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THE GROTIAN DOCTRINE OF THE FREEDOM OF THE SEAS REAPPRAISED

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I. INTRODUCTION

THREE hundred and fifteen years ago, on August 12, 1645, a man of obvious distinction, yet whose countenance revealed a state of grave anxiety and depression, stood on the dock in the Harbor of Stockholm, Sweden, ready to take passage in a vessel, which had been assigned by Queen Christiana to carry him to Lubeck. The departure was made in view of a large assembly, among which were distinguished members of the Royal Court, gathered to do honor to the great statesman who had so long and faithfully served as Swedish Ambassador to France. Shortly after clearing the port, the ship was overtaken by a violent storm, which continued to rage with unremitting fury for four long and turbulent days as if to demonstrate the freedom of the seas by tossing both the ship and its celebrated passenger upon its wild and unknown waves. Finally cast ashore on the Pomeranian coast, within a few miles of Dantzic, there to live or to die, as God should will, within sight of the ocean's heaving billows, within sound of its manifold voices, this lonely individual, now ill and in a weakened condition, was forced to travel for a distance of sixty miles in an open, springless cart, over unspeakable roads, in a continuing wind and rain, arriving in Rostock, on the twenty-sixth day of August, weary and spent beyond repair. Unable to continue further on his journey, the destination of which was then and even now remains unknown, a physician and a minister of the gospel were called in to prescribe for the last physical and spiritual needs of this stranger in a strange land, who only two days later, in the early morning hours of August twenty-ninth, passed to that land from which no man returneth. And so he, who in life had stirred millions by the influence of his ideas, and who, after death was to move generations and even nations by the intellectual and spiritual force of his arguments, died in a deserted and lonely spot, far removed from Kith and Kin, in an atmosphere of unutterable misery and gloom, all of which was

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overshadowed with a complete sense of failure, as evidenced by his dying words: "By undertaking many things I have accomplished nothing." After religious ceremonies were concluded in Rostock, his mortal remains were removed to Delft and there quietly buried in the Nieuwe Kirche in the tomb of his ancestors, upon which is inscribed an epitaph, written by himself, doubtless in a bitter hour of disillusionment and despair. It reads:

"This is Hugo Grotius, captive and exile of the Dutch, Ambassador of the Great Realm of Sweden."¹

In 1608, or thirty-seven years prior to his untimely death in exile, Hugo Grotius, then Attorney-General of the Dutch Republic, ordered the anonymous publication of a book under the title, *Mare Liberum*, in which he expounded his theory of the freedom of the seas, or the right of the Dutch to participate in the East Indian Trade.² In this famous book, which the author was then unwilling publicly to acknowledge, but which he evidently deemed important, because it was addressed "To the rulers and to the free and independent nations of Christendom," Grotius, contrary to prior theory and practice, asserted that by the Law of Nations navigation was free to all persons whatsoever. Marshalling his arguments under the subjects of navigation, ownership of the sea, and the right to trade, he denied the Portuguese the right to title by discovery, by occupation, by papal gift or by war, and concluded therefore that the Dutch had, as against the Portuguese, the right to trade freely with the East Indies and, if necessary, in order to do so, wage war, which could be justified as legitimate under the principles of the law of nations.

While the doctrine of *Mare Liberum* was neither immediately nor fully accepted, some two hundred years after its appearance, in the case of "*Le Louis*,"³ Lord Stowell rejected England's claim to the exercise of jurisdiction beyond a marine league from the British shore, basing his conclusion on two fundamental principles of public law: *one*, that there is perfect equality and entire independence of all distinct states; and *two*, that all nations being equal, all have an equal right to the uninterrupted use of unappropriated parts of the ocean for their navigation. And since that time there has been little disposition to question

1. "Grotius hic Hugo est, Batavum captivus et exul, Legatus regni, Suecia magna, tui." KNIGHT, *THE LIFE AND WORKS OF HUGO GROTIVS* 289 (1925). For a further discussion, see *id.*, at 267-89.

2. GROTIVS, *THE FREEDOM OF THE SEAS* (1916). Translated with a Revision of the Latin Text of 1633 by Ralph Van Deman Magoffin, and Edited with an Introductory Note by James Brown Scott.

3. 2 Dods. 210, 165 Eng. Rep. 1464 (1817).

the validity of the Grotian doctrine, as thus approved in such sweeping terms.

Recently, however, there has developed a tendency to take a more realistic attitude as to the total validity of this doctrine. Thus, in the Declaration of Panama,⁴ made immediately upon the outbreak of World War II, the Foreign Ministers of the American Republics declared, that as a measure of self-protection, they were inherently entitled to prohibit all belligerent action in waters extending several hundred miles from the shore. And the domestic difference of opinion between the United States and the States of California, Louisiana and Texas⁵ has called attention to the conflicting claims to title to the natural resources lying under the continental shelf, which in turn, raises a disturbing issue as to how far such shelf and land extends into the sea.

Such problems as these, recurring with increasing frequency, not to mention the implications of the atomic or hydrogen bomb, suggest that the time is at hand when the basis of the original doctrine of freedom of the seas should be reexamined and reappraised. As a background for such reappraisal, let us together quickly glance back over the pages of history in order to observe what has been the law and practice of nations with respect to the dominion of the sea, prior to the age of Grotius, to note the occasion and peculiar circumstances under which the Grotian freedom of the seas doctrine was originally proclaimed, to take notice of how, in the intervening years, the new theory has actually worked in practice, what its present status is in the light of modern developments in peace and war, and finally, what are its prospects in the immediate future.

II. THE EMPIRE OF THE SEA AS VIEWED IN THE HOLY WRIT, BY THE ANCIENT STATES, BY THE MODERN STATES BEFORE THE DISCOVERY OF AMERICA, AND BY THE MODERN STATES AFTER THE DISCOVERY OF AMERICA, UNDER THE LAW OF NATURE AND THE LAW OF NATIONS

A. THE DOMINION OF THE SEA

As Grotius addressed his celebrated book, *Mare Liberum*, "to the free and independent nations of Christendom," it seems not unreasonable first to inquire as to whether the doctrine that the sea is susceptible to private dominion and propriety within the meaning of sacred history as set out in the Holy Scriptures.

4. 1 DEP'T STATE BULL. 331 (1939).

5. United States v. California, 332 U. S. 19 (1947); United States v. Louisiana, 339 U. S. 699 (1950); United States v. Texas, 339 U. S. 707 (1950).

(1) *As Viewed in the Holy Scriptures*.—According to the Holy Writ, the people of Biblical times recognized that a state might have not only dominion of the sea, but also the right to fish in the sea. Thus, in Genesis, man is directed to “*Replenish the Earth and subdue it, and have Dominion over the Fish of the Sea. . .*”⁶ Also in Genesis, it is said: “*The Fear of you, and the Dread of you [which are terms implying dominion] shall be upon all the Beasts of the Earth and upon every Fowl of the Air, and upon all that moveth upon Earth, and upon all the Fishes of the Sea. . .*”⁷ By these words, dominion over field, air and sea, were given to the sons of men and their posterity in general. It remained for mankind to make use of the land and sea to satisfy its own needs.⁸ The dominion of the sea thus recognized by the Holy Writ, was recognized and put into practical application by the Phoenecians, whose sovereignty was actually set forth in Ezekiel, in the following language: “*Then all the Princes of the Sea shall come down from their Thrones . . . and they shall take up a Lamentation for thee. How art thou destroy'd, that wast inhabited of the Sea, the renowned City [Tyre], which wast strong in the Sea, she and her Inhabitants which cause their Terror [Dominion] to be upon all that haunt the Sea.*”⁹ Clearly, sovereignty is here implied. The “renowned city” referred to was the ancient city of Tyre, made strong and rich by her commerce, as observed by Isaias, who said, “*The Harvest of the River is her Revenue.*”¹⁰ Moreover, again referring to Tyre, the prophet remarks that “*The Sea has spoken even the Strength of the Sea.*”¹¹ And by the Psalmist it is declared that “*I will set his Hand also in the Sea, and his Right Hand in the Rivers,*”¹² by which, according to Ebon Ezra, the Dominion of the Waters was assigned to King David, as the ruler of all who sailed therein. The same theme also finds support in a passage in Esther, which reads: “*And the King Assuerus laid a tribute upon the Land, and upon the Isles of the Sea,*”¹³ from which it appears that the King was both

6. C. i, v. 28.

7. C. ix, v. 2.

8. Nor was that passage of Scripture found in Psalms, 113, v. 16, presented by those opposed to the verses in Genesis, and which read: “*The Heavens, of the Heaven is the Lord's, but the Earth hath been given to the Children of Men,*” in contradiction, because of its failure to mention the sea. The theory was that the Almighty reserved this jurisdiction to Himself. Such an implication is not only unnecessary but is contradicted by the Holy Scriptures. JUSTICE, A GENERAL TREATISE OF THE DOMINION OF THE SEA 12 (2d ed. 1702).

9. C. xxvi, v. 16, 17.

10. C. xxiii, v. 3.

11. C. xxiii, v. 4.

12. PSALM, 88, 26.

13. C. 10, v. 1.

lord of the sea and islands, upon which he had the power to impose a tribute. The views thus expressed also find confirmation in the Apocryphal Texts,¹⁴ and in the comments of the Jewish Rabbis in the 34th Chapter of Numbers, to the effect that the boundaries of Canaan include the sea. Thus, according to the Holy Writ, it is clear that the sea was regarded as susceptible of being brought under dominion, the only issue being not the extent but the nature of the dominion.

(2) *As Viewed by the Ancient States*.—Among the earliest states which have claimed the empire of the sea, may be listed Tyre, the home of the Phoenicians;¹⁵ the inhabitants of the Aegina Island, located in the Gulf of Salamis;¹⁶ Crete, under King Minos;¹⁷ the Rhodian people, who framed the laws of the sea;¹⁸ Persia, under Darius, who met defeat on

14. 1 BOOK OF ESDRAS c. 4; 2 BOOK OF ESDRAS c. 7.

15. They were among the earliest builders and navigators of armed ships, who mastered the Mediterranean, and passed beyond the columns of Hercules to discover Great Britain and to claim the Atlantic in gratification of their boundless ambition. Having acquired dominion of the sea over the immense area controlled by the great monarchs of Asia and India, and also Egypt, the masters became tyrants, exercising piracy and oppressing the peoples subject to their control. Finally, opposition developed which resulted in the siege and fall of Tyre at the hands of Nebuchadnezzar, King of the Babylonians, who in the year 580 B.C., exterminated the people and destroyed the city to its foundations, and with it their empire of the sea, thus fulfilling Ezekiel's sad prophecy of doom, to which we referred in discussing property rights of the sea as viewed by the Holy Scriptures. See EUSEBIUS IN CHRONIC. lib. 2; 1 AZUNI, *THE MARITIME LAW OF EUROPE* 25-9 (1806); JUSTICE, *op. cit. supra* note 8, at 12.

16. These inhabitants, credited by Hesoid as the inventors of the art of navigation, in the struggle against the Persians, established themselves as the masters of the Eastern Seas, not long before the beginning of the Peloponnesian War. Feeling their strength the Aeginetae insulted the Athenians, caused them to increase their naval strength, so that, according to Eusebius (EUSEBIUS IN CHRONIC lib. 2) and Strabo (STRABO, GEOGRAPHY lib. 16), after the Aegean Island had exercised from ten to twenty years of sovereignty over the Eastern Sea, the Athenians during the time of Pericles, destroyed their naval power, annihilated their commerce, and drove them from the island. Consult on this topic, 1 AZUNI, *op. cit. supra* note 15, at 29-36; JUSTICE, *op. cit. supra* note 8, at 20.

17. The inhabitants of the island of Crete, later known as Candia, exerted a large dominion over the neighboring seas, including a great part of the Aegean Sea (THUCYDIDES, HISTORY lib. 1), which lasted approximately one hundred and seventy-five years. After the abolition of the Cretan monarchy, disunity developed, and piratical expeditions infested the Mediterranean, harassed navigation up to the very coasts of Italy, thus invoking an attack by the Romans upon their native island, then completely independent, which attack resulted in changing the government of Crete, and reducing it to one among many provinces of the Roman Empire. See 1 AZUNI, *op. cit. supra* note 15, at 30; JUSTICE, *op. cit. supra* note 8, at 16. The Ottomans succeeded the Romans in controlling the islands in the Cretan seas.

18. According to Eusebius the Rhodian people held dominion of the sea for twenty-three years, during which period they acted as protectors of the nations which others might have enslaved. They gained immortality as the framers of the laws of the sea, pronounced

land at Marathon, and on sea at Salamis;¹⁹ Greece, by reason of its geographical position in relation to the Propontis, the Aegean and Ionian Seas, the Corinthian Gulf and the nearby islands;²⁰ Macedonia, under the successive leadership of Philip and Alexander the Great;²¹ Egypt, master of the Red Sea as far as India;²² Carthage, built on the ruins of

by Constantine Hermenopolus (PROCHIR. JURIS lib. 12, tit. 11) as the most ancient then extant. These laws were subsequently recognized by the Romans from the time of Tiberius (See JUS GRAECOROMANUM tom. II, p. 265) and ultimately found a place in the Justinian Digests, where they served for the maritime law of the nations bordering on the shores of the Mediterranean. Finally taken over by the Romans, their laws of the sea were adopted, in accordance with the Roman policy of adopting whatever was found excellent among foreign nations. For a more detailed account of the Rhodian dominion of the sea, see 1 AZUNI, *op. cit. supra* note 15, at 31-4; JUSTICE, *op. cit. supra* note 8, at 17.

