I

The Origins

"Pirate . . . . Middle English from Latin *pirata*, from Greek *peirates*, 'attacker,' from *peiran*, to attempt, attack, from *peira*, an attempt . . . . From Indo-European root per-."[5]

"per-[5] . . . . To try, risk;" from which come the modern English words: fear, peril, experience, expert, empire, and pirate.

American Heritage Dictionary of the English Language (William Morris, ed.) (1969), pp. 998, 1534.

The word "piracy" is used in modern English in many different ways, from a half-admiring description of the shrewd practices of an assertive businessman cutting the corners of morality but strictly within the law, to a highly technical legal word of art related to some crimes for which people have been hanged. In between lie uses that relate to unrecognized rebels, naval vessels acting beyond their authority, naval vessels acting within their national commissions to interfere with peaceful commerce in ways the international legal order will not tolerate, and many other shades of meaning. The most cursory examination of learned literature, treaty articles and national statutes shows at least six different meanings: (1) A vernacular usage with no direct legal implications; (2) An international law meaning related to unrecognized states or recognized states whose governments are not considered to be empowered at international law to authorize the sorts of public activity that is questioned, like the Barbary States of about 1600-1830, the Malay Sultanates of about 1800-1880, and the Persian Gulf Sheikhdoms of about 1820-1830; (3) An international law meaning related to unrecognized belligerency, like Confederate States commerce raiders and privateers during the American Civil War of 1861-65 in the eyes of the Federal Government of the United States; (4) An international law meaning related to the private acts of foreigners against other foreigners in circumstances making criminal jurisdiction by a third state acceptable to the international community despite the absence of the usual territorial or nationality links that are normally required to justify the extension abroad of national criminal jurisdiction; (5) Various special international law meanings derived from particular treaty negotiations; and (6) Various municipal (i.e., national, domestic) law meanings defined by the statutes and practices of individual states. It is possible to elaborate this list to take account of ambiguous or inconsistent

state practice and diplomatic correspondence, special technical interpretations within the learned international legal writings and different states' positions as to particular incidents, and other traditional modes of legal analysis.

All of these uses of the word "piracy" have been argued from time to time to rest on classical writings and precedents. In the days leading up to the Westphalian settlement of Europe in 1648, citations to Greek and Latin sources were a major element of legal argumentation. Those renaissance legal arguments and the municipal law of the European sea powers, particularly England, purported to rest on Roman law and usage. Thus, to understand fully the modern meanings of the term "piracy" it is necessary first to examine the Greek and Latin writings and Roman usages.

Time changes the meaning of words, and it is an error in scholarship to attribute to ancient or even not very ancient authors the full range of implication that a word carries in current usage. An amusing example appears in the 14th century Middle English poem *Sir Gawain and the Green Knight* where the Green Knight, entering King Arthur's great dining hall, asks, "Where is . . . the governour of this gyng?" and it can be shown by analyzing the uses of the word "governour" and "gyng" ("gang") in other medieval works that the modern cockney connotation of jocular contempt that might be implied from the context of the Green Knight's speech is simply not there.[1]

When, in 1811, Sir T.S. Raffles, the British Lieutenant Governor of Java, wrote to Lord Minto, the Governor-General of India, that "It is unfortunately the practice in some of the Malay States rather to encourage the young nobles of high rank, especially those of the Rajah's own extraction, whose maintenance would fall otherwise upon the Rajah himself, to subsist themselves by piratical practices"[2] he was using the word in a non-legal sense insofar as the attitudes of the Malays was being explained. At the same time, from its European legal implications he concluded that suppressive activities by the British Navy might be justifiable as a matter of international law. He seems to have been conscious of the two meanings of the word when he advised that the British in the first instance, rather than bearing the burden themselves of sweeping the "pirates" from the seas, should "oblige every Rajah to refuse to every description of pirates . . . any sort of assistance or protection in his own territories."[3] This suggestion, with much legal difficulty, became translated into British policy and assertions of international law over a period of sixty or seventy years.

In the light of this and similar persistent confusions, before embarking on an analysis of the precise meaning of the word "piracy" as used in ancient texts it might be useful to set forth a few of the many instances in which the word or its derivatives has been used by translators to reflect their own ideas as to when it is appropriate to use it despite the fact that the word does not appear in any form in the text being translated. Since so much nineteenth and

twentieth century writing about "piracy" cites ancient usages that in fact exist only in the nineteenth and twentieth century purported translations, but not in the ancient texts, it might be possible to clear away some common misconceptions of our own time, when some citations to earlier scholars, which in turn rest on still earlier scholarly citations, which in turn appear to rest on non-legal translations of words that have no connection with the ancient conception of "piracy," seem to have become conventional wisdom; i.e., seem to be accepted as correctly reflecting the ancient concepts merely because so often repeated in scholarly writing.

Coleman Phillipson, whose analysis of classical conceptions of international law is justly famous to the degree that it seems to have almost cut off later scholarship, wrote: "In the Homeric age the practice [of "piracy"] was looked upon as a creditable . . . means of enrichment."[4] Without disputing Phillipson's point, which will be examined more closely below, it is interesting to check his citations. These include Homer's *Iliad*,[5] and *Odyssey*,[6] and Thucydides's *History of the Peloponnesian War*.[7] In fact, in none of these places cited by Phillipson does the word "*peirato*" or any of its derivatives appear in the original Greek.[8] Instead, the original Greek uses derivatives of the word "*diapertho*"[9] or the word "*leia*."[10] Indeed, even if the word "*peirato*" did appear in the places cited in Homer, it would not indicate a clear usage of the word, since, aside from some clearly inappropriate contexts, what most commonly appears is a formula of words that seems to have been a customary greeting addressed to strangers:

> Is it on some business, or do ye wander at random over the sea, even as 'pirates,' who wander hazarding their lives and bring evil to men of other lands?[11]

This particular formula, which does not include the word "*peirato*" or any of its derivatives in the original Greek, is repeated in many places, including Hesiod[12] and Thucydides.[13] And yet it is the very Thucydides passage not using the word "*peirato*" or any of its derivatives that is mentioned by at least one very eminent twentieth century scholar as evidence that "piracy" in the modern sense was accepted as legitimate in ancient Greece.[14] Obviously, it was not "piracy" that was legitimate, but something else, labeled with a different word, that may or may not have been analogous to the modern legal conception of "piracy."

It may be significant that the more or less standard glossary, Autenrieth's *Homeric Dictionary*, defines "*peiran . . . -ato*" as "test, attack, make trial of, put to proof, contend with" etc., but does not record any usage in Homer that would correspond with a sense of illegality or even roving to seize the property of others regardless of legality.[15]

Similarly, in Herodotus's history of the Persian War, the passage most frequently cited as mentioning "piracy" does not use the Greek word or any of its derivatives, and that passage is translated properly as saying merely the coming of "Bronze men of the sea" was predicted by an oracle.[16]

Perhaps the most egregious anomaly of translation is in the frequent citation to an historical episode in which the citizens of the "*polis*" of Halonnesos refused to receive their property back from Philip of Macedon as a gift, but insisted that they had never lost title since the capture had been by "pirates," who lack the legal power to alter rights to title in property. But the Greek original does not contain the word "*peirato*" or any of its derivatives.[17]

As for Roman sources,[18] again some of the most often cited writings purportedly defining the classical conception of "piracy" do not use the word in either its Greek or Latin ("*pirata*") form. For example, Cicero, in his second speech *Against Verres*, does not mention "*pirata*" in the passage cited time and again by renaissance and later scholars as one of the sources of the law of "piracy." The word he uses is "*praedones.*"[19] And Livy's translator gives a totally distorted impression of the legal relations between the Great Pompey's son, Sextus Pompey, and Octavian Caesar, building on the distorted picture painted by the not wholly impartial Livy himself, in this passage:

> When Sextus Pompey again made the sea dangerous through acts of piracy [*latrociniis*], and did not maintain the peace to which he had agreed, Caesar undertook the inevitable war against him and fought two drawn naval battles.[20]

In the original Latin the word "*pirata*" or its derivatives does not appear.[21]

There are other anomalies in this passage that point out the need for great circumspection in drawing far-reaching legal conclusions from the use of Latin words in ancient sources. The word "*bello*" (war; belligerency) is used to describe the conflict between two claimants to some public authority in Rome in the turmoil following Julius Caesar's assassination and before Octavian achieved full mastery of the political system and became Caesar Augustus. But if the Roman law of war applied, as the word would seem to indicate, then the fundamental Roman conception of "war" as a legal status with legal implications would have applied in the absence of declaration. And it would have applied against those who commit "*latrociniis*" acts. This path of analysis leads to complications of significant magnitude and in the light of other writings seems wholly misguided. It is very likely that Livy was using the word "*latrociniis*" perjoratively and not legally, and the word "*bello*" to mean "struggle" or some similar non-legal idea, rather than war. Since these distinctions are vital to a careful legal analysis, it may be concluded that not only translations, but even original texts must be read very carefully before legal implications are drawn from them.

The Greek and Roman Conception of "Piracy"

Thucydides's description of political life in the Aegean area rests not only on the poetic formula of greeting, but on other passages in Homer[22] and, no

doubt, oral and perhaps lost written traditions familiar enough to his generation that citation was not felt to be necessary by him. Modern scholarship sees this proud description as evidence not only of a political system accepting the organized use of force by small bands without pejorative implications or any deep analysis of the political structure of the bands themselves,[23] but also of a far-reaching economic order. During the 10th and 9th centuries B.C.,[24] such wars and raids reflected the struggle for survival and economic gain by combinations of families and small communities as part of a larger economic system in which "Forcible seizure followed by distribution in this fashion, was one way to acquire metal or other goods from an outside source."[25] The seizures did not necessarily involve essential supplies, and the concepts of justifiable behavior apparently extended to permit these raids by Greeks against Greeks and non-Greeks alike merely for gain. Given the state of politics and economics in the area, such raids were probably not the principal means of commerce, and it has been suggested that gift-exchanges were the main mechanism for economic transfers.[26] The system might bear some similarity for purposes of this study with the Viking political and economic system of Scandinavia in the 9th to 11th centuries A.D.[27]

The earliest time when the surviving literature in Greek uses the word *peirato* and its derivatives to describe anybody appears to be about 140 B.C., and it is to some specific political and economic communities of the Eastern Mediterranean littoral that the word was applied. Polybius, whose *Histories* is the principal source of much of our knowledge of the rise of the Roman Republic, uses the word *peiraton* in a passage translated by W.R. Paton in a way avoiding the confusions wrought by too frequent use of the English word "pirate," but creating an equivalent confusion. He refers to: "Euripidas with two companies of Eleans together with his freebooters [*peiraton*] and mercenaries . . ."[28] Just what "freebooter" means in that context seems very unclear. But what does seem clear is that the word "*peirato*" and its derivatives was being applied not to brigands or others outside the legal order, but to small communities including fighting men who were regarded as capable of forming alliances and participating in wars as they were fought between acknowledged political leaders within the legal order of the time.

Diodorus Siculus, writing about 60 B.C., uses the word in connection with events of 304 B.C.:

> [Amyntas] . . . suddenly confronted some pirates [*peiratais*] who had been sent out by Demetrias . . . the Rhodians took the ships with . . . Timocles, the chief pirate [*archipeirates*].[29]

The usage of Livy, writing in Latin 29 B.C.-14 A.D., is similar. In describing events of 190 B.C., he refers to Nicander, whom he calls a pirate chief (*archipirata*), fighting with five ships as an ally of Rome.[30] In referring to the "war" of 68-67 B.C. by which Pompey the Great cleared the Eastern

Mediterranean of Cilician commerce-raiding communities,[31] Livy not only refers to the struggle as "war" and describes it as if it were legally indeed a "war" at Roman law, but he refers to its ending by a negotiated surrender under which the "pirates" agreed to conform to more settled ways:

> Gnaeus Pompeius was ordered by a law passed by the popular assembly to pursue the pirates, who had cut off the traffic in grain. Within forty days he had cleared them from all the seas. He brought the war [*belloque*] against them to an end in Cilicia, received the surrender of the pirates and gave them land and cities.[32]

Finally, the Greek Plutarch, writing in about 100 A.D., paints such a clear picture of the "pirates" to which Livy referred in his brief synopsis of the "war" of Pompey to end their control of commerce in the Eastern Mediterranean, that it seems worth setting out in some detail. Throughout this translation, wherever the word "pirate" is used, the word "*peirato*" or one of its derivatives is used in the original Greek,

> The power of the pirates [*peiratiki*] had its seat in Cilicia [in Asia Minor, where they flourished during the wars of Rome against Mithridates [88-85, 83-81, 74 B.C.] . . . until they no longer attacked navigators only, but also laid waste islands and maritime cities. And presently men whose wealth gave them power, and whose lineage was illustrious, and those who laid claim to superior intelligence, began to embark on piratical [*peiratike*] craft and share their enterprises, feeling that the occupation brought them a certain reputation and distinction . . . Their flutes and stringed instruments and drinking bouts along every coast, their seizures of persons in high command, and their ransoming of captured cities, were a disgrace to the Roman supremacy [*hegemonias*].[33]

To complete the picture of political societies conforming to the archaic Eastern Mediterranean pattern, Plutarch mentions the unique religious worship of the "pirates," whose rites centered on the town of Olympus in southern Asia Minor.[34] This combination of settled communities, religious rites, musical tradition, and the conception of the "pirates" that what they did was entirely proper, is what brought them into conflict with Rome. It is hard to see how they were considered outlaws or violators of any law other than the Roman conception of hegemony; a conception obviously not shared by non-Romans at that time,[35] and possibly not by many Romans of the pre-Augustan age that Plutarch was writing about almost a century after the reign of Augustus. On the other hand, Plutarch seems to have accepted the idea that such political societies, no matter how conforming to a traditional pattern, were an anachronism beyond the orderly system within which Rome had become accustomed to operate. The word "*peirato*" and its derivatives seems to be applied to traditional Eastern Mediterranean societies operating in ways that had been accepted as legitimate for at least a millenium. But the conception of Roman order, the idea that Roman hegemony was a matter of right, of law, had begun to make the continued existence of "pirate" communities unacceptable even if no justification for distinguishing those "pirate" communities from their less assertive neighbors could be found

directly in Roman or general international law as it was applied between Rome and other political communities of the Eastern Mediterranean.

The procedures for the "war against the Pirates" adopted by the Roman Senate were extraordinary and reflect these legal doubts as to the precise status of the Roman hegemony and its legal basis. A law was passed by the Republic's Senate in 68 B.C. under which Pompey the Great was commissioned to subdue them not as a naval commander (the word "admiral" had not yet been invented, but the Loeb Classical Library's translator of Plutarch uses it here) but as a king deriving his sovereign powers from the Roman donation, thus opposing the "pirates' " sovereignty with Roman sovereignty and making of the piratical society something like rebels. Plutarch makes it clear that this procedure was shocking: Pompey was commissioned by the Roman Senate to take the seas away from the "pirates [*peiraton*]" by giving him "not an admiralty, but an out-and-out monarchy and irresponsible [*sic:* "unbridled" might be a better translation] power over all men."[36] His authority was decreed to extend to land areas within 400 furlongs of the sea, thus to include the entire territory of the Aegean Islands, Crete and the Dodecanese and enough of the land of Asia Minor to include all their villages and Olympus, the "pirates' " religious center.

Plutarch's description of the course of the war, and the negotiation for peace, seems to confirm this impression, that Rome treated the "pirates" not as outlaws but as enemies to be met in war and defeated. After dispersing the "pirates' " fleet,

> Some of the pirate bands [*peiratorion*] that were still roving at large begged for mercy, and since he [Pompey] treated them humanely, and after seizing their ships and persons did them no further harm, the rest became hopeful of mercy too, and . . . betook themselves to Pompey with their wives and children, and surrendered to him. All these he spared, and it was chiefly by their aid that he tracked down, seized, and punished those who were still lurking in concealment because conscious of unpardonable crimes.[37]

> But the most numerous and powerful had bestowed their families and treasures and useless folk in forts and strong citadels near the Taurus mountains, while they themselves manned their ships and awaited Pompey's attack near the promontory of Coracesium in Cilicia; here they were defeated in a battle and then besieged. At last, however, they . . . surrendered themselves, together with their cities [*poleis*] and islands of which they were in control . . . The men themselves, who were more than 20,000 in number, he [Pompey] did not once think of putting to death . . . [but] determined to transfer the men from the sea to land . . . to till the ground. Some of them, therefore, were received and incorporated into the small and half-deserted cities of Cilicia . . . To most of them, however, he gave as a residence Dyme in Achaea, which was then bereft of men and had much good land.[38]

Pompey's monarchical position under the commission issued by the Roman Senate received something of a comeuppance shortly after, when Metellus, another Roman general, was with rather less mercy wiping out Cilician "pirate" villages in Crete. Since all of Crete lay within 400 furlongs of the sea

Pompey apparently regarded this as an encroachment on his authority and sent one of his lieutenants, Lucius Octavius, to join with the "pirates" fighting against Metellus. Metellus won, "captured the pirates [*peiratas*] and punished them, and then sent Octavius away . . ."[39] There is no further reference to Pompey's commission in this context.

It seems clear that the word "pirate" was used by Plutarch to classify communities with which Pompey felt it was appropriate not only to go to war and conclude a peace treaty, but even to send military assistance to, as to an ally, when they accepted the Senate's ordinance subjecting them to the law of Roman "hegemony."

On the other hand, it appears that there was a change in Roman concepts underway. To label a group "pirates" was not merely to classify their way of life within a legal order as we still use the word "Viking" to evoke a way of life legitimate within the harsh legal order of the middle ages. By the time Plutarch wrote, there was an implication of impropriety to that way of life. It had nothing to do with political motivation or criminality even under the law of Rome as applied in the Empire or allied areas. It dealt instead with the place of an antiquated way of life in a new commercial and political order that could not countenance interference with trade in the Mediterranean Sea. It was not bound to "piratical" acts on the "high seas," but to a conception of "piratical" villages forming a society [*poleis*] on land which refused to accept Roman supremacy. Relations with the "pirates" were relations of war, not of policing the internal or imperial Roman law; the results of Roman victory were the normal results of a victorious war at that time and in that place.[40]

"War" to the Roman jurists was not merely a condition of fact with people of one village or religious worship killing or enslaving people of another village or divine descent. War was regarded as a legal status even if no active fighting was occurring, and since victory or defeat in war had such enormous consequences for the belligerents and their families, reflecting the vitality of the vivifying force given by the tribe's or community's "God" or totemic life source to some eponymous ancestor or founder, the ceremonies involved in the creation of that status were essentially religious. The religious element of the status of war was not a mere prayer for victory, but reflected much deeper concerns for the continuance of the race. Virgil's epic poem, *Aeneid*, telling the mythology surrounding the founding of the Roman tradition in Italy by Aeneas, a son of the defeated King Priam fleeing from the sack of Troy, is unmistakably, in this sense, a religious work.

The interplay between religion and the secular law between "nations" or "races" or god-protected communities and tribes, is evident from the narration of the great literary (but not always accurate) historian Livy, who grew to manhood during the days of Julius Caesar, and wrote his history of Rome with access to sacred documents during the early days of the reign of Augustus. He details from the oldest treaty in the holy archives (c. 670 B.C.)

the treaty-making procedures of Roman tradition, setting out some of the formulas of words and symbolic acts, involving a freshly plucked holy plant, the sacrifice of a pig, and metrical ritual (which in part, alas, he fails to record as "not worth the trouble of quoting"). Through these rituals the titulary gods on both sides (in this case the Romans and the Albans) were called upon separately to witness the commitment of the current holders of the life of each god's own community to the sanctity of the pledge.[41] In this particular incident, as reported by Livy, the "war" between the Romans and Albans was put into the hands of three representatives from each side, chosen for their martial vigor and thus presumably reflecting the vigor of the holy life of each community as well as its mere secular martial prowess. The Romans won in a close contest, only one champion for each side surviving, and Horatius for Rome ultimately killing his Alban antagonist as the two armies stood by and watched. The two sides then buried their dead and Alba accepted Roman rule submitting their entire treasure and lives to the mercy of the Roman god represented by the Roman political organization.[42]

Livy also details the ceremony followed by the Romans even into his own time when "war" was to be begun. In Livy's version, the ceremony for a formal declaration of war was adopted from the religious rites of the ancient Roman tribe of the Aequicolae and taken over by priests (*fetials*) representing the entire Roman community. It is worth repeating in its entirety for an understanding of the importance of the ceremony and the significance of Cicero's argument in Livy's own time[43] that "war" against "pirates" could be begun without it:

> When the envoy arrives at the frontier of the state from which satisfaction is sought, he covers his head with a woolen cap and says: Hear me, Jupiter! 'Hear me, land of So-and-so! Hear me, O righteousness! I am the accredited spokesman of the Roman people. I come as their envoy in the name of justice and religion, and ask credence for my words.' The particular demands follow and the envoy, calling Jupiter to witness, proceeds: 'If my demand for the restitution of those men or those goods be contrary to religion and justice, then never let me be a citizen of my country.' [Presumably so that the results of impiety will not be visited on the entire community.] The formula, with only minor changes, is repeated when the envoy crosses the frontier, to the first man he subsequently meets, when he passes through the gate of the town, and when he enters the public square. If his demand is refused, after thirty-three days . . . war is declared in the following form: 'Hear, Jupiter; hear Janus Quirinus; hear, all ye gods in heaven, on earth, and under the earth: I call you to witness that the people of So-and-so are unjust and refuse reparation . . .' The envoy then returns to Rome for consultation. The formula in which the king asked the opinion of the elders was approximately this: Of the goods, or suits, or causes, concerning which the representative of the Roman people has made demands of the representative of . . . [So-and-so], which goods or suits or causes they have failed to restore or settle, or satisfy . . .: speak, what think you?' The person thus first addressed replied: 'I hold that those things be sought by means of just and righteous war. Thus I give my vote and my consent.' The same question was put to the others in rotation, and if a majority voted in favour, war was agreed upon. The fetial thereupon proceeded to the enemy frontier carrying a spear with a head either of iron or

> hardened wood, and in the presence of not less than three men of military age made the following proclamation: 'Whereas the peoples of [So-and-so] . . . have committed acts and offences against the Roman people, and whereas the Roman people have commanded that there be war with [them], and the Senate of the Roman people has ordained, consented, and voted that there be war with [them]: I therefore, and the Roman people hereby declare and make war on [them].' The formal declaration made, the spear was thrown across the frontier.[44]

These forms, or at least their underlying concepts, were employed against not only the South Italian peoples with whom the Romans shared a similar culture, but also against the North Italian Gauls[45] and presumably everybody else with whom it was religiously conceived that a struggle on earth reflected competing demands on a divine source of life symbolized by tribal or community gods.[46]

The most commonly cited authority for the original Roman legal conception of "piracy" adopted as the source for modern European views of international law on the subject is Marcus Tullius Cicero. Cicero, an active lawyer and politican contemporary with Julius Caesar, killed apparently by order of Marc Antony in 43 B.C. in the aftermath of the murder of Julius,[47] has been cited inappropriately often,[48] but did in fact mention "pirates [*pirata*]" in one passage that evidences the changing legal conceptions of the generation that gave Pompey the legal power to subdue them by simply asserting a superior legal power over the territory and seas in which their outmoded culture survived. In that passage he merely denies any legal obligation to keep an oath to "pirates" on the ground that by being the enemies [*hostes*] of all communities, they are not subject to the law of the universal society that makes oaths binding between different communities.[49] There are many reasons for regarding this statement as not indicating any considered legal opinion. Hugo Grotius himself, the great Dutch scholar and jurist of international law of the first half of the 17th century, criticized this passage on the ground that the observance of an oath is owed to God, not to the person receiving the benefit of the oath.[50] Other factors not usually considered by those citing this passage of Cicero as evidence that "pirates" in his day were common criminals[51] include the fact that the passage appears in a work on moral duties, not law; as Cicero himself noted, the two do not always coincide.[52] Moreover, bearing in mind Cicero's political situation in 44 B.C. when this was written, and the episode in Julius Caesar's life involving the same Cilician "pirates,"[53] and the peculiar legal authority given to Cicero's sometimes friend Pompey coupled with Pompey's use of that authority against Metellus and the fact that Pompey was by now dead and his twenty-five year old treaty with the "pirates" could be discarded without personally insulting him, and some notion of the complexity of Cicero's thinking can be appreciated. Indeed, the "pirates" that had been suppressed by Pompey in 67 B.C. had revived by the time Cicero was writing this, and Marc Antony was believed to have mobilized them against Brutus and Cassius. Cicero's

condemnation of the "pirates" seems thus less a statement of a legal opinion than a slap at his enemy, Antony.[54]

Perhaps the best evidence of the Roman jurists' actual conception of "piracy" lies in the collection of undated opinions appearing in Justinian's Digest of 534 A.D.[55] There appears to be in fact only one passage in the Digest in which the word "*pirata*" or its derivatives appears. In the section on the law of property dealing with the devolution of property rights in case of a wrongful taking, the opinion of Paulus (c. 230 A.D.) is given: "Persons who have been captured by pirates or robbers remain [legally] free."[56]

Two other opinions have been so often cited by so many scholars as applying to "pirates" that it seems important to set them out here, even though by failing to use the word "*pirata*" or any of its derivatives they seem to demonstrate the opposite of the lesson for which they so often are cited. Ulpian (d. 223 A.D.) wrote:

> Enemies are those against whom the Roman people have publicly declared war, or who themselves have declared war against the Roman people; others are called robbers or brigands. Therefore, anyone who is captured by robbers, does not become their slave, nor has any need of the right of *postliminium*. He, however, who has been taken by the enemy, for instance, by the Germans or Parthians, becomes their slave, and recovers his former condition by right of *postliminium*.[57]

And Pomponius (c. 130 A.D.):

> Those are enemies who declare war against us, or against whom we publicly declare war; others are robbers or brigands.[58]

The concept of property rights needing reassessment after a legal capture, and that in some circumstances captives would become free and property would revert to its former owner on the conclusion of a war or on recapture, was an important one.[59] It becomes much more important for purposes of this study later when the European-based international law of naval prize makes it significant that the captor be classified as a person able to change legal title or not. It was by reading the word "*capti*" in the passage ascribed to Paulus, to apply to goods and not merely to persons, and by classifying "pirates" as covered by Ulpian and Pomponius as if they were brigands [*latrones*] or robbers [*praedones*], that this legal conclusion was reached. But that analysis belongs to a later chapter.[60]

One other implication of these passages seems significant. By attaching the word "*hostes* [enemies]" to those against whom legal war [*bellum*] was waged, and refusing to attach the word to police action against brigands and robbers [*latrones et praedones*], an entirely different light is shed on the phrase "common enemies of all mankind [*hostes humani generis*]"[61] as a paraphrase of its original, Ciceronian, meaning. If this analysis is correct, and Cicero was speaking as the technical lawyer later scholars have assumed in drawing their implications from this reference to "pirates," then what he really seems to have meant was that "pirates," are not robbers or brigands but legal enemies with the sole

exception regarding promises to them that Grotius rightly criticises as illogical and which is incorrect as history.

