

THE AMBIVALENCE OF HUGO GROTIUS: STATE SOVEREIGNTY AND COMMON INTERESTS OF MANKIND

SUSUMU YAMAUCHI

I. *Neo-Grotianism*

According to Hedley Bull, Professor of International Relations at Oxford University, there have been three main competing traditions of thought in the modern international system of states. The first is "the Hobbesian or realist tradition, which views international politics as a state of war". The second is "the Kantian or universalist tradition, which sees at work in international politics a potential community of mankind". The third is "the Grotian or internationalist tradition, which views international politics as taking place within an international society".¹

In the Hobbesian tradition each state is always hostile towards every other. International relations resemble a zero-sum game in which the victory of one state excludes any interest of the others. The Hobbesian state exists "in a kind of moral and legal vacuum" and conducts itself on its own account. That norm is only one, "utility".

The Kantian tradition is polar to the Hobbesian, and views the essence of international politics as the transnational social bonds which bind the whole world. Here the point is not the relationship among states, but "the relationship in the community of mankind". In this community of mankind the "interests" of all men are one and the same. International politics, from this point of view, is not a zero-sum game, but a co-operative or non-zero-sum game. Nevertheless, this coexistence or co-operation does not exist among states. States are rather eliminated. This cosmopolitanism has absolute moral imperatives and laws. There are no inner differences in this Kantian society. The idea of respect for state sovereignty or independence does not exist here, neither should it be required.

The Grotian tradition stands between the Hobbesian tradition and the Kantian tradition. It is based on the idea of "international society". International society is a society of states, and fundamentally a peaceful society in which states are found in coexistence, co-operation and interdependence. International society is neither a society of state of

* This article is based on my "Grotius no Ambivalence" published in Ohtani Yoshio (ed.), *Kyotsu Rieki Gainen to Kokusaihou* (The Concept of Common Interests and International Law), Tokyo, 1993.

¹ Hedley Bull, *The Anarchical Society, A Study of Order in World Politics*, London, 1977, p. 24 ff.

war, nor a society having central government. It recognizes the self-interest of every state, but at the same time respects for law and morality. The interests required by international society are neither those of only one member, nor the same ones for the total society. They are no more than common interests of states.

H. Bull thinks that these three traditions constitute European international politics. But the most important one is for him the Grotian tradition. Because "the Grotian idea of international society had always been present in thought about the states system". It represents the basic structure of the system of European states. Bull describes it as follows:

A society of states (or international society) exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions. If states today form an international society . . . , this is because, recognising certain common interests and perhaps some common values, they regard themselves as bound by certain rules in their dealings with one another, such as that they should respect one another's claims to independence, that they should honour agreements into which they enter, and that they should be subject to certain limitations in exercising force against one another. At the same time they co-operate in the working of institutions such as the forms of procedures of international law, the machinery of diplomacy and general international organisation, and the customs and conventions of war.²

H. Bull insists that it is H. Grotius who established the idea of international society in this sense and therefore international society has belonged to the Grotian tradition. But there are two types of the idea of this Grotian international society.

The one is a pluralistic concept of international society (=pluralism). This type lays stress on the sovereignty of each individual state and the pluralistic character of international society. It understands international society as a world of agreements and co-operation. This stresses the independence of each individual state. It has been influenced by 'reason of state' theory or realism.

The other is a solidaristic concept of international society (=solidarism). This stresses the same quality, the solidaristic character and strong bond of international society.³

Bull himself tends to the pluralism. But this pluralism unites with the solidarism. His standpoint was able to appear only after a doctrine of Grotian solidarism. This Grotian solidarism made an appearance in and after World War I. Before World War I every sovereign state had an almost perfect free hand in waging war. At this time international law recognized neither a just nor unjust cause of war. Modern international law denied the just war idea of classical international law. Every state was free, independent and equal. War was only a so-called value-free instrument for the solution of some conflicts between or among sovereign states, which should never be brought to justice by the

² Ibid., p. 13.

³ On these two streams see Benedict Kingsbury and Adam Roberts, 'Introduction: Grotian Thought in International Relations', in: H. Bull, B. Kingsbury, A. Roberts (eds.), *Hugo Grotius and International Relations*, Oxford, 1990, pp. 47-50. This book contains also H. Bull, 'The Importance of Grotius in the Study of International Relations'.

other. Therefore, even the most famous classic international lawyer, Hugo Grotius was often disregarded in the 19th century modern international world.

In the midsdt of World War I, a Netherlandish Professor of International Law, C. van Vollenhoven, advocated a new idea of international law. He wanted to create a new system of international politics. He tried to discriminate between just and unjust war from the new point of view of the character of the sovereign state and society of states. In his thought the almost absolute liberty of every sovereign state, including the right of going to war, often causes international conflicts and the use of force. It seems to be in a continual state of war. But international society can discriminate between a just and unjust cause of war. To keep international peace, international society must stand by just cause and condemn an unjust cause. In this way international society can punish the unjust state as an international criminal. The new international society of the 20th century is at least for Vollenhoven essentially solidaristic and superior to every state.

