NUCLEAR WAR, HUGO GROTIUS AND HIS FOUR HUNDRED YEAR LEGACY

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To celebrate the 400th anniversary of Hugo Grotius' birth in Delft, Holland (1583-1645) is to be reminded of his seminal contribution to western and world history. For his was the first systematic approach to a statement "of the laws of war and peace" that somehow bridged the medieval and the early modern and thus helped to design a framework for the international legal order we know today. Perhaps it required someone whose interests ranged from theology to poetry, from playwriting to classical translation and from law to diplomacy, to have the imagination that embraced states and men in a philosophy of constraint whose vitality persists and colours the large debates of this nuclear age.

There were, of course, important statements on the behaviour of sovereigns, and decent limits to be placed on their violent encounters, in the centuries before Grotius wrote his magistral **De Jure Belli ac Pacis.** Indeed, the Spaniards -- Suarez and Vitoria, the English -- Selden and Gentilis -- and other continental lawyers and priests had begun to examine rationally the relations of political entities no longer governed by the fiat and rules of a Holy Roman Empire that had disappeared so long ago in fact and now in theory. Most of the earlier pre-Grotian writers were preoccupied with the problems of princely violence or the prizes of war, and made serious and morally inspired attempts to shape the limits beyond which Christian monarchs must not go in deadly conflict. Hence these late medieval and subsequent debates on the nature of the "just war". Perhaps even more important was Grotius' inheritance from his precursors of "natural law" as the original moral/legal determinant for decent or indecent state or sovereign behaviour.

But what distinguished Grotius from his predecessors was the clear-eyed recognition that no system could be regarded as having significant effects on sovereign states unless its norms or precepts were reinforced by evidence of active consent, or of state practice. This "positivist" insight, married to the older "natural law" tradition, gave to Grotius a key to the modern reality that made his mind and his works fit so well into the expanding international order of the 17th and 18th centuries. With the "Westphalia Charter" of 1648 something of a formal basis, these operational footnotes to the new age were captured by Grotius' **De Jure Belli ac Pacis** in 1625 almost two decades before the Treaty of Westphalia ended the Thirty Years' War.

Grotius could not foresee the nuclear era. But he understood violence well enough to recognize that the link between the actions of states and men, and their higher duty to human life and survival, required a continuing symbiosis between this transcendent duty to mankind, in the name of natural law, and the 'positive' business of men in both war and peace.

In these late years of the 20th century "total war" and nuclear weapons clearly have been made for each other. Their "final solution", potentially, to the human story is now the premier subject of this era; and Grotius, as the "father of international law", would today doubtless be appalled at man's management of weapons and warfare. "Of the Laws of War and Peace" is significant for the emphasis Grotius, who was witnessing the horrendous religious violence of the Thirty Years' War, placed on the regulation of conflict in the emerging international legal system. Open cities and towns, non-combatants, defenceless women and children, were given a primitive but meaningful "protection" system.

Since his day, and particularly throughout the 19th and 20th century, serious efforts have been made to place some limits, generally in treaty form, on the inevitable barbarities of warfare -- and even to eliminate "wars of aggression" themselves, as the Kellogg-Briand Pact, the Nuremburg trials and the UN Charter all tried to do. One of the more significant exercises in matching legal rules with war technology was the 1925 Convention prohibiting the use of poison gas and bacteriological warfare, with valuable, if diminishing, constraining consequences to this day.

But World Wars I and II with their planes, bombs and tanks, their submarines and warships, and their massed but increasingly mobile infantry, still followed the long line of classical war-making. The most telling change came at the end in 1945/46 with the smashing of the atom and harnessing its forces for battle -- against everyone, soldiers and population alike. Albert Einstein said, not long after Hiroshima, "... the unleashed power of the atom has changed everything except our modes of thinking, and we thus drift toward unparalleled catastrophe."

Today the stockpiles of deliverable warheads are many multiples of what states may need for their security. Indeed, the concept of 'security' itself has altered fundamentally. For it now must be addressed specifically to the perceptions of the two super-powers as they enact their leading roles and manage allies and clients toward an uncertain destiny. Since 1946 the peace has been kept among these two major actors by 'deterrence strategy' and the great fear that underlies that policy and makes it credible. Yet the threat of nuclear weapons, aggravated now by proliferation among other large and smaller states, puts the fate of man ever closer to the margin of ambiguity and survival.

What has international law, so long interested in weapons and warfare, and its professional priesthood the international lawyers, to say about this new and immensely dangerous situation? It is regrettable to report that despite the great rise in the volume of rules regulating the commercial, environmental, humanitarian and other relations of states, including the 'primitive' parliamentary and executive order of the United Nations system, in nuclear matters the international lawyer has largely failed his world constituency. By contrast, organized physicians and scientists, both technically and politically, have done much better at making their voices heard.

