Lawfare and Sea Power: A Historical Perspective

Dennis Harbin*

Strategists and international lawyers usually make strange bedfellows. Exponents in law and in the application of reason over power do not easily snuggle up to brokers in disorder and international conflict.[1]

—Ken Booth

Four hundred years ago, the United East India Company hired Hugo Grotius, who would later be memorialized as the "father of international law," to legitimize Dutch sea power in the South China Sea. The legal defense he crafted would have major implications for competition between democracies and autocracies centuries later. Today, free and open access to the world's oceans is once again "under assault." Therefore, defending the international rules-based order requires states to exercise a legalistic version of sea power in which international law influences 1) maritime, strategic objectives, and 2) naval power in the information domain—a concept known today as "lawfare."

Introduction

Free and open access to the world's oceans is "under assault."[2] In this era of strategic competition between democracies and autocracies,[3] defending the international rules-based order requires states to exercise a legalistic version of sea power. Put another way, sea power is more than just a state exercising its military prowess at sea, it is also about international law's historical ability to influence and further 1) a state's maritime, strategic objectives, and 2) a state's use of naval power in the information domain[4]—a concept known today as "lawfare."

* LCDR Dennis Harbin, JAGC, USN (LL.M., The Judge Advocate General's School; J.D., Pennsylvania State University; B.A., Virginia Military Institute). LCDR Harbin is a judge advocate in the US Navy. Views expressed in his article represent the personal views and conclusions of the author writing in his personal capacity. A former version of this article was presented at the U.S. Naval Academy's 2021 McMullen Naval History Symposium.

1. Ken Booth, Law, Force and Diplomacy at Sea 5 (1985).

2. Kenneth Braithwaite, *Preface* to Dept. of Def., Advantage at Sea: Prevailing with Integrated All-Domain Naval Power (2020).

3. *See* Exec. Off. of the President, National Security Strategy (2022).

4. *See* Dept. of Def., Advantage at Sea: Prevailing with Integrated All-Domain Naval Power (2020), *infra* note 143. The current definition of "naval power" makes reference to the "information domain" which is that space where states exercise power to influence the "knowledge, understanding, beliefs, world views, and, ultimately, actions of an individual, group, system, community, or organization" in order to gain a military advantage. *See* Joint Chiefs of Staff, U.S. Dep't of Def., Joint Concept for Operating in the Information Environment (2018), https://perma.cc/39MK-AFGQ.

While the People's Republic of China (PRC) is undermining the rules-based order and making the South China Sea ground-zero for maritime lawfare,[5] it is important to note that "free and open" originates from and relies on a legal principle developed in violent waters centuries ago. The seizure of the *Santa Catarina* near the Strait of Singapore in the seventeenth century inspired the development of one of the cornerstones of the rules-based order—the Free Sea principle.[6] The man who crafted the Free Sea principle, as well as the framework for using the law to legally justify and legitimize sea power, was Dutch lawyer Hugo Grotius. In publishing *Mare Liberum (The Free Sea)*,[7] he sparked a debate that would result in the establishment of international norms and promote "security and prosperity" [8] around the world. In arguing that the maritime activities of trade access and navigation were essentially inalienable rights, he laid the legal foundation that these rights may be defended with force.[9] Later in his life, Grotius helped establish the foundation of the relationship between law and military power in his monumental work *De Jure Belli ac Pacis* (*On the Laws of War and Peace*).[10] Just over three-hundred years later, Admiral Alfred Thayer Mahan would rely on Grotius' argument—that the sea is a "common"—as a foundation on which he built his sea power philosophy.[11] Then in the twentieth century, this relationship between international law and sea power was expertly illuminated by international legal scholar Daniel Patrick O'Connell in his thought-shaping book *The Influence of Law on Sea Power*.[12] The ideas of Mahan and O'Connell grew from the intellectual seeds planted by Hugo Grotius. Grotius' argument for a Free Sea principle, and its use to legitimize sea power, arguably makes him the father of maritime lawfare. [13]

The purpose of this article is to aid in the understanding of how international law[14] shapes a state's use of sea power[15] in this era of strategic competition. In some ways, this argument serves as a modest contribution to the much larger

5. Jill Goldenziel, *Law as a Battlefield: The U.S. China, and Global Escalation of Lawfare,* 106 CORNELL L. REV. 1085, 1102 (2021).

6. The phrase "Free Sea principle" will be used throughout this article to refer generally to Grotius' ideas and works on the freedom of the seas and the justification to use force to defend it.

7. HUGO GROTIUS, MARE LIBERUM (David Armitage ed., 2004).

8. *See* EXEC. OFF. OF THE PRESIDENT, *supra* note 3.

9. *See* GROTIUS, MARE LIBERUM, *supra* note 7, at 25 (arguing that the freedom of the seas stemming from natural law and the Creator, and thus are inalienable). *See also* HATHAWAY & SHAPIRO, *infra* note 25, at 11 (describing Grotius' theory that war is a justifiable alternative to courts when rights are violated).

10. HUGO GROTIUS, ON THE LAWS OF WAR AND PEACE (Stephen C. Neff ed., 2012)

11. JAMES HOLMES, A BRIEF GUIDE TO MARITIME STRATEGY 4 (2019).

12. DANIEL P. O'CONNELL, THE INFLUENCE OF LAW ON SEA POWER (1975).

13. ORDE KITTRIE, LAWFARE: LAW AS A WEAPON OF WAR 4-5 (2016).

14. For the purposes of this article, "international law" will primarily refer to public maritime law or what is also known as the law of the sea.

15. While there is an academic distinction between "sea power" and "naval power," that distinction is outside the scope of this article. This paper will refer to "sea power" and "naval power" interchangeably.

study "of the role played by international law in shaping foreign policy."[16] To help visualize this relationship between international law and sea power, it's helpful to think of it as a cable consisting of three strands. One strand is how international law, or specifically the law of naval warfare, shapes the exercise of traditional naval power.[17] The laws of privateering, blockading, undersea warfare, and mining, as well as the status of maritime zones or the types of naval weapons used, all rely heavily on naval commanders and staffs interpreting and adhering to treaties, conventions, and customs. Another strand is how international law shapes sea power on a regional scale by enabling maritime security cooperation.[18] In this case, international agreements that reflect common objectives are the tools in which the strategic ends of peace and order on the seas are achieved. The third strand, which is the focus of this article, is how international law shapes sea power so that it has become a strategic objective in and of itself, while also legitimizing naval power to achieve those objectives. Moreover, in this modern era of strategic competition, the law has become weaponized in the maritime-information domain.

This article is divided into three sections. Before examining more closely the third strand described above, it is critical to understand how the Free Sea principle was born out of the need to justify and legitimize use of force at sea. Therefore, the first section will introduce Hugo Grotius and the development of the Free Sea principle and the formulation of the relationship between law and war. This includes the fascinating story of the seizure of the Portuguese carrack *Santa Catarina* in the same waters where the freedom of the seas is contested today—the South China Sea. In light of the 2016 South China Sea arbitral tribunal ruling,[19] this section will also examine Grotius' rationales for war compared to the use of military power within the modern, rules-based order. The second section will examine how the Free Sea principle and international law influences maritime strategy and has become a strategic objective in and of itself, thus requiring states throughout history to use naval power to defend it. [20] Finally, the third section will explore how law is used as a tool to legitimize military activities, specifically at sea. This is known as waging "lawfare." In this part, the article hopes to contribute to the great work already undertaken in the study of law's influence on sea power by conforming the examination of this relationship to the contemporary concept of lawfare.

16. *See generally* MICHAEL SCHARF & PAUL WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS xx (2010).

