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## Seventeenth Annual Grotius Lecture Series - Some Thoughts About Grotius 400 Years On

Sir Kenneth J. Keith

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**SEVENTEENTH ANNUAL GROTIUS LECTURE  
SERIES**

**SOME THOUGHTS ABOUT GROTIUS 400  
YEARS ON**

SIR KENNETH JAMES KEITH\*

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**I. INTRODUCTION**

What would Grotius see as major challenges for international law and its practitioners in our time? How would he approach them? How would he balance beautiful theory and ugly fact? Heritage and heresy? What lessons does he teach us in dealing with our tasks today?<sup>1</sup>

I will be looking back not just to the early seventeenth century, but also over the past fifty years. In 1965, I came to this meeting for the first time, travelling from Cambridge, Massachusetts, in a

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1. \*Emeritus Professor, Victoria University of Wellington, New Zealand. For the life of Hugo Grotius, see the justly acclaimed biography by HENK NELLEN, *HUGO GROTIUS: A LIFELONG STRUGGLE FOR PEACE IN CHURCH AND STATE, 1583-1645* 2 (J.C. Grayson trans., 2007); *see also* JACOB TER MEULEN & P. J. J. DIERMANSE, *BIBLIOGRAPHIE DES ÉCRITS IMPRIMÉS DE HUGO GROTIUS* 820 (1950). The first items are from 1595 when the author was just twelve!

Greyhound bus with Peter Trooboff. In the course of the last fifty years, I have been an observer and occasional participant in the application and development of international law in the face of major change and challenge, to refer to the theme of this conference. To mention one matter to which I will return, in 1960, as I began as a junior lawyer in the New Zealand Department of External Affairs, the second United Nations Conference on the Law of the Sea was assembling. It will be recalled that it narrowly failed to adopt a provision for a six-mile territorial sea and a further six-mile exclusive fisheries zone.<sup>2</sup> New Zealand, a few years later, adopted a twelve-mile fishing zone. Japan challenged the extension and proposed that the matter be taken to the International Court of Justice ("Court" or "ICJ"). Instead, a phase out agreement was reached.<sup>3</sup> There were already much more extensive claims, notably the 200-mile claims to a "patrimonial sea" made by Chile, Ecuador, and Peru, and the practice relating to the continental shelf was developing apace.<sup>4</sup>

Four hundred years ago, give or take a few years, we find Hugo Grotius in the early 1600s addressing law of the sea issues as counsel for the Dutch East Indies Company in the admiralty or prize court in Amsterdam in a dispute arising from the seizure by a ship of the Company of a Portuguese galleon in the straits of Malacca, in 1613 in London. He was appointed as Pensionary of Rotterdam when he was just twenty-four. He negotiated in Latin with James I of England about fisheries and much broader matters of trade in the East Indies and, in 1615, again in London, negotiated over whaling around Spitsbergen.<sup>5</sup> He was already a renowned author, especially on

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2. Second United Nations Conference on the Law of the Sea, Official Records, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, 29-30, 170-71, 173 (1960).

3. 683 U.N.T.S. 53 (1967). Compare the terms of the agreement reached by the two States just 11 years later when New Zealand, as the States recognized in the preamble, had "established in accordance with the relevant principles of international law" a 200 mile exclusive economic zone. Japanese fishing boats were to receive part of the unused total allowable catch. 1167 U.N.T.S. 441.

4. *See eg.*, the legislation and other state practice reviewed by the Parties and the Court in Maritime Dispute (Peru v. Chile), Judgment, 2014 I.C.J. Repts 1 (Jan. 27).

5. *See eg.*, the extracts in GROTIUS READER 119-41, 160-63 (L.E. van Holk & C. G. Roelofsen eds. 1973).

matters of theology, and a poet. But from that time, it is his treatise on the law of prize, *De Jure Praedae*, or rather one chapter of it, that is relevant for my purpose. The treatise was prepared as a brief for the Dutch East Indies Company. The famous chapter, *Mare Liberum*, was published anonymously in 1608 and was used by the English in the 1613 negotiations. They quoted from the writings of the “assertor *Maris Liberi*” (the negotiations, written as well as oral, were largely in Latin), taking a passage from the last paragraph of chapter 8 to the effect that freedom of trade is based on a primitive right of nations which has a natural and permanent cause that is part of the law of nature rather than the positivist law of nations.<sup>6</sup> The argument may also be made that the legal underpinning which he gave to the role of the Dutch East Indies Company facilitated Abel Tasman’s voyage thirty-five years later around the west and southern coasts of Australia and the first European discovery and mapping of New Zealand.

## II. THE VARIOUS ROLES OF GROTIUS THE LAWYER

By the time he is thirty, Hugo Grotius has already prepared an important work on international law of large continuing influence—as Professor Ernest Nys, an early honorary member of this Society, declared, “in this battle of books,” Grotius “had the better” of Johannes Selden, “his English antagonist.” Grotius has undertaken work as an advocate; he has been appointed to two major public offices; and he has had a significant role in diplomatic negotiations, although with some questioning his effectiveness in that role. When we look across those roles, it is the writing of *Mare Liberum* that is by far the most important for international law and international lawyers—taken as an independent scholarly work when it was in fact part of a brief for the Dutch East Indies Company.

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6. HAMILTON VREELAND, JR., HUGO GROTIUS: THE FATHER OF THE MODERN SCIENCE OF INTERNATIONAL LAW 82, 130 (“[F]reedom of trade is based on a primitive right of nations which has a natural and permanent cause; and so that right cannot be destroyed, or at all events it may not be destroyed except by the consent of all nations. So far is that from being the case, that any one nation may justly oppose in any way, any other two nations that desire to enter into a mutual and exclusive contractual relation.”).

