

**THE UNIVERSITY OF HULL**

**Formative Influences on the Evolution of International Law:  
a Case Study of Territorial Waters (1550-1650)**

being a Thesis submitted for the Degree of

Doctor of Philosophy

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by

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## ABBREVIATIONS

|                   |  |
|-------------------|--|
| AHR               | - <i>American Historical Review</i>  |
| AJIL              | - <i>American Journal of International Law</i>   |
| AN                | - Archives Nationales, Paris   |
| Annales           | - Camden, <i>The History of ... Elizabeth</i> , 1675   |
| BM                | - British Museum, London   |
| BYIL              | - <i>British Yearbook of International Law</i>   |
| CLP               | - <i>Current Legal Problems</i>  |
| Dumont            | - <i>Corps universel diplomatique du Droit des Gens</i> , 8 vols, 1726-31, Amsterdam   |
| Econ. Hist. Rev.  | - <i>Economic History Review</i>   |
| EHR               | - <i>English Historical Review</i>   |
| Exch.T.R.         | - Exchequer Treasury of Receipt  |
| HMC               | - Historical Manuscripts Commission  |
| HMSO              | - Her Majesty's Stationary Office  |
| IJECL             | - <i>International Journal of Estuarine and Coastal Law</i>  |
| JRSA              | - <i>Journal of the Royal Society of Arts</i>  |
| LQR               | - <i>Law Quarterly Review</i>  |
| Mar.              | - Archives de la marine (in the Archives Nationales)   |
| MM                | - <i>Mariners' Mirror</i>  |
| NRS               | - Naval Records Society  |
| ODIL              | - <i>Ocean Development and International Law</i>   |
| PRO               | - Public Record Office   |
| Recueil des Cours | - <i>Recueil des Cours de l'Académie de Droit international</i>  |
| RGDIP             | - <i>Revue générale de Droit international public</i>  |
| Rot. Scot.        | - <i>Rotuli Scotiae in Turri Londiensi et in Domo Capitulari Westmonasteriensi assertavi</i> , 1819, Record Commission, London |
| Rymer             | - Rymer, <i>Foedera, Conventiones, Literae et cujuscunque Generis Acta Publica Anglica</i> , 3rd ed., 10 vols, 1739, The Hague |
| SP                | - State Papers   |

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*Id imperfectum manet dum confectum erit.*

Leonardus Kravitz

MJF



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**Introduction**

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## 1.1 General thesis

The aim of this study is to examine the formative influences on the evolution of international law. One particular aspect of international law - the breadth of territorial waters (that is, the belt of sea adjacent to the coast) - has been selected, and the creation and development of the international legal rules pertaining to it will be traced and set in the context of political, cultural and other influences which may have had some bearing on that process. Through this contextual/historical analysis, an account will emerge of the extent to which international law is moulded by factors which might be supposed *prima facie* to have very little influence. This will then go towards an understanding of how international law was, and is, formed.

The issue here is not that States argue for international laws that enable them to achieve their will, but to examine the process of change from the old laws to the new - the law in flux. It is tempting, perhaps, given the myriad examples in any given area, to assert that international law is always subservient to States' policies. This is not the place to rehearse the arguments on this point. But it will be shown that at the start of the period with which this study is concerned, contrary to this assertion, States regarded rules emanating from two sources as binding on them (which furthermore can be said to be 'supra-national') and policies and practice were framed with regard to the rules: 'canon law', or the law handed down by the Pope; and 'natural law', that is, the law that derives from rational, logical deductions, or 'the nature of things'. State practice was influenced by both, and a part of this study is to note the decline of canon law and (more gradually) natural law as, in the perception of States, the source of rules imposing an obligation.

Of central importance is the extent to which international law can be said to have been in existence during the period covered, and if so, what can be regarded as the 'sources' of the law. Any examination today of the sources conventionally takes as its starting point Article 38(1) of the Statute of the International Court of Justice, and both Parry<sup>1</sup> and Carty<sup>2</sup> have discussed the problem of defining or describing

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<sup>1</sup> Parry, *The Sources and Evidences of International Law*, 1965, Manchester University Press, Manchester.

international law without using it, or what Carty calls "textbook categories". But it will be shown that in the place of canon law and natural law grew a 'law of nations'<sup>3</sup> to govern the relations between States. They referred, as sources of international law, variously (as the need arose) to the law of nature, the *jus gentium*, papal bulls, agreements between States (including, but not only, treaties), custom and practice, the writings of jurists, and immemorial usage.<sup>4</sup>

The main argument maintained throughout this study is that international law regarding territorial waters (especially their breadth) , during the period under discussion,<sup>5</sup> was formed not by the application of legal rules but by the pursuit of national policy. This is not to say simply that the legal rules gradually evolved in accordance with the dominant custom or practice of States. Rather that States followed or ignored certain legal norms in pursuit of policy and then put a legal gloss on their actions. Legal justification for the State Practice thus performed, perhaps with a different legal source, was found *ex post facto*. It will also be argued that territorial waters as we understand them today derived directly from the Spanish and Portuguese claims to sovereignty over vast tracts of the ocean, and the ensuing disputes; that the seas of Europe were subject far less to claims of jurisdiction and sovereignty than is generally supposed and is often argued;<sup>6</sup> and that English policy in the early modern period was almost entirely in favour of freedom of navigation in

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<sup>2</sup> Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, 1986, Manchester University Press, Manchester.

<sup>3</sup> 'International law' was not so called until the 19th century, reputedly a term coined by Jeremy Bentham.

<sup>4</sup> It will be examined to what extent States considered these factors to be 'binding' on them, or had about them what is called in modern times an '*opinio juris sive necessitatis*'.

<sup>5</sup> On which see *infra*.

<sup>6</sup> See, for instance, Potter, *The Freedom of the Seas in History, Law and Politics*, 1924, Longmans, New York, 41.

its own seas, contrary to common argument.<sup>7</sup>

This course of study was chosen for three reasons. Firstly, historical analysis of the evolution of international law is rarely conducted in this way,<sup>8</sup> certainly in modern times since the start of the great process of 'codification' of international law that proceeded after the end of the 1939-45 war and the setting up of the United Nations. Secondly, as far as is known, it has not been done before in this interesting field, which as one of the 'earliest' areas of international law has its formative period in the years covered, and has since remained little changed to the present day. Thirdly, it is hoped that an analysis of this sort will add to the general understanding of the processes by which international law is formed, in a historical and contemporary context.

Such 'international law' (or rules which States regarded as a fetter on their and others' actions) as did exist generally concerned only the law of the sea (widely defined), diplomatic immunities and perhaps boundary disputes. Carty suggests that, at this time, because there was "no sovereign authority to adjudicate upon disputes among States concerning the extent of their obligations" they existed in a 'state of nature'.<sup>9</sup> This may be taken to be an extreme - almost post-modern - view of the nature of international law, but it can usefully act as a parameter for the present discussion. It will therefore be necessary to examine how far States regarded themselves as fettered by rules, and how far they abided by any obligations and restrictions on them.

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<sup>7</sup> See, for instance, Laughton (1866) 5 *Fortnightly Review* 718 "The Sovereignty of the Seas", *passim*.

<sup>8</sup> See comment by O'Connell: *Influence of Law on Sea Power*, 1975, Manchester University Press, Manchester, 15. Hoof has conducted a study in a broadly similar vein, taking the Final Act of the Helsinki Accords 1975 as a case study for an examination into the sources of international law: *Rethinking the Sources of International Law*, 1983, Kluwer, Deventer.

<sup>9</sup> Carty, *ibid.*, 15. But to assert that the lack of a sovereign authority suggests the absence of any recognisable international legal framework is rather to beg the question. In fact, the situation prior to the 19th century is barely discussed by Carty, since he concentrates particularly on the contribution of the German historical school.

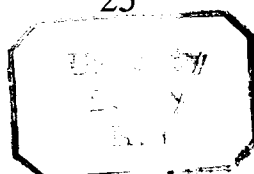
The sources States regarded as sources of the 'law of nations' have already been mentioned, and each will be examined in the study. Treaties though, should perhaps be highlighted first since their place in States' armoury has recently been doubted. Carty has suggested that treaties were not regarded as either binding or a source of evidence of customary international law until late in the 19th century when jurists (as opposed to statesmen, who were generally unversed in international law) began to propose it. Until then, treaties were usually only bilateral agreements with the occasional multi-lateral convention. European States, he argues, started to demand that treaties be regarded as binding only when Germany tried to loosen itself from international society in the mid-19th century.<sup>10</sup> But Carty offers little evidence to support this claim and others have argued that the principle of *pacta sunt servanda* was widely held during medieval times. Schwarzenburger, for instance, has shown that the network of treaties binding the princes of Europe - within and without the Empire - was extensive.<sup>11</sup> It will be shown that treaties often expressed States' agreements on rules pertaining to territorial waters and were referred to as evidence of generally applicable law.

The nature and sources of international law have for centuries been the subject of juristic debate, and major upheavals in the geo-political framework, and even socio-cultural trends, have led to periodic analysis and reanalysis of international legal theory. They have become increasingly connected and intertwined with the study of 'international relations' and the development of theories of international society. The process has accelerated in the post-war era with the opening up of archives and State Papers to researchers, and there has recently been a greater academic interest in the policy behind a decision, rather than simply the decision (and consequent State

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<sup>10</sup> Carty, *ibid.*, 15, 16. The London Protocol of 1871 expressed the British view that a party could not revoke a treaty unilaterally. And Carty notes that after the German invasion of Belgium in 1914, in violation of the 1839 treaty guaranteeing the latter's neutrality, there was increased discussion of the principle of *pacta sunt servanda*: indeed, it "became a pivotal feature of 'positive' international law". *Ibid.*

<sup>11</sup> Schwarzenburger, *The Frontiers of International Law*, 1962, Stevens and Sons, London, 47-51, 97-100. See also, Parry, *op. cit.*



Practice) itself.<sup>12</sup>

A useful tool for a theoretical analysis of international law is to take a discrete period of time and examine the 'variables' in the international system throughout, showing how the dynamics at play affected the law that developed.<sup>13</sup> A good example is the balance of power system in Europe from roughly the Congress of Vienna 1815 to 1914: there were five States - Austria, Britain, France, Prussia and Russia - whose shifting defensive and aggressive alliances ensured that no one Power emerged as supreme. Out of this system emerged the notion that the State was supreme - the subject of international law - and could be bound only by laws to which it had agreed, ie. the classical positivist approach to international law.<sup>14</sup> Another example is the post-war bi-polar system with two world 'super-powers' again keeping each other in check. It produced (or, at least, allowed to emerge) the UN system and the process of decolonisation. This study adopts a similar method, by taking a discrete period (1550-1650) and analysing the political objectives of States during that time. It examines the influence that those objectives had on States' practice in relation to what they perceived to be their legal obligations, and the effect on the law that emerged.

The period covered in this study, the early modern period, is especially interesting because there was then much less of a consensus as to what was the law of nations, on any particular point at any particular moment, than is the case in

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<sup>12</sup> McDougal and others of the New Haven School have in particular been in the vanguard of the 'policy-oriented' movement. See McDougal, "International Law, Power and Policy", (1953) 82 *Recueil des Cours* II, 133; McDougal and Reisman, *International Law in Contemporary Perspective*, 1980, Yale University Press, New Haven.

<sup>13</sup> This so-called international systems analysis has been developed and applied by, for instance, Kaplan. See Kaplan and Katzenbach, *The Political Foundations of International Law*, 1961, John Wildy, London, 62-70. See further, McClelland, *Theory of International Systems*, 1966.

<sup>14</sup> A similar 'balance of power' arose among the Italian city-States of the 11-13th centuries: their economic and political interests demanded a system of binding treaties and immunity for permanent residential envoys. See further Bull, *The Anarchical Society*, 1977, Macmillan, London, ch.5.

modern times (even given the debate that sometimes ensues over contemporary State Practice). It is only in the present century that 'globalist' enterprises have produced, for instance, an International Court of Justice (whose Statute, as mentioned above, provides what is generally taken as the starting point for defining the sources of international law). Such projects were probably possible only in the particular circumstances in which they emerged: firstly, the end of a war involving all of the world's major Powers after which the victors were in a position virtually to dictate a new order of relations between States (ie. the 1939-45 war); and secondly, the motivation to create such an order "to save succeeding generations from the scourge of war"<sup>15</sup> (ie. the United Nations system).<sup>16</sup> In the early modern period, in contrast, States were *emerging from* a system seeking to impose an international order, including the making of law.<sup>17</sup> There were thus many 'competing' sources of the law governing States' relations (see above), and which of these (if any) would emerge as predominant was for much of the period not certain. This study, then, seeks to show the factors which determined that process.<sup>18</sup>

## 1.2 Format

The period with which this study is concerned is from the mid-16th century to the Peace of Westphalia 1648. Thus it straddles the end of the era which saw the recommencement of navigation and commerce, and consequent expansion of European States around the world, and the start of the era during which the fixed

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<sup>15</sup> From the Preamble to the United Nations Charter 1945.

<sup>16</sup> That neither of these two conditions was fully satisfied after the 1914-18 war probably led to the failure of the precursors to the United Nations institutions, the League of Nations and the Permanent Court of International Justice.

<sup>17</sup> The capacity to make treaties (and perhaps cite other sources of law) was seen as a mark of sovereignty.

<sup>18</sup> While such an approach may contain many pitfalls it is hoped that one of the greatest of them will be avoided, here and elsewhere, through early awareness of its dangers, that of too "whiggish" an interpretation of history. See Butterfield, *The Whig Interpretation of History*, 1931, Bell, London.

limit to territorial waters emerged. In that sense it was perhaps the most important period for the development of the law of territorial waters, and also saw the emergence of the first great wave of European jurists whose writings are even now influential on international law. That the period ends at Westphalia is also not insignificant, since it was the peace agreed there that finally terminated the claims of both Empire and papacy - in effect, for so long, the Habsburgs - to decree laws that bound independent nations. The rise of nation States was of prime importance in the development of international law.

While the overall time-frame is as set out above, chapters two and three introduce the legal and political developments preceding it. A relatively brief account will be given in chapter two of the early State practice regarding territorial waters from the late Middle Ages, when maritime traffic began to increase and claims to "sovereignty" over the sea started to emerge. The claims to large areas of the sea put forward by Spain and Portugal towards the end of the 15th century will then be studied in chapter three. These may perhaps be regarded as the real precursors to modern territorial waters, and they were certainly the catalyst for a polarisation of opinion and policy within Europe and hence the emergence of the now familiar doctrines of *mare liberum/mare clausum* (the 'freedom of the seas'/the 'closed sea').

It is in the period of the late 16th and early 17th centuries that the differences in the two positions become most apparent, which is covered in chapters four to seven (with a conclusion in chapter eight). Certain States - Spain and Portugal, Denmark and Sweden, Venice and the Mediterranean city States - argued that under international law (as then identified) States were able to claim vast territorial waters, from which others could be excluded. Other States - France, England and the Dutch Republic - on the other hand, advocated only a very limited jurisdiction, and argued that States could not be excluded. Which of these conflicting doctrines would ultimately become dominant was for long uncertain, and the shifting political balances (eg. the rise of France and the decline of Spain) and personal ambitions (eg. the pretensions of the Stuart Kings of England) will be charted and their influence on the trends in international law noted. Of particular interest is the change in policy of England just after the turn of the century, from being the most ardent advocate of the



freedom of the seas to being one of its most resolute opponents. Strangely, this change, which might have been expected to tip the balance in favour of *mare clausum*, occurred at the same time as jurists such as Grotius were eloquently and persuasively putting the case for *mare liberum*, as territorial waters claims were being scaled down, and as doctrines for delimiting the breadth of territorial waters - line-of-sight, cannon-range, etc. - were starting to emerge.

In the period just after this study concludes, towards the end of the 17th century the battle for liberty of the oceans was being won. Dutch persistence on the seas and French political power had undermined the claims to larger territorial seas and by 1702 Bynkershoek was able to assert that the cannon-range was, under the law of nations, the allowable breadth of the territorial sea.<sup>19</sup>

### 1.3 Structure

In chapter two an account will be given of State Practice regarding territorial waters from the late Middle Ages, when maritime activity began to increase and claims to 'sovereignty' over the sea began to emerge. The maritime rules that developed had mainly pacific intentions, concerned jurisdiction rather than sovereignty, and generally did not affect navigation. The sea was regarded as being "free, like the air".<sup>20</sup> The first widely used rules concerned marine protocol and were developed as a series of codes by sailors and maritime courts rather than "States". Claims to jurisdiction made by States were most forcefully expressed in three areas - the Mediterranean, the coasts of Britain and the northern seas - and the various methods employed to delimit a State's claimed territorial waters will be examined and an analysis of rights to fish will show that fishing was almost

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<sup>19</sup> Bynkershoek, *De Dominio Maris*, 1744, Leyden; (tr. Magoffin; ed. Scott) 1916, Classics of International Law, Carnegie Endowment, New York, 365. See further on Bynkershoek, Walker (1945) *BYIL* 210 "Territorial Waters: the Cannon-Shot Rule"; and more generally Baty (1928) 22 *AJIL* 503 at 515-6 "The Three Mile Limit".

<sup>20</sup> Gidel, *Le Droit international public de la mer*, III, 1934, Établissements Mellotlée, Chateauroux, 25.

universally permitted. Despite the maritime codes being developed by seamen, a juridical framework was established at this time by the 'supra-national' papacy, and princes also concluded treaties committing themselves to certain courses of action. It can be said that a doctrine of law between nations (which States regarded as imposing an obligation on them) was starting to emerge from these three sources.

Chapter three examines the first large scale claims to exclusive jurisdiction, dominion indeed, of areas of the sea. They arose at a time when intellectual and technological advances were raising the eyes of Europeans above limited medieval horizons to the possibility of new territories to be discovered elsewhere. Papal backing was given to the explorations of Henry the Navigator, of Portugal, whose ships travelled down the West African coast. The search for a new route to the East led Columbus to the Americas and da Gama around the Cape, and eventually to the Atlantic being divided by a 'Papal Line' into Spanish and Portuguese hemispheres. The two States were given exclusive rights to the seas and lands discovered in their respective areas, and defended them against the protests of other States, and of contemporary jurists such as Vitoria and Castro. After Portugal had purchased Spain's 'rights' to the East Indies, the two States had divided much of the world between them, and established two enormous areas of exclusive jurisdiction. In essence the Spanish and Portuguese claims to jurisdiction were based on three legal premises: that papal bulls were regarded as binding *on* all States *by* all States; that the Pope had the capacity to assign newly discovered territories (and oceans); and that States would in practice not contravene the jurisdictional areas thus constituted. But Spanish wealth from the Americas, and Portuguese from the East Indies, was an irresistible lure for other European States, and it will be shown that the three legal premises were so undermined and disregarded that it is doubtful whether the Spanish and especially Portuguese exclusive jurisdiction was ever for more than a few years juridically extant.

Chapter four examines the general reaction of the States of Europe to the expansive claims of Spain and Portugal, and charts the gradual undermining of those claims. French power grew throughout the 16th century and it was as a result of this that Spain was obliged to concede to France first the right to navigate and trade with

the West Indies, by the Treaty of Crépy in 1544,<sup>21</sup> and later, at the peace made at Câteau-Cambrésis in 1559,<sup>22</sup> even that there were some parts of the western Atlantic beyond Spanish jurisdiction. England's forceful rejection of any claims to sovereignty over the sea, coinciding with its desire to establish its own trading empire, also detracted from the Spanish claims, and Spain argued against them. Portugal's 'union' with Spain in 1580 did little to arrest the Dutch undermining of its claims to exclusive rights in southern Asia, and indeed may even have hastened that decline. The binding nature of two sources of law was starting to supersede the papal bull: the (usually unspecified) "*jus gentium*", sometimes cited with but probably equivalent to the later "law of nations"; bilateral agreements, sometimes confirming what States already understood to be the legal position, and sometimes 'creating' that position.

Towards the end of the 16th century, in chapter five, the gradual definition of jurisdiction in States' "territorial waters" and their breadth can be observed. Spain and Denmark, the two States making the claims to exclusive rights to waters, realised in this period that their claims could not be defended. The pursuit of their interests, and other States acting contrary to them, led to the emergence of distinct legal rules concerning neutrality and the carrying of contraband goods. Spain made peace at Vervins<sup>23</sup> in 1598 with France, but tensions grew with England, especially when that State gave assistance to the fellow Protestant United Provinces. The constant state of either war or belligerent peace, and the desire to trade during it led to the emergence of a doctrine of neutrality, promulgated by those whose chief interest was trade (such as the Hanse and the Dutch). The more powerful States developed in turn rules allowing, for instance, visit and search of ships, and forbidding the carrying of contraband. The desire for new markets, or new and less disputed routes to old markets, led to the search for a northern passage. Denmark protested, since it claimed exclusive dominion of the northern seas, but ultimately it had to concede the right of

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<sup>21</sup> Treaty of Crépy-en-Laonnais 1544. Dumont IV, ii, 279.

<sup>22</sup> Dumont V, i, 31.

<sup>23</sup> Treaty of Vervins 1598. *Mémoires et Documents. France et divers états*, f.16.

navigation (on payment of a tax). This period is notable for the emergence of the 'unilateral edict' as a source of binding rules. With the undermining of the expansive claims to jurisdiction, States began to assert narrower, more defensible, areas. Ordinances issued concerning matters of contraband and neutrality easily led to the definition of the 'limits' of a State's adjacent waters: for Denmark a two league limit, for Spain the line-of-sight, and for England the "King's Chambers" (lines connecting the headlands of bays).

By the early 17th century, it is possible to say, the *mare liberum/mare clausum* dispute had become crystallised, and the two sides' positions and the reasons for their emergence are examined in chapters six. Since it was the Dutch and the English who were the main protagonists in the dispute, their positions will be examined most closely. The Dutch, French and English still argued strongly against Spain's attempted exclusion of them from the American and East Indies trade, and with colonial ambitions themselves they forced Spain to agree by a series of treaties to their rights to navigate there. England turned towards a policy of the 'closed sea' off its own coasts, following the declaration of the King's Chambers, particularly under Charles I. To increase its burgeoning trade with the East Indies, the United Provinces commissioned Hugo Grotius to provide a legal justification for their policy of freedom of navigation and trade it was asserting there, which he did in *Mare Liberum* (1609). The book, while drawing on previous works, was the pre-eminent proponent of the cause of the freedom of the seas. After its publication the Portuguese capitulated in the East, although the Dutch shortly afterwards began to engage in much the same 'exclusiveness' towards the English, and it will be shown how the Dutch formulated their own theory and practice regarding the law of nations. A parallel development is also discussed: the Anglo-Dutch disputes over fishing rights, when England under James I attempted, for the first time in its history, to prohibit fishing off its shores, pursuant primarily to a new perception of the Dutch as its main enemy and competitor rather than ally. Despite its greater power, Dutch diplomatic dexterity meant England was never able fully to enforce this policy, and James conceded the right to fish in the alliance of 1624.

In chapter seven the various responses to Grotius are considered.

Diplomatically England, most affected immediately, reacted angrily, but no written refutation of Grotius appeared until Welwood's work (1615), which argued that a State had a jurisdiction over its adjacent waters. The Portuguese were also affected by the Dutch policy, in the East, and Freitas published a rebuttal (1625), arguing that rights of navigation and free trade were not over-riding, and that States could refuse admission to the seas adjacent to their coasts. It is in his work, perhaps, that we see the first clear indications of an emerging concept of territorial waters as now understood. As a response to a perceived threat to the Channel from France, Charles I ordered a search for the records and evidence of England's sovereignty over the sea. It resulted some time later in Selden's *Mare Clausum* (1652), and an overwhelming mass of information and argument, most of it wholly unconvincing, designed to demonstrate a long-standing English dominion over the "British Seas". Other States' perspectives were also represented by jurists, and this period is notable for the emergence of doctrine as important evidence of the law of nations in the perspective of States.

#### **1.4 Methodology and use of sources**

The method used for this study involved, in essence and to simplify greatly, a three-fold process. The evolution of the international rules pertaining to rights on and breadth of the seas adjacent to States' coasts was traced and major factors in that evolution - such as important treaties or agreements, and shifts in a State's policy - were drawn out. Then a general 'political' history of the period to be covered was sketched out, showing the major preoccupations of the main powers, their wars and alliances, domestic concerns, and foreign policy. Finally, correlations between the two lines of development were drawn, with the result that the effect of the latter on the major of the factors of the former emerged.

It is intended by this study to illustrate a methodology for approaching theoretical and historical analysis of international law, which can be used in almost any area of the field. It is hoped that others researchers will be able to apply this and similar methodologies to the broad panorama of international legal study, and that a better understanding may thereby achieved of the way that policy and other objectives

of States can influence the way that international law evolves.

Having sight of the text of treaties, alliances and other agreements between States, and legislation and ordinances, was of obvious importance to the study. Accounts of treaties may be found in various works, but they are usually radically abridged, often imprecise, and sometimes inaccurate. The use of these sources is therefore best minimalised, although locating collections of treaties is not always easy.

Of the collections, the two main ones are generally regarded almost as 'primary sources' in their own right (and are quoted as such in the text): Dumont (*Corps universel diplomatique*), supplemented by Rousset, and Rymer (*Foedera Acta Publica Anglica*), which are both in the Library of the University of Utrecht. The former also gives a large amount of background correspondence. Of modern day works, Davenport (*European Treaties*) provides many useful treaties from the late Middle Ages (and some useful analysis) but is not intended to be a full account, and although Parry (*Consolidated Treaty Series*) is the main source in general, it covers only the period after the Treaty of Westphalia and is thus not of use for this study. A list of every treaty made by Britain since the start of the 12th century is given by Parry and Hopkins (*Index of British Treaties*), which is of obvious use, although gives little in the way of content. Hertslet (*Complete Collection*) gives more, while others, such as Chalmers (*Collection of Treaties*) give only a selection of major treaties, and not always the ones relevant here. It is possible to build up a complete picture for all States with the collections, such as Martens, GF (*Nouveau Recueil*) for France, Reedtz (*Répertoire historique*) for Denmark, and Martens, FF (*Recueil des traités*) for Russia, all of which are in the Bibliothèque Nationale in Paris. Crocker (*Extent of the Marginal Sea*) covers the right subject but mainly the wrong period, although is useful for extracts from some older secondary works.

Communications between States and discussion within governments show for instance States' responses to particular incidents, and the *travaux préparatoires* leading up to a treaty. The vast array of British official communications published by the HMSO yields useful communications mainly from the early Middle Ages, and relating to trade links with Venice and the Italian States and Spain. The calendars

(and lists) of State Papers, Foreign and Domestic, cover most of the 16th, 17th and 18th centuries, contain letters to and from foreign States as well as internal memoranda and domestic correspondence. Thus the period with which the study is concerned is covered. Researches in foreign archives have produced collections of documents concerned with Britain or which affect Britain. For Spain (and thus for some time also the Netherlands, Austria, etc.) these cover the 16th century, and for Venice the 13th-17th centuries. These collections are helpful in that they have a fairly wide remit and give much information on relations between States other than Britain.

Material from which to build a general, although necessarily detailed, picture of the political history of the time is relatively easy to come by. Any number of secondary sources (discussed in the next section) is available for an understanding of States' foreign policy, and diplomatic records and political memoirs or collections of letters are helpful on particular points of detail.

### **1.5 Survey of relevant literature**

Changes in relevant aspects of the law of the sea over the period with which this study is concerned can be drawn from a variety of sources. As well as the standard general works such as Colombos (*International Law of the Sea*), O'Connell (*International Law of the Sea*), Churchill and Lowe (*Law of the Sea*), etc., examples of State Practice, treaties and agreements between States, diplomatic correspondence, etc. - all of which will add to a picture of the law - come from many of the sources mentioned below.

Any study in this area must still start with Fulton's masterly survey (*Sovereignty of the Sea*), which contains a mass of information, although ultimately it may be seen as a little Anglo-centric, and perhaps weighted overly towards fishing rights. Other general works cover similar ground to Fulton but in less detail: Smith (*Law and Custom*) is helpful for factual points, although is concerned mainly with the laws of war; McFee (*Law of the Sea*) is unacademic, but is still helpful in providing general background. Potter (*Freedom of the Seas*) provides a short, pithy account, and an uncommon perspective is given in Anand's recent work (*Origin and Development*), a determinedly non-Western account of the law's history, drawing heavily in part

from Alexandrowicz (*History of the Law of Nations in the East Indies*). Verzijl (*International Law in a Historical Perspective*) gives a short but detailed summary of claims to jurisdiction.

Sources concerned more precisely with territorial waters are Swarztrauber (*Three mile limit*), which draws heavily on many of the sources mentioned here; Bustamente (*Territorial Sea*), which gives an account of much State Practice and of many treaties fixing boundaries; and Meyer (*Extent of Jurisdiction*) which concentrates on Danish and Norwegian practice. Masterson (*Jurisdiction in Marginal Seas*), Marston (*Marginal Seabed*) and Rhee cover periods too late for this study, but are of help from a methodological point of view. Other sources on particular points are the articles by Baty, Fenn, Beinzan, Kent, Higgins and Walker.

The famous works by Grotius, Selden, Vitoria, *et al*, are available in relatively modern editions, and are important as contemporary contributions which had great influence on States' actions. They are also well analysed by De Pauw (*Grotius and the Law of the Sea*) and Scott (*Spanish Origin*), etc., and in many other works, such as Potter.

The place of the law of territorial waters in the development of international law is considered briefly by Butler and Maccoby (*Development of International Law*) and Hosack (*Rise and Growth*). The classic work on the history of international law generally is Nussbaum (*Concise History*), and Ward, Walker and Whiteman (*inter alia*) may be used similarly.

The question of the sources of international law, and the precise way in which State Practice and so on, can be said to lead to its development, is considered famously by De Visscher (*Theory and Reality*). Parry (*Sources and Evidences*), Carty (*The Decay of International Law*) and Van Hoof (*Rethinking the Sources*) are also helpful. How far the dictates of policy can influence the direction of international law is considered by Fenwick (*Foreign Policy*) and Kaplan and Katzenbach (*Political Foundations*). These works are very much in the abstract however and are not concerned with the law of the seas as such, but international law in general. Moreover they consider recent trends rather than historical ones, and so while they are useful in contributing to a theory of international law generally, other sources



(diplomatic correspondence, State Papers, etc.) are needed for a full historical analysis.

The sources gathered loosely together in the Bibliography under the heading Secondary Sources (General) are used to draw out the extra-legal factors which may have played a part in shaping the law of the sea. That is to say, they will show which policy objectives have influenced States' maritime practice. One of the most useful sources is the classic work by Mahan (*Influence of Sea Power on History*), whose central thesis was that the effect of sea power had been hugely under-appreciated. In attempting to redress the balance Mahan spends a lot of time examining in exhaustive detail the innumerable sea battles of the period (which, perhaps, is to be expected from a naval officer), but he also gives a lot of information on trade factors, naval policy, and so on.

The general history of the period can be taken from any number of works, and few general historical works are listed here. Sources on particular aspects will however be given. The expansion of Spain and Portugal into the New World, which, if not the cause, was certainly the catalyst for the expansive claims to territorial waters in the 16th and 17th centuries, is usefully covered in Parry (*Europe and a Wider World*), which is particularly good for its accounts of the trade interests of the States concerned. Similarly Boxer (*Dutch Seaborne Empire*) gives an account of Holland, and the trade policy of England is covered in Foster (*England's Quest*), Wilson (*Profit and Power*) and the various works by Davis (in particular *The Rise of the English Shipping Industry*). Trade relations as regards other States and particular parts of the world are found in such sources as Unger, Kerling, etc. Foreign policy in general is covered in Brinkmann, Edmundson (*Anglo-Dutch Rivalry*), Egerton (*British Foreign Policy*), Motley (*History of the United Netherlands*), etc.

Factors other than trade which have influenced the attitude of States towards the law of the sea are covered in Mahan. Other works cover particular points: for instance the question of timber for ships is addressed in Albion (*Forests and Sea Power*) and Gold (*Maritime Transport*). A study of the navy, naval policy and shipping in general will be necessary to an extent. To this end, for Britain at least, sources such as Kennedy (*Rise and Fall*), Corbett (*Fighting Instructions*), Richmond

(*Navy as an Instrument of Policy*), and Penn (*Navy under the Early Stuarts*), will be useful. More generally, Calendar and Hinsley (*Naval Side of British History*) and Waters (*The Art of Navigation*) are of some help.

The correspondence of ambassadors and envoys abroad will be of use in showing how the views of States were expressed to other States, and as a record of what those views were. Background on who the diplomats are is in Raschet (*Lists of Ambassadors in England*), Rindoff (*British Diplomatic Representatives*), Legg (*Lists of Ambassadors*). The work of diplomats and how they operate comes from Merillat, and McDonald, etc. The reports of diplomats, their correspondence, etc., showing the responses to incidents, suggestion, legal opinions and so on (of both the diplomat's national State and the receiving State) are available in many cases. They are found in collections of State Papers, private papers and memoirs, eg. Foster, Kemble, Firth and Lomas, Chance and Birch, and also British Diplomatic Instructions, Recueil des Instructions, etc. In addition British legal opinions come from the Foreign Office (*Law Officers' Opinions*) and McNair (*International Law Opinions*).

The nature and sources of international law have for centuries been the subject of juristic debate, and major upheavals in the geo-political framework, and even socio-cultural trends, have led to periodic analysis and reanalysis of international legal theory. To the present day debate is conducted in the long shadow of positivism, which was at its apotheosis in legal theory as long ago as the middle of the 19th century, and yet still forms in essence the starting point for discussion of the sources of international law. Theoretical developments since have suggested a number of models for the formation of international law, and the present study will conclude, without straying too far from its central purpose, with an analysis of how well the developments in the area of law under examination fit into these frameworks.

Positivism traditionally asserts that States are 'supreme' and can be bound only by those laws to which they have agreed. A legal framework is built up around treaties between States, and rules of custom (to which they give an implied agreement). For some, such as Anzilotti, perhaps one of the greatest positivists, the binding nature of international law was due to the fundamental norm of *pacta sunt*

*servanda*:<sup>24</sup> once States had given their consent to a rule, therefore, they were bound by it. But while respect for agreements and treaties goes back several centuries BC,<sup>25</sup> in practice States find themselves to be (and regard themselves as) bound by rules to which they have not agreed or consented, either because the society of States in general has given agreement or a treaty made by other States has a wider effect, or because the State came into existence after the law had been agreed.<sup>26</sup>

Some have seemed to dispute whether consent need be given by States at all for a rule to come into being. For Parry the sources of international law turn on the practice of States: "States are thus not only subjects of the law, but they are objects as well... [W]hile it is to them the law is given, they are the law-givers."<sup>27</sup> Treaties are, under this model, peripheral: "Despite the primacy of treaty over customary international law in any particular regard, the proportional contribution of treaties to the whole stuff and content of the international legal system, even allowing for the area of customary law to be codified and restated by treaty, is relatively small."<sup>28</sup> But Parry discounts too far the connection between the reasons for a State taking a particular course of action, whether under a treaty or following custom, and its perception of its obligations under law. The more common view regarding the importance of custom holds that State practice must be accompanied by an element of '*opinio juris*'. For D'Amato law is changed or formed through a process of States violating existing customary rules, with every violation containing the "seeds of a new

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<sup>24</sup> Anzilotti, *Cours de droit international*, 1929, Paris.

<sup>25</sup> Nussbaum, *A Concise History of the Law of Nations*, 1954, Macmillan, New York, 1-10. As will be shown, Carty is erroneous in asserting that statesmen did not regard treaties as legally binding until the late 19th century. Carty, *op. cit.*, 15.

<sup>26</sup> Ch.6, *post*, examines how the Dutch Republic formulated its policy regarding extant international law as it became independent from Spain in the late 16th and early 17th centuries.

<sup>27</sup> Parry, *The Sources and Evidences of International Law*, 1965, Manchester University Press, Manchester, 8.

<sup>28</sup> *Ibid.*

rule".<sup>29</sup> If the violation is pursued and followed by a sufficient number of States for a sufficient length of time it will lead to a new rule of custom.

This emphasis on custom and practice has led to counter-argument from those who assert again the need for States to consent to rules by which they are bound. Hoof, for instance, claims to be taking a strictly legal approach (as opposed to one from a philosophical, empirical or political science perspective), and asserts that "[i]t is not necessary to resort to violations in order to explain changes in customary international law [since] contrary practice cannot strictly speaking change rules of international law."<sup>30</sup> He argues that if practice makes a rule a customary rule, but needs *opinio juris* to turn itself into a rule of law, then "it is only through the operation of *opinio juris* that customary international law may change: what *opinio juris* can do, only *opinio juris* can undo."<sup>31</sup> For customary international law to change, Hoof says, "requires the crumbling away and disappearance of *opinio juris* with respect to the old rule and, subsequently, the development and the expression of *opinio juris* with respect to the new one."<sup>32</sup> Hoof encounters many familiar problems in his work, but perhaps most fundamentally his model is highly theoretical (which he admits) and as such seems not to bear comparison with the actual decision-making process of States. It is difficult to see how the *opinio juris* regarding one rule can "crumble" entirely and disappear *before* the formation of an *opinio juris* for the new one. He tries to separate *opinio juris* from practice,<sup>33</sup> whereas in fact they are too closely connected and inter-dependent for this to be possible. Hoof's central objective is to show whether a rule is indeed a rule of law, and to this end he is also

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<sup>29</sup> D'Amato, *The Concept of Custom in International Law*, 1971, Ithaca, London, 29. Akehurst has argued a similar point: (1974-5) 47 *BYIL* 1 "Custom as a source of International Law".

<sup>30</sup> Hoof, *op. cit.*, 100.

<sup>31</sup> *Ibid.*, 101.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 97.

concerned to narrow the gap between 'law' and 'non-law' that some have detected in the form of so-called 'soft-law' (such as the Resolutions of the General Assembly of the United Nations).<sup>34</sup>

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<sup>34</sup> For recent discussion of its importance, see Charney (1993) 87 *AJIL* 529-51 "Universal International Law".

**Early State practice: claims to jurisdiction, the maritime codes, and maritime laws to the 15th century**

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## **2.1 Introduction**

In the late Middle Ages claims to a form of jurisdiction or sovereignty over areas of the sea were made by a number of States in Europe. Usually these claims amounted to an assertion of criminal jurisdiction over acts occurring within the waters. Sometimes they would involve demands for taxes from ships sailing through them (for example, Venetian claims in the Adriatic), which would be expressed as a charge for the protection of the coastal State while within the waters; or a claim to exclude other States ships from the waters entirely (for example, Danish claims in the Norwegian Sea); and in a few cases (for example, English claims in the "British Seas") the claim led to demands that ships lower their sails or flag if ordered to do so within the waters. However, these claims should not lead us to the view, which is commonly held, that the seas of Europe were effectively 'closed', and remained so until the 17th century. Ships could generally navigate wherever they wished without much hindrance from coastal States, and, as we shall see, the claims were often responses to immediate political events, rather than measured steps in the direction of custom. The status of coastal waters was also affected by customs and usages developed by traders for behaviour at sea which were occasionally codified and took on the character of binding "rules" of practice.

This chapter will examine generally these early claims to jurisdiction and the maritime codes, and the reason for their emergence. It will then look, in more detail, at the maritime codes and the jurisdictional claims in the context of the three areas of Europe where they were made - the Mediterranean, the "British Seas", and the northern seas - and look at the nature of the claims more closely. Then the influence of fishing and navigation treaties will be examined, and finally a brief account of the political context will be given.

## 2.2 The emergence of maritime rules and claims to jurisdiction

Claims to jurisdiction, dominion or sovereignty<sup>1</sup> over territorial waters or adjacent seas did not emerge until well after the decline of Rome, and indeed would have been impossible before then. In Roman times the sea was regarded as free for all. Gidel describes the contemporary position thus: "la mer est libre, comme l'air; tous les hommes en peuvent faire les usage et non pas seulement les citoyens romains, la mer est *juris gentium*".<sup>2</sup> But such Roman concepts could not survive the vacuum left by the empire's collapse, and without a strong political control from the centre to maintain them, individual States began, contrary to traditional practice, to make tentative 'claims' over their adjacent waters. The impulses behind the emergence of rules of "maritime law" (as they became known) were, it will be shown, desires firstly to make the seas safe for trade, and secondly to avoid disputes between subjects of the same State, in order to keep the peace within it.

The medieval rebirth of European trade led merchants to carry large quantities of oriental goods from the Levant to the ports of the western Mediterranean, and thus to the markets beyond. The Baltic trade also increased with the growth of the Hanse. The ships would thus make long, exposed journeys, and, laden with goods, were easy

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<sup>1</sup> The distinction between jurisdiction (*jurisdictio*), dominion or ownership (*dominium*) and sovereignty (*imperium*) has always been difficult to draw. There is general agreement amongst writers that the latter two are the wider terms, with the former connoting only a power to legislate. However, States (and jurists) have always found the terms difficult to define, and it is more productive to look at what a State claims to be able to do, rather than the nomenclature it uses. The distinction between the three is made in a memorandum in SP/9/53/49 f.3. See further, De Lapradelle (1898) 5 *RGDIP* 264 "Le Droit de l'état sur la mer territoriale"; Fulton, *The Sovereignty of the Sea*, 1911, Blackwood, London, 2, 3.

<sup>2</sup> Gidel, *Le Droit international public*, III, 1934, Paris, 25. Potter suggests, *contra*, that Rome claimed a dominion over the Mediterranean, at least when it conquered all the coastal States around that sea. The Roman *practice* was either different to the *doctrine*, or the latter applied only to Romans. See Potter, *The Freedom of the Seas*, 1924, Longmans, New York, 25-35. See generally on the Mediterranean, Mollat du Jourdin, *Europe and the Sea*, 1993, Blackwell, Oxford, 32-38; Fenn (1925) 18 *AJIL* 716 "Justinian and the Law of the Sea".



and enticing prey. The seas of the time were infested with pirates, notably the Saracens in the Mediterranean and the Normans in the Channel and North Sea, and a merchant ship sailing alone was liable to be attacked - merchants began, therefore, to travel in groups, or fleets. The chief of a fleet became known as an "admiral",<sup>3</sup> and disputes amongst the fleet on matters of prize and maritime practice were taken to him. Customs and usages built up among the fleets. At this time States - whose interests lay, of course, in uninterrupted trade routes to their ports - did not generally have their own navies (which did not emerge until about the 15th century) but employed the fleets instead, and in doing so left them to obey their customary rules.<sup>4</sup> Customs also developed on a regional basis, amongst merchants using particular groups of ports, many of which were later codified. Often the local laws could not provide the necessary rules for the efficient management of foreign trade, and disputes would be resolved by adverting to commonly recognised customs. They would have been followed long before they began to be written down in the 12th and 13th Centuries, and sometimes they were imported by a ruler to new territories. These two sources of practice - the customs of fleets, and those of the merchants at certain ports - grew into the corpus of maritime law.

