

## IV

# British Practice in the Nineteenth Century

### Eurocentrism and British Imperial Law

**B**ritish sea power emerging from the Napoleonic Wars so dominated international sea commerce that it is difficult throughout the nineteenth century to distinguish British interpretations of international law uttered for the purposes of self-justification and adversary argument from statements of international law persuasive on all states participating in the international legal order as defined in Europe.<sup>1</sup>

It is consistent with the facts to classify the British assertions of law as persuasive statements of true international law, acquiesced in by other states where not protested and, in any event, becoming the basis for a sort of stable order eventually accepted by statesmen generally as compelled by international law. It is equally consistent with the facts to classify the British assertions as mere adversary arguments resented and at times protested by other states (including non-European political societies treated for many purposes as states, although not conceded much more than the formal title and the legal capacity to conclude disadvantageous treaties)<sup>2</sup> but not pressed for political reasons irrelevant to the apprehensions of law held by those statesmen and their societies regardless of the British arguments and military power. It is even possible consistently with the facts to classify the British dominion over the seas as a kind of effective occupation in the sense argued in the 17th century by Grotius,<sup>3</sup> and British assertions of "international law" being merely a British municipal law classification of that part of British municipal law that was determined by the Crown or by Parliament in parts of the British dominions under the jurisdiction of the Admiral, excluding the ordinary colonial or Common Law courts.<sup>4</sup>

Whatever the classification of British views, legal or political, reflections of true international law or merely a British interpretation of that law; reflections of the law conceived by the British to bind and restrict the actions of all states on the basis of their sovereign equality, or conceived by the British to endow themselves with legislative and executive authority to declare and enforce rules in a way not permissible to other states; the British

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actions and justifications have been accepted by most European scholars as highly persuasive regarding the law and as views and state practices that cannot be disregarded, even if not fully determinative, in any analysis of the public international law relating to “piracy” in the nineteenth century.

As noted above,<sup>5</sup> by 1819 the leading British Admiralty judge of the time, Sir William Scott, Lord Stowell, regarded “piracy” in the criminal law sense of “robbery within the jurisdiction of the Admiralty courts” as an anachronism, applying the word for the purposes of a property adjudication only. In another sense, to justify political action, the word was at that time in England gaining increasing currency.

The transition from word of art in a property law and a criminal law context to a word used to justify merely political action in modern times seems to have begun in England with the series of statutes beginning in 1777 by which American privateers were sought to be called “pirates,” and no serious legal consequences flowed from that labeling.<sup>6</sup> In form, the statute of 1777 recited that “acts of treason and piracy” had been committed upon the ships and goods of British subjects and that persons charged with “such treasons and felonies” had been taken into custody. It authorized their detention without bail, and forbade their being tried “without order from his Majesty’s most honourable privy council.” In fact, nobody was executed as a “pirate” under this statute or its successors, and all prisoners were ultimately exchanged or released.<sup>7</sup>

In the United Kingdom as in the United States in the 1780s to 1820s<sup>8</sup> there were many rhetorical references to the Barbary states as “piratical.” The legal meaning of these references was resolved in a series of cases all concluding that the Barbary states were “states” in the international legal order.<sup>9</sup> Nonetheless, in a series of incidents during the nineteenth century, Great Britain found itself for various political, economic, historical and cultural reasons needing legal labels to justify action short of war against foreigners interfering with British shipping. British military dominance of the seas, and the spreading notion that the forms of sovereignty that might be possessed by non-European societies (whether denominated “states” or not by European jurists and statesmen) should not be permitted to interfere with the natural law of property or trade, led to a further assumption by Great Britain of a legal authority to protect shipping lanes in general, thus third country shipping indirectly; eliminating the need for direct injury to a British flag vessel or national to justify military action. Such military action could then be seen either as an option of policy unfettered by the usual legal restraints on the decision to go to war both in municipal law and international law, or as a mere enforcement action by a “policeman” of the international order, or even by a “policeman” of the British legal order as it was extended to all seas for the purposes of securing universal “rights” to commerce as those “rights” were perceived by British lawmakers. This mixture of motives

and political, economic and legal rationales was covered by a revival of the label "piracy" as a basis for military action quite distinct from the municipal criminal law and Admiralty law property usages historically rooted in English law.

In the international law classifications, the word "piracy" had by the mid-eighteenth century dropped out of serious usage. Christian Wolff, a prodigy born in 1679 in Breslau (now Wrocław, Poland) and making his career in the German principalities of the Holy Roman Empire, did not use the word. He concluded that "if any nation desires to restrain another from the use of navigating and fishing in the open sea, the latter nation has just [legal?] cause of war."<sup>10</sup> In 1758, Emmerich de Vattel, a Swiss jurist writing what was to prove the most popular treatise on international law of the first two or three decades of the nineteenth century, came to the same conclusion: "Since, then, the right of navigating and fishing on the high seas is common to all men, the Nation which undertakes to exclude another from that advantage does it an injury and gives just cause for war."<sup>11</sup> As has been seen, the first two wars of the United States, that with France in 1798-1800 and that with Tripoli in 1802-1805, were naval wars with no declarations of war—rather a continuation through public action of the privateering engagements of the previous centuries that had been resorted to in place of a public "war." The distinction between a "just cause of war" and military action to enforce "rights" without the formalities of a legal status of "war" (but with all the legal results flowing regardless of formal "status") was nil by the turn of the nineteenth century in Europe, including the North Atlantic and Mediterranean. It is in this context that the shift in terminology from "war between states" (even without declarations) to "military action to suppress piracy" must be evaluated.<sup>12</sup>

### *"Pirates" as Permanent Enemies in British Imperial Law*

**The Legal Rationale for Naval Action.** It was noted above<sup>13</sup> that the British Foreign Minister at the European Conference of Aix-la-Chapelle in 1818, Lord Castlereagh, had tried unsuccessfully to appeal to the analogy between "piracy" and the slave trade to justify British enforcement action at sea against slave traders of countries who had by their municipal law abolished the trade. His argument was based on the naturalist conception that if a law is common to the municipal orders of all civilized states, then that law reflects a natural law which exists independently of state boundaries. From this premise he argued that legal "standing" existed in all states to enforce the universal "law of nations;" thus that the British Navy could arrest and try a Portuguese or French slave trader *not* for violation of English law (which did not apply on a foreign ship on the high seas), or the law of the flag state (which the British had no legal power to enforce), but international law, of which the "law of nations" was conceived to be a part.<sup>14</sup>

As has been seen, this argument was rejected by France, Portugal and the leading British Admiralty judge of the time, Sir William Scott.<sup>15</sup> Although Castlereagh's approach was adopted by Justice Joseph Story in the United States, it was rejected by the Supreme Court under Chief Justice John Marshall, who felt the furthest the powers of a Court established by the American Constitution could extend in the absence of a link of territory or nationality to provide "standing," was to the acts of "stateless" "pirates"<sup>16</sup> unless an Act of Congress required a broader reach by the Court, in which case the political dispute that was likely to result with other sovereigns protecting their own jurisdiction would best be handled by the political arms of government while the Court did what the Congress had directed it to do. It was then seen that the Congress never did direct the Court to act in a way that would raise the problem with a foreign sovereign; that in practice the United States restricted its jurisdictional claims to narrower limits than Story and other natural law theorists might assert.

But the limits the courts might feel restricted the legal powers of their sovereigns, and the limits that legislators apparently felt it wise to adopt in passing legislation of general character, were not always the limits that active politicians would adopt in suggesting arguments to justify action against foreigners that was otherwise felt to be desirable. If Castlereagh could eliminate the slave trade on foreign vessels by analogizing that trade to "piracy" and then asserting universal policing jurisdiction over "piracy" as part of the *jus gentium* "law of nations," and the "law of nations" could be construed to be part of the law between sovereigns, *jus inter gentes*, in disregard of the distinction drawn by Zouche,<sup>17</sup> a rationale would have been achieved by which naval action could be released from the normal rules of "standing;" the British interpretation of British law, as part of the "law of nations," could become the basis for British action against foreigners abroad. Unless a particular foreign country chose as a matter of policy to deny the existence of the rule of substantive law on the basis of which the British acted, there would be no basis for diplomatic correspondence, no claims, and no problem arising out of the law of "standing." The British Navy would rule the seas as far as foreign individuals were concerned. The logic of this position must have seemed very attractive to British statesmen of the period immediately following the fall of Napoleon regardless of the underlying legal problems perceived by the courts, legislators, and foreign governments.

The transition of the word "piracy" into the military/political vocabulary of British statesmen took at first a very odd form—the extension to "piracy" of legislation that had been aimed solely at encouraging the British Navy to fight Napoleon's warships.

**The Bounty Legislation of 1825 Retroactive to 1820.** At the beginning of the nineteenth century, the distinction was small between commissioned vessels that were part of a permanent military force, a navy, on the one hand,

and private vessels commissioned to act for personal profit under letters of marque and reprisal subject to executive control in the issuance, cancellation and bonding procedures<sup>18</sup> on the other hand.<sup>19</sup> Since the destruction of enemy naval vessels did not lead to riches as capture of enemy merchant vessels did through Prize proceedings, and naval engagements with armed men of war involved human butchery of a sort that no sane person could voluntarily submit to without a large inducement in glory or money or both; and not enough men were mad enough to volunteer for it in the hope of glory alone,<sup>20</sup> Parliament in 1803 introduced a substantial money inducement. The Act of 1803<sup>21</sup> did not distinguish between navy vessels and privateers:

XXXVII. . . . That there shall be paid by the treasurer of his Majesty's navy upon bills to be made forth by the commissioners of the navy . . . unto the officers, seamen, marines, soldiers and others, who shall have been actually on board any of his Majesty's ship or ships of war, or hired armed vessel or vessels, or of any privateer or privateers, at the actual taking, sinking, burning, or otherwise destroying any ship or ships of war or privateers belonging to the enemy . . . during the present war, five pounds for every man who was living on board any ship or vessel so taken, sunk, burnt, or otherwise destroyed, at the beginning of the attack or engagement between them . . . .<sup>22</sup>

This statute was superseded two years later but the language of this section was repeated verbatim in Section V of the new statute.<sup>23</sup>

With the end of the war against France and the War of 1812 against the United States, the main job of the British navy shifted to protection of the growing maritime commerce of the expanding Empire. While navy duty became less profitable, therefore, it also became less hazardous except where there was armed interference with British ships which it was the function of the navy to protect. Without reexamining the legal implications of the situation, this new (or revived) sort of armed interference was denominated "piracy" and in 1825 the head-money system was extended and vastly increased to cover it:

That . . . there shall be paid by the Treasurer of His Majesty's Navy . . . unto the Officers, Seamen, Marines, Soldiers and others, who shall have been actually on board any of His Majesty's Ships or Vessels of War, or hired armed Ships, at the actual taking, sinking, burning or otherwise destroying of any Ship, Vessel or Boat, manned by Pirates or Persons engaged in Acts of Piracy . . . the Sum of Twenty Pounds for each and every such piratical Person, either taken and secured or killed during the Attack on such piratical Vessel, and the Sum of Five Pounds for each and every other Man of the Crew not taken or killed who shall have been alive on board such Pirate Vessel at the beginning of the Attack thereof.<sup>24</sup>

Another provision of the Act required the return of property in the possession of "pirates" to its former owners or proprietors after *in rem* proceedings in Admiralty, and on the payment by the owners of one eighth of the value of the property returned in lieu of salvage.<sup>25</sup> The bounty provision was made retroactive to engagements after 1 January 1820.

The Act does not require any adjudication of the criminality of anybody, and seems to have merely continued the war-time legislation to cover acts against “pirates” as if the Latin phrase about “pirates” being “*hostes humani generis*”<sup>26</sup> were being read once again in a literal way to make of “pirates” persons to whom the laws of war applied, or at least those parts of the laws of war that were favorable to the British Navy.

Action under this statute was a major part of British imperial activity from 1825 to 1850 and the British seemed to assume they were legally at war with all who obstructed the expansion of British hegemony, both on the high seas and elsewhere. It is patently impossible to examine for legal and political implications all the instances in which “suppression of piracy” became the asserted basis for British naval action during that period, but a few instances and British adjudications illustrating the changing conceptions of “piracy” that are both evidenced by the Act and by actions under it are necessary. Thus, in the narrative and analysis that follows, it should be borne in mind that details regarding some Persian Gulf, Mediterranean and Southeast Asian practice is not the only evidence of the political use of the word “pirate” and its transition into the vocabulary of public international law with overtones of municipal criminal law and maritime property law.

### *The New Law Applied*

**The East India Company in the Persian Gulf.** It is possible that a major reason for making the statute of 1825 retroactive to 1 January 1820 reflected British political activities in the Persian Gulf. In 1806 the British established formal relations with the Sheikh of the Qawasim, an Arab people in the Persian Gulf. In the more or less standard history of the area written a century later by a British scholar and published by the British Government of India this interest was said to be the result of the “increase of piracy and lawlessness at sea” in that area.<sup>27</sup> The formal relations were begun in a document in treaty form between the British East India Company and the Sheikh in which the word “pirate” or equivalent concept is not mentioned, nor is any “lawlessness” or any indication what “law” was conceived to apply in the area; the document is called an “Agreement” in the English translation.<sup>28</sup>

On 6 and 8 January 1820 the British produced some more documents in an attempt to stabilize the legal order of the Persian Gulf in a way that would protect their shipping interests. The one that was clearly intended to be the permanent commitment of the acceding Sheikhs to the relationships desired by the British was in Arabic called by the same word that in 1806 had been neutrally translated “Agreement.” It was now translated “Contract.”<sup>29</sup> The Arabic word, like the English word “agreement,” has no particular legal implications. But the word “contract” in English implies the existence of a legal order and legal obligations; indeed, the word “contract” is usually used in English with regard to the municipal legal order and private relationships,

while the word “treaty” is usually used to label agreements between states that are binding in the international legal order. Historically, this distinction in implication between the words “contract” and “treaty” in English legal documents was not as sharp as it is today, and even today the usage is not entirely consistent. There seems to be no record of why the same Arabic word was translated officially into two English words with differing connotations. It is possible that a change in translators was all that was involved, except that the new translator in 1820 used the word “treaty” in another group of documents to be discussed below. It is probably incorrect to read excessive legal subtlety into the translations made of an Arabic word in the Persian Gulf by a British military officer in the employ of the East India Company in 1820, but it is some sign of the translator’s conception of political, and thus legal, relationships between the Company as a creature of English law and the Arab Sheikhdoms as political societies with which the Company had to deal. If the Company were to deal with the Sheikhdoms as legally equal, then “contract” must have seemed an appropriate term even though it implied subordination of the Sheikhdoms to English law; just as the Company was wholly subject to English law regardless of its also being subject to international law when it acted for England abroad. But it is unclear whether the word “contract” in this context was consciously intended to imply the subordination of the Sheikhdoms to English municipal law as such, English municipal law in its Imperial Law phase using the language of international law, or true international law as it applies between equal sovereigns.<sup>30</sup> It is certain that British officials at this period were familiar with Roman “imperial law” as an aspect of Roman municipal law engulfing the “independent” societies of the Roman world in “treaty” relationships that were wholly governed by the interpretations of the Roman Senate and derived their legal force from Roman conceptions of the legal order.<sup>31</sup>

The “Contract” of 8 January 1820 is in treaty form. It provides:

*Article 1.* There shall be a cessation of plunder and piracy, by land and sea, on the part of the Arabs, who are parties to the Contract, for ever.

*Article 2.* If any individual of the people of the Arabs contracting, shall attack any that pass by land or sea, of any Nation whatsoever, in the way of plunder and piracy, and not of acknowledged war, he shall be accounted an enemy of all mankind, and shall be held to have forfeited both life and goods; and acknowledged war is that which is proclaimed, avowed, and ordered by Government against Government, and the killing of men and taking of goods, without proclamation, avowal, and the order of Government, is plunder and piracy . . . .

*Article 4.* The pacificated Tribes shall all of them continue in their former relations, with the exception that they shall be at peace with the British Government, and shall not fight with each other . . . .

*Article 7.* If any tribe, or others, shall not desist from plunder and piracy, the friendly Arabs shall act against them according to their ability and circumstances, and an arrangement for this purpose shall take place between the friendly Arabs and the British at the time when such plunder and piracy shall occur.

*Article 8.* The putting men to death after they have given up their arms is an act of piracy and not of acknowledged war . . .

*Article 9.* The carrying off of slaves, men, women, or children from the coasts of Africa or elsewhere, and the transporting them in vessels, is plunder and piracy, and the friendly Arabs shall do nothing of this nature . . .<sup>32</sup>

Pending their acceding to this agreement, other Persian Gulf Sheikdoms agreed to various “preliminary treaties” at about the same time.<sup>33</sup> Five of these treaties concluded on 6, 8, 9, 15 January and 5 February 1820 have common articles under which the Arab Sheikhs agreed to surrender their boats to a British General except for pearl fishery and fishing boats, yield up “Indian prisoners” (presumably British Indian traders and Sepoy soldiers under British command), and accept peace terms with the British as “friendly” or “pacificated” Arabs.<sup>34</sup> One of the five, that with the representative of two Sheikhs of Bahrein on 5 February 1820, instead of mentioning the surrender of boats except for fisheries vessels, provides that “the sale of any commodities which have been procured by means of plunder and piracy,” and the sale of supplies to “such persons as may be engaged in the practice of plunder and piracy” shall be forbidden by the Sheikhs in Bahrein or its dependencies, and that “if any of their people shall act contrary hereto, it shall be equivalent to an act of piracy on the part of such individuals.”<sup>35</sup>

A sixth “preliminary treaty,” with the Sheikh of “Aboo Dheebbee” on 11 January 1820, does not address Indian prisoners (perhaps there were none) or fisheries, but seems to reflect an alliance in the struggle between the British and Abu Dhabi:

*Article 1.* If in Aboo Dheebbee or any other of the places belonging to Sheikh Shahbout there are any of the vessels of the piratical powers which have been attached or may be hereafter attached by the General during the present war against the pirates, he [presumably the Sheikh] shall deliver such vessels to the General.<sup>36</sup>

As noted above, it is unclear precisely what the implications were of the word for “treaty” and “contract” actually used in the Arabic texts, which were the only texts the Sheikhs could read or have read to them with understanding. Without more analysis than available documents make possible at this time, it is wise to be cautious about far-reaching implications from inferential evidence. But some implications can be drawn.

The British dominated the negotiation and controlled the translations between English and Arabic. Evidence of this can be garnered from the documents themselves. For example, the seal of Captain J.P. Thompson, 17th Light Dragoons “and interpreter,” appears in the place of the seal of Hussun



(*sic*; Hassun?) bin Ali, Sheikh of Zyah with an explanation: "The seal is Captain Thompson's, as Sheikh Hassun bin Ali had not a seal at the time of signature."<sup>37</sup>

In only two of the "preliminary treaties" is "piracy" mentioned. The treaty with Bahrein analogizes dealings with those who practice "plunder and piracy" as "equivalent to an act of piracy." There is no definition of "piracy" and no direct statement of the legal result of the label as used. It is, of course, possible to speculate with some assurance that the word was being used in a political sense implying a British intention to suppress by force whatever the British determined unilaterally to be "piracy," and whether on land or sea, and without any criminal or Admiralty proceedings in any court. But evidence to support that speculation rests on more or less contemporaneous British actions and language elsewhere, which will be discussed below.

More directly pertinent at this point is the distinction drawn between "piracy" and "acknowledged war" in the "contract," and the clear implication that there is no intermediate status between the two. Thus, political motivation, the absence of the *animo furandi* required in British municipal law before a criminal conviction of "piracy" could be obtained before a Commission set up under the statute of 1536, was dropped from the conception of "piracy" as a basis for military action. It fits the facts equally well to regard the conception of "piracy" in this period as reflecting British perceptions of true international law, British Imperial law as a branch of British municipal law, or simply the unilateral assertion of a special set of rules of law to govern British relations with Arab societies whether or not part of general international law or some concept of British hegemony, or even some disguised assertion of British dominion in the Persian Gulf equivalent to the imperium exercised at sea although not overtly claimed as such after 1801.<sup>38</sup>

While it is easy to imagine the British attitudes towards the "freedom of navigation" on the "high seas" in the early nineteenth century, and the British role as trustee for world commerce, or proprietor of the commercial world's "rights" against those who saw no natural law underpinning to foreigners' asserted rights of trade and property, it is impossible to put those feelings into legal terms acceptable to all and conformable to all statements of judges and statesmen of the time. It is this impossibility of positing a legal system capable of explaining the British actions and British rhetoric at the same time that makes it best to treat the situation as fundamentally a matter not of natural law, but of policy. Moreover, to the degree that positive law arguments were posed against British actions, as at the Congress of Aix-la-Chapelle in 1818,<sup>39</sup> the British arguments lost. It was only where confronting societies at that time unable to frame their objections to British assertions of "law" in terms of the Westphalian "constitution" of international society, or

too weak to make those arguments heard against British military opposition, that the British felt free to impose their views.

Another, rather more subtle, approach supports the contention that the British, in using the word "piracy," were applying a British municipal law conception; not the British municipal law of crimes within the jurisdiction of the British Admiralty courts (although there remain overtones of that), but of British unwritten constitutional law under which enforcement of some "British Imperial law" was given to the navy by direct action rather than to the British judiciary. That is in the distinction between British action by the officials of the East India Company on the one hand, and British action by the Royal Navy on the other. The Persian Gulf transactions were entered into on the British side not by the diplomatic representatives of the government in London, but by the military and administrative representatives of a mere Chartered British Company.<sup>40</sup> The history of the Company and its relationship to the Crown, the Parliament and the Courts of England is beyond the scope of this study.<sup>41</sup> But it seems clear that major political and legal results flowed from the distinction between the Company (and other European Companies of equivalent status, such as the United Dutch East India Company) and the home Government as the party concluding treaties (or "contracts") with non-European governments.<sup>42</sup>

Among the pertinent legal and political results was the placing in the hands of the representatives of a military arm of a body organized under the law of England for commerce, and which had not wholly lost its commercial functions or traditions, responsibility for keeping open the sea lanes for that commerce. The temptation to regard any political action by others that obstructed the course of commerce as "illegal," or at least within the legal powers of the Company officials to suppress, must have been enormous even if unconscious. In view of the use of the word "piracy" in England to bring about the legal results of treason in the 1690's, and the continuance of the statute of 1700,<sup>43</sup> although clearly it was not applicable to foreign commerce raiders in foreign waters, it is not surprising that the word "piracy" was felt to have broader legal meanings than the strictly historical one in English law relating to robbery within the jurisdiction of the Admiral.

An example of the spreading use of the word is implicit in the distinction between the "preliminary treaties" and "contract" referring to "plunder and piracy" as if something done by the ill-disciplined subjects of the various "pacificated" Arab Sheikhs, and the status of the Sheikhs themselves. In the treaty with Abu Dhabi there are references to "vessels of the piratical powers" and the "present war against the pirates," implying that those Sheikhs who did not come into treaty relations with the British were themselves mere leaders of "pirate" bands. How there could be a "war" against them when, in the "contract," it was asserted that a key legal distinction existed between "piracy" and "war," is totally unclear. It might

be cynical, but still accurate in the light of this usage, to conclude that the British Company's officials wanted the privileges of "war" themselves in the struggles with the Arab Sheikhdoms and their military arms and unruly merchants, but also wanted to deny the legal status of prisoners of war and belligerent rights of search and seizure to those Arabs. The language is reminiscent of the Roman conception of permanent war with "*pirata*" who opposed the establishment of Roman hegemony in the Eastern Mediterranean,<sup>44</sup> and it can be suggested in light of the remarks of Sir T.S. Raffles<sup>45</sup> that this coincidence is not accidental.

**The British Navy in the Eastern Mediterranean Sea.** Events in the Mediterranean confirm this analysis. In January 1813, the British Foreign Minister, Lord Castlereagh, sent William à Court as Envoy Extraordinary and Minister Plenipotentiary on a "Special Mission to the Several Powers on the Coast of Barbary . . . [to place] on a more permanent and satisfactory footing the Relations between This Court [Great Britain], and the Respective Sovereign States on that Coast."<sup>46</sup> Court was made subordinate to the Principal Secretary of State for War, not for Foreign Affairs, although the language of his instructions refers to the Barbary Coast societies as "States."<sup>47</sup> It may be remembered that until this time, the British had maintained relations for the previous 200 years with the rules of Algiers, Sallee, Tripoli and Tunis on a consular level and had considered those societies to be "states" capable through their own legal proceedings of changing title to vessels and goods.<sup>48</sup> At the same time, in the complex history of the Barbary "states," a constitutional relationship to the Ottoman Emperor was maintained by the Barbary rulers.

While it might frequently have been in the Barbary rulers' interest to deny that subordination from time to time, it was undoubtedly in their interest at other times to emphasize it.<sup>49</sup> For example, as late as 27 September 1819 the Dey of Tunis used the technical Ottoman legal position in the constitution of Tunis as a basis for refusing to yield to European pressure seeking to get the Tunisians to disarm their ships and pursue peaceful trade only (i.e., to allow the Europeans to sail freely through waters historically claimed as within the taxing jurisdiction of Tunis): "If a War should break out between any Power and the Ottoman Porte, what shall We answer if she requires Us to arm Our Vessels to assist her, as has always been the practice . . . ?"<sup>50</sup>

Court's mission failed. In 1818, at Aix-la-Chapelle, the "allied Powers" who had defeated and occupied Napoleon's France agreed to send an international commission to repeat the British effort. It too failed.<sup>51</sup>

Meantime, in 1816 Great Britain had sent Lord Exmouth with a military expedition to Algiers to secure the Dey's agreement to new constitutional arrangements with regard to some islands populated by ethnic Greeks, for several centuries in the past part of the Ottoman Empire. The British sought to establish a "protectorate" in the "Ionian Islands," and had achieved the

agreement of their European allies in this endeavor at the Congress of Vienna.<sup>52</sup> In a sense, Exmouth's expedition, which involved the bombardment of Algiers, was too successful in that the Dey not only agreed to the new status of the Ionian Islands, but also agreed to end "Christian slavery" in Algiers. Ironically, the British position then, agreed to by the Dey, was that the law of war should be applied with regard to Europeans taken by the privateers of Algiers, who were thenceforth to "be treated . . . as Prisoners of War, until regularly exchanged according to European practice . . ." <sup>53</sup>

Thus, in 1816, it was clearly the British position that Algiers was a state in the international community capable of participating in the legal order of Europe with regard to "war;" that it was not a mere "piratical" community. The legal position adopted by British Admiralty courts<sup>54</sup> had thus been translated to the area of public international law as a reflection of high policy.

France was unhappy with the continued independence of the Barbary states as full members of the international community as defined by the public law of Europe and, in 1827 instituted a blockade of Algiers, finally capturing the city in accordance with the European conceptions of the law of war on 5 July 1830.<sup>55</sup> Except in polemical writings in Europe, the Barbary states throughout the period were not treated as "piratical," but as "states."

The political pressures to find a rationale for naval activity against those who, for whatever reason, interfered with British merchant shipping in the Mediterranean Sea reached something of a pitch in the early 1820s, at about the same time the British East India Company forces in the Persian Gulf began to use the word "piracy" in connection with the activities of the Arab Sheikdoms there and the market in Bahrein. The parts of the Ottoman Empire populated by ethnic Greeks had begun to assert a degree of independence inconsistent with continued Turkish rule already in the second decade of the nineteenth century and a "Protectorate" by Great Britain of the "Ionian Islands" was established while unrest in the rest of the ethnic Greek area increased. The Senate of the Ionian Islands on 7 June 1821 proclaimed the "neutrality" of the Protectorate of the Ionian Islands in that struggle.<sup>56</sup> The British High Commissioner in the Ionian Islands, Sir Frederick Adams, issued a series of declarations between April and October of that year committing the Ionian Islands as a political body to "non-interference."<sup>57</sup> On 30 June 1821 Lord Bathurst, the British Colonial Secretary, instructed Sir Frederick "against adopting any proceeding which can be construed as a violation of that strict Neutrality which His Majesty has determined to observe . . ."<sup>58</sup> and a formal Proclamation of Neutrality for the Ionian Islands was issued by the High Commissioner on 7 October 1821.<sup>59</sup> Interestingly, there is no record of any equivalent formal British announcement near this time although internal British documents imply it.<sup>60</sup>

Meantime, on 22 September 1821 a British firm had asked the Government if it could sell arms to the Pasha of Egypt to defend one of his ships from attack

by rebels against Ottoman rule.<sup>61</sup> Lord Liverpool, the Prime Minister,<sup>62</sup> replied that the arms could also be used for attack, thus their sale would be unwise in the view of the British Government, but he did not forbid it.<sup>63</sup> Apparently the question and the situation in the Ionian Islands Protectorate produced a flurry of interest in the Cabinet; Dr. Christopher Robinson was asked for a legal opinion about whether Greek insurgents operating at sea in the Eastern Mediterranean should be regarded by the British as “pirates.” His opinion was delivered on 4 October 1821:

[I]t would not be proper to consider Persons as *Pirates* who may be cruising under a state of alleged Hostilities, whether regular or irregular, provided their Intentions were in fact satisfactorily distinguished from the mere predatory character of Piracy as considered in Law. . . . [But since there is no regular Greek government or public law in the area] I think it would be consistent with the Neutrality or forbearance that His Majesty’s Government might be disposed to use and practice under existing Circumstances to instruct His Majesty’s Cruizers to interpose by all amicable [*sic!*] means, to protect the Ships of His Majesty’s Subjects, or of the Ionian Islands under His Majesty’s protection, from being treated by such Cruizers as liable to all the restrictions to which Neutral Commerce is required to submit in a state of War, between regular and recognized Governments.—It may be a matter of discretion, on what Occasions and to what extent this interposition should be authorized; But . . . a reasonable limitation of the arbitrary pretensions of such Cruizers, would be justified, and may perhaps be found to be expedient for the protection of British Commerce in the Mediterranean.<sup>64</sup>

Two aspects of this opinion seem noteworthy; (1) as a matter of standing, it applies only to the protection of British commerce and does not relate at all to the protection of Egyptian or other vessels; and (2) the classification “pirate” seems to reflect English municipal criminal law conceptions and a continued reluctance to intervene in the internal affairs of any other country by questioning its licenses or even its very existence when the fact pattern clearly involved public action by foreigners for political ends. Nonetheless, the possibility was opened that as a matter of policy the British government could intervene without violating public international law. The choice as to whether to accord belligerent rights to the Greek irregular vessels was to be a matter of policy only, and there is an implication that if a state of war was, for political reasons, not recognized, or the legal capacity of the Greeks to license privateers was not accepted, there would be no legal obstacle to British intervention to suppress “piracy.”

The British officials in London were apparently considering the options open to “positivist” jurists: Whether the struggle between the Greek “National Assembly” and the Government of Turkey was to be regarded as belligerency in which both parties assumed symmetrical legal rights and obligations and the British were “neutral,” or the Greek vessels under National Assembly license could be legally suppressed as “pirates” consistent with British interest in the area; indeed, whether the law of “piracy” required that suppression by “neutral” powers. Robinson’s answer was that

the labeling system to be adopted was a matter of policy, not law, and that the international law regarding "piracy" did not require British suppressive action against Greek insurgents.