As is well known, the remaining three decades of Grotius' life had amazing twists and turns in high office, as pensionary, in politics and religion, as a person accused and convicted of sedition and sentenced to life imprisonment, his study and writing in the Castle of Lowenstein for two years, notably his *Introduction to the Jurisprudence of Holland*,<sup>7</sup> his escape in a book box, his time in Paris and Hamburg, and his ten years as Ambassador of Sweden in Paris, but it is *De Jure Belli ac Pacis* that is the immortal part of him, or at least the major part of that immortal part. Its continuing immeasurable impact flatly denies his last words, words of despair: “[b]y undertaking many things I have accomplished nothing.”<sup>8</sup>

In his *Prolegomena* to that great work, Grotius said that “devotion to study in private life was the only course open to [him, given that he had been] undeservedly forced out from [his] native land which had been graced by so many of [his] labours.”<sup>9</sup> He was now contributing “somewhat” to the philosophy of law, which previously in public service he had practiced with the utmost degree of probity of which he was capable.<sup>10</sup> One message which the life of Grotius and of a number of more recent leading international lawyers teaches me is the value of changing hats—of having time as a scholar, as a practitioner, private and public, in law reform work and in litigation, as counsel or arbitrator or judge. The whole is other than the sum of its parts. A related message is that it may well be that scholarly work lasts the longest. I stress the “may,” but recall Oliver Wendell Holmes’ marvellous reference to the secret isolated joy of the thinker that, a hundred years after they are dead and forgotten, people who

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7. Professor R. W. Lee in his 1930 Annual Lecture on a Master Mind at the British Academy (proceedings Vol. XVI) says of the Introduction that it is a masterpiece of condensed exposition. It is at once a treatise on jurisprudence and a statement of positive law, the concatenation of the two being artfully contrived. While the newly constituted Kingdom of the Netherlands entered into an era of codified law in the early nineteenth century, the Introduction is still held in regard in those parts of the British Empire which have retained or adopted the old Dutch law as the foundation of their legal system (South Africa, the three protectorates and Southern Rhodesia, Ceylon, and British Guiana).

8. See W. S. M. KNIGHT, *THE LIFE AND WORKS OF HUGO GROTIUS* 289 (1925).

9. HUGO GROTIUS, *ON THE LAW OF WAR AND PEACE* 9 (Stephen C. Neff ed., 2012) [hereinafter *GROTIUS, WAR AND PEACE*].

10. *Id.*

have never heard of him will be moving to the measure of their thoughts,—the subtle rapture of a postponed power.<sup>11</sup> And here we are speaking of 400 years! The example shown by Grotius also makes the point about the importance of governments having good lawyers. Good legal work should help structure and complement good policy advice in the public sector.

### III. THE ENDURING VALUES OF GROTIUS' WORK

What do I see in that writing that is of enduring value in addressing the challenges the world faces today? I will have to be very selective. In the *Prolegomena*, Grotius highlights two central matters.<sup>12</sup> While acknowledging his predecessors, especially Gentilis, he is the first, he says, to treat the whole of the argument: his topic is the law which governs the “mutual relations among states or rulers of states (inter populos plures aut populorum), whether derived from nature, or established by divine ordinances, or having its origin in custom (moribus) and tacit agreement . . . .”<sup>13</sup> The enduring influence of great scholars who treat the whole of a body, in this case, of international law, is not measurable. But I am sure that it is the experience of many of us that the understanding of a particular matter may be greatly enhanced if we step back and see it in its more general context. That is a third message. To move away from international law for a moment, when considering the concept of property in a New Zealand case, in one particular area of statutory law, William Blackstone’s *Commentaries on the Laws of England*, notably his structure, helped me well along the way and to see the particular in its context. His books were rights of persons, rights of things, private wrongs, and public wrongs.<sup>14</sup> That structuring, contextual role of the great scholar may even be seen in terms of paragraphs (c) and (d) of article 38(1) of the Court’s Statute, as principles or teachings, but certainly not as subsidiary. Should we

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11. OLIVER WENDELL HOLMES, *The Profession of the Law*, in THE HOLMES READER 99, 101 (Julius J. Marke ed., 2d ed. 1955).

12. See GROTIUS, WAR AND PEACE, *supra* note 9, at 1 (focusing on the mutual legal relations between ancient states and Rome and the resolution of controversies that arose between them).

13. *Id.*

14. See *Z v. Z* [1997] 2 NZLR 258 at 278 (CA N.Z.) (listing Blackstone’s treatise).

not, more often, heed what Matthew Arnold said of Sophocles: “[w]ho saw life steadily, and saw it whole”?<sup>15</sup>

The other matter Grotius emphasizes at the outset goes to substance, to a central issue of any legal system. It was most certain, he said, that “there is among nations a common law of Rights which is of force with regard to war, and in war . . . .”<sup>16</sup> But:

I saw prevailing throughout the Christian world a licence in making war of which even barbarous nations would have been ashamed; recourse being had to arms for slight reasons or no reason; and when arms were once taken up all reverence for divine and human law was thrown away, as if men were thenceforth authorized to commit all crimes without restraint.<sup>17</sup>

That common law of *jus ad bellum* and *jus in bello*, his vigorous differentiation between just and unjust wars, and his flat rejection of private wars, were to be found, to return to his more general formulation and to the full title of the treatise, in “the law of nature and of nations as well as the principal questions of public law,” by which he meant constitutional and criminal law. He did not draw fine lines between international law and national law. A fourth lesson here is that the law controlling resort to armed force should not be seen as recent, as dating, say from as late as 1928.