It may be concluded that the fundamental Greek and Roman conception of "piracy" distinguished between robbers, who were criminals at Roman law, and communities called "piratical" which were political societies of the Eastern Mediterranean, pursuing an economic and political course which accepted the legitimacy of seizing the goods and persons of strangers without the religious and formal ceremonies the Romans felt were legally and religiously necessary to begin a war. Nonetheless, the Romans treated them as capable of going to "war"—indeed as in a permanent state of "war" with all people except those with whom they had concluded an alliance. There is some evidence that the Romans refused to extend the technical law of *postliminium* to them, perhaps on the ground that since they never ceased to be at war, there was no opportunity to determine the title to captured goods and no need to recognize title in those deriving rights from belligerent capture; the goods remained subject to recapture by anybody, and the rights of *postliminium* would be applicable against the recaptor, just as in war goods recaptured before the end of hostilities reverted to their original owner subject only to payment of costs attributable directly to the recapturing action.[62] The legal rationalization found by the Roman Senate for suppressing the communities of "pirates" was not an asserted Roman right to police the seas (although Plutarch seems to have thought that rationale would have been better than the one actually used by the Senate), but the quite different assertion of a Roman right to territorial as well as maritime jurisdiction in the Eastern Mediterranean. To examine the full implications of this popular Roman view on the course of Roman, and, indeed, world history, is far beyond the limits of this study. For present purposes it seems enough to point out that "piracy" to the Romans was a descriptive noun for the practices of a particular landbased Eastern Mediterranean people whose views of law and intercommunity relations appear to have reflected a millenium-long tradition that had become an obstacle to Roman trade and inconsistent with Roman views of the world order under Roman hegemony. The word did not imply criminality under any legal system, Roman or law of nations. It was applied to a fully organized society with families and a particular religious order that seems to have been not shockingly different from the social organization and religious orders of many other peoples of that time and place.

It is not beyond conjecture that something of this pattern was in the mind of Sir T.S. Raffles when he called "piratical" some of the Malay sultanates with which he had to deal in 1811.[63]

None of this is meant to imply that non-*polis*-connected marauding at sea, what today might (or might not) be called "piracy" as a result of later legal developments, was permissable at Roman internal law, Roman imperial law relating to hegemonial rights, if any, or international law as perceived by

Roman statesmen. But those acts were called something else, and to analyze the full range of legal results that flowed from using those other labels would involve a discussion beyond the limits of this study. To Europeans of later times whose education included familiarity with Greek and Latin writings in which the words "*peirato*" and "*pirata*" or their derivatives were used, some hint of the earlier meaning remained despite later legal uses of the word in forms contemporary with the later Europeans in special legal contexts. And that classical meaning did not carry the implication of criminality or violation of general international law that other meanings carried; it justified a kind of political action, perhaps, and also perhaps had some legal implication in general international law particularly as it related to the laws of war and postliminium. But these are factors better discussed later on.

The Reorganization of the Renaissance

"Piracy" Enters Vernacular English as "Privateering." For a thousand years after Justinian the word "pirate" appears to have remained buried in the Greek and Latin texts familiar to learned monks but not considered significant to soldiers and statesmen. Norse raiders of the 9th to 11th centuries A.D. following a career that seems in many ways analogous to that of the "pirates" of the time of Cicero and Pompey were not usually called "pirates" in English or Latin in contemporary documents, but were called by the names they gave themselves, "Danes" or "Vikings." Ranulf Higdon (or Higden) wrote a general history of the world in Latin in the first half of the 14th century, referred to by a Greek abbreviation for its long title as the *Polychronicon*, that received some popularity for a century or so after its first production in manuscript. In it he drew the obvious analogy, calling the Vikings "*Dani piratae.*" John de Trevisa, a don at Oxford 1362–1379, translated Higdon into his native Middle English, translating the word "*piratae*" as "see theves [sea thieves]." The earliest use of the word "pirate" in English found by the compilers of the Oxford English Dictionary is in the second quarter of the 15th century.[64] That early usage seems to have no legal connotation.

Meantime, in the Mediterranean Sea area, the old Greek and Roman usages seem to have survived. Merchant ships that passed near enough to fishing or small agricultural villages of the Mediterranean to be safely attacked by the inhabitants of those communities were, from time to time, attacked. The dangers of trade and travel during the rise of Venice, the Crusades, the establishment of the Ottoman Empire and the dominance of Suleiman the Magnificent in 16th century Turkey and the Eastern Mediterranean generally, and the establishment of stable Muslim rule in the maghrebi towns of Algiers, Salee (Rabat), Tripoli and Tunis did not evoke images of "piracy" as a violation of any law.

Later writers have used the word "piracy," with its modern legal and romantic connotations, in wholly misleading ways. As with later references to "piracy" attributed to classical authors, the most eminent modern writers have used the word to refer to a host of activities in the Mediterranean of the 16th and 17th centuries that may or may not have been considered "piracy," or even wrongful under any legal system. The situation is summed up admirably by Fernand Braudel, a French historian who himself uses the word "*piraterie*" in the most confusingly vague and unhistorical ways:

> In the 16th century [as in Homeric times] the sea was filled with pirates, and pirates perhaps even more cruel than those of earlier days. Commerce raiding [*la course*] takes a mask, disguises itself as semi-official warfare, with letters of marque . . .
>
> I have repeatedly said that piracy was the child of the Mediterranean. True enough, but historians have often lost sight of the generality of the practice while focusing their attention and reproofs only on the Barbary corsairs. Their fate, which was grand, overshadows the rest. Everything else is deformed. That which is called "piracy" when done by the Barbary corsairs is called heroic, pure crusading spirit when done by the Knights of Malta, and the equally ferocious Knights of St. Stephen, based at Pisa under the protection of Cosimo dei Medici.[65]

Thus, while the picture painted by Braudel[66] is brilliantly clear and imaginative, the fact that he uses the word "pirate" to include licensed warfare at sea should not be forgotten. He describes the Mediterranean of the 16th century as featuring: "Sea-pirates . . . aided and abetted by powerful towns and cities. Pirates on land, bandits, received regular backing from nobles."[67] But the picture is actually, legally, one of lively and dangerous commerce and conflicting claims to authority that might be called an authority to tax nearby shipping lanes with capture of the vessel, confiscation of its cargo, and the enslavement of the crew the penalty for tax evasion. Another legal basis for "piracy" as the word is used by Braudel was the medieval law of war: "One of the most profitable ventures of Christian pirates in the Levant became the search of Venetian, Ragusan or Marseillais vessels for Jewish merchandise, . . . likening it to contraband, a convenient pretext for the arbitrary confiscation of goods."[68] The "Christian pirates" referred to here seem to have been the Knights of Malta, a crusading Order asserting sovereign rights to govern land and to participate in lawful war.[69]

For theft to be profitable, "stolen" goods must have a market. Where the market is in the control of a "government," a person or body to whom is conceded the legal power to change title to property, and a "taking" is authorized by the proprietor of that market, it is difficult to conceive of "stealing" as distinct from "lawful capture" or "taxation." By the end of the sixteenth century such markets were flourishing in Valetta (Malta), Leghorn (Livorno, Italy) and Algiers. Their legal basis was thus the law of the Christian Knights of Malta, Cosimo de' Medici, and the Muslim Governor (under Turkish control) of Algiers.[70]

For the pattern of commerce to be profitable the goods must continue to flow; the taxation or belligerent interdiction (or robbery) must not be so burdensome as to drive trade away; even risk-sharing through insurance must be managed in such a way that the risk does not become so great as to be uninsurable.[71] Examining this economic reality and the undeniable vitality of Mediterranean trade in the period 1580-1648, when captures at sea were most vigorously condemned by European writers as intolerable, even if legal, it can be conjectured that the forcible exchange of goods and slave-taking was in fact a tolerable part of the economic system of the Mediterranean at that period. Indeed, even a century later, the risk of being taken as a slave in the waters near Algiers and Morocco was significant, and the fate of the slave once taken was not always as grim as might be assumed by a 20th century reader.[72]

England was already a major sea power by the time the Spanish Armada was defeated in 1588, soon to dominate large areas of the sea and express through the application of force its sentiments as to the proper order of commerce and private property.

John Chamberlain, whose letters written 1597 to 1626 constitute a major source of insight into the trade and politics of that period in England, apparently uses the word "piracies" as a synonym for "privateering under license" in a letter to Dudley Carleton dated 31 January 1599: "Upon the Duke of Florence's embargo and complaint of our piracies, here is order upon pain of death that no prizes be taken in the Levant seas."[73] A similar usage appears thirteen years later when Chamberlain refers to unlicensed takings as a matter of state authority bearing no apparent relationship to abstract notions of morality or international law: "Many of our pirates are come home upon their pardon for life and goods, but the greater part stand still aloof in Ireland, because they are not offered the same conditions, but only life . . ."[74] The same usage was applied to Algiers and Tunis, whose licensed or unlicensed prize-takers were called "pirates" while routine treaty negotiations were conducted with the rulers of those places.

> Sir Thomas Roe had taken great pains and thought he had done a *chef d'oeuvre* in concluding a truce or peace for our merchants with the pirates of Algiers and Tunis. But he is in danger to be disavowed and all this labor lost (howsoever it comes about) and we left to the mercy of those miscreants who have already seven or eight hundred of our able mariners, among whom many gunners and men of best service at sea, who by this treaty should have been delivered.[75]

About the beginning of the 17th century "pirates" began to take the place of "Spaniards" as the villains in English popular ballads. A ballad published in 1609 condemning John Ward and a Dutchman named Simon Danseker for their villainies under Barbary license illustrates the changing mood:

> Gallants, you must understand,
> Captain Ward of England,
> A pyrate and a rover on the sea,

late a simple fisherman
In the merry town of Feversham,
Grows famous in the world now every day.

. . .

Men of his own country
He still abuses vilely;
Some back to back are cast into the waves;
Some are hewn in pieces small,
Some are shot against a wall;
A slender number of their lives he saves.

. . .

At Tunis in Barbary
Now he buildeth stately
A gallant palace and a royal place,
Decked with delights most trim,
Fitter for a prince than him,
To which at last will prove to his disgrace.

. . .

There is not any Kingdom,
In Turkey or in Christendom
But by these pyrates [Ward and Danseker] have
received loss;
Merchant-men of every land
Do daily in great danger stand,
And fear do much the ocean main to cross

. . .

But their cursed villanies,
And their bloody pyracies,
Are chiefly bent against our Christian friends;
Some Christians so delight in evils
That they become the sons of divels,
And for the same have many shameful ends.

. . .

London's *Elizabeth*
Of late these rovers taken hath,
A ship well laden with rich merchandize;
The nimble *Pearl* and *Charity,*
All ships of gallant bravery,
Are by these pyrates made a lawful prize.

. . .

The ballad ends with three more verses describing a quarrel between Ward and Danseker, and seeing in their separation, Ward to stay near Tunis and Danseker to hover near "Argier" (Algiers), the hand of God which will lead to their overthrow.[76]

The realities reflected on this ballad led to a diplomatic expedition to Algiers in 1621 under Sir Robert Mansell, which failed,[77] and an unsuccessful attempt by Parliament to ransom 1500 Christian captives in 1624. Popular indignation over the plight of the captives is reflected in a frankly polemical ballad of that year:

Not many moones have from their silver bowes
Shot light through all the world, since those sworne foes
To God and all good men . . . [*sic*] that hell-borne crew
Of Pirates (to whome there's no villanies new),
Those halfe-Turkes and halfe Christians, who now ride
Like sea-gods (on rough billows in their pride),
Those renegadoes, who (their Christ denying)
Are worse than Turkes . . .[78]

In 1637, 3-400 souls were taken from Salee by the English ship *Rainborow*, apparently peacefully.[79]

The English conception of when the word "pirate" was appropriate in international relations at this period had not come to be stably reflected in a specific legal context.[80] As is apparent from the last quoted line of the ballad of Ward and Danseker, at least in the popular mind there was no distinction between privateering and "piracy;" a "pyrate" could make "lawful prize" of a captured vessel. It is possible, although not entirely clear, that the word was a pejorative used for privateers of any nationality who captured English vessels. The word appears to have slipped so quickly into the general pejorative vocabulary that whatever legal precision it might have derived from classical sources eroded by the late 16th century.

Some clues as to the evolving meaning of the word, and some insight into the pattern of governance and trade that gave rise to the changes in meaning, are implicit in contemporary documents relating to the East India Company's business in Southeast Asia. There are mentions, for example, of English and Dutch ships in 1622, during one of the very brief periods of cooperation between the merchants of the two nations, keeping company "for fear of pirates" near Java, but it is unclear precisely who or where the "pirates" were.[81] Similarly there is mention in December 1623 in a communication from the Council at Batavia to the English merchants at Jambi (in Sumatra) that it is deemed "dangerous to send one ship for England alone, because of the abundance of pirates lurking in all places,"[82] and a few days later the same Council referred to the need for homeward-bound ships to be prepared "against the invasion of that cursed crew of pirates."[83] Again, it is unclear precisely who or where the "pirates" were, but they were probably not the Dutch; there is a reference in instructions given to an English trading voyage to Bantam (in Java) by the "President and Council of Defence" in Batavia on 16 August 1623 to the need to defend against an assault by the Dutch "as from pirates,"[84] apparently distinguishing between the two threats.

King James I, convinced that the East India Company was withholding from the Admiralty its tenth share of prize money taken under license by the Company as "reprizals" (apparently against Portugal), is reported to have called the Company itself "pirates."[85] In the Court Minutes of the East India Company the same transaction is explained:

> . . . Mr. Governor replied that upon receipt of the release promised for the time past and the warrant and direction for the future they were ready to pay the money. His Majesty's answer was that this was to give them leave to be pirates; the answer was that the Company delighted neither in blood nor rapine, and therefore humbly besought his Majesty would be a means that peace might be between the English and Portugals . . . or else that his Majesty would explain in what cases the English might defend themselves by offending others if there were cause.[86]

It seems likely that two different conceptions of "piracy" were involved, one asserted by the Company referred to "blood" and "rapine" and seems to relate to English criminal law as it might be applied generically to robbery within the jurisdiction of the Admiral; the other implied by King James I related to any unlicensed taking. It is tempting in this to see a Stuart King seeking a legal basis for classifying as criminals those who merely failed to submit to total centralized control over their activities, and a private Company seeking to restrict royal control to what was permitted by Parliament in its criminal statutes. But, as shall be seen below, the dispute probably reflects differing conceptions of law on a much deeper level.

It does seem to be concluded by all who have examined the facts of Mediterranean commerce in the 16th and 17th centuries that licensed "privateering" of many European powers, including England, made trade not only in the Mediterranean but also in the North Atlantic and elsewhere, hazardous for all traders of any nationality, and that the four Barbary communities of Tunis, Tripoli, Algiers and Salee joined in this practice in the early 17th century.[87] The word "piracy" was used increasingly around the turn of the 17th century to refer to privateering, possibly by analogy to the classical "pirates" of Cilicia in the Eastern Mediterranean, but the word was assuming a more specific meaning related to unlicensed "privateering" as the century progressed.

"Piracy" Enters the Legal Vocabulary as "Outlawry." The professional international law scholars of the 16th and 17th century left in their writings evidence of this evolution of meaning, and how the word "piracy" acquired technical international legal meanings reflecting the popular culture.

The North Italian Pierino Belli, publishing his major work on military subjects and war in 1563, rests on the medieval post-glossator Baldus Ubaldus (1327–1400) as authority for interpreting Cicero's and Plutarch's writings to mean that while war should not be begun without a declaration, "it is customary to make an exception in the case of pirates [*piratae*], since they are both technically and in fact already at war; for people whose hand is against every man should expect a like return from all men, and it should be permissible for any one to attack them."[88] He distinguishes "pirates," towards whom the laws of war apply, from persons whom the Pope or Holy Roman Emperor have branded as public enemies; public enemies, but not

"pirates," are termed "outlaws" whom even persons without soldiers' licenses may kill.[89] But Belli makes a major departure from precedent when repeating Cicero's condemnation of Marc Antony's agreement with the Cilician "pirates" in 44 B.C.[90] as if applicable in all contexts and disregarding any evidence that treaties with the Cilician "pirates" had in fact been concluded and observed by Pompey as well as by Marc Antony. Indeed, the inconsistency between the two passages in Belli, one affirming the applicability of the law of war to relations with "pirates" and the other asserting a rule of law that would make the termination of that war impossible except by the complete annihilation of the "pirates," seems to reflect some confusion of thought.

Balthasar de Ayala, a native of Antwerp (now part of Belgium, then part of the provinces of the Habsburg monarchy ruled from Spain) writing in 1581 carried the confusion a step further. By reading the passages of Justinian's *Digest* relating to captivity and postliminium as if all references to "brigands" ("*latrones*") applied equally to "pirates," he actually denied the status of lawful enemy ("*hostes*") to pirates in apparent disregard of all the ancient writings:

> For the same reason, the laws of war and of captivity and of postliminy, which apply to enemies, do not apply to rebels, any more than they apply to pirates [*piratis*] and robbers (these not being included in the term "enemy"). Our meaning is that these persons themselves can not proceed under the laws of war and so, e.g., they do not acquire the ownership of what they capture, this only being admitted in the case of enemies; but all the modes of stress known to the laws of war may be employed against them, even more than in the case of enemies, for the rebel and the robber merit severer reprobation than an enemy who is carrying on a regular and just war and their condition ought not to be better than his.[91]

Nor is it clear why he denied the status of lawful enemy to rebels, although legally the case for criminality was easier to make regarding "rebels" than "pirates" in 1581, since rebellion was obviously a violation of the law of the monarch against whom it was aimed, and was committed by people within the "allegiance," of that monarch, while "pirates" were beyond the reach of municipal law under normal feudal concepts. The possibility that rebels might achieve an independent status under international law before the former monarch accepts that negation of his monarchy's internal law, and thus become best viewed as entitled to the protection international law gives to lawful belligerents even if their precise status is doubtful, was not considered by Ayala. Perhaps his views were influenced by loyalty to the Habsburg monarchy during the violent days of the rise of the Dutch Republic.[92]

The Legal Order and Outlawry

Positivist Theory: Law as a Support for Policy. The first writer of lasting eminence to convert the confusions of the time to legal principle, to argue that the label "pirate" carries with it unmistakably the meaning of

outlawry and that what "pirates" do is forbidden by international law, was Alberico Gentili. Born in Italy in 1552, but forced by the Inquisition to leave when his father, and apparently he himself, converted to the Protestant religion in the 1570s, Gentili settled in England in 1580 and was appointed to a teaching post at the University of Oxford in 1581. He was made Regius Professor of Civil Law there in 1587 and published the first volume of his *Commentaries on the Law of War* in 1588. Two other volumes followed in 1589, and all three were reissued together in 1598. He appeared with Royal permission as the advocate for Spain in several cases before the Royal Council Chamber in London, dying in 1608 full of honors.[93]

After defining the legal state of war ("*Bellum est*") as a "just [lawful?] and public contest of arms [*publicorum armorum iusta contentio*],"[94] and asserting on the basis of quotations from Justinian's *Digest* that only Princes have the legal power to resort to war,[95] Gentili devotes an entire chapter to demonstrating by legal logic that "pirates" cannot be public enemies; cannot wage "war."[96] "A state of war cannot exist with pirates and robbers, in the opinion of Pomponius and Ulpian [*cum piratis & latrunculis bellum non est. vt ita Pomponius, & Ulpianus definierunt*]."[97] He goes on: "Pirates are the common enemies of all mankind, and therefore Cicero says that the laws of war cannot apply to them."[98] But the passage Gentili immediately quotes from Cicero does not mention "*pirata*" or any of its derivatives or the law of war; it is a passage relating only to promises given to "*praedones*."[99]

It is, of course, possible to quote the entire chapter, but it is not the function of this study to subject to critical analysis the influential scholarship of others except as necessary to trace the evolution and legal meaning of the concept of "piracy" in modern international law. Thus, without further examples, it is possible to conclude that Gentili in 1588 took an argumentative position, supported with an advocate's brief, that "piracy" was not a matter of permanent war with communities pursuing violent tax collections at sea or basing part of their economy on booty seized from their neighbors. "Piracy" to Gentili was apparently any taking of foreign life or property not authorized by a sovereign, synonymous with brigandage or robbery on land, i.e., that his conception of the criminal law implications of the words *praedones* and *latrones* or *latrunculi* in Roman law, which he does not analyze, applied equally to "pirates" without analysis.

It seems clear that the license of an established sovereign was the key to his thinking. The chapter concludes with a famous example illustrating precisely that:

> But what are we to think about those Frenchmen who were captured by the Spaniards in the last war with Portugal and were not treated as lawful enemies: They were treated as pirates [*piratae*], since they served Antonio, who had been driven from the whole kingdom and never recognized as king by the Spaniards. But history itself proves that they were not pirates [*piratas*] and I say this because of no argument derived from the number and quality of the men and ships, but from the letters of their king which they

exhibited; and it was that king whom they served, not Antonio, although this was especially for the interest of Antonio: a consideration, however, which did not affect their status.[100]

The implications of Gentili's position were great. If it were generally accepted, whatever the weaknesses of the appeal to classical writings in support of it, that all takings were in some sense "criminal" unless authorized by a person whose legal power to issue such an authorization were acknowledged, no degree of political organization or goal could make a "rebel" into a lawful combatant or require the application of the laws of war to the struggle against the rebel army. A tool of enormous power was placed in the hands of "sovereigns." The political struggle to unify France and to engorge the royal power of the Stuart kings of England would be helped. Moreover, each "sovereign" would seem to be accorded the legal power, by "recognizing" anybody's legal status needed to license privateers or naval commanders (or withholding that "recognition"), to determine what legal regime would be applied to any struggle between the "sovereign" and an enemy of uncertain status. The Barbary states could be rendered "piratical" by simply withholding recognition of his governmental position from a new Dey or "recognizing" a rival, thus depriving the one not liked of the power to issue the Turkish equivalent of letters of marque and reprisal. Gentili's approach was clearly attractive to him as an advocate for Spain in England 1605-1608.[101]

Many of the cases in which Gentili was concerned involved "postliminy" in its renaissance form, the determination of title to goods and status of persons taken by a foreign sovereign, his agent, or a "privateer" (or "pirate") possibly acting in excess of his foreign license. While it is not necessary for purposes of this study to set out the complexities of the Roman law of postliminium, a few words as to its growing importance in renaissance Europe seem needed.

Some Technicalities: Property Law and Privateering. "Postliminium" was the Roman law word of art to denote that branch of the law which dealt with rights of property during wartime. Questions involved primarily the status of persons (slave or free) captured in war and brought to the territory of a neutral before the war ended; would it be unneutral of the third country to deny the property right of the captor in his slave? If so, could the captor sell the slave and pass title to a neutral? And if that neutral sold the slave to a buyer from his original country, what then; would the captive soldier become a slave in his own country? The analogy to captured goods and vessels seems clear.

