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International Law and the Grotian Heritage

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Book Reviews

International Law and the Grotian Heritage. Edited by T.M.C. Asser Instituut, 1985. The Hague: T.M.C. Asser Instituut. xxii and 367 pp. ISBN 90 6704 037 1.

Recent emphasis on codification of this or that aspect of international law has encouraged a number of writers to re-examine the "classics" with a view to ascertaining the extent to which we have moved from the 17th and 18th centuries and how far the views of the "teachers" are still relevant or may even today be regarded as *lex ferenda.* Coincident with the fourth centenary of the birth of Grotius, the Interuniversitair Instituut voor International Recht T.M.C. Asser Instituut in cooperation with the Grotiana Foundation organized a commemorative colloquium in the Peace Palace and the Academy of International Law at the Hague on the 8th of April 1983. The present volume reproduces the papers presented on that occasion, together with certain additional pieces, as well as the score of the piece of music specially commissioned to mark the occasion, and a coloured photograph and certificate of registration of an orchid specially bred in honour of Grotius.

One of the problems which faces the modern international lawyer, and particularly one in the western world, is whether it is any longer possible — if it in fact ever was — to talk of a universal international law (see the reviewer's "Is There A Universal International Law Today?", 23 Can. Y.B. Int'l L., 1985, 3-33). This problem forms the subject of three of the papers in this collection, each written by a judge of the World Court. Judge Mosler inquiries "To What Extent does the Variety of Legal Systems of the World Influence the Application of the General Principles of Law within the Meaning of Article 38(1)(c) of the Statute of the International Court of Justice?"; Judge Sir R.Y. Jennings considers "Universal Law in a Multicultural World"; while Judge Lachs looks at "The Grotian Heritage, the International Community and Changing Dimensions of International Law."

Mosler reiterates a point which was already becoming clear in the days of the League of Nations, that the reference to "civilized nations" in Article 38 has become synonymous with "Member States of the international legal community" (p. 174), and he contends that the reference in Article 9 of the Statute to judges from the main forms of civilization and the principal legal systems of the world "was no more than an attempt to conceal, by this euphamistic description, the pretentions of the Great Powers. This ambiguity still exists today" (p. 175). Nevertheless, there can be no doubt that "from the very beginning

. . . the interests of national States and later, in the United Nations, the interests of political groups of States, have been highly influential on the elections" of the judges (p. 176). He draws attention to what may be an obstacle in the way of finding common ground or general principles, pointing out that "lawyers coming from the common law countries are inclined to stick to a more restrictive interpretation of written legislation and, consequently, of international agreements, in particular codifications, which take the place of legislation in the international community . . . Continental lawyers, however, have been trained with codified law; they are accustomed to deducing, from abstract concepts, the rule applicable in concrete cases. The common lawyer attempts to decide the case as far as possible according to the wording of the text, whereas his continental brother argues from a concept to the legal consequences, which may not necessarily be found in the definition of the abstract rule" (pp. 176-7). The future, however, may witness an interesting development, for "socialist judges will probably be reluctant to give international instruments an extensive interpretation" (p. 178). Further problems may arise due to differences "whether a developing principle or rule of international law has already achieved the character of a binding norm, or whether it has yet reached general acceptance by the international community" (*ibid.*). Such problems are inherent when examining the effect of General Assembly resolutions, but are equally important in relation to new conventions which have been agreed perhaps by consensus, but which have not yet been ratified by major powers, as is the case, for example, with Protocol I, 1977.