#### IV. THE INTERNATIONAL RULE OF LAW: BETTER IMPLEMENTATION

Hersch Lauterpacht in his great article entitled *The Grotian Tradition in International Law*,<sup>18</sup> building on the first brief passage I have quoted and on more besides, lists as the first of the treatise’s principal and characteristic features that the totality of international

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15. Matthew Arnold, *To a Friend*, in MATHEW ARNOLD: THE COMPLETE POEMS 1 (2012).

16. PERCY BORDWELL, THE LAW OF WAR BETWEEN BELLIGERENTS: A HISTORY AND COMMENTARY 30 (1994).

17. Lord MacMillan et al., *Grotius Commemoration*, 24 TRANSACTIONS GROTIUS SOC’Y xxix, xxxi (1938).

18. (1946) 23 BYIL 1, reprinted in 2 HERSCH LAUTERPACHT, INTERNATIONAL LAW, THE COLLECTED PAPERS 207 (Elihu Lauterpacht ed. 1975). Elihu Lauterpacht records in that volume that “from conversations which my father had with me he regarded this article as probably the most important one that he ever wrote. Certainly I can remember the immense amount of labour he put into it.” *Id.*

relations is subject to the rule of law. That is the fifth lesson I draw. Similar statements have been made by the U.N. General Assembly, for instance, in its recent declaration on the rule of law.<sup>19</sup> But what does that mean in a practical sense? To take one central matter, if the State is subject to the international rule of law should it not also be subject to the processes of compulsory third party settlement as has increasingly been seen in national legal and constitutional systems?<sup>20</sup> Or should States at least not make better use of the existing processes than they do even if the processes are voluntary?

What are the reasons for the refusal or reluctance to accept jurisdiction in advance, or to make use of settlement methods on a voluntary basis when a dispute arises in a legal system which, in substantive terms, may be seen as a rather mature one? If a text has been carefully negotiated and agreed to or if principles and customary rules are widely accepted, what reasons are there for resisting binding “third party” procedures? Over twenty-five years ago, as the Cold War was ending, Grigori Tunkin, recalling what Mikhael Gorbachev had proposed—that the P5 (permanent members of the U.N. Security Council) should take the initiative and accept the Court’s jurisdiction—declared that the international community required a greater role for the Court and could not see any such reasons.<sup>21</sup> And if States are so reluctant to accept such procedures, why do they try so hard to have their nationals elected to the ICJ and other tribunals? Do they assess with equal diligence the qualities of other candidates for election?

I take as a prime example of the need for better implementation the law of armed conflict or international humanitarian law, one of Grotius’ major concerns, as indicated by a passage I quoted a

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19. G.A. Res. 67/1, ¶¶ 1-2 (Nov. 30, 2012) (“We recognize that the rule of law applies to all States equally, and to international organizations, including the United Nations and its principal organs, and that respect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions.”).

20. See, e.g., HERSCH LAUTERPACHT, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT’L L. 220, 232-34 (1951) (contending that foreign state immunity from the jurisdiction of national courts should be narrowed by analogy by the changes being made in national law limiting the immunity of the local state).

21. Grigory Tunkin, *Politics, Law and Force in the Interstate System*, 219 COLLECTED COURSES OF THE HAGUE ACAD. OF INT’L L. 227, 381-82 (1989).

moment ago.<sup>22</sup> Over many years the improved implementation of that law has been at the top of many agendas. The very first Geneva Convention of 1864 required governments to give instructions to their Commanders in Chief to implement that Convention in accordance with the general principles set forth in it.<sup>23</sup> Over one hundred years on, at the 1974-77 Diplomatic Conference which adopted the 1977 additional protocols to the 1949 Geneva Conventions, better implementation was the subject of extensive attention, concerning the enhancement of the role of Protecting Powers, the role of the International Committee of the Red Cross (“ICRC”), better dissemination and training, provisions for legal advisers, new grave breaches, new prohibitions on reprisals, strengthened inquiry procedures with the establishment of the International Humanitarian Fact-Finding Commission (“IHFFC”), state responsibility, and meetings of States Parties.<sup>24</sup> To come forward to 2003, the States Parties to the Geneva Conventions and the National Societies at the four yearly International Conference of the Red Cross and Red Crescent Movement declared their conviction that “the existing provisions of international humanitarian law form an adequate basis to meet challenges raised by modern armed conflicts . . . .”<sup>25</sup> That was a direct rejection of the proposition, to be heard in the previous two years that the Conventions were “obsolete” and “quaint.”<sup>26</sup> What was missing, declared that Conference, was better implementation. The Conference recalled the responsibility of States to “respect and ensure respect” for the Geneva law. One aspect

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22. MacMillan et al., *supra* note 17, at xxxi (quoting Grotius’ *Prolegomena*, in which Grotius expresses his dismay with the lawlessness of war).

23. Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1864, Aug. 22, 1864.

24. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 4, 6, 7, 11, 20, 51(6), 52(1), 53(c), 54(4), 55(2), 56(4), 80-91, June 8, 1977, 1125 U.N.T.S. 4.

25. Int’l Comm. of the Red Cross [ICRC], *28th International Conference 2003: Resolution 1* (Dec. 6, 2003), <https://www.icrc.org/eng/resources/documents/resolution/28-international-conference-resolution-1-2003.htm>.