The solidarist, van Vollenhoven, referred to Hugo Grotius in his articles very frequently. Because Grotius was for him the first solidarist. Therefore Grotius had for long been much ignored because of the dominance of the 'reason of state' doctrine. But the 20th century was the time which awoke to Grotius' importance. He insisted that the just war theory of Grotius had to be revived.⁴

A distinguished British international lawyer, H. Lauterpacht, seems to be a solidarist, too. His brilliant article, 'The Grotian Tradition in International Law' is very impressive. It is even symbolic that the published year was 1946, the year of the decision of Nuremberg Trial and the opening of Tokyo war crimes tribunal. Lauterpacht says; "International law, in the three centuries which followed *De Jure Belli ac Pacis*, rejected the distinction between just and unjust wars. War became the supreme right of sovereign states and the very hallmark of their sovereignty. To that extent international law was deprived of a reasonable claim to be regarded as law in the accepted sense of the word. The law on the subject has now undergone a fundamental change. War has ceased to be a supreme prerogative of states. The Grotian distinction between just and unjust war is once more part of positive international law. . . . Yet, among the imponderables which have worked in that direction, the Grotian tradition occupies a high place."⁵

Van Vollenhoven and H. Lauterpacht can be called Grotians. Their point of emphasis is, as it were, a post-modern renewal of the just war concept represented by Grotius. So, this doctrine is possible to be called Grotianism. But Lauterpacht was more flexible and took wider views than Vollenhoven. He indicated so many aspects of modern and post-modern characteristics of the Grotian theory. Along these lines, H. Bull constructed a more pluralistic theory of international society. He tried to harmonize the solidarism with the pluralism in his "international society". And such an international society was, at least for him, founded by Grotius. His new standpoint can be called Neo-Grotianism.⁶

⁴ Cf., Cornelis van Vollenhoven, *The Three Stages in the Evolution of the Law of Nations*, The Hague, 1919.

⁵ Hersch Lauterpacht, 'The Grotian Tradition in International Law' *BYIL*, (23, 1946).

⁶ H. Bull, 'The Grotian Concept of International Society', in: H. Butterfield and M. Wight (eds.), *Diplomatic Investigations*, London, 1966. As a critical article about Neo-Grotianism see G.W. Grewe, 'Grotius Vater des Völkerrechts?', *Der Staat*, 23 (1984) S. 161 ff. On the distinction between Grotianism and Neo-Grotianism see A. Claire Cutler, 'The "Grotian Tradition" in International Relations', *Review of International Studies*, (17-1 1991).

The harmonization of solidarism with pluralism means that every state can be independent and at the same time should show respect for international society. Is it possible? Is Neo-Grotianism available? This problem leads to the Grotius' questions. Is Grotius indeed relevant at the present time? Is the character of his masterpiece modern or post-modern, or medieval? In the first place, is his work not contradictory? To answer these questions, we will seek one theme, that is "The Ambivalence of Hugo Grotius".

II. *Rejection of Civil War and Conception of New Order*

Early modern Europe was in a sense a period of wars. Years of no wars were rather exceptional. Besides, these wars were often civil wars. The 16th and 17th centuries were the times of civil and religious wars.

It was the most urgent task to build a "New Order" in early modern Europe. The feudal constitution that had been a kind of alliance between royal powers and certain independent local powers through the medium of fiefs, was dissolving in the religious wars, having involved most dynasties, many nobles and citizens. Killing each other miserably was exercised under the religious passions and in the dispersion of powers. Then, prominent political, legal thinkers in early modern times considered that building a "New Order" was most important and necessary. They published their original plans competitively and requested political leaders to realize their ideas. "The Six Books of the Commonwealth" of Jean Bodin, "Six Books of Politics or Civil Doctrine" of Justus Lipsius, "The Law of War and Peace" of Hugo Grotius, "Leviathan" of Thomas Hobbes are neither more nor less than the supreme results of their works. The character common to all these works is the rejection of civil war. For this aim these thinkers proposed to build a sovereign state which would weaken local independent powers supposed to be the main cause of civil war. Of course, their way of thinking was yet neither institutional nor structural enough. Their theories were generally expressed in the form of the concentration of powers in a monarch. The theory of sovereignty by Bodin, the idea of *prudentia civilis* by Lipsius, and *Leviathan* by Hobbes had all such a character. As far as it goes, there is reason for their being called the thinkers of absolutism.

This is also applicable to Grotius, "the father of international law". He did not describe a modern model of international law and society whose subjects were solely the sovereign institutional state. In this meaning it would be correct that "Grotius had written the international law of absolutism, Vattel has written the international law of political liberty".⁷ But it should not be forgotten that in early modern times to concentrate powers in a monarch was urgent and progressive as the French *Politiques* and Netherlandish Neo-stoicism had done it.⁸

We must explain a little about "progressiveness." The distinctive feature of European feudalism is the dispersion of powers. Even the monarch was only one supreme feudal

⁷ Albert de Lapradelle, 'Introduction—Emer de Vattel', in: Emer de Vattel, *Le Droit de Gens ou Principes de la Loi Naturelle Appliqués à la Conduite et aux Affaires des Nations et de Souverains* (London, 1758), Vol. 1 (Classics of International Law), Washington, 1916, p. iv.

⁸ Cf., Gerhard Oestreich, *Strukturprobleme des europäischen Absolutismus*, in: Ders., *Geist und Gestalt des frühmodernen Staates*, Berlin, 1969, S. 179 ff.

power and could keep his monarchy on the contractual network with his local powers. The semi-independent local powers (seigniors) had themselves their own military powers and often exercised their force to solve the troubles with the other powers on their own account. These are so-called feuds (private wars).

The feud or private war was not illegal in the sense of the middle ages if it was done in the common due process. Monarchs tried to restrict feuds. But it was impossible. The local powers persisted in keeping their right of feud. They desired for their monarch to be only a good conciliator. The medieval monarch had to be a judicial power. His power meant the jurisdiction.

The epoch-making point of Jean Bodin is that he didn't limit the monarchical power to the conciliative jurisdiction, but defined it as the "absolute and eternal power"⁹ which was represented by the legislative power. But Grotius took a different softer way in the concentration of powers in a sovereign.

