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## Book Review: Freedom of the Seas written by J.M.G. de Rayneval

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## Joseph Mathias Gérard de Rayneval, *Freedom of the Seas*

translated from the French by Peter Stephen Du Ponceau; edited with an Introduction by William E. Butler (Clark, New Jersey: Talbot Publishing / The Lawbook Exchange, 2013. ISBN: 978-1-61619-404-8, 146pp, 2 Volumes, index of names.

The bringing of Rayneval's *On the Freedom of the Sea* to the English-language world should be recognised for what it is: a bibliophile's delight. How could it be otherwise when its first paragraph reads thus:

On 17 July 1840, not long after his eightieth birthday, a distinguished American jurist of French origin, philologist, historian, translator, legal practitioner, international and comparative lawyer, and civic patriot devoted to Pennsylvania stumbled out of his home in central Philadelphia to deliver a substantial bundle of bound papers to the American Philosophical Society just nearby. The bundle contained a manuscript translation of Joseph Mathias Gérard de Rayneval's two volume work. *De la liberté des mers* (Paris, 1811).<sup>1</sup>

William E. Butler, the John Edward Fowler Distinguished Professor of Law at Pennsylvania State University – Dickinson Law School, has included this manuscript in a series of historical texts of international law he has been editing for Talbot Publishing / The Lawbook Exchange, which has seen him produce introductions for a number of new editions of works by the likes of Grotius, Bynkershoek, and James Brown Scott, as well as the Nakaz of Catherine the Great.

More on the 'distinguished American jurist' who translated the text later, for now consideration turns to Rayneval, and his text *On the Freedom of the Sea*. Joseph Mathias Gérard de Rayneval (1736-1812) will be little known to English-language scholars of international law despite the fact that his general text was *the* French-language reference of international law for much of the 19<sup>th</sup> Century.<sup>2</sup> Rayneval followed in the footsteps of his brother Conrad Alexander Gérard, who would become France's first Ambassador to the United States of America; with both brothers having been intimately involved in negotiations of the Peace of Paris of 1783 and having penned the foreign policy memorandum which "embodied the French strategy for extending secret assistance to the Americans" during the US revolutionary war.<sup>3</sup>

Rayneval would spend nearly two decades with the French foreign ministry, where he would rise to become the Under-Secretary of Foreign Affairs under the Comte de Vergennes, before having been put out to pasture when, in 1792, a revolutionary purge saw a wholesale removal of the *ancient regime* at the Ministry. Prior to that, Rayneval career had evolved, having been *chargé d'affaire* in what is now Germany and Poland; and later, for a brief period of time, Ambassador to the Court of St. James. When, in 1808, he was invited to draft a new governmental system for the Margrave of Baden, his pen ran afoul of the heir of the Margrave – and apparently Emperor Napoleon – the result being his arrest at the French border as a prisoner of the State and for a short period of time, interment within the Château de Vincennes.

As for *On the Freedom of the Sea*, Butler writes that it is "the first work in two centuries, since Hugo Grotius' *Mare Liberum* (1609) to appear with this title"; though in essence, Rayneval's *On the Freedom of the Sea* is narrower in scope than its title suggests, focusing on maritime neutrality in times of war and, in the main, challenging Selden's 1635 *Mare*

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<sup>1</sup> William E. Butler, (ed.) Joseph Mathias Gérard de Rayneval, *De la liberté des mers* (trans: Peter S. Du Ponceau), 2013, p. xi.

<sup>2</sup> Joseph-Mathias Gérard de Rayneval, *Institutions du droit de la nature and des gens*, appears in three editions: 1803, 1832 and 1851. Note that the first edition of this texts is appear in English translation in 2017 as *de Rayneval's The Institutions of Natural Law and the Law of Nations*, with Oxford University Press (Jean Allain, translator).

<sup>3</sup> Rayneval, *De la liberté des mers*, n.1, p. xv.

