MARE LIBERUM AND OPINIO JURIS: A GROTIAN READING OF THE NORTH SEA CONTINENTAL SHELF CASES

ERIC WILSON*

This essay is concerned with the lingering, albeit largely unrecognised, influence of Natural Law upon contemporary internationalist jurisprudence and judicial discourse. Following an agenda that is broadly Derridean in nature, the paper strives to provide a critical reading of a pivotal contemporary "positive" ICJ ruling, The North Sea Continental Shelf, illustrating the myriad ways in which the allegedly post-naturalist language of the World Court in fact replicates nearly all of the primary metaphysical assumptions of naturalist jurisprudence. This is most notable in the ICJ's strategic deployment of a reading of opinio juris that is blatantly "post-metaphysical", with the Presence of the One mimetically substituted with the equally monistic Will of the State. These considerations are underscored by the critically juxtaposition of select vital passages of North Sea with an extended critical exegesis of the openly Naturalist international maritime treatise Mare Liberum of Hugo Grotius. By reading Grotius, the alleged "Father" of International Law, "against himself", both Grotius and much of contemporary international jurisprudence will be revealed as being the (unwitting?) replicators of supposedly archaic modes of juro-political discourse.

I INTRODUCTION: INTERNATIONAL PUBLIC LAW AS TAXONOMY

In no other branch of jurisprudence is the connection between textual discourse and legal praxis as vital as in International Public Law. Article 38 of the Statute of the International Court of Justice (ICJ) instructs the Court to 'apply' international convention, international custom, general principles of law, and 'judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'[1] As Philip Allott has pointed out, there is 'a conflict in the drafting here, as the Statute tells the Court to apply the teachings of publicists and also to use them as a means for determining the rules of law.'[2] According to Allott, this mandated

* Lecturer in Law, Monash University; SJD Candidate, University of Melbourne.

1 Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 *The British Yearbook of International Law* 78, 118.

2 Ibid 118.

convergence of legal doctrine with judicial practice arguably belies a manifestly political configuration of judicial policy as expression of state policy.[3]

> Law conceives social reality as abstraction, then reabstracts it in the form of generalised legal relations. To do law is necessarily to do theory. Law is the application of ideas to material reality, with a view to re-forming human consciousness, that is to say, with a view to being a cause of conforming behavior. To do law is, inevitably, to act philosophy[4] ... [Consequently] each time that a writer, or Government or a tribunal carries out the process (forming a pattern from the subject's own internal patterns, and from the patterns of all those who have carried out the process before and whose results are known to the subject), the resulting pattern becomes more dense, more autonomous of the will of the subject, and, in this sense, more objective.[5]

Allott's language is particularly striking - the sheer repetitiveness of the action/process itself generates (over time) the degree of 'ontological weight' necessary to make the process binding, or customary. This insight is of great significance in understanding international public law, predicated upon the twin pillars of state action and uniform consistency over time. As Allott reminds us, the effect of public international law upon natural and/or legal persons other than States ultimately depends upon the operation of extra-juridical social processes.[6] The concept of customary international law, then, is integral to the entire public international legal regime, both in its instrumental capacity (functional), as well its potential normative capacity, effecting a paradigmatic substitution of international public interest (communitarian) for traditional Nation-State self-interest (atomistic). Allott's shift of analytic focus of international society to the communitarian-based model of public interest forces a correlative re-definition of the nature and function of the (now) subordinate atomistic Nation-State systems. Henceforth, sovereign states are to be viewed as the composite 'constitutional organs of international society', the loci of collectively delegated governmental powers (as opposed to traditional exclusionary territorial powers). This inverted re-formulation of the international community is legitimised, in turn, through the prioritisation of the public interest and the correspondent postulation of collective social objectives as the 'true' purpose of international society. This identification of international community with a public trust/interest model of the juro-political 'good' highlights the radical jurisprudential potential of the operational scope and efficacy of international customary law; within such a strongly internationalist system, 'the subjects of the law, by willing and acting for the sake of obeying the

3 International law is frequently linked to the doctrine of political realism in this regard. 'The characteristic feature of modern realism is its use of the concept of power to explain the course of international politics. The primary unit of analysis is the State which is regarded as operating in an anarchical system dominated by conflict. ... Realism aligns international law with power in so far as international law is considered a tool at the disposal of the most powerful.' Shirley V. Scott, 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994) 5 *The European Journal of International Law* 313, 314.

4 Philip Allott, '*Mare Nostrum*: A New International Law of the Sea' in Jon M Van Dyke, Durwood Zaelke and Grant Hewison (eds), *Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony* (1993) 49.

5 Allott, above n 1, 134.

6 Allott, above n 4, 57.

law, are privileged to become part of the legislator [hitherto the exclusive role of the sovereign State] because their behaviour, in being intentionally law conforming, is behaviour for the sake of the public interest of the whole society.'[7]

Historically, the Law of the Sea has played a pivotal role in the emergence and (re)definition of international legal norms and practices, both as the subject of particular sets of judicial discourses, as well as the constituent object of substantive International Law. As Allott has argued, Law is inherently taxonomic, reclassifying material reality for its own discursive objectives. This classifactory process, however, is identical with the normative act of prescription; through the naming of an entity as a 'legal person' law invests that person (discursive object) with a qualitatively distinct form of juridical existence. Consequently, if international law were to utilise the discursive concept of 'the sea' as a primary classifactory concept, then law 'sets the sea apart for legal purposes, thereby giving rise to the possibility of assimilation and discrimination on the basis of that isolating definition.'[8] When this taxonomic process is viewed through the prism of Allott's internationalist public trust model it becomes evident that society's 'natural' relationship to the sea is more than proprietary; rather, 'it is a relationship of participation in the forming of social objectives for our sea and in the sharing of its benefits and its governance.'[9]

Within that set(s) of critical convergences between textual formation and legal praxis that together constitute the law of the sea, two names/events are outstanding - Hugo Grotius (Huig de Groot; 1583-1645), the widely hailed 'father of international law'[10] and the International Court of Justice (ICJ) ruling *North Sea Continental Shelf Cases* (1969). Both the author and ruling are central to the

7 Ibid 60-61. On this point, cf Scott, above n 3, 325. 'Questions as to whether and why states obey international law are no longer meaningful. It can now be seen that States neither obey nor disobey international law; they simply act so as to demonstrate acceptance of the ideology of international law.' The crucial point here, of course, is that the entire edifice of the '"ideology" of international law is underpinned by the sum total of customary practice.' Power is not a consideration distinct from international law. It appears that the idea of international law is an important form of power in international politics.' at 324.

8 Allott, above n 4, 51. 'In complex modern societies, a vast mass of lawmaking and law applying has turned property into one of the most intricate phenomena of a social system, with property power shared, in different ways for different kinds of property, between the property owner and a society that intervenes powerfully in all property relations.' Ibid p53.

9 Ibid. 'The international social objectives that are realized in legal relations of international law, including the law of the sea, are formed by a process of double aggregation. Each State system aggregates through its internal social process a view of its interests (subjective social objectives) in relation to a given matter. The national interests are then aggregated through the international system - negotiation, agreement, and decision making of international organs. International legal relations are then said to be formed as the product of two particular forms of aggregation - through the accumulation of lawlike behaviour into legal relations of customary international law and through the conclusion of treaties.' Ibid 57.

10 'Grotius is so especially associated with international law as to become entitled to the general tribute he has received in modern times as "father of international law"'. W S M Knight, *The Life and Works of Hugo Grotius* (1925) 112; 'Grotius did not create international law. Law is not made by writers. What Grotius did was to endow international law with unprecedented dignity and authority by making it part not only of a general system of jurisprudence but also of a universal moral code'. Hersch Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht, Vol. 2: The Law of Peace. Part I: International Law in General* (1975) 365. For a highly critical view of Grotian paternity, based upon the vital issue of authorial originality, cf Giorgio Del Vecchio, 'Grotius and the Foundation of International Law' (1962) 37 *New York University Law Review* 260.

evolution of the substantive and interpretative corpus of international law. Grotius' seminal text *Mare Liberum* (1604) firmly established the doctrine of 'freedom of the seas' as an integral part of international law[11]; simultaneously, it successfully classified (prescribed) the sea as a subject of legal discourse, thereby creating the ultimate foundational principle of the *North Sea* ruling. Furthermore, both have been crucial in legitimising and classifying the body and scope of customary law - *opinio juris sive necessitatis* - within the international legal system. Utilising Article 38, the ICJ has made it repeatedly clear in the long line of cases[12] not only that *opinio juris* is a 'necessary component of customary norm creation in international law, but also that the requirements of *opinio juris* is implicit in the "accepted as law" language of Article 38.'[13] Of these cases, *North Sea*, employing variants of earlier Grotian principles, has proven to be historically the most important. Since the initial formulation of the concept in *North Sea*, the ICJ has reiterated the necessity of *opinio juris* in six subsequent opinions.[14] International arbitral tribunals[15] as well as US domestic courts applying international law[16] have expressed cognisance of the doctrine's necessity as well.[17]

Despite their apparent doctrinal similarities, however, a closer examination of *Mare Liberum* and *North Sea* reveal substantial theoretical fissures concerning the nature and function of *opinio juris* within international customary law. A critical reading of *North Sea* through the 'lenses' of the 'Grotian Heritage' will not only illuminate the nature of the historical origins and evolution of contemporary international customary law doctrine, it will also provide greater critical awareness of both the actual and potential scope of the role of customary law within the emergent international legal order. Although the ICJ ruling is conventionally interpreted as a landmark event in the development of positive

11 '*Mare Liberum* initiated the doctrine of the "freedom of the seas" and the modern law of the sea... It has been accepted as an incontrovertible principle, almost a religious doctrine which could not be questioned.' R P Annand, *Origin and Development of the Law of the Sea: History of International Law Revisited* (1982) x. 'The heart of Grotius' position, expoused in the *Mare Liberum* . . . came eventually to be a foundation of the modern regime of the high seas: namely, that states may not individually or collectively acquire the high seas by occupation since they are *res communis omnium* or *res extra commercium*.' W E Butler, 'Grotius and the Law of the Sea' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (1990) 209, 211.