No significant principles or rules, or even the "soft law" of hoped-for-standards, have emerged to deal with nuclear weapons or to define their place in the human order. The banning of nuclear tests in outer space, the atmosphere and the oceans, and the attempted prevention of weapons of mass destruction in space, have their roots in UN sponsored conventions and resolutions. The non-proliferation treaty, a once promising omen, is now increasingly porous and vulnerable to covert nuclear arms development among many countries. Even the United Nations General

Assembly, in a series of Resolutions over a thirty-five year period (the last one very recently), has failed to do more than attempt to brand as "illegal" nuclear instrumentalities; these Assembly votes have not created any recognizable change in the specifics of the international legal system.

Yet if it was possible to label poison gas and bacteriological weapons as "unlawful" in 1925 by specific agreement (with an attempted update in 1972), it surely ought to have been feasible by now for the international lawyers of the world to have formulated a modern rationale that would begin to stigmatize forever the 'legality' of nuclear weapons and warfare. (The UN-created Conference on Disarmament is now examining possible new restrictions on the manufacture, storage and use of chemical, bacteriological, and radiological instrumentalities and weapons).

Where and how would this rationale be found? The history of the "laws of war" ("armed conflict" today), as Grotius helped to reformulate them, already provides the beginnings for a juridically meaningful search. Think for a moment of the basis on which most violence -- wars -- between peoples has been justified: dynastic rivalries, territorial expansion, boundaries, colonial enterprise with commercial gain, national/religious conflicts, and other reasons minor and major. Here the "Just War" concept shaped by theologians and lawyers became both benchmark and goal -- although ending in failure.

All of these patterns of war-making rested upon one grand assumption, namely, that while the result might provide a net benefit to the victor, there should, in due course, be restored some viable relationship with the vanquished -- save where vengeance and annihilation was itself the goal (as Rome destroyed Carthage).

In short, all warfare, even the immensely destructive experience with the First and Second World Wars of this century, had some built-in theory of limitation and renewal. The war would end, victor and vanquished would somehow continue to share in the human bargain. The objective, therefore, of all warfare, except at its most primitive and vengeful levels, was the achievement of a policy, a goal, with some form of continuing and viable environment, political and material, that would follow victory however great the immediate damage to the vanquished.

Both winners and losers had their share in the future, together. Japan and Germany are today the very models of the vanquished renewed.

Yet can any policy or goals be defined as achievable in a conflict using nuclear weapons, particularly an outbreak among the two supreme custodians of these weapons? Since what will remain after a major nuclear exchange would be a continent or a planet probably non-viable for anyone, there would be no victors or vanquished to play out the old rules of the laws of war and then the peace-making systems that historically have followed. The international laws of war, as we have known them, were not designed for the permanent destruction of all or most human and life-supporting environments. They were formulated to protect lives during war and to produce a more or less liveable peace afterward. That was the Grotian way.

Viewing these now accepted basics it is surprising how few international lawyers have argued that in the absence of any conceivable policy purposes, save for a simplistic or sophisticated "deterrence", justification for such irreversible and obliterating force ceases to exist. Indeed, much of the classical laws of war have become almost wholly irrelevant to the nuclear situation.

The UN Assembly, the churches, one Japanese court in 1964 (the Shimoda Case), and a few adventurous scholars in recent years, have tried to fashion a doctrine that perceives nuclear weapons as intrinsically (or **per se**) unlawful because they are unusable for any conceivable purpose consistent with post-conflict human and social survival. Unhappily, the textbooks relying on tribunals or state practice, military and political, are still not too helpful -- although the moral and "practical" case is being made with great force almost everywhere. Few of the major professional organizations of the international lawyers' world have used their great forums to pronounce, or even adequately to discuss, the essential illegality of nuclear weapons or the moral obscenity of their use. These lawyers were not slow to find new rules to fit the emerging technologies of outer space, and yet the nuclear age (1945/46) preceded the space era (1957) by at least a decade.

If "policy" and "goals" are a requisite for a viable "laws of war" system, then there is nothing to justify the nuclear capability. Lawyers, soldiers and politicians have developed concepts such as "military necessity" and "proportionality" to limit the scope and degree of conventional violence between states when conflict does happen. None of these hard-won conceptual constraints can possibly operate once the warheads are launched. Policy is not served; "military necessity" and "proportionality" cannot be disciplined in a nuclear exchange. Have we, therefore, not reached a moment when a self-evident illegality, for reasons that go far beyond those reciprocal fears that compelled the "elimination" of poison gas, must now apply with even greater persuasion to the abolition of the nuclear dimension and so prohibit it from having any role in the lawful conduct of human affairs? (Sadly, chemical warfare may no longer be as closed to possible use as had been thought until recently.)

