GROTIUS AND THE LAW OF THE SEA

by

Ivan Shearer*

When I was a law student in Adelaide, a favourite aphorism of the then Chief Justice of South Australia was that "the law is often a compromise between what is ideally right or just, and what is practically attainable or convenient." It is one of those general observations about the law that make the student - and especially a new law student - feel at the same time attracted by its pungency and worldliness, and repelled by its implications. What compromises, and by whom, and for what payoff, and against what ideal virtues? Oliver Wendell Holmes' cheerful acceptance of the triumph of experience over logic in the law left us all similarly bemused; we greatly preferred the shining idealism of Lord Devlin in *Hedley Byrne* v. *Heller* when roundly rejecting as nonsense any legal doctrine that did not have logic at the bottom of it.

The development of the doctrine of the freedom of the seas by Hugo Grotius is alledged by some to demonstrate a similar triumph of expediency over principle. Perhaps an even darker explanation lurked in the unanswered question posed recently in this place to a similar audience by Professor Wilson, when he pointed to the apparent *volte-face* executed by Grotius in his views on the freedom of the seas expressed in his greatest work *De jure belli ac pacis* (1625) against his earlier views propounded in *Mare Liberum* (1609), and to the coincidental changes in Grotius' personal fortunes and patronage. We know that *Mare Liberum* was part of a larger work commissioned by the Dutch East India Company to defend their interests against the Portuguese. Later in 1613 and 1615 he was the spokesman for the Dutch delegation in diplomatic conferences with the English over fishing, whaling, and trade disputes, in which he found himself confronted with many of his own arguments, used by the English against the Dutch negotiating position, which was to concede the right of the English to control coastal fishing in exchange for English recognition of Dutch trading monopoly in the East Indies. And finally, in 1637, as Swedish ambassador in Paris, we find him agreeing, in private correspondence, that every country can take possession of its coastal

*Faculty of Law, University of New South Wales.

waters, and that a defence of his earlier position would be "injudicious" in the light of Sweden's aspirations to lay claim to sovereignty over the Baltic Sea. [1]

It is one of the purposes of this paper to unravel this complicated story, and to demonstrate that Grotius's intellectual honesty is not in question and that the undoubted change in his views was based on juristic principle.

The other purpose of this paper is to relate the seventeenth century debates on the freedom of the seas to current issues arising out of the recently concluded United Nations Third Conference on the Law of the Sea. Here too it has been alleged that expediency has triumphed over juristic integrity and that the package deal, so painfully put together, is but a house built on quicksand. Much of the credit (if credit it be) for the fragile consensus of the Montego Bay Convention of 1982 must go to the informal negotiating group led by Ambassador Evensen of Norway. Had Grotius been the Norwegian ambassador to the U.N. in 1974, instead of the Swedish Ambassador in France in 1634, would we give the same answer to that question?

The origins of *Mare Liberum*.

In order to understand how Grotius's first treatise was written we have to recall briefly the historical setting. When Grotius was born, in 1583, Holland (or the United Provinces as it was then called) had recently rebelled against Spanish rule, and had successfully maintained its independence for sixteen years, although formal relinquishment of Spanish claims did not occur until 1609. Dutch expeditions to the East Indies began in the 1590s. They soon came into conflict with the Portuguese who had established lucrative trading posts in India, China, Japan, Ceylon and what is now Indonesia. The celebrated Bull of Pope Alexander VI, confirmed in the Treaty of Tordesillas in 1494, had divided the New World between Spain and

Portugal, the Spaniards to the West, and the Portuguese to the east, of a line which first went through the Azores but later through Brazil. Its purpose was limited to ecclesiastical jurisdiction, but its beneficiaries later interpreted it to mean sovereignty and the power to exclude foreign commerce. These claims were resisted by both the English and the Dutch.