*Clausum*.<sup>4</sup> Readers of the *JHIL* will be most familiar with the so-called ‘battle of the books, the high point of which was the debate manifest through John Selden’s *Mare Clausum* and Huig de Groot’s *Mare Liberum* as vehicles considering different conceptions of the seas.<sup>5</sup> That debate related to the appropriation the seas, and had come to a head when Protestant States sought to break free from the 1493 *Inter caetera*, the Papal Bull of Donation which included claims to jurisdiction over the seas in drawing a line between the Portuguese and Spanish dominion over the New World. While Grotius argued that the seas were not be open to appropriation and thus free to all so as to carry on commerce, Selden took issue with this, believing that like land, the seas could be possessed. Selden’s focus was, for his part, more narrow in scope, his “discussion of the sea was not whether in theory that it was possible to possess the sea but whether or not a particular claim to such possession was legitimate”.<sup>6</sup>

In tenor, Rayneval’s consideration of Selden’s work is based on the age-old literary trope of appearing to be above the fray; when in its tone, *On the Freedom of the Sea* is a polemic attack on Perfidious Albion (Rayneval saying as much, in consider certain dealings between the British and the Dutch: “It cannot be too often repeated that the conduct of the Court of London on that occasion is a classical model of cunning and perfidy”).<sup>7</sup> Yet, posterity proves Rayneval correct as to his concerns regarding possible British attempts to recast the 19<sup>th</sup> Century law of the sea, through an expansion of the exception to the freedom of the seas related to the right to visit and search neutrals ships during times of war. Rayneval’s concerns were well placed, as not only would the United Kingdom seek to expand a right to visit during the Napoleonic Wars, but would go much further throughout much of the 19<sup>th</sup> Century, in seeking to carry such a right to visit in wartime into a peacetime right so as to suppress the slave trade.<sup>8</sup>

It is here that more context could have been provided to the translation of Rayneval’s maritime treatise. *On the Freedom of the Sea* was published in 1811, the year before Rayneval’s death. What transpired in the years previous to publication which would have Rayneval draft – nearly two hundred years after the fact – a written rebuttal to Selden’s 1636 *Mare Clausum*? The answer, in a word is: Trafalgar. The 1805 Battle of Trafalgar, coming in the wake of the British destruction of the convoy of the French expeditionary force to Egypt at the Battle of the Nile of 1798, meant that Britannia ruled the waves as no other had in human history. “Her maritime power” Rayneval acknowledges “has progressively increased, and is now preponderant on the ocean”.<sup>9</sup>

Rayneval spends the first ninety pages of Volume 1 considering both the principles and the scope of the law of neutrality in times of war (with specific reference to arms and ammunition, naval stores, and ‘numerous categories’ including enemy property under neutral flags and neutral property under enemy flags). Yet, he states that there was another subject of the law of the sea which was “still more important and of a more serious nature, it is the practice of visiting or searching neutral vessels”.<sup>10</sup> It is here, the microcosm of the right to visit, that Rayneval’s overall thesis regarding British encroachment on the freedom of the seas can best demonstrate that history was on his side.

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<sup>4</sup> *Id.*, xxvii.

<sup>5</sup> See Wilhelm Grewe, Chapter Nine: “Law and Dominion of the Seas: *Mare clausum v Mare liberum*”, *The Epochs of International Law*, 2000, pp. 258-274 at p. 266.

<sup>6</sup> James Muldoon, “Is the Sea Open or Closed? The Grotius-Selden Debate Renewed”, Kenneth Pennington and Melodie Harris Eichbauer (eds.), *Law as Profession and Practice in Medieval Europe*, 2011, p. 125.

<sup>7</sup> Rayneval, *De la liberté des mers*, n.1, Volume Two, p. iv.

<sup>8</sup> See Jean Allain, “Nineteenth Century Law of the Sea and the British Abolition of the Slave Trade”, *British Yearbook of International Law*, Vol. 78, 2008, pp. 342-388; as reproduced in Jean Allain, *The Law and Slavery: Prohibiting Human Exploitation*, 2015, pp. 46-100.

<sup>9</sup> Rayneval, *De la liberté des mers*, n.1 at 30.

<sup>10</sup> *Id.*, p. 95.