19. After Darius was defeated at Marathon, Xerxes sought to wrest the control of the sea from Greece, but met disaster in the naval battle of Salamis, where the Persian maritime forces were overthrown, leaving Greece, the freest nation of the world at that time, exercising a despotism over the sea, to which the most absolute monarch of the period was forced to do homage. Thus, the battle of Salamis, followed by the battles of Plataea and Mycale, destroyed Persian power, delivering from their yoke Cyprus, Thrace, Macedonia and the Chessonesus. 1 AZUNI, *op. cit. supra* note 15, at 34-6.

20. Greece, of necessity, became a maritime nation, and after her brilliant victory over the Persians, resolved to maintain their mastery of the sea. In this she was successful during the time of Themistocles. Under the leadership of Aristides, we find that she gained a temporary victory over the Lacedemonians, who had previously laid claim to the mastery of the sea. Subsequently, although threatened by the rival Republic of Lacedemonia, the Athenians exposed themselves by a disastrous attack upon Sicily, and in their weakened state were set upon, their remaining fleet destroyed, and Athens, their capital, demolished, thus giving the Lacedemonians an absolute despotism over the Mediterranean Sea. Ten years later Conon defeated the Lacedemonians at the battle of Gnidus, after which dominance of the Eastern Mediterranean Seas was abandoned to Macedonia. 1 AZUNI, *op. cit. supra* note 15, at 36-40; JUSTICE, *op. cit. supra* note 8, at 20-2.

21. Philip sought to erect an Empire upon the ruins of his Grecian neighbors. As an incident of this policy he created a marine force under the pretext of suppressing piracy in the Aegean and Ionian Seas. Philip's violent death at a time when he was preparing to invade Persia, and regarded himself as conqueror of Asia and the ruler of the sea, left his son, Alexander the Great, in a very advantageous position. Accepting that which Philip gave him, he found new projects of his own, and swept on to world conquest. Not forgetting that success turned on commerce and a well established marine, he destroyed Tyre, threatened Carthage, and founded Alexandria as the capital of what was to be a universal empire over both land and sea, located centrally between Tyre and Carthage, for purposes of controlling communication between India and Ethiopia by the Red Sea and the Nile on one hand, and on the other hand between Europe and Africa by the Mediterranean, thus drawing to itself the commerce of both areas. But all these brilliant plans of Alexander for world conquest and continued dominance of the sea, were cut off by his unexpected and untimely death. 1 AZUNI, *op. cit. supra* note 15, at 40-2.

22. Egypt, by reason of its geographical and topographical aspects, was originally not induced to make navigation a principal industry. But Sesostris, who reigned in Egypt

Tyre;²³ and Rome, whose supremacy over the seas was established as an incident of its conquest of Carthage and was to continue until the fall of the empire, after which all claim of dominion over the sea ceased until a new power arose capable of asserting and maintaining it.²⁴

1,659 years before the Christian era, discovered the advantages of commerce with India, established a marine and became master of the Red Sea, as far as India. Upon the death of Alexander the Great, Egypt fell to Ptolemy, who encouraged the development of Alexandria and revived intercourse with India, which had been interrupted at the time of the death of Sesostris. Ptolemy-Philadelphus established control over both the Red Sea and the Mediterranean, which supremacy was maintained until the time of the twelfth Ptolemy, called Dionysius, who lost his empire when Caesar laid siege to Alexandria. (See CAESAR, *DE BELL. CIV. lib. 3*). Although the maritime power of Egypt was revived by Cleopatra to such an extent as to be of aid to Anthony in his war against Augustus, Egypt was reduced to the position of one among many Roman Provinces after the battle of Actium, with the control of its marine power passing into the hands of the Romans. 1 AZUNI, *op. cit. supra* note 15, at 42-8.

23. With the fall of Egypt the control of the Mediterranean passed to Carthage and Rome. Carthage, built on the ruins of Tyre, became the proud rival of Rome, disputing with her the mastery of the world. Inspired by avarice and greed for wealth, Carthage acquired control over all the coasts of Africa, Sicily and Sardinia, and ruled with tyrannic sway over the Mediterranean up to the very gates of Gibraltar. Foreigners were permitted only a five-day in Sardinia and the Romans were prohibited from washing their hands in the Sicilian Sea. The sway of Carthage was substantially uninterrupted, except for some opposition from Agathocles, the King of Sicily, until the beginning of the First Punic War, when the Romans refused subjection to them at sea. Prior to that time the Romans, by the first treaty concluded with the Carthaginians, had surrendered their sovereignty of the sea. It had been agreed "that neither the Romans, nor their confederates should sail beyond the fair Promontory, unless they should be driven thither by Tempests or Enemies." In the second treaty at the close of the First Punic War Polybius states: "That no Roman should so much as touch either upon Africa or Sardinia, except it were either to take in Provisions or repair their ships." At the close of the Second Punic War, which resulted in Carthage being forced to submit to the Romans, who were victorious at sea and on land, the dominion of the sea passed from their hands. At the end of the Third Punic War, not only the last fleet of Carthage was destroyed, but also the City of Carthage itself, and thus vanished their mastery of the sea forever. JUSTICE, *op. cit. supra* note 8, at 23.

24. Having established its naval supremacy as an incident of the conquest of Carthage, Rome sought at all times to maintain dominion of the sea by keeping a powerful fleet available to suppress piracy or to assert her sovereignty. At the end of the Second Punic War, Scipio, the Conqueror of Hannibal in Africa, granted peace only on condition that Carthage should keep ten ships, delivering up the remainder to the Romans. The fall of Carthage at the close of the Third Punic War established Rome as the masters of the seas, with control over all Africa. Subsequently, under Caesar the Romans entered the Atlantic, passed over to England, and became sovereigns over most of the known seas. Under Augustus, after Caesar's assassination, three fleets were maintained, one to keep in awe the coasts of Spain, one to protect the Etrurian Sea, the Islands of Sicily, Sardinia and Caicos, and another, to secure the control of the Adriatic Sea. Thereafter, the naval power of Rome declined, but was again revived under Trajan, who established his empire of the sea as far as the Red Sea in one direction and as far as England in the other.

(3) *As Viewed by Modern States Prior to the Discovery of America.* After the barbarians, the first modern state prior to the discovery of America to claim dominion of the sea was the Republic of Venice which asserted sovereignty over the Adriatic.²⁵ Genoa, as a result of her victory over the Venetians, Pisans and Saracens, also pretended to dominion of the sea, extending her power to the Aegean, Euxine, Syria and Palestine.²⁶ At one time Pisa,²⁷ the Goths, Vandals, Saracens and Nor-

Succeeding emperors permitted the marine to fall into decay, and when the barbarians overran the Empire, the Empire's power was broken both on land and at sea. (POLYBIUS lib. 1, c. 3). 1 AZUNI, *op. cit. supra* note 15, at 54-76.

25. Situated at the bottom of this sea, Venice, from the beginning, encouraged commerce, and built up her strength at sea which gradually enabled her to assert and maintain sovereignty and impose a tax upon all who sailed in the Adriatic Sea. This practice having been complained of to the Pope by the inhabitants of Ancona, the complaint only resulted in the confirmation of the practice by Gregory X, as essential to support the marines employed against the pirates and Saracens. At even an earlier period the preponderance of the Venetians over the Adriatic Sea resulted in 1177 in a grant by Pope Alexander III of the sovereignty of the sea. Riding on the tide of victory the Venetians took Cyprus, Marea, Candia; they became masters of Constantinople, Naples, Sicily and a large part of Italy. The Crusades they used as a source of added wealth; they triumphed over the Greeks, the Saracens, the Pisans, the Genoese, the Dukes of Milan, the Turks and the English. Their conquests created jealousy, which Pope Julius II took advantage of in 1509 to recover several Italian cities and to organize a league against them. By promoting dissension among the opposition and by a lavish use of gold, Venice escaped this danger, only to fall a victim of the Portuguese, who suddenly appeared after a voyage around the Cape of Good Hope. As a result of this development the commerce, in which the Venetians had engaged with the East Indies through the Red Sea and with Egypt and the maritime cities of Asia, was lost. Lacking these resources, Venice ceased to assert mastery of the sea. JUSTICE, *op. cit. supra* note 8, at 25-7. The story of how the Pope conferred on the Venetians the sovereignty of the Adriatic Sea constitutes an interesting sidelight on the developments of this period. It appeared that Pope Alexander III, persecuted by Emperor Frederick Barbarossa, had taken refuge in Venice, where he was accorded the honors due his position. A naval battle between the forces of the Emperor and Venice off the coast of Istria resulted in a victory for the Venetians. In appreciation of this outcome, the Pope met the victorious leader of the Venetian fleet, and to immortalize the triumph, presented him with his ring with these words: "Use this as a chain, to hold the waves in subjection to the empire of Venice; with this ring espouse the sea, and hereafter, on the same day, in every year, let the celebration of this marriage be renewed by you and your successors. By this ceremony, posterity will learn, that your arms have acquired the vast dominion of the waves, and that the sea is subjected to you, as the wife to her husband." By reason of this incident, the ceremony performed yearly at Venice on the day of the Ascension, continues even unto this day. 1 AZUNI, *op. cit. supra* note 15, at 78; JUSTICE, *op. cit. supra* note 8, 25-7.

26. Genoa seized Cappa, on the coast of the Cimerian Bosphorus, and also parts of Cyprus, Mytilene and Galata, opposite Constantinople. Half of Sardinia, and the islands of Corsica and Caprara, belonged to the Genoese. Thus fortified, Genoa carried on commerce with India across the northern part of Asia and the deserts of Arabia by the Persian Gulf, the Tigris and Euphrates, the Black Sea and the Mediterranean, thus emulating

mans,²⁸ and finally the Crusaders,²⁹ held sway.

(4) *As Viewed by the Modern States After the Discovery of the New World and Prior to the Promulgation of the Grotian Theory of the Freedom of the Seas.*—The discovery of the magnetic needle, which suggested the mariner's compass, attributed to the French, led to the opening of a new route to India by the Atlantic Ocean, and to the discovery of America.³⁰ Thereafter, inspired by the prospect of gold and silver, and other forms of wealth, in turn Portugal, Spain, Holland, England and France, made discoveries in the new world, and sought to retain exclusive possession of their respective discoveries, as an incident of which they asserted and made every effort to maintain exclusive control of the seas.

a. Portugal.—Of these states, Portugal stands out as the most effective advocate of the doctrine of the lawfulness of a dominion and propriety in the sea, as appears by the title of their King, in the preface to the Laws of Portugal, wherein he pretends to be sole Lord of Navigation and Trade in Ethiopia, Arabia and India.³¹ With such theories in mind,

the earlier Greek empire. Celebrated as navigators, the Genoese held the empire of the sea for a long period, their power, like that of the Venetians, being finally annihilated because of continuing rivalships among the Mediterranean states, in the light of a shift of power as a result of the discovery of the Western Hemisphere by Christopher Columbus, an enterprising Genoese. Now that all maritime developments were directed to the Atlantic Ocean, Italy ceased to be the commercial center of the world. 1 AZUNI, *op. cit. supra* note 15, at 83-5; JUSTICE, *op. cit. supra* note 8, at 27.

27. When the Roman Empire was subverted, Pisa, like several other Italian cities, became a republic. By means of the Arno, which served as a port and offered a shelter from pirates and storms, she soon became a formidable maritime power with such numerous fleets as to make her mistress of the sea. In 1267 the Pope advised Henry, brother of the King of Castile, who desired to conquer Sardinia, to desist as he would have to overcome the Pisans. Alternately on the side of the Pope and that of the Emperor in the disputes of the Guelphs and Ghibbelines, Pisa was weakened and subsequently its naval power suffered a severe blow at the hands of the Venetians from which it never recovered. 1 AZUNI, *op. cit. supra* note 15, at 85-9.

28. Following the downfall of the Roman Empire, these peoples overran Europe, and for a short period exercised a momentary empire of the sea, which extended no further than the coasts of Africa, Sardinia and Spain. After the Saracens, the Normans infested the coasts of Britain and France, finally settling down in Normandy, from whence they cruised along the coasts of Spain, passed through Gibraltar, and conquered Naples and Sicily. 1 AZUNI, *op. cit. supra* note 15, at 90.

29. The period of the Crusaders, during which nine attempts were made to save the Holy Land from the Turks, resulting in as many disasters, nevertheless gave the fleets of the Crusaders a temporary preponderance in the Mediterranean which vanished when the Crusades ended. 1 AZUNI, *op. cit. supra* note 15, at 91.