Relying on their expansive interpretation of the Bull, the Portuguese claimed exclusive trading rights in Asia. The Dutch wished so far as possible to avoid conflict with Portugal, especially since the Spanish King Philip II had conquered Portugal in 1580, and any such conflict would destabilize Holland's precarious de facto peace with Spain. But the lure of spices and other rich trading opportunities led the Dutch East India Company (formed in 1602) to test the Portuguese attitude more firmly, and finally to take as prize Portuguese vessels in retaliation for attacks made on Dutch shipping.

This development had two consequences. First, the States General (the Government of Holland) were rather reluctantly forced to support the position of the Company and to defend the taking of prize, despite their desire to bring about final peace with Spain. The second - and rather hearteningly odd-consequence was that a number of shareholders expressed conscientious scruples about the moral and legal rights of the Company to take prize, and threatened to resume their capital and form a new company in France. The issue came to a head with the condemnation in prize of the rich Portuguese vessel *Catherine* before a Dutch Admiralty Court in 1604. Immediately after this judgment Grotius, aged 21, was commissioned to write a treatise on the law of prize justifying the Company's action legally and morally so as to quell the doubts of the shareholders. Grotius set to work and completed the treatise in 1606 under the title *De jure praedae commentarius*.

De jure praedae commentarius was much more than a Directors

Report to shareholders, or even a legal brief. It was a comprehensive treatise on the law of war and commerce in 15 extensive chapters. Chapters II - X (Dogmatica) are nothing less than an exposition of fundamental principles of the natural law, the law of nations, and the concept of the just war. In chapter XI the facts of the case at hand are set out, and in chapters XII and XIII the proposed principles are applied to those facts. It is chapter XII which is of most interest to us because it is this chapter which was later excised, slightly adapted, and published separately as *Mare Liberum* In it, Grotius refutes the claim of any country to dominion over the seas, and to exclude foreigners from the right of peaceful trade.

The whole book, however, never appeared in Grotius's lifetime, and faded from sight, to be rediscovered only in 1864 and published in Holland four years later. [2] The reasons for this were, first, that the shareholders appear to have overcome their scruples when the size of their dividend cheques was seen, and thus the Company's early panic abated. And secondly - the more important reason - Dutch foreign policy itself moved into an aggressive phase with a blockade of the Spanish coast, interference with trade between England and the Flemish coast, and the commissioning of some 130 privateers to raid the neutral seatraders of France, England, Denmark and Hamburg. The book was clearly contrary to the new Dutch policy and Grotius was unable to find a publisher willing to risk its printing.

Nevertheless, in 1607 peace negotiations were begun between Holland and Spain which resulted in an early armistice while talks continued. The Dutch East India Company was fearful that the Government might yield too much to Spain in negotiations over navigation rights, remembered that Grotius's twelfth chapter of the previously commissioned work was very strong on freedom of trade and urged its immediate publication to bring pressure to bear on the Dutch Government to forestall a too hasty treaty. In fact *Mare Liberum* did not appear until 1609 some months after the treaty, owing to

printing delays, and thus did not directly affect the outcome of those negotiations.

The effect of *Mare Liberum*.

In what is now already a story of tangled motives and unexpected developments, we find that publication of *Mare Liberum* had its effects outside Holland, which were both unintended and fateful.

Grotius could not have been unaware, at the time he wrote *Mare Liberum*, that in mediaeval writings there was shadowy authority for the proposition that ownership of the sea might be claimed. Bodin's treatise on sovereignty in 1582 proclaimed that a State might exercise power over shipping within 60 miles of its coast, citing as authority the writings of the Italian jurist Baldus de Urbaldis (1327-1404). (In fact he got Baldus wrong on limits, for Baldus had said 30 leagues, i.e. 90-100 miles, but no matter). He would also have been aware that Venice claimed ownership of the whole of the Adriatic. The notion of coastal States having the right to control shipping within cannon-shot of shore was also adverted to in some writings of the period, although its origin is unknown even now. But Grotius does not mention these sources in *Mare Liberum* or address those arguments. The reason appears to be that he separated clearly in his mind two concepts, which separation he took for granted was shared by his readers: this is, that *jurisdictio* or *imperium* (power to control) is separate from *dominium* (ownership) and that the former concept is applicable to persons, and the latter to things. Moreover, *imperium* beyond the territory over which the State has *dominium* is exercisable only over one's own subjects. Hence any such claims to extended maritime jurisdiction would have been interpreted by him as personal jurisdiction only over one's own subjects. What concerned him in *Mare Liberum* was to refute the Portuguese claim to exclude foreigners from the seas around their trading colonies in the East, a claim based on *dominium* over

the seas.