A further, and more serious implication of this opinion exists when it is read as part of a broader context. The Greek "National Assembly" declared the independence of Greece from Ottoman rule on 13 January 1822,<sup>65</sup> and on 25 March of that year the new "Provisional Government" of Greece declared a "blockade" of some Turkish ports.<sup>66</sup> The British Government seems to have considered Great Britain "neutral" as if "belligerency" were the correct legal status of relations between the Greek authorities and the Turkish Government. By 30 April 1822 the British authorities were accepting as legitimate the captures of neutral merchant vessels by privateers licensed by Greek authorities pursuant to the blockade declaration of 25 March. Merchant ships of the Ionian Islands themselves were not protected by the British Navy.<sup>67</sup>

Early the next year, Dr. Stephen Lushington was formally asked whether the insurgents had a belligerent right to institute a legal blockade effective against British neutral merchants, and rendered two opinions dated 29 May and 26 June 1823. In the first he advised the Government that the Greek authorities, although unrecognized, and the state of war being unrecognized by the British government, nonetheless had the equivalent of belligerent rights. Lushington had grave difficulties meshing this naturalist conclusion, in which the law flowed from the facts in disregard of the labels given or withheld for policy reasons by the political branch of the British Government, with the positivist orientation of his clients (the Government) and his own inclinations. The legal tactics of the Greek privateers were ingenious:

[O]ccasionally to blockade the entrance to a port and when driven away by the absolute appearance of a superior Turkish force . . . they quit that part of the Turkish coast, and proceed off another port, where a similar conduct is pursued, so that it is impossible for the British owner when he dispatches his vessel to know whether upon her arrival at the port of destination, such port may be blockaded or not.<sup>68</sup>

In the absence of formal notification and effectiveness maintained throughout the period subject to notification of the legal "blockade," the blockade would not be regarded as legal in a British Admiralty court. Nonetheless, Lushington pointed out, it is regarded as legal in Greek courts. He concluded that the British should "compel the Greeks to observe towards British subjects the usages of legitimate warfare."<sup>69</sup> As to the status of the Greek privateers and Greek courts themselves, Lushington divided the British position into a recognition *de facto* but not *de jure* of the independence of the Greek nation from Turkey, finding precedent in the British attitude towards the former Spanish colonies in the Western Hemisphere. From this, he argued that a blockade properly proclaimed and maintained by Greek forces would be the exercise of belligerent rights justifying Greek confiscation of the

property and perhaps even imprisonment of the crew of British blockade-runners.<sup>70</sup> He thus found himself in the same position that Gentili had discovered more than two hundred years earlier and that the United States was discovering at the same time (only to forget it in the emotion of the Civil War in 1861): policy-makers cannot change the real world by manipulating the labels. As Lushington wrote: "To apply the strict principles of the Law of Nations to a state of things so anomalous [apparently meaning a state of reality out of step with the legal labels affixed by policy-makers seeking to use the Law of Nations to justify policy in disregard of reality], would, I apprehend, tend only to mislead the parties interested, for these questions are always mixed up with political considerations, and the practice will in some degree differ from the theory."<sup>71</sup>

Shortly after this opinion was rendered, on 6 June 1823 the Foreign Office issued a general proclamation of British "neutrality" in all "hostilities . . . between different states and countries in Europe and America"<sup>72</sup> and, without mentioning British "neutrality" expressly, another proclamation was made by the Foreign Office on 21 June 1823 that the British Government "will treat the warfare between the Turks and the Greeks as legitimate warfare."<sup>73</sup> In his opinion dated 26 June 1823, Lushington interpreted this proclamation to be the positivist document finally meshing the world of law with reality as a matter of British policy, and considered the rights and obligations of British merchants in the Eastern Mediterranean as subject to the law of neutrality under the Law of Nations as it might be applied in Greek and Turkish Prize courts. He thus confirmed his earlier opinion, but on the basis of law rather than policy in the mere guise of law.

Just a few days later, on 12 July 1823, the Foreign Minister, Lord Canning, told the British Ambassador in Constantinople, Lord Strangford, that the "blockade" had degenerated in some instances to lawless violence and plunder, mentioning several examples of British remonstrances given diplomatically to the Turkish Government on the ground of humanitarian concern, and indicating that a British rescue of "wretched survivors" of a defeated Turkish garrison at Napoli di Romani might have been an "interference [of which] according to the strict laws of Neutrality, the Greeks might, in their turn, have complained."<sup>74</sup>

Things limped along with the British becoming more and more involved in the politics of the Ionian Islands, the Greek rebellion, and British trading interests, attempting to apply the law of war to the situation. This approach was condemned by Prince Metternich of Austria-Hungary, who believed that rebellion was illegal; a violation of the natural law under which states were created and governed by inherited authority deriving from history and God.<sup>75</sup>

On 31 December 1824 Canning instructed Sir Henry Wellesley, the British Ambassador in Vienna, how to respond to Metternich:

The doctrine of Prince Metternich, that the Greeks, as *rebels* [*sic*], are not entitled to the same rights of war, as legitimate belligerents, is one, of which, we think His Highness would do well to weigh all the consequences, before he promulgates it to the world . . . [W]e think it for the interest of humanity to compel *all* [*sic*] belligerents to observe the usages by which the spirit of civilization has mitigated the practice of War.<sup>76</sup>

The word “piracy” and its legal results at English law were injected into the politics of the Greek rebellion by the Royal Navy. The Navy’s problem was how to protect British shipping and perhaps other neutral shipping, including the shipping of the Ionian Islands, from the depredations described by Sir Stephen Lushington; the abuse of the law of blockade by Greek privateers. Indeed, there was a trend of British naval thought that objected in principle to privateering. Lord Nelson himself in 1801 had written:

Respecting privateers, I own that I am decidedly of the opinion that with few exceptions they are a disgrace to our country; and it would be truly honourable never to permit them after this war. Such horrible robberies have been committed by them in all parts of the world, that it is really a disgrace to the country which tolerates them.<sup>77</sup>

It was apparently but a short step for British naval officers, encouraged by the Bounty Act of 1825<sup>78</sup> to begin referring as “pirates” to those who interfered with commerce protected by the Royal Navy. The “Agreements” negotiated by the military arm of the East India Company with the Persian Gulf Sheikhs indicate that the transition in language from a loose vernacular reference to the Barbary states as “pirates” had already occurred by 1820 in international documents of legal importance. That this development was not accidental is indicated indirectly by the fact that the documents concluded in the Persian Gulf were not in fact published in England outside the East India Company until about the time Parliament enacted the Bounty Act in 1825, when the “Contract” (but not the Preliminary Treaties or the 1806 Agreement with the Qawasim) was published in Parliamentary Papers.<sup>79</sup> It thus appears that the bounty of twenty pounds per “pirate” killed or captured and five pounds per escaping “pirate” on board a vessel attacked by the Navy had begun to be paid with regard to actions in that area against vessels classified as “piratical” by British municipal authorities only (the Treasurer of the Navy on receipt of certification by a British Naval Commission).<sup>80</sup>

The enthusiasm with which British naval forces chased down unlicensed Greek privateers led local Greek authorities to demand “licenses” from the Greek Provisional Government as a condition of their support. The situation is succinctly summarized by Captain G. W. Hamilton of H.M.S. *Cambrian* in a report to Vice Admiral Sir Barry Neale, Bart., the Commander-in Chief of the British Naval Forces in the area on 4 March 1827:

[S]everal pirate vessels have been destroyed . . . yet piracy evidently increases. The Greek people are starving, and I have no doubt that the opposition of the Naval Islands to the present [Greek Provisional] Government is principally occasioned by their refusing to sanction cruising.<sup>81</sup>



Indeed, in the absence of a license by the authorities impliedly “recognized” by the British as legally empowered to grant it, local Greek authorities seem to have granted their own licenses, whose legal effect was denied by the British regardless of the public purpose and local official support given the “pirates.” At one point Commander Charles Leonard Irby of H.M.S. *Pelican* wrote to the Ruling Council (“*Ephori*”) of Sparta threatening direct political action:

Ephori,—If you fail to deliver into my hands the persons of the two pirates Nicolo Suito and Nicolo Coccocci, I will intercept all vessels coming to you with provisions, and on this account I have already detained an Imperial [Turkish] trabaccolo.<sup>82</sup>

In this particular incident, one of the Ephori finally appeared to the British Commander, denied that there were any “pirates” protected by the Spartan authorities, and the matter was smoothed over without any delivery of anybody.<sup>83</sup>

Under pressure from the local Greek authorities, the Provisional Government did in fact begin to issue licenses to Greek privateers, who exercised the belligerent right of search and seizure of contraband on neutral vessels against British, French and Austrian ships. The British regarded those captures as illegal, but whether because the goods taken were not considered properly “enemy” (Turkish) property, or neutral “contraband” or because denying the belligerent right of search and seizure in the absence of blockade is not clear.<sup>84</sup>

One reason for the British frustration with the ways of the law, thus a reason for using the term “pirate” to cover military action regardless of nice legal definitions, was the difficulty of obtaining convictions on a criminal charge of “piracy” before any court. In the one known case in which the captain and crew of a Greek privateer were haled before a British court in Malta, the result was an acquittal:

The evidence for the prosecution was weak very much owing to the absence of Capt. Curtis [the British captor]—Capt. Lazzaro Mussu . . . maintained that the *Themistocles* was a regular Greek man-of-war.<sup>85</sup>

The British apparently felt the law an obstacle to action:

The more I see of these trials the more I see that a jury and our Piracy Court can do nothing likely to put a stop to the activity of the Greeks in plundering every vessel they meet with, calling all cargo Turkish property.—It was a fatal step allowing Greeks anything like the right of searching vessels under neutral flags.<sup>86</sup>

Things reached something of a crisis stage as far as the British were concerned in October 1827. Under demands by Admiral Codrington, the Greek Provisional Government reported that it “has taken the necessary measures to stop the cruising, and does not issue any more papers for cruising.”<sup>87</sup> Within two weeks Admiral Codrington in frustration at what he regarded as the faithlessness of the Greek authorities wrote to “The President and Members of the Legislative Body of the Greek Nation:”

The conduct of the Provisional Government of Greece . . . has been so unjust and so injurious to the commerce of the Allied Powers, and they have so entirely falsified the promises they made to me, that I shall decline writing to them henceforth.<sup>88</sup>

Finally, the British authorities in London issued an Order-in-Council instructing His Majesty's Naval Forces in the Mediterranean:

[T]o seize and send into some port belonging to (or under the protection of) His Majesty, every armed vessel which they shall meet with at sea under the Greek flag . . . such ships-of-war only excepted as are belonging to, or under the orders of, the persons exercising the powers of Government in Greece. . . .<sup>89</sup>

Whether this was intended to stop privateering and require the Greek authorities to establish a formal naval arm, or merely to require some regularity in the form of licensing and allow claims to be brought directly to the Greek authorities for abuses of the licenses is not clear. In any case, the absurdity of the British actually trying to police the seas with regard to Greek activities against the Ottoman Empire, while at the same time diplomatically supporting the efforts of the Greek authorities to achieve their independence of Turkish rule, was clear. The ultimate answer was simply to attack as "pirates" all the privateers whom the British sought to suppress, while arguing that the Greek Provisional Government retained all the belligerent rights that the facts justified as a matter of international law.

On 1 February 1828 Commodore Sir Thomas Staines reported to Admiral Codrington that he had entered the harbor of Grabusa and, against no military opposition at all, commenced firing; that the Greek garrison did not return fire and eleven "piratical vessels" were destroyed or captured.<sup>90</sup> The Greek authorities denied British rights to do what Staines had done and demanded that "pirates" be tried according to Greek or international law, implying that in their view the suppression of "piracy" was not a valid basis for political action; that "piracy" was a legal term with legal consequences that were being ignored by the British. Captain William B. Parker discussed the Grabusa action with the Greek "President" (of the Legislative Body of the Greek Nation—the body treated by Codrington as the Government of Greece) pressing the British view that the British had jurisdiction to police the seas against "pirates" and arguing that the Greek authorities were bound by British views as expressing international law. In his report to Admiral Codrington he indicated that he had spoken of the "necessity of delivering up all the plundered goods . . . and four notorious pirates" to the British authorities, "with a view to their [the pirates] being sent to Malta for trial." The response of the Greek "President" to this demand, as reported by Parker, sets out the legal position that any independent state would have assumed at that time (or today):

His Excellency cannot consent to order the arrest of those individuals for trial at Malta, on the principle that such conduct would be contrary to the laws and customs of civilized nations, and render him the mere shadow of that authority, in which the Allied Powers

are disposed to support him, in order to establish a regular Government; but he most readily gives orders for their arrest and to be conveyed here [the seat of the Greek Government], and tried by the strictest tribunal he can appoint in Greece, leaving to the English the selection of the [Greek] judges if they wish it.<sup>91</sup>

The “plunder” was promised to be restored to its rightful owners by the Greek authorities.<sup>92</sup> He thus appears to have conceded that unlicensed depredations were a violation of Greek law and possibly of international law, but that to treat them as violations of British law alone, as would be implied by removing the accused “pirates” to Malta for trial, would be in effect to deny that Greece was an independent country. His emotions and underlying convictions seem identical to those of Attorney General Charles Lee in 1798, refusing to accept a British request for extradition of accused “murderers” under the terms of the Jay Treaty; not on the ground that the British lacked jurisdiction in a case in which both parties had jurisdiction by traditional legal rules, but on the ground that it was inconsistent with the “justice, honor and dignity of the United States” to hand over to another for trial, persons who are amenable to the jurisdiction of American courts.<sup>93</sup> But where Lee rested his argument primarily on the competence of American courts under the authority of the American Constitution and did not consider the overall question of the power of the United States at international law to erect courts with a competence to hear foreign cases, the President of the Greek Legislative Body rested his argument on the more fundamental basis assumed by Lee: That as officials of an independent country the competence of Greek authorities to try Greek nationals for “piracy” or any other crime under Greek or international law could not be questioned, even if Greece had to erect special new tribunals to hear the cases.

As to the source of law to be applied by the Greek tribunal, the Greek “President” took an approach that seems analogous to that taken by Justice Story as a District Court judge in 1834,<sup>94</sup> asserting the propriety of the United States taking jurisdiction over a foreigner committing “piracy” on the high seas after the British authorities had voluntarily sent the culprit to the United States for trial. Story’s dicta, asserting no limit to American jurisdiction in “piracy” cases occurring in the avenues of commerce where all states had “territorial” jurisdiction, were necessary to maintain his own naturalist definition of the widest extension of national jurisdiction to prescribe criminal laws to protect commercial sea lanes against the depredations of foreigners. Those dicta were unnecessary in a case in which American jurisdiction to enforce the American prescriptions could be grounded on the nationality of the victim and thus not require acceptance of Story’s conceptual framework of universality. Here the Greek authorities already had jurisdiction to prescribe based on the nationality of the accused, and jurisdiction to enforce based on their custody of the four “pirates.” Thus, the dicta of Story were again unnecessary to maintain the Greek position, and the

British authorities seem to have yielded not to convenience, as in the Pedro Gilbert case, but to legal argument. And the legal argument was not the extensive natural law argument of Story, but the simple assertion of jurisdiction based on nationality as an attribute of statehood which, for policy reasons on policy, positivist, grounds, the British were bound to support.

From this point of view, the transactions in the Greek War of Independence in the 1820s seem an assertion of British Imperial law defining "piracy" as a basis for political action, rejected by Greece when legal results in the international legal order were sought to be derived from the British label, except so far as appropriate to maintain the framework of national action to apprehend and try their own nationals accused of "robbery within the jurisdiction of the Admiral" of any country's government, that is, outside the land-based territorial jurisdiction of any other state. The ancient extension of that jurisdiction to include prescriptions over foreigners whose victims were nationals of the country exercising enforcement jurisdiction was maintained, but as at best a concurrent jurisdiction, under which many states with a legal basis for enforcement of their own prescriptions could among themselves choose the most convenient; but no single state's jurisdiction could claim priority over the jurisdiction of the state with actual custody and prescriptive jurisdiction based on nationality of the accused or his victim or the victim's vessel's flag. The British attempt to assert a general supervisory jurisdiction over the seas succeeded only when diplomatic correspondence was avoided.

Diplomatic correspondence could most easily be avoided in dealings with non-European societies and with unrecognized rebels. Let us turn now to British dealings with those actors.

**The East India Company, the Navy and the Courts in Southeast Asia**  
*Politics and "Piracy" in Southeast Asia.* The word "piracy" was first used by the English<sup>95</sup> in connection with affairs in Southeast Asia in the loose vernacular of 1608 to refer to possibly politically organized sea-borne Malayan soldiers taking part with the Dutch in their unsuccessful attack on Portuguese Malacca.<sup>96</sup> The word was used in 1717 by William Dampier to refer to Malays who interfered with shipping in the Straits of Malacca in 1689.<sup>97</sup> In both these early usages there is no hint of legal connotations except for Dampier's idea that the "piracies" were probably caused by the policies of the Dutch interfering with the profitable flow of Malayan trade; thus, that the "piracies," if illegal, were violations of Dutch assertions of doubtful rights to intercept Malayan trade, or violations of an underlying international law which the Dutch were also violating except to the degree that their trading regulations were agreed to by treaty with Malayan governments legally empowered to commit their merchant populations. The Dutch considered all disregard of their treaty-based trade restrictions in the area as "piracy," even if no depredations against any shipping were ordered, and

even if undertaken by the acknowledged Sultans of recognized Malayan communities.<sup>98</sup>

In 1808 the chief British official in Malacca seized a ship flying the flag of Achin, a northern Sumatra Malayan sultanate with important political and financial backing from Arab traders, claiming it to be Danish and lawful prize during the Napoleonic Wars. The Achinese authorities in retaliation seized a British ship and a Malayan ship from the British colony of Prince of Wales' Island (Penang), ostensibly under Achinese law in Achin waters. Those seizures were called "piracies" by the Penang officials.<sup>99</sup> In 1813 the Sultan of Achin condemned an Indian ship violating his blockade orders during a revolution in Achin. This seizure was also denominated "piracy" by the Penang officials.<sup>100</sup> The vessel was recaptured on the orders of those officials and returned to its owners. The British East India Company government in India, called "The Supreme Government" in contemporary British documents, agreed that the word "piracy" in some sense fitted the acts of the recognized Achin Government:

[T]he right of the King of Acheen to regulate the Trade of the Country actually under his authority cannot be disputed, but his pretensions . . . with respect to Countries which are only nominally a part of his dominions cannot be admitted. . . . [T]he seizure by the King of Acheen of Vessels trading to those countries on the pretence of it being a violation of the laws of his Kingdom is little short of piracy.<sup>101</sup>

The British authorities in Penang then authorized a local Arab merchant to fit out five ships flying British colors and with some British subjects taking part to fight against the Sultan's forces as if suppressing "piracy."<sup>102</sup> An Arab merchant fighting to have his son installed as Sultan in Achin then seized some of the defending Sultan's vessels in which British merchants appear to have had an interest, and in 1816 was himself actually jailed in Penang on a charge of "piracy" until political pressures from the Muslim community in that colony brought about his release without trial.<sup>103</sup>

The same Penang British authorities in January 1816 wrote to the Sultan of "Quedah" (Kedah), the Malay Sultan in the Peninsula opposite Penang, to reassure him regarding a threat from the "King of Siack" (Siak) in Sumatra to attack Perak, the Sultanate just South of Kedah in the Malay Peninsula:

I am very sorry to hear of the design entertained by the Siack chiefs against Perak; for although not so intimately connected with that country as with Quedah, I feel interested in all our neighbours, and I should desire by all means in my power to promote their prosperity. . . . [T]hough not bound by treaty to protect Perak from invasion by sea, *as in the case with Quedah [sic]*, I shall treat as pirates any whom I find waging hostility so near to this island as any part of the Perak territory.<sup>104</sup>

At the same time, in writing to the Sultan of Siak, Governor Petrie of Penang did not refer to "piracy" at all, but, in the paraphrase by the only available source, wrote that he would consider "all abettors of such proceedings as enemies of the British Government."<sup>105</sup> So far as is known,

Siak called off its raid, and no British action was taken either to suppress “piracy” or to fight on any other legal basis against Siak.

The need to find a legal label to justify British military activity was acute. In 1784 Parliament had forbidden Subordinate Presidencies of the Governor-General of India and Council (of which the British government in Penang was one) to make war or even to negotiate a treaty without express permission from higher authorities, ultimately those in London, except in the direst emergencies.<sup>106</sup> Aside from vernacular usages, memories of Livy or Plutarch from the schooldays of classically educated British colonial administrators, and some possible analogies to the use of the label “pirate” to help suppress the political activities of James II’s privateers, it was strongly in the interest of British colonial officials to find somewhere a way around the restrictions of the Act of 1784 if the ambitions of their aggressive merchant constituents in distant outposts like Penang were not to embroil entire colonies in bloody episodes. The Malay nobility had to be convinced that the British would not confine themselves to defense, would in fact act before attacked, if a major Malayan attack were to be deterred. It was very tempting to call Malayan military adventures “piracy.”

The word pops up in much of the official and unofficial correspondence of the time. Sir T.S. Raffles in 1811 used it in contemplating the legal basis for curbing the young Malay nobility.<sup>107</sup> In 1819 Governor Bannerman of Penang tried unsuccessfully to annex Pangkor Island, nestled in the Perak coast, partly as a base from which “piracy” could be fought.<sup>108</sup> In 1824 Colonel Nahuijs, a Dutch official in Malacca, suggested to the Dutch Governor-General in Batavia (now Djakarta, the capital of Indonesia) that various legal problems surrounding the British acquisition of Singapore Island would have been avoided if the British had classified the senior Malay chief there, the Temenggong of Johore, as the leader merely of “sea-scum,” instead of as the highest official of Johore under the Sultan. To Nahuijs, he was merely the “head of the pirates:”

If the British Government, instead of entering into their contracts . . . with the son of the king of Johore and the head of the pirates, had driven the latter from Singapore by armed force and had established itself there, then its title of possession could have been based on Right of War, and our Dutch Government, which had left the pirates so many years . . . undisturbed . . ., would certainly not have all these strong and convincing arguments which we can now bring forward.<sup>109</sup>

In fact, the easy “legal” solution suggested after the fact by Nahuijs would not likely have left the Dutch with no counterarguments,<sup>110</sup> and the difficulties over the British occupation of Singapore Island had been resolved by Treaty concluded in London between the British and Dutch on 17 March 1824.<sup>111</sup> That Treaty does refer to “piracy” and to some extent indicates the looseness with which the word was coming to be used in Europe as well as in the farther reaches of the British and Dutch Empires:

Their Britannick and Netherlands Majesties . . . engage to concur effectually in repressing Piracy [*“Zeerovery”* in the Dutch version] in those Seas: They will not grant either asylum or protection to Vessels engaged in Piracy [*“Zeeroof”*], and They will in no case permit the Ships or Merchandize captured by such Vessels to be introduced, deposited, or sold, in any of their possessions.<sup>112</sup>

There is no mention of extradition, cooperation in criminal procedures or arrests. Indeed, the only steps actually envisaged seem to relate to “Vessels,” as if unmanned ships alone interfered with trade. This might be a reflection of the usage noted in Raffles’s correspondence that identified Malay nobles sailing under licenses issued by the highest officials of the various Malayan sultanates as “pirates;” Raffles, when writing in 1811, was the British Lieutenant Governor of Java, the seat of the Dutch Empire occupied by the British 1811–1816 to keep its resources from the French under Napoleon. The complications that might occur if the British or Dutch took to trying as criminals at British or Dutch law the licensed tax-collectors and “privateers” of the Malay sultanates were too serious to warrant discussion; certainly neither power would undertake an obligation to the other to incur these risks of embroilment in Malayan law and politics by imposing European notions on the organized political societies of the area.

Nonetheless, the use of the word “piracy” to justify European political adventures at suppressing Malayan activities felt to be inconsistent with British, or at least European, “hegemony,”<sup>113</sup> led to entanglements that brought local British officials into conflict with the Supreme Government as the relationship between suppressing “pirates” and going to war in contravention of the Act of 1784 was frequently unclear. It is impossible to give more than a sampling of the many instances of which records survive in which the word “piracy” was used to justify British political action in Southeast Asia, but two incidents led to an examination of the relationship between the political use of the word and the legal use of the same word, and so are especially instructive.

On 17 October 1826 James Low, a British official under orders from the Governor of Penang, negotiated an agreement with the Rajah of Perak under which Perak would have ceded to the East India Company “the Pulo [Island] Dinding and the Islands of Pangkor . . . because the said Islands afford safe abodes to the pirates and robbers, who plunder and molest the traders on the coast and the inhabitants on the mainland . . . and as the King of Perak has not the power or means singly to drive out those pirates.”<sup>114</sup> A week later, on 25 October 1826, the Rajah of Perak sent to Low a letter, obviously written by Low and taken by the Governor of Penang, Robert Fullerton, to be a binding commitment by Perak, providing:

His Majesty will speedily seize or expel the head officers now residing at Kurow . . . [and other named places], who may have connected themselves with pirates or robbers, and will give warning to the people there, that should they let pirates or robbers remain

amongst them, and should any English come then from Penang in search of pirates, the innocent might in that case suffer with the guilty.<sup>115</sup>

In late January 1827, Fullerton sent Low to the Kurow on what he termed a “pirate-hunting” expedition aimed at ousting from that area a Kedah official, Nakhoda Udin, who was believed to have been involved in some depredation in Penang waters.<sup>116</sup> The raid was repeated in April and May 1827.<sup>117</sup> In the fuss that followed, the Governor General of India, Lord Amherst, took the position that:

[A]ccording to the laws of all civilized nations, [Udin’s] conduct should have formed the subject of representation and remonstrance to his own Government. If that Government refused redress, the question of the proper course to be pursued would then have naturally attracted the grave and deliberate consideration of your Board and of the Supreme Government.<sup>118</sup>

Low replied by referring to European difficulties in dealing with what he regarded as an analogous situation involving the “pirates” of Algiers, and argued that as the states of Europe had the legal right to suppress Algerine corsairs, so in the Malay Peninsula, “the neighbouring state or states whose subjects suffered from the cruel depredations of the pirates . . . , had a just right to adopt any means for their destruction.”<sup>119</sup>

Fullerton and Robert Ibbetson, his chief subordinate, the “Resident Counsellor of Penang,” replied to Lord Combermere, the Vice President in Council of the Supreme Government, on 27 August 1827, fully supporting Low and arguing that British municipal law being inapplicable within the domains of the Malay sultanates, and the Malays and Thai (who also claimed sovereign rights in the area) being either unable to apply their law or themselves involved in the actions of Udin, summary action against the “pirate” was appropriate:

The regular course . . . is to require the State protecting pirates to disperse them. If unwilling, or as in the case of Perak, unable it is our duty to assist them and do it ourselves. We are bound by the Treaty of 17 March 1824 to cooperate with the Netherlands Government in the destruction of pirates, and the Straits of Malacca is the portion of the sea we must be expected to protect.<sup>120</sup>

To the suggestion that Udin himself, as a person injured by British activity, might bring suit in a British court in Penang against Low or even Fullerton for the actions taken beyond their authority as officials, Fullerton and Ibbetson replied:

[F]or a noted pirate, one of the common enemies of mankind whom we are bound to destroy to be allowed to appear in a Municipal Court against an Act committed in a sovereign capacity beyond its [i.e., the Court’s] jurisdiction is a novel idea certainly.<sup>121</sup>

The Supreme Government apparently mistrusted the rash Fullerton, while at the same time accepting his view of the law and politics. The cession of Pulo Dinding and the Islands of Pangkor was refused and Fullerton’s military support was cut to the point that further adventures of this sort would be



impossible.<sup>122</sup> But at the same time, the propriety of Low's raids was approved. The evidence of Udin's lawlessness was found convincing, wrote the Governor General of India in Council to Fullerton on 16 November 1827,

and it is much to be regretted that this was neither forwarded for the information of the Supreme Government, nor even alluded to in the correspondence upon which the view taken in the Governor General's letter of 23d July . . . was founded. But for the still unsettled question of . . . jurisdiction [over Kurow], the example which was made of that nest of pirates would have been entirely satisfactory.

If the Thai official in the area can prove his claim to the Kurow, the British would be "answerable to him for the error," Lord Amherst continued. But if he should press that claim, "You will at the same time impress on [him] the right which all nations possess to seize and punish pirates wherever they may be found."<sup>123</sup>

It seems plain that both the local authorities and the officers of the Supreme Government in India believed that the forms of British law were not capable of dealing with "piracy" in the area. The label was attached to land-based groups with political connections; the counter-action was taken on land that, whatever its legal subordination might be, it was certainly not within the territorial jurisdiction of any British court. Nor were the acts in question done within the jurisdiction of British Admiralty courts,<sup>124</sup> the attack on Udin having occurred on land. Had Udin been arrested in Penang or Province Wellesley, presumably he could have been tried in Calcutta for "piracy," but British authority to arrest him was not considered to exist outside the territorial jurisdiction of a British court. The problem was treated as one of policy only, and no mention was made in any of the known correspondence of Molloy's or Jenkins's rationales for arrest and summary judgment by ships' masters either under the natural law of property and self defense, or under presumed license from their flag states.<sup>125</sup>

The word "pirate" was used repeatedly in further correspondence by the British authorities in Penang with regard to a dynastic struggle in Kedah, and applied to the Malay forces seeking to restore a deposed Sultan to his claimed authority there in defiance of the new Sultan placed there by the Thai exercising what they believed to be their own legal right to determine succession in Kedah.<sup>126</sup> When Robert Ibbetson succeeded Robert Fullerton as the chief British official in the area he adopted Fullerton's vocabulary. But when he attempted to use the term "piracy" to bring British naval forces more actively into the struggle to suppress the forces of the deposed Sultan as "pirates," he was brought up short by Rear Admiral Sir Edward W.C.R. Owen, the British Commander-in-Chief of Naval Forces, East Indian Station, who advised him that, in the words of Governor Ibbetson, "I could not treat as pirates any against whom no acts of piracy had been specifically alleged, or proof obtained."<sup>127</sup> "Piracy" was in that instance viewed by the Senior Naval Officer in the area as a concept of British municipal law, not an

excuse for political action. When Samuel G. Bonham, then Resident Counsellor at Singapore subordinate to Governor Ibbetson, suggested a "pirate-hunting" expedition to the East coast of the Malay Peninsula to counter a Thai move in Trengganu, Ibbetson replied with a careful analysis of the Treaty of 1826, did not mention "pirate-hunting" or "piracy" in any way, and refused Bonham's proposal.<sup>128</sup>

In 1838 Bonham was Governor of the "Straits Settlements" of Penang, Singapore and Malacca, and tried again. Without using the word "pirate," he asserted British authority over the rebel leaders, Tuanku Mohamed Saad and Tuanku Mohamed Taib, nephews of the deposed Sultan of Kedah, Taju'd-din, by virtue of their holding land in the British colony (which Bonham believed made them subjects of the British Government) and asserting that their object in Kedah was not political but mere plunder.<sup>129</sup> The Thai had now taken to calling the rebels "pirates . . . enemies to the Siamese as well as the English countries" and requested the British to drive them from the seas.<sup>130</sup> The Supreme Government did not accept this Thai classification,<sup>131</sup> but instructed Bonham to take various actions consistent with British commitments to Thailand under the Treaty of 1826.