By late medieval times, the legal status of war, retaining some of its religious background, no longer applied to many lawful private takings. It was, in fact, in an effort to avoid bringing about a state of war between princes that letters of marque and reprisal were issued to private persons

authorizing them to recapture from foreigners goods that had been wrongfully taken by those foreigners. There were no judicial proceedings prior to the issuance of the letters, thus there could be, and presumably were, serious questions about the "wrongfulness" of the original taking and the propriety of the supposed "recapture." Moreover, it was rarely possible to assure that the goods "recaptured" were identical with the goods originally taken, and it was but a small step to issue letters of marque and reprisal ("*licentia marcandi*" in 1295) for the taking not necessarily of the original goods, but of any goods up to the value of the original goods; and not necessarily from the original taker, but from his fellow-citizen.[102]

Little help in determining the precise meaning and origin of the system exists in etymology. "Reprisal" comes from Latin via French and means "re-taking." It is possible to speculate that the original sense in law involved simply an authority to recapture goods wrongfully taken by another. "Marque" seems to have an obscure origin and some relationship to the technical old Provençal law of pledge. It has no English usage other than in "Letters of Marque" and almost always the words "marque and reprisal" appear together. On the other hand, as noted above, the phrase "*licentia marcandi*," clearly meaning a letter authorizing a taking in the sense of "letters of marque and reprisal," appears in a document of 1295, and the phrase "*marquandi sue gagiandi*" in an English legal document of 1293, predating by some sixty years the earliest reference to "*la lei de Mark & de represailles*" found by the compilers of the Oxford English Dictionary in an English statute of 1354. The word "*marquandi*" seems to relate not to seizures and pledges but to merchantability; the legal power to pass title to goods.[103]

These shifts in the system of private "reprisal" and equivalent capture for sale to satisfy the original claim in money terms by the end of the 16th century had failed of their purpose to avoid war between the sovereigns over private claims. The issuance of such letters had begun to be regarded in Northern Europe as necessarily involving the centralizing monarchies in the attack on foreigners whom it was the legal duty of their own sovereigns to protect. Thus, the issuance of letters of marque and reprisal was becoming itself a belligerent act, justifiable only by the law of war. The old forms persisted, and it was apparently felt not necessary that the war be declared before the letters were issued, while it was felt to be necessary to apply the laws of war to determine the lawfulness of the capture. Thus the license, the letters, held by the captor were felt to be subject to examination and the legal status of the foreign "sovereign" issuing an equivalent license could be called into question. The question would arise whenever goods or a ship purchased in Algiers or Tunis arrived in England or Holland, for example, and some former owner identified it as his. This was often done in the case of a ship; Admiralty proceedings to determine rights in a vessel became the typical forum for hearing questions of this sort. Thus, while "prize courts" in any

country[104] might deal with wartime captures, and the Royal Council Chamber in England dealt with various claims involving the dignity of the Crown in the early 17th century, ordinary Admiralty courts in England dealt with a variety of cases arising out of peacetime capture under letters of marque and reprisal.

The proceedings in Admiralty, Royal Chamber and Prize were proceedings before national courts; i.e., only the sovereign could authorize an adjudication of property rights within his domain, so all the courts there, whatever their title or form, derived from him their authority to adjudicate title to property. But the substantive law they applied was necessarily a law that had to be acceptable both at home and, if the new title were to be of any use to the winner of the case, abroad. Thus rationales or, probably more accurately, justifications based on legal logic and precedent for the determinations of the tribunal, had to be found in terms that would seem persuasive to the tribunals erected by foreign sovereigns dealing with the same or similar cases. This pattern of logic and the appeal to precedent based on incidents not tied to local circumstances and legislation might be best described as the application of "international law" to the case, or of a special branch of municipal law, or even as a sort of conflict of laws situation where the municipal law refers the tribunal to a foreign system of laws (in this case "international law") which in turn refers the questions of title to a foreign law (perhaps the law of Tunis in the case of a Tunisian capture followed by legal proceedings equivalent to Prize or Admiralty or Royal Chamber proceedings in Tunis). Which set of concepts was used would depend on the complexity of the mind of the analyst and the consistency of the particular legal model with other legal principles important to the tribunal.

Gentili, as the Advocate of Spanish interests in England at the highest legal levels, apparently phrased his pleadings, when he could, as pleadings on behalf of English merchants deriving title through Spanish claimants, and seems frequently to have omitted the Spanish middle step. Thus, where he argued on behalf of English merchants against other English merchants, he was actually doing his proper jobof representing Spanish interests. Where he could, he also described the interests of the other side as foreign, even where it seems likely that they were as deeply (or as shallowly) rooted in England as his own side's were.

In the first cases in his book of pleadings, Gentili argued that the Roman writers and precedents created a law of "postliminy" that should be applied in the Royal Chamber to permit lawful title to pass to a captor only as a result of lawful capture during time of war, and then only after the capture is perfected by the captive people, goods or vessel being brought to the territory controlled by the capturing person's sovereign and the capture declared good there. He noted, as if merely in passing, that "To Pirates and wild beasts no territory offers safety [*Piratis, & feris territorium nullum praebet securitatem*]"

because "Pirates are the enemies of all men [*Piratae sunt hostes omnium*]"[105] and cannot perfect their captures any more than wild beasts can. In a case involving a purchase by English merchants directly from "pirates" in a market under the supervision of the treasury officials of the "King of Barbary," Gentili argued that the Roman law forbidding pirates to alter title (he did not distinguish between title to persons and title to goods) applied in Barbary as it applied in Turkey, the territorial descendant of the Eastern Roman Empire of which Justinian was Emperor. That law, he argued, nullified the purported legal effects of the English purchase even though there was some official Barbary connection with the sale. As an additional reason in policy for adopting the legal pattern he proposed, he argued that a contrary result would give to "pirates" a "very convenient place, which is quite close to the Spanish lines of trade and occupied by English merchants, where they may distribute their booty among their confederates. Does this make for trade?"[106]

On the other side, when attempting to support title derived by purchase in Tunis from "pirates" against the Venetian original owners, he argued that there are exceptions to the absolute rules. Under one such exception at Roman law the payer of a ransom to pirates could hold the persons ransomed until repaid the amount of the ransom; rights of possession might thus be passed by pirates even if full rights of property could not.[107] It is not clear just who the "pirates" were (they were asserted to be English) or what they did or if they had any letters from a foreign prince. Since they were not parties to the case, and Gentili's argument did not rest on asserting the legitimacy of their acts (which might have been conformable to international law but forbidden by English municipal law under some special definition of "piracy")[108] these issues were not presented.

Finally, in a case involving English possessors of "pirate" property deriving their title through purchase at Tunis, with Gentili arguing for the English possessors, he was forced to depart still further from his theoretical position that the Barbary states were "piratical" when they licensed takings without going to war. Admitting that his former argument[109] went the other way, he tried to distinguish the cases on the ground that the involvement of the Turkish Treasury ("*fiscus*") in the first case was merely a matter of form while in this case the involvement was direct. But major stress is placed on a more solid policy ground: That those who are safe under the law of the place of the transaction must be safe in their rights in England also. This is a basic principle of conflict of laws and necessary for any country involved in international trade. It thus indicates a limit to the theoretical discretion of lawyers and statesmen to attach legal labels to suit the particular interest of the moment. Gentili went even further: "Our countrymen have their trade with Tunis, Algeria, and many another state taken from them by this claim of the Venetians that those states are nothing but piratical retreats and that there

is none in them but pirates and that the very magistrates in them are pirates too."[110] This frankly political argument for attaching the label "state" to the Barbary organizations, and "government" to their officials, is consistent with Gentili's basic idea: That legal labels are attached not on the basis of facts, but on the basis of their legal and political results by a policy choice.

Thus Gentili's "recognition" approach had its limits. Reality and the needs of commerce exposed it as not a rule for judgment by a third party or scholar, but as a tool of advocacy attractive primarily to flexible-minded lawyers and statesmen seeking a justification for actions that might not stand moral scrutiny.

It was not even clear that the Gentili approach would help "legitimate" monarchs dispose of rebels as "pirates." Not only was its legal basis shaky, but it was not clear politically that treating a dynastic claimant as a "pirate" chief would have any significant effect in the world of affairs. It was not clear, as it is not clear today, that the legal results of loss in war are less harsh on the vanquished than defeat as "pirates." Hanging for treason, for political convenience or influence, or for crime differ as far as the victim is concerned only to the degree that some sense of dignity might attach more easily to the political prisoner than to the common criminal. Yet, it has been common in all ages that political prisoners suffer far more than common criminals in times of stress. And if the alternative to fighting on in a hopeless cause was to be death on a criminal's scaffold, it is not clear that calling "piracy" what others might call "privateering licensed by an unrecognized sovereign" would always shorten the struggle or make victory easier for the established sovereign. Thus the particular example does not seem to support the principle Gentili argued to underlie it.

There are other implications to Gentili's approach. His approach to "law" seems dominated by the ephemora of policy. If "piracy" is criminal, by what law? Apparently, by giving to each sovereign the power by "recognition" or "non-recognition" to classify belligerent behavior as "piracy" when engaged in by licensees of a foreign government or of a political movement whose status could be denied, the privateers or soldiers of that government or movement could be subjected not to international law, but to the domestic ("municipal," to use the usual word of art) criminal law of the "non-recognizing" sovereign. In theory, Gentili's approach, based on an advocate's twist to Roman municipal law, reached the same position as was condemned by Plutarch when considering the authority the Senate had given Pompey to suppress the Cilician "pirates" in 68 B.C. Now any sovereign could extend his municipal law to the high seas, and possibly even to foreign land, by authorizing his Admiral or General or other delegate to wipe out the "pirates" there. Clearly, this broad authority would not survive the politics of Europe, where the extension of one state's municipal law to the land claimed by another would result either in a system of competing empires and

"war" unmodified by the humanitarian and chivalrous law of war that was generally acknowledged in Europe as necessary, or in the acknowledgment that a European sovereign of sufficient political power and a claim to authority along traditional lines could not be properly denied "recognition" as such. But outside of Europe, where the competition for empire among European sovereigns and their subjects was becoming intense, the claims of non-European rulers to the legal authority of a European sovereign could be denied without those implications. And if the struggle grew too difficult to manage or the non-European too strong to ignore as a political actor or too adept at finding European allies who would "recognize" his legal capacity to license soldiers and privateers, the European power that had overextended itself by abusing the legal tools Gentili would place in its control could simply withdraw for a while to reconsider the politics and law of its position.[111]

The vistas opened by Gentili's discovery in the ancient Roman law relating to *latrones* and *praedones* of a pattern of rules that could justify the most extreme action against non-European political societies, and against internal forces resisting the move towards centralized control in the monarchies and bureaucracies of European expansion, were immense and very attractive to the rising merchant classes.

Naturalist Theory: Law as a Moral Order Governing Policy. Gentili's approach was not universally adopted by scholars. Hugo Grotius (Huigh de Groot) was a Dutch prodigy whose reformulation of the basic conceptions of the law that governs relations among states was so influential that he became known as the father of modern international law. Born in 1583, he began University studies at Leyden eleven years later, received his Doctorate at fifteen from the University of Orleans while accompanying Johan van Oldenbarnevelt on a diplomatic mission, and was greeted on that occasion by King Henri IV as "The miracle of Holland."[112] The first edition of his masterwork, *On the Law of War and Peace*, was published in France in 1625 and incorporates writings dating back to 1604. Later editions with his own corrections in them appeared in 1631, 1632, 1642 and 1646, the last being published posthumously.[113] His active life included government service in many capacities, including Ambassador from Queen Christina of Sweden to France in 1634-1645,[114] and the 1646 edition of *On the Law of War and Peace* incorporates not only vast classical scholarship and literary precision, but distills the experience of an active statesman deeply involved in the political struggles of his time.

Without mentioning Gentili by name, Grotius took issue with him on at least two vital points: (1) His classical scholarship, which Grotius corrected in large part; and (2) his emphasis on the power of an established sovereign through non-recognition to place an active political community within the legal classification "pirate." Most importantly, by describing some characteristics of "pirates," Grotius implied a view of the legal order which permits an

objective classification; he indirectly created a definition of "pirate" quite different from the Gentili definition and equally influential in the long run.

As to the disagreements, Grotius addressed the same preliminary question that Gentili addressed as to whether "war" was a fitting legal classification for all armed contentions. Quoting Pomponius and Ulpian among others, Grotius came to no sweeping conclusions regarding "pirates" on the basis of their opinions. Instead, he turned to a more direct analysis of the characteristics of a society before it should be denominated "piratical," asserting that the label properly fits only those who are banded together for wrongdoing but does not include societies formed for other reasons even if also committing illegal acts.[115]

Moreover, a commonwealth or state to Grotius did not immediately cease to be such if it commited an illegality, even as a body; and a gathering of pirates and brigands was not a state, even if they did perhaps mutually maintain a sort of equality. The reason, according to Grotius, is that pirates and brigands are banded together for wrongdoing; the members of a state, even if at times they are not free from crime, nevertheless have been united for the enjoyment of rights, and they do render justice to foreigners.[116] The problem comes in practice when trying to distinguish a "piratical" community from a wrong-doing state. Comparing Ulpian's conclusions about captives not losing their liberty if taken by brigands[117] with the willingness of Ulpian to allow lawful capture to German marauding tribes on land as described in the works of Caesar and Tacitus,[118] and comparing the celebration of a Roman "Triumph" at the end of the "war" with Illyrian indiscriminate sea-borne marauders with the refusal of Rome to order a Triumph to end Pompey's acknowledged war with the Cilician "pirates,"[119] Grotius simply reiterated his view that these legally vital distinctions which, after all, determine rights to potentially large amounts of captured property[120] and the liberty of real people, rest solely on the criminal purpose of the marauders' association.[121]

This basis for discriminating between "piratical" and non-piratical marauding communities in the classical literature seems insupportable. There is no evidence that the "*peiraton*" of Plutarch and Polybius, with their villages, religious observances, alliances, etc., were banded together for the purpose of plundering their neighbors any more than were the Germanic tribes or Illyrians. Moreover, Grotius himself saw that the distinction could not survive close legal scrutiny or the need politically to take full account of marauding societies no matter what the purpose of their original union, once their activities and degree of organization and their political power passed a certain point. He argued that a "transformation [*mutatio*]" may take place with regard to individual chieftains of brigand bands [*praedonum ducibus*] who become "lawful chiefs [*justi duces*]" in some cases,[122] and also to whole

communities by mere evolution.[123] But, instead of reconsidering his definition Grotius immediately passed on to other things.[124]

In short, Grotius's conception of when the word "pirate" would fit as a legal word of art seems to focus not on recognition or the derivation of authority from some acknowledged prince, but from facts directly: The word would fit robber bands on sea or land; it would not fit the Barbary states or other complete communities, whose primary purpose of association is lawful, i.e., defense, raising families, making war. The legal results that flow from attaching the word seem vague indeed, since Grotius would allow oaths and promises to "pirates" to be kept and legation to be maintained. The only really significant passage then is the one offhandedly expanding the Justinian *Digest's* rule regarding the impossibility of a piratical capture changing the personal status of the captive, to the very important area of general postliminium—the disposition after recovery of goods previously captured by "pirates."

Even in this last regard, postliminy, Grotius was not certain that its rules and exceptions had any application to his time. The expansion of organized political societies in peaceful contact with each other had, in his optimistic view, made the Roman law of postliminy obsolete: A lawful capture in war followed by prize proceedings would legally change title to captured goods; an unlawful capture in war or the lack of a legal proceeding similar to prize court proceedings in which the various claimants to the goods would have an opportunity to dispute the lawfulness of the capture, the contraband nature of the goods and their actual ownership and destination, would not change the title, and the loser could reclaim his goods if he could in fact recover them. A lawful capture outside of war he regarded as impossible.

But what, then, about seizures by the Barbary corsairs? Were those "states" in a permanent status of war with the states of Europe? Could their licensees' seizures and their magistrates' legal procedures confer title on the corsairs and thus on the European merchants who eventually bought the goods? Or were they "pirates" who, by the ancient Roman law, could not get title to goods however elaborate their legal proceedings? Or were they "states" not at war whose depredations could give them some rights of possession, but with regard to whom the law of postliminy should be revived to clarify precisely what those rights were and against whom they could be asserted? Grotius reported without comment a judgment of the highest court in Paris delivered while he was writing (presumably shortly before 1625):

> The decision held that goods which had belonged to French citizens, and had been captured by the Algerians, a people accustomed in their maritime depredations to attack all others, had changed ownership by the law of war, and therefore, when recaptured by others, became the property of those who had recovered them.[125]

Despite Grotius's seeming to doubt the legal strength or practical wisdom of the Paris decision, and bearing in mind that his merely recording it added

greatly to its weight in those days when there were no formal court reports and a necessarily different concept of *stare decisis*, (i.e., the bindingness of common law decisions on later courts) from the current concept, the inclusion of this judgment in his book may indicate Grotius's own uneasiness with the classifications that his logic and moral perception of the legal order had led him to. Of course, if there were no moral content to the law but only form, the decision was clearly correct: Algiers met the criteria of statehood by Grotius's own definitions, and the procedures of legal title transfer by the law of Algiers were not questioned. Moreover, presumably both the former owner and the owner deriving title through the sale in Algiers were innocent of the taking and certainty in the law seems always to have been more important for practical men of affairs and merchants than its conformity to an abstract ideal of morality; a decision against Algiers would have had to come in the form of a decision against a merchant who presumably had his insurance or other 17th century risk-sharing arrangement to fall back on. It is only the moral feeling that such takings seemed more like robbery than like war or tax enforcement that seemed bothersome, and that sense of wrong came from an analogy to the municipal law of robbery that seems misplaced in an age when privateering was the normal way to recover the loss due to the acts of foreigners abroad. Perhaps there was an undercurrent of yearning for Empire, the imposition of Dutch order on the world, or at least on the non-European part of it. Perhaps it was a deeper sense of order felt increasingly as the excitement of trade and travel combined with classical learning began to stir European scholars. But this is speculation.

The practical diplomat's position expressed by implication throughout *De Jure Belli ac Pacis*, that facts and the needs of politics and moral order dictate the legal classifications that must be attached to situations, contrasts strongly with Gentili's position that lawyers and politicians can apply the labels best suited to their legal and political needs by a simple exercise of will. Under Grotius's analysis, rebels at a fairly early stage, when their independent existence at least as a community capable of belligerency could be objectively determined, must be treated as a legal entity exercising belligerent rights under international law. That position, of course, suited very well the position of the Netherlands rebelling from Spain. Gentili, the Spanish advocate in London's Royal Council Chamber sitting in Admiralty insisted that only a license from a recognized sovereign could authorize the exercise of soldiers' or privateers' privileges, thus that legitimate sovereigns attempting to suppress rebellion could treat the rebels as criminals, even "pirates," with whatever legal results could be drawn from that classification, without raising any questions of international law.

Under the analyses of both Grotius and Gentili, robber bands not purporting to have any license could be treated as "pirates," but the legal result of this was not to treat "pirates" directly as Roman law "*latrones*" or

"*praedones.*" It was to justify attaching the label "pirate" to those robber bands that would have been called "*latrones*" or "*praedones,*" but not "*pirata,*" before the great reanalysis of the late 16th century. Whatever the Roman law treatment of "*latrones*" *and* "*praedones,*" the effect of this was to refer the treatment of those now called "pirates" back to the municipal law systems of the labeling states, presumably by unconscious analogy to the primacy of Roman municipal criminal law in questions involving the disposition of those whom the Roman law called "*latrones*" or "*praedones.*"

There is another aspect to the Grotian view of the international society of the time that must be mentioned. Despite Grotius's reputation as an able advocate for seas open to all,[126] in *De Jure Belli ac Pacis* the more extreme arguments, under which Portuguese monopoly treaties with the Sultans of the Malay Archipelago and their enforcement against third states were denominated criminal,[127] were dropped and Grotius concluded that:

> [S]overeignty over a part of the sea is acquired in the same way as sovereignty elsewhere, that is, . . . through the instrumentality of persons and of territory. It is gained through the instrumentality of persons if, for example, a fleet, which is an army afloat, is stationed at some point of the sea; by means of territory, insofar as those who sail over the part of the sea along the coast may be constrained from the land no less than if they should be upon the land itself.[128]

Thus the basis for the extension of municipal criminal law to the activities of foreigners on at least parts of the sea was laid in theory. The theory was that of effective occupation—the power in fact of a sovereign to dominate a part of the sea and apply his law there as he did on land; a power that could be exercised not by theoretical claims, but by the use of military force. Argumentative support for this position was found in various Greek and Roman precedents,[129] although the example of the Roman Senate conferring monarchical powers on Pompey in 68 B.C. is not cited. Thus, as Gentili had found a legal rationale for the extension of municipal law to foreign territory, so Grotius, reversing his earlier position as the sea power of The Netherlands increased, found a rationale for the extension of municipal law by any state with a warship to that part of the sea within the military control of that warship.

Some Implications. It may thus be seen that the word "piracy" entered modern English usage in a vernacular sense to cover almost any interference with property rights, whether licensed or not, and was applied as a pejorative with political implications but no clear legal meaning. The word in its Latin form entered the vocabulary of lawyers concerned with public order in the late 16th and early 17th century as a synonym for action, whether or not related to property rights, which was conceived to be unauthorized within the legal system posited by the lawyers using the term. Thus, it could be applied to "rebels" violating the constitutional order of a single country; persons within the allegiance of one monarch acting against that monarch

under the purported authority of another monarch; foreign privateers whose property rights were being denied; or even the officials of a political society denied legal status as a person subject to the "international legal order," as defined by each ruler in Christendom for himself, with the legal effect that the officials of that "non-state" would be regarded in the denying state as lacking the legal power to change property rights or carry on a legal "war" or prescribe law in any territory. In its most expansive meanings, no implication of criminality existed; it was not a crime by any law to be an official of an unrecognized political society. On the other hand, an individual acting against the criminal law, or the law regarding "treason" or "mutiny," of a state could not exculpate himself from the operation of that law by claiming a license to act issued by an unrecognized "government." A link between individual criminality and the international legal order was thus put in place, as the existence of political groups outside the legal order, "outlaw" groups, meant that action taken pursuant to the "outlaw's" authority was, as far as an official within the legal order was concerned, unauthorized and, if that action violated a rule of law of the enforcing official, and occurred within his perception of his jurisdiction to enforce the rule, could be punished regardless of the link to an "outlaw" organization.

To follow the evolution of this conception further, it is necessary not only to understand the fundamental difference in the approaches to defining the legal order taken by "naturalists" and "positivists," but to know that as governmental control tightened with the rise of a secular legal order in Europe based on effective control and ambition, the outer limits of national assertions of jurisdiction to prescribe rules of property and criminal behavior were explored. Some of those limits have already been mentioned, as it was pointed out that legal words that did not reflect reality may have governed some statesmen's actions, but that legal policy as well as political action lost persuasiveness and effectiveness as it departed from reality as perceived by those whose actions were supposed to be influenced by it. As the vice of "naturalism" is to attribute legal force to the merely moral commands that the lawyer or statesman would like to be law but which is denied by others, so the vice of "positivism" is to treat as if real the model built by mere words to reflect what the lawyer or statesman would like to be real rather than what actually is. Where "naturalism" imputes consensus where there may be none, "positivism" can lead to solipsism — an emphasis on the arbitrary aspects of consent as the basis of the law-making process, and a retreat to "de jure" dreams of power.

In any case, in addition to its usage in the international legal order, the word "piracy" in the 16th and early 17th century was acquiring a meaning in the municipal legal orders of the countries of Europe whose views of law were to dominate sophisticated thought for the next four hundred years. It is impossible to understand the evolution of the conceptions of "piracy" in

international law without first understanding not only some rudiments of the conception of the international legal order and some legal theory, but also it is necessary to consider the municipal law usage, particularly in connection with municipal criminal law and its jurisdiction to apply to the acts of foreigners abroad, and municipal property law and the need to mesh that law with foreign property law so that private property crossing national boundaries remain secure in the possession of the foreign "owner." We now turn to that.