What was fateful about Grotius's writings was that they appeared just at the time when James I of England, having come from Scotland to assume the English throne in 1603, was preparing the ground to assert more vigorously an English doctrine of sovereignty (not merely jurisdiction) over the seas. Previously, under Elizabeth, the doctrine of the freedom of the seas had been maintained and asserted against Spain, Portugal, and Denmark, as a matter of international law, although theoretical opinions were not lacking (e.g. Digges in 1569 and Plowden's arguments in *Constable's Case*, 1575) [3] that the Sovereign owned the seas about the coasts (the "four seas" of the Proclamation of Edward I in 1299) and hence the foreshore. Gentili of Oxford, in 1588, argued that the doctrine of the freedom of the seas was essential for the preservation of peace. [4] James, however, was influenced in his thinking by Scottish opinion and practice which had long excluded foreign fishing from its seas. The Scots lawyer Craig, in 1603, argued that *property* in the sea belonged to the State nearer to it than any other (thus implying a wholesale division of seas on a median line principle). [5] (Grotius appears not to have been aware of Craig's writings - at all events he does not cite him in *Mare Liberum*). James also brought with him to England from Scotland a more limited doctrine of "land-kenning" whereby sovereignty was claimed seaward at least to the limit of vision, and from headland to headland in bays. This notion was apparently shared by all northern countries.

In 1609 - the same year in which *Mare Liberum* appeared in Holland - James prohibited foreign fishing from the English seas, the limits of which were not defined but which covered the areas in which the Dutch had fished for a long time. This decree brought immediate protests from the Dutch, and clashes at sea, which led to the diplomatic conferences of 1613 and 1615, in which Grotius was involved as a member of the Dutch delegations. The Dutch relied on

Grotius's arguments in *Mare Liberum*; the English reply was based on the refutation of those arguments in the book *De Dominio Maris* published by the Scottish jurist Welwood in 1613. Grotius in turn responded to Welwood in the *Defensio*(6) published in 1615, in which he defended the thesis of *Mare Liberum*.

It is important to note at this point the intellectual basis of the opposing arguments. Grotius, in the Key fifth chapter of *Mare Liberum*, bases his doctrine of the freedom of the seas on the natural law. At the beginning of time, he says, all things were owned in common, but later certain things became susceptible of private ownership. Not, however, the sea; for, like the air, it cannot be occupied, *occupatio* being a prerequisite to ownership. The reason for this is that the sea is inherently limitless, and because navigation and fisheries require that it should be available for the common use of all. The sea is thus *res communis*, or *res nullius* provided that the latter term is understood in a restricted sense as precluding claims to ownership.[7] Welwood's argument, by contrast, is based on the divine rather than the natural law. He asserts that Grotius's concept of the sea as *res communis* is contrary to the Scriptures, because God's injunction to man to "subdue the earth and rule over the fish" could not carried out without "subduing the waters also." And since waters were divisible, God's command to replenish the earth after the Flood applied also to the seas. The seas were thus not common to all mankind but given to be partitioned among men in propriety. It appears, however, that Welwood was speaking only of the coastal seas and not of oceans, which are "far removed from the just and due bounds above-mentioned;" the exact limits of national seas were to be determined by the "understanding heart" that God had implanted in man."[8] Welwood's arguments were adopted and extended later in the 17th Century by Selden in his famous book *Mare Clausum* (1635), the title of which was clearly chosen in opposition to Grotius.