12 *Lotus (France v Turkey)* [1927] PCIJ (Ser A) No.10' Asylum (Columbia v Peru), [1950] ICJ 266; *North Sea Continental Shelf (Federal Republic of Germany v Denmark)(Federal Republic of Germany v Netherlands)(Judgment)* [1969] ICJ Rep3.

13 J L Slama, 'Opinio Juris in Customary International Law' (1990) 15 *Oklahoma City University Law Review* 641.

14 *Military & Paramilitary Activities in & Against Nicaragua (Nicaragua v United States of America)(Merits)* [1986] ICJ 14; *Continental Shelf (Libyan Arab Jamahiriya v Malta)* [1985] ICJ 13; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v United States of America)* [1984] ICJ 246; *Western Sahara (Advisory Opinion)* [1975] ICJ 12; *Fisheries Jurisdiction Case (Great Britain and Northern Ireland v Iceland)* [1974] ICJ 3; *Barcelona Traction* (Belgium v Spain) [1970] ICJ 3.

15 *Sedco Inc v. National Iranian Oil Co* 10 Iran-US CTR 180 (Iran-US Cl. Trib. 1986); *INA Corp v Iran* 8 Iran-US CTR 373 (Iran-US Cl. Trib. 1985).

16 *Amerada Hess Shipping Corp v Argentine Republic*, 830 F.2d 421, 423 (2d Cir 1987); rev'd 488 US 428 (1989); *Filartigu v Peru-Iraka*, 630 F. 2d 876, 881 (2d Cir. 1980); *Von Pardel v USSR*, 623 F.Supp. 246, 257 (DDC 1985).

17 Slama, above n 13, 645.

international law, a close reading of the Court's decision in terms of Grotian Naturalist jurisprudence reveals the presence of crucial elements of the National tradition.[18]

II CUSTOMARY INTERNATIONAL PUBLIC LAW

Although customary international law lies at the very heart of the contemporary international legal regime, it has proved notoriously difficult to define with precision.[19] Article 38(1) of the Statute of the International Court of Justice self-referentially instructs the Court to apply international custom 'as evidence of a general practice accepted as law.'[20] Legal custom is inseparable from state responsibility within the international legal community, denoting 'specifically the juridical position of an obligator-state following its breach of an international obligation.'[21] This, of course, presupposes that the legal person of Nation-State (re taxonomic reclassification) possesses an objective set of international obligations in the first instance - 'in order that a State may incur responsibility it is necessary that an unlawful international act be imputed to it, that is there exist a violation of a duty imposed by an international juridical standard.'[22] Other commentators have gone beyond this position, arguing that the creation of binding sets of international obligations is itself the very essence of customary law. Norms of customary law emerge (or 'crystallise') at that point 'when a preponderance of states and other authoritative actors converge on a common understanding of the norms' content and generally expect future behavior in conformity with those norms.'[23]

There appears to be two necessary conditions for the existence of customary international law: usage and *opinio juris sive necessitatis*. Usage, or state practice, may be expansively defined as any formal action or statement by a recognised Nation-State from which views of customary law may reasonably be logically inferred - these include physical acts, claims, declarations in *abstracto* (eg United Nations resolutions), national laws, and national court rulings.[24]

18 Cf Ijaz Hussain, *Dissenting and Separate Opinions at the World Court* (1984) 236-59, for a comprehensive discussion of the ICJ's surprisingly frequent utilisation of Natural Law.

19 Ibid, passim. 'International lawyers . . . invoke rules of customary international law every day, but they have great difficulty in agreeing on a definition of customary international law.' Michael Akehurst, 'Custom as a Source of International Law' (1974-1975) 47 *The British Yearbook of International Law* 1.

20 Elias Olufemi and Chin Lim, 'Some Tentative Claims Concerning the Basis of Customary International Law' (1994) 25 *Cambrian Law Review* 103.

21 Brian D Smith, *State Responsibility and the Marine Environment* (1988) 5.

22 Ibid 6.

23 S James Anaya, *Indigenous Peoples in International Law* (1996) 50.

24 'Customary international law can also be created by the practice of international organizations and (in theory, at least) by the practice of individuals.' Akehurst, above n 20, 53. 'The practice needs to be one which has existed without interruption for a period of years. ... Apparently, it is not necessary for the custom to be humane, nor unanimously accepted - only a general acceptance is necessary. Consequently, consent by all nations is not necessary for the creation of a custom. It has been suggested that a custom becomes binding on States which came into existence following the development of a custom, and on those pre-existing States which have an opportunity to apply it.' Leslie M MacRae, 'Customary International Law and UNCLOS' (1983) 13 *California Western International Law Journal* 181, 202-4.

However, in order to create customary rules, state practice must be combined with *opinio juris*, the aggregate of express statements from States that particular forms of conduct are permitted, required or prohibited by international law.[25] Custom is realised through by State belief in - and, therefore, voluntary acquiescence to - its inherently binding nature; the essence of *opinio juris* 'is characterized by both a state's subjective belief as to the legality of a particular usage, as well as the binding international obligation which results from its existence.'[26] Minimally, the role played by *opinio juris* can be described as the role played by consent: 'in its simplest and most workable aspect, it is a manifestation of the system of consensual law-making that is customary international law.'[27]

Traditionally recognised sources of both state practice and *opinio juris* include diplomatic correspondence, diplomatic instructions, municipal law, court rulings, treaties, negotiations, international agreements, and the practices of international organisations.[28] Expressed formalistically, State action constitutes the material element, going to certain past uniformities in behavior, and *opinio juris* constitutes the psychological element, going to certain 'subjectivities of 'oughtness', attendant upon such past behavioral uniformities'.[29] Hence, the 'traditional points of reference for determining the existence of a customary norm are patterns of communicative behavior involving physical episodic conduct.'[30] It is precisely this synthetic 'episodic conduct' that constitutes the essence of international legal obligation which is, in turn, demonstrative of the juro-political

25 'It is not necessary that the State making such statements believes them to be true; what is necessary is that the statements are not challenged by other States.' Akehurst, above n 19, 53.

26 Slama, above n 13, 656.

27 Olufemi and Lim, above n 21, 513. 'International law only exists in the sense that nation-state officials in their international dealings *refer to* it, both by direct literal reference and by use of legal argumentation in claim-conflict situations. In the aggregate, states are therefore both the creators of international law and the subjects of the legal regime they have created. It follows from this that the content of the rules of international law depends upon the consensus of nation-state officials as to what the content of the law is.' Anthony A D'Amato, *The Concept of Custom in International Law* (1971) 33.

28 MacCrae, above n 24, 204; Ian Brownlie, *Principles of Public International Law* (4th ed, 1985) 1-31.

29 'In terms of its function, *opinio juris* may be thought of as a solvent that transforms the nitty-gritty of a historical rendition of examples of state practice into a more liquid form: a rule of customary international law that may be applied to current problems. Without *opinio juris*, there may exist only a history lesson more or less devoid of legal significance.' Mark W. Janis, *An Introduction to International Law* (2nd ed, 1993) 46.

30 Ibid. Anthony D'Amato has illustrated such 'episodic conduct' in the following manner: '[A] courier of state X delivers an unwelcome message to the king of state Y. The king imprisons the messenger. State X responds by sending another courier (obviously a reluctant one) who delivers the message that unless Y returns the first courier safe and sound X will sack and destroy the towns of Y. If Y releases the first courier with an apology and perhaps a payment of gold, a resolution of the issue in this manner will lead to a rule that official couriers are entitled to immunity against imprisonment.' Quoted in Ibid.

reality of the customary norm.[31]

So defined, *opinio juris* would appear an intrinsic component of what legal scholars have identified as the essence of the 'Grotian Heritage', that aggregate of juro-textual discourse(s) emanating from Hugo Grotius. This 'Heritage' consists of the following three propositions concerning the international legal order: (1) the universal subordination of all States to normatively binding rules of law which are themselves the result of myriad interactions between the law of Nature - 'conceived as an inexhaustible resource of moral and equitable principle derived by the application of right reason' - and the law of Nations, derived from the exercise of state volition; (2) the sovereign equality of all States, conceived of as the expression of the fundamental freedom and equality of all legal persons on the level of the Nation-State; and (3) the material inter-dependence of all States as members of the international community.[32] A detailed analysis of *Mare Liberum* will highlight these convergences between modern customary law doctrine and the Grotian Heritage; it will also underscore the fundamental theoretical incompatibility between Grotius and the ICJ's seminal (re)formulation of *opinio juris* in the *North Sea* ruling.

III *MARE LIBERUM*

It is not the least of the ironies of the history of western jurisprudence that the foundational text of international marine law should be a defence of privateering.[33] The composition of *Mare Liberum* was sparked by the capture of the Portuguese carrack *Santa Catharina* in the Straits of Malacca on 25 February 1603 by Admiral Jacob Hemskerck of the Dutch East Indies Company, of which

31 'It would appear that a State, in asserting that it is legally bound by a given rule, is accepting at least two obligations. First, as a matter of logic, it seems that if a state acknowledges it has a legal duty to behave in a certain fashion, it acknowledges that a state toward which it has not behaved in this fashion has a right to question its conduct ... The second element of a legal obligation is the duty to correct any breaches of the obligation. This conclusion flows not only from logic but also from authority. Commentators frequently state that, as a general principle of international law, breach of an international duty by a state entails a duty to make reparations. Reparations may take one of three forms: restitution, compensation, or satisfaction, satisfaction meaning some act by the offending state acknowledging its breach of duty. If, therefore, a State acknowledges the breach of some international undertaking or rule of practice and does not assert the existence of mitigating circumstances or exceptions to the rule but nonetheless denies that the breach requires it to make reparation, the State is effectively denying that the undertaking or rule imposes on it a legal obligation.' Arthur M Weisburd, 'Customary International Law: The Problem of Treaties' (1988) 21 *Vanderbilt Journal of Transnational Law* 1, 8.