Private disputes or wars between a State's subjects were uncondusive to its welfare, and acts of violence on the sea by one subject against another, or against a foreigner, were prohibited.<sup>5</sup> Private reprisals were disapproved in favour of redress through the sovereign of the offender's State, and only if redress were denied thereby could action be taken, and then only with letters of *marque* or reprisal granted by the

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<sup>3</sup> The word comes from the Arabic *amir-al-bahr* ('commander of the sea'). See Colombos, *International Law of the Sea*, 6th ed., 1969, Longmans, Green and Co., London, 12-13.

<sup>4</sup> Higgins, in Holland Rose and Newton (eds.), *Cambridge History of the British Empire*, 1929, CUP, Cambridge, I, ch.VI, 196.

<sup>5</sup> See generally, Reddie, *Researches Historical and Critical, in Maritime International Law*, 1844, Clark, Edinburgh, 41; Fulton, *op. cit.*, 6.

sovereign.<sup>6</sup> Officers of the State were given the power to visit and search vessels to suppress piracy, and this right was eventually, although not without resistance, extended to searching vessels during wartime, to look for enemy cargoes, and the laws of neutrality developed in relation to it. The prohibition of maritime violence could be enforced by a State most effectively close to its shores, and the action to enforce it, it is submitted, easily became transmuted into a jurisdiction over criminal matters in the coastal waters, and ultimately in some cases to claims to 'sovereignty' and 'dominion'.<sup>7</sup>

The question of jurisdiction had no bearing on the maritime right of fishing: there was a general freedom of fishing in the waters close to France, England, Germany and Denmark. The waters were well-stocked with fish, and the notion of restricting foreign fishing did not arise. However, it may be noted that in these States fishing was not the principal means of sustenance, whereas farther north, in Scotland and Norway, it was vital, and in those States restrictions were imposed on foreign fishermen.<sup>8</sup> Restrictions on fishing and the granting of licences - where they did occur - stemmed from a different source than did maritime rules in general: whereas the latter evolved from the practice of fleets of merchant ships, the former had their origin in feudal law concepts. Fishing limitations could come only from immemorial usage.

The maintenance of peace in the seas close to a State's coast was, then, the main factor in the emergence of claims to jurisdiction or sovereignty, such as they were. Coastal States were not slow to see that if their own vessels benefitted from the

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<sup>6</sup> Reddie, *op. cit.*, 42.

<sup>7</sup> It will be shown below how these claims amounted to very little, in comparison to later ones. Gidel argues, *contra*, that the jurisdiction claim emerged *before* a duty of protection, with the latter consequent on the former; see Gidel, *op. cit.*, 28.

<sup>8</sup> The law relating to fishing will be considered further *infra*. Necessity developed the concept of an adjacent sea more quickly in the North than the South, due to the greater need for protection from pirates, but also because the waters were richer in fish than in the Mediterranean.

safety of these waters, foreign ships would do so also, and the levying of taxes in consideration for this protection was sometimes introduced, for example in Venice. This also contributed to the notion of States having a sovereignty over the waters, as did, later, monarchical pretensions to being "Lord of the Sea", and to having this suzerainty acknowledged and recognised by other States, and the protection and preservation of fishing stocks.

## **2.3 Maritime codes**

### **2.3.1 Introduction**

Coming before the emergence of the nation State - which produced its own laws - the maritime codes that appeared in the 13th and 14th centuries represent early customary law. Codes developed around certain ports, or between a group of trading nations: the customs built up by sailors and merchants would be set down either as general principles or binding rules. Numerous codes developed,<sup>9</sup> resulting in several concurrent juridical areas on European seas, but two in particular came to be influential: the *Consolato del Mare* in the Mediterranean and the *Rôles d'Oléron* in northern and western Europe.

### **2.3.2 The *Consolato del Mare***

In the Mediterranean the commercial revival led the traffic between the most important trading cities (Venice, Genoa, Pisa, Florence, Marseilles and Barcelona) to develop maritime customs and usages, which were compiled in the *Consolato del Mare* (or *Costumbres maritimos*) in Barcelona in the early 14th century.<sup>10</sup> The

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<sup>9</sup> An excellent concise account of the codes and their history is given by Colombos, *op. cit.* A more detailed treatment is given in Sanborn, *Origins of the Early English Maritime and Commercial Law*, 1930, Century, London, ch.2. See further, Reddie, *op. cit.*, 45.

<sup>10</sup> First published by Francisco Celedes: *Consolato del Mare*, 1494, Barcelona. For a more detailed discussion of the codes in the context of maritime history see Mollat

*Consolato* contained many local statutes, and decisions on their application by the elected "consuls" who had jurisdiction in maritime cases: they were mainly rules of conduct for ships when dealing with others on the sea, in peacetime and at war, being intended to counter the effects of conflicts between the Mediterranean republics. It was a well-organised and comprehensive account (there were 252 chapters) covering all aspects of maritime enterprise. As a compilation of practice and custom steadily built up by maritime powers over the preceding centuries, it was widely adopted, and influenced maritime law for some time after its publication.<sup>11</sup> Indeed, Hosack writes that it was observed, with only occasional interruptions, for five centuries, proving that it was "framed in accordance with the general interest and convenience of maritime nations."<sup>12</sup> It was also later exported to South America and the East Indies by Spain and Portugal.<sup>13</sup> The *Consolato*, then, contained the first well-defined rules applicable to both belligerent and neutral shipping in time of war.

### 2.3.3 The *Rôles d'Oléron*

The cities and peoples living on the coasts of northern and western Europe gradually adopted, from the mid to late 12th century, the code of practices contained in the *Jugements ou Rôles d'Oléron*.<sup>14</sup> The *Rôles* seem to have been compiled by the

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du Jourdin, *op. cit.*, 96, *et seq.*

<sup>11</sup> Reddie, *op. cit.*, 56. Another reason for its influence was that it was in the vernacular rather than the Latin of the statutes, which few merchants understood.

<sup>12</sup> Hosack, *Rise and Growth of the Law of Nations*, 1882, John Murray, London, 164. Some of the rules survived to the Peace of Paris 1856.

<sup>13</sup> Reddie, *op. cit.*, 56.

<sup>14</sup> The most complete version of the *Rôles* is in Pardessus, *Collection de Lois maritime antérieures au XVIII<sup>e</sup> siècle*, I, 1828, Paris. An early version, from 1266, is referenced in A.N. Mar./A/3/1/1 to Cleirac, *Us et Coutumes de la mer*, 1671, Rouen. An English translation appears in McFee, *Law of the Sea*, 1951, Faber and Faber, London, App. See generally Wood (1914) 4 *MM* 195 "The Laws of Oleron"; Hosack, *op. cit.*, 163.

order of Eleanor of Aquitaine before she married Henry II of England in 1152,<sup>15</sup> and were derived from the judgements of a maritime court on the island of Oléron, off Bordeaux, 20 miles north of the Gironde estuary, which dealt with the ships of the region's enormous wine trade.

The *Rôles*' influence - as a collection of rules when there was little maritime legislation - grew, and copies were made in several languages for use in other parts of north-western Europe, perhaps in particular those connected with the wine trade. The original Gascon version appeared in the mid 12th century, and an Anglo-Norman translation in England in the late 12th or early 13th century, with Breton and Castilian versions in or soon after 1266.<sup>16</sup> And there was a Flemish version in the famous "Purple Book" of Bruges by the late 14th century. As the *Rôles* spread their provisions were developed, and in various parts of Europe there were many additions to the original 24 articles.

The *Rôles* contained rules concerning peacetime conduct (but not conduct during war) and although they had no rules for settling international disputes as such, many of the provisions were designed to avoid conflict. With so many ships from different countries sailing in and out of the same ports, national hostilities could easily lead to incidents between ships flying different flags. Even between seamen from States nominally at peace, lingering ill-will could easily be manifested by, say, a ship coming into port ramming the side of a ship already docked. For such an instance, the *Rôles* provided for a system of recompense which made it in the interests of both ships to avoid such an incident.<sup>17</sup>

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<sup>15</sup> Colombos, *op. cit.*, 32. However, legend has it, in England at least, that they were published by Richard I when he returned from the Holy Land. See the Memorandum in SP/9/53/49 f.1. The evidence supporting this as the source of the *Rôles* is less than overwhelming, although it is possible that they first appeared in England by that means: Oléron provided many ships for the Third Crusade.

<sup>16</sup> Wood, *op. cit.*.

<sup>17</sup> See note by Laughton (1914) 4 *MM* 315.

Other provisions concerned discipline of seamen and forms of punishment. For instance, in a copy of the *Rôles* contained in the Black Book of the Admiralty, Article 34 provides:

"Item etabliir est pour coutume de mer que le nef est perdue la deffaulte dun lodeman les mariners puent si leur plect amener le lodeman a la guyandas ou a autre lieu et couper sa teste sans ce quen aps le maistre ou mal de les mariners tenu den respondre devans aucune autre juge pource que le lodeman fist grant trayson a som entreprise de lodemanage. Et cest le jugement en le cas."<sup>18</sup>

This is notable as an example of one of the regional variations of the *Rôles*. The English version of this rule in the Black Book (which, indeed, has ten more articles than the original) is different from the Castilian code, which for the same offence allowed the unfortunate 'lodeman' to make good the damage if able, and the version in the "Oak Book" of Southampton, which required only that he lose his right hand and left eye.<sup>19</sup>

#### 2.3.4 Other codes

The *Rôles d'Oléron* themselves had been derived in part from an early Greek maritime law book, dating from pre-Christian times, but written in the 7th or 8th century, called the Rhodian Sea Law, which is often said to be the 'source of maritime law'.<sup>20</sup> The customs developed at Rhodes were in turn reflected in the

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<sup>18</sup> The Black Book is referenced HCA/12 in the PRO. Translation in Owen (1911) 1 *MM* 267: "It is established for a custom of the sea that yf a ship is lost by defaulte of the lodeman (pilot) the maryners may, if they please, bring the lodeman to the Windlass, or any other place and cut off his head withoute the maryners being bounde to answer before any judge, because the lodeman has committed high treason against his undertakynge of the pilotage. And this is the judgement".

<sup>19</sup> Wood, (1914) 4 *MM* 196.

<sup>20</sup> See, for example, La Moire, *Précis de Droit maritime international et de Diplomatie*, 1888, Berger-Leurault, Paris. An English translation appears in McFee, *op. cit.*, App. See further Ashburner, *The Rhodian Sea Law*, 1909, Oxford;

*Digests* of Justinian the Great in the 6th century, and in the Byzantine *Basilica* of the 9th century. Other codes emerged,<sup>21</sup> but ultimately were either superseded by, or subsumed, the *Rôles* or the *Consolato*, eg. the Assizes of Jerusalem,<sup>22</sup> and the *Guidon de la Mer*.<sup>23</sup>

In England, various "ancient statutes of the Admiralty to be observed both upon the ports and havens, the high seas and beyond the seas"<sup>24</sup> were collected in a small volume known as the "Black Book of the Admiralty".<sup>25</sup> It was compiled at the time the English Admiralty Court was instituted in the late 14th century, although contains documents purporting to be from the 13th century. It was of great authority in the court and was cited in admiralty cases for centuries. It has, for instance, instructions to the fleet leading up to the important naval victory of Sluys in 1340 in the reign of Edward III, on questions of regulating the navy, admiralty jurisdiction,

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Colombos, *op. cit.*, 31; McFee, *passim*.

<sup>21</sup> See Colombos, *op. cit.*

<sup>22</sup> These were the laws administered by Crusader courts in the Levant.

<sup>23</sup> The 'last' of the codes, this was a collection of rules applied by a court in Rouen (although it was in practice, and later in fact, national legislation) and published in the early 17th Century. La Moire, writing towards the end of the 19th Century, says "Le *Guidon* ... fut une oeuvre de grande valeur. Plusieurs de ses dispositions sont encore quelquefois invoquées. L'Ordonnance de la marine de 1681 en est, pour ainsi dire, la reproduction." See La Moire, *op. cit.*, 1888.

<sup>24</sup> From a judgement of the High Court of Admiralty in a case from the early 18th Century, quoted (un-named) by Owen, *op. cit.*.

<sup>25</sup> HCA/12 in the PRO. See further Twiss, *The Black Book of the Admiralty*, 1867; Marsden, *Documents Relating to the Law and Custom of the Sea 1205-1767*, I, 1915, NRS, 118.

captures at sea, collisions, practice on meeting other vessels, and so on.<sup>26</sup> It was not until the 19th century that the Black Book was fully superseded as an authority.<sup>27</sup>

### **2.3.5 The codes in practice**

There was an inevitable conflict in war-time between the interests of a belligerent and the interests of a neutral. The latter would claim to have nothing to do with the conflict and would wish to transport its own or the enemy's cargoes on its ships, and have its goods transported on the enemy's ships. The former would seek legitimately to capture anything that might assist the enemy, whether enemy cargo in a neutral ship, or an enemy ship, whether or not it was carrying a neutral cargo. This conflict was sharpest in the 16th century when the new Nation-States began to prohibit the carriage of supplies to their enemies. Other States and the Hanse would risk being captured by continuing to trade with them.<sup>28</sup>

The *Consolato* favoured the belligerent. Its fundamental principle was that the commerce of an enemy at sea could at all times be lawfully captured. If an enemy cargo was carried on a neutral ship, then the cargo was good prize, but the ship had to be returned to the owner, who was paid whole freight. If an enemy ship was carrying a neutral cargo, then only the ship was good prize, and the cargo had to be restored. If an enemy ship was carrying an enemy cargo, then both, of course, were good prize.<sup>29</sup>

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<sup>26</sup> HCA/12, *op. cit.* See further Owen, (1911) 1 *MM* 268; Marsden, *Law and Custom*, Introduction, xiv. –

<sup>27</sup> The Black Book was lost for 50 years before famously being discovered in the mid-19th Century (oddly, at about the same time as the discovery of Grotius' *De Jure Praedae* in Leiden - see ch.6 *post*) by Sir Travers Twiss, the last Registrar of the Admiralty Court, in an old chest containing the private papers of one of his predecessors. It is now kept in the Safe Room of the Public Record Office, London.

<sup>28</sup> See *infra*, ch. 5.

<sup>29</sup> See Celedes, *Consolato del Mare*, 1494, cap. cclxxiii, cited in Hosack, *Rise and Growth of the Law of Nations*, 1882, John Murray, London, 165.



The Hanse Towns established the first main attempt to alter the *Consolato* rules. They favoured the neutral, meaning themselves, due to the vast profits that could obviously be made carrying goods while all around were at war. Their preferred rule was that the flag should protect the cargo - "free ship, free goods" - meaning that enemy goods on a neutral ship would be exempt from capture. In 1667 the Hanse published a code containing its own rules of maritime commerce.<sup>30</sup>

### 2.3.6 Widening of use of the codes

The development of printing in the mid-15th century allowed for a far wider distribution of the maritime codes, and in the vernacular rather than Latin. The *Consolato del Mare* seems to have been the first to be printed, in Catalan, in 1494, with further editions in Catalan and editions in Spanish, Italian and French being printed throughout the 16th century.<sup>31</sup> The *Rôles d'Oléron* were first printed in English in 1536 - after long being acknowledged as an authority in the English Admiralty Court - in a book of sailing instructions translated from the French.<sup>32</sup> Other codes were, over the next few decades, printed in French,<sup>33</sup> Dutch<sup>34</sup> and Spanish.<sup>35</sup>

The influence of the codes is shown by the fact that, despite the advent of printing, for many years, very few books on maritime law were published. So in

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<sup>30</sup> *Jus Maritimum Hanseaticum*, 1667. See further Reddie, *op. cit.*, 59; Colombos, *op. cit.*, 33.

<sup>31</sup> Celelles, *Consolato del Mare*, 1494. Shortly afterwards were printed the *Laws of Wisby*, 1505, and the *Ordinamenta et Consuetudo Maris* of Trani, 1507. See generally Senior (1921) 37 *LQR* 323 "Early Writers on Maritime Law", at 325, 326.

<sup>32</sup> Copland, *The Rutter of the Sea*, 1536 (or 1528), London.

<sup>33</sup> *Le Guidon de la Mer*, 1556.

<sup>34</sup> Barent Adriaensz, *Boek van de Zee-rechten*, 1594.

<sup>35</sup> Juan de Hevia Bolaños, *Curia Philipica*, 1603, Lima.

1590 when the Scottish jurist William Welwood published his first maritime work<sup>36</sup> he was at pains to show that it was the first book in English on maritime law, which would otherwise be curious, as Senior has noted,<sup>37</sup> given the rapid developments in maritime exploration and overseas trade at the time. The codes were widely known, with additions and variations being made locally if and when necessary. For instance, the *Rôles d'Oléron* were not thought antiquated in the 16th century, even though they had been around for centuries. The English Admiralty Court's records after 1530 show that of the increasing number of maritime cases being decided there, many involved the principles of the *Rôles*.<sup>38</sup> With the use of a large number of manuscripts and ancient codes the Court had little need for other works. When Welwood published a second edition of his *Sea-Lawe* he dedicated it to the three Lord Admirals of England, whose jurisdiction in the Admiralty Court was then being assailed by the common lawyers, led by Sir Edward Coke. As late as 1896 there was an (unsuccessful) attempt to argue that the *Rôles* were still part of English law.<sup>39</sup>

The codes appealed to States because they were dynamic: they could, over time, be 'nationalised', or added and developed by individual States. As we have seen, they filled the vacuum left by the collapse of Roman dominion, and were 'intra-national', and becoming *jus gentium*, rather than *jus inter gentes*: developing amongst merchants from many States. They can be seen as ushering in, or being the herald of, international law as it is understood today. The older, more universal,

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<sup>36</sup> Welwood, *Sea Law of Scotland: shortly gathered and plainly dresit for the reddy use of all seafairing men*, 1590, Waldegrave, Edinburgh.

<sup>37</sup> Senior, *op. cit.* It seems, however, that Welwood was not in fact the first to publish a book on sea law in English. At a meeting of the Grotius Society in Edinburgh in 1953 Professor Smith said that, "Lord President Balfour's Sea Laws was written some ten years before Welwood's work of the same name" (ie. in 1580). See McNair, *International Law Opinions*, 1956, CUP, Cambridge, App.II, 428.

<sup>38</sup> Senior, *op. cit.*.

<sup>39</sup> *The Gas Float Whitton No. 2* [1896] P. 42 at 47.

codes would be replaced by national systems, just as the concept of universal empire was being replaced by Nation-States.

## **2.4 Maritime laws made by individual States**

### **2.4.1 Claims to exclusive jurisdiction and navigation in the Mediterranean**

When maritime commerce again began to take place on a large scale, the Mediterranean City-States flourished.<sup>40</sup> Venice in particular grew powerful, with its proximity to the Levantine ports making it the natural gateway to European markets for the produce of the Orient. Venetian dominion eventually spread along the shores of the Adriatic to the Dalmatian coast, and as far as Athens, Crete and Cyprus. A claim to sovereignty over the Adriatic was established relatively early - at least before 1177, when the sovereignty was recognised by Pope Alexander III in the Peace of Venice.<sup>41</sup> From 1269, a toll was levied on ships sailing north of a line between Ravenna and Fiume. Genoa had, similarly, long claimed the Ligurian Sea as its own, and it regulated the passage of ships through the sea, either granting or refusing permission to sail: for instance, permission was granted in 1239 to ships from Lucca, and in 1251 to ships from Florence; but refused by a treaty of 1143 to ships from

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<sup>40</sup> See generally Mollat du Jourdin, *op. cit.*, 57-69.

<sup>41</sup> Some claim that Venetian rights to control the Adriatic existed only *from* 1177, when they were accorded in gratitude by Alexander III as a privilege. See Haitsma Mulier, EOG, *The Myth of Venice and Dutch Republican Thought in the 17th Century*, 1980, Van Gorcum, Arran, 80. See also Potter, *The Freedom of the Seas in History, Law and Politics*, 1924, Longmans, New York, 37. It seems likely that the Venetian claim probably followed the pattern common at the time, of a claim being established in practice (by force, if necessary) and only then being recognised, by the Pope, and by treaties. On the famous ceremony whereby the Doge of Venice annually "married" the Adriatic, see Fulton, *op. cit.*, 4.

Montpellier.<sup>42</sup> Other cities claimed similar rights in the seas off their coasts, such as Pisa.<sup>43</sup>

The claims to exact tolls were not accepted immediately by other States. A few years after its toll was imposed, Bologna and Ancona went to war with Venice on the question, but they were not successful and were forced to pay and also formally to acknowledge Venetian sovereignty over the Adriatic.<sup>44</sup> The claims to sovereignty over parts of the Mediterranean, especially those of Venice and Genoa, were not generally successfully challenged for centuries and were maintained until the 17th century: for Venice, perhaps - a useful barrier against the Ottoman Turks and the Saracen pirates - even until its final decline and fall at the hands of Napoleon in 1805.<sup>45</sup>

Commerce with Islamic lands beyond Christendom was slow to develop, due to a mutual reluctance to trade with the enemy. When links were made, however, treaties often granted privileges to one city or State, and often brought with them exclusive rights of navigation. The waters at the eastern end of the Mediterranean were claimed by Turkey, which, says La Moire, "voulut être la maîtresse de toutes les mers baignant ses possessions, en particulier de la mer Noire".<sup>46</sup> It seems that Genoa was granted almost exclusive navigation rights in those waters by its many treaties with the local Tartars.<sup>47</sup> Venice - which had earlier requested commercial

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<sup>42</sup> Burgus, *De Dominio Serrenissimae Genuensis Republicae in Mare Ligustico*, 1641, Rome; cited by Gidel, *op. cit.*, 137.

<sup>43</sup> Selden, *Mare Clausum: the Right of Dominion of the Sea*, (tr. Needham) 1652, London, 105.

<sup>44</sup> Hall, *A Treatise on International Law*, 7th ed., 1917, Clarendon, Oxford, 144; Butler and Maccoby, *Development of International Law*, 1928, Longmans, London, 41.

<sup>45</sup> See further, *post*, ch.8.

<sup>46</sup> La Moire, *op. cit.*, 19.

<sup>47</sup> Hautefeuille, *Histoire des Origines, des Progrès et des Variations du Droit maritime international*, 2nd ed., 1869, Paris, 105.

privileges in all lands conquered by the Crusades, in return for providing crusading ships for the King of France - developed a good trade with the Christians in Armenia.<sup>48</sup> The Muslims of the East were unwilling to share the riches of their trade with the infidel countries of Europe, but those of Africa were more amenable, and concluded many treaties with the Italian city States,<sup>49</sup> eg. the Pisa-Tunis treaty 1264.<sup>50</sup>

Legal justification for the assertions of sovereignty came many years after the assertions began - from the 14th century onwards - from the Italian jurists whose works had such an influence on the foundations of modern international law. Bartolus of Saxoferrato argued that a State had exclusive jurisdiction, although not ownership, over the seas up to 100 Italian miles from its coast,<sup>51</sup> and his pupil Baldus of the Ubaldi, asserted that jurisdiction (and sovereignty) was up to 60 miles.<sup>52</sup>

Bartolus argued, on the basis of Roman and canon law, that while usage of the sea was common to all a State had jurisdiction over it out to a certain distance from its coast, just as it would have jurisdiction over an island near its coast. Beyond two days journey, or 100 miles, from the coast, the seas were under the emperor's jurisdiction. For Bartolus the jurisdiction on the sea - which he was careful to distinguish from the other possible rights of property and usage - was essentially

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<sup>48</sup> Treaties over a number of years are given in Rymer, V, VI.

<sup>49</sup> Hautefeuille, *op. cit.*, 106.

<sup>50</sup> Rousset, *Supplément au Corps universel diplomatique*, II, 1739, Amsterdam, i, 115.

<sup>51</sup> Bartolus de Saxoferrato, *Tractatus: Tyberidis sive de Fluminibus*, in *Opera*, VI, 1570-1. An Italian mile was approximately 1478 metres. See Figgis (1905) XIX NS *Transactions of the Royal Historical Society* 147 "Bartolus and the Development of European Historical Ideas".

<sup>52</sup> Baldus de Ubaldus, *Usus Feudorum Commentaria*, 1585. Raestad cites another of the Italian 'post-glossators', Angelus de Pérage, asserting a jurisdiction up to a line equidistant from opposite coasts: (1912) *RGDIP* 598 at 599 "La Portée du canon comme limite de la mer territoriale".

repressive, and it carried a duty of protection. Gidel puts his argument thus: "L'Etat riverain a le devoir de nettoyer la mer des pirates et le droit de juger les actes de violence commis par eux dans les limites de son territoire maritime."<sup>53</sup> Baldus extended Bartolus' notion of jurisdiction, claiming that a State had the right, for example, to raise taxes from ships using its waters. Venetian practice followed the theory of Baldus rather than Bartolus.

## **2.4.2 The "British Seas"**

### **2.4.2.1 Origin of the English claims**

In northern Europe, England had also been making claims to jurisdiction or sovereignty from early times.<sup>54</sup> The earliest known claims made by England were as far back as the 10th century, and when, after the Norman invasion, the king possessed land on both sides of the Channel, he considered as his own the waters between them. When the Duchy of Normandy was taken by the French, the sea remained in English hands, and according to Laughton "the Norman coastline, in fact, was the boundary between the two kingdoms".<sup>55</sup> Until the mid-16th century, with the loss of Calais, England controlled territory on the French coast, and the Channel's importance to it was well recognised. It was then, as now, the busiest strait in Europe, and with ships of the North-South trade, a large fishing industry, and lawless brigands out for plunder all using the waters, protecting the "Narrow Seas"<sup>56</sup> became

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<sup>53</sup> Gidel, *op. cit.*, 28.

<sup>54</sup> In general see Fulton's survey, *op. cit.*, 25-56; Colombos, *op. cit.*, 48.

<sup>55</sup> Laughton, (1866) 5 *Fortnightly Review* 718 "The Sovereignty of the Sea" at 723. See also Potter, *op. cit.*, 38-40.

<sup>56</sup> The Narrow Seas were defined in 1557 as being between "North Foreland [in Kent] and the Cape of Cornwall on the side of England, and between Flushing [ie. Vlissingen, Zeeland] and our Isles of Jersey and Guernsey on the side of France" in instructions given to the Lord Admiral, Lord Clinton, 29 May: SP/9/53/33.

an important policy in England<sup>57</sup> and led, for instance, to the organisation of the Cinque Ports.

Some have sought to show that the sea was regarded as an integral part of the kingdom.<sup>58</sup> A custom dating from Norman times of having officers governing the sea, who were given the title *Custos Maris* ('Warden of the Sea'), was continued up to and beyond the time of Edward I when the title 'Warden' was gradually changed to 'Admiral'. The *Custos Maris* was not, however, given 'jurisdiction' over *all* matters maritime. There were separate positions of Wardens relating to ships (*Custos Navium*) and to coasts (*Custos Maritimae*).<sup>59</sup> The fact of the distinction made between these posts seems to indicate, the argument goes, that there was a tendency to regard the sea not only as uniquely subordinate to English jurisdiction, but important enough to have its own officer wielding that jurisdiction. But the posts were in fact often held by one person, and as Fulton has shown,<sup>60</sup> other States had done much the same thing even earlier, and it was more a question of naval administration than a part of a claim to dominion of the seas.

Disputes at sea, involving the legality of captures, came to the King in Council: there was yet no 'admiralty court' as such. Prizes were sued for in the common law courts, and with the jurisdiction of the Admiralty not yet fully defined, there was a long-running dispute between them. During the 14th century, the 'local' courts of the Admirals of the North, South and West, heard disputes on prize matters,

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<sup>57</sup> The famous poem *The Libelle of Englyshe Polycye* was written against the perceived direction of English policy, which did not do enough to protect the narrow seas. An extract gives the flavour: "Keep them the sea about in special/The which of England is the round wall/As though England were likened to a city/Of which the wall environ was the sea". The original MS is among the *Cottonian MSS* in the BM, although long passages are given by Selden, *op. cit.*, II, ch.25. Fulton also cites it as being in *Political Poems*, ii, 157.

<sup>58</sup> As well as Selden in the 17th Century, Laughton has taken this line. See Laughton, *op. cit.*, 722.

<sup>59</sup> Laughton, *ibid.*

<sup>60</sup> Fulton, *op. cit.*, 31, 32.

but the expense and remoteness of these tribunals and the lack of consistency in the separate jurisdictions, led to repeated foreign complaint.<sup>61</sup> Richard II therefore instituted a Lord High Admiral and a High Court of Admiralty to deal with maritime matters, which was intended to rank with the ancient courts of common law, with which it soon developed jurisdictional conflicts.<sup>62</sup> At about the time that the Court of Admiralty was established, the Black Book of the Admiralty was compiled for practitioners. The fact that there are no records of the Court's proceedings until 1519 and that it did not begin to play a significant role for 50 or so years after that,<sup>63</sup> show how unimportant it was for two centuries or more. The lawlessness of Europe's seamen was too far ingrained for it to be tamed more quickly.

Although, as mentioned above, 'navies' as such were a thing of the future, and England did not create one until the time of Henry VIII, English sea power was generally strong. Ships were provided by certain ports in return for trade privileges and exemptions. For instance, the Cinque Ports in South-East England (Dover, Hastings, Sandwich, Romney and Hythe), which had received their first Charter under Edward the Confessor, formed the nucleus of the navy.<sup>64</sup>

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<sup>61</sup> Marsden, *op. cit.*, 118. For a detailed account of the history and development of the Admiralty Court, see Colombos, *op. cit.*, 10, *et seq.*

<sup>62</sup> The two main statutes were 13 Ric. II c.5 (1390) and 15 Ric. II c.3 (1392). Marsden, *op. cit.*, Introduction, xiv.

<sup>63</sup> See HCA/24 for the original early files of the Court. There are also transcripts of selected cases in Marsden, *Select Pleas*, 1894-97, Selden Society, vols. VI, XI. In the early 16th Century there was a great expansion of the Admiralty Court's work, and cases which until then had been dealt with in Chancery were taken to it, in consequence of the patent granted to the Duke of Richmond as Lord High Admiral in 1525.

<sup>64</sup> Laughton, *op. cit.*; Colombos, *op. cit.*, 51. For evidence of the special position of the Cinque Ports and the independence they felt, see the text of a letter addressed by them to Edward I, in Marsden, *op. cit.*, 50 n.1. See generally Callendar and Hinsley, *The Naval Side of British History 1485-1945*, 1952, Christophere, London.



#### 2.4.2.2 The flag-salute

The English demand that ships lower sail (or flag) or be seized or fired on - which was upheld with varying degrees of force and purpose until formally abandoned in 1805 - appeared first in an Ordinance of King John in 1201. It required all vessels "at sea" (foreign and English) to "stryke and lower their sailes at the command of the Kyng's lieutenant, or the Kyng's admirall, or his lieutenant" or be forfeited.<sup>65</sup> At this time, the King of England still had sovereignty over the shores of northern France, and mastery of both sides of the Channel was undoubtedly helpful in putting the Ordinance into practice. Its purpose was to protect shipping: lowering the top-sail meant a vessel had to come to a halt, thus enabling the King's ship to determine whether it was a lawful trader or a pirate. It was not, yet, done to force an acknowledgement of a sovereignty over the sea, and there was no attempt to levy a toll, as elsewhere, or prevent foreigners passing,<sup>66</sup> which we can here contrast with

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<sup>65</sup> Various texts exist, eg. SP/9/6 (roll marked "Sovereignty of the Sea"); and both French and English texts are in SP/9/53/9 (English trans. perhaps by Ryley, Keeper of the Records in the Tower, 1653): "It was ordained at Hastings for a Lawe and Custome of the Sea in the 2nd yeare of the Raigne of King John by the advice of the Lords temporall that if a Lieutenant on any voiage being ordained by common Councill of the Kingdome doe encounter upon the sea any shipp or Vessells laden or unladen that will not strike and veile their Bonnetts at the commandement of the Lietenant (sic) of the King or at the admirall of the King or his Lieutenant but will fight against them of the fleet that if they can be taken they be represented as Enemies and their shipp, vessells and goods taken and forfeited as the goods of Enemies." This is followed by a note, which betrays, perhaps, a certain eagerness to establish its authenticity, in about the time of Charles II (on which see *post*, ch.7) : "The French is in a very ancient ... Booke amongst the rest of the maritime Lawes and undoubtedly was a record of the Admiralty Court then in the Possession of the Register of that Court [which] is now remaineing with Mr Selden and is of no less authority than antiquity." For some time there was a shadow hanging over the authenticity of this infamous edict, but it seems now to have lifted: there are various other evidences uncovered by the author in SP/9; and Fulton also concludes that it probably was issued; see *The Sovereignty of the Sea*, 40. See further Higgins, *op. cit.*, 196.

<sup>66</sup> Indeed, in 1422, when England's power over France was at its greatest, the King turned down a request from the Commons for a tax on passing ships: (1420) *Rot. Parl.* iv, 126; cited by Fulton, *op. cit.*, 35.

the policies of Denmark and Venice, both of which exacted taxes (see *supra* and *infra*). Henry V inserted the Ordinance in the Black Book of the Admiralty, and the importance of the demand grew. The lowering of the sail developed into a ceremony, and eventually, writes Wade, "it came to be regarded as the symbol and acknowledgement of the English claim to sovereignty of the sea, and was jealously regarded as such".<sup>67</sup> Over time the demand extended to a ship's flag - forcing other States to acknowledge a "sovereignty" - and ultimately the demand itself became an expectation: a ship flying its flag within the range of an English naval ensign could expect a swift and forcible protest.<sup>68</sup> At first this claim was confined to the seas between England and Ireland (St George's Channel, the Irish Sea, Bristol Channel, St Patrick's Channel)<sup>69</sup> but enforcement was gradually widened to include all of the seas washing the shores of England and Wales.<sup>70</sup>

#### **2.4.2.3 Plantagenet claims**

In the time of the Plantagenet kings of England<sup>71</sup> claims to 'sovereignty' were made more strongly over the seas around Britain<sup>72</sup> They were later dramatically, and ultimately vainly, revived by Charles I in the 17th century, and many of the 14th century justifications for the sovereignty were exhumed and represented as proof of

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<sup>67</sup> Wade, (1921-22) 2 *BYIL* 105.

<sup>68</sup> It led to many disputes in the 17th century between England and the Dutch. See generally on the flag salute, Fulton, *op. cit.*, *passim*; Verzijl, *op. cit.*, 158 *et seq.*

<sup>69</sup> Verzijl, *op. cit.*, 10.

<sup>70</sup> Treaty of Westminster 1674, signed 9/19 January. Dumont VII, i, 253. See further Perrin (1928) 63 *NRS* 289 "The Salute in the Narrow Seas".

<sup>71</sup> The first three Edwards, reigning from 1272 to 1377.

<sup>72</sup> Potter, *op. cit.*, 46; Fulton, *op. cit.*, 36, *et seq.* In 1344 Edward III issued his Rose-Noble, a coin with a rose on one side and himself on the other, standing with a sword on a ship at sea. Years later, when England's naval star had waned, the coin was an object of ridicule for French and Flemish sailors.

a long-standing English dominion.<sup>73</sup> After England's victory at the Battle of Sluys in 1340, Edward III was able forcibly to assert his claim to a special jurisdiction.<sup>74</sup> He saw himself as the defender of ancient rights that England had over the sea and was concerned at the time in particular to keep the French at a safe distance:

"Whereas we call to mind that our ancestors, kings of England, have in time past been lords of the English Seas on every side, and defenders of the same against the incursions of their enemies, and it would deeply grieve us if our royal honour in this kind of defence should in our time (which God forbid) be lost or in any way diminished."<sup>75</sup>

As we shall see, the nature of Edward's claim was different from the claims in the Northern Seas, and it was in most cases not readily accepted by other States. And where it was accepted it is possible to detect an attempt to play up to the King's pretensions and thereby obtain redress for some injustice committed in the waters that he claimed. By examining a few of the cases put forward by the English to substantiate their claim we shall see that it had little basis in the general practice of States, was advanced by a monarch who found himself in an unusually strong maritime position, and even to the extent that it was claimed by the English was probably sovereignty much more in form than in substance.

In 1338 Edward had consulted with his justiciars over the claim and they gathered together various documents in a roll entitled *De Superioritate Maris* to affirm

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<sup>73</sup> See *infra*, ch. 7.

<sup>74</sup> For an impression of the size of England's "huge fleet", see the long list of ships in the roll in SP/9/53/5.

<sup>75</sup> *Rotuli Scotiae*, i, 442; 10 Edw. III m.16. From a commission to Admiral Geoffrey de Say in 1336, who was instructed to intercept French ships thought to be preparing to go to Scotland. See further, Wade, *op. cit.*

the King's rights over the seas.<sup>76</sup> They tried to find evidence showing not only that there had been English claims to jurisdiction, but that these claims had been accepted by other States and the jurisdiction acknowledged. Edward's own view is shown by the terms of the request, which are given in a document in the same roll, entitled the *Articuli*.<sup>77</sup> They were asked how to revive the forms of procedure used by Edward I for

"restoring and preserving the ancient sovereignty of the Sea of England and the authority of the Admiralty therein, by correcting the laws and statutes previously ordained by his predecessors, Kings of England, for the maintenance or peace and justice among all his people of all nation soever who may pass through the Sea of England."

The "laws and statutes" referred to were those derived from the *Rôles d'Oléron*.

One piece of evidence contained in the roll concerns an incident whereby an Admiral of France, Reyner Grimbald, seized various ships in the Channel after the Anglo-French peace treaty 1303. The procurators (agents) of the merchants and mariners of the most powerful maritime States of Europe - Denmark, Germany, Holland, Zeeland, Friesland, Catalonia, Spain and Genoa - were moved to present a complaint to the French. The English drew up five copies of a complaint, which appears in the roll, the intention being that the States all present a complaint in the same terms:

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<sup>76</sup> *De Superioritate Maris Angliae et Jure Officii Admirallatus in Eodem* (On the Supremacy of the Sea of England and the Right of the Office of Admiralty in the same): *Chancery Miscellanea*, 47/32/19. For further English attempts to manifest their sovereignty by simple assertion, see Colombos, *op. cit.*, 48.

<sup>77</sup> *Articuli super quibus Justiciarii Domini nostri Regis sunt consulendi*. The *Articuli* achieved some authority, and were later occasionally cited in evidence by Welwood (*An Abridgement of all Sea-Lawes*, 1613, London), who referred to it as "an olde parchment autenticke booke yet extant", and were printed by Francis Clerke (*Proxis Supremae Curiae Admiralitatis*, 1679), a proctor in the Elizabethan Arches Court. See Senior (1921) 37 *LQR* 329.

"The Kings of England, by reason of the sayd Kingdome, from the time whereof there is no memory to the contrary, have been in peaceable possession of the Dominion of the Sea of England, Statutes, and restraints of Armes and of Ships otherwise furnished than to Ships of merchandize appertaineth, and in taking suretie and affording safeguard in all cases where need shall be, in ordering of all other things necessary for maintaining of Peace, Right and Equity, amongst all manner of people, as well of Dominions of their owne, passing through the said seas, and the Sovereign guard thereof, and in doing Justice, Right and Law according to the sayd Lawes, Ordinances and Restraints, and in all other things which may appertaine to the exercise of Sovereaign dominion in the places aforesayd."<sup>78</sup>

This evidence of an affirmation by the main sea powers of the sovereignty of the English King was seized upon by later English writers as conclusive confirmation.<sup>79</sup> Wade takes the view that the drafts in the *De Superioritate Maris* roll were probably never actually agreed by the foreign States - merely drawn up by English lawyers - and notes that Selden suggested the matter was settled by agreement.<sup>80</sup> If it was indeed presented it is an indication that other States did not merely raise no objection to the English claim to make laws and take actions commensurate with sovereign dominion, but indeed definitely recognised and accepted it. If it was not - and given the rest of the evidence, this seems the more likely - we can see the complaint as merely the current English attitude to its own rights: no more, in essence, than wishful thinking.

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<sup>78</sup> Boroughs, *Sovereignty of the British Seas passed by Records, History, and the Municipal Lawes of this Kingdom*, 1920, Green, Edinburgh, 56. Laughton, (1866) 5 *Fortnightly Review* 726, gives a slightly different wording. Fulton, *op. cit.*, also gives the full text, 45-48, and the original French version in App.A, 741.

<sup>79</sup> See, for instance, the Memorandum in SP/9/53/49 f.2.

<sup>80</sup> Wade, (1921-22) 2 *BYIL* 101.

There was another notorious 'acknowledgement' of England's position by a foreign State.<sup>81</sup> It arose out of an incident where English sailors had robbed some Flemish merchants at sea. Complaining to the King for redress, they said it had occurred "on the Sea of England at Crauden".<sup>82</sup> Now for a long time the exact location of this town was not known, and even on which side of the Channel it was situated was uncertain. If in England, it would be an instance of a State being regarded as having a criminal jurisdiction a short distance off its coast, which was perhaps not unremarkable at the time. If the town were in France, it would show that the "Sea of England" was regarded as composing the whole of the Channel - very much in line with English assertions. In 1320 the King instructed the Keeper of the Cinque Ports to enquire into the incident and punish the offenders.<sup>83</sup> The words of the complaint are quoted, with the incident said to have occurred "super mare Anglicanum versus partes de Crauden, infra potestatem dicti domini nostri Regis"; the King's jurisdiction is said to be "quod ipse est dominus dicti maris, et depredatio praedicta facta fuit supra dictum mare infra potestatum suam".<sup>84</sup> The King also said that he was ready to do justice for any injury inflicted by his subjects on the Flemish.<sup>85</sup>

The town has now been identified as lying on the coast of Brittany,<sup>86</sup> indicating that the foreign merchants regarded English dominion as reaching France.

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<sup>81</sup> Wade, who is of the view that the complaint in the Reyner Grimbold case (*supra*) was probably not presented, says that it is "probably the solitary recorded instance of a direct admission by foreigners of the dominion of the King over the sea at a distance from the shore of England". See Wade, *op. cit.*

<sup>82</sup> Marsden, *Select Pleas*, 1894, Selden Society, xxxiii, xxxiv, says the complaint was termed "on the sea within [the King's] power". This would seem, however, to make the issue of where exactly the incident took place redundant.