17. *See generally* O'CONNELL, *supra* note 12.

18. *See generally* James Kraska, *Grasping 'The Influence of Law on Sea Power*, 62 NAVAL WAR COLL. REV. no. 3 (2009) (providing a modern assessment of this relationship related to the 2007 maritime strategy).

19. *See* S. China Sea (Phil. v. China), 33 R.I.A.A. 153, 610–17 (Perm. Ct. Arb. 2016).

20. Further studies should examine the security strategies of other governments and assess how international maritime law shapes and informs them.

I. FORGING THE FREE SEA THROUGH FORCE

The South China Sea is the most "important body of water for the world economy."[21] It is "also the most dangerous body of water in the world"[22] and according to Pulitzer Prize-winning author Daniel Yergin is haunted by four ghosts, two of whom relate directly to the development of maritime lawfare. While Alfred Thayer Mahan will be discussed in a later section, Yergin describes how it was the Dutch lawyer Hugo Grotius who "[laid] the foundations for the concept of free passage through the world's oceans, and embod[ied] the 'rule of law'. . .."[23] Hugo Grotius was a prodigious writer; his two books *The Free Sea* and *On the Laws of War and Peace* would have significant lasting impact on law's influence on the use of naval power to enforce inalienable maritime rights. Before examining these two works and how they enable modern naval power, it is prudent to explore how Grotius' Free Sea principle was first forged through a violent struggle for sea power in the South China Sea.

A. Who was Hugo Grotius

Above the 23 gallery doors leading into the House of Representatives chamber in the U.S. Capitol sit marble reliefs of some of history's greatest lawgivers. These men were chosen "for their work in establishing the principles that underlie American law."[24] Recognizable are the reliefs of Moses, Hammurabi, Napoleon, Blackstone, Mason, and Jefferson. In the same company is a man few have likely heard of—Dutch lawyer Hugo Grotius who is memorialized as the "author of *On the Law of War and Peace*, the first treatise on international law."[25]

While sometimes referred to as the Father of International Law,[26] he did not create the law of nations, but rather relied on preceding just war theologians and state practice and "meld[ed] these ideas and rules together into a coherent system that formed the basis by which global commerce and international relations were governed for centuries." [27]

Born in 1583 and recognized as a child prodigy, Grotius was praised by the intellectual and royal classes of his era. At 15, he was sent with the diplomatic mission to the French royal court where, according to legend, Henry V declared him "the Miracle of Holland."[28] In 1599, he was admitted to practice law and began a

21. Daniel Yergin, *The World's Most Important Body of Water*, ATLANTIC (Dec. 15, 2020), https://perma.cc/E2K8-YB4L.

22. *Id.*

23. *Id.*

24. *About Relief Portrait Plaques of Lawgivers,* ARCHITECT OF THE CAPITOL, https://perma.cc/FMB2-HAN3.

25. OONA HATHAWAY & SCOTT SHAPIRO, THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD 28 (2017); *see also Hugo Grotius, Relief Portrait*, ARCHITECT OF THE CAPITOL, https://perma.cc/6ZWH-VVQQ.

26. *See* Michael P. Scharf, *Hugo Grotius and the Concept of Grotian Moments in International Law*, 54 CASE W. RES. J. OF INT'L L. 17, 17–52 (2022).

27. HATHAWAY & SHAPIRO, *supra* note 25, at 28.

28. HATHAWAY & SHAPIRO, *supra* note 25, at 6.

distinguished career as a corporate lawyer and politician. Grotius would go on to hold such positions as *advocaat-fiscaal* (prosecutor and overseer of the state's property interests, which was the second highest office in Holland), Pensionary of Rotterdam, and member of the States-General of Holland and later States-General of the United Netherlands.[29] After falling victim to political and legal machinations in his home country, including a sentence of life imprisonment after a *coup d'etat*, he escaped to Paris where he published *On the Laws of War and Peace* in 1625.[30] This seminal work would cement his legacy as a "preeminent philosopher of war. . .[and] the most creative and articulate exponent of the idea that states are permitted to wage war against each other in order to enforce their legal rights."[31] He would go on to live in Hamburg and Paris, eventually serving as France's ambassador to Sweden. His last words spoken while lying on his death bed in 1645 reportedly were, "[b]y undertaking many things, I have accomplished nothing."[32] While Grotius would eventually build his legacy as an internationally renowned scholar, he was first a young lawyer. Practicing in a time of war, he focused on using the laws of war to enable the interests of his client, a maritime trading company.[33] In "approaching the laws of war through the lens of a corporate attorney,"[34] Grotius' legal argument justifying his client's seizure of a Portuguese carrack would cement international law's influence on sea power for centuries.

B. The Seizure of the Santa Catarina

In 1604, Grotius was hired by the Verenigde Oostindische Compagnie (United East India Company, or VOC) "to [legally] justify the practice of capturing enemy goods."[35] The Dutch Republic and their Spanish rulers were in the midst of the Eighty Year's War,[36] and the VOC sent Admiral Jakob van Heemskerck to the South China Sea to bolster its trading presence.[37] Competition was fierce in the South China Sea, with the Portuguese defending its trading dominance in East Asia, often by committing atrocities against Dutch sailors and traders.[38] The Portuguese had recently executed 17 Dutch men sent to negotiate trading rights

29. EDWARD DUMBAULD, THE LIFE AND LEGAL WRITINGS OF HUGO GROTIUS 9-10 (1969).

30. *Id.* at 13, 16.

31. HATHAWAY & SHAPIRO, *supra* note 25, at xix.

32. DUMBUALD, *supra* note 29, at 18.

33. HATHAWAY & SHAPIRO, *supra* note 25, at 28.

34. *Id.*

35. DUMBUALD, *supra* note 29, at 25.

36. *See Eighty Years' War*, ENCY. BRITANNICA, https://perma.cc/A7XW-QR83 (Jan.19, 2023) ("Eighty Years' War, (1568–1648), the war of Netherlands independence from Spain, which led to the separation of the northern and southern Netherlands and to the formation of the United Provinces of the Netherlands (the Dutch Republic).").

37. LINCOLN PAINE, THE SEA AND CIVILIZATION: A MARITIME HISTORY OF THE WORLD 444 (2013).

38. Peter Borschberg, *The Seizure of the* Sta. Catarina *Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602 – c.1616)*, 33 J. OF SE. ASIAN STUD. 31, 44 (2002) (using the story of the Santa Catarina as a case study related to early seventeenth century Portuguese shipping and the competitive commercial dynamics in the South China Sea between the Dutch); *see also* van Ittersum, *infra* note 39, at 524.

with China. Authorized to use force only in self-defense or when seeking reparations for damages, van Heemskerck sought out a prize that would avenge his countrymen.[39] On February 25th, he got his chance.[40] In command of the *Alkmaar* and *Witte Leeuw (White Lion)*, van Heemskerck discovered the Portuguese carrack *Santa Catarina* at anchor in the mouth of the Johor River, on the southern peninsula of modern Malaysia.[41] Likely dwarfing van Heemskerck's vessels, the *Santa Catarina* was of the class of ship known at the time as being akin to a "floating city."[42] As described in his reporting of the seizure, van Heemskerck ordered his crew to aim for the *Santa Catarina's* sails, "lest we should destroy our booty with our own guns."[43] After 10 hours of constant firing by van Heemskerck's fleet, Captain Sebastiano Serrao signaled a white flag and surrendered the *Santa Catarina* and its cargo.[44]

Taken back to Holland, the *Santa Catarina* and its cargo was adjudicated before the College of Admiralty and condemned as a fair prize.[45] The ship and cargo was then sold off, with its proceeds distributed to the VOC, van Heemskerck, and his crew.[46] The capture of the *Santa Caterina* and its adjudication as a prize was a significant public relations story. Even with the complex monarchial regimes of the era, the Dutch were technically not at war with the Portuguese. Admiral van Heemskerck had only been granted authority to use force in self-defense or when seeking reparations, not to seek out and destroy Portuguese commerce.[47] An additional factor contributing to the public sensation was that when the ship and cargo were sold, they grossed "a sum equivalent to just less than the annual revenue of the English government at the time and more than double the capital of the English East India Company."[48] This of course brought a lot of attention, both internationally and domestically, to the practices

39. Martine Julia van Ittersum, *Hugo Grotius in Context: Van Heemskerck's Capture of the 'Santa Catarina' and its Justification in 'de Jure Praedae' (1604-1606)*, 31 ASIAN J. OF SOC. SCI. 511, 527-28 (2003) (reconstructing the seizure, as well as events that led to Grotius writing the unpublished Commentary on the Laws of Prize and Booty, of which Mare Liberum was taken and refined).