32 M C W Pinto, 'The New Law of the Sea and the Grotian Heritage' in *International Law and the Grotian Heritage* (1985) 47, 91. 'The work of Grotius is cardinal because it states one of the classic paradigms that have since determined both our understanding of the facts of inter-state relations and our ideas as to what constitutes right conduct therein. This is the idea of international society: the notion that states and rulers of states are bound by rules and form a society or community with one another, of however a rudimentary a kind.' Hedley Bull, 'The Importance of Grotius in the Study of International Relations', in Headley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (1990) 71.

33 As with so much else regarding Grotius, his central concept was far less original than is commonly supposed. 'Neither did Grotius invent his doctrine of the freedom of the seas, nor was it a new practice he was recommending. His genius lies in pointing at the existence of that practice, as well as in systematically presenting it as a doctrine relying on the ever-respected Roman law, and recommending it to Europeans as the most desirable practice.' Annand, above n 11, 86.

Grotius appears to have been a Board member.[34] The early draft of the treatise was originally incorporated as the twelfth chapter of a longer work defending Dutch privateering, *De jure Praedae Commentarius (Commentary on the Law of the Prize and Booty*[35]*)*, also titled *De Indis (The Indies*[36]*)*. Originally composed as a legal brief for advocacy work in the Dutch Admiralty court,[37] it doubled as an exercise in moral suasion against the Arminian and Mennonite shareholders of the Company whose pacifistic inclinations led them to disavow privateering as a legitimate commercial activity.[38]

Although the *Commentarius* is not the first work in which Grotius discusses international law, it does constitute the earliest systematic Grotian treatise devoted to an international legal problem - in this instance, the justification of the Company's seizure of a Portuguese vessel as a war prize.[39] It is not a formal philosophical exposition, but a practical exercise in legal advocacy; 'the treatise on the law of the prize, of which the *Mare Liberum* is a chapter, was in the nature of a brief.'[40] As one would expect, there is an intimate and precise correlation between the development of Grotius' juridical writings and the contemporary political environment. Ironically, the *Commentarius* was formally withheld from official publication due to its de facto incompatibility with Dutch maritime practice, itself a contradictory mixture of both free-market and mercantilist impulses.

Despite the brief's adamantly free market approach - fully consistent with national trade and maritime policy - it ultimately worked to doctrinally subvert Holland's concurrent monopolisation of the North Sea fisheries.[41] By 1609, however, the political climate had changed substantially, with the Dutch seeking a rapprochment with Spain. Within this context, freedom of the seas now formed a vital part of the United Province's overarching political design of a comprehensive peace settlement founded upon free-trade principles; 'commerce with the East Indies was of great importance for the security of the country, and that it was clear enough that such commerce could not be conducted without arms, given [in the Dutch view] the Portuguese obstruction by force and fraud.'[42]

34 James B Scott, 'Introduction', in Hugo Grotius, *The Freedom of the Seas or the Right Which Belongs to the Dutch to Take Part in the East Indian Trade* (1604, Van Deman Magoffin translation, 1972) vi.

35 Frans De Pauw, *Grotius and the Law of the Sea* (1965) 14.

36 Richard Tuck, *Philosophy and Government* 1572-1651 (1993) 170.

37 Hence, 'the first systematic treatise on the law of nations - the law of [maritime] war and peace - was not merely a philosophical disquisition, but ... it was the direct outgrowth of an actual case of professional employment.' Scott, above n 34, vi.

38 De Pauw, above n 35, 16. Grotius himself was a Remonstrant. Janis, above n 29, 158. It is worth noting that 'religious sources were very much more important to Grotius than any of the evidence of treaties, diplomatic history, state practice, or judicial decisions which predominate in the ordinary literature of international law today.' Mark W Janis, *The Influence of Religion on the D evelopment of International Law* (1991) 63.

39 De Pauw, above n 35, 14.

40 Scott, above n 34, vi.

41 De Pauw, above n 35, 18.

42 Tuck, above n 36, 170. Cf Annand, above n 11, 60-9 on Portuguese attempts to prohibit freedom of navigation and trade with India. 'It is important to note that, unlike the Portuguese, Hollanders [sic] were a nation of shipowners and merchants. The Portuguese had gone to the East as crusaders, not necessarily as traders. But in Holland, "successful trade was not merely respectable. It was almost a religion."' Ibid 74.

Accordingly, in 1609 the *Mare Liberum* was published, albeit anonymously.[43]

As with the *Commentarius*[44], the text is of an utterly practical nature - 'We must thus regard the *Mare Liberum* as an occasional pamphlet, "an eloquent plea, employing legal doctrine without sample for a political end" ... a "special pleading for a special situation."'[45] The basic purpose of the text was to effect that representational (mimetic) substitution of private property law with obligatory normative concepts of international public interest expressed through customary legal praxis. In the first instance, Grotius is primarily concerned with extensively renegotiating the fundamental concept of private property.

> It is ... necessary to explain that in the earliest stages of human existence both sovereignty and common possession had meanings other than those which they bear at the present time. For nowadays sovereignty means a particular kind of proprietorship, such in fact that it absolutely excludes like possession by anyone else. On the other hand, we call a thing 'common' when its ownership or possession is held by several persons jointly according to a kind of partnership or mutual agreement from which all other persons are excluded. Poverty of language compels the use of the same words for things that are not the same. And so because of a certain similarity and likeness, our modern nomenclature is applied to that state of primitive law. Now, in ancient times, 'common' meant simply the opposite of 'particular'; and 'sovereignty' or 'ownership' meant the privilege of lawfully using common property. This seemed to the Scholastics to be a use in fact but not in law, because what now in law is called use, is a particular right, or if I may use their phraseology, is, in respect to other persons, a privative right.[46]

The central task of the *Mare Liberum* is to accomplish a systematic re-classification (prescription) of the terminological categories of traditional property law and to apply them practically in a judicial resolution of the question of the legal status of the High Seas.

> Neither a Nation nor an individual can establish by right of private ownership over the sea itself (I except inlets of the sea), in as much as its occupation is not permissible either by nature or on grounds of public utility ... The discussion of this matter has been taken up for this reason, namely, that it may be seen that the Portuguese have not established private ownership over the seas by which people go to the East Indies. For the ... reasons that stand in the way of ownership are in this case infinitely more powerful than in all others.

43 Grotius provides his own, customarily modest, explanation for choosing anonymity. 'To this little book I had refrained from giving my name, because it seemed to me to be safe, like a painter skulking behind his easel, to find out the judgements of others and to consider more carefully anything that might be published to the contrary.' Quoted in Ibid 80. This is disingenuous. Far more likely was the author's own careerist anxieties prompted by the vicissitudes of Dutch diplomacy and trade policy.

44 'The writing of the *De Jure Pradae Commentarius* (1604) and the publication of the *Mare Liberum* (1609), is the work of an advocate retained by the Dutch East India Company.' De Pauw, above n 35, 75.

45 Ibid 21.

46 Grotius, above n 34, 22-3.

> That which in other cases seems difficult, is here absolutely impossible, and what in other cases we recognize as unjust is here most barbarous and inhuman.[47]

Two rhetorical moves are crucial to Grotius' overall strategem: (1) he establishes a necessary correlation between the 'ordinance of nature' (ie, natural law) and 'common consent' (ie, legal custom, *opinio juris*) within the parameters of a broader, historically based argument concerning the customary law of nations; and (2) the (re-)classification of property law yields the normatively desirable resolution by being itself made subject to the dictates of natural law; it is the common ownership of the sea (*Mare Liberum*, or 'The Free Seas') that best realises the common interest, which is identical to the greater moral good.

> In the legal phraseology of the law of Nations [*publicum juris gentium*], the sea is called indifferently the property of no one (*res nullius*), or a common possession (*res communis*) or public property (*res publica*) ... At the first period when mankind was created, all things were under joint ownership of all human beings. This joint ownership was provided by the early law of Nations, which is sometimes called Natural law [*Iure primo Gentium, quod et Naturale interdum dicitur*]. This period of joint ownership, however later passed into the period of division and private ownership became admissible ... when property or ownership was invented, the law of property was established to imitate nature [*Repertae proprietati lex poita est, quae naturam imiaretur*] ... all things were, however, not made subject of private ownership. The things not possessed were left under joint ownership of all human beings as was the case in the past in the period of joint ownership. So in regard to such things the following two principles were laid down. The first principle was that the things not possessed by their nature or things which have never been possessed cannot be anyone's property. The reason is that all privately owned properties result from possession [*proprietas ab occupatione*]. The second principle was that all things which were made by Nature and were such that if a certain person used them all others might still use them jointly, not only exist even now in the same state as they were made by Nature at the beginning, but also have to exist as such forever ... These two principles are applicable to flowing water, air, the seashore, the sea, and others. These things are, therefore, called common property [*communia omnium*] in conformity with natural law [*iure naturali*] and called public property [*publica*] in conformity with the law of Nations [*iuris gentium*]. But, these are one and the same after all. Both of them mean the things which all human beings can use in common [*sicut et usum eorum modo communem, modo publicam vocant*]. Furthermore, these things are called ownerless property [*res nullius*] in the sense that they cannot become the object of private ownership. There are, however, two types of ownerless property in this sense. The first type are such things as wild animals, fish, birds, which are not owned by anyone, but which can be owned by someone who takes possession of them. The second type are those things

[47] Ibid 36, 37.

> which cannot become the object of private ownership forever by mutual agreement of the whole of mankind. The things of this type are those the use of which is common to all human beings and as to which it is not permitted for one person to take away the common use from all others. The sea falls into the latter category. It is, therefore, impossible that the sea become the property of one person.[48]

In strictly economistic terms, Grotius' classification/prescription of the sea as *res communis* facilitates the expansion of free trade, the materialist expression of the 'common good'; the sea now becomes *res extra commercium.*

> 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.[49]

Here, free trade acts as the universal signifier of 'freedom' per se, the text revolving around a binary opposition between the Imperialist-Mercantilist-Spanish and the Republican-Entrepreneurial-Dutch.