<sup>83</sup> *Rot. Pat.* 14 Edw II.

<sup>84</sup> *Rot. Pat.* 14 Edw II pt. ii. m.26. See also Wade, *op. cit.*, 104.

<sup>85</sup> Rymer, ii, 47.

<sup>86</sup> Fulton, *op. cit.*, 54-6.

The importance of this was not realised in the time of Charles I (when the location of the town was not known); if it had been, doubtless, far more would have been made of it than the brief reference given by Selden. We can now view it as an acceptance of the English assertions by the Flemish. However it seems that this position was reached only by negotiations and that France and Spain protested at the idea of British maritime dominion.<sup>87</sup> Once again, the expansive claims that England was making were not accepted by other States, and seemed not to bear much resemblance to practice: ultimately, England had only a jurisdiction over the captors personally at Crauden, rather than a jurisdiction over the sea *per se*.

Examining the nature of the Plantagenet claims we can observe, as Wade does,<sup>88</sup> how redolent they are of the form and substance of feudal law. Edward III in particular regarded himself as *Dominus Maris Anglicani Circumquaque*, with a superiority or 'sovereignty' over the sea similar to that he maintained over the land territory in his kingdom. It was not so much naval preeminence that interested him as a sovereignty which belonged to him "by reason of the sayd kingdom".<sup>89</sup> Words such as *superioritas* or *dominium* are used in describing the sovereignty claim - which come from a feudal lord/vassal relationship - and its description in the case presented to the Commissioners in Paris (*supra*) details the rights and duties of a feudal superior, involving preserving the peace and punishing its breach. It was similar in this respect to the right of Venice in the Adriatic. There is no indication, says Wade,

"that the kings of England looked on the sea itself as part of their patrimony, or that they considered themselves entitled to exclude foreigners from passing through it, or from appropriating its produce.

The Plantagenets strove for little more than high-sounding title, and

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<sup>87</sup> Marsden, *Pleas*, xxii, lxxv, lxxix. Laughton, *op. cit.*, 727, *contra*, says that "[e]ven France acknowledged [the English claim], and the entrance of a French fleet into the narrow seas was itself considered on both sides as an act of hostility".

<sup>88</sup> Wade, *op. cit.*, 106. See also, Potter, 41, 42.

<sup>89</sup> From the complaint presented to the Commissioners in Paris (*supra*).

were willing, for the prestige which it conferred, to undertake the burdens and duties which it involved."<sup>90</sup>

The flag-salute itself had feudal overtones. In its original formulation there was no geographical limit, and it was easy to see it as requiring a feudal lord - the King of England - to be honoured by his vassal, meaning any other State with ships at sea.

We can conclude then that England's claim to 'sovereignty' over the seas off its coasts was not heeded by the other major maritime powers.<sup>91</sup> Indeed, *pace* Laughton,<sup>92</sup> the claim was rather hollow: it amounted to a few assertions of jurisdiction over crimes at sea, and under Edward III a neo-feudal desire to be called *Dominus Maris*. Similarly the flag-salute, which was originally devised as a means of keeping track of pirates, was developed into a ceremony acknowledging English sovereignty. Looking at the context of the claims, we can see that at the time England was increasingly concerned at the piracy committed in the waters off its coast. There were numerous complaints from Flemish and French sailors that they had been robbed by English brigands,<sup>93</sup> and similarly, many from the English side. Until then prize matters had been dealt with by the common law courts, but the exigencies of

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<sup>90</sup> Wade, *op. cit.*, 107. The price demanded by the Hanse merchants for acknowledging sovereignty was, indeed, that England should keep its seas free of pirates.

<sup>91</sup> Fulton asserts that the evidence for it amounts to "scarcely a scrap": *op. cit.*, 33. After Selden's *Mare Clausum* (1652), however, the orthodox position was that the claim was well-founded. See, for instance, the note in SP/9/53/15 (which makes explicit reference to Selden, and is, therefore, perhaps to be treated with caution: see *post*, ch.7): "It was encountered treason if any ship whatsoever had not acknowledged the King of England in *his own sea* by striking Sayle ... Penalties also were appointed by the King of England, in the same manner as if Mention were made concerning a Crime committed in Some territories of his island." (Italics added)

<sup>92</sup> Laughton says that "there was no more vanity in calling [English] kings sovereign of the sea than there was in calling them sovereigns of Sussex or Kent; that the entrance of a hostile fleet into the narrow seas was an invasion of English territory as much as when the Scotch ravaged Northumberland, or when the Spaniards landed on the coast of Ireland." See (1866) 5 *Fortnightly Review*, 733.

<sup>93</sup> Potter, *op. cit.*, 46.



the situation led to the establishment in the mid-14th century of a court dedicated to piracy matters.<sup>94</sup> It is possible to conclude that the impulse which led to the setting up of this special court led also to Plantagenet claims to sovereignty.

After Edward III these claims declined, and English policy regarding the seas adjacent to its coast reverted back to its previous state.<sup>95</sup> Edward's temporary regaining of the shores of northern France after the battle of Sluys made the claim - which would have been seen as consequent upon that capture, as it was in the days of the Conquest - far easier to defend. Subsequently this was not the case, and until Elizabethan times English 'dominion' over the seas was very light.<sup>96</sup> The flag-salute was again used as a weapon against piracy, but little more. The newly-constituted Admiralty Court was not a success, and its jurisdiction was difficult to wield. Fishing and navigation were unrestricted. The British Seas - whatever were their limits<sup>97</sup> - were 'free'.

### **2.4.3 The northern seas**

From ancient times, Denmark claimed sovereignty - not just jurisdiction - over all the seas off its coasts, and from 1380, when it formed a union with Norway, it also claimed Norwegian waters and the northern seas between Norway, the Faroe

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<sup>94</sup> It did not, however, as we have seen, achieve prominence for two centuries.

<sup>95</sup> There are no recorded claims of a similar nature until the time of Charles I. Until then proclamations would still refer to the dominium nominally. See, for example, the instructions from Elizabeth given to sailors in 1576 (SP/9/53/29): "...these seas, of which she and her Predecessors have been accounted to have always held Supreme..."

<sup>96</sup> In the Elizabethan case *R v. Constable* (1575) Leonard Reports, III, 72, Plowden argued that England had a jurisdiction over the seas, but they were common to all and no-one could be prohibited from fishing there. *Hargrave MSS*, 15, f.95d.

<sup>97</sup> They were not defined in any of the Plantagenet pronouncements, and for centuries were referred to - even by the admirals - no more precisely than as the King's "own sea" (SP/9/53/13), or the "Sea of England". For the earliest attempts at (still imprecise) delimitation we have to wait for Selden in the mid-17th Century. See *post*, ch.7.

Islands and Greenland.<sup>98</sup> Denmark would in general refuse to allow foreigners to sail freely in the waters over which it claimed sovereignty, whether for trade purposes, fishing or general navigation. This applied in particular to the northern seas, whereas in the North Sea and Baltic, Denmark could countenance other States navigating, and offered many concessions. The policy excluded Europe's fishermen from the abundant waters of the Norwegian Sea, and in effect formed a vast territorial sea stretching hundreds of miles across the North Atlantic. Other States seem initially to have been willing to acquiesce in this policy. For instance, in 1432 England made a treaty, signed 24 December, with Denmark agreeing that its subjects should not sail to Iceland, Finmark, Haalogaland or any "prohibited lands" or ports in Denmark, Norway or Sweden, on forfeiture of life and goods.<sup>99</sup>

Denmark controlled the Scanian Provinces in southern Sweden and was thus in a position to control the entrance to the Baltic, one of the busiest waterways of Europe given the value of naval stores - the timber for Europe's ships - taken from the Baltic coastal States. In 1429 King Eric of Pomerania introduced the "Sound Dues" - a toll payable by any ship passing through the Sound - and built castles on both sides to enforce it.<sup>100</sup> Although the maritime States of Europe objected to this, the toll was initially low - only one rose-noble per ship - and Denmark was able to enforce payment without much difficulty: the Baltic was a valued destination, and the Sound was narrow and well-defended. For more than four centuries Denmark obliged all ships to pay the toll, dip their flags and lower their top-sails when passing. The Sound Dues must have seemed the source of a large and unending revenue for

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<sup>98</sup> Lauring, *A History of the Kingdom of Denmark*, 1960, Höst, Copenhagen, 110, 150. See also Aubert (1894) *RGDIP* 429 "La Mer territoriale de la Norvège"; Mollat du Jourdin, *op. cit.*, 42-56.

<sup>99</sup> *Norway's Ancient Laws*, series 2, vol.1, 129, et seq.; cited by Meyer, *op. cit.*, 479; *Diplomaticum Norvegicum*, VI, 466; cited by Aubert, *op. cit.*, 429. A declaration by the King of England to the same effect is mentioned in Latour, *La Mer territoriale*, 1889, Paris, 122.

<sup>100</sup> Lauring, *op. cit.*, 110, 111.

Denmark, but the very ease with which the money rolled in may have led to the demise of the toll. States were willing, if grudgingly, to pay the toll when it was relatively low but, as we shall see in later chapters, when Denmark succumbed to the temptation to fill the State coffers by increasing the Sound Dues, the maintenance of the toll became more difficult. Great political problems befell Denmark in its attempts to continue the toll, until it was finally compelled to abandon it in 1857.<sup>101</sup>

#### **2.4.4 The limits of jurisdiction**

The notion of jurisdiction over adjacent seas - territorial waters - was advanced only to the extent already stated.<sup>102</sup> There was no settled means of determining the breadth of the waters over which jurisdiction would extend. States would claim jurisdiction under one method of delimitation when the situation demanded it, and under another when circumstances were different.

As we have seen, Denmark and England claimed a jurisdiction over the waters when they had dominion over the land on both sides. The ancient Scandinavian limit of the *thalweg*, or median line, was common early on, and was used in England as late as Elizabethan times. For instance, in *R v. Constable*,<sup>103</sup> the argument was advanced by Plowden, as defence counsel, that the "bounds of England" extended to the middle of the adjoining sea, and the whole of the sea in the case of the waters between England and France, and Ireland. It was also suggested by Grotius for the

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<sup>101</sup> Treaty of Copenhagen 1857, signed 14 March. Under the treaty, which involved most of the States of Europe, Denmark was paid 30,476,000 rix dollars, the equivalent of £20,000 million (1960 value), as an indemnity for continuing to protect an international strait: Lauring, *op. cit.*, 220.

<sup>102</sup> Gidel, *op. cit.*, 31, goes too far in saying that a territorial sea was well-established in the north by the 13th Century. He says (at p.29) that this was due to the need to protect ships from pirates, and because the waters were much richer than in the Mediterranean. While this is correct, pirates were equally prevalent in the waters of southern Europe; and as Gidel himself observes (*ibid.*) most States in the north allowed freedom of fishing.

<sup>103</sup> (1575) Leonard Reports, III, 72; 74 English Reports 549. See also Fulton, *op. cit.*, 102; Fenn, *op. cit.*, 129.

Netherlands.<sup>104</sup> The 'line of sight' limit was also widely used, which despite its name was often defined to be a certain distance, although there was little consistency.<sup>105</sup> The doctrine also spread to the Mediterranean, with the Norman kingdom of Sicily declared at the start of the 15th century by Guillaume de Perno, of Syracuse, to have sovereignty over the sea out to the line of sight.<sup>106</sup> Most Mediterranean States gave fixed distances as the limits of their jurisdiction, as in the case of Venice.

## **2.5 Rights of fishing and navigation**

The desire to conserve the fishing grounds off the well-stocked coasts of England and Scotland, and to preserve them for the indigenous population, was to lead to many disputes involving England, Scotland, The Netherlands and Denmark. As we have seen, English policy was not to hinder fishing in any way. One of the earliest reference to fishing agreements found is from 1295, when Edward I of England gave permission for the subjects of Count Floris V of Holland to fish near Yarmouth.<sup>107</sup> But this agreement suffered the problems that have ever plagued States which consent to them (and which we shall see again, especially in the context of Scotland, in later chapters): the policies of the State lead to situations not well-liked by the native fishermen, who object strongly to foreigners fishing in the waters they regard as their own by right.

In the 15th century fishing in the North Sea became increasingly important, and a number of treaties were made to regulate the fisheries there. England made a

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<sup>104</sup> Grotius, *Introduction to Dutch Jurisprudence (1631)*, 1652, Leiden. See Gidel, *op. cit.*, 29.

<sup>105</sup> The doctrine had different names in different countries: France - v(e)ue, 7 leagues; England - ken, 21 miles (= 7 leagues); Scotland - land-kenning, 14 miles; The Netherlands - kennis, 5 leagues. See Gidel, *op. cit.*, 30.

<sup>106</sup> Gidel, *op. cit.*, 30.

<sup>107</sup> Rymer, i, 826.

number of treaties with France and the Netherlands confirming its freedom of fishing policy. In 1403 a truce in the Hundred Years War was agreed between Henry IV of England and Charles VI of France, and a temporary fishing agreement was made, allowing fishermen from both sides to fish without restriction in a certain part of the Channel up to both shores. And three years later Henry proclaimed a similar, but far wider, arrangement for the fishermen of England and Flanders:<sup>108</sup> this was to cover the whole of the sea, not merely a certain part of it, and to be permanent, rather than temporary.

In 1407 Henry signed the first of the series of "Burgundy Treaties" with the Governor of Flanders, the Duke of Burgundy, which allowed for mutual fishing in all parts of the sea.<sup>109</sup> Over the next few decades, and by various monarchs, the 1407 treaty was confirmed, renewed and confirmed again,<sup>110</sup> and in 1468 Holland and Zealand became parties to the treaty.<sup>111</sup> The principle of a general freedom of fishing close to England's coasts thus became established, but it would cause great problems in the 17th century.

Danish policy was the opposite of the English, however, provoking numerous disputes about England's claim to trade with Iceland and along the Norwegian coast.<sup>112</sup> In 1415 Henry V, ignoring the protests of the House of Commons, bowed to the Danish view and signed a treaty with King Eric, agreeing to prohibit the English from going to Iceland or other Danish-Norwegian islands.<sup>113</sup> In 1429 the King of Denmark prohibited English fisherman from purchasing fish at Finmark, or

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<sup>108</sup> Rymer, viii, 306, 336. See further Fulton, *op. cit.*, 68; Meyer, *op. cit.*, 11.

<sup>109</sup> Rymer, viii, 469, 472; Dumont, II, i, 302.

<sup>110</sup> It was confirmed twice in 1408 (Rymer, viii, 530, 548) and in 1417 (Rymer, ix, 483). A new treaty was signed in 1439 (Rymer, x, 730) which itself was renewed in 1442 (Rymer, x, 736) and 1442 (Rymer, x, 761) and 1468 (Rymer, x, 791).

<sup>111</sup> Rymer, x, 791.

<sup>112</sup> See Fulton, *op. cit.*, 108, *et seq.*

<sup>113</sup> Rymer, ix, 322. Fulton, *op. cit.*, 108.

anywhere else other than at Bergen,<sup>114</sup> and by a proclamation of 1 March 1432 Henry VI enjoined them to observe this law.<sup>115</sup>

The freedom of fishing off English coasts granted in successive treaties to the Dutch was decisively confirmed by treaty in 1496. The provinces of The Netherlands were annexed by Austria and Philip the Fair, Archduke of Austria and Duke of Burgundy, made a great treaty of peace and commerce with Henry VII, the *Intercursus Magnus*.<sup>116</sup> The treaty, made on 24 February, superseded the series of Burgundy Treaties made throughout the 15th century which had established a right of fishing. The treaty, which was to be perpetual, was wide in scope and concerned fishing only peripherally, but it affected Anglo-Dutch fishing policies and was central to the conflicts between them for the next 150 years. It provided that fishermen from both States could fish anywhere in the sea, use ports, etc., without requiring a licence.<sup>117</sup>

Over the next 20 years several supplementary treaties were made between England and Burgundy, but these were restricted to commercial matters and did not mention fishing.<sup>118</sup> This fact was to become important in later Anglo-Dutch fishing disputes.

## **2.6 The emerging doctrines of law between nations**

Relations between States had been governed in the Middle Ages not so much by an 'international' law as one that was 'supranational': with the Church omnipotent, canon law, and to a lesser degree the law of the Empire, was dominant. The Pope was given supreme authority over all of Christendom: it was he who resolved disputes

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<sup>114</sup> *Rot. Parl.* iv, 348, 378; cited by Fulton, *op. cit.*, 108, 109.

<sup>115</sup> 8 Hen VI c.2. See further, Meyer, *op. cit.*, 479.

<sup>116</sup> Rymer, xii, 578; Dumont, III, ii, 336. See further, Meyer, *op. cit.*, 12.

<sup>117</sup> See further Higgins, *op. cit.*, 198.

<sup>118</sup> Rymer, xii, 714; xiii, 132, 539, 714.

between princes and even set them up or deposed them. For a long time trade with the Saracens was forbidden by the Pope, but even so it was too lucrative for many to resist, and Benedict XII finally yielded in 1345 and granted a licence to trade to Venice.<sup>119</sup> And when European States began to explore Africa and the Americas they carried papal authority with them, and a commission to convert all the heathens they came across.

Where States came into contact with each other, some form of 'international law' did begin to develop, for instance, when the ancient practice of exchanging diplomatic legations led to rules concerning diplomatic immunity. Outside the Empire, and as it declined increasingly within it too, princes and cities began to make alliances and treaties with each other. The trading of the Hanse and the Italian City-States brought out questions of freedom of trade and navigation. And where traders and seamen met - at fairs, markets and seaports - mercantile and maritime law, and courts to apply it, began to emerge. For a State there was the advantage of taxes and duties where goods were exchanged, which it would seek to encourage by establishing security for the trader, perhaps with privileges and a law favourable to him. As trade increased, especially in the Mediterranean, a uniform mercantile and maritime law began to develop.<sup>120</sup>

## **2.7 Assessment**

Up to the 16th century the seas of Europe were far less subject to what would later be known as '*mare clausum*' than is generally supposed.<sup>121</sup> The claims to sovereignty and jurisdiction such as there were over adjacent seas were allowed by other States only when a protection within them was afforded to foreign ships:

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<sup>119</sup> Nussbaum, *op. cit.*, 20.

<sup>120</sup> *Ibid.*

<sup>121</sup> For example, see Potter, *op. cit.*, 41, who says that claims to dominion over the sea were "accepted as part of the principles of inter-state relations or even international law and custom".

anything more met strong protest. Codes derived from maritime practice were applied in much of Europe, but these did not initially concern States' sovereignty. Most of the seas of Europe were quite freely navigable - if dangerous - to all States. Those that were not - it seems that only the Norwegian Sea was truly 'closed' - were only sustainable with vastly superior naval power (such as that of Denmark). The only tolls that managed to survive - in the Adriatic and the Sound - depended on overwhelming geographical advantage: Genoa's attempts to emulate Venice were frustrated by the immense problems of enforcement in open water. And England expressly decided against a toll in the Channel, even when at the zenith of its power there. States did try to curb piracy off their shores, by developing an 'admiralty jurisdiction', but not until the 16th century was this effective. In general, States desired, and were able, to navigate and trade wherever they wished. The Roman concept of seas being "free, like the air" was still current.<sup>122</sup> Fishing, too, was usually free. There were no restrictions on fishermen except in the far north of Europe, off Scotland and Norway. The English, French and Dutch all made treaties confirming the liberty of fishing off their shores.

A pattern was being established in the Mediterranean. A jurisdiction was claimed over the sea adjacent to the coast of a State or City-State. It would allow certain vessels to sail the waters, exclude others, levy tolls. For Venice the geographical limit of this jurisdiction was the confines of the Adriatic (and the Ravenna-Fiume line in the south) making the claim easier to defend - practically and, perhaps, legally. For Genoa there were no similarly easily definable limits, and it was forced to fall back on other means of delimiting the territorial sea. The first juristic arguments (ie. from Bartolus and Baldus) seem to set precise, measurable limits. However they were given as estimates of how far a vessel might travel in a certain time. For instance, Bartolus thought that Venice's sovereignty stretched out as far as a ship could sail in two days, and in two days a ship could sail 100 miles: hence he asserted for ease of reference that the sovereignty extended for 100 miles. This was

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<sup>122</sup> Gidel, *Droit international public*, III, 1934, 25.



easier, perhaps, for other States to respect but it had no necessary connection with geography. The extent of jurisdiction would rather depend on technology - how far a boat could travel in a day. This would for some time have been a fairly constant standard but it suffered similar problems as a limit of jurisdiction (smaller boats travel faster, speed depends on the weather, etc.) as did the later standard of cannon-range (range increases with larger cannon, etc.). The early Italian limits, therefore, can be regarded as of a different nature from the later limits, also expressed in terms of a precise distance, which came out of the Northern Seas.

That there is no record of opposition to the Venetian juristic claims - which might have been expected from the States for whom the toll must have been inconvenient, and with whose positions it conflicted - can be attributed partly to Venetian power, but mainly, it is submitted, to Venice's struggle to assert its independence from the Empire. Papal backing had been given to Venetian assertions of dominion very early on, and since Europe was, up to the 15th century, in theory at least, unified under Pope and Emperor, any State would have been disinclined to contest the claims. Later, conversely, Venice's battle *against* Pope and Empire worked in its favour: France and England would not have protested at the juristic support for Venetian claims for fear of harming its cause. France and England had never been part of the Empire as such, and wanted at this time to undermine it, so to have opposed the arguments of Bartolus - which in themselves were part of the Venetian independence struggle - would have acted contrary to their interests.

Denmark, the power of Northern Europe, was well able to assert its claim to keep out foreigners from the Norwegian Sea; England, for instance, was forced to capitulate in the treaty of 1415 and proclamation of 1432. The narrowness of the Sound, and its coastal protections, allowed Denmark to extract a toll from every ship that passed, as could Venice from ships within the confines of the well-fortified shores of the Adriatic.

As Rome's power declined it endeavoured to increase its strength by gaining new dominions, and looked on the vulnerable Italian States as possible acquisitions. Venice, and its wealth, was an attractive conquest, and the City-State began to side

with France and England against the Pope. When Spain and Portugal grew closer to Rome, the battle-lines were being drawn for the battle for the liberty of the oceans that would break out at the end of the 15th century. The Iberian claims to dominion of the Atlantic and Pacific Oceans, consequent on the expansion of Spain and Portugal into the New World and the East, which we shall examine in the next chapter, can be viewed, in the context of the claims we have set out, as aberrant. Apart from the odd cases such as Denmark in the Norwegian Sea (and discounting idiosyncrasies such as the brief Plantagenet claims in England) the practice of freedom of navigation, trade and fishing was quite uniform. Until the end of the 15th century there was far more *liberum* than *clausum* in the seas of Europe.

Before moving on it can be noted that a 'law of nations' - no more than practices and usages built up over a number of years - was starting to develop. It did so only as the new nation States of Europe began to emerge from feudalism and to assert themselves, competing with each other, but also feeling less beholden to the Pope. It was also mainly in areas where States had common interests in peace and stability, such as diplomatic immunity and maritime practice. Concessions for fishing and navigation were granted, but necessarily only by those States attempting to preserve the exclusivity of areas of the sea (ie. Denmark and Venice). Treaties confirming such concessions were concluded, but it was often necessary to confirm their provisions with new treaties only a few years later, indicating perhaps both that States regarded them as creating only a temporary judicial framework, and that a State's subjects were not easily shaken from the practice of centuries. A King might gain a short-term political advantage by making a treaty but his authority was often not sufficient to force his fishermen to desist from their "immemorial usage".

**The claims of Spain and Portugal to exclusive jurisdiction**

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### **3.1 Introduction**

Claims to very large territorial seas were made by Spain and Portugal in the context of the later Christian Crusades and the burgeoning exploration of newly-discovered territories, and from them we can trace the development of the concept of territorial waters as it is understood in modern times. They were also the catalyst for the crystallisation of the *mare liberum/mare clausum* dispute in the 17th century. After peace came to Spain and Portugal in the late 15th century they quickly expanded into the New World, Africa and Southern Asia, claiming to monopolise trade to these regions, and to exclude foreign vessels from the seas near them. Papal backing was given to these claims to exclusive jurisdiction, which initially bolstered Spain and Portugal, but the Church's power over States was in decline, and when the riches of the new lands became more widely known, other States felt even less constrained by the Iberian claims. It is important for an understanding of the background to the emergence of the law of nations to appreciate the great intellectual and technological advances that were taking place at this time, and a brief (and necessarily generalised) account will now be given.

Numerous factors played a part in the change, but several discoveries occurring at about the same time were particularly significant.<sup>1</sup> Wars were fought more effectively, and powerful artillery was developed, after the discovery of gunpowder in the mid-14th century. And it led directly to the loss to Christendom of Constantinople in 1453 after a deserter to the Sultan's army had passed on the secret. After the city's fall thousands of Greek scholars fled before the Muslim armies to Italy, which contributed to the spreading of classical literature and learning which was then underway as a result of the new technology of printing. The New Learning, advanced by Petrarch, Erasmus, and the like - which appealed for a 'humanism' in the face of corrupt, hostile and monolithic universities and the Church - broadened people's horizons immeasurably, in intellectual, cultural and moral terms, but also in

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<sup>1</sup> See generally, Kennedy, *The Rise and Fall of British Naval Mastery*, 3rd ed., 1991, Fontana, London, 16-21.

the sense of seeing their place in a broader community of nations.<sup>2</sup> The Renaissance was a wave of new ideals sweeping across Europe, of liberty and emancipation, but also a yearning for change, and a willingness (previously discouraged by the Church) to contemplate life continuing elsewhere.<sup>3</sup>

The burgeoning sense of wanting to explore what lay beyond the borders of Europe was for some time held in check by problems of technology. The compass had been in use since the 12th century in Europe (and from shortly afterwards in the Middle East) but although it allowed sailors to travel in a certain direction, they could not calculate their latitude and position accurately and thus were never certain that they would be able to return to the port from which they had set out. This encouraged vessels to sail close to the coast, and none was inclined to venture into the dark and forbidding waters to the west and south of Europe. But this changed in 1480 with the invention of the astrolabe (the precursor to the sextant) with which sailors could measure the altitude of the sun.<sup>4</sup>

The changes, and resulting discoveries, effected great changes in the relations between States. For the first time States discovered peoples and territories beyond the bounds of Christendom, resulting in a great debate as to how they should be regarded legally. Also States were, again for the first time, competing with each other. The customs and laws governing their actions did not remain unchanged.

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<sup>2</sup> Scott describes the situation characteristically, and with familiar metaphors, thus: "The sun of the ancient world had set, and the people of the Middle Ages were living in its afterglow...looking backward, it was as if they saw for the first time the moon and the stars, and the light of another world." *The Spanish Origin of International Law*, 1934, Clarendon, Oxford, 9. See also, Jebb in *Cambridge Modern History*, 1909, CUP, Cambridge, I, 578-9.

<sup>3</sup> Scott, *op. cit.*, 13. For discussion of this new conception of the world - larger in the eyes of explorers but smaller in the minds of philosophers - see further, Petit de Sulleville, *Histoire de la langue et de la littérature française*, III, 13, 14.

<sup>4</sup> Castlereigh, *The Great Age of Exploration*, 1971, Aldus, London, 37-39. Twelve years after its invention Columbus used the astrolabe to cross the Atlantic.

### 3.2. The end of the Crusades and the first new discoveries

The failure of the Crusades to the Levant led States to look for other crusading routes, and different Muslim strongholds. The *Reconquista* of the Iberian peninsula had been completed in the 13th century, and it was from here that Crusades went to North Africa. Portugal had sent a minor force in 1415 which successfully took Ceuta, on the tip of Africa. This was the first small step in Portugal's empire building, and although portrayed as a religious mission, it was dominated by thoughts of trade. It gave Portugal much information that other States in Europe did not have.<sup>5</sup>

Portugal had already embarked upon voyages of discovery, and had consequently come into conflict with Castile. After the productive reign of Dionysius I, during which the seeds of its future expansion were sown, Portugal was engaged in succession struggles with Castile when the discovery of the Canary Islands provided another point of contention and the first dispute involving newly-discovered lands. We see also in this context the first papal backing given to such expansion, which was to become more important later. The islands were granted by the bull *Tuae devotionis sinceritas* to the Castilian prince Luís de la Cerda, grandson of King Affonso X the Wise of Castile, on 28 November 1344.<sup>6</sup> The Pope, Clement VI, attached the condition that the peoples there be converted to Christianity.<sup>7</sup> A dispute immediately arose between the kings of Portugal and Castile, both of whom notified the Pope of a principality of the Canaries.<sup>8</sup> As we shall see, the question of the title to the islands was not settled and was the cause of a long-running dispute until the Treaty of Alcáçovas 1479.

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<sup>5</sup> See Parry, *Europe and a Wider World*, 1949, Hutchinson, London, 10-11, 29.

<sup>6</sup> Magn. Bull. IV, 474. Cited by Verzijl, *International Law in a Historical Perspective*, IV, 1973, AW Sijthoff, Leyden, 15. See text in Verzijl, *ibid.*, 331.

<sup>7</sup> Higgins, in Holland Rose and Newton (eds.) *Cambridge History of the British Empire*, 1929, CUP, Cambridge, I, ch. VI, 183.

<sup>8</sup> Verzijl, *op. cit.*, 15.

### 3.3 The first "Territorial Sea" claims

Portugal started to build its African Empire under Prince Henry the Navigator,<sup>9</sup> who had distinguished himself at Ceuta and was a pious Churchman, who led the Portuguese down the coast of Africa, with the object of encircling Islam in the Mahgreb, and perhaps discovering the seat of the Coptic Church in Ethiopia, the legendary home of "Prester John". In 1419 he became Governor of the Algarves and in the following year sent the first of many voyages from the small court of mariners, astrologers and scientists he had gathered around himself at Lagos. Henry had to contend with sceptics who believed there was nothing to discover, and more practically, sailors who were reluctant to go beyond Cape Bojador, frightened by tales of boiling oceans, sea monsters and the like. However in 1441 some gold and a few native African captives were brought back to Portugal. He was granted the monopoly of trade with the Guinea coast by his brother Affonso V, and a significant slave trade began to develop.<sup>10</sup>

Portugal was currently in the Pope's favour, since Affonso had been the only western king to come to his aid against the Turks after the fall of Constantinople. Nicholas V was moved to help Henry further by issuing the bull *Romanus Pontifex*<sup>11</sup> on 8 January 1455, which confirmed the acquisitions of seas and lands that he had already made, and gave papal backing to any further acquisitions and trade that he might make in the area, specifically from Cape Bojador and Cape Nam to Guinea and beyond.<sup>12</sup> On the same day a further bull *Imper non* was issued addressed to all

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<sup>9</sup> According to Parry Henry was "the most outstanding figure in the first stages of Portuguese - and indeed European - overseas expansion": Parry, *op. cit.*, 11. See further Beazly (1910) XVI *AHR* 11-23 "Prince Henry of Portugal and the African Crusade of the 15th Century".

<sup>10</sup> See generally, Castlereigh, *op. cit.*, chs.1,2.

<sup>11</sup> National Archives, Lisbon, Coll. de Bullas, maço 7 no.29. Cited in Davenport, *European Treaties bearing on the History of the United States and its Dependencies to 1648*, 1917, Carnegie Institute, Washington, 13.

<sup>12</sup> See English translation in Davenport, *op. cit.*, 20 *et seq.*

other princes, prohibiting them from navigating in the adjoining sea without licence. And in the following year (on 13 March 1456) the new Pope Calixtus III issued a further bull *Inter Caetera*<sup>13</sup> confirming the earlier one.<sup>14</sup> Portugal now had papal backing for what was in effect a territorial sea off a large swathe of the coast of North West Africa, within which all other States were prohibited to navigate.

Henry died in 1460 and the territories he had discovered went to the Portuguese crown. But King Affonso was more interested in acquiring the Crown of Castile than continuing Henry's work, and the momentum that Henry had built up gradually decreased. Affonso invaded Castile in 1475, and during the resulting War of Succession, Castile was able to step up its trade with Guinea, contrary to the bull *Romanus Pontifex* which had granted the land to Portugal. Despite the bull Castile claimed Guinea as its own. A peace was agreed in 1479, and the Treaty of Alcáçovas<sup>15</sup> signed, which also united Castile and Aragon.<sup>16</sup> It ended the long struggle between Spain and Portugal, allowing both States to build up their army and navy and leading to the rapid expansion that followed. By the treaty, Ferdinand and Isabella agreed not to disturb Portugal's possession of, and trade with, Guinea, the Azores, Madeira, and the Cape Verde islands; and Portugal ceded the Canaries to Spain. The two States also agreed that new territories discovered in one part of the Atlantic would go to Portugal, and those in the other part to Spain. The Treaty of Alcáçovas (which was to be important later in the discovery of America) was recognised by the bull *Aeterni Regis* granted by Sixtus IV.<sup>17</sup> (It was later confirmed

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<sup>13</sup> Gav. 7a, maço 13, no.7, National Archives, Lisbon; cited in Davenport, *op. cit.*, 27.

<sup>14</sup> See English translation in Davenport, *op. cit.*, 30 *et seq.*

<sup>15</sup> Gav. 17, maço 6, no.16, National Archives, Lisbon; cited in Davenport, *op. cit.*, 35.

<sup>16</sup> See English translation in Davenport, *op. cit.*, 42, *et seq.*

<sup>17</sup> Coll. de Bullas, maço 25, no.10, National Archives, Lisbon; cited in Davenport, *op. cit.*, 49. See English translation *ibid.*, 53 *et seq.*



by a bull of 12 September 1484 granted by Innocent VIII, which also recognised the King of Portugal as "dominus Guineae".<sup>18</sup>) On 21 June 1481 the Pope confirmed the treaty's exclusion of foreigners from Guinea. In August Affonso died and his son succeeded him as John II the Perfect. Under John, the further exploration of Africa, virtually non-existent under his father, was resumed and later in that year he sent a force to build a fortress at Elmina, on the Gold Coast, for the protection of Portuguese commerce. He decreed that all foreign ships visiting Guinea could be sunk or captured.<sup>19</sup> Portugal was convinced that India was just a little farther east along the great latitudinous sweep of the African coast. It was with great disappointment then that Fernando Po discovered the southerly trend of the coastline in 1483, but by 1487 Bartholomew Dias had rounded the Cape. However before John could go on around the Cape to discover what lay beyond, his attention was distracted by more domestic concerns. And then came Columbus, claiming to have reached India already, and by sailing west.

The initial stand-points in the forthcoming freedom of the seas dispute were already emerging: on one side Spain and Portugal were asserting a jurisdiction over a large area of sea, excluding other States, with papal backing; and on the other side, France and England were claiming to be allowed to sail in the seas claimed by Spain and Portugal. For instance, in about 1482 Edward V of England was petitioning the Pope to permit the English to trade in any part of Africa, contrary to the bulls already granted, and in that year John II sent ambassadors to England urging him to prevent his subjects sailing to Guinea.<sup>20</sup> Edward was persuaded to make a treaty with Portugal confirming its title under the papal bull of its West African possessions.<sup>21</sup>

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<sup>18</sup> Verzijl, *op. cit.*, 16.

<sup>19</sup> Parry, *op. cit.*, 33.

<sup>20</sup> *Calendar S. P., Venice*, I, 142. See further Hakluyt, *The Principal Navigations of the English Nations*, 1589, G Bishop and R Newbene, London; 1972, Penguin, Harmondsworth, IV, 122-124.

<sup>21</sup> Rymer, xii, 195. See also Higgins, *op. cit.*, 184.

### 3.4 The papal lines in the sea, dividing up the world

#### 3.4.1 Columbus and the papal line

Throughout the 15th century many new islands were discovered in the Atlantic, and sailors began to "see an island in every cloud bank, and peppered the Atlantic charts with imaginary islands".<sup>22</sup> One such was Antilla (or Atlantis), which, legend had it, was a prosperous Christian Kingdom, and which many an explorer dreamed of finding. As Parry says, it was "into such a world of sailors yarns, where anything might happen, that Columbus came peddling the 'enterprise of the Indies' around the courts of Europe."<sup>23</sup> The story of Columbus' voyages needs no retelling here, but the circumstances illustrate well the attitudes of States towards jurisdiction over the sea.

Returning from his journey after reaching land, but before he reached Spain, Columbus was forced to put into a Portuguese port due to bad weather, and on 9 March 1493 was obliged to tell King John what he had found. He said his orders had been to sail due west from the Canary Islands, and John said that to sail south would violate Portugal's rights. Butler and Maccoby assert that this was a novel claim by Portugal,<sup>24</sup> but it can be seen as a further step in the development of Portugal's claim to a monopoly of trade and navigation in the South Atlantic, and was perhaps framed in the context of its rights *vis-à-vis* Spain under the Treaty of Alcáçovas.

From what Columbus told him John did not believe the discoveries to be important. He did not trust the mariner's geographical calculations and thought that

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<sup>22</sup> Parry, *op. cit.*, 47.

<sup>23</sup> Parry, *ibid.* It may be that the New Learning that led to Columbus' expedition - providing both the means and the motivation - led also to the demise of the end of that era. According to Scott, "The discovery of America put an end to the Renaissance, for instead of contenting themselves with adventure to be found in books...succeeding generations sought adventure in the New World": Scott, *The Spanish Origin of International Law*, 1934, Clarendon, Oxford.

<sup>24</sup> Butler and Maccoby, *Development of International Law*, Longmans, London, 1928, 49.

he had found only an island of the type that was frequently being discovered at that time. He certainly did not think that Columbus had reached 'easternmost Asia'. However, he considered that the islands might be in the Portuguese part of the sea under the Treaty of Alcáçovas, or were even part of the Azores group, and prepared a force to take possession of them. Spain learned of this and sent an emissary to John requesting that the caravels should not sail until they knew in whose seas the discoveries lay. In staking *its* claim to the lands, Spain informed Pope Alexander VI (who was Ferdinand's friend Rodrigo Borgia, a Spaniard) of the discoveries, and he obligingly issued three bulls in its favour in 1493.<sup>25</sup> These famously 'divided the world' and have long attracted opprobrium: Nussbaum writes that "the Holy See's plenitude of power over the whole earth had never been set forth in such challenging terms as was done by this most unworthy incumbent of the Holy Office."<sup>26</sup>

The first bull, *Inter Caetera*,<sup>27</sup> dated 3 May, assigned Spain any lands that it discovered not already owned by a Christian prince, thus rejecting any rights to lands it had already discovered. And it "strictly [forbade] all persons ... to go for the sake of trade or any other reason whatever to the said islands and countries after they have been discovered" without Spain's consent. However, Portugal's rights to lands

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<sup>25</sup> The precise date of these bulls has for long been a matter of contention. One recent suggestion (see Verzijl, *op. cit.*, 17) is that the first bull *Inter Caetera* was issued on 28 or 29 April 1493, but postdated to 3 May. This rejected the claims of Portugal in favour of Spain, but the latter was not satisfied with it and a couple of months later on about 28 June it provoked a new bull *Eximae Devotionis* amending the first, which was backdated to the same day, 3 May. Then, in July, a more precise delimitation of the States' respective zones was laid down, which was issued as the second bull *Inter Caetera* and backdated to 4 May.

<sup>26</sup> Nussbaum, *A Concise History of the Law of Nations*, 1954, Macmillan, New York, 63. See also Colombos, *International Law of the Sea*, 6th ed., 1969, Green, Longman and Co., London, 49. On Alexander VI, see Van der Linden, (1916) XXII *AHR* 13 "Alexander VI and the demarcation of the maritime and colonial dominions of Spain and Portugal".

<sup>27</sup> *Inter Caetera*, 3 May 1493: Patronato 1-1-1, no.1, Archives of the Indies, Seville; see (1904) XIV *AHR* 776 for photographic reproduction; cited in Davenport, *op. cit.*, 56; see English trans. *ibid.*, 61 *et seq.*; a copy is also in AN Mar./B/7/1.

it had already discovered were safe-guarded, since "no right conferred on any Christian prince [was] understood as withdrawn or to be withdrawn."<sup>28</sup> Since the purpose of the grant was, at least partly, to save heathen souls, Spain was also enjoined to instruct the inhabitants of newly discovered territories in the Christian faith.

Favourable though it had been, Spain was not satisfied with the bull, and procured another bull, *Eximae Devotionis*,<sup>29</sup> which restated its provisions. A further bull, *Inter Caetera*,<sup>30</sup> was even more favourable to Spain, giving a precise delimitation of the States' respective zones. Spain was assigned the exclusive right to acquire territory, to trade in, or even to approach any lands west of the meridian 100 leagues west of the Azores or Cape Verde islands. And this time there was no safe-guard of possible Portuguese rights.

### 3.4.2 The Tordesillas line

Spanish fishermen were starting to stray south of Cape Bojador, and Portugal sent an emissary to Spain to ask that they be prohibited from doing so until the limits of possession of the two States were fixed. It was suggested that the limit in the south be the parallel of the Canaries, with Portugal controlling navigation south of the line. Portugal sent two more emissaries to negotiate, but while negotiations were going on Spain appealed once more to the Pope. He granted the bull *Dudum Siquidem* on 26 September 1493, which was again in Spain's favour.<sup>31</sup> It confirmed the bull *Inter Caetera* of 4 May, and revoked the earlier papal grants that had seemed to give

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<sup>28</sup> Patronato 1-1-1, no.1, Archives of the Indies, Seville; cited in Davenport, *op. cit.*, 63; from text *ibid.*

<sup>29</sup> Patronato 1-1-1, no.4, Archives of the Indies, Seville; cited *ibid.*, 64; see English translation *ibid.*, 67, *et seq.*

<sup>30</sup> Patronato, 1-1-1, no.3., Archives of the Indies, Seville; cited *ibid.*, 71; see English translation *ibid.*, 75, *et seq.*

<sup>31</sup> Patronato 1-1-1, nos.2 and 5, Archives of the Indies, Seville; cited *ibid.*, 79; see English translation, *ibid.*, 82 *et seq.*

Portugal some claim to lands not already in its possession in the Americas. Spain's permission was to be required for navigation, fishing and exploration in the area. And a new line was fixed in the western Indian Ocean which corresponded with that through the Atlantic.

