

Hugo Grotius, *The Freedom of the Seas*, 1609

Introduction: In 1609, Hugo Grotius (1583-1645), defended the Dutch right to trade in the East against Spanish and Portuguese claims, which held that Portugal had the exclusive right to trade with the East in accordance with the Treaty of Tordesillas of 1594, which, they insisted, had divided the newly discovered ocean routes exclusively between the Spanish and Portuguese nations. Grotius, who is generally credited with having provided the foundation of international law with his greatest work, *Mare Liberum*, the Free Sea, argued that the seas belonged to no one and thus no state could claim sovereignty over them. While Grotius based his argument upon theoretical grounds, drawn from both classical antiquity and Renaissance scholars, and rooted his thesis in a tradition of natural law, his argument was of great practical importance to the Dutch, who were at war with both the Spanish and Portuguese (the crowns were united between 1580 and 1640). The Dutch not only had to defend their right to trade in Asian waters by force of arms from the Spanish and Portuguese, but also from the English. John Selden, one of England's greatest legal scholars, argued for the principle of English sovereignty over the "narrow seas" between England and the continent in his *Mare Clausum*, the Closed Sea, in 1635. In later centuries, Grotius' brief for the freedom of the seas was codified as international law and enforced by British and American naval power. The selections below are from *The Freedom of the Seas, or the Right Which Belongs to the Dutch to take part in the East Indian Trade*, translated by Ralph Van Deman Magoffin, Introduction by James Brown Scott, Director of the Carnegie Endowment for International Peace (New York, 1916). This edition is available at the Liberty Fund's website, <http://oll.libertyfund.org/index.php>

Chapter I; By the Law of Nations navigation is free to all persons whatsoever

My intention is to demonstrate briefly and clearly that the Dutch—that is to say, the subjects of the United Netherlands—have the right to sail to the East Indies, as they are now doing, and to engage in trade with the people there. I shall base my argument on the following most specific and unimpeachable axiom of the Law of Nations, called a primary rule or first principle, the spirit of which is self-evident and immutable, to wit: Every nation is free to travel to every other nation, and to trade with it. God Himself says this speaking through the voice of nature; and inasmuch as it is not His will to have Nature supply every place with all the necessaries of life, He ordains that some nations excel in one art and others in another. Why is this His will, except it be that He wished human friendships to be engendered by mutual needs and resources, lest individuals deeming themselves entirely sufficient unto themselves should for that very

reason be rendered unsociable? So by the decree of divine justice it was brought about that one people should supply the needs of another, in order, as Pliny the Roman writer says, that in this way, whatever has been produced anywhere should seem to have been destined for all. Vergil also sings in this wise:

“Not every plant on every soil will grow,” and in another place:

“Let others better mould the running mass Of metals,” etc.

Those therefore who deny this law, destroy this most praiseworthy bond of human fellowship, remove the opportunities for doing mutual service, in a word do violence to Nature herself. For do not the ocean, navigable in every direction with which God has encompassed all the earth, and the regular and the occasional winds which blow now from one quarter and now from another, offer sufficient proof that Nature has given to all peoples a right of access to all other peoples? Seneca thinks this is Nature’s greatest service, that by the wind she united the widely scattered peoples, and yet did so distribute all her products over the earth that commercial intercourse was a necessity to mankind. Therefore this right belongs equally to all nations. Indeed the most famous jurists extend its application so far as to deny that any state or any ruler can debar foreigners from having access to their subjects and trading with them. Hence is derived that law of hospitality which is of the highest sanctity; hence the complaint of the poet Vergil:

“What men, what monsters, what inhuman race,
What laws, what barbarous customs of the place,
Shut up a desert shore to drowning men,
And drive us to the cruel seas again.”

And:

“To beg what you without your want may spare—
The common water, and the common air.”

We know that certain wars have arisen over this very matter; such for example as the war of the Megarians against the Athenians, and that of the Bolognese against the Venetians. Again, Victoria holds that the Spaniards could have shown just reasons for making war upon the Aztecs and the Indians in America, more plausible reasons certainly than were alleged, if they really were prevented from traveling or sojourning among those peoples, and were denied the right to share in those things which by the Law of Nations

or by Custom are common to all, and finally if they were debarred from trade.

We read of a similar case in the history of Moses, which we find mentioned also in the writings of Augustine, where the Israelites justly smote with the edge of the sword the Amorites because they had denied the Israelites an innocent passage through their territory, a right which according to the Law of Human Society ought in all justice to have been allowed. In defense of this principle Hercules attacked the king of Orchomenus in Boeotia; and the Greeks under their leader Agamemnon waged war against the king of Mysia on the ground that, as Baldus has said, high roads were free by nature. Again, as we read in Tacitus, the Germans accused the Romans of 'preventing all intercourse between them and of closing up to them the rivers and roads, and almost the very air of heaven'. When in days gone by the Christians made crusades against the Saracens, no other pretext was so welcome or so plausible as that they were denied by the infidels free access to the Holy Land.