English Municipal Law and Piracy in the Renaissance

Jurisdiction and Substance; Admiralty and Common Law. It is beyond the powers of a sole scholar in reasonable time to analyze the municipal laws that might relate to the conception of "piracy" of all countries, or even all European countries, or even a few major European countries. It is fortunately possible to trace the municipal law of England[130] as it relates to "piracy" from the time it began to emerge from the obscurity of time and the vagaries of medieval records, through the great formative days of Sir Edward Coke (1552-1634) and Sir William Scott (Lord Stowell) (1745-1836) to modern times. As in the examination of classical sources, it is necessary to begin with a word of caution. The word "pirate" does not appear with a precise meaning in English legal literature until the 16th century, and attempts to trace the law regarding "piracy" back beyond that time all seem to assume that other legal words carried the identical meaning.[131] The assumption may be correct, but it is not convincingly argued in any known source despite the extraordinary volume of writing devoted to the history of the English law relating to "piracy." Typical of the confusion, and worth mentioning only because of the eminence and scholarly reputations earned by the people involved, is the elaborate history of the English and international laws of "piracy" by Chief Justice Cockburn in Regina v. Keyn[132] and the compilations of documents by Reginald G. Marsden.[133] In the first, Lord Cockburn refers[134] in some detail to two cases of Common Law indictment for "piracy" in the time of Kings Edward II and Edward III.[135] In fact the word does not seem to appear in any of his quotations.[136] Marsden, while reproducing several documents that use the word in the 14th century and even earlier, notes:

> As a legal term "piracy" belongs to a later date. The Latin word is common from the first, but it was not always used in an evil sense. In 1309 wines are stated to have been captured "*more piratico*;" in 1353 "*piratae et alii inimici nostri*" are spoken of . . ., and in 1359 one Robert Blake, who robbed a ship at sea, is called "*pirata*" . . . But in the twelfth century ships in the service of William II are spoken of as "*piratae*"—"*jam mare munierat piratis . . .*; *Anglici vero piratae qui curam maris a rege susceperant . . .*;" and in 1324 Edward II prepared for war "*Admiralos et piratas super mare constituendo*" . . . Before the latter part of the 14th century robbery at sea seems to have been dealt with in the King's courts as one and the same crime as robbery on land; and so of murder and assault. The records do not,

> to the present writer, appear to support the view insisted upon by some of the judges in Reg. v. Keyn . . . that piracy has from the first been recognized by the law of England as a crime distinct from robbery and murder on land.[137]

On the other hand, Marsden himself used the word "piracy" in headnotes to various documents in which neither the word nor any clear concept appears; his indexes use the word to refer to cases that seem to have nothing to do with the word or any clear concept of "piracy," and in at least one place in his table of contents he refers to a document that seems irrelevant in both word and sense to anything related to "piracy" and for which he does not use the word in his own headnote.[138] Occasionally he uses the word to translate Latin documents in which the word "pirata" or its derivatives does not appear; since his own note quoted above indicates his awareness of how deceptive that can be, the practice is inexplicable. In these circumstances, and finding similar doubts and problems to attend reference to other deservedly reputable works,[139] it seems necessary to return once again to primary sources, so happily collected by Marsden, hoping only that the reprints purporting to set out original language are more accurate than the translations.[140]

There are at least three analytically distinct problems that must be seen clearly before it is possible to understand the growth of English law relating to "piracy" and its relationships to international law. First, there is the question of jurisdiction: Is there a court in England empowered by English law to consider the case? Second, there is the question of substance: Is the particular act complained of a violation of English law? Third, there is the question of the reach outside of England of the prescriptions of English law and the enforcement jurisdiction of English courts. Each of these problems contains within it a whole host of subsidiary questions and the answers to any one of them change the pattern in ways that effect the whole problem and, indeed, the perceptions of all three problems. Because the interplay of these three problems is so complex, and the implications of tracing any particular pattern of legal behavior in disregard of the entire picture are so destructive of coherence, a basically chronological approach will be taken.

In the earliest documents, as noted above, the word "pirate" (the documents are in Latin, the word "*pirata*") and its derivatives are not used in any sense pertinent to this study. Indeed, Marsden's headnotes to documents of 1216 and 1228 relating to a ship "piratically captured" and "A pirate hanged" do not reflect either language or concept in the documents reproduced. In the first[141] King John directs his port bailiffs to find and deliver to its owners on presentation of proof of ownership a ship and goods alleged to have been diverted, and to hold for further action those in whose hands the ship and goods may be found. The case may involve maritime embezzlement and in any case seems a civil rather than a criminal matter with an undifferentiated legal power in the King to resolve both civil and criminal

aspects of it. In the second, the criminal charge for which one Willelmus de Briggeho was hanged involved consorting with general evil-doers who robbed a ship off the port of Sandwich (". . . *Willelmus de Briggeho, suspensus postea pro consensu malefactorum navis depredate ante Sandwicum* . . . ").[142] Not only is the word "*pirata*" or its derivatives not used, but again the facts are so unclear as to make any conclusions doubtful. All the people involved might well have been English, the vessel robbed might have been English, the location seems to have been mentioned for the purpose of identifying the incident, rather than as significant to establish any court's or nation's jurisdiction, and the location is so closely linked with a bit of land clearly within the realm of England that it is impossible to say that any concept of extending that jurisdiction seaward was involved.

The earliest reference to an international incident in the modern sense appears in a document of 1289. King Edward I by that document established a Commission to inquire into "certain trespasses [*transgressiones*]" committed by Englishmen against some Frenchmen and complained of by the King of France. The Commissioners were directed to "cause due restitution to be made of the goods."[143]

Apparently private recapture, self-help, was the normal remedy of seamen despoiled of their property in those rough times, and well into the next century,[144] but there is mention of letters of marque in documents of 1293 and 1295 indicating at least a Royal attempt to get control over the activities of his mariners when foreign ships might become involved and protests from foreign princes could be expected.[145] In the latter case, the letter ("*licentia marcandi*") granted an English petitioner the legal right at the law of England to take back from Portuguese "sons of perdition" the value of goods seized by them under license of the King of Portugal, who is alleged to have got a tenth of the booty. It is noteworthy that the English license is not directed against the particular people who took the English goods, but against any subjects of the realm of Portugal. What seems to have been involved was not an attempt to get control of robbery at sea, but of private legal remedies; to limit the rights of English victims to the equivalent of restitution for injury done by a foreigner, and to avoid as far as possible committing the public forces and resources of the Crown to the petty struggle.

It was about this time that the post of "Admiral" was established in England as a magnate authorized to oversee the issuance of letters of marque and reprisal and their due performance and ultimate cancellation.[146]

It is not clear what the source of substantive law was that the Admiral was supposed to apply. The Commissioners of 1289, responding to complaints by the King of France against English seamen, were directed to make the restitution "in accordance with the law and custom of our realm," England.[147] In 1361, a prior commission[148] to try the case in a Common Law court (the accused having been caught in England with their booty) was

revoked and replaced by a commission authorizing "our Admirals" to try the case "according to the maritime law."[149] But the "maritime law" is not likely to have been conceived as a law foreign to England. The great Code of the Laws of Oleron, compiled in a small island within the feudal lands of Eleanor, Duchess of Guienne, the wife of Henry II and mother of Kings John and Richard I, had been promulgated by her for Guienne in the Gascon tongue, promulgated with revisions then in England by Richard and John, re-issued by Henry III in 1266, and confirmed by Edward III in 1329.[150] They were distinguished from the Common Law of England by the very fact of royal promulgation as a Code; the power of interpretation was given to the Admirals as beneficiaries of royal patronage rather than Common Law judges with their own traditions of independence and the legal power to develop custom, as distinct from statutory or decree law, in both criminal and civil matters. Presumably the merchants most directly concerned with the terms of maritime law preferred this system also, since their interests could more easily be pressed at the royal court or with a royal administrator, the Admiral, than with Common Law judges when a change in the law or its interpretation was sought in the interest of English sea-borne commerce. Thus, when a commission of 1374 directed the leading administrators of England's Southeastern coast to hear and determine various criminal matters arising at sea along the coasts, "*supra mare per costeras*," of Kent (the word "piracy" is not mentioned: The list of offenses included the Common Law and non-legal words "robberies, depredations, discords and slayings")[151] it seems significant that the law to be applied was "the law and custom of our realm of England and . . . the law of the sea."[152] The implication is not that the law of the sea is different from the King's law in England, but that it is different from the *other* law of England, the Common Law which includes its own custom. The reference to the "law of the sea" pointedly omits any reference to custom.

The word "pirate" enters the English legal vocabulary via Latin commissions in the 15th century. The first direct legal use of the word appears to have been in an order of Henry VI in 1443 directing the restitution to Englishmen of goods taken from them by "pirates."[153] The context is purely civil—a question of property rights, not of crimes, and the word seems to be used in a pejorative, not a technical, sense. Similarly, a Proclamation by Henry VII in 1490 mentions:

> divers and monyfold spoliations and robberies . . . uppon the se unto the said subgettis of the said most high and myghty princes [of England and various foreign places] . . . as well by their enemyes as by other pirattis and robbers, which, as it is said, daily resorte into divers portes and places of this his realme of England, and ther be suffered to utter and sell their prises, spoiles, and pillages . . .[154]

This seems to classify the "pirates" with "enemies" as well as with "robbers," and classifies what might be lawful spoils with the booty of wrongful takings. Significantly, the Proclamation does not purport to apply

the law of England or the "law of the sea" or "maritime law" to the first takers of the goods. To discharge the King's international obligations to his fellow princes it takes a strictly territorial approach, commanding that:

> [N]o manner of persons . . . from henssforth comfort, take no receyve, in any . . . places of this his realme any of the said mysdoers, ne any merchandisez or goodes by them spoiled or takyn . . . uppon payn of forfeiture of the same merchaundises . . . or to the value thereof, for restitution to be made to the parties grevid, and uppon payn of imprisonment . . . at the Kinges will.[155]

The command is directed at Englishmen and perhaps foreign merchants only when they are in England; punishment for the "enemies," "pirates" and "robbers" is not prescribed, but only for the receivers of their goods in England.

The earliest reference to "pirates" in a context that seems to attach specific legal results to their activities seems to be a Latin letter of appointment by Henry VIII in 1511 to John Hopton, who was directed to:

> [S]eize and subdue all and singular such spoilers, pirates, exiles, and outlaws [*praedones, pirates, exules, et bannitos*] wheresoever they shall be seized, to destroy them and to bring all and singular of them, who are captured, into one of our ports, and to hand over and deliver them, when so brought in, to our commissioners . . .[156]

Whether or not this instruction was actually intended to apply to foreigners in foreign vessels, or only to Englishmen and persons of any allegiance in English vessels, is not clear. Nor is it clear how far from the coasts of England Hopton was expected to range; he appears to have confined his activities to areas within easy sail of English ports[157] and the more general language of the letter of appointment may never have been intended to reach farther. Moreover, the degree to which the commissioners mentioned in the letter had jurisdiction in derogation of Admiralty courts and Common Law courts, whether in fact there were Admiralty courts functioning throughout the period, are questions it is impossible to resolve without what appears excessive research.[158]

Admiralty Commissions and Common Law: The Statutes of 1535 and 1536. The first attempt to organize the administration of justice regarding maritime English offenses and have it apply in a regular way, through permanent tribunals instead of through *ad hoc* tribunals set up under *ad hoc* commissions of the King, was not until 1535.[159] The Preamble to that statute says:

> Where pirates, thieves, robbers and murders upon the sea, many times escape unpunished, because the trial of their offences hath heretofore been ordered before the admiral, or his lieutenant or commissary, after the course of the civil laws, the nature whereof is, that before any judgment of death can be given against the offenders, either they must plainly confess their offences, (which they will never do without torture or pains) or else their offences be so plainly and directly proved by witnesses indifferent, such as saw their offences committed, which cannot be gotten but by chance at a few times, because such offenders commit their offences upon the sea . . .[160]

To cure these legal problems, the statute provides that all "felonies, robberies, murders and manslaughters" should henceforth be tried by special Commissions using the forms of the Common Law, under which conviction and execution were easier. The word "pirates" or its derivatives is not used in the operative part of the text.

Section IV of the statute of 1535 allows for an unlicensed taking at sea not to be considered criminal if only necessities of the voyage were taken, and a written promise to pay for them was given and redeemed within four months if the taking were "this side of the straits of Marroke" or 12 months if on the other side (in the Mediterranean). There is no mention of takings across the Atlantic or on the other side of the Straits of Magellan; but then Drake had not yet made his circumnavigation. The statute is silent as to the nationality of the taker or the victim, or the nationality of the vessels. Nor does it deal with the defense of vessels anywhere. It appears to envisage the arrest in the normal Common Law fashion of accused malefactors in England; it thus merely replaces the discretionary Admiralty courts, using Civil Law procedures, with tribunals (Commissions) to be appointed and to use Common Law procedures outside both Admiralty and Common Law systems in England without affecting the normal rules of jurisdiction.

The statute of 1535 was superseded the following year by a nearly identical statute, 28 Hen. VIII c. 15 (1536).[161] The Preamble to the statute of 1535 referred to "pirates, thieves, robbers and murders." The Preamble to the statute of 1536 refers to "traitours pirotes theves robbers murtherers and confederatours." Presumably, "traitours" and "confederatours" were added to the list to take account of evolving Common Law thought that wanted to classify "piracy" as an Admiralty term for breach of feudal relationships, equivalent to the master-servant bond in days when status seemed more important legally than contract ties. Under the laws of Oleron, the master of a vessel had some of the legal powers of a feudal superior over his crew.[162] Thus, "traitours" and "confederatours" (i.e., conspirators, those who join together to commit a wrongful act) would relate to passengers and crew within the vessel, and seem to refer to what today would be called "mutineers."[163] Like the statute of 1535 the statute of 1536 drops the word "pirate" ["pirotes"] in its substantive terms:

> All treasons felonyes robberies murders and confederacies, hereafter to be comytted in or uppon the see, or in any other haven ryve creke or place where the admyrall or admyralls have or pretende to have power auctorities or jurisdiction, shall be enquired harde determyned and judged in such shires and places in the realme as shall be lymytted by the Kynges Comission or Comissions to be directed for the same, in like fourme and condicioun as if any such offence or offences hadd been comytted or done in or uppon the lande; and such comissions shall be . . . directed to the admyrall [or his delegates] . . . and to iij or iiij such other substantiall persons as shall be named or appointed by the lorde chauncellor of Englande . . .[164]

The legal words of art did not include any reference to international law or Roman law or, indeed, any concept of "piracy" except in the nontechnical recitation of the preamble; instead the words of art of the English Common Law of crimes were used. It is in that context that the word "felonyes" makes sense; the distinction being drawn involved the technical English law of "high treason," "petit treason" and Common Law crime, as yet incompletely distinguished from tresspass, or tort actions.[165]

The extraterritorial reach of this legislation was no more clear than before. It was apparently restricted to the places in which the Admiral by the law of England had legal power, authority or jurisdiction. That apparently included vessels flying the English flag wherever they might be afloat, including foreign ports and the navigable waters of England.[166] But it was never clear whether it extended to foreign vessels on the high seas or on internal navigable waters of England which were within the Common Law courts' jurisdiction. The case of Regina v. Keyn showed at great length that there was considerable doubt, ultimately resolved rightly or wrongly against the Admiral's pretentions, if he had any, that it extended to foreign vessels outside England's Common Law jurisdiction even within three miles of the English coast.

The system remained fundamentally unaltered through the entire period of this study.[167]

In Rem Property Adjudications. The earliest technical legal usage of the word "pirate" in an English court reflects the Roman law origins of the "Civil Law" applied in those English courts not governed by the "Common Law" of England.[168] In 1553 John Clerke, "Proctor General" of the Admiralty court of England, referred to goods "left and deposited by Henry Strangwis, Peter Killigrew, Thomas Killigrew and Baptist Roane & others . . . pirates, robbers and malefactors [*piratas predones et malefactores*] . . . now being under arrest."[169] Apparently it was the goods that were arrested, not the "*piratas predones et malefactores*," who had fled. The goods were confiscated and the various claimants were given a chance before the Admiralty court in an *in rem* proceeding to prove their property rights. It is unclear whether the denial of property rights to those who had fled (presumably for fear of criminal prosecution in the Common Law courts or before Admiralty Commissions under the statute of Henry VIII) was a reflection of a legal conclusion that "pirates" could not possess property at English Common or Civil Law. It might equally well have been a mere incident of the Civil Law system of *in rem* proceedings under which those with claims to property must submit those claims for adjudication in the light of the claims of others, and failure to present a claim for whatever reason resulted in loss of the possible rights and carried no criminal law or other general implications.

The notion that calling the possessor of a ship a "pirate" would deprive him of legal rights to the ship seemed very useful to Sir Julius Caesar,[170] who

applied the word to possible claimants in a series of widely different *in rem* cases. For example, in 1585 the *Diana* was arrested at the order of Caesar and condemned as a "pirate" ship to be sold for the benefit of the Admiral when her Master, a Frenchman named Killie, sailing under a French flag, did not appear. Killie was considered a "pirate" by Caesar even though it seems possible that he had a French commission, or letters of marque and reprisal, authorizing in the name of France his depredations against English ships.[171] There was no criminal action involved.

In another case in 1598, Caesar gave title to a prior owner against a purchaser who derived his claim to title from an Englishman "commonly, openly, publicly, and notoriously reputed to be a pirate [*articulatis pro pirata communiter, polam, publice, et notorie reputatum fuisse et esse*]" in the complete absence of criminal proceedings or other evidence as to the place of the taking or the circumstances surrounding it.[172]

In 1608 another Admiralty judge, Thomas Crompton, used the word in a similar way to deny title to James and John Powntis, purchasers "in foreign parts" of Venetian goods "captured . . . by one John Ward,[173] and other pirates and sea rovers" and sold to them apparently via official channels in Algiers. The goods or their value were granted to the Venetian Ambassador for the merchants he represented.[174] This case seems to avoid the problem of a commission for Ward, or the possibility that his capture was a "lawful prize" or a confiscation for non-payment of Algerine transit tolls, by simply calling Ward a "pirate" and ignoring the probable subsequent involvement of the Algerine officials in a legal transaction to transfer title. There was no criminal proceeding or attempt at definition.

While not pertinent to the definition of the word "piracy," it might be mentioned in this place that the use of that word to bring into play the idea that stolen goods should be returned to their previous owner because thieves by ancient principle cannot pass title they do not have, even to innocent purchasers, created special problems with regard to the use of the word. Without denying the superior title of the prior owner to the title a thief might assert merely by his possession of the goods, the needs of commerce required greater stability of title when dealing with a foreign seaman; a merchant had to be able to buy goods from one who might later turn out to have been a "pirate" (however defined), or a major legal impediment would limit international seaborne commerce. The solution to this problem appears to have been not only the easy acknowledgment of title transfers under Barbary states law for the benefit of corsairs (or "pirates"), but also the application in English law of the rule that:

> [I]f a Man commit Piracy upon the Subjects of another Prince or Republique (though in League with us) and brings the Goods into England, and sells them in a Market *Overt*; the same shall bind, and the Owners are for ever concluded, and if they should go about in the Admiralty to question the property, in order to restitution [*sic*], they will be prohibited.[175]

Englishmen's goods found in England were still to be returned to their English prior owner as a matter of statute law.[176]

A strange incident in 1615 demonstrates the vernacular use of the word by the highest officials of England to refer to an Admiralty in *rem case* in which the word "piracy" was not in fact used but the legal results were drawn without it. In 1615, Captain Newporte of the *Centaur* invited the Captain of the French ship *L'Esperance* to dinner off Cape Verde. Newporte then seized the French ship, whose owner turned out to be the politically influential Governor of Dieppe, Francois de Villiers Houdan. The English Admiralty court under Judge Daniel Dun decreed restitution of the vessel or its value to the French owner, ending a diplomatic crisis. There is no evidence of Captain Newporte's authority, if any, for his action, nor is there any known record of a criminal proceeding growing out of the incident. But in the Privy Council Register for 11 July 1617 there is a reference to money held "for satisfaction of a sentence given in the Court of Admyraltie on the behalfe of Viliers Howden, a governor of Deipe, concerning a pyracie committed upon a shipp of his by one capten Newporte."[177] Apparently, the word "pyracie" was used in a non-legal sense to mean something like "unauthorized taking," with an implication of crime; no clear legal sense seems to have been intended. The only legal action mentioned was the one for restitution. The word "sentence" does not seem to refer to any criminal court's action, but to the judgment of the Admiralty court in an *in rem* proceeding. It is in this context that it is possible to interpret the remark of King James I in 1624[178] referring to the East India Company as "pirates" merely for failing to pay him what he felt was his share of their lawful captures.

Outlawry, Crime and Licenses. From the mid 16th to the mid 17th centuries the word "pirate" and its derivatives was used more and more frequently in official English documents not related to property-rights cases before the Admiralty courts, and had acquired a meaning as a vague basis for ever-expanding English assertions of jurisdiction. In 1569 Queen Elizabeth had by proclamation denounced "all pyrats and rovers upon the seas" and declared them "to be out of her protection, and lawfully to be by any person taken, punished, and suppressed with extremity."[179] Until 1569 ships suspected of involvement in "piracy" and privateering without a commission had been treated with strict attention to English forms; they (the ships) were to be arrested only after arriving at English ports, and Vice-Admirals were simply warned against harboring or countenancing "pirates" within their jurisdiction as that jurisdiction was established by their commissions.[180] An indication of the difficulties of an increasingly centralized administration gaining legal control of English seamen continuing the ancient practice of re-capture without a license, abusing their opportunities and making general commerce of English as well as foreign merchants unsafe, lies in the recitation of fact

accompanying a Warrant from Queen Elizabeth to the Warden of the Cinque Ports (the English fortified towns strategically situated on the South coast) in 1577:

> Whereas there is an unyversall complainte made as well by our owne merchaunts and fishermen, as also by other merchaunts straungers, being the subjects of our frinds and allyes, of the great number of pyrats and sea rovers haunting and keeping the narrow seas and streames thereof . . .; We having care that our streames should be quyet and voyde of such malefactors, and understanding that sute hath ben made to our previe Counsell on the behalf of divers townes corporat of our realme, being annoyed by such pyrates and sea rovers haunting their coasts, to have license to sett fourth shippes for the chastening and repressing of the said malefactors, offering to do the same at their owne adventure, proper costs and chardges . . . by these presents do geve full power and authoritie unto you, to give and graunte commissions under the seal of your office of the Cinque Portes to as many, as well cities and townes corporat of this our realme, as you shall thinke good, as also to others whom you shall thinke such as will not abuse the same, to arme and sett fourth . . . to purge and clere the sea coasts of such evill persons . . .[181]

Despite the language of outlawry in the Proclamation of 1569, the Warrant of 1577 requires that the forms of English law be followed if any property were to change hands as a result of the law-enforcement effort. Persons licensed by the Warden of the Cinque Ports under this Warrant, if they wanted any compensation for their own costs to be paid out of "the proper shippes and goodes of the pyrats or sea rovers" they have caught, could do so only "after they have been thereof attaynted in the [form] of lawe as shall be thought convenyent by the [officials] of our Exchequier."[182] The procedure was set out in a series of commissions:

> Imprimis that the pyrats taken maye be brought to the next port, and there presented to the Vice Admirall, . . . or the next justice of the peace, who shall send them to the nexte gaol, their [*sic*: ther (there)?] to remayne untill they be tryed by order of justice.
>
> That the shippes and goods and merchandizes in the possession of the pyrats be . . . valued by the oth of fower honest, skilfull, and expert persons . . . and then delyvered to the custodie of the said customer . . ., their to remayne unto such tyme yt maybe appear how much thereof shall appertaine to these pyrats, and how much to others.[183]

"Customer" apparently meant "customs enforcer," i.e., person holding a license to patrol the coast and see to the enforcement of English import laws. The word "pyrat" seems to have been applied to smugglers as well as those whose acts fell within the legal terms used in the legislation of Henry VIII quoted above.

The term "pirate" was used also to cover Englishmen holding foreign commissions as "privateers" without the Queen's permission. In a Proclamation of 1575 the situation is clearly described:

> [H]er Majestie's will and pleasure is that none of her subjects should entermeddle in anie quarrells of anie forraigne prince or subjects, either on thone side or thother, (speciallie by sea), without her Majestie's license . . . Because now of late, under pretence of those forraigne services, manie piracies be dailie committed and done, yea in her Majestie's

> owne ports, and a great number of maryners . . . be torned from good subjects to be pirates . . . And because her Heighnes hathe further bin informed that divers of her officers . . . have wincked often at theis disorders . . . express warning to all her Heighnes' officers that whosoever shall be hereafter founde to be negligent in the apprehending of suche malefactors in the execution of this proclamation, or shall wincke at their doinges, . . . shall not onlie lose their offices, but shall incurr her Majestie's further displeasure, and be suerlie punished . . .[184]

This Proclamation apparently rested on the assumption that "piracy" was not illegal at international law but only at English municipal law, and that the English jurisdiction was felt to be grounded in the relationship between subject and sovereign, not in any jurisdiction over the acts of foreigners. Some territorial aspect to jurisdiction seems to be implied by the failure to distinguish between acts done in "her Majestie's owne ports" as well as in the narrow seas (which were, in any case, regarded as within English prescriptive jurisdiction even if only to exclude foreign ships or make them as a legal unit obey English law without actually applying English law within them) and in the Warrant issued at about the same time to the Warden of the Cinque Ports mentioning "oure streames." "Piracy" seems to have meant robbery or some other crime listed in the legislation of Henry VIII within the jurisdiction given then to Admiralty Commissions, and not acts done by foreigners outside of that jurisdiction. As noted above, that jurisdiction was territorial and extended to English flag vessels, but, despite the learned arguments of the minority in Regina v. Keyn, did not at this time in practice extend to foreign flag vessels on the high seas or foreigners within foreign vessels in English seas.

