THE LAW OF PIRACY

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DEDICATION

To Susanne, who put up with it all.

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FOREWORD

The study of International Law has been an important and integral part of the curriculum at the Naval War College since its founding in 1884. This, the sixty-third volume of the "Blue Book" series, continues a Naval War College tradition begun in 1901 of publishing scholarly treatises and articles that contribute to the development and understanding of International Law.

Professor Alfred P. Rubin of the Fletcher School of Law and Diplomacy of Tufts University, the author of this volume, has contributed a work of exceptional scholarship that will long be regarded as an authoritative reference material not only with respect to the law of piracy, but to the whole of international law. Professor Rubin's work is considered to be informative, comprehensive, and provocative.

The opinions expressed in this volume are those of the author and are not necessarily those of the United States Navy nor of the Naval War College.

Ronald J. Kurth
Rear Admiral, U.S. Navy
President, Naval War College

THE LAW OF PIRACY

by
Alfred P. Rubin

PREFACE

This book began many years ago, when, as a student at the University of Cambridge, looking into the legal rationalizations used by British leaders to justify using gunboats to secure the remote fringes of their commerce, I found that in the first three quarters of the 19th century in the Malay Peninsula it was common to refer to the bands headed by young nobles as "pirates." It is true that they robbed merchants, primarily Malay merchants, in the waters of the Archipelago and the rivers of the Peninsula. But it is also true that few of their depredations occurred on the high seas in the nineteenth century British conception of the term, i.e., further than three nautical miles from the nearest governed land; that the nobles had at least the kindly acquiescence of the Sultans accepted by the British and the Malays of the Peninsula as possessors of sovereign authority to grant privateering licenses; and that "pirate hunting" expeditions by the British occasionally hunted their prey ashore.

This use of the term "piracy" as a justification for military action seemed to me inconsistent with its use in courts of law, and, indeed, as my research progressed I found that there were cases in British courts in the Malay area arising out of some incidents in which the courts and the naval authorities disagreed as to what "piracy" meant. The results of this research were published as parts of two books whose principal focus was elsewhere, and an article included in the *Grotian Society Papers 1968*. Having completed my studies of the legal rationalizations for European imperial adventures in the Malay area, of which the "piracy"-suppressing justification was a significant but not dominating part, I laid aside that work for other things.

My appointment in 1981 as Charles H. Stockton Professor of International Law at the U.S. Naval War College, Newport, Rhode Island, gave me the opportunity to return to the subject of "piracy" and I have happily done so. It has been a fascinating legal challenge to disentangle the threads of ancient, renaissance and modern municipal and international law and politics, and to analyze how the current confusion regarding the law of "piracy" arose and is maintained. Among the very many works on various aspects of the subject there are scholarly analyses that seem to have been overwhelmed by the mass of less thoughtful writing and adversary briefs for definitions of "piracy" that would serve parochial political or legal ends

at the expense of legal integrity or objectivity. What seems to have happened is not a mere evolution of legal and political thought, but the use of a legal word to justify political action that is justifiable neither by the law nor by wise policy. In a few cases, the use of the word "piracy" to justify a quick "solution" through military action has even obscured the availability of sounder, more persuasive and better based legal rationales—to the cost of the political leaders who might have done better had they known more about the law. But that tale belongs to the text itself.

I must thank the administration and staff of the Naval War College at Newport, Rhode Island, for unfailing support, particularly the three Staff Judges Advocate, Dave Albrecht, Dennis Mandsager and Jim Brush, and the staff of the Naval War College Library. The administrators of The Fletcher School of Law & Diplomacy allowed me a sabbatical year at the Naval War College to conduct the research; they were very understanding of the continuing pulls on my time and energy. Finally, the staffs of the Widener, Langdell and International Legal Studies Libraries at Harvard University were most helpful when I had trouble finding obscure works that no other library in the world would have had at all.

Special acknowledgment must also be made for the help of Donald Lippincott, a student at The Fletcher School of Law & Diplomacy, whose knowledge of classical Greek was indispensible; Guive Mirfendereski, also a student at The Fletcher School, whose work on the history of the Persian Gulf was more than useful; Professor Martin Glassner of Southern Connecticut State College, whose eagle eye and strategic presence made it possible to keep up on some important recent developments; Professor Edward Gordon of Albany Law School and The Fletcher School of Law & Diplomacy, who referred me to an important article I had overlooked; Frank Uhlig, Jr., Publisher of the Naval War College Press, for finding maps and pictures and editorial help; Professor George Bunn, a successor to the Stockton Chair at the Naval War College, whose comments and suggestions, particularly regarding the organization of the first chapter, Daniel Webster's contributions to the American tradition and the final conclusions were most valuable and perceptive; and Robert Laske, Editor of the *Naval War College Review*, and his sterling associates from the Publications Division who did all those things necessary to bring this work from manuscript to printing. Several others have read parts of the book and given encouragement that helped me to get through the interminable middle stages. To all I am grateful.

Of course, all responsibility for errors of scholarship, as well as for misstatements, confusions and the difficulties of reading my infelicitous prose, is mine alone, alas.

Alfred P. Rubin

I

The Origins

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Greek and Roman Conception of "Piracy"

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Reorganization of the Renaissance

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

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

. . .

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

. . .

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

. . .

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

. . .

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Legal Order and Outlawry

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

English Municipal Law and Piracy in the Renaissance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Notes

1. A.C. Spearing, *Criticism and Medieval Poetry* (2nd ed. 1972) 7.
2. Raffles, Lady Sophia, *Memoir of the Life and Public Services of Sir Thomas Stamford Raffles*... (London 1830), printing what appears to be a selection of the original letters of her husband, at p. 45-46.
3. *Id.*, p. 48. The entire letter, beginning at p. 39, is worth reading, especially p. 45-46, 48, 77-82, for its eloquent appeal to the concept felt by Raffles to be embodied in the word "pirate" in order to justify political action, contrasting with its gingerly referral to the jurisdiction of the Malay Rajahs as the enforcement authority to be applied. He apparently felt that what the young nobles were doing was not "piracy" at international law, but should be a crime under the law of the Malay sultanates from which the "pirates" apparently derived their licenses to interfere with peaceful shipping. See below Chapter IV.
4. 2 Phillipson, *The International Law and Custom of Ancient Greece & Rome* (1911) 370.
5. i, 367; vi, 58; ix, 588; xii, 64.
6. xv, 385, 426; xvii, 425.
7. i, 5-7, 8.
8. 1 Homer, *The Iliad* (A.T. Murray, transl.) (LCL 1971) 30-31, 266-267, 424-425; 2 *id.* 458-459; 1 Homer, *The Odyssey* (A.T. Murray, transl.) (LCL 1960) 72-73, 320-321; 2 *id.* (1953) 102-103, 182-183; Thucydides, *The Peloponnesian War* (C.H. Smith, transl.) (LCL 1969) 8-9, 12-13.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

34. *Id.*, p. 175.

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

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

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

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

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

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

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

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

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

43. See below.

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

45. *Id.*, p. 381-383.

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

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

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

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

48. See note 19 above.

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

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

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

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

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

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

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

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

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

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

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

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

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

60. See below at note 120.

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

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

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

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

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

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

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

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

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

67. *Id.*,p. 749.

68. *Id.*,p. 728.

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

70. *Id.*, p. 870.

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

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

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

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

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

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

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

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

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

80. See below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

96. *Id.*, ch. iv.

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

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

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

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

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

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

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

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

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

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

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

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

108. See below, Chapter II.

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

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

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

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

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

114. *Id.*, p. 16.

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

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

117. See above note 57.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

136. 2 *BILC* 759.

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

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

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

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

141. 1 Marsden, *Documents* 2.

142. *Id.*, p. 7.

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

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

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

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

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

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

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

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

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

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

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

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

155. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The statute of 1529 said:

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

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

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

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

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

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

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

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

178. See text at note 86 above.

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

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

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

182. *Id.*, p. 217.

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

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

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

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

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

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

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

190. *Id.*, p. 252.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

201. *Id.*, p. 113:

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

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

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

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

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

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

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

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

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

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

II

The Evolution of the Concept of Piracy in England

English Law and International Law

It was noted above that three fundamentally different conceptions of "piracy" gained currency during the 16th century among statesmen and jurists. One, put forth by Grotius, involved attaching the label "pirate" to armed bands or individuals whose primary object was plunder regardless of place. Its legal result, derived from the ancient Roman law dealing with the extension of Roman criminal jurisdiction to cover the acts of foreign "*latrones*" or "*praedones*" within the Empire, including its seas, was suppression at the whim of the state and trial of those captured under the municipal law of the captors. Another, urged by Gentili, incorporated the same results, but, instead of flowing from facts more or less objectively determined, flowed from political decisions of the decision-makers in each society as to what labeling system would best suit their needs, and achieved the legal and political results they preferred as a result of their choice of labels. The third involved the incorporation of the word "pirate" into municipal law and in England involved the application of the word and whatever legal results were determined to flow from it as a matter of English municipal law by the civilians in Admiralty, the Common Law judges of the King's Bench, and, presumably, whatever was formally decided by the body with legislative authority outside of the complex legislative competence extended to judges in the guise of "discovering" the Common Law or Civil Law in English courts.

Where the Grotian and Gentili approaches either presumed the existence of a world state analogous to Rome, and thus saw no limit to municipal law territorial jurisdiction, or saw the world divided into separate sovereignties with "privateers" or even whole communities deriving their authority to act against strangers from a distribution of legal powers within the overall system, the Common Law judges in England thought municipal concepts of jurisdiction the essence of the situation and traced jurisdiction to the legal powers of the sovereign in England over his subjects and his territory. The English Admiralty judges thought of "piracy" as a word of art in English law that was useful in questions of property rights primarily; to dispose of the

claim to title that might be presented by a "privateer" licensed by a foreign sovereign in the case of goods recaptured by an English privateer claiming salvage from the original owner or claiming the full rights of property against an "owner" whose "rights" derived from foreign "privateers" or "pirates." The administrators of England thought of "piracy" as a word to cover mutinies and other shipboard violence within the jurisdiction of the administrator, the Admiral, whose perquisites of office included a share of the profits of litigation and whose relationship to royal favor could be used as a counterweight to the independent Common Law courts. The Common Law judges thought of "piracy" as a special Admiralty word whose precise meaning could be developed by civilians, but which bore some relationship to petty treason and shipboard authority. The Acts of 1535 and 1536 placed Common Law judges and both Common and Civil Law trained administrators on the tribunals that had thitherto been dominated by civilians. The result was a reconsideration of all the basic rules and concepts, worked out in a series of cases with major constitutional implications in England because involving the distribution of legal powers between the Crown and the Common Law career judges and, in the case of the actions of the East India Company and other chartered organizations, the struggle between the Crown and Parliament for control of the profits of overseas activities by English bodies corporate.

Among the first things to fall was the notion adopted by Coke and Hale that "piracy" was a kind of petty treason; it fell with a political struggle, but with little analysis of the underlying jurisdictional and definitional questions. To understand the shift of meaning occurring at the end of the 17th century in the context of the political pressures involved in maintaining the fruits of the Glorious Revolution of 1688 despite efforts both on land and sea by the deposed James II and his French ally, Louis XIV, it is necessary first to consider some of the evolution of thought by civil lawyers as the naturalism of Grotius and the positivism of Gentili began to affect their conceptions of national jurisdiction in an age of expanding foreign trade.

As English commerce expanded, it first became important to come to grips with the question of the legal classification best fitted to unrecognized or unpleasant states and rebels with real military power. Gentili's experience showed that the asserted freedom of statesmen and lawyers to attach such labels as suited their needs was in fact limited by reality and the needs of stable commerce, if stable commerce were considered a value to be protected by the law and reality was important to the state whose merchants engaged in it. The position was well stated by Sir Leoline Jenkins, Privy Councillor to King Charles II, in a letter to the King dated 11 February 1680, concerning title to a British ship taken by an Algerine warship and then wrecked on the coast of Ireland. The technical question was whether the Muslim members of the ship's company should be treated as pirates and hanged, or as honorable soldiers. There had been no declaration of war between England and Algiers

effective at the time. Jenkins, a civilian who had served with distinction as a judge in the Admiralty courts and was reputed one of the most influential jurists in England,[1] took an eclectic approach:

> As for the *Moors* and *Turks* that are so by birth, and were found on board . . . since the Government of Algiers is owned as well by several Treaties of Peace and Declarations of War, as by the Establishment of Trade, and even of Consuls and Residents among them by so many Princes and States, and particularly by your Majesty; they cannot . . . be proceeded against as Pirates . . . but are to have the Privileges of Enemies in an open War.[2]

His conclusion was thus based not only on convenience and policy as evidenced by consistent European practice and British consular practice, but also on an examination of what classification would best fit the facts more or less objectively determined. The policy arguments that might have been urged by an advocate like Gentili are not raised: There is no mention of the fact that Englishmen caught without license in Algiers or in English ships captured by Algerian raiders were enslaved at this time; and no policy argument based on the apprehension of reciprocal mistreatment or reprisals by Algiers against the English trading community there. Nor is there any doubt cast on the validity in England of a license or commission issued by the Dey; the question does not seem to have arisen.

Confirming this approach to the question of how to treat the Barbary states the great Dutch jurist of fifty years later, Cornelius Bynkershoek, used the same logic to come to the same conclusion:

> . . . I do not think that we can reasonably agree with Alberico Gentili and others who class as pirates the so-called Barbary peoples of Africa, and that captures made by them entail no change in property. The peoples of Algiers, Tripoli, Tunis and Salee are not pirates, but rather organized states, which have a fixed territory in which there is an established government, and with which, as with other nations, we are now at peace, now at war. Hence they seem to be entitled to the rights of independent states. The States-General [of the Netherlands], as well as other nations, have frequently made treaties with them . . . .[3]

As a practical matter, this resolution of the question of theory with regard to attaching the label "pirates" and its legal results facilitated the removal of the question from the policy arms of government in England to the courts. A more or less objective standard based on British (or Dutch) official behavior as a symbol of acquiescence and convenience, and on facts, was fixed in these opinions. Judges, whose training and constitutional place in municipal law made them conceive of their function as that of applying the law, given elsewhere, to facts presented as pertinent to established prescriptions of law and procedure, could determine who was a "pirate" and who a licensed "privateer" or commissioner of a Prince without the case by case referral to the Crown that Gentili's approach would have required. The standard was also much more coherent than the high policy decision that was proposed by Grotius, which involved some kind of determination as to the purpose of the

foundation of the society purporting to license raiders. Instead, it found the authority to license raiders in evidence of how the society in question was treated by England in other matters and, in default of English precedent, how that society was treated by other actors in the European state system. While this approach was still far from certain and allowed a substantial measure of subjectivity when dealing, for example, with rebels or non-European "states" whose relations to any European "state" were ambiguous or negligible in quantity, in practice the questions could be handled with substantial ease within the normal processes of English municipal law.

Commissions: Privateers as "Pirates"; Positivism Rampant and Naturalism Resurgent in the 1690s

In 1688 King James had been forced to abdicate the English throne and flee to France and then to Ireland. There he issued commissions to privateers to raid English shipping, regarding the new government of William of Orange and Mary, the eldest daughter of James, as usurpers. Eight of his privateers were caught and in about July 1692 the Lords of William and Mary's Privy Council resolved that they should be tried by an appropriate tribunal as "pirates." That November the Lords of the Admiralty ordered Dr. William Oldys, the King's Advocate of the Admiralty,[4] to proceed against them on that charge. Oldys refused on the ground that their acts as commissioners even of a deposed King did not constitute "piracy" as he understood the term. The conclusion of the civil lawyers whom Oldys consulted[5] agreed with this except for Dr. Littleton (about whom very little seems to be known other than that he succeeded Oldys as Admiralty Advocate at the conclusion of the episode now being recited) and Matthew Tindall.[6] On 20 May 1693, the following opinion was formally presented by the civilians of Doctors' Commons to the Admiralty Board on the question, "Whether Their Majesties' subjects serving under the late King James' commission ought not to be prosecuted as pyrats":

Tho. Pinfold: They are not in law pyrates, nor ought to be prosecuted as such, as I conceive.

Wm. Oldys: I am of the same opinion.

Matt. Tindall: None can grant commissions for private men of war but they that have summum imperium, or a power of making peace and war for some state or nation. That the late King James, by having justly lost his kingdom, and being in the dominion and power of another, has not only lost the power of making peace and war, but without his [?] consent has not the power or freedome to send to or receive or protect the persons of any that are sent to him with a publick character to treat about peace or war, and is reduced to the state and condition of a private person. For he that has no government, nor a right to any, and also [is] in the power

of another, cannot but be a private person, and has no right to grant commissions to disturb the trade and commerce of a nation (with whom too he has no war); and those taken serving under his commission are to be dealt with as if they had no commission, and being subjects of their Majesties, are incapable to receive any commission to fight against their fellow subjects, though granted by a just authority, and, in my opinion, may be by the law of nations prosecuted as pirates.

Rt. Walton: I am of the opinion that by the law of nations no persons who act in the prosecution of an open war, and against some particular enemies only, are to be esteemed pirates. A pirate being such an one as commits acts of hostility against all men without distinction, and without the solemnities of war . . . .

Wm. Oldys: This was agreed on by all the King's Councell, both common and civill, that in case their opinions were required, whether it were advisable that these prisoners should be prosecuted for treason or pyracy, their opinions were in the negative, thinking it no ways advisable, and desired me to intimate as much to this honorable Board.

F. Littleton: I am of the opinion that their Majesties' subjects taken fighting under the late King James, his commission, against others their Majesties' subjects upon the high seas may be prosecuted as pyrates.[7]

In September 1693, Dr. Oldys was summoned before the Cabinet Council composed of the Lords of the Admiralty, the Earls of Nottingham, Devonshire and Pembroke, and Sir John Trenchard.[8] Trenchard questioned Dr. Oldys about his opinion:

Dr. Oldish:[9] Pirates are common enemies to all mankind, having no legal authority for what they do; but they shew a commission signed J.R. [Jacobus Rex (James the King)] dated at the court of St. Germaine's, together with articles and instructions annexed, in the same form as privateers have, giving caution and security to bring prizes, and judgment into the Court of Admiralty, before Thomas Shadford, at Brest, or elsewhere: this does no way agree with piracy, or the character of a pirate, who is a robber, and has thereby lost his right in the law of nations.

Sec. Trenchard: But king James has lost his sovereignty, in that he has parted with his crown, and consequently with the power of granting such commissions.

Dr. Oldish: A king may be deposed of his crown, but cannot lose his right. So says Grotius, 'Jus regis penes ipsius manet, utcunque possessionem amiserit.' A king, therefore, in case he be deposed of his kingdom by the law, he has a right to war, and if so, he has all the ways and consequences of war, amongst the rest, pignorations and reprisals, which is a power of granting letters of mart [*sic*] and reprisal.

Sec. Trenchard: This may be law, in case where the king is deposed; but what if the king abdicates?

Dr. Oldish: If he did really abdicate, as did the emperor Charles the fifth, or the queen of Sweden, then he is no other than a private person, and cannot legally grant any commission. But whether a privateer, acting by commission granted him *de facto* by king James, not knowing that he had abdicated, whether such an error will excuse *a poena delicti*? For that a reputable power is equivalent to a real one in such a case.

Sec. Trenchard: To clear this, doctor, we must examine the circumstances of the case, and see if they be such as may occasion and induce a common error, whereby many may be deceived, as well as privateers.

Dr. Oldish: It is notorious to us, and all the world, that king James was once a lawful king, and acknowledged by us, and all the world, to be so; that when his army deserted him, he fled to his ally in France for aid; then he went into Ireland to recover his kingdoms, as his declaration sets forth; there he grants commissions: those who fought under those commissions, and were taken, were not used as thieves and robbers, but as prisoners of war; whereby his claim seemed to be allowed by his very enemies; and those persons who acted under him in Ireland were treated as enemies, not rogues, though they acted under no king but king James, and by his command; that upon their return to France, they repaired to king James, their king, and thought him as well impowered to grant commissions by sea as land, and upon receipt of commissions from him, came out 'animo hostili,' as privateers, 'non animo furandi,' as pirates: That a colourable authority remaining in king James, will excuse those who acted under him from being pirates, since the abdication was never published, nor so much as heard of in France; and since in piracy, which deserves 'ultimum supplicium,' if proved, all favourable allowance ought to be made, and a general acknowledgement of a false authority in another country (where the commissions were taken) will free them from a felonious intent in taking them, and consequently from piracy; for so it is, that king James is owned and reputed a king in France; and therefore in this case it is undoubted law, 'Communis error facit jus.'

Lord Devon: What if Tourville should grant such commissions to any Englishman, were they not pirates who acted under him?

Dr. Oldish: No, even the power of granting such commissions being excepted in his patent, yet by common intendment, as admiral, he can grant such commissions; and as it is not to be presumed, that private men should look into his patent, so neither ought they to suffer for not having seen it; it is sufficient for them, that he is reputed to have such power.

Lord Devon: What if monsieur Pompone, or any other minister of state, should grant such commissions?

Dr. Oldish: Why then it would not be good; for by common presumption, a secretary of state would not grant such commissions, that power being proper only to the admiral.

Sec. Trenchard, and Lord Faulkland, in the great heat: I—pray, doctor, let us deal more closely with you, for your reasons are such as amount to high treason. Pray, what do you think of the Abdication?

Dr. Oldish: That is an odious, ensnaring question; however it may be, I think of the abdication as you do; for since it is voted, it binds at least in England; but those gentlemen were in a foreign country, and knew nothing of it; and though king James be not king here, yet the colour of authority remaining, and common reputation of him as king there, excuses them, as I said before.

Sec. Trenchard: What say you of the pirates under Anthony, King of Portugal?

Dr. Oldish: As to the case of the Frenchmen, under Anthony, king of Portugal, the book says, '*Traciati sunt non quasi justi hostes, sed quasi pirati qui sub Antonio militant*;' and the difference of this case appears in the reason of it: For there the Spaniards never owned Anthony as king; here it is quite otherwise, for king James was really and truly a king, owned by us, and all the world.

Sir Thomas Pinfold being asked what he had to say, declared himself of the same opinion. Dr. Newton and Dr. Walker,[10] did not deliver their opinions, but desired time to consider of it. Dr. Newton said, it was against his conscience to have a hand in blood.

Dr. Littleton said, That king James now was a private person; we had no war with him, nor he with us; or if he designed to have any, *Aerarium non habet*, he is not in a capacity of making war, he can neither send nor receive ambassadors; and those who adhere to him, are not enemies, but rogues, and consequently those persons are not privateers, but pirates.

Dr. Tindall was of the same opinion with Dr. Littleton.

Dr. Oldish hereupon was removed from his place of king's advocate, and Dr. Littleton succeeded him, who tried the persons, and condemned them.[11]

Tindall, in an *Essay Concerning the Law of Nations* considered this entire episode from his own point of view and added some further details. According to Tindall, after Oldys had made his telling point that those who followed the deposed King James II on land in Ireland were treated as enemies, not as criminals, by the English victors,

> One of the Lords then demanded of him [i.e., Oldys], if any of their majesties' subjects, by virtue of a commission from the late king, should by force seize the goods of their fellow-subjects by land, whether that would excuse them from being guilty at least of robbery? If it would not from robbery, why should it more excuse them from piracy? To which he made no reply.[12]

A variant of the same point was addressed to Sir Thomas Pinfold and Oldys both:

> Whether it were not treason in their majesties' subjects, to accept a commission from the late king, to act in a hostile manner against their own nation? Which they both owned it was (and Sir Thomas Pinfold has since, as I am informed, given it under his hand, that they are traitors). The Lords further asked them, if the seizing the ships and goods of their majesties' subjects were treason, why they would not allow it to be piracy? Because piracy was nothing else but seizing the ships and goods by no commission; or what was all one, by a void or null one; and said, that there could be no commission to commit treason, but what must be so: To which they had nothing to reply.[13]

It thus seems clear that to the Lords of the Admiralty and Council, "piracy" had retained some of the "treason" implications of Coke's analysis of some 60 years before: A word that could be attached to "traitors." The legal effect in a high treason case, as distinct from petty treason under Coke's analysis, was to substitute a trial by special Commission under the statute of 1536[14] for the trial by the House of Lords or other less malleable court required by an accusation of high treason. This possibly cynical and extreme view of the utility of legal categories was apparently more than Tindall himself was willing to affirm, although he did not dispute it and represented Oldys and Pinfold standing mute before the Lords' argumentation. Tindall seems to have adopted entirely the position given by Sir Leoline Jenkins a generation earlier: That it was a matter of national discretion whose licenses to acknowledge, and that any taking not authorized by a license issued by an acknowledged "sovereign" could properly be called "piracy" at English law, and be visited with the legal procedures and punishment fitting that charge in England.

It does appear that by Tindall's and the Lords' analysis, only English people without a valid commission were precluded from asserting belligerent rights (as privateers) against other English people. The equation of "piracy" with "treason" rested on the notion that the accused criminal must be bound in loyalty to the government of England; that "piracy" could be the charge that flowed from a breach of that loyalty. Since foreigners not "denizens," habitually resident in England, are not so bound, the question was left open as to whether "piracy" could exist where there was no "treason," and the similar but easier question was posed, whether an Englishman could accept a commission from a foreign acknowledged sovereign to act against Englishmen.[15]

To the first of these questions, Tindall replied by reviewing the story of Dom Antonio and the Frenchmen with commissions from the French king who were executed as pirates by Spain.[16]

> As to the story of Antonio, the doctor [Oldys] is (to suppose no worse) abominally mistaken in the very foundation. . . . It was the royal navy of France (which is very improbable did act by any authority but that of the French king's) set out . . . 'regis sub auspiciis,' with which the Spanish fleet engaged, and had the good fortune, after a long and bloody fight, to route it, and took above five hundred prisoners, of which almost the fifth part were persons of quality, whom the Spanish admiral was resolved to sacrifice as pirates, because the French king, without declaring war, had sent them to the assistance

> of Antonio: Against which proceedings the officers of the Spanish fleet murmured, and represented to their admiral, that they were not pirates because they had the French king's commission; but that they chiefly insisted on, was the ill consequence it would be to themselves, who, if they fell into the hands of the French, must expect the same usage. As to the French king's assisting Antonio without declaring war, they supposed, that before the sea fight, the two crowns might be said to be in a state of war, by reason of frequent engagements they had in the Low Countries. . . .[17]

Tindall then compared the legal position of Antonio with that of James after his abdication, finding that while the fighting was still going on the Spaniards allowed Antonio the same privileges on land as the English allowed to James in Ireland despite both Spain and England denying the royal prerogatives of the respective claimants to authority. He then treated the Spanish condemnation of French officers as illustrative precedent:

> And if the Spaniards, by the law of nations, after Antonio was driven from his kingdom, might treat those that acted by his commission as pirates, why may not the English deal after the same manner with those that act by the late king's commission, since they look on him to be in the same condition as the Spaniards did on Antonio, without a kingdom, or right to one?[18]

From this careful phrasing, it seems that Tindall did not excuse the Spanish action insofar as it resulted in treating as pirates Frenchmen who held French commissions. Rather, he adopted the argument put forth by the Spanish fleet, that reasons of reciprocity and the factual existence of fighting in which either side's adherents might fall into the hands of the other compel a legal classification that gives protection to honorable soldiers fighting within the system; that that protection is lifted only when they remove themselves from the system by accepting a commission from a person not authorized under the system as perceived by the capturing authorities to give it.

In fact, the case of the eight Irish "pirates" was far more complex than appears from these discussions. It was alleged in the appeals petition of the eight to the House of Lords after they had been tried and condemned as "Pirates and Traitors" that they were all natives of Ireland and never left their allegiance to King James; that by the Statute of Treasons[19] conviction can only be had by judgment of the King in Parliament; that they had a right to jury trial. Two of the petitioners, John Golding and Thomas Jones, argued that their commissions had in fact been issued with the consent of King James by the King of France. All averred that they had never come into any allegiance with the English government of William and Mary, thus cannot have committed treason against it. In their view King James, although defeated in his rightful territories, was still a King and ally of King Louis XIV of France: "That king James and the king of France being confederated together in war against England, it matters not in the judgment of the law of nations, under which of the confederates commission the subjects of either act;" they should be treated as land soldiers were and might yet again be

treated in Ireland, as honorable prisoners of war.[20] This argument, implying sound policy reasons for applying the laws of war to "rebels" (or "loyalists," depending on whether Parliament or the king is regarded as the sovereign in England), shows how the Gentili-positivist approach could still be applied to reach the same practical result as the Grotius-naturalist arguments. Why one argument is more persuasive than another when both rest on the same jurisprudential premises is a matter of psychology and sociology more than logic, and it is not fruitful for present purposes to pursue this point further.[21]

It is difficult to unearth at this remove in time the reasons why the very broad authority under the statute of 1536 to try "treasons" as well as "piracies" was not conceived in 1693 to make it unnecessary to charge the eight privateers with "piracy." There seem to be two likely explanations. One, resting on a technical reading of the Statute of Treasons,[22] involves the possible desire of the prosecuting authorities and the Privy Council to avoid the distinctions between the person of the sovereign and his realm on the one side and the constitution of the state on the other as protected by the terms of the statute. Nobody pretended at that time that King James II and his supporters aimed to slaughter William of Orange or Queen Mary, the eldest daughter of James and the wife of William, who had been placed on the throne of England by actions in Parliament that were inconceivable in 1352, when the Statute of Treasons was enacted. The more likely explanation is that by the 1690s, about 150 years after the statute of 1536 had been enacted, the idea that its purpose had been to provide tribunals to consider cases peculiar to Admiralty jurisdiction, of which "high" treason was not one, had become rooted in common thought among lawyers. Coke, writing before 1634, had begun his chapter on matters covered by the statute of 1536 by referring only to "Piracy, Felonies, Robberies, Murders, and Confederacies committed in or upon the Sea, & c."[23] He then quoted the statute, including its word "Treason," but in his gloss upon its meaning concluded, in the light of the historical interpretation of the Statute of Treasons, and the clarifying statute 35 Henry VIII c.2 (1543),[24] that "it [treason] wanted trial, (as by the preamble of this statute is rehearsed) at the Common Law."[25] Moreover, Coke raised a rather subtle technical difficulty when he concluded that after the Statute of Treasons, the robbery of an Englishman by an Englishman, which might have been "petit Treason" before, warranting the offender to be "drawn and hanged," could no longer be considered treason.[26] Coke was innocent of an uncharacteristically anachronistic reference to "Piracy" as a discrete concept as of 1352 or earlier, when using the word to mean merely "robbery within the jurisdiction of the Admiralty," as was apparently the point of the statute of 1536, but he seems to have been alleging a gap between the jurisdiction of the Common Law courts and the commissioners in Admiralty under the statute of 1536 in the case of "piracies" committed by those Englishmen who, for some reason, perhaps involving the technicalities

of the laws of feudal allegiance, were not acting *contra ligeanciea suae debitum,* against their obligations of loyalty. These are questions that by 1693 it might well have seemed better to leave unraised.

On the other hand, the solution found in the case of the eight Irish commissioners was clearly unsatisfactory, and in 1695 a statute was passed bringing "treason" directly into the Common Law procedures similar to the procedures envisaged by the act of 1536.[27] A Commission sat at the Old Bailey in 1696 to try Captain Thomas Vaughan under this statute, for treason.[28] The facts are very like the facts in the case of the eight Irish commissioners, but Vaughan was not accused of "piracy"; only of "treason" under the Act of 1352. The statutes of 1536 and 1695 were taken to permit a treason trial before an Admiralty tribunal. The case was considered important and the judges of the tribunal included Sir Charles Hedges (judge of the high court of Admiralty), Lord Chief Justice Sir John Holt (King's Bench), Lord Chief Justice Sir George Treby (Common Pleas), Lord Chief Baron Edward Ward (Exchequer), Sir John Turton (Justice of King's Bench) and others. Dr. Oldys appears in a minor role as one of the court's advisers on Civil Law.

Being a treason trial, the principal point of contention was the nationality of the defendant, who asserted himself to have been born in the French island of "Martinico" and thus a Frenchman for purposes of receiving a privateer's commission from King Louis XIV. Other evidence, which the jury found more convincing, tended to establish that he was Irish, thus within the "ligeance" of the crown of England. Conflicts of allegiance, and the idea of dual nationality, which had not been strange to Coke in contemplating the relations of French subjects of King John to English subjects and to King John himself,[29] were not discussed. But the issue of whether a commissioner could be a "pirate" did. Vaughan was accused of sailing with French subjects during a war between France and England. It then appeared that his crew was in the main Dutch (thus, apparently, subjects of William III as Prince of Orange) not French. Lord Chief Justice Holt questioned Mr. Phipps, Vaughan's defense attorney:

> *L.C.J.* If Dutchmen turn rebels to the state, and take pay of the French king, they are under the French king's command, and so are his subjects. Will you make them pirates, when they act under the commission of a sovereign prince? They are then 'Subditi' to him, and so 'Inimici' to us.
>
> *Mr. Phipps.* It does not take away their allegiance to their lawful prince. They may go to the French king, and serve him; yet that does not transfer their allegiance from their lawful prince to the French king, and make them his subjects. But however, to make them subjects within this indictment, they must be 'Gallici Subditi;' so they must be Frenchmen as well as subjects.
>
> *L.C.J.* Acting by virtue of a commission from the French king, will excuse them from being pirates, though not from being traitors to their own state; but to all other princes and states against whom they do any acts of hostility, they are enemies: And their

> serving under the French king's commission, makes them his subjects as to all others but their own prince or state. . . .[30]

It would thus appear that having lost on all grounds in the case of the eight Irish commissioners, the point of view expressed by Dr. Oldys had won on all points three years later. Indeed, the victory went further, as the denomination of Lord Chief Justice Holt, a Common Law judge, to head the tribunal had a great impact on the forms of indictment, proof and other questions under the Act of 1695 where the civilians disagreed with his rulings; the arguments run throughout the report.[31] And such questions as might under Tindall's rationale have been determined by simple assertion of the Crown, as whether there was a "state of war" between France and England at the key times (there having been no declaration of war by either side), were submitted to the jury as questions of fact. Despite the fact that Vaughan was convicted and hanged, the natural law Grotius-Oldys approach was winning when the tribunal was dominated by Common Law judges instead of being a council of successful political figures.

The disagreement represented by the conflicting views of Tindall and Oldys as to the proper definition of "piracy" for purposes of a prosecution under the statute of 1536 which, it will be remembered, uses the words "treason," "felony" and "robbery," but not the word "piracy" in its operative provisions, was not satisfactorily resolved for the future by the precedent of the convictions as "pirates" of the eight Irish commissioners of King James or by the statute of 1695 and the trial of Thomas Vaughan. Doubts as to the English conception of "piracy" as a form of "high treason" were partially resolved in 1700 by statute:

> That if any of His Majesty's natural-born Subjects or Denizens of this Kingdom, shall commit any Piracy or Robbery, or any Act of Hostility, against others His Majesty's subjects upon the Sea, under colour of any Commission from any Person whatsoever, such Offender and Offenders, and every one of them, shall be deemed, adjudged, and taken to be Pirates, Felons and Robbers; . . . and suffer such Pains of Death, Loss of Lands, Goods and Chattels, as Pirates, Felons and Robbers upon the Seas ought to have and suffer.[32]

That the British municipal law of treason should not have been clarified, but the British municipal law of "piracy" should have been clarified (or expanded) in this way is probably due to the ease of trials by Commission using Admiralty judges but Common Law procedures as set up by the statute of 1536. At least the cases of the eight Irish commissioners and Vaughan point that way. It appears to have been a choice based on good political grounds to avoid a trial in the Common Law courts and to permit pejorative adjectives to be thrown at some of the licensees of foreign sovereigns who claimed a right to act in disregard of English law as interpreted by the highest political authorities in England. It is noteworthy, however, that merely taking a foreign commission was not by itself deemed to involve "piracy"; only the

use of that commission against English subjects and denizens—those who were parties in the conceptions of the time to the social contract between nationals and residents of England on the one hand, and the sovereign on the other who was obliged by that tie to protect them. It is also noteworthy that the statute of 1700 does not purport to make foreigners acting in excess of foreign commissions into "pirates" at English law; only Englishmen acting against other Englishmen were deprived of the protection of a foreign commission. Since jurisdiction to make laws that are binding on a state's own nationals wherever they may be was undoubted in the legislative organs of a state, and that principle of jurisdiction based on nationality has traces in the very earliest conceptions of social organization[33] and is sufficient to justify the English legislation, it would seem that the international law of piracy as posited by Grotius and Gentili, was irrelevant to the entire proceeding. What was involved was an English statute giving to an English tribunal subject-matter jurisdiction to try Englishmen for acts against other Englishmen. To the extent there is any implied reference in this statute to international law, it was merely as a technical limit the English were drawing to the legal capacity under international law of a foreign sovereign to license depredations against English shipping or, even more narrowly, to limit that sovereign's capacity to remove Englishmen and other residents of England from the obligations arising out of their being parties to the English social contract.

English Commissions: Positive Grace v. Natural Justice

Another question remained to be considered by the English courts. That was the degree to which captures beyond the authority of an otherwise valid English commission constituted "piracy." The property law implications of a "piratical" capture had been worked out by Caesar long before.[34] The new issue was whether action in excess of a commission was a crime, or a mere tort with civil (i.e., tort and property) but not criminal law consequences.

It might be well at this place to recapitulate the evolution of those commissions. There is clear evidence that by 1599 "piracy" was to become the crime at English municipal law of an English privateer even under valid English license who did not bring his capture in for English adjudication.[35] The means by which this was done were the insertion into every commission and bond beginning in 1602 of "an especiall article and clause to inhibite them [English privateers] from comminge either in the Streightes [of Gibraltar] or Barbarie, or for seeling anye of the goodes taken by them in anye other place then [*sic*] onlie within this realme of Englande."[36] And in 1643 the Admiral the Earl of Warwick instructed his fleet:

> [W]hen the shipp under your command shall apprehend any pyratts . . . you are to cause them to be kept in safe custody . . . [until] I may take course for the sending of the sayd shipps and goods into some of his Majestie's ports, according to instructions to mee given in that behalfe.[37]

There were, of course, other reasons for the licensing procedure than to assure payment of the Admiral's and the King's shares of belligerent captures and of "pirate" goods. In principle the regulations requiring a license from the King rest on the assumption that the King by withholding the license can forbid the activity for which the license is legally required. Thus, the assertion of a legal power to issue a license is not only a source of money directly, since payment can be demanded for the license itself, it is also an assertion of authority against the Parliament or other lawmaking body. And it is a means of asserting discipline over the general populace which, at times, might have been an end of itself.[38]

Now, since by 1700 it had been English practice for over a hundred years to require a special license of anybody seeking to sail against "pirates"; and even merchant venturers appear to have been required to get those licenses, the natural law approach taken by some jurists[39] concluding that there was no need of a license to hang "pirates" when it was as a practical matter not feasible to take them to a port in which they could be properly tried, seems inconsistent with the formal assertions and practices of the administrators of England. It is, of course, possible, that the proprietors of the great companies went along with the approaches of the administrators because it was politic to do so, and that it was policy, not law, that determined the entire English superstructure of practice built on an underlying natural law of self-defense and property rights so valued by the naturalist common lawyers. But it is probably fruitless to speculate as to the most congenial theoretical models useful to make sense out of complex events. It is possible to accept the positivist view as to the "grace" involved in permitting action against enemies or pirates without a license[40] as easily as it is possible to accept the naturalist view implying that it would have been unjust, and possibly illegal in the grand scheme of natural law, for the Crown and its judicial officers to withhold that "grace."

In any case, in the prosecution of John Quelch,[41] there is evidence that by 1704 the rumblings of natural law and "social contract" theory had become if not dominant at least significant in New England. Positivist theory emphasizes the legal power of a sovereign to grant a commission and withholds authority to act in any way from those individuals not able to find a license for their act in either the express grant of a license or in the implied grant of a license by action of Common Law or tradition; naturalist theory emphasizes the direct legal powers of individuals to protect their natural rights and views the sovereign, deriving his own legal powers from the consent of the governed under social contract theory, as either bound to grant the license (even retroactively) or unnecessary. Natural law jurists would allow individuals to protect their natural rights without any grant of legal authority from the political superstructure of society.