The sequel to *Mare Liberum*. In the negotiations with England, which extended from 1610-1618 and when Grotius was actively involved in the conferences of 1613 and 1615, three major issues arose. The first was the decree of James I of 1609 which drove the Dutch away from the valuable herring fisheries off England. The second was freedom of navigation to Spitsbergen, whaling rights near which James I had purported to give to an English monopoly. Both of these matters clearly raised the major issue of freedom of the seas, with the Dutch on the assertive side. But the third issue was the English claim to freedom of access to trade in the Moluccas which, having ousted the Portuguese, the Dutch were now claiming exclusively for themselves. On this third issue, Grotius found himself embarrassed; indeed the English revelled in quoting passage after passage of *Mare Liberum* (the purpose of which, you will recall, was more concerned with freedom of trade than abstract notions of the freedom of the seas) against the Dutch delegation. Grotius squirmed and quibbled, making most unconvincing distinctions. The East Indies, he claimed, were under the protection of the Dutch who had saved them from the Portuguese and now had a duty to protect. The natives had freely contracted to give a monopoly of the spice trade to their protectors. This was flagrantly in contradiction to his philosophical position which put the law of contract into the category of human law, subordinate to the natural law. All we can say of this is that Grotius was observing the time honoured tradition of barristers as a cab on the rank. One can scarcely believe that he made these arguments with any conviction.

The other sequel in these negotiations was that the Dutch delegation, on instructions from above, soon decided to abandon their hard-line approach on fisheries and to attempt a compromise. It was the Dutch who proposed that the English would not seek to assert their fisheries jurisdiction further than cannon-shot distance from shore. This is the first documented use of the cannon-shot doctrine in international practice. This again was clearly contrary to Grotius's own writings, but it is highly

unlikely that he himself suggested the compromise; the decision was made by his pragmatic political masters.

De Jure Belli ac Pacis.

We now come to the point left open by Professor Wilson. Did Grotius change his views on the doctrine of the freedom of the seas through conviction, or through opportunism?

As a prelude we must recall that Grotius's government career ended with his arrest in 1618 and he was imprisoned from 1619 to 1621. During that time he wrote his *Elements of Dutch Law* but not on international law. After his escape from prison he went to Paris where he resumed writing. His most famous general treatise on international law, *De Jure Belli ac Pacis* appeared in 1625.

It was Professor Telders who first accused Grotius of a "volte-face." Comparing the texts of *Mare Liberum* (1609) and *De Jure Belli ac Pacis* (1625) he finds them in flagrant contradiction.[9] De Pauw agrees with this assessment.[10] O'Connell disagrees. He says that the concession now made by Grotius that a coastal State may assert dominium by way of occupation of bays and straits and other areas of enclosed or semi-enclosed seas was already contained in *Mare Liberum*.[11] There is indeed a passage which is capable of this meaning in *Mare Liberum* but the Magoffin translation of the text[12] makes it appear more plausibly as a rhetorical flourish to make the Portuguese pretensions even more absured. Grotius is, in effect, saying that "it is not as though the Portuguese were claiming ownership of gulfs, straits or even the sea within range of vision from land (which would be indefensible enough a view) but they claim as their own the whole expanse of the sea between two oceans!" Nevertheless, this is what Grotius does come to say - or very nearly so - in 1625. It seems impossible, on the other hand, to agree that the volte-face is as wide as de Pauw would have us believe when he asserts that Grotius was arguing in 1625 that a coastal state might occupy its belt of

coastal waters on the open shore. This is to confuse again dominium and imperium. Oudendijk's interpretation of *De Jure Belli ac Pacis* on this point is, it is submitted, much more persuasive. He concludes that Grotius did change his mind in two respects between 1609 and 1625. First, that Grotius now agrees that straits and bays may be occupied, and thus subjected to dominium, if they are sufficiently connected with the adjacent land area, and not too large, to be subject to the same division (of land and water). In other words he now concedes that his earlier reason for holding the sea to be not open for appropriation, because it is inherently lacking in natural indicia of delimitation, no longer holds good in the case of waters naturally bounded by land. Secondly, that the common consent of nations (scil,. newly emerged or crystallized norm of customary international law) permits a coastal State to exercise *imperium* (jurisdiction, not ownership) to its coastal waters for the purpose of police powers and even for levying taxes of a reasonable amount on foreigners exercising rights of passage through them. In these areas fishing may legitimately be regulated. The exact extent of this coastal jurisdiction is not specified by Grotius, but there are hints of the cannon-shot doctrine in what he writes. [13]

