Yet to those drafting the UN Charter in 1945, this was not a satisfactory point at which to rest: force could only be used in self-defense, and not to pursue legal rights or genuinely held notions of justice.

[2] Hugo Grotius, De Jure Belli ac Pacis, Book II, ch. 1, i (A.C. Campbell trans., London 1814) (1625).
[3] *Id.*, ch. 1.
[4] *Id.*, ch. 1, § 2.

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The Charter was meant to provide for collective security. At the heart of the Charter was the intention that it would be realistic to enjoin states to use force only in self-defense, because collective security would be provided to ensure that rights would not be denied in a manner which might threaten international peace. The United Nations collective security system has failed. The brief flurry of hope at the authorized military action to remove Saddam Hussein from Kuwait was short-lived. Since then, ''authorized action'' as a means of blowing life into the collective security system has been fraught with problems. And in recent times we see regional action not fully authorized by a divided Security Council.

So often the will to act is not there and, worse still, different actions engaged in conflict have the protection of different members of the Security Council. ISIS seems so vile that now there is some response.

The contemporary problem of humanitarian intervention is another difficult aspect of the same matter. In the Grotian view, humanitarian intervention *could* be a just war. Under the United Nations Charter, this is harder to maintain. Whether the Charter forbids all such intervention has indeed been the subject of scholarly debate among international lawyers. Grotius had some pertinent remarks to make on the matter. In Book II of *De Jure Belli ac Pacis* he declared that ''wars are justly waged against those who treat Christians with cruelty for the sake of their religion alone.''[5] Yet we know today that religious persecution abounds, and that states, for good or ill, will not normally intervene except perhaps where the lives of co-religionists are immediately in danger.

What was especially important about Grotius's contribution in this context was that while he upheld as a just war a humanitarian intervention to protect oppressed Christians, his was an extraordinarily early voice in rejecting the proselytizing underpinnings to this view: ''War cannot justly be waged against those who are unwilling to accept the Christian religion,''[6] he wrote at the beginning of the seventeenth century. Cortez completed his defeat of the Aztecs in 1581, some two years before Grotius's birth; Pissaro landed in Peru in 1532 and began his cruel suppression of the Incas immediately thereafter. Notwithstanding these terrible events, Grotius planted a seed that was eventually to thrive—namely, the restriction of the use of force to just causes, and the refusal to allow religious domination to be deemed a just cause.

I have referred to the failure of the United Nations collective security system, with the result that sometimes interventions for utterly unacceptable purposes are made, as well as sometimes unlawful interventions for more acceptable purposes. The picture is alarmingly random and unpredictable. Of course, the gap between what was intended and what was attainable was plugged in part by the evolution of the concept of United Nations peacekeeping. Even if they could not enforce the peace, and thereby encourage the unilateral use of force, they could encourage the protagonists to disengage by moving into a vacuum, supervising military withdrawals, and overseeing ceasefires. All these functions had to be based on consent, and from 1956 until quite recently, it seemed that this was a major contribution of the United Nations. But this success is now running down. For various reasons, United Nations peacekeeping has become unacceptable to certain states, which are now looking to alternative solutions. These include today much greater reliance on regional action—which also can be useful or fraught with legal and political problems.

[5] *Id.* at ch. 20.
[6] *Id.*

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I spoke earlier of Hugo Grotius's contribution to the idea that international law places limits upon the circumstances in which a state is able to resort to war. He has also had a profound influence on our perception that the means of pursuing war—even war lawfully entered into—may not be unlimited. *Jus in bello*, as this branch of international law is referred to, is not explicitly mentioned in the UN Charter. But the UN has shown a keen interest in promoting *jus in bello* and in developing international humanitarian law, alongside the International Red Cross. Grotius, long before the Hague Conventions of 1899 and 1907, wrote that the prohibition of unnecessary suffering was the leading precept of *jus in bello*. Grotius urged that unnecessary fighting be avoided and advanced early and constraining ideas on the doctrine of military necessity. As Geoffrey Best put it:

> It was above all Grotius who brought the non-combatant firmly onto the stage of warfare and set the pattern for that categorization of 'protected persons' which provides the *dramatis personae* of international humanitarian law. It must be doubtful whether any greater single stroke has been struck on the non-combatant's behalf.[7]

This Grotian principle has, of course, been under enormous pressure in recent years, not only because military convenience has often urged that it should be ignored (this is nothing new) but because the methods of contemporary warfare, with their reliance on guerillas, irregulars, and drones, make it increasingly hard to distinguish combatant from non-combatant. But in all the horrors we have witnessed, and in the important diplomatic negotiations that have led to the conclusion of various legal instruments in the last few decades on humanitarian law, the Grotian distinction between combatant and non-combatant has never been lost sight of.

But there is also a less well-known aspect of Grotius's writings that merits our attention. Central to his enunciation of the law is the insistence that *bellum privatum* is forbidden. War is limited to the state. It was, in Grotius's view, critical to move away from what was commonplace at the time he was writing—namely violence between families, groups, cities. The limitations on the use of force imposed by Grotius's notion of *bellum justum* could only work if states asserted a monopoly over the use of force.

But the trend has been all in the opposite direction so far as the use of force is concerned. Grotius's insistency that the state should have the monopoly on the use of force seems to have had its heyday. Liberation movements were supported by the UN. Self-determination widened the idea of use of force other than by states. Guerilla warfare is being undertaken for political reasons and non-state warfare for religious reasons.

Grotius had some things to say about this topic, even though his comments did not go by this name: ''An unjust cause of war is [to oppose] the desire for freedom among subject people.''[8] With extraordinary liberalism he declared that ''an unjust cause of war is the desire to rule others against their will on the pretext that it is for their good.''[9] He viewed the Native Americans as having rights under international law, and declared it unlawful to take their tribal lands from them by force. The respect that he accords to indigenous peoples, and his refusal to use international law to justify, whether on grounds of religion or cultural superiority, their domination, shines out like a beacon among his contemporaries and successors.

[7] Geoffrey Best, Humanity in Warfare: The Modern History of the International Law of Armed Conflicts (1983).

[8] Grotius, Book II, *supra* note 2, at ch. 22.

[9] *Id.*

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Grotius did not elaborate his great ideas in a vacuum. He wrote against the background of the struggle between the Dutch Republic and its component provinces. The Netherlands was at war with the King of Spain who in 1580 also succeeded to the Portuguese crown. There was a struggle with the Portuguese for the control of overseas trade routes. Grotius's advocacy of the freedom of the seas and of the liberty of the Dutch to trade with the East Indies fitted entirely with the political objectives of his country. By 1625, Grotius's views on this topic had been somewhat qualified; the Dutch East India Company had in its turn concluded exclusive trade treaties with local princes. Grotius defended this, not wholly convincingly, by contending that treaties were an exception to the general requirements of the law of nations, and that, in any event, the arrangement was less than monopolistic. I mention that so that we cannot be accused, four hundred years later, of looking at Grotius naively, blocking out that which we do not wish to see. But it is exactly because Grotius was a realist, and not what some today would pejoratively call a ''do-gooder,'' that his views command our respect. As Ken Keith has pointed out, there are today fearful problems facing us that were utterly beyond what could have been imagined by Grotius.

Scholars have spoken of the articulating of memorable, great ideas (such as freedom of the seas, restraint in law) as ''Grotian moments.'' And Richard Falk has suggested that the continuing relevance of such ideas is assured by focusing not on the minutiae of international law rules, but on the spirit that underlies them.

Finally, it is not, in my view, in accordance with the Grotian principle to declare a *non liquet* in the face of new and seemingly intractable problems, on which perhaps no definitive answer can easily be found in the accepted sources of international law. The Grotian tradition does not suggest that we throw up our hands and say ''there is no law on this matter.'' There are Grotian principles to invoke in resolving this dilemma, as Judge Keith has so well pointed out. And—dare I say it—if you embrace an approach to international law that emphasizes how to make authoritative decisions to achieve Grotian outcomes, the battle is half won.

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