The notion that persons holding a foreign license might be enemies but not criminals even if acting on board English vessels or against English vessels, even if acting in English rivers and portions of the seas, may be seen in the restriction to English subjects of the terms of the Proclamation of 1575. In approving the draft Warrant of 1577 Lord Burghley, the head of Elizabeth's administrative office, indicated that this was his conception. He wrote to the Warden of the Cinque Ports, Lord Cobham, that if there were peace between England and Spain the entire fuss would subside "for lack of victims."[185] Further evidence that the word "pirate" was applied in 1577 without specific meaning at international law exists in a note by David Lewes, an Admiralty judge apparently consulted by Lord Burghley in this matter. At the bottom of a draft letter of assistance to Sir William Morgan ordering her Majesty's officials to help him prepare for his voyage of discovery and "also (if occasion so serve) to serve against the Turkes and Infydells," Lewes wrote "Instede of this make a permission to take pyrates, according to her Majestie's warrant."[186] It is hard to see how "Turkes and Infydells" were necessarily criminals at English law or how English law extended to places in which the discovery of unknown lands might be made. And there is no evidence at all

that "Turkes and Infydells" were conceived at that time as necessarily violators of international law in Europe. Indeed, it would seem that Lewes's note was not a legal translation of Morgan's request, but a denial of that request as it might apply to "Turkes and Infydells," restricting Morgan's authority to whatever authority was given to commissioners under the warrant of 1577.

The needs of English commerce and possibly imperial policy seem to have influenced Lewes, and two years later, in 1579, he issued a legal opinion in which the earlier documents other than the Proclamation of 1569 were ignored and the most expansive statement of English jurisdiction was given to the Lord High Admiral:

> First it is lawful for every man, by the lawes of the sea, to apprehend and take pyrats, being public enemies to all estates, without authority or commission.
>
> Secondly, the Queen's Majesty for proclamation published in Aprill ano 11° regni sui [1569], hath declared and denounced all pyrats and rovers upon the seas to be out of her protection, and lawfully to be by any person taken, punished, and suppressed with extremity.
>
> Thirdly, the first and principall part of the Lord Admirall's office by law is, and ever hath been, to clear the jurisdiction apperteyning to his office, being the sea, of pyrats and rovers haunting the same; in respect whereof he hath, and ever hath had their goods and chattels, being condemned and atteynted for the same.
>
> Fourthly, by his Lordship's letters patents it may appeare that he hath a more ample and larger power than to set forth ships to take pyrats.[187]

The implementation of this opinion, which seems to have no legal argument in it to support its conclusions of law, indicates that it was not taken seriously as a statement of international law by the Crown. Shortly after it was issued, Elizabeth complained to Lewes as an Admiralty judge, Sir Gilbert Gerrard as Attorney General, and 13 others involved in the enforcement of the law, that the 1577 warrant had not worked well. Instead of simply instructing the Admiral to suppress "piracy" by seizing "pirates" wherever he found them under the general law of the sea or as outlaws under English law as Lewes's opinion seems to have urged, she stiffened the enforcement in England of the English procedures by providing for small Commissions consistently with the statute of Henry VIII:

> To enquire searche and trie out . . . by oathes of twelve good men or otherwise by all waies and meanes you can devise of all manner of person or persons that have offended . . . contrarie to the lawes and statutes of this our realme or equitie and justice . . .[188]

The possibility that "equitie and justice" was intended to include international law seems to have been overborne by the need to dispose of the property of the "pirates," however defined, under the forms of English law. Those forms were essential to the prosperity of the Admiral however

inconsistent with the view Lewes might have had as to the legal justifications at international law for individuals unlicensed by the Crown to seize "pirates." When a fearless adventurer like Sir Walter Ralegh was involved, there was no thought of his simply seizing "pirate" goods any place. His appointment in 1585 to be "Vice Admiral" was restricted to "the countie of Cornwall and the sea quoasts thereunto adjoyning," and he was required to post bond against the possibility that he might fail to make true account "of all suche piratts' goods, concelmentes, profitts, and casualties, as shall happen to growe and rise within the precincte of the said Viceadmirallshippe." Fully half of the "pirate" goods coming to him in his new post was to go to his political senior, the Lord Admiral.[189] And in 1589 an Order in Council was issued that all English captures, with no exceptions, must be submitted to an Admiralty court to have the lawfulness of the prize adjudged; failure to abide by the procedure meant that the buyers got no title and the commission under which the prize was taken was to be considered void.[190]

Coke's Synthesis. There are many documents relating then to the growth of the English law regarding prize and commissions, letters of marque and reprisal under the centralized administration Lord Burghley organized for Queen Elizabeth. In them there is no indication that "pirates" might be taken without a commission,[191] and by 1599 there is some indication that the word "pirate" was acquiring yet another meaning in English, as a generic term carrying with it the implication of criminality and applied to English captains who ignored the rules under which the Admiral made his living:

> [H]er Majestie now commaundeth, that whosoever shall herafter intermeddle with, or take at sea, any shippe or vessell coming from, or going to, any port or haven belonging to the sayd Seigneurie of Venice, or Grand Duke of Tuskane, and shall break the bulke of the goodes of any such shipp or vessell, (though the prise be lawfull), before the same shalbe adjudged good prize in the high court of the Admiralty, such offendors shalbe executed as pirates, and the shippe, with the prize also, shalbe forfeited to her Majestie.[192]

The relationship between the English municipal law regarding "piracy" and the international law of "piracy," if there was any before 1600, received attention at the most prestigious levels of English municipal law in 1615 when Sir Edward Coke, Chief Justice of England at the Common Law criminal court of King's Bench, presided over two cases in which "piracy" was an issue. The reports of these cases by Rolle are important to an understanding of the English conception of "piracy" as the word entered common legal usage and England became the world's greatest sea power.

Marche's Case, alias Palachie's Case,[193] concerned a capture of a Spanish ship by a Moroccan official during a time when England regarded Morocco and Spain as legally at war.[194] Acknowledged as a subject of the King of Morocco, Palachie represented to the court that:

He is the Moroccan Ambassador to the Netherlands and that on the sea he captured a Spanish ship (there being war between the King of Barbary [*sic*] & the King of Spain) and then coming with the ship in England, & thereupon the Spanish Ambassador complained against him as a Pirate, & diverse Civil Law experts were commanded by the King [of England] to give their opinions on the matter. They agree that an Ambassador is immune from local law by the law of nature & of Nations, but if he commits any offense against the law of nature or of reason, he loses his immunity; not so if he offends only a positive law of any particular country, such as laws regarding clothing, etc. And many other questions were answered by the civilians; but as we [the panel][195] and other common law Justices are asked for our opinions, we should say that the civilians have missed the point, because the Defendant is being tried here for piracy, and being tried under the statute of 28 Henry VIII cap. [15? The text has a blank space here], which says that piracy should be tried as a felony committed on land under the common law. And what is charged as piracy here is not piracy nor would it be even a felony had it been committed on land [the report repeats some words here and seems slightly garbled] because it is legal for one enemy to capture another on land. According to our opinion and the relevant statute [which is cited] we hereby rule accordingly, that if anybody wants to bring charges against another under the pertinent statute [citing another] he who is robbed must prove that he himself was a legal friend of our Lord the King, and that he who robbed him was within the jurisdiction of our Lord the King or in legal friendship, because if the taking was by an enemy it was not robbery but lawful capture. As to Palachie's Case, we agree with the civilians that the [Spanish] Ambassador could proceed against him civilly for the goods that are here, for those are in friendly territory, (R[olle]: I question whether it seems that by the law of nations an enemy can legally take from another [in neutral territory?])Dod. suggests that rights of reprisal might be significant; Coke suggests that if goods were taken illegally and not restored, the King [of England] might simply return them.[196] Coke and Dod. also said that nobody could be hanged for piracy based on robbery on the Thames [River] because that is within an English county [thus outside the Admiral's jurisdication?].[197]

In the second case, Hildebrand, Brimston, & Baker's Case,[198] English shipowners were trying to recover their ship in an *in rem* proceeding at Admiralty. The ship and cargo had been captured by "pirates." The petitioners sought the intervention of the King's Bench Common Law court to prohibit further Admiralty proceedings, apparently fearing the Admiral's interest in "pirate" goods would make it difficult for them to recover what they felt was theirs.

Those men [petitioners] were the owners of a ship, and sent it to the Indies to trade. On the high sea the sailors took the ship through "Piracy" (as is assumed in the Admiralty court) and as the ship returned here to the Thames the Admiral seized it and all that is on it as "pirate goods," claiming it all for himself under the terms of his Royal warrant, and the merchants are taking the sails and tackling out of the ship and are suing for them in the Admiralty court. The Petitioners now pray for a "Prohibition" to that court, to stop the action. Coke agrees that the Admiralty has, by the grant of the King, all "Pirate goods;" i.e., the property of pirates. But the Admiralty does not have the goods which pirates took from other men, because that is not within the Royal grant; the owners have those things. And if the Admiralty wants those goods, it may not sue for them in prize because they are within the body of a county of England, that is, on the Thames. Dod.: If a man borrows a horse, and commits a robbery while riding it, the horse is not forfeit; so here, the ship is not forfeit simply because those who were in the ship committed piracy.

> Coke agreed, and he asked the Petitioners if they were convicted of piracy; to which they replied that nobody had been convicted. So the Prohibition was granted on the ground that the taking had been within the body of a county of England.[199]

It seems plain from both these cases that Coke was primarily concerned with the division of jurisdiction in England between the Admiralty courts and the Common Law courts; that to him "piracy" was simply the Admiralty word for an offense against the law of England that was based on the "Civil Law," i.e., the Roman law based system that English courts with extra-territorial reach applied to transactions occurring outside England, and not the Common Law; that it carried legal results at the Civil Law which were not the same as the legal results the same action would have drawn at Common Law.

In summarizing the legal situation long after these cases were decided, Coke addressed "Piracies, Felonies, Murders and Confederacies committed in or upon the Sea" by first noting that James I's amnesty for felons given on his coronation in 1602 did not extend to pirates because theirs was not an offense at Common Law, but at Civil Law, outside the kingdom, without the legal result of forfeiture of land or corruption of "bloud" (i.e., disinheriting the children).[200] His entire discussion of the substance of the offense is based on the technical construction of statutory English law except for a major assertion that only subjects of England could legally be tried for "piracy." To Coke "piracy" at Common Law was a type of "petit treason," and those who are not subject to the King of England cannot break the tie of allegiance, since there is no such tie, therefore they cannot commit treason, therefore, with only minor exceptions, there cannot be a foreigner guilty of "piracy."[201] Since resident foreigners, denizens of the realm, do come within the allegiance of the King for some purposes, it might appear that Coke's language is somewhat too general and his conclusion too broad, but since "piracy" cannot occur within the realm, where the Common Law applies to the exclusion of Civil Law, that exception would not apply and Coke's analysis seems beyond dispute. The effect of Coke's approach, which seems to set out the traditional English position as reached by a judge concerned with questions of jurisdiction and limiting the Crown's discretion, is simply to make "piracy" the legal word of art that Admiralty tribunals and commissions set up under the Act of 1536 applied to some but not all of the "crimes" listed in that Act. As a kind of "petty treason," it would seem that all cases of "mutiny" in an English vessel, i.e., a vessel with a master whose authority over the ship's company and passengers is fixed by English law, could be denominated "piracy." Also, an attack by one English vessel on another could be denominated "piracy" since both vessels would have been conceived to have a legal existence deriving from a common superior, the Admiral or the Crown, and an attack by one on the other would necessarily involve a breach of legal subordination by the attacking vessel unless

otherwise authorized by the Admiral or Crown. But, if the law regarding "piracy" were part of the criminal law of England and derived from the feudal conception of treason, it could apply only to those within the allegiance of the Crown in England, just as King John's Norman knights could not commit "treason" by attacking John's English subjects, whatever else their acts may have meant legally. Under this "treason," personal allegiance, conception, the English Admiral's jurisdiction, and thus the jurisdiction of Commissions set up under the Act of 1536, would apply only to English vessels, not to foreign vessels, in navigable waters (of course, all vessels *infra corpus comitatus* would be subject to the Common Law courts of the Shire, not the Admiralty at all). To Coke and the Common Law judges of England in the early 17th century, Admiralty jurisdiction itself must then have seemed in a sense territorial, with English ships filling the role of counties in England, and foreign vessels being ruled by the municipal laws of whatever countries gave their captains authority to command the ships' companies and passengers.

One major gap must have disturbed Coke, although no mention of it appears in his known writings. What law governs the actions of a foreign vessel attacking an English ship, or an English vessel without license attacking a foreign ship? In both those cases, the breach of allegiance apparently necessary before the label "piracy" could attach, would be present only in the case of an Englishman aboard the foreign attacker or the fortuitous presence of an Englishman aboard the foreign vessel attacked. In the first case, it would seem that the assault on an English vessel would likely have been analogized to a similar assault in an English county's territory; the foreign attacker would have been guilty of an assault or robbery within the jurisdiction of the Admiralty under the Act of 1536, thus triable by a Commission; but the crime would not have been "universal" or "law of nations" "piracy," it would have been "assault" or "robbery" or some Admiralty term, perhaps "piracy," equivalent to that. In the second case, there would have been no crime in England unless the breach of the terms of a commission or letters of mark and reprisal justifying the forfeiture of a deposit or other civil penalty. The gap in English law and jurisdiction here seems to have been the basis for the difficulties Queen Elizabeth's administration tried to solve by the Warrant of 1577, and the path by which the vernacular word "piracy" began to enter the legal vocabulary applied to Englishmen injuring foreigners abroad.

It should be noted that foreigners aboard English vessels were, by Coke's notion, "denizens" within the allegiance of the King of England, thus there was a territorial basis in the nationality of a vessel for attaching English jurisdiction to some foreigners. Coke's conception of the "high seas" (or navigable waters) did not apparently make them part of any "territorial" part of England or trace the Admiral's jurisdiction to any concept of territoriality other than the analogy between a vessel itself and a bit of English territory for the purposes of jurisdiction, and the notion that Common Law courts'

jurisdiction stopped at the edge of navigable waters. The Admiral did not rule the seas, only English vessels on the seas and perhaps Englishmen in foreign vessels for some limited purposes where they, as the "denizens" of a foreign sovereign, had to satisfy two allegiances and could be the victims of English "pirates" in the traditional sense as persons against whom a "petty treason" at English law could be committed.

From this point of view, the later notion that to be "piracy" there had to be an exchange between two vessels of different legal subordination was a complete reversal of the "petty treason" definition in English Common Law as applied in Admiralty. Also, from this point of view, the notion was excluded that England ruled the British seas as a matter of territorial right as Grotius might have argued. The Grotian view of *mare clausum* might have had considerable appeal to statesmen, but required a reconsideration of the fundamentally feudal English conceptions of jurisdiction. It was, of course, out of these inconsistencies that the confusions of Regina v. Keyn grew, as the English assertions of territorial rights in the "Narrow Seas" (the English Channel), the North Sea and elsewhere, or even in the three-mile strip of navigable waters surrounding the British Isles, were not matched by legislation placing those "territories" within the body of a county or within the "territorial" jurisdiction of the Admiral as the law-giver for English ships.

Summary. Based on Queen Elizabeth's Warrants of 1569 and 1577, and the conceptions of territoriality that seem to underlie them, and the summary by Coke in the reign of James I some fifty years later emphasizing a breach of feudal personal ties as the root of the conception of the substantive crime of "piracy," it seems clear that later English assertions of jurisdiction over foreign "pirates" for their acts against other foreigners, or even against English vessels abroad, did not grow from any "natural law" concept of universal jurisdiction over thieves, or the universality of property rights. The assertions grew from the impact on English vessels or English persons of foreign depredations, the impact on an English ship being analogized to an impact amounting to physical presence in an English county, and the Admiral's jurisdiction being that of a county judge with regard to events within English traditional jurisdiction but outside the physical bounds of an English county. It seems that this conception is also what gave rise in later years to the notion, first expressed by Sir Leoline Jenkins in 1680,[202] that to be "piracy" two ships had to be involved; one of them being a ship flying the flag of the country whose "Admiral" was seeking a jurisdictional basis to hear the case. There is apparently no basis in the early English law for "universal" jurisdiction over foreigners abroad in connection with acts denominated "piracy."

One other case before the King's Bench at about this time appears to have ended the question of the legal status of the Barbary states as far as concerns

English Common Law. In 1617 an Englishman named Howe was alleged to have sent his servant, Saddocke, with a known counterfeit jewel to "Barbary," where the jewel was sold for 800 pounds English money to the "*Roy de Barbary*." The King of Barbary, after discovering the fraud, imprisioned Southerne, another Englishman there, until Southerne repaid the value of the fraud. The transaction appears to be similar in sense to holding a foreign merchant through a capture under letters of marque and reprisal, responsible for the value of goods wrongfully taken by his countryman, except that there appears to have been no attempt first to exhaust the English remedies, perhaps because the "King of Barbary" did not choose to submit himself to English remedies as a matter of royal pride. Southerne then sued Howe for the amount of his ransom. Lord Popham threw the case out saying that there should be no legal indemnification to the plaintiff on the basis of his imprisonment without conviction in Barbary because that was merely an act of a "barbarous King," for which he should seek remedy through a petition to the Crown, not through the courts.[203] Whatever else might be doubtful in the conclusion or reasoning of the case, the dictum that the "barbarous King" was nonetheless a King for being barbarous, implying that the Barbary states were states for purposes of English municipal law, and their rulers entitled to the dignity of foreign sovereigns, was clear. The case was frequently cited afterwards for that proposition, despite the fact that the same result would have flowed had the King been merely a pirate chief (why should Howe have been responsible for the lawless acts of an outlaw any more than for the lawful, or legally unchallengeable, acts of a King?).[204]

From this brief survey, it would seem that there were several different conceptions of "piracy" reflected in the English municipal law of the late 16th and early 17th centuries and within those conceptions, several major issues of definition. One conception, expressed most persuasively by Lord Coke, was that "piracy" was not at all part of the Common Law of England, but was part of the "Civil Law" enforced in England in appropriate cases. To Coke, those cases were only those to which English concepts of jurisdiction gave purview to English officials responsible for enforcing the Civil Law. With regard to "piracy," he used the word to refer to a host of Civil Law offenses within the jurisdiction of the English Admiral by tradition and Royal delegation. That jurisdiction gave the Admiralty courts purview over offenses that would be Common Law offenses had they been committed with the "*corpus comitatus*," the body of an English county, and included any forcible takings, whether properly considered "robbery," "murder" or, apparently, any other violation of the King's peace. The people subject to that jurisdiction were those within the King's "ligeance," including English subjects wherever they might be, and foreigners acting within the territorial jurisdiction of the Admiral, i.e., in English ships. It did not apply to foreigners who acted under commissions of their own sovereigns, regardless of where

and who their victims. Nor did it apply to foreigners without commissions acting beyond the "territorial" reach of English jurisdiction (including ships administered under English law). To Coke, the jurisdictional rules and ties of allegiance were the essence of the matter; the law defining the substance of the offense could be changed by statute.

To David Lewes and presumably other Admiralty judges and officials, the word "piracy" carried much wider connotations. There appeared to them to be a wider general law forbidding "piracy" under which the Admiral and his delegates could act, if not indeed any person with or without commission. But what the precise definition of "piracy" was, whether it included all "Turkes & Infydells" regardless of their political organization or specific activities, and what happened to "pirate" goods once captured, were questions they seem to have left unanswered. Their conception seems to have derived from the use of the term "piracy" in vernacular English, taking what seemed politically useful, and ignoring those parts of the common usage, like reference to "lawful prize," that seemed to get in the way. The highest officials of England seem from time to time to have adopted this common usage, but despite Lewes's position on the Admiralty court and as a Commissioner under the statute of 28 Henry VIII, his general notions appear never to have been translated into legal documents or English legal practice.

To Sir Julius Caesar and other Admiralty judges, the concept of "piracy" was important as part of the Civil Law of property applied through *in rem* proceedings by English Admiralty courts. There seemed to be a tendency to use the word in connection with property seized within Admiralty jurisdiction without the authority of a commission or letters of marque and reprisal. But the legal result of that usage was connected with the disposition of the property, not the person who seized it. The usage did not reflect a concept of criminal law, but of property law; the 16th and 17th century English Civil Law version of the ancient Roman law of postliminium.

Notes

1. A.C. Spearing, *Criticism and Medieval Poetry* (2nd ed. 1972) 7.

2. Raffles, Lady Sophia, *Memoir of the Life and Public Services of Sir Thomas Stamford Raffles* . . . (London 1830), printing what appears to be a selection of the original letters of her husband, at p. 45-46.

3. *Id.*, p. 48. The entire letter, beginning at p. 39, is worth reading, especially p. 45-46, 48, 77-82, for its eloquent appeal to the concept felt by Raffles to be embodied in the word "pirate" in order to justify political action, contrasting with its gingerly referral to the jurisdiction of the Malay Rajahs as the enforcement authority to be applied. He apparently felt that what the young nobles were doing was not "piracy" at international law, but should be a crime under the law of the Malay sultanates from which the "pirates" apparently derived their licenses to interfere with peaceful shipping. See below Chapter IV.

4. 2 Phillipson, *The International Law and Custom of Ancient Greece & Rome* (1911) 370.

5. i, 367; vi, 58; ix, 588; xii, 64.

6. xv, 385, 426; xvii, 425.

7. i, 5-7, 8.

8. 1 Homer, *The Iliad* (A.T. Murray, transl.) (LCL 1971) 30-31, 266-267, 424-425; 2 *id.* 458-459; 1 Homer, *The Odyssey* (A.T. Murray, transl.) (LCL 1960) 72-73, 320-321; 2 *id.* (1953) 102-103, 182-183; Thucydides, *The Peloponnesian War* (C.H. Smith, transl.) (LCL 1969) 8-9, 12-13.

9. "To destroy utterly, sack, waste, always of cites," Liddell & Scott, *Greek-English Lexicon* (8th ed. 1897) 354.

10. "Booty, plunder," *id.* 881; the word is "*leis*" in the Epic dialect, *id.* 889.

11. Nestor's interview with Telemachus, *Odyssey* iii, 73, as translated by Murray in 1953, cited note 8 above. "*E ti kata preksin e mapsidios alalesthe hoia te leisteres hupeir hala toi t'aloontai psuchas parthemenoi kakon allodapoisi pherontes?*"

12. Hesiod, *The Homeric Hymns & Homerica* (H.G. Evelyn-White, transl.) (LCL 1954), Hymn III to Delian Apollo 352 at p. 356-357. *O kseinoi, tines este? E ti kata . . . leisteres . . .?* The first 177 lines of this Hymn are addressed to the Delian Apollo; the rest, including the lines cited here, to the Pythian Apollo. Homer, *The Odyssey of Homer . . .* (T.A. Buckley, transl. and notes) (1891) 349 note 1.

13. i,5. The formula is different, but again the word derives from "*leisteia,*" not "*peirato:*" "*[D]elousi de ton te epeiponton tines eti kai nun, hois kosmos kalos touto dran, kai hoi palaioi ton poieton tas pusteis ton katapleonton pantachou omoios erotontes ei leistai eisin, hos oute hon punthanontai hapaksiounton to ergon, hois te epimeles eie eidenai ouk oneidizonton.*"

14. Alfred Zimmern, *The Greek Commonwealth* (5th rev'd ed.) (1931) (Oxford paperback ed., 1961), p. 237-238.

15. Autenrieth, *Homeric Dictionary* (R.P. Keep, transl.) (1885) 252.

16. Herodotus, [*The Persian War*] (A.D. Godley, transl.) (LCL 1931) 462-463 (ii, 152): " . . . *elthe chresmos hos tisis heksei apo thalasses chalkeon andron apiphanenton.*"

17. Demosthenes, *De Halonneso*, 2 *On Postliminium*, quoted (in Greek) in 2 Phillipson, *op. cit.* note 4 above, at p. 375 note 2: "*touton de ton logon, hos ouk esti dikaios, ou chalepon estin autou aphelesthai. Hapantes gar hoi leistai tous allotrious topous katalambanortes kai toutous echurous poioumenoi enteuthen tous allous kakos poiousin. Ho de tous lestas timoresamenos kai kpatesas ouk an depou eikota legoi, ei phaie, ha ekeinoi adikos kai allotria eichon, tauth heautou gignesthai.*" The words "*leistai*" and "*lestas*" are translated "pirates" also by J.H. Vince. 1 Demosthenes, [*Orations*] (J. H. Vince, transl.) (LCL 1954) 151-153. See also "*leston*" at p. 156 translated "pirates" at p. 157. On "*leistrikos*" as a form of political economy accepted as normal in ancient Greece see below and quotation from Aristotle at note 26 below.