This jurisprudential distinction seems to be the bridge over which English municipal law as applied to "piracy" crossed into the realm of international law. A license from a sovereign might raise international law questions with regard to action against foreigners whose own sovereigns might seek to protect them, but where the "pirates" to be hunted under a license were nationals of the license-granting sovereign in ships of that sovereign or of no sovereign on the high sea, no international law issues are presented. And where the "pirates" are foreigners or anybody in a foreign sovereign's vessel or in foreign sovereign's territory, the questions raised by the "pirate hunter" pursuing his license beyond the reach of his own sovereign's jurisdiction to enforce his own law regarding "piracy" are resolved by the normal means of pursuing the domestic remedies of the licensing sovereign (normally through prize court *in rem* actions to recover property improperly captured) or by war, at that time normally pursued through private licenses granted to aggrieved individuals by their offended sovereigns.[42] An outline of the system seen through the naturalist eyes of Henry Marten (Judge of Admiralty, 1617-1671) in 1626 was prepared during a technical state of peace between England and Spain when nonetheless letters of marque and reprisal had been issued in response to alleged Spanish captures from English merchants:

> [T]his commission is not of grace, but of justice; for it is intended that none have theis [these] Letters of Reprisall but such as have received losse & damage & wronges; to whome his Majestie, beeing not able otherwise to minister right and redresse of the wronges and losses (a duty incident to his royall function), doth in this kind and by his meanes, affoord justice and due satisfaction .... Were there a solemn warr between us and the King of Spayn, it is notorious that whatsoever wheresoever any subject could gett from the King of Spayne's subjectes should bee his own *jure belli*, and not the Kings . . . Now, because there is no such common or solemn warr, but a reprisall warr, this privilege or benefitt is restrayned to them who have such commissions of reprisall . . . . [43]

The same notion expressed a generation later by the positivist Jenkins will illustrate the distinctions drawn here:

> [P]iracy at sea is made up of the same ingredients as robbery on land; for it is piracy to assault a ship, carry away a ship or goods out of a ship, unless it be in necessity (in which case payment must be made and the victim able to spare the things taken).[44] Also a man is excused if he takes a ship or goods by a legall commission in time of war or by reprisalls; but otherwise he shall be esteemed a pirate . . . . [45]

Where Jenkins's general language would seem to label as "pirate" an unlicensed foreigner acting wholly outside of England and attacking ships only of third countries, Marten's logic applied to the same case would seem to excuse the foreigner on the basis of natural justice if his sovereign had arbitrarily refused to issue the necessary commission. But since neither Marten nor Jenkins was focusing on the case of foreigners, it would be improper to read specific applications to foreigners into their generalities. It might be noted in passing that this excerpt from Jenkins appears to be the first

historically in which the notion appears that to be " piracy" the taking must be either from a second ship, or the ship itself must be taken from its rightful possessors; thus, that "piracy" might may not be quite the same as "robbery within the jurisdiction of the Admiral's courts" (which would include a forcible taking wholly within a single English vessel), but must involve some element of foreign jurisdiction or, more precisely, some gap in the normal jurisdictional rules applicable to English legal prescriptions. To the extent that his approach would find it to be "piracy" if an Englishman attacked a second English vessel at sea, which was, of course, precisely the case with regard to James II's privateers, the border between international law and municipal law would seem to be very vague indeed. As noted above, the English handling of those cases involved the use of the municipal law regarding "piracy" and the utter rejection by the Lords of the Admiralty and Privy Council of the notion that international law or Civil Law might stand in their way. Presumably, Jenkins would have denied that the language quoted here from 1680 was intended to apply to such a case, but only to the case of unlicensed Englishmen attacking a foreign vessel or unlicensed foreigners attacking an English vessel; that in other cases either English municipal law applied without reference to any international complications, or, if English law were not applicable because all actors and victims were foreign, that it was not of English concern and the international law implications, if any, should be worked out in diplomatic correspondence and not by the English courts. Marten, on the other hand, would appear to have adopted an approach that would make the underlying "justice" of the attacker's case a legal question for whatever tribunal was hearing it, and thus to bring the international legal order's concepts of "justice" into play even in a municipal law trial.

The question of whether a foreign license had to be proved in an English court did not involve the *droits of Admiralty*, the Crown's share in any privateer's booty, nor did it involve the extent of the Crown's or Parliament's legal power to control the actions of Englishmen abroad. Thus, the political need for strict form was much less. The general coalescence of state authority over the acts of individuals was nonetheless important to the emerging commercial order. The issue of greatest importance to the new mercantile classes was that goods and vessels taken by a privateer be submitted to a tribunal for an *in rem* proceeding at which the owner could present his case, if for no other purpose than to satisfy his insurance company that the goods had in fact been taken under conditions covered by the insurance contract.[46] The English assertions of the importance of a valid commission were thus never applied with strictness to foreigners, and even as applied to the likes of Captain William Kidd (to be discussed below) appear to have been exaggerated. The situation was more or less definitively summarized in 1729 when a Majorcan Spaniard without a commission seized a British vessel as

part of the war between Great Britain and Spain. The King's Advocate was asked for an opinion as to whether the privateer without commission could properly be treated in England as a "pyrat." George Paul rendered an opinion in the negative:

> That by the Laws of Nations (strictly considered) commanders of uncommissioned ships have no power or authority to take or seize the Vessels or Goods of a State in War, with their Sovereign, but such capture has never been deemed piracy, provided the ship taken, has been carried by the Captor, without fraud or delay, into the first proper port, belonging to his Prince, and there delivered without embezelment, to the officers of Justice, to be proceeded against as enemys goods; such ships and Goods are always rendered in Great Britain as the perquisites of the Admiralty, without any certain [?] [*sic*] profit or advantage to the seizor.[47]

"A Pyrat," according to Dr. Paul, is "a Sea Thief" only. He suggested that the Spaniard be detained until it could be determined whether he delivered the captured goods and vessel to a proper port for legal condemnation.

Animo Furandi and Hostes Humani Generis

The dispute between Tindall and Oldys had other major implications for the public international law of piracy which were not resolved by the statute of 1700 bringing some "rebels" into the procedures applicable to "pirates" as a matter of English municipal law. The civilians led by Oldys had given two other distinct reasons than valid commissions why Vaughan and the other commissioners should not have been treated as "pirates," and those reasons stand regardless of the perceived invalidity of King James's commissions. They were (1) that it is an essential element of the English municipal law "crime" of "piracy" that the accused be acting for private motives ("*animo furandi*") and not as part of a struggle for political power; and (2) that the international law label by Coke's time was considered to require that the accused be acting against all lucrative targets—that he handle himself as "*hostis humani generis*"—and not the vessels of one flag or a narrowly prescribed group of allied flags alone. The first is not entirely incorporated into the concept of acting under a license since licenses, letters of marque and reprisal, had been considered necessary at English municipal law to authorize English takings of foreign goods or vessels from at least the 14th century, and that requirement had existed wholly independently of any motive requirement from the earliest records.[48] The idea that "*animo furandi*" was an essential element of the "crime" of "piracy" appears instead to derive from the English Common Law relating to "robbery."[49] If that is correct, then the requirement of predatory intent, taking for private gain as distinct from a struggle for public power, would be a result of the use of the word "piracy" in the nonoperative parts of the statute of 1536, and the growing identification of that word with the private acts, "robberies," which were the real subject matter of the statute. Whether the statute of 1536 itself intended this result is

doubtful. It may be remembered that the commission of 1511, by which Henry VIII authorized John Hopton to clear the area near English ports of "*praedones, pirates, exules, et bannitos*"[50] did not distinguish between those with private motives and those "exiles and outlaws" whose depredations might have been for public political purposes in France or elsewhere. It might also be remembered that until about 100 years after the statute of 1536 there was a serious legal question as to whether the takings by commissioners of the Barbary states' rulers should properly be considered to be "piracy"; the public purpose of those takings, as seen from the point of view of the Barbary states and in light of the British privateering practices of this time continuing until the 19th century, cannot be seriously questioned. Goods taken by the Barbary commissioners were openly sold and the relationship of the fisc of those states to the practices of the commissioners cannot be doubted.

The evolution of the phrase "*hostes humani generis*" is also important to an understanding of the conception of "piracy" in public international law at the end of the 17th century. The phrase first appears printed in England in 1644[51] reflecting usage no later than 1634 and in a form that seems to imply still earlier origins. The conception appears in Cicero,[52] but in a narrowly restricted context relating to the politically significant communities of the Eastern Mediterranean of Cicero's time and earlier who pursued a course of behavior similar to that of the Vikings of about 800 years later.[53] The evolution of this classical conception into a sense of outlawry was discussed above.[54] The idea apparently was that the laws of war, which even in classical days were "international" in the sense that gods who were not subordinate one to another were fighting through earthly representatives as equals under an overarching world order, were applicable to "*hostes*" in "*bello*," enemies in war. "*Pirata*" were "*hostes*" in a permanent belligerent relationship to all communities, because they did not declare "war" before their attacks, and attacked all with whom they were not in treaty relationships or who were too strong to beat. This legal and practical situation had its impact on the law of property, particularly the law regarding property changes as a result of war, postliminium. In that single area, some analogy was drawn, apparently at least in part reflecting a pejorative view of those who interfered unpredictably with peaceful commerce as the Roman Empire consolidated its economic and political hold on the Eastern Mediterranean, between "*pirata*" on the one hand, and criminals at Roman law, "*praedones*" and "*latrones*," on the other. Now, by the early 17th century in England the same concept was sought to be applied by analogy to the Western Mediterranean communities of Algiers, Tunis, Salee and Tripoli, the Barbary states. As the legal results of attaching the label "piracy" were conceived to be broader and broader, apparently to some publicists involving outlawry of the "pirates" for all purposes, the degree of political organization and economic importance of the Barbary states made it advisable to withhold the word (and thus its legal

results) from those politically stable and functioning communities. At the same time, the word "pirates" had begun to be attached to all who interfered without the backing of a substantial political and legal community in seaborne commerce. Thus, it seems that the word shifted its meaning from raiders with a substantial political organization in perpetual "war" with their neighbors, to common robbers at English municipal law. The phrase "*hostes humani generis*" apparently survived from the old concept, and was applied to the new, without thought as to the real meaning of the word "*hostes*" in Latin, and its legal consequences in public international law. Ironically, it was applied to distinguish rebels fighting without a declaration against those who considered themselves the legitimate government, from mere robbers and outlaws within the jurisdiction of the English Admiralty tribunals. Yet it was the first, the rebels, who were claiming the privileges of "*hostes in bello*," enemies in war, and whose situation in fact bore some analogy to the concept of "pirates" in classical usage, while it was the latter, the robbers, who would have been called not "*pirata*" but "*praedones*" or "*latrones*" by Roman jurists and who were not "*hostes*" at all, but simply criminals by the rules applied in English tribunals. And it was the desire to heap contempt on rebels that they were labeled "pirates" and "*hostes humani generis*" by Tindall and those accepting his definitions by the end of the 17th century, while from those labels were drawn the legal results that they never had in classical days: Outlawry.

But Robert Walton in 1693 had argued that the phase "*hostes humani generis*" was not a mere description or a technical phrase.[55] He seems to have drawn from it the idea that permanent and general predation was an essential element of the accusation of "piracy"; that the accused "pirate," to deserve the word, must have robbed the merchants of all nations without discrimination by flag. It is tempting to read large conclusions from Walton's short comment; it can certainly be suspected that Walton was well educated in the classics and was repeating the classical use of the word, making that its meaning in 1693 as a matter of public international law. If so, his conception seems to have been anachronistic. Did he mean for English tribunals set up under the statute of 1536 to try contemporary Vikings, such as Barbary states corsairs and Malayan nobles, for "piracy"? Or did he merely mean that in his view the word should not be attached to rebels or anybody else for whom the application of English municipal law relating to robbery at sea was not appropriate for other reasons?

One paradoxical conclusion seems inescapable: The phrase, "*hostes humani generis*," the one phrase that all writers seem to agree should fit somehow in any definition or description of "piracy," is the one phrase impliedly linking the 17th century conception of "piracy" to classical writings, and in no way fits the facts or the legal conclusions drawn by 17th century policy makers or tribunals from those facts.

The question was not firmly resolved as to whether it was proper to apply to rebels the English municipal law procedures created to handle "robbery" within the jurisdiction of English Admiralty. It apparently disturbed at least some jurists removed from the immediacy of politics to apply those procedures and words (and ultimate punishments) to people whose true transgressions were better described as treason or mutiny, crimes under English municipal law that might even be within the jurisdiction of the Admiralty tribunals in some cases, but which were not apparently considered to be among the "petty treasons" or "felonyes" covered by the statute of 1536. Disagreement also apparently remained with regard to the importance of a motive of private gain (*animo furandi*) as an essential element of the crime. And the phrase "*hostes humani generis*" appears to have remained in the minds of some a key to withholding the label "piracy" and its legal results from those who attacked the property of one or two nations only quite apart from the question of public authority for those attacks.

Other serious questions remained as to the precise definition of "piracy" at its least controversial level: The case of the private-gain motivated, all-prey attacking, unlicensed Englishman. The simplest case, Rex v. Dawson (1696), the one most frequently quoted for its charge to a grand jury defining "piracy," is variously cited.[56] The charge was given by Sir Charles Hedges, judge of the high court of Admiralty. The tribunal was composed of the same eminent judges sitting in the Thomas Vaughan case,[57] which in fact was tried immediately after the Dawson case on the same day, 31 October 1696; Vaughan and two others ("J. Murphey" and "Tim Brenain"; they were not tried with Vaughan) were arraigned formally while the Grand Jury was hearing evidence after the charge by Judge Hedges quoted below.[58] The reason for the extraordinary galaxy of legal talent in Dawson's case lay apparently not in the importance of the defendants, or because any particularly knotty legal issues, like the relationship of "piracy" to "treason," were involved in the sordid tale, but the fact that at an earlier trial of the same defendants under the direction of Lord Chief Justice Sir John Holt, "the jury, contrary to the expectation of the court, brought in all the prisoners Not Guilty"! This new presentment was for other piracies, according to the report.[59] The key portion of the Charge follows:

> Now piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty. If any man be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy. If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel or furniture, with a felonious intention, in any place where the lord Admiral hath, or pretends to have jurisdiction, this is also robbery and piracy. The intention will, in these cases, appear by considering the end for which the fact was committed; and the end will be known, if the evidence shall shew you what hath been done.[60]

The breadth of the charge is apparent; presumably it has been so often cited because so broad. Under this charge, it would seem that violently taking another's goods all within a single vessel is "piracy," as is also "mutiny." It is not necessary to show the "*animo furandi*" by any evidence other than the taking itself; the "end" can be inferred from the facts surrounding the taking but an intention to "take" would seem to have been all that was needed to constitute "piracy."

Jurisdiction and Legal Interest

Naturalists v. Positivists (Again): Molloy v. Jenkins. Many questions remained on the fringes which assumed great importance to the evolving concept of "piracy" in Europe and its application to a rapidly expanding world community based on energetic trade. These questions resolved themselves into two basic ones: (1) What was the jurisdictional basis for English prescriptions over the acts of foreigners outside of the territorial jurisdiction of English courts; i.e., did English Admiralty jurisdiction extend to all "piracies," no matter where committed or by whom? and (2) Was there any legal authority left over, outside the court process, by which English commissioners could suppress without bringing to an English tribunal the acts of foreigners or Englishmen abroad that interfered with property rights and trade; i.e., was there to be anything left of the public international law of "piracy," or was the concept to be restricted to municipal law henceforth?

In his eloquent paean on the virtues of free trade and the evils of "piracy" in 1677, Charles Molloy set out his preferred answers. The jurisdiction of the tribunals established under the authority of the Act of 1536[61] can be exercised against any Englishman, apparently on the basis of his nationality alone, who commits "Piracy, be it upon the Subject of any Prince or Republique in Amity with the Crown of *England*," and apparently without regard to place so long as it be within the jurisdiction of the English "Admiral" as established by English precedents.[62] Foreigners could also be subjected to the same process, but only if there were some basis for English legal interest in their actions, such as the nationality of their victim being English[63] or if both the victim and the accused "pirate" are physically present in England and the matter has not already been clarified in the victim's own country, and the forms for personal accusations are used.[64] An additional basis for jurisdiction over the acts of foreigners was conceived to lie in the English claim to territorial jurisdiction over large parts of the seas:

> Piracy committed by the Subjects of the *French* King, or of any other Prince or Republique, in Amity with the Crown of *England* upon the *British* Seas, are punishable properly by the Crown of *England* only, for the Kings of the same have *istud regimen dominium exclusive*, of the Kings of France, and all other Princes and States whatsoever.[65]

The British Seas at this time were considered to extend "by long custom and usage" right up to the coasts of the Netherlands and France.[66] Obviously, the conception supported by Molloy was not of "universal" jurisdiction over the acts of foreigners abroad, but of jurisdiction in the normal English conception of the reach of national sovereignty. That included jurisdiction based on the nationality of the accused, on the territorial sovereignty over the place in which the event occurred (not the far reaches of the Admiral's jurisdiction in English ships wherever they might be, but only within the British seas), the nationality of the victim,[67] and in a special procedure allowing a criminal-like action to be brought on private initiative but not to enforce the "King's Peace"—and then only in default of opportunity for the victim's own sovereign to adjudicate the matter.

As to incidents "on the *Ocean*," i.e., beyond the reach of English jurisdiction as normally applied, Molloy considered that there was an almost unlimited scope for self-help:

> If Piracy be committed on the *Ocean*, and the Pirats in the attempt there happen to be overcome, the Captors are not obliged to bring them to any Port, but may expose them immediately to punishment, by hanging them up at the main Yard end before a departure; for the old natural liberty remains in places where are no judgments.[68]

> ... So likewise, if a Ship shall be assaulted by Pirats, and in the attempt the Pirats shall be overcome, if the Captors bring them to the next Port, and the Judge openly rejects the Tryal, or the Captors cannot wait for the Judge without certain peril and loss, Justice may be done upon them by the Law of Nature, and the same may be there executed by the Captors.[69]

A somewhat different view of the English law was taken by Sir Leoline Jenkins. Under his rationale for allowing private justice to be meted out to "pirates" he appears to have considered the Admiral's jurisdiction under English law to extend everywhere on the seas as if territorially based. But instead of requiring accused "pirates" to be brought in for adjudication, or restricting private punishment to cases where adjudication is denied by a foreign judge or impracticable for other reasons, and instead of relying on an underlying law of nature to authorize private punishment, he construed the English law to commission everybody a law officer:

> There are some Sorts of *Felonies* and *Offences*, which cannot be committed anywhere else but upon the Sea, within the Jurisdiction of the Admiralty ... the chiefest in this Kind is *Piracy*.

> You are therefore to enquire of all *Pirates* and *Sea-rovers*, they are in the Eye of the Law *Hostes humani generis*, Enemies not of one Nation ... only, but of all Mankind. They are outlawed, as I may say, by the Laws of all Nations; that is, out of the Protection of all Princes and of all Laws whatsoever. Every Body is commissioned, and is to be armed against them, as against Rebels and Traytors, to subdue and to root them out.[70]

Some time later[71] Jenkins expanded on this theory to lay the ground for an extension of English Admiralty jurisdiction to what later became "universal" jurisdiction over "piracy:"

> Every *Englishman* knows, that his Majesty hath an undoubted Empire and Sovereignty in the Seas that environ these his Kingdoms . . . .
>
> But besides these four seas, which are the peculiar Care, and as it were, part of the Domaine of the Crown of *England*, his Majesty hath a Concern and Authority (in Right of his *Imperial* Crown) to preserve the publick Peace, and to maintain the Freedom and Security of Navigation all the World over: So that not the utmost Bound of the *Atlantick* Ocean, not any Corner of the *Mediterranean*, nor any Part in the *South* or other Seas, but that if the Peace of GOD and the King be violated upon any of his Subjects, or upon his Allies or their Subjects, and the Offender be afterwards brought up or laid hold on in any of this Majesty's Ports, such Breach of the Peace is to be enquired of, and tryed . . . in such Country, Liberty, or Place, as his Majesty shall please to direct. So long an Arm hath GOD, by the Laws, given to his Viceregent the King, and so odious are the Crimes of *Piracy*, Bloodshed, Robbery, and other Violences upon the Sea, that Justice observes and reaches the Malefactors, even in the remotest Corners of the World . . . .
>
> This Power and Jurisdiction which his Majesty hath at Sea in those remoter Parts of the World, is but in concurrence with all other Soveraign Princes that have Ships and Subjects at Sea.[72]

This conception, that the territorial extent of the Admiral's jurisdiction *in English vessels* could become the basis for jurisdiction over foreigners *not* in English vessels whose acts do not directly affect English vessels, subjects or goods, although reserving to all other sovereigns the equivalent jurisdiction over all accused "pirates" (including, presumably, Englishmen committing their "piracies" from English vessels against either other Englishmen or third country nationals) seems rather much.

The problem of putting limits to the implications of Jenkins's position as a judge in Admiralty supporting the widest possible English jurisdiction arose when the practical position was reversed and Scots subjects of King Charles II were sought to be tried as "pirates" in the Netherlands in 1675. They had held licenses from England, which appear to have been exceeded; the question was whether the foreign court had jurisdiction to examine into the validity of those licenses and their legal extent. Jenkins, no longer a judge but deeply involved as a trusted Royal adviser, was asked for his legal opinion by Sir Joseph Williamson, the Secretary of State under King Charles II at the time charged with principal political responsibility for Anglo-Dutch relations.[73] The legal opinion, dated from Nimeguen on 3 April 1675, caught Jenkins on the horns of a dilemma, trying to reconcile his expansive view of English jurisdiction with his fundamental positivism by which the consent of other states affected must be construed from diplomatic correspondence, treaty or practice before the English jurisdiction can be exercised. He began by affirming his basic positivism, suggesting that the disagreement between England and the Netherlands about jurisdiction over the Scots privateers,

> will never be decided; because there is no third Power that can give a Law that shall be decisive or binding between two independent Princes, unless themselves shall please to do it (which seldom happens) and then cannot be extended beyond the Cases expressed by that Treaty.[74]

He then drew an analogy between this case and another in which a French merchantman had been tried in an English Admiralty court and although the master of the vessel had successfully escaped, his ship itself and the goods on board were confiscated as "pirate" goods, and a French formal objection rejected.

> [T]he King and his Council were pleased to adjudge, he was sufficiently founded in Point of Jurisdiction, to confiscate that Ship and Goods and to Try capitally the Person himself, had he been in hold; the Matter of Renvoy [reference to foreign, in this case French, law] being a Thing quite disused among Princes; and as every Man, by the Usage of our *European* [*sic*] Nations, is justiciable in the Place where the Crime is committed; so are Pyrates, being reputed out of the Protection of all Laws and Privileges, and to be tried in what Ports soever they are taken.[75]

This logic, asserting that the law of the place of the crime determines jurisdiction but that because "Pyrates" are not protected by jurisdictional limits fixed by European practice among sovereigns, they can be tried in whatever port they are taken, seems insupportable; the jurisdictional quarrel was not between the English and the "pirate," but between the English and the French sovereigns. Implicit is the denial of the exclusiveness of French jurisdiction with regard to events occurring on board a French ship, and there is no explicit reference to English victims or general English jurisdiction on the high sea to substantiate the conclusion. Instead, it treats jurisdiction as an assertion of sovereignty to be made on any territorial linkage between the accused and the "sovereign;" if nothing else, the place of arrest, which seems a minimal link that would exist in any case in which a criminal trial could be contemplated as a practical matter. It appears to reach that conclusion by supposing there to be a lacuna in the normal jurisdictional rules in the case of accused "Pyrates," cutting them off from the protection of their own sovereigns even before any act of "piracy" has been proved in a court. Since the jurisdiction seems unlimited, resting on the mere accusation of "piracy," it amounts to making port calls by any vessel in a port ruled by a country other than the country of the vessel itself, a very dangerous business. The risks were probably increased by the notion that, as in the case recited by Jenkins, the ship and goods once denominated "pirate goods" were subject to total confiscation by the court itself.

But under this approach, it would have seemed that the Scots were properly tried by the Dutch authorities, and that is the opposite conclusion to the one Jenkins reached. The basis for distinguishing the two cases was to downplay the nationality link evidenced by the flag of the "pirate" vessel as a basis for interposition by the sovereign to protect his subjects, and to raise

the license, "Commission," issued by the foreign sovereign to a position of prime importance:

> But as the Law distinguishes between a Pirate who is a Highwayman, and sets up for Robbing, either having no Commission at all, or else hath two or three, and a lawful Man of War that exceeds his Commission [including, apparently, a privateer; the case of the Scots privateers would not have been covered if Jenkins had intended his language to draw a distinction between privateering and naval activity]; so I think, Sir, you had Right to interpose for these *Scots* . . .; for tho' the Crimes were great and notorious, yet the Proceedings whereby they were laid open and proved to be such, being void and null, if the Judges did (as I am of Opinion they did) exceed the Bounds of their Power, it may be truly said, the Crimes are but *pretendu* [supposed], being the Proofs made of them are not *sufficient* in Law.[76]

In the rest of the opinion, Jenkins finds two other arguments for English jurisdiction to the exclusion of the Dutch. First, that a treaty between England and the Netherlands, by not mentioning criminal trials in the article dealing with reparations for damages left nationality as the major jurisdictional link;[77] and second, that all ships in public service, whether naval, privateer, or impressed "out of the Thames," are to some degree the arms of the King, that taking them is "taking the King's Weapons out of their [the property owners', the Scots'] Hands *pro tanto*," and thus that proper recourse for those unjustly injured by the operation of those vessels is appeal to the King, not the exercise of foreign jurisdiction over them.[78]

The treaty argument seems to depend on matters of interpretation with which the Dutch officials disagreed and which seem in other ways weak.[79] The King's Weapons argument would seem to apply to all vessels of English flag, as at least potentially the King's weapons because subject to English law which could order them at any moment into the King's service, thus to reverse the earlier argument distinguishing a French flag vessel sought to be protected diplomatically by France, and a French privateer that would be hypothetically the least French vessel that could legally be excluded from English jurisdiction by French interposition. The only thread that seems to run through the argument by Jenkins is that England wins all the time. It may thus be supposed to be an adversary's brief for the position most favorable to England, but its persuasiveness as an incisive analysis of the international law governing jurisdiction in cases of supposed "piracy" seems small.

The differences between Molloy and Jenkins, while appearing technical and simply two different ways of approaching a single reality with no practical implications, are really very significant indeed. Two quite different conceptions of the law applicable to "piracy" are involved; conceptions which reappear time and again in English and American courts and which account, in part, for the inconsistencies in later decisions. From Molloy's point of view, there is a "natural law" forbidding any person to deprive another of life or property without a higher motive supported by reason or the historical evolution of the overall system. Life and property being the

natural right of all, the taking of the life or property of another cannot be consistent with natural law unless some other natural right, superior to the rights of life or property of the victim, is involved. Such higher rights might exist in the law that authorizes each person to defend himself and his property even if it means depriving another—certainly if that other is the aggressor seeking to achieve a taking not justifiable on some equivalent basis. It is possible to speculate further as to Molloy's unexpressed thoughts, for example, to wonder if the protection of the property of another would justify the taking of the life of an innocent bystander. But such speculation leads to endless complications and is best left to the courts that find Molloy's basic attitudes appealing.

Jenkins, as a judge dealing in Common Law procedures as applied in Admiralty jurisdiction to criminal cases, and as a "political" Privy Counsellor to King Charles II, opposed Molloy's fundamental natural law approach with an emphasis on commissions and legal authority. From this point of view, there is no international law of "piracy"; only a municipal law authorizing its subjects to act against some people which that municipal law designates "pirates" on whatever basis it chooses. The limits to this approach seem analogous to the limits that reality and politics fixed on the approach taken by Gentili from the point of view of an international law expert, and it seems fair to label both "positivist" jurists. They both trace the legality of action to authorization by a state, which is conceived as exercising complete discretion on the basis of political factors to grant or withhold the legal labels or authorizations. The authorization determines the legality of action under the system that grants or withholds authorization; there is no question of morality, reason or motive on the part of either the "pirate" or the "commissioner" apprehending him.

There are so many implications to this split in fundamental orientation that a working out of the major ones is best left to works on jurisprudence. Only a few can be mentioned here. For present purposes, perhaps the most important is the utility of the Grotius (for that is where it first appears applied to the law of "piracy" as known today)-Molloy-natural law approach to Common Law and Admiralty tribunals. In the absence of a formal expression of public policy in a writing like a statute or treaty, a tribunal must be guided by reason in the light of higher principle, and the judges must be aware that their capacity to function as legislators, attaching legal labels and results for the sake of national interest, is severely limited by the structure of the forum and their own training and experience. Judges, bound by rules of evidence, and concepts of both substantive and procedural fairness to those accused of "crimes," cannot impose what they would like the law to be; they are bound by tradition and the English Constitution tracing back to Magna Carta and before to apply the law as it exists reflected in the traditions and habits of English society with only passing regard for what might be desirable for the

future. To them, appeals to reason and higher principles recognized in the legal tradition are liberating, and justify departures from the harshness of rules that unmitigated would require the punishment of a person who is morally innocent.

On the other hand, to legislators, whether in Parliament or acting directly for the Crown as ministers or members of a council with discretion to make law, or as naval officers or merchants seeking to protect their lives or property or the lives or property of those who rely on them for protection, the notion that deep analyses of the underlying values of society must be undertaken before a "pirate" can be properly hanged is absurd. A simple rule that life and property can legally be protected from any assault is attractive, and the notion that any responsible person is commissioned by the operation of law, whether via a commission issued by the Crown's officers or by direct operation of the King's will without a written commission, is irresistable. The world is simple and authority lies in the substantial people possessed of property who undertake hazards for profit which the society considers beneficial to all. If there are complications, then legislators or counsellors can confront them as a matter of policy and change the rules to take account of them. To practical men of affairs, and statesmen and merchants, particularly sea captains, are practical men of affairs because the political and economic system in England favors practical men of affairs for those functions in society, the Jenkins approach is the only one that makes sense.

The Courts

Jurisdiction. As to jurisdiction and the nationality of the victims, in Rex v. Dawson,[80] aside from repeating some of the language of the statute of 1536, Hedges developed Leoline Jenkins's jury charge of the previous generation.[81] Hedges wrote:

> The king of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in concurrency with other princes and states, for the punishment of all piracies and robberies at sea, in the most remote parts of the world; so that if any person whatsoever, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we have no war, with whom we hold trade and correspondence, and are in amity shall be robbed or spoiled in the Narrow Seas, the Mediterranean, Atlantic, Southern, or any other seas, or the branches thereof, either on this or the other side of the line, it is piracy within the limits of your enquiry, and the cognizance of this court.[82]

He ends with a rousing appeal to patriotism and glory to encourage the jurors to do all they could "to the end that by the administration of equal justice, the discipline of the seas, on which the good and safety of this nation entirely depends, may be supported and maintained."[83] The grand jury brought in bills against the defendants, who were then tried, convicted and hanged.[84] Their defenses were to the facts, seem unconvincing as reported, and raised no further legal issues.

Again, Hedges's language seems to reach very far. He did not address the issue of whether an Englishman was authorized by implied commission or by universal natural law to hang pirates wherever caught, nor did he really address the question of universal jurisdiction: The applicability of English conceptions of piracy as a crime to foreigners acting beyond the reach of English territorial claims. In the case before him, no foreigners were defendants and no extraordinary powers in uncommissioned pirate-captors were at issue. Thus the entire proceeding can be rationalized as the application of English municipal law to Englishmen through the normal processes of English judicial administration, and the unqualified assertions of wider authority are mere puffery.

The most enlightening case of the "classical" series dealing with national jurisdiction over foreign "pirates" is the notorious trial in 1705 of Thomas Green before the High Court of Admiralty of Scotland.[85] The procedures of Scotland followed the forms of the Civil Law; the statute of 1536 did not apply directly as an act of Parliament in Scotland since the union of the crowns was not until the accession of James I/VI to the throne of England in 1603, and the Acts of Union uniting the Parliaments of England and Scotland were not passed until 1706-1707,[86] two years after Green's trial.

Captain Green was an Englishman, master of a ship owned by the Company of Scotland Trading to Africa and the Indies in competition with the English East India Company. He sailed with a commission authorizing him to attack and suppress pirates, issued by King William III.[87] He and his crew, on arrival in Edinburgh to report to their owners on a voyage to Africa and India, were arrested for "piracy" and an elaborate series of factual allegations made to the effect that they had plundered another Scottish vessel near Calicut, sunk the vessel and tossed its crew over the side to remove witnesses. Green and his accused English crewmen were convicted and Green, his first mate and one other man were hanged, apparently to appease a mob. It was later discovered that the supposed victims were alive and well in India and that the supposed "piracy" had never in fact occurred;[88] all the testimony about it was explicable on other grounds, such as currying favor with the mob.

From the point of view of this study, the important part of the case was its handling of the jurisdictional question. Green was not a Scot, nor was his ship considered a Scottish ship for purposes of jurisdiction, nor was any act connected with the supposed "piracy" committed in Scotland. The tribunal did not rest its jurisdiction on the Scottish nationality of the supposed victims, although for popular opinion in Edinburgh that seems to have been the most important connection between Green and Scots law. The tribunal took a higher line, adopting the argument of the "pursuer" (prosecuting attorney):

> That though the competency of the judge in criminals be ordinarily said, to be found either *in loco delicti* (the place where crime was committed) or *in loco domicilii* (place of habitation of the delinquents) or *in loco originis* (the place of their birth) yet there is a superior consideration, and that is the *locus deprehensionis* (place where they were taken) where

> the criminal is found and deprehended, which doth so over-rule in this matter, that neither the *locus domicilii*... nor the *locus originis*... doth found the judges competency, *nisi ibi reus deprehendatur* (except the criminal be apprehended there). And so it is that here the pannels [defendants] were and are deprehended, which happening in the cause of piracy, a crime against the law of nations, and which all mankind have an interest to pursue, wherever the pirates can be found; the Procurator Fiscal's [Prosecutor's] interest to pursue is thereby manifest, and the pannels being here deprehended, cannot decline the admiral's jurisdiction as incompetent.[89]

This logic represents an assertion of universality of jurisdiction in the case of "piracy" that goes far beyond the precedents. The normal rule was apparently conceived to be that the tribunals of the *locus delicti* had competence; which is a reflection of the "territorial" basis of jurisdiction familiar to international lawyers. In the Green case it would have supported English jurisdiction on the basis of the analogy between a vessel and territory of the flag or licensing state.[90] Prescriptive or legislative jurisdiction based on residence or nationality (*locus domicilii* or *locus originis*) of the defendant, it was correctly argued, is not sufficient to give a particular court competence unless the defendant is physically before the tribunal, i.e., in these pre-extradition days, one of those places is also the place in which the defendant was apprehended and detained (*locus deprehendatis*). But the leap from the place of physical detention supporting jurisdiction based on residence or nationality, to finding prescriptive jurisdiction in the place of physical detention with no other contact, is a giant leap supported in the pursuer's logic only by the assertion that "piracy" is a crime against the law of nations and that all mankind have an interest in pursuing it. This legal interest in pursuit (i.e., in prosecution), the legally essential link between the incident and the application of local law to it, the link that gives to a Scottish tribunal the competence to hear the case without being considered an officious intermeddler in matters of no concern to Scots law, is asserted to rest on the characterization of "piracy" as a crime against the law of nations. From that characterization is said to flow universal competence, including the competence of a Scots tribunal.

Commissions Become Evidentiary Instead of Determinative. The great case setting the English pattern concerning the need of an Englishman for an English "commission" was the trial in 1701 of William Kidd.[91] Apparently Captain Kidd was well-known in England, and there is clear evidence that there had been business dealings of some sort between him (Kidd was a native Londoner) and the Earl of Bellamont, "Governor of New England," an Irish peer.[92] The degree to which those dealings might have involved the Governor in the profits of Kidd's adventures is not clear, but Kidd was formally a privateer, operating under two commissions sealed in the name of King William III, and it would have been entirely proper for the King's representative in any colony to be on convivial terms with a successful privateer.

Kidd's two commissions were dated 26 January 1695 and 11 December 1695. The first specifically involved Kidd in the New World:

> To our trusted and well-beloved Captain William Kidd, commander of the ship Adventure-Galley, or to any other the commander for the time being, greeting. Whereas we are informed that captain William Mase or Mace, and other our subjects, native inhabitants of New-England, New-York, or elsewhere, in our plantations in America, have associated themselves with diverse other wicked and ill-disposed persons, and do against the law of nations, daily commit many and great piracies, robberies, and depredations upon the seas in the parts of America and in other parts, to the great hindrance and discouragement of trade and navigation, and to the danger and hurt of our loving subjects, our allies, and all others navigating thereon upon their lawful occasions: Now know, that we being desirous to prevent the aforesaid mischiefs, and, as far as in us lies to bring the said pirates, free-booters, and sea-rovers to justice, have thought fit, and do hereby give and grant unto you the said captain William Kidd (to whom our commissioners for exercising the office of our lord high-admiral of England, have granted a commission as a private man of war . . .) . . . and unto the officers, mariners, and others, who shall be under your command, full power and authority to apprehend, stop, and take into your custody, as well the said captain Thomas Too, John Ireland, captain Thomas Wake, and captain William Mase or Mace, as all such pirates, free-booters and sea-rovers, being either our own subjects or of any other nations associated with us, which you shall meet upon the coast or seas of America, or in any other seas or place with their ships and vessels, and also such merchandizes, money, goods, and wares as shall be found on board, or with them, in case they shall willingly yield themselves: And if they will not submit without fighting, then you are by force to compel them to yield. And we do also require you to bring, or cause to be brought such pirates, free-booters, and sea-rovers, as you shall seize, to a legal trial; to the end they may be proceeded against according to law in such cases . . . . And we hereby strictly charge and command that you shall answer the same [accounting for every ship and pirate taken] at your peril, that you do not in any manner harm or molest any of our friends or allies, their ships, or subjects, by colour or pretence of these presents, or the authority there granted . . . . [93]

The second recites that there have been injuries and acts of hostility committed by the French king and his subjects upon English subjects, that "many and frequent demands" had been fruitlessly made for redress and reparation, that the Privy Council had ordered "that general reprisals be granted against the ships, goods, and subjects of the French king." It then grants:

> Commission to, and do[es] license and authorise the said Wm. Kidd to set forth in warlike manner the said ship called The Adventure-Galley, under his own command, and therewith by force of arms to apprehend, seize, and take the ships, vessels and goods belonging to the French king and his subjects, or inhabitants within the dominions of the said French king, and such other ships, vessels, and goods, as are, or shall be liable to confiscation, and to bring the same to such port as shall be most convenient, in order to have them legally adjudged in our high court of admiralty, or such other court of admiralty as shall be lawfully authorized in that behalf . . . . [94]

Kidd was first charged with the murder of William Moore, a gunner of the *Adventure-Galley*; uncontradicted testimony had Moore muttering about Kidd

not seizing a near-by Dutch ship, and Kidd, apprehensive of mutiny by a crew bent on turning to piracy, bashing Moore on the side of the head with a handy iron-bound bucket and cracking his skull. The incident occurred off the Malabar Coast (southwest India) and the defense of imminent mutiny was contradicted by several crewmembers called as witnesses testifying that the threatened mutiny by Moore and others wanting to turn pirate had been quelled some weeks before the killing.

The jury took only an hour to deliver a verdict of guilty under a charge relating solely to the English law of murder by Lord Chief Baron Ward.[95]

The next day, Kidd and his companions were tried together for "piracy." The incident involved the capture "piratically and feloniously" of a merchant ship, the *Quedagh* [Kedah] *Merchant*, of unknown flag, "upon the high sea . . . about ten leagues from Cutsheen [Cochin], in the East-Indies, and within the jurisdiction of the admiralty of England." The events were alleged to have occurred on 30 January 1697 and the year after.[96]

Three of the prisoners, James Howe, Nicholas Churchill and Darby Mullins, sought to take advantage of a pardon proclaimed by William III[97] but failed on the ground that they had surrendered themselves to an English officer other than one of the four Commissioners named in the Proclamation. Indicative of the attitude towards Kidd in London when the pardon was proclaimed in 1698, the pardon covered all within the area east of the Cape of Good Hope who had been guilty of "piracies or robberies committed by them upon the sea or land" and who surrendered to the named Commissioners within the period fixed by the proclamation, but specifically excludes "Henry Every alias Bridgman, and William Kidd."[98]

Kidd sailed from New York in 1696 and flew a French flag when chasing the *Quedagh Merchant*.[99] His defense was that the *Quedagh Merchant* had a French pass and that he was commissioned to take French vessels; also that his crew had threatened to mutiny if he did not take the *Quedagh Merchant*.[100] But he could not produce the French pass (which he claimed was being withheld by the Earl of Bellamont) and the court seemed disinclined to believe him. The court also seemed to believe that the commission to seize French property did not extend to the property of "Armenians" even if they had French passes.[101] In his charge to the jury, Lord Chief Baron Ward emphasized what he regarded as Kidd's repeated acts not consistent with the terms of his commissions:

> Could he have proved, that what he did was in pursuance of his commissions, it had been something: but, what had he to do to make any attack on these ships, the owners and freighters whereof were in amity with the king? This does not appear to be an action suitable to his commission. After he had done this, he came to land, and there, and aftewards [*sic*; obviously "afterwards"] at sea, pursued strange methods, as you have heard. The seeming justification he depends on is his commissions. Now it must be observed how he acted with relation to them, and what irregularities he went by . . . . [W]e are confined to the Quedagh Merchant; but what he did before, shews his mind and intention not to act by his commissions, which warrant no such things . . . .