Portugal was aggrieved by the *Inter Caetera* bull: the meridian was only 100 leagues west of its frequently-visited Azores and Cape Verde islands, giving little room to manoeuvre around them, and when sailing to Guinea Portuguese sailors would avoid privateers based at the Spanish Canaries by swinging far out into the Atlantic and calling at the Azores.<sup>32</sup> The King appealed to the Roman Curia for a modification of the line, but was refused.<sup>33</sup> He wanted another meridian to be agreed on, farther west, halfway between the Cape Verde Islands and the lands Columbus had reached, and began to negotiate directly with Spain. But John had other motives too - he was confident that other territories would be found within the new limit,<sup>34</sup> as indeed they were.

Spain agreed to the new demarcation line, which was to run 370 leagues west of the Cape Verde Islands, by the Treaty of Tordesillas<sup>35</sup> signed on 7 June 1494. (The treaty was confirmed in 1506 by Pope Julius II by the bull *Ex quae pro bono*.<sup>36</sup>) Territories west of the line discovered by Spain were to be Spanish, and those east of the line discovered by Portugal, Portuguese. Spanish ships crossing Portuguese seas had to take the most direct route. They also agreed not to send ships

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<sup>32</sup> Parry, *op. cit.*, 46.

<sup>33</sup> Verzijl, *op. cit.*, 18.

<sup>34</sup> He was "certain that within those limits famous lands and things must be found": Davenport, *op. cit.*, 84.

<sup>35</sup> Gav.17, maço 2, no.24, National Archives, Lisbon; cited in Davenport, *ibid.*, 85; see English translation, *ibid.*, 93 *et seq.* See Dawson (1899) *Transactions of the Royal Society of Canada*, 2nd ser., 496-526 "The Line of Demarcation of Pope Alexander VI".

<sup>36</sup> See *infra*.

to each other's areas for purposes of "[discovery] ... trade, barter, or conquest of any kind".<sup>37</sup> Within 10 months of the treaty, both States were to send a group of mariners to sail out to determine the boundary, but this did not in fact occur. Nor were the provisions of a later agreement (signed on 7 May 1495) carried out, by which the States agreed to send representatives to meet to determine the position of the boundary.<sup>38</sup> In fact neither monarch organised an expedition to determine it until 1512.

It seems strange that Spain agreed to the treaty. It directly contradicted the bull *Inter Caetera*, issued by Ferdinand's old friend Alexander VI and confirmed by him in another bull at Spain's request. However Spain did not feel threatened by the modifications suggested by Portugal - it had faith in the geography of Columbus - and perhaps the potential benefits of the treaty were too great for Spain to resist. By delimiting separate zones Spain and Portugal were agreeing not to interfere with each other's trade: Spain would be free to trade in the Americas, and Portugal free to trade in Africa.

Whatever the motives, Spain and Portugal had, by the treaty and the papal bulls, claimed exclusive rights of trade and navigation in large areas of sea, and the right to exclude other States from them. As we saw in chapter two, the other States of Europe were not making similar claims, and they opposed them. The rights asserted in the Iberian claims are in modern times associated with a State's territorial waters and these claims may be seen as the antecedents of today's territorial sea claims.

The new line ran approximately 370 leagues west of the Azores. At the time that its position was agreed, the only parts of the American land mass known to exist by European States were the islands of the Caribbean. In particular the existence of South America was not known. In fact (like the papal line) the line, which was

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<sup>37</sup> From text in Davenport, *op. cit.*, 95.

<sup>38</sup> Gav.10, maço 5, no.4, National Archives, Lisbon; cited in Davenport, *ibid.*, 101; see English translation, *ibid.*, at 102 *et seq.*

presumably thought to run continuously through sea, cut through the eastern part of what is now Brazil. This was to be significant later, since it gave Portugal a toehold in South America, and led to clashes between Portugal and Spain.

The Treaty did not make provision for the situation where Spain might reach the same seas as Portugal by sailing east. This happened in 1521, however, when Magellan reached the Moluccas, and Portugal bought out Spain's claim.

### **3.4.3 The true route to India revealed**

All of Europe bar Portugal had been convinced by Columbus that he had reached 'the East', and a desire to share in its riches led them to contravene the papal rulings giving a monopoly to Spain. In 1496 John Cabot sailed under the flag of England, exploring Newfoundland, Labrador, and New England, having been authorised by Henry VII to navigate

"to all ports, countries and seas of the East, of the West and of the North [to discover] whatsoever isles, countries, regions or possessions of the Heathens or Infidels, wheresoever they be, and in what parts soever of the world, which before this time hath not been known to all Christians."<sup>39</sup>

This seems to have been an intentional ignoring of the papal line and provoked protests from the Spanish ambassador. However Cabot was not authorised to enter the southern seas, which were the only ones thus far navigated by Columbus, perhaps indicating that the King did not want to raise that question.<sup>40</sup>

Due to the long negotiations over Columbus' discoveries, it was not until 1497 that Vasco da Gama set off on the voyage that would take him round the Cape of Storms (renamed by John, with well-founded optimism about the prospects of opening up an eastern trade, the Cape of Good Hope) to the Indian Ocean. He sailed with information about the coasts of Malabar provided by Pedro da Couilha - who had left

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<sup>39</sup> Rymer, V, iv, 89.

<sup>40</sup> On Cabot's voyage, see generally Higgins, *op. cit.*, 184 *et seq.*

Lisbon in 1487 - and put in at Calicut, one of the main spice ports. However the local Hindu ruler saw no reason to give up his profitable trade connections with the Arab merchants who had now been there for some time, and the latter were of course keen to confirm him in that view.<sup>41</sup>

Columbus' subsequent voyages west were disappointing, failing to yield any trace of India or Cathay. Voyages by other States were exposing a similarly depressing truth, with Cabot's voyages also bringing back no spices or silk. But by then, as Parry puts it, "da Gama's first voyage had revealed to an envious Europe the true route to India."<sup>42</sup>

### **3.5 Expansion into the East and the New World**

#### **3.5.1 Portuguese-Spanish battles for the Eastern trade**

The land-mass that is America was at first seen only as a barrier between Europe and Asia. The riches of its soil which would later profit Spain so greatly were for a time unknown. Spain and other European States concentrated on finding a western passage to India, to compete with the great potentials latent in the new Portuguese trade. The explorers of the time were professionals "whose allegiance sat lightly on them",<sup>43</sup> and who would carry their skills and geographical knowledge to any monarch who would employ them. Spain, France, England and Venice all took advantage of their services. Only Portugal tried to employ its own nationals, and so "consequently only the Portuguese succeeded in keeping their discoveries secret, until Magellan, in the sailors' phrase, blew the gaff."<sup>44</sup>

Spain tried to use the Treaty of Tordesillas to restrain Portugal in the East. As

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<sup>41</sup> Parry, *op. cit.*, 35. See also, Fiennes (1918) 66 *JRSA* 663-69 "The Freedom of the Seas".

<sup>42</sup> Parry, *op. cit.*, 52.

<sup>43</sup> *Ibid.*, 54.

<sup>44</sup> Parry, *ibid.*, 55. See further Guillemerd, *Life of Ferdinand Magellan*, 1890.



we have seen, it gave Portugal rights in Brazil, which began to be exploited after its occupancy in 1500 by Pedro Álvares Cabral. Given the new value of the Tordesillas line, which allowed Portugal to claim rights to Brazil, King Emmanuel sought to have the Pope back his claims. On 24 January 1506 Portugal received papal confirmation of its rights under the treaty by the bull *Ex quae pro bono* issued by Julius II,<sup>45</sup> which frustrated any lingering Spanish hopes of reviving Alexander VI's demarcation line. Spain claimed that the line extended right around the world. Portugal was unsure which side of this line the Moluccas were on and sought papal confirmation that its application was confined to the Atlantic.

Portugal had now replaced Spain in papal favour, due to its missionary success in north-west Africa and burgeoning activity in India. In 1514 Leo X, who had been pleased by the gift of a performing elephant sent by the Portuguese commander in the East, Affonso d'Alberquerque, granted two bulls in Portugal's favour. The first, issued on 7 June, gave Emmanuel "the patronage of ecclesiastical benefices in Africa and *in all other places beyond the sea*, acquired or to be acquired from the infidels, and subjected them to the spiritual jurisdiction of the Order of Christ".<sup>46</sup> (Original italics) The second bull *Praecelsae Devotionis*,<sup>47</sup> issued 3 November, confirmed the earlier grants in favour of Portugal and also donated all lands "recovered, discovered, found and assigned from [heathen peoples] or in future to be recovered, acquired, discovered and found by [Portugal] both from capes Bojador and Nao to the Indies, and in any place or region whatsoever, even though perchance unknown to us at

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<sup>45</sup> Coll. de Bullas, maço 6, no.33, National Archives, Lisbon; cited in Davenport, *op. cit.*, 108; see English translation, *ibid.*, 110 *et seq.* Two other similar bulls were issued at the same time.

<sup>46</sup> Davenport, *op. cit.*, 112. The Order of Christ was a group of private crusaders that made many expeditions for Portugal. Prince Henry was its Grand Master. When it became too powerful, it was united with the crown of Portugal in 1551.

<sup>47</sup> *Ibid.*, 116-7. Portugal's replacing of Spain in papal favour was symbolised by these two bulls, which, as Davenport notes (*ibid.*, 112) are respectively to Portugal what the *Inter Caetera* and *Dudum Siquidem* bulls were earlier to Spain.

present."<sup>48</sup> Thus Portugal obtained the right to any lands that might be reached by sailing east, indicating that the Pope regarded the demarcation line as confined to one hemisphere. Portugal could obtain infidel territory that was more than halfway round the world.

Magellan had already sailed in the Far East for Portugal and believed that the Moluccas were in Spain's sphere of influence. He knew that the islands were covered by the bull *Praecelsae Devotionis* but offered to Spain to sail to them by a Spanish route - ie. round Cape Horn - and left in 1519.<sup>49</sup> When Magellan's ship arrived in the Moluccas he found that the Portuguese had been there for 10 years already. Hostile negotiation began between the two States on the question of the exact position of the Moluccas. Spain based its claim on the islands being on its side of the line; Portugal disputed this, and argued that even if they were, it had a better right through its discovery. By the Treaty of Vitoria 1524,<sup>50</sup> signed 19 February, the two States agreed a conference to calculate the exact position of the line.<sup>51</sup>

The meeting was a failure. This was the most likely result since the parties could not agree from where the 370 leagues of the Tordesillas line should be measured. Spain wanted it to be measured from the most westerly of the Cape Verde islands, meaning the Moluccas would be about 25 degrees west of the demarcation line; Portugal measured it from the most easterly island, with the result that the Moluccas were about 21 degrees east of the line.<sup>52</sup> Diplomatic negotiations were resumed.

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<sup>48</sup> Coll. de Bullas, maço 29, no.6, National Archives, Lisbon; cited in Davenport, *op. cit.*, 113.

<sup>49</sup> Parry, *op. cit.*, 57.

<sup>50</sup> Gav. 18, maço 6, no.5, National Archives, Lisbon; cited in Davenport, *op. cit.*, 120. See text and English translation *ibid.*, 121, *et seq.*

<sup>51</sup> On the conference see Blair and Robertson, *Philippine Islands 1493-1503*, I, 1903, AH Clark and Co., Cleveland, 165-221.

<sup>52</sup> Davenport, *op. cit.*, 131.

Portugal was obviously too well established in the East Indies for Spain to dislodge. Given that, his war with France and his dire financial situation, the Emperor, Charles V, conceived to sell Spain's 'rights' to the Moluccas. Portugal wanted to avoid being dragged into the anti-Spanish war, which would have disrupted its eastern trade, and so was responsive - if cautious - to the idea of buying out the Spanish claim, but Charles also looked at the possibility of selling to England.<sup>53</sup> However, Spain finally did sell to its Iberian neighbour, for 350,000 ducats, by the Treaty of Saragossa 1529,<sup>54</sup> signed 22 April. The treaty fixed "a semi-circular line from pole to pole, 17 degrees (which equals 297½ leagues) east of the Moluccas".<sup>55</sup> Spanish desperation to reach an agreement allowed Portugal to insist on this arbitrary demarcation.

### **3.5.2 The success of Iberian colonialisation**

The two Iberian States quickly established their trade routes. Spanish Conquistadors spread out through central and southern America. They discovered gold, silver and other minerals, which began to be shipped back to Europe. Despite da Gama's unpromising reception in India, when he returned home with news of his success Portugal put into effect a well-planned operation for establishing commerce with the region. Since the Arab trade was so entrenched, and the local rulers looked on the Portuguese with disdain,<sup>56</sup> Portugal had to use force to make headway. A

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<sup>53</sup> Letter from Edward Lee, 20 January 1527: *Letters and Papers, Foreign and Domestic, Henry VIII*, IV, pt.II, no.2813.

<sup>54</sup> Gav.18, maço 8, no.29, National Archives, Lisbon; cited in Davenport, *op. cit.*, 171; see text and English translation *ibid.*, 171, *et seq.* Charles concluded the treaty despite the opposition of the Cortes. See also, Parry, *op. cit.*, 59.

<sup>55</sup> Davenport, *op. cit.*, 161.

<sup>56</sup> "In the eyes of a cultivated Hindu they were mere deperadoes, few in number, barbarous, truculent and dirty": Parry, *op. cit.*, 39. See also Alexandrowicz, *An Introduction to the Law of Nations in the East Indies*, 1967, Clarendon Press, Oxford, 15.

notable victory was scored by Almeida in 1509 - the smaller Portuguese fleets being successful against Arab fleets and local ports - and in the following year d'Alberquerque took the large, prosperous island city of Goa as the Portuguese base.<sup>57</sup>

Portugal took other ports on the Malabar coast and also spread along the Arabian coast, taking forts in Arabia including the important market of Hormuz, in the Persian Gulf. It could now control the Arab trade routes in the Indian Ocean, and began to look for ways of extending its power in the Bay of Bengal.<sup>58</sup> Trade with the Far East had to travel through the Straits of Malacca and this major port was an obvious target for Portugal. It was taken by d'Alberquerque in 1511 and then the Far East lay open to Portugal. It made treaties with the Sultans of the Spice Islands and of the Moluccas. And in 1573 a Portuguese ship put into Canton, becoming the first European visit to China since the time of Marco Polo.<sup>59</sup>

Despite the expectations of the Portuguese that their voyages would bring the light of civilisation into the barren, dark reaches of savagery, the peoples of the East Indies and China had, of course, developed political cultures and legal systems. Portugal's arrival in the East was no easy passage amongst barbarians - as Alexandrowicz has shown<sup>60</sup> it struggled to deal diplomatically with a sophisticated semi-feudal system of sovereignty. For instance, it failed to appreciate the delicate respect that had to be shown to the Emperor of China, who was deemed to be a suzerain of the rest of the world: China would not return envoys or make treaties, but gave concessions. Portugal's errors meant that its envoys were treated with contempt; whereas some years later, the Dutch - not carrying the papal cross, and with a zeal

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<sup>57</sup> Parry, *op. cit.*, 41.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, 42.

<sup>60</sup> Alexandrowicz, *op. cit.*, 16, 17.

only for commerce - met with more success.<sup>61</sup>

### **3.6 Juristic opposition to the Iberian claims**

Spanish jurists did not support Spain's claims to dominion in the same way as Italian jurists had Venetian and Genoese claims previously. For example, Francisco de Vitoria denied that the claims could be justified, as did the missionary Las Casas. In his famous *De Indis* lecture in the late 16th century Vitoria gave the first serious opposition on legal grounds to the Pope's assumption of the existence of a right to dispose of non-Christian territories to Christian Kings.<sup>62</sup> For Vitoria, rules governing relations between nations were based on the law of nature, which was of universal application, deduced by reason rather than handed down from the Pope. Thus it extended universally, to the Indians as well as the Spanish. And under the law of nature, the Indians formed nations with rights, and were not in the gift of the Pope.<sup>63</sup>

As well as opposition to the Iberian States' claims to heathen lands, there was some resistance to their monopolistic policies in the seas from Spanish jurists in the middle of the 16th century. The monk Francis Alphonso de Castro argued against the exclusive navigation rights claimed by Spain and Portugal, and also Venice and Genoa.<sup>64</sup> They were, he said, contrary to the imperial law, the primitive right of

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<sup>61</sup> *Ibid.*, 17.

<sup>62</sup> Vitoria, *De Indis et de Jure Belli: Relectiones*, 1696, Cologne; (tr., Bale; ed. Scott) 1917, Classics of International Law Series, Wildy, London. Butler and Maccoby, *op. cit.*, 49. Nussbaum, *op. cit.*, 83, 84, while recognising Vitoria's influence and 'enlightened' views, cautions against categorising him as a 'liberal', as he defended papal authority with vigour. See further Kennedy (1986) 27 *Harvard International Law Journal* 1 "Primitive Legal Scholarship" at 13. On Portugal's similar claim in the East Indies, Alexandrowicz, *op. cit.*, chs.3, 4.

<sup>63</sup> *De Indis, op. cit.*, 148.

<sup>64</sup> Castro, *De Potestate Legis Poenalis*.

mankind and the law of nature.<sup>65</sup> Ferdinand Vasquez argued against the application of civil law concepts, such as prescription, to relations between States.<sup>66</sup> They had to be governed by the law of nations, which "could never admit of such usurpation of a title to the sea".<sup>67</sup>

### **3.7 Assessment**

The period up to the mid-16th century saw the first claims to what we would regard today as territorial waters. Departing from previous practice, Spain and Portugal excluded other States from areas of the sea off the coasts of territories they discovered. They developed a virtually exclusive trade to their new-found territories, effectively shutting out the other States of Europe from the whole of the west African coast, and all but the north-western shores of North America. Navigation to the Pacific or Indian Ocean, was *a fortiori* impossible.

The initial source of the right to make these claims was Rome. Several papal bulls were issued enjoining Christian princes not to send ships to the Spanish and Portuguese territories, and disposing of them in the Iberian States' favour. Other States acquiesced in the papal right to do so: Edward V of England recognised that right by sending ambassadors to the Pope asking for dispensation from the terms of the bull. Treaties were made confirming the Spanish and Portuguese claims, between the two States themselves, but also between, for instance, England and Portugal, in about 1482.

It is possible to say then that in the first stages of the discovery and settlement of new territories, and claiming exclusive juridical rights over the sea, papal authority and bilateral treaties were the two main, if not only, factors generally recognised by

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<sup>65</sup> *Op. cit.*, lib. ii, ch.14; cited by Grotius, *Mare Liberum: the Freedom of the Seas or The Right which belongs to the Dutch to Take Part in the East Indian Trade*, (tr. Magoffin; ed. Scott) 1916, Classics of International Law, Carnegie Endowment, New York, ch.8.

<sup>66</sup> Vasquez, *Controversiae Illustres*, 1564, Venice, II, ch.89, s.12.

<sup>67</sup> Fulton, *op. cit.*, 341.

States as imposing an obligation on them. Later, States were more willing to contravene the bulls - for instance, English ships sailed in 1496 with permission to cross the papal lines, provoking protest from Spain - although they did not yet disregard them entirely. The important factor was a realisation of the potentials in the new Spanish and Portuguese trade. Opposition to Church and Empire was growing generally, but what made States willing to incur the wrath of Rome was the very obvious wealth of the Americas and Indies. Another development was the evolution of the theories of what is referred to as 'natural law', and the works of the two especially important jurists at the time: Vitoria, who argued that newly-discovered nations had rights, as much as Christian nations, and there was no inherent papal right to dispose of them; and Castro, who applied similar reasoning to the oceans.

In the late 15th and early 16th centuries, then, Spain and Portugal had constructed a legal framework for their claims which was being undermined in three ways. Their starting point was the Pope issuing a bull disposing of land and sea in their favour and excluding other States. Firstly the papal edict itself was losing its currency as an obligation imposing source of law (with even Spain and Portugal agreeing to amend the terms of one bull). Secondly the capacity of a bull to dispose of land and sea anywhere in the world was disputed by theologians who asserted the rights of all nations and peoples under natural law. And thirdly in practice States began to try to navigate through the Iberian waters, hardly accepting Spanish and Portuguese exclusive dominion.

In sum then, in the middle of the 16th century the exclusive claims to enormous areas of the sea were founded on papal authority, which was being disputed by the natural lawyers and undermined by the practice of States. How States continued to respond to the Spanish and Portuguese claims will be examined in chapter four.

**The reactions of other States in the mid-16th century to the claims to  
jurisdiction of Spain and Portugal**

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## **4.1 Introduction**

In the mid-16th century, the power of Spain (and the Empire) was sufficiently great, and the backing given to its claims to jurisdiction by Rome so firm, that the other States of Europe could make little inroad into the wall of Iberian dominion keeping them from the Atlantic. But as the riches of their new territories became known, the other States reacted more strongly against the Spanish and Portuguese claims, and this chapter examines the effect of this response. French and English sailors began to ignore the claim to dominion of the Atlantic and to commit acts of piracy against Spanish ships carrying cargo back from the Americas.<sup>1</sup> Eventually, too, the high prices demanded by Spanish merchants would allow other States to undercut them and trade directly with the settlers.<sup>2</sup> And when other States began to establish settlements in North America - France did so, for instance, in Florida in 1524 - they could from there attack Spanish settlements in the West Indies. As part of their struggle for independence from Spain, the Dutch began to open up their own trade with the East Indies, ignoring the Portuguese claims to exclusive navigation there.

In 1516 Charles I succeeded Ferdinand as King of Spain, and in 1519 he was elected Emperor Charles V, defeating the opposing candidate Francis of France. The claims of Spain to exclude States from the Western Atlantic (and similar claims of Portugal elsewhere) and the reactions of other States to them, must be seen in the context of the Franco-Spanish struggle for the mastery of Europe over the next forty years.

## **4.2 The growth of 'national' piracy**

Attacks on shipping were no longer carried out merely by groups of lawless brigands roaming the seas on the look-out for Spanish galleons. Piracy came to be

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<sup>1</sup> Swarztrauber, *The Three-Mile Limit of Territorial Seas*, 1972, US Naval Institute, Annapolis, Maryland, 15. France and England were still concerned about piracy against their own ships elsewhere. See, for instance, the Treaty of London 1518, signed 4 October, which provides for the suppression of piracy and redressing of deprivations at sea: *Exch. T. R. Dip. Docs.* 826.

<sup>2</sup> Parry, *Europe and a Wider World 1415-1715*, 1949, Hutchinson, London, 82.

seen as a useful weapon for the prosecution of national policy, by France and later England, in the face of overwhelmingly superior Spanish wealth and power.<sup>3</sup> With the Reformation in its infancy States were still unwilling completely to contravene the papal authority invested in the Iberian claims, and use of corsairs was a way of achieving their national objectives while being able to deny involvement. The old 100 miles jurisdiction of Bartolus was insufficient to counter the corsairs. According to Gidel,

"Le pirate relève du droit criminel, le corsaire relève du droit politique. La limite des 100 milles assignée en Méditerranée à la juridiction des Etats riverains sur les pirates s'accommodait mal des entreprises des corsaires; il fallut donc la restreindre."<sup>4</sup>

Instead, a coastal State's jurisdiction began to incorporate a notion of 'safe passage'. A ship could not be captured and visited if it had letters of safe conduct from the coastal State.<sup>5</sup>

An example of this was a form of 'neutrality zone' around the coast of England, which is recorded for the first time in the records of negotiations in 1521 between Francis and Charles, mediated by Cardinal Wolsey.<sup>6</sup> The subsequent Treaty of Calais 1521<sup>7</sup> mentions an English coastal zone - the English Chambers - within which the waters were under the jurisdiction of the King of England and where ships of either State should be free from attack. Later chapters will show what an important part of English policy these Chambers became. It is sufficient to note here the fact that they were developed enough a concept and sufficiently accepted by other States

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<sup>3</sup> See, for instance, the complaints in *Calendar S. P.* 1580-6, 59-61, 249, 326.

<sup>4</sup> Gidel, *Le Droit International Public de la Mer*, III, 1934, Paris, 33.

<sup>5</sup> *Ibid.*

<sup>6</sup> A record of the negotiations is given in *Mémoires et documents. Fonds divers Espagne*, f.23.

<sup>7</sup> Rymer, xiii, 752; Dumont, IV, i, 352. England's rights in "the Narrow Seas" were recognised by the Spanish ambassador to the negotiations; see the declaration on 14 September 1521, by Mercurius de Gattinara in *Exch. T. R. Dip. Docs.* 859. See further, *Dip. Docs.* 860 and 871; *B. M. Cotton MSS. Galba B7.*

for Wolsey to put them in a treaty, and that the Chambers were purely for the purposes of neutrality and no right was asserted to exclude other States from them.

### 4.3 The response to Spain's claims

#### 4.3.1 Introduction

France's attempts to undermine Spain and the Empire led it to conclude a number of agreements contrary to its natural allegiances. For instance, Francis agreed secretly to support the League of Smålhalde, formed by German Protestant States, even while suppressing his own Protestants. And the *Rex Christianissimus* even made a treaty with the Porte, Soleiman the Magnificent, in 1535. This 'capitulation' by the Ottoman Sultan was concluded by France while trade with the Saracen was still strictly limited by the Pope, and French public opinion was outraged. However France received many concessions and was given wide jurisdiction in Ottoman territories and coastal waters. Throughout the 16th century there were further capitulations and French influence in the Levant grew quickly. It became the dominant European power in the region, and other States would place their vessels under the protection of the French flag.<sup>8</sup>

France's corsairs continued to attack Spanish trade ships from the West Indies, and it pressured Portugal to allow them to shelter in Portugal's ports while waiting for ships to attack. Such a practice had, it seems, already gone on informally for some years<sup>9</sup> and Portugal agreed to the French request, with one eye on the growing power of the Emperor, but also needing to retain France's goodwill to avoid attacks on its spice-fleet sailing to Flanders.<sup>10</sup> The Treaty of Lyons 1536,<sup>11</sup> signed 14 July,

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<sup>8</sup> See further the letters patent and confirmation of prizes taken in the seas of the Levant in A.N. Mar./1/1/32 (4 March 1548) and A.N. Mar./1/2/1 (26 February 1558).

<sup>9</sup> See the early Spanish complaints in *Calendar S. P. Spain* 1538-42, vol.VI, pt.I, 294.

<sup>10</sup> See *Calendar S. P. Spain*, 1536-8, 318; Davenport, *European Treaties bearing on the History of the United States and its Dependencies to 1648*, 1917, Carnegie Institute, Washington, 199.

provided that France would protect Portugal's (ostensibly neutral) shipping, and Portugal would allow France's corsairs to shelter in and bring prizes to, its ports, including the ones in the Azores and Madeira, which were conveniently close to Spain's trade routes.<sup>12</sup> The ports were in the Portuguese designated part of the Atlantic, however, and for the first time Portugal had conceded the right of another State to navigate there, contrary to the papal bull's juridical framework.

France maintained that the seas were *res communes* and that States could not therefore be excluded by the papal bulls.<sup>13</sup> But as the effects of the Treaty of Lyons began to hurt Spain,<sup>14</sup> as Francis had intended, and because he wanted to consolidate the Franco-Portuguese relationship, he agreed to pass decrees in 1537, 1538 and 1539 forbidding his subjects to sail to Brazil, Guinea or any other of the lands discovered by Portugal.<sup>15</sup> These restrictions on the freedom of navigation of French sailors conflicted with France's policy of the seas being open to all States. They were imposed, it seems, for reasons of political expediency: to undermine Spain, France needed to attack the silver ships from which Spain received the resources to finance the war. To do this France needed to shelter its ships in Portuguese ports. And to maintain its relationship with Portugal it agreed to ban its ships even from navigating in much of Portuguese waters.

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<sup>11</sup> *Corpo Chronologico*, parte 1a, maço 57, cloc.65, National Archives, Lisbon; cited in Davenport, *op. cit.*, 201; see text and English translation *ibid.*, 201, *et seq.*

<sup>12</sup> Davenport, *op. cit.*, 201-204; Parry, *op. cit.*, 86.

<sup>13</sup> Swarztrauber, *op. cit.*, 15.

<sup>14</sup> See *Calendar S. P. Spain* 1536-8, 314-5, 317-8, 334-5.

<sup>15</sup> Davenport, *op. cit.*, 200, 201. La Roncière, *Histoire de la Marine Française*, III, 1923, Paris, 292. See also, *Calendar S. P. Foreign, Elizabeth*, 1562, 54.

### 4.3.2 The Treaty of Crépy-en-Laonnois 1544

There were four wars in total between France and Spain before they reached a compromise with the Treaty of Crépy-en-Laonnois 1544,<sup>16</sup> at which France secretly agreed to Spain's demands for help against the parts of the Empire - some Provinces of the Netherlands and Germany - which had turned to Protestantism. In return Spain, under a separate article,<sup>17</sup> granted France the right to sail to and trade with (although not to colonise - the territory, after all, had been granted to Spain by the Pope) its territories in the West Indies, through what Spain still claimed as its own seas. France agreed not to go on voyages of discovery and conquest.<sup>18</sup>

This agreement was contrary to the positions on 'territorial waters' maintained by both parties. Spain claimed dominion over the whole of the sea west of the Tordesillas line, and yet was here agreeing to allow another State to navigate and trade in the region. France argued that it could sail in any part of the seas and yet was here recognising limits on that freedom: it had agreed that it would not colonise in the Americas. The reasons for the deviance are, it is submitted, the interests of security, for Spain, and trade, for France. Spain wanted to contain France, which had already begun to colonise Newfoundland; and France was disappointed with the "gold and diamonds" brought back from its explorations in Canada<sup>19</sup> and hoped for better trade in Spanish America, if needs be within the limits imposed by Spain.

There was strong opposition within Spain to giving France permission to trade, and in fact there can have been little, if any, trading under the terms of the agreement, since in 1545 under pressure from the Emperor Francis forbade his subjects to go to Spain's overseas possessions.<sup>20</sup> France's position now was that

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<sup>16</sup> Dumont, IV, ii, 279; Davenport, *op. cit.*, 208. See further Verzijl, *International Law in a Historical Perspective*, 1973, AW Sijthoff, Leyden, 19. Documents relating to the treaty are given in *Mémoires et Documents. Fonds divers Espagne* f.27.

<sup>17</sup> *Mémoires et Documents, Espagne*, vol.306, f.196. See text in Davenport, *op. cit.*, 208, *et seq.*

<sup>18</sup> Verzijl, *op. cit.*, 19.

<sup>19</sup> La Roncière, *op. cit.*, 326.

<sup>20</sup> *Ibid.*, 302, 303.

although it espoused the freedom of the seas, its subjects were forbidden from sailing to the overseas territories of both Spain and Portugal.

### 4.3.3 The Treaty of Câteau-Cambrésis 1559

Philip II of Spain, who had succeeded Charles in 1556, continued his father's war against France and the papal alliance, but towards the end of 1558 both he and Henry II of France wanted peace. Both wished to address the problem of Protestantism within their territories and additionally Philip was virtually bankrupt. Envoys gathered at a large European peace conference - with Spain, France, England, Savoy and Navarre all represented - resulting *inter alia* in the Treaty of Câteau-Cambrésis 1559,<sup>21</sup> signed 3 April, between France and Spain. It was perhaps the most important treaty in Europe until that of Westphalia, a century later. For France the peace in Europe was a triumph, securing it against foreign invasion, even though it was obliged to give up territories to Spain and Savoy and abandon ambitions in Italy. For the Empire the treaty meant a hastening of its decline against the nation States, as exemplified by France, and its religious balance changed too, tilting towards German Protestantism.

The question of the Indies was much discussed at the conference, since French corsairs were now constantly harrying Spanish territory. The Spanish commissioners asserted the Spanish claim to exclusive navigation on the basis of the bulls of Alexander VI (in favour of Spain) and Julius II (in favour of Portugal) but also on the fact of Spain having carried the expense of discovery. The French said that the sea was common to all and therefore they could agree only that French ships should keep away from islands already possessed by Spain, and not those that they discovered themselves that were not in Spanish possession.<sup>22</sup> As an alternative they suggested not referring to the Indies in the treaty, as in earlier treaties, and since no other

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<sup>21</sup> *Exch. T. R. Dip. Docs.* 1123. Dumont, V, i, 31; Leonard, *Recueil des Traitez de Paix, de Treve, de Neutralité, de Confédération, d'Alliance et de Commerce, fait par les Rois de France avec tous les Princes et Potentats de l'Europe*, II, 1693, Paris, 535; B. M. Cotton MSS. Caligula E5.

<sup>22</sup> Higgins, in Holland Rose and Newton, *Cambridge History of the British Empire*, 1929, CUP, Cambridge, I, ch.IV, 187; see also Davenport, *op. cit.*, 220.

agreement could be reached this is indeed what came about. By an oral agreement the terms of peace were limited to an area within certain agreed "lignes d'amitié" - east of the prime meridian and north of the Tropic of Cancer - beyond which acts of violence were not to be regarded as infringements of the agreement, and indeed treaties in general did not apply.<sup>23</sup> 'Beyond the line', might should make right, and ships captured there were considered good prize. Spain had previously been forced to permit France to navigate to the West Indies (under the Treaty of Crépy), and its relatively weaker position demanded a new policy: to delimit only a small area of the sea as exclusively its own and outside that to allow its naval power to ward off other States.

#### 4.3.4 The Elizabethan stance against Spanish *mare clausum*

After the extensive claims of the Plantagenets, English policy<sup>24</sup> regarding the sea had reverted to asserting occasionally a vague and unspecified jurisdiction over the waters washing its coasts, similarly to many other States.<sup>25</sup> The old flag-salute was sometimes enforced, but generally foreign trade was encouraged and the fisheries were not limited. Elizabeth made a treaty establishing freedom of trade and navigation with France, which applied very widely in all areas of the sea under their command.<sup>26</sup>

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<sup>23</sup> The "remaining differences after the treaty" are discussed in *Mémoires et Documents. Fond divers Espagne* f.42. See also Higgins, *op. cit.*, 187; Verzijl, *op. cit.*, 20.

<sup>24</sup> Kennedy seeks to show that England's position was the most advantageous of any of the major sea powers: Spain and the Empire had very many continental distractions, France was threatened on three sides by Habsburg power, and the Dutch were consumed by the battle with Spain. See Kennedy, *The Rise and Fall of British Naval Mastery*, 3rd ed., 1991, Fontana, London, 22, *et seq.*

<sup>25</sup> The jurisdiction mainly concerned ensuring that the seas were safe for navigation, and English admirals were instructed to "plye up and downe the Narrow Seas" to do so: see instructions to Captain John Pennington, 1526, in SP/9/53/33. The extent of the Narrow Seas, as defined in 1557, is given in different instructions at the same reference.

<sup>26</sup> Treaty signed 13 April 1564: *Mémoires et documents. France et divers états*, vol.366, f.259.

England maintained the view that the seas were free for navigation to all. It also asserted that any territory which was not effectively occupied by another Christian power was open to be taken by the English adventurers.<sup>27</sup> Elizabeth pursued these policies both through sending out voyages which contravened opposing claims, and through diplomatic protest to Spain. The voyages of Cavendish and Lancaster in the east, and Drake, Frobisher and Hawkins in the west, often challenged Spanish claims. Cabot and Cartier also infringed the papal line in the North Atlantic - although Spain seems not to have been so concerned about the northern waters<sup>28</sup> - and when Hawkins approached a Spanish port he would always have ready the excuse that he had been blown off course.<sup>29</sup> Eventually Spain's patience was exhausted and he only narrowly escaped capture.<sup>30</sup>

In 1562 Hawkins began to carry cargoes of the two most wanted commodities in America - cloth, from England, and slaves, from Portuguese west Africa - in a series of voyages. Although Hawkins tried to legitimise these voyages by paying taxes, the Spanish ambassador to London protested. The two States were at this time at peace, and Elizabeth - who had secretly been a shareholder in the most recent voyage - forbade Hawkins to go again.<sup>31</sup> But in 1567 he persuaded Elizabeth to allow him to embark on his slave trade once more, but it ended disastrously, with defeat at the Battle of San Juan de Ulvá. Hawkins' plans had disintegrated, but the episode was part of a general worsening of the relations between England and Spain, and more widely, between Protestant and Catholic interests.

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<sup>27</sup> The Spanish view was that treaties and doctrines of the 'old world' did not apply in the 'new'. See Higgins, *op. cit.*, 199.

<sup>28</sup> Smith, *The Law and Custom of the Sea*, 3rd ed., 1959, Stevens, London, 58.

<sup>29</sup> On Hawkins, see generally Bindoff, *Tudor England*, 1950, Penguin, 252, *et seq.*

<sup>30</sup> Butler and Maccoby, *Development of International Law*, Longmans, London, 1928, 50.

<sup>31</sup> Parry, *op. cit.*, 84.



Early in her reign Elizabeth protested to King Sebastian of Portugal about the Tordesillas line.<sup>32</sup> And when the piratical activities of Drake attracted the wrath of Spain, and Philip demanded his surrender, England argued that there was no legal justification for surrendering him, since there was no Anglo-Spanish treaty prohibiting England from trading and navigating in the seas claimed by Spain. The King could deal with those he captured as he wished, but had no grounds for extradition.<sup>33</sup>

Ultimately Drake's plundering became too blatant and frequent for it not to provoke a serious diplomatic conflict between the two States, although English diplomatic manoeuvres seem to have avoided addressing the question for some time.<sup>34</sup> After Drake's return in September 1580 from his circumnavigatory voyage, during which he had plundered Spanish settlements and ships in South America, the Spanish ambassador Mendoza complained directly to Elizabeth for restoration. She avoided granting an interview for a year, and then responded to the complaints about Drake with some of her own concerning Spanish incursions in Ireland.<sup>35</sup> In fact no official answer seems to have been given by the time diplomatic relations were broken off three years later. Finally, and without, it seems, admitting any illegality on his part, it was stated that Drake was subject to the jurisdiction of the English court, where he could be prosecuted by anyone he had wronged, and where restitution would be made.<sup>36</sup>

Elizabeth also famously told Mendoza that Spanish policy forbidding English commerce and navigation in the West Indies was contrary to the law of nations:

"The Spaniards have brought those evils on themselves by their injustice towards the English, whom, *contra jus gentium*, they have excluded from commerce with the West Indies. The Queen does not

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<sup>32</sup> Selden, *Mare Clausum: the Right of Dominion of the Sea*, (tr. Needham) 1652, London, I, ch.18.

<sup>33</sup> Butler and Maccoby, *op. cit.*, 50.

<sup>34</sup> See generally *Calendar S. P.* 1580-6, 59-61, 249, 326; Senior (1921) 37 *LQR* 660 "Early Writers on Maritime Law".

<sup>35</sup> Cheyney, (1905) 20 *EHR* 659 "International Law under Queen Elizabeth" at 659.

<sup>36</sup> Camden, 309.

acknowledge that her subjects and those of other nations may be excluded from the Indies on the claim that these have been donated to the King of Spain by the Pope, whose authority to invest the Spanish King with the New World as with a fief she does not recognise. The Spaniards have no claim to property there except that they have established a few settlements and named rivers and capes. This donation of what does not belong to the donor and this imaginary right of property ought not to prevent other princes from carrying on commerce in those regions or establishing colonies there in places not inhabited by the Spaniards. Such action would in no way violate the law of nations, since prescription without possession is not valid. Moreover all are at liberty to navigate that vast ocean, since the use of the sea and air are common to all. No nation or private person can have a right to the ocean, for neither the course of nature nor public usage permits any occupation of it."<sup>37</sup>

Elizabeth would later resist Denmark's claims in the northern seas on similar grounds (see *post*).

The assertion of freedom of the seas was based on the law of nature and of nations, and, as Cheyney writes, from it England "devolved the claim that all nations had the right of navigation, trade and colonisation in all seas and lands, limited only by the actual occupation of those lands by another civilised power".<sup>38</sup> Since the start of its expansion into the New World in the late 15th century Spain had argued that papal grant alone was sufficient to give it title to a territory. As the effects of the Reformation were felt on the authority of the Pope, it began also to assert title through discovery. Elizabeth denied it could gain title on either of these grounds, arguing the need for an act of settlement, and before long Spain was forced to accept this fetter on its ambitions.

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<sup>37</sup> Camden, 225. Anand, *Origin and Development of the Law of the Sea: History of International Law Revisited*, 1983, Martinus Nijhoff, The Hague, 95, has a slightly different and longer passage. See generally Cheyney, *op. cit.*

<sup>38</sup> Cheyney, (1905) 20 EHR 660.

In its arguments with Spain, England said that the papal bull giving Spain exclusive rights in the Americas had been conditional on the conversion of the natives to Christianity, which had not occurred, and that therefore Spain's rights were void. But also, the Pope did not anyway have the power to deprive States of their rights of navigation on the sea. England averted to agreements it had made with Spain since the bull, which allowed ships to sail freely to each other's dominions, asserting its rights under those. And it pointed to an inconsistency in Spain's arguments - previously Spanish lawyers had argued that Venice did not have the right to exclude other States from trading in the Adriatic. If that were true, said England, then Spain and Portugal could not prohibit traffic to their overseas possessions.<sup>39</sup>

#### 4.3.5 The "Spanish School" of international law

When Spain was at the height of its political power, with a large part of Europe under Habsburg dominion and regular shipments from South America fuelling this hegemony, its theologians and jurists were at their most prolific. Subsequently, their contribution to international law was for centuries overshadowed by Grotius, whose works in fact had borrowed from them, but after being 'rediscovered' relatively recently the debate as to their actual influence is unresolved.<sup>40</sup> Although they were referred to briefly in a previous chapter, a further brief consideration of them here is important given their opposition to Spanish pretensions, and, not least, their influence on Grotius.

Since Spain was the dominant European power there was not the same movement opposed to the 'status quo' (of Church and Empire) as appears in other

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<sup>39</sup> *B. M. Hatfield MSS*, ii 84, undated, but calendared under the year 1578.

<sup>40</sup> The main protagonists are Scott (see, for instance, the Introduction to *Grotius' De Jure Bello ac Pacis* in the Classics of International Law series, 1925, and Introduction to *Selections from Three Works of Suárez*, same series, 1944) and Nussbaum (see *A Concise History of International Law*, 1954, Macmillan, New York, 74, and Appendix). See further, Roelofsen, in Watkin, *Legal Record and Historical Reality*, 1989, Hambledon Press, London, 54. The long debate as to the paternity of the law of nations is now in fact virtually wound down. See recent comment and list of references in Bull (ed.), *Hugo Grotius and International Relations*, 1989, OUP, Oxford, 3.