The conclusion must be that Grotius has not fundamentally changed his views, but has modified them; in respect of bays and straits, as a result of maturer reflection, and in respect of coastal jurisdiction, on the basis of State practice, in which, in the negotiations with England, he himself played a significant part.

Although marginal to the present topic, it may be noted that de Pauw is surely on stronger ground when he points out that in *De Jure Belli ac Pacis* Grotius attempts a justification of his diplomatic stand on the Moluccas issue by claiming that trading monopolies are justified even where the necessities of life are concerned, and that there is no right at all to trade in luxuries. This, he says with sardonic humour, is a clear reference to spices

and other colonial products from the East, and stands in violent contradiction to *Mare Liberum*.[14]

Grotius and the modern law of the Sea

We have seen how Grotius's view of the scope of the freedom of the Seas was modified in 1625, from his first position in 1609, to concede that coastal States might claim property in their bays, straits and other areas of water closely linked with the land so as to be subject to principled delimitation. This was a natural progression of ideas by no means deserving of the label *volte-face*. De Pauw cites some correspondence later in Grotius's life, and after Grotius had had the opportunity to read Selden's *Mare Clausum* (1635), purporting to express the opinion that territorial waters (his first use of the expression) might now be claimed, and that the only open question in his mind was how large a claim to them might be made.[15] This is a much more significant reversal of his earlier position. But it is significant that he never published such a view (no doubt being inhibited by his contract of employment with Sweden which was pursuing even more ambitious claims to the whole of the Baltic), and it is possible that the letter was written more as a wry comment on political realities than as a considered view.

Even taking this alleged final change of mind into account, Grotius's thinking still revealed the essence of the problem that confronts us today in the international public law of the sea: to reconcile the notions of territory and jurisdiction. In a perceptive passage O'Connell links the 17th and the 20th century debates on the law of the sea in the following way:-

> "Running through the 17th century debate was the persistent question of the intrinsic relationship between the new concept of sovereignty and the

> philosophical notion of effective power which took legal form in the Roman law doctrine of *occupatio*. The question was whether the power to rule (*jurisdictio*) flowed from proprietorship of the maritime terrain, or was independent of it. It was a critical question then, and it remains a critical one today, for the jurists have been unsuccessful in their search for a touchstone of the exercise of governmental authority outside the boundaries of national territory. Power tends to be destabilized and incongruous when manifested extraterritorially, because it cannot be plenary, as it is intra-territorially, yet no rubric is available to determine its nature and extent. Contemporary juristic theory is still encapsulated in the philosophy of power of the Age of Reason, and is ill-adapted to grapple with the revived tension between *mare liberum* and *mare clausum* which is now inherent in the uneasy co-incidence of the high seas and the exclusive economic zone."[16]

The key word in this passage is "destabilized." Once projected beyond a territorial area of operation, the assertion of power tends inevitably to bring about conflict. (To take but one current example outside the present frame of reference - consider the extraterritorial reach of anti-trust legislation). Grotius was careful to base his concession to coastal State sovereignty over the marginal seas in *De jure belli ac pacis* to areas closely linked with the land; in other words, he sought a stable criterion. As to jurisdiction, he foresaw abuses, but could hardly do more than assert the traditional freedoms of navigation and commerce, inhibited as he had by then become by political realities. These realities were fast coalescing into a customary rule allowing many kinds of extraterritorial jurisdiction at sea over fishing, police and customs,

and the insistence on salutes. We can hardly blame Grotius for this, or his successor Bynkershoek who in 1702 tried to arrest "creeping jurisdiction" by popularizing the cannon-shot doctrine (later to be accepted as a 3-mile limit) for both territorial and jurisdictional claims.