It follows therefore that the Portuguese, even if they had been sovereigns in those parts to which the Dutch make voyages, would nevertheless be doing them an injury if they should forbid them access to those places and from trading there. Is it not then an incalculably greater injury for nations which desire reciprocal commercial relations to be debarred therefrom by the acts of those who are sovereigns neither of the nations interested, nor of the element over which their connecting high road runs? Is not that the very cause which for the most part prompts us to execrate robbers and pirates, namely, that they beset and infest our trade routes?

Chapter VIII: By the Law of Nations trade is free to all persons whatsoever

If however the Portuguese claim that they have an exclusive right to trade with the East Indies, their claim will be refuted by practically all the same arguments which already have been brought forward. Nevertheless I shall repeat them briefly, and apply them to this particular claim.

By the law of nations the principle was introduced that the opportunity to engage in trade, of which no one can be deprived, **1** should be free to all men. This principle, inasmuch as its application was continually necessary after the distinctions of private

ownerships were made, can therefore be seen to have had a very remote origin. Aristotle, in a very clever phrase, in his work entitled the Politics, has said that the art of exchange is a completion of the independence which Nature requires. Therefore trade ought to be common to all according to the law of nations, not only in a negative but also in a positive, or as the jurists say, affirmative sense. The things that come under the former category are subject to change, those of the latter category are not. This statement is to be explained in the following way.

Nature had given all things to all men. But since men were prevented from using many things which were desirable in every day life because they lived so far apart, and because, as we have said above, everything was not found everywhere, it was necessary to transport things from one place to another; not that there was yet an interchange of commodities, but that people were accustomed to make reciprocal use of things found in one another's territory according to their own judgment. They say that trade arose among the Chinese in about this way. Things were deposited at places out in the desert and left to the good faith and conscience of those who exchanged things of their own for what they took.

But when movables passed into private ownership (a change brought about by necessity, as has been explained above), straightway there arose a method of exchange by which the lack of one person was supplemented by that of which another person had an over supply. Hence commerce was born out of necessity for the commodities of life, as Pliny shows by a citation from Homer. But after immovables also began to be recognized as private property, the consequent annihilation of universal community of use made commerce a necessity not only between men whose habitations were far apart but even between men who were neighbors; and in order that trade might be carried on more easily, somewhat later they invented money, which, as the derivation of the word shows, is a civic institution.

Therefore the universal basis of all contracts, namely exchange, is derived from nature; but some particular kinds of exchange, and the money payment itself, are derived from law; although the older commentators on the law have not made this distinction sufficiently clear. Nevertheless all authorities agree that the ownership of things, particularly of movables, arises out of the primary law of nations, and that all contracts in

which a price is not mentioned, are derived from the same source. The philosophers distinguish two kinds of exchange using Greek words which we shall take the liberty to translate as 'wholesale' and 'retail' trade. The former, as the Greek word shows, signifies trade or exchange between widely separated nations, and it ranks first in the order of Nature, as is shown in Plato's Republic. The latter seems to be the same kind of exchange that Aristotle calls by another Greek word which means retail or shop trade between citizens. Aristotle makes a further division of wholesale trade into overland and overseas trade. But of the two, retail trade is the more petty and sordid, and wholesale the more honorable; but most honorable of all is the wholesale overseas trade, because it makes so many people sharers in so many things.

Hence Ulpian says that the maintenance of ships is the highest duty of a state, because it is an absolutely natural necessity, but that the maintenance of hucksters has not the same value. In another place Aristotle says: "For the art of exchange extends to all possessions, and it arises at first in a natural manner from the circumstance that some have too little, others too much." And Seneca is also to be cited in this connection for he has said that buying and selling is the law of nations.

Therefore freedom of trade is based on a primitive right of nations which has a natural and permanent cause; and so that right cannot be destroyed, or at all events it may not be destroyed except by the consent of all nations. So far is that from being the case, that any one nation may justly oppose in any way, any other two nations that desire to enter into a mutual and exclusive contractual relation.