The starting point of Grotius is the medieval constitution of the rivalry of local princes. He insists in the chapter 2 of his masterpiece whose title is "Whether it is ever lawful to wage war" that as the self-preservation and self-keeping are the first principles of nature, every war in these cases is just.

In the first principles of nature there is nothing which is opposed to war; rather, all points are in its favour. The end and aim of war being the preservation of life and limb, and the keeping or acquiring of things useful to life, war is in perfect accord with those first principles of nature. If in order to achieve these ends it is necessary to use force, no inconsistency with the first principles of nature is involved, since nature has given to each animal strength sufficient for self-defence and self-assistance.¹⁰

This logic which reminds us of the state of nature of Hobbes reflects, as in the case of Hobbes, the reality and concept of medieval European law, according to which every man of honor can legally use his force on his own account to protect his life, liberty, honor and estates, and to defend his dependent people and their rights. Grotius recognized it as the right of private war.

Chapter 3 of the first book of "The Law of War and Peace" affirms "that private wars in some cases may be waged lawfully, so far as the law of nature is concerned. . . ." For "the use of force to ward off injury is not in conflict with the law of nature". Man who has such a natural right is a free man. It is the free man who made a contract and constructed a state.

So the state is for him "civitas", namely "a complete association of free men, joined together for the enjoyment of rights and for their common interest". The state was established to settle and conciliate their conflicts for the sake of their common interest (communis utilitas). Therefore it has still the character of juridical organization.

But Grotius changed this traditional character of state into an authoritarian one in his

⁹ Jean Bodin, *Les Six Livres de la République* (Paris, 1577), Paris, 1986, L. 1, p. 179.

¹⁰ Hugo Grotius, *De Iure Belli ac Pacis Libri Tres* (Paris, 1625), Leiden, 1939, pp. 49-50 (L.1, C. 2, §I-4). When I cite some sentences in this book, I use English translation by F.W. Kelsey in *Classics of International Law Series*, Oxford, 1925 (Abbreviation Kelsey). Kelsey, p. 52.

¹¹ *Ibid.*, p. 41. (L. 1, C. 1, §XIV-1: *Est autem Civitas coetus perfectus librorum hominum, iuris fruendi et communis utilitatis causa sociatus.*), Kelsey, p. 44.

particular way. The lever is "common interests". He says:

By nature all men have the right of resisting in order to ward off injury, as we have said above. But as civil society was instituted in order to maintain public tranquillity, the state forthwith acquires over us and our possessions a greater right, to the extent necessary to accomplish this end. The state, therefore, in the interest of public peace and order, can limit that common right of resistance. That such was the purpose of the state we can not doubt, since it could not in any other way achieve its end. If, in fact, the right of resistance should remain without restraint, there will no longer be a state, but only a non-social horde, such as that of the Cyclopes. . . .¹²

Here, the "common interests" are expressed by the concept of "the interest of public peace and order". That reason is for Grotius very obvious. He asked why the rights of war of free men had to be limited after public tribunals had been established. For it is "much more consistent with moral standards, and more conducive to the peace of individuals, that a matter be judicially investigated by one who has no personal interests in it". Grotius cites the words of King Theodoric. "The reason why laws were clothed with a reverential regard, was that nothing might be done by one's own hand, nothing on individual impulse. For what difference is there between tranquil peace and the hurly-burly of war, if controversies between individuals are settled by the use of force?"¹³

But this judicial power is no longer the medieval conciliatory one. It has the compulsory power and authority to call the persons concerned and execute decisions. In this point Grotius stands for the new thought of the new age. Grotius calls this judicial power the supreme power and insists the supreme character of this sovereign power. He wrote about it. "The power is called sovereign [=supreme] whose actions are not subject to the legal control of another, so that they can not be rendered void by the operation of another human will."¹⁴ Once this power is established, a private person is not able to execute his right of private war. Naturally, no man can use his force against this power.

Grotius cited the phrase of Tacitus which had been used in Lipsius' "Six Books of Politics or Civil Doctrine": "God hath given him the sovereign judgement of all things, and hath left the glorie of obedience to subjects."¹⁵ In this connection we can remember the definition of civil war made by Lipsius. "I define civil warre to bee, The taking of arms by the subjects, either against the Prince, or amongst themselves." Grotius denied the popular sovereignty apparently in order to avoid civil war, too.

At this point first of all the opinion of those must be rejected who hold that everywhere and without exception sovereignty resides in the people, so that it is permissible for the people to restrain and punish kings whenever they make a bad use of their power.

¹² Ibid., p. 138 (L. 1, C. 4, §II-1), Kelsey, p. 139.

¹³ Ibid., p. 90 (L. 1, C. 3, §I-2), Kelsey, p. 91.

¹⁴ Ibid., p. 100 (L. 1, C. 3, §VII-1: *Summa autem illa dicitur, cuius actus alterius iuri non subsunt, ita ut alterius voluntatis humanae arbitrio irriti possint reddi.*), Kelsey, p. 102. On the *summa potestas* see Tanaka Tadashi, 'State and Governing Power', in: Onuma Yasuaki (ed.), "A Normative Approach to War-Peace, War, and Justice in Hugo Grotius", Oxford, 1993, p. 133 ff.

¹⁵ J. Lipsius, "The Six Books of Politics or Civil Doctrine (London, 1594)", Amsterdam, 1970, p. 201. Cf., Yamauchi Susumu, *Shinsutoashugi no Kokka Tetsugaku (A State Philosophy of Neostoicism)*, Tokyo, 1986, p. 213 ff.

How many evils this opinion has given rise to, and can even now give rise to if it sinks deep into men's minds, no wise person fails to see. We refute it by means of the following arguments.