> Now this is the great case that is before you, on which the indictment turns: the ship and goods, as you have heard, are said by the witnesses to be the goods of the Armenians, and other people that were in amity with the king; and captain Kidd would have them to be the goods of Frenchmen, or at least, that this ship was sailed under French passes. Now if it were so, as Capt. Kidd says, it was a lawful prize, and liable to confiscation; but if they were the goods of persons in amity with the king, and the ship was not navigated under French passes, it is very plain it was a piratical taking of them. . . . If he had acted pursuant to his commission, he ought to have condemned the ship and goods, if they were a French interest, or sailed under a French pass; but in his not condemning them, he seems to shout his aim, mind, and intention, that he did not act in that case by virtue of his commission, but quite contrary to it; for he takes the ship, and shares the money and goods, and, was taken in that very ship [Kidd had transferred from the leaky *Adventure-Galley* to the sound *Quedagh Merchant*] by lord Bellamont, and he had continued in that ship till that time, so there is no colour or pretence appears, that he intended to bring this ship to England to be condemned, or to have condemned it in any of the English plantations, having disposed of the whole cargo. . . .[102]

Turning to the other prisoners, the charge to the jury first focused on the three who had, by documents of indenture and witnesses proved themselves to be servants of Kidd and others on the voyage:

> Now, Gentlemen, there must go an intention of the mind, and a freedom of the will, to the committing a felony or piracy. A pirate is not to be understood to be under constraint, but a free agent . . . . It is true, a servant is not bound to obey his master but in lawful things, which they say they thought this was, and that they knew not to the contrary, but that their masters acted according to the king's commission; and therefore their case must be left to your consideration, whether you think them upon the whole matter guilty or no. . . .[103]

As to the rest,

> [W]e were, say they, under the captain, and acted under him as their commander: and, gentlemen, so far as they acted under his lawful commands, and by virtue and in pursuance of his commissions, it must be admitted they were justifiable, and ought to be justified: but how far forth that hath been, the actions of the captain and their own will best make it appear. It is not contested, but that these men knew, and were sensible of what was done and acted, and did take part in it, and had the benefit of what was taken shared amongst them: and if the taking of this ship and goods was unlawful, then these men can claim no advantage by these commissions. . . . [I]f you are quite satisfied that they have knowingly and wilfully been concerned or partaken with Capt. Kidd in taking this ship, and dividing the goods, and that piratically and feloniously, then they will be guilty within this indictment. . . . Whilst men pursue their commissions they must be justified; but when they do things not authorised, or never acted by them, it is as if there had been no commission at all. . . .[104]

The verdict under this charge was guilty all, including Kidd, except for the three servants, Robert Lamley, William Jenkins and Richard Barlicorn.[105]

A trial on four further indictments was held, and after that another trial on yet two more indictments, all relating to the taking of various specific ships not French or piratical within the sense of the two commissions. The results were the same as before, with the three servants acquitted and Kidd with six

of his crew convicted. The charges to the juries by Mr. Justice Turton follow the lead of the charge by Lord Chief Baron Ward. The major emphasis of the evidence is to show which of the accused profited from the shares distributed by Kidd after the sale of the captured valuables, the three servants either not being shown to have received any share at all, or to have received a half share which it is alleged they turned over immediately to their masters who were Kidd himself, Abel Owens (the cook) and George Bullen (the mate). Kidd and his six convicted crew members were then hanged.[106]

It appears that as to the substance of the "crime" of "piracy," the charge given by Justice Hedges was not repeated, but its substance, that "piracy" was simply English Common Law "robbery" within the jurisdiction of the Admiralty, was assumed without any analysis. The essential elements of the crime are there, and no discussion of its borders was necessary or attempted. The murder of his own crewman by Kidd was not charged as " piracy" but directly as "murder." Whether this was done because the entire action occurred in a single vessel under the English flag (and thus no need was felt to refer to a legal word of art that might imply international significance) or because all the actors, accused and victim, were English, or any other reason, is not made clear. The same procedures were used by the tribunal in dealing with this charge as in dealing with the charges of "piracy" in the other two trials, thus it seems likely that the "felony" term of the statute of 1536 was being used, under which the procedures for "piracy" and for "felony" trials regarding events within the jurisdiction of the Admiralty were identical.[107]

It seems significant that the action in excess of his commission did not appear immediately to have involved the crime of "piracy." In Lord Chief Baron Ward's charge to the jury, much was made of the failure of Kidd to bring the captured *Quedagh Merchant* in for legal condemnation in accordance with the terms of the commissions, but nothing is made of the possibility that acting under the commission a mistake might have been made regarding the subordination or French connection of the captured ship. The argument regarding the possible immunity of the goods of merchants who are subjects of nations in amity with the King of England was directed at Kidd's apparent knowledge that they were not French or piratical (thus there being no possibility of an act under the commissions which was excessive because simply mistaken as to facts), and Kidd's ignoring the directions of his commissions with regard to the disposition of his captures. Apparently, errors might lead to loss of the prize in condemnation proceedings, and there was every likelihood that egregious errors would result ultimately in revocation of the commission as a practical matter. But such errors were not regarded as enough to make a good-faith capture into a "piratical" act. The problem was to prevent privateers using their commissions as a license to take everything and then try to buy off the innocent victims of their taking cheaply one by one if ever a victim found the privateer in a port with an English tribunal in it. The

solution was to label such takings "piracy" when the privateer himself did not allow the victim the opportunity to present his case in an English prize court before the goods were sold and the proceeds distributed among the crew of the privateer.

In fact, this solution was inconsistent with history and practical convenience outside of the overstated rhetoric of the Kidd case itself. Illustrative examples of non-piratical takings in excess of or without commissions abound. On 16 December 1664 the Privy Council issued a General Reprisal Order in the name of Charles II authorizing retroactively the capture of Dutch vessels already taken without license by English privateers at the start of the second Anglo-Dutch War.[108] At the start of the third Anglo-Dutch War in 1672, Sir Leoline Jenkins sitting as a Judge in Admiralty allowed an English captor his privateer's share of a Dutch capture despite the lack of a commission, saying it was "out of grace" and because the captor was "then in the service of the king."[109] But all captures of enemy vessels during wartime were presumably "in the service of the king," and by this logic there would be very few cases in which commissions would be necessary at all, principally cases in which the accused "pirate" was merely setting sail in violation of other regulations, or was accused of "piracy" after an unsuccessful attack or attempt on a vessel later shown not to have been an enemy vessel.[110] Thus it appears that the requirement of a license or commission to exercise belligerent rights of capture at sea in the 17th century was not as rigid as some of the later rhetoric about license requirements make it appear. Kidd's problem was less his exceeding his license than in his converting the captured property to his own use without legal condemnation procedures required not only by the terms of the usual license (and his own commissions), but by any conception of legal rights of property that distinguishes between mere possession and other rights commonly associated with property, such as rights to future possession and rights to use even without possession. If this is correct, then a great deal of Lord Chief Baron Ward's charge to the jury in the Kidd case is exaggerated, and the final phrases[111] read in the context of the times do not make criminal all those acts not authorized by a commission, but make the commission to do some things relevant merely with regard to motive and other legal implications of things done without the authority of a commission; that is not a rigid positivist position, but almost a legal platitude.

In the Kidd case, the essence of the distinction between a commissioner exceeding his authority and a "pirate" was conceived to be whether the accused took the captured valuables in to a proper tribunal for condemnation. If he did, regardless of the ultimate decision as to the legality of the capture, he was no pirate. If he did not, he would appear to have been a pirate as far as English municipal law was concerned. The action in excess of a commission that would turn a privateer to a pirate was

not a question of whose goods or ships he might take, but what he did with them after the taking.

This interpretation of Rex v. Kidd is confirmed by a short review of the use of licenses as a "police" tool of the centralizing government of England under the Tudors. This subordination of private "police" activity to public authority had begun in the earliest days of commissions aimed at hunting "pirates." It may be remembered that in 1511 King Henry VIII had commissioned John Hopton to

> seize and subdue all pirates wherever they shall from time to time be found; and if they cannot otherwise be seized, to destroy them, and to bring all and singular of them, who are captured, into one of our ports, and to hand over and deliver them . . . to our commissioners.[112]

It was also pointed out that in a series of commissions and proclamations beginning in 1575 Queen Elizabeth had authorized various high officials to license privateers to capture "pirates," but had consistently maintained that no changes in title to any goods or vessels could occur unless the items had been first submitted to an English court for condemnation or equivalent legal proceeding;[113] that to the extent the legal opinion of David Lewes in 1579 concluded that by the law of the sea any person might seize pirate goods without any commission, that opinion was ignored by the highest administrators in England;[114] that in 1589 an Order in Council declared that no title to goods derived from capture at sea unless decreed by an Admiralty court;[115] and that an Englishman could find himself in serious legal difficulties if he purported to hunt pirates without a commission after that time.[116] In those cases in which a prize was taken with the English captor's license under some cloud, as long as the prize was brought in to an English port for condemnation, there does not appear to be any case in which the captor faced significant difficulties.[117]

On this view of things, it was impossible to maintain the jurisdictional provisions of the statute of 1536 unamended, because taking the captured valuables to England for Admiralty condemnation was clearly impracticable, and sale without such proceedings would open the privateer to a charge of "piracy" even if he had done his best to assure the legitimacy of the taking. Moreover, for trials under the statute on a charge of "piracy," removal of the accused and witnesses to England was expensive and time consuming. And, as in the case of the possible dereliction by the Earl of Bellamont with regard to the French pass Kidd alleged to have been found in the *Quedagh Merchant*, serious injustice might be done to accused "pirates" simply through the vicissitudes of bureaucracy and transportation in the early 18th century (and, indeed, for two hundred years thereafter).

This last difficulty was solved by a statute usually dated to 1700[118] authorizing the holding of Admiralty Commissions to try "pirates" outside of England. That statute repeats the substantive terms of the statute of 1536 and

adds provisions authorizing the establishment of colonial Admiralty courts, which could hear property cases in the usual Admiralty fashion. But, even more significantly from the point of view of this study, it uses the word "pirates," for the first time in England, as a statutory word of art, prescribing punishment as "pirates" for those subjects or denizens of England who commit any act of hostility against other subjects of His Majesty at sea under color of a commission issued by a "forreigne prince or state or pretense of authority from any person,"[119] and any captain or seaman betraying his trust.[120] This general language seems to include within the English definition of "piracy" acts within a single vessel not involving robbery, such as mutiny and barratry (embezzlement of ship or cargo by a captain or other person with limited rights of disposal). It thus revived the Coke-Hale definition of "piracy" as a form of "petty treason" including "mutiny."[121]

This statute was amended many times as the English (British, after 1707 and the Act of Union with Scotland)[122] modified their municipal law in various technical ways not pertinent to this study.[123] The next major adjustment of British municipal law to raise the question of the relationship between that law and the international law relating to "piracy" was not until 1825, when a bounty paid out of public money was authorized for the destruction of foreign "pirates."[124]

It is possible to conclude from the fact that the prescriptions of that statute were restricted to English subjects or denizens that the statute did not purport to incorporate into English law any particular rules of international law. It did not seek to define "piracy" in any sense that would imply an English assertion that the crime called "piracy" for purposes of English tribunals was equally punishable by those tribunals if the "criminal" were a foreigner acting outside the territory of England—or even within England.

"Piracy" or "Felony" in English Law as Adopted in American Courts. The first known trial under the authority of the Act of 1700 was held in the new world. Captain John Quelch and some of his crew were tried in Boston beginning 13 June 1704.[125] Nine separate articles were levied against Quelch and his men with regard to actions taken by them against Portuguese victims (England being then at peace with Portugal) in November 1703 to February 1704. The points of similarity in eight of the nine charges against Quelch are the identical recitals:

> For that you, the said John Quelch, with divers others, . . . at or near [such a place] . . . by force and arms, upon the high sea (within the jurisdiction of the admiralty of England) [parentheses *sic*] piratically and feloniously did surprize, seize and take [a described vessel] . . . belonging to the subjects of the king of Portugal, (her majesty's good ally) [parentheses *sic*] and out of her, then and there, within the jurisdiction aforesaid, feloniously and piratically did, by force and arms, take [described articles of stated value].

The ninth article is the only one that separates "feloniously" from "piratically" and therefore seems significant. The difference is in the last clauses which say:

> . . . and then and there, within the jurisdiction aforesaid, did feloniously kill and murder the commander thereof, and wounded several others, and out of her piratically, by force and arms, did take and carry away [various listed items] contrary to the statutes in that case made and provided.

The reference to statutes in the last line seems to relate only to this ninth article, and, if so, its meaning is obscure. If it is intended to apply to all the preceding articles charged against Quelch, it seems mere form; there is no express indication which precise statutes are intended, presumably the statutes of 1536 and 1700.

It appears to have been the conception of the officials making the articles, that "piratically" referred to the taking of property by force and arms, and that meshes with the idea of "piracy" being the Admiralty term for robbery as stated by Sir Charles Hedges in his 1696 charge to the jury in the Dawson case. Killing does not appear to have been considered part of "piracy," but to be included in the "felony" as well as the "murder" term of the statute of 1536. Since neither "murder" nor "robbery" of a stranger was a "felony" in 1536 and the statute of 1536 in fact does not use the word "piracy" in its substantive provisions, and uses the words "robberies and murders" directly,[126] this evolution of form with regard to the words "piratically" and "feloniously" needs some explanation. Apparently, the statute of 1700, having adopted the word "piracy" into the legal vocabulary in a way directly pertinent to the Quelch case, "piratically" was adopted in the articles to reflect the new statutory language relating to jurisdiction, and "feloniously" to reflect an evolving definition transferring the "petty treason" label to some serious crimes in which the legal results of "petty treason" were sought to be applied without all the feudal-status baggage of the phrase.

The opening statement of Paul Dudley, Attorney General and Her Majesty's (Queen Anne's) Advocate for the Court of Admiralty, to the commissioners holding the trial indicates how far English thought had come, building on the misinterpreted excerpts of Roman opinion to make a municipal crime of "piracy," and then call it part of international law:

> The prisoner at the bar stands . . . charged with several piracies, robberies and murder, committed by himself and his company, upon the high sea (upon the subjects of the king of Portugal, her majesty's good ally) the worst and most intolerable of crimes that can be committed by men. A pirate was therefore justly called by the Romans, *hostis humani generis:* And the civil law saith of them, that neither faith nor oath is to be kept with them; and therefore if a man that is a prisoner to pirates, for the sake of his liberty promise a ransom, he is under no obligation to make good his promise; for pirates are not entitled to law, not so much as the law of arms; for which reason it is said, if piracy be committed upon the ocean, and the pirates in the attempt happen to be overcome, the captors are not obliged to bring them to any port, but may expose them immediately to punishment,

> by hanging them at the mainyard; a sign of its being of a very different and worse nature than any crime committed upon the land; for robbers and murderers, and even traitors themselves, may not be put to death without passing a formal trial. . . .[127]

Aside from other errors or exaggerations, the notion that "pirates" could be hanged by whoever catches them in an attempt seems inconsistent with the terms of Kidd's commission to hunt down "pirates," which is certainly typical in this regard. That commission required Kidd "to bring, or cause to be brought, such pirates . . . as you shall seize, to a legal trial" whether the pirate was taken in battle or otherwise.[128] Dudley's notion also seems inconsistent with the very idea that a commission was necessary to hunt "pirates," and, although the lack of a commission in many cases could be cured retroactively through a grant or by judicial reasoning, the centralizing positivist jurists and administrators from the time of Queen Elizabeth, a century and a quarter before, had insisted on the legal form being acknowledged. Dudley followed naturalist logic identified in this area with Charles Molloy. He appears to have felt that natural law rights of property and self-defense, possibly coupled with the sense of collective defense of property and life believed by naturalist philosophers of the time to underlie a hypothetical "social contract"[129] on which all political structures must rest for their natural law power to exercise law-making authority, were enough to justify the hanging of "pirates" defined as violators of those natural rights. But why he chose to express those sentiments before this court in this case is not known. The formal need for a commission before an Englishman could, by the municipal law of England, legally hunt pirates had been well established in practice by 1704.

Quelch's defense went to the facts and the form of trial under the statute of 1536. On those points his arguments were rejected and he was convicted. No question about the essential elements of the offense of "piracy" was raised nor any jurisdictional argument.[130]

The trials of the men associated with Quelch indicate some additional undercurrents associated with the conception of "piracy" in 1704. Three black slaves had been forcibly taken from their owners by Quelch and served as cooks and in other non-combatant capacities in the crew. Presumably they had no share of the spoils. They were acquitted. The record does not indicate the basis the court felt that it had to apply any system of law to these men, who, by the law of Boston at the time were not subjects of England. The Queen's Advocate (Dudley?) following the naturalist approach adopted for the Quelch trial, addressed the point:

> [T]he three prisoners now at the bar are of a different complexion, it is true, from the rest that have been arraigned upon these articles; but it is very well known, that the first and most famous pirates that have been in the world were of their colour;[131] and negroes, though slaves, are as capable of taking away the lives and estates of mankind, as any freemen in the world. . . .[132]

The implication, that international law applied to all men regardless of their legal status of bondage under any particular municipal law, and that "piracy" was a crime under a naturalist version of international law, does not appear to have been the subject of any comment at the time. The positivist counter-model, that the English law of "piracy" under the various statutes of the realm applied to slaves as to free men as a matter strictly of English law, was not posed either.

Six Englishmen members of Quelch's crew were then tried and convicted of "piracy" despite their testimony that they took no active part in the captures. The tribunal pressed them on two points: (1) Did they ever protest against the action; and (2) Did they take a share of the spoils. The evidence was that they made no protest and did share in the takings. Several other members of the crew then changed their not guilty pleas to guilty, and two other trials were held; all were sentenced to death. There were two final acquittals; one, the ship's clerk who appears to have been sick throughout the entire voyage and took no part in the captures and received no share of the takings; the other, a servant boy only fifteen years old who was adjudged not guilty as a matter of the court's indulgence.[133]

The Classical Publicists: Zouche to Bynkershoek

The "Law of Nations." The phrase "law of nations" in 1705 was itself ambiguous. Richard Zouche, an English Admiralty judge and civilian, distinguished in 1650 between "the law of nations" and "the law between nations." The latter, which he called in Latin "*Jus inter Gentes*," he regarded as the descendant of the Roman "*Jus Feciale*" and "has to do with the conditions of kings, peoples, and foreign nations, in fact with the whole law of Peace and War." The former, the "law of nations," he defined as:

> [T]he common element in the law which the peoples of single nations use among themselves; . . . the law which is observed in common between princes or peoples of different nations.[134]

This use of language would imply that to the degree "piracy" is regarded as a crime against the "law of nations," it is merely an act proscribed by the laws of all separate states; the fact that an act is forbidden by all states does not address the problem of officious intermeddling—of one state applying its version of the law through its tribunal to a person acting beyond the range of that state's legal interest.[135]

To natural law jurists, there are two ways to bridge this gap in logic. One is to eliminate the distinction between the "law of nations" and the "law between nations" posited by Zouche. That had been the course taken by Samuel Pufendorf in 1660 on the argument that the substance of both systems of law rested on "reason" alone, and that therefore there could be no differences in the law based on differences in the character of the actors, which he regarded as small:

> . . . [T]he *Law of Nations* . . . in the eyes of some men, is nothing other than the law of nature, in so far as different nations, not united with one another by a supreme command, observe it, who must render one another the same duties in their fashion, as are prescribed for individuals by the law of nature. On this point there is no reason for our conducting any special discussion here, since what we recount on the subject of the law of nature and of the duties of individuals, can be readily applied to whole states and nations which have also coalesced into one moral person. Aside from this law, we are of the opinion that there is no law of nations. . . .[136]

From this point of view, the problem of intermeddling could be avoided by regarding each country's law applying to "piracy" as a national means of applying the underlying natural law to individuals who have transgressed it; there would be universal "standing" to apply national law because the national law is a mere expression of the universal natural law applied by one subject of that law (the state) to another (the individual "pirate"). The special interest of the state derives from the universality of the system.

Another way to bridge the gap in logic was the way expressly adopted by none at this time, but implicit in much naturalist writing, to call the right to commerce a "natural right" justifying "war" with states impeding commerce between willing partners.[137] If war against states could be justified on the basis of interference with the natural right to trade, *a fortiori* it would seem that those obstructing such trade without commissions issued by the authority of states through their governments could be blown away. If war against them was not legally appropriate, then the "pirates" were not protected by the laws of war and could simply be hanged when captured. From this point of view, the criminal law procedures by which "pirates" were condemned and hanged were mere municipal law safeguards against the abuse of the authority every man had to destroy those who obstructed trade, "pirates."

It is noteworthy that both these lines of legal thought rest on calling "piracy" a crime under the law of nations, the "law of nations" being conceived as a natural law system binding on all men in all places because based on reason.[138]

The relationship between municipal law and international law so central to an understanding of the conception that "piracy" should be suppressed and that the normal jurisdiction of municipal law tribunals would not suffice to suppress it when foreigners and possible foreign commissions were involved, was never fully resolved during the 18th century. Individual jurists certainly had their own favorite jurisprudential models into which they fit "piracy" for the sake of particular cases, legislation, or treaties. But the fundamental orientation of the "positivists," to whom all questions seemed best considered as questions of national policy, and the orientation of "naturalists," to whom all questions seemed best considered as questions of international justice and natural rights, were irreconcileable.

The Growth of Positive Law Concepts as an Implication of National Sovereignty. Those who tried to raise their sights above the jurisprudential

dogmas of various advocates and political demands of practical statesmen and their national constituencies, restricted their analyses to the specifics of individual cases and incidents, leaving overall patterns to others. Typical of this, and most influential in later times, was Cornelius Bynkershoek, a Dutch jurist whose major work, *Questionum Juris Publici*, appeared in 1737.[139] In addition to arguing on the basis of positivist, policy-oriented logic that the Barbary states were not "piratical" in any legal sense,[140] he began with the proposition that "those who rob on land or sea without the authorization of any sovereign, we call pirates and brigands."[141] In later passages he uses the world "pirates" only in connection with those who sail, but he leaves unanswered the question as to whether "pirates" who, once having sailed, commit depredations only in raids ashore, are punishable as if their depredations were at sea—whether the word "pirate" applies to all who begin their depredations from a ship or those who make a mere sea-departure without a license from some Dutch port regardless of the place of their depredation. To avoid the problem he asserts a simple positivist position based on Dutch municipal law: "[W]e punish as pirates those who sail out to plunder the enemy without a commission from the admiral, and without complying with . . . the rules of the Admiralty of . . . 1597."[142] He then cites other Dutch statutes as authority for terming "pirates" those Dutchmen who sail under a commission from a foreign prince or of several princes.[143] His supporting argument, that "it is indeed very reasonable that those should be treated as pirates" because "if this were permissable they might plunder neutrals and bring our state into war with other nations,"[144] argues the Dutch municipal legal policy to be reasonable to curb the depredations of Dutch nationals even if those Dutchmen are not "criminals" (because licensed by a sovereign) at international law. But Bynkershoek did not assert that The Netherlands had a duty at international law to restrain the licensed activities of Dutchmen abroad. Ultimately, Bynkershoek's logic does not unite international and municipal law, but asserts the dominance of policy for international affairs and municipal law as the basis for controlling Dutch nationals abroad. Support for this analysis lies in Bynkershoek's adverting to the fact that

> There are also various other persons who are punished as pirates on account of the atrocity of their crimes, though they are not actually pirates, as for instance those who sail too near the land contrary to the prohibition of the sovereign, . . . commit frauds in matters of insurance . . . and also those who cut the nets of the herring-fishers. . . .[145]

It is interesting confirmation of arguments presented earlier with regard to the evolution of English conceptions that the word "pirate" seems to have been used in a promiscuously pejorative sense in the late 16th century, and had its meaning narrowed somewhat in 1696, presumably in coordination with the English war against Louis XIV over the exile of James II at that time.[146] But the narrowing was not in the direction only of making "piracy" the proper

legal term for robbery within the jurisdiction of the Dutch Admiralty; it also followed the English view that certain forms of licensed activity involving depredations by foreigners against foreign vessels might be denominated "piracy" and treated as criminal by the municipal law of the prescribing state. Where the English prescriptions arising out of the struggle over the Stuart exile had focused on the legal power of the English government to consider null a commission issued by an unrecognized "sovereign" (James II) or to consider as "piratical" even in the absence of legislation the taking by an Englishman of a license from the King of France to raid English shipping, the Dutch legislation cited by Bynkershoek rested on Dutch jurisdiction to prescribe with regard to belligerent action by foreign-licensed foreigners in neutral Dutch coastal waters. It seems that once the conception was accepted that the word "piracy" would be a useful pejorative that could be applied with capital legal results by an act of municipal legislation, the evolution of the word was away from "normal" municipal law crimes (whether at sea or not) and towards the political activities of individuals. Under the system of letters of marque and reprisal by which some political activities were highly profitable to individual adventurers, the word "piracy" seems to have been used to identify such adventurers with motives of base profit when they were fighting for causes not approved by the municipal legislators, and the definitions of "pirates" as "robbers within the jurisdiction of the Admiralty courts" were simply expanded to catch those adventurers in the legal web. In this evolution, the net-cutters and insurance fraud criminals proved to be too small to remain enmeshed in that web, and the older laws came to seem an historical oddity as the connotations of the word "pirate" changed.

Bynkershoek also discussed the jurisdictional issues. He asserted that a foreigner committing depredations on Dutch property could properly be tried by a Dutch tribunal "if he is arrested among us," but suggested that if he had a commission, even if he had exceeded it, there would be some doubt. He referred to a negotiation between the Dutch and English in 1667 concerning the disposition at law of privateers who had not stopped after their commissions expired at the end of the second Anglo-Dutch War:

> The English contended that the sovereign who had given the letters ought to have jurisdiction; the envoys of the States-General urged that those who committed hostile acts without a legitimate commission from their sovereign, should be treated as pirates. That it was the law of nations that such could be punished by any sovereign into whose hands they chanced to fall. . . . The French envoys at that time concurred in this view, and this principle was accordingly adopted by the English and the States-General.[147]

Since only the sovereigns whose subjects were victims of the unlicensed depredations were involved, and there is no suggestion that France should have prosecuted English privateers whose victims were only Dutch, it is difficult to say just how far this sweeping assertion was intended to carry. No cases are cited of "pure" universal jurisdiction by Bynkershoek or any other

writer of this time despite the broad statements and possible cases, like the embarrassing Green case in Scotland,[148] from which the appearance of support in practice could have been derived. The broad assertions coupled with the refusal to support them with possible cases, and the total absence of statutory support for judges' or prosecutors' grand assertions in this regard, seem anomalous.

Bynkershoek expressed some doubt that a privateer exceeding his commission was necessarily a "pirate," and seemed to regard the procedure by which the sovereign issuing the commission would be the sovereign whose tribunals should hear the case as the best solution. This is not explained except by citation to a peace-treaty of 1662 between France and the Netherlands in which it was agreed that only the sovereign furnishing a commission should hear any cases of prize resting on the validity of the commission.[149] From his point of view, if that sovereign turned the prize back to its prior owner, there would be no issue to resolve, while if the unauthorized taking were upheld, whatever problems might arise could be discussed as a possible international delict between the two sovereigns involved. This seems to treat the question of commissions as simply an issue of property law, not of "piracy" at all. Since a guilty intention is required for any criminal conviction, perhaps that is a sensible approach; but it is surely more congenial to "positivist" administrators than to "naturalists" concerned with "justice" and the application of the "law of nations."

Bynkershoek also dealt directly with the question of jurisdiction, terming "difficult" the question of whether a foreigner who has committed depredations upon other foreigners could be tried by Dutch courts. He stated it as a dilemma:

> If . . . the laws ordain that no one may sell ships and goods captured on a foreign commission, except when condemned at a port of the sovereign issuing the commission, it might seem unjust to give an action against the captor, either to the government, on a criminal charge, or to the foreign owners of ships and goods, for the damage suffered. Both foreigners ought to have the same rights. . . . And yet it would be hard and unexampled to deny access to the courts to the owners of the ships and goods who found their property here in the hands of a foreigner who might depart at any moment. And if you grant that, you can hardly refuse the captor.[150]

There is substance to this argument if "piracy" were essentially a matter of licenses, as Bynkershoek and the other positivists conceived it. There seems little substance when the argument is applied to totally unlicensed depredations; and that is a question disposed of in England by the Statute of the Staple in 1353,[151] which Bynkershoek did not address.

The Classical English Synthesis: Blackstone and Wooddeson. The English law was summarized in its classical form by both Sir William Blackstone and Richard Wooddeson, the first and third Vinerian Professors of English Law at Oxford University. Blackstone, publishing in 1765-1769,[152]

took a basically naturalist view of the "law of nations" adopting the underlying concept that the "law of nations" is essentially the national law of many states and not the law between states:

> But since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land. And those acts of parliament, which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of the kingdom; without which it must cease to be a part of the civilized world. Thus in mercantile questions, such as bills of exchange and the like; in all marine cases, relating to freight, average, demurrage, insurances, bottomry, and others of a similar nature; the law-merchant, which is a branch of the law of nations, is regularly and constantly adhered to. So too, in all disputes relating to prizes, to shipwrecks, to hostages, and ransom bills, there is no other rule of decision but this great universal law collected from history and usage, and such writers of all nations and languages as are generally approved and allowed of.[153]

Blackstone considered that there were three offenses that could properly be termed crime-like "offences" against the law of nations: (1) Violations of safe conducts (i.e., *laisser passer*), (2) infringement of the rights of ambassadors, and (3) piracy. His brief comments on piracy mix natural law and positive law concepts in a strange amalgam:

> Lastly, the crime of piracy, or robbery and depredation upon the high seas, a pirate being, according to Sir Edward Coke, *hostis humani generis*.[154] As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: So that every community hath a right, by the rule of self defence, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property. . . .
>
> The offence of piracy, by common law, consists in committing those acts of robbery and depredation upon the high seas, which, if committed upon land, would have amounted to felony there. But by statute, some other offences have been made piracy also. . . .[155]

To understand Blackstone's thought, and the American thought that grew out of the immense influence of Blackstone's *Commentaries* in the early days of our Republic, it must be borne in mind that his use of the phrase "law of nations" assumed the supremacy of municipal law in particular whatever the basis in policy, reason or historical practice for the identity of prescriptions applied by the courts of different nations. Moreover, his use of the phrase "common law" is certainly not the same as the technical usage of Lord Coke, to whom the "Common Law" of England meant the law applied by English "Common Law" courts, as distinguished from the other laws applied in England by Admiralty, Equity and other of the King's courts. To Blackstone, the law merchant was part of the law of nations adopted into the English "common

law" because interpreted and applied throughout England by English courts; to Coke the law merchant was applied in the courts of the Staple by administrators appointed for the purpose, and was not part of the Common Law system in England.[156] Similarly with "piracy." Thus Blackstone's calling piracy an offense by common law means merely that it was an offense punishable in England by English courts, and to the degree not based on statute, was capable of being refined and modified by judicial interpretation.

Blackstone's social contract naturalism seems to leave all the questions of Bynkershoek unanswered. If the right of a community to exercise its jurisdiction over a "pirate" rests on an *a priori* rule of self-defense, as Blackstone said, then that jurisdiction rests on the state exercising it being a state victimized by the particular "piracy" that is the subject of the trial: that state must have had its "person or personal property" invaded by the "pirate." Furthermore, the law of self-defense in England and many other places is very limited in its application, essentially to cases of inescapable threat; it does not authorize universal policing of a community by a strong policeman without authority derived from community consent through the positive law. It does not justify officious intermeddling or universal jurisdiction in the absence of a legal interest in the case.

Finally, the arguments based on war imply that the law of war applied to relations between "pirates" and the rest of mankind. That would comport with Roman writings, but does not seem to have been what Blackstone really had in mind, since criminal trials are not the result of capture in war. In sum, the simple language of Blackstone in this area disguises the legal complexities really involved without giving any orientation that would help lawmakers or attorneys find their way through the thickets of the law.

Richard Wooddeson, the third Vinerian Professor of English Law at Oxford, began lecturing in 1777, and his monumental treatise derived from thirteen years of lecturing was published in three volumes in 1792 (volume I) and 1794 (volumes II and III).[157] To Wooddeson, the law of nations was not merely the law of each state conforming in substance to the law of other states. It included also what Zouche called the law between states:

> The law of nations is adopted and appealed to by civilized states, as the criterion for adjusting all controversies proper to be so decided. This is the rule by which the property of captures at sea is determined, more especially when the subjects of independent powers are interested in the litigation. In such case neither the customs of the British admiralty, nor British acts of parliament, can, as such, be of sufficient authority and avail. But the law of nations is part of the law of England.[158]

From this point of view there does not appear to be much distinction between the law of nations in Blackstone's sense and the law between states, and it would seem as if Wooddeson were prepared to use that law, whatever it was, as a looming omnipresence hovering over English law as a basis for interpreting, and perhaps overriding, the customs of the Admiralty and even acts of Parliament.

Turning to piracy directly, Wooddeson defined it: "Piracy, according to the law of nations, is incurred by depredations on or near the sea, without authority from any prince or state."[159] His authority for that statement was Jenkins and Molloy, whose generalities he quoted raising some technical issues that seem of marginal importance to this study.[160] He agreed with Bynkershoek and Jenkins that the Barbary states cannot be "piratical" in any meaningful legal sense,[161] applying Cicero's definition of a state: "They have a fixt domain, public revenue, and form of government." In support of this conclusion he cited European state practice of treating the Barbary communities as states with which they "sometimes carry on war, sometimes stipulate for peace, with them as with other nations."[162]

The major contribution of Wooddeson to the evolving conception of "piracy" came from his notion of general international law, the law of nations,[163] being a single system including not only the law between states and the strictly positivist coordinated law of many states, but also a degree of coordination between the two. The issue on which he focused was whether a license which was technically inapplicable, and therefore could not be used to exculpate a captain of a charge of "piracy," was really necessary if in fact the captain did not hold himself out to be an enemy of all mankind, robbing indiscriminately, or, indeed, robbing anybody at all, since he took all his captures in to proper courts for prize adjudication. There was, therefore, a taking of possession of the property of others, but not of full property rights; not of a right to transfer title. It was, in a sense, Sir Francis Drake's case, raised to a new level of sophistication:

> His majesty granted letters of reprisal to sir Edmund Turner and George Carew against the subjects of the States General, which grant was called in by proclamation, and superceded [spelling *sic*] under the great seal. Then Carew, without Turner, having deputed several to put in execution the said commission, who acted under it accordingly, and being indicted for piracy, it was resolved by all the judges and the rest of the commissioners then present, that the procedure of the captain and his mariners was not a felonious and piratical spoliation, but a capture in order to adjudication [*sic*], and tho' the authority was deficient yet not being done *animo depredandi*, they were acquitted.[164]

Wooddeson approved of this result, commenting that "This case is a strong proof of the efficacy of a public or national commission," implying that had the case been left to positivist-minded administrators concerned with assuring the supremacy of the commission-granting (and withdrawing) authority, the result would have been different, and, to the extent different, unjust. To Wooddeson, then, to be "piracy" there had to be a taking that was both unlicensed and *animo deprendandi* (or *animo furandi*, to use the more familiar phrase); the common law "robbery" elements had to be there as well as the positive law departure from authorization. To further isolate the definition and remove from it the positivist emphasis on commissions, Wooddeson notes

that in another case in 1782, an indictment of a British subject (Luke Ryan) on a charge of "piracy" for taking a Dutch commission was in fact not an indictment "for piracy, generally, by the law of nations, but for that being a natural born subject he piratically, & c., *against the form of the statute*" [emphasis *sic*] did various things. Where the positivist officials might have wanted to extend the pejorative name and legal results of "piracy" to this action of a British subject which had been forbidden by municipal statute, to a naturalist like Wooddeson, the use of the word was merely polemical when added to a statutory charge that was not directly related to his conception of "piracy" under the hovering principles of universal justice he included within his conception of the law of nations.[165]

Searching for other cases in which the form of the commission was not the key to attaching the name and legal consequences of "piracy," Wooddeson referred to Palachie's Case as recited by Coke in his *Fourth Institute*.[166] Wooddeson's conclusion is sweeping and undoubtedly correct, that in order to be "piracy" in England, the taking must have been committed without color of belligerent rights. Even in England itself, he point out, "[T]he law of nations is . . . understood to tolerate at least the forfeiture and capture of enemy's ships and goods in time of open hostilities, without the sanction of a *special* [*sic*] commission."[167] A general proclamation would suffice, and, indeed, what court to which "enemy" goods or ships were submitted for prize proceedings would really refuse to support an English captor acting pursuant to English policy and submitting his takings for proper distribution? No such case has been found.

The implications of this position include a logical shift and coming together of the relative jurisprudential positions of positivist and naturalist thinkers. By regarding the requirement of a "commission" as simply a special English municipal law provision interpreted strictly against English depredators pursuing a "reprisal war"[168] but loosely in case of a general public war, and not applying at all in English courts in cases of belligerency between foreign powers alone,[169] the basic positivist scheme could be maintained. But the sweeping assertions of Jenkins and other early positivists are revealed as far too broad. On the other side, demanding that the English Common Law of robbery and its requirement of *animo furandi* be applied before any taking, commissioned or not, could be deemed "piracy" in the absence of statute calling something else "piracy," and regarding the English law in this phase as a mere municipal law expression of underlying natural law principles, undercut the search for a natural law of "piracy" and diminished the impact of natural law principles of self-defense and property rights on the definition. To the degree that English law was conceived as the embodiment of natural law, the municipal law of England as expressed through the sort of authoritative pronouncements in statutes and cases familiar to positivist jurists and statesmen made it possible to derive the supposed international law

of "piracy" from English precedents and make it appear part of a universal "law of nations" in the Zouche-Blackstone sense. The principles of international law could then be regarded as not a limit on English law, but as English law itself which all other countries were bound to follow because the sources and logic of English law were universally valid even if English jurisdiction was limited. Wooddeson's logic must have seemed very persuasive to both natural law and positive law English jurists.

As to universal jurisdiction and legal interest, Wooddeson was cautious:

> A charge of piracy may properly be exhibited in any country, to which either the party accused, or the owner of the goods, belongs. But whether the law of nations will allow the fact to be tried in a country where they are both aliens, and which therefore seems to have nothing whereon to ground the reasonableness of its jurisdiction, is left undecided by the judicious Bynkershoek [*sic*].[170]

He did support universal jurisdiction in principle on the ground that the seas are within the territorial jurisdiction of all princes, and given the right nationality of the vessels or persons involved, offenses on the high seas could certainly be tried in any port under tribunals deriving their competence from municipal law. But that logic seems to miss the point by confusing various kinds of jurisdiction. The Dutch Admiral might have jurisdiction equal to that of the British Admiral on the high seas, but his prescriptions with regard to events wholly within a British ship in those seas would have been hotly rejected by a British court; and Dutch intermeddling in a legal dispute between Great Britain and France would have been resented even (especially) if the action giving rise to the dispute occurred entirely on the high seas (however defined). In sum, the reference to territoriality as the basis for universal jurisdiction does not reach the true issue, which is legal interest in the case.

The wider assertions of British legal interest, amounting in a sense to assertions of British jurisdiction to rule all the seas to the exclusion of inconsistent foreign law even on board foreign vessels, grew in the nineteenth century and found their limits. But before analyzing those assertions and their limits, it is important to understand the other great stream of jurisprudential thought and practical action growing out of English writings and precedents; the law and policy regarding "piracy" of the newly independent United States of America.