But for a lengthy period the 3-mile rule did achieve relative stability. Neutrality laws and prize practice above all contributed in the 18th and 19th century to the distinct separation of territorial waters from high seas. There were examples of exceptional practice, such as the British Hovering Acts, and academic doubts, but on the whole territory and jurisdiction became accepted as coterminous so far, at least, as action against foreigners was concerned. (States always reserved the right to control the activities of their own subjects wherever on the high seas). The high point of the 3 mile rule, and its rigid separation of territorial waters from high seas, was the *Behring Sea Fur Seals Arbitrations* between the United States and Great Britain in 1893 and Russia and United States in 1902, where the tribunals rejected claims to control the depletion of natural resources outside the limit of territorial waters. This is the first entry of the conservation of resources motif into the debate, which, in the 20th century, was to have such a profound effect on the law of the sea.

For a time, however, stability remained securely fixed on the basis of the 3-mile limit. Various private bodies such as the International Law Association, the Institut de droit international, and national societies of international law attempted codifications of the law on this basis, and to settle such ancillary questions as passage through straits, entry into ports, the delimitation of territorial sea boundaries, and so on. The League of Nations proposed a codification of the law of the sea in 1930. For the first time a multilateral diplomatic conference on the subject was convened, and for the first time the full extent of suppressed frustration at the existing regime of the law of the sea was revealed. The major issue

which emerged was that of fishing. Earlier conferences on fishing had demonstrated the growing danger of depletion of stocks in many areas and the urgent need for conservation measures. Progress, however, was meagre, and by 1930 some countries had lost patience and were no longer prepared to commit themselves to the maintenance of a 3-mile territorial sea limit if that meant that they could not validly enforce unilateral conservation and management measures over fisheries to a greater distance from their coasts. Proposals were made for a 6-mile limit. More extensive limits were also proposed to the waters above the continental shelf, a geomorphological phenomenon which now made its first appearance in the legal arena. The conference broke up for lack of sufficient consensus, and the projected later conference was never held owing to the international crises of the late 1930s and the outbreak of the Second World War.

At this point, 300 years after Grotius, we see similar pressures on the concept of the freedom of the Seas, but now stemming from demands for control over natural resources rather than, as then, from desires to establish monopolies, interdict trade, and to assert the national flag.

In 1951 a significant case was brought before the International Court of Justice. The United Kingdom sought a declaration that Norway's method of drawing the baselines along its coast (from which its territorial sea limits - and hence exclusive fishing limits - were measured) was invalid. Norway's coastline is deeply indented and highly irregular and for much of its length fronted by a rampart of rocks and islets called a "skjaergaard". Norway had drawn a series of long straight lines linking the outermost points of these coastal features, rather than following the coast and adjacent islands more or less exactly in all their sinuosities. The practical effect of Norway's action was to magnify very considerably its jurisdiction over fisheries and thus to exclude British fishing vessels from areas which they had previously worked. The basic issue was whether the Court would insist on Norway adhering to the

low-water mark baseline, which the United Kingdom insisted was the established position in customary law (except for bays, in relation to which a 10-mile closing line was permitted), or would endorse this new method, and if so how it could be constrained within a legal formula. The Court took the latter course, and thereby liberalized the whole law of the marginal sea. More than any other factor leading up to the recent U.N. Conference on the Law of the Sea, this judgment of the Court was decisive.

The Court seemed conscious of Grotius's admonition about the necessary close relationship between land territory and *dominium* in the sea in so far as it stressed, in this case, the "exceptional nature" of Norway's coastline. It also stated that any baselines other than low-water mark should be so drawn as "not to depart from the general direction of the coast." So far, so good. But what would Grotius have made of the other, non-geographical, criterion which the Court invoked? The Court said: "There is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage." This was a clear reference to conservation, and - despite the equal emphasis given to geographical factors - was regarded as encouraging the proliferation of claims. Argentina had already proclaimed the "epicontinental sea" of 200 miles in 1946 and was soon imitated by the Latin-American countries under the banner of "patrimonial sea" claims. These had nothing in common with Norway, but the psychological climate now changed in the direction of favouring wider claims to resource jurisdiction.