To every man it is permitted to enslave himself to any one he pleases for private ownership, as is evident both from the Hebraic and from the Roman Law. Why, then, would it not be permitted to a people having legal competence to submit itself to some one person, or to several persons, in such a way as plainly to transfer to him the legal right to govern, retaining no vestige of that right for itself?¹⁶

If we remember the legal nature of private war waged even against the monarch, it is evident that this theory of Grotius which started from the right of private war for every free man, was transformed into the authoritarian one rejecting the private war. A thinker who saw through this theory and criticized Grotius severely, would appear about the century after. The man is Jean-Jacques Rousseau. He says in his "The Social Contract":

If an individual, says Grotius, can alienate his liberty and become the slave of a master, why should not a whole people be able to alienate theirs, and become subject to a king? In this there are many equivocal terms requiring explanation; but, let us confine ourselves to the word *alienate*. To alienate is to give or sell. Now, a man who becomes another's slave does not give himself; he sells himself at the very least for his subsistence. But, why does a nation sell itself? So far from a king supplying his subjects with their subsistence, he draws his from them; and, according to Rabelais, a king does not live on a little. Do subjects, then, give up their persons on condition that their property also shall be taken? I do not see what is left for them to keep.¹⁷

Nevertheless, if Grotius were able to answer Rousseau's question, he would have done it as follows: It is "the interest of public peace and order", namely the preservation of our lives. Why is it not our "common interest"?

III. *Right of Resistance*

Grotius asks in the 24th chapter of book 2 of "The Law of War and Peace," whether either freedom or peace is desirable, and he says that right reason teaches the following.

Life, to be sure, which affords the basis for all temporal and the occasion for eternal blessings, is of greater value than liberty. This holds true whether you consider each aspect in the case of an individual or of a whole people. And so God Himself reckons it as a benefit that He does not destroy men but casts them into slavery.¹⁸

An example Grotius gave "as a benefit", is the case of prisoners of war. According to

¹⁶ H. Grotius, op. cit., p. 100 (L. 1, C. 3, §VIII-1), Kelsey, p. 103.

¹⁷ Jean-Jacques Rousseau (transl. by Henry J. Tozer), "The Social Contract", London, 1912, p. 104.

¹⁸ H. Grotius, op. cit., pp. 585-6 (L. 2, C. 24, §VI-2), Kelsey, pp. 573-4. Grotius defines the law of nature as follows: "The law of nature is a dictate of right reason, which points out that an act, according as it is or not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God" (Kelsey, pp. 38-39).

the law of nations, "To whom in the hour of victory all things were permitted by the law of war (Sallust). It is even permitted to kill prisoners of war". "So far as the law of nations is concerned, the right of killing such slaves, that is, captives taken in war, is not precluded at any time . . ." ¹⁹ But a victor can save his prisoners of war from killing at his will. The enslaving of prisoners of war is in this sense a kind of act of humanity and "charity". ²⁰

Grotius makes much of keeping lives more than anything else. He insists from this point of view that it is not "permissible for a private citizen either to put down by force, or to kill" even a usurper of sovereign power. For it is preferable "that the usurper should be left in possession rather than that the way should be opened for dangerous and bloody conflicts, such as generally take place when those who have a strong following among the people, or friends outside the country, are treated with violence or put to death. . . . Favonius used to say, 'Civil war is a worse evil than unlawful government'."

Grotius further cites Ambrosius:

This also contributes to the increase of good reputation, if you rescue a poor man from the hands of the mighty, and if you save from death a man who has been condemned, in so far as such a result can be accomplished without raising a disturbance. We must beware lest we seem to act for the sake of display rather than pity, and cause more grievous wounds while we are trying to apply remedies to wounds of less consequence. ²¹

What we see in this quotation of Ambrosius is the attitude of Grotius which regards public order and human lives as the most important. Favonius' sentence that 'Civil war is a worse evil than unlawful government' is very symbolic. This way of thinking is seen in many political humanists in early modern times, specially political Neostoicism. That of Favonius had been already used in "Six Books of Politics or Civil Doctrine" of Justus Lipsius. The Neostoicism guided by Lipsius whose base was at the University of Leiden where young Grotius would enter and inspire the spirit of late-humanism, had required the leaders of his time to create an ancient Roman spirit of constancy and fortitude, and to make a "certaine order as well as in commanding: as in obeying". Grotius who wrote a poem of mourning for Lipsius' death, had been greatly influenced by him. ²²

¹⁹ H. Grotius, op. cit., p. 664 (L. 3, C. 4, §X), Kelsey, p. 649.

²⁰ Cf., Yamauchi Susumu, "Ryakudatsu no Houkannenshi (A History of Legal Conception of Looting)", Tokyo, 1993, p. 62 ff.

²¹ H. Grotius, op. cit., p. 162 (L. 1, C. 4, §XIX-3), Kelsey, p. 162.

²² According to G. Oestreich, Grotius is a representative of the second wave of the Netherlands Movement which begins with J. Lipsius, and in a sense a successor of Neostoicism. Oestreich says: "Political humanism, as it originated in and spread from the Netherlands, addressed itself to precisely such practical tasks—the government of a community, the political education of the rulers, the structure of the army and the administration. The life-work of Hugo Grotius must be mentioned in this connection. It does not consist simply of his theory of the limitation of war and of the humanizing of relations between states, which were in a chaotic natural state: he also gave careful thought to all the internal problems of the contemporary state and the most just way of solving them. His work on natural, international and constitutional law represents a further stage in the development of Dutch humanism. This stage was preceded by Justus Lipsius and those thinkers who, at the critical period of the religious wars, worked out a theory for a strong, authoritarian state supported by the army, and set it down in their manuals. Closely related to it was the idea of moderate government bound by religious, moral and legal principles" (G. Oestreich, *Neostoicism and the Early Modern State*, ed. by B. Oestreich and H.G. Koenigsberger, Cambridge, 1985). Indeed this opinion doesn't deny some influence of Spanish authors on Grotius, but indicates some influence of another important intellectual trend worth while referring.