While Judge Mosler concedes that "general principles" refers to municipal legal systems, he "cannot imagine a judge trying to impose the solution of his own national legislation in disputes between States" although there may be "differences in national legal systems relating to the extent of the application of the rule of law" (p. 179). However, "it goes without saying that the comparison of the solutions given to the same legal problems in many national legal orders can play a predominant role in the ascertainment of how far the application of an identical principle goes, and which among such principles are apt to be applied to the relations between subjects of international law" (*ibid.*). In this connection the comments by Professor Butler on "The Use and Misuse of the Comparative Method in International Law", are of interest (pp. 214-6). Judge Mosler concludes that "international law must, by definition, be the same for all subjects of the international community. International courts, and in particular the Court at The Hague as the only universal judicial body, must be inspired by the principles and rules found in national legal orders. They need not explore all of them, but they have

to find the appropriate solution in the disputes they have to decide on. This process is a creative work, not the mere application of more or less analogous answers to analogous questions in domestic legislations. If the Court finds a solution in a domestic legal order which has significance by way of paradigm for international relations, it may apply it. It must, however, always be conscious to the need to obtain the silent consensus or acquescence of the international community in applying it" (pp. 184-5). This comment is of general validity, and does not merely relate to general principles. In so far as the work of the Court is concerned, states resorting or taken to the Court must be prepared to accept a decision as good law even when it is against their own contentions or even interests.

Judge Jennings reiterates Grotius' view that international law *must* be universal, but "universality does not mean uniformity. It does mean, however, that a regional international law, however variant, is a part of the system as a whole and not a separate system, and it ultimately derives its validity from the system as a whole. . . . There must always be some basic universal element — some general fabric of law — that binds all mankind" (p.187). On the other hand, one must recognize that certainly in the past "the postulate of universality" was often based on an assumption of power, and in regard to international law this was, until very recently, "Europocentrism", but "it has not been without competitors. . . . Socialist international law, and more recently some forms of Islamic fundamentalism, have sometimes seemed to understand universality in a mono-cultural sense" (p. 188). It is well-known that new states have often sought to deny the validity of what were previously regarded as well-established rules of customary law, but "any change must begin from the place where history has placed us. . . . [The] Europocentric system of international law was called into being in the seventeenth century precisely to meet the needs of the new society of independent national States which, in the ferment in Europe of renaissance and reformation, had displaced the former ideas of a united Christendom organized not vertically but horizontally in a feudal stratification. . . . Now it is also the case that the post-Second-World-War explosion of new nation-States which emerged from former colonial States . . . is in a significant sense a continuation and perhaps even a completion of that evolution of the nation-State world, which required and produced the original European international law. So that, insofar as it is itself the product of the juxtaposition of sovereign, independent nation-States, classical international law, with its roots in the period and place of the first emergence of that particular problem, is peculiarly apposite to the position of the latest band of recruits, from other continents and cultures, to an international society to which all members

are either such nation-States, or are eager to achieve that status as soon as may be. . . . Thus, it was . . . inescapable that the newly enlarged society of States should begin with the common stock of traditional international law for historical and sociological as well as reasons of legal principle. . . . [Y]et it is also true that more or less rapid change in that law, resulting directly from the new situation is likewise both inescapable and right" (pp. 189-91). At the same time we must recognize that the new States may themselves enunciate propositions that they consider to be universal and which they demand the rest of the world to acknowledge as universal rules of international law as, for instance, the principle of "the common heritage of mankind" concerning the resources of the seabed (pp. 192-3).

Judge Jennings suggests that "at the present juncture in the development of the international legal system it may be more important to stress the imperative need to develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions, than to concentrate on what might be called 'the common law of mankind approach' which sees importance in those general notions which, so long as they are stated in sufficiently general terms, are undoubtedly hardly surprisingly to be found in all systems" (p. 195). In fact, he contends that with the explosion in the number of sovereign states since 1945 and the major role these new states tend to play in codification efforts, "it can now be seen that [now is] in fact the time when international law [has] become for the first time truly universal in the Grotian sense" (p. 197).