30. See 1 AZUNI, *op. cit. supra* note 15, at 93.

31. In the Body of the Laws of Portugal, this doctrine is more positively stated in the form of an absolute prohibition to any person whether native or stranger in any ship or vessel "to pass to the Countries, Lands and Seas of Guinea and the Indies,

it is not surprising to find the Portuguese making the ocean an avenue of conquest. Henry, son of John I of Portugal, conceiving the idea of trading on the coasts of Africa, instituted the study of astronomy and erected an observatory, which led to the invention of the Astrolabe. Making first use of the compass, pilots under his direction discovered the Island of Maderia in 1419. John II, son of Henry, also using the compass, rediscovered the Cape of Good Hope,³² opening up a new passage to the East Indies. In 1497, King Emanuel, prosecuting the schemes of his predecessor, sent a squadron of four vessels under the command of that intrepid sailor, Vasco de Gama, who, after running along the Eastern coast of Africa, discovered Indostan. Profiting greatly from these various discoveries, Emanuel, in 1505, dispatched Francis Alameyda to India, for the purpose of setting up a permanent establishment under a Viceroy. Equipped with a fleet of twenty-two ships, he met and defeated a fleet composed of ships of the King of Calicut, leagued with the Arabs and Egyptians. The son of Alameyda, directed to cut off Arabian ships from the Maluccas, discovered the Island of Ceylon and took possession of it in the name of the King. In 1508, a new fleet enroute to India discovered Madagascar and on its arrival in India consolidated the Portuguese positions, leaving Albuquerque, who became Viceroy upon Alameyda's death. In subsequent years, he laid the foundation of the Portuguese empire in India and extended its glories to the extremities of the earth, only to be recalled finally as a result of the envy of his enemies. As Portugal and Spain were near neighbors, their respective discoveries brought on dissensions. Thus a dispute over the Canary Islands arose between Don Alphonso, King of Portugal, and Ferdinand and Isabella. The issue was settled by compromise, under which the Portuguese were given the Azores, Guinea, and Western Ethiopia, which convention was confirmed by subsequent Papal Bulls.³³ A further dispute developed as an incident of the memorable Bull of Pope Alexander VI in which he made the King of Spain a gift of nothing less than the newly discovered Western World. "The bounds therein were on this side of an imaginary line drawn from the Arctic to the Antarctic Poles;

either upon occasion of War or Commerce, or for any other Reason whatsoever, without the King of Portugal's special License and Authority, under pain of Death and Confiscation of all Effects, to be inflicted upon all such Persons as should presume to go thither to Contempt of the said Prohibition." DUNTO LIBRO DES ORDENNACONNES tit. 112; JUSTICE, *op. cit. supra* note 8, at 29.

32. It had been thought that Hanno, under Carthagian sponsorship, had made the discovery at an earlier period. ARNOULD, *SYSTEM, marit. et polit.* c. 2.

33. "Pope Sextus IV, by his letters, dated at Rome, the 11th of the calends of July, confirmed this treaty as well as the bulls of Martin V, Eugene IV, and Nicholas V." 1 AZUNI, *op. cit. supra* note 15, at 100.

which line was to be distant from each of the Islands called the Azores and Cape Verde, one hundred leagues towards the West and South: All that was Eastward fell to the Share of the Portuguese, all that was Westward to the Spaniards."³⁴ It appeared that Sebastian Cano, having arrived at the Maluccas, by a short route discovered by him and Magellan, suggested to Charles V that the islands should belong to him, as the Portuguese had not penetrated to them, and since they fell within the area belonging to him under the division of Pope Alexander VI. Such reasons seemed highly unjust to King John III of Portugal, who in the ensuing struggle, gained possession of the Maluccas, notwithstanding the Papal Bull. In 1581, Portuguese dominion of the sea was terminated when they submitted to the Spanish yoke. From then on her activities were restricted, though not, as we shall see, entirely eliminated.

b. Spain.—Prior to the reign of Ferdinand V, Spain was not an important factor in marine affairs. But the marriage of Ferdinand to Isabella, united the Crowns of Castile, Leon, Arragon, Navarre and Granada, gave him a predominant position in Europe and caused him to look upon the sea as a new empire and as a medium for acquiring new Kingdoms. In 1446 his first maritime expedition reduced the Canary Islands. In the same year, another fleet, dispatched to Guinea, returned laden with riches, only to be captured by the Portuguese, then at war with Spain. In 1484, Gonsalvo Hernandez Cordova aided the King of Naples and recovered Calabria for the French. These first efforts of Ferdinand opened up the way for new discoveries. While the Portuguese were occupied along the coasts of Africa and Asia, the Spanish discovered America, and as an incident thereof discovered and conquered the West Indies. Columbus reached San Salvador on October 11, 1492; in 1497, Americus Vespucius, a Florentine, sailing in a subordinate capacity in a squadron commanded by Alonso de Ojeda, wrote of the new land, and as a consequence the newly discovered country bears his name. In 1518 Cortez and in 1525 Pizzaro extended Spain's conquests in the New World, and in the succeeding years the continued activity of the Spanish fleet established Spain on the coasts of Africa, in the Canary's and the Indies, and transferred the empire of the Indian Seas to Spain. Then it was that Ferdinand, following the earlier example of the Portuguese, sought and obtained the Papal Bull from Alexander VI, which was issued at Rome on May 2, 1493, and which assigned to these states their respective spheres of sovereignty over the seas. By authority of this Bull, Ferdinand became possessed of the legal property in the seas and Kingdoms of the two Indies, and now turned his attention to the Barbary pirates who ravaged the coasts of Spain, taking refuge in the Harbor of Oran.

34. JUSTICE, *op. cit.* *supra* note 8, at 3.

In quick succession a fleet subdued Oran, while another defeated the Venetians, thus giving the Spanish a great preponderance in the Mediterranean. In 1535, Charles V of Austria, who had succeeded Ferdinand, thus uniting the Crown of Spain with the Germanic Empire, successfully resisted the effort of Barbarossa to seize the Kingdom of Tunis. In 1540, a similar effort to seize Algeria came to grief as the result of a terrific storm, with the loss of one hundred and fifty ships. Philip II, son of Charles, was equally unsuccessful against the Barbary powers. In the meantime, the Dutch had shaken off the Spanish yoke, with the aid of Queen Elizabeth. Furious with indignation, Philip forgot his troubles in the Mediterranean, and now undertook the conquest of England. Over a three year period he concentrated all the ships' carpenters of Spain, Portugal, and of Naples and Sicily, which then belonged to Spain, in a unified effort to build a fleet of tremendous size and force. This fleet, which put to sea in 1588, known as the Invincible Armada, consisted of one hundred and thirty ships, one hundred of which were the largest ever to appear on the ocean. It also had twenty caravels or light ships, which followed the fleet, maneuvering under its wings. The ships in this fleet were too large to be skilfully maneuvered, they were manned with poorly trained sailors, and were under the leadership of the Duke de Medina-Sidonia, who lacked both energy and practical experience. Counting on these weaknesses, the English avoided being boarded, used their artillery effectively, burned and took many ships and disabled the remainder. A storm which arose during the battle drove a number of the Spanish ships on the Scottish and Irish Coasts, where they were taken or sunk. Of the entire fleet only about twenty ships returned to Spain. Such a defeat naturally caused the mastery of the sea to pass to other hands.³⁵

c. Holland.—This was the situation when the decay of the Spanish mastery of the sea saw the Dutch, after many years of oppression as a Spanish colony, proclaim their independence in 1581, just seven years prior to the destruction of the Spanish Armada by the English.³⁶ Independence was not undisputed by Spain. After a long contest, in 1609, a truce which lasted for twelve years was finally declared. Having thus thrown off the Spanish yoke and established a federal republic, stimulated by a desire for revenge against their former oppressors who, while still strong, were now definitely on the decline, the Dutch commenced privateering, formed a marine and sought riches in trade, at the expense of the Spanish, whom they everywhere defeated, and of the Portuguese,

35. 1 AZUNI, *op. cit. supra* note 15, at 103-13.

36. FLOETZ, *MANUAL OF UNIVERSAL HISTORY* 331 (1911).

whom they detested.³⁷ This development went unopposed by England and France, which saw in the rise of the new republic nothing but the humiliation of the Spanish Crown. Accordingly, at first they assisted the Dutch in preserving their conquests and spoils, not then fully realizing their value. This course of action by the Dutch necessarily brought them into direct conflict with Portugal and Spain, which as yet claimed exclusive control of the respective areas assigned in 1493 by the Bull of Alexander VI, who, incidentally, was a Spaniard. Not yet having acquired a mastery of the seas, yet desiring to take advantage of peaceful trade as well as the profits of privateering, the Dutch were naturally inclined to favor the community of the seas doctrine,³⁸ which as of that time was directly contrary to the doctrine of the empire of the seas as followed by the ancient states, the modern states, which claimed dominion of the sea prior to the discovery of America, the Crusaders, and finally, those states, which, after 1492, asserted empires of the sea, to wit, Portugal and Spain. England, as the victor over the Invincible Armada of Spain, was just emerging as a sea power, and as yet in the main was content to limit her jurisdiction to the territorial seas. In the meantime, the discovery of America, now almost a century in the past, with the Spaniards claiming possession because of its discovery and settlement, followed by their inhumane treatment of the natives both in war and peace, had led in Spain as well as abroad to a discussion of the principles of war upon which their claims and their actions might be justified.³⁹

B. STATUS OF THE DOCTRINE AS TO THE DOMINION OF THE SEA AT THE BEGINNING OF THE SEVENTEENTH CENTURY

Such then, was the status of world affairs, when in 1598, the trade of the Dutch in the East Indies began, in opposition to the Portuguese and Spanish,⁴⁰ soon deteriorating into a series of privateering if not downright piratical practices, resulting in the capture of prizes, the title or legality of which could only be settled by a determination of whether the Dutch, under the existing theories as to the dominion of the sea, had a right to act as they had acted in the past and intended to act

37. 1 AZUNI, *op. cit. supra* note 15, at 113-18.

38. JUSTICE, *op. cit. supra* note 8, at 32.

39. For the developments along this line in Spain, see SCOTT, *THE SPANISH ORIGIN OF INTERNATIONAL LAW* (1928), in which the contributions of Francisco de Vitoria (1480-1546) and Francisco Suarez (1548-1617) to the development of an organized system of international law are admirably and succinctly set forth.

40. "We are between the discovery of America on the one hand, and the ending of the Spanish wars in Holland and Belgium, on the other; and in the interval between those two periods, the modern school of international law came into being, to meet the modern needs of nations." SCOTT, *op. cit. supra* note 39, at 20.

in the future. The determination of this question not only raised once again in most acute form the issue of the ancient doctrine of the mastery of the sea but also necessitated the formulation of the rules of international law which were to govern nations in both peace and war.

III. THE JOINT-STOCK CORPORATION, HUGO GROTIUS, AND THE OCCASION AND CIRCUMSTANCES UNDER WHICH THE DOCTRINE OF THE FREEDOM OF THE SEAS WAS FORMULATED

More specifically then, what was the immediate occasion and the particular circumstances which impelled Grotius to formulate and, after a considerable period of hesitation, finally publish his revolutionary theory as to the empire of the seas? The answer to this question is neither easy nor short, but is to be found in a combination of factors which will appear as the story unfolds.

With the return of the first Dutch fleet from the East Indies in late 1597, the route to this commercial area had been discovered and opened up. But the situation was fraught with potential difficulty, as the Portuguese regarded any attempt to trade in the Indies or to carry on traffic with the natives as a direct infringement upon their established rights. In opposing such encroachments they at first resorted to cunning which, proving of no avail, was followed by the use of force. In the ensuing struggle now barely beginning Dutch merchants and masters were treated as pirates. At first the Dutch, long on a friendly basis with Portugal, were reluctant to take up war. But gradually purely defensive measures necessarily turned into aggressive action, as a result of which Dutch sailors sometimes overstepped their instructions, attacked the enemy, and wreaked their vengeance but failed to recoup their losses, as the treasures of the Portuguese were carried in large ships, which avoided hostilities and sought only to reach the home port safely. For a few years this remained the status of affairs. But as each returning ship brought new tidings of violence on the part of the enemy, rancor added to self-interest created a determination among Dutch merchants and sailors to meet these aggressive tactics with superior force.⁴¹

A. THE JOINT-STOCK CORPORATION, GROTIUS AND THE PRIZES SEIZED AS AN INCIDENT OF TRADE IN THE EAST INDIES.—But a few individual ship-owners were powerless to supply this superior force. This was not only understood by these men, but it was fully appreciated by the government and the lawyers of the States-General. At this point, therefore, the

41. Fruin, *An Unpublished Work of Hugo Grotius*, in 5 *BIBLIOTHECA VISSERIANA* 8-10 (1925).

joint-stock corporation appeared upon the scene, in the form of the United East Indies Company, which was composed of several smaller companies, operating under an exclusive patent for trading with the Indies, founding Dutch power, constructing fortresses, recruiting soldiers, and making treaties. Authority was not given to capture prizes, but the undeclared design of the organization was to weaken the enemy, and how else could this be done except by destroying his trade and seizing his wealth. Even before the United Company was organized in 1602, ships sent out by Zealand ship-owners, subsequently included in the Company, had seized and brought in a Portuguese vessel as a result of a fight begun by the Dutch—a clearly illegal act. This occurred in May of 1602, and in October of the same year another prize was seized in violation of the master's instructions. Shortly, however, all pretense was discarded, and we find the government itself ordering the directors of the Company to instruct their admirals and captains "to damage the enemy in the Indies, their persons, vessels and goods in all possible ways."⁴² In such an atmosphere not unnaturally, we find the directors, in cooperation with the deputies of the States-General, secretly ordering one who was sailing with twelve ships in December, 1603, "to greatly damage the enemy, both by water and land." According to Fruin, that instruction marked the "turning point in the history of the trade with the Indies. From this moment the United Company ceases to be a mere trading company; it becomes a Power waging war and in the Indies it represents the Republic in the fullness of its authority."⁴³

The two prizes mentioned earlier were taken by the Zealanders. But now one, Captain Heemskerck, representing a company which was subsequently incorporated in the United Company, captured the large Portuguese galleon, the *Catherina*, loaded with a fabulous amount of booty. After the arrival of the galleon in the home port a huge sale was organized to dispose of the cargo. But during this period a law-suit was filed in the admiralty court to determine the right to the award of the booty. By mutual consent the Advocate-Fiscal of Holland, the Company of the eight ships and Admiral Heemskerck appeared as plaintiffs and requested citation of all unknown persons claiming any interest in the cargo. At the end of the required period of publication sentence was pronounced on September 9, 1604, and "the carack, together with all the goods which came out of it, were declared forfeited and confiscated."⁴⁴ As a result of this lawsuit, according to Grotius, Holland, as the party really waging the war, was entitled to the prize, but she waived her right in favor of

42. *Id.* at 11.