> Indeed, can anything more unjust be conceived than for the Spaniards to hold the entire world tributary, so that it is not permissible either to buy or to sell except at their good pleasure? ... It ought not to be supposed that trade was invented for the benefit of the few, but in order that the lack of one would be counterbalanced by the oversupply of the other, a fair return also being guaranteed to all who take upon themselves the work and dangers of transport.[50]

Having established the corollary between sea as public property object/thing (*res communis*) and sea as site of public activity/use-right (*res extra commercium*), the text effects a compelling mimetic identification between the free trade entrepreneurial interests of the Dutch with the collective interests of Humanity; the sea is transferred from the realm of private property to the domain of the public interest.

48 Ibid Chapter V 22-30. Emphasis added. Cf Fujio Ito, 'The Thought of Hugo Grotius in the Mare Liberum' (1974) 18 *Japanese Annual of International Law* 1, 6-7. Here, 'one person' means the Prince. On the ultimately personal nature of political *dominium* in the seventeenth century, cf Cornelius F Murphy, *The Search for World Order: A Study of Thought and Action* (1985) 21-7.

49 Grotius, above n 34, 7. On this point, cf Tuck, above n 36, 173-179. Grotius' 'central idea was thus quite a simple one: to take the principle of self-preservation and show how, interpreted as a fundamental moral right with a set of consequential rights, it could provide a theory of ethical conduct (including a theory of justice) ... the most obvious [feature of Grotius' account of property] was that it excluded the sea from the category of things which could be owned ... In particular, the sea could not be owned by private individuals nor carried by them into the domain of a State, and so Grotius had established his main polemical point.' It is important to note, however, that even on the basis of Tuck's reading, the vital principle of 'self-preservation' is still a derivative of Nature; that is, the Divine Will.

50 Grotius, above n 34, 70-1.

> 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 it not that the very cause which for the most part prompts us to exercate robbers and pirates, namely that they beset and infest our trade routes? ... 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.[51]

Through his adroit reclassification of the categories of property law, Grotius facilitates the emergence of the sea itself as a subject of a form of discourse within international public law. In substantive terms, the sea serves as the locus for the principles of international solidarity and agreement, governed by the essential precepts of the customary law of nations and mediated through the property law category of res communis. The *Mare Liberum* acts as the ground of the discursive emergence of the Grotian Heritage, 'the solidarity, or potential solidarity, of the states comprising international society, with respect to the enforcement of the law.'[52]

It is at this delicate juncture that *North Sea* appears most consistent with Grotian doctrine. The ICJ ruling is a customary law-based determination of the 'binding' nature of the Geneva Convention on the Continental Shelf. Although the majority rejects West Germany's contention that the equidistance principle has, as a matter of legal fact, achieved the status of a customary norm,[53] the court's language is essentially Grotian, not only in its acceptance of the notion of the high seas as a subject of international customary legal discourse, but, more importantly, in its prioritization of the internationalist perspective to be employed in marine dispute resolution, an approach which is itself legitimised by binding legal custom.

> In so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual law in its origins, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed

51 Ibid 10, 73.

52 Hedley Bull, 'The Grotian Conception of International Society' in Herbert Butterfield and Martin Wight (eds), *Diplomatic Investigations: Essays in the Theory of International Politics* (1966) 51, 52.

53 The ICJ does so on two main grounds: (1) the number of states to have explicitly endorsed the Convention is 'hardly sufficient'; (2) the period of time necessary to establish the customary norm is lacking. 'Although the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interestsare specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked and should have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.' *North Sea* [1969] ICJ Rep 32

one of the recognized methods by which new rules of customary international law may be formed.[54]

An irresolvable tension, however, lies between Grotius and the ICJ concerning the precise nature of the relationship between the Nation-State and the establishment of customary law.

IV THE NATION-STATE AND INTERNATIONAL CUSTOMARY LAW

Critical to the relationship between the Grotian Heritage and the *North Sea* is the international political environment historically derived from the Thirty Year's War (1618-1648), the newly emergent Grotian conception of international society receiving its first (and, arguably greatest) expression through the Peace of Westphalia (1648). Pursuant to the pan-European peace settlement, the notion of an harmonically convergent 'international society' - as opposed to an agglomerate international 'system' (ie an aggregate of disparate atomistic State actors) - attained coherent and compelling form, with the newly juridically reconfigured Nation-States internalising the binding rules and practices of international governance, along with those sets of Naturalist-derived assumptions and common interests necessary for maintaining them.[55] Grotius' treatment of the seventeenth-century Nation-State as an agent of international customary law is inseparable from his broader axiomatic reliance upon *ius naturale*, the ultimate theological-moral foundation of any comprehensive legal order. Natural law is absolutely essential to Grotian international society, mediated through the juridical metaphor of the personification of legal entities. Princes, Peoples, and States are all taxonomically re-classified as 'persons', and, as such, are all equally subject to the rules of natural law, which work to bind all persons to the 'Great Society of Mankind' (*magna communias humanis generis*); within this Grotian schema, natural law functions as 'a body of moral rules known to all rational beings against which the mere will or practices of states can be measured.'[56]

As *Mare Liberum* makes clear, although *ius gentium* is not strictly reducible to natural law - certainly not in any substantive sense - it is inextricable from it as a derivative or dependent legal category, customary State practice being expressive of the binding legal and moral norms of nature. Nations are simultaneously both the subjects and agents of international law; furthermore, the sovereignty of States is to some degree circumscribed by that very international legal order to which they collectively give expression. Crucially, the Naturalist-derived Great Society is wholly existent (and, therefore, 'real') in the absence of positive sovereign authorities; 'even without central institutions, rulers and peoples might constitute a society among themselves, an anarchical society or a society without

54 Ibid 30.

55 Bull, above n 52, 75-6.

56 Ibid 78. 'In stressing the practical analogy of States and individuals Grotius derived substantial assistance from the fact that in the century in which he wrote the emerging territorial state was a creature of personal rule. The history of Europe could still, to a large extent, be conceived as a history of dynasties and dynastic ambitions.' Lauterpacht, above n 10, 338.

government.'[57] Prima facie, *North Sea* still accords well with the Grotian Heritage. Nation-States are the principal actors of international law, mutually bound (and binding) through *opinio juris*, which is itself both the grounds of and means for the objective expression of customary state praxis. As the majority holds in *North Sea*:

> In the world today an essential factor in the formation of a new rule of general international law is to be taken into account: namely that States with different political, economic, and legal systems, States of all continents, participate in the process. No more can a general rule of international law be established by the fiat of one or of a few, or - as it was once claimed - by the consensus of European States only ... All this leads to the conclusion that the principles and rules enshrined in the Convention ... have been accepted not only by those States which are parties to the Convention on the Continental Shelf, but also by those which have subsequently followed it in agreements, or in their legislation, or have acquiesced in it when faced with legislative acts by other States affecting them. This can be viewed as evidence of a practice widespread enough to satisfy the criteria for a general rule of law.[58]

The similarities here, however, are only apparent. In stark philosophical contrast to Grotius, who bases the whole of customary law upon *jus naturale*, the ICJ adopts a rigorously positivist approach, viewing binding legal custom as nothing more than an empirical (ie secular) aggregate of state belief plus state practice, inherently devoid of transcendental significance.

> So far as ... *opinio juris sive necessitatis* is concerned, it is extremely difficult to get evidence of its existence in concrete cases.[59] This factor, relating to international motivation[60] and being of a psychological nature, cannot be ascertained very easily, particularly when diverse legislative and executive organs of a government participate in an internal process of decision-making in respect of ratification of other State acts. There is no other way to ascertain the existence of *opinio juris* from the fact of the external existence of a certain custom and its necessity felt in the international community, rather than to seek evidence as to the subjective motives for each example of State practice, which is something which is impossible of achievement. ... For to become binding, a rule or principle of international law need not pass the test of universal acceptance ... Not all States have ... an opportunity or possibility of applying a given rule. The evidence should be sought in the behavior of a great number

[57] Bull, above n 52, 72. This insight is directly relevant to positivist/statist critiques of the 'un-reality' of international law. Grotius' naturalist jurisprudence highlights the inherently statist bias of legal positivism. If the 'true' receptacle of legal identity/personality can be established as 'the people' taxonomically re-classified in the extra-statist/institutional sense (*magna communitas humanis generis*), then the positivist lament over the absence of monistic sovereign authority may be dispensed with.

[58] *North Sea* [1969] ICJ Rep 37. Cf Dissenting opinion of Judge Lachs.

[59] This is an important point. Note how the Court's empirical/positivist-based approach necessarily eschews the deductive methodology employed by Grotius, as dictated by natural law assumptions. For Grotius, the ambivalence of 'concrete cases' proves no obstacle, as he is reasoning a priori from universal first principles; empirical determination (finding of fact) is subordinate to 'right reason'. See below.

[60] Or, 'volitional law'. See below.

> of States, possibly the majority of States, in any case the great majority of the interested States.[61]

It is the ICJ's rejection of the necessity of a natural law-based juridical foundationalism in favour of an empirical, state-consensus, positive law regime (*ius voluntarium*) that accounts for its fundamental doctrinal inconsistency with the Grotian Heritage in general, and with the *Mare Liberum* in particular.