26. See Anthony Lewis, *Introduction*, in *THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB* xiii, xv (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (recounting that White House Counsel called the Geneva Convention’s limitations on questioning enemy prisoners “obsolete” and other provisions “quaint” in the context of the War on Terror).

of the drafting history of the sentence I have just quoted gives emphasis to its direct and clear character. An earlier version would have said that “in general” the existing provisions formed an adequate basis to meet the challenges raised by modern armed conflicts. That qualifier was removed, with the U.S. government delegation in the vanguard. The Conference, in terms of implementation, called on all States to make use of existing mechanisms such as Protecting Powers and the IHFFC, calls which are also regularly made by the U.N. General Assembly but without any appreciable concrete effect.<sup>27</sup> The latest attempt at improving implementation is currently undertaken by the Swiss Government and the ICRC aimed at a text to be considered at the International Conference held later this year.<sup>28</sup> I do not get the sense from the published records of the meetings of those involved that major improvements will occur, but I would be pleased to be proven wrong.<sup>29</sup> Raw sovereignty raises its ugly head yet again. Would not Grotius 400 years on be surprised by the continued emphasis on sovereignty in such an interdependent world and by the insistence that nationalism is back?

I recall that in 1949, the Conference which adopted the four Geneva Conventions recommended that States consider using the ICJ to resolve disputes about compliance with the Conventions. Such disputes are often the subject of reservations by those States which have accepted the Court’s jurisdiction under the optional clause, and

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27. See, e.g., G.A. Res. 69/120, ¶ 3 (Dec. 18, 2014).

28. See Int’l Comm. of the Red Cross [ICRC], *Swiss/ICRC Initiative on Strengthening Compliance with International Humanitarian Law (IHL)* (Jan. 2015) (indicating that the ICRC-Swiss report will propose the establishment of a regular Meeting of States to strengthen respect for the implementation of international humanitarian law).

29. The initiative is taken in recognition of the fact that insufficient respect for applicable rules is the principal cause of suffering during armed conflicts. The focus of “the major consultation” over the past two years has narrowed and now focuses on a proposed “Meeting of States as the central pillar of the future IHL compliance system.” It would not be established by treaty and would impose no obligations. The initial *Background Document* listed an extensive array of compliance mechanisms. See *Working Group Meeting on Strengthening Compliance with IHL, Background Document*, § 2 (Oct. 2012). On the present focus see the existing provisions of article 7 of Protocol 1 which has never been invoked. See also the earlier Conference resolutions and actions referred to in section 2.5 of the October 2012 *Background Document*. *Id.* at § 2.5.

it has been said, for instance in respect of the Cuban Missile Crisis and in the commentary following *the* Nicaragua case of the mid-1980s, that such matters could not be justiciable. According to Dean Acheson speaking at one of these meetings “the propriety of the Cuban quarantine is not a legal issue . . . . [The] law simply does not deal with such questions of ultimate power . . . .”<sup>30</sup> But consider to the contrary the various cases relating to nuclear weapons, the cases about armed conflicts in the Great Lakes, the Pakistan POW case against India, aspects of some of the cases from the Balkans, the Iran/United States Aerial Incident case and decisions of the Eritrea/Ethiopia tribunal. Or at a more general level, the rejection of “reason of State” as a limit to obligation—a rejection, Lauterpacht notes, which is achieved by Grotius without a single reference to Machiavelli.<sup>31</sup>

In considering implementation, we should not forget implementation through national processes which, after all, undertake the bulk of that task day by day, particularly in mundane or normally mundane areas such as trade, including customs and tariffs, and communications, including post, telecommunications, shipping, by road and by air, as well as more serious areas such as war crimes, for instance the prosecutions in the national courts in the former Yugoslavia and Rwanda, and piracy. Further recall Grotius’ early advocacy in a national prize court, and the fact that he did not draw a clear distinction between national and international law. To return to the freedom of the high seas and to mention again a case, the New Zealand Court of Appeal about 140 years ago decided that New Zealand courts had no jurisdiction over an alleged murder committed on a foreign vessel on the high seas.<sup>32</sup> The Court was referred to a number of eighteenth and nineteenth century authorities including Phillimore, Vattel, Kent, and Story, some of whom cited

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30. MURRAY COLIN ALDER, *THE INHERENT RIGHT OF SELF-DEFENCE IN INTERNATIONAL LAW* 131 (2013) (adding that the international community was divided on whether the United States’ quarantine of Cuba violated international law).

31. (1946) 23 BYIL 1, *reprinted in* 2 HERSCH LAUTERPACHT, *INTERNATIONAL LAW, THE COLLECTED PAPERS* 207 (Elihu Lauterpacht ed. 1975).

32. *See R v Dodd* (1874) 2 NZ Jur 52 at 52-53 (CA N.Z.) (holding that without a jurisdiction granting statute, the Court lacked the authority to try the accused).

Grotius, but not to Grotius himself.<sup>33</sup> That decision was not among the many court decisions used in the *S.S. Lotus (France v. Turkey)*<sup>34</sup> case where the Permanent Court of International Justice reached the opposite conclusion.<sup>35</sup> That ruling was, of course, reversed by treaty some years later.<sup>36</sup>

## V. WELL-DESIGNED PROCEDURES

It would be wrong for me to leave an impression that I am gloomy about the prospects of third party settlement of international disputes. The figures alone of many matters being decided by many different tribunals produce a positive picture, particularly if we compare the situation fifty years ago. I have spoken on other occasions recently about how improvements might be made to enhance the roles of international courts and tribunals and I will not revisit those matters. I take just one recent set of processes to illustrate a point which Lon Fuller made here many years ago—choose your appropriate instrument. “A sledge hammer is a fine thing for driving a stake. It is a cumbersome device for cracking nuts . . . it is hopeless as a substitute for a can-opener.”<sup>37</sup> The particular matter is also to be related back to *Mare Liberum*, chapter 7, since it concerns the absolute freedom to fish on the high seas.<sup>38</sup> Grotius based that freedom on the inexhaustibility of high seas fisheries. The open sea was to be contrasted with rivers—in respect of navigation as well. He based the freedom on that fact (of nature), on many authorities (assembled by a Spanish jurist) and on the inadmissibility of

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33. *Id.* at 52.