Judge Lachs emphasised that the purpose of this particular celebration was to assess the modern significance of Grotius, for whom "law was not an immutable instrument of the *status quo*: there was a moral code and independent superior sources of law, while another voluntary law also existed between States. Here we see the most essential of Grotius' concepts: the process in which he saw the will of States evolving law reflected no imposition of external principles but rather a meeting of minds. This dual approach was perhaps one of the main reasons for Grotius' work becoming a lasting part of international law's history" (p.199). Grotius at the beginning of the 17th century had already seen not only "what he calls 'a common law among nations that binds them' but more, the idea of 'a great society of States', the idea of interdependence and close co-operation. . . . Hence one finds the concepts of an international community, an international society . . . as a child of necessity. . . . Thus the underlying theme is not only universality, it is the necessity for a set of mutual links, and it is to a large extent also unity" (p. 200), and it is this "set of mutual links" that provides the basis for

national recognition of foreign judgments and, on the international level, of concepts that are regarded as *erga omnes* or *jus cogens* (pp. 201-2).

The views propounded in the *Mare Liberum* and elsewhere reflecting the significance of freedom of commerce may still be seen in regard to our own problems in international economic relations and all the legal devices used in trade, all of which reflect what Grotius called instruments by which "one people should supply the need of others" (p. 204). The development of such concepts as "the common heritage of mankind", considerations of assistance in development and the just apportionment of natural resources indicate that "Grotius' ultimate vision is being gradually implemented" (p. 205). New developments, particularly of a technological character, require new legal regulations, but "law here and elsewhere has remained very much behind. . . . [M]any a disaster could have been prevented had law intervened prior to the event. . . . [N]ow, more than ever before, technology has to be harnessed to law, and not vice versa" (p. 205), and such needs are clearly seen in regard to the law of the sea, telecommunications, outer space and the like. "What Grotius saw mainly in economics has now grown into areas inaccessible at the time. . . . Today, even though the march of history and law have changed the international scene so greatly it is timely to recall Grotius for we owe much to his vision of an international community and a world or progress and peace" (p. 206).

Among the other matters discussed at this celebratory colloquium were Grotius and the concept of a just world order, his relationship to the modern concept of law and state, his impact on the law of the sea — Ambassador Pinto suggests "there is no finer expression of the Grotian heritage to be found in the modern Law of the Sea, than the provisions of the new Convention which deal with the settlement of disputes" (p. 90) and Professor Logue considers the common heritage of mankind idea a revival of Grotius' common property doctrine (pp. 99-108). In addition, Professor Röling reflects on what Grotius is perhaps best known for, namely "*Jus ad Bellum* and the Grotian Heritage". He argues that "according to positive international law, a state is now forbidden to start a war. The only war a State may decide to wage by sovereign auto-interpretation of facts and law is a defensive war in the case of armed attack. [As a consequence, therefore,] Grotius' doctrine on the *jus ad bellum* does not fit in with our times. It has, as has every just war doctrine which sees war as a means of upholding law and justice, been rendered obsolete by the changing nature of war, from a means of measuring strength to a means of mutual destruction. Such a broad just war doctrine is terribly dangerous as it serves to keep weapons ready for action . . . each time legitimate interests are infringed. . . . [S]uch a just war doctrine

contributes to the continuation of the arms race, and to the absence of arms control. Such a comprehensive just war doctrine is especially dangerous in the hands of sovereign States. If it is necessary to uphold law and order because the injustice is intolerable to mankind, there is at the most a task reserved for the UN. The *'auctoritas'* to use force no longer pertains to the sovereign States, but only to the world organization" (pp. 134, 133). The reviewer wishes he could agree with this sanguine view of the realities of modern politics!