43. *Ibid.*

44. MINUTES OF THE ADMIRALTY OF AMSTERDAM, 9th September, 1604.

the members of the States-General and the boards of admiralty.⁴⁵ Grotius was so enthusiastic about the booty that he described the prize as "the finest and true fruit of the trade with the Indies."⁴⁶ In subordinating the honest profits from legitimate commercial traffic to the greater gains of privateering, Grotius was thus displaying an attitude of mind hardly conducive to the unbiased consideration of the issues raised by the capture of the *Catherina* on which he was shortly to prepare a report. More ethical by far in the same situation was the conduct of certain Mennonite directors of the Company who sold their shares and retired, preferring to disassociate themselves from an organization whose principal motive was not commerce, but war.⁴⁷

B. DE JURE PRAEDAE, OR THE LAW OF PRIZE.—This, then, was the situation which called forth the first literary efforts of Grotius in the field of international law. The Portuguese naturally used the conduct of those directors who withdrew from participation in the illegal profits as a reason for seeking the aid of Spain, who now lined up with Portugal for purposes of defense. All of these developments aroused great public consternation, both locally and throughout Europe. Accordingly, the directors of the Company felt the need of having their viewpoint presented in such a way as to show their compatriots, as well as all Europe, that the East Indian Company had a right to act as they had acted in the past and proposed to act in the future, and to expose the false pretenses behind which their adversaries, the Portuguese and the Spaniards, concealed their commercial rivalry.⁴⁸

It was only natural that the Company should employ the same attorney who had so ably represented it in its law-suit in the admiralty court concerning the award of the prize. That he was closely connected with the Company, and had direct access to their archives as well as its predecessors can hardly be doubted.⁴⁹ Having represented the Company in the litigation originating out of its first important prize, at the urging of the directors, he now set out to write a book which was not only designed to constitute a second defense of their pecuniary interests, but

45. The first prize was followed by another in 1604. Fruin, *op. cit. supra* note 41, at 31.

46. GROTIUS, *DE JURE PRAEDAE* 201.

47. Outstanding among the men of this character was Pieter Lijntgens, the head of a great commercial house of Amsterdam, who planned to set up a new company for peaceable trade. But the exclusive patent given to the United Company stood in the way. By way of circumvention, it was decided to seek a patent from Henry IV of France, who enthusiastically favored the scheme. But opposition of the original company, with which the States-General sided, resulted in delay after delay, until the possibility was buried with the murder of Henry IV. Fruin, *op. cit. supra* note 41, at 32-5.

48. Fruin, *op. cit. supra* note 41, at 35-6.

49. See Grotius' letter to his brother, *Epist. App.*, No. 450, 507.

also to crush the bitter criticism which prevailed both at home and abroad.

The book which was called forth in this critical hour of world history is now known as *De Jure Praedae*, or the *Law of Prize*. While only twenty-one years of age, it is generally believed that Grotius was one among but few lawyers of that day competent to handle the issues of law raised by the Admiral of the East India Company when he seized the *Catherina*—issues which involved an understanding of both the laws of war and the laws of peace. By the time the book was completed, however, having been written in the autumn of 1604, and the spring of 1605, the wave of criticism had substantially subsided, perhaps as a result of the withdrawal of the Mennonites, which eliminated all internal opposition on the part of the Company shareholders to the future capture of prizes. Moreover, public opinion had swung to the side of the profit-making enterprise, while at the same time underground gifts of part of the booty to the French and English Crowns had won the Company favorable consideration in those quarters. Under such circumstances, the occasion which had suggested the effort originally, had been dissipated, and accordingly the directors decided it was the wiser policy to promote their trade and secure their rights of war, not by argumentation, but by direct action.⁵⁰ Whatever the reason, the treatise, *De Jure Praedae*, obviously prepared against a background of local and European incidents and conditions as a piece of highly specialized pleading, in which the objective was evident before the writing began and for which the eager writer was undoubtedly generously compensated, was thus abruptly doomed to partial obscurity for a period of two hundred and sixty-five years.

What then were the scope and arguments advanced in *De Jure Praedae*? They were presented in three main divisions.

In the *first*, entitled *Dogmatica de jure praedae*, without reference to the case of the *Catherina*, which was the direct occasion of the book, Grotius deduced the right to wage war and take prizes as an incident thereof, from the broad and systematic development of the principles of natural law and the laws of nations.

The *second* division, under the title, *Historica*, describes the tyranny of Alva, the Spaniard, which drove the Dutch to rebel against its prince and to wage war against Spain and her allies. In addition, it pointed out the mistreatment of the Dutch sailors at the hands of the Portuguese in the East Indies and prior to the capture of the *Catherina* in 1603; and it pointed out other forms of misconduct by the enemy, in the form of slander, agitation of the natives, and finally open violence and murder.

50. Fruin, *op. cit.* *supra* note 41, at 37-40.

In consequence, observes Grotius, the long-suffering and generous Dutch were simply compelled as a matter of self-preservation to combat and rob the enemy.

In the *third* division, beginning with Chapter XII, *Mare Liberum*, the author sought to vindicate the conduct of the East India Company, in acting as they did in taking prizes, seeking to bring this portion of the argument within the purview of the *Dogmatica* of the first division. This is merely another way of attempting to prove that the Portuguese possessed no exclusive right to trade with the East Indies, or to barter with the natives thereof, hence they were unjustified in regarding the efforts of the Dutch to trade in the Indies as hostile acts, punishable as such. In the unprinted part of Chapter XII, Grotius goes one step further, and justifies the conduct of the Dutch, according to the rights of war, in fighting and robbing because the Portuguese sought to bar their trade.⁵¹

In remaining chapters Grotius demonstrates that capturing prizes under the circumstances was not only just, but in the interests of the Republic, which profited, at the expense of the wealthy Portuguese.

While we can understand the non-publication of the *Commentarius De Jure Praedae* upon its completion in 1605, it is difficult to understand why it was not published immediately after 1609. Fruin, the distinguished Dutch historian suggests that one explanation is to be found in the very inconsistency of publishing the whole work, after a part had appeared separately, to wit, *Mare Liberum* of Chapter XII of the principal manuscript. Moreover, observes the same commentator, that part of the manuscript completing the third main division of the work, had lost its currency, because the war, whose justice it had sought to prove, had by that time been justified by the twelve-year armistice concluded in 1609.

This in no way invalidated the first and second parts, called the *Dogmatica* and *Historica*, and doubtless Grotius looked forward to their subsequent appearance on some more appropriate occasion, perhaps in a slightly recast form.⁵² For a while it seemed as if this occasion was to present itself when the Board of the East India Company deliberated on September 16, 1610, on the question as to whether "they ought not to have the trade with the East India described historically by the advocate-fiscal Grotius or by some other learned person, to its honour and reputation and to those of the country, to have it printed when most convenient".⁵³ Thus, for the second time, the relation of Grotius to the Company as a special pleader appears in this resolution of the Board and doubtless the conception of such a history was a product

51. *Id.* at 40-2.

52. *Id.* at 46.

53. *Id.* at 47. According to Fruin the resolution was never printed.

of Grotius' own mind. This is indicated by the fact that when the remainder of the Grotian papers were sold at the Hague in November, 1664, a collection of documents bearing on the Indian trade was found in the same bundle with the *Historica* of the *Commentarius*, ready for the pursuit of the project, which was never undertaken, becoming a victim of the Company's procrastination. This was a tragic loss, as it leaves only the *Historica* as a study of the Indian trade and travel.⁵⁴

Intended to show the injustice of the Portuguese, and the innocence of the Dutch, it follows that these two divisions of *De Jure Praedae* constitute a detailed indictment of the Portuguese on one hand and a stalwart defense of the Dutch East India Company on the other. The lawyer of the company, like all counsel, emphasized those arguments favorable to his client, and omitted any mention of those favorable to his adversary. This aspect of special pleading will take on added importance when we come to consider the relation of the first two divisions of *De Jure Praedae* to the bulk of Grotius' work, *De Jure Belli ac Pacis*, which did not appear until 1625, and was, as asserted by the author himself, written upon a very high plane, with no reference to or relationship with local or European incidents.⁵⁵

Contrast the alleged long suffering of the Dutch at the hands of the Portuguese, as described by Grotius, with the stories of the Dutch sailors, which reveal contempt for the Indians and hatred for the Portuguese and Spaniards. Under such circumstances, when passion ran high and profits were at stake, patriotism and commercial interest were a unit, and anything the enemy did was wrong. Now Grotius was bound to have known this condition and hence "he cannot be acquitted of wilful partiality in writing his narrative. As a rule he speaks the truth and nothing but the truth, but not always the whole truth."⁵⁶ Thus, for example, Grotius states on page 262 of *De Jure Praedae* that Heemskerck treated the crew of the *Catherina* well, and gave them liberty without ransom, but he fails to mention that that was done according to the capitulation terms, and on condition that the crew be returned to Malucca, thus showing that the good faith is attributal to the Admiral, and not to the generosity of the Dutch, as falsely represented by Grotius. And worse than merely telling only part of the truth is the characteristic of intentionally representing the enemy to be worse than he was. Grotius was guilty of this when he ascribed the kidnapping and execution of certain Dutch sailors as an example of violation of the laws of war. Fruin points out that among his papers sold at the Hague

54. *Ibid.*

55. *Id.* at 48.

56. *Id.* at 49.

was a document showing that these men had made a prior attack on the Portuguese without a declaration of war, which amounted to an act of piracy.⁵⁷ In concluding this phase of the matter Fruin aptly observes: "And now that we have once found in what manner DeGroot uses his documents, we shall henceforth be on our guard against allowing his representation of matters to testify against the enemy without further confirmation."⁵⁸

C. *MARE LIBERUM, OR THE FREEDOM OF THE SEAS.*—Doubtless this outcome of his effort was a severe disappointment to Grotius, for he dropped his study in the field of public law for a time. But in December, 1607, he was appointed Advocate-Fiscal of the Court of Holland and Zealand, which again directed his attention to constitutional law. In the same year peace negotiations with Spain began again, but although Spain was willing to recognize the independence of the States, a deadlock developed because Spain insisted upon prohibiting and the States upon maintaining trade with the East Indies. It began to appear that the States, greatly desiring peace, would surrender to the demands of the Spaniards. The East India Company, apprehensive of such a result, caused the publication of a series of pamphlets vindicating their title and emphasizing the importance of the trade, which development doubtless served to remind Grotius of the completely finished but unpublished manuscript, available but not called for, and his mind must have repeatedly adverted to that part of the work which exposed the claims of the Portuguese to exclusive trade on grounds of natural right and under the laws of nations. It is not surprising then to find that under these circumstances, he reviewed the treatise, and determined to publish separately Chapter XII, dealing with the freedom of the seas.⁵⁹

D. *The Battle of the Books.*—Published therefore in the midst of the negotiations between Holland and Spain in 1608, with the avowed purpose of making the Spaniards more reasonable and the Dutchmen firmer, it seems extremely doubtful whether *Mare Liberum* appeared in time to accomplish that objective.⁶⁰ Nor did it when first published attract great attention. According to Fruin, who made a most extended

57. *Id.* at 50.

58. *Ibid.*

59. *Id.* at 41-2.