34. Judgment, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

35. *See id.* at 32 (holding that the criminal proceedings under Turkish Law against Lieutenant Demons, an officer on the *Lotus* who caused a collision killing eight Turkish nationals, did not violate international law).

36. *See* Convention for the Unification of Certain Rules Relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, art. 1, May 10, 1952, 439 U.N.T.S. 233 (stating that in the event of a collision, only the judicial authorities of the state whose flag the ship was flying under may institute criminal proceedings).

37. Lon L. Fuller, *Adjudication and the Rule of Law*, 54 AM. SOC’Y INT’L L. PROC. 1, 1 (1960).

38. *See* HUGO GROTIUS, THE FREEDOM OF THE SEAS OR THE RIGHT WHICH BELONGS TO THE DUTCH TO TAKE PART IN THE EAST INDIAN TRADE 51-52 (James Brown Scott ed., Ralph van Deman Magoffin trans., 1916) (“[I]t is a universal law that the sea and its use is common to all.”).

prescription or custom or express law to defeat such a freedom. But the facts have long been different. Fisheries are not inexhaustible. John Maynard Keynes has an apt comment, as on so many matters, “[w]hen my information changes, I alter my conclusions. What do you do, sir?”<sup>39</sup> No doubt Grotius would agree. A sixth lesson I suggest.

My example of well-designed processes for the ongoing management of fisheries as well as the settlement of disputes relating to those fisheries comes from the South Pacific Ocean. The fisheries in that area have long been under serious threat. Some species were protected in some degree but until recently there was no overall management regime. Over the last decade, the South Pacific Regional Fisheries Management Organisation has been established.<sup>40</sup> In the preamble of the Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean (“South Pacific Regional Fisheries Management Convention”), the Parties express their commitment to ensuring the long-term conservation and sustainable use of the fisheries resource in the South Pacific Ocean and in so doing safeguarding the marine ecosystems in which the resources occur.<sup>41</sup> The Parties and the institutions they create are to apply a precautionary approach as well as an ecosystem approach—approaches which are broadly defined in the South Pacific Regional Fisheries Management Convention.<sup>42</sup> Grotius would, I imagine, have been intrigued at the use of the word “approach” as opposed to “rule,” “principle,” or even “standard,” and the cautious attitude of the ICJ to that matter.

In the drafting of the South Pacific Regional Fisheries Management Convention, procedures were established for the annual fixing of the total allowable catch and of quotas for fishing countries.<sup>43</sup> The procedures emphasize decision-making by consensus but allow for majority voting if consensus cannot be

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39. Paul A. Samuelson, *The Keynes Centenary*, in THE COLLECTED SCIENTIFIC PAPERS OF PAUL A. SAMUELSON 275, 275 (Kate Crowley ed., 1983).

40. Convention on the Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, Nov. 14, 2009, U.N. treaty registration no. 50553.

41. *Id.* art. 20.

42. *Id.* art. 3.

43. *Id.* art. 16.

attained.<sup>44</sup> States could object on prescribed grounds and a dispute settlement process, which was to operate expeditiously, was arranged. I should add another element to this picture. When the negotiations were underway, Peru brought ICJ proceedings against Chile for the delimitation of their maritime boundary. There was nothing in the record before the Court to indicate that oil was an issue, fisheries were in part covered by existing arrangements, the South Pacific Regional Fisheries Management Convention, although not mentioned, was being negotiated and was beginning to be applied, and there were security and customs interests as well as the long history running back at least to the War of the Pacific. The Court delivered its judgment in early 2014, more than a year after the end of the oral argument, the longest period in my time on the Court. What, you may well ask, was the real purpose of the Peruvian application? I can make a guess, but judges often can do no more than speculate about the background to and the reasons for litigating. That judgment was given on the day the second meeting of the South Pacific Fishing Management Commission began the task of fixing the quotas for the next year. In the meantime, the Russian Federation had challenged a measure adopted at the first meeting, a challenge which was heard on a Monday and the ruling in which was delivered the following Friday by a panel chaired by a former editor of the *American Journal of International Law*, in Fuller's terms, the operator of a clever can opener.<sup>45</sup> A seventh lesson then is to look across the range of possible processes which are available or may be invented. I add the caution that available methods may simply be ignored and that the success so far of that particular process of management and of one instance of dispute resolution must not be allowed to disguise the rapid depletion of many fish stocks. The definition of "success" may be too narrow. The earlier collapse of the jack mackerel fishery stock in the South Pacific provides one

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44. *Id.*

45. See Objection by the Russian Federation to Decision, Findings and Recommendations of the Review Panel, RP 98381, Review Panel Under the Convention on Conservation and Management of High Seas Fishery Resources in the South Pacific Ocean, ¶ 4 (July 5, 2013), <https://pca-cpa.org/en/search/?q=Objection+by+the+Russian+Federation+to+Decision%2C+Findings+and+Recommendations+of+the+Review+Panel%2C+RP+98381%2C++Review+Panel+Under+the+Convention+on+Conservation+and+Management+of+High+Seas+Fishery+Resources+in+the+South+Pacific+Ocean>.

spectacular example among many.