In addition to the papers presented to the celebration the volume contains a variety of additional papers, of which perhaps the most interesting are the two by Professor Wang Tieya on "Grotius' Works in China" and "China and International Law: an Historical Perspective" and by Professor Chiu on "Hugo Grotius in Chinese International Law Literature." In his historical perspective Professor Wang tells us that, although parts of Suarez were translated into Chinese in the early 17th century, "it was after the middle of the 19th century that international law was introduced to China . . . with the translation . . . of the 'Elements of International Law' by Wheaton" (pp. 261-2), but Grotius' work was not translated until 1930 and its impact was affected by the Japanese aggression (p. 265). While, as has been mentioned, Röling argues that the just war doctrine is defunct, Professor Wang contends that the "Chinese people abhor war and attach particular importance to the distinction of just and unjust wars" (pp. 269-70). He also maintains that "[s]ince the end of World War I, the doctrine of anti-war and the view of the distinction between just and unjust wars have regained support on both the theoretical and practical levels" (p. 271). He quotes Mao Zedong's axiom, "History knows only two kinds of war, just and unjust. We support just wars and oppose unjust wars. All counter-revolutionary wars are unjust, all revolutionary wars are just" (p. 271). This leads him to contend that "[u]nder the present circumstances, it is appropriate to revive Grotius' doctrine of just war. Although his book was written 358 years ago, although the concept of just and unjust wars has changed to a large extent, his view in distinguishing just and unjust wars in law and according them legal effects is significant both in theory and practice. To study this doctrine of Grotius, to combine it with practice, and to propagate it for the purpose of asserting its influence on international politics, seems to be a most important task facing international law scholars in our era" (p.272). Professor Chiu is surprised that, despite their long history of relations with China, the Dutch did not make the Chinese aware of Grotius' writings. He states that the "Chinese came to know more about Grotius through the works of some British international lawyers such as Lawrence and Oppenheim" (p. 311). In fact, "the

Chinese translation of L. Oppenheim's *International Law,* Vol. 1, 8th edn., ed. H. Lauterpacht, remains the most complete coverage of Hugo Grotius' work and is significant in the history of international law in the Chinese language" (*ibid.,* n. 7), and this translation did not appear until 1981. Nevertheless, many of the Chinese writers referred to Grotius and "in a comprehensive law dictionary published in 1936, Hugo Grotius was given biographical coverage of about 2000 Chinese words. . . . Among the more than 600 jurists given a biography in the dictionary, only four — Marx, Gierke, Lenin and Sun Yat-sen — were given longer biographical coverage" (p. 312).

The commemorative colloquium on *International Law and the Grotian Heritage* contains a wealth of fascinating material. It would be interesting to see similar volumes on Vattel and perhaps also Pufendorf.

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Family Law: Cases Comments & Questions. Harry D. Krause West Publishing Co. 2nd. Edn. 1221 pages including index $23.95 (U.S.)

The thought that a Canadian, who has difficulty mastering the Federal Divorce Law together with that of 13 Provincial or Territorial bodies of family law might benefit from reading a large American casebook with national coverage requires explanation.

In fact the problems of family law seem to run along defined channels of human behaviour which transcend national boundaries. The solutions are not always the same (hence the nature of this book in breaking out of particular mind sets) but the underlying problems are.

Within a traditional three part analysis (Part I Wife and Husband, Part II Divorce and Part III Child Parent and State) there is much of interest to Canadian readers:

(i) the *Marvin* case on cohabitation has been the backdrop for the Supreme Court of Canada decisions in *Sorochan* and *Pettkus* v. *Becker;*
(ii) the material on community property poses an interesting contrast to the various Canadian systems of marriage property but the discussion of pensions at p. 587 has a clear relationship to local cases like *Clarke* v. *Clarke* (1986) 1 R.F.L. (3d) 29;
(iii) the material on Alternative Dispute Resolution at p. 681 makes an interesting background to the mediation provisions of our own *Divorce Act 1985* s. 9;
(iv) the material on rights of visitation and joint custody has a familiar ring to Canadian readers as will the material on grandparents' visitation rights. This material at p. 792 *et seq* and especially the Minnesota statute gives insight into likely problems over applications for access by third parties under s. 16(2)(3) of the *Divorce Act 1985;*
(v) the material on step-parent support obligations and the liability of children to support their parents at p. 951 is of equal interest in days of enhanced expectation of life and constraints on the public purse.

In addition there are comments on the battered wife syndrome (p. 239), the "black family" (p. 278), artificial insemination, *in vitro* fertilization and surrogate motherhood.

The notes are done with insight and humour. The Canadian author can only wonder, however, at a market which makes a hard-backed book of 1221 letter-sized pages available at a price of $24.00 (U.S.)

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