18. What is addressed here are sources focusing on Roman law and Roman perceptions. Since many educated Romans were literate in Greek, and some of the leading historians of Rome, such as Plutarch and Polybius, were of Greek heritage, writing in Greek, a simple distinction based on language would be misleading.

19. 2 Cicero, *Contra Verres II* (L.H.G. Greenwood, transl.) (LCL 1953) iv, 21, at p. 304: "*Fecisti item ut praedones solent; qui cum hostes communes sint omnium . . .*" This passage is translated in the same work (p. 305): "*You behaved just as the pirates are wont to behave. They are the general enemies of all mankind . . .*" Cp. 2 J.B. Scott, *Law, the State, and the International Community* (1939), p. 326: "Pirates . . . are the general enemies of all mankind," citing Cicero, *The Verrine Orations* II, iv, 21. A more precise analysis of the word "*praedones*" would seem unnecessary here; one etymological study is enough for one book. Derivatives of the Latin word "*praedor,*" "to make booty, to plunder, spoil, rob," Lewis & Short, rev'n, *Freund's Latin Dictionary* (Andrews, ed.) (1879) 1417, are commonly translated "pirate" or "piracy."

20. 14 Livy, *History of Rome* (A.C. Schlesinger, transl.) (LCL 1959) cxxviii at p. 159. The period described is 38-37 B.C.

21. *Id.*, p. 158: "*Cum Sex. Pompeius rursus latrociniis mare infestum redderet nec pacem, quam acceperat, praestaret, Caesar necessario adversus eum bello suscepto duobus navabilus proelis cum dubio eventu pugnatio.*" Again, it would seem unnecessary to delve into the precise usage of another Latin word, "*latrociniis,*" whose relevance to this study is marginal. Derivatives of the Latin word "*latro,*" "hired soldier, brigand," Lewis & Short, *op. cit.* note 19 above 1041, are commonly translated "pirate," "piratical," "piracy," etc.

22. The most important, repeated by several later translators and scholars to support the assertion that "piracy" was a way of life to Homeric-Age Greeks, although the passage does not use the word "*peirato*" or any of its derivatives in the original, is from the *Odyssey*, ix, 39-42: Odysseus is speaking:

> *Iliothen me pheron anemos Kikonessi pelassen, Ismaroi. Entha d' ego polin eprathon, olesa d' autous, ek polios d' alochous kai ktemata polla labontes dassameth', hos me tis moi atembomenos kioi ises.*
>
> The wind bearing me from Ilium made me approach the Ciconians in Ismarus; and there I laid waste the city, and destroyed them. And taking their wives and many possessions out of the city, we divided them, that no one might go deprived of an equal share . . .

This careful translation by T.A. Buckley in Homer, *op. cit.* note 10 above, 116, avoids the English word "pirate."

23. Of course, Odysseus's band was poetically a group of warriors without fixed base seeking to return to Ithaka after the sack of Troy (*Ilium*). Although they derived their political existence from allegiance to Odysseus, the "King" of Ithaka, their precise composition and Odysseus's own legal power to mount raids

against towns not in communication or "at war" with Ithaka is not examined. Presumably to the author(s) of the *Odyssey*, the question did not arise.

24. The sack of Troy is usually placed several centuries earlier by scholars. But M.I. Finley convincingly argues not only that the fabled sack never took place, just as the stirring events of the epic *Niebelungenlied* and *Beowulf* could never have taken place outside of poetic imagination, but, more importantly, that the world reflected in the Homeric poems was the world of the historical tradition of their author(s), reflecting realities of the 10th and 9th centuries B.C. M.I. Finley, *The World of Odysseus* (2nd rev'd ed., Pelican Books 1978) 48-49.

25. Finley, *op. cit.*, p. 63, after quoting the passage in Homer translated by Buckley in note 22 above.

26. *Id.*, p. 64. Aristotle mentions plundering [*leistrikos*] as one of five general categories of political economy: "the pastoral, the farming, the freebooting [*sic*], the fishing, and the life of the chase [*Hoi men oun bioi tosoutoi schedon eisin, hosoi autophuton echousi ten ergasian kai me di' allages kai kapelaeias porizontai ten trophen, nomadikos, georgikos, leistrikos, halieutikos, thereutikos*]." Aristotle, *The Politics* (c. 350 B.C.) 1256b, (E. Barker, transl., 1946) 20 (1975 ed.) I, viii, 8.

27. J. Bronsted, *The Vikings* (1965), *passim* esp. p. 26-27. The word "Viking" seems to have an obscure origin unrelated to attacks or attempts.

28. 2 Polybius, *The Histories* (W.R. Paton, transl.) (LCL 1954) iv, 68, p. 461. In the original Greek the key phrase is "*Euripidas, echon Eleion duo lochous meta ton peiraton kai misthophoron . . .*"

29. "*[Amyntas]. . . epephane paradoksos peiratais tisin, apestalmenois hupo Demetriou . . . hoi Rodioi biasamenoi ton neon autandron ekurieusan, en hois en kai Timokles ho archipeirates.*" 10 Diodorus Siculus, [*History*] (R.M. Greer, transl.) (LCL 1954) xx, 97, 5 at p. 400-401.

30. 10 Livy, [*History of Rome*] (E.T. Sage, transl.) (LCL 1935) xxxvii, xi, 6-7, p. 320-321: "*Hinc Nicandro quodam archipirata quinque navibus tectis Palinurum iusso petere . . .*"

31. See Plutarch's description of the same events at notes 36-39 below.

32. 14 Livy, *op. cit.* note 20 above, xcix, p. 122-123: "*Cn. Pompeius lege ad populum lata perequi piratas iussus, qui commercium annonae intercluserant, infra quadragesimum diem toto mari eos expulit; belloque cum his in Cilicia confecto, acceptis in deditionem piratis agros et urbes dedit.*" The Cilicians [Kilissi] had had an unsavory reputation at least as early as pre-Aristotle Greece. See Demokos, "All the Cilicians are bad . . .," in *The Greek Anthology* (Jay ed.) (Penguin 1981) No. 38 at p. 47.

33. 5 Plutarch, *Parallel Lives of Greeks and Romans* (C.B. Perrin, transl.) (LCL 1917) xxiv, p. 173-175.

34. *Id.*, p. 175.

35. This Roman hegemony was achieved not by mere assertion or, indeed, by simple conquest, but in the main by diplomacy and by treaty. See Livy, *Rome and the Mediterranean* (H. Bettenson, transl.) (Penguin Classics 1976), *passim*, for a lively English translation of the principal part of books 31-35 of Livy's History. The Roman hegemonial system involved military alliances in return for which Rome guaranteed the personal position of the person invested as the embodiment of the legal power of the client state. A very clear and evocative description is Sallust, *The Jugurthine War* (J.C. Rolfe, transl.) (LCL 1931, 1960) 14. A lively modern translation is Sallust, *Jugurthine War; Conspiracy of Cataline* (S.A. Hanford, transl.) (Penguin Classics 1963). See esp. the speech of Adherbal to the Roman Senate in 116 B.C. in the Loeb edition 14.1-25 at 14.7, p. 158; Penguin edition ch. IV, p. 47 sq. The British imperial system appears in many ways to have been patterned on the Roman, with "recognition" under the British interpretation of international law filling the place of investiture under the donation of the Roman Senate. Since the British interpretation of international law was not necessarily identical with international law objectively derived, and the municipal constitutional and inheritance law of the state principally involved actually determined representational powers, not international law as such, the British practice amounted to the establishment of British imperial law and the extinguishing of the foreign state as a person under international law; it led to many wars when pressed as a matter of law beyond British political power since it was essentially a political, not a legal, maneuver. Examples are dissected in Rubin, *International Personality of the Malay Peninsula* (University of Malaya Press 1974) *passim*, particularly the acquisition of Singapore as analyzed at p. 167-169, 253-277. The process is analyzed in some detail in chapter IV below.

36. Plutarch, *op. cit.* note 33 above, xxv, p. 177: "*egrapse de' Gabinios, heis ton Pompeiou sunethon, nomon ou nauarchian, antikrus de' monarchian autoi didonta kai dunamin epi pantas anthropous anupeuthunon.*"

37. Just what these "crimes" were, and against what law other than the Roman hegemony that did not become law until after the conquest and the evolution of Roman conceptions of law under Augustus, is not clear. Furthermore, it appears that their "unpardonable crimes" consisted of resistance to the Roman sovereignty, since those who had participated in commerce-raiding but who surrendered seem to have been freely and humanely treated as conquered enemies. This passage looks like an illogical interpolation by a post-Augustan Greek scholar guarding his safety under a rigid Roman imperial system more interested in justifications than in historical accuracy.

38. Plutarch, *op. cit.* note 33 above, xxvi-xxviii, p. 181-187. It has been suggested that the "pirates" whom Pompey had settled at Dyme returned to sea roving about 45 B.C. Cicero, contemplating a trip to Achaia in July 44 B.C., just four months after Julius Caesar's assassination in the Roman Senate chamber,

wrote: "It is not surprising that the Dymaeans, having been driven out of their land, are making the sea unsafe." 6 Cicero, *Letters to Atticus* (D.R. Shackleton Bailey, transl. and notes) 151 (1968), letter XVI.1 (409) para. 3. In the original Latin: "*Dymaeos agro pulsos mare infestum habere nil mirum. Id.* 150. Shackleton Bailey suggests that the "pirates" who had been settled there by Pompey in 67 B.C. and the Dymaeans were the same folk, apparently "dispossessed by Caesar and returned to their old calling." *Id.* 281. Cicero does not seem shocked or to have any reference to criminality when he refers to them as "pirates" a few days later in another letter to Atticus: "It looks as though the legions can be dodged more easily and safely than the pirates, who are said to be in evidence [. . . *devitatio legionum fore videtur quam piratum, qui apparere dicuntur*]." *Id.* 164–165, letter XVI.2 (412). The "pirates" and the "legions" seem equally hazards to safe travel. The "legions" referred to were presumably the forces under the control of Marc Antony seeking to wrest control of Rome from the Senate after the death of Caesar. It was indeed one of the legionaries under Antony's command who killed Cicero attempting to escape Italy about a year and a half later. See text at note 47 below.

39. *Id.*, xxix at p. 189–191: ". . . *alla tous te peiratas ekselon etimoresato, kai ton Oktaouion . . . apheken.*"

40. Those results were essentially to put the losers at the discretion of the victors; the men were frequently killed and the women enslaved. There were no trials, no accusations or defenses, no lawyers involved. See Euripides, *The Trojan Women* (415 B.C.). See below.

41. Livy, *History*, i. 23. An excellent modern translation of Books I–V of this work is Livy, *The Early History of Rome* (A. de Sélincourt, transl.) (Penguin Classics 1971). See p. 59–60.

42. *Id.*, p. 60–61. Livy's version may reflect more religious myth than political history. Modern research in this area began with the reanalysis of Roman and Greek religious and political forms by N.D. Fustel de Coulanges, *La Cité Antique* (1864). See Fustel de Coulanges, *The Ancient City* (transl. unknown) (Doubleday Anchor Books 1956), Introductory note at p. 5–6.

43. See below.

44. Livy, *op. cit.* note 41 above, i, 32, at p. 69–71.

45. *Id.*, p. 381–383.

46. Cf. Cicero, *De Officiis*, I, xi, 36: "As for war, humane laws touching it are drawn up in the fetial code of the Roman People under all the guarantees of religion; and from this it may be gathered that no war is just [lawful?], unless it is entered upon after an official demand for satisfaction has been submitted or warning has been given and a formal declaration made [*Ac belli quidem aequitas anctissime fetiali populi Romani iure perscripta est. Ex quo intellegi potest nullum bellum esse iustum, nisi quod aut rebus repetitis geratur aut denuntiatum ante sit et indictum*]." Cicero does not say that Rome never fought a war without going through the religious rituals, only that such wars should not be considered "lawful." The Latin word "ius" in this context seems to relate solely to the form of "law," not to "justice" or morality. The English distinctions between "justice" and policy-based "law" are in many cases reversed in Latin, or simply disregarded; in this case Cicero was obviously referring to the "jus fetiali" adopted as a matter of discretion into Roman positive law and not reflecting "justice" except indirectly. To Cicero, "true law [*vera lex*]" was moral and overrode the positive law in cases of conflict. Cicero, *De Re Publica*, III, xxii, 33. Grotius, writing in the 17th century quoted Cicero's linking of the form of declaration with the phrase "*bellum iustum*" as an aspect of Roman law to support the very different notion that to be "lawful" under his concept of the law between states war must be declared publicly: "*Sed ut iustum hoc significatu bellum sit . . . ut audivimus, ut et publice decretum sit, et quidem ita decretum publice ut eius rei significatio ab altera partium alteri facta sit.*" Grotius, *De Iure Belli ac Pacis* (1625, 1646) III, iii, 5 (photographic reproduction 1925). F.W. Kelsey, translating this passage for the Carnegie Endowment edition of 1925, correctly translates "iustum" as "lawful." 3 Grotius, *On the Law of War and Peace* (CECIL 1925) 633–634. This double transposition of a Roman positive law form into international law, and the reversal of meaning between "ius" and "lex" as the correct word for "moral law" or "justice" as distinguished from positive law, has created much confusion in later writings. In fact, Grotius seems to have read Cicero entirely correctly; to Grotius a "declaration of war" was, despite the quoted passage, clearly not required to bring into play the international law of war. An attack against a state or a refusal of reparations when legally due were, to Grotius, equivalent to a declaration of war under natural law, thus reducing the formal declaration to its place in positive municipal law. Id., III, iii, 6.1: "*Naturali iure aut vis illata arcetur, aut ab eo ipso qui deliquit poena deposcitur, nulla requiritur denuntiatio.*" In fact, public declarations of war in the days of the Roman empire were exceptional despite the religious ceremonies given such emphasis by Livy and Cicero. 4 Dio Chrysostom, *Discourses* (Discourse 38, To the Nicomedians) (H. Lamar Crosby, transl.) (LCL 1956) 48 at p. 67: ". . . while peace is proclaimed by heralds, wars for the most part take place unproclaimed [*eirene men epikerussetai, polemoi de hos epi to pleiston akeruktoi gignontai*]." Both "*epikerussetai*" and "*akeruktoi*" come from *kerusso*—to proclaim. It seems clear from the context that Dio Chrysostom, discoursing shortly after his return from exile in 96 A.D. (*id.* 49; 1 *id.* (Cahoon introd.) viii) apparently thought it common knowledge at that time that wars could be begun without formality, but some formality was needed to end them. Grotius quoted this passage from Discourse 38 to support his assertion that the law of nature allows people to dispense with the formality of declarations of war at least in some cases. In fact, the fetial practice had died out long before Livy described it and had become a more

political than religious ceremony fully a century or two prior to the time of Livy and Cicero. Ogilvie, *A Commentary on Livy Books* 1-5 127-130 (1965).

In addition to overstating the importance of religious ritual to the legal classification "war" or "peace" in practice, Cicero also seems to have confused to some extent the moral or legal right of a state to fight a war and the right of an individual to assert soldiers' privileges under the law of that state. He quotes Marcus Cato the elder for the proposition of Roman law that "the man who is not legally a soldier has no right to be fighting the foe [*negat enim ius esse, qui miles non sit, cum hoste pugnare*]" (*De Officiis*, I, xi, 37), but does not assert that an enemy is bound by the same rule, thus seems to imply that it is not a rule of natural law or international law, only a rule of Roman municipal law applied to determine whether a Roman citizen was exercising a military privilege to kill or not should the question arise.

47. The complex politics of Rome at this period are not important to the present analysis. Cicero had sided with Pompey the Great against Julius Caesar at times, and with the Senatorial party of Brutus and Cassius against the triumvirate of Marc Antony, Lepidus and Octavian that seized power on the death of Julius. See 7 Plutarch, *op. cit.* note 38 above, 83 sq., esp. p. 206-207 making clear Plutarch's opinion of Antony's responsibility for Cicero's death, and the reasons for it. See also 3 Cicero, *Letters to Atticus* cited note 38 above, 179-181, letter VIII.8 (131), paras 4-5, and letter VIII.2 (152), penultimate paragraph, for insight into Cicero's relations with Pompey in 50 B.C.

48. See note 19 above.

49. *De Officiis*, III, 29: "... *Nam pirata non est ex perduellum numero definitus, sed communis hostis omnium: cum hoc nec fides nec jus jurandum esse commune.*"

50. Grotius, *op. cit.* note 46, II, xiii, 15; Kelsey translation volume at p. 373. As Grotius interpreted the quoted portion of Cicero's work, Cicero argued a *non sequitur*:

> That there is no perjury if the ransom for life, which had been agreed upon even under oath, is not paid to pirates, for the reason that a pirate is not entitled to the rights of war, but is the common enemy of mankind, with whom neither good faith nor a common oath should be kept.

Cicero did not in fact mention the "rights" of war, and, as Grotius pointed out, there seems no reason why an oath to God should not be kept with even brigands; it hardly seems logical or moral to construe a violation of the law to lead to the conclusion that the violator is necessarily no longer protected by law. Even convicted criminals are in fact legally protected in many ways in many legal systems, including that of ancient Rome.

51. See below. Nothing has been found in Cicero's writing or Plutarch's or any other Roman sources of that time that can fairly be read to relegate "pirates" to overall treatment as criminals under Roman or any other law in classical times.

52. Cicero, *De Officiis* III, xii-xvi.

53. 7 Plutarch, *op. cit.* note 33 above, 441 at 444 sq. Plutarch's narrative of the famous episode in the life of the young Julius Caesar (he was 19 years old at the time) uses a derivative of the Greek work "*peirato*" in one place only (i. 8 at p. 444), in placing the capture near the "island Pharmacusa, by pirates [*peiraton*], who already at the time controlled the sea [*ten Pharmakoussan neson hupo peiraton ede tote . . . katechonton ten thalattan*]." Later, these "pirates" are referred to as Cilicians [*Kilissi*] (ii, 2, p. 444). They thus appear to be the specific people also involved in the Pompeian war of 67 B.C. No other passage has been found in which the word "*peirato*" or any of its derivatives was applied at this time to any other people. It is interesting to note that Suetonius in his recitation of the same incident (although placing it a few years later) does not use the Latin word "*pirata*" or any of its derivatives at all: "While crossing to Rhodes . . . he [Caesar] was taken by pirates [*praedonibus*] near the island of Pharmacusa . . . [*Huc . . . circa Pharmacussam insulam a praedonibus captus est. . . .*]." 1 Suetonius, *The Lives of the Caesars* (J.C. Rolfe, transl.) (LCL rev'd ed. 1928) i, 4 at p. 7. Suetonius was writing about 120 A.D. *Id.*, Introduction by Rolfe at p. xii.

54. Cicero, *Selected Works* (M. Grant, transl.) (Penguin Classics 1971) at p. 177 note 1. Among Cicero's last works were 14 "Philippics" *Against Antony*. The revival of the "pirate" communities of the Eastern Mediterranean was noted by Cicero in a letter to his friend Atticus. See note 38 above.

55. A convenient summary of dates, names and structure of the Justinian Digest and its place in the legal literature is Nicholas, *An Introduction to Roman Law* (corrected ed. 1969). The dates and other general information retailed here appear *passim*, esp. p. 30, 39-42.

56. *Corpus Juris Civilis* (Mommsen & Krueger text, Kunkel ed.) (1954), XLIX.15.19.2, Paulus, *On Sabinus*, Bk. xvi: "*A piratis aut latronibus capti liberi permanent.*" My translation is identical to that in 9 J.B. Scott, *The Civil Law* (1932) at p. 184, except for the interpolation of the word "legally" to avoid the absurd reading that captives are in fact free.

57. *Corpus Juris Civilis* XLIX.15.24: Ulpianus, *Institutes: "Hostes sunt, quibus bellum publice populus Romanus decrevit vel ipsi populo Romano: ceteri latrunculi vel praedones appellantur et ideo qui a latronibus captus est, servus latronum non est, nec postliminium illi necessarium est: ab hostibus autem captus, ut puta a Germanis et Parthis, et servus est hostium et postliminio statum pristinum recuperat.*"

58. *Id.* L.16.118: Pomponius, Book II, Ad Quintum Mucium: " *'Hostes' hi sunt, qui nobis aut quibus nos publice bellum decrevimus: ceteri latrones aut praedones sunt.*"

59. It apparently dates back to Greek conceptions. See text and works cited at note 17 above.

60. See below at note 120.

61. The phrase appears to have gained currency as a shortening of the passage from Cicero quoted in note 49 above. The source of the paraphrase "*hostes humani generis*" has not been found. Blackstone attributed it to Sir Edward Coke. 4 Blackstone, *Commentaries on the Laws of England* (American Edition 1790), p. 71. The phrase appears in Coke, *Third Institute of the Laws of England* (1628) (first published 1644) p. 113: "*pirata est hostis humani generis.*" But the form, as a Latin insertion in an English text, makes it look like a stock phrase Coke was borrowing from another source. See note 201 below. Coke finished his *Third Institute* in 1628 and died in 1634. The *Third* and *Fourth Institutes* were published at Parliamentary order from Coke's notes ten years later, when it was felt that Coke's well-known views of the supremacy of the law to the prerogatives of the Crown would help in the Parliamentary struggle against Charles I. Bowen, *The Lion and the Throne* (1956), p. 510. Another possible source for Coke's phrase is Sallust, *op. cit.* note 35 above, 81.1, in which Jugurtha refers to the Romans themselves as "men with no sense of justice and of insatiable greed, common enemies of all mankind [*Romanos iniustos, profunda avaritia communis omnium hostis esse . . .*]" (Hanford transl., Penguin ed. p. 113; LCL ed. p. 302).

62. This is not the place to analyze the Roman law of postliminium. Its modern descendant is visible in the classical law of prize and salvage, and will be addressed as necessary in Chapter II below.

63. See note 35 and text at notes 2 and 3 above.

64. The earliest usages recorded by the Oxford English Dictionary are:

> . . . 1387 Trevisa, *Higden* (Rolls) VI, 415 the "*see theves*" of Danes (L. Dani piratae); 1426 Lydg. De Guil. Pilgr. 23963, I mene pyratys of the Se, which brynge folk in pouerte. 1430-40 - Bochas 1.xii (1544) 38 this word pirate of Pirrhus toke the name. 1522 J. Clerk in Ellis Orig. Letti. Ser III.I.312, Pirats, Mores and other Infidels . . .

OED "O-P" p. 901. Higden (or Higdon) and the *Polychronicon* are explained in 13 *Encyclopedia Britannica* (11th ed.) 454 (1910); John de Trevisa's translation and its place in the development of the English language is put into perspective in 9 id. 592. Trevisa's translation was apparently issued in 1387; there seems to be some petty inconsistency in the secondary sources about the date. As noted in the text above this note, it is not significant for present purposes, since the word "pirate" does not in fact appear in the English translation by Trevisa and the equation of the Latin "*piratae*" with the Middle English "*see theves*" appears to have no legal, or even any clear vernacular, meaning worth preserving except as an illustration of picturesque speech and some surviving underlying sense of the impropriety by the law of England as perceived in the 14th century of the activities of Vikings about three centuries earlier.

65. Braudel, *La Méditerranée et le monde méditerranéen à l'époque de Philippe II* (1949). Because of the importance of the specific words I have translated the French original myself despite the existence of a fine English translation by Sian Reynolds of the 1966 2nd (revised) edition of Braudel's masterpiece. Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II* (S. Reynolds, transl.) (1973). In the original, p. 694, the text is as follows:

> *Sur l'Ocean, au XVIe siècle aussi bouleversé que la mer Intérieure par les pirates, et des pirates peut-être plus cruels, la course prend un masque, se déguise en guerre semi-officielle avec la multiplicité des lettres de marque. . . . On a dit et répété que la piraterie était fille de la Méditerranée. Image juste, mais souvent perdue de vue: les historiens n'ont d'attention et de réprobation que pour les corsaires barbaresques. Leur fortune, qui fut grande, dérobe le reste du paysage. Tout s'en trouve déformé. Ce que l'on désigne, chez les Barbaresques, sous le nom de piraterie, s'appelle héroïsme, pur esprit de croisade chez les Chevaliers de Malte et ces non moins féroces coureurs de mer que furent les Chevaliers de Saint-Etienne, basés à Pise par les soins de Cosimo de Medicis.*

66. *Id.* For convenience, citations to Braudel below will be used to refer to his work as translated by Reynolds, and the Reynolds translation will be quoted without closer analysis of its use of the word "pirate" or its derivatives.

67. *Id.*,p. 749.

68. *Id.*,p. 728.

69. *Id.*, p. 822: "As early as 1552 and again in 1565, Jewish protests had singled out for complaint the ships of the 'most evil monks' of Malta, that 'trap and net which catches booty stolen at the expense of Jews'," citing J. HaCohen, *Emek Habkha, la vallée des pleurs...* 172 (1881) for the inner quotes. Braudel, *op. cit.* 822 note 371.

70. *Id.*, p. 870.

71. *Id.*, pp. 883-884.