V *IUS NATURALE*, POSITIVE LAW, AND THE 'SUBJECTIVE ELEMENT'

As Philip Allott has argued:

> In international law, there is really only one problem, what to do about natural law. In this sense natural law should be understood, not in its religious sense which would explain its existence in terms of the divine origin of nature, but in a secular sense. The question raised by natural law is whether it can be said that a legal system, such as international law, should conform to some general underlying pattern or principle, or whether it must be said that the rules of international law must justify themselves in their own terms and in terms of their end-purposes as being useful to, and accepted, by States.[62]

The 'debate' over the presence of natural law within contemporary international jurisprudence consists largely of the question as to whether *ius naturale* should be abstractly understood (and, therefore, pragmatically applied) in a theistic/ontological sense, or in a functionalist/pragmatic sense. International law has traditionally inducted a general 'ought pattern' from three main empirical sources: (1) the historical record of State practice; (2) the pattern of attitudes of jurists who have attempted to determine international custom; and (3) the jurist attempting to determine International Law within a particular situation.[63] Although the contemporary resolution of the foundationalist I/Ought dichotomy is essentially functionalist/pragmatic in nature, it nevertheless implicitly, and necessarily, recapitulates the internal logic of (post)theistic thought: that of grounding a universal imperative norm upon a neo-transcendental source of authority.[64] Here, State practice performs this operational function via a mimetic substitution of the ontological categories of Goa/Nature. Methodologically, State practice is critically examined for the purpose of determining any pattern that would hypothetically emerge if the State had believed itself bound by International Law.[65] Hopefully, a dual pattern is revealed: a pattern of practice empirically established from the historical record of State practice, and an inferentially derived (deductive) pattern of practice which would be observable if

61 *North Sea* [1969] ICJ Rep 37.
62 Allott, above n 1, 100.
63 Ibid 102.
64 Or, in more expressly Derridean terms, 'Presence'.
65 Allott, above n 1, 103. 'This is the best meaning to give to the classical concept of *opinio juris*, which otherwise tends to the supposition of a situation in which States were mistakenly believing that there was a legal requirement to do what they were doing.' Ibid. The language here is highly suggestive of the existence and operation of a 'legal fiction'.

the State had been acting under the self-perceived constraint of binding *opinio juris*.[66]

The *North Sea* ruling is crucially situated within the modern, or positivist (ie 'positive law-centric') tradition, serving as the cardinal ruling in the utilisation of the 'subjective element' as a determinant of *opinio juris*. Following the legal writings of extreme juridical positivists such as G I Tunkin,[67] the ICJ holds that some final, positive act of state consent is not only a necessary but a *sufficient* condition of the creation of binding international customary norms.

> The essential point in this connection - and it seems necessary to stress it - is even if these instances of actions by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute *opinio juris* - for, in order to achieve this, two conditions must be fulfilled. Not only must the acts concerned amount to a settled practice, *but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, ie, the existence of a subjective element, is implicit in the very notion of the* opinio juris sive necessitatis. *The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.* The frequency, or even habitual character of the acts is not in itself enough. There are many international acts, eg in the field of ceremonial and protocol, which are performed almost invariably, which are motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.[68]

Henceforth, States are only truly 'bound' when they feel and/or believe themselves to be so. Here, the ICJ explicitly asserts the unconditional sovereignty of secularist State will as the self-sufficient foundation of customary International law, the Nation-State deployed to perform the juridical role historically played by God.

Nothing could be more antithetical to the natural law-based argumentative structure of *Mare Liberum*, wherein the author repeatedly commits himself to an orthodox 'Naturalist' position.[69] Grotius is firmly within the Spanish Natural Law

66 Ibid. Not surprisingly, this hermeneutical act is inextricable from the material production of textual discourse itself. 'Writing about international law is writing about law. [A puzzling] leap across space has to be made - from "is" to "ought". Much effort has been spent by classical philosophy and legal philosophy on the problem of how such a leap can be made consistently with logic or, at least, with comprehensive intellectual processes. Essentially, the problem is that, from a logical point of view, manipulation of "is" propositions should not lead to an "ought" proposition'. Ibid 101.

67 G I Tunkin, *Theory of International Law* (1974) 89-203.

68 *North Sea* [1969] ICJ Rep 32-3. (emphasis added). In neo-Thomistic terms, *lex humana* is invested by the ICJ with the ontological attributes of *lex aeterna*. See below.

69 'Naturalists submit that the "law" consists of principles of right and wrong that transcend time, place, political system, religion, and culture. This law can be apprehended by human reason and remains eternally and universally valid, not withstanding human legislative enactments ('positive law').' Robert J Beck, Anthony Clark Arend and Robert Vander Lugt (eds) *International Rules: Approaches from International Law and International Relations* (1996) 34. 'Naturalism attributed the existence of international law to the moral law of nature; according to the currently dominant ideology of positivism, sovereign consent constitutes the basis of the system.' Scott, above n 3, 322..

tradition[70] - the leading sources of the text are Francisco de Vitoria (1480-1546),[71] Fernando Vasquez de Menchaca (1509-1566),[72] and Albericus Gentilis (1552-1608).[73] Examined closely, *Mare Liberum* emerges as a neo-Thomistic text, following the natural law theories of St. Thomas[74]. Aquinas propounded a four-fold division of the law: *lex aeterna*, 'eternal law' known only to God: *lex divina*, the law of Goa known by humans only through divine revelation; *lex naturalis*, the participation of rational creatures in the eternal law; and *lex humana*, positive law enacted by human beings. Significantly, Aquinas distinguishes *ius gentium* from the other forms of positive law precisely on the basis of its innate and self-sufficient rationality, placing it in immediate and necessary relationship to *ius naturale*. It is exactly this taxonomic categorisation of *ius gentium* with *ius*

70 In yet another academic swipe at Grotius' basic lack of intellectual originality, James Brown Scott disparages the whole of the Grotian corpus as mere 'trifling additions' to sixteenth century Spanish theo-jurisprudence; cf Annand, above n 11, 8. In Chapter One, p 4 of *Mare Liberum*, Grotius explicitly invokes the authority of Spanish natural law writers - 'In this controversy, we appeal to those jurists among the Spanish themselves, who are especially skilled in divine law and human law; we actually invoke the very laws of Spain itself.' Cf Murphy, above n 48, 5, 8: 'Grotius sought to give the principles of natural law human, as well as divine authority ... By striking an integral combination of natural, human, and divine laws, Grotius extended the vision of the great jurist-theologians who preceded him. Like Suarez and Vitoria, Grotius contemplated the universe as subject to the reign of jurisprudence.'

71 Grotius, above n 34, 8, 12, 16, 17. Cf Ito, above n 48, 3-8.

72 Grotius, above n 34, 51, 52, 54, 55, 57, 66, 67, 69. Cf Ito, above n 48, 8-12

73 Ito, above n 48, 12-15. Cf Alfred Vendross and Heribert Franz Koeck, 'Natural Law: The Tradition of Universal Reason and Authority' in Ronald St John Macdonald and Douglas Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) 17, 19-24, passim. Also cf De Pauw's instructive comment on the intrinsically deductive/scholastic methodology of *Mare Liberum*. 'The method adopted by the celebrated jurists of antiquity is to be followed, the method of those who refer the art of civil government back to the very fount of nature ("naturae fonts"). Like a mathematician, [Grotius] will start by gathering rules and very general laws in order later to apply the whole to the capture of the *Catharine*.' De Pauw, above n 35, 22. On page seven of the *Commentarius*, Grotius elaborates upon his own use of the deductive method. 'Just as the mathematicians customarily prefix to any concrete demonstration a preliminary statement of certain broad axioms on which all persons are easily agreed, in order that there may be some fixed point from which to trace the proof of what follows, so shall we point out certain rules and laws of the most general nature, presenting them as preliminary assumptions which need to be recalled rather than learned for the first time, with the purpose of laying a foundation upon which our conclusions may safely rest.' Quoted in Tuck, above n 36, 171. Of course, such a method is ideal for one constructing an argument upon universalist foundationalist premises, such as Nature, or God. True to his scholastic procedures, the 'preliminary assumptions' of Chapter One of the *Mare Liberum* include authoritative pronouncements from Pliny the Elder, Seneca, Virgil, Vitoria, Moses, St. Augustine, Hercules, Agammenon, Baldus de Ubaldis, and Tacitus. 'Even though Grotius ostensibly bases his legal system on natural law, in practice he subordinates his naturalist argumentation to the recitation of recognized classical and biblical precedents.' C G Roelofsen, 'Grotius and the International Politics of the Seventeenth Century' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (1990) 99,125.

74 Cited twice in the text, 13 and 19. 'The religious connotation of natural law, as sanctified by St Thomas Aquinas, meant that it was an absolutely limiting factor, which it was virtually shameful to disregard.' Allott, above n 1, 99. 'Grotius based his conception of Natural Law on the teachings of theologians, ie, the *Summa Theologicae* of Thomas of Aquinas, which in particular contributed in large measure towards developing in him this sentiment for a natural reason.' Elemer Balogh, 'The Traditional Element in Grotius' Conception of International Law' (1929) 7 *New York University Law Quarterly Review* 261, 273.

naturale that establishes public international law's inherently naturalist origins.[75]

On one level, Grotius effected a 'translation' of a Naturalist-based theory of *ius gentium* into the classifactory (or, taxonomic) categories of the early modern Nation-State system, contemporaneous with the Peace of Westphalia. Accordingly, Providence serves as the foundational principle of the whole of the *Mare Liberum.*

> God is the creator of the world and the father of mankind. Thus God created the world so that the whole of mankind might constitute a universal human society, and He provided laws common to the whole of mankind and universally applicable to all human beings in that society.[76] That law is, however, not carved in a sheet of copper or in stone, but is engraved in every person's mind. Accordingly, any human being can easily know this law if he appeals to his own conscience ... On the basis of this law common to the universal human society, each human being has the right to use in common with all other human beings the things left to the common ownership of the whole of mankind ... The reason why each human being possesses such things under the common ownership of the whole of mankind in addition to the things under each person's ownership is not that Nature contrived this result for the use of human beings. This result enables the existence of a universal human society and the maintenance of social harmony[77] ... In regard to such things which are under the common ownership of the whole of mankind and which all human beings can use jointly, there are additional questions. They concern almost all areas of the sea, the right of navigation, and the freedom of commerce.[78]

At fundamental variance with the positivist reasoning of *North Sea*, Grotius propounds not only the categorical derivative status of *opinio juris*, but the expressed ontological privileging of Divine Will over secular legal custom. Effectively precluding *ius voluntarium*, Grotius insists that secular custom must be suspended in the event of contradiction with *ius naturale*, thereby recapitulating the descending hierarchy of Thomistic legal theory.

> For, since the law of nature arises out of Divine Providence, it is immutable; but a part of this natural law is the primary or primitive law of nations,

[75] Beck, above n 69, 35-6. 'All four categories of Aquinas' law taken together made up God's inclusive principles for governing the universe and for ordering man's social life on earth. The analytical scheme of Aquinas indicated his conviction that the Christian requisite for a supernatural end for man could be combined with Aristotelian naturalism so as to bring about the possibility of perfect happiness.' Charles S Edwards, *Hugo Grotius and the Miracle of Holland: A Study in Political and Legal Thought* (1981) 46.