Notes

1. William Wynne, *The Life of Sir Leoline Jenkins* . . . (1724), Vol. I, pp. xii-xiii, x1; 10 *DNB* 739-742.
2. Wynne, *op. cit.*, Vol. II, p. 791.
3. Cornelisz Bynkershoek, *Questionum Juris Publici* (1737), Book I, ch. XVII (Tenney Frank, transl.) (CECIL 1930), Vol. II, p. 99. See text at notes 139-151 below. The passage in Gentili's works that Bynkershoek cites is the first of the Spanish Advocate's Pleadings analyzed in the text at note I-105 above. There is no mention of Gentili's altered views.
4. William Oldys (spelled Oldish in the Report in 12 *Howell's State Trials* 1269) is described as "an eminent civil lawyer" in 14 DNB 1013. Despite the outcome of the discussion to be retold below, in which Dr.

Oldys was himself nearly accused of treason by some members of the Cabinet Council, and was removed from the list of Advocates of the Admiralty, he survived well, and had enough reputation to run (unsuccessfully) for Parliament as a member for Oxford University in 1705. He died aged 72 in 1708. *Id.*

5. The civil lawyers, i.e., lawyers expert in Admiralty, Ecclesiastical and Roman law, were regarded as expert also in international law. The most learned, all with Doctoral degrees (D.C.L. from Oxford or LL.D. from Cambridge) organized themselves in what was called "Doctors' Commons" and were frequently consulted by the Crown on questions of international law. See 3 McNair, *International Law Opinions* (1956) 408-420.

6. Tindall's (spelled Tindal in 19 *DNB* 883; his biography is at pp. 883-885) career was interesting. He turned Catholic during the reign of James II and abandoned that religion for the Church of England at about the time James was deposed and Catholicism became unpolitic again. He was only 36 years old at the time of this incident in 1693. Oldys was near 60.

7. 2 Marsden, *Documents* . . . 146-148. Tindall's opinion is listed with the majority although in substance he certainly dissented. Is it possible that he falsified this entry after the opinion was formally presented?

8. Secretary of State and member of the Privy Council. Trenchard was a very active politician who had had to flee the country in 1685 when his involvement in the Monmouth revolt against Charles II was discovered. A devout Protestant, he was bitterly opposed to King James and his supporters. 19 *DNB* 1123-1125.

9. See note 4 above.

10. It has been impossible with reasonable effort to identify these civil lawyers.

11. 12 *How. St. Tr.* 1269-1275. The actual proceedings in the trial are not provided. The eight Irish "pirates" were named John Golding, Thomas Jones, John Ryan, Darby Collings, Richard Shivers, Patrick Quidley, John Slaughter and Constantine de Hartley.

12. An original copy of Tindall's Essay has not been found. This version, cited to pp. 25-30 of the *Essay*, appears in 12 *How. St. Tr.* 1271-1274 as a very long footnote. The quoted passage is in col. 1272. The same excerpt is printed (with some minor editorial differences) in 2 Marsden, *Documents* 142-146.

13. 12 *How. St. Tr.* 1271.

14. 28 Hen. VIII c. 15 (1536), reproduced in Appendix I.A below.

15. It is interesting that Coke's analysis and Hale's adoption of it as recorded in the 1685 edition current in the 1690s was not mentioned in this discussion. See Coke, *Third Institute* 113; 1 Hale *Pleas of the Crown* (1685 ed.) 23, 77-78. Presumably the reason was that the civilians were focusing on "piracy" as a question of the legal power of foreign sovereigns to issue privateering licenses, and whether a contender for the English crown could be considered a foreign sovereign in England when acting as if he were the sovereign of England in disregard of the constitution under which his acts were being measured. That is an interesting legal question, but did not involve the English municipal law of treason directly; indeed, Charles I having been beheaded for "high treason" in 1649 under a definition that supposed him to be levying war against the kingdom, the jurists of 1693 did not want to raise the question again. The Lords and Common Law people involved presumably did not want to be reminded that Coke defined "piracy" as a species of "petty," not "high," treason, and thus the entire category would seem to have been irrelevant to criminal charges brought against those whose real offense was felt to be "high treason." See text at notes 19 sq. below.

16. This was, of course, the incident referred to by Gentili and discussed in Chapter I at note I-100 above. The same passage of Gentili is cited by Tindall.

17. 12 *How. St. Tr.* 1273-1274.

18. *Id.*, col. 1274.

19. 25 Edw. III statute 5 c. 2 (1352), 2 Pickering, *The Statutes at Large* 50-52 (1762). See note I-201 above.

20. 12 *How. St. Tr.* 1275-1279. The quoted passage is in col. 1278.

21. The appeals petition was rejected by the House of Lords and of the defendants, "some of them, if not all, were executed." *Id.*, col. 1280. Some clue as to the emotional issues at play in that rejection might be seen in Tindall's *Essay*, which concludes by comparing King James's claim to continued political authority to "the charms, or indelible characters, the Papists say, are inseparable from the persons of their priests," saying such a persistence of powers, "whatever it be in ecclesiasticals, is no small bigotry and fanaticism in civil affairs. And it is the height of folly, madness, and superstition, to believe that the people, who have entrusted some one amongst them with power for no other end but for protecting them, can, upon no account whatsoever, resume it." *Id.*, col. 1274. It might be suggested, however, that to treat the struggle as ended in fact with the Parliament victorious was premature in 1693.

22. See note I-201 above.

23. Coke, *Third Institute* 111.

24. 5 Pickering, *op. cit.* 199 (1763):

> Foreasmuch as some doubts . . . have been moved, That certain kinds of treasons . . . committed out of the King's majesty's realm of *England*, and other his Grace's dominions, cannot ne may be [*sic*; by?] the common laws of this realm be enquired of, heard and

> determined within this said realm of England . . . [Enact] That all manner of offences, being already made and declared . . . treasons . . . and done perpetrated or committed . . . by any person or persons out of this realm of *England*, shall be from henceforth enquired of, heard and determined before the King's justices of his bench . . . or else before such commissioners, and in such shire of the realm, as shall be assigned by the King's majesty's commission, . . . in like manner and form to all intents and purposes, as if such treasons . . . had been done . . . within the same shire . . . Provided . . . that if any of the peers of this realm shall be indicted of any such treasons . . . [they shall have] trial by their peers . . . as hath heretofore been accustomed.

25. Coke, *Third Institute* 113.

26. The text of the pertinent part of Coke's short analysis is in note I-201 above.

27. 7 Will. III c. 3 (1695) 9 Pickering, *op. cit.* 389 sq. (1764). The "Act for regulating of trials in cases of treason and misprision of treason" takes the odd form of setting forth the requirement of two witnesses to the overt act unless the defendant confess or refuse to plead, and provides for jury trials (and trial of peers before the House of Lords) in capital cases. The trials were still held by royal commissioners as judges and it is difficult to understand how the new procedures differ from the ones established in 1535 and repeated in 1536 for "treasons" along with "robbery and felony" cases, except that the jurisdiction of the new "treason" commissioners was not restricted by statute to the traditional Admiralty jurisdiction. The aim of the new statute seems to have been less to catch James's (and Louis XIV's) licensed privateers acting at sea, than to catch Englishmen (and Irishmen) adhering to James in France.

28. 13 *How. St. Tr.* 485. Among the many points argued in the case was the question of the tribunal's jurisdiction to hear a treason indictment. The discussion was short but illustrates the technical problems:

> Mr. Phipps [Vaughan's defense attorney]. Then next I am in your lordship's judgment, whether the statute of 28 of Hen. 8, by which captain Vaughan is tried, is in force, and be not repealed by the 1st and 2nd of Philip and Mary, which saith, that all trials, in cases of treason, shall be at the common law. Now, by the common law, before the statute of 28 Hen. 8, treason done upon the sea was tried before the admiral, or his lieutenant; and my lord Coke, in the 12 Rep. in the case of the admiralty, saith, the jurisdiction of the admiralty is by the common law. By the statute 33 [*sic*; 32? 35?] Hen. 8, c. 4, treason committed in Wales, might be tried in what county the king would assign; but since the statute of Philip and Mary, it must be in the proper county; so that we are in your lordship's judgment, whether the statute of 28 Hen. 8 be in force; and whether, since the statute of 1 and 2 Philip and Mary, treasons done upon the sea, ought not to be tried before the admirals or anciently at the common law [instead of before a special tribunal appointed by the crown to replace admiralty courts in some cases only].
>
> L.C.J. [Lord Chief Justice Sir John Holt of King's Bench, President of the tribunal]. This is treason by the common law, and the trial is by the method of the common law.
>
> Mr. Phipps. It is true that my lord Coke, and other authorities say, that the statute 35 Hen. 8, for trying treasons committed beyond sea, is not repealed by the statute of 1 and 2 Philip and Mary; but they do not say that this [part of ? the] statute is not repealed by the statute of Philip and Mary; and the books being silent in this, is the reason why I propose this question for your lordships' judgment.
>
> L.C.J. It is no more a question than the trials of foreign treason, and then the determination of the trials upon the 35th [Hen. 8?] determines the question upon this.

That is the complete discussion related to the point. *Id.*, cols. 533-534. The statute of 1 & 2 Philip and Mary is apparently 1 & 2 Philip and Mary c. 10 (1554) (6 Pickering, *op. cit.* 53 (1763)), sec. VII of which provides that "all trials . . . for any treason, shall be had and used, only according to the due order and course of the common laws of this realm . . ." (p. 54). Other statutes pertinent to the evolution of the procedures for handling "treason" in England, such as 32 Hen. VIII c. 4, and 33 Hen. VIII c. 20, 23, seem too far removed from this study for further discussion. The statute cited by Phipps, 33 Hen. VIII c. 4, is hopelessly irrelevant. It deals with the repair of decayed houses in England and Wales. The statute dealing with treasons committed beyond the sea is 35 Hen. VIII c. 2 (1545).

29. See note I-201 above, reference to the "Normans, who had revolted in the reign of king John," Coke, *Third Institute* 113.

30. 13 *How. St. Tr.* 503.

31. *Id.* passim, esp. cols. 495-499, 534-535. Dr. Oldys played a prominent part in pressing the civilian viewpoint.

32. 11 & 12 Will. III c. 7 sec. viii (1698-1699); dated to 1700 in 10 Pickering, *op. cit.* 320 (1784) and normally referred to that latter year. It is indexed in the official *Chronological Table of Statutes* as 11 Will. III c. 7 (1698). Reproduced in Appendix I.B below.

33. See, e.g., The Journey of Wen-Amon to Phoenicia (c. 1100 B.C.?) in 1 Pritchard, *The Ancient Near East* (1958) 16-24.

34. See text at notes I-170 sq. above.

35. See text at note I-192 above, Proclamation of 1599.

36. Lord Admiral Charles the Earl of Notingham to Sir Julius Caesar, 1 Marsden, *Documents* 320-321.

37. *Id.* 522 at 523.

38. See, for example, the Proclamations of 23 June 1603 by James I declaring

> [T]hat all such our men of warre as now be at sea, having no sufficient commission . . ., and have taken . . . any ships or goods of any subject of any prince in league and amitie with us, shall be reputed and taken as pirates, and . . . shall suffer death . . . according to the ancient lawes of this realme.

1 Marsden, *Documents* 342 at 343. The object of this Proclamation was to enforce the new peace with Spain. There is no known ancient English law of "piracy" to justify the last sentence of the Proclamation, and the use of the word seems consistent with James's flinging it about to everybody not obeying his orders. See text above at notes I-85 and 86.

39. See below.

40. See text at note 109 below.

41. See below.

42. See, e.g., the French letter of marque of 1693 authorizing a privateer not only to capture English and Dutch ships, but also to "*courir sus [sic]* aux Pirates, Corsaires, et gens sans aveu." 2 Marsden, *Documents* 140. Presumably Captains Golding, Jones and Vaughan had commissions in this form. See text above at notes 20 and 28 sq. On the evolution of privateering from a private act to avoid belligerency to a belligerent right of a sovereign, see note I-176 and works cited there.

43. 2 Marsden, *Documents* 427-428.

44. This trace of a natural law license to take necessities from the rich comes not from natural law or from Jenkins, but is merely Jenkins's paraphrase of the provision of 27 Hen. VIII c.4 and 28 Hen. VIII c.15 sec. iv. See also Molloy, *De Jure Maritimo*, Book I, ch. IV, para. xviii(2) at p. 41.

45. Charge to a Grand Jury at Admiralty Session in Southwark, 18 February 1680, 167 Eng. Rep. 561. This charge does not appear to have been among those collected by Wynne, *op. cit.* note 1.

46. As to the availability of insurance at this time for "all events and for all disasters," see Defoe, *Moll Flanders* (1722) (Signet ed. 1964) 280. Defoe pretended that the book was a first-person account by a whore written in 1683. It has frequently been asserted that the tale was intended in the usual form of the time as a satire on the emerging merchant classes in England and North America.

47. 1 McNair, *Law Officers' Opinions* 266-267.

48. See text at notes I-143 sq. above.

49. Once again, it is not proposed to follow this interesting side-trail; to trace the history of the concept of "piracy" is enough for one book without also attempting the history of "robbery." The phrase "*animo furandi*" appears as an essential element of the Common Law crime of "larceny," of which "robbery" is an aggravation according to 1 Hale, *Pleas of the Crown* 61, 71. Curiously, the phrase does not appear in Hale's direct discussion of either "robbery" or "piracy." Its first known technical use in English law was ironically in Bracton's (c. 1250) Latin treatise in which the English Common Law crime of "theft" is translated with the Latin word "*latrocinium*," which in turn was later translated back into English as "larceny"—thus, it seems, contributing to the confusion between "*pirata*" and "*latrones*" by indirectly over a period of some 400 years finding the former to be at English law a mere sub-category of the latter. Bracton did not mention "*pirata*" while recording in the reign of Henry III with regard to "*lactrocinium*," "*sine animo furandi non committitur* [without the intention of stealing it is not committed]." 2 Pollock & Maitland, *History of English Law* 494, 499. The Latin word "*furandi*," translated "of stealing" above, itself contains a complex idea of illegality and taking which it is impossible to analyze further in this place. The word "*animo*" in Latin is in the ablative case and means "with intent." The dative is the same, "animo." The nominative singular is "*animus*" and the accusative is "*animum*."

50. See text at note I-156 above.

51. See note I-61 above.

52. See notes I-49 and I-50 above.

53. The analogy between Vikings and classical "*pirata*" was drawn no later than 1387. See text at note I-64 above.

54. See text at notes I-93 sq. above.

55. See colloquy in text at note 7 above.

56. The most common is Rex v. Dawson and others (1696), 13 How. St. Tr. 451. It is cited in East, *A Treatise of the Pleas of the Crown* (1804), as Rex v. May, Bishop and others. The defendants were Joseph Dawson, Edward Forseith, William May, William Bishop, James Lewis and John Sparkes.

57. See text at notes 28 sq. above.

58. 13 *How. St. Tr.* 453, 457, 529 sq.

59. The issue was one of double jeopardy, of course. The report is less than satisfactory on this point; the places and names of the principal victims of the defendants' depredations, and the witnesses for the prosecution, seem very similar in the two trials insofar as reported.

60. 13 *How. St. Tr.* 454–455.

61. 28 Hen. VIII c. 15. The text is set out in Appendix I.A.

62. Molloy, *op. cit.*, Book I, ch. IV, para. vii at p. 37.

63. *Id.*, para. viii: "And so it is, if the Subject of any other Nation or Kingdome, being in Amity with the King of *England*, commit Piracy on the Ships or Goods of the *English* . . ."

64. *Id.*, para. xiv at p. 39:

> "If a *Spaniard* robs a *French Man* on the High Sea, both their Princes being then in Amity, and they likewise with the King of *England*, and the Ship is brought into the Ports of the King of *England*, the *French Man* may proceed *criminaliter* against the *Spaniard* to punish him, and *civiliter* to have Restitution of his Vessel: but if the Vessel is carried *intra Praesidia* of that Prince, by whose subject the same was taken, there can be no proceeding *civiliter*, and doubted if *criminaliter*; but the *French Man* must resort into the Captor or Pirats own Contrey, or where he carried the Ship, and there proceed."

65. *Id.*, para. x, p. 38.

66. Letter from Sir Leoline Jenkins to Admiral Sir Thomas Allen dated 8 October (1674?), 2 Wynne, *op. cit.* 699–700.

67. This basis for "normal" jurisdiction appears to have dropped out of the customary international law regarding the extent of national jurisdiction, or at least become doubtful, by the 20th century. See The Lotus Case, Permanent Court of International Justice (P.C.I.J.), Ser. A, No. 10 (1927), and the "voluminous literature inspired by this case," 2 Hudson, *World Court Reports* 20. This is not the place to pursue this interesting subject further.

68. Molloy, *op. cit.*, para. xi, p. 38.

69. *Id.*, para. xii.

70. 1 Wynne, *op. cit.*, 1xxxv–1xxxvi, Charge given to an Admiralty Session within the Cinque Ports, 2 September 1668.

71. The precise date is unclear; Wynne does not give it. Since the title "Sir" is used, and Wynne does not use the title with regard to Jenkins's writings before 1669, when Sir Leoline was knighted, and Jenkins left the Admiralty bench in 1674, some time between 1669 and 1674 is indicated.

72. *Id.*, pp. xc–xci, Charge given to an Admiralty Session held at the Old Bailey.

73. Williamson's biography is capsulized in 21 *DNB* 473–478.

74. 2 Wynne, *op. cit.* 713 at 714.

75. *Id.*

76. *Id.*

77. Which treaty is not specified by Jenkins. It appears to be the Treaty of Breda, 21/31 July 1667, 10 *CTS* 255. Jenkins refers to an Article 35, which seems to bear some relationship to Article 35 of a Treaty between France and the Netherlands which was made applicable also to England by Article III of the Treaty of Breda. 10 *CTS* 278, 281.

78. 2 Wynne, *op. cit.* 714–715.

79. Article XX of the Treaty of Peace and Alliance between Great Britain and the Netherlands, Breda, 21/31 July 1667, 10 *CTS* 231, specifically provides for the "condign punishment" of "Pirates and Sea Rovers" regardless of nationality. Interestingly, the reproduction in the *CTS* omits the English translation of the Latin text of this (and several other) articles. The Englist text quoted here is from an unattributed volume, *Extracts from the Several Treaties Subsisting Between Great Britain and Other Kingdoms and States* . . . (1741) 132, apparently a shipboard reference work for English naval commanders. Obviously, the compilers of this work believed the Treaty of Breda's provisions regarding the punishment of "pirates" were continuing in force. In the original Latin, the phrase "Pirates and Sea Rovers" is "*Piratae et Praedones*," 10 *CTS* 242.

80. Cited at note 56 above.

81. Text at note 72 above.

82. 13 *How. St. Tr.* 455.

83. *Id.* 457.

84. *Id.* 483.

85. 14 *How. St. Tr.* 1199.

86. 6 Anne c. 40 (1707); Scottish Act 5 Anne c. 7 (1706).

87. 14 *How. St. Tr.* 1238.

88. *Id.* 1311-1312.

89. *Id.* 1224.

90. The roots of this conception and its incorporation into English law through the adoption of the maritime Laws of Oleron are mentioned in the text at note I-150 above.

91. The Trial of Captain William Kidd, at the Old-Bailey, for Murder and Piracy upon the High Seas; and of Nicholas Churchill, James Howe, Robert Lamley, William Jenkins, Gabriel Loff, Hugh Parrot, Richard Barlicorn, Abel Owens, and Darby Mullins, for Piracy, May 3 and 9, 1701, in 14 *How. St. Tr.* 123.

92. *Id.*, cols. 123-125 note, summarizing the Journal of the House of Commons 16 March, 1700 - 16 April, 1701 in which there appear many actions and resolutions relating to the accusations against Captain Kidd and the role of the Earl of Bellamont in confiscating Kidd's papers and sending only a selection of them to England with the ship bearing Kidd and his accused crewmembers. Kidd appears to have tried to bring Lord Bellamont to court in England alleging irregularities in his actions as Governor of New York (not "New England"). The Crown intervened to defend Bellamont and the cause never was heard. 2 Salk. 625. The removal of the case appears to have become a precedent on a technical aspect of English administrative law. 2(ii) Anson, *The Law and Custom of the Constitution* (4th ed., by A.B. Keith 1935) 334. Bellamont's name is misspelled in note 1 on that page and in Anson/Keith's table of cases; the correct spelling appears in Salkeld's Reports.

93. 14 *How. St. Tr.* 171-173.

94. *Id.*, cols. 169-170. This entire commission is as interesting and as tightly drafted as the previous one, but relating to privateering in time of war rather than to piracy, its technical language is not directly pertinent to this study.

95. *Id.* 146. There is some inconsistency in the report, which also mentions that verdict being brought in during the second trial (for piracy) the next day. Id. 153.

96. *Id.* 147. The exact location is obscure. There is a Cochin port in the Malabar coast of India, and a Cochin district in what is now Vietnam, but no Cochin (or Cutsheen) is known in the islands now part of Indonesia or the East Indies as normally intended about 1700. Cochin in India was apparently intended. The *Quedagh Merchant* is described later in the proceedings as "a Moorish ship," and the merchants on board as "Armenians." *Id.* 155. The capture is dated to February 1697 in that place. Indeed, there seem to be several inconsistencies between the charge and the actual facts as uncovered during the trial, but apparently those discrepancies were not considered significant by the court and the defendants did not make much of them. For good or ill, the trial procedures in England at that time were considerably more favorable to the prosecution than in the United States today.

97. The text is given at *id.* 149-150.

98. *Id.* 150. Every (Bridgman) was mentioned prominently in the Dawson case also, cited note 56 above, but was never captured.

99. *Id.* 158.

100. *Id.* 169.

101. *Id.* 180. It is not proposed to cite all places in the transcript of the trial in which these points were made; the transcript makes exciting reading but, like most trial records, is repetitive and must be read in its entirety to understand all the points of dispute and their relative importance to the trial. This study is focused on the legal definition of "piracy" alone.

102. *Id.*, 183-184.

103. *Id.*, 185.

104. *Id.*, 185-186.

105. *Id.*, 186-187.

106. *Id.*, 234. George Bullen does not appear in the proceeding.

107. Kidd asked to have Dr. Oldys, the Civil Law expert, appointed one of his defense counsel for the murder trial, and, after some procedural argument on another point (whether he had to plead before counsel would be permitted to address the court), that was done. *Id.* 127. Oldys appeared actively arguing for Kidd during the trial. *Id.* 132 (arguing that if the ships he took had French passes "there was just cause of seizure and it will excuse him from piracy"), 133 (concerning a procedural point regarding notice of the charge and that money to obtain witnesses should have been permitted Kidd), etc.

108. 2 Marsden, *Documents* 48-49.

109. *Id.*, 82.

110. If it were shown to have been an enemy vessel, it is hard to see that any legal proceedings would be brought before an English tribunal since there would have been no loss to provoke even a private restitution claim by an English or neutral skipper. If it were shown to have been a neutral or English vessel, the lack of commission would likely have seemed damning in an English tribunal, while the possessor of a commission might well have been able to argue mistake, in those days of false flags.

111. Text at note 104 above.

112. See text at note I-156 above.

113. Text at notes I-182 sq. above.
114. Text following note I-187 above.
115. See above at note I-190.
116. See note I-191 above.
117. The incident of Sir Francis Drake's submitting his unauthorized prize to Queen Elizabeth is well known. The conventional wisdom that Drake sailed without a commission to take Spanish and Portuguese prizes, but bought the Queen's retroactive consent by submitting his spoils to her personal disposal, may reflect court gossip more than fact at least with regard to Drake's raid on Nombre de Dios and his round the world expedition. There are traces of secret permissions uttered by the avaricious Elizabeth although an open commission would have risked an unwanted war with Spain. See Nuttall, ed., *New Light on Drake* (Hakluyt Society, 2nd Ser., Vol. 34) (1914) 54-56 (Sir Francis's cousin John's account of Sir Francis's reception by Queen Elizabeth in 1573; John's account was delivered under questioning by the Spanish Inquisition in Lima, Peru, in 1587 regarding the Nombre de Dios raid); 429-430 (letter of 22 October 1580 from Elizabeth to her treasury official, Edmund Tremaine, to grant Drake 10,000 pounds out of his own spoils just brought in, but adjuring him to strictest secrecy). Cf. Wagner, *Sir Francis Drake's Voyage Around the World* (1926) 25-26 (summarizing the probabilities); 445-446 (copy of the commission from Elizabeth to Captain Edward Fenton dated 2 April 1582 indicating the usual form, authorizing the captain to administer justice on board his ships, but silent as to captures or the administration of justice to pirates or any foreigners). In 1593 Lord Howard, the Lord High Admiral, wrote to Sir Julius Caesar of a Spanish ship taken to Plymouth by one of Drake's captains, "to let you know the premises, and to require you that the want of a commissione maybe noe let unto the same." 1 *Marsden*, Documents 281-282.
118. Cited note 32 above; text reproduced in Appendix I.B.
119. *Id.*, sec. 7.
120. *Id.*, sec. 8.
121. "Barratry" is not mentioned as such in the statute. It would have been included as "petty treason" or "felony" as a breach of trust. See notes I-134, I-165 above.
122. Cited note 86 above.
123. E.g., 4 Geo. I c. 11 (1717), ending the "benefit of clergy" for "pirates" ("benefit of clergy" refers to special procedures to remove the clergy (at times, any literate person) from the jurisdiction of the normal Common Law courts); 8 Geo. I c. 24 (1721) making it a crime to "consort" with pirates; 18 Geo. II c. 30 (1744) minor amendments to the Act of 1700; 46 Geo. III c. 54 (1806) allowing Commissions under the Act of 1536 to be held in any overseas British colonies; 7 Geo. IV c. 38 (1826) refining the Act of 1806; 7 Will. IV & 1 Vic. c. 88 (1837) making a technical adjustment to clarify a doubt about whether attempted murder was capital by making it so when accompanied by "piracy."
124. 6 Geo. IV c. 49 (1825). See chapter IV.B.2 below. The Act is reproduced in Appendix I.C below.
125. 14 *How. St. Tr.* 1067.
126. See Appendix I.A below. The relevant passage is quoted in the text at note I-164 above.
127. 14 *How. St.* Tr. 1073. Of course, "pirates" were not called by the Romans "*hostis humani generis.*" See note I-201 above. As to oaths given to pirates, see notes I-49, 50 and 51 above and the text that follows them. In fact, in relations with "*pirata*" in classical times the law of arms was followed. See generally text at notes I-22 sq.
128. Text quoted at note 93 above.
129. The "Mayflower Compact" of 1620 can be seen as an application of this "social contract" theory in practice, although the most eloquent statement of social contract theory that has survived, Hobbes, *Leviathan* (1651), was not published until some thirty years later.
130. 14 *How. St. Tr.* 1084-1087.
131. It is not known what incidents are referred to. Presumably some form of popular nonsense was being alleged without basis in fact or literature.
132. 14 *How. St. Tr.* 1089.
133. *Id.* 1090-1095.
134. Zouche, *Iuris et Iudicii Fecialis* (1650) (J.L. Brierly transl.) (CECIL 1911) Part I, sec. i, p. 1.
135. It has become conventional wisdom that Jeremy Bentham first made this distinction in English. See Woolsey, *Introduction to the Study of International Law* (1860, 3d ed. 1871) sec. 9 at p. 26-27). As Woolsey points out, the conceptual distinction between the *jus gentium*, the common law of all countries, and the *jus inter gentes*, the law between nations, was well known at Roman law and Bentham's contribution, if any, was merely to introduce the phrase "international law" as a label for the second concept. In fact, Bentham does not focus on this distinction at all in the works in which the phrase "international law" was first used. 2 Bentham, *The Works of Jeremy Bentham* (John Bowring, ed.) (1838-1842, 1962) 535. The first of the four essays in which the phrase appears was written in 1786 and the last in 1789, but none of them was printed until Bowring's edition of the complete works a generation later. Id. 536. Nussbaum refers the phrase to a slightly later work of Bentham, the *Introduction to the Principles of Morals and Legislation* (1789) (Nussbaum, *A Concise History of the Law of Nations* (Rev'd ed. 1954) 136), and calls it "one of his [Bentham's] happiest linguistic innovations." *Id.* If so, it is

hard to see why Nussbaum himself titled his great *History* as he did. Bentham himself seems to have oversimplified the jurisprudential relationship between, on the one side, rules of conflict of laws and the common municipal law of all states (today considered a branch of public international law only in certain narrow contexts, like the municipally enforced laws of war, prize law and some parts of Admiralty; see the *Zamora* [1916] A.C. 77, opinion by Lord Parker of Waddington), and, on the other side, the law between states:

> Now as to any transactions which may take place between individuals who are subjects of different states, these are regulated by the internal laws, and decided upon by the internal tribunals, of the one or the other of those states: the case is the same where the sovereign of the one has any immediate transactions with a private member of the other: the sovereign reducing himself, *pro re nata* [fig., for that purpose], to the condition of a private person, as often as he submits his cause to either tribunal; whether by claiming a benefit, or defending himself against a burthen. There remain then the mutual transactions between sovereigns, as such, for the subject of that branch of jurisprudence which may be properly and exclusively termed *international*[1] [1. The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express, in a more significant way, the branch of law which goes commonly under the name of the *law of nations*: an appellation so uncharacteristic, that, were it not for the force of custom, it would seem rather to refer to internal jurisprudence . . .].

Bentham, *Introduction to the Principles of Morals and Legislation* (1789) (printed with *A Fragment on Government*, Wilfrid Harrison, ed., 1948) 426. Bentham's rather glib dismissal of the legal obstacles that the theory of sovereign immunity places in the way of private suits against foreign sovereigns seems not to be based on any logic or historical precedent of his time.

136. Pufendorf, *Elementorum Jurisprudentiae Universalis* (1660) (ed. of 1672) (W.A. Old Father, transl.) (CECIL 1931), Definition XIII sec. 24. Compare with Rachel, *De Jure Naturae et Gentium Dissertationes* (1676) (J.P. Bate, transl.) (CECIL 1916), Dissertation Second, sec. III:

> "For if there be any Law observed among many peoples, but no obligation springing therefrom obtains among them so that by its bond they are constrained into a Society and kept therein, that is not Law of Nations at all and ought not to be so called, but it is a Civil Law common to many peoples and belonging to them as individual peoples. Now Grotius saw this rightly and pointed it out; but here and there he falls in with the common but quite unjustified usage and calls that Law the Civil Law of many peoples, or a kind of Law of Nations."

Rachel, positivist in his main lines of thought, considered it "quite wrong to confuse the Law of Nations with the Law of Nature." Id., sec. IV.

137. Cf. Grotius, *De Iure Praedae Commentarius* (1604) (Williams & Zeydel, transl.) (CECIL 1950), passages referred to in note I-126 above; Wolff, *Jus Gentium Methodo Scientifica Pertractatus* (1747, 1764) (Joseph H. Drake, transl), (CECIL 1934), secs. 200-201; Vattel, *Le Droit des Gens* (1758) (Charles G. Fenwick, transl.) (CECIL 1916), Book II, ch. ii, secs. 23-24. It is noteworthy that Vattel does not address "piracy" directly. Privateers without commission he wrote could be treated on capture as "robbers or brigands [*des voleurs ou des brigands*]" while those with commissions were properly considered "prisoners captured in regular warfare [*prisonniers, faits dans une Guerre en forme*]." *Id.* Book III, ch. xv, sec. 226, Vol. II p. 199; Vol. III, p. 318. His discussion of privateering (*id.* sec. 229) addresses only those who abused their licenses for personal gain instead of justice, as unable "to remove the stain of infamy [*ne peut laver leur infamie*]," but he does not call them "pirates" or brigands. He does not address the infamy of those who pursue the same ends without commissions.

138. Wolff dealt with the problem of an expanded knowledge of political societies outside of Europe, and the apprehension that not all men found the interference with peaceful commerce to be unreasonable, by hypothesizing the entire "society of men united for the purpose of promoting the common good by their combined powers" as a "supreme state" governed by its own unwritten constitution. Wolff, *op. cit.*, Prologomena secs. 9-11. He considered indivduals as bound equally with states to the whole system. *Id.*, sec. 12. But he excluded from the supreme state nations which, without naming any, he called "barbarous and uncultivated." *Id.* secs. 52-53, 168-169. This approach raises many theoretical problems, particularly when it is remembered that Wolff expressly notes that all nations are imperfect, and that there is no right of war against a "barbarous" state merely on account of its barbarity (*id.* sec. 169)—thus implying that there is yet another, even more "supreme," state linking the "supreme state" of civilized nations to barbarous states in a single system. But this is not the place to analyze Wolff's full thought.

139. Bynkershoek, *op. cit.* note 3 above.

140. *Id.*, text at note 3 above.

141. *Id.*, 98 (English translation); Vol. I, p. 122: "*piratarum praedonumque vocabulo intelligentur.*"

142. *Id.*, Vol. II, p. 98 (English translation); Vol. I, p. 122: "*Unde, ut piratae, puniuntur, qui ad hostem depraedandum enavigant sine mandato Praefecti maris . . .*"

143. *Id.*

144. *Id.*

145. *Id.*, Vol. II, p. 99, citing Dutch (and pre-independence Habsburg) laws of 1570 (insurance), 1580 (herring-fishers) and 1696 (French privateers too close to Dutch territory). The Dutch word used in these statutes was not "piracy" but "*zeerovery.*" *Id.*, Vol. I, p. 126.

146. See text at notes 17 sq. above. William III of England was, of course, William, Prince of Orange, the *Stadhouder* of the Netherlands. The line of succession in England diverged from that of the Netherlands after his death, England having invited him to rule only because he was the Protestant husband of James's daughter Mary. Under this arrangement, William ruled England alone as William III after Mary's death in 1694, but was succeeded by Anne, Mary's younger sister, who died without surviving children in 1714. George I of Hanover succeeded Anne in that year as the nearest relative of the Stuart line (he was a great-grandson of James I).

147. Bynkershoek, *op. cit.*, Vol. II, pp. 101-102. It is not clear whether this negotiation is the same as that retailed in the text at notes 73 sq., in which Sir Leoline Jenkins took the view in 1675 that the Treaty of 1667 had a different meaning than that stated here by Bynkershoek.

148. See argument in text at notes 85 sq. above.

149. Bynkershoek, *op. cit.*, Vol. II, p. 102. The treaty is in 7 *CTS* 141. Article XVII (pp. 146-147) comes closest to what Bynkershoek says, but I have found no provision that says it clearly.

150. Bynkershoek, *op. cit.*, Vol. II, pp. 102-103.

151. See note I-176 above.

152. Blackstone, *Commentaries on the Laws of England*, was published in four volumes, Only the fourth is pertinent to this study; it was published in 1769. The identical text is used in the edition published in Worcester, Massachusetts, in 1790, which is the one from which these excerpts are taken as more likely to have influenced American judges in the early 19th century, particularly Justice Story. See chapter III below.

153. 4 Blackstone, *Commentaries* (1769, 1790) 67.

154. See notes I-61 and I-201 above.

155. 4 Blackstone, *op. cit.* 71-72.

156. Coke, *Fourth Institute* (1644) passim.

157. All the excerpts below are taken from 2 Wooddeson, *A Systematical View of the Laws of England (1794)*, Lecture XXXIV, "Of Captures at Sea."

158. *Id.*, 421.

159. *Id.*, 422.

160. Such as whether an attempt at "piracy," the mere assault, not being "robbery" was properly considered to be "piracy." Jenkins and Molloy each has passages relating to this, Jenkins asserting the attempt to be enough, according to Wooddeson, Molloy taking the other position on the basis of statute law in many jurisdictions. But Wooddeson's citation to Molloy (Molloy, *op. cit.* sec. 18) seems unrelated to the point, and in another place (sec. 13) Molloy argues that an unsuccessful assault will still carry criminal penalties—the distinctions being technical ones as to whether members of the crew are all principals or only accessories in the crime. This does not seem a significant issue for present purposes. An exhaustive analysis of the technical questions, treating the English treatises and cases as if determinative of international law, is *In re Piracy Jure Gentium* [1934] A.C. 586. See note V-101 sq. below.

161. Wooddeson, *op. cit.* 423.

162. *Id.*, 423-424.

163. On the shift of language from "law of nations" to "international law," see note 135 above.

164. *Id.*, 426.

165. *Id.*, note "n" at the foot of p. 426. Wooddeson records that Ryan was convicted but pardoned, which seems to illustrate the point of jurisprudence: Convicted under positive law relating to commissions; pardoned as a act of grace under natural law principles relating to moral fault.

166. See last sentence in note I-196. Oddly, Wooddeson cites p. 152 instead of 154 of Coke's *Fourth Institute*. There is language in p. 152 to support the citation, but not as direct as the language from p. 154 quoted in note I-196 above, since under the recitation of the case by Coke in p. 152 it is noted that Palachie in fact had a commission.

167. Wooddeson, *op. cit.* 432.

168. See classifications of Henry Marten, in the text at note 43 above.

169. This must have been so as a practical matter, since only the prince issuing a license could have the legal power to interpret his own grant. That, of course, is the problem hinted at but not expressed very clearly by Bynkershoek in discussing the practice of referring all belligerent captures back to the courts of the licensing sovereign. See text at note 149 above.

170. Wooddeson, *op. cit.* 427.

III

The United States of America and the Law of Piracy

The Basic Framework

The United States of America was governed by basic conceptions of English law during the days of the formation of the Union, and the leading drafters of the Articles of Confederation in 1777 and the Constitution in 1787 were lawyers trained in English law.

Under the Articles of Confederation, each of the thirteen newly independent states retained "every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States."[1] State laws with regard to "treason, felony, or other high misdemeanor" were preserved and extradition obligations accepted; there was no equivalent extradition obligation among the states of the confederation with regard to ordinary crimes.[2] This language seems to rest on an archaic definition of "felony" and an evolving conception of the impact of the Statute of Treasons of 1352 as it might apply to states not ruled by a king.[3] "Piracy" was not included. Instead, "piracy" was treated as both a kind of public war and special sort of common crime. While the states were forbidden to maintain vessels of war in time of peace except as authorized by the representatives of at least nine of the thirteen states in a formal meeting of the "Congress,"[4] or issue any "letters of marque or [*sic*; and?] reprisal" in the absence of a declaration of war by the Congress,[5] an exception was made for the case when any particular state should "be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United states in Congress assembled, shall determine otherwise."[6] The courts to deal with cases of alleged piracy, however, were not to be courts of the states. The power was expressly given to the Congress of all the states for:

> Establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States [but not state militias or warships] shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures. . . .[7]

To the degree the provision authorizing states to commission their vessels of war to defend them from infestations of "pirates" might be construed as a derogation from the power of the Congress alone to determine on peace and war, the power of the states was preserved,[8] but that derogation does not seem to have been intended to affect the jurisdiction of maritime and prize courts established by the Congress or authorize the states to establish competing courts.[9] On the other hand, treating "piracy" as if a branch of maritime warfare cannot have been intended to affect the residual powers of the states to denominate as "piracy" whatever they chose within their territorial jurisdiction, and establish courts to try alleged offenders under state law. The congressional courts were authorized only to try "piracies and felonies committed on the high seas," apparently intended to refer to areas beyond the territorial jurisdiction of any particular state. There is no closer definition of "piracy" in the Articles of Confederation and no known significant practice.

The confusion between "piracy" as a sort of unlicensed belligerency and "piracy" as a municipal law crime equivalent to robbery seems to have been maintained, with both definitions existing side by side, and naval suppression existing side by side with municipal tribunals. The distinctions were presumably worked out in practice depending on where any particular accused "pirate" was taken and by whom, and under what license the taker operated.