40. *Id.*

41. Borschberg, *supra* note 38, at 46.

42. *Id.,* at 35; *see also Carrack*, ENCY. BRITANNICA, https://perma.cc/5XSM-5EPK (June 3, 2022) ("The premier merchant ships of the Mediterranean powers. . .[making] possible the great voyages of European exploration in the 15th and 16th centuries. The carrack was the precursor of the galleon.").

43. van Ittersum, *supra* note 39, at 530.

44. *Id.*

45. *See Prize Court*, ENCY. BRITANNICA, https://perma.cc/Z6YU-T42G (May 30, 2008) ("Prize court, a municipal (national) court[s] in which the legality of captures of goods and vessels at sea and related questions are determined. During time of war private enemy ships and neutral merchantmen carrying contraband are subject to seizure. Title to such vessels and their cargoes does not immediately pass to the captor state but, under international law, must be adjudicated by the captor state's prize court, which may condemn them as lawful prizes. Enemy warships, enemy public ships (such as prison ships), and neutral ships participating in hostilities, on the other hand, are subject to capture. Title in them passes immediately to the captor state and is not subject to condemnation by a prize court.").

46. *See* DUMBAULD, *supra* note 29, at 26; *see also* Edward Gordon, *Grotius and the Freedom of the Seas in the Seventeenth Century*, 16 WILLAMETTE J. OF INT'L L. AND DISP. RESOL. 254 (2008).

47. van Ittersum, *supra* note 39, at 511.

48. DUMBAULD, *supra* note 29, at 26.

of the VOC and its own, private navy. Thus the need to hire Grotius to legitimize VOC's use of naval power.

While Grotius was not hired to represent the VOC in any judicial proceeding, "scholars now believe. . .that his work was intended, like that of a modern 'public relations counselor,' to influence public opinion."[49] Put in modern military parlance, Grotius was asked to achieve an objective in the information domain. The initial work, known as the *Commentary on the Law of Prize and Booty*,[50] was never published and only discovered by happenstance in 1864 when a Dutch bookseller sold some of the Grotius family's papers.[51] Included in the *Commentary* as part of his initial legal defense was a single chapter specifically arguing for the right of the Dutch to trade in Southeast Asia. Five years later, when the Dutch and Spanish began negotiating a truce, the VOC wanted to ensure that their commercial trading rights were included. "Among the issues on the table during these discussions was the question of Dutch access to the expanding markets of the East Indies, where the Dutch were engaged in cut-throat competition with the Portuguese, the Spanish, and, increasingly, the English, for the huge profits to be gained from trade in silks, spices, porcelain, and other luxury goods."[52] So, the VOC commissioned Grotius once again to publish a single chapter of his *Commentary* that specifically advocated for the natural law right to navigate and trade. The book was published anonymously in 1609 as *Mare Liberum,* and while only pocket-sized, [53] it would spark a much larger debate. The ideas espoused in this small book would have lasting historical implications on the development of modern international law, naval strategy, and the legitimate use of naval power.

C. Mare Liberum

Grotius' legal basis for the freedom of the seas rested on two foundational concepts: (1) the ability for states to trade—and thus navigate freely—with other states is a natural law right, and (2) the ocean, unlike the land, cannot be possessed as property and thus is "common." First, Grotius initiates his Free Sea claim by pointing out that while nature provides all that man needs to survive, it is not all in one place. Quoting Virgil, "[n]or yet can all soils bear all fruit,"[54] Grotius argues that because mankind requires trade to survive and enjoy the fruits of earth, then man should also have the freedom to navigate on the seas in support

49. *Id.*

50. HUGO GROTIUS, COMMENTARY ON THE LAWS OF PRIZE AND BOOTY (Martine Julia van Ittersum ed., 2006).

51. *See* DUMBAULD, *supra* note 29, at 24; *see also* GROTIUS, MARE LIBERUM, *supra* note 7, at xii (responding to Welwood, Grotius recalling, "The universal laws of war and prize (*universi belli praedaeque jura),* and the story of the dire and cruel deeds perpetrated by the Portuguese upon our fellow-countrymen, and many other things pertaining to this subject, I treated in a rather long *commentary* which up to the present I have refrained from publishing").

52. GROTIUS, MARE LIBERUM, *supra* note 7, at xii.

53. *See* GROTIUS, MARE LIBERUM, *supra* note 7, at xi.

54. GROTIUS, MARE LIBERUM, *supra* note 7, at 11.

of that trade. Second, Grotius makes the obvious point that, whereas mankind may be able to possess and own land and thus exercise sovereignty and legal jurisdiction, the sea cannot be possessed. Grotius writes that just like the air, the sea "oweth a common use to men. . .the element of the sea is common to all, to wit, so infinite that it cannot be possessed and applied to all used, whether we respect navigation or fishing."[55] Continuing to rely on the natural characteristics of the ocean, Grotius writes that "the sea therefore cannot be altogether proper unto any because nature doth not permit but commandeth it should be common. . .."[56] Put simply, because man cannot build on the ocean, man cannot occupy it.[57] Thus if man cannot occupy and possess the sea, then nature has reserved it for common use. Grotius' belief that the sea is "common" laid the foundation for the development of early twentieth century thinking on sea power. Three centuries after Grotius, Alfred Thayer Mahan, arguably the father of modern sea power, would portray the sea as "a great highway; or better perhaps, of a a wide common, over which men may pass in all directions. . .."[58]

It wasn't Grotius' argument alone that would have such lasting influence. After all, Grotius did not discover the sea's fluid nature. Instead, it was the energy in which he proclaimed the freedom of the seas that sparked the debate that would influence the development of that part of international law related to the sea.[59] As professors Churchill and Lowe declared, "[s]uch literary exchanges did much to clarify understanding of the issues involved in the law of the sea, and to refine the concepts upon which it was based."[60]

While born out of naval warfare in the South China Sea, it wasn't until disputes over herring fishing along English and Scottish coasts that *Mare Liberum* caused the greatest wake.[61] Grotius' new opponents believed that *Mare Liberum* threatened what was then a lucrative and influential enterprise—the British fishing industry. In opposition to Grotius' argument that the freedom of navigation and trade are rights protected under natural law, jurist William Welwood of Scotland published *An Abridgement of All Sea-Laws* in 1613 and John Selden of England published *Mare Clausum* (*The Closed Sea*) in 1635. The premise of their counter-argument is that God directed mankind's dominion over the seas (and its fish), and while they conceded the right to navigate and trade, they believed that restricting these rights was not unlawful because the sea "in fact had often been

55. *Id*. at 25.