72. Cf. Defoe, *Robinson Crusoe* (1719) ch. 1. Defoe is also supposed to be the author of *A General History of the Pirates* (1718) under the pseudonym of Capt. Charles Johnson.

73. Chamberlain, *The Chamberlain Letters: A Selection...* (E.M. Thomson, ed.) (Capricorn Books 1966) 12 (letter no. 16 to his friend Dudley Carleton in the standard collection edited by N.E. McClure).

74. *Id.* 124 (letter no. 132 to Carleton dated 29 January 1612).

75. *Id.* 226 (letter no. 434 to Carleton dated 12 July 1623).

76. *Naval Songs and Ballads* (NRS, Vol. 33) xx-xxi, 25-29 (1907). Rising national pride, so evident in Shakespeare's historical plays of this period, particularly Richard II, II. i.40 (1595) (John of Gaunt's paean to England) and Henry V (1599), led Captain John Smith in the last chapter of his *Travels* to attribute the war capabilities of the Turks and Moors to English renegades, whom he calls "pirates." That view found its way into English folklore, apparently through the writings of Andrew Barker, *A True and Certaine Report of the Beginning, Proceedings etc. of Captaine Ward and Danseker, the Late Famous Pirates* (1609), cited in Sir Godfrey Fisher, *Barbary Legend* (1957) 160. According to Fisher, Danseker was executed by the Dey of Tunis in 1611. *Id.* p. 142. Ward died in the Tunis plague of 1622-23. *Id.* p. 161. The idea that the Turks, whose fleets dominated the Mediterranean under Suleiman the Magnificent until their defeat at the battle of Lepanto in 1571, had to learn military tactics or seamanship from an Englishman, seems at least something of an exaggeration. There was in fact a revolution in maritime ventures at this time, in which new sail technology made ocean voyages feasible that had been too risky before, and the Mediterranean Muslim powers rejected it in favor of old, maneuverable, short-range galleys. But that change seems irrelevent to the activities of Ward and Danseker. Parry, *The Age of Reconnaissance* (1964) 69-84; Hess, *The Forgotten Frontier* (1978) 208-209.

77. Chamberlain, *op.cit.* note 73 above 281 (letter no. 374 to Carleton dated 10 March 1621): "We hear that Sir Robert Mansell and his fleet have done just nothing, but negotiated with those of Algiers for certain slaves."

78. *Naval Songs and Ballads*, pp. 31-32, "The lamentable cries of at least 1500 Christians: Most of them being Englishmen . . ."

79. *Id.*, pp. xxii-xxiii.

80. See below.

81. *Calendar of State Papers, Colonial Series, East Indies, China and Japan, 1622-1624* (Sainsbury, ed.) No. 143 at p. 64 (1878, 1964). This is in a report dated 27 August 1622 from the British East India Company's Council in Batavia (Richard Fursland (President), Thomas Brockedon and Augustine Spaldinge) to the Company in London.

82. *Id.*, No. 367 at p. 196. Fursland had died and was replaced on the Council by Henrie Hawley and John Goninge; Thomas Brockedon apparently acted as President.

83. *Id.*, No. 368 dated 14 December 1623 at p. 202, report to the Company in London.

84. *Id.*, No. 565, p. 365, signed by Brockedon, Hawley and Goninge.

85. *Id.*, No. 303, p. 125, Minutes of meetings concluding 23 June 1624. Eventually, the Company paid two tenths to the King in order to obtain the release of their vessels from arrest by the Admiral.

86. *Id.*, No. 481, p. 294, Minutes dated 23-25 June 1624.

87. In addition to Braudel, *loc. cit.* above note 65, see Fisher, *op. cit.*, note 76 above, esp. pp. 137-145 and sources cited there.

88. Belli, *De Re Militari et Bello Tractatus* (1563 ed. photographically reproduced) (CECIL 1936) Part II, ch. xi: ". . . *excipi Piratae . . . qui enim omnes habent pro hostibus, debent ab omnibus expectare rependi vices . . .*" The translation by H.S. Nutting is published in another volume of the same set. The English excerpts in the text above this note are from p. 83 of the translation volume by Nutting. On the post-glossators, see Nicholas, *op. cit.* note 55 above at p. 47.

89. Belli, *op. cit.*, (Nutting, transl.) p. 83. The Latin (p. 39) refers to persons who "*sint extra omne legum*" but does not use any single word for "outlaw."

90. *Id.*, p. 88, Part II, ch. xiv. Belli quotes Cicero verbatim. See note 46 above. See also note 50 above and note 124 below, where the position of Grotius and his criticism of this passage by Cicero are set out more fully.

91. Ayala, *De Iure et Officiis Bellicis et Disciplina Militari* (J.P. Bate, transl.) (CECIL 1912) I, ii, 15. The original says:

> *Hinc iura belli, captiuitatis, & postliminij, quae hostibus tantum conueniunt, non posse rebellibus convenire, consequens videtur: sicut nec piratis & latronibus (qui hostium numero non continentur) conueniunt, quod ita intelligi debet, vt ipsi iure belli agere non possint: ideoqi dominium reru captarum non acquirunt, quod hostibus tantum tributum est in ipsos vero iure belli faeuire, multoque magis quam in hostes, licet: suntenim odio digni maiore, & non debet esse melioris conditionis rebellis & latro, quam legitimus & iustus hostis.*

Oddly, the Latin version is photocopied from the first edition of 1581, but the translation seems to be based on the 1597 edition.

92. Ayala's father was a Spaniard, married to a Belgian and resident in Antwerp for some 16 years before the birth of Balthasar in 1548. The Ayala family were very well connected with the Habsburg monarchy.

The Act of Abjuration was passed by the States General of the Netherlands in 1581. Until 1648, Spain denied the legal labels resulting from the ability of the Netherlands to maintain its independence militarily. The standard works on this watershed episode in European history are J.L. Motley, *The Rise of the Dutch Republic* (1856) and The United Netherlands (1860).

93. Gentili, *De Iure Belli Libri Tres* (1612) (J.C. Rolfe, transl., introd. by Coleman Phillipson) (CECIL 1933) 12a-14a.

94. *Id.*, Book I, ch. ii. The English translation throughout is by Rolfe. The Latin is from the photographic reproduction of the edition of 1612 in 1 Gentili, *op. cit.* Rolfe's translation of "iusta" as "just" seems very dubious. See note 46 above.

95. *Id.*, p. 22, quoting the passages from Ulpian and Pomponius set out in notes 57 and 58 above. In Gentili's quotations as in the originals, the word "*pirata*" or its derivatives does not appear; those debarred from entering the legal state of war are termed "*latrunculi*" or "*praedones.*" Thus the Rolfe translation of Ulpian, "All others are termed brigands or pirates" (p. 15) seems a serious mistranslation of Gentili's quotation from Ulpian: "*caeteri latrunculi, vel praedones appellantur.*" Also, Gentili's conclusion immediately following the quotations from Pomponius and Ulpian, "That is to say, the war on both sides must be public and official and there must be sovereigns on both sides to direct the war [*Publica ergo esse arma vtrinq; oportet, & utrinq; esse Principes, qui bellum gerant*]," seems a non sequitur.

96. *Id.*, ch. iv.

97. *Id.* Again, Rolfe's translation seems imprecise; Gentili did not say that Pomponius and Ulpian actually came to that conclusion, but that that legal conclusion flowed from their definition.

98. *Id.* "*Piratae omnium mortaliu hostes sunt communes. Et itaque negat Cicero, posse cum istis intercedere iura belli.*"

99. *Id.* "*Si praedonibus pactum pro capite pretium non attuleris, nulla fraus est . . .*" Rolfe translation: "If you do not pay *brigands* the price demanded in exchange for your life, you do no wrong . . ."

100. *Id.*, last lines of the chapter:

> *Sed quid sentimus nos de his Gallis, qui capti postremo bello Lusitanico ab Hispanis, & tractati sunt non quasi iusti hostes? Tractati sunt quasi piratae: qui Antonio militarent, pulso iam de regno vniuerso, & in regem agnito ab Hispanis nuqua. At ipsa historia vincit, eos non fuisse piratas: non dico per argumentum ductum a numero, & qualita te virorum, ac nauium; sed per literas,quas regis sui ostendebant, cui regi seruiebant, non Antonio, esti maxime pro Antonio. quod illos non tangebat.*

101. See text at note 93 above. A collection of Gentili's briefs before the English Royal Chamber was published posthumously in 1613. Gentili, *Hispanicis Advocationis* (1613, 1661), reproduced photographically by CECIL in 1921. The English translation of the 1661 text published in Vol. II of the same set is by F.F. Abbott.

102. See, e.g., letter of 1295 (23 Edw. I) authorizing an English captain to make capture [*licentia marcandi*] up to the value of the goods spoiled by "the men and subjects of the realm of Portugal." 1 Marsden, ed., *Documents Relating to Law and Custom of the Sea* (NRS, Vol. 49) (1915) 38.

103. The *Oxford English Dictionary* definition is in Vol. VI, p. 179. It defines "marque" as meaning merely "reprisal" and traces it back to medieval Latin "marcare," "to seize as a pledge." The first English use given is the law-French of a statute, 27 Edw. III, stat. 2 c. 17 (1353) quoted in part in the text above this note. See note 176 below. The *American Heritage Dictionary*, pp. 751, 1529, traces the word back to the Indo-Germanic root "merg-": "Boundary, border" via Old Provençal "marcar," "to seize." The phrase "*marquandi sue gagiandi*" ("marque and recapture"?) appears in a document of 1293 cancelling a similar license that had apparently been issued earlier. 1 Marsden, *op. cit.*, p. 19, 38-39.

104. The practice of holding prize courts only in the territory of the capturing country as an aspect of belligerency does not seem to have become clearly established until somewhat later. 2 Marsden, *op. cit.* (NRS, Vol. 50) (1916) xii.

105. Gentili, *Hisp. Adv.* cited note 101 above, Book I, ch. iv at p. 15.

106. *Id.*, ch. xv at p. 68: ". . . *stendi piratis locum oportunissimum navigationibus propinquissimum Hispanicis, habitatum mercatoribus Anglis, ubi praedas suas possint suis distrahere, si jusistud constituitur fisci illus terrae. Hoccine pro mercatura?*" The translation by Abbott seems unnecessarily awkward.

107. *Id.*, ch. xxii at pp. 101-105. This is not the place to argue substance, but it might be noted that Gentili's argument seems to confuse liens based on salvage-like services with property rights derived from a thief. The first derive from principles well known in Gentili's time. Aside from the analogy to postliminium and the Roman law principles set out in part in Justinian's *Digest* and mentioned above, the Laws of Oleron, cited at note 150 below, articles 3, 22 and 30, had already been part of the Law of England for about 400 years and established the basis for the modern English law of maritime salvage.

108. See below, Chapter II.

109. He is not specific, but seems to be referring to ch. iv cited at note 105 above.

110. *Id.*, ch. xxiii, pp. 105-112 at p. 112: "*. . . quod eripitur nostris negotiatio Tunetana, Algeriana, alia non una per haec Venetorum dicta, quod sint illae civitates nil aliud nisi receptacula piratarum, ned in illis sint nisi piratae, & sint in illis ipsi quoque magistratus piratae.*"

111. Gentili's approach, which might be considered the birth of "positivism" as an operating theory of international law, is most lucidly elaborated and the role of "recognition" harmonized with current practice by Kelsen, Recognition in International Law, 35 AJIL 604 (1941), and Gross, States as Organs of International Law and the Problem of Autointerpretation, in Lipsky, ed., *Law and Politics in the World Community* (1953) 59-88 reprinted in 1 L. Gross, *Essays on International Law and Organization* (1984) 367.

112. Dumbauld, *The Life and Legal Writings of Hugo Grotius* (1969) 3-4; "*Voilà le miracle de Hollande*," *id.*, at p. 56 note 165.

113. *Id.*, p. 23, 58. Grotius died in 1645, reportedly regretting that "by undertaking many things, I have accomplished nothing!" *Id.*, p. 18.

114. *Id.*, p. 16.

115. 2 Grotius, *op. cit.* note 46 above, Book III, chs. i and ii (p. 630-631).

116. *Id.*, p. 631. The key passages in the original Latin are: "*Non autem statim respublica aut civitas esse desini, si quid admittat injustum, etiam communiter, nec coetus piratarum aut latronum civitas est, etiamsi forte aequalitatem quandam inter se servent, sine qua nullus coetus posset consistere. Nam hi criminis causa sociantur: illi etsi interdum delicto non vacant, juris tamen fruendi causa sociati sunt, et exteris jus reddunt . . .*" 3 Grotius, *De Jure Belli ac Pacis* (Whewell ed.) III, ii, 1 (1853) p. 54-55. Unless the context indicates otherwise, all citations below to Grotius's Latin original text are taken from Whewell's edition, and all English translations are by Kelsey.

117. See above note 57.

118. Caesar, *De Bello Gallico*, VI, xxiii; Tacitus, *De Morib. Germ.* ch. 46, *Ann.* xii, 27, *Hist.* iv, 50. These citations by Grotius do not seem particularly strong to support his point, but the point itself, that the Germanic tribes were treated as legal enemies in war despite the Roman opinion that their political and social organization was contemptible, is beyond dispute.

119. Appian, *Bell. Illyr.* ii; 9 Plutarch, *op. cit.* above note 33.

120. It was pointed out in the text above at note 57 that Justinian's *Digest* addresses the legal inability of "pirates" to effect a change in the personal status of captives, but extends that legal incapacity in the case of property only to "*latrones*" and "*praedones*."

121. Grotius, *op. cit.* Book III, ch. iii, sec. ii para 3.

122. Grotius does not say how this comes about legally, implying that it is not by "recognition," but by the force of natural law.

123. Grotius, *op. cit.* Book III, ch. iii, sec. 8 last sentence, quoting with approval St. Augustine, *De Civ. Dei* IV, iv: "[*H*]*oc malum si in tantum perditorum hominum accessibus crescit, ut et loca teneat, sedes constituat, civitates occupet, populos subjuget, regni nomen assumit* [If by accessions of desperate men this evil grows to such proportions that it holds lands, establishes fixed settlements, seizes upon states and subjugates peoples, it assumes the name of a kingdom]." It is hard to see how this description could not be applied to the "*peiraton*" of 67 B.C.

124. Grotius used the word "*pirata*" or its derivatives in five other places in *De Jure Belli ac Pacis*: (1) In confuting Cicero as mentioned at note 46 above (Book II, ch. xiii para. 15(1)); (2) In a passing reference to Roman taxes for Red Sea navigation being justified by the expenses of suppressing "piracy" (Book II, ch. iii para. 14); (3) In a passage slightly amending Cicero's position that oaths to enemies must be kept while oaths to "*piratae*" need not be kept—Grotius eviscerates Cicero's entire polemical point by adding "unless an oath prevents," i.e., unless you have promised the pirate that you would keep your word to him! (Book II, ch. xvii para. 19; cf. above note 50); (4) In a passage approving the exchange of legation with rebels but not with "pirates and brigands, who do not constitute a state [*Piratae et latrones, qui civitatem non faciunt*]" and therefore do not come under the rule of the law of nations—but this rigid position is immediately softened by observing that "Sometimes, nevertheless, persons of such character obtain the right of legation on the strength of a pledge of good faith [*Sed interdum tales qui sunt, just legationis nanciscuntur fide data*]" (Book II, ch. xviii, para. 2(3)); and (5) In a possible slap at Gentili through mention of the record showing Pompey to have concluded his war with the pirates "in great part by means of treaties [*Atqui belli piratici magnam partem Cn. Pompeius pactionibus confecit*]" (Book III, ch. xix para. 19(2)(2)). Curiously, the indexes to neither the Kelsey translation nor the Whewell edition carries a reference to the first of these uses.

125. *Id.* III, ix, 19(2). This language appears in the Amsterdam (Blaeu) edition of 1632. I have not been able to check the 1631 and 1625 editions. It appears in all later editions.

126. In 1604 Grotius drafted an argumentative brief, completed in 1606, to justify the Dutch seizure in the Straits of Singapore of a Portuguese "prize" at a time when the Dutch did not claim belligerent rights against Portugal despite the union of the Portuguese and Spanish dynasties between 1580 and 1640. Basing his argument on a "natural" right of trade and thus the inadmissability in law of Portuguese monopoly treaties with the Sultans of the Malay Archipelago, Grotius concluded that the Portuguese actions were criminal and that Dutch countermeasures could properly include captures in reprisal. 1 Grotius, *De Iure Praedae Commentarius* (1604) [*sic*] (Williams and Zeydel, transl.) (CECIL 1950) 327. The entire background is conveniently set out and Grotius's principal arguments paraphrased and summarized in Dumbauld, *op. cit.* 23-56. The broader historical background is set out in Rubin, *International Personality of the Malay Peninsula* (1974) 29-32.

127. In the Williams and Zeydel translation the word "pirate" is used where, in note 126 and here, I have used the word "criminal." It is not certain that either is correct. Volume II of the set contains a photographic reproduction of the actual Latin manuscript, and in the page corresponding to p. 327 of the translation in Volume I, (2 Grotius, *De Iure Praedae Commentarius*, p. 147) I cannot find the word "*pirata*" or any of its derivatives. The word "*latro*" does appear but not in a place that seems to correspond to either of the two places in which the translators have used the word "pirate." Although Grotius' handwriting seems clear enough, I am not prepared to match my amateur acquaintance of Latin and my almost total non-acquaintance with Dutch calligraphy of 1604–1606 against the expertise of the translators. Still, for the reasons set out above, it would be well to be cautious about this translation and its use of the word "pirate."

128. Grotius, *De Jure Belli ac Pacis* Book II, ch. iii, para. 13(2).

129. E.g., Athenian claims asserted against Megara, Thucydides, *op. cit.*, IV, cxviii, and Dio Cassius's mention of "all the sea which belongs to the Roman Empire," *Roman History*, XLII, v.

130. The evolution of "England" to "Great Britain" and the "United Kingdom" (including Scotland, which has its own legal history and current municipal law), involves a political narrative of daunting complexity. Fortunately, it is not necessary for present purposes. It was the law of England, not the law of Great Britain or the United Kingdom, that became the most influential set of prescriptions and was administered by the most wide ranging system of naval activity and courts, and which lies at the roots of American conceptions of the interplay between the municipal law of "piracy" and international law. The law of Great Britain and of the United Kingdom will be referred to as appropriate later in the narrative.

131. It is not proposed in this place to trace the word or the concept (if there is any discrete concept) of "piracy" in non-legal English usage. It might be useful to those so inclined to mention that the earliest trace of the concept seems to be in the epic Beowulf (eighth century A.D.). In line 242 there is reference to the sea-watch guarding the Danish coast that "*lathra naenig/mid scip-herge sceth than ne meahte* [none of our enemies with their fleet of ships might harm us]." Chickering, *Beowulf; A Dual Language Edition* (1977) 63. The word "lathra" is translated "enemies" by Chickering. It is commonly translated "pirates." Cf. translation by David Wright in Penguin Classics edition (1957) at p. 32. Wright also translates as "pirates" (p. 33) the word "feonda" in line 294. The similarity of the word "*lathra*" to the Latin "*latro*" is too clear to be missed. The Latin word "*pirata*" or its derivatives does not appear in Beowulf.

132. Regina v. Keyn (frequently indexed as R. v. Keyn, Reg. v. Keyn or The Queen v. Keyn) [1876] L.R. 2 Exch. Div. 63, reprinted at length in 2 *British International Law Cases (BILC)* 701 at 756-800. That case turned on the question of whether the statutory municipal laws of England applied to acts by foreigners on board foreign vessels in waters less than three miles from the English coast in the absence of a clear indication from the Parliament that the law was intended to apply beyond the land, except in British flag vessels. Fourteen judges heard the arguments. One died during the course of the proceedings and the final decision, that the law of England did not apply to foreigners in foreign ships even in England's territorial waters in the absence of a clear expression of Parliament's intention, was carried by a 7-6 majority with substantive views expressed by nine of the judges in individual opinions.

133. Marsden, ed., *Select Pleas in the Court of Admiralty* (Selden Society, Vols. 6 and 11) (1894, 1897) and Marsden, ed., *Documents Relating to the Law and Custom of the Sea* (NRS, Vols. 49 and 50) (1915, 1916), cited at notes 102, 104 above.

134. Cockburn relied heavily on Hale's *Pleas of the Crown*, but does not seem to have checked Hale's sources. Hale, *Pleas of the Crown* (1685 ed.) 77, in fact refers to "Piracy" and "Depredation upon the Sea" as a species of "petit Treason, if done by a [British] subject." Hale implies without any evidence what it was triable at Common Law until the Statute of Treasons, 25 Edw. III statute 5 c. 2 (1352). But his source is clearly Coke, who in his *Third Institute*, emphasized not the "piracy" aspect of the offense, but its relationship to the law of "treason," limiting the jurisdiction of British Common Law courts to the jurisdiction they had in other cases of "petit Treason" and in no way implying any purview over the acts of foreigners outside of England. See note 201 below. Aside from this possible unintended implication in Hale, there was no doubt that Hale knew that the offense of "piracy" was triable only at Civil Law, not Common Law, in England from 1352 to 1536:

> Since that *Statute* [of 1352] an offence triable by the Civil Law until 28 *H.* 8.15 [1536].
>
> The *Stat.* 28 H. 8 alters not the offence; but it remains onely an offence by the Civil Law: and therefore a pardon of all Felonies doth not discharge it: but it gives a trial by the course [i.e., procedures] of Common Law: . . . It extends not to Offences in Creeks or Ports within the Body of a County, because punishable by the Common Law.

"Civil Law" was the body of law administered by Admiralty and some other non-Common Law courts of England. See below. Thus, to the degree Cockburn meant to imply that "piracy" in any way pertinent to the case of foreign actions on board a foreign ship was historically an offense against English Common Law, he was certainly wrong with regard to actions after 1352, and probably wrong with regard to actions before then.

135. 18 Edw. II (1325) and 25 Edw. III (1352).

136. 2 *BILC* 759.

137. 1 Marsden, *Documents* at p. 99-100 note 1.

138. *Id.* Table of Contents regarding p. 12, headnotes at p. 2, 6, 10, 31, 46, 74, 89, 136, 371, 388, 391. This list is not exhaustive.

139. E.g., Holdsworth, *A History of English Law* (1922-1928).

140. Since in some cases Marsden modernizes the spellings, and in others he seems to prefer what seem quaint and false antique spellings, it is impossible to be certain about the accuracy of his reprinted "original" texts without duplicating his entire research; a patent impossibility at this time.

141. 1 Marsden, *Documents* 2.

142. *Id.*, p. 7.

143. *Id.*, p. 10-11.

144. *Id.*, p. 8 and 69. Marsden interprets these documents of 1276 and 1341 as involving the King in suits before his own Common Law courts for a share of the value of a "prize" taken by English seamen without license of the Crown. The King apparently lost.

145. *Id.*, p. 19, 38-39. See notes 102 and 103 above.

146. *Id.*, p. 19 (revoking a letter of "marque or reprisal [*marquandi seu gagiandi*]" in 1293); 38-39 (informing the administrators of the realm of the proper issuance of letters of marque by "our nephew, John of Brittany" in 1295); 88-89 (transferring the trial of English malefactors from the Common Law courts to the jurisdiction of the Admiral's court because the robbery had occurred at an unspecified place at sea, not within any particular shire of England in 1361—it is not clear whether this case involved any foreigners or letters of marque).

147. *Loc.cit.* note 143 above.

148. *Id.*, p. 84-88.

149. *Id.*, p. 88-89, cited note 146 above.

150. 1 Peters, *Admiralty Decisions* . . . (1807) Appendix, p. iii.

151. 1 Marsden, *Documents*, pp. 100-101: "*qui malefactores, et pacis nostre perturbatores diversas roberias depredaciones sediciones ac interfectiones*"; English by Marsden.

152. *Id.* p. 101-102: ". . . *legem et consuetudinem regni nostri Angliae et legem maritimam.*"

153. *Id.*, p. 132-134. The Latin original uses the word "*pirata*" (p. 135). I omit mention in the text of a treaty of 1414 between Henry V and the Duke of Brittany which Marsden translates as containing an obligation not to "receive any traitors, fugitives, banished men, pirates, or exiles." *Id.*, p. 127-128. As noted above, Marsden's translations are not always reliable; Marsden does not quote any Latin or French text and it is unlikely that the original was written in English; nor is Marsden's reported English version the English of the time of Henry V.

154. *Id.*, p. 145-146.

155. *Id.*

156. *Id.*, p. 146-147.

157. *Id.*, p. xv, xviii.

158. *Id.*, p. 149, where it is indicated that the Admiralty courts had been allowed to atrophy and were revived only in 1520.

159. 27 Hen. VIII c. 4 (1535), in 4 Pickering, *The Statutes at Large* (1763) 348 sq.

160. *Id.*, 348-349. The 18th century English must be Pickering's transliteration. The original language is not given in this source. Presumably it was identical with the language of the Preamble to 28 Hen. VIII c. 15 (1536). See below.