## VI. THE LAW OF NATURE AND OF NATIONS

The recent development and application of the law of the sea highlights another central characteristic of Grotius' writing—his sources—of the law of nature and of nations. The first once dictated freedom of the high seas but, in fact, new fishing methods no longer accorded with the principle and new oil extraction technology helped generate the principle that the land dominates the sea and the principle of the natural prolongation of the land territory into and under the seabed. Those principles of nature (which many would question as scientifically accurate, certainly in the case of the first) have become principles of law. Delimitation between contiguous and opposite states takes account of such principles but the treaty law, the 1982 United Nations Convention on the Law of the Sea (“UNCLOS”), the law of nations in Grotius' terms, speaks only of an equitable result. No real criteria for reaching that result are identified by the UNCLOS. The negotiators were unable to agree even on a minimal statement.

Many, including members of the Court, have been critical, even scornful, about the law on delimitation as stated in the UNCLOS and developed by the Court. In 1982, one of the judges who had undertaken extensive scholarly and diplomatic work on the law of the sea declared that the Court in its judgment appeared simply to suggest “the principle of non-principle,” a criticism he repeated three years later in a further dissent.<sup>46</sup> The headings in that opinion, quite apart from the supporting text, give the flavour; misconceptions in the present judgment, misconstruction, misapplication, maladjustment, and misunderstanding. In the earlier case another judge, having decided that the judgment did not provide a just solution and had strayed into subjectivism, added a further point by concluding his dissent in this way:

For the past ten years or so, States have been less and less inclined to present themselves before the Court; when they have chosen voluntarily to come, the Court must answer their request and declare the law, not

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46. *See* Continental Shelf (Tunisia v. Libyan Arab Jamahiriya) [1982] I.C.J. Repts 18, 157, ¶ 1; Continental Shelf (Libyan Arab Jamahiraya/Malta) [1985] I.C.J. Repts 13, 123, ¶¶ 2-30, 71-79.

attempt a conciliation by persuasion which does not belong to the Court's judicial role, as long ago defined by the Court itself.<sup>47</sup>

Those grim forebodings and criticisms have not been realized; a steady stream of delimitation cases has continued, including four in my time, from the Pacific, the Caribbean, and the Black Sea. Another three have been filed in just the last eighteen months. More broadly, the Court has dealt with many more cases in the thirty years since those statements were made than in the preceding longer period. The criticisms of those judges about the lack of principle and failure of reasoning in the delimitation cases have also not been realized: the Court has developed robust methods which in practice have led to broadly accepted, indeed largely unanimous decisions (with the adhoc judges concurring). Further, that body of law was recently applied by the International Tribunal for the Law of the Sea ("ITLOS"), the specialist body established under UNCLOS, in *Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh v. Myanmar)*.<sup>48</sup> And we may presume that it guides States when they settle boundaries by agreement. An eighth lesson then is to attend carefully to the interaction of principle, rule and facts—facts which may in the end be decisive.

## VII. LARGE CHALLENGES TO INTERNATIONAL ORDER

Many matters on the international agenda today would strike Grotius as requiring close attention by international lawyers and others—the threats posed by nuclear weapons, climate change, pandemics, and natural disasters, the gross breaches of human rights, the subject of a recent book by a U.S. lawyer who sees human rights as being in the twilight,<sup>49</sup> the work being done within the United Nations on Sustainable Development Goals which the Economist magazine sees in their present form as damagingly ambitious, as being worse than useless,<sup>50</sup> and the killings in armed conflicts in

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47. [1982] I.C.J. Reps 143, 156.

48. See Case No. 16, Order of Mar. 14, 2012, ¶ 90, [https://www.itlos.org/fileadmin/itlos/documents/cases/case\\_no\\_16/1-C16\\_Judgment\\_14\\_02\\_2012.pdf](https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_16/1-C16_Judgment_14_02_2012.pdf).

49. Eric A Posner, HUMAN RIGHTS IN THE TWILIGHT (2014).

50. See *Unsustainable Goals*, ECONOMIST (Mar. 28, 2015),

many parts of the world, although on the last, he would, I trust, be challenged by Steven Pinker's *The Better Angels of our Nature*.<sup>51</sup> I will conclude by considering, in relation to natural disasters and pandemics, issues of legal process.

Pandemics have long been the subject of general international regulation, while the broader matter of protection from natural disasters has had only incidental regulation internationally. Recently, that broader matter has become the subject of consideration at the international level, notably by the International Federation of Red Cross ("IFRC") and Red Crescent Societies, the Institut de Droit International, and the International Law Commission ("ILC"). The texts they have developed address major issues, some of which I will note briefly.

On the broader matter, according to a recent paper given by the United Nations Development Programme Administrator, drawing on work by the U.N. Office for Disaster Risk Reduction ("UNISDR"), over the past twenty years 1.3 million people have been killed and 4.4 billion have been affected by disasters caused by natural hazards.<sup>52</sup> 95% of the deaths occur in developing countries; by contrast only 2% of deaths from cyclones occur in highly developed countries.<sup>53</sup> The UNISDR calculated in 2013 that since 2000, the economic losses caused by floods, earthquakes, and drought amount to \$2.5 trillion.<sup>54</sup> A United Nations/World Bank calculation is that every dollar spent on prevention (such as seismic strengthening)

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<http://www.economist.com/news/international/21647307-2015-will-be-big-year-global-governance-perhaps-too-big-unsustainable-goals> (claiming that the pursued goals are overarching, that the process is spinning out of control, and that there is a pervasive lack of direction for solving various world issues).