It should be emphasised that Rayneval is focused on the ‘practice of visiting or searching neutral vessels’ in wartime.<sup>11</sup> That practice, as it was playing out by belligerent powers, at the time of writing, consisted in “arresting neutral merchant men wherever they meet them; examining their papers to ascertain their neutrality, origin, destination, and the nature of their cargoes; in detaining them if they have on board goods said to be prohibited; [and] searching for evidence of fraud”.<sup>12</sup> But for Rayneval:

The high sea is the dominions of no one, and all nations have an unlimited right to enjoyment. These primordial truths are axioms of the law of nations, and it follows as a direct consequence from them that any vessel sailing on the high seas is out of all foreign jurisdiction and preserves the free and independent character of the nation to which she belongs. Therefore, her flag when properly made know is inviolable, and all kind of restraint laid upon it is a violation of its independence.<sup>13</sup>

Before considering the issue of inviolability of a flag on the high seas, Rayneval sought to also emphasise issues regarding the territorial waters of neutrals. There, the practice which persisted, of belligerents cruising those waters looking for contraband, “is such an abuse of power, such an odious violation of the law of nations, [that it] cannot be too much resisted”.<sup>14</sup> Since Rayneval’s times, such a practice has indeed be confirmed as a violation of international law, the 1907 Hague Convention concerning the Right and Duties of Neutral Powers in Naval War makes plain, at Articles 1 and 2, that “belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality”, and that “any act of hostility, including capture and the exercise of the right of search, committed by belligerent war-ships in the territorial waters of a neutral Power, constitutes a violation of neutrality and is strictly forbidden”. That said, more generally with regard to maritime neutrality and the laws of war, “the twentieth-century wars [...] have produced a trend in naval warfare toward a progressive erosion of the traditional rights of neutrals”, as result, it is “not clear what legal parameters circumscribe the reciprocal rights and duties of belligerents and neutrals”<sup>15</sup>.

Returning to the inviolability of a flag on the high seas, this issue was paramount to attempts by the United Kingdom to transform a belligerent right to search ships to a peacetime right, so as to end the slave trade at sea. In 1812, the United States would declare war on the United Kingdom, in part because of its violations of the belligerent right of search, so as to impress American seamen into the Royal Navy. A decade later, when asked by the British Ambassador whether he could contemplate anything more odious than the slave trade, US Secretary of State, John Quincy Adams, replied: “Yes; admitting the right of search by foreign officers of our vessels upon the sea in time of peace; for that would be making slaves of ourselves”.<sup>16</sup> While the United Kingdom failed to reach agreement on universal instrument abolition the slave trade at sea until 1890, in the interim it create a large number of bilateral instruments allowing for such search to be carried out on the high seas. The United States of America, for its part, never did grant the right to search its ships in peacetime, instead sending its own squadrons to police the American flag so as to suppress the trade.<sup>17</sup> As for France, despite making a reservation to

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<sup>11</sup> *Id.*, p. 95

<sup>12</sup> *Id.*, p. 96.

<sup>13</sup> *Id.*, p. 97.

<sup>14</sup> *Id.*, p. 99

<sup>15</sup> Boleslaw Adam Boczek “Law of Warfare at Sea and Neutrality: Lessons from the Gulf War” (1989) 20 *Ocean Development & International Law* 257.

<sup>16</sup> Hugh Soulsby, “The Right of Search and the Slave Trade in Anglo-American Relations 1814-1862”, (1933) 51 *John Hopkins University Studies in Historical and Political Science Collection* 18.

<sup>17</sup> See Article 8, Treaty between Great Britain and The United States, to settle and define the Boundaries between the Territories of the United States and the Possessions of Her Britannic Majesty in North America, for the final

the provisions of the 1890 General Act of the Brussels Conference regarding the right to search in peacetime to suppress the slave trade, the essence of that Act, and ultimately what France agreed to, was what had been advocated by Rayneval in 1811. That the right to visit a foreign ship of any reason (but one) was prohibited, including that of suppressing the slave trade. The only justification for visiting a foreign ship on the high seas was where its flag was in question, and thus to ascertain whether it had the right to fly the flag or whether it was doing so fraudulently; any further policing of that ship was to fall to the flag State.