56. *Id*. at 26.

57. *See* U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS] (positing that perhaps China is using the inverse of Grotius' logic as it builds and defends artificial islands).

58. ALFRED THAYER MAHAN, THE INFLUENCE OF SEA POWER UPON HISTORY, 1660-17683, at 25 (Dover, 1987).

59. GERHARD VON GLAHN, THE LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 32 (Macmillan, 5th ed. 1986).

60. ROBIN CHURCHILL & VAUGHAN LOWE, THE LAW OF THE SEA 4 (Manchester, 1986).

61. *See* Gordon, *supra* note 46, at 257.

occupied and appropriated throughout history."[62] Some level of control and occupation would eventually be deemed acceptable, with another Dutch lawyer, Cornelius Van Bynkershoek, articulating the principle that dominion over the seas should equal that of the distance of a cannon shot.[63]

While customary international law would adopt Grotius' Free Sea principle, it wasn't until the twentieth century when states came together five times to codify the freedom of the seas and define the limits of land's power over what he and Mahan established as the world's great "common."[64] In 1924, the League of Nations made the initial attempt, creating an expert committee to explore codifying concepts such as territorial seas, piracy, and exploitation of marine resources.[65] A conference was later held at The Hague in 1930, but representatives were unable to reach an agreement.[66] In 1958, eighty-six nations attended the first United Nations Convention on the Law of the Sea (UNCLOS I), adopting four conventions, but failing to resolve the issue related to the acceptable breadth to territorial seas.[67] A second convention was convened (UNCLOS II) in an effort to settle the problem, creating a six-mile territorial sea and six mile fishing zone beyond, but the effort failed by a single vote.[68] Ultimately, the effort to codify Grotius' Free Sea principle in the modern era would bring statesmen representing the nations of the world together at Montego Bay, Jamaica on 10 December 1982 to mark the official opening for signature of the United Nations Convention on the Law of the Sea (UNCLOS III).[69] The 320 articles and nine annexes that make up the "constitution of the oceans" is the fruit of the seeds planted by Grotius during his defense of Dutch sea power in the South China Sea. While UNCLOS is not a treaty governing naval warfare, it is important to understand that "at the core" of the centuries-long development of public international maritime law is the "conflict between the privileges of belligerent navies and the rights of noncombatant and neutral sailors."[70] Although many of the statesmen gathered in Jamaica believed that UNCLOS promoted "the peaceful uses of the seas and oceans. . .,"[71] the study of history suggests a correlation between the Free Sea

62. *Id*. at 266.

63. *See generally* Wyndham Walker, *Territorial Waters: The Cannon Shot Rule*, 22 BRIT. Y.B. INT'L L. 210 (1945).

64. CHURCHILL & LOWE, *supra* note 60, at 14.

65. *Id*.

66. CHURCHILL & LOWE, *supra* note 60, at 15.

67. *Id*. UNCLOS I adopted the Convention on the Territorial Sea and the Contiguous Zone, the Convention on the High Seas, the Convention on the Continental Shelf, and the Convention on Fishing and Conservation of the Living Resources on the High Seas. CHURCHILL & LOWE, *supra* note 60, at 15.

68. *Id*.

69. 168 nations have ratified UNCLOS. While the United States has not ratified, U.S. policy is that many of the substantive rules articulated in UNCLOS, especially those related to freedom of navigation, are customary international law and therefore binding on all nations. UNCLOS, U.N. TREATY COLLECTION (Feb. 4, 2023), https://perma.cc/SZ6L-TX24.

70. JOEL HOLWITT, "EXECUTE AGAINST JAPAN": THE U.S. DECISION TO CONDUCT UNRESTRICTED SUBMARINE WARFARE 5 (2009).

71. UNCLOS, *supra* note 57, at pmbl.

principle and the use of naval power—at sea and in the information domain—to defend it. As professors Churchill and Lowe explain, the debate sparked by Grotius "was eventually won by the advocates of the open seas. . . as the development of real naval power displaced notional claims to sovereignty over the seas."[72] In other words, international law and sea power are fundamentally linked.

D. On the Laws of War and Peace

In exploring the relationship between international law and sea power, and specifically the use of naval power to defend the freedom of the seas, it is important to understand the legitimate justifications for the use of force generally. As mentioned previously, Grotius' reputation throughout the centuries, and arguably his relevance today, was as the matchmaker of this relationship. The circumstances surrounding the seizure of the *Santa Catarina* make clear that Grotius' Free Sea principle was born out of a need to legitimize the use of force at sea. His unpublished *Commentary,* while in part advocating for the freedom of the seas, was also a treatise on war and the right to wage it. In 1625, while in exile in Paris, Grotius finally completed what he started for the VOC in 1604. Published as *On the Laws of War and Peace,* it "would become the foundation for all future treatises on international law,"[73] and earn him the title, as James Madison hailed, "the father of the modern code of nations."[74] Consisting of three volumes, Grotius defines war and confirms the morality of war in volume one; identifies the justifiable causes of war, which later informs *jus ad bellum* criteria,[75] in volume two; and presents general rules and rights in the conduct of war (*jus in bello*[76]) in the third volume.

Focusing on volume two, Grotius identified three justifiable causes of war.

> It is evident that the sources from which wars arise are as numerous as those from which lawsuits spring; for where judicial settlement fails, war begins. . .. Authorities generally assign to wars three justifiable causes, defence, recovery of property, and punishment.[77]

Clearly arguing for law's influence on the use of force, the central premise of Grotius' ideas on *jus ad bellum* is that "[w]ar is a substitute for courts. . .because courts are the original substitutes for war."[78] Law professors Hathaway and Shapiro characterize Grotius' war rationale this way: "Because the function of

72. CHURCHILL & LOWE, *supra* note 60, at 204-05.
73. HATHAWAY & SHAPIRO, *supra* note 25, at 2.
74. HATHAWAY & SHAPIRO, *supra* note 25, at 27.
75. *Jus ad bellum* refers to the body of international law concerning the resort to force. U.S. DEP'T OF DEF. OFF. OF THE GEN. COUNS., LAW OF WAR MANUAL § 1.11 (Dec. 13, 2016), https://perma.cc/8UBN-ATWW.
76. *Jus in bello* refers to the body of international law concerning conduct during war. *Id.* at § 1.1.2.
77. GROTIUS, ON THE LAWS OF WAR AND PEACE, *supra* note 10, at 81.
78. HATHAWAY & SHAPIRO, *supra* note 25, at 11.

both warfare and litigation is to right wrongs, Grotius claimed that the reasons to wage war are identical to those that prompt lawsuits."[79] Put yet another way, "[h]aving been wronged, the victim has the right to go to war precisely because he cannot go to court."[80] Therefore, because the legitimacy of a state's use of force hinges on the rights recognized in law, Grotius wrote *On the Laws of War and Peace* in a manner that primarily focuses on cataloguing legal rights that a litigant may list in a lawsuit. Hathaway and Shapiro further explain:

> Grotius plumbed deeper than any thinker before him in an effort to justify war. Because he treated war as a permissible response to the violation of rights, he audaciously attempted to catalogue every right that any person could possess. Grotius wanted to know what rights people could have, in other words, because he wanted to know when they could go to war over them.[81]

As one of many rights discussed, Grotius recycles his *Mare Liberum* arguments in his treatise on war, declaring "the sea. . .cannot become subject to private ownership. . .[because] the extent of the ocean is in fact so great that it suffices for any possible use on the part of all peoples, for drawing water, for fishing, for sailing. . .."[82] Additionally, Grotius articulated the right of innocent passage, stating that "it is certain that one who has occupied a part of the sea cannot hinder navigation which is without weapons and of innocent intent. . .."[83] Notably, innocent passage is a legal maritime right often enforced with the use of naval power in the South China Sea today.[84]

