I

You have all heard of Grotius referred to as the "father of international law." Although the complex arguments of *De Jure Belli ac Pacis*, his major work, are now the domain principally of scholars of legal history, there remains a common recognition that his work was foundational to the modern system of international law. In the intervening 400 years, the substance of international law has changed almost beyond recognition. Yet, the concept of a community of nation states, bound to a system of law governing the totality of relations among them, and the persistent role of a secular vision of natural law in shaping the contours of the law of nations remain with us and originate with Hugo Grotius.[1]

My interest, however, differs from this classic understanding. I am interested less in the persistent principles that hold true from Grotius' day to our own, than I am in the role he played in the world around him. For Grotius was very much a practicing international lawyer, deeply involved in the international disputes of his day and wielding legal argument as a tool on behalf of the Netherlands. Moreover, Grotius was practicing as an international lawyer at a time of great turmoil and change in the international system: The discovery of the new world and the increasing reach of Spanish, Portuguese, and Dutch trade brought the European system for the first time into regular contact with a wide range of different peoples. At the same time, the thirty

[1] *See* H. Lauterpacht, "The Grotian Tradition in International Law," 23 *British Yearbook of International Law* 1-53 (1946). On the relationship between natural law and other sources of international law, see E. Lauterpacht, ed., I *International Law: Being the Collect Papers of Hersch Lauterpacht* 75-77 (1970); H. Lauterpacht & C.H.M. Waldock, eds., *The Basis of Obligation in International Law: And Other Papers by the Late James Leslie Brierly* 1-68 (1958). *See also* Stephen Hall, "The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism," 12(2) *European Journal of International Law* 269-307 (2001).

years war raged across Europe as the continent struggled to adapt to a system in which both political and religious unity were absent and out of reach.[2] As we confront the myriad changes of our own globalizing world –different from those of the seventeenth century, but no less profound– I submit to you that we may yet draw lessons from the role of law in earlier times.

Grotius' *Mare Liberum* is a paramount example of his role as a legal advocate. An argument for what is now a central tenet of international law –the freedom of navigation over the high seas– it was, at the time it was written, far from an unquestioned principle. Ocean sailing was a new reality, yet the rules for international relations in this wider world remained unsettled. *Mare Liberum* was one piece (the twelfth chapter) of a much longer work, subsequently published as *De Jure Praedae* (On the Law of Prize), commissioned by the Dutch East India Company to justify the seizure of a Portuguese merchantman, the *Santa Catarina*, by Dutch vessels in the Singapore straights.[3] *Mare Liberum* is a refutation to the Spanish and Portuguese claim to exclusive dominion and control over oceanic trade routes and newly discovered lands[4]

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2 *See* C.V. Wedgwood, *The Thirty Years War* (1938).

3 For a historical account of the capture of Santa Catarina, see M.J. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Ries of Dutch Power in the East Indies 1595-1615* at 1-42 (2006).

4 The Spanish and Portuguese claim of that time had Papal sanction, in the form of the Papal Bull Romanis Pontifex, which forbade the other Christian nations "to carry or cause to be carried merchandise and other things permitted by law, or to navigate or cause to be navigated those seas, or to fish in them, or to meddle with the provinces, islands, harbors, seas, and places, or any of them, or with this conquest, or to do anything by themselves or another or others, directly or indirectly, by deed or counsel, or to offer any obstruction whereby the aforesaid King Alfonso [of Portugal] and his successors and the infante may be hindered from quietly enjoying their acquisitions and possessions, and prosecuting and carrying out this conquest." The Bull *Romanus Pontifex* (Nicholas V), January 8, 1455, *available at* <www.nativeweb.org/pages/legal/indig-romanus-pontifex.html>. The same claim was also the underlying basis for the Treaty of Tordesillas, Spain-Portugal, signed June 7, 1494, dividing newly discovered lands between the two monarchies.

an attempt to establish the justness of Dutch resistance. In his work, Grotius proceeds systematically through the authority of the Papacy under Canon law to award control of the seas; the possibility of acquiring title through war, occupation, or prescription; the treatment of the seas under Roman law; and the place of trade in natural law. *Mare Liberum* is deeply scholarly, yet its purpose was to justifying keeping the rich cargo of a Portuguese ship on the grounds that Portuguese restrictions on trade could legally be countered with private force. Moreover, Grotius' factual account of Portuguese actions was based on a set of accounts from Dutch captains that were subsequently published under the title of "The Cruel, Treasonous and Hostile Procedures of the Portuguese in the East Indies."[5] This was **not** neutral legal scholarship!

The status of *Mare Liberum* as –effectively– a legal brief has long served to decrease interest in its arguments and to focus attention instead on Grotius' use of natural law.[6] Yet the critical question of **why** it was written remains. *Why did the Dutch East India Company feel the need to devote resources to procure a legal defense of its actions at a time when Dutch naval power was on the rise and when the Amsterdam Admiralty Courts had already approved the seizure of the Santa Catarina?* If this were an isolated incident, one might dismiss it merely as public relations, or as an effort to assuage the concerned shareholders of the Company. Yet legal arguments pervade the international disputes of that time. *Mare Liberum* itself was rushed into print in the hopes of affecting treaty negotiations between Spain and the Netherlands. The King of Spain thereafter commissioned a full response to Grotius, rebutting in detail

5 van Ittersum, *supra* note 3 at 24.

6 *See, e.g.*, E. Gordon, "Grotius and the Freedom of the Seas in the Seventeenth Century," 16 *Willamette Journal of International Law and Dispute Resolution* 252, 260-61 (2008).