[76] 'In the Grotian system, the precepts of natural law were intimately bound up with the idea of man as a social being (*appetitus socialis*).' Murphy, above n 48, 13.

[77] This striking passage effectively underscores the necessary relationship that exists between Naturalism and the teleological mode of argumentation. From this, it follows that positivist international legal doctrine is inherently anti-teleological; that is, there is no 'necessary' or 'correct' subordination of means to ends.

[78] Grotius, above n 34, 1-10. Cf De Pauw, above n 35, 53-4. This is dogmatic Naturalism. 'Natural right is the dictate of right reason, showing the moral turpitude, or moral necessity, of any act from its agreement or disagreement with a rational nature, and consequently that such an act is either forbidden or commanded by God, the author of nature.' Pinto, above n 32, 58.

> differing from the positive law of nations which is mutable (*Huius autem iuris naturalis partem esse ius gentium, primaevum quod dicitur, diversum a iure gentium secundario sive positivo, qourum posterius mutari potest*). For if there are customs incompatible with the primary law of nations ... they are not customs belonging to men, but to wild beasts,[79] customs which are corruptions and abuses, not laws and usages ... For what is clearer than that custom is not valid when it is diametrically opposed to the law of Nature or Nations?[80] ... Therefore those prescriptions cannot be justified by the passage of any law, cannot be established by the consent, the protection, or the practice of even many nations . . . [Vasquez says that] 'Such an act is not only contrary to the laws, but is contrary also to natural law or the primary law of nations, which we have said is immutable'. And this is seen to be true because of that same law not only of the seas or waters, but also all other immovables were *res communis*. And although in later times there was a partial abandonment of that law ... nevertheless it was different as regards sovereignty over the seas, which from the beginning of the world down to this very day is and always has been a *res communis* and which, as is well known, has in no wise changed from that status.[81]

Expressed in contemporary terms, Grotius is offering a *jus cogens*-based critique of positive law doctrine.[82]

A *De Iure Belli ac Pacis*

It would be misleading, however, to restrict a Grotian reading of *North Sea* to the parameters of *Mare Liberum*, especially with regards to natural law; if other texts of the corpus are examined, a more complex picture emerges. This is especially so in the case of *De Iure Belli ac Pacis* (*On the Law of War and Peace*), published in 1625, and generally considered Grotius' masterpiece. With this text, Grotius is commonly assumed to have formulated an early, wholly secularised version of *ius naturale*, thereby historically paving the way for the eventual emergence of

79 A not so veiled reference to the Portuguese.

80 Here, Grotius explicitly classifies natural and municipal law as identical, both being emanations from Providence. 'Though a great deal of international law proper rests on consent, much, but not all of it follows from the precepts of the law of nature. In a wider sense, the binding force of even that part of it that originates in consent is based in the law of nature as expressive of the social nature of man." Lauterpacht, above n 10, 329-30. On this point, compare Grotius with the Spanish theo-jurist Francisco Suarez (1548-1617): "As existing in God, [*ius naturale*] implies, to be sure, according to the order of thought, an exercise of judgment on the part of God Himself, with respect to the fitness or unfitness of the actions concerned, and annexes to that judgement the will to bind men to observe the dictates of right reason.' Quoted in Edwards, above n 75, 58.

81 Grotius, above n 34, 52, 53-4.

82 'The place which the law of nature occupies as part of the Grotian tradition is distinguished not only by the fact of its recognition of a source of law different from and, in proper cases, superior to the will of sovereign states. What is equally significant is Grotius' conception of the quality of the law of nature which dominates his jurisprudential system. It is a law of nature based on and deduced from the nature of man as being intrinsically moved by a desire for social life, endowed with a measure of goodness, altruism, and morality, and capable of acting on general principles and learning from experience.' Lauterpacht, above n 10, 333. For Grotius, 'binding rules of conduct were grounded in natural law much more in anything resembling what later came to be called positive international law.' Benedict Kingsbury and Adam Roberts, 'Introduction: Grotian Thought in International Relations' in Hedley Bull, Benedict Kingsbury and Adam Roberts (eds), *Hugo Grotius and International Relations* (1990)1, 11.

positive international legal doctrine.[83] Much of this interpretative orthodoxy rests upon a highly selective reading of a single passage in the *Prolegomena* to the longer treatise.

> First of all, I have made it my concern to refer the proofs of things touching the law of nature to certain fundamental conceptions which are beyond question, so that no one can deny them without doing violence to himself. For the principles of that law, if only you pay strict heed to them, are in themselves manifest and clear, almost as evident as are those things which we perceive by the external senses ... In order to prove the existence of this law of nature, I have, furthermore, availed myself of the testimony of philosophers, historians, poets, finally also of orators. Not that confidence is to be reposed in them without discrimination; for they were accustomed to serve the interests of their sect, their subjects, or their cause. But when many at different times, and in different places, affirm the same thing as certain, that ought to be referred to a universal cause; and this cause, in the lines of inquiry which we are following, *must be either a correct conclusion drawn from the principles of nature, or common consent. The former points to the law of nature; the latter, to the law of nations.*
>
> *The distinction between these kinds of law is not to be drawn from the testimonies themselves (for writers everywhere confuse the terms law of nature and law of nations), but from the character of the matter. For whatever cannot be deduced from certain principles by a sure process of reasoning, and yet is clearly observed everywhere, must have its origin in the free will of man.*[84]

As Philip Allott has remarked, 'this short passage is of the greatest possible significance with regard to the style, the method and the nature of classical international law. Grotius ... sees the rules of natural law as things which are potent and evident and which one cannot deny without doing violence to one's nature . . . this is a useful secular definition of natural law.'[85] Prima facie, Grotius

[83] 'By the late seventeenth century, the positivist notion of international law's basis on State consent began seriously to challenge the naturalist view.' De Pauw above n 35, 73. 'In light of the Spanish tradition, Grotius' truly distinctive contribution was that he "secularised" international law.' Janis, above n 29, 157.

[84] Hugo Grotius, 'Prolegomena' in Robert J Beck, Anthony Clark Arend and Robert Vander Lugt (eds), *International Rules: Approaches from International Law and International Relations* (1996) 38, 48. (emphasis added). Many scholars have also made much of Paragraph 11 of the *Prolegomena* as indicative of a secularizing intent: 'What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to Him.' Such an interpretation would be going too far; cf Richard Tuck, 'The "Modern Theory" of Natural Law' in Anthony Pagden (ed), *The Language of Political Theory in Early-Modern Europe* (1987) 99. Consistent with Grotius' excessive reliance upon Spanish juro-theological sources, this hypothetical argument is drawn almost verbatim from Suarez, who was a Jesuit; cf Edwards, above n 75, 54-7. 'To imply that something would be true if God did not exist was only a hypothetical way of saying that what God Himself had willed he would not change." Edwards, above n 75, 59. 'It would be tempting to regard Grotius' methodological hypothesis about the non-existence and "non-providence" of God as only a somewhat dramatic illustration that Grotius' opinion that the natural law is willed by God because it is in itself binding in consequence of the very nature of man: the natural law being thus unchangeable even by God.' E B F Midgely, *The Natural Law Tradition and the Theory of International Relations* (1975) 141-2.

[85] Allott, above n 1, 100.

appears to postulate two ontologically distinct sources of international law, *jure naturale* and *jure gentium voluntaris* ('positive law'), 'which has received its obligatory force from the will of many nations' (*quod gentium omnium aut multurum vim obligandi accepit*).[86] Throughout *De Iure Belli ac Pacis* Grotius employs *ius gentium* in two senses: (1) all laws that govern relations between sovereigns or peoples, regardless of the source of the law; and (2) the universal law that arises from the expression of the collective will of international society (*magna communitas humanis generis*), this approximating contemporary definitions of 'positive international law'.[87]

It is important to keep in mind, however, that Grotius' prioritisation of State-centric judicial voluntariness may be more apparent than real. As we have already seen, Grotian legal texts do not constitute finished philosophical systems; rather, they are infused with practical considerations and issues of political expediency. It is well worth recalling the intensely political environment within which Grotius produced his treatises. Much of this historical context, in turn, was governed by the requisites of an inherently contradictory national trade policy, which simultaneously advocated free market (ie Dutch penetration of the Portuguese-held East Indies) and mercantilist (ie Dutch monopolisation of the resultant 'captive' colonial market) principles. As already noted, the theoretical basis of the *Mare Liberum* proved ambivalent, effectively undermining the legitimacy of Dutch monopolisation of the East Indian spice trade; 'the point at issue for the Dutch was, therefore, not to have freedom of trade and navigation recognised in general, but solely the freedom of their own trade and navigation'.[88] Contradictory political agendas, not agnosticism, thus appears as the most economical explanation for the superficial doctrinal inconsistencies between the two Grotian texts. Utilising the textually pre-established Thomistic hierarchy of the descending classes of law (natural, national, municipal), *Mare Liberum* seeks to nullify positive law whenever in conflict with freedom of trade and navigation, these as derivative necessary sub-categories of *lex aerterna*. This rhetorical impulse is wholly absent in *De Iure Belli ac Pacis*.[89] As one would expect, the later work follows an altogether different discursive strategy. Here, natural law is exhaustively identified with right reason (*recta ratio*), a self-evident and immutable principle, logically deducible and operationally efficacious

86 Vedross and Koeck, above n 73, 25.

87 Bull, above n 52, 66-7.

88 De Pauw, above n 35, 46. 'His *Mare Liberum* proved to be suitable for justifying the policy of the States General in Europe. In the dispute about the herring fisheries along the English coast and that about whaling off Spitsbergen, but also in the fight against the Danish tributes on the Sound, the booklet could offer useful arguments; as far as the East Indies were concerned, however, it was inconsistent and could not possibly serve colonial policy.' De Pauw, above n 35, 64. Significantly, English jurists tended to display the greatest hostility towards 'freedom of the seas'. Cf Thomas Wemyss Fulton, *The Sovereignty of the Sea* (1911) Chapter IX, 338-77. Through the legal writings of John Selden, the English crown sought to impose a more traditionalist (anti-capitalist) regime of *dominium* (ie, *mare clausum*) upon the territorial seas. *Mare clausum* thus constituted a direct extension and application of the internal economic logic of late feudalism to early modern international legal discourse. 'It was therefore against the Dutch that the English pretensions to sovereignty of the sea were specially directed.' Annand, above n 11, 84-5. Cf Fujio Ito, 'Defense of Hugo Grotius for his Mare Liberum' (1976) 18 *Japanese Annual of International Law* 1.