60. "Chronology, methinks, refutes his (Grotius') assertion; for the publication cannot have taken place before the first days of March (on the 18th of February he sent Heinsius the preface and the appendices) and as early as the 18th of March Jeannin reported to the States on the progress of the negotiations, from which it appeared that everything, also the difference about the trade with the Indies, had been arranged during the Armistice. How, then, can De Groot's argument have influenced the course of affairs?" Fruin, *op. cit.* *supra* note 41, at 42.

and significant study of the problem, the English and French ambassadors stationed at the Hague at that time, made no mention of the book in their dispatches to their respective governments. And the event appears even to have gone without notice in the Dutch publications of the day. Perhaps this may be attributed to the fact that it appeared anonymously, immediately after an armistice between Holland and Spain had been signed on April 9, 1609, which was to last for a period of twelve years. Moreover, there was nothing in the book that was startlingly new or calculated to center the attention of the world upon its implications. In refuting the claim of the Portuguese, it merely adopted the views earlier expressed by the distinguished Spanish theologians, Francisco de Vitoria (1480-1546) and Francisco Suarez (1548-1617), and the celebrated lawyer and juriconsult, Fernandos Vázquez (1509-1566). Moreover, the gospel of the freedom of the seas which he advanced in favor of the right of the Dutch to trade in the East Indies, as opposed to the Portuguese, who claimed dominion over the seas in question, was the same as that presented four years earlier by the English East India Company in a petition to King James, who at the time was negotiating peace with Spain, in which the right of the English to trade with the Indies was vindicated on exactly the same grounds as those now relied upon by the author of the anonymous *Mare Liberum*. Originally published in Latin by Elzevier, of Leiden,⁶¹ it was not even translated into the native tongue of the author, although his identity was an open secret.⁶² But this condition was not to prevail for long. For only a few weeks after the appearance of the publication the King of England issued an edict in which all fishing on the coasts and in the seas of Great Britain, Ireland and other surrounding islands, was prohibited, except under a license from his Majesty or the commissioners appointed by him. While the issue thus raised was not that of the freedom of the seas, nor the right of navigation, which Grotius had treated, but the narrower question as to the right of fishery in a special part of the sea, it followed that the Grotian doctrine, as laid down in *Mare Liberum*, if pressed to a dryly logical extreme, would make wholly untenable such a minor claim to the exclusive possession of the sea even though for fishing purposes only.⁶³ From that moment on, in the eyes of English authors, and in the eyes of the world at large, *Mare Liberum*

61. The books printed by Elzevier have become highly prized among discriminating book collectors as fine examples of early printing.

62. See Introductory Note by James Brown Scott, in GROTIUS, *THE FREEDOM OF THE SEAS* (1916). Translated with a Revision of the Latin Text of 1663 by Ralph Van Deman Magoffin.

63. Fruin, *op. cit.* *supra* note 41, at 44.

began to assume larger significance, and soon we find successive, but relatively ineffective, efforts to silence Grotius. The first effort came in 1612, when William Welwood published his Abridgment of all the Sea Laws, in which he maintained the English view of the issue⁶⁴ in a rather unscientific manner. Grotius prepared a reply to Welwood's first attack,⁶⁵ which for some reason was not then published, being discovered in 1864, at the same time as the commentary *De Jure Praedae*, and published in 1872.⁶⁶ Far more significant was the defense of the English position in *Mare Clausum* prepared by the distinguished lawyer, scholar and publicist, John Selden in 1617 or 1618, and offered to King James, only to have its publication delayed until 1635, at which time it finally saw the public light by direct order of King Charles I, to whom it was dedicated.⁶⁷ This battle of the books, viewed from the standpoint of the acceptance of the respective positions advocated by the two antagonists, resulted in a victory for the Dutch gladiator.⁶⁸

After Selden had prepared his book entitled *Mare Clausum* in 1617-18, and its publication had been delayed, Grotius, between 1622 and 1625 and while in Paris, completed his famous book, *De Jure Belli ac Pacis*, or the Law of War and Peace, upon which his claim to fame as the father of international law is premised. As the story goes, in November, 1622, he began collecting the necessary materials and formulating the plan of the work. Six months later, or in April, 1623, he began systematic work on the project, making haste slowly. Thirteen months later, or in June, 1624, it was substantially completed, except for the

64. Introductory Note by James Brown Scott in GROTIUS, *op. cit. supra* note 62, at viii, n. 1.

65. Title XXVII, pp. 61-72, dealt with the community and property of the seas. Welwood also published a second work two years later in Latin, entitled *De Dominio Jurisbusque a Dominium praecipue spectantibus Assertia ac Methodica*.

66. This reply was entitled, *Defensio Capitis Quinti Maris Liberi Oppugnati a Gulielmo Welwodo Juris Civilis Professore, Capite XXVII ejus Libri Scripti Anglica Sermonem cui Titulum Fecit Compendium Legum Maritimarum*. This manuscript is now available in the Leiden University.

67. The dedication read: "There are among foreign writers, who rashly attribute your Majesty's more southern and eastern sea to their princes. Nor are there a few, who following chiefly some of the ancient Caesarian lawyers, endeavor to affirm, or beyond reason too easily admit, that all seas are common to the universality of mankind." GROTIUS, *op. cit. supra* note 62, at ix.

68. "If it cannot be said that Grotius wears his learning 'lightly like a flower,' the treatise of Selden is, in comparison, over-freighted with it; the *Mare Liberum* is still an open book, the *Mare Clausum* is indeed a closed one, and as flotsam or jetsam on troubled waters, Chapter XII of the Law of Prize rides the waves, whereas its rival, heavy and water-logged, has gone under." *Ibid.*

drafting of a final copy.⁶⁹ In the execution of this work, Grotius deliberately refrained from all references to the events of this period, and from any adverse criticism of the deeds of nations or their rulers, of which he was fully conversant, either as a student of jurisprudence, philosophy and theology, or as a witness at first hand. In paragraph 58 of the Prolegomena of *De Jure Belli ac Pacis*, Grotius, in referring to this very matter, declared:

"The reader will do me injustice, if he judges me to have written with a regard to any controversies of our own time; either such as already exist, or such as can be foreseen as likely to arise. I profess, in all sincerity, that, as mathematicians consider their figures as abstracted from body, so did I, in treating of Rights, abstract my mind from every particular fact."⁷⁰

Thus, it must be observed, that Grotius purported to be developing the eternal and immutable principles which were to govern the conduct of mankind in peace and war in the age in which he lived and in the ages to come; he was operating on a plane completely above this mundane world; he was extracting the eternal verities of the law from nature itself, completely separated from what are today known as the realistic facts of life.

If, in making this profession for posterity, Grotius was intellectually honest and sincere, then he is entitled to have his contribution to international law measured on that plane; but if this profession, needlessly made, turns out to be false and the product of insincerity, then it may cast some doubt, although not necessarily so, upon the total validity or integrity of the views he expressed in *Mare Liberum* as well as those developed in *De Jure Belli ac Pacis*.

In reality then, was Grotius searching for the eternal principles which were to regulate international relations, or may his failure to deal with or make any reference to past or present questions of law having a direct bearing on his topic, be explained on some other grounds? The answer to the first question must be in the negative, for two reasons. In the first place, he was living in Paris at the time, under the direct protection of the French King, having been exiled from his native land.⁷¹ As a consequence, and as a sheer matter of self-preservation, he had to steer clear of matters which concerned the interests of France or its King. In the second place, having ostensibly set himself the task of writing for posterity, and not for his contemporaries, it became necessary to launch his enterprise on the plane of the eternal verities,

69. Fruin, *op. cit. supra* note 41, at 55.

70. See GROTIUS, *DE JURE BELLI AC PACIS* xxxix (1853). Accompanied by an Abridged Translation by William Whelwell, with the Notes of the Author, Barbeyrac, and others.

71. Fruin, *op. cit. supra* note 41, at 55.

and to appear to ignore the relation of the principles presented to the events of the day at home or abroad. By pursuing such a policy, by remaining silent as to his opinion concerning current affairs, "which is far removed, indeed from true impartiality, from judging without respect of parties,"⁷² was Grotius able to increase the value and prestige of his work. Fruin feels that he may have realized his objective "in the eyes of his contemporaries,"⁷³ who may have been pleased because no one was condemned or criticized. He had remained aloof and above the factions of the day in the field of abstract principles, as the King above the warring groups under his rule. If the King does wrong, not he, but his ministers are responsible. So, likewise, with Grotius. The validity and scope of his arguments might remain unquestioned, yet their effect as applied to the particular events of the day might be successfully challenged. As to whether the conceptions of law which Grotius thus purported to develop in such a rarified state, can be eternally and absolutely true, aside from the background of actual conditions against which they were drawn up, is doubtful. Their chief significance lies in their importance to the age in which they were written; to all other ages their significance is mostly historical, as evidence of what the law then may have been and not as evidence of what the law may be today.

If this be true, in order to measure the value of the work, we need to discover how far the author and his message reflected the spirit of his times. And about this crucial matter Grotius has been strangely silent, being content to observe in letters to his friends that his sole inspiration was to reduce the lust for warfare which seemed to prevail among princes and nations—a declaration which is too general to satisfy one seeking the truth. We desire to know why Grotius sought "to place his doctrine outside his time, to insure eternal authority to it; we wish to consider it as the fruit of his time, in order to fairly determine its relative value."⁷⁴

E. *The Relationship Between De Jure Praedae (1603-1604) and De Jure Belli ac Pacis (1625).*—Was the latter work, upon which the author's chief claim to fame rests, written on the high plane as professed in the Prolegomena, entirely disassociated from the events in Holland and the world at large, or was it, like practically all other great works, reflective of the age in which it was produced?

The answer to these two questions is to be discovered in a comparison of the conceptions of international law as developed in the earlier and later work. According to Fruin, the *Dogmatica de jure praedae*, the most significant portion of the earlier work, was identical with the first

72. *Id.* at 6.

73. *Ibid.*

74. *Id.* at 7.

half of *De Jure Belli ac Pacis*,⁷⁵ which the author had, by his protestations, led us to believe was the sole product of his efforts between April, 1623 and November, 1624, or only a period of thirteen months, when, as a matter of fact, it was the joint product of the effort which Grotius originally expended in the original draft of *De Jure Praedae*, as counsel for the East India Company in 1603-1604, plus his subsequent effort in making such revision of the original as would be natural at the hands of the same author of more mature years, and rendered more conservative by the exigencies of exile and the hope for permission to return home. The truth seems to be, that from the moment of the publication of *Mare Liberum*, making the publication of the entire work impossible, Grotius had entertained the prospect of revising the *Dogmatica*, the principal portion of the original work, and hence lapsed into a twenty-year period of silence. During this period he read widely and during his stay in prison in Holland prior to his escape to France, he read *Jus Belli* and *Advocationes Hispanicae*, both written by Albericus Gentilis, from whom many authorities assert, he borrowed much. And then, shortly after he reached Paris he began work on *Jus belli ac pacis*, a title taken directly from Cicero.⁷⁶ In the work now begun Grotius undoubtedly had before him his earlier manuscript, *De Jure Praedae*, adopting the greater portion of it in slightly modified form. This required no preliminary study, but merely a slight recasting to remove any reference which might have revealed its original background. Only the latter part of the work under the title, *Jus Pacis*, was originally composed, and this explains why such a short time was required in completing the first draft, and why the work, as a whole, lacks unity,⁷⁷ and in quality fails completely to measure up to the standards set in the earlier effort. Fruin ascribes this failure to the fact that in the earlier work Grotius limited himself to a single task of proving that the East India Company had a right to take booty from the Portuguese in the East Indies, whereas, in the latter work, he was seeking to develop an entirely new science of international law, the out-

75. *Id.* at 54.

76. ORATIO PRO BALBO cap. 6.

77. Fruin, in referring to the point observes: "In my opinion the work does not form a well composed and complete whole. I must grant Rufendorf (*Specimen controvers. cap. IV, § 1*) to be right when he says that the author has not discussed everything that his subject comprises and on the other hand is treated of details of the law of war which had better been omitted in a work of such a general nature. This is especially evident when we compare it with the composition *De Jure Praedae*. We then discover that the law of war is the real nucleus of the whole work and that what was added to it—nearly all the second book—destroys the original connection without substituting another firm union." Fruin, *op. cit. supra* note 41, at 56.

lines of which were not too clearly drawn even in his own mind.⁷⁸ In other words, if the war in the Indies was treated as a private war of the Company, or as merely a portion of the war carried on by the Republic against King Phillip and his subjects, in which the role of the Company was merely that of subject, the proof would have to be different. If the former were the situation, then Grotius had the task of proving that a private individual could wage war and take prizes and that the Company could do likewise under the circumstances, whereas, if the latter were the case, then the right of the Republic to wage war against the Portuguese would have to be established, and also, that in so doing it could make use of the Company, turning over to it such booty as it might capture. But before these issues could be determined the whole law of war had to be considered; whether the objection that no Christian war could be waged and prizes captured, could be satisfactorily surmounted; whether war was lawful, and if so, for what reasons, and in what manner, and for what purposes could it be waged? Moreover, the rights and obligations of the subjects of the contending powers had to be clarified and fixed, and in this particular case with reference to the right of taking prizes. In thus covering the whole gamut of war and peace, and organizing the materials into a unified system, Grotius observed the rules of artistic form, marshalled his arguments in such a way as to demonstrate the points which he desired to make, discussed and reported, at least to his own satisfaction, those objections of others which obstructed the course of his argument, at the very point necessary to give additional emphasis to the thesis sought to be demonstrated. In short, the arguments were marshalled and presented in the systematic form of a brief or a piece of special pleading, which in truth it was. Aiming at the proof of the right of war, he cast his ideas so as to achieve that objective, and this explains why, when he came to the task twenty years later of transforming his pleadings into a text book on the law of war and peace, it required no long period of preparation. Except for a less absolute tone, *Jus Praedae* and *Jus Belli* are substantially identical, a difference easily attributable to the fact that when he wrote the earlier work he was a youthful citizen of a state which had just asserted its independence by rebellion, whereas when he made the revision, he was a regent in exile in Paris as a result of a rebellion against the established Dutch government growing out of religious discord. This probably explains one of the few variances between the earlier and later work, to wit, as to the right of subjects to rebel against their prince.⁷⁹

It is interesting to know that Grotius did not regard his *Mare Liberum*,

78. *Ibid.*

79. *Id.* at 57-9.

or the remainder of the work, *De Jure Praedae*, of which it was a part, of great weight. Most assuredly, he regarded his *De Jure Belli ac Pacis*, and not the earlier work, which remained unknown to the world for two hundred and sixty-five years, as ranking far above the original contribution. This was natural, as being an afflicted man in exile from his native land, sobered by the ingratitude of his own people, he undoubtedly rejoiced at the prospect that posterity was not to judge his work on the earlier product, *De Jure Praedae*, written while he was an inexperienced youth, filled with high ideals, and out of a desire to vindicate the conduct of his countrymen, but rather was to base its judgment on *De Jure Belli ac Pacis*, the latter effort which, so far as the world was to know for two hundred and sixty-five years, was the product of a mind tempered by bitter experience, and filled with the wisdom which comes only from long years of keen observation and sober reflection.⁸⁰

Thus as a condition precedent to a reappraisal of the total validity of Grotius' work on the freedom of the seas, we have been compelled to survey somewhat in detail his various contributions in the field of international law, in order to acquire a picture of the background against which he worked, and by which the value of his contribution on the freedom of the seas, as well as to the law of nations, must be measured.