51. See generally STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011).

52. See Helen Clark, UNDP Administrator, Hopkins Lecture, Building Resilience: The Importance of Prioritizing Disaster Risk Reduction (Aug. 15, 2012) (giving an example that in 2011 there were 302 disasters, which killed 30,000 people and affected 206 million people by floods, droughts, etc.).

53. See *id.* (stating that the majority of people exposed to disasters have less human development, which increases the number of deaths when disasters strike).

54. See U.N. Int'l Strategy for Disaster Relief, Global Assessment Report on Disaster Risk Reduction, From Shared Risk to Shared Value: The Business Case for Disaster Risk Reduction, at 38-39 (2013); see also Press Release, UNISDR, UN Warns That Economic Losses from Disasters are Out of Control and Urges Private Sector to Reduce Risk (May 15, 2013).

saves seven lost.<sup>55</sup> Disease also causes many more deaths, especially in the developing world. Malaria, for instance, kills more than 500,000 a year, mostly children in Africa, one child every minute.<sup>56</sup> In a recent issue of the *New England Journal of Medicine*, Bill Gates argues, no doubt correctly, that although epidemics and wars are terribly costly of blood and treasure, war is taken seriously by the politicians, at least in terms of preparations such as standing armies.<sup>57</sup> The deaths from the recent Ebola outbreak exceed 10,000 and the World Bank calculates the resulting harm to the three countries' economies as at least \$1.6 billion.<sup>58</sup> And deaths from armed conflict are far exceeded by those caused by disease.<sup>59</sup>

Attempts to regulate the international spread of diseases, to turn to that more specific matter, have a very long history. Initially, control was exercised by local quarantine—the forty-days ships were required to be isolated before passengers and crew could go ashore during the Black Death plague epidemic.

The latest International Health Regulations (“IHR”), adopted by the World Health Organization (“WHO”) in 2005,<sup>60</sup> have their origins in the international response to the cholera epidemics that overran Europe between 1820 and 1847. The epidemics led to the International Sanitary Conference in Paris in 1851 and to the adoption of treaties, for instance in 1903, requiring international cooperation in meeting such epidemics.<sup>61</sup> The WHO took over the legislative role when it was established in 1948. Its regulations of

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55. See Clark, *supra* note 52.

56. World Health Org. [WHO], *World Malaria Report 2013*, at 63 (2013); *Factsheet on the World Malaria Report 2013*, WORLD HEALTH ORG. (Dec. 2013), [http://www.who.int/malaria/media/world\\_malaria\\_report\\_2013/en/](http://www.who.int/malaria/media/world_malaria_report_2013/en/).

57. See generally Bill Gates, *The Next Epidemic—Lessons from Ebola*, 372 *NEW ENG. J. MED.* 1381, 1381 (2015).

58. Press Release, World Bank, *Ebola: Most African Countries Avoid Major Economic Loss but Impact on Guinea, Liberia, Sierra Leone Remains Crippling* (Jan. 20, 2015); *Ebola Response Roadmap Situation Report Update*, WORLD HEALTH ORG. (Oct. 25, 2014), [http://apps.who.int/iris/bitstream/10665/137185/1/roadmapupdate25Oct14\\_eng.pdf](http://apps.who.int/iris/bitstream/10665/137185/1/roadmapupdate25Oct14_eng.pdf).

59. See Gates, *supra* note 57, at 1381.

60. International Health Regulations (2005), art. 2, May 23, 2005, 2509 *U.N.T.S.* 79 [hereinafter IHR 2005].

61. See International Sanitary Convention, art. 1, Jan.17, 1912, 112 *L.N.T.S.* 283 (requiring governments to inform other governments when “plague, cholera, or yellow fever” has been identified in their territories).

1951 were replaced in 1969.<sup>62</sup>

The revision of the 1969 regulations was needed to address their limitations. In particular in recent decades, cross-border travel and trade have increased and communication technology has developed markedly. Over the past fifty years, for instance, the numbers of travellers flying in and out of New Zealand has increased by a factor of 100.<sup>63</sup> New challenges have arisen in the control of emerging and re-emerging infectious diseases. The world has entered an information age in which news spreads via a multitude of formal and informal channels.

Further, the focus in the 1969 regulations on just three diseases—cholera, plague and yellow fever—did not address the multiple and varied public health risks that the world faces today. In addition, some unwarranted and damaging travel and trade restrictions had led to a reluctance by some countries to report disease outbreaks and other events promptly.<sup>64</sup>

I now consider some of the legal process issues arising in these two very challenging areas. To be a little concrete, consider swine flu, bird flu, Ebola, and SARS; and the Boxing Day tsunami (2004), the earthquakes in Port au Prince (2010), Chile (1960 and 2010), Kobe (1995), Fukushima (2011), Hurricane Katrina, the Russian heat waves, Pakistani floods, the Thai floods, and recently Cyclone Pam in the Southwest Pacific Ocean. Among the international legal process, issues are:

The actors. Who should be developing the rules? Official or private? Local or regional or international? An institution with general or particular responsibilities?

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62. International Health Regulations, art. 5, July 25, 1969, 764 U.N.T.S. 3.