James Madison's *Reports on the Debates in the Federal Convention of 1787*[10] records the discussion preceding the adoption of the Constitution. According to that source, a "Committee of Detail" chaired by "Mr. Rutlidge" (*sic*)[11] on 6 August 1787 presented a working draft with the following provision:

> *[Art.] VII Sect. I.* The Legislature of the United States shall have the power . . . To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offenses against the law of nations. . . .[12]

This clause is quite separate from the proposed clause authorizing the legislature to "make war," but appears immediately after a clause authorizing the legislature "To make rules concerning captures on land and water." The authority of the Supreme Court in the Rutledge Committee's draft was to extend "to all cases arising under laws passed by the Legislature of the United States" and also "to all cases of Admiralty and maritime jurisdiction," among other things; the legislature was to be empowered to assign any part of this jurisdiction to such inferior courts as it might establish.[13]

The "piracy" clause was brought before the Convention on 17 August. Madison moved to strike the words "and punishment" after "declare the law." Two delegates expressed concern only over the effect of the deletion on counterfeiting (apparently construing the suggestion to strike the phrase in both places where it appears in the clause). One of them pointed out that

without the phrase there might be no legal authority to punish counterfeiters of foreign currency. Since the only reference in the provision to counterfeiting is restricted to "the coin of the United States," it seems that delegates to the Convention and Madison in his notes were considering counterfeiting foreign currency as an offense "against the law of nations." It is clear that territorial limits on jurisdiction were a concern; that a foreign power would have no jurisdiction to apply its law in the new federation, and if the federal government did not have the express power to punish the counterfeiters of foreign paper or coin some states of the union might become havens for counterfeiters. The argument that seems to have carried the day merely pointed out that in writing a constitution it was not necessary to be as meticulous as in drafting a statute. Madison's motion was carried 7-3 with three states abstaining.

Governeur Morris of Pennsylvania then moved to strike out "declare the law" and insert "punish" before the word "piracies." That motion also carried 7-3. Madison and Edmund Randolph[14] then moved to reinsert the word "define" before "punish" arguing that the definition of "felony at common law is vague" and in places "defective." There is no hint that anybody conceived of "piracy" as a crime at international law, but only as a felony at English Common Law. There was no doubt entertained by anybody that the Congress of the United States could exercise a legal power to define not only "piracy," but apparently to define "offences against the law of nations." The Madison and Randolph amendment passed unanimously.[15]

It is difficult to understand either the reference to "common law" or the assumption that the United States, a single entity in the world, had the legal power to define and punish offenses against the "law of nations" if those two phrases are taken in any other context than that of Blackstone. If the "law of nations" meant merely the national law of all states, there could be no problem; but if it were intended to mean the law determined by treaty, diplomatic correspondence and the practice of states in the international order there are obvious technical legal difficulties in the language as adopted on 17 August. The problem with the phrase "common law" is easier once it is recalled that since 1536 in England "Common Law" procedures were used in the trials of piracies and "felonies" within the jurisdiction of the Admiral. The English constitutional struggle focusing on the traditions and political subordination of the various courts in England at the time of Lord Coke and the Stuart Kings, thus the technical distinctions between "Common Law" and "Civil Law" as the law applied in Admiralty courts, had lost meaning. By time of Blackstone, the phrase "Common Law" had acquired a normal meaning referring to nonstatutory law applied throughout England, but not necessarily the law applied only by specific courts.

The more important question, that of bringing the power of the Congress to make law into harmony with the international legal order was raised again

on 14 September 1787 by Governeur Morris moving to strike out "punish" before the words "offences against the law of nations" so as to have the words he had proposed successfully a month before simply carry their meaning on through the entire clause. But James Wilson, also of Pennsylvania,[16] objected on the ground that "To pretend to *define* [emphasis *sic*] the law of nations which depended on the authority of all the civilized nations of the world, would have a look of arrogance, that would make us ridiculous."[17] Morris replied that the word "define" "is proper when applied to *offences* [emphasis *sic*]; the law of nations being often too vague and deficient to be a rule." The motion by Morris passed very narrowly, 6-5, with Pennsylvania opposed: The word "punish" was retained as applied to "Piracies and Felonies committed on the high Seas," but was deleted from the text as applied to "Offences against the Law of Nations."[18] The clause as adopted, and now contained in the Constitution is as follows:

> The Congress shall have the Power . . . To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.[19]

The authority of the Congress to provide for the punishment of counterfeiting appears elsewhere, and applies only to counterfeiting the securities and current coin of the United States; there appears to be no authority in the Congress to make laws against counterfeiting foreign currency unless that is considered an offense against the law of nations or part of the power of the Congress elsewhere in the Constitution.[20]

The power of the Congress to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water appears in the clause of the Constitution immediately following the clause relating to piracy and offenses against the law of nations. There was no reference to piracy in the discussion of that provision as recorded by Madison.

All cases of "admiralty and maritime jurisdiction" are reserved to the federal courts,[21] and treason is defined as "only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."[22] Further refinement of all these sweeping words was left to the Congress and the courts.

Piracy as such was not discussed when the Convention passed unanimously the provision that "all Treaties made under the authority of the United States shall be the supreme law of the several states and of their citizens and inhabitants; and the Judges in the several States shall be bound thereby in their decisions."[23] The minor alterations that resulted in this language being condensed to the form in which it appears in the Constitution were apparently the work of the "Committee of Stile [*sic*; style] and Arrangement," which had reported its proposed text on 12 September 1787.[24] There is no known record of the deliberations of that Committee. The final language says: ". . . all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby. . . . "[25]

From this brief summary, it is possible to conclude that the framers of the American Constitution, insofar as they focused on the question at all, conceived "piracy" to be something different from "offenses against the law of nations," but rather falling into a like category with "felonies committed on the high seas." Precisely what was left of the category "offenses against the law of nations" seems very unclear; indeed, it appears to have been considered unclear by most of the delegates at the Constitutional Convention. To those who accepted the Blackstone conception of "piracy" being an offense against the law of nations, but the "law of nations" being merely a collective term for national laws that were similar in all civilized nations, like the law merchant, there would have been no problem of analysis or interpretation. To those like James Wilson whose conception of the "law of nations" involved obligations owed by states in the international legal order to their sister states, the power of the Congress to define any of its terms must have seemed inconsistent with the power of the Executive to negotiate with foreign governments and to send and receive diplomatic missions, since diplomatic correspondence was necessarily conceived as part of the law-making process of that "law of nations." Wilson's analysis was rejected 6-5 in the one instance in which the problem was discussed as far as surviving records indicate. The law-making process of the law between states (to revert to Zouche's term) was apparently conceived by the framers of the Constitution to be confined to treaty, and there was no discussion of the development of the law relating to "piracy" (or any "offenses against the law of nations") in the discussion of the treaty-making power or the binding force within the Union of treaties made under the Constitution.

This analysis is more or less borne out by Federalist No. 42 (written by James Madison) which addresses the powers of the federal government relating to intercourse with foreign nations. The question addressed in the Federalist is, Why should these particular powers be given to a central authority and not reserved to the states? The answer with regard to the powers to make treaties and to send and receive ambassadors, said Madison, was self-evident; they "speak their own propriety," and merely repeat powers already conceded to a central authority in the Articles of Confederation.[26] As to the power to define and punish piracies and felonies committed on the high seas, Madison argued that "the provision of the federal articles [i.e., the Articles of Confederation] on the subject of piracies and felonies, extends no farther than to the establishment of courts for the trial of these offences."[27] And, he went on, "The definition of piracies might perhaps without inconveniency, be left to the law of nations; though a legislative definition of them, is found in most municipal codes."[28] By distinguishing between the "law of nations" and "most municipal codes" Madison seems to have denied the relationship between the two sources of substantive law considered inherently linked by Blackstone and a narrow majority of the

Convention. But Madison went no further, and it appears that he did not regard the issue as sufficiently pressing in 1788 to be an obstacle to the states adopting the new Constitution. He seems to have regarded "piracy" as a "crime" in fact defined by the "law between states." But he has left us no other clue as to how he believed that law was evidenced and what its jurisdictional terms and substantive provisions might have been.

This glib reference to "piracy," reminiscent of the remark by Justice Potter Stewart of the United States Supreme Court nearly two hundred years later regarding pornography, that he could not define it, but he knew it when he saw it, can be contrasted with the somewhat more elaborate treatment Madison gave "felonies on the high seas," a definition of which he felt was "evidently requisite:"

> Felony is a term of loose signification even in the common law of England; and of various import in the statute law of that kingdom. But neither the common, nor the statute law of that or of any other nation, ought to be a standard for the proceedings of this, unless previously made its own by legislative adoption. The meaning of the term as defined in the codes of the several States, would be as impracticable as the former would be a dishonorable and illegitimate guide. It is not precisely the same in any two of the States; and varies in each with every revision of its criminal laws. For the sake of certainty and uniformity therefore, the power of defining felonies in this case, was in every respect necessary and proper [for the central government].[29]

As to "offenses against the law of nations," Madison seems to have conceived them as not applicable to individuals at all, but possible sources of public conflict if a single state could determine for itself the propriety of its public acts that impinge on the sovereignty of a foreign power:

> These articles [of Confederation] contain no provision for the case of offences against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the confederacy with foreign nations.[30]

There is no other word in the Federalist addressed to that provision of the Constitution, or any explanation of why it should be within the power of the Congress, rather than the Executive and perhaps the Senate through diplomatic negotiation and treaty, to define "offenses against the law of nations" as so conceived.

The difficulties of defining "piracy" became apparent when the first Congress attempted to implement these provisions by statute. The problems of jurisdiction and criminal law enforcement's needs for some degree of specificity in setting out the precise limits that a person could transgress only at risk of punishment by public authorities of a government with limited powers, could no longer be assumed away or covered over with Blackstonian or Madisonian generalities.[31]

"Piracy" as a Municipal Law Crime in the United States

The Court System. The Judiciary Act of 24 September 1789,[32] section 9, gave to each of the thirteen original federal "District Courts" exclusively of the

courts of the several states, cognizance of all "crimes and offences that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas" where the punishments did not exceed 30 stripes with a whip, a fine of $100, or imprisonment of six months. In addition to this rather minor criminal jurisdiction, the District Courts had civil jurisdiction in "all civil causes of admiralty and maritime jurisdiction" (but not superseding state Common Law jurisdiction in any cases of overlap), and concurrent jurisdiction with state courts and federal Circuit Courts "of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States."[33] The Districts were grouped into three "Circuits," and the Circuit Courts were presided over by a District Court Judge and two Supreme Court Justices. These Circuit Courts were given original jurisdiction over "all crimes and offences cognizable under the authority of the United States" with some irrelevant exceptions, and concurrent jurisdiction with the District Courts over crimes within their original jurisdiction. They also served as appeals courts from District Court cases.[34]

The Substantive Law of 1790

The Definition. The substantive law relating to "piracy" was the Act of 30 April 1790, the pertinent part of which says:

> 8. . . . That, if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon and being thereof convicted, shall suffer death . . . [35]

Sections 10 and 11 of that Act extend the same punishment to "any person" knowingly assisting or advising any other person "to do or commit any murder or robbery, or other piracy aforesaid, upon the seas" and provide for imprisonment and fine for those who help the "pirate or robber" after the fact. Under section 12, a separate offense subjecting the offender to imprisonment and fine is created for "any person" who commits manslaughter upon the high seas, or attempts to corrupt any member of a ship's company to yield to pirates or to turn pirate or to trade with any pirate knowing him to be such, and any "seaman" who confines the master of any ship or endeavours to "make a revolt in such ship."

There appear to be no statutes requiring those hunting pirates to get letters of marque and reprisal or any other license from the federal authorities.[36]

The notion that "piracy" was a gap-filling legal conception relevant only when no territorial jurisdiction applied, and that the normal rules of jurisdiction would apply to limit a state's jurisdiction to traditional bounds, i.e., not to apply to the acts of foreigners without minimal contacts with the United States on which criminal jurisdiction could be based, appeared very early despite the "any person" language of the statutes. A Captain Hickman (nationality not specified) in 1792 appears to have landed in the French colony of Martinique and absconded with some slaves, which he landed in Georgia and tried to sell. The Attorney General, Edmund Randolph, advised Secretary of State Thomas Jefferson on 1 November 1792 that "the offence would seem to be piracy; but it may prove, when the precise place of its commission shall be fixed, to be of a merely municipal kind," implying that the French jurisdiction would exclude American even though the "pirate" was caught within the territorial jurisdiction of an American court. The opinion also sheds some light on the original intention of the provision of the Judiciary Act of 1789 extending the jurisdiction of District Courts to the tort claims of aliens alleging the tort to be a violation of the law of nations. Randolph instructed the United States Attorney (the federal District Court's prosecuting official) in Georgia "To prosecute the culprits *criminaliter*, as far as the law will permit," and Randolph went on:

> If the criminal process should be insufficient to procure [the restitution of the slaves to their owner in Martinique], to institute the necessary civil process for the like purpose, with the approbation of the owners or their agent. The last remark is made in order to impose the expense of a suit upon the individuals interested, rather than to assume any responsibility on the United States.[37]

Apparently, the alien tort claims provision was envisaged by Randolph as a supplement to criminal process to permit the victim of a wrongful taking abroad to recover his property when the tort law of the place of taking and the tort law of the United States coincided and the taker or the property was in the territorial jurisdiction of American courts. It would have had obvious applicability to aliens seeking to recover their goods from "pirates" as well as from those taking their property abroad, but seems to have rested on Blackstone's naturalist conception of the "law of nations."

Further indications exist of the jurisdictional limits felt to be implicit in the international system and not overcome by general words applying to "any person" in statutes relating to "piracy." In 1795 some Americans who had helped plunder the British colony of Sierra Leone were apprehended in the United States. Attorney General William Bradford advised Edmund Randolph, now Secretary of State:

> So far, therefore, as the transactions complained of originated or took place in a foreign country, they are not within the cognizance of our courts; nor can the actors be legally prosecuted or punished for them by the United States. But crimes committed on the high seas *are* [emphasis *sic*] within the jurisdiction of the district and circuit courts of the United States; and, so far as the offence was committed thereon, I am inclined to think

> that it may be legally prosecuted in either of those courts in any district wherein the offenders may be found. But some doubt rests on this point. . . . [38]

Again, the relationship between criminal and civil jurisdiction was noted, and Bradford went on:

> But there can be no doubt that the company or individuals who have been injured by these acts . . . have a remedy by a *civil* suit in the courts of the United States; jurisdiction having been expressly given to these courts in all cases where an alien sues for a tort only, in violation of the laws of nations . . .; and as such a suit may be maintained by evidence taken at a distance, on a commission issued for that purpose, the difficulty of obtaining redress would not be so great as in a criminal prosecution, where *viva voce* testimony alone can be received as legal proof.[39]

The first hint that "piracy" might be a crime of universal jurisdiction as far as the United States was concerned came in 1798 when the Attorney General, Charles Lee, advised the Secretary of State, Timothy Pickering, that an extradition request from Great Britain for three "murderers" under the terms of the Jay Treaty of 1794,[40] could be denied:

> The criminal tribunals of the United States are fully competent to try and punish persons who commit murder on the high seas, or piracy, as may appear from the 8th . . . [section] of the act of 30th April, 1790. One of the persons (Brigstock) is a citizen of the United States; and it is not to be reasonably expected that his country will not exercise the right of trying him. . . . [The other two may also be Americans.] But, supposing them to be foreigners, the stipulation in the 27th article [of the Treaty of 1794] is not applicable to their case; and as they are triable in the courts of the United States . . . I deem it more becoming the justice, honor, and dignity of the United States, that the trial should be in our courts.[41]

The hint is not too broad. Not only was there an undoubted link of nationality on which to base jurisdiction over Brigstock, and what seems to be a hope that the same link would be found with regard to the other two, but the crime involved in the British request was not "piracy" at all; it was "murder" within the terms of the treaty. The rationale does not flow from an analysis of the crime of "murder on the high seas" being included in the concept of "piracy" and therefore subject to universal jurisdiction, but, although it is not clear what the basis was for American jurisdiction if not nationality, from a direct jurisdiction asserted over "murderers" whose acts were committed on the high seas. The assertion of a universal jurisdiction over "murder" on the high seas, if such it was intended to be, was based on the competence of American courts as set forth in the statute of 1790, not on any analysis of public international law or any measuring of the statute's provisions against the legal powers under public international law of the United States to assert jurisdiction over the criminal acts of foreigners on the high seas. Apparently the desire to uphold that jurisdiction as a matter of American policy, and to state it in terms that would apply equally to "piracy" and, indeed, any other "crime" defined by an American statute, would serve equally well as a direct assertion of universal jurisdiction. The logic of the opinion would support the

effectiveness in American law of any statute applying to any person on the high seas, and seems to challenge the British government to find a reason in international law why the American assertion was wrong. No British response to this position has been found.

Indeed, on closer examination, the position taken by Attorney General Lee seems to have been both unnecessarily broad and unnecessarily narrow. If the accused committed their "murder" from or in an American vessel, and British assertions of jurisdiction were based on some effects on British subjects or in a British vessel, there would seem to have been an overlapping jurisdiction. If the "murder" had been done solely in a British vessel with no American contacts other than the nationality of one of the accused murderers, the assertion seems extreme that American jurisdiction existed over accused (possibly British) foreigners for their acts in a British vessel (presumably, from the fact of the extradition request) on the basis that "the high seas" was within concurrent territorial jurisdiction of all states including the new United States of America. Such an assertion, denying the exclusiveness of flag state jurisdiction over its own nationals in its own vessels on the high seas, seems a formula for universal policing of everything at sea, and was surely more than the United States would have conceded to Great Britain with regard to American nationals in American vessels. Although the full facts are not before us, it seems likely that Lee was making a broader argument for new national pride and policy reasons than a closer examination of the case and more mature judgment would warrant.

Narrower arguments were available. The same treaty of 1794 in fact devotes several articles to the treatment of privateers and pirates. If it had really been Lee's position that the accused were "pirates," and not "murderers" subject to extradition under the peculiarly narrow terms of the treaty, the terms related to "pirates" would have applied and extradition denied on the narrow ground that the treaty envisaged a distinction between the two crimes and that the "murder" provision simply did not apply. Why Lee chose to make a wide assertion of American jurisdiction over "murderers" on the high seas as distinct from "pirates" is not known, but extreme "positivism" by policy-oriented officials not charged with judicial responsibilities can be seen from time to time in many newly independent states (and occasionally in some very old states), and there is no reason to think that the officials of the United States of America in its early days were immune from the same urge to flex the muscles of statehood until its full implications were reached.

A similar position was asserted by Attorney General Lee a few months later, when the United States Attorney in Yorktown, Virginia, asked for guidance with regard to the ship *Nigre*, taken as a prize by the U.S.S. *Constitution* during the undeclared war with France and found to be of doubtful flag. On 20 September 1798 Lee replied (sending a copy to the

Secretary of State), that if the ship is a "pirate," all its crew, of any nations, can be tried in the United States Circuit Court for Virginia. Property rights in the ship and her cargo, on the other hand, were directed to be submitted to the District Court in Virginia "according to the laws of congress, and the usage and practice of admiralty in prize cases."[42]

That Lee's policy-maker-positivist approach was not universally shared in the United States in the 1790s is evident from the terms of the Treaty of 1794 itself. The principal American negotiator of that Treaty with Great Britain was John Jay, the first Chief Justice of the United States Supreme Court (1789-1795). It is therefore not surprising that many of its terms were devoted to technical legal problems of assuring that property claims deriving from possible illegal captures at sea by both sides, as well as many other problems of debt collection and land tenure, were addressed. Three articles are pertinent to this study.

Article 19 deals with men of war and privateers who commit outrages against the persons of the other side under color of their commissions. In such a case, the treaty provides that "they shall be punished, and shall also be bound in their persons and estates to make satisfaction and reparation for all damages, and the interest thereof, of whatever nature the said damages may be." Nowhere in the article are they referred to as "pirates" or as "deemed to be" or "treated in the same way as" "pirates." It appears that all action in excess of a commission was to be compensated by "sufficient security by at least two responsible sureties, who have no interest in the said privateer" placed before a "competent judge." It is possible that under an approach such as this, Captain Kidd would have gone free, although that is doubtful in view of the emphasis in his trial given to his failure to submit his captures to a prize court.[43]

Article 20 deals directly with "pirates" as such:

> It is further agreed that both the said contracting parties shall not only refuse to receive any pirates into any of their ports, havens, or towns, or permit any of their inhabitants to receive, protect, harbor, conceal or assist them in any manner, but will bring to condign punishment all such inhabitants as shall be guilty of such acts or offences.
>
> And all their ships, with the goods . . . taken by them and brought into the port of either . . , shall be seized . . . and shall be restored to the owners . . . even in case such effects should have passed into other hands by sale, if it be proved that the buyers knew or had good reason to believe or suspect that they had been piratically taken.

It appears to be assumed in this article that the definition of "pirate" was known to both parties, and from the emphasis on returning property to its owners it appears that the definition was related to wrongful takings of property—robbery within the jurisdiction of Admiralty courts, presumably. There is no hint of a broader definition in the text.

This reading of article 20 of the 1794 Jay Treaty is verified by article 21:

> And if any subject or citizen of the said parties respectively shall accept any foreign commission or letters of marque for arming any vessel to act as a privateer against the other party, and be taken by the other party, it is hereby declared to be lawful for the said party to treat and punish the said subject or citizen having such commission or letters of marque as a pirate.

It would appear that the national legislation of each party making it "piracy" for their respective nationals to accept privateering commissions from third parties to act against their own country[44] was not regarded as codifying a more general rule of international law forbidding adventurers taking foreign commissions, but only as an aspect of the national law related to treason.[45] The fact that such activity was regarded as not covered in the preceding article referring generally to "piracy" without any definition, but was the subject of an article of its own, and that a very limited one merely expanding the national rule to cover acts undertaken against only the other party under color of a foreign commission, seems to indicate that the drafters of the treaty did not regard taking a foreign commission as part of the basic conception of "piracy" in 1794. Article 21 itself did not even clearly say that the forbidden activity by subjects or citizens of each was "piracy," but only that if either party were injured by such activity it could lawfully as far as the treaty partners were concerned treat and punish a perpetrator of the other nationality as it would treat one of its own people acting under such a commission against the capturing state, "as a pirate." Thus it appears that to the drafters of the Jay Treaty of 1794, "piracy" was indeed a crime punishable by the municipal law of either party, but the jurisdictional rules and the applicability of the law to foreigners, including those of the other treaty partner's nationality, were not clear, and the substance of the "crime" itself was related to the English legal conception of "piracy" being a municipal law crime equivalent within the traditional English Admiralty jurisdiction to robbery on land. It did not clearly include "murder."

These provisions of the Jay Treaty were in fact personally drafted by John Jay.[46] The distinctions between privateers exceeding their commissions, nationals accepting foreign commissions, and "pirates" reflected instructions drawn up by Edmund Randolph as Secretary of State pursuing an outline prepared by Alexander Hamilton.[47]

Pinckney's Treaty, the Treaty of 27 October 1795 between the United States and Spain, follows a similar pattern with variations. There is no provision regarding persons on either side exceeding their privateering commissions. Nor is there any provision requiring each side to bring "pirates" and those who consort with them to condign punishment. The reasons for these omissions are not clear from available secondary material. In place of Jay's statute-like language regarding the return to owners of ships and goods "if it be proved that the buyers knew or had good reason to believe

or suspect that they had been piratically taken" is a much more general obligation seeming to envisage either national enforcement through implementing legislation along the lines of Jay's language, or simple political handling without the involvement of courts and judges:

> Each Party shall endeavor by all means in their power to protect and defend all Vessels and other effects belonging to the Citizens or Subjects of the other, which shall be within the extent of their jurisdiction by sea or by land, and shall use all their efforts to recover and cause to be restored to the right owners their Vessels and effects which may have been taken from them within the extent of their said jurisdiction whether they are at war or not with the Power whose Subjects have taken possession of the said effects.[48]

Some indication that the principles of this article were intended specifically to apply to "pirated" goods and vessels, and not just those of foreign privateers, is in a later article specifically applying the general principles to "pirates," but with no greater legal detail of a sort that would be helpful to a judge:

> All Ships and merchandize of what nature soever which shall be rescued out of the hands of any Pirates or Robbers on the high seas [49] shall be brought into some Port of either State and shall be delivered to the custody of the Officers of that Port in order to be taken care of and restored entire to the true proprietor as soon as due and sufficient proof shall be made concerning the property thereof.[50]

Another article treats "pirates" as if a natural hazard comparable to weather:

> In case the Subjects and inhabitants of either Party with their shipping whether public and of war or private and of merchants be forced through stress of weather, pursuit of Pirates, or Enemies [*sic*], or any other urgent necessity for seeking of shelter and harbor to retreat . . . they shall be received and treated with all humanity. : . .[51]

The only other mention of "pirates" in the Treaty seems to be in article 14, closely paralleling article 21 of Jay's Treaty. It concludes that a citizen or subject of either side taking commissions or letters of marque to act against the subjects or property of the other side "shall be punished as a Pirate."[52] This seems considerably more direct than the equivalent term of Jay's Treaty which merely made it lawful as a matter of bilateral treaty for each party to treat an illegal licensee of the other nationality as a "pirate," but did not require such treatment, and seems much more doubtful that such treatment was proper as a matter of international law. Since there are no known prosecutions for "piracy" under these provisions, and no known diplomatic correspondence concerning the interpretation of these terms of the two treaties, it seems unnecessary to analyze the differing conceptions of the negotiators of the two documents any further.

American courts in the first decades of the 19th century tried to translate the statutory language into rules that could be administered to achieve the political results they supposed were intended. In doing so, they did not have the freedom of policy-making positivists like Attorney General Lee to interpret their conceptions of law into clear rules on the basis of their perceptions of the political interest of the United States or pride in their

hard-won independence. The most articulate judges took a basically "naturalist" view when trying to expand by interpretation the conceptions embodied in the language of the statute, but were held back by the deep Common Law traditions of judicial restraint and various natural law perceptions antithetical to expansive interpretations, like the notion that an accused criminal must have clear notice of the substance of the rule he is supposed to have transgressed. The judges were deeply split in their perceptions of the natural law and the balance to be struck by the competing legal, as well as policy, interests.

The leading judge seeking to expand the definition of "piracy" and the jurisdiction of American courts to deal with it, was Joseph Story of Massachusetts, who sat on the Supreme Court 1811-1845. In two cases in 1812 he set out his reasoning.

The first case involved a taking by the defendants, Tully and Dalton, of an American vessel, the *George Washington*, while Uriah P. Levy, its Captain,[53] was not on board. Since he was not put in "fear," as the Common Law of "robbery" would have required (the taking was thus more akin to the Common Law crime of embezzlement—the unlawful taking by a person with right to possession), to the degree "piracy" was supposed to be only "robbery" within Admiralty jurisdiction, the taking was not "piracy." Judge Story charged the jury in the Federal District Court that "at the common law, the offence of piracy consisted in committing those acts of robbery and depredation upon the high seas, which, if committed on land, would have amounted to a felony there."[54] This, of course, treats the entire operative part of the statutes of 1536 and 1700 as if containing a single definition of "piracy," making even the least "felony" within the jurisdiction of the Admiral into a capital offense. There is no known precedent for that position in English cases, and no evidence that the Congress intended that result when passing the statute of 1790. Nonetheless, Judge Davis concurred with Story and the two defendants were convicted of "piracy."

The logic used by Story and Davis deserves some closer examination. Story's assertion, that piracy was an offense at Common Law and as such was identical to depredation upon the high seas which if committed on land would have amounted to felony there, was taken verbatim from Blackstone.[55] But where a careful analysis of the precedents shows Blackstone to have written more than the actual cases would bear, apparently accepting as persuasive, at least, some of the more extreme dicta of Sir Leoline Jenkins as to the definition of "piracy" under English municipal (but not technically "Common") law, Story used Blackstone's summary as a base for further expansion of the concept. "It was not necessary by the common law," Story wrote, "that the offense should be committed with all the facts necessary to constitute the technical crime of robbery."[56] Abandoning this line of logic before facing the obvious problems of showing which facts should be

disregarded in holding something technically not "robbery" within the Admiral's jurisdiction to be nonetheless "piracy" as a matter of Common Law, Story adverted to the statute of 1790. In his view the "crime" of "piracy" in the United States from 1790 on included the acts of "any . . . mariner of any ship [who] . . . shall piratically and feloniously run away with such ship"[57] regardless of whether such running away had been "piracy" at English Common Law. All that was needed under the statute, said Story, was "piratical and felonious intent."[58] The logic by which statutory language under which the adverbs "piratically and feloniously" which modify the act, "run away," become indicators of "intent" is not entirely clear, but it does not seem outrageous. Story did not explain the linkage, which presumably rested on distinguishing between running away with the vessel to avoid a loss to the owners, which would not be a crime, and running away with an intent to convert the vessel or cargo to the mariner's own use, which Story felt should be a crime, even if not "piracy." He concluded merely: "After much reflection . . . I remain of the same opinion that I expressed at the trial," affirming as part of an appeal panel in the Circuit Court the charge to the jury he had given as a trial judge in the District Court.

But there is a missing step; the intent to convert the ship or cargo coupled with the running away might well properly be denominated a crime, but was it "piracy," warranting a death penalty? Judge Davis focused on that question, concurring with Story's conclusion on the basis of a citation to Molloy which, in the original, says merely:

> If a Ship shall ride at Anchor, and the Mariners shall be part in their Ship-Boat, and the rest on shore, and none shall be in the Ship, yet if a Pirat shall attacque her and rob her, the same is Piracy.[59]

While it might well be argued that this passage in Molloy is part of a series of sections fixing technical limits to the crime of "piracy" and not intended to be used as a basis for expanding the definition by analogy to cases in which the technical definition of "robbery" could not be applied to the acts treated in particular statutes and isolated cases as if "piracy," there is room for opinions to differ. Tully was hanged and Dalton eventually pardoned because the judges were convinced he was contrite.

Another case (in 1818, U.S. v. Howard and Beebee),[60] illustrates the definitional problems inherent on the Act of 1790. Defendants were pilots in Delaware who had guided a suspicious vessel to anchorage and were now accused of helping the absconded master and crew of that vessel in violation of section 12 of the Act of 1790 forbidding assistance to "pirates." The question was whether, to fit section 12, the "pirates" being helped had to have been shown to have violated section 8,[61] thus whether a full-scale hearing had to be held on the misdeeds and the legal classification for those deeds of people not before the court. Bushrod Washington, like Story a participant in the Supreme Court majority decision in U.S. v. Palmer shortly before,[62] had to

retreat like Story from his expansive naturalist position. Like Story he did so in practice while trying to preserve his position in theory. In the Palmer case, the acts of foreigners against foreigners only was held not to be "piracy" within the intent of section 8 of the Act of 1790, according to Washington, apparently mixing the jurisdictional problem with the question of the substantive definition of the term. Continuing along the same line, Washington charged the Jury that if the defendant is properly within the scope of American jurisdiction, and in this case he clearly was since "the pilot boat is an American vessel, and the persons on board were citizens of the United States," then "The *pirate* [*sic*] with whom the confederacy and correspondence takes place, may, in our opinion, be any sea robber or pirate, according to the general law of nations." Section 12 was thus severed from the restricted meaning of section 8 as it emerged from the Palmer case. But were the absconded persons "pirates" according to the general law of nations? To that question, Washington admitted doubts that only a jury could resolve. They might have been privateers acting solely against Spain "under a commission from the revolutionary government of South America (which would not amount to acts of piracy)," of the legal possessors of property which they were taking to their own use without the violence necessary to fit a charge of "piracy," merely criminals by the law of the flag of the vessel they had abandoned. These and other doubts he laid before the jury, which acquitted the defendants.[63] The charge was never appealed to higher courts, thus the question of whether a general international law of "piracy" existed under which American courts could even indirectly exercise a universal jurisdiction over the acts of foreigners directed solely against foreigners beyond the limits of the Palmer case as expanded in the Klintock case, to be discussed below, was not completely resolved.

Jurisdiction. It would appear from U.S. v. Tully and Dalton[64] and from the passage in Molloy cited by Judge Davis that the English conception of the jurisdiction of the Admiral in England, which extended to all navigable waters, was applied to foreign waters also; that the phrase "high sea" had a somewhat different meaning than it has today, when it is distinguished from territorial waters.

That this broad interpretation of the phrase "high sea" was in fact the interpretation held by Story and other expansive interpreters of the law needed to suppress "piracy," seems clear. In the other case in 1812, U.S. v. Ross,[65] the vessel was only a half mile from shore when the crew stabbed a passenger, and from two to six miles from shore when they threw his body overboard. Story declined to resolve the case on the basis of technicalities regarding the assault (stabbing) and the greater distance from shore when the passenger actually died or his body was disposed of. Instead he asked rhetorically whether the Act of 1790, section 8, in referring to "the high seas" was intended by the Congress to include foreign harbors. His answer was Yes. It means, he said:

> [A]ny waters on the sea coast which are within the boundaries of low water mark; although such waters may be in a roadstead or bay within the jurisdictional limits of a foreign government. Such is the meaning attached to the phrase by the common law; and supported by the authority of the admiralty, perhaps to a more enlarged extent.[66]

To the extent this language was applied only to an American flag vessel and acts within it, it seems to be addressing a different set of facts than those envisaged by the jurisdictional provisions of the Act of 1790, section 8. To the extent it was addressing facts within the contemplation of that statute, Story's reasoning seems inconsistent with the language of the statute, which clearly distinguishes between "high seas" and "any river, haven, basin, or bay," and specifically requires that in either case the act, to be within the terms of the statute must be "out of the jurisdiction of any particular state." In sum, his conclusion supports universal jurisdiction with regard to "piracy," defined in the Tully and Dalton case to cover all Common Law felonies that might be committed on the "high sea," and views the "high sea" as including foreign territorial waters; there is no language of limitation with regard to the flags of the vessels involved or the nationality of the accused or their victims. To the extent that construction rests on statutory language merely interpreted in the light of American municipal law (including the inherited concepts of English Common and Admiralty Law), it would seem to place the United States in a position of world policeman with regard to all felonies (by American definitions) occurring in any navigable waters. The underlying assumption seems to be the natural law of personal security, commerce and property, with overlapping jurisdiction available to all states to safeguard those natural rights. It is Molloy carried beyond Molloy himself,[67] to the far reaches of Jenkins.[68]

That this was in fact his view was confirmed some 20 years later when Story, in U.S. v. Pedro Gilbert & Others,[69] held that the British had overlapping jurisdiction with the United States in a case in which he appears to have assumed that there were no British contacts at all except as world policeman. Despite the American legislation to be discussed below superseding the Act of 1790 in large part, Story applied the same section, section 8, of that Act, so the case is perhaps better discussed here than in its chronological place.

The defendants were Captain and crew of a Spanish vessel which had allegedly attacked and robbed an American vessel on the high seas. The Spanish vessel was later found in port in Africa fitted out for slave trade, and a British warship acting under arrangements between Great Britain and Spain for the suppression of the slave trade arrested the crew and took them to England. The British then transferred the prisoners to the United States for trial on the American charge of "piracy" growing out of the first incident. The legality of the "extradition," or administrative transferrence of custody, was not at issue. The degree to which the British might have had jurisdiction

to try the accused for their attack on an American vessel was raised as a point by the defendants seeking to overturn their American conviction, and Story addressed the point in a long footnote:

> The British Government, on this occasion, finding [Spanish] persons in England in custody of one of its own officers, accused of piracy on an American vessel, chose to send those persons here, where the best evidence could be obtained, and where the greatest facilities and advantages for their trial were to be found. Over piracy, all nations exercise equal jurisdiction and the British Government might justly have exercised it in this case. But they preferred, that the offenders should be tried by the citizens of that country against whom the offence had been committed. . . . [Reciting the difficulties and dangers faced by the British commander, Captain Trotter, in capturing the accused.] Now what inducement had Captain Trotter to encounter all this, but a high sense of public duty, not merely to his own country, but to the commercial world.[70]

It is apparent that to Story there was not only universal jurisdiction to apply to "pirates" a municipal law that reflected what he must have felt to be universal prohibitions against unlicensed violence at sea, but there were no inhibitions to that application except the practical ones of marshaling evidence. The decision not to try the accused in England was based not on any lack of a legal interest in their activities against a foreign vessel, but only on the practicalities of the particular case. The legal interest seems to have been felt to derive from a universal duty to the "commercial world" to safeguard property rights based on natural law, and not the particular law of any country. Since the defendants were in fact transferred to the custody of, and taken to trial in, the United States, a country that clearly had the legal interest necessary to support such action against Spanish or other objection on much narrower grounds, as the country whose property law had been violated by the Spanish attack on an American flag vessel, this long passage was unnecessary to the disposition of the issue. Moreover, in view of the position on this point of extraterritorial reach of American criminal jurisdiction, and the way in which "piracy" was regarded as an "American" rather than an "international" crime by the majority in the Supreme Court in cases to be discussed below, this footnote by Story can probably best be regarded as an expression of a deeply felt "naturalist" position by a learned jurist who had lost the jurisprudential argument at a higher level. While Story's position never was adopted as the legal position of the United States Supreme Court, and in the Pedro Gilbert case was expressed as mere dictum, thus did not take a position of legal significance for purposes of analyzing the law as it was actually applied, that approach has continued to seem persuasive to many jurists regardless of the dominance of positivism as the philosophy of the Supreme Court. Story's approach certainly represents a strain of legal thought that has been influential in the evolution of the law regarding "piracy" in the United States.

Since the statute of 1790 was taken by 1812 to define "piracy" for purposes of American trials, and trials of accused "pirates" could not be the subject of

foreign complaint based on the substance of the law defining "piracy" unless the accused "pirate" were considered to be beyond the proper reach of American prescriptive jurisdiction, the key question before the American courts was the proper reach of that jurisdiction. Story's approach, that all states have adequate territorial jurisdiction in navigable waters anyplace (by defining "high sea" to include a foreign bay or roadstead) subject only to the overlapping jurisdiction of other states, but not any notion of the territorial state having exclusive jurisdiction over its ships or close-in waters, was not wholly accepted even in the United States. Indeed, one of the very first surviving opinions of an American Attorney General, and one of the most emotional, was an opinion by Edmund Randolph dated 14 May 1793 to Secretary of State Thomas Jefferson holding that Delaware Bay (and by like logic Chesapeake Bay) was "internal waters of the United States and capable of being closed to foreign vessels" and totally subjected to American law.[71] Since Story's language was not restricted to instances of "piracy," but rested on assertions of the Admiral's historical jurisdiction in English law for all felonies (which Story defined as "piracy"—all felonies within the Admiral's historical jurisdiction as viewed in England) it must have seemed intemperate to some of his colleagues concerned with limiting foreign exercises of jurisdiction in American bays and roadsteads.

The question received a definitive answer construing the Act of 1790, section 8, in 1820. Bushrod Washington, sitting as a District judge in Philadelphia, had charged a jury in 1819 along the same lines Joseph Story would have used, that Peter Wiltberger, who killed a seaman on board an American vessel at anchor in the Tigris River in China, about 35 miles inland, 14 miles below Canton, was acting on the "high sea" within the sense of the Act of 1790. Wiltberger was convicted.[72] On appeal ultimately to the Supreme Court, the conviction was reversed squarely on this point. The Court, which included Justice Story, was unanimous; testimony to the persuasiveness of Chief Justice Marshall, who wrote the opinion, and the intellectual honesty of Justice Story when persuaded of his error. Marshall took a strict positivist position. The criminal statutes must be construed strictly to protect individuals from the exercise of arbitrary power by judges. "The power of punishment is vested in the legislative, not the judicial department," he wrote. The legislative purpose in enacting the statute of 1790, section 8, was not to assert jurisdiction over everybody any place, but only in a certain place, the high sea and rivers, havens, basins or bays outside the jurisdiction of any state. The Tigris River being wholly within the jurisdiction of China, the American courts cannot derive jurisdiction over the statutory offense from the words of the statute. Therefore, Wiltberger went free.[73] Henry Wheaton, probably the most celebrated American scholar of international law of the first half of the nineteenth century, wrote a long analysis of the issue. In his view both Story and Marshall were right and

Story's retreat was not a retreat in principle: English Admiralty jurisdiction indeed extended into foreign ports, and American Admiralty jurisdiction could do the same. But, he concluded, the statute of 1790 did not go so far. Since federal criminal law in the United States rested on statute and not on Common Law except as embodied in statutes, the lesser description of jurisdiction contained in the statute limited the jurisdiction to less than the court could have exercised at English law. The fact that the Congress apparently did not intend to allow the court to exercise its full jurisdiction in cases of "piracy" in foreign waters meant that the court could not exercise its power over cases envisaged in the statute of 1790 beyond the limits set in that statute.[74] Another statute could go farther without creating any legal problems in the international legal order, in his view. But as long as no statute in fact went farther, that issue would not have to be resolved. Wheaton apparently gave no weight to the policy and possible legal reasons why the Congress had not authorized the exercise of jurisdiction by American courts in cases occurring in foreign navigable waters. It seems noteworthy that Wheaton did not argue the obvious bases for jurisdiction, the flag of the vessel and Wiltberger's American nationality. Indeed, since the incident occurred within an American vessel, it is not clear why any international concept of "piracy" was thought to be involved, or any inhibition on applying American Admiralty prescriptions. Wheaton's sympathies obviously lay with the jurisprudential approach taken by Story as the entire point of his comment was to preserve the theoretical possibility of universal jurisdiction based on territorial principles and natural law against a Supreme Court majority (including Story himself) that had carefully taken a very different position.