The result of this instruction was a blockade which Bonham apparently regarded as resting partly on the Treaty of 1826, which was then interpreted to require the British to prevent the Malay claimants to the throne from disturbing Kedah in any way. It rested also partly on Bonham's conviction that it was a British obligation at general international law to suppress "piracy," and that the Malay claimants were out for personal gain, thus "pirates" in the contemplation of international law. The Thai agreed with both these assertions. The British naval officers present had serious doubts about the second.<sup>132</sup>

*Mohamed Saad; "Pirate" or Patriot?* The matter was resolved, in a fashion, by the success of the "pirates" under Mohamed Saad on 2 August 1838, followed on 7 March 1839 by the complete victory of the Thai. On 6 April 1839 Mohamed Saad and two other ousted Kedah nobles fled to British territory to escape the Thai. On 2 July 1840 Mohamed Saad was captured in Province Wellesley, a strip of British territory along the coast of Kedah opposite Penang, and on 26 October 1840 he was tried at Penang on a charge of "piracy."<sup>133</sup> The result was an acquittal for Mohamed Saad and his companions.<sup>134</sup>

The specific charge was the forcible capture of a boat on "the high seas" on 8 July 1840,<sup>135</sup> thus after the Thai had reconquered Kedah and Mohamed Saad and his people had lost their base there. It is unclear where their base actually was and what the nationality of the owner or persons on board the boat; the possibility was not considered that there might have been normal British jurisdiction resting on preparatory acts or conspiracy by Mohamed Saad and his companions in Province Wellesley or other British-governed territory, or

on the nationality of the victims.<sup>136</sup> Instead, the case was treated as one of “piracy” *jure gentium* and the defense first went to the jurisdiction of the British courts to sit in judgment on the public acts of a “rebel” against his sovereign (Thailand). The arguments of counsel are learned and eloquent in the thunderous style of the period. Citations to *R. v. Kidd, Palachie’s Case*<sup>137</sup> and a charge by Leoline Jenkins<sup>138</sup> appear among other citations.<sup>139</sup> On 2 November 1840 the Recorder, Sir William Norris, overruled the first plea to the jurisdiction by the defendants on the basis that defenses going to the substance of the charge cannot be a basis for defeating the court’s jurisdiction. Norris cited *R. v. Kidd* for the proposition that even if Mohamed Saad had a commission from the rightful Sultan of Kedah, he might have exceeded it and thus become a “pirate.” In general, Norris took a “naturalist” position, asserting British jurisdiction to exist over foreigners for their depredations on the high seas against yet other foreigners.<sup>140</sup>

The case was then tried before a jury with the defense alleging that as subjects of the “King of Quedah” they “are not British subjects, neither are they are [*sic*] of the description of other persons who, by the Laws of England respecting the offences of Piracy, are made amenable to the said Laws” by virtue of their official connection with the Ruler of Kedah.<sup>141</sup> Moreover, by virtue of that connection they claimed the right:

to pursue any hostile measures of retaliation against Subjects of Great Britain and Siam, that were consistent with the received Laws of Nations by States at war with each other. By which acts of retaliation, such as are charged . . . , the said defendants . . . might have rendered themselves liable to the Laws of War, but not to the Criminal Laws of England.<sup>142</sup>

Norris charged the jury that the law of nations applied to the case, apparently meaning “international law” or the law between states rather than the private law identical in all states, and not the law of England. He held that uncontradicted evidence made it clear that the defendants acted for public purposes on behalf of the Sultan of Kedah at all important times. He argued as a matter of law that dynastic struggles such as that of James II after 1688<sup>143</sup> and in Scotland for forty years after the Act of Union of 1707<sup>144</sup> could not be deemed by international law to involve acts of “piracy” whatever the labels used by one or other of the parties to the struggle.<sup>145</sup>

The prisoners were released except for Mohamed Saad himself, who was held as a political prisoner in “honourable captivity” at the will of the Crown.<sup>146</sup>

The impact of the case on the British political use of the term “piracy” in the Malay area was great. Governor Bonham immediately consulted Norris formally about the law on 23 December 1840, asking a series of written questions concerning the implications of the decision for other British measures to suppress Malay activities less closely tied to Peninsular politics and relations with Thailand. He looked beyond the particular case to the

wider implications of Norris's view of the law. First, Bonham asked if the British executive authorities in Penang had been asked by the court for a statement of British political relations with Kedah. Second, he asked if the other Kedah nobles of the family of the Sultan who had been ousted by the Thai before Mohamed Saad began his activities to regain the throne had any immunities from ordinary suit in the British court in Penang, where they resided.<sup>147</sup>

Norris replied a month later. To the first of these two questions he answered, No. In an earlier case dealing with Ilanun (Malay) defendants accused of robbery within the Admiralty jurisdiction, inadequacies of their defense made it impossible for them to frame their relations with their political superiors in legally comprehensible ways, "so in humanitarian interests the court undertook to find the facts without adversary proceedings." That accounted for a query to the executive officials; it was not a sign that the law either required such a query or that the courts would be bound to apply as if true the labeling system urged by executive officials as a result of their own evaluation of the facts and political interests. In the Mohamed Saad case, Norris continued, Saad was quite well represented and no doubt of the facts existed,

his possession and actual government of Keddah for many months, his expulsion from thence by the British and Siamese authorities, and the continuation of hostilities between him and them up to March last, if not to the very moment of capture. . . . Neither for its own satisfaction, therefore, nor in justice to the accused did the Court feel itself called upon to seek further information from the executive authorities . . . and scarcely would it have been justified in volunteering to call upon the Government, especially in a government prosecution, as this essentially was, for evidence to rebut or explain away a defence, the substantial truth of which there was no apparent reason to doubt.<sup>148</sup>

As to the other question, Norris refused to reply on the ground that it would be the particular facts of the case that would determine the legal results, and it would be improper for a judge to anticipate the outcome of a case that had not yet been brought.<sup>149</sup>

The Court of Directors of the East India Company in London accepted Norris's analysis on both points: The power of an English court at English law to determine the facts and the legal categories best fitting those facts for the purpose of a case before the court regardless of perceptions of fact and categories deemed controlling by the executive authorities, and the impropriety of speculation as to the outcome of future cases. They issued policy guidance to the Government of India at Fort William:

If any relative or dependant of the Ex Rajah [of Kedah] should hereafter engage in similar courses, he will of course on the principles laid down by the Recorder, be treated as a public enemy, and when taken, as a prisoner of war; unless the case should be such as under the following passage of the Recorder's address would afford a prospect of conviction for piracy.<sup>150</sup>

The passage of Norris's charge to the jury that was thus adopted as policy guidance on the point of law, defining when a Malay noble might be considered a "pirate," was quoted:

He [Norris] by no means intended to say that every Malay inhabitant of India<sup>151</sup> who could contrive to fit out a prow [native vessel; usually spelled prahu in modern writings] was at liberty to cruise about and capture any property belonging to subjects of Siam and of this Government which might fall his way without fear of incurring the guilt and punishment of piracy. In every such case a piratical intention must necessarily be presumed until the contrary was shown by the clearest evidence of a combined national object, and an authority or commission from some person or persons who had an indisputable right to grant it.<sup>152</sup>

The legal designation "pirate" was thus held to be inappropriate for those pursuing public ends who have some show of organization sufficient to warrant a court in holding that a license had been granted by a person or persons with a "right" to grant it. Furthermore, the determination of the legal system under which that "right" existed was to be a matter of law determined by a British judge, not by the executive authorities; that "right" apparently did not derive from British or English law, under which nobody had authority to issue such licenses except the officials of the Crown. Thus a natural law approach was taken in which judges themselves determined the fitness of labels based not on policy considerations and legal results sought for policy reasons, but on the conception that the law existed outside of national interest and could be determined and applied by British judges in the normal way, on the basis of argument by learned counsel. To fit this approach into a legal pattern more familiar to lawyers today, it appears to have envisaged a rule of conflict of laws applicable in English colonial courts that referred cases of alleged "piracy" to true international law, not British Imperial law (whose spokesmen were officials of the Crown). By "international law" as perceived by Norris, the label "pirate" was not appropriate for a political actor, even a Malay fighting in an area of British hegemony; it was appropriate only for sea-robbers, those called "pirates" by British municipal law. This approach was clearly a check on those British officials who fancied applying the ancient Roman conception of hegemony to the fringes of the Empire; what they wanted to gain as a matter of law, they would have to fight for militarily, thus justify their actions not as law-enforcement, but as political action within the terms of their delegated authority and the restraints put on it by the Parliament in London.

Another implication was the continued restriction of the applicability of the British law regarding "piracy" to those cases in which there was some legal basis for applying British prescriptions to the acts of the foreigners outside of British territory. Norris had referred to the capture of property "belonging to subjects of Siam or of this Government" in the passage adopted in London as the basis for future policy. The extension of criminal jurisdiction to cover the acts of foreigners against a state's own nationals on the high seas,

the use of the nationality of the victim as a basis for “standing” to apply a state’s municipal law to the foreigner acting abroad in territory in which no other state had a greater basis for claiming jurisdiction, has already been discussed.<sup>153</sup> The extension of this basis for jurisdiction to protect Thai nationals is not explained, but in context probably rests on a reading of British obligations under the Treaty of 1826 requiring the English to “aid and protect” Thai merchants and their ships coming to trade in territory governed by the East India Company.<sup>154</sup>

If this narrow reading of Norris’s position is correct, it leaves a gaping hole with regard to depredations not only against Malays, but also against Dutch and other European merchants coming to trade in the Straits Settlements. It is not surprising that British colonial officials began looking for other ways to spread the net of British Imperial law over the area and make the sea lanes safe for peaceful trade. The way was to shift the focus out of the courts, and assert a right at British Imperial law to hunt down “pirates” as a matter of enforcing *not* the municipal law administered by Admiralty courts,<sup>155</sup> but of enforcing international law, or the British version of international law, directly against groups or persons whom that law was interpreted to leave unprotected, and which could be destroyed under the law of war or even under an anarchical conception that those unprotected by the law were mere “outlaws” and action against them required no special license under international law.

*Lushington Unleashes the Navy’s Naturalists.* The tale has already been told with scholarly reliance on primary documents regarding the British activities to suppress “piracy” in waters along the coast of China<sup>156</sup> and in the waters adjacent to the Malay Peninsula.<sup>157</sup> It is, of course, unnecessary to repeat that story here. But the implications on the evolution of legal conceptions have never been fully analyzed<sup>158</sup> and it might be instructive to examine here the further impact of the Mohamed Saad case on British conceptions of “piracy” as a political act justifying political counteractions under the British administrators’ interpretations of international law regardless of the criminal law administered by British Admiralty tribunals following the precedents begun in 1536.

It is an irony of legal history that the Mohamed Saad case and the formal shift in British policy that it caused in Southeast Asia was barely reported in England, and that two Admiralty decisions in England that had very little impact on British policy were so widely reported as to take the form of leading cases although misinterpreted by later generations. In 1843 Henry Keppel, a son of the Earl of Albemarle, was Captain of H.M.S. Dido in Malayan waters. Considering some Dyak villages in Borneo to be “piratical,” he attacked them in waters that could by no definition be considered “high seas” except that they were navigable, and wiped them out. The political effect of the raid in Borneo was to help James Brooke, an English adventurer, in his attempts to get control personally of the government of Sarawak.<sup>159</sup>

Legally, the question was raised as to whether the label “pirate” could be attached to organized political groups operating on land as well as at sea to interfere with the British version of freedom of navigation on the high seas when Keppel sought the bounty provided for engagement with “pirates” under the Bounty Act of 1825.<sup>160</sup> The decision of the Court of Admiralty was written by Dr. Lushington and delivered in 1845 under the name *Serhassan (Pirates)*.<sup>161</sup> It awarded the five Pound Bounty with regard to 125 “pirates on board the vessels at the commencement of the conflict,” and the twenty Pound bounty with regard to 45 “pirates . . . captured or destroyed.”<sup>162</sup>

The only act of “piracy” alleged against the Dyaks was their attack on the British force led by Captain Keppel and his men. The Queen’s Advocate seeking to limit the payment of bounty under the Act of 1825 apparently did not argue that such an attack if intentional would be an act of war, not “piracy,” but only that the attack was in context “unintentional,” at least that is as far as Dr. Lushington was willing to discuss the matter:

It matters not that they may possibly have entertained no inclination to bring themselves in conflict with the British power; it is sufficient, in my view of the question, to clothe their conduct with a piratical character if they were armed and prepared to commence a piratical attack upon any other persons.<sup>163</sup>

There is no analysis of the reach of British criminal law jurisdiction; no apparent limit to the legal right of a British force to sail where it would and to protect any person, of whatever nationality, who might be the victim of a “piratical” attack. The phrase “piratical character” seems to be used with no analysis at all, implying that the Dyaks had no shadow of a legal right under the law as understood by Dr. Lushington to resist any British inroads on their territory or exert a jurisdiction of their own to control commerce, tax it, or forbid it in waters they might claim as part of their own territory. Moreover, there is no attempt using the usual tools of statutory construction to find this meaning of the word “pirate” in the intention of the Parliament when the Act of 1825 was passed other than a recital of the preamble. That preamble is singularly unhelpful in this context, itself using the phrase “Pirates or Persons engaged in Acts of Piracy” without narrower definition:

Whereas it is expedient to give Encouragement to the Commanders, Officers and Crews of His Majesty’s Ships of War and hired armed Ships to attack and destroy any Ships, Vessels or Boats, manned by Pirates or Persons engaged in Acts of Piracy . . .<sup>164</sup>

It appears that British naval forces would do much better attacking and destroying anybody who interfered with seaborne commerce than trying to arrest and bring such persons in for trial before a British court competent to hear a “piracy” case. The result in practice was the proliferation of claims to the point that the Bounty Act had to be repealed. That proliferation is traceable directly to the *Serhassan (Pirates)* decision.<sup>165</sup>

The Bounty Act of 1825 was in fact repealed on 25 June 1850<sup>166</sup> and replaced with a provision for the Lords Commissioners of the Admiralty to request the

Directors of the East India Company (by then incorporated into the formal Government of England for all practical purposes)<sup>167</sup> for money to pay a reward fixed at the discretion of the Commissioners under the same procedures as applied in the case of British actions to suppress the slave trade.<sup>168</sup> The Act of 1850 preserved bounty claims that arose out of British naval activity before the Act of 1850 took effect in British municipal law.<sup>169</sup> Its operative section resolved the question of whether shore-based persons could be “pirates” by adopting Dr. Lushington’s conclusion in *The Serhassan (Pirates)* case that shore-based persons could commit “piratical” acts when they engaged British naval or amphibious forces, and it appears to have been assumed that all acts involving those forces were within the ancient assertions of English Admiralty jurisdiction or on the “high seas” even if occurring ashore:

That, whenever any of Her Majesty’s Ships or Vessels of War, or hired armed Vessels, or any of the Ships or Vessels of War of the *East India Company*, or their Boats, or any of the Officers and Crews thereof, shall . . . attack or be engaged with any Persons alleged to be Pirates afloat or ashore, it shall be lawful for the High Court of Admiralty of *England*, and for all Courts of Vice Admiralty in any Dominions of Her Majesty beyond the Seas . . . to determine whether the Persons or any of them so attacked or engaged were Pirates . . . <sup>170</sup>

Dr. Lushington was the person who had to construe the new legislation. On 1 December 1851 a British ship, the *Eliza Cornish*, damaged by weather, anchored in the Straits of Magellan for refitting. A nearby convict settlement maintained by the Chilean Government overthrew the Chilean guards and seized the vessel and its cargo as part of what was regarded by Dr. Lushington as an insurgent operation challenging the authority of the Government of Chile. The vessel was recaptured by a British warship at sea, and with a small British contingent and master, but with her mixed original crew, the *Eliza Cornish* set out for England. She foundered again and was sold in Portugal, eventually returning to England under Portuguese colors and renamed the *Segredo*. In an Admiralty action in which the original English owners sought to have the Portuguese sale annulled<sup>171</sup> Dr. Lushington held that it was irrelevant whether the taking in Chile had been by insurgents or “pirates”<sup>172</sup> but that the English law authorizing the master to sell the vessel was the only statute to be construed. Lushington held for the English original owners on the ground that the English municipal law rule, although statutory, restricting the ship’s master’s legal power to sell his vessel to cases of “necessity” as conceived by Parliament, was somehow a better reflection of the universal natural law of nations than the Portuguese rule, which allowed a wider discretion in the master and safeguarded the interests of the good faith purchaser in Portugal. Lushington seems not to have considered persuasive any conflict of laws approaches. The phrase is not used by him. As a judge, he seems to have abandoned entirely the positivist approach he had taken as legal adviser to the



political officers of the Crown in 1823, and become a champion of judicial discretion affixing legal categories as interpreting universal law regardless of jurisdictional restraints on British Admiralty tribunals, if any. It is as if he and Joseph Story in the United States had exchanged heads in 1834. Ironically, the cases that involved this resurgence of naturalism were based not on incidents to be resolved by the rule of reason, but on a naturalist construction of British municipal legislation. Holding that legislation to express universals that as a matter of law could not be contradicted by the legislation or judicial decisions of foreign Admiralty or other tribunals, Lushington had found a legal path through which British legislation could rule the world, at least as long as British courts could assert jurisdiction to hear the cases. The legal and political implications of this were enormous.

Immediately after Lushington's decision in the *Segredo* case, an application for bounty was made by the British captors under the Act of 1850 and opposed by the Crown and the English owners, arguing that if the Chilean captors were insurgents, Chile, not the British Treasury and the owners in a salvage claim, would be legally responsible for the costs to the owners occasioned by the temporary loss of the vessel. Dr. Lushington could not avoid a legal distinction created by English municipal law that seemed to rest on classifications created by international law.<sup>173</sup>

He began by arguing that both the Act of 1850 and its predecessor Bounty Act of 1825 had in mind the same conception when they used the word "pirate." That conception, he held, rested on the usage of the word in English criminal law: "I apprehend that, in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts; and piratical acts are robbery and murder upon the high seas."<sup>174</sup> He then went on to the first of several grave confusions:

I do not believe that, even where human life was at stake, our courts of common law ever thought it necessary to extend their inquiries further, if it was clearly proved against the accused that they had committed robbery and murder upon the high seas. In that case they were adjudged to be pirates, and suffered accordingly.<sup>175</sup>

In fact, as we have seen, English Common Law courts were never involved in "piracy" cases, and questions of license were the essence of several cases before Commissions constituted under the statute of 1536. Those cases were never overruled but confirmed by implication of the statute of 1700, laying a new rule down in conformity with the Commissions' and Admiralty Board's approach that an Englishman could be a "pirate" who acted against other Englishmen under color of a foreign commission.<sup>176</sup>

Turning to the question of whether to be "piratical" the acts had to be aimed indiscriminately at all potential victims, Dr. Lushington specifically held not, finding the leading American Case, *United States v. Smith*<sup>177</sup> on this point irrelevant:

Whatever may have been the definition in some of the books, and I have been referred by Her Majesty's Advocate to an American case, where, I believe, all the authorities bearing on this subject are collected, it was never, so far as I am able to find, deemed necessary to inquire whether parties so convicted of these crimes had intended to rob on the high seas, or to murder on the high seas indiscriminately.<sup>178</sup>

This view, directly at odds with the American position adopted in *U.S. v. Klinton*,<sup>179</sup> when the "standing" point was squarely raised and argued, seems insupportable in logic, and Dr. Lushington's logic seems elusive. He did not discuss the reach of domestic jurisdiction to make rules and definitions, or national jurisdiction to apply even internationally agreed rules to the acts of persons not within the allegiance of the sovereign of the applying court when the victims of those acts are not legally protected by that sovereign under any acknowledged principle of law. Nor did he consider whether there were lacunae in the coverage of law that could be filled by extending national jurisdiction as the Americans had done up to the point at which some foreign municipal law begins to apply or some foreign interest protected by international law shifts the burden of enforcing that law to the shoulders of those most directly affected, thus most able to compromise and negotiate a solution to any particular tension. Instead, Dr. Lushington seems to have assumed that British courts applying British municipal conceptions of "piracy" as a crime under English law (indeed, under English Common Law, where there was no such crime)<sup>180</sup> faced no significant problems deriving from the distribution of authority to states under the international legal order. He stated that:

Though the municipal law of different countries may and does differ, in many respects, as to its definition of piracy, yet I apprehend that all nations agree in this: that acts, such as those which I have mentioned, when committed on the high seas, are piratical acts, and contrary to the law of nations.<sup>181</sup>

Since the phrase "the law of nations" not only commonly meant the identical municipal "natural" law of all countries to writers of the time, and Dr. Lushington is explicit that what he was looking at was the least common denominator of such municipal laws as they might define "piratical acts," his failure to consider questions of jurisdiction, his assumption that a British court could apply to foreigners its version of the "law of nations" applicable to "piracy" without any consideration of the British connection to the offense, seems unaccountable. Perhaps, in this case, the nationality of the *Eliza Cornish* so dominated his thinking that he did not consider the point worth mentioning.

But the major issue to Dr. Lushington was not the reach of British jurisdiction or even the definition of the "crime" at English municipal law. It was the reach of English law to the acts of those who claimed a license from a foreign belligerent: insurgents. As to that, he began by arguing that even if international law gives to belligerents a license to attack opposing forces of

their own country, that license does not extend to attacks on other countries' shipping. But instead of regarding the attack on third country (British) shipping as a breach of belligerent obligations toward neutrals in a war, he argues that it can properly be considered "piracy," "especially if such acts were in no degree connected with the insurrection or rebellion."<sup>182</sup> There follows the most extreme, and most often cited, passage in the case:

Even an independent state may, in my opinion, be guilty of piratical acts. What were the Barbary pirates of olden times? What many of the African tribes at this moment? It is, I believe, notorious, that tribes now inhabiting the African coast of the Mediterranean will send out their boats and capture any ships becalmed upon their coasts. Are they not pirates, because, perhaps, their whole livelihood may not depend on piratical acts? I am well aware that it has been said that a state cannot be piratical; but I am not disposed to assent to such a dictum as a universal proposition.<sup>183</sup>

He concluded that the Parliament in enacting the Acts of 1825 and 1850 had in mind the depredations on the high seas committed by "the subjects of a barbarous state, or by insurgents" as well as be mere unlicensed individuals or groups.<sup>184</sup>

Turning to the circumstances of the capture of the *Eliza Cornish*, Dr. Lushington pointed out that the Act of 1850 refers to engagements against pirates "afloat or ashore"<sup>185</sup> and concluded that the forcible capture of the vessel in port, even though there was no immediate bloodshed and a color of right claimed by the insurgents, was "piratical" within the sense of the Act. He did not distinguish between those who might have had political motives and those acting *animo furandi*, asserting "that all who embarked on board the *Eliza Cornish* . . . were conspirators in the original murders and robberies."<sup>186</sup>

The question of political motive seems not to have been considered. Dr. Lushington concluded that:

It was for services like these [the engaging of the "pirates" and recapture of the vessel] that the Legislature intended to provide a reward; services of great importance to the safe navigation of the seas in that part of the world, and effected by the capture of a band of persons whose acts of murder and plunder, both on land and at sea, rendered their capture and punishment indispensable to the safety of ships of all nations occupied on those waters.<sup>187</sup>

It is clear throughout the opinion by Dr. Lushington that his concern is not with establishing any definition of "piracy" at international law, or even "piracy" at English municipal law for the purpose of a criminal trial; there was no criminal trial involved. Nor did his concern involve "piracy" as an element of a property adjudication; the *Magellan Pirates* case was a simple bounty claim under a British statute, and, although coupled with an implication for salvage charges, was not an *in rem* action and did not determine questions of property directly.<sup>188</sup> His concern was to construe an Act of Parliament providing rewards for naval action far from England. The reference to the English municipal crime of "piracy," and his dismissal of

American precedents with regard to aspects of that definition and its reach to acts of foreigners abroad, are consistent with his search for an understanding of what the non-lawyers in Parliament seemed to intend when they referred to “piratical acts” in the bounty legislation. The result was to transfer the pejorative definition of “piracy,” the usage that had been hanging in the background since at least the time of James I,<sup>189</sup> into British Admiralty law and policy.

As noted above, no British criminal jurisdiction was involved; the “pirates” had in fact been turned over to the officials of the Government of Chile recognized by the British authorities,<sup>190</sup> and their jurisdiction to apply Chilean law to Chilean nationals acting in Chilean territory, despite the claims of belligerent rights, was undoubtable.<sup>191</sup>

The major implication of the case was to establish British Imperial law as the basis for British political action worldwide. Upholding the jurisdiction of the British Parliament to prescribe with regard to the acts of British naval forces on foreign shores, which can hardly be doubted, and silent as to the reach of British municipal criminal law to measure the acts of foreigners there, the case gave every encouragement to British military planners to believe their political action against foreigners who interrupted the course of British (and possibly third country) commerce was legally justifiable. Since no extension of British municipal law was involved beyond the reach of the Admiralty courts established in peacetime, the essence of the departure from precedent taken by the decision of Dr. Lushington in the *Magellan Pirates* case was its application of a British political definition of “piratical acts” to justify political action against groups claiming legal privileges under international law. Indeed, the very form of the investigation pursued by Dr. Lushington, his search for a meaning for the adjective “piratical” rather than a meaning for the noun “pirate,” indicates the narrow scope of his logic. Apparently, to Dr. Lushington “piratical acts” were those acts which “pirates” at English criminal law committed; no question of jurisdiction to enforce English law was involved and the Chilean insurgents might even not have been “pirates” at all. The bounty statute was construed to provide bounties for those engaging persons committing “piratical acts” whether or not “pirates” technically, and whether or not amenable to British courts’ jurisdiction. From this point of view, Dr. Lushington’s logic becomes entirely clear, but the precedent value of the case becomes petty; it turns out to have nothing to do with definitions of “piracy,” but rather is a construction of a municipal statute giving a municipal reward to designated agencies of government deployed to suppress an activity in the public sphere which the Parliament felt should be suppressed. It is the assertion through an Act of Parliament of government policy to sweep the seas of all persons, whether licensed or not, who impede commerce by killing or robbing those whose business was trade, or, to bring up Lushington’s views expressed in the *Serhassan (Pirates)* case,

who obstructed British naval activities whatever they were. It was, on a deeper level thus, an attempt to apply British municipal interpretations of international law regarding freedom of navigation (including port calls) by encouraging British assertions of naval power. Whether those assertions were consistent with international law as it derives from diplomatic correspondence and the structure of the legal order, was not considered by Dr. Lushington except in a passing reference patently false and in a context not directly applicable—a reference to the vernacular meaning of the adjective “piratical” as it might have been applied to the Barbary states and others, and not to any legal context at all.

It was this passing reference to the “piratical” activities of “the Barbary pirates of olden times,” and the inclusion of political societies of the same North African region under the label “pirates,” that was the great change. As has been seen, the Barbary “states” had in fact never been considered legally as anything but states in the international legal order in “olden times” despite the losing arguments to the contrary by Gentili,<sup>192</sup> the representatives of Venice,<sup>193</sup> and the original British owner of the *Helena* before Lord Stowell in 1801.<sup>194</sup> The vernacular use of the word “pirate” by the East India Company people in the Persian Gulf in the 1820s, as has been seen,<sup>195</sup> was not a reflection of any view of English law, but a local usage by East India Company officials in treaties that seem to have been significant in Parliamentary deliberations about extending the Napoleonic Wars’ bounty provisions to the suppression of Arab sheikhdoms there, but aside from that there does not seem to have been any basis but English vernacular usage for Dr. Lushington’s conclusion.

The basis for English vernacular usage in Roman precedents regarding the organized societies of the Eastern Mediterranean opposing the extension of Roman “hegemony” has already been noted.<sup>196</sup> It is thus not surprising to find the usage applied in England to analogous societies opposing the extension of British hegemony to areas in which there was British territorial expansion as in the Persian Gulf and Malaya. But it is highly significant to see the scope of the “hegemony” expanded to cover all seas, and land-based opposition not only in Malayan waters but even in Latin America. Since Dr. Lushington’s views applied to British naval activity worldwide, and were made in disregard of the questions of international law regarding belligerency that limited the British position with regard to the Greek independence movement in the 1820s,<sup>197</sup> and in disregard of the same factors that led to the acquittal of Mohamed Saad in Penang in 1840,<sup>198</sup> it is possible to conclude that by 1853, when the decision in the *Magellan Pirates* case was rendered, the British had differentiated the criminal charge of “piracy” at English law from the use of the term “piracy” to justify military action, and that the use of the term in the latter sense was not a reflection of any international consensus, but a purely British interpretation of the law, making it appropriate to call it a word of art in British Imperial law only.

## British Imperial Legal Policy and Real Public International Law

***The British Change of Definition.*** The decision by Sir Stephen Lushington in the *Magellan Pirates* case prompted reconsideration within the British Government concerning the definition of “piracy” and British action under the Bounty Act of 1850. The *Magellan Pirates* decision had come down on 26 July 1853. On 15 February 1854 a legal “Report” was rendered by J.D. Harding for the Law Officers of the Crown to George W.F. Villiers, the 4th Earl of Clarendon, Foreign Secretary in the Aberdeen and Palmerston Cabinets of 1853-1858.<sup>199</sup> Although the subject is ships, “Piratical Vessels under British or other Flags,” the report begins by referring to persons and defining “pirates:”

1st, That all persons (whatsoever their origin, or under whatsoever Flag or Papers they may Sail, or to whomsoever their ship may legally belong) will be pirates by the Law of Nations who are guilty of forcible robberies, or captures of Ships or Goods upon the High Seas without any lawful Commission or authority. They and their Vessels and Cargoes may be captured by Officers and Men in the public Service of any Nation, and may be tried in the Courts of any Nations. For the purpose of Jurisdiction in capturing, or trying, them, it is of no consequence where, or upon whom, they have committed their Crimes, for piracy under the Law of Nations is an offence against all Nations, and punishable by all Nations.<sup>200</sup>

It is apparent that the extreme naturalist view traceable back in English legal perceptions to Molloy and earlier, was adopted as part of the “Law of Nations.” The phrase “Law of Nations” was used not to refer to the uniform municipal natural law of all countries, but in its public law sense of the law between sovereigns, as the notion of an “offence against all Nations” seems to envisage an offense defined by a body of law other than the municipal law of the “nation” affected. Thus, the British Imperial law definition of “piracy” resting on the intent of the British Parliament alone, was translated into an assertion of public international law, although, again, no supporting argument is given and the “natural law” of property and the legal power of a flag state to determine property rights in a vessel and the goods it carries seems to be assumed to be a part of public international law. There is no question of legal injury or “standing” raised, as jurisdiction not only to capture, but also to try accused “pirates” is asserted to lie with no other qualification than that the “forcible robberies, or captures of Ships or Goods” have occurred “upon the High Seas;” jurisdiction is defined then in territorial terms as if English Admiralty jurisdiction lay within foreign vessels and governed acts between foreign vessels as long as those vessels were on the high seas as defined in England. The underlying conception seems to be of overlapping national jurisdictions, not an assertion of exclusive British jurisdiction, since the acts amenable to British courts are asserted also to be “punishable by all Nations.” The nationality of the victim is expressly denied any role in the jurisdictional jurisprudence. Thus, the position taken by Justice

Story in the United States and rejected by the Supreme Court there as fundamentally inconsistent with the international legal order embodied by implication in the American Constitution, limiting the jurisdiction of courts deriving their authority from that Constitution, was adopted in the United Kingdom.<sup>201</sup> The logic by which that adoption occurred was precisely the mirror image of the logic of the young and weak United States: the spread of British jurisdiction by the assertion of the Parliament without regard to the international legal order. The confusion between British Imperial law and public international law, begun by Lushington's citation to a misconceived "piracy" of the Barbary states and other African societies as if there were a rule of public international law involved in construing a merely municipal bounty statute, was completed by the Law Officers of the Crown applying conceptions of English Admiralty jurisdiction and criminal law to the acts of foreigners against other foreigners within the solely municipally established Admiralty jurisdiction of British courts. Indeed, it is a possible reading of Dr. Harding's Report that British jurisdiction over "piracy" extended to "forcible robberies" taking place entirely within a foreign flag vessel with which the British had no connection at all. Only one case has been found in which British jurisdiction was actually applied to a transaction wholly within a foreign vessel outside of British territorial waters.<sup>202</sup>

The rest of Dr. Harding's Report of 1854, translating into policy guidance Sir Stephen Lushington's interpretation in the *Magellan Pirates* case of 1853 of the Bounty Act of 1850, reveals a conception of "piracy" far more restricted in scope than the general definitional terms of its first paragraph.<sup>203</sup> As with the American cases analyzed in chapter III above, it provides for action that can be rationalized on grounds far less radical, less dependent on assertions of "naturalist-universal jurisdiction" than that paragraph. Obviously, there had been a complete reversal of position from the days of the *Mohamed Saad* case<sup>204</sup> a decade earlier when the law seemed a serious impediment to expansive policy; it now seemed to be the position of the lawyers that the law could be used as a valid basis for expanding authority still further, but that it was doubtful policy to use it to its fullest extent; the general assertions of law go far beyond the advice as to the policy that could properly be pursued under the asserted law. Harding advised:

3rd. When any reasonable causes of suspicion of the piratical Character of any Ship exist . . . Her Majesty's Ships may, on the High Seas and beyond the limits of local Jurisdiction of any Nation, compel such ship to stop, and exercise the right of visit on board any such ship for the purpose of . . . ascertaining her true character.<sup>205</sup>

Once satisfied that a foreign flag vessel is not dominated by "pirates" whatever might have happened on board, the British authorities should, according to Harding, leave her, although they might remain in the area to watch if suspicions persisted. In a port, the local authorities must be called in.<sup>206</sup> This latter provision seems inconsistent with the result in the *Magellan Pirates* case

where, it may be remembered, the first seizure of the *Eliza Cornish* occurred in a port, and the authorities actually in control, Chilean rebels, supported the seizure.<sup>207</sup> By Harding's Report, if the rebels were to be considered the "local authorities" then there was no "piracy" in the *Magellan Pirates* case, but a denial of justice by those authorities or an exercise and possibly an abuse of their belligerent rights. If the more distant authorities of the recognized government of Chile were to be considered the "local authorities," then Harding's approach would seem to imply that British direct action against the *Segredo* was an intervention in internal Chilean affairs; those authorities should have been consulted first. The passages of Lushington's opinion referring to piracies "ashore" seem to have been thus overborne by Harding, despite the word "ashore" appearing in the Bounty Act of 1850.<sup>208</sup> This "correction" of the meaning of Parliament by the Crown's gloss in disregard of the interpretation given by the judiciary seems to raise constitutional questions, but they were not addressed at the time in any known document.

The only detailed instructions contained in Harding's Report relate to the case in which British criminal jurisdiction was undoubtable:

6th. British ships with their cargoes, and all persons on board of them, should, if met with on the High Seas, under whatever Flag, in cases of reasonable proof of the actual commission of piracy by those on board be secured and sent into the most convenient part of Her Majesty's dominions, with the necessary witnesses against them, to be there dealt with according to law.<sup>209</sup>

Why British courts and not the most convenient court of any sovereign if, as was asserted repeatedly, the "crime" is one of universal jurisdiction, is not mentioned.