States.<sup>41</sup> The Emperor was always a Habsburg and the *Reys Catolicos* were the most fervent defenders of the supremacy of the Church. Jurists based their theories on the solid reality of papacy and empire - princes were defined in relation to these, and the idea of 'sovereignty' as was emerging elsewhere was alien. Indeed the very concept of a State did not fully form until the 17th century. Even the most "enlightened" jurists and theologians such as Vitoria (a Dominican) and Suárez (a Jesuit) by no means had a secular conception of international law. Vasquez, legal adviser to Philip II, asserted that there could be no public or private rights over the open sea.<sup>42</sup> He wrote against the claims of Venice and Genoa as well as Spain, although as Nussbaum says the former were more securely founded.<sup>43</sup>

#### **4.4 The undermining of Portugal's claims and the rise of the Dutch**

##### **4.4.1 Portugal's weakness exposed**

Throughout the 16th century, Portugal had been developing better relations with the local Hindu rulers in India, allowing its hugely profitable spice trade to be maintained with relatively few ports and bases, and a limited fleet. The arrival of the Moghuls in 1527 and their pushes to the south threatened this delicate balance, but since they were only ever a land power and could not compete with Portugal on the oceans, they could never completely dislodge its grip. But Portugal's trading empire was also threatened, indirectly, by events beyond its control. In 1568 Philip II ordered a hispanicising process in the Spanish Netherlands, heralding the Dutch 'war of independence'. While the Latin Provinces in the south were easily won back by the Union of Arras in 1578, in the following year the seven Northern Provinces formed the Union of Utrecht. The Union declared independence in 1581, and the burgeoning Dutch trade with the East, now unfettered by the Spanish connection, began to increase. The Portuguese grip on the East Indies was already lessening, with

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<sup>41</sup> Nussbaum, *op. cit.*, 71.

<sup>42</sup> Vasquez, *Controversiae Illustres*, 1563, Venice, II, ch.89, s.12.

<sup>43</sup> Nussbaum, *op. cit.*, 74.

the Moghul attacks in India, and the Dutch increasingly moved in on its trade. In 1580, after the death of King Sebastian *sine prole*, Philip annexed Portugal, which Spain held for 60 years. In the circumstances, the protection afforded by the strongest European power through what could be represented as a 'union', was "almost welcome".<sup>44</sup>

In 1577 Sir Francis Drake had voyaged round Cape Horn and up the coast of America, on to the Moluccas, and back to England via the Portuguese trade route. This important journey, writes Parry, "revealed to Europe that the Portuguese, far from being masters of the East, were defending immensely long trade routes and widely scattered strongholds against a host of jealous enemies."<sup>45</sup> Further evidence of Portugal's vulnerability and the wealth of its trade came from the Dutch explorer Jan van Linschoten who also gave accurate navigation advice.<sup>46</sup> Until then Portugal had managed to keep its knowledge of the East secret. The uniting of the two Iberian powers was viewed as dangerous by the Dutch and English. After the English Levant Company was prevented in 1579 from carrying Syrian goods through the Straits of Gibraltar, under a treaty with the Ottoman Sultan, the two States resolved on a more structured approach to attacking the Spanish (and now Portuguese) empire. Instead of relying on privateering, they would attack Portugal's exposed trade routes directly.<sup>47</sup>

#### **4.4.2 Rise of the Dutch**

Using Linschoten's directions the Dutch began regular sailings in 1595. The explorer had recommended sailing directly east after rounding the Cape, instead of taking the Portuguese route north-east to Goa. The Dutch could then go directly to

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<sup>44</sup> Parry, *op. cit.*, 93.

<sup>45</sup> *Ibid.*, 97.

<sup>46</sup> Linschoten lived in Goa from 1583 to 1592, gathering information about the Indian coast and trade to Malacca and the Indies. In 1596 he published his major work *The Itinerario* in Dutch, which ran to several editions and was quickly translated into English, French, German and Latin. See Anand, *op. cit.*, 74, 75.

<sup>47</sup> Parry, *op. cit.*, 97.

Java, where, Linschoten said, "we might wel traffique, without any hinderance, for that the Portuguese come not thither because great number of Java come themselves unto Malacca to sell their wares".<sup>48</sup> This also avoided the monsoons farther north which forced the Portuguese to sail only once a year. The Dutch - sailing south of the equator - thus managed to avoid many of the strategic problems that beset Portugal, and since they were concerned only with commerce, rather than the missionary work which had been an important concern of the Portuguese, the Dutch sailors and their well-stocked ships received a warm reception. Portugal's decline in relation to the Dutch was rapid, which Parry attributes principally to the small numbers of Portuguese sailors and its unwelcome religious proselytising.<sup>49</sup> Portugal had to rely on badly trained sailors and it was at the mercy of a stronger, more efficient navy.

The Netherlands' expansion of its Eastern trade was as rapid and well organised as had been Portugal's of a century before. In 1602 the separate trading syndicates were amalgamated into one company, the Vereenigde Oost-indische Compagnie (VOC), which had strong links with the States General, and was granted a monopoly of trade between the two Capes.<sup>50</sup> England's East India Company had already been in existence since 1600, but was never as active or as well-supported as its Dutch competitor.

The Dutch, as the 'carriers of Europe', already had a profitable trade in distributing Portuguese imports to Northern and Eastern Europe. A part of his campaign against the Netherlands Philip prohibited Dutch ships from the port of Lisbon, effectively cutting off the port's trade. This was to be Portugal's downfall, as the Dutch - after some attempts at finding a north-eastern passage - began to import goods from the East themselves: between 1595 and 1601 they sent 65 ships

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<sup>48</sup> Linschoten, *The Voyage of John Huyghen van Linschoten to the East Indies*, London, 1865, 112; cited in Anand, *op. cit.*, 75.

<sup>49</sup> See Parry, *op. cit.*, 94-97.

<sup>50</sup> *Ibid.*, 100. See generally Klerck, *History of the Netherlands East Indies*, 1938; Boxer, *The Dutch Seaborne Empire*, 1965, Hutchinson, London.

on 15 voyages.<sup>51</sup> Spain did little to protect Portugal's ailing trade empire, although on one occasion Philip ordered the seizure of all Dutch ships in Spanish waters.<sup>52</sup> The Dutch raided ports, often taking them over. However Spain still needed the trade provided by these settlements and colonies, many formerly its own, and by continuing to deal with them thus helped to finance the war against itself.

#### **4.5 Assessment**

In this chapter the main reactions to Spanish and Portuguese claims to exclusive jurisdiction and navigation have been discussed. The claims were new and imposed very suddenly, unlike those of Denmark in the northern seas, or even Venice in the Mediterranean, which had some claim to deriving from immemorial usage. The Iberian claims, however, derived from papal authority to dispose of parts of the world (and thus the seas) which were not already occupied by a Christian power.

We can see three main results of the claims, particularly when (again in contrast to the Danish claims) they were seen to be excluding other States from significant trading opportunities in the Americas and the East Indies. Firstly, piracy increased and became a covert instrument of national policy, even though it was declared illegal and steps to curb it were taken. If Spain would prevent the French and English from navigating in the western Atlantic and trading with the settlements, then they would see Spanish trading ships as legitimate targets when they neared port. They were also able to deny involvement if their own ships were captured (as happened with, for instance, Drake and Hawkins).

Secondly, to take part in the trade, States were willing to compromise their previously maintained positions on the legality of such claims. So when France wanted to shelter its corsairs in Portuguese ports, the better for attacking Spanish ships and claiming prizes, it agreed to exclude itself from much of Portuguese

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<sup>51</sup> Butler and Maccoby, *op. cit.*, 52. Portugal eventually conceded defeat to the Dutch in 1661.

<sup>52</sup> Anand, *op. cit.*, 76.

waters<sup>53</sup> despite its position that all seas were open to all States. France was always more interested in the western than eastern trade and so seems to have been able to admit this fetter fairly easily.

By the Treaty of Crépy 1544<sup>54</sup> France agreed another limit to its freedom - not to colonise or settle in the Americas - while gaining the freedom to trade, although this was later taken away. Spain relaxed its position, in allowing France to navigate in its previously exclusive area. But in the later Treaty of Câteau-Cambrésis 1559<sup>55</sup> Spain recognised its weaker position: it could make no agreement about the Indies trade and left it to be decided by force. Given French power this was as much as Spain could achieve; it still maintained its position (where it could) that the western Atlantic was under its dominion, which we saw in its protests when States other than France navigated to the West Indies.

The third trend we can observe is the increasing willingness in some States to contravene papal authority, and avert instead to the law of nations. One factor in this was the Reformation, which gave some States a convenient framework for their arguments, but even amongst largely Catholic States and jurists, the scope and injustice of many papal rulings led to the embracing of a more secular doctrine.<sup>56</sup> Perhaps the most stark enunciation of this known to be preserved is the declaration by Elizabeth of England to Mendoza, the Spanish Ambassador.<sup>57</sup> She averts specifically to a "law of nations", in the context of denying the right of the Pope to any 'supra-national' powers to decide between States. For her what governed States was not papal writ but the *jus gentium*. And France's proposed to Spain that papal bulls had no effect on the juridical nature of the sea since it was *res communes*.

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<sup>53</sup> Treaty of Lyons 1536: *Corpo Chronologico*, parte 1a, maço 57, cloc.65, National Archives, Lisbon; cited in Davenport, *op. cit.*, 201; see text and English translation *ibid.*, 201, *et seq.*

<sup>54</sup> Dumont, IV, ii, 279; Davenport, *op. cit.*, 208

<sup>55</sup> *Exch. T. R. Dip. Docs.* 1123. Dumont, V, i, 31; Leonard, *op. cit.*, 535.

<sup>56</sup> See generally, Boegner, (1925) *Recueil des Cours* VI, 245 "L'Influence de la Réforme sur le développement du droit international".

<sup>57</sup> See reference under note 37, *supra*.



Spain's argument that treaties made in the old world did not apply in the new had a parallel in the arguments of other States that the doctrines (such as papal authority over them) of the old world of powerful Church and Empire should not apply in the new world of the Enlightenment and Reformation. So England refused to produce Sir John Hawkins for Spain for trial on charges of piracy and crossing the papal lines, *precisely because* there was no treaty between the two States prohibiting English navigation there. A corollary of the willingness of some States to circumvent papal rulings was the increase in the number of bilateral agreements between States regarding their rights and obligations concerning the sea. It has been shown that treaties had been made regarding, for instance, rights to fish in the northern seas, for many years. In this new area, however, papal authority was held to be the starting point. Although Spain and Portugal, for instance, still founded their claims, and based their arguments, on the papal bulls, their declining power in relation especially to France led them to attempt to make their positions more certain by concluding written agreements of their rights: in the mid-16th century there were no less than four treaties concerning French and Spanish rights at sea. France and England, too, although not in disagreement over the sea's juridical nature found it necessary to conclude a treaty putting in written form that trade and navigation were permissible throughout each other's dominions.

Whatever the source of the law, it has been shown that there was also disagreement over its provision for establishing title to territory and areas of the sea. Spain and Portugal argued that territories in the areas they had been designated were not open to be settled by another State. France and England both maintained that any territory not effectively occupied by another Christian power was open to be taken by them. Discovery was not sufficient; settlement was needed. In Elizabeth's phrase, "prescription without possession is not valid".<sup>58</sup> In general Spain and Portugal were unable to preserve for long their claims to exclusive "territorial waters". The positions maintained by States were polarised: while Spain and Portugal claimed

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<sup>58</sup> *Ibid.* It is interesting to note that for Elizabeth prescription was part of the law of nations, whereas for Vasquez it was a civil law concept and could thus not apply between States: the former was referring to territory and would have agreed with the conclusion, if not the argument, of the latter, who was referring to the sea.

dominion over the seas, France, England and the Dutch argued that "the use of the sea and air are common to all".<sup>59</sup> Despite this France, Portugal and Spain's practice had been to compromise, and agree to a limited form of jurisdiction, and indeed breadth. To what extent this limited jurisdiction became more defined will be examined in chapter five.

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<sup>59</sup> *Ibid.*

**The increasing definition of jurisdiction in and breadth of Territorial Waters  
in the late 16th century**

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## 5.1 Introduction

The previous chapter showed that the claims totally to exclude other States from large areas of the sea were gradually undermined in the mid-16th century. This chapter looks at how this process continued and how States making the large claims responded. It examines the way in which the claims were reduced in scope and the resultant emergence of the notion of a more limited belt, which was under the coastal States's jurisdiction, and the more precise definition of that jurisdiction with which this was concomitant.

## 5.2 The emerging doctrine of neutrality

For a long time the idea of 'neutrality' in warfare was alien to the States of Europe, and its formulation was not until the publication of the *Consolato del Mare* in 1494.<sup>1</sup> But it was in the 16th century, with the rise of independent States in relation to papacy and Empire, and the resultant conflict, that it started to develop fully. Previously when a war broke out Christian princes were in general all on either one side or the other. And if the war was with the Saracen, the whole of Christendom could be called on by the Pope to contribute to the cause. But when a State saw that its interests could best be served by remaining apart from a conflict, it began to claim a 'neutrality', and often asserted that it could continue to trade with one or other, or both, of the belligerents.<sup>2</sup> The great trading centres - the Hanse towns and the Mediterranean City-States - also pressed to trade with States at war.<sup>3</sup>

As a corollary of this, a State at war would demand that no other State, or town, traded with its enemy, or supplied its war needs. This only echoed an earlier papal policy of banning trade with the infidel, which, was at first effective but was

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<sup>1</sup> See *ante*, ch.2.

<sup>2</sup> The earliest known proclamation of neutrality, according to Marsden, is that by Henry VIII of England in 1536, during the war between the Empire and France: *B. M. Harleian MSS.* 442, f. 99. See text in Marsden, *Documents Relating to the Law and Custom of the Sea 1205-1767*, I, 1915, NRS, 149, *et seq.* This, in fact, *prohibited* trade by English merchants with the two belligerents.

<sup>3</sup> Potter, *The Freedom of the Seas in History, Law and Politics*, 1924, Longmans, New York, 48.

undermined and later nullified by France and the 'capitulations' it achieved from the Ottoman Empire. States would now visit and search foreign vessels ('neutral' or 'friendly') for enemy cargo. The action of visit and search had its origin in the suppression of piracy within waters over which a State claimed jurisdiction. Many complaints were made from aggrieved merchants "who by these spoyles have utterly been undone" to Elizabeth of England, who despatched her ships for the "cleering of the Seas, and the apprehension of the said malefactors".<sup>4</sup> A jurisdiction over pirates was easily extended to merchant vessels that might be carrying munitions or provisions to a State's enemy:

"Piracy was hardly distinct from war, war hardly distinct, therefore, from peace. As a result, jurisdiction over pirates, easily admitted, might mean jurisdiction also over alien vessels in war and peace."<sup>5</sup>

It began to occur not only within a State's seas, but wherever the merchant vessel was encountered. Laws were enacted to counter piracy, despite many a pirate having almost a commission from his monarch. The English Court of Admiralty was given the authority to inflict the death penalty on pirates in 1536,<sup>6</sup> and a similar provision was passed in France in 1584. In 1598 Gentilis declared piracy to be contrary to the law of nations.<sup>7</sup>

Portugal was enforcing its rights in the seas of the Indies with *cartazes*, or safe-conducts, which borrowed from earlier Chinese and Arab practice allowing a ship issued with a safe-conduct to pass undisturbed through certain waters. Alexandrowicz has shown that a ship would be searched before a *cartaz* was issued, and any vessel unable to produce one on demand when at sea was liable to be

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<sup>4</sup> See the "Instructions for Ships", May 1576, in SP/9/53/53. See further the letter from Walsingham to Burghley, 1571, SP/9/53/37.

<sup>5</sup> Potter, *op. cit.*, 50.

<sup>6</sup> 28 Hen VIII c.15.

<sup>7</sup> Gentilis, *De jure belli libri tres*, 1598; (ed. Phillipson), Classics of International Law, Carnegie Endowment, New York.

captured and forfeited. Portugal's employment of *cartazes* was especially useful in relation to its battle against Islam, distinguishing allies from enemies.<sup>8</sup>

### 5.3 Contraband

The banning of 'contraband' goods was decreed by, for instance, England in its campaign against Spain. Although Spain was rich, it had to import building equipment for ships, ammunition and food-stuffs, and after the defeat of the Spanish Armada in 1588, England resolved to cut off its supplies. The English Privy Council issued a decree that certain (listed) items were not to be carried to Spain, on pain of seizure, by any neutral State.<sup>9</sup> In November 1588 Elizabeth protested to one of Spain's major suppliers, the Hanseatic League. When Hanse vessels began to be stopped for inspection in the Channel they started to take the far longer and more perilous route around the north coast of the British Isles. Elizabeth attempted to prevent Dutch trade with Spain completely, but after complaints from the Dutch she gave an Order in 1590 that allowed some trade under very limiting conditions:<sup>10</sup> nothing that might assist the Spanish war effort could be taken, only certain sizes of ship were allowed, and all vessels had to be checked and licences issued by English officials. Carriage of provisions by French merchants to Portugal was also held illegal.<sup>11</sup>

England defended its position by averting to precedents, but Spain was fomenting discontent amongst the northern countries and there was the possibility of their uniting in a war against England. With Henry IV of France already negotiating a peace with Spain, Elizabeth felt obliged to be more moderate towards Denmark

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<sup>8</sup> Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, 1967, Clarendon Press, Oxford, 70. They were often established by treaty: see examples given by Alexandrowicz, *ibid.*, 74.

<sup>9</sup> SP/9/4/67. See, for instance, the condemning of Spanish goods and neutral ships by the Admiralty Court in the cases given in Marsden, *op. cit.*, 291, 306.

<sup>10</sup> SP/9/4/67; *B. M. Cotton MSS. Galba D*, vii f. 144. See text in Marsden, *op. cit.*, 262.

<sup>11</sup> Dumont, V, iii, 33. (The reference in Potter, *op. cit.*, to the text being given in Marsden, I, 175, seems to be false.)

when it protested at the decree in 1597, and the list of items that could be seized was narrowed.<sup>12</sup> However, as Cheyney writes, such "evidences of a conciliatory spirit ought not to be taken too seriously. Elizabeth and her ministers were far from surrendering their claim to the right of confiscation of contraband."<sup>13</sup> Indeed in a proclamation a few years later England prohibited

"all and every one, of what ever condition or realme or land soever, none excepted, to lade, ship, carry, or transport by sea ... any ship, goods, wares or marchandises [to Spain or Portugal, under the] chiefest law of pollicy to bee regarded by the Soverain Commander [viz.] the safety and presentation of the kingdomes and people committed to his charge".<sup>14</sup>

Other States also made such laws: in 1543 a French Ordinance provided that a ship carrying enemy goods would be considered good prize ("enemy goods, enemy ships"); and that enemy ships carrying neutral cargo ("enemy ship, enemy goods") were similarly condemned.<sup>15</sup> A later Ordinance of 1584 repeated the provision: a friendly vessel carrying contraband was liable to capture. The opposite view was asserted by the Hanse, with its slogan "free ships, free goods". The *Consolato del Mare* said that only the enemy goods could be captured.<sup>16</sup> Denmark claimed a neutrality jurisdiction in the Northern Seas: in 1591 during the Russo-Swedish it had refused to allow Swedish ships to go north to disrupt trade with Russia.<sup>17</sup>

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<sup>12</sup> Cheyney, (1905) 20 *EHR* 668, 669.

<sup>13</sup> Cheyeny, *ibid.*

<sup>14</sup> *Add. MSS.* 36767, f.31. See text in Marsden, *op. cit.*, 313, *et seq.* The proclamation was made c.1601. See further the letter on the matter in SP/9/4.

<sup>15</sup> Nussbaum, *A Concise History of the Law of Nations*, 1954, Macmillan, New York, 70.

<sup>16</sup> See *ante*, ch.2; Potter, *op. cit.*, 49, 50.

<sup>17</sup> Meyer, *The Extent of Jurisdiction in Coastal Waters*, AW Sijthoff, Leiden, 1937, 481.

## 5.4 The beginnings of Spanish decline

During the Dutch war of independence England and France, particularly the former, supported the United Provinces and diverted Spain's army, seeing a chance to undermine Spain and weaken its empire. Trade with the Spanish settlers in the Americas was also increased. The demand in Europe for American goods - silver, leather, sugar and tobacco - and in America for European goods and slaves, could only rise. As Parry puts it, "once Hawkins had shown the way, English, French and Dutch mercantile communities would not rest content to buy American products in small quantities at high prices from grasping middlemen in Seville."<sup>18</sup>

Spain seems to have come to the conclusion that its claims to large tracts of ocean could no longer be defended. Previous chapters have shown what concessions it was obliged to make to France. In 1563, for the first time, Philip II used the line of sight doctrine for delimiting a juridical sea area - in the Nautical Laws, or Admiralty Code, given to the Dutch, foreigners were forbidden to attack enemies within sight of land.<sup>19</sup> In 1565 Philip declared the boundaries of another new sea area using the line of sight doctrine for the coast of Spain:

"No-one can come to our coasts, harbours, roadsteads, or rivers, or within sight of our land to wait for or damage the ships of our allies, under any pretext whatsoever, on pain of seizure of crew and goods."<sup>20</sup>

It will be recalled that Spain maintained that new legal doctrines - such as its attempted total exclusion of other States from the Americas - applied in the New World. It is therefore misleading to argue, as some have done, simply that Spain was

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<sup>18</sup> Parry, *Europe and a Wider World*, 1949, Hutchinson, London, 85.

<sup>19</sup> *Nautical Laws*, Tit.I, s.27; cited by Bynkershoek, *De Dominio Maris*, 1744, Leiden; 1916, Classics of International Law, Carnegie Endowment, New York, 363-65. The Ordinance is also in the *Groot Placaatboek*, I, 1658, The Hague, 796; cited by Verzijl, *International Law in a Historical Perspective*, IX, 1973, AW Sijthoff, Leiden, 65.

<sup>20</sup> Original cited in Nys, *Les Origines du droit international*, I, 1894, Paris, 499. English translation in Crocker, *The Extent of the Marginal Sea: A Collection of Official Documents and Views of Publicists*, 1919, US Dept. of State, Washington, 622.



here being inconsistent in applying a line of sight doctrine around its coasts, rather than a 'total exclusion';<sup>21</sup> the Spanish argument would be that 'total exclusion' was legal in the New World, whereas in the Old it was not, due to the different juridical frameworks. However the proclamations of 1563 and 1565 must represent a reflection of Spain's perception of its own capacity to enforce the previous claims, given its weakening power.

After Antwerp fell to Spain in 1585 England was more open in its support for the rebellious United Provinces and war could no longer be disguised. Philip resolved to rid himself of the problem of England by assassinating the Queen - a plan which he dismissed in favour of simply invading the country, to which end he assembled a large fleet which sailed in 1588. The plan failed however, partly due to Drake, who defeated the massive Spanish force in the Channel with the help of the weather, and partly to the assistance of the Dutch, who held back the Prince of Parma - invading England from the east - until the Armada was defeated. This event, more than any other perhaps, has been seen as causing the first major cracks in Spanish power. Spain's naval strength had allowed it to keep the other maritime States of Europe virtually caged in European waters, while the two Iberian States roamed the seas of the world at will, transporting back rich cargoes from afar. Spain was able to impose high taxes on Europe's merchants, who had no other markets to trade in. But its naval power was being usurped.

In continental Europe Spain found further conflict. Since the gold supply from its American colonies was financing the attempts to stem the growth of Protestantism, French Protestants joined England in trying to cut it off at source.<sup>22</sup> Spain antagonised France by interfering in the Huguenot wars on the side of the Catholic Guises (although England was supporting the Huguenots), and in 1595 France declared war, soon being joined by England and the United Provinces with the Treaty

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<sup>21</sup> See, for instance, Swarztrauber, *op. cit.*, 36.

<sup>22</sup> Higgins, *op. cit.*, 191.

of The Hague 1596,<sup>23</sup> signed 21/31 October. This alliance at first seemed strong enough to break up Spain's empire,<sup>24</sup> and the Anglo-French forces in particular won spectacular success, but shortly afterwards France made peace with Spain by the Treaty of Vervins 1598, signed 2 May.<sup>25</sup> However Spain's decline as a major power was confirmed as it agreed to cease interference in France.

After Vervins French-Spanish battles in the Channel ceased and England regained control of the Narrow Seas. It was now open to England to make terms with Spain too, and since the Dutch were steadily profiting from the West Indian trade that their ships were carrying on with Spain and Portugal - from which England was barred - a powerful English peace party grew. An end to the conflict would also reduce the danger from Ireland. However the wider implications of the context pointed to continued war; it was not lost on Elizabeth that the battle with Spain was for the "commercial and colonial supremacy of the world".<sup>26</sup> Peace, she felt, would not only have allowed Spain to reassert its sovereignty over the Dutch, but would have given up the fight for the Indies trade. The English and Dutch therefore made an alliance, by the Treaty of Westminster 1598,<sup>27</sup> signed 6/16 August.

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<sup>23</sup> *Exch. T. R. Dip. Docs.* no.1175; *BM Add. MSS* 19876. See text in Davenport, *op. cit.*, 232 *et seq.* The Anglo-French treaty (signed first) is in Dumont, V, i, 525. On the negotiations leading to it see Black, *Elizabeth and Henry IV: being a short study in Anglo-French relations 1589-1603*, 1914, Blackwells, Oxford, 103 *et seq.*

<sup>24</sup> Parry, *op. cit.*, 89. On the 'Cadiz Voyage', in 1596, the allies forced Spain to burn its entire American fleet, rather than let it fall into their hands, costing 12m ducats. See Monson, *Naval Tracts of Sir Wm. Monson*, I, 1902, NRS, 362, II, 1-20. On the later, and less successful, 'Islands Voyage', see *Calendar S. P. Domestic 1595-97*, 438-41; Monson, *ibid.*, II, 21-83.

<sup>25</sup> Given in *Mémoires et Documents. France et divers états*, f.16. On the negotiations leading to Vervins, see *Mémoires et Documents. Fonds divers*, f.34.

<sup>26</sup> Corbett, *Successors of Drake*, 1900, Longman, Green and Co., London, 233.

<sup>27</sup> T. R. Diplomatic Documents, no. 1174; Rymer, XVI, 340-3; Dumont, V, i, 589-91. See further *Calendar S. P. Venice 1592-1603*, 353-60; Davenport, *op. cit.*, 241; *B. M. Salisbury MSS* (1883) VIII, *passim*; Camden, II, 606-10.

Spain was further humbled by the later agreements with England by the Peace of London 1604,<sup>28</sup> and the United Provinces by the Truce of Antwerp 1609,<sup>29</sup> both of which forced it to recognise the principle of effective occupation in the law of nations, a secular concept which until then had been anathema to Spain, which relied on the traditional doctrine of papal authority to dispose of lands throughout the world. Spain had the right to territory it occupied already, but the English and the Dutch were on their way to those parts as yet unoccupied.

The Dutch had previously had rights to fish off Scottish coasts agreed in a number of treaties and privileges.<sup>30</sup> But James V of Scotland was now less liberal regarding fishing rights than the Dutch had found his predecessors and the Tudors of England to be. In 1540 many Dutch ships were seized by the Scots.<sup>31</sup> A treaty of 19 February 1541 declared fishing to be as free as it was previously, and this settled the matter, but only temporarily. During the Franco-Scottish war against England, Emperor Charles V intervened as King of Spain and ruler of the Low Countries, thus making things worse for the Dutch.<sup>32</sup> Subsequent negotiations led to the Treaty of Binche 15 December 1550 between Mary of Scotland and Charles V which confirmed previous treaties and again granted complete freedom of fishing.<sup>33</sup> James VI renewed it on 26 July 1594 with the States General of the United Netherlands,<sup>34</sup> an attitude to be contrasted with his policy on becoming James I of England.

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<sup>28</sup> Dumont, V, ii, 34; Davenport, *op. cit.*, 246.

<sup>29</sup> Dumont, V, ii, 99. On the background to the truce, see *post*, ch.6.

<sup>30</sup> See Verzijl, *op. cit.*, 26, citing with no further reference agreements of 1359, 1427, 1469, 1529, 24 July 1531.

<sup>31</sup> *Ibid.*, 25.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 26.

<sup>34</sup> *Ibid.*

## 5.5 The Northern Seas - the last bastion of *mare clausum*?

### 5.5.1 Introduction

In the Northern Seas the sweep of Danish dominion was large, stretching up to 50 nautical miles from the Norwegian coast and out to the Jutland Reef south west of The Naze. Danish naval power was quite sufficient to maintain these claims, but even so the end of the 15th century had seen a change in Danish policy with regard to allowing other States to fish and trade off its coasts. Whereas previously it had sought to deny any right to do so, it now made two treaties which went a certain way to conceding such a right. In 1490 John II made a treaty with Henry VII of England which granted English fishermen the liberty to sail to Iceland to fish and trade, on purchase and renewal of a licence,<sup>35</sup> and this was confirmed in a second treaty between Henry VIII and Christian II in 1523.<sup>36</sup> In the 16th century wars in Scandinavia meant the English could escape with fishing in the northern seas without licence, which later led to a claim to the fishing by prescription, as well as a claim to sovereignty.<sup>37</sup>

### 5.5.2 Navigation to Russia

While Denmark was asserting its right to exact the Sound Dues from ships entering the Baltic, England and other maritime States of Europe - until recently hemmed in by Spanish power in the Atlantic - were looking for new routes for trading with the northern countries. Also, they wanted to find a way of joining the Portuguese spice trade that avoided the hazardous Magellan's Strait and the Cape. They began to consider sailing to the north of America or Europe - a northern passage. To this end, in the latter half of the 16th century Dutch, French and English

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<sup>35</sup> Rymer, xii, 381. See generally Aubert (1894) *RGDIP* 429 "La Mer territoriale de la Norvège".

<sup>36</sup> Rymer, xiii, 798.

<sup>37</sup> Justice, *Dominion and Law of the Sea*, 1705, 168; cited by Hall, *A Treatise on International Law*, 7th ed., 1917, Clarendon Press, Oxford, 179n.

vessels began to sail into the Arctic Circle to the north of Norway, reaching Lapland, northern Russia and the White Sea.<sup>38</sup>

The King of Denmark protested at these voyages to the northern seas and beyond, since he claimed the waters as Danish and it denied him the increasingly useful and convenient revenue that came from the Sound Dues. He sent letters to (*inter alia*) England, Scotland, the Netherlands and France asking that navigation there be halted.<sup>39</sup> He said however that he was willing to allow navigation for a levy similar to the Sound Dues - to cover the expense of keeping the seas safe. In negotiations on the matter with English delegates at Haderslev on 13 June 1583, the Danish reasoned thus: by the law of nature all oceans were common to all, but by the subsequent law of nations seas could become subject to a right of dominion by occupation, which Denmark (through Norway) had obtained over this sea.<sup>40</sup>

The negotiations with England resulted in a treaty of 22 June of that year allowing England's Muscovy Company on payment of a tax to sail the northern sea to St. Nicholas in Russia (and to put into port in Iceland or Norway if compelled to do so by bad weather) but not for trade in other parts of the sea.<sup>41</sup> Denmark viewed this agreement purely in terms of commerce: it was not intended to give England a general right of navigation or trade in those waters - vessels could put into ports other than St. Nicholas only for reasons of bad weather - and no general right to fish was

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<sup>38</sup> Parry, *op. cit.*, 79. In 1553 the English Company of Merchant Adventurers, one of the many syndicates set up for the purpose, sent three ships to China under Sir Hugh Willoughby, via a north-eastern passage. Only one, the *Edward Bonaventura*, survived the Arctic Sea: it arrived in Archangel, and its captain, Richard Chancellor, learned about the power and wealth of the Russian Emperor, Ivan IV the Terrible. Fortuitously for England Russia's relations with its only European contact, the Hanse, had recently been broken off, and when Chancellor arrived in Moscow with the information that England produced just the goods that Russia needed - cloth and arms - and that England had a market for Russian-produced goods - furs, hemp, and tallow - it must have seemed that a long and beneficial trading relationship was certain. There were indeed trade and diplomatic exchanges, but various misunderstandings meant the trade did not flourish as might have been expected. See Parry, *op. cit.*, 80.

<sup>39</sup> Meyer, *op. cit.*, 479, 480, citing no further reference.

<sup>40</sup> *Ibid.*, 480.

<sup>41</sup> *Ibid.*

given. It seems that Denmark had no intention of allowing all States a general right of navigation there, even on payment of taxes, and the King instructed his commanders at Vardöhus not to permit navigation without licence.<sup>42</sup> Other States were not granted the privileges of England: legal proceedings were instituted against a burgher of Middleburg who had sailed to St. Nicholas in 1588.<sup>43</sup> (Similar voyages from merchants in the Low Countries provoked complaints to Antwerp and Archduke Albert at Brussels in 1578, 1596, and 1608.<sup>44</sup>) England was reluctant to enter the agreement of 1583, as its policy was that navigation was allowed through Danish waters for all States, without payment. In making the treaty it bolstered the Danish position, and allowed Denmark later to argue that England recognised Denmark's exclusive rights over the waters by making the payment. England made the agreement out of necessity - its ports were blockaded and it needed to find new trading markets. Frederick II seems to have managed to persuade England and France to recognise his supremacy over "His Majesty's Royal Seas", and in 1561 he produced "a splendid legal document", his Marine Law.<sup>45</sup>

### 5.5.3 Anglo-Danish disputes

Further disputes arose with England over fishing rights. English fishermen attacked Danish fishermen and in 1585 Elizabeth issued an Order in Council demanding that they act in accordance with the 1490 agreement.<sup>46</sup> But when they continued to fail to renew their licences, Denmark interrupted the English fishing, seizing some ships and driving others away from Iceland.<sup>47</sup> Elizabeth complained

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<sup>42</sup> Royal Letters of 18 January 1557, 17 April 1564 and 14 April 1572: *Norske Rigregistranter*; cited by Aubert, *op. cit.*, 430.

<sup>43</sup> *Baltic archivalia*, 47-51; cited by Verzijl, *op. cit.*, 28.

<sup>44</sup> Verzijl, *op. cit.*, 28.

<sup>45</sup> Lauring, *A History of the Kingdom of Denmark*, 1960, Host, Copenhagen, 150.

<sup>46</sup> *S. P. Domestic, Elizabeth* vol.180, 26. The Order was issued on 15 July. For correspondence concerning the English spoils, see *B. M. Bath MSS*, III, 192.

<sup>47</sup> See Fulton, *op. cit.*, 109, 110.

at these acts,<sup>48</sup> and the Danish ambassador argued that there was no general right in the English to sail in the northern seas. He referred to a treaty between Edward IV and Christian I of 1468,<sup>49</sup> which agreed that English vessels would not go further north than Haalogaland. He also referred to the 1583 treaty - allowing only a particular right to navigate - and asked the Queen to prohibit her subjects from fishing at Iceland or Vardöhus without licence.<sup>50</sup>

In her response Elizabeth gave full vent to her views on freedom of the seas. In 1586 envoys were sent to Denmark to negotiate arrangements on the freedom of fishing in the northern seas, and also on the Sound Dues.<sup>51</sup> In the instructions given to the envoys<sup>52</sup> Elizabeth argued that the law of nations allowed fishing everywhere on the sea, and if England was debarred it could only be because it had agreed to it, which it had not. If England had "yielded" to take licences in the past it might have been for a special consideration, so it did not matter if it did not take them now. On the question of Denmark's claim to the sea between Iceland and Norway, she allowed for some jurisdiction, but said it was not possible to forbid passage or fishing and gave the Adriatic and the seas of England and Ireland as examples.

These arguments can be seen as disingenuous: for English kings to have agreed to take licences for fishing in Danish waters implies a recognition of a need to do so, and that fishing was not totally free. If England had the right to fish in Danish waters, why did it agree that its fishermen should buy licences to do so? Elizabeth could be said to have recognised this by issuing the proclamation of 1585. Her position seems all the more tenuous when we note that she instructed her ambassadors to "yield to some renewing of licences", if pressed, for the sake of amity.<sup>53</sup> It was England's ultimate intention, we can deduce, to press Denmark to

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<sup>48</sup> *B. M. Cotton MSS. Nero B3; B. M. Ancaster MSS (1907)*, 17-302.

<sup>49</sup> Rymer, xvi, 431.

<sup>50</sup> *B. M. Vespasian MSS*, C.xiv, f.22.

<sup>51</sup> *S. P. Domestic, Elizabeth*, vol.274.

<sup>52</sup> Rymer, xvi, 433.

<sup>53</sup> *Ibid.* See further, Fulton, *op. cit.*, 112.

concede off Norway the same rights to fish that England had off Iceland under the 1490 treaty. It was willing to use force to achieve this if necessary, backed up by legal argument. No agreement was reached between the two States.

#### 5.5.4 The Bremen Conference 1603

Denmark was now in a difficult position. The increasing number of foreign fishermen - licensed or not - off Norway, the 1583 treaty allowing the English to sail to the White Sea, and the Anglo-Dutch struggle against the similar Spanish-Portuguese claims in the Atlantic and Pacific, all meant that Denmark's claim to the northern seas, and the legal validity of the claim, were gradually being eroded.

On 10 May 1598, Denmark tried to bolster its position, and issued the following Ordinance:

If any English vessels, contrary to the orders of the King, are found hovering and fishing in the waters between Vespennö and Iceland, or two Norwegian leagues north east, make all haste possible to capture them and bring them to Copenhagen.<sup>54</sup>

And on 1 August of the same year, and later on 26 October 1601, the commanding officer at Vardöhus was instructed to prevent foreigners trading and fishing.<sup>55</sup> England objected and was told that since it had agreed in the 1583 treaty that the King of Denmark had the right to forbid navigation, it had *a fortiori* admitted his right to forbid fishing: "without navigation no fishing".<sup>56</sup> A conference met in Bremen in 1603 to resolve the dispute and England brought forth many of the arguments it had previously used in its arguments against Spain in favour of freedom of the seas, and which were subsequently used by Grotius in *Mare Liberum*. The

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<sup>54</sup> Raestad, *Kongens Strömme*, 1912, Christiania, Copenhagen, 195. Translation by Crocker, *op. cit.*, 513.

<sup>55</sup> Meyer, *op. cit.*, 484.

<sup>56</sup> *Ibid.*, 485. Elizabeth seems to have been anticipated the Danish arguments, and recognised the weight of the treaties between the two States, since there is record of her having inspected the treaties of 1490 and 1521: *B. M. Cotton MSS. Nero B5*.



English negotiators were instructed to argue<sup>57</sup> that the law of nations did not give any right of dominion over a sea, only a jurisdiction "at a short distance from the coast", where navigation and fishing were yet allowed. The State had a right to protect trade and shipping. States in the Channel and North Sea claimed no exclusive right of fishery (although this was sometimes obtained through reciprocal concessions through treaties, which they did not mention). However, if Denmark would recognise the free use of its seas, England was willing to pay a tax on the fisheries as a compensation for the King's protection.

The Danish argument had three strands.<sup>58</sup> Firstly, they cited Bartolus and Baldus<sup>59</sup> in support of the proposition that a State could be sovereign over the sea. Secondly, they claimed a right of dominion by prescription and immemorial usage. Thirdly, they pointed to old treaties - made by Eric of Pomerania and Henry VI, Christopher of Bavaria and Henry VI, and Christian I and Edward IV - and said that their prohibitions applied to fisheries as well as trade, contrary to England's assertions. The 1490 treaty, giving liberty to fish near Iceland, had now lapsed, as the English had failed to obtain permission every seventh year as required.

The Danish negotiators were empowered if absolutely necessary, although they did not do so, to agree that the English could fish on the coast of Lapland on payment of a tax, although not on the coast of Finmark in any circumstances.<sup>60</sup> This seems to indicate a certain flexibility, and as Kent suggests,<sup>61</sup> Denmark's policy now was to retreat from its earlier wider claims to dominion, which it was becoming increasingly hard to defend, and to put forward a narrower, more defensible belt, in the hope of preserving at least the fisheries close to the shore for its own nationals.

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<sup>57</sup> See Meyer, *op. cit.*, 485, 486.

<sup>58</sup> *Ibid.*, 486.

<sup>59</sup> On whom see *ante*, ch.2.

<sup>60</sup> Meyer, *op. cit.*, 487.

<sup>61</sup> Kent, (1954) 48 *AJIL* 537 "Historical Origins of the Three Mile Limit" at 538.

However no actual conclusion was reached at Bremen due, perhaps, to the gap between the two positions.<sup>62</sup>

## 5.6 English practice

### 5.6.1 Introduction

England had joined France in harrying the Spanish in the Americas but had not made the same concessions to the Spanish claims to territorial waters claims, and as we have seen Elizabeth was a dedicated proponent of *mare liberum*. Perhaps due to this firmness of resolve and England's help for the Protestant United Provinces, France joined with Spain and the Hanseatic League in blockading English ports. This and England's growing commercial sector (the London Stock Exchange opened in 1571) necessitated the search for new markets and trading farther afield, on the north coast of Europe, in the Americas and in the East. Stock trading companies were founded to accomplish these tasks, such as the Muscovy Company (1554) and East India Company (1600), and towards the end of the 16th century England began to establish its own colonial empire. In 1598 the first English colony, Virginia, was established by Raleigh, and in the same year - symbolising the shift in English trading policy from the Old World to the New - the offices of the Hanseatic League in London were closed.<sup>63</sup>

England's maritime policy was influenced by three main concerns. Firstly, it still sometimes required ships to lower their top-sails on demand in the seas off its coast in recognition of its 'sovereignty', although it did not seek to hinder other States' passage or deny a right of navigation. Secondly, it sought to deny the right of Spain and Portugal to exclude other States from the Atlantic, the New World, and the

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<sup>62</sup> Meyer suggests that the inability to agree was due to the differing perceptions of the law of nations: the English case was based on Roman law, which had never been in force in Northern Europe. See Meyer, *op. cit.*, 486.

<sup>63</sup> See generally on England's policy, Kennedy, *The Rise and Fall of British Naval Mastery*, 3rd ed., 1991, Fontana, London, 25-27; Davis, *English Overseas Trade 1500-1700*, 1973, Macmillan, London; Foster, *England's Quest of Eastern Trade*, 1933, A and C Black, London.

Indian Ocean and Southern Asia, and the similar policy of Denmark in the northern seas, in order that it might build its own empire and enhance its trade.<sup>64</sup> And thirdly, England desired to rebuild its fishing industry, which had declined so severely after the Reformation, and to compete with the Dutch, the fishermen of Europe. It was also seizing goods in the Channel and North Sea that were headed for Spain.