The question as to whether American jurisdiction covered acts by foreigners on the high sea against victims who were not Americans reached the Supreme Court in 1818. The holding in U.S. v. Palmer, et al.,[75] among many other points,[76] included the important rule of construction phrased by Chief Justice Marshall as follows:

> The constitution having conferred on congress the power of defining and punishing piracy, there can be no doubt of the right of the legislature to enact laws punishing pirates, although they may be foreigners, and may have committed no particular offence against the United States. The only question is, has the legislature enacted such a law?... [No.][N]o general words of a statute ought to be construed to embrace [offenses] when committed by foreigners against a foreign government.[77]

Justice William Johnson dissented, going even further than Marshall and the majority in denying power to the legislature. In his view "congress cannot make that piracy which is not piracy by the law of nations in order to give jurisdiction to its own courts over such offences."[78] A consensus was reached in the "Certificate" customary at the time to blend the views of all the justices together on the broadest common position:

> [T]hat... the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a foreign state, on persons within a

> vessel belonging also exclusively to the subjects of a foreign state, is not piracy within the true intent and meaning of the act [of 1790, section 8] . . . and is not punishable in the courts of the United States.[79]

Shortly afterwards, indeed, after the passage by the Congress of further legislation whose effect was to overrule the quoted part of U.S. v. Palmer[80] but relating to facts occurring before that later legislation took effect, the Supreme Court reduced the impact of U.S. v. Palmer by asserting American jurisdiction in cases in which no particular foreign jurisdiction would serve despite the fact that the accused "pirates" and their victims were not American nationals. Chief Justice Marshall spoke for a unanimous Court in U.S. v. Klintock, a case involving a vessel sailing under the nominal control of an unrecognized Mexican authority during a revolution in Mexico, but exceeding any reasonable powers that could have been based on the laws of war. Klintock had seized a Danish ship *"animo furandi,"* and "not . . . *jure belli.*"[81] The capturing vessel was clearly "foreign." Marshall wrote:

> Upon the most deliberate reconsideration . . . the Court is satisfied, that general piracy, or murder, or robbery, committed in the places described in the 8th section [of the Act of 1790], by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatsoever, is within the meaning of this act, and is punishable in the Courts of the United States. Persons of this description are proper objects for the penal code of all nations; and we think that the general words of the act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State, ought to be so construed as to comprehend those who acknowledge the authority of no State. Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations.[82]

The Certificate concludes:

> That the act of the 30th of April, 1790, does extend to all persons on board all vessels which throw off their national character by cruizing piratically and committing piracy on other vessels.[83]

The case illustrates the problems of judges caught between a natural law orientation and positivist one. By natural law approaches, the rule towards which the Court was striving seems more or less clear. There is, in that conception, an underlying law forbidding interference with property as defined by any national legal system or by natural law, but that natural law of property yields to the positive law of any state within whose territorial or other traditional jurisdiction (such as the nationality of the possessor of the physical property) it comes. On the high sea, the law of the state whose flag is flying over a vessel authorized by that law to fly it, governs. A person acting outside that vessel, thus outside the flag-based jurisdiction traditionally analogized to territorial jurisdiction, can interfere in property rights only by

superimposing some other state's positive law on the positive law of the flag state. This could be done by capture or, perhaps, even sinking the first vessel and taking the property on board the capturing vessel or replacing the captured vessel's flag with the captor's. The law of naval captures and privateering evolved in Europe to prescribe the necessary rules as between the states of Europe and other states participating in the European legal order, such as the former European colonies in the Western Hemisphere and, if they wanted to participate in the system, the Muslim states of the Mediterranean Sea and some other societies that fit the pattern elsewhere, such as Thailand and China. Disputes over the lawfulness of the capture at sea and the proper disposition of captured property could as among these states be resolved by diplomatic negotiation, counter-captures under limited letters of marque and reprisal, or even the ultimate arbitrament of war. To the naturalist judges of the United States Supreme Court in the early nineteenth century, the word "piracy" could properly be used to attach legal results to captors outside the system; those who sought to change property rights by naval capture but who lacked the authority of a state within the system to supersede the law of the flag state of the captured vessel with any new positive law. And natural law would retain the rights to property in the holder prior to the capture. The function of the international law of "piracy," as it was then conceived, was thus to fill a gap in the legal order; to render punishable as "outlaws" those who operated outside the system and whose actions were inconsistent with the law within the system. All that was necessary for "standing" was that the acts of the "pirates" impinge upon the system somehow. Normally this was considered to flow from their taking of property against the rules of the system, i.e., without the authority of a state behind them, and from people whose property rights were blessed by the positive law of a state within the legal order.

But the system, the legal order of Europe in the early nineteenth century, required "standing" of any "state" within the system before a municipal legal rule could be applied. In the case of captures at sea, the need for "standing" was supplied by some legally sufficient contact with the event, normally the connection, posited to rest on a fictitious "social contract," between the victim of the depredation and some state within the system. Attempts by "naturalist" jurists, like Story, to rationalize each state's authority to police the seas, foundered on the hard rocks of the legal order itself, which limit each state's jurisdiction to those cases in which the state has "standing." Rhetoric of both naturalists and positivists in the late 17th century has been noted in which the legal order's requirement for "standing" was disregarded, but U.S. v. Palmer appears to be the first case in which a systematic treatment of the question was attempted in the context of a real case, and American "standing" was found lacking despite the apparent positivist decision by the Congress in 1790 to disregard the international legal order in authorizing

American courts to suppress an undefined "piracy." The naturalist reaction, to find "standing" in U.S. v. Klintock by applying natural law as part of Blackstone's concept of the "law of nations"—the natural law that is reflected not in the system of international distributions of authority to states, but in the common municipal laws of all states participating in the system—filled the gap. Under that approach, all states would have had equal rights to apply their municipal laws related to "piracy," defined as robbery within the municipal law jurisdiction of the "Admiralty," that branch of the municipal court system that applied municipal law rules, including the law merchant and other rules labeled part of the "law of nations" by Blackstone, to the acts of foreigners against foreigners all on board foreign vessels, but only when the accused "pirates" had no state system within the legal order to license the taking in question. And even when the accused "pirate" was found flying the Jolly Roger or some false, non-authorized national flag, or flag of some unrecognized authority (i.e., some pretender to authority not accepted by the capturing state as empowered within the legal order to issue a license), the natural law background remained strong in Marshall and Story. The accused must have been caught engaged not in a taking that might be justifiable but for the lack of recognition, but in a taking that was robbery by the English municipal law of robbery, involving *animum furandi,* the intention to take for personal gain. Apparently, no middle ground was seen between such a taking and a taking *jure belli,* by the law of war, which was not "piracy" even if the taker did not have a license issued by a recognized authority.

Clearly, the system implied in U.S. v. Klintock was incomplete; many fact patterns can be imagined that do not fit neatly into the categories supposed by the Supreme Court to fill the field. The principal gap fell in the contemplation of the availability of the law of war to unrecognized belligerent rebels such as the American forces had been a generation before—would it not have seemed monstrous to Chief Justice Marshall's generation if John Paul Jones had been hanged by the British not as a rebel but as a mere "pirate?"[84]

The Substantive Law of 1819

The Attempt to Avoid Problems of Definition, Jurisdiction and Foreign Commissions. The immediate result of U.S. v. Palmer in the halls of the Congress was the passage of a statute that simply ignored all the legal problems. The Act of 3 March 1819[85] provided:

> Sec. 5. . . . That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall upon conviction thereof . . . be punishable with death.[86]

The Act of 1819 was limited in time to one year, and this section was continued without limit of time by section 2 of another statute passed on 15 May 1820.[87] This last Act with minor amendments, is still in force.[88] Instead of

defining the substantive law of "piracy," it refers to a definition supposed to be contained in the "law of nations;" instead of addressing the jurisdictional point raised by Justice Johnson and acknowledged in the Supreme Court's Certificate, it takes an assertive "positivist" position as to the extent of national jurisdiction apparently based on universality.

The new statute was immediately applied. A foreign vessel putting out from "Buenos Ayres," the state now called Argentina formed out of the Spanish Vice-Royalty of La Plata by 1816, was seized by mutineers including Americans and turned to general "cruizing" without any commission from anybody. The question was the amenability of the crew to the jurisdiction of the American court before which both non-Americans and Americans had been taken. Chief Justice Marshall sitting as an appeals judge in the Federal Circuit Court in Virginia concluded:

> It was impossible that the act [of 1819] could apply to any case if not to this. The case was undoubtedly piracy according to the understanding and practice of all nations. It was a case in which all nations surrendered their subjects to punishment which any government might inflict upon them, and one in which all admitted the rights of each to take and exercise jurisdiction. Yet the standard referred to by the act of congress . . . must be admitted to be so vague as to allow of some doubt. The writers on the laws of nations give us no definition of the crime of piracy.[89]

In view of Marshall's doubts as to the substance of the law, the jury was instructed to give a special verdict as to the facts alone, and the case was referred to the Supreme Court for argument as to whether there was any such thing as "the crime of piracy, as defined by the law of nations" within the meaning of the Act of 1819.[90]

At the Supreme Court level the case was called U.S. v. Smith and became the leading case construing the Act of 1819. Justice Joseph Story wrote the Court's opinion. He wrote:

> There is scarcely a writer on the law of nations who does not allude to piracy as a crime of a settled determinate nature . . . [R]obbery or forcible depredations upon the sea, *animo furandi,* is piracy.[91]

His citations include a footnote seventeen pages long in which are cited many of the works analyzed above, including Blackstone, the trials of Dawson, Kidd and Green, and the writings of Grotius and Wooddeson, among others.[92] To support the assertion that the English Common Law of piracy is identical with the substantive crime of "piracy" at international law he cited Hedges's and Jenkins's charges to juries quoted above,[93] and Blackstone.[94] There seems to be no independent legal argument other than long quotations from the various ancient authorities, and no distinction is drawn as to the jurisprudential bases for the various opinions or their possible inappropriateness to the narrow facts to which those opinions were applied. But Story's citations focusing on Marshall's single observation relating only to "the writers on the laws of nations," but not to the law of nations, or

international law, itself, seems to have convinced all but one of his colleagues on the bench. The one dissenter was Justice Henry Livingston, who read the words of the Constitution strictly to authorize the Congress to define "piracy," not just to refer to a foreign law, international law, for this purpose. In his view, a criminal statute, violation of which might result in hanging, should define the prohibited acts directly.[95] The Certificate which issued disregarded Livingston's position and found the reference to the law of nations in the statute of 1819 to be sufficient, and that law sufficiently clear, to justify hanging Smith, Chapels and the others.[96]

The decision in U.S. v. Smith appears to have broken a logjam of "piracy" cases, all of which were summarily handled by the Supreme Court immediately afterwards. From the opinions loosely tied together in this series of cases under one heading, U.S. v. Pirates,[97] it is clear that Justice Johnson was not fully convinced by Story and that there were many loose ends still remaining in the American approach to defining "piracy" and the scope of American courts' jurisdiction under the Act of 1819. Justice Johnson found an American legal interest sufficient for "standing" in all the cases but one, and in that case the facts were found to bring the situation within the scope of U.S. v. Klintock—the defendants having acted so as to lose all national character. In U.S. v. John Furlong alias John Hobson[98] the Certificate is explicit in finding a particular American basis for extending jurisdiction over the acts of the Irish defendant against an English victim:

> [I]t was not necessary that the indictment charge the prisoner as a citizen of the United States, nor the crime as committed on board an American vessel, inasmuch as it charges it to have been committed *from* [emphasis added] on board an American vessel, by a mariner sailing on board an American vessel.[99]

The American contact was the flag of the attacking vessel. In the one case in which no American contact equivalent to this could be found, U.S. v. David Bowers and Henry Mathews, U.S. v. Klintock was the sole authority needed to support a Certificate holding:

> That the act [of 1790] does extend to piracy committed by the crew of a foreign vessel on a vessel exclusively owned by persons not citizens of the United States, in the case of these prisoners, in which it appears that the crew assumed the character of pirates, whereby they lost all claim to national character or protection.[100]

The other cases all involved major American contacts making it unnecessary to explore the possible incorporation of any rules of international law into the municipal law of the United States.

Justice Johnson appears to have had serious reservations about U.S. v. Bowers and Mathews. In an unclear separate opinion adverting to the one case in which all the defendants are foreigners on board vessels owned by foreigners, he wrote that in his view U.S. v. Palmer was the controlling precedent rather than U.S. v. Klintock, apparently disagreeing with the majority that the foreign "pirates" had wholly cast aside their national

allegiances. Johnson nonetheless seemed to be willing to join with the majority on the strange rationale that while murder would not be triable in the United States other facts being the same, "piracy" being such a horrible crime in its very nature was amenable to American jurisdiction.[101] But why "robbery" is to be considered more horrible than "murder," and how revulsion at the substance of the crime translates into rules of jurisdiction which must be resolved before any court erected by any municipal system can hear the substance of any accusation, is unexplained.

Justice Story's expansive view of American jurisdiction to right the wrongs of the world was reflected also in two other cases in this series upholding jury verdicts that labeled as "high seas" for the purpose of "piracy" charges, roadsteads within three miles of a foreign state's coast: "[F]or, those limits, though neutral to war, are not neutral to crimes."[102] The logic of U.S. v. Ross[103] was apparently felt to be persuasive, perhaps in part because the Court remembered the origins of the American three-mile limit in a series of Secretary of States' almost arbitrary selections of a distance within which foreign gunboats could be excluded without offending any foreign powers in order to support American neutrality.[104] The notion that the Admiralty jurisdiction of all states extended as a matter of overlapping territorial jurisdiction to the navigable waters of the entire globe, rather than merely within the vessels of the various states, seems to be implicit in the holding.

Substance Reexamined. In one respect the expanded view supported by Story lost in this series of cases. The definition of the substance of the crime of "piracy" asserted by Story in U.S. v. Tully and Dalton[105] to include all "felonies" committed within Admiralty jurisdiction, not merely "robbery," was rejected by Story himself when forced to review the "writers" in U.S. v. Smith.[106]

Congress adopted as a matter of positive law Story's view of the utility of the legal label "piracy" to condemn whatever crimes the municipal law system of the United States wanted to attach the label (and its legal results) to without regard for the historical evolution of the concept or the jurisprudential concerns that run through the earlier writings. The most notable legislation concerned the slave trade. Story loathed slavery as a matter of natural law. While little could be done to abolish slavery within any particular state of the new Union under the positive law compromises of the Constitution of 1787, the Congress had the power to regulate foreign commerce and as early as 22 March 1794 had enacted a law forbidding the involvement of any person within the United States in the carriage of slaves in commerce between the United States and any foreign country.[107] On 10 May 1800 another Act forbade any American citizen or resident serving on board a foreign slave-trading vessel or holding any interest in the foreign slave trade.[108] The piracy statute of 1819 does not mention the slave trade. But the renewing statute of 15 May 1820 expressly makes it "piracy" with a penalty

of death for Americans to be engaged in the slave trade abroad or to detain a "negro" or "mulatto" with the intent to enslave (except for the recapture of persons (!) already held in slavery by the operation of the law of a state of the United States).[109] This use of the word "piracy" in connection with the international slave trade presumably represents an attempt by Story and others to develop the international law, as the "law of nations," by changing the municipal law of the United States, using the label, and hoping that other states in the international legal order would follow suit. To the extent that was the aim, it failed.[110] The American legislation remained municipal law in the United States, but the treatment of American active participants in the foreign slave trade as "pirates" before American courts did not make it "piracy" at international law any more than treason against the established order of England was made "piracy" in the international legal order by the hanging of James's (and Louis XIV's) Irish privateers in 1693.[111]

The interplay between American municipal law resulting from the statutes of 1819 and 1820, and the international law regarding the slave trade, and the retreat Story was forced into against his own inclinations was made clear shortly afterwards when an American naval vessel under Lieutenant Stockton seized a French slaver off the coast of Africa and France denied American jurisdiction to consider the case. Story upheld the American jurisdiction in principle, but turned the vessel over to France with an elaborate opinion seeking to bind France to apply its municipal anti-slave-trade laws passed as a result of British pressures and the Congress of Aix-la-Chapelle.[112] Story's reasoning is naturalist in holding the slave-trade to be a violation of the law of nations (because illegal under the law of all civilized states as well as in its nature inconsistent with Christian and universal moral principle). But he finds positivist reasons in policy for not applying the American municipal law: "The American courts of judicature are not hungry after jurisdiction in foreign cases, or desirous to plunge into the endless perplexities of foreign jurisprudence." He did not mention "piracy" or explain why the perplexities of foreign jurisprudence would be pertinent to a "law of nations" case.[113]

The issue appears to have been laid to rest in 1855. In that year a vessel sailing under the American flag was taken to Philadelphia under arrest for participating in the slave trade. The master of the vessel, Darnaud, was tried for "piracy" under the Act of 14 May 1820 secs. 4 and 5.[114] There was evidence that he was actually of French nationality despite the laws of the United States restricting masters' licenses for American flag vessels to American nationals. There was also a good deal of confusion as to the true ownership of the vessel, and it seems likely that a true American owner had attempted to mask his illegal operations behind various foreigners to whom title had been given, but not control or the legal capacity to transfer title further. Judge Kane charged the jury with regard

to the applicability of the American statute by which participation in the slave trade was made a species of "piracy:"

> [N]o State can make a general law applicable to all upon the high sea. Where an act has been denounced as crime by the universal law of nations, where the evil to be guarded against is one which all mankind recognize as an evil, where the offence is one that all mankind concur in punishing, we have an offence against the law of nations, which any nation may vindicate through the instrumentality of its courts. Thus the robber on the high seas, the murderer on the high seas, the ravisher on the high seas, pirates all of them, recognizing no allegiance to any country, because the very act violates their allegiance to all their fellow men, if caught, may be punished by the first taker. And so too, if the nations of the so-called civilized world, who are fond of calling themselves the whole world, and of arrogating to themselves somewhat too readily all the rights that belong to the whole world, could for once unite in defining that some one act should be regarded as a crime by all, it may be that after such an agreement by all the world, the courts of any one nation might without reference to the nationality of the individual undertake to punish the offence he had committed.
>
> But so soon as we leave these crimes of universal recognition, the jurisdiction of a State over the acts of men upon the high seas becomes circumscribed.
>
> But it is only in the two cases, where the individual accused is himself a citizen . . . or where the property upon which the individual was found perpetrating a wrong was properly recognized as American . . . that the United States can make a law which would be binding upon all citizens or which could be enforced by courts of justice; and I do not hesitate to say, after something of mature consideration, that if the Congress of the United States, in its honorable zeal for the repression of a grievous crime against mankind, were to call upon the courts of justice to extend the jurisdiction of the United States beyond the limits I have indicated, it would be the duty of courts of justice to decline the jurisdiction so conferred.
>
> That the offence is called in our particular statute piracy, does not vary the legal position. . . . Piracy is essentially an offence against the universal law of the sea. It assumes that the individual has thrown off his allegiance to mankind. He is the enemy of all who meet him. The slave trade, however horrible it may be, is not within that category.[115]

Under this charge, Darnaud was acquitted of "piracy."[116] The attempt of Justice Joseph Story to structure the American courts' approach to the international legal order in such a way as to enforce against foreigners whatever assertion of jurisdiction the Congress might see fit to make for policy reasons failed. The logic espoused by Judge Kane seems clear; it is based upon the existence of an international legal order that withholds from states the power to legislate with regard to the acts of foreigners abroad except in very narrowly prescribed cases. Participation in the slave trade, because consistent with the international legal order, even if horrible and possibly sinful, even if a violation of the law of nations in the Zouche-Blackstone-Story sense of violating the municipal laws of all states, was not inconsistent with the international legal order; indeed it was part of the trade between states that is a reason for the existence of the international legal order. Thus, to Kane it must have seemed that Castlereagh was wrong at Aix-la-Chapelle and France and Sir William Scott were right:[117] The law of

nations as it was reflected in the international law of the mid-nineteenth century was not conceived as the natural law evidenced by the concurrence of municipal legislation of all "civilized" states; it was the positive law, with no moral component divorced from the assent of states, evidenced by treaty or practice which in turn depended on political evaluations of the desirability of concluding the treaty or engaging in the practice.

It is perhaps worth noting explicitly that the Zouche-Blackstone idea that the law of nations, in the sense of the natural law evidenced by unanimity in the municipal laws of "civilized" states on some particular point, was part of "international law" in the sense of the law between states, seems to have bred more confusion than clarity in the minds of the naturalist jurists of the early 19th century. To legislators grappling with the practical problem of making rules for the governance of their societies, the idea that their rules, when coinciding with the equivalent rules of similar societies, represented the expression of some higher law and not of political choice was, to say the least, strange. They knew the argument and compromise that had been involved in drafting the rules and enacting them (through whatever political process). They also knew that what seems an incomplete trend or evidence of imperfect understanding of the underlying rules to a judge, teacher or other outsider, was more likely the balance of the political forces whose cooperation was necessary to the consensus process of legislation; that "imperfection" or "incompleteness" in expressing the "natural law" was evidence of the misperception of the outsider as to the "natural" rule, because the arguments that had resulted in the "imperfection" or "incompleteness" were sufficiently compelling, and reflective of important social interests, to be as "natural" as the arguments supporting a more sweeping rule. The evidence of the American experience of this time seems to have meshed with the evidence of British experience of the late 17th century and of this time as well, that rules of "international law" cannot be made binding on other states by the act of legislation or even judicial pronouncements of a single state or even a large majority of states. Thus, while a positivist approach to assertions of national interpretations of the law and its utility to express national policy even in international affairs resulted in legislation that used the word "piracy" in a sense desired by the national law-makers and in the hope of results in the international legal order,[118] that hope was futile. The structure of the international order, giving to each state the same powers of interpretation, make national legislation incapable of expressing "natural law" in a sense persuasive on others who do not share the identical perception of the "natural law." The argument by Blackstone, Story, Castlereagh[119] and others is thus circular; it rests on the *a priori* acceptance of the rule by the state seeking to be bound to it by international law arguments based on principles already found unpersuasive to its municipal legislature.

This is not to say that the naturalist argument regarding underlying principles is wholly mistaken, only that its application to specifics can never be presumed.[120] The 1945 Statute of the International Court of Justice, which is binding on all members of the United Nations and a few other states as treaty law even if not codifying generally accepted formulae, requires the Court to apply "general principles of law recognized by civilized nations" as part of the body of rules contained in international law.[121] Whether those "general principles" have anything to do with "piracy," and whether, if they do, they can be applied to anything else, remains doubtful in the light of the experience of the United States in trying to use them to expand the concept to cover the foreign slave trade and felonies other than "robbery" and in areas other than the high seas outside the territorially-based assertions of jurisdiction of any state, and to persons and incidents not related in legally significant ways to the state seeking to apply its law (or its conception of the international law) of "piracy."

Jurisdiction Reexamined. Story's reasoning in the *La Jeune Eugenie*, declining to exercise over a wholly French vessel the American jurisdiction asserted in the Act of 1820,[122] seems to reflect the policy underlying the distribution of legal powers, the jurisdiction of national courts and the problem of "standing" inherent in the international legal order. It is thus more compelling as a demonstration of the limits of "natural law" than of the substantive law regarding the slave trade that Story felt truly reflected "natural law," and which he declined to apply despite asserting a universal American jurisdiction both to legislate and to enforce American "universal" law against foreigners abroad. As Story's reasoning demonstrates, it is possible to assert this distribution of legal powers in the international legal order to rest on either natural law growing out of the structure of international society, or positive law—the convenience of the enforcing state in a particular situation—thus it is not necessary to resolve the jurisprudential disputes as to the best model to posit for an understanding of the international legal order. The policy argument given by Story will be very strong in any particular case. It, in turn, rests on unstated perceptions as to the convenience of the state system and narrower conceptions of territorial jurisdiction than he was willing to admit openly.

If this is so, then the "crime of piracy, as defined by the law of nations" seems to be simply the extension of municipal laws relating to crimes labeled "piracy" for historical reasons, largely resting on confusion and polemics, and related to the international legal order by another confusion between the "law of nations" and the "law between states" the former being merely a collection of the similar municipal laws of states which regard themselves as the sole members of the system. The similarities seem to rest on policy reasons related to the needs of commerce, not on underlying natural moral and legal principles. Indeed, ironically, the underlying principles seem more nearly

related to the unwritten constitutional order of international society, and make the conception of a substantive "natural law" valid for all states because reflecting immutable substantive principles, inconsistent with the system and an impediment to a clear understanding of it. Story himself seems to have reached this conclusion by 1834.[123]

In some other respects, what Story could not win by traditional legal argument based on natural law, he and his supporters were able to win briefly through changes in the positive law; by the blend of law, morality and policy in legislation by the United States Congress. The Act of 15 May 1820,[124] in addition to extending indefinitely section 5 of the Act of 1819,[125] and otherwise regulating the exercise of the powers of the President to authorize captures at sea, contained a new provision codifying Story's view as to the territorial reach of American Admiralty jurisdiction:

> Sec. 3. . . . That if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin or bay, or in any river where the sea ebbs and flows,[126] commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be judged to be a pirate; . . . And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore commit robbery, such person shall be adjudged a pirate.[127]

The possibility of a clash of jurisdictions was noted with a proviso:

> *Provided*, that nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offences, when committed within the body of a county [*sic*; this was obviously copied from the statute of 1536], or authorize the courts of the United States to try any such offenders, after conviction or acquittance [acquittal], for the same offence, in a state court.

But the references to counties and to state courts makes it likely that what was in the mind of the Congress was not a clash between the United States and foreign countries, but between Federal and state authorities within the United States alone. On the other hand, the United States had not authorized any courts under the Constitution, except military tribunals and counsular courts, to hear criminal cases arising outside of the territorial jurisdiction of the United States and the high seas.[128] Thus the degree to which the territorial view of Admiralty jurisdiction, urged by Story and evident in many of the writings and cases noted above, was actually adopted by the Congress is doubtful.

As was pointed out with regard to the positivism of Gentili, where concepts of natural law and inherent limits to sovereignty are not regarded as persuasive, policy arguments frequently are persuasive to reach the same results. It is frequently better to refrain than to exercise an assertable jurisdiction when inordinate expenses must be borne to transport witnesses and inordinate delays are involved when a court cannot be set up in the area of the acts over which a state seeks to apply its law. The British had solved the problem in 1700 by authorizing the establishment of colonial tribunals to hear

"piracy" cases. In 1820 the United States did not have the same resources or distant interests involving sea power that the British felt. And even the most assertive positivist in the administration or the Congress at that time would not have urged that America establish a land-based court in territory ruled by a foreign sovereign with his own judicial system; to supersede, or even supplement a foreign judicial system and apply American law in a foreign sovereign's territory were major steps involving treaties[129] or the extension of national sovereignty, colonization or imperial expansion, in disregard of local authority.[130] The diplomatic and military consequences of such a policy made it inadvisable to apply it in distant territory at that time.[131]

The practical restraints the international legal order, with its emphasis on territory as the prerequisite for enforcement jurisdiction, fixes upon the legal powers of states to legislate effectively within that order through arguments based on the natural law evidenced by coinciding municipal legislation, are implicit in the leading American text of the period. Chancellor James Kent of New York in the first edition of his *Commentaries on American Law* (1826)[132] regarded the public law of nations as "enforced by the censures of the press, and by the moral influence of those great masters of public law, who are consulted by all nations as oracles of wisdom" and ultimately by "the penal consequences of reproach and disgrace" and the hazards of "open and solemn war by the injured party." But offenses that can be committed by individuals he considered as enforced by the "sanctions of municipal law," specifying not individual acts of unneutral service when the state is seeking to maintain neutrality, or similar acts violative of national policy alone, but "violations of safe conduct, infringement of the rights of ambassadors, and piracy."[133] "Piracy" he defined merely as robbery, or a forcible depredation on the high seas, without lawful authority, and done "*animo furandi*," citing U.S. v. Smith as authority for the assertion[134] and he asserted with Story that "There can be no doubt of the right of Congress to pass laws punishing pirates, though they may be foreigners, and may have committed no particular offence against the United States."[135] But he applied that broad language only to cases noted above in which the "pirate" had lost all his national character by acting "in defiance of all law, and acknowledging obedience to no government or fiat whatsoever." The Acts of 1790 and 1819 as continued and expanded in 1820 he noted:

> Did not apply to offences committed against the particular sovereignty of a foreign power; or to murder or robbery committed in a vessel belonging at the time, in fact as well as in right, to the subject of a foreign state, and, in virtue of such property, subject at the time to its control. But it [the Act of 1790] applied to offences committed against all nations, by persons who, by common consent, were equally amenable to the laws of all nations.[136]

He thus repeated the compromise on the Supreme Court noted by Wheaton, that allowed the wide assertion of jurisdiction urged by Story to

survive alongside a restrictive interpretation of the statutes under which that jurisdiction was interpreted to avoid a clash with foreign jurisdictions. And he emphasized the restriction by referring to the "particular sovereignty" of other states as a limit to American assertions, and to "common consent" as the basis for a wider exercise of jurisdiction if it were ever to be attempted.

Foreign Commissions and Unrecognized Belligerents[137]

The Statutes. The historical experience of the United States with unrecognized belligerents being classified as "pirates" dates back to 1777, with the licensees of the Continental Congress itself so classified by British statute.[138] Those statutes envisaged the detention of American privateers as "pirates," with a possibility of criminal trial at Executive discretion in England. There appear to have been no prosecutions for "piracy" as a crime either under the law of England or under international law growing out of the licensed activities of American privateers during the War. American privateers conducting captured vessels into neutral ports during those years were either welcomed on terms of equality with other belligerent vessels or turned away after British protest. The British authorized reprisals against Dutch shipping in retaliation for the Dutch refusing to deny port facilities to American privateers; but there seems to be no instance of a licensed American privateer actually being treated as a criminal.[139] In one instance British correspondence protested host state favors to an American naval officer as a breach of international obligations related to "piracy," but the context is political and the legal argument seems obscure.[140]

The use of the word "pirate" in what appears to have been a municipal criminal or administrative law context, but actually as a mere pejorative, and as a legal basis in either British municipal law or international law (certainly municipal law; international law to the extent the privateers licensed by the Continental Congress were conceived to be exercising belligerent rights) for holding political prisoners without calling them prisoners of war, was thus familiar to the statesmen of the United States from the moment of independence.

The United States, as a new state in the international order, preferred not to use the legal word in this way but did use it as a political pejorative without legal implications. Among the earliest treaties of the United States under the Constitution of 1787, aside from the Jay Treaty and Pinckney's Treaty with Great Britain and Spain respectively,[141] were the treaties with the "states" of the North African Mediterranean littoral, the Barbary states.[142] The word "pirate" was often used in the political rhetoric surrounding the so-called War with the Barbary Pirates, but in the actual conduct of hostilities, the normal laws of war and diplomatic and military intercourse were followed; the word seems to have reflected popular emotion only, not any legal classification.[143]

The American statute of 1790[144] contained a provision dealing with privateering done under color of a foreign commission. It was restricted in terms to American citizens taking such commissions, and thus rested its

"standing" on the nationality of the accused "pirates." It separated conceptually the problem of commissions from the problems of "piracy" unauthorized by any public authority, thus for a full understanding of the American attitude towards depredations done by foreigners also under color of a foreign commission it is necessary to set it forth here:

> 9. . . . That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon, and robber, and on being thereof convicted shall suffer death.[145]

This provision was left unchanged by the revisions of 1819 and 1820. The principle was expanded in 1847 during the war between the United States and Mexico of 1846-1848 through which the United States acquired California, New Mexico and Arizona, and ended Mexican claims to Texas. At that time the United States, as a matter of municipal law, extended the treatment as "pirates" even to foreigners acting under valid commissions by foreign governments if those commissions were inconsistent with the provisions of a treaty to which the United States is a party:

> That any subject or citizen of any foreign State, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or the citizens of the same, contrary to the provisions of any treaty existing between the United States and the State of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted, and punished before any circuit court of the United States . . . in the same manner as other persons charged with piracy.[146]

The statute of 1790 and its continuations apply only to Americans and, after 1847, some foreigners acting against the United States. Its provisions do not reflect any acknowledged underlying customary law. A British assertion that Americans serving on French privateers in 1794 were "pirates" was denied by the United States;[147] similarly, a French decree of 6 June 1803 classifying as a "pirate" vessel any privateer sailing against France two-thirds of whose crew were not subjects or citizens of a country at war with France, was considered by the United States to be inconsistent with the law of nations.[148] The question of Americans acting under foreign commissions against foreigners was answered as far as the United States was concerned by the Neutrality Act of 5 June 1794[149] under which various unneutral acts by individuals within the territory of the United States were forbidden, including the fitting out of privateers to cruise against foreign powers. But only acts within the territorial jurisdiction of the United States were affected as it was apparently the American policy to regard mercenary activity by Americans, including privateering under foreign license (which could be very profitable indeed to the successful privateer), to be neither forbidden by any conception of the law

of nations applicable to individuals nor any violation of American neutrality under international law as applicable between states.[150]

By 1854 it appears that even the British had accepted the American position that a regularly issued commission would remove the charge of "piracy" from nationals acting under third country commissions against yet other countries, and such a situation would not violate the neutrality of the privateers' own state if that state's territory or its own affirmative public policy were not involved.[151] Of course, municipal law or treaty could commit a state to a different policy. In addition to various policy arguments, such as the possibility that Great Britain might some day want to be able to employ American seamen in British privateers sailing against a third power, the Americans argued successfully that "By the law of nations, as expounded both in British and American courts, a commission to a privateer, regularly issued by a belligerent nation, protects both the captain and the crew from punishment as pirates."[152]

The Early American Experience. There is no American statute relating expressly to foreigners sailing under foreign commissions other than these. Thus, a legal gap was left with regard to foreigners sailing under commissions of foreign authorities who are not accepted by the political branches of the government of the United States as the representatives of foreign states. To the extent those foreign privateers act only against foreign shipping, not only would the United States lack standing to try them for "piracy" under any definition, but even if the jurisdictional problem were regarded as solved by calling them stateless under the approach taken in U.S. v. Klintock,[153] the lack of *animo furandi*, an essential element of the crime of "robbery," would seem to take the privateers with doubtful license out of the conception of "piracy" as it evolved with regard to the "classical" application of Admiralty jurisdiction to hang foreigners acting abroad for violations of a municipal law relating to property rights on board ships of the prosecuting state. A different conception is involved relating less to the municipal law of "robbery" or "murder," and more to the international law of war involving unrecognized political societies or groups forming themselves into governments but not yet in control of all the levers of the political society they claim to govern. The conception relates in the statutes to Americans engaging in "hostility" against the United States, or foreigners "making war" on the United States in disregard of treaty obligations of their own state. The uses of the word "piracy" in this very different context than the "robbery within the jurisdiction of the Admiral" definition, caused a confusion of thought that persists to today.

Ironically, the first form in which the key questions arose was with regard to commissions issued by the United States itself in 1798 authorizing privateers to cruise against French shipping.[154] Under the Constitution of 1787, the American Congress has the legal power in the United States "To

declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."[155] On 7 July 1798 the Congress legislated "That the United States are of right freed and exonerated from the stipulations of the treaties . . . heretofore concluded between the United States and France."[156] Two days later the Congress authorized the President to "instruct the commanders of the public armed vessels . . . employed in the service of the United States, to subdue, seize and take any armed French vessel" and to grant equivalent authority through "special commissions" to the owners of "private armed ships and vessels of the United States."[157] Since there was no Declaration of War, the legal question was posed as to whether American commissioners acting under commission in the public interest, and not as licensed individuals in a "reprisal war,"[158] could claim the rights of lawful combatants and whether Frenchmen captured by American privateers were to be treated as soldiers under the laws of war. In addition, the question arose as to whether an American taking a French commission or aiding the French was guilty of "treason" or of "piracy" under the "hostility" provision of section 9 of the Act of 1790. The Attorney General, Charles Lee, addressed the questions in an opinion sent to the Secretary of State, Timothy Pickering, on 21 August 1798:

> Sir: Having taken into consideration the acts of the French republic relative to the United States, and the laws of Congress passed at the last session, it is my opinion that there exists not only an *actual* [*sic*] maritime war between France and the United States, but a maritime war *authorized* [*sic*] by both nations. Consequently, France is our enemy; and to aid, assist, and abet that nation in her maritime warfare, will be treason in a citizen or any other person within the United States not commissioned under France. But in a French subject, commissioned by France, acting openly according to his commission, such assistance will be hostility . . . [he] must be treated according to the laws of war.[159]

The Latin American Wars for Independence. It being more or less established, thus, that as far as the United States was concerned, the facts should determine the legal classifications pertinent to any particular situation, and that the political act of "recognition" through the formal attaching of classifications like "war" to a factual situation was a clarifying and at times determinative step, but that the failure to make a formal "declaration" was not determinative, the courts found themselves in some difficulty during the wars for independence of the Spanish colonies in the Americas.

The *Romp* of Baltimore sailed under a commission from the revolutionary government of Buenos Ayres and, as the *Santafecino*, cruised successfully against Spanish shipping. The laws of maritime warfare were fully observed. Available records do not indicate why the terms of Pinckney's Treaty with Spain were not applied to make the American involvement in the voyage of the *Romp* equivalent to "piracy,"[160] but when the crew was arrested on 1817

and charged with "piracy" Chief Justice Marshall, sitting as a Circuit Judge in Virginia, found the major issue to be whether the commission from Buenos Ayres was significant legally in the absence of "recognition" by the political branches of the American government, and whether, if not, the "robberies" against Spain committed by the *Romp*'s crew fell within section 8 of the 1790 statutory definition of "piracy:"

> The commissions should go to the jury, merely as papers found on board the vessel. But on the main question . . . that a nation became independent from its declaration of independence, only as respects its own government. . . . That before it could be considered independent by the judiciary of foreign nations, it was necessary that its independence should be recognized by the executive authority of those nations. That as our executive had never recognized the independence of Buenos Ayres, it was not competent to the court to pronounce its independence. That, therefore . . . the seals attached to the commissions in question prove nothing.[161]

As to the law of "piracy" that would apply if the commissions were found by the jury not to endow the crew with an immunity from the law of "piracy" for the purposes of the case, Marshall reviewed section 8 of the Act of 1790 and concluded in the light of a split of opinion between Justices Bushrod Washington and William Johnson that the law is "doubtful" as to whether to be "piracy" the depredation must be one that would be punishable by death if committed on land.[162] With this confusing instruction he sent the case to the jury, which took only ten minutes to return a verdict of not guilty.

The legal questions were given a much more elaborate treatment about a year later in U.S. v. Palmer et al. As to the substance of the question as to whether the phrase "punishable by death" in the Act of 1790 section 8 modified the word "piracy" as well as the phrase "any other offences," Johnson, in his dissent to U.S. v. Palmer, took the opportunity to reiterate his views conscientiously opposed to capital punishment.[163] He also reiterated his interpretation of the Constitution to withhold from the Congress the power to make that "piracy" which by the law of nations is not "piracy" in order to give jurisdiction to its own courts over such offenses[164] and went much further with regard to the question of commissions by unrecognized public authorities:

> When open war exists between a nation and its subjects, the subjects of the revolted country are no more liable to be punished as pirates, than the subjects who adhere to their allegiance. . . . The proof of a commission is not necessary to exempt an individual serving aboard a ship engaged in the war, because any ship of a belligerent may capture an enemy; and whether acting under a commission or not, is an immaterial question as to third persons: he must answer that to his own government.[165]

It is not clear whether the majority agreed with Johnson on these last points; Chief Justice Marshall exercised his usual genius for finding words that would satisfy all parties and resolve the case without actually taking a position. As noted above, the majority agreed with Marshall that acts by

foreigners exclusively against foreign individuals or vessels "is not a piracy within the true intent and meaning of the act" of 1790 section 8.[166]

But what of Amercan defendants and foreigners who take American property at sea under a doubtful foreign commission? As to these, Marshall wrote:

> [I]f the government [of the United States] remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy.... This would transcend the limits prescribed to the judicial department.[167]

This reiteration of the position taken so futilely a few months before in U.S. v. Hutchings at the Circuit Court level, was modified and expanded somewhat when Marshall drafted the "per curiam" Certificate to take account of Johnson's views and conclude the case by giving guidance for the future. After holding that acts by foreigners exclusively against other foreigners are not "piracy" within the sense of section 8 of the Act of 1790 (not mentioning whether "piracy" at general international law), Marshall wrote for the Court:

> [W]hen a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the union must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. If the government of the union remains neutral, but recognizes the existence of a civil war, the courts of the union cannot consider as criminal those acts of hostility, which war authorizes, and which the new government directs against its enemy.[168]

As in U.S. v. Hutchings, Marshall (carrying the whole Court with him) concluded that the seal on a purported commission may be proved by such evidence as the circumstances permit even if there is no clear "recognition" of the seal-granting authority by the political branches of government, and if it cannot be proved, then the defendant may nonetheless otherwise prove himself to be in government service.