But the Grotian idea of non-resistance is no more the thought of slavery than that of Lipsius. It is a result of seeking public peace and order, and protecting lives of subjects. As far as it goes, Grotius admits that subjects can take up arms in a crisis in their lives.

In this opinion it is permissible for subjects to take up arms in "imminent danger of death", "with this qualification, in case resistance could not be made without a very great disturbance in the state, and without the destruction of a great many innocent people". Even "Barclay, though a very staunch advocate of kingly authority, nevertheless comes down to this point, that he concedes to the people, and to a notable portion of the people, the right of self-defence against atrocious cruelty". So Grotius insists "that the right to make war may be conceded against a king who openly shows himself the enemy of the whole people". "In the fourth place", he continued:

says the same Barclay, the kingdom is forfeited if a king sets out with a truly hostile intent to destroy a whole people.

This I grant, for the will to govern and the will to destroy cannot coexist in the same person. The king, then, who acknowledges that he is an enemy of the whole people, by that very fact renounces his kingdom. This, it is evident, can hardly occur in the case of a king possessed of his right mind, and ruling over a single people. Of course, if a king rules over several peoples, it can happen that he may wish to have one people destroyed for the sake of another, in order that he may colonize the territory thus made vacant.²³

This is a very rare case. The reason why subjects can take up arms is that the king is no longer the supreme power. In this case the state of nature revives. Man can defend his life by his own force. This logic is for Grotius very natural.

But there is another interesting prescription against a tyrannical cruelty. It is the relief of the oppressed people by the public war, namely "a war for the defence of subjects of another power".

IV. *Humanitarian Intervention*

"A public war is that which is waged by him who has lawful authority to wage it."²⁴ This is a war waged on both sides under authority of the one who holds the sovereign power in the state. Grotius denied a private war after public tribunals, especially coercive ones under the sovereign power had been established. Therefore a relief of oppressed people by public war, namely "a war for the defence of subjects of another power" means in short an intervention in another state. Intervention under modern international law is generally illegal as an infringement of state sovereignty and an interference in domestic affairs. Nevertheless, Grotius dared to insist it. What is the basis of his argument?

Grotius argues in chapter 25 of the second book of "the Law of War and Peace", "whether a war for the defence of subjects of another power is rightful". This is "a matter of controversy". For "it is certain that, from the time when political associations were

²³ H. Grotius, op. cit., p. 158 (L. 1, C. 4, §XI), Kelsey, pp. 157-8.

²⁴ Ibid., p. 89 (L. 1, C. 3, §I-1): *Publicum bellum est quod auctore eo geritur qui iurisdictionem habet, privatum quod aliter*. Kelsey, p. 91.

formed, each of their rulers has sought to assert some particular right over his own subjects". It is important to respect some such particular right. It means to respect every domestic administration. Even if the administration were terribly bad, to settle the problems of the state is the task of its subjects themselves. As Ovid says:

To the gods is it never permitted
The acts of the gods to revoke.²⁵

"However, if the injury (*iniuria*) is obvious, even though the particular right of the rulers must be respected, the exercise of the right vested in human society (*ius humanae societatis*) is not precluded." He continues:

If, further, it should be granted that even in extreme need subjects cannot justifiably take up arms (on this point we have seen that those very persons whose purpose was to defend the royal power are in doubt), nevertheless it will not follow that others may not take up arms on their behalf. . . .

Hence, Seneca thinks that I may make war upon one who is not one of my people but oppresses his own, as we said when dealing with the infliction of punishment; a procedure which is often connected with the protection of innocent persons. We know, it is true, from both ancient and modern history, that the desire for what is another's seeks such pretexts as this for its own ends; but, a right does not at once cease to exist in case it is to some extent abused by evil men. Pirates, also, sail the sea; arms are carried also by brigands.²⁶

According to Grotius, both in private and public war the cause of just war is fundamentally "injury." He says: "No other just cause for undertaking war can there be excepting injury received."²⁷ To put it more fully, for Grotius there are four justifiable concrete causes of war which result in injury in the end.

- ① defence
- ② the obtaining of that which belongs to us
- ③ the obtaining of that which is due
- ④ the inflicting of punishment

Punishment is a penalty against the wrong-doer in which unjust enemy is included. In a sense the essence of war in pre-modern times existed in inflicting punishment on the one party by the other party. But, far from it, Grotius regards a punitive war to the oppressor of his people by the other supreme power as just.

In Grotius' thought an execution of the right of punishment is a natural right of every man. Besides, there is "a threefold advantage of punishment". The first is the good of the wrong-doer, namely "correction". The second is the good of him who has been wronged, namely "revenge". The third is the good of the whole, namely "prevention". Here the important are the second and the third. The second, the good of the victim is to recover his honor and to satisfy his revenge. At the same time the punishment has an effect

²⁵ Ibid., p. 596 (L. 2, C. 25, §VIII-1), Kelsey, p. 583. cf. B. Kingsbury & A. Roberts, 'Grotian Thought in International Relations', in: H. Bull, B. Kingsbury, A. Roberts (eds.), op. cit., p. 41.

²⁶ Ibid., pp. 597-8 (L. 2, C. 25, §VIII-1-4), Kelsey, p. 584.