There are other problems in analyzing Harding's Report. For example, in defining "piracy" he refers to "forcible robberies." "Robbery" at English law to be "robbery" must involve the threat of force<sup>210</sup> and the word is used without the adjective "forcible" in the English statute of 1536. It is not clear what the function of the adjective is in Harding's Report. Similarly, the emphasis on property rights seems excessive: was not "murder" to be considered "piratical" any longer? But Harding's Report was an internal British document, not the basis for any definition of "piracy" outside of the British Navy, as far as can be seen, and it was the actions of the British Navy defended by the Foreign Office that become the evidence of public international law, not the unpublished Reports of officials whose views in their technical details did not form the basis of legal precedents in public international law.

### *Applying the New Definition*

**The Kwok-A-Sing Case.** The one case applying to the full Harding's and Lushington's notions of universal jurisdiction was *The Attorney-General of Our Lady the Queen for the Colony of Hong Kong and Kwok-A-Sing*, an appeal by the



Government from the discharge of Kwok-a-Sing from custody in Hong Kong upon a writ of *habeas corpus*.<sup>211</sup> Kwok-a-Sing, a Chinese national, had apparently participated in a mutiny on board a French vessel on the high seas in 1871, alleging that he and others had been kidnapped for slave labor in Peru. The prisoners had killed the captain and several of the French crew and taken the vessel back to China. Kwok-a-Sing took refuge in Hong Kong, where he was arrested by British authorities as they believed themselves authorized and required to do under the Treaty of Tientsin of 1858.<sup>212</sup> The article of that treaty requiring China to capture and punish “pirates” who plunder any British merchant vessel<sup>213</sup> was clearly not applicable because no British merchant vessel had been plundered by Kwok-a-Sing. The treaty contained no other term relating to “pirates,” implying that “universal jurisdiction” and universal extradition were not in the contemplation of the drafters. But the Treaty did provide that “If criminals subjects of China, shall take refuge in Hong Kong . . . they shall upon due requisition by the Chinese authorities, be searched for, and on proof of their guilt be delivered up.”<sup>214</sup> There were a number of technical problems not relevant for purposes of the current analysis. For example, the Hong Kong ordinance under which the British authorities acted was based on the continued validity of the prior extradition language in the Treaty of the Bogue of 1843, which had been superseded by the Treaty of Tientsin.<sup>215</sup> The key point for now is that the British Court in Hong Kong and the Judicial Committee of the Privy Council both decided that extradition of Kwok-a-Sing to China was not authorized or required by the Treaty of 1858 with regard to his acts on board a French vessel on the high seas; that if the very general language of that Treaty covered the acts of Kwok-a-Sing it was only if there were universal jurisdiction regarding “piracy,” and if there were such universal jurisdiction, the jurisdiction of Hong Kong would suffice. The logic is identical with that of the 1864 majority in *In re Tivnan*.<sup>216</sup> Kwok-a-Sing was held for trial as a “pirate” *jure gentium* in Hong Kong.<sup>217</sup> Whether he was ultimately convicted is doubtful; there was much questionable in the Privy Council’s definition of “piracy” *jure gentium*, which rested entirely on a superficial reading of Sir Charles Hedges’s charge in *Rex v. Dawson*<sup>218</sup> and on the view that the carrying away of the ship itself to China was “robbery” rather than mutiny (which was conceded to be a matter for French law only).<sup>219</sup> The Privy Council carefully refrained from attempting to determine questions of evidence of intention that were not before it, indicated that without such evidence as would convince a jury of Kwok-a-Sing’s felonious intent, he would not have been a “pirate” even under Hedges’s charge. The conclusion of the Privy Council was clear on the jurisdictional point, favoring universal jurisdiction in a situation in which such a position would allow a British colonial court to pass judgment on the acts of a foreigner against other foreigners in a known foreign vessel on the high seas. The logic by which that conclusion was reached seems wholly

lacking unless regarded as implicit in the statement of the substance of the offense of “piracy” as given in its broadest form by an English judge in 1696, and the application of the logic of a case in 1864 under which universal jurisdiction was appealed to in a highly political case apparently to *avoid* extraditing persons who lacked the *animus furandi*, the “felonious intention” required by Hedges’s charge. There is an irony in the evolution of two rules adopted to suit special circumstances to become a single general rule applicable in the absence of special circumstances, and it may be questioned that the legal logic would have been as persuasive to a non-British tribunal or a British tribunal at a time when British commercial interest and naval dominance and national pride were not so great. But this leads to mere speculation.

**The Law Officers Retreat.** But while the Privy Council was applying conceptions of international law to expand British municipal law to the “piratical” acts of Chinese in French vessels on the high seas, the international legal order’s restrictions on applying municipal law conceptions to the acts of foreigners beyond British legal interest were becoming more apparent to the Law Officers of the Crown and local administrators as a result of incidents in Latin America, Spain, the Malay Peninsula and in the Persian Gulf.

In 1879 British shipping in the Gulf, then nominally ruled by the Ottoman Empire, was obstructed as it had been in 1820 by Arab fleets. On 2 December 1879 the Law Officers addressed the question directly. The British Government was *not* justified, according to Drs. Holker, Gifford and Deane:

On the ground of . . . the inability and unwillingness of the Turkish Government to prevent outrages on British subjects and British commerce in the Persian Gulf, in authorizing the commanders of Her Majesty’s ships, against the wishes of the Turkish Government, to pursue the pirates and marauders in question in Turkish waters, and destroy their strongholds on the Turkish mainland.<sup>220</sup>

The justification for British action, if any, was not to be universal jurisdiction or any international legal rules regarding the suppression of “piracy,” but “reprisal:”

Should the Porte neglect to take any measures for the security of British trade in the Persian Gulf, Her Majesty’s Government may, consistently with international law, endeavour to obtain from the Porte permission to act in Turkish waters against pirates and marauders, and should this permission be refused, and the Porte continue to allow piracy in its waters, Her Majesty’s Government might not improperly make such negligence a ground for reprisals.<sup>221</sup>

Having an eye to the technical problems of applying the international law relating to “reprisal” in the circumstances, the Law Officers a year and a half later found a more satisfactory rationale:

We do not regard the proposed measures as ‘reprisals,’ but simply as necessary for the protection of life and property, in the continued absence of the maintenance of authority by the Power on which that duty would more naturally devolve.<sup>222</sup>

Action was apparently taken on the basis of this rationale in July 1881 under an instruction from the Foreign Office (Sir Julian Pauncefote) to the Secretary of the Admiralty:

I am accordingly directed by Earl Granville [the Foreign Minister] to request that you will move the Lords Commissioners of the Admiralty to . . . instruct [the British Naval Officers in the Persian Gulf] not to allow themselves for the future to be too much hampered by the 3-mile limit in pursuing and capturing pirates, especially as the Turkish authority on the coast is at many points of a very shadowy description.

They will scrupulously avoid any collision with Turkish cruisers or troops, and they will hand over to the Turkish officials all offenders captured in Turkish jurisdiction.<sup>223</sup>

It seems clear that the word “pirates” was used by Pauncefote only as a descriptive word; the legal results that had been implied by Harding’s Report in 1853 and its expansive view of British jurisdiction, did not flow.

Similar limitations on the actual application of the rules of law asserted by Lushington and Harding were found when these natural law and universal jurisdiction conclusions confronted reality. Harding’s Report had mentioned lack of any “lawful Commission or authority.” Even accepting Lushington’s and Harding’s view as to the reach of concurrent Admiralty jurisdiction into the territorial waters of a foreign state, and ignoring Harding’s apparent change of mind between the general assertions of his first paragraph and the far more sensitive and carefully limited policy suggestions in his third and succeeding paragraphs,<sup>224</sup> the British naval authorities found their scope for action restricted by questions of “lawful Commission” wherever they turned. The question was referred to the Law Officers of the Crown in connection with the seizure of a British vessel at anchor in a Venezuelan port by Venezuelan rebels in 1870. Accepting the Lushington-Harding definition of “piratical acts” and the reach of British jurisdiction in foreign territorial waters, assuming a universal jurisdiction over “pirates” to lie in British Admiralty courts, although a more certain jurisdiction existed resting on the nationality of the victims,<sup>225</sup> Drs. Collier, Coleridge and Twiss still had difficulties:

[I]f the *Maparari* had no ‘Commission of War’ or ‘Letters of Marque,’ [the seizure] was an Act of piracy, the cognizance of which is within the Admiralty Jurisdiction of Nations, and as the Republic of Venezuela has declined to exercise her territorial jurisdiction, which is concurrent with that of the Admiralty of Nations, Great Britain may properly exercise the latter, and direct the *Maparari* to be seized wherever she shall be found upon the seas by a British Cruizer, and carried for adjudication on a charge of piracy before the most convenient British Court of Vice Admiralty.

We assume that there has been no recognition on the part of Her Majesty of the insurgents . . . as belligerents.<sup>226</sup>

Apparently, a group exercising “belligerent rights” could issue a “lawful Commission” to commit “acts of piracy,” and such acts if performed under a belligerent’s commission would *not* carry the legal result of “piracy” whatever Lushington’s reading of the intention of the Bounty Act of 1850. The key was to be British “recognition,” a key that if applied to the Barbary states and North African societies referred to by Lushington in the *Magellan Pirates* case, would have reversed his dicta that they were “piratical.” “Recognition” was apparently viewed as a political act of discretion; the Law Officers clearly imply so in their final paragraph quoted above, which envisages the possibility that “recognition” had been granted and that the granting or not of “recognition” as belligerents to the Venezuelan rebels was an act performed independently of their analysis of the law by the political branch of the government, the Crown. Thus, the fundamental approach of the Law Officers in 1870 seems to have been “positivist” in the Gentili sense.<sup>227</sup> The legal label “pirate” was regarded a thing possible to attach as a matter of policy, not of law, even when the roots of the violence constituting the “act of piracy” were political ambition and not private gain. “Piracy” for private ends appears to have been left to the criminal law of individual states providing for the protection of property rights defined by overlapping and consistent municipal laws, including the right to be secure in a vessel flying the flag of a prescribing state.

On the other hand, when this frankly positivist, policy-oriented view was adopted by France in connection with the Spanish insurrection of 1873, the Law Officers of the Crown took an even more restrictive view of “piracy,” arguing that some underlying international law set limits to the discretion of a state to classify rebels as “pirates.” The imperatives of the fundamental rules of the international legal order were coming to be seen as inhibiting interference in the political struggles of other states and limiting the “standing” of a state to enforce even public international law when the incident is not linked more or less directly to the legally protected interests of the interfering state. Earl Granville, Secretary of State for Foreign Affairs in Gladstone’s Cabinet 1870-1874, asked the advice of the Law Officers, Drs. Coleridge, Jessel and Deane, about the incident, which involved Spanish insurgents. At issue was France’s position that third states have “the right of treating the rebel Spanish ships as pirates . . . , under the general law of nations.” The Law Officers replied:

The Spanish rebel ships have not committed and are not cruising with the intent to commit any act which a foreign nation can properly call or treat as a piratical act. . . . [Therefore,] they cannot properly be visited or detained or seized unless the Government which orders or approves of such visit, detention or seizure is prepared to support the Government at Madrid against all persons and parties who may be in insurrection against that government.<sup>228</sup>

While the conclusion seems to be overstated somewhat, the point is clearly made that once the rebellion has reached a certain point, Spanish classifications do not matter and international law directly would require the rebels to be treated as belligerents; that the insurgents would be justified in treating the British (or French) as belligerent allies of the defending Spanish government, and exercising belligerent rights as enemies against British (or French) commerce with Spain, rather than being restricted at law to exercising only those rights that public international law gives to belligerents to exercise against neutral commerce. There is no mention of British “recognition” as the threshold at which the law of war comes into play, and it seems to be assumed that that great area of law is brought into play by an objective examination of the facts. The approach taken by the Foreign Office with regard to the Greek insurgents of the 1820s was thus confirmed<sup>229</sup> and the limits reality fixes on legal policy even within a basically positivist framework. The “lawful Commission” phrase in Harding’s Opinion of 1854 was turning out to be less capable of policy manipulation than might have been expected.

### **The Empire Advances**

*The Selangor Incident.* At the same time, under the instructions issued by the East India Company and the Colonial Office<sup>230</sup> after the Mohamed Saad case<sup>231</sup> the limits the international legal order in its most fundamental sense places on the legal power of statesmen to use technical, not analogous, emotive legal concepts within the order, such as “piracy,” to justify political action were becoming equally apparent. It would be tedious to repeat the primary research done by others where the legal points are adequately covered even though not the direct focus of the historical analysis, but one short recitation based on excellent research can illustrate the point<sup>232</sup> and a dip into some primary sources of the early 1870s that have been misconstrued or ignored by historians will make the argument complete.<sup>233</sup>

The Mohamed Saad decision was rendered by a British court in Penang, a British colony at the northern entrance to the Straits of Malacca, on 26 October 1840 and the local authorities were instructed as to policy in light of that decision on 31 December 1841. In 1851 a Chinese junk apparently owned or financed by merchants based in Singapore<sup>234</sup> was captured by the Malay Sultan of Trengganu. At the time, Trengganu was regarded as legally subordinate to Thailand but treated by the British colonial officials in most ways as if an independent state.<sup>235</sup> The Sultan of Trengganu held a brief trial of the survivors of the junk, and executed them in his own territory as “pirates.” The British colonial officials investigated and concluded that the conviction rested on insufficient evidence; the British demanded \$11,000 in compensation for the Singapore merchants whose investment in the junk’s voyage had been lost. On 9 October 1851 the British colonial officials threatened to seize and destroy the Sultan’s property in Trengganu if he did

not pay the sum demanded. The matter was referred by the local British authorities to their superiors in India, who sought legal advice. The advice was that the seizure of the junk violated international law and that the demand for reparations was well based. When the Sultan still refused, the Supreme Government<sup>236</sup> backed down, conceding that the Sultan's administration of Trengganu law in Trengganu was *prima facie* no concern of the British authorities, and that a judicial decision in the face of conflicting evidence could not be clearly rejected as a denial of justice or otherwise improper. The Government of the Straits Settlements was reproved for endangering friendly British relations with Thailand. In fact, there is some evidence that the junk had been seizing Trengganu traders' ships and property without any legal warrant in British or Trengganu law, and that it and other junks were closely connected with merchants or other agents in Singapore.

In December 1855, in response to complaints of "piracy" by similar vessels with similar connections, Mr. E.A. Blundell, the Governor of the Straits Settlements, recommended to the Supreme Government that British ships be empowered to seize suspected "pirates," "not . . . hampered with common law definitions of piracy." This request, amounting to an attempt to apply the British Imperial law definition of the 1853 *Magellan Pirates* case as a legal basis for political action in disregard of the more secure "overlapping municipal law definitions" approach implicit in the Mohamed Saad case<sup>237</sup> and the definitions of the "law of nations" that Dr. Lushington and Dr. Harding were trying to translate into assertions of public international law between sovereigns, was rejected by the Supreme Government. Blundell was advised that the Supreme Government felt it had no legal power to authorize "pirate-hunting" without regard to the limits of jurisdiction and definition contained in English law. Thus, when legislation was finally enacted to authorize British ships to act against suspicious vessels it was confined to vessels in the ports of the Straits Settlements and to British flag ships on the high seas.<sup>238</sup>

The most enlightening correspondence in the Malay area occurred when an ethnic Chinese merchant in Penang in 1871 reported that his junk had been "pirated" and the crew and others murdered by nine "passengers" who then took the vessel to port in the Malay state of Selangor. Whether the offense if measured by English law would have been "piracy" as defined by the traditions and cases codified by Hale and developed in the cases analyzed above, or "mutiny" because occurring in a single vessel and wholly governed by the law of the flag state of that vessel, and not international law or British Imperial law at all, and whether "piracy" at English law includes the crime of "mutiny," were not considered in the correspondence arising out of the incident. Instead, the word seems to have been used in the vernacular sense attributed by Dr. Lushington to the Parliament in the *Bounty* Act of 1850. Thus, the problems of jurisdiction that arose illustrate the limits that the

international legal order put on British Imperial law and the thought processes by which the British translated a term from English criminal law, via the “law of nations” conception of “natural” criminal law that all states were obliged by reason and morality to adopt, through British Imperial law attributing an underpinning in the international legal order to actions determined on a parochial policy basis by British officials alone, to an autointerpretation of asserted rules of general international law, to the enforcement of “international law,” obliging a Malay state as a subject of the international legal order to obey British demands that it adopt rules of municipal law in British interest.

Shortly after the taking of the junk was reported, the Acting Governor of the Straits Settlements, Colonel Sir Archibald E.H. Anson, ordered Commander Bradberry as captain to take the Colonial Government’s steamer *Pluto* with British police on board to search for it. On 28 June 1871 the *Pluto* anchored about three miles off the mouth of the Selangor River and a boat was sent upstream to take a letter from Anson to the Sultan requesting help. Arriving at the Malay village, Bradberry found the “pirated” junk there and her cargo already partially distributed in shops and stores maintained by some Chinese merchants. He “boarded her and took six prisoners, who [*sic*; whom?] we left on board the junk in charge of Mr. Barnum and Mr. Daniels. . . . We now returned to the [*Pluto*] accompanied by Rajah Moossa . . . and steamed . . . up the river.”<sup>239</sup> Bradberry proceeds:

[H]aving got the full permission and assistance of the Rajah [Moossa] to re-ship the cargo on board the junk, as also to capture as many of the pirates as possible; . . . we had taken [by 9 P.M.] three more prisoners . . .; on capturing the fourth—evidently one of the head pirates . . . [a] Chief told us to give him over to his charge . . .; we did so, and the prisoner escaped . . . pursued by Mr. Cox; this excited the Malays, who immediately drew their krisses . . .,<sup>240</sup> causing most of us to take to the boats . . . leaving . . . Captain Bradberry and Mr. Cox, still on the beach; the boat now returned . . . and the remaining party retired . . .; shortly after our return on board two guns were fired, and then all was silent. . . . Rajah Moossa gave us all the assistance possible, and would have done more had it not been for him being in bodily fear of Rajah Mahdie.<sup>241</sup>

1 P.M., . . . proceeded, with junk in tow, for Penang, where she now lays [*sic*; lies?] in safety.<sup>242</sup>

This report, signed by Commander Bradberry, is significantly different from the report of the same incident by Mr. Cox. It seems clear that Bradberry’s general language assumes a legal effect for parts of the transactions described that was not objectively intended by the Malays involved:

After . . . hesitation, Rajah Moossa allowed us to remove the goods, and remained by us until 7 P.M., during which time the goods were carried from the different Chinese shops to the beach, and from thence on board the junk. . . . [T]hree Chinese pirates . . . were arrested . . . and were at once dispatched on board. . . . [A]nother Chinese pirate was also arrested, and, . . . was rescued by a Malay Chief . . . although pursued by me. . . . [That

Chief, a Rajah,] collected a large body of armed Malays, who drew their weapons . . . and it was with extreme difficulty . . . we managed to reach the vessel . . . as numbers of the police and crew of the steamer were obliged to swim. . . . Two guns from Rajah Mahdie's stockade . . . were fired at us at intervals. . . . Rajah Moossa called on board at 8 A.M. . . . [and] told me . . . that Rajah Mahdie . . . and [three named Chiefs] were all acting in opposition to him.

I believe that six of the Chinese pirates are still at Salangore, under the protection of these Chiefs, who . . . have connived at all their actions.<sup>243</sup>

The probability that those whom the British officials were calling "pirates" were actually people with a license to raid shipping in the waters of Selangor and possibly at sea, and that license was issued by nobles with both a claim to royal authority and the reality of legal and political power in Selangor despite the adverse claim of the Sultan "recognized" by the British and of his son, Rajah Moossa, is confirmed by what happened next as reported by Commander Robinson of H.M.S. *Rinaldo*:

In consequence of a requisition from you on the 30th [of June] . . . I started . . . to Salangore, for the purpose of seizing the six pirates still at large . . . and to take such measures as may seem best for the punishment of those Malays who resisted the Colonial Officers and men in their attempt to secure the pirates.<sup>244</sup>

[Anchored the Navy vessel H.M.S. *Rinaldo*] off the town of Salangore. . . . Sent boats away manned and armed to search both sides of the river and vessels at anchor.<sup>245</sup>

Lieutenant Maude of the Royal Navy led a party ashore and found Rajah Mahdie. Maude relates that Mahdie agreed to return with him to the *Pluto*, which was anchored with the *Rinaldo* at the mouth of the river, but the description sounds more like an arrest:

The Rajah went between the boat and the small-arm men, with about twenty men around him. He was told that the boat was ready, when he replied that he would not go now.<sup>246</sup>

Shots were fired against the British party and a scuffle ensued. Maude was cut on the wrist by a kris; six British men were wounded, one mortally; Mahdie escaped. Robinson continues:

I decided to return to *Rinaldo* . . . and to send *Pluto* to Penang with wounded.

I . . . took the responsibility of incurring all risks for the sake of punishing the pirates for their treacherous attack . . . and for teaching them to respect the flag for the future.

[The next morning at 6:15 a.m.] on the southern entrance of the river, fire was opened upon us from these forts . . . immediately answered by the *Rinaldo*; . . . [we] rendered their chief defences untenable.

At 5:30 [p.m.] ceased firing, after having silenced all the forts and partially burnt the town . . . on the opposite bank.

The *Pluto* returned yesterday at 4.30 P.M. from Penang with . . . the whole of [British] disposable force. . . . [The following morning] no return was made to our fire . . . so after



a little . . . the disembarkation soon commenced. . . . [W]e spent the day in utterly destroying this nest of pirates. The town of Salangore is completely burnt down. . . . Had it been possible to make terms with any one, I might have spared the town on the condition that the six pirates . . . be given up. I would also have inflicted a fine to pay for the expenses of this expedition. Failing this we have done all the damage we could.

A flag of truce was shown at 10 A.M. at the landing-place . . . but those who displayed it proved to be people of no importance, whose object was simply that a few houses on that side be spared.<sup>247</sup>

The “nine” men apprehended by the British force under Commander Bradberry were taken to Penang and charged before the British colonial court with murder and piracy.<sup>248</sup> There seems to be no record of their trial, if any, in the available documentation. The British advised the Sultan on the appointment of another of his sons, Tunku Dia Oodin, as “Agent” with full powers to rule in Selangor, and the British found themselves deeply enmeshed in the complicated internal politics of that sultanate.<sup>249</sup> Lord Kimberley approved “general countenance and support” for the Sultan and Oodin, but drew the line at “material assistance.”<sup>250</sup> Nonetheless, Commander Robinson had in the meantime instructed Commander Blomfield of H.M.S. *Teazer* that:

The object [of our Naval presence] is to prevent Rajah Mahdie from returning to Salangore, and to support by your presence the friendly Malays.

It would be advisable to explore the river of Salangore as far as practicable.

Armed proas [prahus] of a suspicious nature in that river you can capture.<sup>251</sup>

The British Naval authorities supported Commander Robinson in this:

[N]o action should be less energetic and decisive, to rid the sea of intolerable and merciless Malay pirates, than that adopted by Commander Robinson.<sup>252</sup>

***The Legal Tangle.*** The legal questions were raised by the former Chief Justice of the Straits Settlements, now retired, Sir Peter Benson Maxwell, in a letter to the London Times dated 9 September 1871.<sup>253</sup> Relying on local newspaper accounts and, presumably, the private correspondence of friends in Southeast Asia, Maxwell reviewed the entire procedure. He construed the first mission sent by Col. Anson, two police officers and 20 men in the *Pluto*, as a party sent with a letter to the Sultan, “requesting, apparently, the extradition of any of the malefactors who might be found in his territories, and the restoration of the captured cargo.” The conduct of Raja Musa [Moossa] in response, in his view, “was irreproachable.” The first problems arose, in Maxwell’s opinion, when “a seventh Chinaman was pointed out by one of the junk’s crew as a member of the gang; and he was at once arrested.” Maxwell went on:

But the man appealed to Rajah Mahmud, and this subordinate [to Raja Musa] officer procured his liberation, partly, according to the newspapers, by threats, and partly by a

promise to produce him at a future time if required. Hardly, however, had he been set at liberty before the Straits policeman pursued and attempted to recapture him. Mahmud would not permit this. . . .

and the scene with drawn krisses and a retreat by the Straits police under Mr. Cox was the result. Maxwell then put the situation into a legal context:

Whether the Malay chief [Mahmud], in requiring the release of the Chinaman was protecting an innocent man or screening a heinous offender does not appear; but let us assume . . . the latter. . . . As to the attempt of the colonial police to arrest the man on Malay territory, it is hardly necessary to observe that they had no more right to do such an act there than a French police agent has to arrest a Communist<sup>254</sup> in the streets of London; and it may account for the irritation which the Malays displayed by retaining some of the merchandise.

It is noteworthy that Maxwell nowhere uses the word “pirate” as a legal word of art; indeed he treats the initial transaction as a routine matter of international cooperation in the rendition of accused criminals, with the Malay state of Selangor considered as a matter of law fully equal to Great Britain, and British jurisdiction over the escaped “malefactors” as resting on their violation of the law of England in a ship flying the British flag.

Maxwell seems to have seen printed Colonel Anson’s actual instruction to Commander George Robinson, Captain of the *Rinaldo*:

The Acting-Governor, on being apprised of what had happened, addressed a request to the commander of the *Rinaldo* ‘to arrest the pirates who were still at large’ in Salangore, and ‘to take suitable measures for the punishment of the Malays who had resisted the colonial officers in their attempt to secure the pirates’.

The word “pirates” is Anson’s, not Maxwell’s.

Before proceeding with further legal analysis, Maxwell raised the question of legal authority in Raja Mahdie and Musa’s brother-in-law, Tunku dia Oodin:

[F]or the last four years a private war has been going on in a part of the Sultan’s territories between Mahady [*sic*] on the one side and Tunkee dia Udin [*sic*], the son-in-law of the Sultan, on the other; and that the latter, who had been appointed a Governor by the Sultan, had had his appointment subsequently revoked. . . . The Sultan always abstained from interference in the dispute.

As Maxwell reconstructed the later events,<sup>255</sup> the Sultan’s “renewal” of Oodin’s commission was imposed by the British through an ultimatum to which the Sultan bowed most reluctantly; the legal effect of the transaction was thus dubious in Selangor’s constitutional law whatever the British interpretation of Oodin’s authority.

Maxwell argued strongly on legal grounds that the entire transaction by Anson should be condemned:

In the first place, what power has a colonial governor to arrest offenders in a foreign country, and to punish the subjects of that country who obstruct him there? Such an act by the armed force of a State is an act of war; and if a colonial governor has not power to

make war, how will Colonel Anson justify this hostile descent on the territory of a prince with whom England was at peace, to arrest not only criminals who had taken refuge there, but even subjects and officers of the prince? . . . [W]as not the descent of armed men on Malay soil for [Rajah Mahdie's] arrest . . . the threat that force would be used to deprive him of his liberty, violence enough to the man and his country? How much further were we privileged to carry hostilities before the Malays acquired the right of defending their officer and repelling us?

After then questioning Anson's judgment as to the wrongfulness of Mahdie's resistance and the justifiability of a punitive response, Maxwell turned to the role of international law and the respective places of Great Britain, Selangor, and the law of "piracy" in that system:

It may be said that the Malays are not within the pale of civilized nations; indeed, one of the local papers rings the changes on the "piratical" tendencies of Salangore, and Captain Robinson puts his finger on a passage in Horsburgh's "sailing directions," in which the old navigator describes the place as having "always been a piratical haunt." He also speaks of some vessels which he found and burnt there as "piratical" war prahus. Even if all this were true, it would be enough to answer that Salangore was not attacked because it was a piratical haunt. Neither its Government nor its inhabitants had committed any act of piracy. But it is not true that Salangore is "a piratical haunt." . . . There is no such thing as a piratical state there—not even, I believe, such a thing as a prahu armed and manned as a professional pirate. Unquestionably murders and robberies are occasionally committed in the Straits of Malacca by Malay and Chinese malefactors, who are the subjects or take refuge in the territories of the Rajahs of the Peninsula; but what happens then? We have extradition Treaties with several of those States, and the criminals are delivered up to justice. It was under such a Treaty, made in 1825, that the demand for the Chinese criminals was made in the present case.<sup>256</sup> Such demands are by no means rare; they are usually attended to with respect and even alacrity, and the conduct of [Raja Musa] shows that there was no disinclination on the part of the highest authority of the State to comply.

Maxwell was furious about Robinson's military action:

Such executions are not glorious even when they are necessary; for what can Malay stockades and guns do against the ships and artillery of Europe? But when they are not necessary, when, on the contrary, they are unjust and wanton, they . . . can bring only discredit and hatred upon us, and if they are not sternly repudiated by our Government the face of England, in Oriental idiom, will be blackened, and her name will stink.

This was an attack not to be ignored. The first response was another letter to the Times signed "Singaporean," apparently arguing that the "piracy" in the area was supported by one of the Rajahs competing for local power in Selangor and that the British interest in trade and the natural law protecting private property justified intervention to eliminate that "piracy" and support the "legitimate" Sultan, looking forward to Selangor being opened to further trade in due course as a worthy result of Col. Anson's action.<sup>257</sup> Faced with what seemed a conflict of factual assertions, the Times editors refused to take sides between "Singaporean" and Maxwell. In their opinion, the issue really was only whether the destruction carried out by Commander Robinson on Col. Anson's orders was disproportionate to the military need. It seems to

have been assumed that British interference was in principle justifiable because “these rebels, already in arms against the Throne, interfered, and attacked the British ships into the bargain.”<sup>258</sup>

Maxwell, responding directly to “Singaporean” in the *Times*, apparently before he had seen the *Times* lead article,<sup>259</sup> rephrased his legal argument:

I will take [the facts] as [“Singaporean”] would have them . . . :—A demand was made by one State on another for the extradition of a criminal refugee; the man is arrested and delivered up, but he is rescued by the lawless or insurgent subjects of the surrendering State, and the officers of the demanding State are insulted, threatened, and fired at. The latter Power, without complaining of the wrong done or demanding of the ruler the punishment of its guilty subjects, instantly dispatches a man of war to arrest, on its ally’s territory, both the rescuers and the rescued; and this force, because it meets resistance in executing these measures, burns down the town in which the culprits have shut themselves up, and which they hold in defiance of their Sovereign’s authority. And further . . . the invader finishes off by requiring the Sovereign of the invaded territory to appoint the nominee of the former his *Maire du Palais*.<sup>260</sup> Now, call that Sovereign the Queen of England, call the soil British soil, and call the man of war American, and I should be glad to know in what temper public opinion in England would listen to Jonathan’s [Uncle Sam’s] protestations that he had ‘never intended to make war’ on Great Britain, but only to arrest on her territory criminals and their accessories after the fact, a piratical, rebellious, and insolent crew; that he had ‘intended to settle the matter amicably,’ and would have done so if he had not been resisted; and that as to the *Maire du Palais*, it was an admirable institution, which would ‘work well’ in ‘opening up the country.’

. . . I expect to hear, of course, that the rules of international law are not applicable to petty Malay States, just as I have often heard it said that our municipal law was too good for our Oriental subjects. But if international law be merely the expression of sound international morality,<sup>261</sup> why should we refuse to Malays the justice and consideration which we accord to greater Powers? . . . I trust that we have not one measure for the strong and another for the weak; and that, while ready to push conciliation and concession to all reasonable lengths in the West, we do not thirst for some compensating glory in the destruction of cheap sheds . . . and, I suppose, cheap lives in ‘the beneficent climes of Malaya.’<sup>262</sup>

This eloquent plea that the normal rules of international law, even if regarded as “moral” law merely, be applied between equal sovereigns whatever the military or political inequalities (as they apply between Great Britain and Denmark without question in Europe) even when the government of the state that is a treaty partner or protector of “pirates” is a Malay Sultan or a claimant to his authority, while of doubtful persuasiveness to the race-proud English populace and possibly even the editors in 1871 of the *London Times*,<sup>263</sup> had some impact on the more sophisticated British authorities who had to deal with political realities in the Malay Peninsula. Col. Anson on 24 October 1871 sent a long dispatch to Kimberley giving his response to Maxwell’s first letter, which apparently had not reached Anson’s desk until the 19th of that month. As might be expected, he used the word “piracy” in a general political sense with no specific legal content:

[T]here was no intention on the part of this Government to wage war upon, or to interfere injuriously with the country of Salangore; . . . the question at issue was treated purely as one of piracy, and that this Government, when it found that the junks and pirates were at Salangore, cooperated with the Sultan's officers under . . . Rajah Moosa . . . in capturing some of the actual perpetrators of the crime on board the stolen junk; and that Captain Robinson . . . punished the rebellious Rajahs . . . who had interfered to support the pirates against the authority of the Sultan, and who had fired upon the . . . 'Rinaldo.'