In these three factors, inherent contradictions, or at least tensions, may be discerned. To deny Spain and Portugal's assertions, England would argue for freedom of the seas, and against the right of a State to claim complete sovereignty over an area of sea. Yet it would argue that there was a right for States (or England, at least<sup>65</sup>) to demand a lowering of top-sails and flags by other States' ships, in certain parts of the sea. And to bolster its domestic fishing industry, it would claim to exclude foreign (especially Dutch) fishermen without licences from the seas off its coast. How England attempted to reconcile these apparent contradictions in its policies will now be examined.

While asserting international legal principles, of the freedom of the seas and the right to capture neutral war goods (bound for Spain), England pursued these policies with a violent recklessness which often obscured the issues at stake. English ambassadors were frequently assailed with complaints from aggrieved sailors who had suffered the aggressive zeal of the defenders of English claims. Cheyney writes that,

"the maritime policy of the English included a wide and almost undefined field of practice, ranging all the way from the simple self-defence of armed merchant vessels, through various forms of reprisals, privateering and seizure, to sheer bald piracy... Nations did not always clearly distinguish seizure under the claim of contraband from those frequent instances of capture under some other, or no

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<sup>64</sup> Verzijl cites a rather peculiar and anomalous departure from England's general policy when Elizabeth's English Company attempted in 1586 to bar French and Dutch ships from navigating in the mouth of the Dwina in the White Sea. Tsar Feodor protested in 1589: "How was it possible to think of obstructing the ocean, that God-created highway?": Verzijl, *op. cit.*, 11.

<sup>65</sup> It denied similar rights to other States. See Verzijl, *ibid.*

other, claim which, in the later 16th century, bade fair to make Englishmen the scourge of the seas"<sup>66</sup>

### 5.6.2 The English view of the law of nations

In England the law of nations was regarded as strongly related to, if not actually part of, civil, or Roman, law, which was thus seen as the proper tool for the settling of international disputes. Perhaps due to its historical development generally, but certainly due to the Reformation, England's view of the position of the Pope and the source of laws governing the relations between States differed markedly to that held by, say, Spain. The indigenous common law, which had grown out of feudalism, could not be used against foreigners, but the civil law was used throughout most of Europe: the English attitude was demonstrated by James I in 1609 when he said in Parliament that civil law was "in a manner *Lex Gentium* and maintaineth intercourse with all foreign nations".<sup>67</sup> Civil law was the law used throughout western Europe - the civilised world - and thus was naturally thought of as the tool for any 'international' dealings. So in the mid-16th century when a dispute arose regarding the King's right to "impeche (prevent) the victualling of his enemy" by neutral ships, the Privy Council despatched two diplomats to settle the question with instructions that England was entitled to do what it did "by ordre and usaige of the commyn lawe of the woorld".<sup>68</sup>

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<sup>66</sup> Cheyney, *op. cit.* See further, Kennedy, *op. cit.*, 28.

<sup>67</sup> James I, *Political Works*, 1918, 310; cited by Nussbaum, *op. cit.*, 74, n.64.

<sup>68</sup> *State Papers*, X, 246 (1554). When England came to have some dealings with a foreign State in the Middle Ages, and a question arose concerning the settlement of a dispute or the negotiation of a treaty, it was generally lawyers versed in the civil law at Oxford or Cambridge, or even at foreign universities, who were consulted. Consequent on this was the formation in 1511 of what became known as "Doctors' Commons", an association or college of Doctors of Law whose advice on civil law questions would often be sought by the Government: "the opynons of the doctors" were commonly given throughout the 16th Century. (See, for example, the *B. M. Lansdowne MSS, passim*; and the extracts given in Marsden, *op. cit.*, 1915. See also McNair, *International Law Opinions*, 1956, CUP, Cambridge, 410.) As intercourse with other States increased, so did the importance of 'civilians', and Henry VIII sought to maintain the supply by establishing in 1540 the two Chairs of Civil Law at

Civil law concepts thus run through many of the international legal decisions and pronouncements made in England in this period. For instance, when Mendoza was implicated in the plot against Elizabeth public opinion demanded that he be sent to trial immediately, and presumably subsequently to the block. But the Government consulted civil lawyers such as Alberico Gentilis and Jean Holtman as to the correct legal position, and followed their advice that the Spanish ambassador had diplomatic immunity and should merely be expelled from the country.<sup>69</sup> Elizabeth's responses to Spanish complaints about Drake's incursions in the West Indies took the form of arguments derived from civil law.<sup>70</sup>

### 5.6.3 The "King's Chambers"

On the accession of James I in the early 17th century, England defined its territorial waters with unusual precision, both in extent and nature of jurisdiction. With the intensification of the Dutch-Spanish war - in which James wanted England to have no part, or even to prevent - which led to many battles off the English coast, James issued several proclamations intended to reduce the conflict so close to his shores. There were even instances of locals being killed by stray shot from off-shore. The proclamations generally concerned privateering, and were mostly in favour of Spain.

In a proclamation of 1604 for the "revocation of Mariners from forreine service" a form of neutrality zone was established around England and Wales. After commanding all mariners to return to Britain, and not to take letters of "Marke or Reprisall" from a foreign State without the licence of the King or High Admiral, it set out the reasons for this development:

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Oxford and Cambridge. England here followed the practice in much of Europe of courts and governments consulting universities on legal questions. (McNair, *op. cit.*, 408, 409.)

<sup>69</sup> Nussbaum, *op. cit.*, 68. A similar result followed the discovery of a plot involving the Bishop of Ross, the Scottish ambassador.

<sup>70</sup> On these, see further *post*, ch.6.

"[A]lthough wee are in peace with all Christian Princes and States, yett during the conyewance of the warre betweene the King of Spayne and the Archdukes on the one side, and the United provinces of the Low Countries on the other side, manie chaunces may happen, as some alreadie have happened, of difficulte interpretation to our Officers and Subjects howe to behave themselves in such cases, unless they be explainned unto them: We have thought it conveniente to make an open declaration how our said Officers and subjects shall demeane themselves towards the Subjects as well as the King of Spayne and Archdukes, as also of the States united in cases following:

...That within our Portes, Havens, Rodes, Creekes, or other places of our dominion, or so neere to any of our sayd Portes or havens as may bee reasonable construed to bee within that tytle, limitt, or Precinct, there shall be noe force, violence, surprise, or offence suffered to be done, eyther from Man of Warre to Man of Warre, or Man of Warre to Merchante, or Merchante to Merchante of eyther partie, but that all of what Nation soever, soe longe as they shall bee within those our Portes and places of our jurisdiction, or where our Officers may prohibite violence, shall bee understood to be under our protection to be ordered by course of justice, and be at peace with each other."<sup>71</sup>

This neutrality zone became known as the King's Chambers: certain parts of the sea were to be under the jurisdiction of the King and belligerent acts were prohibited within them. Enemy ships captured inside the boundaries were not good prize. Fulton suggests that the proclamation merely embodied what had for long been

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<sup>71</sup> Patent Rolls, 2 Jas., I, pt.32; *Booke of Proclamations*, 1609. Contemporary print in *S. P. Domestic, James*, I, vol.lxxiii, f.98. See text also in Marsden, *Law and Custom*, I, 1915, 353 *et seq.* (Marsden, 353, says that the proclamation was given in 1605, but since it is said in the text to be given on 1 March in the second year of James' reign, this must be an error. It is also said to have been given in 1605 in a judgement of the Admiralty Court in 1606 (see text in Marsden, 362) which must also be erroneous.)

State Practice,<sup>72</sup> as is evidenced by its occurrence in the treaty negotiations involving Wolsey for the 1521 treaty between France and Spain (see *ante*, ch.4), and it is perhaps significant that the proclamation 'establishing' the King's Chambers was (nominally at least) directed towards something different (ie. prohibiting British sailors from serving other States), suggesting either that they were already sufficiently well-known only to require reinforcing, or that they were not deemed important enough for a separate proclamation. We can ask, however, why the King's Chambers were included in the proclamation if this is the case, since it would seem to be a redundant measure, effecting no change. Also *contra* Fulton's assertion is the fact of the disputes arising subsequent to the proclamation (eg. in the Admiralty Courts concerning Spanish ships caught by the Dutch): if England's neutrality practice was indeed well-established practice, would these cases have been so contentious?

The Trinity House produced a chart showing the boundaries of the King's Chambers.<sup>73</sup> There were 26 in all, and they were based on the "headland theory" - being drawn in straight lines from headland to headland - and in some cases resulted in vast areas of the sea being closed off. For example, a line of 100 nautical miles was drawn from Land's End to Milford, enclosing the Bristol Channel, an area of 3400 square miles. (Credence is given to the assertion that the concept of some sort of Chambers existed before the proclamation by the fact that on the east coast many of the Chambers were smaller than they could have been, due to the previous custom being followed.)

What was the nature of the jurisdiction claimed by James in his Chambers? Fulton claims that he was concerned only to protect the neutrality of the seas close to England in the war between Spain and the United Provinces.<sup>74</sup> It seems to be the

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<sup>72</sup> Fulton, *op. cit.*, 120. Marsden says the Proclamation was "properly asserted" but also (perhaps contradictorily) that it was "in advance of the times". See Marsden, *op. cit.*, Introduction, xxiv.

<sup>73</sup> The headlands and Chambers are described in *S. P. Domestic, James*, I, vol.xiii, no.4. They are described also in Fulton, *op. cit.*, 120, *et seq.*, and see the map in Fulton, 122.

<sup>74</sup> Fulton, *op. cit.*, 122.

case that in the disputes with the Dutch over fisheries throughout the 17th century, the limits of the King's Chambers were never used in argument. It is certainly true that if James had in mind the exclusion of foreign fishermen from the fishing grounds on the East coast he would have been advised to make the Chambers larger. But could not the same argument be put concerning the question of neutrality? If James was concerned with the safety of England during the Spanish-Dutch war, then why did he not push out the boundaries further into the Channel and North Sea?

It is clear that James did not have in mind an assertion of the 'sovereignty of the sea', and that the neutrality proclamation had nothing to do with the flag-salute: There seems to have been no explicit connection with the glimmerings of a doctrine of territorial waters, then emerging in various parts of Europe, and, as we have seen, mentioned almost in passing by Elizabeth's envoys to the Bremen Conference. It was not until the time of James' successor that the issue was taken beyond neutrality.

What was possibly the first case to arise after the proclamation concerning England's jurisdiction involved the capture in 1605 of *The Hope*, by ships from Dunkirk, off Winterton, Norfolk. The case went to the Admiralty Court where it was declared not to be a good prize, and was restored. In his judgement, Sir Julius Caesar said the ship was "clearly within the jurisdiction and protection of our lord the King, in what is commonly called the chamber of our lord the King."<sup>75</sup>

A case occurring in the following year also suggests that the King's Chambers were not as solidly based in practice as Fulton asserts. It involves the capture of the *St. Anne* in Harwich harbour. In his judgment Caesar said that the captors had taken the boat "with them to parts of Belgium, against right, and against the public proclamation of our lord, the King."<sup>76</sup> The captors were deemed to have contravened both "right" and the proclamation, implying a distinction between them. This could mean either that "right" was used to mean some sort of 'natural' law, and the proclamation was fully in accordance with it; or that the proclamation was not

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<sup>75</sup> Adm. Ct. Libels, 71, no.212. Cited by Marsden, *op. cit.*, 351. See further Fulton, *op. cit.*, 360, who says the King's Chambers were being treated as settled law by English and Continental courts.

<sup>76</sup> Adm. Ct. Libels, 71, no.154. See text in Marsden, *op. cit.*, 362.



regarded as forming part of the law ("right"), although in this instance they lead to the same result. If the latter is correct, then Caesar was saying that the proclamation, and the King's Chambers, were not necessarily following previous law, that they were a new direction.

On balance then, the King's Chambers seem to have existed (if only because of the 1521 treaty) in some form before the Proclamation and to have been accepted by other States. Even if James did not intend to give them any stronger substance than they already had, the Courts saw the Proclamation as giving them greater jurisdiction than before.

#### 5.6.4 The flag-salute

The claim of the English kings to be able to require other States' ships to lower their flags and top-sails in certain parts of the sea was not, as we have seen, formally abandoned until early in the 19th century, and became a major point of conflict with the Dutch in the 17th century. How far the claim was by the late 16th century more substance than form is questionable, however.<sup>77</sup> And the vigour with which the demand was made and enforced varied with the whims of the monarchs, reaching its apotheosis under Charles II. There are records of the demand being made, albeit rarely, under Henry VIII, and then more strongly under Edward IV, for example in 1549 and 1550.<sup>78</sup> The demand was not always absolute - even when the policy was to enforce it stridently, pragmatism often dictated that it be done judiciously, indicating perhaps that acquiescence to the demand by foreign States was not an over-riding concern of English policy: for example, on one occasion in 1552

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<sup>77</sup> Laughton, *contra*, asserts that after claiming the sovereignty of the sea "for nearly a thousand years, [Britain] voluntarily resigned it at a time when [it] held it with a stronger grasp than at any period in [its] history". See Laughton (1866) 5 *Fortnightly Review* 718 "The Sovereignty of the Sea".

<sup>78</sup> See further, Burnett, *History of the Reformation*, 1865; Oppenheim, *History of the Administration of the Royal Navy*, 106; Colombos, *International Law of the Sea*, 6th ed., 1969, Longmans, Green and Co., London, 52; Verzijl, *op. cit.*, 58 *et seq.*

Sir Henry Dudley was instructed by Order of the Privy Council to act with discretion when dealing with a more powerful French ship.<sup>79</sup>

Sir William Monson, an admiral under both Elizabeth and James, expressed the English policy thus: "If a fleet of any country shall pass up on his Majesty's seas, and meet the Admiral's ship serving on those seas, they are to acknowledge a sovereignty to his Majesty by coming under the lee of the Admiral, by striking their top-sails, and in taking flag."<sup>80</sup> If it was not the Admiral's ship, the foreign flag could then be raised again. When putting into an English port the flag had to be lowered three times, or altogether, if the Admiral was there.

England was by no means alone in demanding a flag-salute. It was a common practice in the Baltic and Mediterranean as well as the Channel and North Sea: it was an ancient custom that merchant vessels in waters under the dominion of a foreign State would lower their sails on meeting one of its warships.<sup>81</sup> So in a treaty between Denmark and the Hanse in 1507, it is stipulated that the latter's ships should salute first on the high seas;<sup>82</sup> and the Dano-Swedish Treaty of Brömsebro 1645 contains rules on the mutual honours to be shown to their flag.<sup>83</sup>

As seen in the Dano-Hansa treaty above, there was often an order of salute, which depended on the precedence, or 'rank', of the States concerned: the ships of a republic would salute those of a monarchy first. Other factors such as the relative naval strengths of the fleets that met and the rank of the commanding officer were

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<sup>79</sup> *Acts of the Privy Council of England*, iv, 37; cited by Fulton, *op. cit.*, 116, 117. The Order was made on 7 May.

<sup>80</sup> Monson, *Naval Tracts*, 242.

<sup>81</sup> See also the precise instructions concerning the salute given in the Instructions to Captain Pennington when Admiral of the Narrow Seas, 1633, SP/9/53/721; and the numerous others explaining the rules in SP/9/53 *passim*.

<sup>82</sup> Reedtz, *Répertoire historique et chronologique des traités*, 1826, Göttingen; cited by Verzijl, *op. cit.*, 59.

<sup>83</sup> Dumont, VI, i, 314. Various other examples are given in Verzijl, *op. cit.*, 58, *et seq.*

also significant.<sup>84</sup> Disputes would arise when a captain acted contrary to the policy of his State, either refusing a salute when one was deemed to be required, or demanding one when it was inappropriate. But the flag-salute was made into an issue touching the very sovereignty of the State in England due to the threat of the rising Dutch naval power, against which it brought war, and the personal pretensions of Charles II.

Some States were more willing to assent to England's demand than others. The Dutch Republic generally did so peaceably before the English Crown (and even under Cromwell), whereas the Spanish had to be persuaded: in 1554 the fleet carrying the future Philip II to marry Queen Mary suffered the ignominy of being forced to lower its colours to Admiral William Howard, whose ship it met in the Channel<sup>85</sup>; and the same fate befell the fleet carrying Anne of Austria to marry Philip.<sup>86</sup> And in 1613 the fleet carrying the Spanish ambassador Gondomar to Portsmouth was required to take in its flags, by a ship which had not been so commanded by the Admiral of the Narrow Seas. After a subsequent complaint England conceded that the ship had been in error, but no action was taken since "the Admiralty was unwilling to check its officers from insisting on the prerogative to the fullest extent."<sup>87</sup> The French, who, says Fulton, "had never shown the slightest inclination to recognise Britain's asserted 'sovereignty of the sea'"<sup>88</sup> consistently opposed the English claim,<sup>89</sup> while enforcing the same policy on their own coasts: an Ordinance of Henry II in 1555 (which was repeated by Henry III in 1584) required all vessels to strike their vessels when they met the ships of the French navy.<sup>90</sup>

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<sup>84</sup> Verzijl, *op. cit.*, 60.

<sup>85</sup> Monson, *Naval Tracts of Sir Wm. Monson*, (ed. Oppenheim) 6 vols, 1902, NRS, London.

<sup>86</sup> Froude, *History of England*, iii, 68.

<sup>87</sup> Laughton, *op. cit.*, 720.

<sup>88</sup> Fulton, 117.

<sup>89</sup> See, for instance, the dispute mentioned in SP/9/53/721.

<sup>90</sup> Selden, *op. cit.*, lib.ii, ch.24.

### 5.6.5 The fisheries

Under Elizabeth, England's policy, as we have seen, was that all States were permitted to fish in the sea. But the English fishing industry had been in decline since the Reformation, after which the consumption of fish on Fast days and during Lent had decreased considerably. In its attempts to revive the industry England had two main policies: encouraging the population to eat more fish; and discouraging foreigners from fishing on its coasts, thus allowing local fishermen greater opportunity to do so. The first of these policies was indeed put into effect by the introduction of a "Political Lent": laws were introduced prohibiting the consumption of meat during Lent or on former fast days.<sup>91</sup> The laws were unpopular, however, and were widely ignored<sup>92</sup> - they were thought papistical and fish was expensive - and the policy was ultimately abandoned.

The second policy was first advocated in the middle of the 16th century and it became increasingly widely urged throughout Elizabeth's reign. It had its first exponent in the astrologer Dr John Dee, who said that the British Seas should be free to all for navigation, but not for fishing: within the Royal limits, only those foreigners who had paid for a licence should be allowed to fish.<sup>93</sup> He based the 'limits' largely on Bartolus and Baldus, and they were supported by Plowden, but did not find favour with Elizabeth.<sup>94</sup> It would have been very difficult - attractive and efficacious as the idea must have appeared - for her at once to argue *for* the right of England (or any State) to sail and trade in the waters claimed by Spain, and to fish in the waters claimed by Denmark (which in itself was aiding the English fishing industry), and *against* the right of another State to fish in the waters off the coasts of England. The

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<sup>91</sup> For instance, 2 & 3 Edw. VI c.19 (1550).

<sup>92</sup> Fulton, *op. cit.*, 114.

<sup>93</sup> Dee, *General and rare memorials pertayning to the Perfect Arte of Navigation, or The Brytish Monarchie*, 1577; cited in Higgins, *op. cit.*, 198.

<sup>94</sup> Higgins, *ibid.*

seed of this policy had been sown, however, and it would be pursued with a vengeance by the Stuart Kings.

## **5.6 Assessment**

Towards the end of the 16th century there was a general increase in States' jurisdiction over adjacent waters. The concept of a band of coastal waters with a limited extent was becoming more defined. States were asserting many rights of jurisdiction different from those of a century before. Jurisdiction over pirates had led to jurisdiction over foreign ships, in war and peace, and the laws of neutrality and contraband had begun to emerge. At the same time the claims to total exclusion of other States were severely undermined.

Two States with opposing arguments and aspirations were Denmark and England, the former attempting to exclude all States from its waters, the latter desiring to navigate, fish and trade where it pleased. Their respective positions were expressed at the conference held at Haderslev in 1583. Denmark argued that by the law of nature the oceans were common to all, but by the law of nations the sea could become subject to dominion by occupation, and other States's could therefore be excluded. England admitted that States could have some jurisdiction over the sea, but said they could not prohibit fishing or navigation. As we have seen, England at this time had great need of Danish trade since its ports were blockaded by Spain and Portugal, and Denmark was finding it increasingly difficult to sustain its position. The agreement the States reached was consistent with neither State's previous position. English navigation would be allowed in Danish waters, but it would not be free: a tax had to be paid.

At the same time we can see that the concept of "territorial waters" was being propounded with a State's jurisdiction extending out only to a certain point from the coast. Spain introduced a line-of-sight neutrality limit on the coast of the Spanish Netherlands in 1563, and a line-of-sight total exclusion limit on the coast of Spain itself in 1565. Shortly before the Bremen conference in 1603, Denmark decreed a limit of two Norwegian leagues from the coast, within which other States (or England, in particular) could not sail. At the conference itself England still maintained that fishing and navigation were permissible right up to the coast, but argued now that

a coastal State could have dominion "at a short distance from the coast". It was willing to pay a tax for the State's protection.<sup>95</sup>

The general trend regarding the source of rules by which States were bound, in this period, began to incorporate much more generally the 'unilateral' edict or ordinance. While in some areas - notably the Mediterranean and northern seas - these had a long provenance, they had not been used extensively elsewhere. But the need to ensure the safety of coastal waters, the growing desire for neutrality when others were at war, and the problems of contraband trade and piracy, led many States to declare that their coastal waters were a 'neutrality zone' and defend them accordingly. Any zone requires to be delimited, and so it was a short step to the limits mentioned above, which are recognisably the antecedents to the territorial waters of modern times. There seems to have been little dispute over the *right* of States to pass such edicts, even affecting as they did the practice of other States. There was certainly conflict over their *effect*, but that is a different matter. As early as 1521 France and Spain accepted England's proclaimed neutrality 'chambers', and towards the end of the century edicts asserting a jurisdiction or even dominium over coastal waters seem to have been accepted by most States.

By the end of the 16th century the extreme positions of *mare clausum* and *mare liberum* were proving unsustainable. On the one hand, the desire for trade and settlement could not be constrained and any single State which attempted to exclude entirely all others from its waters was forced to concede the impossibility of the task. On the other, the rise of piracy and the power of a State near its own coast led to the enforcing of neutrality or other forms of jurisdiction there, and to other States being more willing to pay a tax or recognise that jurisdiction for the security it gave. In the next chapter the importance of the trade policies of the Dutch will be examined.

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<sup>95</sup> At the same time certain jurists were propounding a limit to territorial waters derived from the limit of 100 miles of Bartolus, notably Bodin, who transformed it into "thirty leagues": *Six Livres de la République*, 1577, Paris, 215. Caron took a similar view: *Pandectes ou Digestes du droit françois*, 1596, Lyons, 209.

**The Dutch emerge as champions of *mare liberum* in the early 17th century**

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## 6.1 Introduction

At the start of the 17th century there were still two opposing views current amongst the maritime States of Europe. Certain States claimed exclusive rights over areas of the sea, and other States challenged these claims.<sup>1</sup> But the nature and extent of those rights varied, and the notion that rights, jurisdiction or sovereignty, could extend to a limited distance from the coast, leaving an area of water which in modern times would be called High Seas, had only recently been entertained. However it has been shown that the first indications that such a view would emerge more widely, due to the mounting pressure and untenability of claims to larger territorial waters, had appeared. Within the space of a few years, Philip II of Spain imposed a line-of-sight neutrality limit on the Netherlands; Denmark a two league fishing limit around the coast of Norway; and, it will be shown, at an Anglo-Dutch conference in 1610 the concept of a territorial sea limited by cannon-range was first proposed. These three methods of delimiting territorial waters became increasingly widely used throughout the 17th century, and the claims of Spain, Portugal and Denmark itself were increasingly difficult to maintain.

It is inaccurate to assert, as Hall does, that at this time "no part of the seas which surround Europe was looked on as free from a claim of proprietary rights."<sup>2</sup> It is the case, as Hall notes, that in the Mediterranean Venice still maintained its claim to the Adriatic, and Genoa to the Ligurian Sea; that Spain and Portugal still claimed much of the Atlantic and Pacific as their own; and that Denmark claimed the northern seas between Norway and Iceland. But three of the strongest maritime powers in Europe resolutely opposed these claims, and made no similar claims on their own coasts. The Dutch powerfully opposed the claims of Portugal in the East

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<sup>1</sup> Potter, too, believes that there were two views current at this time; however he says, *contra* to the argument maintained here, that the dividing line was not between different States, but between States (whose practice was *mare clausum*) and jurists (whose theory was *mare liberum*): Potter, *The Freedom of the Seas in History, Law and Politics*, 1924, Longmans, New York, 50, *et seq.* As has been argued, Potter overstates the extent to which claims to territorial jurisdiction were being made.

<sup>2</sup> Hall, *A Treatise on International Law*, 7th ed., 1917, Clarendon Press, Oxford, 144. And see Colombos, *International Law of the Sea*, 6th ed., 1969, Longmans' Green and Co, London, 48.



Indies, and did not claim exclusive rights over the seas off its own coast in the North Sea. And England, although in the past it had claimed a certain jurisdiction in the seas around the British Isles,<sup>3</sup> had, as was shown earlier, increasingly adopted a freedom of the seas position during the 16th century, especially under Elizabeth. Hall is therefore in error to suggest<sup>4</sup> that the earlier English claims were continued to the start of the 17th century. France, although making vague claims to the seas around its coasts, also advocated the freedom of the seas.

This chapter examines the role played in the early 17th century by the Dutch, who, in asserting their independence from Spain, and traditionally a nation of traders, found that the opening up of their own trade routes was blocked by the various applications of a *mare clausum* policy around the world. The whaling grounds of the Northern Seas and the ships' stores of the Baltic; the Levantine and Mediterranean trade; and, most importantly, the spice trade in the East and the trade with the New World - all were to varying degrees closed to the United Provinces. Although there had been some juristic resistance to such policies in the past, it was not until early in the 17th century that legal works, most famously by Hugo Grotius, championed the freedom of the seas and "heralded the dawn of a new epoch".<sup>5</sup> The East India Company of the Netherlands, and to a lesser extent those of France and England, was competing with Portugal for the East Indies trade. As has been stated previously, the Europeans' expectation of finding a legal vacuum in the East was misguided. They were intent on finding a territorial base for their actions - Portugal for missionary work and the others for trade - but could not apply the same legal ideas that had been used a few years previously in the Americas. As Alexandrowicz says, they could not deal unilaterally with the indigenous communities, but had to establish bilateral

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<sup>3</sup> See argument over this point, *ante*, ch.2.

<sup>4</sup> See Hall, *op. cit.*, 144.

<sup>5</sup> Fulton, *The Sovereignty of the Sea*, 1911, Blackwood, Edinburgh; 1976, Krauss Reprint, Millwood, New York, 338. As has been argued previously, the epoch heralded by Grotius was "new" in the sense of the balance being tipped more in favour of *mare liberum*. The pre-Grotius position was not so completely *mare clausum* as some, such as Fulton, argue.

relations.<sup>6</sup> Titles to territory through discovery, or occupation of *terra nullius*, were no use to them. Portuguese and Dutch jurists were forced to respond to the unexpectedly legally advanced situation in the East Indies.

Jurists were generally in accord that the sea was incapable of appropriation, deriving their arguments largely from the principles of Roman Law, although some appreciated that on the international plane these old principles had to be developed and could not be applied exactly. Donnellus, for instance, distinguished public use from public ownership: public roads would be under the former, and the sea under the latter. Vasquez argued simply that the sea could not be made into private national property.<sup>7</sup> Others went further with more sophisticated ideas. Gentilis differentiated between dominion and jurisdiction - allowing the latter but not the former - which led to the sea being under the protection of a State, but not its property. The sea was still common for all, as long as they recognised a State's protective jurisdiction in it.<sup>8</sup>

## 6.2 Dutch Practice

Over the next few decades the two sides of the dispute over the freedom of the seas were to some extent polarised by the struggle for independence of the Dutch, with the help of France and England, which was ultimately successful and continued the steady decline of Spain as a major power. However the religious dimensions of the dispute should also not be ignored. Under the Treaty of Passau the only Protestants recognised were Lutherans, leaving others dissatisfied, and so it was more in the nature of a truce than a permanent peace.<sup>9</sup> The different traditions or sects in the Church struggled for Church lands, and the Catholic-Protestant tensions were intensified when the Duchy of Cleves became vacant in 1609. The Emperor wanted

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<sup>6</sup> Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies*, 1967, Clarendon Press, Oxford, 41.

<sup>7</sup> *Controversiae Illustres*, 1563, Venice, II, ch.89, s.12; cited by Potter, *op. cit.*, 52.

<sup>8</sup> Gentilis, *Hispanicae Advocationis Libri Duo*, 1613, Hanover; 1964 (tr. Abbott; ed. Scott), *Classics of International Law*, Wildy and Son, London, 53, 54.

<sup>9</sup> Hosack, *The Rise and Growth of the Law of Nations*, 1882, John Murray, London, 173.

to increase his power in the lower Rhine, and the Dutch were naturally wary of any imperial influence so close to their borders. Other European powers took sides, including Henry IV and his large, well-prepared army, and a great religious conflict began to seem inevitable.<sup>10</sup>

In the first part of the 17th century Spain maintained its position that treaties did not operate 'beyond the line', and indeed that beyond the line 'might was right'. Since the Câteau-Cambrésis treaty in the mid-16th century France and Spain had fought there without violating it.<sup>11</sup> The matter came up again, although (as at Câteau-Cambrésis) was left unresolved, in the negotiations leading to the peace signed between Spain and Great Britain at London in 1604, on 18/28 August.<sup>12</sup>

The Dutch felt abandoned by their allies. Both France and England had now concluded a separate peace with Spain. When, therefore, the archdukes of the Southern provinces indicated that they would be willing to treat for peace, Oldenbarnevelt, the Great Advocate of Holland, was inclined to listen. Philip II was concerned at the rapacious swallowing up of the Portuguese trade by the Dutch, and he was also being counselled to end the war. There was still a fairly large Dutch war party, however, arguing that the East and West trade would be made less profitable, if not curtailed altogether, by peace.

Negotiations began in late 1607 - also involving French, English, Danish and German envoys - but by the middle of the following year agreement could not be reached on the issue of the Indies trade. In early 1609 French and English ambassadors acted as intermediaries in the negotiations and a solution was found, and

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<sup>10</sup> *Ibid.*, 173.

<sup>11</sup> See *ante*, ch.4.

<sup>12</sup> Treaty Roll, no. 216. Rymer, XVI, 585-96; Dumont, V, ii, 32-36, 625-31. Text with English translation in Davenport, *European Treaties bearing on the History of the United States and its Dependencies to 1648*, 1917, Carnegie Institute, Washington, 250. On the negotiations, see *B. M. Harleian MSS*, 35; *B. M. Add. MSS* 14033; *Calendar S. P. Venice* (1603-07), *passim*.

the Truce of Antwerp,<sup>13</sup> which was to last for 12 years, was signed on 9 April. Among various other provisions (including acknowledgement of the States' independence) it stated that the Dutch could trade in the Indies with the express permission of the King in his territories, and with the permission of the natives in other areas. Outside the Indies they could travel anywhere that Spain's allies were permitted to go. This was a significant concession to the Dutch interest.

### 6.3 Dutch empire-building and initial concerns over taking prizes

The spark for the emergence<sup>14</sup> of the doctrines, and the writings of Grotius, that would be so influential in international law for the next three centuries occurred in the context of the Dutch-Portuguese struggles in the Indian Ocean and the seas of the East Indies, battling for the spice trade to the Moluccas. On 25 February 1604 the Portuguese carrack the *Santa Catharina* and its valuable cargo were captured in the Strait of Malacca by the Dutch Admiral Jacob van Heemskerck.<sup>15</sup> This seems to have caused some consternation back in the Netherlands, being, perhaps, one of the first instances of the capture of another European ship for prize in the East Indies. While many of the VOC's shareholders saw it as a legitimate part of the profits of their enterprise, others viewed it as possibly unlawful plunder. Public opinion in the Provinces, traditionally more interested in commerce than war, was overwhelmingly

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<sup>13</sup> *Secrete Casse, Spaighen en de Ertzhertogen*, casse B, loquet A, no.24, Rijkarschief, The Hague. Dumont V, ii, 99; Davenport, *op. cit.*, 264. *Calendar S. P. Venice*, 1603-7, passim; 1607-10, passim. France and Great Britain concluded a treaty of guarantee with the Dutch with the object of ensuring the latter's security: Treaty of The Hague 1609, signed 7/17 June. *S. P. Foreign, Treaties*, no. 294; Dumont V, ii, 110; Davenport, *op. cit.*, 272.

<sup>14</sup> Or, at least, general awareness.

<sup>15</sup> Verzijl, *International Law in a Historical Perspective*, IX, 1973, AW Sijthoff, Leiden, 32; Anand, *The Origin and Development of International Law: History of International Law Revisited*, 1983, Martinus Nijhoff, The Hague, 77, claims - probably correctly given the date of the sale of the cargo - that the boat was captured in 1604; whereas Potter, *op. cit.*, 57, and Alexandrowicz, *op. cit.*, 22, 43, have it as 1602.

of the latter view.<sup>16</sup> The captured cargo was partly perishable, leading to a sense of immediacy, and on 29 July 1604 the States General authorised its public sale with the profits to go to the shareholders of the VOC. Just over a month later on 9 September the Admiralty Court in Amsterdam, after hearing argument for the VOC from the young lawyer Hugo Grotius, declared the vessel and cargo good prize, which led to severe criticism and protest within Holland. This prompted the Amsterdam Chamber of the VOC to request Grotius to prepare a written justification of the capture, showing that "war might rightly be waged against, and prize taken from the Portuguese, who had wrongfully tried to exclude the Dutch (and others) from the Indian trade".<sup>17</sup> He completed it in 1605, but the completed work, *De Jure Praedae*, consisting of 12 chapters, was not published.<sup>18</sup>

#### 6.4 Grotius's *Mare Liberum*

A few years later, in 1608, as negotiations for a truce were proceeding between Spain and the United Provinces, Grotius was asked by the Zeeland Chamber of the VOC to prepare arguments against the Spanish claims of a monopoly of trade and navigation to the West Indies.<sup>19</sup> Another of the VOC's motives for commissioning Grotius was "to influence favourably the negotiations then in progress between [the two countries] for peace on reciprocally acceptable bases"<sup>20</sup> and to justify "in the eyes of the world the whole cause and methods of the Dutch as against

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<sup>16</sup> Anand, *op. cit.*, 78.

<sup>17</sup> Knight, *The Life and Works of Hugo Grotius*, Grotius Society, London, 1925, 80.

<sup>18</sup> It was forgotten, and indeed unknown, until discovered by the publisher Martinus Nijhoff in 1864 in Leiden, and was printed in 1868. However it was revised and enlarged to form Grotius' later work *De Jure Belli ac Pacis* (now in Classics of International Law series, 1950). See Verzijl, *op. cit.*, 32; Knight, *op. cit.*, 79-112.

<sup>19</sup> Verzijl, *op. cit.*, 32.

<sup>20</sup> Scott in Introduction to Hugo Grotius, *Mare Liberum, The Freedom of the Seas, or The Right which belongs to the Dutch to take Part in the East Indian Trade*, 1916, Classics of International Law, Carnegie Endowment, New York; 1972, Arno, New York, viii.

Spain".<sup>21</sup> He produced a small treatise drawn entirely from the last chapter of *De Jure Praedae*, and it was published anonymously under the title *Mare Liberum* in March 1609.<sup>22</sup>

In researching *De Jure Praedae* (and thus *Mare Liberum*) Grotius was given access to the records and archives of the VOC.<sup>23</sup> These showed him the view of the law of nations taken by the East Indian rulers, and it has been argued by Alexandrowicz that he drew much of the inspiration for his doctrine of freedom of the seas from this source.<sup>24</sup> In *Mare Liberum* Grotius spends some time examining the freedom of navigation that existed in the Indian Ocean.<sup>25</sup> Alexandrowicz follows the traditional (and, as has been argued *ante*, incorrect) view that it was a radical departure from existing European practice, and thus that what Grotius learned was highly significant for future custom. But Roelofsen has shown that Grotius' sources and inspiration were more the works of the so-called "Spanish School" than East Indian practice. He questions how much Grotius actually knew of Asian custom and

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<sup>21</sup> Knight, *op. cit.*, 83.

<sup>22</sup> *Mare Liberum, sive de jure quod Batavis competit ad Indicana Commercium Dissertatio*, 1609, Elzevier, Leyden; now in English (tr. Magoffin) in the Classics of International Law series, *op. cit.*

<sup>23</sup> For some time it was believed that Grotius was able to conduct his own research in the archives of the VOC, but it has recently been suggested that he had to rely on the reports and affidavits of VOC officials: Coolhaas (1965) 79 *Bijdragen en medelingen van het Historische Genootschap* 415-540 "Een Bron van het Historische Gedeelte van Hugo de Groot's *De Jure Praedae*"; cited in Roelofsen in Watkin, *Legal Record and Historical Reality*, 1989, Hambledon Press, London, 53. This calls into question how much Grotius in fact knew of any Asian "freedom of the seas".

<sup>24</sup> See Alexandrowicz, *op. cit.*, ch.4; Anand, *op. cit.*, develops Alexandrowicz's ideas.

<sup>25</sup> Anand, *op. cit.*, 34, asserts that the freedom of the seas was the recognised custom in the Indian Ocean before the Portuguese arrived; although Roelofsen, *op. cit.*, 55, 56, questions whether the freedom of the seas existed as a *legal rule*, saying that there is no evidence of any *opinio juris*. He also argues (at 59, 60) that if there were such local practice it would be apparent in the arguments put forward against the Dutch by the English at the conferences of 1613 and 1615, in the Malaccar remonstrance of 1615, and after the arrest of two French ships off Java in 1618 that provoked a diplomatic protest to The Hague.

cautions against "confusing Grotius, the author of *Mare Liberum*, with Grotius, the East Indian expert of 1613".<sup>26</sup>

In *Mare Liberum* Grotius propounded (and perhaps named) the doctrine of the freedom of the seas, arguing that the sea could be the property of no nation. As he himself acknowledged, Grotius relied on well-established sources, including Spanish theologians and lawyers such as Vitoria and Suárez<sup>27</sup> (somewhat ironically, given that Grotius' arguments were directed against Spain and Portugal). The Protestant Grotius, of course, was not beholden to the Pope in the same way as the writers he quoted, and in fact the book was dedicated to the free peoples of Christendom. Indeed, writes Fulton, "the strength of [the book] lay...in its appeal to [their] sense of justice and [their] conscience."<sup>28</sup> Grotius did not argue for complete freedom of the seas however. He allowed that ownership was possible in certain circumstances: where general navigation rights had been given up by treaty or where the law of freedom does not govern. He also said that possession of a fleet or a strong point on land might impose maritime jurisdiction with it.<sup>29</sup> Grotius' approach in arguing the Dutch case was to assert the sovereign rights of the local princes which could not be countermanded by any purported act unilaterally transferring title to their territory by a European power. So Portugal could not claim territorial rights through discovery or occupation of *terra nullius* and especially not by papal donation: it had to be through cession or conquest.<sup>30</sup> Thus Portugal could not prevent the Dutch from visiting any territory not held under such a title.

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<sup>26</sup> Roelofsen, *op. cit.*, 52.

<sup>27</sup> On whom, see ch.4, *ante*.

<sup>28</sup> Fulton, *op. cit.*, 342.

<sup>29</sup> *Mare Liberum*, *loc. cit.*, 35.

<sup>30</sup> It will be recalled that Portugal had, by conquest, taken Goa (in 1509) and Malacca (in 1511), which led Grotius, following his own reasoning, to admit Portuguese sovereignty over the territories. However this would have meant that the Dutch were excluded, and the full text of *De Jure Praedae* (the edition in the Classics of International Law series, published in 1950) shows that he crossed this part out of the text: Alexandrowicz speculates that he had 'remembered' that he was retained by the VOC. See Alexandrowicz, *op. cit.*, 46.

The Portuguese had based their claim in the law of nations to territory in the East Indies partly on Alexander VI's bull *Inter Caetera* of 1493, which, as has been seen, divided up the world into Spanish and Portuguese hemispheres, with title to any territories that each State discovered automatically accruing to it. Grotius argues that it was issued merely to decide the dispute between Spain and Portugal and did not therefore affect the rest of the world, such as the nations of the East Indies, which were not under papal jurisdiction.<sup>31</sup> As to Portugal's assertions of title through discovery, Grotius argues that territory that was *terra nullius* had to be occupied: discovery itself was not sufficient. And much of the East Indies was not *terra nullius* (and therefore could not be discovered), which was evidenced by Portugal's having to obtain concessions from local rulers, or being allowed there only on sufferance.<sup>32</sup>

In the last few chapters of *Mare Liberum* Grotius argues against the Portuguese claim to a trade monopoly, borrowing the notion of a general freedom of trade from Vitoria's *De Indis*. He emphasises the culture and civilisation of the peoples of the East Indies and notes that the region has a long tradition of free trade. The rulers have the right to trade with whomsoever they choose. Thus, he concludes, one State could not maintain a monopoly. As well as asserting that no State could have exclusive rights to trade, it suited Dutch interests for Grotius to argue - inconsistent though it was with his earlier comments on the supremacy of the sovereignty of the local rulers - that any State could have access to East Indian territory for trade, seemingly whether the rulers consented or not!

According to Grotius the sea is "commonly to all, because it is so limitless that it cannot become a possession of anyone and because it is adapted for the use of all, whether we consider it from the point of view of navigation or of fisheries".<sup>33</sup> Portugal had claimed to exclude other States through having discovered the sea, which he dismissed: "If the Portuguese call occupying the sea merely to have sailed over it before other people, and to have, as it were, opened the way, could anything

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<sup>31</sup> *Mare Liberum*, 46.

<sup>32</sup> Alexandrowicz, *op. cit.*, 46, 47.