²⁷ Ibid., p. 169 (L. 2, C. 1, §I-4), Kelsey, p. 170.

of depriving the wrong-doer of the power to do harm again. "Accordingly, vengeance, even if it is exacted by private individuals, is not unlawful according to the bare law of nature . . . , provided that it is employed for these objects and within the bounds of right." And "it is all the same whether vengeance is exacted by one who was injured himself or by another, since it is in harmony with nature that man should be helped by man."²⁸ "But, since in our private affairs and those of our kinsmen we are liable to partiality, as soon as numerous families were united at a common point judges were appointed, and to them alone was given the power to avenge the injured, while others are deprived of the freedom of action wherewith nature endowed them."

But this applies only to the interior. There is no public tribunals in the international society where the natural law rules. Therefore to take revenge on behalf of the other people is permissible here.

This recognition of helping one another on this earth is given greater emphasis in his third justification of punishment. The punishment here is first accomplished by removing a wrongdoer "or weakening him or restraining him so that he cannot do harm, or by reforming him". Second the infliction of punishment is "outstanding penalties (*supplicium conspicuum*)", and "these exemplary punishments are employed so that the punishment of one may cause many to fear, and that others may be frightened by the nature of the punishment . . . " "And the possession of the right to punish for this purpose also, according to nature, may rest with any person whatever."²⁹ Naturally public tribunals deny the natural right of every man to punish. Nevertheless, traces and survivals of this "primitive right persist in those places and among those persons who are subject to no fixed tribunals . . . " It is needless to repeat that international society is such a non-fixed tribunal space.

But, in this international society private man has no right of punishment any more. Here the main subject is a supreme power or state represented by it. In this sense Grotius is pluralistic. From this pluralistic standpoint, Grotius states:

The fact must also be recognized that kings, and those who possess rights equal to those kings, have the right of demanding punishments not only on account of injuries committed against themselves or their subjects, but also on account of injuries which do not directly affect them but excessively violate the law of nature or of nations in regard to any persons whatsoever. For liberty to serve the interests of human society through punishments, which originally, as we have said, rested with individuals, now after the organization of states and courts of law is in the hands of the highest authorities, not, properly speaking, in so far as they rule over others but in so far as they are themselves subject to no one.³⁰

Nevertheless, solidarism stands as the basis of this statement. Because the reason for punishment in this case is the violation of "the law of nature or of nations". What is to be served is to the end "the interests of human society". The executer of the punishment must be only a supreme power of state. That is the international order thought by Grotius. He doesn't recognize a universal power, and asks for the coexistence of states

²⁸ Ibid., p. 474 (L. 2, C. 20, §VIII-2), Kelsey, p. 472.

²⁹ Ibid., p. 478 (L. 2, C. 20, §IX-2), Kelsey, p. 476.

³⁰ Ibid., p. 509 (L. 2, C. 20, §XLI), Kelsey, pp. 504-5.

as political, economic and cultural unities. At the same time he seeks "the interests of human society". This is none other than his "pluralistic solidarism".

According to Grotius, to go to the rescue of the oppressed, wronged and life endangered people is not only lawful, but also honorable. "Those who have written on the subject of duties rightly say that nothing is more useful to a man than another man." "There are, however, various ties which bind men together and summon them to mutual aid." One is kinship. Another is neighborhood.

"But, in default of all other ties, the common bond of human nature is sufficiently strong. Devoid of interest to man is nothing that pertains to man. In the words of Menander:

If we our strength should all together join,
Viewing each other's welfare as our own,
If we should each exact full punishment
From evil-doers for the wrongs they do,
The shameless violence of wicked men
Against the innocent would not prevail;"³¹

As Democritus says, this is a work of justice and goodness. Grotius states the following in the argument on the causes of undertaking war on behalf of others.

The final and most wide-reaching cause for undertaking wars on behalf of others is the mutual tie of kinship among men (*hominum inter se coniunctio*), which of itself affords sufficient ground for rendering assistance. 'Men have been born to aid one another' says Seneca. . . . In the view of Ambrose: 'Courage [. . .] which defends the weak [. . .] is perfect justice'.³²

H. Lauterpacht indicated that "this is the first authoritative statement of the principle of humanitarian intervention".³³ Indeed Grotius respected monarchs and their supreme powers so highly as would be severely criticized by Rousseau. And it seems to be contradictory that he who denied civil war and tried to prevent it, on the contrary admitted intervention which often linked with civil war. But, he admitted it as a humanitarian intervention from the point of view of pluralistic solidarism on international society. Recognizing a state sovereignty, he appealed to political and intellectual leaders of his time for seeking "the interests of human society". This seems to be an ambivalent position if we think from the standpoint of modern international law which regard the liberty and independence of the modern state as absolute. But this "ambivalence of Grotius" is consistent with the Grotian system of international law and relations. It represented his plan for an emerging international society and its law.

³¹ Ibid., p. 165 (L, 1, C. 5, §II-1), Kelsey, pp. 164-5.

³² Ibid., p. 595 (L. 2, C. 25, §VI), Kelsey, p. 582.

³³ H. Lauterpacht, op. cit., p. 46. According to G.W. Grewe ("Epochen des Völkerrechtsgeschichte", 1988, Berlin, S. 580-1), "humanitarian intervention" was permitted by some excellent Anglo-American International lawyers. On Grotian theory of resistance and intervention see Charles S. Edwards, *Hugo Grotius The Miracle of Holland*, Chicago, 1981, p. 129 ff. and R.J. Vincent, 'Grotius, Human Rights, and Intervention', in: H. Bull, B. Kingsbury, A. Roberts, op. cit., p. 241 ff.