With regard to Sir Benson Maxwell's statement that the police 'had no more right to do such an act there, than a French police agent has to arrest a communist in the streets of London' putting aside the absurdity of the comparison, I presume it could hardly be objected to, that if a nobleman came to interfere with the Government official who had just handed over the communist to the French police agent in the streets of London, and assisted the communist to escape, the police agent would be justified in assisting the Government officials in running after and recapturing him; and this corresponds to what was really done by the police at Salangore.<sup>264</sup>

Apparently Commander Robinson also conceived of "pirates" as an undefined class that might include rebels or others who interfered with British actions in the Peninsula. In his report to Col. Anson regarding Maxwell's letter, he wrote:

The war proas [prahus] are called 'piratical' by me because they sided with the pirates, and fired upon the 'Rinaldo' while the ship was returning the fire from the forts.<sup>265</sup>

Commander Blomfield<sup>266</sup> of H.M.S. *Teazer* reported on his entire proceeding to Vice-Admiral Kellett after Maxwell's first letter had been published in London, but before news of it reached Anson. He too used the word "piracy" in a political sense, apparently referring generally to Malays or Chinese who obstructed British trade in Selangor without the direct commission of the Sultan:

The object of my mission . . . was to convey a letter . . . demanding that the remainder of the pirates . . . be given up to H.M.G. . . . also that a ruler in whom our Government could place implicit confidence should be appointed.

These demands were made with the 'Teazer's' guns bearing upon the Sultan's palace, and an answer insisted upon within twenty-four hours.

[T]he Sultan told us . . . that the pirates had already been given up at Malacca, with the exception of one Chinaman, who had died, and whose queue was sent in proof.

[I]t appeared to me a good opportunity for opening up the rivers, and substituting law and order for piracy in the Salangore coast, by giving countenance and active support to a Governor of our own recommendation.<sup>267</sup>

Without resolving the question of who was or was not a "pirate" in the contemplation of British naval authorities,<sup>268</sup> Kellett instructed his subordinates "that no such expeditions be undertaken in future without reference to me, unless immediate action is absolutely necessary, in which latter

case . . . diplomatic and political affairs be carefully avoided.”<sup>269</sup> Of course, Col. Anson was the chief British political officer in the area in 1871, and it is not clear precisely what this instruction was actually intended to accomplish.

**Dropping the Legal Facade.** The impact of the *Rinaldo* affair was in fact great on the political officers of the Government of the Straits Settlements. They never did admit error in the actual case, although it is possible to see in their rewriting of legal relationships, having the Sultan of Selangor appear the undoubted sovereign there, cooperating fully in attempting to discharge his supposed obligations under the Treaty of 1825, and the British acting throughout merely as his agents or with his permission, a hinted confession that absent these classifications of fact the episode was of dubious legality regardless of the label “piracy.” It would be tedious in this place to delve more deeply into the troubled affairs of Selangor and the complications that led to overt British intervention in 1874 and the conquest of the sultanates of the Malay Peninsula.<sup>270</sup> But sensitivities were raised by the *Rinaldo* affair; the local correspondence that followed it regarding “piracy” and international law clearly assumed the equality as sovereigns of Great Britain and each Malay sultanate.

There were several illustrative incidents between 1871 and 1874 in the Straits of Malacca and the waters of the West coast of the Malay Peninsula, including an attack on the ship *Fair Malacca* on 12 December 1872, which Governor Sir Harry St.G. Ord refused to call “piracy:” “I do not find it clearly established . . . that this vessel was attacked in the open sea, or under circumstances which would justify a charge of piracy against the junks.”<sup>271</sup> The Solicitor-General, David Logan, rendered an opinion to Governor Ord on 22 December 1872 that the firing on the *Fair Malacca* “cannot be said to have been committed ‘where all have a common and no nation an exclusive jurisdiction,’ i.e., upon the high seas,” and that therefore it cannot be classified legally as “piracy.”<sup>272</sup> Ord asked Logan to reconsider his opinion on the ground that the authority of the Sultan had been effectively superseded by anarchy.<sup>273</sup> Logan replied that the British were justified in looking into the matter and taking the suspicious junks in to the nearest British port for a judicial investigation, but concluded: “I am not disposed, without more reliable evidence, to decide that these junks were piratical, as such a conclusion, if correct, might justify any man-of-war in dealing with them in the most summary manner on the spot.”<sup>274</sup> One of the junks was ultimately released for lack of evidence, and the other condemned in an *in rem* proceeding by the British court. Nobody was tried for “piracy;” all the accused were released.<sup>275</sup>

On the other side, a British naval commander named Denison reported to Ord and Vice-Admiral Sir Charles Shadwell, the Commander-in-Chief of the China Fleet succeeding Vice-Admiral Kellett, from the *Zebra* in Penang, 3 January 1873, that he had boarded a Chinese junk in a Malay river in the following circumstances:

[A]s there was nothing but anarchy in the place, any vessel [falsely] flying a recognized flag of whatever nation was a pirate. I merely came as a policeman of the seas to seize a pirate, and . . . would not interfere in their dissensions. . . . I took two . . . junks and left them four, not being able to prove their having committed piracy.

I then addressed the head man of the Rajah . . . that I did not come from the Governor, but . . . I only came to seize the junks that happened to be in his dominions, as he could not help us.<sup>276</sup>

The political situation changed most dramatically with the arrival in the Straits Settlements of a new Governor, Sir Andrew Clarke, who thought like Denison and did not seem to think it necessary to consider legal advice as to the definition or legal results of attaching the word “piracy” to anything. His use of the word “piracy” as if to justify the most extreme military measures entangled him and his successors in the very web of Malayan dynastic and other power struggles that they had been most strongly instructed to avoid.

The trail into this thorny thicket seemed smooth as the Governor apparently felt that his knowledge of the legal qualifications and results of the term “piracy” were adequate, and he got hopelessly confused only when trying to enforce what he believed without legal advice was in fact the law. On 11 January 1874 there was a sea-borne attack on the land-based lighthouse at Cape Rachado in Selangor. The situation was described by Governor Clarke as follows:

A piracy . . . has recently been perpetrated . . . in the territory of Salangore.

[T]he men (or, at least Several of them) who committed this act, came to Malacca, and nine have been arrested, of whom one has turned Queen’s evidence.

The evidence . . . is most conclusive, but a doubt might possibly arise . . . as to our jurisdiction, and it appears to me that the safest course will be to deliver over the prisoners to the Governor or Viceroy of Salangore, T.D.O. [Tunku dia Oodin], in whose territory the crime was committed.

[T]hese *bona fide* acts of piracy by Malays (which must be looked upon as very distinct from the lawless acts by Chinese, which have been lately put down . . .) are again becoming frequent, . . . supported now by the sons of the Sultan.

I . . . [suggest] the delivery of the pirates whom we have in custody to T.D.O., who demands them from us, under the Indian Extradition Act, and providing him with evidence, require him to try them on the spot.

I . . . [propose] to insist on [the Sultan’s] coming on board [a British gunboat], while I shall require T.D.O. to make a prisoner . . . of his brother-in-law Rajah Yacub . . . and other suspected Chiefs. . . . T.D.O. will doubtless require support, and material assistance . . . if any of the pirates should resist.<sup>277</sup>

It appears that the new Governor was unfamiliar with the legal analyses of Judge Sir Benson Maxwell and Solicitor-General David Logan and was using

the word “piracy” to refer to mere “robbery” by the law of Selangor, or by what he would have liked to be the law of Selangor. But calling it “piracy” seemed to him to give the British an authority to act, somehow, in disregard of the inhibitions international law would place on one sovereign in its dealings with another. There seems to have been no doubt in Clarke’s mind that the “piracies” he referred to were authorized by political figures with some claim to legal authority in Selangor (the Sultan’s sons), that the incident occurred entirely in the territory of Selangor, and that Selangor law, not the law of the Straits Settlements or international law, applied to the individuals accused of the “piracy.” There seem to be no precedents or logic to support this translation of a vernacular usage with no specific legal meaning into a legal term, and it would appear analytically sounder to regard Clarke’s usage as not indicating a legal sense at all, but an emotional excuse for political action in disregard of the law.<sup>278</sup>

The delivery “demanded” by Tunku Dia Oodin had, of course, been suggested by British officials, and the references to the Extradition Act, being fundamentally irrelevant to a demand from one sovereign to another, where treaty controls and not the legislation of either sovereign, are clear indications that the forms of law being followed were those of British Imperial law, not public international law.<sup>279</sup> As to the law of Selangor, Clarke sent two “Commissioners” “to see that the enquiry [by Tunku Dia Oodin] is properly conducted, and to support T.D.O.’s authority.”<sup>280</sup>

Apparently, Governor Clarke began to have some doubts about the legal aspects of these proceedings, and explained his actions (with some gloss that seems disingenuous in attributing to Tunku Dia Oodin an initiative that seems almost certainly to have come from Clarke himself) in a way that made the entire affair a question of policy alone, prompted indeed in part by doubts as to how a British tribunal would handle the questions of jurisdiction and definition:

[Although the attack on a lighthouse in Salangore was clearly piracy, jurisdiction was in doubt] as it was not clear that the crime had been committed on the high seas.

Even were a conviction certain, I felt that any punishment inflicted by us, and in our territory . . . would be barren of any permanent deterring influence or beneficial result.

I desired to show the [pirates] that they could not be screened from punishment by the authority and influence of [Malay Rajahs].

I consequently gladly availed myself . . . of the proposal made by T.D.O. . . . to demand these men under the terms of the Treaty [of 1825], as well as under the provision of the Indian Act for the Extradition of Offenders.

I determined that the authority of the Tunku should yet be covered by still higher authority, and . . . the Sultan should be the chief responsible agent and approving power.<sup>281</sup>



In fact, the “demand” from Tunku Dia Oodin was a “request” that cited the British legislation but not any treaty, and came in reply to a British initiative. It said:

Sir, In reply to your letter of [2 February 1874], I do hereby request that the nine Malay subjects of Salangore State, now in custody at Malacca, and alleged to be concerned in an act of piracy in the territory of Salangore, may be handed over to me under the Indian Act No. 7 of 1854, to be tried and dealt with according to law.<sup>282</sup>

In fact, to all the Malays involved, it seems very doubtful that any law was being applied to the incident other than British law, either a version of the British municipal law of piracy or British Imperial law defining “piracy” in ways insupportable by reference to the normal sources of public international law or the constitutional aspects of the legal order creating distinct and legally equal international persons in the “states” of Selangor and Great Britain as propounded by Maxwell. There can be little doubt that the actions in Selangor called “piracy” by Clarke were part of a continuing “war” in Selangor, with the “pirates” actually part of the military arm of a faction which controlled substantial territory and population.<sup>283</sup> To Thomas Braddell, Clarke’s Attorney-General, the constitutional position of Tunku Dia Oodin in Selangor was not free from doubt, and the political connection of the “pirates” with a faction hostile to him was assertable as a simple matter of fact.<sup>284</sup> Amusingly, if not tragically, the Sultan seemed to think that Tunku Dia Oodin’s role in the trial of the “pirates” was to administer British justice. Braddell did not mention international law regarding “piracy” in reporting that a reply was immediately sent to the Sultan of Selangor “pointing out, in order that there might be no mistake in this report, that the justice was to be that of the Salangore, not of the British, Government.”<sup>285</sup>

On 15 February 1874 the tribunal under Tunku Dia Oodin and in the presence of the two British Commissioners found all eight accused<sup>286</sup> guilty of “piracy and murder.” One of them was let off on account of his youth, and the other seven were executed in the Malay fashion by kris in such a way as not to spill blood.<sup>287</sup>

It will come as no surprise to those familiar with the almost automatic enforcement pattern of public international law that the policies of Governor Clarke and Thomas Braddell in trying to cover over a political advance by Great Britain with a display of legal words of art created grave difficulties of policy. Once it was accepted as a matter of policy that “piracy” included the political violence of Malay nobles battling for authority within the territories of the Malay Peninsula, British involvement in peninsular politics could not be avoided by trying to use “piracy” as a word of art in public international law that justified British exercise of authority without concomitant responsibility. The British advance continued and the result was the war between British-supported factions and even British forces on the one side, and the old Malay nobility on the other. But the word “piracy” seems to have

lost all legal meaning in the correspondence that followed.<sup>288</sup> It was used in connection with British blockading actions and the destruction of Malay stockades, but not of trials or judicial executions or, indeed, any actions on the high seas or elsewhere where British courts might have been argued to have jurisdiction or public international law to have actually authorized an interference in the territorial affairs of a “state.”

### *The Limits of the British Imperial Law of Piracy*

**Introduction.** It has been narrated above, how the word “piracy” was adopted from English vernacular by Parliament and applied to authorize rewards to British naval personnel in disregard of the legal history of the concept to which the word had been applied in English courts. It has also been narrated in some detail how the word was sought to be used in the Persian Gulf, the Eastern Mediterranean, and in Southeast Asia to justify British actions inconsistent with the fundamental rules of the international legal order that make equal subjects of the law of all cohesive political societies that can maintain their independence, even if only as belligerents. It has been seen that in each case in which the word was used beyond the limits the legal order contains to imply any British authority inconsistent with those fundamental rules, the facts ultimately forced the British either to withdraw their pretensions or plunged them into the warlike complications that the use of the word had been expected to avoid. To conclude the tale of the political use of the word “piracy” by British authorities, one final incident might help indicate the refusal of the more sophisticated world to accept British political decisions as proper statements of law.

It may be recalled that during the American Civil War of 1861-1865 the Federal authorities of the United States tried to attach the legal results of “piracy” as they were conceived to flow from international law to the acts of Confederate-licensed privateers and naval vessels, but that outside of the courts bound by the Constitution of the United States and legal labels attached by legislators under that Constitution, the attempt failed; and even within that legal order, the courts found ways to avoid applying the legal results of “piracy” to “rebels” in most cases.<sup>289</sup> With one limited Latin American exception, it was the position of the Law Officers of the Crown in the 1870s that the word could not properly be attached to foreign “rebels” unless the country so attaching the word were prepared to become involved in the political struggle among claimants to authority in a foreign state.<sup>290</sup> In the affairs of the Malay Peninsula of the 1870s, it has been seen that the use of the word “piracy” in disregard of these conclusions in fact brought about the predictable result of British involvement as belligerents, and ultimately the British conquest of the sultanates of the Malay Peninsula and the conversion of the word “piracy” in practice to a word of

political argumentation bringing about the very political entanglements it had been intended through legal argumentation to avoid.

Nonetheless, in 1877 there was an incident in which the British Law Officers of the Crown attempted to use the word "piracy" as a legal word of art to justify British military action, and that incident has been so often cited and misunderstood that it must be examined in a little detail to set it in proper perspective.<sup>291</sup>

**The Huascar Incident.** On 6 May 1877 the crew of the Peruvian warship *Huascar* mutinied and sailed out of the Peruvian port of Callao, shortly afterwards receiving on board Don Nicolas Pierola as "President of Peru" in disregard of the existing Peruvian constitution.<sup>292</sup> The very next day, 7 May 1877, the Peruvian Chargé d'Affaires in Chile, Senor Zegarra, sent a note to the Chilean Minister of Foreign Affairs, Senor Alfonso, implicitly calling on Chile to seize the *Huascar* as a "pirate" ship.<sup>293</sup> The position of the constitutional Government of Peru was publicly announced a day later, on 8 May 1877, when a decree was issued by the President, M.J. Prado, countersigned by P. Bustamente, the Peruvian Minister of War and Navy, declaring that the Republic of Peru "is not responsible for the acts of the rebels" and authorizing under the constitutional law of Peru "the capture of the *Huascar*," with recompense to those who help bring the vessel back to the authority of the Government. The word "pirate" is not used.<sup>294</sup>

On 10 and 11 May, the *Huascar* detained two British ships, demanding mail and dispatches; but the boarding party peacefully left in both cases when the demand was refused. A cargo of coal was divided, the *Huascar* taking a portion alleged to belong to Peruvian owners but shipped under British control, and two Britons, including a British engineer, were taken on board the *Huascar* to serve professionally, but whether voluntarily or not is not clear. It thus became legally very important whether the *Huascar* were classified as entitled to exercise belligerent rights (under which neutral vessels could be detained and contraband seized),<sup>295</sup> or not. If the Pierola people were "rebels" exercising "belligerent rights" against the British, who would then be "neutrals," the question of whether coal in these circumstances was "contraband of war" would have to be resolved by diplomatic discussion; British political action would be restricted to defending British neutral interests. If, on the other hand, the Pierola forces were regarded as mere Peruvian criminals, mutineers and thieves of Peruvian property, then British rights to defend British property from takings unauthorized by international law would seem to have been beyond the range of argument, and Pierola having no "standing" within the international legal order to discuss the matter, British self-help to recover the property, and perhaps political cooperation with the established Government of Peru to apprehend the Peruvian "criminals," would seem to have been justified. Finally, if the Pierola people were classified as

“pirates,” by “naturalist” logic the British could chase them down and hang them. By basically conservative “positivist” traditions the British Government itself, as the legal representative of the world order, basing standing on the injury to British nationals (if there were such injury), could apply British municipal criminal law within the jurisdiction of British Admiralty courts to the “pirates,” if British municipal law made them such. Their apparent lack of *animo furandi* would make the application of British law doubtful. On the other hand, the “naturalist” tradition might have been interpreted to allow summary justice to be rendered by the Royal Navy to those classified as “outlaws,” people beyond the protection of the law’s classification system, regardless of “standing.”

The first British opinion was uttered by Rear-Admiral A.F.R. de Horsey, Commander-in-Chief of Her Britannic Majesty’s Naval Forces in the Pacific Ocean, who sent a message to the “Commander of the *Huascar*” on 16 May 1877. He prefaced himself with the language of neutrality, taking basically the middle view of Peruvian criminality, but hinting that he might attach the legal consequences of the “piracy” view, while avoiding use of the word:

It becomes my duty to inform you that, notwithstanding my desire to preserve a strict neutrality in all internal dissensions in Peru, any boarding of, or other interference with British subjects or property by a revolutionary ship owing allegiance to no recognized or established government, cannot be tolerated, and that any acts of the kind performed by the *Huascar* will therefore necessitate my taking possession of that ship, and delivering her over to lawful authority.<sup>296</sup>

The next day, 17 May 1877, the *Huascar* entered a Chilean port and Zegarra, on instructions from Lima, again formally demanded that Chile deliver the ship to the Peruvian legation. In the Peruvian view, Chilean refusal to seize the *Huascar* would be “mixing in the civil strife of other countries.” Zegarra’s note did not mention “piracy” and denied the applicability of the law of war to the situation, thus denying any obligation in Chile to observe “neutrality”: “[T]here was no civil war in Peru; the case was purely one of mutiny,” he wrote; thus, any hospitality shown to the *Huascar* would violate “the rights of nations,” presumably Peru’s rights to property in a Peruvian vessel.<sup>297</sup>

Senor Alfonso responded for Chile the next day, ignoring Zegarra’s current position and seeming to regard the legal situation as involving either “piracy” or “belligerency” with no intermediate classification possible. In that context, he absolutely denied Zegarra’s arguments of ten days before, 7 May 1877, and concluded that Chile should, and would, conform to the behavior that the international law of neutrality would require:

The Chargé d’Affaires had stated to him that the ship should be treated as a pirate, but such an assertion was opposed to the most elementary principles of international laws; on the contrary it appeared that the mutiny had a political object . . . It was clear the

vessel was not a pirate, and the Government considered they had no reason to engage their naval forces in an encounter not required by the dignity or interests of Chile. . . . [N]o men or arms could be allowed to be embarked, nor any coal, and all communication with her would be cut off. The provisions and water necessary for the use of the crew alone would be granted. She was ordered not to remain longer than 24 hours in Chilean waters.<sup>298</sup>

Zegarra replied in writing on 22 May 1877:

Your Excellency maintains that the *Huascar* is not a pirate, and that there was no cause to fear she would interfere with Chilean commerce, and, therefore, that Chile had no right to assume a hostile attitude towards that vessel. The reasoning of your Excellency points to a simple insinuation contained in my letter of the 7th May, in which my first demand was put forward. . . . It was very natural that, finding no other term for an armed vessel which floated on the high seas, subject to the passions of its crew, who recognized no responsibility, and who had committed a grave crime [mutiny against the law of Peru?], that I should have attributed to her a piratical character; but in my second letter I did not expressly and exclusively base my demand on this circumstance; yet, if a vessel under such conditions is not a pirate, I confess I do not know what to term her; she navigates without a commission from any Government, acknowledges no territorial authority, and, to establish more precisely her position, has detained on the high sea a commercial packet [the first British vessel], forcibly obliging the delivery of the correspondence on board.<sup>299</sup> If such a vessel is not a pirate, at the least she has placed herself completely outside international right; the flag she flies does not belong to her.<sup>300</sup>

There seems to have been no formal reply to this letter from the Chilean Foreign Minister and other actions to be discussed below made the correspondence moot. But the legal point must have disturbed important people both in Chile and in Peru. There was a debate in the Chilean Chamber of Deputies in which Alfonso's position, that the *Huascar* was not properly classifiable as a "pirate" and that any Chilean action other than strict "neutrality" would inject Chile illegally into the internal affairs of Peru, seems to have carried the day, but with significant opposition.<sup>301</sup> The most significant change in position came from Peru, where the Foreign Minister, J.C. Julio Rospigliosi, ultimately concluded that Zegarra had been wrong; that there never was any "piracy" involved and that Chilean action to take sides in a Peruvian political struggle would have indeed been improper:

In view of the correspondence of our Chargé d'Affaires *ad interim* in the Republic of Chile, and considering that on the mutiny of the *Huascar* taking place the Government naturally foresaw she would proceed to that Republic, in whose waters our squadron could not seize her; . . . our Chargé d'Affaires at Santiago was ordered to ask for the detention and delivery of the revolted vessel; that this order did not entail, and it was never the intention of the Government that it should entail, the intervention of Chile in our domestic questions.

For this reason, and out of respect for the feeling of the nation, and notwithstanding the Government feel that the fault committed by our Chargé d'Affaires is due to an excess of zeal in order the better to merit the confidence reposed in him, his proceedings are disapproved and his protest to the Chilean Government declared null and void.<sup>302</sup>

J.R. Graham, the British Chargé d'Affaires in Lima, apparently misunderstood the import in law of this Peruvian withdrawal from an untenable legal position, and reported back to Lord Derby that the disapproval ran merely to the "form in which" Zegarra had demanded the return of the *Huascar*, and was an attempt "to make a victim" of him.<sup>303</sup> It was not the subject of analysis by Graham or Drummond-Hay and seems not to have been discussed openly in any of the surviving correspondence.

It is perhaps significant that Alfonso's position was that there was no other classification legally possible than "piracy," which he rejected because the motivation of the crew of the *Huascar* was essentially political or there was an objective "belligerency" requiring Chile to act as a "neutral" in the internal struggle in Peru. Julio Rospigliosi's position did not concede "belligerency." While apparently agreeing with Alfonso about the impropriety in law of attaching the word "piracy" to the politically motivated rebels, he seems to have regarded the matter legally as one of Peruvian law enforcement in which Chile was not bound to the international law regarding "neutrality," but to the law of peace forbidding interference in the internal concerns of other states. Under that law, the Chilean obligation would have been simply to return the "stolen" property, but not necessarily to extradite or try the violators of Peruvian law, since Peruvian law does not apply in Chile and any Chilean attempt to apply Chilean law to property rights in the *Huascar* would have been an intrusion into exclusively Peruvian legal interests. Zegarra, rejected by both the Chilean and Peruvian governments, seems to have agreed with Alfonso that there was no Peruvian "crime" involved, but only "piracy" or "belligerency," and that Chilean recognition of "belligerency" would give a status to Peruvian rebels that they did not deserve, thus affecting Peruvian politics and intervening in Peruvian domestic affairs. In his opinion, apparently, the only remaining classification was "piracy," which would require Chilean cooperation in suppressing the "rebellion." It is enough to say that both Governments involved rejected that view as wrong in law.

It would thus appear that while the Governments of Chile and Peru disagreed as to the proper legal classification to be given to the *Huascar*, belligerent rebels requiring Chilean neutrality or Peruvian criminals of no legal concern at all to Chile but to be denied a base of operations there and Peruvian property in Chile to be returned to the Peruvian authorities, they agreed that the international law regarding "piracy," if there were any such law, was not applicable. They also agreed that whatever the rationale for applying it, the fundamental international legal principle must be maintained that no state is authorized to meddle in the affairs of another, even the criminal law enforcement of that other, without either an invitation or some other basis in the international legal order for the action. From the Chilean note, it appears that Chile thought such a basis might arise if the *Huascar* attacked Chilean shipping, but that the mere arrival of the *Huascar* in Chilean

waters was not enough. Peru argued that Chile was somehow legally bound to accept Peruvian official statements regarding Peruvian property rights in the vessel flying the Peruvian flag, but Chile rejected that argument and Peru did not press it further. Ultimately, Chilean abstention *as if* applying the international law of neutrality in a belligerency situation was apparently deemed acceptable to all concerned except the Peruvian subordinate official, Zegarra, who was reprimanded for pressing his view too loudly.

Meantime, on 29 May 1877, the *Shah* and the *Amethyst*, British warships under Rear-Admiral de Horsey, had engaged the *Huascar* actually within Peruvian waters. Expressing considerable admiration for the seamanship exhibited by the *Huascar*, “steaming about 11 knots, and . . . always contriving to keep her turret guns pointing on us, except when in their loading position,” de Horsey found that the *Huascar* claimed to be operating with “the President of Peru” (Sr. Pierola) on board therefore properly flying the Peruvian flag. She escaped at night and in the early morning of 30 May surrendered to the recognized Peruvian Government’s squadron at Iquique. In de Horsey’s view, explaining his actions to the Secretary of the Admiralty immediately after the events recited, the *Huascar* in interfering with British vessels, property and persons had “committed acts which could not be tolerated.” Moreover,

[H]aving no lawful commission as a ship of war, and owning no allegiance to any State, and the Peruvian Government having disclaimed all responsibility for her acts, no reclamation or satisfaction could be obtained except from that ship herself.

Going further into polemics, he argued:

That the status of the *Huascar*, previous to action with [my fleet], was, if not that of a pirate, at least that of a rebel ship having committed piratical acts. . . . [And] that the status of the *Huascar*, after refusing to yield to my lawful authority, and after engaging Her Majesty’s ships, was that of a pirate.

He concluded:

That I trust the lesson that has been taught to offenders against international law will prove beneficial to British interests for many years to come. That I have carefully abstained from any interference with the interests of the Peruvian Government, or those of the persons in armed rebellion against that Government; my action in respect to the *Huascar* having been entirely for British interests.<sup>304</sup>

In his further defense about ten days later, de Horsey wrote to the Secretary to the British Admiralty that the fuss raised in Peru by his action against a Peruvian rebel in Peruvian waters could be “easily understood by those who are conversant with the state of politics.”

As there are at least three rebels to every loyal man, there is a vast feeling of disappointment at the practical result of my proceedings in respect to the *Huascar* having been the termination of the rebellion. . . . The political cry of the enemies of order is now that the Peruvian flag has been fired into by British ships, of course omitting to say that those colours were falsely hoisted by a piratical rebel vessel.<sup>305</sup>

In fact, it was not merely popular upset that ensued. On 10 June 1877 the Peruvian Foreign Minister, J.C. Julio Rospigliosi, addressed a circular communication to all Peruvian diplomatic representatives strongly condemning the fact that de Horsey had “opened fire upon the Peruvian ship within the waters of the . . . port”:

The *Huascar* did not, on account of having refused to recognize the authority of Government, cease to belong to Peru. And, although the supreme Decree of 8th May last<sup>306</sup> was issued to bring about her apprehension, foreign ships-of-war were not thereby entitled to attack her, not only because international law prohibits mixing in the internal affairs of other states, but also because the reward offered by that Decree could not refer to the commanders of such ships without grossly offending their personal and national dignity.

Moreover, Julio Rospigliosi argued:

Let us, however, suppose that the *Huascar* provoked an attack of Her Britannic Majesty’s ships, such attack could never be permitted to take place in the waters under the jurisdiction of the Republic without causing a flagrant violation of the immunity of her territory.<sup>307</sup>

The questions of law were referred by the British to the Law Officers of the Crown, who replied on 21 July 1877 adopting de Horsey’s view but without using the word “pirate”:

Admiral de Horsey was bound to act decisively for the protection of British subjects and British property, and . . . the proceedings resorted to by him were in law justifiable.<sup>308</sup>

This view was debated twice in Parliament on 7 August and 11 August 1877, primarily by Sir William Harcourt,<sup>309</sup> who attacked the Attorney General, Sir John Holker,<sup>310</sup> both as to the facts and the law. Harcourt pointed out that the acts of the *Huascar* hardly seem “piratical” when all that she did would have been permissible if she were conceded the rights at international law of a “belligerent.” The *Huascar* indeed stopped two “neutral” (British) vessels, but did not seize any property or mail, and left after being satisfied of their neutrality; the property supposedly seized was in fact claimed by a Peruvian owner as his part of a British shipment and was not clearly British property; at least one and probably both of the British individuals taken off one of the vessels seems to have gone voluntarily; etc. Belligerent rights, in his opinion, flowed from the facts of a political struggle with rival claimants to a governmental authority in Peru, which was the undoubted situation. Attorney General Holker argued essentially the same ground previously argued by Senor Zegarra and rejected by the Governments of both Peru and Chile, that absent recognition as a “belligerent,” all acts under color of “belligerent rights” were criminal at international law and there was no label better fitting them than “piracy.”<sup>311</sup>

One other aspect of the Parliamentary debate is worth mentioning. One of the supporters of the Government’s position that the *Huascar* was “piratical,” Sir George Bowyer, quoted in Latin the portion of Justinian’s Code referring



to “enemies” being those with whom there is a public war, others being “*praedones et pirata*.”<sup>312</sup> It does not appear to have been noticed in the debate that the original language does not refer to “*pirata*” at all, but “*latrones*,”<sup>313</sup> that the question was not the relationship between the British and bandits, but between the British and unrecognized rebels, and whether such “rebels” could properly be treated as if they were mere “bandits;” that the Roman law presumed an imperial hegemony which seems inconsistent with the world of 1877 and British limited legal powers in the Pacific coast of Latin America; that the quotation, thus, presumed an imperial law-making authority and classification system that was more than the Romans had asserted and was inconsistent with British views of the world legal order of the time. But it appears quite likely that Bowyer was expressing a view in Parliament that seemed to give to political action a legal cover that was convincing to many British policy-makers.

The proper classification of the *Huascar* incident was referred back to the Law Officers of the Crown twice more. On 9 October 1877 they advised Lord Derby that a British claim against Peru for losses by the British interests that claimed to own the coal taken by the *Huascar* would not be justified. The ground for this opinion was essentially British reliance on the Peruvian Decree of 8 May 1877 disclaiming responsibility for the acts of the *Huascar* which were the basis for de Horsey’s attack.<sup>314</sup> Since the British defense of de Horsey’s action rested on the need to protect British interests, not on any reliance on the Peruvian note, this logic is hard to follow. Moreover, it would have seemed a clearer answer that Peru is not the insurer of foreign shipping or even foreign property physically within Peru, and, absent any failure of the Government of Peru to protect foreign property with “due diligence,” or to open her courts in the normal way to do justice, there simply was no basis for an international claim. Many people are injured by criminals (under Peruvian or other law) who, when caught, cannot pay for what they stole; there was certainly no lack of diligence by Peru in trying to end the depredations (if that is what they were) of the *Huascar*. It seems likely that Holker was trying to avoid any implication that the actions of the *Huascar* might be justifiable under the law relating to “belligerency,” and in his obsession with justifying British enforcement action without using the word “pirate” and yet without denying the possibility of using the word, reached for an argument that seemed pertinent to de Horsey’s action rather than the simpler argument arriving at the same result without touching on the possible justifications for de Horsey’s violation of Peruvian territorial waters.