E. Strategic Competition Four Hundred Years Later

Four centuries after Grotius developed the Free Sea principle and formulated the relationship between law and war, free and open access to the world's oceans is again "under assault."[85] Applying Grotius' theories on the use of force, which is viewed through the lens of an attorney skilled in litigating legal rights, traditional forms of naval power used to counter this assault would be justified. Under modern international law, however, the use of force (or threat of it) against the "territorial integrity or political independence of any state"[86] is prohibited unless exercised for self-defense[87] or when the United Nations Security Council deems it necessary to restore peace.[88] Furthermore, under modern international law,

79. *Id*. at 10.
80. HATHAWAY & SHAPIRO, *supra* note 25, at 11.
81. *Id*. at 21.
82. GROTIUS, ON THE LAWS OF WAR AND PEACE, *supra* note 10, at 94.
83. *Id*. at 111.
84. *See* ELEANOR FREUND, FREEDOM OF NAVIGATION IN THE SOUTH CHINA SEA: A PRACTICAL GUIDE2017).
85. Kenneth Braithwaite, *Preface* to U.S. DEPT. OF DEF., ADVANTAGE AT SEA: PREVAILING WITH INTEGRATED ALL-DOMAIN NAVAL POWER (2020).
86. U.N. Charter art. 2, ¶ 4.
87. *See id*. at art. 51.
88. *See id*. at art. 39.

states have an obligation to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered."[89] Therefore, in the response to threats against the freedom of the seas, can the courts provide a remedy?

In cases of disagreement involving maritime rights codified in UNCLOS, states have various options, other than resorting to force, to resolve their disputes.[90] In 2016 for example, the Philippines exercised one of the dispute settlement options under UNCLOS and requested that an arbitral tribunal adjudicate certain disputed maritime claims made by another signatory to UNCLOS—the PRC. The tribunal ruled that these specific maritime claims in the South China Sea were excessive and unlawful under international law.[91] The PRC ignored this ruling and continues to wage its own form of lawfare by misusing international law principles to justify violating not only the maritime rights of the Philippines, but those of other states that have maritime claims in the South China Sea as well.[92] Moreover, by building their "great wall of sand,"[93] and claiming sovereignty over the areas of the great "commons," the PRC injures the rights of all states.

Given that the "courts" have failed, what is the recourse for the Philippines and other states wishing to navigate freely through those waters? According to Grotius' work in *On the Laws of War and Peace*, because the courts have failed to remedy the injury of an inalienable, legal right, the state is justified in using force. As touched upon previously, however, modern international law contrasts with Grotius' position that "war is a morally acceptable way to prevent or remedy the violation of rights."[94] According to the U.S. Department of Defense Law of War Manual, which cites to Grotius seven separate times, international law recognizes four rationales for the resort of force.[95] The first, which Grotius also acknowledges, is the use of force in self-defense. This, however, is where the similarities end. The other three modern rationales for initiating armed conflict are when the United Nations Security Council authorizes the use of force under Chapter VII of the U.N. Charter; when the foreign state consents to the military action within its territory; and in humanitarian interventions.[96] While there is a

89. *Id*. at art. 2, ¶ 3.

90. Under UNCLOS part XV, state parties may satisfy their obligation to peacefully settle disputes related to the Convention by written declaration to: (a) the International Tribunal for the Law of the Sea established in accordance with Annex VI; (b) the International Court of Justice; (c) an arbitral tribunal constituted in accordance with Annex VII; (d) a special arbitral tribunal constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein. UNCLOS, *supra* note 57, at art. 287.

91. *See* S. China Sea (Phil. v. China), 33 R.I.A.A. 153, 610-17 (Perm. Ct. Arb. 2016).

92. Goldenziel, *supra* note 5, at 1118.

93. Sean Quirk, *Water Wars: Lines in the Great Wall of Sand*, LAWFARE (Aug. 17, 2020, 8:01 AM), https://perma.cc/7P3J-XAW9.

94. HATHAWAY & SHAPIRO, *supra* note 25, at 27.

95. *See* U.S. DEP'T OF DEF. OFF. OF THE GEN. COUNS., *supra* note 75, at § 1.11.4

96. *Id*. Not only does the United States not recognize humanitarian intervention, but humanitarian intervention remains highly disputed with many other countries not recognizing it as a legitimate justification. *Id*.

gap between Grotius' rationales and modern international law, Grotius' efforts to link law with naval power, both in his defense of the *Santa Catarina's* seizure and in his later works, suggests the legitimate use of naval power directed to gain tactical advantages at sea must also be directed toward gaining advantages by less violent means—such as waging lawfare in the information domain.

Under the modern rules-based order, naval power used to enforce the rights advocated by Grotius must be carried out under a solid, legal basis. When the rules-based order is threatened, a legalistic form of sea power is necessary to defend the Free Sea principle, especially when the power of the courts are ignored. Professor O'Connell captured this sentiment well when he wrote that "the law of the sea has thus become the stimulus to sea power and not its restraint."[97] The legacy of Grotius' defense of the seizure of the *Santa Catarina* is the impact it had on the relationship between law and sea power. Therefore, Grotius' legal defense of the seizure arguably is one of the first instances of maritime lawfare because he used legal principles, in the information domain, to enable sea power. These legal principles would go on to shape the development of modern maritime strategy and how states use their naval power to achieve strategic objectives.

II. SHAPING SEA POWER

The British international relations theorist Ken Booth stated that "[n]aval strategy and the law of the sea have always been connected."[98] Writing in 1987 just after UNCLOS III was drafted, Booth foresaw international law's ability to influence sea power. Further writing, "[n]aval strategy has been and will be shaped by threat perceptions, economic considerations and technological innovations rather than by changes in the legal regime at sea. . ..That said, it is evident that developments in the law of the sea will affect the course of future naval strategy. . .."[99] His prophecy has come true in that maintaining the rules-based order, particularly the Free Sea principle, has become a strategic objective in and of itself.

Before shedding light on how international law shapes sea power and the role of lawfare in this era of strategic competition, it is prudent first to dispense with some foundational definitions. The naval historian John Hattendorf defines maritime strategy as the "the direction of all aspects of national power that are related to a nation's interests at sea."[100] Naval strategist James Holmes incorporates the theory of sea power in his definition and writes "[m]aritime strategy is the art and science of using power to fulfill purposes relating to the sea. Sea power is a means to the strategic ends set by political leaders in concert with domestic constituents."[101] Finally, Alfred Thayer Mahan knots naval power together with

97. O'CONNELL, *supra* note 12, at 13.

98. BOOTH, *supra* note 1, at 3.

99. BOOTH, *supra* note 1, at 7.

100. John Hattendorf, *What is a Maritime Strategy?* NAVAL HISTORY AND MARITIME STRATEGY: COLLECTED ESSAYS 235-36 (2000).

101. HOLMES, *supra* note 11, at 1.

commercial shipping and trade. He famously writes that sea power "in the broad sense. . .includes not only the military strength afloat that rules the sea or any part of it by force of arms but also the peaceful commerce and shipping from which alone a military fleet naturally and healthfully springs, and on which it securely rests."[102] Putting this all together,

> [t]he goal of a Mahanian maritime strategy, then, is 'to secure commerce, by political measures conducive to military, or naval strength. This order is that of actual relative importance to the nation of the three elements-commercial, political, military.' Maritime strategy is about access.[103]

The relationship between a state's strategic objectives, international law, and sea power here is clear. While Grotius' Free Sea principle supports the view that maritime interests such as trade access and navigation are inalienable rights, it is less clear in the post-United Nations Charter era that these inalienable rights may be defended with force. If not, then states must develop other means to achieve strategic objectives and exercise naval power—such as lawfare.