This opinion did two important things from the point of view of this part of the analysis: (1) It impliedly applied the municipal law "robbery" conception to the international law concept of "piracy" by allowing that any commission, or even mere government service without a commission, could negative the *animus furandi* necessary for a "piracy" conviction at American law; and (2) while repeating the subservience of the judicial branch to the other two branches of the American Federal government, it allowed juries to construe the silence of those other branches as consent to whatever the jury might find to be the legal classifications for the purposes of the particular case best flowing from the facts introduced in evidence before the court. Thus, while allowing the political departments of government to "recognize" as facts for the entire government a labeling system that might bear no relationship to the labels that a jury objectively viewing the evidence might

find, the legal system was not to be crippled by the inability of the political officers of government to make up their minds as to the labels that would do most to advance American policy interests. They could continue to be as positivist as they pleased, but the law using the traditional tools of naturalism, reason and fundamental principle derived from conscience and experience, could act when policy did not intervene. The result of this approach was to separate the law of "piracy" from the law of war, which was conceived to apply to all public contentions of arms whether or not declared and whether or not all parties were "recognized" as states or governments.[169]

In the light of the history of the American revolution and the policy followed during the undeclared war with France, this was hardly earthshaking, but it caused considerable confusion to the political arms, which felt they might be losing control of reality by permitting the judiciary to affix legal labels on the basis of evidence instead of on the basis of policy as examined by the political representatives of the Union. On 6 November 1818, shortly after the decision in U.S. v. Palmer et al. was announced, the Attorney General, William Wirt, responded to a request for legal guidance from Elias Glenn, the Federal District Attorney for Baltimore, in a case involving American privateers sailing under licenses issued by the organization headed by Jose Gervasio Artigas, the leader of the Uruguayan independence movement involved in struggles against the governments of Buenos Ayres and Portugal (which was still sovereign in Brazil). The easy answer might have been to rest not on the law of "piracy," but on the American Neutrality Act of 1794 forbidding American nationals taking foreign colors while in the United States.[170] But, this statute had only a very narrow territorial application, did not apply to American nationals abroad, and was aimed at preserving the neutrality of the United States by forbidding American *territory* to be used for foreign enlistments or fitting out foreign warships. The only reference to "piracy" in the act is in its section 9: "[N]othing in the foregoing act shall be construed to prevent the prosecution or punishment of treason, or any piracy defined by a treaty or other law of the United States."[171] The strictly territorial applicability of this statute had been assumed in 1796 by Attorney General Charles Lee, who had felt it necessary to explain why it was necessary to preserve the neutrality of the United States by controlling even the actions of foreign seamen; his language, while so general that it might be read to apply to foreign seamen abroad, cannot have been intended to apply so broadly because the neutrality of the United States cannot have been conceived to have been affected by that, and it is neutrality that is the subject:

> Mariners may be said to be citizens of the world; and it is usual for them, of all countries, to serve on board of any merchant ship that will take them onto pay. . . . In the acts of Congress passed for punishment of crimes against the United States, it is observable that *mariners* [*sic*] are forbidden to serve on a foreign ship of war, letter of marque, or

> privateer, but are left at liberty to serve on board a vessel merely engaged in commerce.[172]

To Wirt, the enlistment under Artigas's licenses was illegal under the act of 1794, but if not, then it must have been "piracy" under the act of 1790, section 9. Since it is not clear that the place of enlistment was within the territory of the United States, it is not clear how the 1794 act was conceived to apply; and since it is not clear that any victim of the privateers was American, it is hard to see how section 9 of the act of 1790 could apply. But Wirt seems to have been obsessed with his reading of U.S. v. Palmer et al. and U.S. v. Hutchings:

> If the prisoners fail in showing that our government had admitted the existence of a civil war between Artigas and Portugal, then the principles laid down in Palmer's case . . . can have no application.[173]

In that case, wrote Wirt, Marshall's position in the *Romp* case will result in a conviction for "piracy." In case that argument seemed unconvincing, Wirt found another by citing Vattel for the proposition that "the citizens of the United States cannot mingle in that war, on this hypothesis, without being guilty of piracy." But the citation given by Wirt does not support his conclusion, since it forbids only foreign recruitment, not enlistment.[174]

Wirt raised also the possibility that if all else failed the American adventurers might be considered "pirates" under an unspecified Act of 1817. The only Act that might fit his description provides:

> That if any person shall, within the limits of the United States, fit out and arm, . . . any such [*sic*; there is no prior referent in the statute to justify the "such"] ship or vessel, with intent that such ship or vessel shall be employed in the service of any foreign prince or state, or any colony, district or people, to cruise or commit hostilities . . . against the subjects, citizens, or property, of any prince or state, or of any colony, district or people with whom the United States are at peace, every such person so offending shall, upon conviction, be adjudged guilty of a high misdemeanor.[175]

He seems to have overlooked the limiting language "within the limits of the United States."[176] This series of confusions and citations to inapplicable statutes and writings seems good evidence of the desire of the Administration of President James Monroe to find a basis in the law for controlling the adventures of Americans in the free-wheeling revolutionary days of the early 19th century Western Hemisphere without additional legislation. Indeed, it seems likely that stronger legislation to limit North Americans' adventures in Latin America could not have been passed through the Congress, in which representatives from the less sedate members of American society had a stronger voice than in the Virginia lawyer's appointed executive branch. Marshall's ambiguities were not sufficient. The defendants were acquitted without the jury leaving their seats, much to the fury of the Secretary of State, John Quincy Adams, who felt the acquittal showed a lack of character and ability in all those involved in the prosecution, including William Wirt, and the judges in the case; William Pinckney, the defense counsel, was

regarded by Chief Justice Marshall and Justice Joseph Story as the greatest advocate to appear before them.[177]

Examples of the practical difficulties of administering the terms of section 8 of the Act of 1790 were given above,[178] and the ambiguities were substantially increased by the possibility that a foreign commission might authorize the depredations observed or suspected by American licensees seeking to capture "pirate" vessels. As early as 1813, Bushrod Washington had tried unsuccessfully to use section 8 of the Act[179] to limit the excessive zeal of foreign privateers. In U.S. v. Jones[180] a jury in Philadelphia had before it a defendant from a vessel which had despoiled a Portuguese ship although, according to Washington, in the political struggle giving rise to Jones's foreign commission Portugal was a "neutral" as far as the United States was concerned. The facts are not entirely clear, but the defendant appears to have been an American, and Washington sought to have him bound by American neutrality not to participate in a struggle among foreign public authorities. No act of the Congress squarely touched the situation and Washington was in the same dilemma Wirt would try to bluster his way out of in 1818. Washington cited Jenkins, Molloy, Wooddeson and the Kidd case,[181] "which latter case," he wrote, "though decided at Common Law, is clearly bottomed upon the principles of the maritime law of nations, with which the Common Law in this respect agrees."[182] The fact of the defendant's commission having authorized depredations against Portuguese vessels Washington instructed the jury to be irrelevant if the defendant "knows, or ought to know, the orders to be illegal." The act of "piracy" under the Act was apparently not necessarily either murder or robbery, but included any other act which would have been punishable by death if committed on land. Washington seems to have felt that this language of the Act of 1790 did not expand the international law of "piracy" but codified it.[183] The verdict was for acquittal, apparently on the basis of a possible mistaken identity between Jones and another defendant named Hancock, and some serious question about the credibility of some witnesses,[184] so possible legal errors in the charge were never appealed to higher courts.

Evolution of the Labels. Among the "piracy" cases dealt with at the Supreme Court level immediately after U.S. v. Smith in 1820[185] was U.S. v. Griffen and Brailsford, in which the charge was applied to an American fitting out a vessel in an American port to cruise under a foreign commission against a foreign power at peace with the United States. The facts are not fully set out, but the Supreme Court's decision was that even if the "piracy" laws did not apply, the Neutrality laws of the United States did,[186] and the defendant concerned was "not protected by a commission from a belligerent from punishment for any offence committed by him against vessels of the United States."[187]

Another was U.S. v. Holmes,[188] in which the Supreme Court avoided the problem of having the judicial branch *via* a jury decision "recognize" the legal

power of an unrecognized authority (Buenos Ayres again) to issue valid commissions in disregard of the silence of the political branches of government by applying the rule of U.S. v. Klintock.[189] Apparently it was hoped that a jury would find that "the vessel . . . had, at the time of the commission [of the offense], no real national character but was possessed and held by pirates, or by persons not lawfully sailing under the flag, or entitled to the protection of any government whatsoever."[190]

It seems likely that the Supreme Court's difficulties dealing with these cases reflected a deep jurisprudential split between Story and Washington, the "naturalists," taking an expansive view of American jurisdiction to apply an international law of "piracy" to foreigners who interfered with foreign shipping in disregard of the legal order's normal demand for some "standing" in the state whose judicial arm had the accused "pirates" before it, and the "positivists," Johnson and Marshall, who insisted that, regardless of judges' perceptions of abstract "justice," "reason" or the presumed needs of society, the jurisdiction of the American courts was restricted to such cases as the Congress by legislation had given to it, and who interpreted the intention of the Congress narrowly. The compromise as of 1820 was to allow jurisdiction in those cases in which American "standing" could be supported in the usual way plus those in which no other state in the international legal order could assert a greater "standing" or legal interest. The limits of this approach were reached when the defendants derived their authority for committing depredations at sea from commissions issued by unrecognized foreign officials; the "naturalists" wanted to consider those cases as within American judicial purview, the "positivists" did not.

Wheaton in 1836 attempted to summarize the American view and ended with the same split between broad assertion of jurisdiction and narrow citation to practice that was the result of the jurisprudential division within the Supreme Court. He wrote:

> Pirates being the common enemies of all mankind, and all nations having an equal interest in their apprehension and punishment, they may be lawfully captured on the high seas by armed vessels of any particular state, and brought within its territorial jurisdiction for trial in its tribunals.[191]
>
> This proposition, however, must be confined to piracy as defined by the law of nations, and cannot be extended to offences which are made piracy by municipal legislation. . . . The crimes of murder and robbery, committed by foreigners on board of a foreign vessel, on the high seas, are not justiciable in the tribunals of another country than that to which the vessel belongs; but if committed on board of a vessel not at the time belonging, in fact as well as right, to any foreign power or its subjects, but in possession of a crew acting in defiance of all laws, and acknowledging obedience to no flag whatsoever, these crimes may be punished as piracy under the law of nations in the courts of any nation having custody of the offenders.[192]

The interplay between the American municipal law and the international law of "piracy" as it might apply to political actors with commissions issued by unrecognized governments at this period was illuminated in a case decided

by a unanimous Supreme Court, opinion by Justice Johnson, in 1821. The *Bello Corrunes* was a Spanish ship, captured in 1818 by an American sailing under commission issued by the authorities of Buenos Ayres in a ship that had been fitted out in the United States in violation of the Neutrality Act of 1794.[193] It ran aground on Block Island, at the Eastern end of Long Island Sound, as a group of its original crew seized control back from the American licensee of Buenos Ayres. The claimants in an Admiralty proceeding thus were the original Spanish owners, on the argument that the capture was "piracy" because the authorities in Buenos Ayres had no legal power to issue a commission; the American licensee, on the basis of his capture of the vessel; and the group of original crewmembers, who claimed compensation as salvors for the original owners by virtue of their recapture of the ship from "pirates" just before she ran aground. The learned counsel before the Supreme Court included Daniel Webster and Henry Wheaton for the Spanish owners and the "salvors" respectively, both arguing the original seizure to have been "piracy" under article 14 of Pinckney's Treaty.[194] The decision was for the Spanish owners not on the ground of the intervening capture having been "piracy," but on the ground of the American captor having violated article 14 of the Treaty and the implementing statute of 14 June 1797,[195] and the salvors not having shown that they truly intended to return the vessel to its Spanish owners rather than keep it for themselves.[196] Johnson indicated that the Treaty deeming to be "piracy" any American privateering against Spain under license from any "Prince or State" with which Spain shall be at war was problematical because Spain refused to consider its troubles with Buenos Ayres to amount to "war," or Buenos Ayres to be the government of a "state." But, he said, whatever the problems in punishing these acts as "piracy," they are clearly prohibited "and intended to be stamped with the character of piracy."[197]

Meantime, as to the relationship between reality and legal labels, in the 1820 case of the *Josefa Segunda*[198] the Supreme Court reiterated in even stronger terms the approach taken by Marshall in U.S. v. Palmer et al. The *Josefa Segunda*, suspected of preparing to violate American laws regarding the slave trade, was taken into an American port. Rival claimants for the vessel, in addition to its captors, were its original Spanish owners and its immediate possessors, who were the prize crew put aboard by a Venezuelan privateer. To defeat the claim of these last, an argument was made that the Venezuelan capturing vessel, the *General Arismendi*, was a "pirate" because the licensing Venezuelan authorities had not been "recognized" by either Spain or the United States as a government; that there was no "recognized" state of war between Spain and any local authorities in Venezuela, and that even if all of this were not so, the *Josefa Segunda* had never been formally taken before a Venezuelan or any other prize court and therefore the legal Spanish title had never been divested. Justice Henry Livingston for the Supreme Court brushed aside all these formal legal arguments:

> Although not acknowledged by our government as an independent nation, it is well known that open war exists between them [the Venezuelan local claimants to authority] and his Catholic Majesty, in which the United States maintains strict neutrality. In this state of things, this Court cannot but respect the belligerent rights of both parties; and does not treat as pirates, the cruizers of either, so long as they act under, and within the scope of their respective commissions.[199]

The lack of actual condemnation before a prize court was considered irrelevant because "a condemnation in a Prize Court of Venezuela was inevitable."[200] This was judicial naturalism with a vengeance. "War" was considered a legally significant "fact," not a legal status. American "neutrality" appears also to have been treated as a "fact" despite the appearance of status language. The reference to both the facts of war and of American neutrality is immediately followed with a reference to "this state of things" compelling legal results, the respect for the "belligerent rights of both parties." If this was not a judicial "recognition" of the status of the Venezuelan authorities as a "party" to a legal "war," it is hard to see what would have been. It differs from a declaration by the Executive branch of the American government only in that it is legally valid for the particular case alone, not necessarily for other purposes or other cases. The case also shows the decreasing importance of the forms of the law, the Prize court proceedings, to the "naturalist" jurist. Until this time, the American capture of the *Josefa Segunda* from a privateer prior to the legal title in the vessel and its cargo being changed by some national Prize court would have had the same legal result as a rescue from "pirates": Return of the vessel and cargo to its legal owners and payment by them of "salvage" to the recaptors. Instead, the result in the *Josefa Segunda* in practical terms was the defeat of Spanish title (by presuming the result of a Venezuelan prize court—and presuming sufficient legal status in the authorities of Venezuela to hold one) and the defeat of the title claimed by the *General Arismendi*'s owners and company by virtue of the violation of the American anti-slave-trade laws in the territorial waters of the United States, and thus the full value of the vessel and its cargo to the American captors and government under those laws. Presumably this is the same result the political branches of the American government would have wanted to reach by the discretionary application of legal labels in a positivist mode, and, by restricting the labels to the particular case, avoided international political complications that handling by the executive branch alone in diplomatic correspondence and administrative action would have entailed. And yet, it seems apparent that to a large degree the Supreme Court was exercising a political discretion, attaching labels not, perhaps, for strictly policy reasons, as a self-conscious executive might have done, but finding colorable reasons in a naturalist mode for attaching the labels most likely to be welcomed by the administration of President Madison. Presumably they are the same reasons that a positivist would have chosen in diplomatic correspondence with Spain, although in that case tempered by apprehensions

of reciprocal treatment by Spanish authorities with regard to American vessels captured by America's enemies and not yet formally condemned, and perhaps also by concern lest the Spanish authorities for their own policy reasons "recognize" the international legal capacity of various American Indian tribes or other groups which it was in the United States political interest to suppress without reference to the rules of international law.

The Supreme Court itself did not maintain this exaggerated role in the discretionary business of attaching legal labels relating to international affairs. Once the political branches had "recognized" the war of independence between Spain and its American colonies, and proclaimed United States neutrality, the Court could skip back to its more comfortable role as a judicial branch of government concerned with applying American municipal law and only such international law as American municipal law required it to apply. The case marking this retreat was the *Santissima Trinidad* and the *St. Andre*.[201] Justice Story delivered the Court's unanimous opinion. The case involved an American-built ship, the *Independencia* sold to James (Diego?) Chaytor, of originally American, now nuclear, nationality, who held a commission from the authorities of Buenos Ayres. Story wrote:

> Buenos Ayres has not yet been acknowledged as a sovereign independent government by the executive or legislature of the United States and, therefore, is not entitled to have her ships of war recognized by our courts as national ships. We have, in former cases, had occasion to express our opinion on this point. The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of . . . intercourse. Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights.[202]

But the fitting out of the *Independencia* and a companion vessel in the United States was a violation of the American Neutrality Act even if not a violation of article 14 of Pinckney's Treaty[203] and Story argued that the American Neutrality Act was but one country's legislation expressing the underlying principles of all civilized countries (or, at least, all countries participating in the international legal order as conceived by Story) and, therefore, was simply part of the "law of nations" as conceived by Blackstone. Thus, while rejecting the characterization of Chaytor as a "pirate" under article 14 of Pinckney's Treaty, and, by virtue of its public character rejecting the characterization of the *Independencia* as a "pirate" vessel, he held that the wrongful fitting out of the vessel in the United States "is a violation of the law of nations, as well as of our own municipal laws" and that violation "infects the captures subsequently made with the character of torts, and . . . requires restitution."[204]

As to the property rights adjudicated by a foreign prize court, Story and the Supreme Court retreated considerably from the glib dismissal of the foreign legal process evident in the presumption of condemnation and the giving of

current effect to the merely anticipated legal action in the *Josefa Segunda*. The *Santissima Trinidad* had been captured by the *Independencia* and, with the consent of all parties in the United States, had been sold there with the money received replacing the vessel as the object of this Admiralty *in rem* proceeding. During the pendency of the proceeding a Prize court in Buenos Ayres had in fact condemned the vessel *in absentia*. The Supreme Court did not object to the action of the Buenos Ayres court, ruling rather surprisingly that a belligerent Prize court could legally act when a prize is physically elsewhere, in a neutral port. But Story found two reasons why that Prize court action was ineffective: (1) the vessel, having already been submitted to an Admiralty court, it was no longer in the hands of the captor, so the *res* essential to an *in rem* action was missing, (2) the property was already in the hands of an American court, and the supervening action of a foreign court cannot oust the American court of its jurisdiction: "It would be an attempt to exercise a sovereign authority over the court having possession of the thing, and take from the nation the right of vindicating its own justice and neutrality."[205] The first reason seems inconsistent with the reasoning of the court in the *Josefa Segunda*, where the act of the foreign prize court was anticipated and had never occurred even during the American proceedings. The second goes to the question of jurisdiction, not substance, and it is hard to see why an otherwise valid legal act should be denied legal effect as a matter of national honor in an Admiralty proceeding whose primary object is to evaluate conflicting claims to property rights resting on foreign laws. Title to the vessel was restored to its original Spanish owners, thus, although they did not in fact get their ship back, they got the money that had replaced it in the action.

It seems clear that by taking a "naturalist" line, labeling "belligerency," and thus subject to the laws of war as they apply between states, the fighting between a group seeking governmental authority and a group losing control over the territory and population its constitution presumed that it ruled, on the basis of "objective" facts rather than policy arguments, the Supreme Court had made the label "piracy" irrelevant to questions arising out of the acts of the licensees of unrecognized authorities. When the policy-making branches of the American government agreed on the basis of its own positivist, policy, arguments there was no difficulty. There is no case known to have arisen over a conflict of labels between the courts and the policy-making branches of the American government.

This evolution was probably helped by an equivalent evolution in England, where Sir William Scott in 1819 had come to similar results in similar (but very complex) circumstances. A British ship, the *Hercules* was commissioned by Buenos Ayres to cruise against Spanish shipping. It had sold various captured vessels without first submitting them to Prize court hearings in Buenos Ayres. It was arrested by a British naval vessel for a claimed breach of the revenue laws of Barbados and taken to the British Admiralty court in

Antigua for adjudication among the captor seeking his share under a British statute regarding naval captures to enforce revenue laws, the British owner of the cargo, the British captain of the vessel for the vessel itself, the Spanish Ambassador for the Spanish crown and owners of vessels and cargo plundered by the *Hercules*, and a local attorney for the particular Spanish owners of identifiable cargo plundered from a particular vessel. In the Antigua court, the Navy captain won. The case was taken to England on appeal. Sir William Scott found the Antigua Admiralty court had lacked jurisdiction under British law to hear a case involving a breach of Barbados revenue laws, and held for the British owner of the vessel and the bulk of its cargo. Immediately, the Spanish Ambassador and the other Spanish claimants appealed again claiming the *Hercules* to have been a "pirate" vessel when it captured their property on the ground that the authorities in Buenos Ayres had no legal power to issue a valid commission.

Scott's solution was to eliminate the law of "piracy" from the case and restrict that law to the "criminal law" context which was only part of its origin in English municipal law. The international law aspects of the case he held to be questions of property law only, on which he proposed to hold further hearings. As a result of this decision, the report notes, "Some further proceedings were had . . ., but owing to a compromise which took place between the several parties, it did not again come on for discussion."[206] In reaching this result, Scott had some pertinent things to say about the law of "piracy" as conceived in England at this time:

> It is to be observed, likewise, that piracy has long ceased to be practiced in any considerable extent. There is said to be a fashion in crimes; and piracy, at least in its simple and original form, is no longer in vogue. Time was when the spirit of buccaneering approached in some degree to the spirit of chivalry in point of adventure; and the practice of it, particularly with respect to the commerce and navigation and coasts of the Spanish American colonies, was thought to reflect no dishonour upon distinguished Englishmen who engaged in it. . . . But whether the numerous fleets, which in later times have been maintained by the European States, or the prevalence of juster notions, and gentler manners, and commercial habits, have cleared the ocean of this nuisance, the fact is certain, that the records of our own criminal Courts shew that piracy is become a crime of rare occurrence, hardly visible for above a century past, but in the solitary instances of a few obscure individuals. Pirates, in the ancient meaning of the term, are literally *rari nantes* on the high seas. . . . Now, piracy is certainly not considered as a felony at the common law . . . [I] will hear the case for restitution.[207]

Thus, by relegating "piracy" to the strict criminal law context and denying Common Law jurisdiction (by virtue of the Act of 1536, which Sir William Scott regarded as excluding the Common Law courts and the normal Admiralty courts from the cases of alleged "piracy" as crime), and viewing the Admiralty courts as strict property courts in the same way as had been done by Sir Julius Caesar some 150 years earlier,[208] the legal efficacy of the word even to justify the preservation of property rights of the victims of

illegal captures at sea was eliminated. His reasoning does not depend on the lack of *animo furandi*, but on lack of jurisdiction and the fundamental irrelevancy of the concept to the kind of case resulting from captures under licenses issued by doubtful public authorities.

A similar approach was taken in 1826 by the American Supreme Court, again unanimously and again under an opinion written by Justice Story, when an American naval claimant sought to justify the taking of a Portuguese merchant ship on the ground of its "piratical" behavior. While Story was much less certain than Scott of the total obsolescence of the law of "piracy," he restricted the notion in the case of a foreign vessel, flying a flag to which it is authorized, to when that vessel was engaged in "a private unauthorized war." Under this opinion, the Supreme Court decreed the return of the vessel to its Portuguese owners, but released the American Navy captain from liability for damages resulting from his wrongful, but reasonable, taking of the vessel.[209]

The same result followed a year later with an accompanying rationale apparently even more strongly influenced by Scott's reasoning in the *Hercules*. The *Palmyra*, sailing under a Spanish commission, had been taken on the high seas by an American warship in 1822 after minor resistance. The *Palmyra*'s commission had been issued to a different vessel under a different commander, and had expired; it had then been renewed and issued to the *Palmyra* by a minor Spanish official of undocumented authority. Acting under that commission, the *Palmyra* had plundered two French vessels, the *Coquette* and the *Jeune Eugenie*. The American captor, Lieutenant Gregory, brought the *Palmyra* in for adjudication, and the owners of the *Palmyra* sued him for damages, claiming American interference with her voyage was unjustified and the case, since it did not involve any American legal interest, beyond the jurisdiction of American courts. Justice Story delivered the Supreme Court's opinion. As to substance, the court held that the burden on the captor to prove the *Palmyra* was a "pirate" vessel had not been borne, thus the acquittal of the vessel and its crew was confirmed; mere irregularity in the ship's papers and her excessive action against the two French vessels did not constitute "piracy."[210] But the statute under which Lieutenant Gregory acted authorized the President to instruct the commanders of American public vessels to take only vessels with armed crews "which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure."[211] This use of "piratical" as an adjective caused obvious problems, and Story pointed out that the case was not a criminal case, but an *in rem* Admiralty proceeding in which the actual charge of "piracy" was not being determined. The question thus resolved itself not to an issue of the law of nations or the precise definition of "piracy," but to a narrower question of the intent of the Congress expressed in the statute. As to the international law, Story concluded that "whatever may be the irregularities, . . . such

commission . . . ought, in the courts of neutral nations, to be held a complete protection against the imputation of general piracy." As to the *in rem* proceeding, he went on, "[T]aking the circumstances together, the Court thinks that they presented, *prima facie*, a case of piratical aggression . . . within the acts of Congress, open to explanation indeed . . . ; Lieutenant Gregory, then, was justifiable in sending her in for adjudication, and has been guilty of no wrong calling for compensation."[212]

Implicit in this holding was an extension of American jurisdiction to foreign vessels suspected of "robbery at sea" against other foreign vessels with no clear American interest in the transaction. Story's conception of universal criminal law jurisdiction over "pirates" seems to have been adopted by the Court as a whole. But again, the case was not presented squarely; it was not in fact a criminal prosecution and the *Palmyra* was restored to its owners despite the doubtful commission and the firmly stated view of the Court that "Her [the *Palmyra*'s] exercise of the right of search on these [French] vessels was irregular and unjustifiable."[213] Thus, the case can be interpreted to stand for something very close to the opposite of what Story wanted. The assertion of universal American police jurisdiction was not necessary for the result and stands as mere dicta; and the need for some clear public authority to license interference with navigation on the high sea was reduced to a mere need for the semblance of such authority which a "neutral nation" could not properly question. A relationship of belligerency between the flag state of the "privateer" (or "pirate") and the victim would come close to making moot the question of licenses. Story preserved the possibility that a "privateer" might become a "pirate" even if acting only against vessels of an authority at war with the authority issuing the commission, but the likelihood seems remote of ever being able to present a convincing case on the point, and none has been found.

On this last point, the trend of the law seems to have been against Story and his attempt to extend the Supreme Court's assertions beyond the cases before it to cover general policing jurisdiction. In 1829 a prosecution of an individual of possible American nationality for "piracy against a French vessel on the high seas" (apparently all the acts took place within a single vessel) resulted in an acquittal "for want of jurisdiction"[214] under a charge that made the nationality of the defendant the key to jurisdiction under the acts of 1790, section 8, and 1820, section 3. Dallas, the prosecuting attorney for the United States, agreed that there was no case against the defendant under a charge of "piracy by the law of nations" because he was "indicted as a citizen of the United States, for violating the laws of the United States." The District Judge, Hopkinson, interpreted U.S. v. Palmer et al. to exclude from the scope of the 1790 Act a crime by a foreigner on board a foreign vessel, and interpreted U.S. v. Klintock to be consistent with that approach. The extension of the statute to cover vessels of no flag in U.S. v. Holmes he

construed as limited to that; it did not extend the act to cover vessels of a known foreign flag. While the act of 1819 extended American jurisdiction to cases of "piracy" at international law, Hopkinson argued the Congress "had felt the force of the reasoning in Palmer's case; and may have doubted the policy or propriety of extending their penal law beyond their own vessels, leaving it to other nations to do the same with theirs."[215] He construed the later acts of Congress to conform to this view, and concluded that acts wholly within a foreign vessel "sailing under the flag of a foreign state, whose authority is acknowledged, is not piracy within the true intent and meaning of that [1820] act, and this court hath no cognizance to hear, try, determine and punish the same."[216]

Story had a final chance to try to establish the jurisdiction of United States courts over foreigners acting solely against foreign shipping, and to expand the definition of "piracy" to include more than robbery and murder across jurisdictional lines at sea in 1844. The Brig *Malek Adhel* bound on a commercial voyage from New York to California apparently attacked at least five other vessels on the high sea. Two of the victims were British-owned and one Portuguese (two were American-owned), but actual depredation and plunder was alleged only with regard to the Portuguese vessel; the others were apparently fired on only to sink them or harass them. Although the *Malek Adhel* was in fact American-owned, and thus there need have been no doubt regarding jurisdiction, Story construed the Act of 1819 as extended in 1820, second section, which authorizes American warships to seize "any vessel or boat . . . which shall have committed any piratical aggression . . . upon any other vessel" to apply without regard to any issues of standing:

> The policy as well as the words of the act equally extend to all armed vessels which commit the unlawful acts specified therein.[217]

As to the substance of the offense, Story interpreted the adjective "piratical" to include:

> The class of offences which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power. . . . If he willfully sinks or destroys an innocent merchant ship, without any other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*.[218]

Of course, the case did not involve "piracy" as such; it was not a criminal proceeding but an *in rem* proceeding. The lower court decree condemning the vessel as a punishment authorized by the statute, but releasing its cargo to the innocent owners, was affirmed. The funds received from sale of the vessel were used to indemnify the captors for their costs and charges; it appears that the victims suffered no provable losses other than to their dignity.[219]

The question of the validity of a commission issued by an unrecognized authority arose again most poignantly when Texas declared its independence

of Mexico. In 1836 an armed schooner, the *Invincible*, captured an American brig, *Pocket*, bound for a Mexican port within the territory claimed by Texas. The President (Andrew Jackson) asked Attorney General Benjamin Butler whether the *Invincible* was a "pirate." His answer was that under Section 9 of the Act of 1790 Americans involved in the action of the *Invincible* would be considered "pirates" by the law of the United States[220] (whatever their situation under international law), but that the situation was different for Texans (or rebelling Mexicans, as they legally were):

> Where a civil war breaks out in a foreign nation, and part of such nation erect a distinct and separate government, and the United States, though they do not acknowledge the independence of the new government, do yet recognize the existence of a civil war, our courts have uniformly regarded each party as a belligerent nation, in regard to acts done *jure belli*. Such may be unlawful, when measured by the laws of nations or by treaty stipulations; the individuals concerned in them may be treated as trespassers, and the nation to which they belong may be held responsible by the United States; but the parties concerned are not treated as pirates.[221]

This approach, relieving the privateers of the unrecognized government of Texas of the legal results of "piracy" on the basis of their deriving their authority to act from the laws of war and their adherence to a public organization engaged in that belligerency, was asserted to be valid despite the fact that the interference with American shipping "would seem to be an infraction of the treaty made in 1831 between the United States and the United Mexican States, (of which Texas was then a constitutent [*sic*] part), and there may be other reasons for doubting its legality as an act done in the right of war."[222] The point was that once the relations between Mexico and the Texas authorities were considered "belligerent," the law of war applied and "piracy" was incompatible with belligerency as long as the "pirates" were acting, not necessarily in full conformity with that law, but within that system of law. They might be "war criminals," but not "pirates." That the law of war applied between Mexico and the authorities of Texas was determined by Attorney General Butler as a matter of strict positivist logic:

> The existence of a civil war between the people of Texas and the authorities and the people of the other Mexican States, was recognized by the President of the United States at an early day in the month of November last. Official notice of this fact, and of the President's intention to preserve the neutrality of the United States, was soon after given to the Mexican government.[223]

Attorney General Butler thus did not examine whether the facts viewed objectively justified this American classification of relations between Texas and the rest of Mexico, but accepted the classifications given by the policy officers of a political branch, the executive, as the basis for his legal analysis. This approach, relying on policy officers for the basic classification system, and then interpreting the law of war to exclude "piracy" even for acts done in excess of any commission or of the power of the belligerent to issue a commission restricts the scope of the law of "piracy" essentially to two areas:

(1) the municipal law relating to robbery within the jurisdiction of the municipal Admiralty courts, and (2) whatever might remain of the original Roman and Mediterranean conception of "piracy" as the behavior of states or belligerents defined by a positive law system as outside the group governed directly by the system.

This approach was not restricted to American executive branch officials. It was taken by an Italian Umpire in 1863 rejecting a claim by American investors (chiefly Cornelius Vanderbilt) against Costa Rica arising out of the war of 1856 between that country and Nicaragua in which American property in Nicaragua had been destroyed. In 1854 the government of Nicaragua had been overthrown by adventurers led by William Walker, an American. In the words of CDR Joseph Bertinatti, the Umpire in the later arbitration, "The new government of Nicaragua . . ., though illegitimate and piratical in its origin, . . . was in fact . . . the only government of that state."[224] Costa Rica intervened in 1856 to oust the "Rivas-Walker" government of Nicaragua. For reasons that are not clear, the American investors then seem to have convinced the Rivas-Walker Government to "nationalize" their property in Nicaragua and hand it over to a second private company organized under Nicaraguan law by the same investors. The property was eventually destroyed by Costa Rica in the war. The American investors' legal theory in the arbitration appears to have been that the Rivas-Walker government was merely a group of "pirates," therefore incapable of changing property rights; that the destruction of the Americans' property by Costa Rica was therefore the destruction not of property legitimately used by the Rivas-Walker people or those legal persons deriving title from them, but of "neutral" property not legitimately the object of belligerent operations.

This attempt to manipulate the legal labels to insulate American investors from the consequence of their own political activities in Nicaragua was rejected by CDR Bertinatti on several grounds. One, that the Corporation created under Nicaraguan law was Nicaraguan, and that the law of claims did not permit foreign investors to assert the neutrality of their indirectly owned property, is irrelevant to the current study.[225] Another, that "the fact, which is more eloquent than words, shows that it was a *public war and a regular war,* fought as such on both sides according to the civilized usages of warfare" and that during the conflict the United States "recognized the Rivas-Walker government, not only as *belligerent*, but also as the regular government of Nicaragua" can be seen to defeat the use of the concept of "piracy" as a basis for denying governmental competence to a *de facto* authority for the purpose of private claims.[226] The importance of this approach will become apparent in the next section.

The United States position regarding the use of the legal word and concept of "piracy" in cases of political rising, based probably on the Revolutionary war experience, reviewed above was absolutely to deny the propriety of the

word. In 1838 Canadian and American raiders based in New York State skirmished with British forces in Canada. In the correspondence that followed, Mr. H.S. Fox, the British Minister in Washington, referred to British-Canadians "defending the British territory from the unprovoked attack of a band of British rebels and American pirates."[227] Daniel Webster, the American Secretary of State, replied:

> But whether the revolt be recent or long continued, they who join those concerned in it, whatever may be their offence against their own country, or however they may be treated, if taken with arms in their hands in the territory of the Government, against which the standard of revolt is raised, cannot be denominated pirates, without departing from all ordinary use of language in the definition of offences.[228]

At the time, Great Britain in no way had "recognized" any degree of belligerent status in the Canadian rebels, and the United States was entirely at peace with Great Britain, referring to the problems in Canada as "civil commotions," not "war" or "belligerency."[229]

Civil War of 1861-1865. The entire question of the validity of a commission issued by an unrecognized authority, and the possibility that the legal results of "piracy" could be attached to an attack under color of such a commission, even if not *animo furandi*, but instead *animo belligerandi*, arose in the United States during the Civil War of 1861-1865, and the entire naturalist-positivist debate broke out again. This time, there was an ironic twist in that the arguments that were persuasive to the slavery-hating Story, who felt until the cases and his work on conflict of laws theory convinced him otherwise, that the natural law of property gave universal scope for American action against "piracy," now became attractive to the slavery-justifying Confederate States and their sympathizers. From their point of view, the actual hostilities occurring between the states of the southern Confederacy on the one hand and the rump of the Union on the other should determine legal labels regardless of the policy reasons that might be advanced in the north for preferring a different set of labels. Their "naturalist" argument was that the substantive law arises from facts and traditions that judges are able by training and empowered by Constitutional law and tradition to find and declare; that under that law, the actions of southern privateers and navy commissioners were public, not *animo furandi*, and fit the labels involved in a legal status of belligerency; they were entitled to be treated as prisoners of war if caught; their legal captures could convey valid title after Prize court proceedings. To the unionist judges, the political branches of the American government had the legal power to determine the classifications of events, and the courts were bound to apply the law growing out of those classifications. If the Confederate authorities were unrecognized, their commissions were simply pieces of paper authorizing nothing; depredations done under color of those commissions could thus be classified "piracy."

The question arose when President Lincoln declared a blockade of the Southern states' ports on 19 and 27 April 1861.[230] The Proclamations of 19 and 27 April said respectively:

> Now, therefore, I . . . deemed it advisable to set on foot a blockade of the ports within the States aforesaid, in pursuance of the laws of the United States and of the law of nations,

and

> [A]n efficient blockade of the ports of those States will also be established.[231]

The Congress did not act until 13 July 1861, when it "empowered" the President "to close the port or ports of entry" in any customs collection district of the United States[232] and "to declare that the inhabitants of [a] State, or any section or part thereof, . . . are in a state of insurrection against the United States" and that commerce unlicensed by him "shall cease and be unlawful so long as such condition of hostility shall continue."[233] The issues were the Constitutional power of the President to impose a blockade prior to the empowering legislation by the Congress, whether the Presidential or Congressional actions amounted to a "Declaration of War" within the sense of the Constitution and international law,[234] and whether Confederate States blockade runners and bearers of Confederate letters of marque were "pirates" or otherwise violators of international law as well as being criminals under the municipal law of the United States.[235]

The Supreme Court was deeply split, not on sectional lines, but on lines of legal theory. The "naturalist" position was taken by the 5–4 majority in The Prize Cases.[236] Judge Robert Grier of Pennsylvania wrote the majority opinion,[237] upholding the legal effect of the "blockade" on the ground that:

> A blockade *de facto* actually existed, and was formally declared and notified by the President. . . . It is not the less a civil war, with belligerent parties in hostile array, but it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors.[238]

Support for this position was found in the American treatment of licensees of the unrecognized governments of rebelling Spanish colonies during the 1810s and 1820s.[239] Mocking the practical implications of the "positivist" position by which all Confederate organization was a mere criminal conspiracy against the laws of the Union, Grier pointed out the absurdity of considering soldiers of the United States in the field to be "executioners" chasing down those accused of "treason." Reciprocally, he pointed out that the Confederates claimed belligerent rights at sea, and could not be heard now to deny the belligerent rights of the Union as "*unconstitutional*!!!" [*sic*].[240] The result of this analysis was the conclusion that the status of the unrecognized belligerent need not be determined, but that "the belligerent party who claims to be sovereign may exercise both belligerent and sovereign

rights."[241] Thus the "naturalist" approach was interpreted to allow "belligerent rights" to the Union without limiting the "sovereign rights" of the Union. The approach would give the same "belligerent rights" to the Confederacy, but not necessarily "sovereign rights"; to compose the Supreme Court majority it was not necessary to go that far and actually hold that the Confederacy had "belligerent rights" equivalent to those of the Union.[242] The result of this approach in practice was that a Virginia vessel whose captain had not known the war had begun was condemned (The Brig *Amy Warwick*); another Virginia vessel outward bound with cargo owned by northerners was condemned but her cargo restored as not "enemy property" (The Schooner *Crenshaw*); a British vessel was condemned on the ground that she had violated the blockade order after notice, as a mere business risk—to finish loading (The Barque *Hiawatha*); and a Mexican vessel was condemned for knowingly entering a blockaded port (Biloxi, Mississippi) without a permit (The Schooner *Brilliante*).[243]

The dissent by Justice Samuel Nelson of New York[244] took a straight "positivist" line. Lincoln's declaration was not classifiable as a blockade *jure belli* because there was no legal status of war, no Declaration of War by the Congress, when he made his proclamations. They represented more a municipal law closure of ports "in the nature of a blockade." The Act of Congress on 13 July 1861 was legally sufficient to serve as a Declaration of War under the Constitution, he said, but came too late to endow Lincoln's proclamations with legal effect against the four vessels before the court. According to the dissenters, the two vessels owned by "neutrals" should have been released to their owners because a strictly internal proclamation with strictly territorial application was not enough to bring the law of belligerent prize into play. With regard to the ships owned by Americans from the Confederate States, Nelson and the others in the narrow minority would have released them on the ground that the President's proclamations exceeded his Constitutional powers and were a legal nullity in the United States.[245]

This split of legal thinking is evident throughout the American Civil War. On 3 July 1861, after President Lincoln's Proclamations asserted some belligerent rights in the Union and before the ambiguous legislation that the Supreme Court majority of one could regard as equivalent to a Declaration of War for the purpose of authorizing the President to begin a blockade effective against both Americans and neutral foreigners, the Confederate warship *Sumter* burned a Union merchant vessel, the *Golden Rocket,* triggering a series of insurance claims. The policy covered hazards of "the sea, fire, enemies, pirates, assailing thieves, restraints and detainments of all kings, princes or people, of what nation or quality soever, barratry by the master . . . " and some other risks, but an additional provision amended all that by making an exception to coverage if the vessel were subject to "capture, seizure or detention . . . " regardless of the other stipulations of

the policy. The question was whether the burning by Confederate forces at a time the Union authorities did not even unambiguously concede a status of belligerency, much less a legal power in any Confederate authorities to license depredations under the laws of war against Union shipping, fell within the exception. In Dole v. New England Mutual Marine Ins. Co.[246] a Massachusetts court held that the term "capture" as used in the policy could describe the taking by the commissioner of one side in "an actually existing state of war between it and the government of the United States," finding support for this naturalist conclusion in the fact that the authority of the Confederate leadership to conduct a war according to the international rules had been recognized by "two of the leading nations of Europe" (Great Britain and France). As an objective matter, therefore, it would be possible for a jury to conclude that the "capture" exception applied, and the case was ordered to trial.[247] The possibility that this way of handling the situation might lead to an inconsistency between the classifications of the judicial branch of the American Government and the other two branches of that government did not seem to be considered seriously, apparently because the case was viewed as a matter simply of interpreting an insurance contract, not of interpreting the foreign relations or legal status of the United States against the Confederate States, neither of whose public authorities in any guise was a party to the suit.