IV. AS THUS FORMULATED AND PROMULGATED WHAT WAS THE OBJECTIVE AND THEORETICAL BASIS OF THE GROTIAN DOCTRINE?

The primary objective of Grotius in publishing *Marc Liberum* in 1609, was to prevent Holland, then engaged in negotiating a twelve-year armistice with Spain and Portugal, from acceding to the claim of their adversaries to the exclusive control of the Indian Ocean and of that washing the West Coast of Africa. As Holland was in no condition to sustain its position by war, Grotius set out to do so by formulating and promulgating a new theory of the freedom of the seas, under which Holland would be legally justified in carrying on trade with the East Indies.

A. THE THEORY OF THE GROTIAN CONCEPT.—With this objective clearly in mind, we may now turn to the theory invoked by Grotius to bring about its realization. The doctrine advanced was that by the law of nations navigation was free to all persons, which he purported to derive from the law of nature. The theory ran somewhat as follows: As the law of nature arises out of Divine Providence, it remains immutable. Under this theory of natural law, from which Grotius derives the law of nations, originally both sea and land were the common property of

80. *Id.* at 70.

mankind, and therefore every one was free to navigate the seas. The theory was supported by two arguments, one, that because of the fluid character of the sea it was incapable of occupation or enclosure, the other, that its products could not be exhausted by general or promiscuous use, either by navigation or fishing, hence the sea was necessarily free. Mindful of the fact that with reference to land there was a partial abandonment of the natural law by which it was at first held in common, only subsequently to be distinguished and divided, and finally separated from the primitive community of use, Grotius declared that the secondary law of nations operated upon land differently than upon the sea, because of expediency and necessity.⁸¹ In short, said Grotius, if the rule of immutability were applied to land, or to a river, their products would soon be exhausted. Under the subjects of navigation, ownership of the sea, and the right to trade, Grotius examines the various titles under which Portugal claimed its empire of the Indian seas, and marshalls his arguments in favor of his avowed thesis. Under each heading, he denies the right to title by discovery, by occupation, by papal gift or by war, and concludes that the Portuguese were completely unjustified in their claims, and that therefore the Dutch had, as against the Portuguese, the right to trade freely with the Indies, and, if necessary, in order to do so, wage war, which could be justified as legitimate under the principles of the law of nations.⁸²

The doctrine thus announced was in direct opposition to that held by the ancient and modern states, as well as to the pretensions of the British Government to the exclusive sovereignty over the waters surrounding the coasts of Great Britain. Selden, as we have seen, undertook to refute the thesis of Grotius in his *Mare Clausum*, written in 1617-1618, but not published until 1635. He sought to point out that in accordance with the natural law as well as the law of nations, the sea, like the land, could be occupied, pointing out that the right which foreign vessels had to travel waters belonging to other nations was analogous to similar privileges sometimes imposed upon landed proprietors.⁸³ To the objection advanced by Grotius that it was impossible to establish limits or franchises in the seas, Selden maintained with the better reason that parallels and meridians could serve as frontiers as well as walls, rivers or trenches.⁸⁴ But while Selden supported the right of appropriations in

81. GROTIUS, *THE FREEDOM OF THE SEAS* 47-61 (1916). Translated with a Revision of the Latin Text of 1633, by Ralph Van Deman Magoffin. The whole argument is taken word for word from Vázquez. 1 SCOTT, *LAW, THE STATE, AND THE INTERNATIONAL COMMUNITY* 539 (1939).

82. GROTIUS, *op. cit. supra* note 81 at 47-61.

83. SELDEN, *MARE CLAUSUM* 123-4 (1663).

84. 1 CALVO, *LE DROIT INTERNATIONAL THEORIQUE ET PRATIQUE* § 351 (5th ed. 1896).

theory, he took the position that for a state to forbid navigation of its seas by other peoples would be recreant to the duties owed to humanity. Although Selden's arguments were logically superior to those of Grotius, and displayed vast erudition, and a broad understanding of history, geography, nautical science and law, his efforts were powerless to stem the tide in favor of the Grotian doctrine, for reasons which will shortly appear. As we shall see, it was not the force of argument or logic which carried the day for Grotius, since subsequent exponents of the positivist doctrine of international law, rightly or wrongly completely repudiate the concept that international law can be the product of natural law,⁸⁵ although they favored the concept of free seas. As usual in such cases the truth probably lies somewhere in between the extremes of the two theories. Thus, some rules of international law may have a foundation in natural law, whereas others may rest on agreement between the states making up the international community.⁸⁶

In the final analysis, it may well be doubted whether the theories, advanced by the various writers, that the sea was or was not free because susceptible or insusceptible of occupation, had any great bearing upon the determination of the issue. Perhaps the restrictive movement against dominion of the sea was accelerated by the theories advanced in the books, but these theories, as such, never achieved general acceptance "outside the realm of books."⁸⁷

V. THE GROTIAN DOCTRINE AS APPLIED IN THE TWO HUNDRED YEAR PERIOD FOLLOWING ITS ANNOUNCEMENT

What, then, was the effect of the Grotian doctrine of the freedom of the seas? It is submitted that *Mare Liberum* was neither immediately nor subsequently of any direct practical effect; its indirect impact may have been decisive. As we have pointed out there is grave doubt as to whether it appeared early enough to affect the 1609 armistice negotiations. Although the work of Grotius, measured by knowledge and

85. See the view of Anzilotti's theory as applied to this topic set out in SERENI, *THE ITALIAN CONCEPTION OF INTERNATIONAL LAW* 217-20 (1943).

86. "The [positivist] doctrine intended to proceed to a strictly legal analysis of international law as a reaction to natural law and political and moral infiltrations. Its point of departure was that all international law is voluntary, but this principle was gradually abandoned. Some rules of international law may have a foundation other than the will of the states. The problem is to ascertain which these rules really are and to reject from the field of positive law the principles and rules not based on the will of the states whose existence had been arbitrarily affirmed by the doctrine of natural law." SERENI, *op. cit. supra* note 85, at 250.

87. HALL, *A TREATISE ON INTERNATIONAL LAW* 189 (8th ed. 1917).

method was perhaps inferior to that of Selden, "it had the incontestable merit of having proclaimed the freedom of the seas and of having entered directly into the spirit of modern civilization."⁸⁸ In other words, it was the timeliness of the message rather than the message itself which gave it what currency it enjoyed. By contrast, Selden, the better logician, who was less empirical, yet more profound than his adversary, achieved a result directly contrary to what he had in mind in his *Mare Clausum*. Although he declared it would be unwise for a nation exercising dominion over the sea to deny the right of innocent passage to another friendly power, by the very nature, extent and force of his arguments, he confirmed the British Crown in its announced policy of exercising dominion over the British seas. In the execution of this policy, the British required foreigners desiring to fish in their seas to obtain a license, and when the Dutch, in 1636, sought to fish without a license, they were attacked and compelled to pay £30,000 for permission to carry on.⁸⁹ Ships entering upon British seas were required to accord honors of the flag as a symbol of British maritime sovereignty. In short, the conduct of the British was so brutal and outrageous, so exclusive and dominating, over the succeeding years, as to provoke a strong reaction in favor of the Grotian concept, with the result that the weaker maritime powers, almost as a matter of self-preservation, abandoned the banner set up by Selden.⁹⁰ Thus, indirectly the mere existence of the Grotian theory may have exerted a negative influence in determining the issue. But in truth the battle for control of the seas had been transferred from the books, where the doctrine was alternately supported and attacked upon both naturalistic and positivist theories of the law,⁹¹ to the ocean highways of the world, where, during the Seventeenth Century, despite the vigor with which England persevered in her ruthless policy of exclusiveness and dominion, the tide gradually began to drift in the other direction.

Thus, during the period of the Renaissance, when international law was in process of creation, the common European theory with respect to the sea was grounded on the idea that it was possible to acquire property in it, and in practice most seas were regarded as in fact appropriated.⁹² But in the Sixteenth Century, the exorbitant claims of Portugal and Spain had caused a reaction, which in the field of argument produced *Mare Liberum*, while a more practical response developed in the predatory voyages of Cavendish and Drake, and in the trade which the Dutch

88. CALVO, *op. cit. supra* note 84, at 476.

89. HALL, *op. cit. supra* note 87, at 183.

90. CALVO, *op. cit. supra* note 84, § 350.

91. See SERENI, *op. cit. supra* note 85, c. XII.

92. HALL, *op. cit. supra* note 87, at 180.

carried on in the East Indies. When Queen Elizabeth was faced by complaint that English ships were intruding in the waters of the East Indies, she rejected such complaints, refusing to acknowledge that Spain could bar her subjects from "freely navigating that vast ocean, as the use of the sea and air is common to all; neither can a title to the ocean belong to any people or private persons, for as much as neither native nor public use and custom permitteth any possession thereof."⁹³ Consistency, it will be observed, was no virtue of Elizabeth, for the principle asserted, if correct, was equally applicable to the British as well as the Indian seas, and it was substantially the same as that which formed the basis of the Grotian attack upon the Portuguese in his *Mare Liberum*. Perhaps the Dutch doctrine as advanced by Grotius went further than necessary to destroy the Portuguese and Spanish pretensions, because Holland, herself, was in effect a prisoner within the British seas. Although the world was anxious to secure the right of navigation, it probably was not desirous of depriving states of minor rights of property and the general rights of sovereignty incidental to national ownership. Thus, Selden, who maintained the right of appropriation on principle and as a customary fact, was favorable to free navigation on grounds of humanity. In practice, the extent of dominion exercised by various nations was determined by the fact of effective possession or by treaties. Except for the fact that the seas became safer, this was the situation during the earlier part of the Seventeenth Century. By the end of the century, although in theory England upheld her title to the British seas, there was a wide difference between the theory and the practice, under which proprietary rights over the open sea were everywhere dwindling almost to the vanishing point. Thus, in the negotiations with the United States concerning the issue as to the right of Great Britain to search American vessels in 1803, no progress was made because the English Crown could not bring itself to concede freedom from search in the British seas.⁹⁴ The acquisition of Alaska led the United States to claim a separation of the Behring Sea from the Pacific Ocean, and along the coast of Alaska a space 1,500 miles long and 60 miles wide. England took exception to this claim and the ensuing controversy was settled by arbitration, under which the proprietary claim of the United States was dropped in favor of a claim to jurisdictional rights of control,⁹⁵ the basis of which is entirely different from claim of dominion.⁹⁶ Turning to the history of

93. CAMDEN, HISTORY OF ELIZABETH (1850).

94. MR. KING TO MR. MADISON, BRITISH AND FOREIGN STATE PAPERS, 1812-1814, 1404.

95. HALL, *op. cit. supra* note 87, at 187.

96. On the distinction between dominion and jurisdiction, see SERENI, *op. cit. supra* note 85, at 69.

treaties during the Eighteenth Century, we find that the tendency was to restrict the scope of maritime occupation, accompanied by an admission that the open sea could not be possessed, being indivisible, inexhaustible and productive. Ignoring the fact that under this theory all parts of the sea would be free it would appear that the right of maritime occupation should have been completely denied. But this is not what happened. Enclosed seas, straits and littoral seas were held susceptible of occupation. In other words, England, as well as other nations, found it physically impossible to appropriate all the seas. Although in theory they might claim domain, there was in fact a wide difference between the theory and the degree to which proprietary rights over the sea could be maintained. It was less expensive and more efficient to have each nation protect and safeguard those seas nearest its shores in order that commercial traffic could safely flow to and fro. In short, while Grotius and his antagonists were carrying on the battle of the books, where freedom of the seas existed at least in theory, the real doctrine of freedom of navigation was being hammered out as a rule of convenience on the anvil of commercial, naval and political rivalry. Under this rule, the true key to the development of the law was to be sought in the principle that maritime occupation must be effective in order to be valid. When considered in the light of the fact that the proprietor of territorial waters may not lawfully deny innocent passage to foreign ships, it reconciles the interest of a particular state with those of the international community of states at large. Thus, the principle of the freedom of the seas, as taught in the universities by Bartolus and Baldus, as debated and clarified within the theological cloisters by Victoria, Suarez, and Azquez, and as modified by the juristic learning and philosophy of Gentili and his successors, has gradually emerged from the field of theoretic discussion, as carried on in the books, to enter triumphantly upon the modern scene as the accepted doctrine of all nations—a product, not a theory, but of the accumulated practical experience of seafaring men.