As an example of just how influential the law can be in shaping strategic objectives, examine the most recent national security strategy of the United States.[104] The document is explicit in its assurance that the instruments of U.S. national power will be directed toward enforcing Grotius' Free Sea principle. Specifically, the strategy document asserts "freedom of navigation" four times and aligns U.S. security interests with supporting and protecting it—in the Indo-Pacific; "through the Middle East's waterways;" in the Arctic; and as a critical international norm that promotes "security and prosperity" for the people around the world.[105] Additionally, the activities of a nation's diplomats are indicative of the relationship between international maritime law and sea power. Using the United States again as an example, in July 2020 the Secretary of State explicitly anchored the government's South China Sea policy to the ruling of an international arbitral tribunal of which the U.S. was not a party. He stated that "as specifically provided in the Convention, the Arbitral Tribunal's decision is final and legally binding on both parties. Today we are aligning the U.S. position on the PRC's maritime claims in the South China Sea with the arbitral tribunal's decision."[106] Whereas

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102. MAHAN, *supra* note 58, at 28; *see also* H. Kaminer Manship, *Mahan's Concepts of Sea Power: A Lecture Delivered at the Naval War College on 23 September 1963*, 16 NAVAL WAR COLL. REV. 15 (Jan. 1964).

103. HOLMES, *supra* note 11, at 2.

104. EXEC. OFF. OF THE PRESIDENT, *supra* note 3. Mandated by the Goldwater-Nichols Defense Reorganization Act of 1986, "The NSS provides discussion on proposed uses of all facets of U.S. power needed to achieve the nation's security goals. The report is obligated to include a discussion of the United States' international interests, commitments, objectives, and policies, along with defense capabilities necessary to deter threats and implement U.S. security plans." *Nat'l Sec. Strategy*, HIST. OFF., OFF. OF THE SEC'Y OF DEF. (Nov. 9, 2022), https://perma.cc/3JDC-AMQG.

105. *Id.*

106. Press Statement, Michael R. Pompeo, Sec'y of State, U.S. Position on Maritime Claims in the South China Sea (July 13, 2020), https://perma.cc/MF5Z-B972.

the U.S. has delegitimized the PRC's claims in the past using customary international law and acknowledging the legitimacy of the tribunal findings, the Secretary's statement marks the most forceful use of the international tribunal as a tool in the information domain to undermine the legitimacy of the PRC's activities.[107] In 2021, under a new administration of the opposing political party, the Secretary of State re-affirmed the previous administration's alignment with the South China Sea arbitral tribunal.[108] Additionally, in an effort to undermine the legal legitimacy of the PRC's activities in the South China Sea, the department released No. 150 of its *Limits in the Seas* series "exam[ing] [the PRC's] national maritime claims and boundaries and asses[ing] their consistency with international law."[109] The department's press release announcing the publication of No. 150 expressed how the legal assessment serves, in part, to "call[] again on the PRC to conform its maritime claims to international law as reflected in the Law of the Sea Convention, to comply with the decision of the arbitral tribunal in its award of July 12, 2016, in The South China Sea Arbitration, and to cease its unlawful and coercive activities in the South China Sea."[110]

In addition to diplomatic action, history has shown time and again that sea power is often used either to defend the freedom of navigation or as a tool when seeking redress for violations of maritime rights. Professor O'Connell writes that "[n]avies alone afford governments the means of exerting pressure more vigorous than diplomacy and less dangerous and unpredictable in its results than other forms of force, because the freedom of the seas makes them locally available while leaving them uncommitted."[111] Part of this may be, just as Grotius recognized, that the sea by nature is unique. Maybe it has to do with its remoteness and a recognition that "[v]iolence at sea is more tolerable or less comprehensible than violence on land, and that the ocean could be the scene of a struggle for power among the nations that would be unacceptable on land."[112] Or maybe it is due to the ability of international maritime law to influence naval activities. As Professor O'Connell opined,

> Admiral Mahan omitted international law from his catalogue of the factors that made for successful resort to sea power, yet its intrinsic relevance to his

107. Robert Williams, *What Did the U.S. Accomplish With Its South China Sea Legal Statement?*, LAWFARE INST. BLOG (July 17, 2020), https://perma.cc/TT5Q-UZG8; *see also* Bill Hayton, *Pompeo Draws a Line Against Beijing in the South China Sea*, FOREIGN POL'Y (July 15, 2020), https://perma.cc/J8LM-NWGA.

108. Press Statement, Anthony J. Blinken, Sec'y of State, Fifth Anniversary of the Arbitral Tribunal Ruling on the South China Sea (July 11, 2021), https://perma.cc/A5A2-R88Y.

109. Media Note, U.S. Dep't of State, Study on China's South China Sea Maritime Claims (Jan. 12, 2022) [hereinafter Study on China's South China Sea Maritime Claims], https://perma.cc/S55Q-L7VW. Of note, the most recent study related to China's claims prior to No 150 was No. 143, published in December 2014. [RECOMMEND CITATION] For a complete list of the *Limits in the Seas* series, *see* https://perma.cc/RG6B-9QQ6.

110. Study on China's South China Sea Maritime Claims, *supra* note 109.

111. O'CONNELL, *supra* note 12, at 3.

112. *Id*. at 2

> thesis is revealed by the fact that, having identified himself as an authority on the intellectual aspects of sea power, he was chosen to be one of the United States delegates to the Hague codification conference of 1899, where his task was to devise laws which would influence the exercise of sea power. Had he written his book after his experience at the conference it is ikely that the role of law would have found a place in his exposition of sea power.[113]

While Professor O'Connell wrote this in 1975, it is likely more true today when powerful autocracies undermine the rules-based order and threaten Grotius' Free Sea principle.

Moreover, "...sea power can express and sustain legal decisions [and in the case of Grotius, legal rights] that could not be represented even remotely credibly in any other way; and it has revealed the peculiar capacity of navies to manifest the concept of law and order among nations."[114] In fact, American naval history is replete with examples of how sea power has been exercised to redress violations of the Free Sea principle. Professors Kraska and Pedrozo chronicle these critical episodes of sea power. During America's infant years, the relationship between sea power and law turned violent multiple times: during the Quasi-War of 1798-1800, when France "conducted an eighteen-month campaign against American merchant ships;"[115] wars against the Barbary pirates, first in 1803-04, then in 1815 "that finally ended the infernal tributary system and won free transit in the Mediterranean Sea;"[116] and the War of 1812, when "threats to American freedom of navigation arose from attacks on commercial shipping."[117] Not long after the United States stepped onto the world stage as a true power after World War I, in which "U-boat attacks on neutral U.S. shipping brought the United States into the war,"[118] did it seek to make the Free Sea principle a cornerstone of the post-war world order. After all, "[t]he second of President Woodrow Wilson's 'Fourteen Points,' which set forth principles for the peace settlement ending World War I, committ[ed] adherents to 'absolute freedom of navigation upon the seas, outside territorial waters, alike in peace and in war.'"[119] Even after World War II and the signing of the U.N. Charter, Grotius' Free Sea principle was at times challenged, resulting in flashes of violence at sea. During the Cold War, "communist governments unilaterally attempted to control U.S. warships and commercial vessels in international waters"[120] in incidents in the Gulf of Tonkin (1964),[121] and

113. *Id*. at xiii.