In the second instance, Lord Derby sent to the Law Officers, including Holker, a draft reply to the formal Peruvian protest and on 7 March 1878 they approved his use of the word “pirate:”

If a vessel under such conditions is not a pirate, I confess I do not know what to term her; she navigates without a commission from any Government, acknowledges no territorial

authority, and to establish more precisely her position has detained on the high sea a commercial packet, forcibly compelling the delivery of the correspondence on board; if such a vessel is not a pirate, at least she has placed herself completely outside international right; the flag she flies does not belong to her.<sup>315</sup>

This language, clearly taken verbatim from Drummond-Hay's translation of Zegarra's note of 22 May 1877,<sup>316</sup> set forth as a British position the legal arguments already rejected by Zegarra's own government and by the government to which it had been addressed, Peru and Chile. There is no record of further correspondence between Great Britain and Peru on this matter in the available records.<sup>317</sup>

The British position as adopted by Lord Derby seems argumentative and unconvincing on several grounds. Most obvious is that it does not address directly one of the two major points made by Peru in Julio Rospigliosi's protest letter: The violation of Peruvian territorial waters. Even if the label "pirate" were the proper label to attach to the *Huascar*, there is no precedent in diplomatic correspondence for the victim of a territorial incursion agreeing that the incursion was justifiable in chasing "pirates." The British had themselves made that assertion and withdrawn from it in the affairs of Selangor analyzed at such length above. The situation was in fact addressed directly by the very same Law Officers of the Crown in Disraeli's Government when, in 1879-1880 the question of the legal right of British warships to chase Arab "pirates" into Turkish rivers in the Persian Gulf area was answered in the negative.<sup>318</sup> In that analysis it may be remembered, the "pirate-hunting" rationale was expressly rejected and another rationale was found in 1881 based on self-help in performing Turkey's asserted legal obligation to suppress predation on third country vessels by rebels as well as by "pirates;" the classification problems were avoided by finding the same legal results to flow regardless of whether the predators were called "pirates" or "rebels." In the *Huascar* case no equivalent failure of Peruvian local authorities could be alleged to justify British self-help, and the alternative British rationale of "self-defense," while suggested by Rear-Admiral de Horsey, also seems a bit strained when it is remembered that the *Huascar* was at the time attacked by the British not actually threatening any legal British interest.

On a somewhat deeper level, the British position stated by Lord Derby seems to presume a British hegemony at sea, and perhaps even in the internal affairs of Peru, inconsistent with the equality and independence of states. This was the point most ardently pressed by Julio Rospigliosi and most persuasive to Alfonso in Chile. It is a point raised directly in the Parliamentary debate of 11 August 1877 when Sir William Harcourt pressed the Attorney General Sir John Holker as to whether, if the crew of the *Huascar* were captured by the British force, the men would be prosecuted in England as "pirates." Holker had replied: "In strictness they were pirates, and might have been treated as

such, but it is one thing to assert that they had been guilty of acts of piracy, and another to advise that they shall be tried for their lives and hanged at Newgate."<sup>319</sup> This looks like the "naturalist" assertions of the Americans Story and Wheaton, preserving a legal theory by asserting to rest on legal discretion a legal position whose application in practice is consistently rejected. In fact, the legal situation appears to have been identical with that which gave the "naturalist" British judges so much trouble during the American Civil War of 1861-1865 and resulted in the refusal to extradite Tivnan and his friends as "pirates," while not trying them for the very "piracy" that was alleged to have been the true crime committed excusing them from the application of the extradition treaty.<sup>320</sup> It seems to treat the concept of "piracy" as a single legal notion with two different descriptions and sets of legal results, accepting the label as proper for all interfering with neutral shipping at sea who are not "belligerents," whatever their motivation, while giving the legal results of hanging as criminals only to those exhibiting the *animus furandi* and releasing the others. Viewed this way, attaching the label seems to be a step in the municipal criminal law process with regard to those with the *animus furandi*, and an excuse for political action against unrecognized "rebels" with regard to those without that *animus*. But since political action against foreigners rebelling against the constitutional authority of a foreign state would seem to be an intervention in the internal affairs of that state, at least when, as in the *Huascar* case, only one foreign state is involved in the rebellion, to use "piracy" as the basis for political action is in fact to take sides in the internal affairs of that state. So it was certainly viewed by the constitutional authorities of Peru in the *Huascar* incident, and they are the people most likely to have benefited from a British action in practice. Their objection was not merely a concession to rebellious and excitable Peruvian opinion, opposed to the British alignment against Peruvian rebels, but to the notion that such an alignment was "pirate-hunting" and not an intervention in internal Peruvian affairs.

What distinguishes the case from the general American assertion of jurisdiction to try stateless "pirates"<sup>321</sup> was that the crew of the *Huascar* were in no way "stateless;" the men were Peruvian in their own contemplation and in that of the Government of Peru and, indeed, of Great Britain. American courts had, with some difficulty, come to the conclusion that the international legal order had a gap with regard to stateless persons on the high seas that could be filled by national assertions of jurisdiction in some cases even in the absence of direct injury to any legal interest threatened by the foreigners other than the general legal interest in secure trade by sea. The British Government was now asserting the existence of a gap in the international legal order to the extent foreign rebels might try to exercise belligerent rights against neutral shipping on the high seas, and asserting a legal power, by withholding "recognition" of "belligerency," to take sides in that foreign

struggle without foreign resentments or British legal obligations. That position was not acceptable to the foreigners involved and might best, then, be classified a position of British Imperial law rather than a statement of a rule of international law.

An implication of this mode of thinking in Great Britain is the free citation, as if applicable, of the Roman law phrases appropriate to the Roman hegemony as if statements of international law appropriate to British sea power, and even the paraphrasing of the Latin texts to better suit British Imperial needs.<sup>322</sup>

In the circumstances, it is not surprising that the writer who saw the greatest precedent value to the *Huascar* incident went out of his way to explain that the case was very special, implying *sui generis*, because “the insurgents had apparently no organized government even of a provisional kind” and their actions “exceeded even those rights of interference with neutral commerce which are accorded to a recognized belligerent.”<sup>323</sup> Since the asserted “President of Peru” was on board of the *Huascar* at the time of the incident, and a large part of the Peruvian population in the estimate of de Horsey, at least, supported him, and since in fact the actions of the *Huascar* do not seem to have exceeded what would have been permissible to a belligerent (indeed, the argument was over whether it was proper even to consider applying the international law of belligerent rights to the activities of the vessel), the entire legal structure posited by later publicists on the basis of the British legal position in the case seems to fall.

At this point, it is possible to argue that the *Huascar* incident does not represent even a view of British Imperial law, but instead a simple political argument put forth by a government that has made an embarrassing mistake, covering it over with a show of legal words convincing to nobody who was involved except, perhaps, to Rear-Admiral de Horsey and the assertive and repudiated agent of the defending Government of Peru in Chile, Chargé d’Affaires *ad interim* Zegarra. That the argument has survived seems testimony to the vigor of “natural law” theorists asserting a view of the international law relevant to “piracy” that ignores the basic structure of international society and raises security of sea-borne shipping to the level of the highest legally protected values of the international order. As applied to an actual incursion into foreign territory, that view failed shortly after the *Huascar* incident might have been interpreted to support it—and it was in fact never supported by the British in the *Huascar* correspondence and should have ended the matter immediately with a British apology to Peru for the violation of Peruvian territorial waters. As applied in theory to make universal criminals of “rebels” at the whim of policy of third states, it failed when it was confessed in Parliament that that legal result is not likely to have flowed; and in fact it could not have flowed because the legal result would have been the application of British municipal law, not international law, to the definition

of the crime of “piracy,” and the lack of *animo furandi* would have ended the chances of a successful prosecution.

In any event, the *Huascar* did not become a major precedent in practice. Instead, the concept of “piracy” was narrowed to its non-political legal limits, and the concept of “belligerency” in the absence of recognition expanded to include the politically motivated acts of rebels or other groups committing depredations without the *animo furandi*. When Colombia’s Minister in Washington argued to Secretary of State Thomas F. Bayard in 1885 that Colombian rebels ought to be considered as “pirates” in the light of Lushington’s opinion in the *Magellan Pirates* case,<sup>324</sup> the American reply was:

[T]hat there can not be *paper piracy* with international effects and obligations any more than there can be a *paper blockade* of effective character.<sup>325</sup> In the one case as in the other no force or effect can be communicated by a municipal decree which is not inherent in the case itself, and I felt constrained to announce to you that this Government could not deem itself bound in any manner by such a decree.<sup>326</sup>

This limit to the utility of the word “pirate” to describe unrecognized rebels Bayard traced in earlier correspondence back to the natural law underpinnings of the legal order and the inevitability of wise policy being based on facts rather than on wishes:

In the late civil war, the United States at an early period of the struggle surrendered the position that those manning the Confederate cruisers were pirates under international law. The United States of Colombia can not, sooner or later, do otherwise than accept the same view.<sup>327</sup>

Thus the United States had solved the problem the British had tried to solve by labeling as “pirates” all otherwise not classifiable as “belligerents,” in much the same way as the British; by avoiding the entire labeling process as too colored by political wishes to reflect a true legal evaluation. Instead of affixing any label at all to “justify” the recapture of American property taken by unrecognized rebels, Bayard informed the Colombian Minister, Becerra:

The commanders of the naval vessels of the United States on the Colombian coast have, however, been told that if conclusive proof be shown that any vessels belonging to citizens of the United States have been unlawfully taken from them,<sup>328</sup> the recovery of such property by the owners, or by others acting in their behalf, to the end of restoration to their legitimate control, is warrantable. Such a right is inherent, depending wholly upon the circumstances of the case, and can not be derived from or limited by any municipal decree of the Colombian Government.<sup>329</sup>

Since the American position rested on legal analysis in which the position of all states as legal equals was not only unquestioned, but was even the foundation stone of the logic holding American interpretations of the facts for purposes of attaching legal labels to be equally weighty with Colombian interpretations, and more weighty for the purposes of American policy,<sup>330</sup> the American position was squarely inconsistent with the implications of the British argument of 1877 seeking to classify the *Huascar* a pirate vessel and to derive from that classification

a general license to chase her down in any other state's territory. It was for each state to decide for itself whether any vessel could properly be classified "piratical," and no one state's autointerpretation was binding on any other. The British autointerpretation could not be binding on Peru. Thus, even if a later Peruvian agreement as to the propriety of the British classification could end the correspondence between those two powers, by the American rationale the British would have acted improperly by invading Peruvian waters before the Peruvian position was known.

Moreover, the American position taken for itself was based on narrower legal reasoning about rules of law within the system as well as rules of the system itself. This was noted above.<sup>331</sup> Where the British rationale developed in internal correspondence by the Law Officers of the Crown in 1879-1881 focused on the extension to the international realm of the principles of municipal or natural law that permit a person threatened with injury by the default of another to perform that other's duty for him, the American rationale was a more direct self-help rationale, more easily limited to direct recapture. The British rationale for using the law of "piracy" as a basis for asserting an obligation in third states to suppress interference with shipping generally was a way of justifying British policing of the seas generally. The American rationale was more narrow, justifying only the recapture of American vessels and goods, not the punishment as if a matter of criminal law of the alleged "pirates." But then, the British attempt to use their legal position to justify "punishment" of "pirates" as if criminals when in fact merely interfering with shipping with or without any license or *animo furandi*, uniformly failed to avoid the very wars that the rationale was designed to make unnecessary. And it was ultimately the British who were forced to retreat into action rationalizable on the American rationale only, although never dropping their assertions of wider authority under international law, just as the naturalist jurists of the United States after Story never dropped their rationales although confined by Supreme Court precedents and the practical considerations of real life to much narrower actions.

## Conclusions

It might be concluded then, that by the last years of the 19th century as seen by the United States and Great Britain, there were at least three quite different legal uses of the word "piracy," with a deep split among statesmen and judges as to how best to formulate the underlying conceptions, if any, in legal terms. The jurisprudential split lay between "naturalists" and "positivists" and has its roots in the 16th century, if not, indeed, in the very structure of human legal thought tracing back at least to Greek and Roman times. It is the split between those who see the law as

containing immutable principles and those who see the law as a matter of political negotiation. While one or other of these basic approaches appears to have been dominant at different times, there is no time and no country whose practice has been discussed above not having ample evidence of both strains of thought co-existing uneasily. With regard to both approaches, reality has a way of inevitably breaking through the theoretical structure to prevent the establishment as law of idiosyncratic views based either on non-generalizable moral perceptions like those of Story, or policy-oriented views demanding classifications that favor one party at the expense of objectivity like the American Federal Government's view of the 1861-1865 Confederate raiders or the British view of the legal powers of Malay Rajahs.

Assuming the two irreconcilable basic approaches, there remain the three quite different conceptions of "piracy": (1) "Piracy" as the raiding, taxing, territorial-jurisdiction concept of control over commerce that restricts the use of the seas as an avenue of commerce. This use of the term traces back at least to Roman times and reappears as a legal rationale for political action to establish a rule of freedom of commerce. This kind of "piracy" was successfully suppressed by military action in the seas beyond the claimed exclusive reach of a single sovereign. Suppressive military action led to war when extended to territorial waters (even when claimed in distant seas, like the Spanish and Portuguese, 16th and 17th century British, and consistent Barbary states claims) until British naval dominance made the entire law of the sea a matter of British Imperial law and contained rules of freedom of navigation as an aspect of that municipal law, more or less acquiesced in by maritime states for their own reasons and for a relatively short period in the 19th century. Even then, it appeared to work best when the assertions of law allowed for limitations on freedom of navigation on the high seas as an aspect of belligerency, provided that the rights of "belligerency" were conceded to unrecognized political authorities, as in the Eastern Mediterranean of the 1820s.

(2) "Piracy" as a concept of municipal law involving merely the exercise of such jurisdiction by municipal courts as public international law allows to states within the legal order. This use of the term traces back to the adoption of the Latin word into English Admiralty law by the civilians of the 16th century as a word of art to attach to some property adjudications and "criminal" cases within the jurisdiction of Admiralty courts as distinct from the Common Law courts of England. The attempt to spread the concept to make an "international crime" of "piracy" seems to have been based on attempts by some statesmen to apply their municipal law to the acts of foreigners abroad. The leading substantive cases all seem to turn on circumstances in which the municipal law jurisdiction of England had a firm basis in the nationality of the actor, his co-conspirators or his victims;

attempts to apply the law still further, to the acts of foreigners against other foreigners, while asserted from time to time, led for practical reasons in the real world to very few cases and the assertion of "natural law" theories that could not be meshed with reality or the equality of states and the territorial bases of sovereignty implicit in the general international legal order from earliest days. The furthest reach of national criminal jurisdiction ever to get through the courts under this conception of "piracy" appears to have been an American case involving stateless defendants, where practical problems of producing evidence made the exercise of jurisdiction by the state of the victim inappropriate and no other state had any basis for jurisdiction in the traditions of the international legal order. From this point of view, the evidence does not support any assertion of "universal jurisdiction" over "piracy" as a matter of international law, but it does support "passive personality," i.e., jurisdiction based on the nationality of the victim of the "piracy," and a universal jurisdiction over stateless defendants, for whom the classical international legal order provides no spokesman anyhow to object on a diplomatic level.

(3) Between the conception of "piracy" as the label for states and persons conceived to be outside the international legal order, or at perpetual war with states within the legal order ("*hostes humani generis*") by virtue of their assertions of territorial or other jurisdiction interfering with trade at least at sea, and the conception of "piracy" as the label for non-state individuals and small groups violating the criminal laws of established states with jurisdiction over the offense based on the place of occurrence or the nationality of the actors or victims or some other basis for jurisdiction acceptable to other states as consistent with the international legal order, there seems to have been a third conception. That is "piracy" as a concept of public international law applicable to political actors whose degree of organization and ability to conform to the laws of war are insufficient in the opinions of states to justify the classification and legal results of "belligerency," but whose actions cannot properly be classified as "piracy" in the common law countries' municipal Admiralty law sense because of the lack of *animo furandi*. Classifying the law applied by municipal Admiralty courts as a branch of public international law, derived from that branch of the "law of nations" that was considered to be the "natural law" common to all countries thus reflecting underlying conceptions of justice common to all mankind, it was possible to label the internal enemies of the constitution of any particular country in the Admiralty courts of that country, "pirates" instead of mere "rebels" or "traitors." It was possible further to argue that, the classifications of any municipal Admiralty court being mere reflections of universal law, such people were "pirates" in all countries and "*hostes humani generis*" in the sense of criminals under the public international law administered by the municipal Admiralty courts of



all nations.<sup>332</sup> This line of logic failed when tried by the United States Federal authorities during the American Civil War of 1861-1865, and failed when Colombia tried it in 1885. Instead, the word "pirate" retained a popular usage occasionally reflected in Imperial policy, as by Sir Andrew Clarke in the Malay Peninsula in 1874, with results that make it clear that that usage was political and not effective as a matter of law. Where the threshold for the classification "belligerent" was lowered to the point that any political violence could be accorded "belligerent rights" even in the absence of a degree of organization and territorial control normally considered legally necessary before the classification could be properly applied, as with regard to the Greek insurgency of the 1820s, stronger tools for persuasion were placed in the hands of policy makers of third countries maintaining "neutrality" in those struggles, and the system worked. Governments defending their national constitutions against rebels remained free to call the rebels "pirates" for internal political purposes, but usually found that a return to peace and stability was made easier by granting "belligerent" status to the rebels, even if only as a "concession" preserving the form of a municipal legal order under which the established government was the only one with legal powers and the rebels could also be classified as "criminals."<sup>333</sup> In these circumstances, it is not surprising that the word "piracy," while remaining in the vernacular and in the vocabulary of some scholars removed from policy responsibility, dropped out of international currency as a legal word of art in this third sense by the end of the nineteenth century. It was revived during the twentieth century in connection with violations of the laws and customs of war by acknowledged belligerents, in particular applied to submarine warfare during and after the World War of 1914-1918, but that revival must be discussed below.

It is with this analysis of the third concept of "piracy," the attempt that failed to use the word as a legal pejorative applied to rebels whom statesmen find it in their parochial interest not to call "belligerents;" to draw on a word with municipal criminal law connotations that seem to reflect some universal, natural-law idea that in other areas has been dropped from public international law and relegated to conflict of laws theory; to bring in overtones of an ancient word with connotations of outlawry and imperial justifications reminiscent of the glories of Rome and the rationales for Roman suppression of those opposing universal trade under Roman hegemony and law; that we end this analysis of the classical international law of piracy.

It adds a touch of charm to our appreciation of W.S. Gilbert, who, in seeking a legal basis for discharging the "Pirates of Penzance" from their legal responsibility, found in his comic opera of 1879 the perfect exculpation; one that would have applied to Malays as well:

They are no members of the common throng;  
They are all noble-men who have gone wrong.

A final word on the place of international law in the British policy decisions seems appropriate in this place. It has been seen how the word "piracy" was used from the early 18th century on to justify policy, and it can be argued that that use represented a conviction of justice and law that made policy wise, or at least is evidence that the statesmen believed their policy conformed to some accepted set of values. But it has also been seen that there was a persistent jurisprudential struggle. On the one side were "positivists," who conceived of the rules of law as those rules agreed on either expressly, as by treaty, or impliedly, as by behavior which is justified in diplomatic or other correspondence as compelled or at least permitted by principle; they defined "law" as the set of rules adopted and promulgated by a legislator (in the case of public international law, by the community of "states"). Under that model, once the rule is adopted, morality drops out of the picture, and the law is the law because it is the law regardless of its moral and political underpinnings. On the other side were "naturalists," who conceived of the rules of law as those rules discoverable by reason according to elaborate patterns analyzed by deep thinkers from the days of Plato, Aristotle and Cicero; to them the law exists whether or not adopted in practice or by treaty, and that "true law" is morally higher and "more binding" than the "positive law." There were times when "positivists" dominated the councils of states and times when "naturalists" dominated those councils. There were times when neither approach dominated, or when each dominated depending on which individuals and which forums were involved.

As a practical matter, taking either a "positivist" or a "naturalist" approach, a competent lawyer can construct a model of reality using legal words that will seem to justify whatever a statesmen thinks is in the political interest of his state. But under "naturalist" theory, that justification is merely an argument with which others, believing themselves more attuned to the eternal rules of morality and "true law," can disagree. Under "positivist" theory, no state has the legal power to determine rules of international law, but only the power to interpret those rules for itself and try to convince others that that interpretation is correct. The decisions as to "true law," or the "determinations" of positive law, are made not by the self-serving pleadings of parties, but by detached scholars, by the reactions of other statesmen and publicists, and by history. Thus, for present purposes, the fact that some British judges had articulated a place for "piracy" in the international legal order that was felt to be persuasive to some British statesmen and some British Admirals is important, but not determinative of the law. The evidence of the disagreement of other statesmen, the unanticipated complexities within the British and international legal

orders created by “naturalist” assertions of Dr. Lushington and others in the cases before them, and the military and political problems created by Admirals and local governors acting under their perceptions of what is justifiable internationally in response to what they called a “piracy,” all indicate that the naturalist perceptions of the last half of the 19th century were increasingly ill-attuned to both eternal values and positive expediency; that the American positivist position taken by Marshall and ultimately by Story in apparent disregard of the model in the hypothetical mind of the Congress in 1790, 1819 and 1820, was founded on a sounder comprehension of the actual operation of the international legal order than the naturalists could accept.

Since each person must make up his own mind as to the most useful model of reality he constructs in his own mind to understand and possibly influence events, and the fundamental differences between naturalist models and positivist models seem to survive regardless of argument or experience, it is surely wisest for present purposes to end this small discursus here. But it might be helpful to bear in mind that the jurisprudential movement of the 19th century towards codification of the law, reaching a peak with regard to public international law in the first twenty years of the 20th century and surviving with some force even today, in the last years of that century, cannot ignore the jurisprudential disagreements. Codification is either a process of translating “natural law” into words, or of legislating. If the latter, morality, history and current policy are all legitimate parts of the law-making process, as they are in municipal legislation; if the former, a handful of incidents showing the application of morality in practice suffices to define a model which is then vigorously pressed with all inconsistencies explained away as minor exceptions or factual deviations from the true norm. The arguments among lawyers and policy-makers about these matters are endless. Here we will address those pertinent to the law of “piracy,” and how the “victory” for the most articulate naturalist model builders resulted in a meaningless codification of no law.

If the readers of this study see analogies to the attempt from 1973 to 1982 to codify the law of the sea, I have no objection.

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## Notes

1. To European statesmen of the nineteenth century and, indeed, well into the twentieth century, European formulations of international law as applied among European states were conceived as universally applicable regardless of the exclusion of political organizations of Africa and Asia (and parts of

Europe) from the processes by which that law was expressed; i.e., the disregard of their diplomatic statements and practices as persuasive within the legal order. See, e.g., the reference to there having been “no claim by any Power other than Denmark to the sovereignty over Greenland” prior to 1921, and the Viking settlements there having been in “unsettled countries,” “a *terra nullius*,” when the evidence shows those settlements to have been “established in a distant country and its inhabitants massacred by the aboriginal population.” *Legal Status of Eastern Greenland* (1933), P.C.I.J. Ser. A/B, No. 53, p. 47. One might ask, Distant from what? Who were the “aboriginal population” sufficiently organized to “massacre” the Vikings who scourged parts of Northern Europe? In the dispute between Norway and Denmark, the possibility that the Eskimo population might have been “sovereign” in its ancestral territory was not considered.

2. Cf. 2(4) Henry Burney, *The Burney Papers* (Bangkok, 1910-1914) passim, esp. p. 134 where Burney, in a report dated 2 December 1826 to the highest British officials in India following his successful conclusion of a major treaty with Thailand, summarized part of the history of British activities in Southeast Asia as accepting the right of Malay Sultans to cede territory while steadfastly refusing to interfere in their relations with Siam or in their internal politics, with some notable exceptions. In discussing the origins in 1786 of British title to Penang Island, off the coast of the Malay Sultanate of Kedah, Burney conceded the Thai argument that Kedah was politically and legally subordinate to Thailand at the moment a treaty of cession was concluded, but argued that regardless of his other obligations to Thailand, the “Rajah of Queda” apparently had the authority to cede territory. *Id.*, 171. This patently self-serving British position was, of course, unpersuasive to the Thai and the nobility of Kedah. An analysis of the entire transaction, and other related transactions, is in Rubin, *International Personality of the Malay Peninsula* (1974) passim., esp. p. 220-221.

3. H. Grotius, *De Iure Belli ac Pacis* (1625, 1646) (CECIL 1925), Book II, c. iii, para. 13(2), quoted in text at note I-128 above.

4. Cf. Longford, *Wellington; The Years of the Sword* 469 (Panther Books 1971): “Metternich’s original idea . . . included the forlorn hope of Britannia climbing down a step or two from her maritime hegemony which she loftily called the Freedom of the Seas.”

5. See text at note III-207 above, quotation from *The Hercules* [1819] 165 Eng. Rep. 1511, 1518-1519.

6. The statutes are cited at note III-138. The lack of legal consequence in international law is noted in the text above notes III-138 to III-140 and note III-140 itself.

7. 2 Moore, *Digest* 1076.

8. See note III-143 above.

9. The most often cited of these decisions and the most directly in point is the decision by Sir William Scott, Lord Stowell, in *The Helena*, 4 C. Rob. 4 (1801). In that case, a purchaser of a British vessel captured by an Algerine commissioner as prize and sold in an Algerine market was given title valid against the original British owner. The taking might have been illegal, but Sir William Scott held that Algiers had the power of a state to apply its legal forms and transfer title; that complaints about denials of justice in applying those forms should be pursued at the discretion of the Crown through diplomatic channels, as would have been the case between European powers in identical circumstances. His reasoning is not policy-oriented as Gentili’s had been two hundred years before in identical fact situations, but “naturalist.” The legal classifications seemed to Scott to flow from the facts directly. He thus adopted the conclusion of the Paris Court impliedly criticized by Grotius by 1632, applying what seems basically Grotian reasoning. See text at note I-125 above, quoting Grotius, *De Iure Belli ac Pacis* (1625, 1646), Book III, ch. ix para. 19(2).

10. 567. Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1747, 1764) (Joseph H. Drake, transl.) (CECIL 1934) sec. 124. The Drake translation used here is in Vol. II p. 70. In the original: “*si qua Gens velit aliam ab usu navigandi & piscandi in mari vasto arceri, haec justam belli causam habet.*” *Id.*, Vol I, p. 46. See also note II-138 above. As to the proper translation of *justum*, “just” or “legal,” see note I-46 above.

11. Vattel, *Le Droit des Gens* (1758) (Charles G. Fenwick, transl.) (CECIL 1916) Book I, sec. 282 in Vol. III p. 106. The original is in Vol. I, p. 245: “*Le droit de naviger & de pêcher en plein mer étant donc un droit commun à tous les hommes; la Nation qui entreprend d’exclure une autre de cet avantage, lui fait injure & lui donne un juste sujet de Guerre . . .*” See also note II-137 above. On the popularity of citations to Vattel in this period, see the statistics prepared by Professor Edwin D. Dickinson on the basis of American cases 1789-1820 set out in Nussbaum, *A Concise History of the Law of Nations* (rev’d ed. 1954) 162, showing court quotations: Grotius-2, Pufendorf-8, Bynkershoek-2, Vattel-22; court citations: Grotius-11, Pufendorf-4, Bynkershoek-16, Vattel-38; citations in pleadings: Grotius-16, Pufendorf-9, Bynkershoek-25, Vattel-92. Without attempting an equivalent statistical study of diplomatic correspondence, it is my personal impression based on the research for this work that the breakdown for the period 1777-1840 would be about the same; if anything more Vattel and less Pufendorf and Bynkershoek.

12. The point can be seen most clearly by skipping over one and a half centuries of terminology, from Grotius to Vattel, to see the change as a quantum leap. In Vattel’s original French the European inaction against the Barbary states is described as follows:

*Les Nations Chrétiennes ne seroient pas moins fondées à se réunir contre les Républiques Barbaresques, pour détruire ces repaires d'écumeurs de mer, chez qui l'amour du pillage, ou la crainte d'un juste châtiement sont les seules règles de la paix ou de la guerre. Mais les Corsaires ont la prudence de respecter ceux qui seroient le plus en état de les chastier; & les Nations qui savent se conserver libres les routes d'un riche commerce, ne sont point fâchées que ces routes demeurent fermées pour les autres.*

Vattel, *op. cit.*, Book II, Ch. VI, Sec. 78 (Vol. I, p. 313). In the Fenwick translation of 1916:

Christian Nations would have an equal right to unite against the Barbary States to destroy the haunts of those pirates to whom the love of pillage and the fear of just chastisement are the only rules of peace and war. But the corsairs are prudent enough not to trouble those who are in a position to punish their attacks; and the Nations which are able to keep the routes of a rich commerce open to themselves are not sorry to see them closed to other Nations. *Id.*, Vol. II, p. 137.

The phrase translated as "pirates" by Fenwick is "*écumeurs de mer*." The word "*écumeurs*" derives from the same Indogermanic root as the English words "skim" and "scum" and the German "*Schaum*" ("foam"). It is picturesque as applied to the swift-boated licensees of the Barbary coast scudding afore the breeze for privateers' profit, but it is not a legal word of art and does not carry the weight of classical tradition or municipal law overtones of the word "pirate" in French or English. Vattel's perception of the motivation of Barbary officials and commissioners of his time seems to have had no basis but European prejudice; indeed, the second of the two quoted sentences makes it clear that the Christian nations of the time in their practices were no less avaricious and disdainful of hypothesized natural rights of commerce than the Barbary states as perceived by Vattel.

13. Note III-110 above.

14. This rationale can be traced back to Aristotle, *Nicomachean Ethics* 1134b, 18 sq. Although Aristotle did speak to natural justice in this famous passage, comparing it to the flame which burns both in Greece and in Persia (sec. 2), he did not draw the conclusion, for which he is often cited, that "justice" is in any particular the same in all countries and that "law," to be "law," must be "just." Nor did he address standing at all. But the roots of the English Common Law distinction between *mala in se* and *mala prohibita* (evils of themselves, and evils because so declared) lie in the same conception and, where the English courts had standing, were applied to foreigners, even when they had the privileges of Ambassadors. See Palachie's Case, 1 Rolle 175 (1615), English version in *R. v. March*, 3 Bulstr. 27, 3 BILC 767. Both English and Law French texts are quoted at note I-197 above. The English Common Law was changed by statute, 7 Anne c. 12 (1708).

15. Note III-110 above.

16. *U.S. v. Palmer et al.*, 16 U.S. (3 Wheaton) 610 (1818); *U.S. v. Klintock*, 18 U.S. (5 Wheaton) 144 (1820). These cases are discussed in the text at notes III-75 sq. above.

17. R. Zouche, *Iuris et Indiciis Feccialis* (1650) (CECIL 1911) 1. See text at note II-134 above.

18. The form had remained more or less unchanged since the days of Captain Kidd. See excerpts of representative commissions in the text at notes II-93 and II-94 above quoting from R. v. Kidd and others, 14 How. St. Tr. 123 (1701). The law of belligerent capture at sea and Prize courts' legal power to change title to enemy goods and to neutral goods denominated "contraband," even in the absence of a legal "blockade," were formulated in elegant brevity by the British Law Officers of the Crown in 1753. They treated prize law as a branch of the law of nations resting on the common practices of all "civilized" states. 20 BFSP (1832-1833) 889 sq., Rules of Admiralty Jurisdiction in Time of War, 18 January 1753. The rules evolved over time as neutral interest in the profits of trade during a war between others clashed with belligerent interests in extending the profitable interdiction of trade with the enemy during wartime. See Scott, *The Armed Neutralities of 1780 and 1800* (1918). As navies expanded and centralized control over military activities became more important to European states, the practice of licensing privateers ceased. Privateering was declared "abolished" as a matter of international law in 1856 with the United States the only major state refusing to go along with the consensus; and that refusal was apparently for other reasons than a desire to continue the practice of licensing privateers. Schindler & Toman, *The Laws of Armed Conflicts* (rev'd ed. 1981) 699-702.

19. Cf. Jane Austen, *Persuasion* (1818) ch. 4: "Captain Wentworth had no fortune. He had been lucky in his profession; and spending freely, had realized nothing. But he was confident that he should be rich: full of life and ardour, he knew that he should soon have a ship, and soon be on a station that would lead to everything he wanted." (Modern Library ed., no date, p. 1225).

20. The British navy at this period was manned by laying a manpower requirement on port towns and letting them enforce it by impressment. See for sample statutes 35 Geo. III c. 5, c. 19, c. 29 (1795). The practical impact of this method of recruitment during wartime is vividly described in Dugan, *The Great Mutiny* (1965, Signet ed. 1967) 63-65. Dugan's book brilliantly and clearly analyzes the British naval mutiny of 1797 at the Nore—the incident that inspired Herman Melville's great novella, *Billy Budd*. Melville

himself served as a seaman on the U.S. frigate *United States* in 1843 and in semi-fictionalized version described his experiences in the novel *White Jacket* (1849).

21. 43 Geo. III c. 160 (1803), 44 Pickering 1020-1057.

22. *Id.* 1037.