Under this doctrine, the public external law of both Europe and America recognizes that no nation may exercise exclusive dominion over the high seas, that the flags of all nations which observe the rules of international law may enjoy the same rights and liberties, that superior naval power does not give one state pre-eminence over another, that the violation of the rules concerning the freedom of the seas by any nation is subject to condemnation; and that unusual police measures by way of supervision, the product of treaties relative to the ships of one or more nations, are the creation of the contracting parties.

VI. LIMITATIONS UPON THE DOCTRINE OF THE FREEDOM OF THE SEAS

In order to measure the limitation upon the principle of free seas, as promulgated by Grotius, it now becomes necessary to consider the true origin of the concept, the distinction between dominion and jurisdiction and the derivation of the conception of the territorial sea.

A. THE TRUE FACTS CONCERNING THE HISTORICAL ORIGIN OF THE FREEDOM OF THE SEAS CONCEPT.—According to Sereni, the conception of freedom of the seas is directly traceable to the Roman doctrine of the *res extra commercium*, or things beyond commerce. But the Romans did not recognize this principle in practice, as they considered the entire sea subject to their dominion, which could be acquired either by investiture by the emperor, which was of feudal origin, or by acquisitive prescription, which was of Roman origin.⁹⁷ Thus, for example, Rome claimed complete dominion over the Mediterranean, referring to it as *mare nostrum*, and exerted such control as was necessary to repress piratical activities and to exclude competitors, such as the Carthaginians and later such peoples as were not federated with the empire. Although the Roman legal authorities, such as Marciaius, Paulus and Ulpian taught that the sea was a *res extra commercium*, they did not intend to imply that it could not be held in dominion by a sovereign government, but were merely affirming that it could not be the subject of private property.⁹⁸ In Roman law, therefore, a distinction was made between *res extra commercium* and *res in commercio*, the latter susceptible of private appropriation. And this distinction, a product of Roman private international law, was transposed by the Italian juriconsults of the Renaissance to the sphere of international relations, for the purpose of and as a foundation for asserting that there were parts of the earth's surface which could not be subjected to exclusive dominion by any state, to wit, the high seas.⁹⁹ By asserting such a principle, these jurists were not saying that the high seas were not subject to the empire of any law, but were merely saying that no state could lawfully bar other states from making free use of the high seas for navigation or fishing. If this were not true, no country could have punished piracy and other crimes on the high seas, which failure would have destroyed all security of navigation. What they really meant was that in practice, sovereignty over the high seas was beyond the reach of and could not be acquired or maintained by any state, whereas juris-

97. See SERENI, *op. cit. supra* note 85, at 68, 71.

98. 3 GIDEL, *LE DROIT INTERNATIONAL PUBLIC DE LA MER* 35.

99. "We have here a typical example of the procedure frequently followed by the Italian jurists of the Renaissance, consisting of the creation of entirely new principles by means of an arbitrary interpretation of Roman texts." SERENI, *op. cit. supra* note 85, at 68.

diction to punish wrongs and to repress piracy, was acquirable, if not indeed, an incidental or inherent power of every state.

B. DOMINION AND JURISDICTION DISTINGUISHED.—Thus, the principle of free seas and the distinction between dominion and jurisdiction, were both products of the early Renaissance period. As such they were bound to undergo a revolutionary process paralleling the change in Europe's political status. This was particularly true as to jurisdiction. In the imperial period, according to the glossators, it meant that jurisdiction over the high seas belonged only to the emperor,¹⁰⁰ but this conception gradually changed with the decline of the empire and the rise of the great independent maritime powers. This transformation is evidenced in the works of Alberico Gentili, who lived and taught in England while the spirit of nationalism was producing independent states. Under his influence the law governing the high seas ceased to be the law of the empire, and became international law. In reaching this result Gentili followed the precepts of natural law, in accordance with which the rules of *jus gentium* were to guarantee the freedom of the high seas, which were not susceptible of dominion, but which were susceptible of having jurisdiction exerted over them by every sovereign state for purposes of punishing crime and suppressing piracy. Such jurisdiction, according to Gentili, was not to be permitted to "degenerate into abuse," by one nation denying the use of the sea to another, which action could justifiably be regarded as sufficient cause for lawfully waging war.¹⁰¹ But the distinction between dominion and jurisdiction has survived, under which it is now well established that the principle of free seas does not exclude the right of every state from exercising a large measure of jurisdiction over them, as for example, in suppressing piracy.

C. THE DEVELOPMENT OF THE TERRITORIAL SEA CONCEPT.—Unlike the free sea doctrine, the conception of a territorial sea was not a product of Roman law. This was natural as the Romans held that the sea was subject to their dominion, hence they had no occasion for distinguishing between the high seas and the seas adjacent to their coasts.¹⁰² But after the fall of the empire, and during the early days of the Renaissance, when the Italian maritime cities advanced claims upon the neighboring waters, the conception of territorial waters began to emerge in the

100. GENTILI, *DE JURE BELLI LIBRI TRES* 19 (1598).

101. *Id.* c. 19.

102. This concept of territorial waters, which, as we shall see, was developed by Italian jurists in the Mediterranean area, out of feudal principles of law, had a separate and independent development among the countries bordering on the North Sea, the territorial waters being there regarded as a part of their respective territories as early as the Thirteenth and Fourteenth Centuries. FEDOZZI, *TRATTATO DE DIRITTO INTERNAZIONALI, INTRODUZIONE E PARTE GENERALE* 381 (2d ed. 1933).

Mediterranean and its development was a product of the "ingenuity of Italian juris consults."¹⁰³ This new doctrine was first expounded by the canon and not the civilian lawyers, because of the impossibility of relating it to the principles of Roman law.¹⁰⁴ As Roman law acknowledged the freedom of the seas, it became necessary to appeal to feudal principles of law in developing the doctrine of territorial waters. Reference to the concept was made in the Sixth Book of the Decretals of Boniface VIII.¹⁰⁵ But for the development of a complete legal theory of territorial waters, resort must be had to certain passages in the works of the glossators,¹⁰⁶ who were thus instrumental in defining and placing the first limitation upon the principle of the freedom of the seas. With Bartolus (1314-1357), the concept assumed more definite form. It was not that he considered the adjacent waters a part of the territory and hence within the dominion of the coastal sovereign, but rather that they were capable of becoming the subject of jurisdiction exerted by such authority.¹⁰⁷ While the concept of territorial waters visualized in the mind of Bartolus was not in accord with the modern view, it is now clear that he contributed mightily in the creation of the modern concept in two respects: *first*, by recognizing the existence in point of fact and practice of certain maritime zones over which the coastal sovereign could exercise exclusive dominion; and *second*, by placing a limit upon such zones. According to Baldus (1327-1406), who reaffirmed the territorial waters concept as developed by Bartolus, the coastal sovereign did not possess an absolute dominion over the adjacent waters, but was vested only with the rights of jurisdiction, ownership, and use, coupled with an obligation to protect ships sailing in these territorial waters against pirates. As opposed to Bartolus, who placed a limit of the distance which a ship could sail in two days, upon the exercise of control in territorial waters, Baldus limited the control to sixty miles, or the distance which a ship could cover in one day; while Van Bynkershock held that the control of the land over the sea extended as far as a cannon would carry.

103. SERENI, *op. cit. supra* note 85, at 70.

104. See CANSACCHI, *L'OCCUPAZIONE DEI MARI COSTIERI*, 75-78 (1936) for a discussion of the difficulties encountered by those seeking to reconcile the freedom of the seas doctrine, as recognized by Roman jurists, with the principle of sovereign control by the coastal state over the territorial waters adjacent thereto.

105. By Domenico di San Gimignano, the distinguished Tuscan canonist of the Fourteenth Century. See also Fenn, *Origins of the Theory of Territorial Waters*, 20 *AM. J. INT'L L.* 465 (1926).

106. SERENI, *op. cit. supra* note 85, at 71.

107. This concept was utilized by Bartolus in determining sovereignty over islands. Those in the adjacent sea were said to belong to the coastal sovereign. Control over the adjacent sea was fixed at one hundred Italian miles.

However this may be, Baldus' merit lies in having been the first to attempt to construct a complete system of rules for the regulation of territorial waters, but his conception varied from that of today. It took the wisdom of Alberico Gentili, the joint product of an analytical mind and a bent for seeking the truth, as modified by actually dealing with the problem in the courts of England, to place the distinction between the high seas and territorial waters upon a much firmer foundation. As he saw the picture, it was idle to overlook the self-evident truth that the surface of the earth over which a state could exercise dominion included both land and sea, a view in accord with the ancient doctrine. And like Bartolus, he limited the extent of the territorial sea to one hundred miles, which might be extended provided the proximity of no other state interfered. But Gentili carries the doctrine forward. Unlike his predecessors, Bartolus and Baldus, he assimilates the land and the territorial waters into a single unit, in so far as concerns the powers which the coastal sovereign may exercise over them. Having taken this step, he proceeds to set up certain limitations upon the sovereign rights of the coastal state,—limitations based upon an observance of actual practice and which are even now partially accepted under the rules of international law. The *first* limitation placed upon the coastal sovereign was that he could not deny to foreign ships free passage through territorial waters.¹⁰⁸ Under the *second* limitation the power of the coastal sovereign could not be wielded for the purpose of barring to foreign ships the free use of harbors, thereby anticipating a rule subsequently adopted by positive international law. Thus, the territorial sea doctrine, as developed from certain passages in the works of the glossators, as extended by assimilating the land to the sea, so far as concerned the power of the coastal sovereign, emerged in substantially its modern form, under the practical and guiding genius of Gentili, who, having evolved the doctrine, at once placed upon such assimilation those limitations suggested by the practical necessities of commerce and navigation and by ideas of natural equity and justice. And all the efforts of those writers who sought to maintain the right of those powers claiming dominion over the seas to prohibit foreign ships free passage through their maritime dominion, were found totally inadequate to support claims which could be sustained by force alone, and which were "contrary to the spirit of the new times, directed toward the principles of the absolute liberty of the high seas and the liberty of passage through the territorial waters."¹⁰⁹

108. In this connection he pointed out that the Venetians, who had frequently denied free passage to the ships of other nations through the waters over which they claimed dominion, were acting contrary to natural law. GENTILI, *DE JURE BELLI* 148 (1598).

109. SERENI, *op. cit. supra* note 85, at 75.

VII. THE TERRITORIAL SEA AND EXCLUSIVE RIGHTS TO THE SEA BED
AND THE SUBSOIL

The issue as to the breadth of the territorial sea and as to who has the exclusive rights to the sea bed and the subsoil lying thereunder, along with the question as to whether the territorial zone should be extended to encompass the continental shelf, was recently projected into the international limelight by the domestic controversy which developed between the Federal Government of the United States and the States of California, Louisiana and Texas.¹¹⁰ The issue was whether the States of California, Louisiana and Texas or the Federal Government had the paramount right and power to determine, in the first instance, when, how and by what agencies, foreign and domestic, the oil and other resources of the soil underlying the ocean, lying seaward of the ordinary low tide mark on the coast of the said States, known or hereafter discovered, might be exploited. Without going further into the facts and issues,¹¹¹ it is sufficient for our purposes here to note that the decision involved a struggle between the oil industry and the State and Federal Governments, that the States opposed the administration by the Federal Government of the natural resources in question, and that the Supreme Court in effect held that such administration would be in safer hands if left with the Federal Government. Although the issue was domestic in the instant cases, by implication it raises the broader question as to whether the rules of international law recognize the principle that jurisdiction or sovereignty over the soil and subsoil of the continental shelf, as well as the waters above that shelf beyond the territorial waters, belong to the riparian state? Originally the concept of the continental shelf was applied to protect fishing rights, but as the result of a treaty between Great Britain and Venezuela in 1942 which dealt with the submarine areas of the Gulf of Paria, a new view developed, so that now the concept is applied to the exploitation of oil and mineral resources. Annexation was carried out by the two governments under domestic legislation defining the areas involved, although the agreements themselves make no mention of the "continental shelf."¹¹² By proclamation, accompanied by an Executive Order, the President of the United States declared that "the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States" was to be regarded as belonging to the United

110. *United States v. California*, 332 U. S. 19 (1947); *United States v. Louisiana*, 340 U. S. 699 (1950); *United States v. Texas*, 340 U. S. 707 (1950).