It may be argued that this line leads to flirtations with "unilateral" freezes or disarmament unless the same rules and advice are taken seriously by governments everywhere, East and West alike. Clearly, no one can argue for unilateralism without being naively vulnerable to the realities of superior power and intimidation in any serious strategic dispute. Indeed, it would equally be naive not to recognize that, despite the threat to mankind since the days both super-powers acquired the weapon, there has been almost forty years of "peace" between them -- even if that peace rested upon their deadly fear of each other.

"Deterrence", as a result, is now a deeply entrenched concept and commands a certain acceptance by anyone assessing honestly the nature of politics and power at this frightening time. But deterrence clearly does not require forty-five to fity thousand warheads -- allegedly the total stockpiles of both super-powers. (Regrettably there is, as yet, no world class center in Canada to provide basic data or serious research in this area.) Deterrence itself cannot continue "securely" when there is mounting evidence of military leaders playing with the tempting concepts of "limited nuclear warfare", "theatre warfare", "non-urban targets" and the rest. Deterrence does not require experiments with a nuclear capability in outer space. Indeed, the new "Star-wars" scenarios, both offensive and defensive, probably are as disturbing to leaders as they are to informed peoples everywhere.

Deterrence can and must be redefined now, at once. It should be viewed as that nuclear capacity with "minimum" stockpiles, at levels of an elusive super-power "parity", yet sufficient to do irreversible damage to each combatant, and on a scale therefore large enough to mutually frighten and therefore to inhibit, in other words, to "deter" in the plain, but often misunderstood, meaning of that word. There must be professionals who can help to measure the quantities required to assure a deterrent "psychology" with limited stockpiles, at "parity". One thousand? Two thousand? Any number chosen for deterrence, but not for "victory", will necessarily be the product of hard political negotiations and a military/strategic realism on both sides. Verification and accident prevention become much more manageable at this level of numbers.

What matters today is the acceptance of the combined concepts of "illegality" plus the minimum requirement for deterrence. Together these might encourage a steady de-escalation of numbers, thus relieving men and states everywhere of the immobilizing fear that has gripped the world today. While there may be some contradiction between having international lawyers develop a theory of illegality **per se** for nuclear instruments, side by side with the concept of an accepted minimum stockpile for mutual security through a revised deterrence standard, that contradiction should be the least of men's concerns.

Indeed, one immediate result would be the swift recognition that a revised deterrence concept which addressed itself to a "minimum stockpile" theory -- given the reality of what H-bombs can do -- would permit a return to the essential concept of "proportionality" and to a re-emphasis on conventional arms. If "military necessity" and "proportionality" have both been lost in the present debating vortex, enveloped by the correctly imagined "final" horrors of a major nuclear exchange, then it is of the highest urgency that political and military leaders find their waay back to these norms of self-limitation. The union of "minimum stockpiles" to "proportionality" may return the laws of war, "armed conflict", to a position of some relevance in the nuclear age. And even if all of this playinng with lower nuclear numbers is an insane metaphysic, unbearable but not unthinkable, it at least may introduce a new level of realism and rationality into the sterile, frozen forms of the present nuclear debate with its cold jargon and its bleak and terrible assumptions.

A changed international mood, encouraged by an emerging rule of nuclear unlawfulness, and a return to "proportionality", would help open the way to a negotiated de-escalation, leading downward to stockpiles that retain the core of deterrent strategies but promise a decreasing threat -- in tensions and weapon numbers -- to the whole of mankind. This initial "soft law" of illegality, indeed, might then move steadily toward increasing acceptance as a "binding" international rule, a political and legal norm. Here time is both enemy and ally.

One of Lord Mountbatten's observations sets out a professional view of the nuclear threat:

> "In all sincerity, as a military man, I can see no use for any nuclear weapons which would not end in escalation with consequences that no one can perceive. In warfare the unexpected is the rule and no one can anticipate what an opponent's reaction will be to the unexpected."

If international law is to retain its ultimate credibility, the international lawyers of the world will finally have to determine with a common voice, the unlawful character of a weapons system that, by serving no policy and by threatening all values and possibly all life, can achieve no political goal except to assure an end to all or most of civilization.

One final hope. If Grotius returned to visit these tremulous times, he would be not only appalled, but surely profoundly distressed as well, at the immense concentration on the growth science of nuclear destruction (and its corresponding "strategy savants" and their dialectic). He would wonder at how little political and professional focus there has been, by contrast, on "the science of law" to constrain the march to the nuclear abyss, with the fruits of man's genius in danger of becoming charred artifacts to be discovered by others yet unknown. Not unimaginably, some galactic years hence, new forms might encounter this once alive and creative plant whose human occupants seemed genetically programmed to "self-destruct". Hopefully the Grotian tradition and inheritance may yet help to produce a fail-safe global political and legal system to rescue mankind from itself.