As for the concerns of Rayneval at the time, with regard to possible attempts by the United Kingdom to take advantage of its naval superiority to expand the right to visit and search, Volume Two of *On the Freedom of the Sea* provides a number of documents which Rayneval marshals to demonstrate such attempts by the United Kingdom to do just that during the latter twenty years of the 18<sup>th</sup> Century. He sets the stage for this by providing an in-depth and meticulous analysis of Selden's arguments regarding a closed British Sea.<sup>18</sup> That analysis – which is required reading for anybody considering the Grotius/Selden debates about the nature of the seas – takes the form of a dual narrative: the text laying out Selden's arguments, the footnotes challenging those arguments. Not surprisingly, Rayneval's has little time for Selden's work, stating that “all the inferences which that author draws from the facts and precedents are either exaggerated or inaccurate, or in opposition to the plainest rules of logic. In a word, that all his erudition, arguments and subtleties exhibit only a series of paralogsms and paradoxes”.<sup>19</sup>

The second document to be found in Volume Two is a 60-page long *Discourse on the Conduct of The Government of Great Britain in Respect to Neutral Nations* written in 1757 but reprinted in 1794 “at the desire of several [British] noblemen and gentlemen who think that in the present circumstances it may be equally useful”<sup>20</sup>. ‘Equally useful’ in that it was originally published at the time when the United Kingdom was also at war against the French (the Seven Years War), whereas at the turn of the Century, the issue was war against Revolutionary France. This study of neutrality was written by a young Charles Jenkinson, the future 1<sup>st</sup> Earl of Liverpool, father to the future Prime Minister, and in his own right, for nearly twenty years, a member of the British Cabinet, as the President of the Board of Trade. In reading this *Discourse* and Rayneval's running commentary throughout his footnoted text, one gets a real sense of belligerent nature of Franco-British relations of this era. The argument put forward by Jenkinson are based on a natural right of self-preservation in being able to confiscate neutral ships carrying contraband, as aiding and abiding the enemy. Rayneval challenges the natural law reading of Jenkinson saying “there is but one methods by which one may be sure of obtaining the general assent of mankind; it is by laying down no other principles but such as are clearly derived from the nature of things, because they cannot by controverted by any but System mongers”.<sup>21</sup> Clearly the original text, written some 50 years previously and presented in Rayneval's book provides him the upper-hand in driving his arguments home. Where Jenkinson – Lord Liverpool, who would die around the time of the writing on Rayneval's *Freedom of the Seas* – states:

I flatter myself, however, it has appeared that reason, authority and practice all join to support the cause I defend; by reason I have endeavoured to trace out those principles on which the right of capture is grounded; and give that weight to my own sentiments which of themselves they would not deserve; and lastly, I have

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Suppression of the African Slave Trade; and for the giving up of Criminals, fugitive from Justice, in certain Cases, Washington, 9 August 1842, 30 *British Foreign and State Papers* 365.

<sup>18</sup> See Of the Dominion claims by Great Britain over Certain Parts of the Seas, Rayneval, *De la liberté des mers*, Volume Two 2, pp. 2-55.

<sup>19</sup> Rayneval, *De la liberté des mers*, Volume Two, p. 54.

<sup>20</sup> *Id.*, Volume Two, p. 56

<sup>21</sup> *Id.*, Volume Two, n. 78, p. 66.

entered largely into the conduct of nations, that I might not only lay thereby a broad foundation for this right, but that I might the more fully illustrate by the extravagant pretensions of other States in this respect the present moderation of England [...].

To which Rayneval comments tersely: “This moderation consists in not confiscating the neutral vessels laden with enemy’s property, but the goods themselves are seized, and that is the point in controversy”.<sup>22</sup>

What then follows are the final four documents of book: two memorials (presented in 1778 and 1779) by Sir Joseph York to the States-General of the United Provinces of the Low Countries; followed by the 1780 Declaration of War against the Hollanders, and the 1781 Answer of the States-General to the Manifesto of the King of Great Britain. The use of the series by Rayneval are to demonstrate his overall thesis about British encroachment on the freedom of the seas, in this instance, through the Dutch voice of the States-General. Whereas Rayneval provides his opinion on these documents, in first considering the “affectionate language” of the first of these four documents which he says notes “the reluctance with which the British Court appears to have ordered the seizure of a considerable number of Dutch vessels and the its apparent anxiety to redress the injury”. But then he follows this, saying this will “appear very strange when compared with the real views of Sir Joseph Yorke” whose “object was to draw Holland into a war in which she was not at all bound to interfere”.<sup>23</sup> Yorke’s Memorial, for its part has little pleasant to say about France, which he considered to be embolden by the “pointed moderation” of the King of Great Britain; the result being that the Versailles “perfidiously encouraging of rebel subjects [re: Ireland] under the mask of liberty, commerce, and independence, to plunge a poignard into the heart of their mother country”.<sup>24</sup>