Time does not allow even a cursory outline of the developments of the 1950s, including the Geneva Conventions on the Law of the Sea, 1958, the growth of the continental shelf doctrine, and the pressures for larger fisheries zones which became intense in the 1960s and were illustrated so dramatically by the Anglo-Icelandic Cod Wars. I wish to select just one of the major issues at the Third Law of the Sea

Conference, convened in 1973 to attempt *de novo* to codify the law of the sea and the seabed, in order to illustrate the present theme which is to examine the tension between the concepts of freedom of the seas and closed seas. This is the new concept of the Exclusive Economic Zone, and its relationship to the traditional freedom of the high seas.

The first formal proposal of an exclusive economic zone of 200 miles in which the coastal State would have resource jurisdiction was made by Kenya in 1971 at the Afro-Asian Legal Consultative Committee. It was presented to the U.N. Seabed Committee in 1972. Support was forthcoming from other African coastal countries as well as from the Latin-American countries which had contemporaneously been promoting a similar patrimonial sea concept. The major maritime powers and the distant water fishing countries were opposed to this move, but by 1974 had been compelled by the weight of numbers of third world delegations enthusiastically endorsing the proposal to accept it in principle, subject to further definition, and subject to its "balancing" in a package deal by provision securing certain strategic and navigational objectives such as strengthened freedom of passage rights through straits and archipelagoes. Things were indeed moving very fast beyond the provisional status quo of the 1958 Conventions which had recognized only certain vaguely defined preferential rights of fisheries and conservation measures beyond territorial waters, and police powers to a maximum extent of 12 miles.

Not the least indication of the politicized atmosphere of UNCLOS III was that the designation *exclusive* economic zone endured throughout the Conference long after it had been reduced through negotiation, in relation to living (but not non-living) resources, to essentially a preferential zone, access to which must be granted to other States on a basis of an available surplus. The promoters of the EEZ did indeed include a number of countries who were intent on regarding it as exclusive, or at all events as a means to the ultimate attainment of that objective. The major naval, shipping and

fishing nations, however, were determined to resist this. How to resolve the matter?

Article 1 of the 1958 Convention had clearly stated that the high seas were all parts of the sea not included in the territorial sea or internal waters of a State. If that article were included in the new Convention, the EEZ would still be part of the high seas, and would merely be an area over which certain jurisdictional (but not property) rights were exercisable. This proposition was not acceptable to the Third World delegations. They proposed an article saying that the high seas should be defined as all parts of the seas not included in the territorial sea, internal waters *or the EEZ*. This, taken together with a further article borrowed from the 1958 Convention that no State might validly subject any part of the high seas to its sovereignty, would effectively have opened the door to assertions of sovereignty over the EEZ. A deadlock was reached.

The resolution was arrived at by a mechanism which is becoming increasingly familiar in international negotiations. An informal working group [17] was set up consisting of key delegations, convened by Ambassador Castaneda of Mexico (one of the few Latin American States not to have proclaimed sovereignty to 200 miles, but with sympathies in that direction) and Ambassador Vindenes of Norway (a representative of the freedom of the Seas lobby, but with reservations and Scandinavian liberal credentials). The Casteneda-Vindenes group, as it came to be called, devised a compromise which was thought to preserve the essential interest of the maritime powers while conceding at least the appearance of success to the territorialists. They took as their fundamental proposition the provision that now appears as Article 55 of the Montego Bay Convention:-

> "The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the *specific legal regime* established in this Part, under which the rights and

> jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

In other words, the EEZ would be a zone *sui generis*, neither high seas nor territorial seas. The second stage was to prevent any steps being taken to claim sovereignty over the EEZ, but without antagonizing the developing States by doing so in direct prohibitory terms. This was done by a method of which the legendary Philadelphia lawyers would be proud. Article 86 defines the high seas as not including the EEZ. (One up for the territorialists). Article 89 states that "no State may validly purport to subject any part of the high seas to its sovereignty." (No contest). Articles 90-115 restate traditional high seas rights and freedoms. (Also no contest). But then the *coup de grace*: back in the Part dealing with the EEZ, paragraph 2 is added to Article 58 as follows:-

> "Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part."