111. For a review of the case, see Reppy, *Constitutional Law*, in the 1947 *ANNUAL SURV. AM. L.* 77-81.

112. Compare VALLET, *BRITISH YEARBOOK OF INTERNATIONAL LAW* 334 (1946).

States, hence subject to its jurisdiction, as a condition essential to the conservation and utilization of the resources therein. In no way effected was the character as high seas of the water above the continental shelf and the right to their free and unimpeded navigation. A similar Declaration was issued on the same day, setting aside a conservation zone in which fishing could be carried on subject to the regulation of the United States, but there was nothing in either Declaration to indicate a relationship between the two zones.¹¹³ With variations, Mexico, Nicaragua, Chile, Cuba, Iran, Saudi Arabia, and others made proclamations or enacted legislation concerning the continental shelf and the rights of the coastal sovereign therein. Despite these developments, the number of states claiming special rights with respect to the resources of the subsoil underlying the waters extending beyond established territorial limits remains small. Other states have not acceded to the claims asserted, and in a few instances protests have been made. It remains to be determined whether the rights of control and jurisdiction are to merge in the right of sovereignty asserted by the coastal state. It also remains to be seen whether the theoretical right of freedom of navigation, recognized by all the proclamations as continuing, will be in fact maintained. Is it not inevitable that once again freedom of navigation will be restricted under a rule of convenience to be hammered out on the anvil of practical experience? Will not the fixed and mobile installations, which are bound to appear as an incident of each nation's exploitation of the resources of the continental shelf to which it lays claim, result necessarily in a further limitation of freedom of the seas, with a corresponding extension in fact of territorial waters? Will the sea be open when the interests of international shipping are set off against the desire of the United States to exploit the petroleum resources of the continental shelf and which she regards as belonging to her? If large mineral or oil resources are found under the high seas, will not America's rights extend not merely over those fields below the water but also over the surface of the sea above those resources? And finally, "Will America find she can allow Russian cruisers or Japanese fishing craft to make trips between American drilling derricks erected in the open sea over American oil fields?"¹¹⁴

113. On October 29, 1945, followed by a supplemental decree on February 25, 1949, Mexico, in an attempt to relate fishery conservation and the continental shelf, laid claim by proclamation to the entire platform or continental base adjacent to its coasts, and the resources to be found therein. See DE AZCARROZA Y BUSTAMANTE, *LOS DERECHOS SOBRE LA PLATFORMA SUBMARINA*, REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL, THE PROCLAMATION 59 (1949).

114. FRANCOIS, REPORT ON THE HIGH SEAS, TO THE INTERNATIONAL LAW COMMISSION 39 (2d Sess. March 17, 1950).

As long as the scope of the concept of the "continental shelf" remains undefined, as long as the portion of the high sea claimed by each riparian owner remains uncertain, as long as there is no agreement between states having a common continental shelf, it seems impossible to accept the view, as urged by some, that under the rules of international law the coastal sovereign acquires jurisdiction, if not ownership, over the continental shelf by virtue of actual occupation. This is merely an oblique suggestion that the Grotian principle of the freedom of the seas is not an absolute; that such concept is capable of further limitation, that the new scientific developments, when coupled with new economic problems, and new problems of national defense, are in fact on the very verge of enforcing new limitations upon the freedom of the seas doctrine. In the face of such a problem internationalization of the continental shelf, as common territory, has been suggested, but this idea has been rejected in favor of giving the coastal state a controlling position in the adjacent waters. Exploitation by the first general occupant, as urged by some, might present a serious situation if such exploitation took place in the continental shelf only a short distance from the shore of the coastal sovereign. Such a policy would almost certainly produce national rivalry and friction, neither beneficial to international society, nor calculated to conserve the natural resources of the subsoil.

According to Feith, "The best solution appears to be to allot the continental shelf to the riparian State, on the condition that such allotment is accompanied, at the outset, by a precise definition of the rights and duties of the various States in these areas. Provided that the privileged State confines itself, on the one hand, to the efficient working of the mineral resources of the continental shelf, without intolerable violation of the principle of the freedom of the seas, and, on the other hand, to protecting the resources of the sea without monopolizing the right to fish for the benefit of its nationals, the principle of the freedom of the seas would appear to be adequately safeguarded."¹¹⁵

Whether such a solution should be made dependent upon the existence of a continental shelf extending from the coastal state claiming the right to exploit the mineral resources of the subsoil and the marine resources, raises another delicate problem, as such a rule would discriminate against those states having no continental shelf, or at least one not reaching beyond the territorial waters. In this situation, Feith suggests that it might be better to discard the concept of the continental shelf, in favor of a grant to riparian states of special rights extending a specified distance beyond their territorial waters.¹¹⁶

115. See FEITH, REPORT TO THE INTERNATIONAL LAW ASSOCIATION 19 (1948).

116. *Id.* at 40. This pretention would change the whole concept of the subsoil theory.

VIII. THE PRESENT STATUS OF THE FREEDOM OF THE SEAS

In the meantime, the situation may be summed up as follows:

1. It is now apparent, in the light of the new claims to rights in the subsoil and in the resources to be found in the continental shelf that the limit of territorial waters is in process of being extended in accordance with the change of technical conditions. In this situation, in order to avoid chaos, such extension can only be carried out internationally and equally, not municipally. Obviously, the enlargement of the territorial waters of the coastal states will involve the exclusion of a considerable amount of space from the free seas.

2. The limit of the subsoil subject to the sovereignty of the coastal state may differ from the limit of territorial waters. Such a limit seems essential as no state can be permitted to claim rights to the subsoil thousands of miles from its shores and the shores of its islands. Moreover, while the limit of territorial waters may be independent of the structure of the coast, the limit of the subsoil may be influenced by its structure, as for example, in the case of the reef extending along the Western coast of Australia.

3. The use of the subsoil will almost inevitably involve restrictions upon the freedom of the sea. Thus, foreign ships may not expect to move freely in the vicinity of installations erected by the coastal sovereign for the purpose of exploitation of the subsoil. Such exploitation should be carried on in a way which may restrict yet never destroy the freedom of the sea. Where a conflict develops in theory the principle of the freedom of the sea should prevail over the right to exploit the subsoil. The same principle also applies, in a lesser degree, to territorial waters. No state should use its jurisdiction over its territorial waters, whatever their extent may be, in a way calculated to prevent the free movement of ships, except in an emergency.

4. In the case of artificial islands, as formed perhaps by sea dromes, it would seem that they should be treated under regulations similar to those governing "permanent ships," and that the regulations for such purpose should be framed internationally and not municipally.

5. Fauna, flora, minerals, chemicals and all intermediary forms in the sea, outside of the territorial waters, belong to the sea and not to the subsoil. They are, therefore, subject to seizure and exploitation by anybody, up to the moment of physical contact made by someone with the intention of taking possession. Thus, the whale belongs to the first person who is able to shoot a harpoon into its body, under the principle that over, on and in the free seas everyone is free to exploit those riches, and that none may legally prevent another from so doing.

6. Under modern conditions, the freedom of the sea reaches above

and below the surface of the water. In the downward direction, it extends to the subsoil outside the territorial waters, but inside the subsoil rights of the coastal state, and into the subsoil beyond this limit, as for example, in the case of the right to lay cables, fish or exploit other riches not connected with the subsoil. So also neutral commercial submarines in time of war in order to avoid seizure might travel under the surface of the sea, as well as in times of peace in order to avoid hampering of free trade.

7. Finally, the use of the free sea in any way which prevents others from making use of it is illegal. Thus, the Declaration of Panama must be understood merely as a protest against the use of those parts of the free sea in which they have special interests in such a manner as to endanger free trade. The proclamation forbade acts of war in those areas because they endangered the freedom of the sea. And so, in the future, the explosion of an atomic bomb impairing the usability of a considerable area of the ocean for a certain period would constitute an act of doubtful validity, and therefore, if to be done, such explosion should only be permitted after due precautions had been taken to protect the rights of other users of the sea. Also, ships traveling a certain distance from each other and sending out rays which endanger the use of the sea over a considerable space would constitute an infringement of the right of passage through the free sea.

IX. CONCLUSION

The Grotian doctrine of freedom of the seas has never at any time in the history of mankind enjoyed a status of total validity, either in theory or in fact. In the long period prior to Grotius, the issue was largely academic, because one great power after another asserted and maintained dominion of the seas in theory and also in fact. This situation is generally thought to have undergone a change with the promulgation of the principle of freedom of navigation by Grotius. But even as Grotius framed the doctrine it was not in terms an absolute doctrine, as he in effect limited his own principle by exceptions which he made in favor of the nations adjacent to inland bays, gulfs and straits. Nor was the doctrine immediately accepted in theory or in fact by the states of the world. On the fact side it was met by the voyages of Cavendish and Drake and by England's assertion of mastery over the English seas, by the continued claims of supremacy of Portugal and Spain over the East Indian seas; and by Swedish and Danish activities over the Northern seas.

On the theoretical side, Grotius was opposed by Selden, whose arguments constituted the theoretical basis of the English opposition to the

Grotian conception, which opposition was so sweeping in its implications and in its practical application as to cause a reaction to set in among the weaker maritime powers of the world, in favor of the free seas principle. Thus, it was the opposition of the English as justified and stirred up by Selden, rather than the principle of free seas as announced by Grotius, which gave the free sea doctrine a tremendous push in the direction of universal recognition. This development, coupled with the gradual recognition by the states of the world that as a practical day-to-day matter, it was impossible for any one state to police the seas of the whole world, or to exert any effective, exclusive dominion of the same, led to a policy on the part of each state, of policing the waters adjacent to their shores, so that commerce could be maintained, with an assertion of jurisdiction beyond such limits for the purpose of punishing crime or repressing piracy. The principle of the free seas as it actually took shape was in no sense a Grotian conception. It originated in Roman law, it was crystallized and clearly stated by the Spanish theologians, Vitoria, Suarez and Carruvias, it was formulated as a rule of international law by Gentili, and it was given wide currency by Grotius as an incident of the commotion which developed in Europe over the capture of the Portuguese prize, the *Catherina*. But none of these developments actually exercised much influence in the sense of directing men's minds toward a belief in the principle. It was the misconduct of England, as justified by Selden's masterful analysis and dissection of Grotius' concept, which turned the tide. This development, plus the practical necessities of everyday intercourse, led to the recognition of the principle of the free seas as a rule of convenience. With this rule once firmly established by the realities of life, its advocates have called to its support the long line of legal authorities, which we have traced and which some have mistakenly accepted as the cause rather than the effect. In other words, while the theorists were arguing in the books, the realities of everyday practice had established the reality of free seas, in such a way as to make the discussions of the scholars purely academic, as in the early part of the present century, the flight of the aeroplane over real estate converted the *cujus est solum* rule of ownership into an academic theory.

And so today, as a result of the projection upon the international scene of the rights of the coastal sovereign to the subsoil underlying territorial waters and extending beyond, along the line of the continental shelf, which necessarily raises the issue as to the control, jurisdiction or ownership of the surface of the water above such shelf, the world finds itself once more in a great period of transition, in which, aside from existing rules of international law, the rights of the states

over subsoil extending over the normal territorial waters limit, and along the continental shelf, will again be hammered out on the anvil of experience. When the practice has thus been determined upon, it may then be incorporated into the body of international law by the customary methods. But it will still remain true that the rule thus established, and which will inevitably further restrict the Grotian principle of the free seas, will have originated not out of some natural or positivist or other theory of law, but will stand forth merely as the newest product of the ceaseless struggle of each nation to control more than its just share of the seas which the captive and exiled son of revolted Holland, Grotius, declared belonged in common to all mankind and not to any one country.¹¹⁷

117. On the indebtedness of the World to Hugo Grotius, aside from his freedom of the seas doctrine, see 1 WALKER, A HISTORY OF THE LAW OF NATIONS, 144-148, 330-337 (1899). But see Fruin, *op. cit. supra* note 41, at 59, in which he declares: "But before I should concede to De Groot's panegyrists that he is the creator of the law of nations I should like to know what is meant by that honourable appellation. Does it mean that De Groot discovered and revealed what before him had been taught by no one, then I should object to give him the title. For by far the greater part of what had been demonstrated by De Groot had already been said by older writers, in other words and dressed up in other arguments, but still essentially the same. He acknowledges this himself, he only claims the merit of having been the first to point out the right to take booty; regarding the right of war he appeals to the authority of his predecessors. If he had been asked wherein the peculiar merit of his system consisted, he would have answered, as in the *prolegomena* of his *Jus belli ac pacis* 'Artis formam jurisprudentiae imponere multi antehac destinarunt; perfecit nemo.' What others had viewed correctly or had represented in itself correctly, but without connection with other ideas, was collected by him, arranged and combined to form a system. This, then, is the merit to which he lays claim and which he fully deserves. He constructed the building, but of material furnished by others. Without their previous labour his work would have been impossible. He acknowledges this gratefully and openly; but his contemporaries and descendants have overlooked the fact and given him all the honour."