89 De Pauw, above n 35, 71.

independent from Providence. A particular legal rule is classified *recta ratio* whenever, and to the degree that, it autonomously corresponds to the essential nature of Man as a reasonable and social being. Consequently, the law of nations acquires a relatively greater scope of operational autonomy, redefined in more expressly secularist terms, a positive and essentially utilitarian customary law, resulting from the common will of nations and serving the common good. It is a recurrent discursive feature of *De Iure Belli ac Pacis* that Grotius persistently attempts to taxonomically categorize the particular legal issue or practice under consideration as pertaining to the law of nations; that is, secular and consensual customary practice. In marked contrast to *Mare Liberum*, Grotius makes a final determination of *lex naturalis* only after he conclusively fails to identify an established or currently emergent secular custom. Ordinarily he is able to either empirically or deductively demonstrate an inherent compatibility between natural and national law; significantly, he gives express preference to the law of nations whenever he is not able to do so.[90]

However, when the two texts are actively joined and read together within the governing context of Grotius' own political and career trajectories at the precise biographical moments of their compositions (1604 and 1625, respectively), then the determinant unifying elements underlying the superficial discursive divergences become immediately apparent. Simply put, all that Grotius has accomplished here is the rather lawyerly expedient of 'carving out' an operational sphere of (relative) ontological/discursive autonomy for *opinio juris*, this solely as a means of establishing the binding, or obligatory, status of Dutch mercantilist claims in the East Indies. By (re)categorising the foundational and operational juridical space of *opinio juris* as a self-sufficient principle, he enables secular custom to function relatively independently from the realm of a priori transcendental necessity (*recta ratio*); simultaneously, by classifying (prescribing) mercantilism as *opinio juris*, he implicitly invests what is a national trade policy with the full jurisprudential significance of legal custom. By insisting that free trade must inevitably result in monopoly, Grotius is able to shift the taxonomic classification of free trade from *lex naturalis* to *lex humana* and l*ex gentium*. Grotius' withdrawal of the principle of freedom of trade from the sphere of eternal and immutable divine law and its subsequent relegation to the inferior and derivative realm of *lex humana*, facilitates Dutch monopolization of maritime commercial routes to the East Indies. The price to be paid for this discursive and juridical strategem is a heavy one, however; the apparent repudiation of his earlier and more orthodox Naturalist texts, which seemingly 'shatters the corner-stone of the juridical structure which he had erected with so much care in *Mare Liberum*.'[91]

[90] Ibid.

[91] Ibid 55-7. The importance of Grotius' own careerist impulses should not be underestimated in this regard. 'It seems incontrovertible that among the motives determining Grotius' activities, his political aspirations played a constant and considerable, even a dominant role. His major [legal treatises] ... are not to be understood if one does not take into account the author's purpose ... That these were written with a political purpose is of course clear as regards *Mare Liberum*, but applies also, though much more subtly, to *De Jure Belli ac Pacis*.' Roelofsen, above n 73, 131.

Situating Grotius' doctrinal inconsistencies - if not an even more fundamental theoretical incoherence - within a broader political-historical environment has two immediate advantages. Firstly, it prioritises the entire issue of authorial intentionality. If 'Grotius the legal author' is biographically identical with 'Grotius political careerist', then it becomes logically impossible to deduce a priori the author's subjective or 'true' intent as expressed via the medium of the text; in this way, either a coherently theistic or a coherently secularist reading of the entire Heritage/textual corpus becomes equally plausible - or, equally ambivalent. Secondly, it follows from the first premise - 'true' authorial intent being impossible to conclusively demonstrate in any particular textual instance - that the degree (quantity) or level (quality) of doctrinal consistency both within as well as between the two texts should be substantially less than we would ordinarily expect from a less self-consciously 'politically situated' author. If both of these premises are correct, then it becomes possible to read/interpret both texts in a more complimentary fashion. In this way, negative doctrinal inconsistencies or, alternatively, positive substantive 'overlaps', constitute textual characteristics that we should expect.

Approached in this way, the *Prolegomena* clearly reveals precise recapitulations of certain crucial logical and argumentative features of the earlier *Mare Liberum*.[92] Natural rights are, once again, derived from *appetitus socialis*.

> Man is, to be sure, an animal, but an animal of a superior kind, much farther removed from all other animals than the different kinds of animals are from one another ... But among the traits characteristic of man is a compelling desire for society, that is, for the social life - not of any and every sort, but peaceful, and organized according to the measure of his intelligence, with those who are of his own kind; this social trend the Stoics called 'sociableness' ... This maintenance of the social order ... which is consonant with human intelligence, is the source of law properly so called. To this sphere of law belong the abstaining from that which is another's, the restoration to another of anything of his which we may have, together with any gain which we may have received from it; the obligation to fulfil promises, the making good of a loss incurred through our fault, and the inflicting of penalties upon men according to their deserts.
>
> From this signification of the word law there has flowed another and more extended meaning ... a power of discrimination which enables [Man] ... to follow the direction of a well-tempered judgement, being neither led astray by fear or the allurement of immediate pleasure, nor carried away by rash impulse. Whatever is clearly at variance with such judgement is understood to

92 These considerations apply not only to the rhetorical structure of the two texts as finished works, but also to the more contingent circumstances of their historical production. '[N]o doubt the existence of the manuscript *[Commentarius]* did something to move Grotius in the direction of a general treatise on the law of nations, for which the dogmatics of the *De Jure Praedae* must have been a valuable preparatory exercise. In this sense the *De Jure Praedae* may have been almost a first draft of the *De Jure Belli*.' Knight, above n 10, 84. As De Pauw has shown, the *Mare Liberum* was 'subsequently incorporated unchanged but in a summarised form in the *De Jure Belli ac Pacis*.' De Pauw, above n 35, 73.

be contrary to the law of nature, that is, to the nature of man.[93]

Even more strikingly, Grotius explicitly grounds human social-being, the expression of Nature, upon Divine Will.

> Herein, then, is another source of law besides the source in nature, that is, the free will of God, to which beyond all cavil our reason tells us we must render obedience. But the law of nature of which we have spoken, comprising alike that which relates to the social life of man and that which is so called in a larger sense, *proceeding as it does from the essential traits implanted in man, can nevertheless rightly be attributed to God, because of His having willed that such traits exist in us*.[94]

This critical passage entails two important juridical consequences. Firstly, national and municipal law are ultimately derived, in an ontologically-grounded 'line of descent', from Providential Being, God performing the necessary role of efficient cause of social existence as such.[95] Law, therefore, ultimately owes whatever binding force it posses by virtue of its existence within a theistically-ordained moral world order. Quite simply, the *Prolegemona* re-capitulates the neo-Thomistic framework of the earlier *Mare Liberum*, relying upon a descending juro-ontological hierarchy from *lex aerterna* to *lex humana*.

> For the very nature of man, which even if we had no lack of anything would lead us into the mural relations of society, is the mother of the law of nature. But the mother of municipal law is that obligation which arises from mutual consent; and since this obligation derives its force from the law of nature, nature may be so considered, so to say, the great-grandmother of municipal law.
>
> *The law of nature nevertheless has the reinforcement of expediency; for the Author of nature [God] willed that as individuals we should be weak, and should lack many things needed in order to live properly, to the end that we might be more constrained to cultivate the social life. But expediency afforded an opportunity also for municipal law, since that kind of association of which we have spoken, and subjection to authority, have their roots in expediency.*[96]

Secondly, while it is true that Grotius formally taxonomically (re)classifies ius gentium as a separate legal category from *ius naturale*, the practical scope of its operational efficacy is only a very approximate one, resulting from that necessity for transnational consent which is itself an integral part of man's natural condition within the world.

> But just as the laws of each state have in view the advantage of that state, so by mutual consent it has become possible that certain laws should originate as

93 Grotius, above n 84, 39-40.

94 Ibid 41 (emphasis added).

95 'God, having willed all traits in man, had instituted society, by an absolute prescriptive act and was, thus, the efficient cause as social organisation.' Edwards, above n 75, 61.

96 Grotius, above n 84, 42 (emphasis added). Note the striking thematic similarity here between Providentially-decreed 'weakness' as mechanical cause for the emergence of municipal law (via expediency), and the condition of radical human 'lack' as guarantor of the necessity of international free trade posited in the *Mare Liberum*.

> between all states, or a great many states; and it is apparent that the laws thus originating had in view the advantage, not of particular states, but of the great society of states. *And this is what is called the law of nations, whenever we distinguish that term from the law of nature.*[97]

Read carefully, it is clear that this taxonomic (re)classification of *ius gentium* as a 'distinct source' of customary international law is posited so as to further the practical requirements of textual discourse; in itself, it is largely devoid of juro-ontological significance.