Thus honour is satisfied. The maritime States consider these provisions as achieving their objective of prohibiting assertions of sovereignty over the EEZ. The territorialists are content that the specific legal regime of the EEZ will enable them to effect an acquisition of it in all but name. But that is not the end of it. The other major purpose of the maritime powers in incorporating as much as possible of the high seas provisions into the EEZ by way of Article 58(2) was to ensure that, in case of doubt as to what rights might legitimately be exercised within the EEZ (such as regulation of navigation, pollution controls etc.) such doubts should be resolved in favour of high seas freedom. But was this purpose achieved by the following Article 59, which is undoubtedly the most extraordinary

of the entire Montego Bay Convention:-

> "In cases where this Convention does not attribute rights or jurisdiction to the coastal State or to other States within the EEZ, and a conflict arises between the *interests* of the coastal State and any other State or States, the conflict *should* be resolved on the basis of *equity and in the light of all relevant circumstances*, taking into account the *respective importance* of the *interests involved* to the parties as well as to the *international community as a whole*."

What would Grotius have made of that Article? More to the point, what *will* international tribunals make of it when it comes to be invoked?

Already we see examples of blurred reasoning based on so-called "equitable principles" in the recent seabed delimitation cases of *U.K.* v. *France* and *Tunisia* v. *Libya*. The growing politicization of the membership of the ICJ gives little ground for hope that the judges will succeed in fashioning principles where the lawyer/diplomats have failed. Just as Grotius seemed to think in the last decade of his life that the genie had escaped from the bottle - only to be stuffed back in again in the 18th Century, at least partially and albeit kicking its legs - in 1982 the genie is right out of the bottle and rampant. The law has all but abdicated its responsibility to control further expansion of claims to jurisdiction, if not sovereignty. Only the constraints of international power politics remain.

--0--

NOTES

1. De Pauw, *Grotius and the Law of the Sea* (1965), 74.

2 R. Magoffin, *Grotius on the Freedom of the Seas* (1916), v. It is a curious sidelight that the publication of an English translation of *Mare Liberum* appears, from J.B. Scott's introductory note to this work, also to serve propagandistic purposes for the Allies against Germany.

3 Marston, *The Marginal Seabed* (1981), 3-5.

4 *De jure belli*, Book 1, chap. 19, 139-49. Grotius cites this work with approval in *Mare Liberum*. Under the Stuarts Gentili later changed his views.

5. *Jus Feudale* I, 15, 13.

6. 'Defensio capitis quinti maris liberi oppugnati a Gulielmo Welwodo', reprinted in *Bibliotheca Visseriana*, Vol. 8 (1928).

7 De Pauw, *op. cit.*, 36-7.

8 O'Connell, *The International Law of the Sea*, Vol. 1 (1982), 10-11.

9. B.M. Telders, 'De oorsprong van het leerstuk der territoriale zee" in *Verzamelde Geschriften*, Vol. II (1948).

10 *Op. cit.*, 67-9.

11 *Op. cit.*, 16.

12 At p. 32.

13. J.K. Oudendijk, *Status and Extent of Adjacent Waters* (1970), 40-52

14. *Op. cit.*, p. 69.

15. *Op. cit.*, 74, quoting a letter from Grotius dated 20 May 1637

16 *Op. cit.*, p. 14-15.

17 I am indebted for the account that follows to Mr. K.G. Brennan, A O., leader of the Australian Delegation to UNCLOS III, whose paper on this subject will be published shortly.