<sup>33</sup> *Mare Liberum*, 51.



in the world be more ridiculous? For, as there is no part of the sea on which some person has not already sailed, it will necessarily follow that every route of navigation is occupied by someone. Therefore, we peoples of today are absolutely excluded."<sup>34</sup> The only right he allowed on the sea was one of jurisdiction and protection. Rights of prescription could not accrue: "for it is impossible to acquire by ... prescription things which cannot become property, that is, which are not susceptible of possession or of quasi-possession and which cannot be alienated."<sup>35</sup>

### 6.5 Dutch policy after Grotius' *Mare Liberum*

The freedom of the seas, especially after the publication of *Mare Liberum*, had become Dutch national policy, and on 15 March 1508 the State Council of Holland passed a secret resolution that it would never "in whole or in part directly or indirectly, withdraw, surrender or renounce the freedom of the seas, everywhere and in all regions of the world."<sup>36</sup> The Dutch obtained concessions from Portugal a month after *Mare Liberum* was published - the right to trade with the East Indies was recognised, as we have seen, in the Truce of Antwerp 1609<sup>37</sup> - and were thus able to increase their Eastern trade. Disputes arose with England, which was trying to increase its own trade in the region. The Dutch were able to present themselves as liberators, freeing local rulers from the zealous Portuguese, and with greater domestic support and more capital than the English, they could work faster. During its war with Spain the Netherlands had been willing to accept English competition. But it was

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<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.*, 53.

<sup>36</sup> Anand, *op. cit.*, 96. The reality proved to be somewhat different, however. Boxer writes that throughout the 17th century the Dutch would "abandon their free trade principles when it suited them, or when they thought they could maintain a suitable monopoly." Boxer, *The Dutch Seaborne Empire 1600-1800*, 1965, London, 62.

<sup>37</sup> *Secrete Casse, Spaignen en de Ertzhertogen*, casse B, loquet A, no.24, Rijksarchief, The Hague; cited by Davenport, *op. cit.*, 258. Dumont, V ii, 99. For text, see Davenport, *ibid.*, 264, *et seq.* The treaty was signed on 30 March/9 April 1609.

aggrieved that James had made a separate peace with Spain,<sup>38</sup> and after the truce in 1609 now began to work at 'squeezing' the English out of the trade with the islands of the East Indies.<sup>39</sup> Indeed, the Dutch began to engage in precisely the practices about which they had previously complained to Portugal - excluding other States. In particular a dispute arose between the VOC and the English East India Company over a Dutch claim to a monopoly in the spice trade from the Moluccas and Banda.<sup>40</sup> In an attempt to reach a settlement an Anglo-Dutch Colonial Conference was convened in London in 1613, and it met again in The Hague two years later, with Grotius as one of the Dutch delegates to the Conference.<sup>41</sup>

In *Mare Liberum* it was argued that there was a natural freedom of trade, allowing a State to trade with any other, which could not be extinguished by a claim to a monopoly. The Dutch now claimed a monopoly, having made treaties with local rulers excluding other States, and the English quoted to them from the treatise. Grotius, who was of course then not known to be the author, found himself caught in the snares of his own argument. He countered as best he could by saying that whereas the English had relied on the liberty of nature, the Dutch claim was rooted in treaties and thus the "contract extinguished the liberty of the law of nations".<sup>42</sup>

## 6.6 Anglo-Dutch disputes over fishing rights

We have seen that the English King's Chambers related only to neutrality and not to fishing, which was generally unlimited. However this began to change. The

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<sup>38</sup> *Supra*, and see *ante*, ch.5.

<sup>39</sup> Parry, *Europe and a Wider World*, 1949, Hutchinson, London, 102.

<sup>40</sup> See Clark, *Grotius' East India Mission to England*, 1934, Grotius Society, London; Alexandrowicz, *op. cit.*, 57; Verzijl, *op. cit.*, 32.

<sup>41</sup> Verzijl, *op. cit.*, 32. See further Clark and Elsinga (1940) *Bibliotheca Visseriana* 15 and (1951) *ibid.*, 17 "The Colonial Conferences Between England and the Netherlands in 1613 and 1615".

<sup>42</sup> From the Agreement of 1620 between the VOC and the English East Indies Company: Heeres, *Corpus Diplomaticum Neerlande-Indicum*, 1907, 1931, 156. On Grotius' developing theories, see further De Pauw, *Grotius and the Law of the Sea*, 1966, Editions de l'Institut de Sociologie, Brussels.

parlous state of the English fishing industry led increasingly to demands that action be taken to revive it. In Scotland James had grown used to the idea that foreigners had no liberty to fish, and that a tax (an "assize-herring") could be imposed even on native fishermen.<sup>43</sup> He conceived the idea of imposing a tax in England and Wales too, in order to increase revenue, and also because of a what Fulton calls a "passion for his prerogative".<sup>44</sup>

James was aided in his policy by the changed public perception in England towards the Dutch. Whereas previously there had been a common interest in opposing Spain, they were now seen as a threat: the greatly increased Dutch fisheries were undermining England. A number of books were published arguing that the Dutch should be prevented from catching "English" fish, which was regarded as the source of their wealth and power, and with which they were harming its interests. To improve England's power, wealth and status, its shipping and commerce had to be increased, and the first step was to secure its fisheries for itself. The plan of action that emerged was to tax foreign fishermen, and then to build up a great fleet.<sup>45</sup>

In 1607 the Privy Council considered proposals to levy a tax on foreign fishermen, leaving natives untaxed, justified by the King's right to the title "grounded by ancient customs and records of his Majesty's predecessors".<sup>46</sup> A memorandum was submitted by a certain Richard Rainsford, one of the chief authors of the scheme, asserting the king's right to impose the tax, and claiming that the payment of taxes for fishing was common in other countries such as Russia, the "Shoffland" islands, Sweden, Denmark and Spain.<sup>47</sup>

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<sup>43</sup> Fulton, *op. cit.*, 124.

<sup>44</sup> *Ibid.*

<sup>45</sup> See generally, *ibid.*, 125-137.

<sup>46</sup> *B. M. Lansdowne MSS*, 142, f.373.

<sup>47</sup> *S. P. Domestic, James*, vol.48, 94. Fulton claims that this was the first attempt (such as it was) to give historical and legal precedents for interfering with the liberty of fishing: Fulton, *op. cit.*, 141.

In early 1609 the Privy Council discussed the policy of a proclamation forbidding unlicensed fishing by foreigners, apparently concerned that it would conflict with the Burgundy Treaties, granting freedom of fishing to the Dutch.<sup>48</sup> In February a Committee reported to the Council:

"We have perused the treaties from Henry the 7th time till this day betweene the Crowne of England and the House of Burgundy, and we have considered of them, and of all other thinges by which (as wee conceive) the lawfulness or unlawfulness may appeare of this proceeding. And are of opinion, that the Kings Majesty may without breach of any treatie nowe in force, or of the law, uppon the reasons specified in the proclamation sent unto us, restreine all strangers from fishing uppon his coasts without licence, in such moderation and after such convenient notice given thereof by publik proclamation, as his Majesty shall think fit."<sup>49</sup>

In March Grotius published *Mare Liberum* and a week or two later Spain and the United Provinces signed the Truce of Antwerp. The peace, and the Council's opinion that the Burgundy treaties did not restrain him from issuing a proclamation, freed James to pursue his policy against the Dutch fishermen. On 12 April a memorandum was drawn up for the Privy Council which was embodied in a proclamation (the language of which recognises the departure from previous policy) issued on 6 May: after 1 August 1609 it would be unlawful for a foreigner to fish on the shores of Britain and Ireland without licence.

Whereas wee have been contented since our comming to the Crowne, to tolerate an indifferent and promiscuous kinde of libertie to all our friends whatsoever, to fish... So finding that our connivance therein hath not onely given occasion of our great encroachments upon our

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<sup>48</sup> A report of the discussion said that "uppon perusall of some Treaties ... we fynde certeyne clauses, by which there maye arise some question how farre any such Prohibition maye concurre with the practice of the same...": *B. M. Lansdowne MSS*, 142, f.375. On the Burgundy Treaties, see *ante*, ch.2.

<sup>49</sup> *Op. cit.*, f.377. The Report is dated 14 February, and written in the hand of Sir Julius Caesar, then the Chancellor of the Exchequer.

Regalities, or rather questioning for our Right, but hath bene a means of much dayly wrongs to our owne people that exercise the trade of Fishing... from the beginning of the Moneth of August next comming, no person of what Nation of qualities soever, being not our naturall borne Subject, be permitted to fish upon any of our Coasts and Seas... untill they have orderly demanded and obtained licences from us [which] shall be yearly demanded.<sup>50</sup>

The reaction in the United Provinces was immediate, since the fishing season (June to September) was imminent. In early June the States General resolved that the proclamation was contrary to the treaties between the two States. The Dutch ambassador to London, Sir Noel Caron, had several meetings with the King and Salisbury, the Foreign Secretary, James insisting that the proclamation was not meant to harm the Dutch, only to manifest his authority on the sea.<sup>51</sup> The ambassador to The Hague, Sir Ralph Winwood, appointed in August 1609, had conferences about the proclamation with the Dutch leader, Barnevelt. Fulton claims to have found no evidence that the edict was ever enforced against France or Spain,<sup>52</sup> although Salisbury's letter of 8 June to the ambassador to Madrid was to explain the reasons for the proclamation, suggesting perhaps that there had been some enquiry from the Spanish.<sup>53</sup> The ambassador to Paris discussed the matter with the French, and a year's respite was granted,<sup>54</sup> which suggests, again, that enforcement was originally contemplated against them.

On 14 April 1610 a Dutch embassy arrived to discuss the matter with James, including Elias van Oldenbarnevelt, Barnevelt's brother, and on 6 May they had a

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<sup>50</sup> *Booke of Proclamations*, 1609, Barker; see text in Fulton, App.F.

<sup>51</sup> Fulton, *op. cit.*, 151.

<sup>52</sup> *Ibid.*, 150.

<sup>53</sup> Letter of 8 June 1609: Winwood, *Memorials of Affairs of State in the Reigns of Queen Elizabeth and King James*, 1725, iii, 49.

<sup>54</sup> Letter from Salisbury to Sir George Carew, English Ambassador to Paris, 20 June 1609. *BM Add. MSS*, 17.677.

conference with the English Commissioners.<sup>55</sup> The Dutch argument had four main strands. Firstly, they said that from time immemorial Dutch fishermen had had the freedom to fish anywhere in the sea, by usage and right. To remove that right would be unjust. Secondly, the sea was as common to all as the air: for "by the law of nations, no prince can challenge further into the sea than he can command with a cannon except gulfs within their land from one point to another".<sup>56</sup> Thirdly, they argued that treaties with England had granted them liberty of fishing.<sup>57</sup> The fourth argument concerned the importance of the fisheries to the Dutch, in terms of the security of the State and the large number of livelihoods that relied on it.

The English argument in favour of the right of the King to charge for fishing<sup>58</sup> consisted firstly of an assertion that the custom of nations allowed such action. The Commissioners cited the examples of Spain, France, Denmark, Sweden, Venice, Genoa and Russia, where the seas were free for navigation, but not for fishing. Secondly, English kings since the days of King Edgar had always received a "consideration" for fishing in the seas adjoining them. Thirdly, the Burgundy Treaties were obsolete. The *Intercursus Magnus* had been superseded by a 1520 treaty (which, however, dealt with commercial matters rather than fishing). The treaties had been made with the House of Burgundy, and so were valid only for subjects of that

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<sup>55</sup> *S. P. Domestic, James*, vol. 47, 111

<sup>56</sup> *Ibid.* This is notable as apparently the first recorded occasion on which this principle - the range of cannon being the limit of sovereignty or jurisdiction - was used, although the language in which it was expressed seems to imply that it was regarded, at least by the Dutch, as a well established principle. It is interesting to note that the Dutch argument allows that bays are within a State's jurisdiction. Could this be related to James' recent proclamation of the King's Chambers - perhaps an attempt to placate him - or does it avert to the concept of 'historic bays' being excepted from general rules regarding territorial waters?

<sup>57</sup> Fulton notes that they referred only to one treaty with England - the *Intercursus Magnus*, 1496 (see *ante*) - while referring to several with Scotland, from 1541, 1550, and especially 1594 when James himself was on the throne of Scotland: Fulton, *op. cit.*, 157.

<sup>58</sup> *S. P. Domestic, James*, vol.47, 111. And see *B. M. Lansdowne MSS*, 142, f.362.

House, which the Dutch were not. The Dutch had anyway broken these treaties themselves. And the circumstances were changed - the Dutch now had more ships.

The negotiations appeared not to have much chance of success, but agreement was reached due to an unexpected and seemingly unrelated occurrence - the assassination of Henry IV of France, the Head of the Protestant League - which was awkward for James due to his relations with Spain. In order to maintain the goodwill of the Republic he accepted defeat, and instructed the Commissioners to inform the Dutch envoys that out of a love of the Low Countries, James would not put the proclamation into effect, while not conceding the arguments.<sup>59</sup>

Over the next few years James made numerous attempts to extract taxes from Dutch fishermen.<sup>60</sup> They were only occasionally successful, with much diplomatic protest on both sides about the treatment of nationals and the rights of fishery, with the Dutch relying on the treaty of 1594. In 1618, after complaints from the inhabitants, the King of Denmark complained to James that Scottish fishermen were fishing near to the Faroe Islands, rendering the natives unable to pay their taxes - doing in fact precisely what was complained of about the Dutch off Scotland. James was now forced to agree to and ratify a resolution of the Scottish Privy Council forbidding the Scottish fishermen from fishing within sight of the Faroe Islands, thus completely disavowing the English standpoint at Bremen in 1603.<sup>61</sup>

The British ambassador to The Hague, Sir Dudley Carlton, complained to the States General about Dutch fishing close to the Scottish shore and oppression of the natives, and suggested they do not fish within sight of land, as under the law of nations. They replied that they had never heard of such a custom<sup>62</sup> (although as was shown in ch.5, *ante*, it had been used on their own coasts by Philip II in 1563).

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<sup>59</sup> *Ibid.*

<sup>60</sup> See Fulton, *op. cit.*, 165-174.

<sup>61</sup> *Register of the Privy Council of Scotland*, xi, 329. On the Bremen Conference, see *ante*, ch.5.

<sup>62</sup> Carlton, *Letters from and to Sir Dudley Carlton, Knt., during his Embassy in Holland from January 1615 to December 1620*, 2nd ed., 1775, London, 259.

However the States General did pass an edict, also in 1618, forbidding the doing of wrongs to the Scots.<sup>63</sup>

Through skilful diplomacy the Dutch managed to delay any final answer to James on the question of fishing rights, and to put off the conference he had long been demanding on the matter.<sup>64</sup> All the while their boats continued to fish off Britain going ever closer to the shore and drawing complaints from local fishermen. James suggested in 1619 that the States General issue a provisional proclamation - pending the treaty he hoped for - forbidding their fishermen from coming within 14 miles of the British coast. This distance was mentioned in the Draft Treaty of Union 1604, and was supposed to be equivalent to a "land-kenning".<sup>65</sup> The States objected that this was a greater distance than the line of sight from the shore, but promised to order fishermen to keep out of sight from land.

The Dutch attitude had hardened and the States General had no intention of giving up their liberty to fish. They were willing to use force to defend it if necessary, as they had over whaling rights at Spitzbergen (see *infra*). But political events overtook them and they found it necessary to accommodate the English demands. The Truce with Spain was coming to an end and they were wary of any increase in Spanish power. By 1619 imperial forces had been cleared from Bohemia and on 17 August at a Diet of the States Ferdinand was deposed. (A few days later he was elected Emperor.) The Elector Palatine, Frederick V, became the King of Bohemia. He was the head of the Calvinists in Germany, a kinsman of Prince Maurice, and was married to James' daughter. As a result, an imperial army invaded Bohemia and took Prague. Frederick fled, and the Emperor banned the exercise of Protestantism throughout Bohemia. And Spain, which was in alliance with the Emperor, attacked and occupied the Palatinate. The United Provinces learned that this was part of a plan to send Catholic troops from Lombardy to the Spanish

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<sup>63</sup> *Groot Placaatboek*, i, 752; cited by Fulton, *op. cit.*, 201.

<sup>64</sup> See Fulton, *op. cit.*, 185-198.

<sup>65</sup> A "land-kenning" was an old Scottish measure meaning the farthest distance at sea from which it is possible to see land. It was defined as 14 miles in a letter from James to Carlton, in 1618; cited by Butler and Maccoby, *op. cit.*, 54.



Netherlands. They felt threatened and vulnerable, and were eager to maintain the goodwill of England. At the Diet of Ratisbon the Emperor gave away the dominions of Frederick to the Catholic Elector of Bavaria, at which the Protestant States of Europe felt obliged to take action. James wanted a peaceful resolution - not wanting to become "entangled...in the labyrinth of German politics"<sup>66</sup> - and hoped to use the influence of Spain, since negotiations were going on concerning the proposed marriage of the Infanta of Spain and the Prince of Wales.

After the war with Spain had restarted, the Dutch learned that Prince Charles of England had gone with Buckingham to Madrid to woo the Infanta, and they decided some form of capitulation to James was necessary. The negotiations regarding the marriage were ultimately unsuccessful, but on 2/12 May 1620 the States General honoured the promise they had made the previous year and ordered fishermen not to catch herring within the rocks and reefs of Shetland, Ireland and Norway. They also renewed the 1618 edict concerning the doing of wrongs to the Scots, and on 2/12 June 1623 ordered herring-busses not to go too near to the Scottish coast.<sup>67</sup>

England concluded a defensive alliance with the United Provinces in 1624, and under this Dutch fishermen were able to fish without disturbance. Fulton well describes the failure of English ambitions:

"James's policy of the assize-herring had thus completely failed. All his efforts to induce or force the Netherlands' fishermen to acknowledge his right were baffled by the superior diplomacy of the States. [But] a new weapon had been forged for the contest with the United Provinces for supremacy of the sea."<sup>68</sup>

James concluded that his son-in-law's Palatinate could only be recovered by force and began to look for allies for a continental war. Negotiations began with France over the marriage of Prince Charles to Henrietta Maria, and Richelieu reluctantly promised aid. James looked also to Sweden and Denmark - Gustavus

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<sup>66</sup> Hosack, *op. cit.*, 186.

<sup>67</sup> *Groot Placaatboek*, i, 752; cited by Fulton, *op. cit.*, 201.

<sup>68</sup> Fulton, *op. cit.*, 203. See further *BM Calthorpe MSS*, II, 40, 41.

Adolphus' demands were excessive and anyway Sweden was already at war with Poland, but Christian was more moderate.<sup>69</sup> However James died before negotiations could be completed.

### 6.7 Assessment

The great divide between States as to policy regarding the freedom of the seas led, Potter concludes, to three principle results.<sup>70</sup> Firstly, the two contending views would be pushed to extremes. This happened with the works principally of Grotius and Selden (whose work is examined in the next chapter) - the two main protagonists in the 17th century juristic battle over the seas. Secondly, these views would then fall back into a compromise, which would emerge as a synthesis and a permanent solution through the works of jurists. Potter suggests that Gentilis was the first to move in this direction. Thirdly, States would in the meantime take sides according to national interest, rather than what they believed to be the principles of law.

This chapter has in part examined in effect whether Potter's third conclusion can be justified, looking at the practice of the United Provinces at a time when their national interests were sharply defined: to escape from Spanish rule and to increase their trade with the East Indies and the Americas. By the Truce of Antwerp 1609 the Dutch wrested a significant concession from Spain: that they could trade in the Indies with its permission. But this, while certainly being in Dutch interests, followed principles already adumbrated by France and England. In fact there is little record of a specifically Dutch (as opposed to Spanish) position on the principles of the laws governing States' relations, certainly until the 1580s.

If Grotius' *Mare Liberum* was adopted as Dutch policy after its publication, then this is the earliest clear indication of the 'Dutch view' of the law of nations. The Council of State of Holland went so far as to declare that they would never "withdraw, surrender or renounce" the freedom of the seas, and by extension Grotius' "natural freedom of trade". It is difficult to find a more direct acceptance and

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<sup>69</sup> Hosack, *op. cit.*, 187.

<sup>70</sup> Potter, *op. cit.*, 54.

adopting of the arguments and conclusions of a jurist by a State (even accepting that Grotius wrote *Mare Liberum* at the commission of the VOC).

A remarkably short time later the Dutch were contravening and adapting their policy: both the freedom of the seas and of trade were denied the English in the East Indies, when the Dutch claimed a monopoly of trade to the region on the basis of the treaties they concluded with local rulers. At the London conference of 1613 the Dutch (represented by Grotius himself) asserted that "contract extinguished the liberty of the law of nations". An earlier dispute involved the right of the Dutch to fish off England without licence. At the conference of 1610 the main Dutch argument was: they had been permitted to do so since time immemorial - which was correct, despite the English protestation that the King had always received a consideration for fishing - and that they were permitted to do so by the law of nations. But they were careful also to assert their rights already granted by treaty.

So in one sense Potter is correct. The Dutch practice did appear to follow their national interests - in attempting to shut the English out of the Indies trade - rather than the principles of law - the freedom of trade and navigation - that they themselves had propounded only a few years before.

But more widely the example of the United Provinces is illuminating as the first State to 'come to legal maturity' (after its independence from Spain) after the decline of papacy and Empire as recognised sources of law. The rate of change of Dutch policy has been noted, but as far as it is possible to draw out the trends the Dutch view of international law relied most heavily on treaties to provide a juridical framework for States, followed it seems by custom and usage. The "law of nations" seems to have been referred to and regarded by the Dutch, as by many other States, as a catch-all term, undefined but necessary.

## The response to *Mare Liberum* in the mid-17th century

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## 7.1 Introduction

This chapter examines the response in the mid-17th century to the publication of Grotius' *Mare Liberum*. The work drew a strong and immediate reaction from England, since despite its origins as a justification for Dutch trading in the East Indies, its arguments were (with a few alterations) used to counter England's attempted tax on Dutch fishing in the North Sea. Its publication contributed to the steady worsening of relations between England and the United Provinces, and also to the change in English policy under the Stuart Kings from advocating to attacking the freedom of the seas.

States countered Grotius either with refutations of his arguments, such as the English and Portuguese responses, or a simple reassertion of their own position, such as those of Genoa and Venice. The series of argument and counter-argument continued throughout the century, and even if Grotius' actual influence on international law is sometimes questioned, it will be shown that his seminal work's legitimising and enhancing of the status of doctrine as part of law is indisputable. States regarded doctrine increasingly as a means of advancing their position, and as evidence of the law of nations. Most jurists and most States concurred that claims to exclusive jurisdiction could no longer be maintained, and that territorial waters had been established in law, by the time Spain did so at the Peace of Westphalia 1648.

## 7.2 England's response to Grotius

### 7.2.1 The change of direction

When James I ascended the English throne in 1603, he began to change English policy from being what Fulton calls "the great champion of *mare liberum*",<sup>1</sup> opposing Spain and Portugal, to being resolutely against it, opposing the Dutch, although no claim to actual sovereignty over the seas in the Venetian/Iberian sense was made until the reign of Charles I. The change was rapid and stark - as Butler and Maccoby put it, "the 'free sea' policy of Elizabeth led to the 'shut sea' policy of the

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<sup>1</sup> Fulton, *The Sovereignty of the Sea*, 1911, Blackwood, Edinburgh; 1976, Krauss Reprint, Millwood, New York, 118.

Stuarts"<sup>2</sup> - and the reasons for it were political and personal. Firstly, there was a perception that the advances made in trade and fishing by the seven northern provinces of the Netherlands since the declaration of independence from Spain in 1581 had made it more in England's interests to oppose the Dutch than Spain and Portugal. Secondly, there was a desire to build up the domestic fishing industry, which was suffering especially at the hands of, again, the Dutch. And thirdly, the King had pretensions to revive the old claims of the Plantagenets to a "lordship" over the seas. Another factor, perhaps initially the main one, was that James came from Scotland, which had a far less liberal policy than England towards foreign fishermen, and this attitude, it seems, came with him.

When England and Scotland united under a single monarch, the problem arose of the very different systems in the two countries for delimiting maritime belts off the coast. In England, as we have seen, there were no restrictions on foreign fishermen coming very close to the shore, whereas Scottish fishermen jealously guarded their exclusive rights and "Reserved Waters", with force if necessary. The two positions reflect the respective importance to the local economies of the fishing industry: the livelihood of the people of Scotland depended on fishing to a far greater degree than was so for the English. The proposed Treaty of Union 1604 enshrined the Scottish rights, reserving fishing off Scotland to the locals up to 14 miles from the coast,<sup>3</sup> thus defining the old Scottish 'land-kenning', and echoing the line of sight set by Philip II for the Dutch in 1563 (ch.5, *ante*). The Scottish Parliament ratified the Draft Treaty, but the English Parliament found objection to certain clauses (unrelated to fishing) and did not ratify it. The Treaty never came into force, therefore, although it seems to have remained of great authority.

### **7.2.2 Anglo-Spanish negotiations**

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<sup>2</sup> Butler and Maccoby, *Development of International Law*, 1928, Longmans, London, 42. Given this phrase it is rather odd that Butler and Maccoby go on to argue (p.42). *contra* the argument maintained here, that there was no change of maritime policy as such, rather it was "but another way of saying [England] passed from an offensive policy against the Iberian powers to a defensive one against the Dutch".

<sup>3</sup> *S. P. Domestic, Elizabeth*, 1604, x.

When James replaced Elizabeth on the English throne the other anti-Spanish European States were concerned that he would - as a natural peace-maker - end the war. At first they persuaded him to continue in alliance against Spain,<sup>4</sup> but he soon reverted to type. By the Treaty of London 1604,<sup>5</sup> signed on 18/28 August, peace was finally agreed between Spain and Great Britain. From the start he had had no time for what he saw as a personal quarrel between Elizabeth and Philip II. Barely three months after his coronation he had issued a proclamation that Spanish ships and goods taken as prize after a certain date should be restored.<sup>6</sup> And despite agreeing to ally with France against Spain, a few months later he was looking for ways of reaching a compromise, and negotiations began with a Spanish deputation in London. His instructions to his commissioners were very conciliatory. On the important question of English trade with the Indies, while it was

"disconsonant with trewe amitie to forbid their friends those common liberties [and] in former treaties there have been contrarie clauses, which have given freedome of trade into all their domynions [to avoid appearing unreasonable] you shall let them knowe that, to avoyde all inconveniences that may peradventure happen in places so remote, when the subjects of other princes shall fall in companie one with another, where their lawes and discipline cannot be so well executed, wee are contented to prohibite all repaire of our subjects to any places where [the Spanish] are planted, but only to seeke their traffique by their owne discoveries in other places..."<sup>7</sup>

This was a great shift from the time of Elizabeth. For instance, in her instructions to the commissioners negotiating at Bourbourg in 1587 where a similar

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<sup>4</sup> Treaty of Hampton Court 1603, signed 30 July/9 August, between France and England and Scotland: *S. P. Foreign, Treaties*, no.50; Dumont, V, ii, 30. See further *Calendar S. P. Venice, 1603-7, passim*.

<sup>5</sup> Treaty Roll, no. 216. Rymer, XVI, 585-96; Dumont, V, ii, 32-36, 625-31

<sup>6</sup> Rymer, XVI, 516-17; Davenport, *European Treaties bearing on the History of the United States and its Dependencies*, 1917, Carnegie Institute, Washington, 246.

<sup>7</sup> *S. P. Foreign, Spain*, bundle 10; *B. M. Cotton MSS, Vesp. C. XIII F.61*.

question had arisen, she was willing only to submit to orders from the time of Charles V in the West Indies, and orders from under Sebastian in the East Indies: "And if those generall answeres shall not content them, then ye shall require of them, what other speciall article they wolde reasonably desire, for that ye are not warranted otherwise to yeelde to them."<sup>8</sup>

The Spanish rejected James' formula of a prohibition only where Spaniards were "planted" - which was quite a common idea<sup>9</sup> - and insisted that the English be prohibited from any part of the Indies, or that England should agree to a 'beyond the line' agreement for the Indies. The English commissioners argued that a denial of reciprocal trade was contrary to the law of nations; the Spanish replied that the equality of nations could be limited by treaty, which ought to happen in the Indies since they were a new world. Another Spanish argument was that 'beyond the line' Old World doctrines had no force: different rules applied there. Coming to no better agreement, the two sides left the question of general intercourse "to the liberty of interpretation of former treaties and the observance and use thereof".<sup>10</sup> But this allowed for differing interpretations, which duly followed. The old English practice of interpreting mutual intercourse treaties with Spain as permitting trade in the Indies was reverted to.<sup>11</sup> Spain interpreted the treaty as excluding the English from the Indies, and resolutely set itself against English trade there. But the tide of law and history was against it, and it could hold to this position only until 1630, when by the Treaty of Madrid it accepted that prizes taken beyond the line should be restored,<sup>12</sup> and saw as inevitable the steady seep of English colonisation into America.

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<sup>8</sup> *S. P. Foreign, Flanders, 1585-87; B. M. Cotton MSS, Vesp. C. VIII.*

<sup>9</sup> It appears, for instance, in the charter of the East India Company.

<sup>10</sup> *Harleian MSS, 35. Davenport, op. cit., 248.*

<sup>11</sup> See letter from Cecil to the Ambassador in Paris, *S. P. Foreign, Spain*, bundle 10.

<sup>12</sup> Higgins, in Holland Rose and Newton (eds.), *Cambridge History of the British Empire*, 1929, CUP, Cambridge, I, Ch. VI, 187, 191; Davenport, *op. cit.*, 249.



### 7.2.3 The extent of England's jurisdiction

Many Spanish ships were being captured by the Dutch off English coasts, and the Spanish Ambassador would often sue, usually unsuccessfully, for their restoration, in the English Admiralty Court. In argument before the court, Spain's advocate was Alberico Gentilis, Regius Professor of Civil Law at Oxford.<sup>13</sup> He asserted that England's jurisdiction extended far into the sea, meaning that many of the Dutch captures had occurred within it and thus could not be good prize. His argument was that under the Treaty of London England was obliged to protect Spanish subjects throughout its dominion and that either England's jurisdiction extended to 100 miles from the coast,<sup>14</sup> or England had dominion far out into the sea (although he does not appear to have suggested a precise limit) even as far as America.<sup>15</sup> Since the proclamation of the King's Chambers was subsequent to the treaty, the jurisdiction under the latter ought not to be limited by the former. The Court rejected this view, however, holding that the King's jurisdiction ran only in the King's Chambers<sup>16</sup> and only captures within their bounds were good prize and were to be restored. It also said that the boundaries delimited had been recognised in similar cases by common usage long before the proclamation. It was, therefore, not significant that the treaty was prior to the proclamation.<sup>17</sup>

The Court thus dismissed the idea that England's jurisdiction went up to 100 miles, as had been suggested by Gentilis. However a letter written by the Foreign Secretary, Salisbury, to the English Ambassador to Madrid, Cornwallis, suggests that a different view may at least have been circulating in private in England. In defending a proclamation of 1609 prohibiting unlicensed fishing off England's coasts (on which,

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<sup>13</sup> See generally Van der Molen, *Alberico Gentilis and the Development of International Law - His Life, Work and Times*, 2nd ed., 1968, AW Sijthoff, Leyden.

<sup>14</sup> Taking this distance from his Italian forebear Bartolus. See *ante*, ch.2.

<sup>15</sup> Gentilis, *Hispanicae Advocationis Libri Duo*, 1613, Hanover; (tr. Abbott; ed. Scott), 1966, Classics of International Law, Wildy and Son, London.

<sup>16</sup> Fulton, *op. cit.*, 124.

<sup>17</sup> Meyer, *The Extent of Jurisdiction in Coastal Waters*, 1937, Martinus Nijhoff, Leiden, 25.

see *infra*), Salisbury said that a State's sovereignty was "generally received to [extend] about one hundred miles at least into the seas".<sup>18</sup> This is of some significance, if we take it, as Meyer does, to represent England's "official" position.<sup>19</sup> It was certainly very unusual for England to specify a precise distance for delimiting its jurisdiction, and only a few years previously it had accepted obligations to neutrals (eg. protecting shipping) only within the bounds of the King's Chambers.<sup>20</sup>

#### 7.2.4 Formulation of England's response to Grotius

The publication of the anonymous *Mare Liberum* drew a quick response from England, where the King angrily upbraided the ambassador to The Hague.<sup>21</sup> Grotius' comments on fishing rights, which had little relevance to the Dutch struggles against the Portuguese, were perceived, probably accurately, as aimed at England. Anglo-Dutch negotiations over fishing rights had been concluded as early as the beginning of 1608, and it seems probable that Grotius was not unaware of James' intentions.<sup>22</sup>

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<sup>18</sup> Letter of 8 June 1609: Winwood, *Memorials of Affairs of State in the Reigns of Queen Elizabeth and King James*, 1725, iii, 49.

<sup>19</sup> Meyer, *op. cit.*, 26.

<sup>20</sup> A few years later, in 1636, there was still no precise definition of what was regarded as the extent of British jurisdiction. When an admiral asked, "What answer shall I give if I be asked what I meane by the seas of the King my master (or our seas)?", the reply was: "By the King's or our own seas you are not to understand or condescend to any restrictive sense but to answer the Brittish seas and that the foure seas mentioned in our Laws are thereby ment ro<sup>ch</sup> you must not otherwise circumscribe or limitt besides they are the same ro<sup>ch</sup> in all antiquitie have been acknowledged to belong unto us, as is sufficiently proved by authentick records." See SP/9/53/25. This can be contrasted with the definitions of the Narrow Seas mentioned *ante*, in SP/9/53/33; however these were concerned with instructions to admirals as to where they should sail, rather than England's jurisdiction as a whole.

<sup>21</sup> Higgins, *op. cit.*, 203. See further Edmundson, *Anglo-Dutch Rivalry during the first half of the 17th century*, 1911, Clarendon, Oxford.

<sup>22</sup> In early 1608 the two Governments had negotiated over the "assize-herring": Fulton, *op. cit.*, 346, 347.

The first academic reply to the work in Britain or elsewhere, seems to have come in 1613 from William Welwood, a Scottish theologian and Professor of Civil Law at St. Andrews. He published a revised edition of an earlier treatise on the sea laws of Scotland<sup>23</sup> containing a new chapter ("The Community and Proprietie of the Sea") responding to the "verie learned but subtle treatise (incerto Autore)".<sup>24</sup> He argued that in the "main sea or great ocean" freedom of navigation was beyond controversy, but use of the sea could be exhausted (as on the east coast of Scotland at the time). Countering Grotius' arguments concerning the 'fluidity' of the sea, he said it was no bar to occupation: it could be divided by navigators. He suggested the Italian limit of jurisdiction of 100 miles. And in 1615 he produced a more formal work in Latin<sup>25</sup> - which thus had a wider audience - in which he expanded his arguments: he asserted the right of a State to the fisheries off its coasts, to maintain the inhabitants and to preserve the fishery.<sup>26</sup> He also asserted that the sea adjacent to a coast was and could be claimed by the coastal State, which could impose taxes for navigation or fishing.<sup>27</sup>

Grotius prepared a reply<sup>28</sup> to Welwood's second work, apparently the only rebuttal of his arguments to which he did,<sup>29</sup> although it was not published, perhaps

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<sup>23</sup> *Sea-Law of Scotland: shortly gathered and plainly dressit for the reddy use of all seafairing men*, 1590, Waldegrave, Edinburgh. He called it "a weake piece of labour".

<sup>24</sup> *An Abridgement of All Sea-Lawes: gathered forth of all writings and monuments which are to be found among any people or nation upon the coast of the great ocean and Mediterranean Sea*, 1613, London.

<sup>25</sup> Welwood, *De Dominio Maris juribusque ad dominium praecipuae spectantibus assertio brevis ac methodica*, 1615, London; 1653, The Hague.

<sup>26</sup> Higgins, *op. cit.*, 203.

<sup>27</sup> Fulton, *op. cit.*, 354.

<sup>28</sup> Grotius, *Defensio Capitis Mari Liberi Oppugnata Guilielmo Welwood*. Now in English as *Defense of Chapter V of Mare Liberum* in Wright, *Some Less Known Works of Hugo Grotius*, 1928, Leyden, 154-205.

<sup>29</sup> Higgins, *op. cit.*, 203.

so as not to inflame further James I. In this work, after trading insults with Welwood,<sup>30</sup> Grotius returned to his theme: "the sea cannot be possessed naturally, neither its entirety nor any part which may remain joined as united to its entirety" because "nothing can be apprehended unless limited corporally".<sup>31</sup> And a liquid that could not be limited, could not be possessed. The *Defensio* was concerned mainly with fishing, and on this Grotius asserted that as sea was common to all, fishing could not be prohibited in it: "fruits of what belong to no-one become the property of the occupier". He also supported the Dutch right to fish off the English coast, the matter at issue, by citing the Burgundy treaties.<sup>32</sup> Grotius here denied entirely a State's right to occupy the sea, in his enthusiasm to counter Welwood, whereas previously in *Mare Liberum* he had allowed it.<sup>33</sup> On Welwood's 100 mile limit Grotius said: "And what reason operates, if the sea can be occupied up to one hundred miles to prevent it being occupied up to 150, thence to 200 and so on? If water is property up to the 100th mile, why cannot the water which is immediately contiguous to the property be equally property?"<sup>34</sup>

In August 1614 the Lord Chancellor, Ellesmere, and the Archbishop of Canterbury, Abbot, asked the Keeper of the State Papers, Thomas Wilson, to search for records concerning the King's jurisdiction on the sea and the right to the fishery.<sup>35</sup> In 1618 John Selden, at the instance of James I, finished a first draft of a work in reply to Grotius, although it was not published as James was then asking

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<sup>30</sup> Welwood had referred to Grotius as an "addict to serve any particular desires". Grotius called Welwood "a man rather suspicious who can see what does not exist".

<sup>31</sup> Grotius, *Defensio*, in Wright, *op. cit.*, 183.

<sup>32</sup> Fulton, *op. cit.*, 356.

<sup>33</sup> *Ibid.*, 357.

<sup>34</sup> *Defensio*; in Wright, *op. cit.*, 202. Gentilis' posthumous work, referred to *supra*, was also published in 1613.

<sup>35</sup> Letter to Wilson, 24 August 1614. *S. P. Domestic, James*, vol.177, 80.

the King of Denmark for a loan, and did not want to offend him,<sup>36</sup> Selden's arguments being, of course, contrary to Danish policy as well as Dutch, although for differing reasons.<sup>37</sup>

### 7.3 Other Responses to Grotius

#### 7.3.1 In General

Outside England the publication of *Mare Liberum* seems to have had a less immediate effect, although it was directly contrary to the policies of Spain and Portugal. In fact, *Mare Liberum* was only one part of a greater movement away from monopolistic dominion, although the book has been credited with "heralding the dawn of a new epoch".<sup>38</sup> While we could agree with Fulton that "[t]he little book of Grotius was...a reasoned appeal for the freedom of the seas in the general interest of mankind", he does, perhaps, go too far in claiming that it was also "the source from which the principles of the Law of Nations have come".<sup>39</sup> Grotius went on to write a number of other treatises, but this, his first published work, has taken on a

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<sup>36</sup> This was explained by Selden in *Vindicae Mari Clausi*, 1652, 25, in a reply to Graswinckel, who claimed he wrote it to secure his release from prison after the parliamentary disturbances of 1629 in which Selden played a part.

<sup>37</sup> There is an intriguing partial refutation of Grotius' arguments in an unsigned and undated memorandum in SP/9/53/49, which seems to have been written as a result of a search for records that support England's position (which search must have been that instigated by Charles I in 1631 (*infra*) rather than that of Ellesmere, here, in 1614, since (*inter alia*) the writer mentions Grotius by name, and his authorship was as yet unknown outside the State General): "[T]hough no man can be said to have the property of the seas, because a man cannot say this water is mine...yet it is manifest that the Kings of England have and had the sovereignty and jurisdiction of those seas, that is Power to give laws and redresse injuries on the same. And therein Grossius who hath written a book of Mare Liberum is deceived, for that can properly be said onely of the Ocean and not of the bounded Seas."

<sup>38</sup> Fulton, *op. cit.*, 338.

<sup>39</sup> *Ibid.*

symbolic value, greater than would have been anticipated at the time from its contents.<sup>40</sup>

A number of works also appeared defending the Venetian position, although these were not replies to Grotius as such.<sup>41</sup> Venice's power had declined, and after the attacks of the previous century and Grotius' work which also undermined it, it felt roused to defend its position, which was also being assailed by Spain.

### 7.3.2 The Portuguese response

In 1625 a Hispano-Portuguese reply to Grotius did finally appear, by Seraphim de Freitas, a Portuguese monk based at Valladolid, which argued the Portuguese case.<sup>42</sup> Freitas' work was far more detailed and scholarly than Grotius', which had been intended less as an academic text than as a tool of Dutch policy. When *De Justo Imperio* appeared Grotius was living in exile in Paris (after escaping imprisonment in Holland) and had no inclination to defend the *mare liberum* which had now become Dutch national policy. He respected its learning however, saying it was "worthy of reply".<sup>43</sup> Freitas' arguments concerning firstly Portugal's claimed trade monopoly, and then the question of the freedom of the seas in general, will now be examined.

Freitas was concerned to answer Grotius' points in *Mare Liberum* attacking the Portuguese claim to a trade monopoly in the East Indies, and in doing so stressed the right of the territorial sovereign above the right of free commercial intercourse.

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<sup>40</sup> Indeed, perhaps it became much more widely known in Europe only due to the reaction it produced - a flurry of refutations - in England, the State immediately most directly affected (even given that it was intended to affect the Spanish and Portuguese positions) in which case it is possible to speculate that England's position would have been better served by keeping silent and ignoring Grotius's work.

<sup>41</sup> See generally Fulton, *op. cit.*, 351, n.1.; Verzijl, *op. cit.*, 11, *et seq.*

<sup>42</sup> Freitas, *De Justo Imperio Lusitanorum Asiatico, adversus Grotii Mare liberum*, 1625, Valladolid. On Freitas see generally, Knight, *Seraphim de Freitas: Critic of Mare Liberum*, 1926, Grotius Society, London; Alexandrowicz, *op. cit.*, 49, *et seq.*

<sup>43</sup> Epistola, no.144, 796, Hugonis Grotii, *Epistolae*, 1687, Amsterdam; cited by Alexandrowicz, *op. cit.*, 50. See further, Alexandrowicz (1959) *BYIL* 163 "Freitas versus Grotius".