V. *International Society and Its Common Interests*

In 1643 Grotius described his impressions of "De Cive" written by Hobbes:

I have read 'De Cive.' I agree with what he argued for king. But, I can not agree with the bases on which he constructed his argument. He thinks that among all men in nature there is war.³⁴

It is obvious that Grotius desired to give a sovereign character to his state (*civitas*). But he doesn't have his eyes only on internal matters. Hobbes gave his every argument only to annihilate civil war. In contrast with him, Grotius extended his field of vision from individual over state to international society, and had a view that at every level "the mutual tie of kinship among men (*hominum inter se coniunctio*)" is the base. The penalty against a man who sometimes breaks the mutual tie is punishment. The right of punishment is at individual level the individual natural right, at state level the jurisdiction of state, and at the level of international society the right of war including the right of humanitarian intervention. What justifies them is law. Naturally at the third international level, it is international law. Consequently, even a sovereign state is not absolute both in its internal affairs and in international society. It obeys "the mutual tie of kinship among men." It means that a state must obey the law of nature and of nations.

Of course, the Grotian state of nature vanishes just after the establishment of state and its tribunals. But the international society which has no common central authoritative power, is still in a state of nature. Nevertheless, such a Grotian state of nature is not the Hobbesian state of war. Indeed in a state of nature every man must preserve his life and property by his own force, but it does not mean the eternal state of war. Although man has the natural right of war on the first principles of nature, at the same time it must conform to "right reason" and "the nature of society." "For society has in view this object, that through community of resource and effort each individual be safeguarded in the possession of what belongs to him." Men originally have "an impelling desire for society, that is, for the social life," namely Stoic "sociableness", the nature of coexisting and helping each other. The law of nature orders them to do so, too. Only the use of force as defence, recovery, avenge and punishment against an offender of this rational sociability is permissible. Every man has not his natural right of perfectly free action at his own desire as Hobbes imagined. The "sociableness" of mankind is valuable also on the level of relations among states. In international society there exists no state of war but law. Grotius starts his "The Law of War and Peace" as follows:

The municipal law of Rome and of other states has been treated by many, who have undertaken to elucidate it by means of commentaries or to reduce it to a convenient digest. That body of law, however, which is concerned with the mutual relations among states or rulers of states, whether derived from nature, or established by divine

³⁴ H. Lauterpacht, *op. cit.*, p. 45.: *Librum de Cive vidi, placent quae pro Regibus dixit. Fundamenta tamen quibus suas sententias superstruit, probare non possum. Putat inter homines omnes a natura esse bellum . . .*

ordinancies, or having its origin in custom and tacit agreement, few have touched upon. Up to the present time no one has treated it in a comprehensive and systematic manner; yet the welfare of mankind demands that this task be accomplished.³⁵

The aspect of which Grotius makes much specially is not a particular utility of a single state, but “the welfare of mankind” by observance of law “which is concerned with the mutual relations among states or rulers of states”. As Grotius cites Cicero’s “On Duty”, “If every one of us should seize upon the possessions of others for himself and carry off from each whatever he could, for his own gain, human society and the community of life would of necessity be absolutely destroyed. For, since nature does not oppose, it has been granted that each prefer that whatever contributes to the advantage of life be acquired for himself rather than for another; but nature does not allow us to increase our means of subsistence, our resources, and our riches, from the spoil of others.”³⁶

The reason why the viewpoint of “the welfare of mankind” is so important, is that a human being is weak as an individual and not capable of living without social combination. Besides, the “combination” of human beings organizes “the great society” of mankind over the frame of every state. Every state must obey the law of “the great society” of mankind.

But just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society (*magna universitas*) of states. And this is what is called the law of nations, whenever we distinguish that term from the law of nature.³⁷

Here Grotius established “the great society” of states on the extension of “sociableness” of man, and stressed the existence of law which cares for “the advantage, not of particular states, but of the great society (*magna universitas*) of states”. This advantage of the great society is none other than the common interests of international society, namely those of states or nations in the sense of solidarism. Every member of international society can make a war justly, claim damages, inflict punishments against another supreme powers or states which violate the common interests. As far as it goes, the state and its people which respect almost only their own particular advantages, don’t consider their true interest. Grotius still continues:

Wrongly, moreover, does Carneades ridicule justice as folly. For since, by his own admission, the national who in his own country obeys its laws is not foolish, even though, out of regard for that law, he may be obliged to forgo certain things advantageous for himself, so that nation is not foolish which does not press its own advantage to the point of disregarding the laws common to nations. The reason in either case is the same. For just as the national, who violates the law of his country in order to obtain an immediate advantage, breaks down that by which the advantages of himself and his posterity are for all future time assured, so the state which transgresses the laws

³⁵ H. Grotius, *op. cit.*, p. 5 (Prolegomena. 1), Kelsey, p. 9.

³⁶ *Ibid.*, p. 51 (L. 1, C. 2, §1-5), p. 54.

³⁷ *Ibid.*, p. 12 (Prolegomena 17), Kelsey, p. 15.

of nature and of nations cuts away also the bulwarks which safeguard its own future peace.³⁸

In this sense "Shameful deeds ought not to be committed even for the sake of one's country" (Cicero). And according to Themistius, the excellent kings "who measure up to the rule of wisdom make account not only of the nation which has been committed to them, but of the whole human race, and that they are . . . not 'friends of the Macedonians' alone, or 'friends of the Romans,' but 'friends of mankind'".³⁹

The international society whose idea was established by Grotius is not in a state of war. It is also not dominated only by Machiavellian 'reason of state'. It is the space within which individual persons, organizations, and most of all states interdepend, co-operate with each other for the benefit of solidaristic interests on the base of stoic sociableness. Needless to say, the social attitude of a particular state is reflective to its perpetual advantage. Therefore, to respect the common interests of international society is also pluralistic. But, in either case they belong to the international society and exceed the short-sighted utility.