114. O'CONNELL, *supra* note 12, at 1.

115. JAMES KRASKA & RAUL PEDROZO, THE FREE SEA: THE AMERICAN FIGHT FOR FREEDOM OF NAVIGATION 4 (2018).

116. *Id*. at 5.

117. *Id*.

118. *Id*.

119. HOLMES, *supra* note 11, at 6.

120. KRASKA & PEDROZO, *supra* note 115, at 5.

121. *See U.S. Involvement in the Vietnam War: The Gulf of Tonkin and Escalation, 1964*, U.S. DEP'T OF STATE OFF. OF THE HISTORIAN, https://perma.cc/E4XH-7JA9 (Mar. 8, 2022), ("In early August 1964, two U.S. destroyers stationed in the Gulf of Tonkin in Vietnam radioed that they had been fired upon by

involving vessels such as the *Pueblo* (1968),[122] and the *Mayaguez* (1975).[123] Finally, it was America's freedom of navigation policy that led to a decades-long commitment of naval power in the Arabian Gulf, that began with threats to the Free Sea during the Iran-Iraq War, known to navalists as the Tanker War (1980-88).[124]

Of course, the United States is not the only state that has exercised sea power to defend the Free Sea principle. In 1959 and 1972, Icelandic and British naval forces violently clashed—in what would be known as the Cod Fish Wars—over legal disagreements regarding the breadth of territorial seas and fishing rights.[125] Also in the 1970s, prior to UNCLOS III, naval warfare was waged over the Paracel Islands near the same waters where the *Santa Catarina* was captured centuries earlier. As Professor O'Connell described: "The battle of the Paracels of 20 January 1974 is a classical instance of the use of coercive sea power in a territorial dispute connected with control of resources, and it is a portent of the way in which nations will in the future be prepared to resort to superior force in order to vindicate their claims."[126]

As in the past, these freedoms and legal rights are again "under assault."[127] But what arguably makes this assault unique is that, not only does it involve raw naval power, but a deliberate misuse of the laws by states attempting to undermine the rules-based order. Ironically, that same rules-based order was designed to prevent the type of violent conflict that is now on the horizon. Examining the development of the U.S. Navy's 2007 "A Cooperative Strategy for 21st Century Seapower," Professor Craig Allen wrote that "strategy must be adapted to the strategic environment in which it will operate."[128] In the first decade of the twenty-first century, the strategic environment was a "world [] said to be suffering from a global security deficit."[129] In response, the naval services developed a strategy that reflected the following:

> In an age when the international supply chains that sustain the global economy and the seas over which those chains are carried are the common concern of all

North Vietnamese forces. In response to these reported incidents, President Lyndon B. Johnson requested permission from the U.S. Congress to increase the U.S. military presence in Indochina.").

122. *See Pueblo Incident*, ENCY. BRITANNICA, https://perma.cc/8UMF-RMDC (Mar. 8, 2022). On January 23, 1968, North Korean naval forces seized the USS *Pueblo* in international waters; one U.S. sailor was killed and the remaining eighty-two officers and crew were held prisoner for eleven months. *Id.*

123. *See generally* John Garofano & Christopher Lamb, *The Mayaguez Crisis, Mission Command, and Civil-Military Relations*, 73 NAVAL WAR COLL. REV. 171, 175-77 (2020). On May 12, 1975, the merchant vessel SS *Mayaguez* was seized by Cambodian Khmer Rouge forces in international waters. Thirty-nine crewmembers were held hostage. During the rescue attempt, fifty Marines were injured, and forty-one were killed. *Id.*

124. *See generally* George Walker, *The Tanker War 1980-88: Law and Policy*, 74 INT'L L. STUD. (2000).

125. *See* Walker Mills, *The Cod Wars and Today: Lessons from an Almost War*, CIMSEC BLOG, (July 28, 2020), https://perma.cc/3ZXB-579T.

126. O'CONNELL, *supra* note 12, at 10.

127. Braithwaite, *supra* note 2, at *Preface*.

128. Craig Allen, *The Influence of Law on Sea Power Doctrines: The New Maritime Strategy and the Future of the Global Legal Order*, 84 INT'L L. STUD. 3, 5 (2008).

129. *Id.* at 6.

> States, global order—including order on the sea—is the new *raison d'etat* and must be the goal of every maritime security policy and strategy.[130]

Now, in the third decade of the twenty-first century, when autocracies deliberately target the rules-based order and the freedom of the seas, Professor Allen's perspective is even more on-target. Therefore, a state's use of sea power to defend these inalienable maritime rights "[m]ust think ahead about how to use military might to renovate and sustain Grotius' vision."[131]

III. MARITIME LAWFARE

The term "lawfare" is attributed to Major General Charles Dunlap, who coined the term in a 2001 article that reflected on the "rise of law as a prime feature of modern military interventions."[132] Since General Dunlap first introduced lawfare into the American legal lexicon, the concept and definition of lawfare has expanded to reflect activities conducted by states as well. Professor Kittrie's 2016 book *Lawfare*, which claims to be the "first English-language book to provide a broad and systematic overview of 'lawfare,'"[133] identifies two, interrelated forms of lawfare: (1) instrumental and (2) compliance-leverage disparity.[134] Instrumental lawfare is the "use of legal tools to achieve the same or similar effects as those traditionally sought from conventional kinetic military action,"[135] whereas compliance-leverage disparity lawfare occurs "typically on the kinetic battlefield [and] is designed to gain advantage from the greater influence that law, typically the law of armed conflict, and its processes exerts on an adversary."[136] In addition to Kittrie's instrumental lawfare (such as the use of sanctions to cause an effect on Iran's nuclear program), Professor Goldenziel identifies the following types of lawfare: i) proxy (taking legal actions using adversary proxies, such as litigation against the Chinese company Huawei); ii) information (use of law to control the narrative by portraying one nation's actions as legal and the other's as illegal; and iii) institutional (deliberating advocating for and creating new domestic and international laws or institutions to achieve strategic effects).[137] The type most relevant to Grotius' legal theories and modern sea power is information lawfare. Framing law's utility through the lens of its impact on the information domain, Goldenziel defines information lawfare as:

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130. *Id.*

131. HOLMES, *supra* note 11, at 9.

132. Charles J. Dunlap, Presentation at Humanitarian Challenges in Military Interventions Conference: Law and Military Interventions Preserving Humanitarian Values in 21st Conflicts (Nov. 29, 2001) https://perma.cc/JA7Z-J7TS. At the time he wrote the paper, Dunlap was a colonel in the U.S. Air Force's Judge Advocate General's Corps. He would go on to serve as the Air Force's Deputy Judge Advocate General at the rank of Major General.

133. KITTRIE, *supra* note 13, at 4.

134. *Id.* at 11.