> For the principles of the law of nature, since they are always the same, can easily be brought into a systematic form; but the elements of positive law, since they often undergo change and are different in different places, are outside the domain of systematic treatment, just as other notions of particular things are.[98]

Understood within the totality of the discursive apparatus forwarded by Grotius, this expedient taxonomic reclassification can be seen to operate coherently only within the parameters of an essentially orthodox Naturalist schema.[99] This point is made supremely well by David Kennedy:

> Grotius does seem to distinguish himself from Suarez and Vitoria by secularizing natural law, thereby distinguishing it from divine will. His resulting search for norms in state practice would seem positivist were his secularization a relocation of normative authority from divine to sovereign will. This, however, does not seem to be the case ... Although manifested by sovereign practice, natural law accords with and is binding as a matter of divine law ... In secularising natural law, Grotius does not create a legal sphere either grounded in sovereign authority or which is not also binding as a matter of morality . . . To the traditional positivist, sovereign consent provides the origin of international law's binding force. To Grotius, the obligation to fulfill the terms of a sovereign promise arises from the conformity of natural law with the principles of right reason upon which sovereign authority rests. Although the sovereign may bind himself in matters not touched by the divine or natural law, these obligations, based in his authority, neither derogate from natural and divine law nor limit the sovereignty which he exercises as a matter of natural and divine law. These promises, moreover, are themselves binding only as a matter of natural and divine practice expressive of the 'law itself' ... Grotius' distinction between divine and natural law exemplifies rather than undercuts the primitive notion that law and morality are one and that the

97 Ibid (emphasis added). 'For Grotius the rule *pacta sunt servanda* is a precept, perhaps the main precept, of natural law.' Lauterpacht, above n 10, 331.

98 Grotius, above n 84, 46.

99 In this regard, Richard Tuck is surely going too far when he claims that with Grotius 'Rights have come to usurp the whole of natural law theory, for the law of nature is simply, respect of one another's rights.' Quoted in Kingsbury and Roberts, above n 82, 31..

> normative force of the legal order is derived from outside the will or authority of sovereigns.[100]

We are thus in a position to reiterate our earlier, more tentative conclusion, that a comprehensive reading of Grotius does indeed reveal irreconcilable doctrinal contradictions with the *North Sea* ruling on the most foundational jurisprudential level. In start contrast to the ICJ, Grotius explicitly postulates that the volitional law of nations derives its final normative source not from the positive authority of secular sovereigns, but from the higher transcendental realm of natural order and Divine Being. Within the overall schema of the Grotian Heritage, secular custom is assigned a merely supplemental role - although a pragmatically efficacious one - in clarifying the existant ambiguities of *lex divina* and *lex naturalis*.[101]

From a rigorously Grotian perspective, the ICJ's grounding of its decision on dogmatic positive-law assumptions renders the whole of *North Sea* inherently - and irredeemably - suspect. For the central core of the entire argumentative structure of the ruling is predicated directly upon that very philosophical manoeuver so inimical to the Grotian text; that is, the secularised relocation of universally binding normative authority from Divine to profane sovereign will as signified by the 'subjective element' of State belief. Within this schema, it is not merely the case that positive law is 'real' or 'actual' law in the sense of its not being founded upon illusory or erroneous principles; a much stronger philosophical claim is being made on its behalf as a necessary attribute of a self-sufficient, and self-validating, secular (ie anti-transcendental) judicial order. Herein, positive law is itself the ontologically autonomous locus of 'objective' or 'true' legal value, its 'positive' nature reflective of its intrinsic moral status (substance) as legitimated by the inherently secular nature of the original creative act of state consent (process); *opinio juris* has been appropriated to perform the function of Grotian *ius naturale*. The equation of *opinio juris* with positive law is not simply the affirmation of an obligating body of customary law that merely happens to be secular in either origin or function; it is the unconditional secularisation of the entire customary law/norm-creating process as such. The *Mare Liberum* and the *North Sea Continental Shelf* Cases exist within two very different, and incommensurable, juridical universes.

VI CONCLUSION

Philip Allott's writings are useful in delineating the precise convergences that exist between broad historical and political trends and substantive innovations

[100] David Kennedy, 'Primitive Legal Scholarship' (1986) 27 *Harvard International Law Journal* 1, 79-81. 'The significance of the law of nature in [*De Iure Belli*] is that it is the ever present source for supplementing the voluntary Law of Nations, for judging its inadequacy in the light of ethics and reason, and for making the reader aware of the fact that the will of States cannot be exclusive or even, in the last resort, the decisive source of the Law of Nations.' Lauterpacht, above n 10, 330

[101] Kennedy, above n 100, 82. Interpreted in this fashion, Grotius' much cited comment that 'writers everywhere confuse the terms law of nature and law of nations' declares nothing more than that the substantive content of the two legal categories are non-identical.

within customary international law. On the one hand, he establishes a compelling normative model of emergent, and expansive, legal regimes of international solidarity mediated through the evolution of customary law; on the other, he formulates a compelling descriptive account of the complex arrays of interaction(s) between developing political practice and juridical language, best expressed by the seminal notion of law as taxonomy. Allott's suggestions are especially pertinent to the sort of critical juxtaposition between legal writings undertaken here, a close reading of two legally influential, but philosophically divergent, judicial texts, the *Mare Liberum* and the *North Sea* ruling. The central paradox uncovered is that the two texts, more than three hundred years apart in composition, yield near-identical substantive outcomes while clearly inhabiting incommensurable jurisprudential spaces, these differences expressed through their respective critical, albeit subtle, taxonomic (re)classifications of juridical categories. Both texts are predicated upon a core set of substantive international legal principles: the high seas as *res communis*, common use-rights demonstrative of an internationalist solidarity governed by *opinio juris*. In purely substantive terms, a direct line of judicial continuity links *Mare Liberum* with *North Sea*.[102]

By examining *Mare Liberum* within the full political-historical context of its original composition, we have illuminated both the motives as well as the means by which Grotius achieved this result: a precise reconfiguration of the judicial taxonomy of property law as governed by Naturalist-derived legal custom. But it is at this very point that the critical juxtaposition between the two texts becomes intellectually most interesting. In *North Sea*, the central taxonomic category of *Mare Liberum* - *opinio juris* - although utilised for similar purposes - the legitimation of international customary law - has been wholly divested of its original Grotian content. No longer expressive of Providential Being, *opinio juris* - the ontological/foundationalist principle of a universalist jurisprudence - is now appropriated and redeployed as the self-legitimising grounds of its own internal and self-referential foundationalist performance; hence, the radical discontinuity between the two texts. The reasons for the shift to a strongly positivist international legal regime are self-evident - positivism best meets the practical requirement of devising a binding universal norm-creating mechanism within a post-theistic legal world. More interesting is what this mimetic substitution (from God/Nature to State/Consent) actually signifies: the necessary recapitulation of the fundamental logical and semantic categories of Naturalism within contemporary international customary jurisprudence. International law

[102] 'The principle of freedom of the seas expounded by Grotius has served and continues to serve as rhetorical reinforcement for the point of departure when deliberating about matters of maritime jurisdiction. Rather like the presumption of innocence in criminal proceedings, we invoke it constantly to remind ourselves that whatever developments in the law of the sea are to be contemplated, we should measure their validity and impact with reference to the freedom of the seas. Grotius left embedded in our consciousness a phrase and standard of community awareness on the international level: anyone doubting the significance of that legacy need merely contemplate what might have been if inherence of *mare clausum* had triumphed in their seventeenth-century conception. On the whole we have been well served by a doctrine that has required us to evaluate the propriety and legitimacy of individual claims against the international community interest, rather than the opposite process of carving an area of community concern from a myriad of conflicting claims to ownership of the seas.' Butler, above n 11, 220.

has not, in fact, 'overcome' its natural law origins: it has merely sublimated them. As Hersch Lauterpacht has remarked:

> The fact is that while within the State it is not essential to give to the ideas of a higher law - of natural law - a function superior to that of providing the inarticulate ethical premiss [sic] underlying judicial decisions or, in the last resort, of the philosophical and political justification of the right of resistance, in the international society the position is radically different. There - in a society deprived of normal legislative and judicial organs - the function of natural law, whatever may be its form, must approximate more closely to that of a direct source of law. In the absence of the overriding authority of the judicial and legislative organs of the State there must assert itself - unless anarchy or stagnation are to ensue - the persuasive but potent authority of reason and principle derived from the fact of the necessary coexistence of a plurality of States. This explains the pertinacity, in the international sphere, of the idea of natural law as a legal source.[103]

All of this is not to in any way suggest that the ICJ 'got it wrong' in striving to give expression to a wholly positivist (ie secularised) notion of *opinio juris*. Rather, the point of the exercise is to draw greater critical attention to: (1) the continuing operational presence of essentially post-medieval categories of juridical thought within 'modern' forms of legal discourse, and (2) the possibility that awareness of the fact that international legal discourse - both normative and substantive - continuously 'repeats' earlier (ie Theistic and Naturalist) forms of judicial theory may provide instructive insights into critical features of contemporary International Law. A heightened critical self-awareness of the 'genealogical line of descent' of contemporary international customary law from its Grotian/Theistic/Naturalist[104] origins will, hopefully, facilitate the emergence of a more creative approach to devising an efficacious international legal regime of the sea, the substantive core of the Grotian Heritage.

[103] Lauterpacht, above n 10, 331. Elsewhere in the same article, Lauterpacht comments that 'Hall, the leading British positivist, who appears to limit the sources of international law to usage and treaties, actually bases international law on the natural foundation of postulates and assumptions. "The ultimate foundation of international law is an assumption that States possess rights and are subject to duties corresponding to the facts of their postulated nature." What is the assumed nature? "It is postulated of those independent States which are dealt with by international law that they have a moral nature identical with that of individuals, and that with respect to one another they are in the same relation as that in which individuals stand to each other who are subject to the law."' Lauterpacht, above n 10, 331.

[104] Of course, the linkage between Theism and Naturalism here necessarily raises the prospect of (re)introducing 'God' into international law. Strictly speaking, 'God' does not necessarily imply a personal, Judeao-Christian deity; a more abstract category may be inserted here, such as 'the Universal Moral World Order' (Kant), 'the Absolute - working - through - History' (Hegel), or 'the recovery of the Ground of Being (Heidegger). The important point is that a close examination of the Grotian corpus - both the *Mare Liberum* as well as the *De Jure Belli ac Pacis* - reveals thoroughly metaphysical dimensions of the historical origina of international legal discourse. Furthermore, it is the author's premise that Grotius himself did not effect that transition to a coherent and self-sufficient Natural Right-based regime, as is often claimed. Simply put, Grotius is not Pufendorf. The irony is that the ultimate historical origin of the self-consciously secularist *North Sea* ruling is a jurist who predicated his entire system upon providential Presence.