VI. *Grotius and Contemporary International Law*

A state in a Grotian conceptual world is not a pure sovereign state in the modern sense. The modern concept of sovereignty is abstract, exceedingly independent and exclusive. It doesn't admit intervention by others. The frontier is essentially the absolute barrier. On the contrary the Grotian state, even if it governs its people and is an element of international society, is not absolutely exclusive nor serves its 'reason of state'. It is based on the sociability of men, and constitutes international society as its basic element. It co-operates and must dare to restrict its selfish utility under the common interests of mankind. On the other hand international society permits any of its members to make war and to inflict punishment against a state or supreme power which "excessively violates the law of nature or of nations" in the name of "the interests of mankind". This is a result of the Grotian solidarism, too.

Certainly Grotius knew the theory of sovereignty of Bodin. Grotius must have had also good knowledge of Machiavellism and reason of state. And he ought to have known of the real politics, especially international politics because he had been a leading statesman of 17th century Netherlands. Nevertheless, any rather, therefore, he didn't make the barrier between states so high, denied the perfect liberty of actions of states and emphasized the existence of the law for the common interests of mankind as the law of nature and of nations.

Surely, Grotius founded modern international law. His plan is to build a state powerful enough utterly to prevent civil war, and to make international society out of the individual states. In this society the subject to settle international conflicts is the state itself. This plan conforms to modern international society. As far as it concerns, "The Law of War

³⁸ Ibid., pp. 12-3 (Prolegomena 18), Kelsey, pp. 15-6. On the importance of Grotian anti-Carneades logic see G.I.A.D. Draper, 'Grotius' Place in the Development of Legal Ideas about War', in: H. Bull, B. Kingsbury, A. Roberts (eds.), op. cit., p. 200; Richard Tuck, 'Grotius, Carneades and Hobbes', *Grotiana-New Series*, vol. 4 (1983) p. 435. Idem, *Natural Rights Theories*, Cambridge, 1979 also is important.

³⁹ H. Grotius, op. cit., p. 15 (Prolegomena 24), Kelsey, p. 18.

and Peace" is to be said the first great work of modern international law.

But, if we value Grotius only as the father of international law, "The Law of War and Peace" would give us an impression of insufficient work. It doesn't recognize the absolute sovereignty of state. It doesn't develop the theory of indifferent war, but just war. It doesn't accomplish the modern principle of non-intervention. On the contrary, it emphasizes that every particular state must obey the common interests of mankind. Still, he permitted every state to use its force against states or supreme powers which "excessively violate the law of nature or of nations".

That Grotius dared to avoid the concept of (absolute) sovereignty is derived from his basic thought of interdependence of states and superiority of common interests in international society. It is also the reason why he opened the way to humanitarian intervention for the sake of any oppressed people. Hence, that a state obeys international law, is not "folly" as Carneades said. For the people who regards only its own utility and transgresses the law of nature or of nations, cuts away in the end "the bulwarks which safeguard its own future peace". Only those people who observe international law, can be assured its perpetual advantage.

The idea of Grotius is in a sense nearer to contemporary international law which makes a point of restricting state sovereignty, co-operating in international society and allows the modern just war, than the modern international law which views state sovereignty as almost absolute. This is the reason why soon after World War I Grotianism and after World War II Neo-Grotianism appeared. That the 400th anniversary of the birth of Grotius splendidly held in the Hague in 1983 was entitled "International Law and the Grotian Heritage" during which many international lawyers and political scientists discussed the works of Grotius, is derived from such a great interest in "its importance today".⁴⁰

Certainly, it is not right for us to apply the thought of Grotius directly to the contemporary international problems. Grotius says almost nothing about a peaceful settlement of international conflicts and some system for their peaceful solutions and preventive systems such as international organizations. He admitted interventional war. But he mentioned no peaceful intervention. In this meaning his theory of just war and humanitarian intervention may be even dangerous in our times, because it is very possible that European mentality decides the legality and illegality of the use of force. It is even anachronistic for us to use Grotian theory so directly as the Grotianism of Vollenhoven once tried.⁴¹

But it is certain that the works of Grotius, specially "The Law of War and Peace" give us very vivid suggestions to solve problems with which the present international society is confronted. Most of all, his pluralistic solidarity is significant in this international society which, supposing the cultural and political multiplicity of the world, tends to make much of the common interests of human beings. It is really the way of making good use of

⁴⁰ T.M.C. Asser Institute, *International Law and the Grotian Heritage*, The Hague, 1985. This also is very significant. Of course, to read Grotius now does not mean to find solutions of the problems of our times. "Grotian solution" must not directly be sought. On this point, see Richard A. Falk, 'The Grotian Quest', in: C.S. Edwards, op. cit., p. xiii ff.

⁴¹ As a balanced estimation for Vollenhoven see P.H. Kooijmans, 'How to Handle the Grotian Heritage—Grotius and Van Vollenhoven', *Netherlands International Law Review*, 30 (1983), p. 81 ff. Grotius himself wrote not to undertake war easily, and insisted that the intervention on the ground of "the mutual tie of kinship among men" is only a permissible right, not an obligation which must be done in any time. Cf. H. Grotius, op. cit., pp. 595–6 (L, II, C. 25, §VII-1–2), Kelsey, p. 582.

Grotius, still to preserve the multiplicity of international society and to realize its solidarity as peacefully as possible, legally controlling the idea of collective security which combines with the Grotian theory of just war. I think, this indeed deserves to be called Neo-Grotianism.

HITOTSUBASHI UNIVERSITY