Grotius had asserted a general freedom of trade and navigation, which Freitas counters by saying that Portugal's claim was based on its right of freedom of propagating the Christian faith in non-Christian lands.<sup>44</sup> In chapter one he says that the law of nations, which must determine the issues, is based on the natural law ideology. The right of free trade and navigation with which Grotius was so concerned, is not an over-riding principle of the law of nations, and thus "the sovereign has the right to refuse admission of foreigners to his territory or commerce and to forbid his subjects trade or intercourse with them."<sup>45</sup> He points out an apparent contradiction in Grotius' argument: Grotius says that Portugal remains in the East Indies on sufferance; but also that the law of nature gives a right of trade and navigation. If the former is right, the latter is revocable.<sup>46</sup>

Grotius had argued that a local ruler could not prevent a foreign power trading in his territory: it was against the general freedom to trade. But Freitas rejects this, likening it to a foreigner entering a ruler's house against his will. There is however an exception (or a loophole) to this general rule: Freitas allows States that had previously been admitted by treaty to a territory to oblige a reluctant ruler into allowing trade in his territory, by force if necessary.<sup>47</sup> Thus Portugal was permitted to trade where it had made treaties, whereas the Dutch (and French and English) were not. The irony in the situations of Grotius and Freitas will be readily apparent: Grotius argued that there was a general freedom of trade, and later (at the London Conference, 1613) that it could be restricted by a State which had made treaties; Freitas argued that there was no general freedom of trade, but in a sense there was for a State which had, again, made treaties.<sup>48</sup>

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<sup>44</sup> Alexandrowicz, *Law of Nations*, 50.

<sup>45</sup> Freitas, *op. cit.*, 26.

<sup>46</sup> Alexandrowicz, *op. cit.*, 51.

<sup>47</sup> Freitas, *op. cit.*, 41.

<sup>48</sup> It is interesting to speculate whether Freitas had come across the arguments put forward by Grotius at the London Conference - perhaps contradicting his views in *Mare Liberum* - which was more than ten years before the publication of *De Justo Imperio*.

Freitas asserted above all that Portugal had a right above other States to the East Indies trade because of its anti-Islamic crusades.<sup>49</sup> His argument runs thus: the heart of Islam was now well-established in Constantinople, and the Ottoman Empire drew much of its resources from Asia. If the Islamic spice trade from the East Indies to the Red Sea could be disrupted, the Ottoman cause would be seriously weakened. The Pope had delegated the role of attacking Islam in the east to the Portuguese among European powers. *Ergo*, Portugal had a right to free access to the East Indies.

Regarding the nature of a State's rights in the sea, Freitas agrees with Grotius that the sea is *res communis* and that possession in the High Seas is impossible,<sup>50</sup> but he allows a "quasi-possession of trade and navigation".<sup>51</sup> Grotius had mentioned that the inhabitants of the coasts of Asia used the waters nearest the coast for fishing and navigation, and were never prevented from doing so by the Portuguese. The Dutch writer meant this to demonstrate that Portugal had not exercised a complete *mare clausum* there, but Freitas turns it round to show that there the seas were not completely free: coastal States did have some rights.

As Alexandrowicz notes,<sup>52</sup> the idea of what would now be called territorial waters runs through Freitas' work. Inside what limits does he allow the rights - which he thought included some jurisdictional right, as well as trade and navigation - to run? He comes back to the idea of effectiveness: the breadth of the territorial waters depends on the capacity of the ruler.<sup>53</sup> Through this device Freitas asserted Portugal's right to control navigation near its possessions in the East Indies, and the routes of access to them.

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<sup>49</sup> Alexandrowicz, *op. cit.*, 54.

<sup>50</sup> As Alexandrowicz notes, *ibid.*, 67-8, Freitas here implicitly rejects the arguments of Selden and Welwood for *mare clausum*.

<sup>51</sup> Freitas, *op. cit.*, 245.

<sup>52</sup> Freitas "anticipates modern trends in maritime law to which the Geneva Conventions of 1958 gave expression": Alexandrowicz, *op. cit.*, 70; and see also 69.

<sup>53</sup> Freitas, *op. cit.*, 302.



We can see how Freitas justifies Portugal's closing of the Indian Ocean to any other State wishing to trade there. If the trade was with a Portuguese possession, then Portugal had the right to exclude any other State from the coastal waters. If the trade was with a State that was not a Portuguese possession, then it was likely that Portugal would be at war with it; and if so, Portugal - which was (as we have seen) fighting a war against Islam - thus had the right to prevent other States trading with (ie. 'supplying contraband to') its enemy. And if the trade was with a State that was not Portuguese, and with which Portugal was not at war, then Portugal had an over-riding right of access to the territory for spreading the Christian faith.<sup>54</sup> Under Freitas' reasoning, the Dutch were left with no way in.

## 7.4 Selden's *Mare Clausum*

### 7.4.1 English practice

Under Charles I England's policy reached its most extreme, in enforcing the flag-salute, preserving the neutrality of the King's Chambers, and putting forward notions of quasi-Plantagenet supposed English "Lordship" over the seas. He also had plans for a fishery scheme involving the whole of Britain, and wanted to build up the navy using the "Ship-Money" writs. The idea of resurrecting long-forgotten historical claims to the sea seems to have come upon the King very suddenly - perhaps sparked off by rumours that the French, who were already strongly contesting the flag-salute, wanted sovereignty of the Channel and even that it had been granted to them by the Pope<sup>55</sup> - and in 1631 Charles instigated a great searching of State records and papers for documents and evidence in support of his claims, since none of the works already published, writes Fulton, "was sufficiently profound or authoritative to furnish reasonable justification for [them] in the eyes of the world".<sup>56</sup> So while in papers written by Coke regarding the fishery scheme in 1629 and 1630 there is no mention

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<sup>54</sup> Freitas, *op. cit.*, 154.

<sup>55</sup> *S. P. Domestic, Charles I*, vol.199, 51.

<sup>56</sup> Fulton, *op. cit.*, 364.

of the King's sovereignty over the seas, in a paper written in 1631 there are, as Fulton notes, many.<sup>57</sup>

While Charles liked to see his claims merely as the reassertion of historical rights which had since Plantagenet times fallen into temporary abeyance, they were in fact quite different from those put forward by the first three Edwards. It was not until the English fishing industry seemed to be under fatal threat from the Dutch that Charles acted. As Wade writes,

"The one claim had its origin in the suppression of piracy, the other in commercial rivalry; the one sprang from the personal ambition of two exceptionally able monarchs, the other from intense jealousy of the success of active and industrious competitors."<sup>58</sup>

Viscount Dorchester,<sup>59</sup> the Secretary of State, wrote to the Clerk of the Privy Council, Boswell,<sup>60</sup> asking for information which would help establish the King's admiralty in the narrow seas. Boswell replied that he believed that the Keeper of the Records in the Tower, Sir John Boroughs, had discovered an "original" manuscript concerning the first institution of the *Rôles d'Oléron* by Edward I. It was in this document that the sovereignty of the King of England over the seas had first been asserted, and since at the time of the *Rôles'* institution England held Brittany, Normandy and Aquitaine, the King of France would not, Boswell said, be able to assert any sovereignty there.<sup>61</sup> Boroughs had also come across the roll *De Superioritate Maris Angliae* dating from 1338, which supported the claims of Edward III to a sovereignty of the sea.<sup>62</sup> Charles did not consider the already-published work by Welwood to be sufficient justification for his claims as it argued only for a

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<sup>57</sup> *Ibid.*, 211, 212. Coke's papers are in *S. P. Domestic, Charles I*, vol.229, 79.

<sup>58</sup> Wade, (1921-2) 2 *BYIL* 107 "The Roll of De Superioritate Angliae - the Foundation of the Stewart claim to the Sovereignty of the Sea".

<sup>59</sup> Formerly ambassador to The Hague, as Sir Dudley Carlton.

<sup>60</sup> Soon to become ambassador to The Hague.

<sup>61</sup> *S. P. Domestic, Charles I*, vol.200, 5.

<sup>62</sup> See *ante*, ch.2.

jurisdiction in coastal waters<sup>63</sup> and he instructed Boroughs to prepare a defence showing, in Boroughs' words, "the true state of the Question concerning the Dominion of the British Seas, as well what Histories our own Records would afford".<sup>64</sup>

Although it seems that not all those who gave an opinion were convinced of the existence of the rights that Charles desired,<sup>65</sup> in 1633 Boroughs completed a memorandum, entitled *Dominium Maris*, on English rights to the sea.<sup>66</sup> However Charles was apparently not satisfied with it - it was perhaps too crude to be his main thrust against the more elaborate work by Grotius, containing virtually no legal argument - and it was not yet published. However it did serve Charles' immediate purpose in one way. Boroughs had uncovered many Plantagenet rolls, including some which asserted sovereignty: for instance, a commission from 1336 to one of Edward III's admirals.<sup>67</sup> Its form of words seems to have resonated strongly with Charles' own ambitions and he adapted the words of the commission for the ship-money writ, paraphrasing them almost exactly:

"For as much as We and Our Progenitors, Kings of England, have been always heretofore masters of the aforesaid Sea, and it would be

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<sup>63</sup> Meyer, *op. cit.*, 26.

<sup>64</sup> Boroughs, *Sovereignty of the Seas proved by the Records, History and Municipal Laws of this Kingdom*, 1633; 1920, Green, Edinburgh, Preface, 41. See also Wade, *op. cit.*, 99; Higgins, *op. cit.*, 203.

<sup>65</sup> An unsigned memorandum (possibly an 'Opinion of the Doctors'? - see *ante*, ch.5), which is undated but from the time of Charles, states: "Note, that the King ruleth on the sea by the Lawe Imperiall, as by the Roll of Oleron, and others, but that is only in the particular case of shipping and for Merchants, and Mariners; But the King hath neyther the propertie of the sea, nor the Realm, and personall profitts there ariseing..." SP/9/6 f.2.

<sup>66</sup> *Dominium Maris Britanici assertum ex Archivis Historiis et Municipalibus Regni Legibus*, Harleian MSS, 4314.

<sup>67</sup> See *ante*, ch.2.

very irksome to us if that princely honour in our time be lost or in anything diminished."<sup>68</sup>

The *Ship-Money case* soon followed, with the King's sovereignty of the sea at the heart of the Crown's case.<sup>69</sup> The origins of the case also offer a useful example of Charles' attempts to assert his sovereignty.

The Dutch, with five times as many ships as England in the Indies, were winning the battle for the spice trade. However in 1619 a conciliation treaty was signed, setting proportions of naval and military force for the protection of the nations' commerce.<sup>70</sup> It also split the Moluccas trade between the two States in the ratio 2:1 in favour of the Dutch. In the seas of Europe they had declared they would capture any ship trading with Spain. But in July 1634 Spain intercepted a certain letter sent by Richelieu to the States General. It notified England and suggested the two States combine their armies to take Dunkirk and Gravelines. Charles was agreeable to this, on condition that Spain would provide him with the financial resources necessary. The English fleet began to be built up, on the pretext of defending Britain's coasts from Barbary pirates and protecting the fisheries.

England and Spain concluded a treaty in August of the same year, the history of the drafting of which is instructive. Charles' first draft expressed the English position. It read: "the English ships shall use their best means that the King of Spain shall receive no wrong, and that his Majesty's sovereignty and dominion in these his seas, shall be protected from violence and insolences on both sides". Spain objected, saying that "it is certain kings do enjoy the sovereignty in what ever is their's, and do not acquire it, where they have it not, though they use the word; but in treaties such terms are commonly avoided." Charles thus changed the words "his Majesty's sovereignty and dominion in these his seas" to "his Majesty's subjects". And so, "while the Government was insisting on the 'sovereignty of the seas' from one part

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<sup>68</sup> Wade, *op. cit.*, 103. But cf. the actual words of the commission in ch.2.

<sup>69</sup> *R v. Hampden*, 3 St. Tr. 825. The court held that the King was sovereign of the sea and so subjects could be taxed to defend that sovereignty. See Wade, *op. cit.*, 104; Potter, *op. cit.*, 40.

<sup>70</sup> Anand, *op. cit.*, 95.

of the world ... such was the delicacy of the claim that it was waived in a treaty of alliance with a friendly power; a remarkable insistence of the accommodating style of politics."<sup>71</sup>

#### 7.4.2 The publication of *Mare Clausum*

Boroughs' text was seen and used extensively by Selden, who in December 1635 finally published a much enlarged and expanded version of his earlier unpublished work entitled *Mare Clausum*.<sup>72</sup> Unlike Grotius' legalistic approach, Selden produced a collection of historical arguments as a vindication of England's position, quoting English and foreign practice and legislation, to accomplish which he "disembowelled his classical and theological library and the muniment chambers at the Tower".<sup>73</sup> His sources were thus wide and various and he went back as far as the pre-Roman Britons to find evidence in support of the claim to sovereignty.<sup>74</sup> Selden's methods and sometimes dubious use of sources were of course standard practice for contemporary historians, and his work was highly regarded for its scholarship. It remained influential for decades, perhaps centuries, to come.<sup>75</sup>

He asserts generally that Elizabeth's objection to Portugal's claimed dominion in the East had concerned not the legality of the claims to a dominion over the sea, but whether or not it had been established, since its naval force was not sufficiently strong. On Elizabeth's famous rebuff to Mendoza (that "the use of the sea and air is common to all...") Selden says it came from adhering too closely to civil law ideas,

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<sup>71</sup> D'Israeli, *Commentaries on the Life and Reign of Charles I, King of England*, 1830, Henry Colburn, London, 37.

<sup>72</sup> Selden, *Mare Clausum, sue de Domini Maris Libris Duo*, 1635, London.

<sup>73</sup> Butler and Maccoby, *op. cit.*, 42. See also Potter, *op. cit.*, 58.

<sup>74</sup> The sources included the Bible, Neptune, etc. Even Laughton says that the arguments thus produced were "utterly worthless of course": Laughton, (1866) 5 *Fortnightly Review* 721 "The Sovereignty of the Sea".

<sup>75</sup> See generally, Knight, *Seraphim de Freitas*, 1926, 7.

and was clearly contrary to the law of England as well as the law of nations.<sup>76</sup> Dominion in the seas could in fact be asserted and maintained. On Grotius' point that the sea could not have boundaries, Selden replies that meridians could be used and he marked out the "British Seas".<sup>77</sup> Selden also gave more modern examples of a dominion being exercised or recognised over the British Seas: Elizabeth had refused to allow Denmark, Sweden and the Hanse towns to carry corn to Spain, and French fishermen requested permission before fishing for sole for Henry IV, and if they did not they might be captured.<sup>78</sup> However Selden did concede a right of innocent or "innocuous" passage for merchants and travellers - what Butler and Maccoby call,

"that fatal bridge over which the hardest defenders of maritime sovereignty were ultimately to be forced, destined to find on the other side no stopping place possible until they reached the hurly-burly and promiscuousness of 'the freedom of the High Seas'".<sup>79</sup>

Charles was obviously pleased with Selden's magnum opus since he ordered copies to be kept perpetually in the Council chest, the Court of Admiralty, and the Court of Exchequer.<sup>80</sup>

### 7.4.3 Responses to Selden

Selden's work was perceived almost as a declaration by the King himself,<sup>81</sup> which in effect it was, and coming with the news of the formation of a huge English fleet (which soon put to sea, scattering the Dutch busses), drew quick responses from the Dutch. They had received an early copy through the ambassador in London, Joachimi, who was secretly ordered to come back for a consultation, under the pretence of attending his wife's funeral. They sent an Ambassador Extraordinary,

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<sup>76</sup> Wade, *op. cit.*, 114.

<sup>77</sup> Fulton reproduces the map: *loc. cit.*, ii.

<sup>78</sup> Butler and Maccoby, *op. cit.*, 43.

<sup>79</sup> *Ibid.*

<sup>80</sup> D'Israeli, *op. cit.*, 38.

<sup>81</sup> Meyer, *op. cit.*, 28.

who took the opportunity of the birth of a princess to bring many gifts, to try to negotiate with the King. He succeeded only in reducing the annual contribution for the fishery.<sup>82</sup>

The States General passed a resolution on 28 April 1636 engaging the lawyer Dirck Graswinckel, a pupil of Grotius, to prepare an official response.<sup>83</sup> However, by the time he had finished a reply to Selden in the following year, the political situation was more favourable to Holland: it appeared that Charles would cease his campaign against the Dutch fishermen. Graswinckel's book was therefore not published. In 1637 Pontanus, Professor of Philosophy and History in the College of Harderwyck, Guelderland, published a response<sup>84</sup> which criticised the English claims to sovereignty in the Northern Seas. His argument was restricted in scope - it was particular to England, rather than general - due to his employment as Historiographer to the King of Denmark,<sup>85</sup> who still claimed dominion over the Icelandic seas and rights over the Sound. Indeed, Reddie claims that Pontanus only reclaimed part of the North Sea for Denmark from the area set out as English by Selden,<sup>86</sup> rather than assert a neo-Grotian position. A response to Selden was never published by Grotius, although he was aware of, and even respected, the work: his loyalties now lay elsewhere than in the policies of Holland, since he was in exile from the Republic and was employed as the Swedish ambassador to France.

### 7.5 Other works

Over the next few years a large number of works were published supporting the position of almost every State, mostly written with a distinctly 'national' perspective. It is worth recording some of the better known. In 1651 Boroughs' work,

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<sup>82</sup> D'Israeli, *op. cit.*, 41.

<sup>83</sup> Fulton, *op. cit.*, 374, gives no reference.

<sup>84</sup> Pontanus, *Discussiones Historicae de Mare Libero, adversus Johannem Seldenum*, 1637.

<sup>85</sup> Meyer, *op. cit.*, 28.

<sup>86</sup> Reddie, *Researches Historical and Critical in Maritime International Law*, 1844, Clark, Edinburgh, 109.

which had been translated into English, was finally published in response to the resurrection of the question of maritime rights by the Dutch,<sup>87</sup> and a series of publications then followed that played a part in the growing Anglo-Dutch tensions that would soon result in war. In 1652 a translation into English of Selden's *Mare Clausum* was published in which the translator, Marchamont Needham, made certain additions designed to appeal to English patriotism, and the dedication to Charles I in Selden's original was replaced by one to the Commonwealth.<sup>88</sup> Graswinckel replied to this (in a work written to counter the Italian Pietro Battista Burgus' claims regarding the Ligurian Sea<sup>89</sup>) and included a personal attack on Selden.<sup>90</sup> Selden responded<sup>91</sup> and drew further reply from Graswinckel in 1653 in the form of an attack on Welwood's work of 40 years earlier.<sup>92</sup>

In 1654 Shoockius, a Dutchman, produced a work which favoured the (new) Dutch position but was contrary to Grotius: he argued for the necessity of dominion over the sea, and concluded that it belonged at the time to the Dutch.<sup>93</sup> In 1656 Henry Boeclerus argued for a freedom of the sea in general without reference to particular States.<sup>94</sup> Venice still maintained its claim to the Adriatic, and was strict enough in 1630 to demand that the Infanta Maria - who was sailing to Trieste to marry the King of Hungary, the Emperor's son - travel not in her brother's ships, but

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<sup>87</sup> Boroughs, *op. cit.*

<sup>88</sup> Selden, *Mare Clausum: Of the Dominion and Ownership of the Sea*, 1652, London. It was republished in 1663, rededicated to Charles II.

<sup>89</sup> Burgus, *De Dominio Serrenissimae Genuensis Reipublicae in Mare Ligustico*, 1641, Rome.

<sup>90</sup> Graswinckel, *Maris Liberi vindiciae adversus Petrum Baptistam Burgum Ligustici Maritimi Domini Assertorem*, 1652, The Hague.

<sup>91</sup> Selden, *Vindicae Maris Clausi, contra Graswinckelium*, 1653. See further Reddie, *op. cit.*, 109.

<sup>92</sup> Graswinckel, *Vindicatio Maris liberi, adversus Guil. Wellvodum Britannici domini assertorem*, 1653, The Hague.

<sup>93</sup> Shoockius, *Jus et Imperium Maritimum*, 1654, Amsterdam.

<sup>94</sup> Boeclerus, *Dissertatio de Minoe*, 1656.



in those of Venice.<sup>95</sup> The claim was supported by Julius Pacius.<sup>96</sup> Genoa's claims to the Ligurian Sea, still asserted, were supported by Burgus, on the grounds of occupation, universal consent and continuing confirming acts.<sup>97</sup> Opinion in France was, it seems, equally opposed to the Dutch claims, and in 1637 the French jurist Jacques Gothofredus published a work maintaining that the sea was capable of appropriation.<sup>98</sup>

### 7.6 The emergence of fixed limits to jurisdiction in State practice

The practice of asserting a fixed limit to jurisdiction, which began outside the Mediterranean in the late 16th and early 17th centuries, was continued more widely in the mid-17th century. For instance, a change can be observed in Danish policy, from trying to forbid all navigation or fishing off a coast to prohibiting navigation within a certain distance.<sup>99</sup> Christian IV issued an Ordinance proclaiming 'territorial waters' around the Faroe Islands in 1616 up to a ship-to-shore sight limit,<sup>100</sup> and he asked James I, his brother-in-law, to stop Scottish fishermen going within that limit. James obliged with a Scottish Order in Council forbidding them to go within sight of the islands, which was understood in Scotland to mean within 14 miles, as expressed in the draft Treaty of Union with England 1604.<sup>101</sup> On 21 April 1643 (and again on 14 February 1651) Christian issued a proclamation that all foreigners were forbidden to come within 10 leagues of Spitzbergen, the area being reserved for

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<sup>95</sup> Hall, *A Treatise on International Law*, 7th ed., 1917, Clarendon Press, Oxford, 147.

<sup>96</sup> Pacius, *De Domino Maris Hadriatici*, 1669.

<sup>97</sup> Burgus, *op. cit.*

<sup>98</sup> Gothofredus, *De Imperio Maris et de jure naufragii colligeni legeque Rhodia*, 1637, Geneva. Reddie, *op. cit.*, 109.

<sup>99</sup> See generally, Kent (1954) 48 *AJIL* 537 "Historical Origins of the Three Mile Limit".

<sup>100</sup> Raestad, *Kongens Strømme*, 1912, Kristiania, 206; translation by Crocker, *op. cit.*, 517.

<sup>101</sup> See *supra*.

the Danish Spitzbergen Company.<sup>102</sup> And fishing by foreigners was prohibited within 6 leagues of Iceland by an Ordinance of 1631:

If Any foreigners, whether whales hunters or English sea fishermen, come within four geographical leagues, or if those from other nations come within six leagues of the coast, they shall be attacked.<sup>103</sup>

Meyer shows that this, and the limit around Spitzbergen, were not intended initially as a maximum limit of sovereignty - although they may later have acquired that meaning - but merely for fishing.<sup>104</sup> The fact that English sailors were permitted to come up to four Norwegian leagues was a mark of the good relations between the two countries, but in fact Charles seems to have been asked by Christian to keep English fishermen back to six leagues.<sup>105</sup> In 1682 the distance was scaled down to four leagues (and later in 1836 to one league), due to pressure from other States, both diplomatic and naval.<sup>106</sup>

States which had previously asserted a less well defined jurisdiction over adjacent waters found limits to jurisdiction to be useful tools of policy. France championed the cannon-shot rule, which method of delimiting territorial waters, as Swarztrauber points out,<sup>107</sup> served its purposes well. England claimed the seas on

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<sup>102</sup> Meyer, *op. cit.*, 490, giving no further reference.

<sup>103</sup> Raestad, *op. cit.*, 216.

<sup>104</sup> Meyer, *op. cit.*, 490.

<sup>105</sup> Kent, *op. cit.*, 538.

<sup>106</sup> *Ibid.* Although outside the remit of this study (which concludes with the Treaty of Westphalia) it is worth recording that later in the 17th century, when the navies of England and Holland were demoralised after being defeated by France off Beachy Head (1690), Denmark reasserted its claims to dominion in the Northern Seas, forbidding privateering within sight of the coast (Order in Council, 13 June 1691: Raestad, *op. cit.*). England and Holland agreed to this and similar orders (Treaty between Great Britain, Denmark and the States General, signed 3 December 1696: Paper Office, f. 16; cited by Chalmers, *Collection of Treaties*, 1790), since they would affect France's capacity to take prizes, but in the 18th century they protested against it. On Denmark's practice at this time see generally, Kent, *op. cit.*, 539, *et seq.*

<sup>107</sup> Swarztrauber, *op. cit.*, 26.

France's Atlantic coasts through its former title to Brittany and Normandy,<sup>108</sup> it was therefore in France's interest to assert that the State's dominion extended only as far as the range of its cannon.<sup>109</sup> By 1685 it was being treated as established law that this was the case.<sup>110</sup>

### 7.7 Spain's final capitulation

A brief account of political developments leading up to the Peace of Westphalia will now be given. With the prospect of renewed war against Spain, the United Provinces looked to renew their alliance with France and England. In 1624, with Richelieu's ascendancy leading to a new French desire to restore its 'natural' frontiers (ie. the Rhine and the Pyrenees) and weaken Habsburg power, negotiations began over a French-Dutch alliance. The French wanted close cooperation in the States' commercial activity, west and east - involving joint voyages - but the Dutch experience of such ventures with the English (and the memory of the Amboina massacre only a year old) did not augur well for agreement. Ultimately the treaty<sup>111</sup> was silent on the matter (although it anticipated further negotiation) and made only a few provisions for French financial help against Spain, and Dutch assistance against Barbary pirates in the Mediterranean.

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<sup>108</sup> Boroughs, *Sovereignty of the British Seas proved by records, History and the Municipal Lawes of this Kingdom*, 1633, London; 1920, Green, Edinburgh, 61-62.

<sup>109</sup> The first recorded use of range of the cannon as the limit of territorial waters was at the Anglo-Dutch conference in 1610 (see, *ante*, ch.6). There is some evidence of cannon being used previously to assert authority over a strait where both shores are part of the same State (Moristos, *Orbis maritimi historia*, 1643, Dion, 469) or to enforce the naval salute (Stypmannus, *Tractatus de jure maritimo et Nautico*, 1652, II, 327-28).

<sup>110</sup> Letter of 19 January 1685 to De Croissy: A. N. Mar./F/2/7. Raestad quotes the French Ambassador to Copenhagen protesting at a Danish claim to larger territorial waters: "Respect of the coasts of any part of Europe whatsoever has never been extended further than cannon range, or a league or two at most." Raestad, *La Mer territoriale: Études historiques et juridiques*, 1913, Pedore, Paris, 111.

<sup>111</sup> Treaty of Compiègne 1624, signed 10 June. *Correspondence Politique, Hollande*, vol. IX, ff.270-252. Text also in Dumont V, ii, 461; Davenport, *op. cit.*, 1917, 287. See further *Calendar S. P. Venice*, 1623-25, preface, xlvi, xlvii.

James I was unwilling to make any offensive overtures towards Spain - indeed, he was still hoping to marry his son to the Infanta - and despite Dutch pressure would conclude only a defensive alliance with them.<sup>112</sup> But Charles I's policy was very different, aimed at war in the continent. Spain and the Catholic League had occupied Bohemia and the Palatinate, and King Frederick of Bohemia, the elector palatine, was Charles' brother-in-law. The House of Commons was more in favour of a naval war, however. The customary Dutch diplomatic dexterity juggled relations with England and France,<sup>113</sup> and the final agreement reached with the former - far stronger than the treaty of 1624 - did not offend the latter. The Treaty of Southampton 1625,<sup>114</sup> signed 7/17 September, provided for an alliance "afin d'assaillir le Roy d'Espagne a guerre ouverte, en tous ses royaumes, terres, subjects, et droits, en tous lieux, deçá et dela la ligne [ie. the equator] par mer et par terre."<sup>115</sup> Various other provisions annulled letters of marque and reprisal against the subjects of either party and dealt with contraband, etc. The alliance was to last as long as Spain continued its war against the Dutch, or occupied the Palatinate.

Anglo-Spanish negotiation took place in Madrid with the Indies trade, again, being one of the main issues. The Spanish asserted that the English should trade only where they had before 1575, but when the English Commissioner, Cottington, sought the King's views he was told that it was unacceptable since James' reputation had suffered when it seemed that Spain had excluded English ships from the Indies trade more than other States.<sup>116</sup> Charles suggested that the exclusion should apply only where it had "ante bellum". Spain insisted it be clear that the war concerned was

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<sup>112</sup> Anglo-Dutch Alliance 1624, signed 5/15 June. Dumont V, ii, 458.

<sup>113</sup> *Calendar S. P. Venice*, 1625-1626, vol. XIX, 161.

<sup>114</sup> *S. P. Foreign, Treaties*, no. 296. Dumont V, ii, 478. See *Calendar S. P. Venice*, 1625-1626, xix, passim.

<sup>115</sup> Art. 1. *op cit.*

<sup>116</sup> Letter from Dorchester to Cottington, 27 September 1630, in the *S. P. Foreign, Spain*, no. 25. See further a letter from Cottington, 17 November 1630, *ibid.* See further Davenport, *op. cit.*, 307.

Elizabeth's, not Charles'. After months of negotiation agreement was reached, resulting in the Treaty of Madrid 1630,<sup>117</sup> signed 5/15 November.

Spain was unable to maintain its previous hold over the Americas. The establishment of colonies, as settlements rather than mere trading stations, began to increase, especially with religious persecution in France and England and the Dutch war of independence producing a wave of emigration from Europe. The union with Portugal had ended in 1640 and the Habsburgs were losing the war in Europe. Spain was broken by the numerous conflicts in which it was engaged in diverse areas, and when negotiations with the Dutch began at Münster in 1646, it was forced to concede to Dutch demands. It agreed, for the first time, to allow the Dutch to trade and navigate, and acquire territory, in the West Indies. The Treaty of Münster 1648,<sup>118</sup> signed 30 January, signalled the acceptance by Spain that its attempts to maintain its hegemony over trade with the Americas had failed.

## 7.8 Assessment

Two discernible trends following the publication of Grotius' *Mare Liberum* were, firstly, that doctrine and the work of jurists became more significant to States as evidence of the law of nations, and came to be used by them to promulgate the positions they maintained; and secondly, that the seas adjacent to a State's coasts, their territorial waters, became increasingly accepted as being under the jurisdiction, although not dominion, of the State.

England and Spain, after long negotiations, could not agree terms for a treaty affecting the Americas (similar to the Franco-Spanish one of nearly a century before, and Dutch-Spanish one of twenty years previously), and were obliged to revert to their old practices. Although England's Admiralty Court decided that the State's jurisdiction extended only to the limits of the King's Chambers, Salisbury's letter indicates a more extensive view in the Government, and (after the failure of

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<sup>117</sup> *S. P. Foreign, Treaties*, no.465. Text also in Rymer XIX, 219; Dumont V, ii, 619; Davenport, *op. cit.*, 308.

<sup>118</sup> Now kept in the exhibition room at the Rijksarchief, The Hague. See text in Dumont VI, i, 429; Davenport, *op. cit.*, 361. The Articles concerning trade and navigation are Arts. 5, 6.

negotiations with Spain, and earlier with the Dutch) the King used Selden to put forward the new English policy of asserting the 'British Seas'.

Welwood had earlier argued that taxes could be levied in the adjacent seas for navigation and fishing, and Freitas allowed a quasi-possession of trade and navigation out to the limit of effective control by States. Shoockius did the same from the perspective of the Dutch, Pacius for Venice, Burgus for Genoa and Gothofredus for France. The trend for States' policies to be advanced partly through jurists was possible, firstly because States were appreciating more a need for their practice to conform to rules of law; and secondly due to the increasing (but by no means total) relative coincidence of the positions maintained by many States. Spain and Denmark had conceded that they would no longer be able to maintain their claims to exclusive jurisdiction and issued ordinances asserting jurisdiction only over adjacent waters. And those States which had long advocated the freedom of navigation and trade had recognised that they themselves required to maintain security off their coasts, and developed a notion of jurisdiction in their territorial waters. If pragmatism and practice had led States to the point of agreeing in a general sense on the 'principle' of territorial waters, then it was now possible for jurists to define the precise nature and extent of the jurisdiction, a complicated task, and difficult to conclude,<sup>119</sup> and more suited to reasoned argument than physical confrontation, thus more suited to doctrine than practice.

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<sup>119</sup> *Vide* that the nature and extent of jurisdiction of territorial waters are still being settled in the present day, more than three hundred years after this point. For example, at the second United Nations Conference on the Law of the Sea in 1960 the 87 participating States were unable to agree a common breadth of territorial waters (and there were also disagreements at the third conference, 1973-82): Starke, *Introduction to International Law*, 1989, 10th ed., Butterworth, London.

## Conclusion

This study has examined the effect of formative influences on the evolution of international law. It has traced the creation and development of the international legal rules pertaining to one area of the law - the breadth of territorial waters - and set them in the context of political, cultural and other influences. While the results of this study have of necessity been divided up into chapters and periods of years to show particular developments in the law and incidents in State practice, this process has inevitably conferred too discrete and 'logical' a framework on the evolution of the law. International law in the main changes in gradual sweeps and trends, usually identified and collected together with hindsight, but the factors which make up the changes - the actions of States, such as changes in policies, or the issuing of edicts - are 'individual entities'. This study has therefore sought to identify the important individual actions - for instance, particular changes in policy, political incidents or juristic works - which were significant in the sweeping change in the law. It has been argued and shown throughout this study that international law regarding territorial waters was formed not by the application of legal rules but by the pursuit of national policy. This conclusion will seek to draw out some of the main trends in the evolution of the law.

In the era leading up to the period covered by the main part of this study law governing the relations and actions of States was largely 'supra-national', deriving from Pope and Empire. But there also were laws maritime and merchant that developed through the practice of seamen and merchants of different nationalities, and provided rules for conducting their business. It was shown that the seas of Europe were fundamentally free for navigation, fishing and trade by any State, although there were a number of instances of States attempting to exclude others from their coastal waters, an exclusion sometimes surmountable on payment of a tax. These claims were successfully maintained where the State was sufficiently either powerful or assisted by geography to defend them (such as Denmark or Venice) but less successfully otherwise (such as in the case of Genoa).

The claims to exclusive dominion of large areas of the sea made by Spain and

Portugal in the late 15th century, which arose out of their encounters with the West and East Indies, derived their legal justification from papal bulls. While Spain and Portugal had in effect engineered the granting of the bulls, other States in Europe were at first inclined to abide by their provisions, which enjoined them not to navigate in the Iberian powers' waters. There was some sympathy with the aims of the bulls, which granted the lands (and seas) to Spain and Portugal for the purpose of the religious conversion of any peoples encountered. But it was shown that the bulls were granted very early in the process of colonialisation and, importantly, before much was known in Europe about the newly discovered territories. Spain and Portugal, particularly the latter, took their religious duties seriously, but it was when they began also to carry back in large quantities the riches of the Americas and the spices of the Indies (which possibility had been the ulterior motive for the initial voyages) that the other States of Europe began to protest against the provisions laid down by the bulls and contemplate contravening them. Whereas in the late 15th century the power of Alexander VI, with Spanish backing, to issue bulls was not seriously challenged, in the mid-16th century jurists as well as States were questioning both papal capacity to dispose of territories and peoples, and also the power of papal bulls themselves. And while at first papal authority gave some solidity to the Iberian claims, they were so different from the usual practice in Europe (which even when it did allow claims to exclusive jurisdiction kept them to a limited and defined extent and required that they have an ancient lineage) that the generality of States did not accept them as legally founded for more than at most 40 or 50 years.

After these extensive claims to jurisdiction and dominion, it is instructive that no similar claims were made in Europe. Indeed Spain itself recognised their extraordinary nature when it asserted that it was permitted to make the claims due to a new legal framework in the New World: new doctrines applied there. Between the two extreme positions a synthesis of a sort emerged, when on one side both Spain and Portugal compromised their previously maintained positions allowing France access to the Atlantic and the West Indies (thus preserving an overall 'dominion' but granting rights of access to another State); and on the other France agreed that Spain had the right to exclude it from much of the Atlantic (thus recognising the greater



jurisdiction of another State). It is significant that these agreements were made by treaty: in the nature of a concession, made to a particular State, rather than a general right in all States to trade and navigate in another State's waters. While it is possible in a historical study such as this to note parenthetically, as has been done above, the synthesis to which the positions and practice of France and Spain were tending, there was still a dichotomy between the actual legal positions of the States. Convergence was forced upon them by the demands of their political ambitions.

A parallel synthesis of the positions of two other States was also observed, during the negotiations between Denmark and England throughout the latter years of the 16th century. The Danish position was that it could exclude other States from its waters, and the English position that it could navigate and fish wherever it desired. These positions were confronted by the difficulty for the former in being one of few States to attempt to maintain its view against the contrary practice of all other States, and the need for the latter to find alternatives to its usual trading routes due to the blockade of some of its ports by Spain and France. The result was that English navigation was allowed, but only on payment of a tax. Again it can be noted that the agreement made here - as an exception to the previous practice - was concluded with a treaty, so that Denmark could claim that it was not allowing a general right of navigation, but a right to a particular State to navigate on payment of a tax.

Other factors also led to a lessening of the extreme view of *mare liberum*, or, to put it another way, increasing claims to jurisdiction (but not dominion in the Venetian or Danish sense) over States' coastal waters. The problems associated with piracy, and increasing numbers of naval wars interspersed with belligerent semi-peace, led to attempts to assert various types of jurisdiction over them. It has been shown that this in turn led to claims to jurisdiction up to defined distances from the coast, which occurred at about the same time as Denmark 'reduced' to a limited distance the application of its claims to exclude other States.

In the time after Grotius published *Mare Liberum* - allowing a certain jurisdiction in the coastal State - the weight of State practice and opinion was in favour of State jurisdiction extending only up to a certain distance, rather than States being able to exclude others from vast tracts of the ocean (despite the paradox of

Dutch attempts to do just that in the Indies). What was established 'at law' at the time of the Treaty of Westphalia was *certain*, but *imprecise*. It was certain in the sense that the existence of the right in States to a jurisdiction over their coastal waters, up to a limit, was agreed. But it was imprecise in that the exact nature of that jurisdiction and its extent were not agreed. Most of the juristic contributions of the time took a similar view, and indeed were concerned to offer precise definitions of both extent and jurisdiction. This period is significant for the greater acceptance by States of the weight of doctrine, and correspondingly, the use by States of jurists to advance their positions. This held in particular for such relatively subtle matters as the nature and precise extent of jurisdiction over territorial waters.

It is possible to trace the stages through which the creation of law has progressed on the international plane, corresponding to different sections of this study. To begin with law was 'intra-national': States as such were not largely involved, and law emerged where merchants and seamen came into contact with each other. Later (for present purposes) there was a 'supra-national' law, issued in the form of papal bulls, which can be regarded perhaps as an early form of international legislation. When canon law's influence declined, and indeed when it began to be amended by States after it had been promulgated, two other sources of law became more prominent: treaties and unilateral declarations. They had been made, as has been shown, since the earliest times, but with the rise of States in relation to papacy and empire, they became more useful tools for forwarding policy. Finally in the mid-17th century juristic works achieved their elevated position as a quasi-source of law.

These were used by States as sources of law, and they were employed promiscuously. To the extent that it is possible to draw a general picture - no easy task, given the indiscriminate way in which States used it - what went to form the 'law of nations', so often referred to by States, consisted mainly of well-established previous practice and custom, or general principles such as the freedom of the seas, or freedom of trade (which of course were based on, if not actually the same as, the self-evident 'natural law' of some years past). It was shown that a State would avert to the law of nations to justify acting in a certain way, but it would often be in addition to citing treaties, bulls, etc. Usually, in fact, in citing it a State did not give

a source for a particular legal proposition, and it meant that *it itself* had always followed the particular practice. Another way in which rules came into being, and often became part of the law of nations, as defined by each State, was by a State asserting that there was an exception to a general principle: the general principle (of the law of nations) is X, except when Y. For instance, the Dutch asserted that there was a general freedom of trade, but later that there was no such principle where treaties had extinguished it; and Denmark maintained that there was a general freedom of the seas, except where by immemorial usage a State had an exclusive right to navigate in a certain area.

It will be seen then that there was little consensus at any particular time as to what States regarded as binding them or fettering their discretion to act. States certainly recognised the need to pay heed to law, but they would use the 'rules' (and sources of rules) that suited their needs. But if none did, they would ignore them. It seems that 'the stakes were too high': in particular, since States were competing with each other to establish trading empires, with the prize of enormous relative prosperity and security for the winners, law was used to advance a State's position as a way of justifying an act. Each State acted according to its interests, and where these conflicted with another State's it has been shown that political or naval weight would be the main deciding factor. Where a State was prevented from achieving its objective - by force or diplomatic dexterity - it might then negotiate within a legal framework.

Given this, is it possible to say that there existed anything recognisable as generally agreed international law at all? In a strict Austinian analysis, it might be concluded that such law did not exist. It has been shown that in the period covered States recognised no law-giving authority, and that the law had no real sanction behind it.<sup>1</sup> But the evidence here seems to support a perhaps more realistic interpretation of international law, as offered recently by Higgins.<sup>2</sup> This view

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<sup>1</sup> See Austin, *The Province of Jurisprudence Determined*, 1956, Oxford University Press, Oxford.

<sup>2</sup> See Higgins, *Problems and Process: International Law and How we Use It*, 1994, Oxford University Press, Oxford, ch.1.

suggests that international law is not so much a set of rules as a process, or a search for shared values and common ground between States. It has been shown that the international law of the period covered reflected States' policies and objectives in a time of great change and expansion. States wanted to develop their international trade, keep their coastal waters safe for traders and fishermen, and so on, and the international law that evolved facilitated this.

International law certainly existed to the extent that States referred to it, and debated its effect on their freedom to act. It has been shown that by the time of Westphalia most States claimed and allowed others to claim a jurisdiction over their territorial waters. (They also respected the integrity of and granted immunity to each other's diplomatic envoys.) Beyond that it can be said with certainty perhaps only that all States recognised the existence of a 'law of nations' (although definitions varied from State to State and crisis to crisis), and all States made bilateral treaties (and subsequently claimed that the treaty had established a relative, and sometimes more widely-applicable, juridical framework). What international lawyers call custom seems to have been allowed too little time to develop - given the fast-changing State Practice - except in the area already mentioned: territorial waters.

This study has shown in essence that "law" is a political tool, but at the same time and to a lesser degree an influence and fetter on political policy-making. So Spain could use the law to buttress and give an 'objectivity' to its claim to dominion of the Atlantic (mainly fortified by its naval might), but would adjust its policy to 'conform to the law' elsewhere so that it could demand that others do the same in the Atlantic. However this went only so far. Where Spain's naval power was insufficient to ensure abidance with the law it declared that no law applied: beyond the line, might, not law, would decide.

In sum, this thesis has traced the evolution of rules regarding the breadth of territorial waters. It has shown how 'laws of nature and of nations' were created and developed mainly as a result of the pursuit of 'political' policies and ambitions. These factors, it is suggested, were the dominant influences on the evolution of the law.