Chapter XIII: The Dutch must maintain their right of trade with the East Indies by peace,
by treaty, or by war

Wherefore since both law and equity demand that trade with the East Indies be as free to us as to any one else, it follows that we are to maintain at all hazards that freedom which is ours by nature, either by coming to a peace agreement with the Spaniards, or by concluding a treaty, or by continuing the war. So far as peace is concerned, it is well known that there are two kinds of peace, one made on terms of equality, the other on unequal terms. The Greeks call the former kind a compact between equals, the latter an

enjoined truce; the former is meant for high souled men, the latter for servile spirits. Demosthenes in his speech on the liberty of the Rhodians says that it was necessary for those who wished to be free to keep away from treaties which were imposed upon them, because such treaties were almost the same as slavery. Such conditions are all those by which one party is lessened in its own right, according to the definition of Isocrates. For if, as Cicero says, wars must be undertaken in order that people may live in peace unharmed, it follows that peace must be called not a pact which entails slavery but which brings undisturbed liberty, especially as peace and justice according to the opinion of many philosophers and theologians differ more in name than in fact, and as peace is a harmonious agreement based not on individual whim, but on well ordered regulations. If however a truce is arranged for, it is quite clear from the very nature of a truce, that during its continuance no one's condition ought to change for the worse, inasmuch as both parties stand on the equivalent of a *uti possidetis*.

But if we are driven into war by the injustice of our enemies, the justice of our cause ought to bring hope and confidence in a happy outcome. "For," as Demosthenes has said, "every one fights his hardest to recover what he has lost; but when men endeavor to gain at the expense of others it is not so." The Emperor Alexander has expressed his idea in this way: 'Those who begin unjust deeds, must bear the greatest blame; but those who repel aggressors are twice armed, both with courage because of their just cause, and with the highest hope because they are not doing a wrong, but are warding off a wrong'.

Therefore, if it be necessary, arise, O nation unconquered on the sea, and fight boldly, not only for your own liberty, but for that of the human race. "Nor let it fright thee that their fleet is winged, each ship, with an hundred oars. The sea whereon it sails will have none of it. And though the prows bear figures threatening to cast rocks such as Centaurs throw, thou shalt find them but hollow planks and painted terrors. 'Tis his cause that makes or mars a soldier's strength. If the cause be not just, shame strikes the weapon from his hands."

If many writers, Augustine himself among them, believed it was right to take up arms because innocent passage was refused across foreign territory, how much more justly will arms be taken up against those from whom the demand is made of the common

and innocent use of the sea, which by the law of nature is common to all? If those nations which interdicted others from trade on their own soil are justly attacked, what of those nations which separate by force and interrupt the mutual intercourse of peoples over whom they have no rights at all? If this case should be taken into court, there can be no doubt what opinion ought to be anticipated from a just judge. The praetor's law says: 'I forbid force to be used in preventing any one from sailing a ship or a boat on a public river, or from unloading his cargo on the bank'. The commentators say that the injunction must be applied in the same manner to the sea and to the seashore. Labeo, for example, in commenting on the praetor's edict, 'Let nothing be done in a public river or on its bank, by which a landing or a channel for shipping be obstructed', said there was a similar interdict which applied to the sea, namely, 'Let nothing be done on the sea or on the seashore by which a harbor, a landing, or a channel for shipping be obstructed'.

Now after this explicit prohibition, if any one be prevented from navigating the sea, or not allowed to sell or to make use of his own wares and products, Ulpian says that he can bring an action for damages on that ground. Also the theologians and the casuists agree that he who prevents another from buying or selling, or who puts his private interests before the public and common interests, or who in any way hinders another in the use of something which is his by common right, is held in damages to complete restitution in an amount fixed by an honorable arbitrator.

Following these principles a good judge would award to the Dutch the freedom of trade, and would forbid the Portuguese and others from using force to hinder that freedom, and would order the payment of just damages. But when a judgment which would be rendered in a court cannot be obtained, it should with justice be demanded in a war. Augustine acknowledges this when he says: 'The injustice of an adversary brings a just war'. Cicero also says: "There are two ways of settling a dispute; first, by discussion; second, by physical force; we must resort to force only in case we may not avail ourselves of discussion." And King Theodoric says: 'Recourse must then be had to arms when justice can find no lodgment in an adversary's heart'. Pomponius, however, has handed down a decision which has more bearing on our argument than any of the citations already made. He declared that the man who seized a thing common to all to the prejudice of every one else must be forcibly prevented from so doing. The theologians

also say that just as war is righteously undertaken in defense of individual property, so no less righteously is it undertaken in behalf of the use of those things which by natural law ought to be common property. Therefore he who closes up roads and hinders the export of merchandise ought to be prevented from so doing *via facti*, even without waiting for any public authority.

Since these things are so, there need not be the slightest fear that God will prosper the efforts of those who violate that most stable law of nature which He himself has instituted, or that even men will allow those to go unpunished who for the sake alone of private gain oppose a common benefit of the human race.