23. 45 Geo. III c. 72 (1805), 45(2) Pickering 1041 at p. 1045.

24. 6 Geo. IV c. 49 (1825), 65 Pickering 230. This statute is reproduced at Appendix I.C below. It is noteworthy that it did not apply to British privateers. Apparently privateering licenses to suppress "piracy" were not being issued any longer.

25. *Id.* sec. III, pp. 231-232.

26. See note I-61 and text at notes II-48 sq. above.

27. 1 J. G. Lorimer, *Gazeteer of the Persian Gulf* (1915) 636.

28. 58 CTS 387, "Agreement" dated 6 February 1806.

29. 70 CTS 464. "Contract" of 8 January 1820. For the Arabic language translation I am indebted to Dr. Guive Mirfendereski whose researches into the history of the Persian Gulf were made available to me for purposes of this study. I am greatly in his debt.

30. Deeper researches into the precise relationships among the Sheikhdoms, and between any of them and the English, at this period have been conducted by Dr. Mirfendereski, whose 1985 Ph.D. Dissertation, *The Tamb Islands Controversy, 1887-1971*, is on file at The Fletcher School of Law and Diplomacy, Tufts University.

31. See note I-35 above.

32. 70 CTS 464-465.

33. This British practice of concluding a "preliminary treaty" fixing relations in the interim between the decision of the British to open formal relations with a non-European society and the conclusion of a more formal document led in some cases to serious difficulties, as local British officials tried to pick and choose among the terms of the "preliminary treaty" and the final document prior to ratification those terms most favorable to their policies, and then claim the other side was bound to the preliminary treaty despite its ephemeral place in the negotiation and the fact that the British themselves in some cases regarded the "preliminary treaty" as being superseded by the new document even before ratification. For an example analyzed in some detail, see Rubin, *International Personality of the Malay Peninsula* (1974) 205-230, regarding the "preliminary treaty" of 1825 and the final treaty of 1826 between the British and Thailand.

34. 70 CTS 472-476, 482.

35. 70 CTS 482, Article 1.

36. *Id.* 475. The word "attached" appearing twice in the text seems to refer to "attachment" as if part of the law of maritime prize. It looks like a legalistic pomposity perpetrated by a non-lawyer negotiating beyond his expertise.

37. 70 CTS 466. Precisely what lay behind the unwillingness or inability of the Sheikh to produce his seal is not clear, nor is the basis for Captain Thompson's legal power to use his own seal in its place. One of the Sheikhs sealed both a "preliminary treaty" and the final "contract" on 8 January 1820; two others sealed the final "contract" a few weeks after sealing a "preliminary treaty"; three more sealed a "preliminary treaty" and the "contract" on the same day some time after 8 January 1820; three sealed the final "contract" without ever concluding a recorded "preliminary treaty." Thus, precisely what the relationship between the "preliminary treaties" and the "contract" was intended to be seems obscure as a matter of law.

38. Whilom extensive British claims to sovereignty over the seas were quietly abandoned by the British during the eighteenth century. See Fulton, *The Sovereignty of the Sea* (1911) 523-527, 538. The adoption of the three-mile limit came about in Great Britain through judicial pronouncement in Prize court actions relating to the extent seaward of "neutral" waters within which a belligerent capture would be impermissible by the law of Prize. *Id.* 576 sq. The leading case is *The Twee Gebroeders*, 3 C. Rob. 336 (1801), opinion by Sir William Scott.

39. See above at note III-110.

40. 70 CTS 471-476, 481-482.

41. A convenient historical survey is Ilbert, *The Government of India* (1922). A full list of even only the essential primary sources would be too complex for purposes of this study. The transition from a private company to an arm of the British government with restricted powers and a complex constitutional relationship to the other arms of government in London involves an understanding of the legal and historical context for Townshend's Act of 1767, 7 Geo. III c. 57; North's Regulating Act of 1773, 13 Geo. III c. 63; Pitt's Act of 1784, 24 Geo. III c. 25; the Independent Powers of Governors Act of 1793, 33 Geo. III c. 32; the East India Company Act of 1813, 53 Geo. III c. 155; and the East India Company Act of 1833, 3 & 4 Will. IV c. 85.

42. The most elaborate recent analysis of this is Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (1967) passim, esp. p. 26-38.

43. 11 & 12 Will. III c. 7 (1700), in Appendix I.B below.

44. See text at notes I-57 sq. above.
45. See text at notes I-2 to I-3 above. Raffles was surely not the only main-line employee of the East India Company familiar with the Latin classics.
46. F.O. 72/142, No. 1, Instruction from Castlereagh to the Duke of Wellington in Madrid and Ambassador Stuart in Paris, dated 8 January 1813, reproduced in 1 H.A. Smith, *Great Britain and the Law of Nations* (1932) 35.
47. This inconsistency is noted by Smith. *Id.*
48. See text at notes I-107, I-120, I-194 sq., citing Gentili, *Pleas of a Spanish Advocate* (1613), and Southerne v. Howe, 2 Rolle 5 (1617), for situations in which English jurists regarded the Barbary powers as fully independent for purposes of English law, including the law relating to “piracy.” Whatever doubts might have revived about the legal power of the rulers of the Barbary states to change title to vessels and goods through the local equivalent of Prize court proceedings were removed for purposes of English maritime property law by the decision of Sir William Scott in *The Helena* (1801), cited note 9 above. Thus, by 1801, Algiers had been held to have a government with the normal powers of a government of a “state” in the international legal order to change title to vessels, at least as far as English law was concerned.
49. See Fisher, *op. cit.* note I-76 above for a useful review of the relations between the Barbary states and the Ottoman Emperor (the Sublime Porte) 1415-1830, concentrating on the 17th and 18th centuries. See also Moessner, *Die Voelkerrechtspersoenlichkeit und die Voelkerrechtspraxis der Barbareskenstaaten* (1968) passim for a comprehensive review of the European classifications of the Barbary states 1518-1830. Moessner seems to give rather more weight to the views of some European publicists than seems warranted by the jurisprudential analysis given in ch. II, esp. text at notes II-139 sq. above. An incisive analysis in the light of further thought and research is Moessner, *The Barbary Powers in International Law*, in Alexandrowicz, ed., *Grotian Society Papers 1972* 197 esp. pp. 207-215 (1972).
50. F.O. 8/3, quoted in Smith, *op. cit.* 36.
51. *Id.*
52. The text of the pertinent Protocol is at 2 BFSP (1814-1815) 744. The correspondence concerning Exmouth’s expedition is at 3 *id.* (1815-1816) 509-552.
53. 3 *Id.* 517.
54. See *The Helena*, cited at note 9 above.
55. The Dey’s surrender is reproduced in 81 CTS 53. Shortly afterwards, France concluded treaties with Tunis (8 August 1830, 81 CTS 99) and Tripoli (11 August 1830, 81 CTS 147), bringing those “states,” without the consent of the Sublime Porte, into French legal control. French authority in Morocco was established soon after. See Case of the Tunis-Morocco Nationality Decrees, P.C.I.J., Ser. B, No. 4 (1923), for an Advisory Opinion by the League of Nations’ judicial arm as to whether nationality laws of those Barbary states, by then under the regime of French Imperial law, raised questions of international law when they affected British nationals resident there. To trace the evolution of the Barbary states, via French (and, in the case of Libya, Italian) “protection” to independence again after the Second World War is beyond the scope of this study.
56. 8 BFSP (1820-1821) 1282-1283.
57. *Id.* 1283-1285.
58. 1 Smith, *op. cit.* 282-283.
59. 8 BFSP 1283.
60. See 1 Smith, *op. cit.*, 282 note 1. Oakes & Mowat, *The Great European Treaties of the Nineteenth Century* (1918, 1970) 105 note 1, refers to a British Proclamation of Neutrality on 30 September 1825 under the Foreign Enlistment Act of 1819, 59 Geo. III c. 69. That Proclamation appears in 12 BFSP (1824-1825) 525 wrongly citing the Act 59 Geo. III c. 63; the correct Act is reprinted as c. 69 in 6 BFSP (1818-1819) 130. There was a vaguely worded Proclamation of Neutrality in the “hostilities . . . between different states and countries in Europe and America” on 6 June 1823. 1 Smith, *op. cit.* 288; 10 BFSP (1822-1823) 648. The British interpretation of the obligations of neutrality as they related to the belligerent law of Prize at this time, expressly referred to as part of the “Law of Nations” reflecting an underlying general international law under the terminology of the period, is set out in the Opinion of the Law Officers of the Crown dated 18 January 1753 (cited at note 18 above). As to the technical meaning of the phrase “Law of Nations” at that time, see ch. II. above.
61. The precise reasons in law for this request are not clear; nor, as shall be seen, was the answer. It is not self-evident that governmental permission was necessary at that time for a private firm to engage in foreign trade even in arms, when there was no state of war, no formal proclamation of neutrality and no embargo order in effect.
62. Robert Banks Jenkinson, 2nd Earl of Liverpool, was Prime Minister (or, more properly at the time, Chief of Cabinet) in the Tory Government 1812-1827.
63. F.O. 78/106 dated 27 September 1821, reproduced in 1 Smith, *op. cit.* 283-284. It is unlikely that Liverpool could constitutionally have forbidden it without formal governmental action even if he had wished to.

64. F.O. 83/2385 quoted in 1 Smith, *op. cit.* 284–285. The first sentence only of this opinion appears in 1 McNair, *International Law Opinions* (1956) 267.
65. 9 BFSP (1821–1822) 620.
66. *Id.* 798; 1 Smith, *op. cit.* 285.
67. 1 Smith, *op. cit.* 286–288. Smith construes a Navy instruction to Vice-Admiral Sir Graham Moore, apparently concurred in by the Foreign Office, as “in substance . . . a recognition of belligerency, though no formal announcement to that effect was made.” *Id.* 288 citing Ad. 2/1693, No. 10.
68. *Id.* 291.
69. *Id.* 293.
70. *Id.* 292–293.
71. *Id.* It would be amusing, if it were not so confusing, that policy-makers seeking to use the law, and lawyers seeking to influence policy outside the proper sphere of a lawyer’s expertise, use the term “*de jure*” to refer to a labeling system based on policy in disregard of law and fact, while lawyers operating within the proper sphere of their expertise and policy-makers grappling with reality as they eventually must, draw their conclusions from labels affixed “*de facto*.” It is mysterious that a reference to “law” is used to justify a departure from reality and refer to a system of labels affixed for non-legal reasons of policy, while a reference to “fact” is universally used when responsible lawyers and judges sit down to decide real cases by applying the law, and counsel clients concerned with reality.
72. Cited note 60 above.
73. 1 Smith, *op. cit.* 293.
74. *Id.* 290.
75. See Nicolson, *The Congress of Vienna* (1946, Compass Books ed. 1961) 268–269; 6 Moore, *Digest* 374–379, 407–408. A full exposition of the views of Prince Metternich and the evolution of the Holy Alliance is beyond the scope of this study.
76. F.O. 7/181, No. 34, reprinted in 1 Smith, *op. cit.* 294–297. The quoted portion is on page 296. Wellesley’s biography is in 20 DNB 1116–1117.
77. NRS, *Piracy in the Levant, 1827–8; Selected from the Papers of Admiral Sir Edward Codrington, K.C.B.* (hereafter cited as *Codrington Papers*) (1934) (Volume 72 of the Navy Records Society Series) xviii–xix.
78. Pertinent text is set out at note 24 above and in Appendix I.C.
79. Parliamentary Papers 1825 XXVI, p. 66, cited in 70 CTS 463.
80. As noted above, the statute of 1825 was made retroactive to 1 January 1820. The publication of the “Contract” of 1825 by Parliament seems to have been part of the justification for this retroactivity.
81. *Codrington Papers* 60–61. The identity of the Greek “Naval Islands” is not clear.
82. *Id.* 48, letter dated 9 January 1827. “Trabaccolo” is the local word for a small ship; the word is Italian.
83. *Id.* 48–52. The chase after Suitto continued at sea, unsuccessfully. *Id.* 114–117. Why the Greek authorities should have been concerned about the British capture of a Turkish vessel is not clear. Moreover, in the official list of Greek “pirates” prepared by the British in 1828, the names of Nicolo Suitto and Nicolo Coccoci do not appear. *Id.* 281–290.
84. *Id.* 67–70. The list of 152 plundered vessels compiled by the British in 1828 oddly enough does not include any French ship, but does include Russian, English, Austrian, Ionian, Tuscan, Maltese and Sardinian vessels. It also regards one shore raid as “piratical.” *Id.* 281–290.
85. *Id.* 104, letter from Sir Frederick Hankey, Chief Secretary to the [British] Government of Malta, to Admiral Codrington dated 8 May 1827. The letter begins on p. 103. Captain Mussu’s name is also not on the list of “pirates” in *id.* 281–290. Malta had been governed by a Crusading Order until taken over by France in 1798. It was captured by the British in 1800 and governed by them until independence in 1964.
86. *Id.* 104.
87. *Id.* 219.
88. *Id.* 225, letter dated 19 October 1827.
89. *Id.* 238–239.
90. *Id.* 246–248.
91. *Id.* 257. The Report begins on p. 256.
92. *Id.*
93. See text at notes III-40 and III-41 above, quoting from 1 AG 48–49 (1841 ed.), opinion dated 14 March 1798.
94. In *U.S. v. Pedro Gilbert & Others*, 2 Sumner 19 (1834), quoted in the text above at note III-70.
95. Cp. text at notes I-80 to I-85, I-130 above.
96. 5 S. Purchas, *Hakluytus Postumus or Purchas His Pilgrims* (1625) (Glasgow, 1905–1907) 221.
97. 2 Dampier, *A New Voyage Round the World* (1717), in Masefield, ed., *Dampier’s Voyages 1700–1726* (1906) 88.
98. See Rubin, *International Personality* 102.
99. Anderson, *Acheen and the Ports on the North and East Coast of Sumatra . . .* (1840) 34–36, 37 note.
100. *Id.* p. 47 note.



101. *Id.* 45; Low, *An Account of the Origin and Progress of the British Colonies in the Straits of Malacca, 4 Journal of the Indian Archipelago* (Logan's Journal) (hereafter JIA) 11 at p. 17 (1850); Cowan, *Early Penang and the Rise of Singapore, 1805-1832*, 23(2) *Journal of the Royal Asian Society, Malayan Branch* (JRASMB) 1 at p. 49-51 (1945).

102. Anderson, *op. cit.* 51-52, 56-58; Low, *op. cit.* 17-18; 1 Kyshe, *Cases . . . Straits Settlements, 1808-1884* (1885) xlv, xvii.

103. Anderson, *op. cit.* 79-80.

104. *Id.* 72-73.

105. *Id.* 73.

106. 24 Geo. III c. 25 [usually called Pitt's India Act], art. 35. The history of British imperial expansion and its legal mechanisms are beyond the scope of this study. A handy collection of selected documents is Muir, *The Making of British India* (1917). A more or less standard secondary analysis is Ilbert, *The Government of India* (1922). See note 41 above.

107. See text at notes I-2 and I-3 above.

108. Letter dated 22 January 1819 from the Secretary of the Government of Prince of Wales' Island to the Chief Secretary of the Government of Fort William (in India), reproduced in Cowan, *Early Penang and the Rise of Singapore, 1805-1832*, cited note 101 above, 88-89. Permission was in fact given to annex Pangkor, but the British were unable to find a Malay Sultan who had both a politically and legally supportable claim to sovereignty and a willingness to cede that sovereignty. Cowan, Governor Bannerman and the Penang Tin Scheme, 23(1) *JRASMB* 52 (1945) at 63, 72-73, 76-78. The situation is summarized in Rubin, *International Personality* 187-188.

109. Miller, *Extracts from the Letters of Col. Nahujs*, 19(2) *JRASMB* 169 (1941), at 192 letter dated 10 June 1824. It has been impossible to find the original Dutch language version of this letter.

110. See Marks, *The First Contest for Singapore: 1819-1824* (1959) for a meticulous analysis of the legal arguments raised during Anglo-Dutch negotiations in Europe concerning sovereignty over Singapore.

111. *Id.* 252; 11 *BFSP* (1823-1824) 194; 74 *CTS* 87.

112. *Id.* article 5. The evolution of the Dutch word "Zeeroof" and its technical legal usages, if any, seem beyond the scope of reasonable research for purposes of this study. Bynkershoek wrote his major legal works in Latin, not Dutch. To check the Dutch translations of the major European writers and the historical development of Dutch statute law seems excessive. It is not known what word Nahujs used that Miller translated "pirates" in the extract at note 109 above.

113. The word is chosen deliberately. The similarities of the British view of their legal powers in Southeast Asia and the Roman view of their legal powers in the Eastern Mediterranean are strikingly apparent. (See note I-35 above). The British began to call their position "Paramountcy" and derive special legal authority from that word at this time. See British Parliamentary Papers, Cmd. 3302, *Report of the Indian States Committee, 1928-1929* passim, esp. paras. 20-21 at p. 14-15, for a British analysis of "paramountcy" from 1804 onwards. The position taken is argumentative in favor of British legal rights in India, but scholarly in its use of source materials.

114. 76 *CTS* 445 at p. 446. Under the Act of 1784 and other legal arrangements, the British colonies in Southeast Asia, including Penang, were governed in the name of the East India Company.

115. *Id.* 449-450, fourth article.

116. Low, responding on 17 August 1827, to allegations of wrong-doing in the raid on 17 August 1827, wrote that "Oodin's" evil reputation was substantiated by police records in Penang and that a freed slave had testified that he, Udin, had been behind kidnappings in Penang Island itself. 2(6) *Burney Papers* 225 at p. 233-235.

117. Low, *Account*, 4 JIA at 116-117 (1850).

118. Lord Amherst to Fullerton, The Governor of Penang, in Council, 23 July 1827, 2(6) *Burney Papers* 205 at p. 213-214.

119. *Id.*, Low's Report cited note 116 above at 232.

120. *Id.* 245 at 250.

121. *Id.* at 249.

122. *Op. cit.* note 118, p. 207 (cutting the military budget), 212 (disapproving the acquisition of the Islands); these portions of the Supreme Government's letter of 23 July 1827 were not rescinded when retroactive approval was given to Low's raids.

123. *Id.* 277-279.

124. Admiralty jurisdiction was not given to the British courts in the area until 25 February 1837. 1 Kyshe lxxix. Until that time such cases as had arisen there that required referral to a British Admiralty court were sent to Calcutta for adjudication. See *R. v. Noquedah Allong & ors.*, 2 Kyshe (Cr.) 3 (1811). In one case, a robbery on a navigable river in Province Wellesley was held to be within the court's Common Law criminal jurisdiction despite it being clearly within the traditional Admiralty jurisdiction. On referral to Madras and eventually Calcutta, the Penang convictions were upheld. *R. v. Lebby Lundoo & Anor.*, 2 Kyshe (Cr.) 6 (1813) esp. p. 12.

125. See text at notes II-4 sq. above.

126. The Thai position legally was quite closely analogous to the British position regarding Paramountcy. The British had agreed to the Thai pretensions in a treaty negotiated in Bangkok in 1826, 14 C.U. Aitchison, *Treaties, Engagements and Sanads* . . . (Calcutta 1929) 115 and undertook to prevent British territory being used for Malay political activity against the Thai regime in Kedah. The tale is too complicated for concise summary. See Rubin, *Piracy, Paramountcy and Protectorates* (1974) 1-34.

127. 3(1) *Burney Papers* 309, Ibbetson to the Chief Secretary to the Supreme Government, despatch dated 25 April 1832.

128. *Id.* 317, letter from Bonham to Ibbetson dated 9 August 1832; 319, Ibbetson's reply dated 28 August 1832.

129. 3(2) *Id.* 444, Report by Governor Bonham to Mr. Prinsep, Chief Secretary to the Supreme Government in India dated 30 July 1838, at p. 446.

130. *Id.* 473, letter from the Chao Phya Pra Klang in Bangkok to Bonham dated 24 June 1838, at p. 475.

131. The Thai word translated "pirates" is not known, nor the legal implications of that word. The intention to use the British conception of "pirates" as the "common enemies of mankind" and thus to bring the British into the dynastic struggle as a party against the rebels seems clear.

132. Cf. Osborn, . . . *The Blockade of Quedah* (2d ed. 1860) p. 22:

[A]lthough many of the leaders were known and avowed pirates, still the strong European party at Penang maintained that they were lawful belligerents battling to regain their own. The East India Company and Lord Aukland, then Governor-General of India, took however an adverse view of the Malay claim to Quedah, and declared them pirates, though upon what grounds no one seemed very well able to show.

133. The full tale is much more complex than can be fully retailed here. I have tried to set out a more complete summary in Rubin, *Piracy, Paramountcy and Protectorates* (1974) 22-30, and the interested reader is encouraged to read for himself the primary documents cited there.

134. *Regina v. Tunkoo Mohamed Saad and ors.* (1840) 2 Kyshe (Cr.) 18; photographically reproduced in 1 Parry & Hopkins, eds., *Commonwealth International Law Cases* 31.

135. This is an obvious error in the Report; either Mohamed Saad was apprehended after that date, which is inconsistent with Governor Bonham's Report to T.H. Maddock, Secretary to the Government of India at Fort William, dated 26 January 1841, 4(2) *Burney Papers* 7 (1913), or the date is wrong in Kyshe's Reports, which seems more likely. The point was not raised during the proceedings in Penang. It appears to have been assumed there, probably because common knowledge, that Mohamed Saad and his companions had acted as if claimants to the crown of Kedah in capturing a Malay boat after the Thai had reconquered the Sultanate.

136. Lord Aukland's Report to the Court of Directors of the East India Company, 18 March 1841, 4(2) *Burney Papers* 1, refers to the "piracy" having been committed "on a vessel belonging to a subject of our Government" (p. 1).

137. R. v. Kidd, cited at note 18 above, analyzed in text at notes II-91 sq. above; Palachie's Case, cited at note 14 above, analyzed in the text at ch. I.d. above.

138. Citing 2 Wynne, *The Life of Sir Leoline Jenkins* (1724) 791, the part of the Jenkins's writing quoted in the text at note II-2 above.

139. Some of these citations seem incorrect and it may be speculated that the library resources available to Sir William Norris, the "Recorder" (Judge) in Penang, and learned counsel were not sufficient to allow everything to be checked.

140. 2 Kyshe (Cr.) 65-67.

141. *Id.* 67.

142. *Id.* 68.

143. See text at notes II-4 sq. above. Norris ignored the actual convictions at English law of the eight Irish commissioners for "piracy." Instead he noted that "the most eminent civilians were of opinion that the grantor [of the commissions, King James II (ignoring that they were in fact granted by Louis XIV)] still having the right of war in him, such captures could not by the Law of Nations be deemed piratical, though made such afterwards by the Statute 11th and 12th, Wm. III., c. 7, in the case of one British subject attacking another under colour of such commissions." See pertinent text at note II-32 above; also in Appendix I.B.

144. 6 Anne c. 11 (1707).

145. 2 Kyshe (Cr.) 71-73.

146. Mohamed Saad actually escaped from British custody to Perak shortly after the trial, but gave himself up a short time later. 4(2) *Burney Papers* 63-64 (Bonham to Maddock, letter dated 10 May 1842). He was deported on a British ship to Calcutta "as a state prisoner." (*Id.*) A *habeas corpus* writ ordering his release was issued on the motion of a local barrister, but the executive officials of the Company had already removed him bodily to a town outside the jurisdiction of the British court in Calcutta. *Id.* 1 (Lord Aukland's

Report cited note 136 above) at p. 2. He was released on the order of the Company's officials dated 29 July 1843. *Id.* 86 (J. Thompson, Secretary to the Government of India, to the Magistrate of Moorshedabad). This looks like a shoddy business. Lord Aukland accepted entirely the opinions of Governor Bonham as to Mohamed Saad's character and activities, which Lord Aukland called "a career of predatory violence of the most atrocious character," (*id.* 1) despite the analysis and evidence of Norris and other substantial members of the British community in Penang.

147. Bonham to Norris, 23 December 1840, 4(2) *Burney Papers* 15 at 16-17.

148. Norris to Bonham, 25 January 1841, 4(2) *Burney Papers* 18 at 20-21.

149. *Id.* 23.

150. The Court of Directors to the Government of India, 31 December 1841, 4(2) *Burney Papers* 3 at 3-4.

151. The British had organized their administration in the area to make the "Straits Settlements" of Penang, Malacca and Singapore subordinate to the East India Company's Government in India and affairs in the Malay area were regarded in British official correspondence as part of the affairs of India. The statutes and regulations involved are cited and summarized in Rubin, *International Personality* 278-280.

152. *Op. cit.* note 150 above at p. 4. The quotation from Norris's charge is taken from 2 Kyshe (Cr.) 73.

153. Especially in connection with American pretensions in the 1810s and 1820s. See ch. III discussed above at note III-264 sq.

154. Aitchison, *op. cit.* note 126 above 116, article 5.

155. Of course, the law applied in Admiralty and Prize courts was, by the middle of the eighteenth century at the latest in England, regarded as part of the "law of nations," thus of "international law" in its *jus gentium* natural law—law common to all people—phase. See Report of British Law Officers on the Rules of Admiralty Jurisdiction, & c., in Time of War, 18 January 1753, cited at note 18 above at 901. The municipal act creating the tribunal could be regarded as directing it to apply a conflict of laws rule referring to true international law as the law of substance to be applied in many cases. But, as has been seen, to gain jurisdiction over accused "pirates," the municipal law limits to a municipal court's jurisdiction would apply, or the international law limits to the jurisdiction of any court of a particular sovereign would apply. Thus, the only "pirates" within the Admiralty or other national court's jurisdiction would be persons linked by nationality to the state whose tribunal was trying them, or not linked by nationality to any other state, or, in the case of foreigners, linked by the nationality of the victim or the flag of a vessel attacked on the high seas ("high seas" itself being a term defined by the municipal tribunal normally as an autointerpretation of international law). Moreover, the substantive law being applied, although called "law of nations" or part of "international law" by the state of the tribunal, was in fact only that state's interpretation of that law, there being no possibility of diplomatic correspondence to modify that state's view. In the cases in which the defendants were conceived to have some claim to international status or a license from a belligerent or foreign government, the charge of "piracy" never appears to have resulted in a criminal conviction. Cf., in addition to the Mohamed Saad case, *In re Tivnan*, discussed above at note III-264 sq. The only known cases that might be regarded as exceptions are the much disputed case of the French adherents of Dom Antonio, discussed at note I-100 above, and the seminal discussions in England concerning the Irishmen holding commissions from Louis XIV to fight on behalf of the ousted James II in the 1690s analyzed in the text at notes II-4 sq above.

156. G. Fox, *British Admirals and Chinese Pirates, 1832-1869* (1949).

157. N. Tarling, *British Policy Towards the Dutch and the Native Princes in the Malay Archipelago, 1824-1871* (Ph.D. Dissertation 2914, University of Cambridge Library) (1956), published in an edited version as *British Policy in the Malay Peninsula and Archipelago, 1824-71* as a complete number of a learned journal, 33(3) *JRASMB* 1 (1957). Another work by Tarling, *Piracy and Politics in the Malay World* (1963) completes the story from an historian's point of view and is sensitive to the legal issues although not dealing with them as a lawyer would.

158. My own beginning along that line, Rubin, *Piracy, Paramountcy and Protectorates* (1974), focuses on the entire law of imperialism of which the British Imperial law relating to "piracy" as an excuse for military action was but a part, handled rather superficially in the light of the research involved in this study.

159. The literature on this incident and the career of James Brooke is voluminous. The interested reader might start with S. Runciman, *The White Rajahs* (1960); N. Tarling, *Britain, the Brookes and Borneo* (1971); and Keppel's own account in H. Keppel, *The Expedition to Borneo of H.M.S. Diado for the Suppression of Piracy . . .* (2 vols.) (1846).

160. 6 Geo. IV c. 49, analyzed above at notes 24-26.

161. The *Serhassan (Pirates)* [1845] 2 W. Rob. 354, reproduced with some editorial errors (e.g. the Malay word "prahu" (boat) being misspelled "prahn" throughout), in 3 BILC 778. Lushington's conceptual difficulties in meshing his fundamentally policy-oriented positivist approach with the realities that those policies sought to change were noted in connection with the Ionian Islands and Greek revolution in 1823 at notes 68-73 above.

162. *Id.* 2 W. Rob. 358, 3 BILC 780. There seems to be some inconsistency or a reporter's error regarding the number captured or killed; the claim was for 55; limiting the award to that appropriate for 45 is not explained.

163. *Id.* 357 (779).
164. The Act is reproduced in Appendix I.C below.
165. Fox, *op. cit.* at note 156 above, p. 112 note 4, cites the Admiralty Digest 12314, correspondence from the Solicitor to Admiralty dated 18 December 1849 and other official correspondence, to support the statement that: "Such [great Chinese 'piracy'] claims following upon equally exorbitant demands for the destruction of the Borneo pirates by Her Majesty's ships and vessels precipitated the repeal of the law which had been under consideration since the Fall of 1847." The great Chinese claim involved an action in 1849 in which 1800 "pirates" were attacked and 400 killed with British casualties of only one man slightly wounded, and two days later an attack on 3,000 Chinese "pirates" killing 1,700 with no British loss of life. *Id.* 107-109. The bounty paid under the Act of 1825 was over 42,000 Pounds.
166. 13 & 14 Vict. c. 26 (1850). Due to a delay in the anticipated date of Parliamentary action, a further Act had to be passed to allow the repeal to take effect retroactively, on the 1st of June. 13 & 14 Vict. c. 27. The reason for the confusion is adverted to in the preamble to the second Act.
167. The Charter Act of 1833, 3 & 4 Will. IV c. 85 (1833) required the Company to close up all its remaining commercial business, but left it as the "trustees" for His Majesty the King of England in his capacity as sovereign in India. For a brief analysis of the effect of this Act in the light of the overall evolution of the Company and its relationship to the Crown, see Ilbert, *op. cit.* note 41 above, at p. 81-90.
168. 13 & 14 Vict. c.26 (1850) sec. III. See the Slave Trade Act of 1819, 59 Geo. III c. 97. The bounty, administered at the Crown's discretion, was in fact continued as "prize money" under various statutes and regulations until 1948. 12 & 13 Geo. VI c. 9 (1948). Summary histories of the British law of prize are in Knauth, Prize Law Reconsidered, 46 *Columbia Law Review* 69 (1946); Colombos, *International Law of the Sea* (4th ed.1959) ch. XXI.
169. 13 & 14 Vict. c. 26 (1850) sec. I.
170. *Id.* sec. II.
171. The *Segredo*, Otherwise the *Eliza Cornish*, 1 Spink Ecc. & Ad. 36 (1853), 3 BILC 780.
172. *Id.* 48 (787).
173. The *Magellan Pirates*, 1 Spink Ecc. & Ad. 81 (1853), 3 BILC 796.
174. *Id.* 83 (797).
175. *Id.* 83 (797-798).
176. See text at note II-32 above.
177. *U.S. v. Smith*, 18 U.S. (5 Wheaton) 153 (1820), discussed in text at notes III-91 sq.
178. The *Magellan Pirates*, cited note 173 above, at 83 (798).
179. *U.S. v. Klintock* and *U.S. v. Palmer et al.*, cited at note 16 above. These cases and their place in the evolving American jurisprudence are discussed in text at notes III-75 sq., III-81 sq. and III-163 sq. above.
180. Perhaps Dr. Lushington was misreading M. Hale, *Pleas of the Crown* (1685 ed.), discussed at note I-134 above.
181. The *Magellan Pirates*, cited at note 173 above, 83 (798).
182. *Id.*
183. *Id.* 83-84 (798).
184. *Id.*
185. See text at note 170 above.
186. The *Magellan Pirates*, cited at note 173 above, 88 (801). The "murders and robberies" included the killing after the capture of the Master of the *Eliza Cornish* and a passenger who was part owner of the vessel. The capture had been effected by intimidation, without direct violence.
187. *Id.* 89 (801-802).
188. The *Segredo* case, cited at note 171 above, was a property adjudication, but Dr. Lushington in that case had held without any analysis at all that whether the takers of the vessel had been "pirates" or "insurgents" would make no difference to the result, which rested on English municipal law and the authority of the acting Master to sell an unseaworthy vessel. There are legal problems in trying to reconcile this decision with the conception of a Master's authority applied in other countries' Admiralty courts. See The *Brig Sarah Anne*, 2 Sumner 220 (1835), opinion by Justice Joseph Story, definitively resolved for the United States as *The New England Ins. Co. v. The Brig Sarah Ann* [sic], 38 U.S. (13 Pet.) 387 (1839), opinion by Justice Wayne. Lushington's apparent unwillingness to consider foreign precedents as significant raises questions about the entire concept of a uniform law of nations, or a special branch of "international law" being the basis of Admiralty law. The implications of this on the persuasiveness of English legal opinions in other courts, and in reducing the role of international law in affecting British actions, are great indeed, but lead too far afield for further discussion here.
189. See text at notes I-85 and I-86 above.
190. The *Magellan Pirates*, cited at note 173 above, 85 (799).
191. There is no inconsistency in individuals being considered rebels, even entitled to belligerent rights as in a war, and at the same time traitors subject to condign punishment, or common criminals if found to lack soldiers' privileges for their acts of violence, or to have exceeded those privileges. "The insurgent may

be killed on the battle field or by the executioner," Justice Grier in *The Prize Cases* 67 U.S. (2 Black) 635 (1862) at p. 673. See text at notes III-232 to III-245 above.