135. *Id.*

136. *Id.*

137. Goldenziel, *supra* note 5, at 1099.

> 1) the purposeful use of law taken toward a particular adversary with the goal of achieving a particular strategic, operational, or tactical objective, or 2) the purposeful use of law to bolster the legitimacy of one's own strategic, operational, or tactical objectives towards a particular adversary, or to weaken the legitimacy of a particular adversary's particular strategic, operational, or tactical objectives.[138]

Moreover, lawfare can be employed both offensively and defensively and as such, has proven to be a valuable force enabler. "While they may not be decisive in their own right, [legal] warfare tactics nonetheless may allow their practitioners to seize the initiative and otherwise multiply the effects of military power."[139]

Thinking of lawfare in the context of Grotius' legitimate war rationale, it is true that the traditional binary model of viewing the strategic environment in either a state of peace or war no longer adequately captures the reality. "We must come to terms that binary notions of war and peace leave us blind to the world in which we have always lived in [sic]. Geopolitically, competition and conflict are in a continuous cycle and reshaping our environment. The way we think about not just military force, but all elements of national power, must reflect that. . . ."[140] Whereas traditional views of law and war (viewing the law only as prohibitive) reflects this binary model, competitors who have implemented lawfare into their strategies are able to exploit the "gray zone"—that competitive space between law and war. Moreover, "Mahan notes that maritime strategy, unlike strategy for the aerial and ground-warfare domains, functions in wartime and peacetime alike."[141]

With the changing character of war[142]and the complexity of this era's strategic competition, a state focused on preserving the freedom of the seas must utilize all the available tools in its armory. Within the South China Sea and the information domain, international law is one of those tools that can complement traditional naval power. Today, the U.S. Navy defines naval power as:

> The influence of naval forces across all domains—from the sea floor to space; across the world's oceans, seas, bays, estuaries, islands, littorals, and from coastal areas ashore; as well as in cyberspace, the information domain, and across the electromagnetic spectrum. Naval power underwrites use of global waterways to achieve national security objectives through diplomacy, law enforcement, economic statecraft, and, when required, force.[143]

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138. *Id*. at 1099.

139. Dean Cheng, *Winning Without Fighting: Chinese Legal Warfare*, HERITAGE FOUND. (May 21, 2012) at 2, https://perma.cc/4NH3-JH9T.

140. Kelly McCoy, *In the Beginning, There Was Competition: The Old Idea Behind the New American Way of War*, MOD. WAR INST., (Apr. 11, 2018), https://perma.cc/8MUM-DGY7.

141. HOLMES, *supra* note 11, at 25.

142. *See* Joseph Dunford, *The Character of War and Strategic Landscape Have Changed*, 89 JOINT FORCE Q., 2nd Quarter (2018); *see also* Benjamin Jensen, *Emergence: The Changing Character of Competition and Conflict*, WAR ON THE ROCKS (Feb. 6, 2017), https://perma.cc/86DH-U6ET.

143. DEPT. OF DEF., ADVANTAGE AT SEA: PREVAILING WITH INTEGRATED ALL-DOMAIN NAVAL POWER (2020) at 26.

Central to this discussion on lawfare and naval power is the principle of legitimacy in modern military operations, especially those that take place, in part, within the information domain. As Chief of Naval Operations Admiral Michael Gilday recently articulated, "[t]hough we are not exchanging fire with our competitors, we are battling for influence and positional advantage today."[144] In a rules-based order, how is this influence and positional advantage obtained? Looking to the study of law's influence on foreign affairs more generally, Abram Chayes, who had served as Legal Adviser to the U.S. State Department during the Cuban Missile Crisis, believed that while "international law may not be determinative in international affairs, [] it is relevant and influences foreign policy. . .as the basis of justification or legitimization for action. . .."[145] On the importance of legitimacy in military operations, generally, U.S. doctrine states:

> (1) The purpose of legitimacy is to maintain legal and moral authority in the conduct of operations. (2) Legitimacy, which can be a decisive factor in operations, is based on the actual and perceived legality, morality, and rightness of the actions from the various perspectives of interested audiences. These audiences will include our national leadership and domestic population, governments, and civilian populations in the [operating area], and nations and organizations around the world.[146]

Apart from the army (or fleet) of lawyers the military uses to ensure operations and objectives comply with the law, and thus are perceived as legitimate, the law can also be used as a tool to achieve objectives. As O'Connell wrote, "the law has never been static. Its pliable character has meant that it has been made to serve the purposes of sea power, and so has become a weapon in the naval armoury."[147] What he identified in his own examination of naval history—that the law can be used as a weapon—is what has become referred to today as "lawfare."

A prime example of how international law shapes modern naval power and uses it in a way that bolsters the legitimacy of Grotius' Free Sea principle is the Freedom of Navigation Program. "Since 1979, U.S. Presidents have directed the U.S. Government to carry out a Freedom of Navigation (FON) Program to preserve this national interest."[148] Under the FON program, diplomats enhance sea power by leveraging both international maritime law and the U.S. Navy's ability to project sea power to challenge excessive maritime claims (foreign laws, regulations, proclamations that violate the rights, freedoms, and uses of the sea

144. M.M. GILDAY, CHIEF OF NAVAL OPERATIONS, FRAGMENTARY ORDER 01/2019: A DESIGN FOR MAINTAINING MARITIME SUPERIORITY 4 (2019), https://perma.cc/35UR-TZLD.

145. *See* SCHARF & WILLIAMS, *supra* note 16, at 4 (citing ABRAM CHAYES, THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISIS AND THE ROLE OF LAW 7 (1974)).

146. Joint Chiefs of Staff, *Joint Publication 3-0, Joint Operations,* (Oct. 22, 2018), A-4.

147. O'CONNELL, *supra* note 12, at 16.

148. U.S. DEP'T OF DEF., FREEDOM OF NAVIGATION (FON) PROGRAM, [hereinafter FON PROGRAM], (Feb. 28, 2017) https://perma.cc/8EJJ-7U6M.

guaranteed to all nations by international law).[149] As evidence of the scale and scope of these operations, FON operations targeted excessive claims of 19 different nations in fiscal year 2020.[150] The program implements a deliberate strategy of using naval power to defend the freedom of the seas. As the Department of Defense recounts in their description of the FON Program: "Since the founding of the nation, the United States has asserted a vital national interest in preserving the freedom of the seas, calling on its military forces to protect that interest."[151]

In order to defend the freedom of the seas and maintain the rules-based order, uses of sea power must be perceived as legitimate in order to be effective in that competitive space between peace and war—where Admiral Gilday's "battle[] for influence and positional advantage"[152] is fought. Therefore, waging lawfare requires states to use their naval power, whether at sea or in the information domain, to promote the legitimacy of the Free Sea principle while undermining states that seek to undermine the rules-based order.

IV. CONCLUSION

In the modern era of strategic competition, the influence of the Free Sea principle over the exercise of naval power is clear. The 2020 U.S. tri-service maritime strategy, titled "Advantage at Sea,'' states "America's Naval Service defends our Nation by preserving freedom of the seas, deterring aggression, and winning wars."[153] The strategy goes on to define "freedom of the seas" as "all the rights, freedoms, and lawful uses of the sea and airspace, including for military ships and aircraft, recognized under international law."[154]

As a young attorney, Grotius used the law to legitimize his client's exercise of sea power. To do this, he advanced an argument that the seas are for common use and that the freedom of navigation is a natural, inalienable right. Later in his life, and in what would contribute to his status as the "father of international law," Grotius zealously defended the use of force to defend a nation's rights. Anchoring military power to the law, he laid the foundation for the relationship between the two. Leveraging this relationship to achieve strategic objectives, especially in the information domain, is known today as lawfare.

History has now come full circle, with strategic competition and maritime lawfare once again bringing the proverbial stormy weather to the South China Sea. Therefore, just as Grotius waged lawfare in defense of Dutch sea power and the Free Sea four centuries ago, lawfare must be waged today in defense of the rules-based order.

149. *See* OFF. OF THE UNDER SEC'Y OF DEF., DEPARTMENT OF DEFENSE REPORT TO CONGRESS: ANNUAL FREEDOM OF NAVIGATION REPORT (FY 2020), https://perma.cc/YKC7-2VQL.

150. *Id*.

151. FON PROGRAM, *supra* note 148.

152. GILDAY, *supra* note 144.

153. Braithwaite, *supra* note 2, at *Forward*.

154. Braithwaite, *supra* note 2, at 25.

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