161. 4 Pickering, *op. cit.*, 441-443; 26 AJIL *Spec. Supp.* 913-915 (1932). Reproduced in Appendix I.A below.

162. See note 134 above; note 201 below. See the laws of Oleron, cited note 150 above, arts. V-VII, XII-XIII, XIX. The blend between mere contract service and a status relationship entered into by contract (as the feudal relationship was entered into by contract forms also) is too complex to analyze here. See Pollock & Maitland, *The History of English Law* (2nd ed.) (1898) passim.

163. "Mutiny" enters the legal vocabulary in England only with the adoption of the Mutiny Act of 1689, 1 Will. & Mary c. 5 (1689), referring not to mariners but to soldiers who "excite, cause, or join in any mutiny or sedition in the army, or shall desert their majesties' service in the army."

164. *Op. cit.* note 161 above.

165. "A mere common crime, however wicked and base, mere wilful homicide, or theft, is not a felony; there must be some breach of that faith and trust which ought to exist between lord and man," 1 Pollock & Maitland, *op. cit.* note 162 above, 304. By Coke's time "felony" had come to cover all serious Common Law offenses, but not Admiralty offenses and not treason, which had become a statuatory offense with its own procedures. See Coke, *Third Institute* 15; note 201 below; Chapter II text above notes 4-33. See also 2 Pollock & Maitland, *op. cit.* 502. As to the relationship between "trespass" and "felony," see *id.* 511-512.

166. The precise territorial boundary between Admiralty jurisdiction and the Common Law jurisdiction evolved over time. The first boundary was merely between things done upon the sea and things done within

the realm. 13 Rich. II c. 5 (1390). Within two years Parliament had decided a clearer line was needed, and drew it at the bridges nearest the mouth of the river, offenses upstream belonging to the Common Law courts, because *infra corpus comitatus*, offenses downstream to the Admiralty. 15 Rich. II c. 3 (1392). An excellent summary of the evolution of English and American statutory law and the struggle for jurisdiction between the Common Law judges and Admiralty is in Robertson, *Admiralty and Federalism* (1970) 28-64. For convenience, and because the details of that struggle are only peripherally interesting to this study, I have referred generally to "navigable waters" as the extent of Admiralty jurisdiction with specific details given only where pertinent to particular incidents or questions relating to the definition and treatment of "piracy."

167. Cf. Sir William Scott in the Hercules [1819] 2 Dods. 363, 165 Eng. Rep. 1511 at p. 1517; 26 AJIL *Spec. Supp.* 910 (1932).

168. On the origins and modern reflections of the Civil Law, see Nicholas, *op. cit.* note 55 above, p. 2; Admiralty actions based on the adjudication of property rights, actions *in rem*, trace back to Roman law, thus Civil Law, concepts. *Id.*, p. 98-103. The experts in Civil Law in England were called "civilians," and sharp distinctions with elements of jealousy are evident in the attitudes of Common Law judges to the Civil Law and the civilians at this period. See Lord Coke's references in Palachie's Case (1615) translated in the text after note 194 below.

169. 2 Marsden, *Select Pleas*, p. 84-86.

170. Like Gentili (see text at note 93 above), Caesar was Italian by birth. He was the leading British Admiralty judge, 1584-1605. 3 *Dictionary of National Biography* (DNB) 656.

171. 2 Marsden, *Select Pleas*, p. 161. Sir Julius simply recited as if proved that the vessel was "*piratarum super alto mari infra jurisdictionem marittimam Admirallitatis Anglie.*" He did not define "pirate," or "high seas," or his conception of the Admiral's jurisdiction as it might have applied in the case.

172. 1 Marsden, *Documents*, p. 298. The holding that "he is [*et esse*]" (lit.: "and be") a "pirate" seems unsupported by any reference to operative facts. It is not known why Marsden did not translate those two words in his transcription quoted here.

173. Apparently the same person that had become notorious in English folk ballad at about this time. See text at note 76 above.

174. 1 Marsden, *Documents*, pp. 373-373.

175. Molloy, *De Jure Maritimo* (1677), Book I, ch. iv, para. xxi, p. 12. "Prohibited" meant that a legal writ of "prohibition" would issue from a Common Law court forbidding further Admiralty proceedings. The procedure was popularized in the struggles between the Common Law judges led by Sir Edward Coke and the prerogatives asserted by judges of other courts, of which there were many, in the early 17th century. The fullest and probably still most readable and accurate summary of the scope of authority of the various English courts of the time is Coke, *Fourth Institute*, cited at note 61 above. A "*market overt*" was merely a market in which merchants displayed their wares and sold them to any buyer. Originally defined to include only fairs and staples, by the end of the 18th century at the latest it included all the open shops in London all days except Sundays. The law permitting a merchant in a market overt to pass good title to stolen goods, including goods stolen by "pirates" (there seems to have been no distinction between goods stolen at sea or on land at the time the basic rule was reduced to statute in 21 Henry VIII c. 11 (1529)), was regarded as "calculated to answer the necessary ends and security of public commerce." 2 Wooddeson, *A Systematical View of the Laws of England* (1794) 431. The rule had an exception in the case of goods stolen either on land or at sea if the thief were actually caught or convicted. *Id.* p. 412.

The statute of 1529 said:

> . . . That if any felon or felons hereafter do rob, or take away any money, goods, or chattels, from any of the King's subjects, from their persons or otherwise, within this realm, and thereof the said felon or felons be indicted . . . and found guilty therefor . . . that then the party so robbed, or owner, shall be restored to his said money, goods, and chattels.

4 Pickering, *op. cit.*, 175. Since the statute applies only to takings from the King's subjects, and only to takings within the realm, and neither Molloy nor Wooddeson gives any basis for his interpretation other than the statute itself for applying its terms to takings from foreign merchants anywhere, or from English subjects at sea, other than the rule in Justinian's *Digest* discussed in the text at notes 56-58 above, the precise evolution of the rule seems doubtful. One possible explanation is given in 1 Hale, *The History of the Pleas of the Crown* (1778 ed. by Sollom Emlyn) 542: "Tho the statute speaks of the king's subjects, it extends to aliens robbed; for tho they are not the king's natural-born subjects, they are the king's subjects, when in *England*, by local allegiance." That still does not explain any application of the statute to goods "pirated" from any merchants, English or foreign, at sea. Wooddeson believed that it was a rule of English Common Law. Wooddeson, *op. cit.*, p. 429. But the Common Law did not apply to offenses at sea. Wooddeson was the third Vinerian Professor of English Law at Oxford (Sir William Blackstone had been the first), and his lectures, published in 1792-94, were regarded by many as highly as the magisterial work of his more famous predecessor, Blackstone, the author of the *Commentaries*. See Chapter II text at note 152 sq. below.

176. Molloy, *op. cit.*, para. xx. The statute is 27 Edw. III statute 2 c. 13 (1353). Assuming Molloy's summary of the law reflected accurately the legal position in 1677, it is a bit confusing. The statute he cited is part of the famous Statute of the Staple. 2 Pickering, *op. cit.*, 78 (1762). In Pickering's translation it says:

> 13. Item, we will and grant, That if any merchant, privy or stranger, be robbed of his goods upon the sea, and the goods so robbed come into any ports within our realm and lands, and he will sue for to recover the said goods, he shall be received to prove the said goods to be his own by his marks, or by his chart or cocket, or by such good and lawful merchants, privy or strangers. (2) And by such proofs the same goods shall be delivered to the merchants, without making other suit at common law.

Id., p. 87. The last sentence relates to the fact that the law of the staple was the Law Merchant, not the Common Law. *Id.*, p. 92, 27 Edw. III 2 c. 22 (1353). It is noteworthy that the statute does not give any special favor to English merchants, but applies equally to merchants "strangers" (foreign) as to merchants "privy" (English). Molloy gives no citation to cases or statutes to explain the construction giving rights of recovery to English merchants that are withheld from foreigners. Of course, the word "piracy" does not appear in the statute of 1353. As noted in note 103 above, the word "marque" does appear in another chapter of the Statute of the Staple, c. 17, dated in the Oxford English Dictionary to 1354 instead of 1353 as in Pickering. The full text of that chapter illustrates the special care taken in England to safeguard the property rights of foreign merchants, and thus, impliedly, the erosion of that concern by the mid 17th century when Molloy was writing:

> Item, That no merchant-stranger be impeached for another's trepass, or for another's debt, whereof he is not debtor, pledge, nor mainpernour: (2) provided always, That if our liege people, merchants or other, be indamaged by any lords of strange lands or their subjects, we shall have *the law of marque, and of taking them again*, as hath been used in times past, without fraud or deceit. (3) And in case that debate do rise (which God defend) betweixt us and any lords of strange lands, we will not that the people and merchants of the said lands be suddenly subdued in our said realm and lands because of such debate, but that they be warned and proclamation thereof be published, that they shall void the said realm and lands with their goods freely, within forty days after the warning and proclamation so made . . .

2 Pickering, *op. cit.*, 89. The statute and the problems discussed in the text illustrate also the impossibility of maintaining private recapture under a theory of the Crown's internal responsibility without engaging the Crown's external responsibility; there is apparent a transition from letters of marque and reprisal as a way consistent with feudal law to avoid going to war on a "sovereign" level, to letters of marque and reprisal as an exercise of belligerent rights valid only on the "sovereign" (or public) level. See Clark, The English Practice with regard to Reprisals by Private Persons, 27 AJIL 694 (1933). A summary of this evolution, with citations useful to those interested in further study, can be found in Sohn & Buergenthal, *International Protection of Human Rights* (1973) 23-40.

177. 1 Marsden, *Documents*, p. 388-394. The Privy Council extract is at note 1 on p. 394. *Quaere* if this is the same Newporte mentioned in Chamberlain, *op.cit.* note 73 above 34 (letter no. 61 dated 28 February 1603) as having taken a treasure rumored to be worth 2 million pounds in Nombre de Dios and Cartagena.

178. See text at note 86 above.

179. 1 Marsden, *Documents* 224, from a recital in an unsigned opinion Marsden identifies as probably a copy of a 1579 legal memorandum from David Lewes, judge of Admiralty, to the Lord Admiral setting out the bases for the Admiral's legal authority. This is the earliest document found setting forth a basis for what later came to be asserted as "universal" jurisdiction in all countries to enforce their domestic laws against foreign "pirates" for their acts solely directed against foreign victims. That the roots of that concept lay in the municipal (English) law of "outlawry" and not in any international practice or Roman law, appears to have been forgotten by later writers and statesmen. See Chapter III below.

180. 1 Marsden, *Documents* 173 note 1, paraphrasing "Instructions to Vice-Admirals of the coast" dated 1563.

181. *Id.*, p. 216-217.

182. *Id.*, p. 217.

183. *Id.*, p. 218, setting out a sample commission.

184. *Id.*, p. 202-204.

185. *Id.*, p. 218 note by Marsden paraphrasing Burghley's letter.

186. *Id.*, p. 220-221.

187. *Id.*, p. 224-225.

188. *Id.*, p. 227-229.

189. *Id.*, p. 235-236.

190. *Id.*, p. 252.

191. After Elizabeth was succeeded by James I in 1601 there was a further tightening of the administration, and commissions to companies engaged in normal mercantile voyages in the Mediterranean or along the African coast began specifically to include authority to capture "pyrates." *Id.*, p. 377-378 (Commission dated 1609 from James to the Lord Admiral, Charles Earl of Notingham, authorizing him to allow ships of the Levant Company to take "anie pyraticall shipp . . . , of what nation soever, . . . to bee tryed and proved by lawe and justice . . . and soe suffer the payne of our [*sic*] lawes for theire pyracie . . ."); p. 385-386 (Order of 1612 from Notingham to his staff to issue a commission to Humphrey Slaney "to resist and take such piratts and robbers att seas as shall piratically sett upon them . . ." as they trade to "Guiney" (Guinea)). There is an implication that pirate-hunting in the absence of such a commission was unauthorized by English law, and an Englishman doing it might find himself in serious trouble at home whatever the strength of David Lewes's or Gentili's legal arguments about the nature of "piracy" at international law. By the end of the 17th century it seems to have been standard practice in England to require those who might encounter "pirates" to procure a license to capture them before setting out. See, e.g., the Warrant by Charles II (signed by Samuel Pepys) in 1684 authorizing "John Castel . . . to seize and destroy all such pyrats, freebooters, and sea rovers, which he shall meet within the limits of [the Royal Affrican] companye's charter . . ." 2 Marsden, *Documents* 112-113. Apparently this authority did not extend to "pirates" outside the limits of the charter. When, in 1697, the East India Company found "pirates" of the Kidd and Every sort (see Chapter II note 91 sq. below) a serious threat to their trade, they petitioned the Lords Commissioners executing the office of the Lord High Admiral of England for a license "to seize and take all pyrates infesting those seas within the limits of the Company's charters." They asked at the same time for authority to set up an Admiralty tribunal "to trye and condemn such pyrates as they shall take." *Id.*, 178-180.

192. *Id.*, p. 300, Proclamation of 1599.

193. 1 Rolle 175 (1615), King's Bench, Easter Term. An English version *sub nom. The King against March* taken from 3 Bulstr. 27 is reproduced in 3 *BILC* 767-769.

194. The captor was "Sam. Palachie." "Joseph Pallache" is mentioned in Fisher, *op. cit.*, 175, as the Moroccan commander of an Atlantic fleet three of whose prizes reached England in 1614. Chamberlain, *op. cit.*, 212-213 (letter no. 213 to Carleton dated 24 November 1614) refers to "a Jew pirate arrested that brought three prizes of Spaniards into Plymouth. He was set out by the King of Morocco, and useth Hollanders' ships and, for the most part, their mariners. But it is like he shall pass it over well enough, for he pretendeth to have leave and license under the King's hand for his free egress and regress . . ."

195. It is not clear whose words are thus reported by Rolle. Sir Edward Coke and Sir John Doddridge are identified by Rolle as members of the panel. Coke gives some details lacking in Rolle's more or less official report. Apparently the Spanish Ambassador had complained directly to the King's Council, which referred the case to the Chief Justice (Coke), the Master of the Rolls (Doddridge) and Sir Daniel Dun (judge of Admiralty). "And the said referees heard the Counsel learned both in the Common and Civil Laws, on both sides on two several days in this Term: and after conference between themselves, and with others, these points were resolved . . ." Coke, *Fourth Institute* cap. XXVI at p. 152-154.

196. The major doubts reported by Rolle were resolved in favor of Palachie on the basis of a precedent pronounced by Lord Popham in King's Bench, 1605, in which a Dutchman landing captured Spanish goods in England while England was at peace with both Holland and Spain, was supported. According to Coke's summary: "It was resolved by the whole Court of the King's Bench upon conference and deliberation, that the Spaniard had lost the property of the goods for ever, and had no remedy for them in England." Coke summarized the law:

> [H]e that will sue to have restitution of goods robbed at Sea, ought by Law to prove two things. First, that the Sovereign of the plaintiff was at the time of the taking in amity with the King of England. Secondly, that he that took the goods was at the time of the taking in amity with the Sovereign of him whose goods were taken: for if he which took them was in enmity with the Sovereign of him whose goods were taken, then it was no depredation or robbery, but a lawful taking, as every enemy might take of another . . .

Coke, *Fourth Institute 154*. It seems significant that Coke does not mention commissions or letters of marque and reprisal to authorize the taking.

197. The translation from the quaint law French of the time is mine. The English version reported in *The King against Marsh* and cited at note 193 above seems obscure in places and not to follow the original law French. The original is as follows:

> [Sam. Palachie, a subject of the] *Roy de Moroccho, & pretend que il est Embassador de son Roy al United Provinces & sur le mere il prist un Spanish niefe (esteant guerre enter le Roy de Barbary & le Roy de Spain) & puis arrive ove ceo [avec ça?] en Engleterre, & darrenment le Spanish Embassador prosecute anvers luy come un Pirat, & divers Civilians fuerunt commaund per le Roy a montre lour opinions de cest matter, lesqueur agree que un Embassador est priviledge per la ley de nature & Nations, mes sil commit alcun offence encontre la ley de nature ou*

*reason, il perdera son priviledge, mes nemy sil offend encountre un possitive ley d'alcun Relme come pur apparrel & c. Et divers auters questions fuerunt faits per les Civilians; mes quant jeo & alcun Justices al comen ley fuerunt demand pur notre opinions, ils disoint que les Civilians fuerunt beside le matter, car cestuy que est destre trie icy pur piracie est destre trie sur l'estatute de 28 H.8 cap. [*blank space in text*] que dit que serra trie pur piracie come pur felonie fait sur le terre al comen ley, & pur ceo nest piracie nisi ad estre felonie si mesme le fact ad estre commit sur le terre, mes en cest case ceo n'ad estre felonie si ad estre commit sur le terre [*sic] car est loyall pur un enemie a prender de l'auter, & accordant a notre opinions fuit rule accordant, & 2 R[ichard] 3.2. est que si alcun voilt prosecutre vers auter sur 27 E[dward] 3 cap. 13. il que est robbe doit proover que il mesme fuit de amicitia Domini Regis, & que cestuy que luy spoliavit fuit sub obedientia Domini Regis vel de amicitia, car si fuit inimicus non fuit spoliatio sed legalis captio. Des en Palachies Case fuit agree per les Civilians que l'Embassador poet proceeder vers luy civillie per les biens icy pur ceo que ils sont en solo amici, (R. Quaere ceo car semble que per la ley de nations un enemie poet loyalment prender de l'auter) Dod. est un reprisell en le Register, Coke ceo est fo. 87. si biens ne sont restore que sont illoyalment prise per subject d'auter Roy donque le Roy grantera ceo. Et per Coke & Dod. home ne poet estre pendus pur piracie sur un robberie fait sur le Thames car ceo est infra corpus comitatus.*

The statute of 27 Edward III cap.13 cited in the case is undoubtedly the part of the Statute of the Staple quoted at note 176 above, 27 Edw. III 2 cap.13. There does not appear to be any language in the statute to support Coke's assertion that a merchant claiming rights under it must prove that he comes from a "friend" of the King and that he who robbed him was within the "obedience" of the king or one of his royal friends. The statute 21 Henry VIII c. 11 (1529) quoted in note 175 above was interpreted this way, as the lawyers apparently sought to make absolute sense of Common Law interpretations that had grown up without a clear statutory base.

The citation to 2 R. 3.2 is very confusing. Pickering's compilation, the more or less standard *Statutes at Large*, does not give any enactments at all for the second year of the reign of Richard III (1484). None from the prior year seems even remotely relevant. The statute 1 Henry VII c. 2 (1485) relates to foreign merchant "denizens" in England, removing from them an exemption from customs duties that had been granted in various earlier letters patent and other documents, alleging abuses by which non-denizen foreign merchants were underselling English merchants by evading the customs duties. It looks like simple protective legislation favoring an important English constituency, irrelevant to the subject. 4 Pickering, *op. cit.*, 526. It was ch. 13 of the Statute of the Staple that gave foreign merchants the legal right to use English courts, and Coke's interpretation seems merely to reflect a Common Law gloss on its meaning.

Another, quite different statute, seems relevant although not cited by Coke: 14 Edward III st. 2 cap. 2 (1340):

> Also whereas it is contained in the Great Charter [c. 30] that all Merchants shall have safe and sure Conduct to go out of our Realm of *England*, and there to come and abide . . .; We . . . will and grant . . . That all Merchants, Denizens and Foreigners (except those which be of our Enmity), may without Let safely come . . ., paying the Customs, Subsidies, and other Profits reasonably thereof due . . . [*Et come y soit contenuz en la Grande Charte qe toutz marchantz eient sauve et seure conduyt daler hors de nostre roialme d'Engleterre . . .; Nous . . . volons et grantons . . . qe touz marchantz denezeins et foreins, forspris ceux qe sont de nostre enemite, puissent sanz estre destourbe sauvement venir en ledit roialme . . .*]

1 Pickering, *op. cit.*, 508. But this statute relates to coming and going, not to access to the courts. It is, of course, possible to speculate that if an "enemy" merchant had no legal basis for coming to England in this statute, he could not legally appear in any guise before an English court; that his only right at English law as an enemy alien would be to depart safely within a time fixed by English law. But that would be to attribute to Coke a logic that he does not himself state.

198. 1 Rolle 285 (1615), King's Bench, Hilary Term.

199. *Hildebrand, Brimston, & Baker fueront sue en Admiraltie Court, le case fuet tiel, ceux homes fueront owners d'un neife, & ceo mist al Indies a merchandiser, & sur le alt mere les Mariners, & rendue commit Piracie (come est suppose en L'admiraltie Court) & quant le neife return icy sur le Thames L'admiral seise le neife, & tout en ceo come bona Piratarium clamant eux per le grant del'Royne, & les Marchants prisont les sailes & tackling hors del' neife, & pur ceo est le suite en le Admiraltie Court. Covent. praie un Prohibition al Cour sur cest matter. Coke est voier que le Admiraltie ad per le grand [sic; grant?] del'Royn bona Piratarium, hoc est les proper biens de Pirats, mes il navera per ceo les biens que les Pirats emblee d'auter homes, car ceux ne sont destre grant, car l'owners doint eux aver arare [?], & si L'admiraltie duissoit aver eux ancor il ne doit suer la pur eux esteant prise intra corpus Comitatus, scilicer, sur Thames. Dod. si home borrow un chivall, & sur ceo commit un robberie uncose le chivall n'est forfet, ac icy le neife n'est forfeit [sic] pur le piracie de ceux que fueront deins le neife, quod fuit concessumper Coke, & il demand de Covent. an ils fueront convict del'Piracie, que dit que nemy. Et Prohibition fuit grant pur ceo que le prisall suit infra corpus Comitatus.*

200. Coke, *Third Institute*, Cap. XLIX, p. 111.

201. *Id.*, p. 113:

> Before the statute of 25 E. 3, if a subject had committed Piracy upon another . . . this was holden to be petit Treason, for which he was to be drawn and hanged: because *Pirata est hostis humani generis*,

and it was *contra ligeanciae suae debitum*: but if an Alien, as one of the *Normans*, who had revolted in the reign of King John, had committed Piracy [*sic*. Coke obviously means "what would otherwise be piracy"] upon a subject, this offence could be no Treason, for though he were *hostis humani generis*, yet the crime was not *contra ligeanciae suae debitum*, because the offender was no subject, but since the statute of 25 E. 3, this is no Treason in case of a subject.

The Statute of 25 Edw. III referred to by Coke is the Statute of Purveyors (tax collectors), statute 5 of that year (1352) (2 Pickering, *op. cit.*, 49), chapter 2 of which has come down to us as the "Statute of Treasons" cited at note 134 above. By this statute, earlier uses of the word "treason" in law were superseded, and a list of exclusive definitions was given:

When a man doth compass or imagine the death of our lord the King or of our Lady the Queen, or their eldest son and heir . . . or if a man do levy war against our Lord the King in his realm, or be adherent to the King's enemies in his realm giving them aid and comfort in the realm, or elsewhere . . . [. . . *quant homme fait compasser ou imaginer la mort nostre seignur le Roi ma dame sa compaigne ou de lour fitz primer & heir . . . & si homme leve de guerre contre nostre dit seignur le Roi en son roialme ou soit adherent as* [*sic*; adherant aux?] *enemys nostre seignur le Roi en le roialme donant a eux eid ou confort en son roialme ou par aillours . . .*]

The statute goes on to call "treason" the violation of feudal or common law obligations owed to lesser mortals also:

And moreover there is another manner of treason, that is to say, when a servant slayeth his master, or a wife her husband, or when a man secular or religious slayeth his prelate, to whom he oweth faith and obedience . . . [*Et ovesque ceo il y ad autre manere de treson cest assavoir quant un servant tue don* [*son*?] meistre une femme qe tue son baron quant homme seculer ou de religion tue son prelat a qi il doit foi & obedience . . .]

The former was eventually called "high treason;" the latter "petty treason." 2 Pickering, *op. cit.*, 51-55.

202. See below at Chapter II note II-45 sq.

203. Southern v. Howe, 2 Rolle 5 (1617): "*Auri icy nest alcun loyal dampnification al Plaintiff, car il fuit imprison mes null loyal proceeding fuit ewe vers luy, mes solment il fuit compell per force d'un barbarous Roy, & donque il doet suer per Petition . . .*" There were other grounds for the decision, such as the rule *caveat emptor* (let the buyer beware), under which Howe and his servant did no legal wrong to the King of Barbary, and thus could not be compelled to bow before the foreign law under which the fraud (at least when worked against the king) would nullify the deal. But this is not the place to trace the development of English rules of conflict of laws or the law of fraud.

204. Again, as so often in this study, an interesting side-track must be resisted. For a full understanding of the background against which the classification of the "King of Barbary" as a king and nothing else (he was not argued to be a "pirate" as far as appears from Rolle's report of Southerne v. Howe) a full course in English commercial, criminal and constitutional law of the early 17th century would be necessary.