192. A. Gentili, *Hispanicis Advocationis* (1613, 1661) (CECIL 1921) c. xv, quoted in the text at note I-106 above. It has already been shown in the text concluding after note I-110 above how Gentili changed his argument as the interests of his clients and his perception of overall English interest changed.

193. *Id.*, c. xxii and xxiii. See text at notes I-107 and I-110 above.

194. The *Helena*, cited at note 9 above.

195. See text at notes 27 sq. above.

196. See notes I-2, I-3 and I-35 above.

197. See text at notes 56 sq. above.

198. See text at notes 133 sq. above.

199. He became Foreign Secretary also in Russell's Cabinet of 1865-66 and Gladstone's in 1868-1870. 20 *DNB* 347-350.

200. F.O. 83.2209:U.S.A., reprinted in 1 McNair, *op. cit.* note 64 above, 271.

201. For Story's approaches and the battles with Marshall and how they were resolved, see the text at III-53 sq., III-89 sq., and III-160 sq. above.

202. The case is discussed in the text at notes 211 sq. below. British judges in practice have been as reluctant as American judges to apply the jurisdiction asserted for them here and by universal-naturalist jurists. Indeed, the major question presented in *R. v. Keyn*, [1876] L.R. Exch. Div. 63, discussed at note I-132 above, was whether British statutes could properly be construed to apply to acts within a foreign vessel even wholly within British territorial waters. The holding by a very narrow majority was that they could if Parliament so indicated.

203. Quoted in text at note 200 above.

204. See text at notes 133 sq. above.

205. 1 McNair, *op. cit.*, 271-272. The extent of this "right of visit" was much disputed in European correspondence. See Rubin, *Evolution and Self-Defense at Sea*, in 7 *Thesaurus Acroasium* 107 (1977) esp. pp. 126-131.

206. 1 McNair, *op. cit.*, 272, paragraphs 4 and 5.

207. The basic facts are set out in the text at note 171 above.

208. Cf. the Law Officers' Opinions regarding acts against Turkish "pirates" "ashore" in text at notes 220 sq. below.

209. 1 McNair, *op. cit.*, 272.

210. Hale, *Pleas of the Crown* (1685 ed.) 71 defines robbery at English Common Law as a taking from a person with fear. The assault without a taking of property was not a felony but a misdemeanor only; the taking without fear is larceny or burglary, not robbery unless a dwelling house was violated. The precise definitions are too complex to bear repeating verbatim here.

211. *Attorney-General of Hong Kong and Kwok-A-Sing* [1873] L.R. 5 P.C. 179; 3 BILC 812.

212. 1 Imperial Maritime Customs, *Treaties, Conventions Etc., Between China and Foreign States* (Shanghai 1908) 212.

213. Article XIX.

214. Article XXI, first paragraph.

215. *Op. cit.* note 212 above at 198. The abrogation of this Treaty is contained in Article I of the Treaty of Tientsin.

216. In *re Tivnan*, 5 Best & Smith's Q.B. Rep. 645 (1864), discussed in text at notes III-261 sq. above.

217. *Op. cit.* note 211 above, 201-202.

218. *R. v. Dawson and others*, 13 How. St. Tr. 451. The text held persuasive in *Kwok-A-Sing* is that quoted at note II-60 above. And consider the extraordinary weakness of that charge as it might have been applied to jurisdictional questions, which are discussed in the text at notes II-61 sq., II-80 sq. and II-147 sq. above.

219. *Op. cit.* note 211 above, 200.

220. McNair, *op. cit.*, 273.

221. *Id.* 274, Opinion dated 5 January 1880.

222. *Id.* 275, Opinion dated 6 July 1881 by Drs. James, Farrer, Herschell and Deane. This seems to be the first expression in a public international law context of a "rectification" rationale, the legal right of a state affected by the failure of another to do its legal duty (thus of a state that is not an officious intermeddler) to perform that duty for the defaulting state. That rationale seems to have been neglected in the literature until revived on the basis of an independent analysis by Jeffrey Sheehan in 1977. See Sheehan, *The Entebbe Raid . . .*, 1(2) *The Fletcher Forum* 135 (1977); Rubin, *Terrorism and Social Control*, 6 *Ohio Northern University L. Rev.* 60 (1979) at 67. In current analysis, the concept rests not on any concept of "necessity" but on the international law of self-defense as codified in article 51 of the United Nations Charter and interpreted in the light of general principles of municipal law relating to quasi-contract. See A.L.I., *Restatement of the Law of Restitution* (1937) secs. 114-115.

223. 2 McNair, *op. cit.*, 276. There seems to be no record of the disposition of “offenders,” if any, captured beyond three miles from the Turkish coast; if they were not taken to British or Turkish tribunals, they were presumably dealt with summarily or released.

224. Texts at notes 200 and 205 sq. above.

225. The Law Officers in 1870, like Lushington in 1854, ignored the logic of the American precedents focusing on jurisdiction. See text at notes III-64 sq. above.

226. 1 McNair, *op. cit.*, 272-273, Opinion dated 11 August 1870.

227. See text at notes I-106 sq. and I-110 above.

228. 1 McNair, *op. cit.*, 273-274, Opinion dated 4 August 1873.

229. See text at notes 72 sq. above

230. The Company was succeeded by the Crown as the governing power in India through legislation following the Indian Mutiny of 1857. The principal Act was the Government of India Act of 1858, 21 & 22 Vict. c. 106 (erroneously cited as c. 108 in Ilbert, *op. cit.* note 41 above, 95 note 2).

231. Discussed above at notes 150-155.

232. The following recitation is based on research done brilliantly by Nicholas Tarling in his Cambridge Ph.D. Dissertation cited note 157 above at pp. 92-99.

233. The leading historical work on the 1870s period of British expansion into the Malay Peninsula is Parkinson, *British Intervention in Malaya 1867-1877* (1964). It ignores the legal issues focused on here.

234. On the British administrative arrangements, see note 151 above.

235. The legal situation was complex because the British, having conceded Thai pretensions in Trengganu in 1826, anticipated eventually establishing their own supremacy there and took every opportunity to assert Trengganu’s “independence” from Thailand. Thai rights were reconfirmed by the British Foreign Office after a bombardment of a Malay fort near Kuala Trengganu, the capital and principal port of the “state” in 1862. The principal documents are in Parliamentary Papers 1863 XLIII 299. They are analyzed in some detail in Rubin, *Piracy, Paramountcy and Protectorates* 54-70. The Colonial Office position is still occasionally adopted as if the treaty of 1826 and later correspondence did not exist. See correspondence by A.J. Stockwell and A.P. Rubin in 77 AJIL 404-407 (1983).

236. The East India Company’s Governor General in Council in India was called the “Supreme Government” by subordinate officials in nineteenth century documents.

237. Of course, the Mohamed Saad case was expressly decided on another point—the existence of belligerent rights in an unrecognized claimant to public authority; but the British municipal law definition’s emphasis on *animus furandi*, the motive of personal, not public, gain, translated the same point into British municipal law without regard to “recognition” or other political acts of the Crown. See note II-49 above.

238. Tarling cites Straits Settlements Act XII of 1857.

239. Parliamentary Papers 1872 LXX 661, C. 466, [hereafter cited as C. 466] 1 (letter from Anson to the Earl of Kimberley dated 14 July 1871) and 2 (Report dated 1 July 1871 from Commander Bradberry to the Lieutenant Governor of the Straits Settlements in Penang) at p. 3. Rajah Moossa was the son of the Sultan whom the British recognized as sovereign in Selangor, and brother-in-law of one of the principal rivals for real power under the nominal authority of the Sultan.

240. Long Malay knives with a wavy blade.

241. Another of the Sultan’s relatives and rival of his sons for royal power. There is a useful genealogy of the Selangor royalty in C. 466 at p. 30.

242. *Id.* 3.

243. *Id.* 4-5 (letter from Mr. Cox to the Lieutenant Governor of Penang dated 30 June 1871).

244. Cp. as to the attitude expressed and its implications for the use of the word “pirate” to justify British military activity in disregard of both the English criminal law regarding “piracy” and the limits the international legal order places on the reach of British jurisdiction on the one hand, and the law of war on the other, the *Serhassan* (*Pirates*) cited note 161 above and the discussion that follows it to note 164. To the Malay nobles dominant in Selangor at the time, the British imposition of what must have seemed English criminal law on territory which the inhabitants regarded as independent must have seemed monstrous. To them the British use of force was a declaration of war, if indeed the mere disregard of Malay sovereignty in Selangor did not itself compel a war by the Malays for survival as a society. Jurgurtha viewed the Roman hegemony that way. See note I-61 above.

245. C. 466 p. 7.

246. *Id.* 8.

247. *Id.* 8-10.

248. *Id.* 14-15 (news account from the Penang “Argus” dated 1 July 1871). There is an obvious discrepancy in numbers. There is no way with available documentation to resolve it. But from Bradberry’s account of the arrest of three and a later report of five more being sent to Malacca by the Sultan whom the British “recognized” together with the queue of a sixth who had died while in the Sultan’s hands, it can be conjectured that the Argus had simply anticipated a more successful British operation than actually occurred. See *id.* 18-19 (Anson to Kimberley, dispatch dated 28 July 1871).

249. *Id. passim*. Anson's advice to the Sultan, undated but apparently written between 7 and 21 July 1871 is at pp. 19-23, including "thanks" for "outlawing the rebellious and piratical Rajahs" (p. 22). The "power" document given by the Sultan to Oodin is a "renewal" (on British advice, to avoid the implication that Oodin had not been the proper Agent of the Sultan in the days of Mahdie's dominance) dated 22 July 1871 of a document originally issued on 26 June 1868. The authenticity of the original had been challenged by Mahdie. *Id.* 24, Report by C.J. Irving (Auditor General) to Anson dated Singapore, July [28? 29?] 1871. It is not proposed to disentangle the various claims to the throne in this place; it seems clear that Rajah Mahdie had a colorable claim, as Mohamed Saad had had in Kedah thirty years before.

250. *Id.* 31, Kimberley to Anson dispatch dated 26 September 1871.

251. *Id.* 33-34, Memorandum from Robinson to Blomfield dated 14 July 1871.

252. *Id.* 36, Vice-Admiral Sir H. Kellett on board H.M.S. Salamis at Yokohama to the Secretary to the Admiralty in London, 2 August 1871.

253. The letter was printed in the Times on 13 September 1871, p. 9 cols. 1-2 under the head: "The Destruction of Salangore." It was written in reaction to the Report to Acting Governor Anson dated 6 July 1871 by Commander George Robinson, quoted in text at notes 244-247 above, which had been reprinted in the Times on 5 September 1871, p. 3 cols. 5-6.

254. The Paris Commune of March-May 1871 was a very recent memory and trials of the leading *communards*, called "communists" in the English newspapers of the time, were going on in September when this correspondence concerning Selangor appeared.

255. Summarized in note 249 above.

256. 75 CTS 353. Article V says: "The King of Salangore engages to seize and return to Pulo Penang, any offenders, such as pirates, robbers, murderers and others who may escape to Salangore . . ." There is much that is doubtful about the negotiation, interpretation, and British implementation of the 1825 Treaty. For example, the East India Company, not Great Britain, was the non-Malay party and the Company had ceased to administer the Straits Settlements in 1858. See note 230 above. But this is not the place for further analysis of these oddities of British Imperial law. See Rubin, *Personality* 208-218.

257. This letter is referred to in a lead article in the Times on 22 September 1871, p. 7. cols. 2-3, and provoked a reply from Maxwell dated 24 September 1871, printed in the Times on 27 September 1871, p. 10 col. 6. Neither the lead article nor Maxwell's reply gives the date of "Singaporean's" letter, and I have been unable to find it in a page-by-page search of the microfilm edition of the Times 1-22 September 1871. I cannot explain the discrepancy and must leave further research to somebody with sharper eyes than mine or a different microfilm set.

258. The Times, 22 September 1871, p. 7 col. 2.

259. Maxwell was writing from Coblenz (his first letter was not identified by place) on 24 September 1871.

260. I.e., his authorized spokesman. The reference seems to be to the Merovingian practice in medieval France, which led to the seizure of the Throne itself by the *major-domo*, *Maire du Palais*, Pepin the short, son of Charles Martel, in 751 A.D., to become the first Carolingian King of France.

261. Maxwell here uses the vocabulary of John Austin, the great formulator of legal "positivism" in the 19th century. Austin defined "law" so narrowly as to exclude customary or other laws not prescribed by a "political superior." "[R]ules of this species constitute much of what is usually termed 'International law,' which, in turn, he denominated "positive morality." Austin, *The Province of Jurisprudence Determined* (1832, Library of Ideas ed. 1954) Lecture I p. 11-12. Austin's definitions, superficially very attractive, on closer analysis lead to insurmountable inconsistencies and have been much modified by later positivist jurists. See, e.g., H.L.A. Hart, *The Concept of Law* (1961) 208-231. To "naturalist" jurists, the "legal" essence of "international law" has never been in doubt because the distinction between community morals and "law," particularly the law applied by Common Law or similar courts in the absence of statute, is almost non-existent. To "positivist" jurists today, reference to "morality" is anathema, and there is no doubt as to the essence of international law, properly so called, being "legal" by any useful definition. This is not the place to explore this interesting aspect of jurisprudence any further.

262. The London Times, 27 September 1871, p. 10 col. 6. The inner quotes and sarcastic references to "cheap sheds" and "Malayria" seem to relate to "Singaporean's" letter.

263. Racial theories to explain British commercial and military dominance were becoming common at the time. A popular book expressing the main theme was Creasy, *The Fifteen Decisive Battles of the World* (1851, Everyman Library ed. 1960). On p. 146 Creasy wrote: "What the intermixture of the German stock with the classic, at the fall of the Western Empire, has done for mankind, may be best felt by watching . . . over how large a portion of the earth the influence of the German element is now extended." By German, Creasy included the English, Scandinavians and everybody else speaking a Germanic language. These theories reached their most sophisticated (and most naive) legal form in the writings of James Lorimer. In 1872 he wrote:

Man is the aggressive animal, *par excellence*; and the most prolific, the most highly endowed and developed men, and races of men, are the most aggressive. The process is one which we

contemplate with approval every day, in the individual, the family, the state, the race;—the able, the active, the industrious, the frugal, the instructed, the earnest, supplant the weak, the indolent, the idle, the ignorant, the frivolous.

Thus, he explains, “aggression” is a “natural right” and “race” is the key to law and history. He explains various anomalies: “The inroads of the so-called barbarians on the effete Roman Empire . . . were true, and have been enduring conquests; whereas the conquests of the Turks were the result of temporary dissensions between the Christian races . . .” Lorimer, *The Institutes of Law* (1872) 415 and note 2 on 416–417. It must have been comforting to European statesmen of the 1870s (and later) to think that their conquests were permanent, while those of non-Europeans were temporary; that history would stop as soon as the Europeans and, within Europe, the British in particular, had acquired an Empire. To gauge the enthusiasm with which Lorimer’s ideas were received in some circles, see his biography in 12 DNB 136.

264. C. 466 pp. 38–39, Report by Anson to Kimberley dated 24 October 1871.

265. *Id.* 40, Report by Robinson to Anson dated 24 October 1871.

266. It is spelled variously Bloomfield and Blomfield in C. 466. His instructions are excerpted in the text at note 251 above.

267. C. 466 44, Report by Commander “Bloomfield” to Vice-Admiral Kellett dated 20 September 1871, at p. 45.

268. It may be remembered that at a similar juncture in 1832 the senior British Naval Officer in the area, Rear Admiral Sir Edward W.C.R. Owen, had advised Governor Bonham against the promiscuous use of the word “pirate” for the sake of trying to justify political, as distinct from legal, activity. See text at note 127 above. Owen’s view had been confirmed by the Mohamed Saad case in 1840. But much had happened afterward, including the *Serhassan (Pirates)* case.

269. C. 466 44, Dispatch from Kellett to the Secretary to the Admiralty dated the *Ocean* at Hong Kong, 30 October 1871.

270. A more or less detailed account, but missing the legal issues, is Parkinson, *op. cit.* note 233 above. The legal issues are raised, but from a point of view rather different from that of this study, in Rubin, *Piracy, Paramounty and Protectorates* (1974). Parkinson mentions Maxwell’s having “so recently [in 1871] tried and sentenced the pirates caught by H.M. Gunboat *Algerine*: pirates belonging to the other side in the Klang War.” Parkinson, *op. cit.* 56. I have not been able to find any details about this and would suppose that Parkinson, like so many writers, is using the word “pirates” either in a merely pejorative sense and they were really tried for something else, or that the “pirates” committed their depredations on the high seas against British vessels or nationals, or otherwise within the jurisdiction of the Admiralty court in the Straits Settlements. In the legal quarrel arising out of the Selangor incident of 1871 the *Algerine* incident is not mentioned in the official documents or the London Times. Parkinson summarizes the incident in a way that makes British jurisdiction reasonably clear on the basis of the nationality of the victim:

The character of these Kedah men is perhaps indicated by the fact that some of them, being left idle after the capture of Klang, turned pirate and captured a small vessel from Penang [emphasis added]. Thirty-nine of them were caught by H.M. Gunboat *Algerine*, early in 1871, and taken to Malacca where they were tried and sentenced by the Chief Justice, Sir Peter Benson Maxwell, very shortly before his retirement.”

*Id.* 45 note 1. Parkinson does not cite any sources for this. There seems to be no necessary inconsistency from a legal point of view between Maxwell’s position in the *Algerine* case and his view of law taken in the Selangor incident. Indeed, it is possible that he was particularly sensitive to the issues and concerned that his own position, and Great Britain’s, was misunderstood as a result of the *Algerine* case.

271. Parliamentary Papers 1874 XLV 611, C. 1111 [hereinafter cited as C. 1111] 22, Instruction from Ord to the Acting Lieutenant-Governor dated Penang, 17 December 1872.

272. *Id.* 24–25.

273. *Id.* 25, Memorandum dated 23 December 1872.

274. *Id.* 24–25.

275. *Id.* 32–33, Report from Ord to Kimberley dated 24 July 1873.

276. *Id.* 23–24; Denison’s similar report to Ord is on pp. 37–38.

277. *Id.* 92–93, dispatch from Clarke to Vice-Admiral Shadwell dated 1 February 1874.

278. It is surely not scholarly, but might be interesting anyhow, to observe that Clarke’s handwriting evident in the Carnarvon Papers, Vol. 40, Correspondence with the Governors of the Straits Settlements (C.O. 30/6 in the Public Records Office, London), is so jagged, large and crude that my first reaction to it aside from worrying about legibility was to wonder if he were missing several fingers and had to grip his pen in a fist. It turned out to be not too hard to read, but Clarke must have broken his pen nibs frequently.

279. Cf. as to British involvement in the Selangor “demand” and the forms of law to be followed in Selangor, Vice-Admiral C.F.A. Shadwell’s Report to the Secretary to the Admiralty dated 12 February



1874 in C.1111 107: “[T]he Sultan has acceded to all Sir Andrew Clarke’s proposals, and has deputed his son-in-law, T.D.O., the Viceroy of Salangore, to deal . . . with the offenders.”

280. *Id.*

281. *Id.* 181, Report from Clarke to Kimberley dated 24 February 1874.

282. *Id.* 184. Letter from Tunku Dia Oodin to the Straits Settlements Colonial Secretary dated Klang, 4 February 1874. This text is the entire substantive text of the letter as printed in C.1111.

283. *Id.* 213, Memorandum by C.J. Irving undated but apparently written in December 1873 at pp. 214-215; *id.* 184 Report by Attorney-General (of the Straits Settlements) Thomas Braddell, undated but apparently written about 11 February 1874 at 188-189.

284. *Id.* 187-188: “[A]lthough the manner of [Tunku Dia Oodin’s] confirmation by the Sultan as Viceroy, in July 1871, was not free from objection, he had been acknowledged by [the British] Government ever since in that capacity; . . . the pirates . . . were supported and led by his personal enemies.”

285. *Id.* 193. The Sultan’s letter to Governor Clarke dated 9 February 1874 is in *id.* 195. The precise text of the reply seems not to have been printed.

286. The ninth mentioned above note 282 had turned state’s evidence and was discharged. See Trial Minutes in *id.* 200 at 203-204.

287. *Id.* [Trial Minutes]; and *id.* 197, The Commissioners’ Report dated 21 February 1874.

288. The political tale is told in the reprinting of key British documents in a series of Parliamentary Papers beginning with C. 1111 and including C. 1320, 1505, 1503 (which, oddly, seems a continuation of the later number 1505) and 1512. Much additional material is reflected in Parkinson, *op. cit.* note 233 above.

289. See text at notes III-246 sq. above.

290. See text at note 226 above. The exception was the *Huascar* correspondence analyzed below.

291. Among the eminent writers citing the incident as if a British use of the word “piracy” to set a precedent for so labeling “rebels” are W.E. Hall, *A Treatise on International Law* (4th ed. 1895) 277-278; 1 Pitt Cobbett, *Leading Cases on International Law* (3rd ed. 1909) 288; 1 Lauterpacht-Oppenheim, *International Law* (8th ed. 1955) 611 (sec. 273).

292. 68 BFSP (1876-1877) 744-745, letter dated 12 May 1877 from J.R. Graham, British Chargé d’Affaires in Lima to the Earl of Derby, Foreign Minister in Disraeli’s Conservative Cabinet of 1874-1880.

293. A diplomatic note of 7 May 1877 from Senor Zegarra, the Peruvian Chargé d’Affaires at Santiago, to Senor Alfonso, the Chilean Foreign Minister, is summarized in 68 BFSP 766, informing Chile of the “mutiny” and requesting that, if the *Huascar* present itself in a Chilean port, supplies be denied her and she be given up to the Peruvian legation. In the summary forwarded to London by the British Chargé d’Affaires in Peru, the word “piracy” does not appear, nor is Chile asked to send a fleet out to capture the *Huascar*. Apparently in discussions between Zegarra and Alfonso when the note was presented, Alfonso asked Zegarra to suggest a legal rationale for Chile detaining the foreign vessel and apparently taking sides in an internal Peruvian affair, and the word “piracy” was mentioned by Zegarra. See below. This note is not included in the précis of correspondence sent to Lord Derby on 14 June 1877 by Mr. J. de V. Drummond-Hay, the British Chargé d’Affaires in Chile, reproduced in 68 BFSP 760-762 and Parliamentary Papers 1877 LXXXVIII 613, Peru No. 1 1877 (C. 1833) 14-15.

294. 68 BFSP 746; C. 1833 2.

295. Great Britain and Peru were both Parties to the Declaration of Paris of 16 April 1856. That declaration provided “The neutral flag covers enemy’s goods, with the exception of contraband of war.” The “neutral” British flag would thus not protect Peruvian coal, which could be seized as belligerent property by the rebels, if the law of war were deemed to apply to the military struggle between the forces of Pierola and the forces of Prado, and if coal were regarded as “contraband.” Schindler & Toman, *The Laws of Armed Conflicts* (rev’d ed. 1981) 699-700. The list of Parties shows the United Kingdom signing on 16 April 1856 and Peru acceding on 23 November 1857. *Id.* 701-702.

296. 68 BFSP 747.

297. *Id.* 766.

298. *Id.* 766-767, noted dated Santiago, 18 May 1877.

299. As noted above, the mail and dispatches were not in fact rendered up to the *Huascar* and the British packet was permitted to continue its voyage; Zegarra seems to exaggerate.

300. 68 BFSP 761, as translated and quoted by Mr. Drummond-Hay. See note 293 above. “International right” seems a rather awkward translation of “*derecho internacional*,” which is almost always translated “international law.” Zegarra was apparently trying to make Pierola seem an “outlaw” without using the word “pirate.” Drummond-Hay’s translation seems to shift focus to moral rather than legal grounds.

301. The debate is summarized in C. 1833 19-20.

302. 68 BFSP 768, Decree dated 26 June 1877.

303. *Id.* Dispatch dated 26 June 1877.

304. 68 BFSP 753, dispatch dated 3 June 1877, the quoted portions are taken from p. 754 and 755. The same dispatch is printed in Parliamentary Papers 1877 (369.) LII 717 at 11-14. This file of Admiralty dispatches concerning de Horsey’s action against the *Huascar* was printed at the behest of Parliament on 27 July 1877 and seems confined to de Horsey’s dispatches and their enclosures ending with this one.

305. 68 BFSP 758-759, dispatch dated Payta, 12 June 1877.

306. Excerpted in the text at note 294 above.

307. 68 BFSP 762 at 763 and 764. See also Rospigliosi's note to Graham dated 24 June 1877 in C. 1833 23.

308. 1 McNair, *op. cit.*, 275, letter to the Earl of Derby dated 21 July 1877, signed by John Holker, Harding S. Giffard and J. Parker Deane.

309. Sir William George Granville Venables Vernon Harcourt, Liberal Member of Parliament for Oxford, was probably the most eminent international law figure in England. His writings under the name "Historicus" were very influential. He held the premier chair as Whewell Professor of Public International Law at the University of Cambridge 1869-1887. See 2 *DNB* (2nd Supp.) 198-212.

310. Sir John Holker was an expert in Patent Law serving as Solicitor-General 1874-1875, then Attorney General 1875-1880 in Disraeli's Conservative Cabinet. He was a member of Parliament from Preston and, as Attorney General, one of the Law Officers of the Crown. 9 *DNB* 1027-1028. As a Law Officer advising the Government, and as a member of the Government itself, his personal prestige was deeply involved in the case as well as the prestige of the Government. It was to be expected that the Law Officers in these circumstances would render an opinion favorable to the position decided on by the Disraeli Cabinet for reasons other than a pure analysis of the law.

311. 36 Hansard, *Parliamentary Debates* (3rd ser.) 567-585, 787-802. See esp. Harcourt's analysis at cols. 787-791 and Holker's reply immediately following. Holker's view that "piracy" is the proper label for "belligerent acts" not recognized as within the context of "war," thus seeming to line up all established governments as potential policemen against revolution anywhere, capable of classifying revolutionaries as "criminals" under international law, apparently even if confining their activities to what would, in the context of war, be "belligerent rights" against "neutrals," is at cols. 795-796.

312. Hansard, *op. cit.* col. 800.

313. The precise quotation from Justinian's Code is above at note I-58. The phrase in Justinian is not "*praedones et [and] pirata*" but "*latrones aut [or] praedones.*"

314. McNair, *op. cit.*, 276.

315. *Id.* 277 at 279.

316. See text at note 299 above. Lord Derby repeated even Zegarra's exaggerated assertions of fact and Drummond-Hay's strained punctuation and apparent mistranslation.

317. Cobbett, *op. cit.* note 291 above at p. 288 (3rd ed. 1909), 300 (4th ed. 1922, H.H.L. Bellot, ed.); 320 (6th ed. 1947, W.L. Walker, ed.) says: "The Peruvian Government also submitted the matter to its Law Officers, and the latter having advised that the acts of the 'Huascar' were piratical the matter was allowed to drop." The only citation given by Cobbett is to C.1833, which has nothing in it to support this assertion. Hall, *op. cit.* note 291 above at p. 278 does not refer to any Peruvian legal opinion saying:

In Peru the occurrence gave rise to great excitement, in which the government shared or affected to share, and a demand for satisfaction was made upon England. There the question was referred to the law officers of the crown [in England, there was no "crown" in Peru], who reported in effect that the acts of the Huascar were piratical. The conduct of the Admiral was in consequence approved, and the matter was allowed to drop by Peru."

The only citation, again, is to C. 1833, which, of course, does not contain any correspondence passed after it was published in August 1877, more than six months before Lord Derby drafted the quoted note to Peru. 1 McNair, *op. cit.*, 275 repeats Cobbett's assertion referring only to Pitt Cobbett, *op. cit.* note 291 above (5th ed.).

It seems likely that the supposed Peruvian concurrence in the British view was based on Pitt Cobbett's misreading of Hall or upon diplomatic correspondence never noticed by anybody else despite its obvious importance to the British legal position. In the circumstances, the asserted Peruvian concurrence must be viewed with some skepticism.

There were, in fact, many reasons why Peru might have wanted to end the *Huascar* correspondence with Great Britain in 1878. First, the British were clearly on the defensive in that correspondence and little could be achieved by extending it. The British had already agreed not to press any claims against Peru and Peru had no hope of collecting any money, or a politically embarrassing apology, from the Disraeli Government. Moreover, as noted by de Horsey, Peru was in a state of some unrest which a fruitless diplomatic dispute with the British could not have helped. And Peru was at the brink of a disastrous war with Chile (1879-1883) in which British interests were heavily on the Chilean side. See Herring, *A History of Latin America* (1955) 515. With that war hanging in the wings, this was not the time to further antagonize the British Government.

318. See text at notes 220-226 above.

319. Hansard, *op. cit.* note 311 above 787-788, 792.

320. See text at notes III-261 to III-269 above.

321. See *U.S. v. Klintonck*, cited note 16 above, and *U.S. v. John Furlong alias John Hobson*, 18 U.S. (5 Wheaton) 203 (1820), discussed above at notes III-81 sq. and III-97 sq.

322. See text at notes 312-313 above.

323. Cobbett, *op. cit.* notes 291 and 317 above, 288 (3rd ed.), 300 (4th ed.), 320 (6th ed.).

324. Cited note 173 above. See text at notes 171 sq. The Colombian interpretation of the case seems inconsistent with its words and context as analyzed above, merely skimming off the generalities about political societies being able also to be properly classifiable as "piratical," but not distinguishing the international legal sense of the word and the vernacular sense used by Parliament and analyzed by Lushington.

325. See note III-228 above. Although neither Colombia nor the United States is a party to the 1856 Declaration of Paris, its provision regarding blockades has been considered in all known sources to codify prior law that exists in custom and diplomatic correspondence independently of adherence to the Declaration.

326. 2 Moore, *Digest* 1094, Bayard to Becerra, letter dated 15 June 1885.

327. *Id.* 1089, letter Bayard to Becerra dated 24 April 1885. As analyzed in the text at notes III-255 sq., III-280 above, Bayard's assertion of fact is plainly wrong.

328. Presumably, the "lawfulness" of the taking was to be measured by international law, and presupposed a natural law of property rights merely administered by a flag state.

329. 2 Moore, *Digest* 1090, letter cited note 327 above. This position was maintained by the United States in later correspondence with Colombia in 1900 as well. *Id.*

330. This fundamental "positivism" has been seen at the bedrock of American legal policy since Marshall's victory over Story in *U.S. v. Wiltberger*, discussed at note III-73 above, regardless of the glosses of "naturalist" writers who preferred their own view of the relationship between morals and law to the view taken for reasons of policy by the political officers of government.

331. See text at note III-281 above, opinion by Wharton addressing the same Colombian incident of 1885.

332. An article drawing an analogy between this common conception of "piracy" in the nineteenth century and activity in current vernacular denominated "terrorism" is Rubin, *Terrorism and Piracy: A Legal View*, 3 *Terrorism: An International Journal* 117 (1979). As can be seen, I now believe I was wrong in failing to see how the analogy, compelling as it is, is too complete. The world community in practice refused to accept this third conception of "piracy" as anything other than a political rationale used more or less unsuccessfully by the British in applying British Imperial law to justify intervention in, or even conquest of, territory whose natural resources they wanted to bring into world commerce despite the objections of the political societies that were well established there. The British themselves, as has been seen, found other rationales for policing the seas that were more persuasive even to themselves than merely labeling all those who opposed them as "pirates."

333. The same arguments can be made with regard to "terrorism" in 1885. See International Law Association, Committee on International Terrorism, *Fourth Interim Report*, in International Law Association, *Report of the Sixtieth Conference Held at Montreal 1982* (1983) 349; Rubin, *Terrorism and the Laws of War*, 12(2-3) *Denver J. of Int'l L. and Pol.* 219 (1983).