What Rayneval ultimately seeks to achieve with the documents of Volume Two of *On the Freedom of the Sea* is to demonstrate a track record of British encroachment on the freedom of the seas throughout the latter part of the 18<sup>th</sup> Century, so as to buttress his argument regarding the vigilance required at the moment he is putting feathered pen to parchment. From a contemporary perspective, his reading of Selden is of great interest, the other documents less so, but for their insights into a less than diplomatic era of British-French relations.

Joseph Mathias Gérard de Rayneval writings are anchored in natural law, as he says “that the natural rights of mankind are the foundations of the law of nations, that whenever some parts of those rights have been given up, it has only been in favour of public authority and for the sake of maintaining peace an social order [...]. But social order does not necessarily require that nations should renounce in favour of one another the right freely navigate on the high seas”.<sup>25</sup> For Rayneval the law of nations “is derived from natural reason and is as ancient as the first formation of man into civil societies.

To close the circle of this review, attention now returns to Peter Du Ponceau, that ‘distinguished American jurist of French origin’ whose contemporaries translation finds its way into print more than two hundred years after Rayneval published his *De la liberté des mers*. Central to Butler’s interest in bringing this text to light is the Pennsylvania connection, with the largest segment of his introduction devoted to Peter Stephen Du Ponceau (1760-1844), who was a trustee of the University of Pennsylvania and President of the American Philosophical Society. Butler mines a rich vein of information on Du Ponceau which shows the man to have been a bookish boy with a gift for languages. At age 17, Du Ponceau accompanied Baron von Steuben to America as his secretary-translator. Von Steuben, Chief of Staff to General George

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<sup>22</sup> *Id.*, Volume Two, n. 93, p. 79.

<sup>23</sup> *Id.*, Volume Two, p. 119.

<sup>24</sup> *Id.*, Volume Two, p. 120.

<sup>25</sup> *Id.*, Volume One, p. 19.

Washington, would become the Inspector-General of the armies of the United States; with Du Ponceau translating his 1779 *Regulations for the Order and Discipline of Troops of the United States* from the German.

Having been parachuted into the American revolutionary elite, Du Ponceau would meet Washington, Lafayette, Samuel Adams, John Hancock; later, through his accomplishments at the bar, Joseph Story and, through the Philosophical Society, President Thomas Jefferson. Du Ponceau would become a citizen and lifelong resident of Philadelphia, where his linguistic abilities would come in good stead in developing a very successful law practice, advancing to the bar of the United States Supreme Court and for a period of years enjoying “a retainer from the French Republic”.<sup>26</sup> Ever erudite, Du Ponceau himself would follow in Jefferson’s shoes as President of the American Philosophical Society, but would also become President of the Historical Society of Pennsylvania and elected as a corresponding member of the *Institute de France*. Beyond translations, including that of Bynkershoek, which Bulter has brought into print in 2008, Du Ponceau wrote on US constitutional law and American jurisdiction; and produced texts on varied subjects including the grammatical system of Native-American languages, the Chinese system of writing, and the silk industry.

Before leaving you, it might be best to say a few words to acknowledge the work of William E. Butler in marshalling Du Ponceau’s English translation of De Rayneval’s *On the Freedom of the Seas* into print. For too long the Carnegie series, *The Classics of International Law*, has become canonical in shaping the discourse of the history of international law. Rayneval’s *On the Freedom of the Seas* is, rather amazingly, the first 19<sup>th</sup> Century French text of international law to appear in English, and for this he should be applauded. As should his series with Talbot Publishing / The Lawbook Exchange of historical text which has now reached more than a dozen books: may many more find their way into print.

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<sup>26</sup> *Id.*, p xl.