63. *Compare International Travel and Migration – ITM: Visitor Arrival Totals (2015)*, STAT. N.Z., [www.stats.govt.nz/infoshare/ViewTable.aspx?pxID=a062c9bb-1213-4d83-80dc-3e4ac7533e98](http://www.stats.govt.nz/infoshare/ViewTable.aspx?pxID=a062c9bb-1213-4d83-80dc-3e4ac7533e98) (last visited Feb. 16, 2016); *with International Travel and Migration – ITM: Visitor Arrival Totals (1965)*, STAT. N.Z., [www.stats.govt.nz/infoshare/ViewTable.aspx?pxID=a062c9bb-1213-4d83-80dc-3e4ac7533e98](http://www.stats.govt.nz/infoshare/ViewTable.aspx?pxID=a062c9bb-1213-4d83-80dc-3e4ac7533e98) (last visited Feb. 17, 2016).

64. *See generally Frequently Asked Questions About the International Health Regulations (2005)*, WORLD HEALTH ORG., <http://www.who.int/ihr/about/FAQ2009.pdf?ua=1> (last visited Feb. 16, 2016) (stating that it is necessary to instill confidence in countries to ensure that they report disease outbreaks in spite of these fears).

The character of the rules. Should they be binding or be a model or a guideline? It is striking, for instance, that the first sentence of the Guidelines for the domestic facilitation and regulation of international disaster relief adopted by the IFRC reads “[t]hese Guidelines are non-binding.”<sup>65</sup> Similarly the Sendai Framework for Disaster Risk Reduction 2015-2030 does not purport to impose legal obligations.<sup>66</sup> By contrast, article 66 of the IHR requires that the Director General deliver copies of the regulations to the United Nations for registration under article 102 of the Charter.<sup>67</sup> The IHR are plainly binding.

The relevant principles. The third of Lauterpacht’s characteristics drawn from *De Jure Belli ac Pacis* is “the affirmation of the social nature of man as the basis of the law of nature.”<sup>68</sup> That basic idea appears in the IHR’s statement of purposes and scope: “to prevent, protect against, control and provide a public health response to the international spread of disease in ways that are commensurate with and restricted to public health risks, and which avoid unnecessary interference with international traffic and trade.”<sup>69</sup>

[The first and third principles are as follows:]

The implementation of these Regulations shall be with full respect for the dignity, human rights and fundamental freedoms of persons.

The implementation of these Regulations shall be guided by the goal of their universal application for the protection of all people of the world from the international spread of disease.<sup>70</sup>

But the fourth principle emphasizes *the sovereign rights* of States “to legislate and to implement legislation in pursuance of *their* health

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65. Int’l Fed’n of the Red Cross and Red Crescent Societies [IFRC], *Introduction to the Guidelines for the Domestic Facilitation and Regulation of International Disaster Relief and Initial Recovery Assistance*, at 13 (2011), <http://www.ifrc.org/en/what-we-do/idrl/idrl-guidelines/>.

66. See *Sendai Framework for Disaster Risk Reduction*, UNISDR, <http://www.unisdr.org/we/coordinate/sendai-framework> (last visited Feb. 16, 2016); see also *Sendai Framework for Disaster Risk Reduction 2015-2030*, A/CONF.224/CRP.1, at 12 (June 3, 2015) (holding that the framework was to create a conducive and enabling environment to increase commitment to the framework).

67. See IHR 2005, *supra* note 60, art. 66.

68. See H. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT’L L. 1, 104-05 (1946).

69. IHR 2005, *supra* note 60, art. 2.

70. *Id.* art. 3.

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policies.”<sup>71</sup> Against that emphasis, the IHR impose important obligations, some of them new, on States and the relevant international organizations of capacity building, notification, consultation, and action, including the declaration of emergencies. These obligations are to be seen in the context of the work of the ILC on international liability for injurious consequences arising out of acts not prohibited by international law; and their adequacy in their terms and in operation may well be assessed by reference to the evaluations of the responses to the Ebola crisis. Bill Gates’ recommendations in the paper I mentioned earlier should be at the center of this work.

The clash between humanitarian values and sovereignty has also arisen in the work of the ILC on the protection of persons in the event of emergencies. The purpose of the first draft articles completed last year is to facilitate an adequate and effective response to disaster that meets the essential needs of the persons concerned, with full respect for their human rights. The text also affirms human dignity and humanitarian principles and places an obligation on the affected State to seek external assistance to the extent that the disaster exceeds its capacities. Assistance cannot however be provided without its consent. The draft does propose a limit on refusal. Consent cannot be withheld arbitrarily. The requirement of consent, says the Commission, is fundamental in international law. That comports with the recognition that an affected state has the primary role in respect of disaster relief. The ILC gives reasons in support of that limit and some indication of how arbitrariness might be shown, but it also records that some of its members were of the view that that qualified duty was not recognized by international law.<sup>72</sup> The next round of State comments and reactions to the final text should make interesting reading.

In this return to academic life, I have moved away from the confined role of the judge—largely confined by the issues properly arising from the legal dispute brought to the Court, by the evidence

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71. *Id.* (emphasis added).

72. *See generally* Int’l Law Comm’n, Protection of Persons in the Event of Disasters, U.N. Doc. A/CN.4/L.831, arts. 4, 14 (May 15, 2014) (finding that when a state is offered assistance, it should make its decision on the offer of assistance known if possible, but this is not a strict requirement).

as presented, by the arguments made, and by the relief sought. Just how successful I have been in looking more broadly at our responsibilities, in looking at structures and inter-connections is for you, for others to judge. But I have tried to emphasize process and principle. I add to my references to Grotius and Lauterpacht one to Karl Llewellyn for his similar emphasis: technique without morals is a menace, but “ideals without technique are a mess.”<sup>73</sup>

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73. See Karl N. Llewellyn, *On What is Wrong with So-called Legal Education*, 35 COLUM. L. REV. 651, 662 (1935) (noting that lawyers must first be taught to have a strong foundational technique before proceeding to their job as a lawyer).