A similar result came out of another case arising out of the same incident in which a different insurance company was sued in Maine. In Dole v. Merchants' Mutual Ins. Co.[248] the Court concluded that the most extreme "positivist" position did nothing to require the Confederate commissioner to be classified a "pirate," although that classification was not ruled out:

> War is an existing *fact*, and not a legislative decree. Congress alone may have power to 'declare' it *beforehand*, and thus cause or commence it. But it may be initiated by other nations, or by traitors; and then it *exists*, whether there is any declaration of it or not. . . . But in a *civil* war, those who prosecute hostilities against the established government are also traitors. And their acts are robbery or murder on the land, or piracy on the sea. [With regard to the burning of the *Golden Rocket*], such a felonious and forcible taking on the high seas was piratical and belligerent, and in either case was a capture and a seizure, within the terms of the warranty [emphasis *sic*].[249]

The fact that the actions of the political branches of government were ambiguous, indicating differing views as to the legal relations that applied between the Union and the Confederacy in the minds of all concerned, was bluntly recognized in another case arising out of the maritime depredations of a Confederate raider, the *Jeff Davis*. In Fifield V. Insurance Co. of State of Pennsylvania,[250] Judge Woodward wrote:

> I suppose that any government, however violent and wrongful its origin, which is in the actual exercise of sovereignty over a territory and people large enough for a nation, must be considered as a government *de facto*.[251]

He then reviewed the two views of secession that had split the lawyers of the political arms of government and concluded that:

> [I]t would be very difficult so to generalize the various, discrepant, and sometimes inconsistent measures that have been taken against the rebellion as to enable us to declare whether the President and Congress regard the seceded states within or without the Union.[252]

The instant case presented a perfect example, in that the crew of the *Jeff Davis* had already been convicted of "piracy" by the judiciary, but the President, "after the conviction of the crew of the *Jeff Davis* for piracy . . . interposed and restored them to the authorities of the Confederate States." He did not pardon them; "he treated them as public enemies, and thus, . . . recognized the belligerent rights of the power that sent them forth. . . . "[253] The court concluded that the capture was "belligerent" and not "piracy," applying the labeling system it construed out of the actions of a policy-making branch of government overruling the judiciary in the very fact situation before the court.[254]

President Lincoln's exchange of the convicted "pirates" in the case of the *Jeff Davis*[255] does not stand alone. Under instructions from Judges Grier and Cadwalader in a case in Pennsylvania in 1862, convictions were obtained on a "positivist" charge of "piracy" against a Confederate raider named Smith and others. Under an agreement between the two judges and the prosecuting authorities, the prisoners were not sentenced but were transferred to military control as prisoners of war.[256] A Confederate adventurer named Burley (or Burleigh) was extradited from Canada to the United States in 1864 under the "piracy" provision of the Webster-Ashburton Treaty, but Judge Fitch of Ohio at the trial held that his acts were "belligerent" and not "piracy" because lacking "*animum furandi.*"[257]

While the Prize Cases enabled the Union forces to institute and enforce a blockade of Confederate ports against neutral vessels, and state court judges of varying persuasions were able to vent their frustrations against the Confederate authorities in harsh words without actually doing violence to the apparent intentions of the innocent parties whose contracts were before the courts for interpretation, Federal District court judges were facing the same difficulties on the lower levels. Two cases in 1861 will illustrate the confusion. In Massachusetts, District Court Judge Sprague charged a Grand Jury with regard to the Confederate seamen whose separate cases were to be presented:

> If war is actually levied, all those who perform any part, however minute, or however remote from the scene and who are actually leagued in the general conspiracy are to be considered as traitors.[258]

He then went on to define "pirates:"

> Pirates are highwaymen of the sea, and all civilized nations have a common interest, and are under a moral obligation, to arrest and suppress them; and the constitution . . . enables the United States to perform this duty, as one of the family of nations. Pirates are called and recognized as enemies. They carry on war, but it is not natural

war; and they are not entitled to the benefit of the usages of modern civilized international war. There being no government with which a treaty can be made, or which can be recognized as responsible for the acts of individuals, the individuals themselves are held amenable to criminal justice, and liable to be put to death for the suppression of their hostilities. If a number of persons, large or small, associate together, and undertake to establish a new government, and assume the character of a nation, and as such to issue military commissions, any other nation may, according to its own view of policy or duty, either utterly refuse to recognize the existence of such assumed government, and treat all who, acting under it, commit aggressions upon the ocean, as mere pirates; or each nation may fully recognize such new government; or it may adopt any intermediate course between these two extremities,—to some extent, and for some purposes, recognize the existence of the new government, while in other respects, and for other purposes, it rejects its pretensions to be deemed a nation. Some of the nations of the earth, and particularly Great Britain, have taken this intermediate course in relation to the self-styled 'Southern Confederacy.' . . . She in no degree interferes with the manner in which we shall treat either our own citizens or foreigners who may be engaged in this conflict, even although [*sic*] such foreigners be British subjects. She leaves us to deal with them as traitors or pirates, according to our own sense of justice and policy. Against this her position, we have nothing to urge under the law of nations or treaty stipulations.[259]

Judge Sprague then went on to review the pertinent Federal legislation of the United States, including the "piracy" statutes of 1790, 1820 and 1847,[260] leaving it to the Grand Jury to determine on the particular facts that might be presented to it whether any individuals ought to be indicted for "piracy" or "treason" under the laws of the Union for their actions in support of the Confederacy. It seems plain that the principal result of this charge was to reduce the question of the proper legal classification to one of municipal law, and that law for the purposes of a Grand Jury empaneled under the Constitution was the law of the Union.

How this approach worked in practice in Massachusetts is not known beyond the evidence noted with regard to Fifield v. Insurance Company of State of Pennsylvania that some convictions for "piracy" were obtained at least in Pennsylvania, and that President Lincoln did not regard himself as bound by the rigid view of American classifications adopted by Judge Sprague and others, but treated even convicted "pirates" under this view as "belligerent enemies" subject to parole and repatriation without "pardon" under the laws of the United States.

A rather less rigid view was taken by the Federal courts in New York. In the Federal District Court for the Southern District of New York Justice Nelson charged a petty jury regarding the same Federal statutes and continued as follows:

Now, if it were necessary, on the part of the Government, to bring the crime . . . [of the Confederate raiders] within the definition of robbery and piracy, as known to the common law of nations, there would be great difficulty . . . upon the evidence. For that shows, if anything, an intent to depredate upon the vessels and property of one nation only—the United States—which falls far short of the spirit and intent, as we have seen,

> that are said to constitute essential elements of the crime. But the robbery charged in this case is that which the Act of Congress [of 1820] prescribes as a crime, and may be denominated a statute offence, as contra-distinguished from that known to the law of nations. . . . [As to whether there is a legal state of war between the Union and the Confederacy, that, according to Judge Nelson was a matter for] the departments of our Government that have charge of our foreign relations—the Legislative and Executive departments. . . . [U]ntil those departments have recognized the existence of the new Government, the Courts of the nation cannot.[261]

But the precedents of the Spanish colonies in America seemed to Nelson to raise confusing issues. The political arms of the United States government had not "recognized" any status in the revolted Spanish colonies with legal implications until 1822.

> Prior to this recognition, and during the existence of the civil war between Spain and her Colonies, it was the declared policy of our Government to treat both parties as belligerents . . ., equally entitled to the sovereign rights of war as against each other.[262]

Not only was he unable to state where this policy was "declared" prior to 1822, but it appears that the Act of 1822 by which the independent status of the former Spanish colonies was "recognized" by the Congress made no difference in the courts. He implied that absent recognition there is no change in the prior legal relationship, thus that the Confederate raiders could not be regarded as authorized by either the law of an unrecognized Confederate government or by the international law of war prior to the "recognition" of a status of war by the political branches of government. But the facts that had resulted in the courts treating the commissioners of the Spanish colonies as belligerents as long as their depredations were aimed, within the terms of their commissions, solely against Spanish shipping, despite the silence of the political branches of the American government, apparently spoke loudly to some members of the jury. In U.S. v. Baker and others, "The jury were discharged, without being able to agree on a verdict."[263]

British judges had similar problems in classifying the American struggle within the system adopted by the political branches of the British government to try to reflect facts and policy in a coherent pattern of law. In May 1864 the United States sought extradition of a group of Confederate raiders who had seized an American merchant ship and then claimed asylum in England.[264] The Webster-Ashburton treaty of 1842[265] provided for the extradition of those accused of "Piracy" in Article X when the offense had been committed within the jurisdiction of either party and the person accused of committing it were found within the other. The extradition request was denied, but on such technical grounds that the suspicion must exist that the British court found itself in a dilemma between the classifications of "piracy" and "belligerency" and did not want to face the case squarely. Three judges wrote separate opinions for the majority. Judge Crompton pointed out that the question of whether the acts of depredation were "piratical" or "belligerent," with

evidence that the captured goods were taken for the personal use of the accused, and not taken for submission to a Prize court, must be one for a jury. Then, instead of holding that there was enough evidence (or not enough) to warrant extradition and the submission of the case to an American jury on a charge of "piracy," he construed the Treaty and statute to refer only to cases which could be tried *only* in the jurisdiction of the requesting state and not in the jurisdiction of the "asylum" state: " . . . 'committed within the jurisdiction of the United States of America' I own, appears to me to mean within the *peculiar* jurisdiction of the *United States*, and would not be properly used if the common jurisdiction of every maritime nation in the world were meant [emphasis *sic*]." Since all maritime nations, in his view, had equal legal powers to try "pirates," the "piracy" intended by the Webster-Ashburton Treaty must mean only municipal law "piracy," not "piracy *jure gentium*." Interpreted this way, "piracy" to be extraditable under the terms of the treaty[266] must be a crime, like murder, punishable independently under the laws of the treaty partners but not committed within the prescriptive jurisdiction of both at the same time. Crompton thus seemed to presume that the international law regarding "standing" did not apply to "piracy," and that the only sort of "piracy" that would come within the terms of the treaty was that which was analogous to taking a commission from a foreign power to act against fellow-citizens as embodied in both British and American statutes.[267] Why taking a commission from a rebelling "authority" did not satisfy this requirement, he did not say. Indeed, his opinion is filled with apparently unsupported assertions, such as, "Suppose these persons rose up in mutiny, that is no less a piracy against the law of nations, and all other powers have the same jurisdiction to punish, although the ship is part of the territory of the country to which she belongs."[268]

Judge Shee agreed on the basis of the word "asylum" in the treaty and statute that "piracy *jure gentium*" was not covered and found that the American statutes of 1790 and 1819-1820 give a basis for this interpretation by distinguishing between "piracy on the high seas," which was "piracy *jure gentium*," and robbery in the waters appertaining to the United States. In his opinion, the Tivnan defendants looked like "pirates *jure gentium*," and not like "pirates" under American law because their acts occurred on the high seas. Judge Blackburn came to the same conclusion and found a way to avoid applying the American statutes of 1790 and 1819-1820 as overlapping the British statutes to bring the offense within the terms of the treaty and statute:

> But looking at the evidence, what was done by the prisoners is either taking the ship for plunder, which would be piracy *jure gentium*, in which case there is no power in us by statute to give them up, or an act of war, and consequently not triable anywhere. For although the Confederated States are not recognized as an existing power, yet they are as belligerents.[269]

Chief Justice Cockburn dissented, but solely on the ground that in his interpretation the treaty and statute provided adequately for the extradition of "pirates *jure gentium*." He pointed out that there were ample reasons for such a provision, such as the difficulties of trial in one jurisdiction when all the witnesses are in the other. As to the relationship of "piratical intent" to "belligerent intent," that, in his view, was a question for the jury.[270]

Reviewing the case as a whole, and considering that something very like extradition had in fact taken place in 1834 with regard to "pirates" totally independently of the treaty of 1842,[271] and that the defendants were not tried for "piracy" in England at all, the impression is left that extradition was refused because the British judges did not trust American courts to make the distinction that Chief Justice Cockburn indicated would be their duty, and that the British classification of events during the American Civil War would be disregarded by American courts bound by American classifications of the same events to deprive the Confederate raiders of the privileges of "belligerents" that the British felt they ought to have. The constant repetition that the prisoners might well be "*jure gentium* pirates" seems either an encouragement to the British authorities to try them before a British jury where the British classifications would have governed, or a politic sop to the American authorities requesting extradition, to indicate that the refusal was not based on British sympathies with the Confederate cause—whether or not that was in fact the case.[272]

The more or less definitive American classification of the Civil War did not come until thirteen years after the War ended. In Ford v. Surget[273] Justice Harlan for a unanimous court hit on an ingenious rationale. Although the Confederacy as such was legally a nullity as far as the Union was concerned, the governments of the individual states of the Confederacy remained governments under the American Constitution of 1787. The legal acts of the Confederacy, therefore, so far as they had legal effect within the individual states of the Confederacy, were entitled to all the respect of state laws under the Constitution. With regard to the military activities of the Confederate army, a "positivist" rationale was found for giving them legal effect:

> To the Confederate army was, however, conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belonged under the laws of nations to the armies of independent governments engaged in war against each other,—that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, on the footing of those engaged in lawful war, [and exempting] them from liability for acts of legitimate warfare.[274]

Justice Clifford, in a separate concurring opinion, addressed the situation of the Confederate raiders directly. He began by citing the Prize Cases for the "naturalist" proposition that ". . . when the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice

cannot be open, civil war exists, and hostilities may be prosecuted to the same extent as in public war."[275] He noted with approval the refusal of the Massachusetts Supreme Judicial Court, and the Pennsylvania and Maine Supreme Courts to hold the Confederate States' commissioners to be pirates,[276] and concluded:

> Exceptional cases supporting the opposite view may be found in the State reports; but they are not in accord with the decisions of this court, and are in direct conflict with the great weight of authority derived from [international law].[277]

Once again, as when viewing the attempt by Justice Story to preserve his universal-jurisdiction, univeral-standing, natural-law-of-property conception of the international law of "piracy" derived from the coinciding municipal laws of the principal European maritime powers, in the face of the judicial-deference-to-policy-makers approach taken by the majority of the American Supreme Court under Chief Justice Marshall, there appears to have been a Supreme Court Justice restructuring the facts to suit his preference for a conceptual approach. Once again, the grand framework seemed unable to gain the support of a majority of the Court, although, again, not expressly rejected either. Once again, the majority took a view of the law based not on underlying structures of justice or evidence of the conscience of mankind perceived through a selective citation to the opinions of others, but based on amoral policy. The rationale for legal classifications seen by the majority was not any perception of underlying principle, but a series of decisions by the policy branches of government expressed in inconsistent terms and occasionally resulting in inconsistent policies that maximized the self-importance of the policy-makers by regarding their practices as entirely volitional. The privileges of belligerency were "conceded" to the Confederate Army; the reasons for that "concession" were political: "the interest of humanity" and "to prevent the cruelties of reprisals and retaliation." It is clear that if those factors had been regarded as less weighty by the policy-makers, as indeed they were from time to time, the "concession" need not as a matter of law have been granted. This approach, visible with regard to "piracy" since the time of Gentili at least, we have called "positivism." And the same limits to the discretion of policy-makers are apparent, resting on reciprocity, the need to deal with a real world in which legal labels have strange effects if not related to some degree with facts, and the pressures from internal and external constituencies (in the case of the American Civil War, including the views of British statesmen and jurists with whom some contacts were economically and politically unavoidable, or avoidable only at exhorbitant cost to the Union).

The American Civil War experience was summed up by Richard Henry Dana[278] in 1866 when annotating a new edition of Wheaton's classic text:[279]

> The following propositions are offered, not as statements of settled law (for most of them are not covered by a settled usage of nations, by judicial decisions of present authority, or by the agreement of jurists), but as suggestions of principles:—
>
> I. The courts of a State must treat rebellion against the State as a crime. . . . If the acts are depredations on commerce protected by the State, they may be adjudged piracy *jure gentium* by the courts of the State. It is a political and not a legal question, whether the right to so treat them shall be exercised.
>
> II. The fact that the State has actually treated its prisoners as prisoners of war . . ., or has claimed and exercised the powers and privileges of war as against neutrals, does not change the abstract rule of law, in the Court. . . .
>
> III. If a foreigner knowingly cruises against the commerce of a State under a rebel commission, he takes the chance of being treated as a pirate *jure gentium*, or a belligerent. It is not the custom for foreign nations to interfere to protect their citizens voluntarily aiding a rebellion against a friendly State, if that State makes no discrimination against them.
>
> IV. If a foreigner cruises under a rebel commission, he takes the chance of being treated as a pirate or a belligerent by his own nation and all other nations, as well as by that he is cruising against. If his own nation does not recognize the belligerency of the rebels, he is, by the law of his own country, a pirate. If it does, he is not. . . . [T]he courts of each nation are governed by the consideration whether their own political authorities have, or have not, recognized the belligerency.
>
> V. Where a rebellion has attained such dimensions and organization as to be a State *de facto*, and its acts reach the dimensions of war *de facto*, and the parent State is obliged to exercise powers of war to suppress it, and especially if against neutral interests, it is now the custom for the State to yield to the rebellion such belligerent privileges as policy and humanity require; and to treat captives as prisoners of war. . . Yet this is a matter of internal State policy only, changeable at any time.[280]

This approach, essentially leaving it to each municipal legal system to attach legal words of art as it chooses for policy reasons, and referring questions of legal policy within the American legal system to the arms of the government given policy discretion by the American Constitution, amounts to a total denial of the existence of any "international law" of "piracy." "Piracy *jure gentium*" seems to have become a conception of each state's municipal law to Dana.

The Later Practice. That this approach was carried over to international affairs is evidenced by the incident of the "Haytian insurgents" in 1869, when a circular dispatch from the government of Haiti attempted to convince the several diplomatic missions accredited to that country that the vessels of insurgents who had not been recognized by any other government "can not be considered according to the spirit of international maritime law otherwise than real pirates." The reply which the Secretary of State (Hamilton Fish) authorized the American Ambassador to Haiti to render said:

> We may or may not, at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right and recognize, where facts warrant it, an actual intent on the part of the individual offenders, not to depredate in a criminal sense and for private gain, but to capture and destroy *jure belli*.[281]

The apparently absolute inability of a state to convince other states to adopt its evaluation of the facts as warranting the label "piracy" at international law, was demonstrated repeatedly, most amusingly (from a distance of 100 years) in an incident of 1873 when a German naval commander acted on a Spanish proclamation terming some insurgent vessels "pirates" in the Mediterranean Sea. He captured one and claimed it as German prize, but his own government disavowed the act. Mr. Frederick T. Frelinghuysen as Secretary of State in 1883, ten years later, advised the American Ambassador in Haiti that the incident demonstrated, if anything, an abuse of the Spanish legal power to classify events in Spain. He adopted Justice Nelson's opinion from U.S. v. Baker and Others[282] without citing it, saying that "The rule is, simply, that a 'pirate' is the natural enemy of all men, to be repressed by any, and wherever found, while a revolted vessel is the enemy only of the power against which it acts." He went on:

> While it may be outlawed so far as the outlawing state is concerned, no foreign state is bound to respect or execute such outlawry to the extent of treating the vessel as a public enemy of mankind. Treason is not piracy, and the attitude of foreign governments toward the offender may be negative merely so far as demanded by a proper observance of the principle of neutrality.[283]

It was even found possible within this general orientation to rationalize the recapture of an American vessel from an unrecognized "belligerent" who did not seem to be a "pirate" because animated by political and not personal goals. That was to treat the captor as if he did not exist! In 1885 some American ships near Colombia were seized by an insurrectionary force. Dr. Francis Wharton, the Solicitor of the Department of State, advised that the vessels could be legally retaken by the United States when on the high seas even though the crew cannot be regarded as pirates or as belligerents:

> But, while this is the case, and while it may be conceded that vessels seized by them on the high seas are seized under claim of right, yet, vessels belonging to citizens of the United States so seized by them may be rescued by our cruisers acting for the owners of such vessels in the same way that we could reclaim vessels derelict on the high seas.[284]

A different view at the same time denied the existence of any intermediary classification between "pirate" and "belligerent." That view ran into such difficulties that it was ultimately disregarded in the case in which it was pronounced, and, without acknowledgment or deeper analysis, Wharton's approach was applied to get the result he would likely have wanted. The *Ambrose Light*[285] was a ship sailing under license of unrecognized authorities competing for control of a part of the state of Colombia. It was seized in the

Caribbean by an American warship. No Americans were involved in the voyage of the *Ambrose Light*, and no Americans were victims of its activities. Judge Brown, of the Federal District Court in the Southern District of New York examined a huge selection of Supreme Court cases and publicists' writings (nearly all of which are analyzed above) to conclude that there was no intermediate legal position between "belligerency" and "piracy," and that the decision as to which of these alternative classifications were to be applied by American courts depended entirely on "recognition," although not necessarily the formal act of recognition by the United States government:

> [I]n the absence of recognition by any government whatever, the tribunals of other nations must hold such expeditions as this to be technically piratical.[286]

On the other hand, he pointed out that this holding, which rested almost entirely on cases involving criminal charges under the Acts of 1790 and 1819-1820, was not related to any criminal charge:

> [T]his is a suit *in rem* for the condemnation of the vessel only; not a trial upon a criminal indictment of the officers and crew. . . . [C]ondemnation of the vessel as piratical does not necessarily imply a criminal liability of her officers or crew.[287]

Why the precedents in one area of law should apply in another area in which, by his own analysis the impact may be quite different and not reversable, is not analyzed.

The final oddity in the case is that all of the lengthy analysis was at the end discarded when some diplomatic correspondence between the United States and the defending government of Colombia was construed by the court to imply "recognition" of a status of belligerency favorable to the authorities commissioning the *Ambrose Light*. The vessel was not condemned as "piratical," but was returned to the officers and crew from which it had been taken.[288] Thus the case cannot represent more than yet another example of a learned judge using the opportunity of an interesting fact situation to expound a view of the law resting on "natural" principles divorced from reality, and finding that the best he could achieve was to show that his approach was not necessarily inconsistent with precedent and principle; that policy-makers, confronted with reality, had to make adjustments of policy to fit that reality, and the result was the creation of a legal pattern that brought about a sensible result in disregard of grand theories.

Summary and Conclusion. This, then, represents the "classical" American view of the law of "piracy." It is possible to assert that by the end of the nineteenth century, as far as the United States was concerned, the international law relating to "piracy," if there were any such law, existed only insofar as adopted by the municipal law of the United States. The act of adoption was in part statutory, as in the Acts of 1790 and 1819-1820, in part through judicial decisions interpreting the references in those Acts to the

"law of nations," and in part through diplomatic practice and internal practice of the United States during a period of ambiguously "recognized" belligerency. The "international law" of "piracy" as thus adopted into American law appears to have been in part the mere British municipal law relating to "robbery and murder within the jurisdiction of the Admiral" at English law, in part American statutes parallel to the English statutes of the time of William III terming "piracy" acts of treason or depredations analogous to treason undertaken under foreign license (which appear never to have been considered part of the "international law" of "piracy," probably because the particular acts involved would not be "crimes" by any other law than the law of the sovereign making the legislation), and in part the application to the interpretation of criminal statutes of the concept of "piracy" applied in England to property cases in which the taker of the property was considered to have no claim to it in an *in rem* action even if no criminal action was involved. The multiple confusions were caused in part by using a word, "piracy," that had a general pejorative meaning in vernacular usage since the early 17th century at least, and at least three distinct legal usages. It was compounded by the dilemmas in theory of those who would define "international law" to include the "natural law of nations" evidenced by parallel statutes in many countries, an approach rejected in practice during the early 19th century in connection with the slave trade both in Europe and America. It was further compounded by the conception of "naturalist" jurists that behind any rule of law reflecting moral values, there must lie a "perfect" model of which the rule is a mere reflection. This platonic approach to legal logic was rejected in practice by the more pragmatic jurists and publicists of the Anglo-American system, but remained so deep in the basic conceptions of "law" held by such eminent moralists and jurisprudential thinkers as Joseph Story, that it was never wholly forgotten or rejected. Rationales were developed for retaining this "idealist" conception in case after case in which it seemed to be irrelevant at best, morally interesting but legally deceptive normally, and obscurantist at worst. In practice, when a non-"idealist" statesman or judge was involved, the language of universality and conception of a perfect "international law" lying behind the imperfections of national legislation drop out with no apparent loss to coherence.

On the other hand, the dominance of moral-free "positivism" in the thinking of the states and pragmatic jurists who have governed the actual policies of the United States from the earliest days of the Constitution of 1787 was also limited. Not only was the strain of moralism never entirely eradicated from American legal thought, but references to "piracy" were found useful in political situations in which the combination of legal results and vernacular pejoratives served policy interests. The result in some cases, condemnations for "piracy" of political actors later treated as honorable political captives, could well look to many as a subservience of true "law" to

ill-conceived policy, making the statesmen and jurists appear more hypocrites than upholders of the moral standards or practical needs of society.

In the dynamic and competitive society of the United States, there was no way these different approaches could be combined into a single coherent jurisprudence; so necessarily, practical politics, thus "positivism," won in practice. The "naturalist" dicta of Story and others nonetheless remained for later generations to cite, and the jurisprudential battle went on.[289]

Notes

1. *Articles of Confederation*, adopted by the Congress on 15 November 1777, ratified by all the states and entered into force 1 March 1781, Article II, in 69th Cong., 1st Sess., House Doc. No. 398, *Documents Illustrative of the Foundation of the Union of the American States* (1927) 27.

2. *Id.* art. IV.

3. See notes I-165 and I-201 above.

4. *Articles of Conferation*, arts. VI(4) and IX(6).

5. *Id.* art. IV(5).

6. *Id.*

7. *Id.* art. IX(1).

8. *Id.* art. IX(1) first clause. The other exceptions referred to there include the recourse to "war" by any state "actually invaded by enemies" or which "shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted." *Id.* art. VI(5).

9. *Id.* art. IX(1). The power reserved to the states was only that power mentioned in art. VI. The power to establish maritime and prize courts is found in art. IX(1) alone, not in art. VI at all.

10. *Documents Illustrative* cited note 1 above, at p. 109 sq.

11. John Rutledge was the head of the delegation from South Carolina, former Governor of that state and at the time of the Constitutional Convention a judge. A frank character sketch of Rutledge by Major William Pierce of Georgia appears in *id.* at 106-107.

12. *Id.* 471, 475.

13. *Id.* 479.

14. Edmund Randolph was 32 years old and Governor of Virginia. He later became Attorney General of the United States. See below. An excellent biography is John Reardon, *Edmund Randolph* (1974).

15. *Documents Illustrative* 560.

16. Wilson is described by Major Pierce as "among the foremost in legal and political knowledge." *Id.* 101.

17. *Id.* 723.

18. *Id.*

19. Article I, sec. 8, cl. 10.

20. E.g., the power to regulate commerce with foreign nations, Art. I, sec. 8, cl. 3. This power has been exercised, and the counterfeiting of foreign currency and other documents in the United States is a criminal offense. 18 U.S. Code secs. 478-484, 486, 488-489, 492. This legislation was first enacted by the Congress only in 1884 (23 Stat. 22, 48th Cong., 1st Sess., Ch. 52) revised in 1909 (35(1) Stat. 1088 at 1117-1119, 60th Cong., 2nd Sess., Ch. 321).

21. Art. III, sec. 2, cl. 1.

22. Art. III, sec. 3.

23. *Documents Illustrative* 603 (*Madison's Debates*, Session of 23 August 1787).

24. *Id.* 702.

25. *Id.* 712; it appears in the *Constitution* as Art. VI, cl. 2.

26. Hamilton, Madison, Jay, *The Federalist* (1788, Cooke, ed. 1961) 279.

27. *Madison's Debates* 281. This seems rather an oversimplification by Madison. See text above at notes 7 and 9.

28. *Id.*

29. *Id.*

30. *Id.* 280-281.

31. One major study of the early statutes and their supersession and judicial expansion in the first three decades of the 18th century is Dickinson, Is the Crime of Piracy Obsolete?, 38 *Harvard Law Review* 334

(1925), sparked by the suggestion that rum running in violation of the Prohibition laws of the United States might be analogous to "piracy." Lacking the full background of the evolution of the conception of "piracy" before 1788, Dickinson's worthy work misses many of the major implications of these statutes and cases, unfortunately, so much of his research has had to be duplicated. I have condensed and focused this study as much as possible to avoid duplicating his analysis, but have repeated it with regard to the points of convergence and followed the line dictated by the sources and the focus of this study as to the points on which his emphasis on narrower issues and those timely only in the light of his special interests have made us diverge as to evidence and conclusions.

There seem to be at least three quite different conceptions of piracy implicit in the statutes, cases and practice of the United States which Dickinson regarded as a seamless whole: (1) "Piracy" as a municipal law crime (whether or not based on conceptions of international law or the "law of nations"); (2) "Piracy" as the acts of unrecognized belligerents, like the privateers of "Buenos Ayres" or, eventually, the naval arms of the Confederate States of America in 1861-1865 and (3) "Piracy" as the military activity of unrecognized or "barbarous" political societies, like the Barbary states (with regard to which the attitudes towards the Indian tribes of the American continent were relevant but unstated in diplomatic correspondence). In this study, these distinctions have been shown to have been implicit in the classical writings from Roman times and reflected in doctrine throughout history. That consciousness affects the focus of the entire work and makes Dickinson's analysis seem confused in places.

32. An Act to Establish the Judicial Courts of the United States, 1st Cong. 1st Sess. ch. 20, 1 Stat. 73.

33. 1 Stat. 76-77. The last quoted provision lay more or less moribund after the period now to be discussed until revived as a basis for extending United States federal courts' jurisdiction to a case involving torture by a Paraguayan official against a Paraguayan youth in Paraguay in 1976. Filartiga v. Pena-Irala 630 F.2d 876 (2d Cir. 1980). See Rubin, U.S. Tort Suits by Aliens Based on International Law, 21 *International Practitioners Notebook* 19 (1983). Other cases are being presented and the proper scope of the statute is a matter of considerable debate in 1987. See exchange between D'Amato and Rubin in 79(1) AJIL 92-113 (1985). An analysis of the relationship among admiralty, prize and tort law under the "law of nations" in the experience of the framers of the Constitution is Bourguignon, Incorporation of the Law of Nations During the American Revolution . . ., 71 AJIL 270 (1977). It seems to support Rubin's view. I am indebted to my colleague, Professor Leo Gross, for bringing this article to my attention.

34. Judiciary Act secs. 4 and 11, 1 Stat. 74-75, 78-79.

35. 1st Cong. 2d Sess., 1 Stat. 112.

36. As to the issuance of letters of marque and reprisal to privateers active against French vessels during the undeclared war with France of 1798-1800, see below at notes 154 to 159.

37. 1 *Attorney Generals' Opinions* (AG) (1841 ed.) 10 at 10-11. There are two official compilations of the earliest *Attorney Generals' Opinions*. The edition of 1841 is more complete with regard to volume 1. The same volume in the edition of 1852 is more commonly found in law libraries.

38. 1 AG 33, opinion dated 6 July 1795.

39. *Id.*

40. 12 Bevans, *Treaties and Other International Agreements of the United States of America 1776-1949* (1974) 13; 8 Stat. 116. The precise term of the treaty involved was article 27, by which each side agreed to deliver up to the other "all persons who, being charged with murder or forgery committed within the jurisdiction of either, shall seek asylum within any of the countries of the other . . ."

41. 1 AG (1841 ed.) 48-49, opinion dated 14 March 1798.

42. *Id.* 50-51. Lee two days later considered the possibility that the *Nigre* might turn out to be neither French nor a "pirate" vessel, but British. In that case, he suggested that if the court find that she has done "nothing contrary to the laws of nations or treaties, she will be acquitted" and go free. *Id.* 51-52. This last opinion, dated 22 September 1798, is not reproduced in the 1852 edition of *id.*

43. See text at notes II-60 sq. above. It will be remembered that Kidd had two commissions and that there is general language in the case and some other writings asserting that action in excess of a commission is "piracy." It may also be remembered that that language was criticized above and the result of the trial attributed to Kidd's disregard of his obligations to the commission-granting authority and not to excesses against his victims.

44. 11 & 12 Will. III c. 7 (1700) sec. viii, set out in text at note II-32 above and in Appendix I.B below; the American Act of 1790, cited note 35 above, says, in section 9:

> 9. . . . That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged and taken to be a pirate, felon and robber, and on being thereof convicted shall suffer death.

This statute does not define "piracy," or any "crime" under international law, but, like the British

statute of 1700, makes criminal at American municipal law certain acts by American citizens against other American citizens only. It is not entirely clear what "piracy" means in this context, disjoined by "or" from the word "robbery," both apparently confined to "the high sea." See text at notes 137 sq. below at which the fuller range of foreign commissions will be discussed in a single section.

45. As to the English root of the idea, and the confusion between this sort of "treason" and the international law of "piracy," see text at note I-201 and ch. II above. The American view expressed in sec. 9 of the 1790 Act was identical, but the reasoning underlying it is not expressed in any known document. It probably merely adopts the British view of 1700, with which lawyers in the American colonies had been familiar for nearly a century.

46. Bemis, *Jay's Treaty* (1923, rev'd ed. 1962), Appendix III, comparison of Jay's Draft of September 30, 1794, with the Treaty Signed by Jay and Grenville on November 19, 1794, 391 at p. 426–432.

47. *Id.*, pp. 291 sq. Cp. instructions 4, 12, 14 at p. 293–4, 295.

48. 11 Bevans 516 at 508–519, art. VI. Grammar *sic*: "Each Party" should presumably have been plural: "The Parties severally."

49. Oddly, the Spanish original does not mention "robbers" only "*algunos Piratas en Altas Mar.*" See parallel texts in Bemis, *Pinckney's Treaty* (1926, rev'd ed. 1960), Appendix V, p. 343 at p. 350. Presumably, Pinckney thought the phrase "Robbers on the high seas" explained the word "pirates" while the Spanish negotiators construed the word "*Piratas*" to include some activity on land as well as on the high sea, and thus sought to restrict the application of the article as it might apply in Spanish Florida. But direct evidence to support these speculations is not available within the reasonable compass of this study.

50. *Id.* art. IX at p. 350.

51. *Id.* art. VIII.

52. *Id.* art. XIV.

53. Levy was barely 20 years old at the time. He led a remarkable life. See 11 *Dictionary of American Biography* 203–204.

54. U.S. v. Tully and Dalton, 1 Gallison 247 (1812) at p. 252.

55. Story cites 4 Blackstone, *op cit.* note II-153 above, p. 72. See text at note II-155 above.

56. U.S. v. Tully and Dalton, *op. cit.* 252. Per contra, Sir Charles Hedges, quoted at note II-60 above, required that the mariners "shall violently disposses the master." Story does not cite Hedges's charge in Rex v. Dawson on this.

57. *Id.* 254. The statutory language is set out above at note note 35.

58. *Id.*

59. *Id.* 256. Molloy, *op. cit.* note I-175 above 41, second paragraph of ch. IV sec. xvii. Molloy's support for this assertion is a statute of 14 Edw. III not more closely identified. The only statute of 14 Edw. III in any way pertinent to any of the questions addressed here appears to be 14 Edw. III st. 2 ch. 2 (1340) which implements chapter 30 of Magna Carta by providing for the safe reception and departure of "all Merchants, Denizens and Foreigners (except those which be of our Enmity)" who pay the prescribed taxes. 1 Pickering, *op. cit.* 508 ["*Et come y soit contenuz en la Grande Chartre qe toutz marchantz eient suave et seure conduyt daler hors de nostre roialme dEngleterre . . ., Nous . . . volons et grantons . . . qe touz marchantz denzeins et foreins, forspris ceux qe sont de nostre enemite, puissent sanz estre destourbe sauvement venir en le dit roialme . . .*"]. This does not appear to be the statute Molloy had in mind.

60. U.S. v. Howard and Beebee, 3 Washington 340 (1818).

61. *Id.*, p. 344 sq. No other section of the Act came near to fitting the facts.

62. U.S. v. Palmer et al., 16 U.S. (3 Wheaton) 610 (1818). See text at notes 75 sq. below.

63. U.S. v. Howard and Beebee at p. 346–349.

64. Cited note 54 above.

65. U.S. v. Ross, 1 Gallison 54 (1812).

66. *Id.* 627. Story's citations, principally to Coke's *Third Institute*, address the reach of the Admiral's jurisdiction in English law. He did not distinguish between the Admiralty jurisdiction on board English flag vessels in distant waters and foreign vessels in those waters, thus concluding that the Admiralty courts of all countries have overlapping jurisdiction in all navigable waters, even territorial and perhaps even internal waters of foreign states, regardless of the flags flown or the nationality of those involved.

67. See text at notes II-64 sq. above. Molloy thought territorial seas jurisdiction was exclusive in the territorial state.

68. See text at note II-72 above.

69. U.S. v. Pedro Gilbert & Others, 2 Sumner 19 (1834). In this case Judge Story was sitting as a judge of a Circuit Court in an appeal by seven defendants from their conviction after five out of the original 12 defendants had been acquitted following trial in an American District Court. Story denied the petition for a new trial for complex constitutional reasons involving double jeopardy, suggesting that the defendants' proper remedy after conviction on evidence insufficient to support an inherently contradictory result was to plead for a pardon from the Executive. These complexities of American Constitutional law lie beyond the scope of this study. It may be significant that Story's seminal book, *Commentaries on the Conflict of Laws*,

was first published also in 1834. Its introduction is invincibly "positivist," denying the existence of any universal laws except the choice of law rules themselves (p. 29, 33). But Story does not address the slave trade or "piracy" in that book. The naturalist view of the universality of the choice of law rules is now substantially modified. See D.F. Cavers, A Critique of the Choice-of-Law Problem, 47 *Harvard Law Review 173* (1933).

70. *Id.* note 1 on pp. 24-26. In fact the British did exercise jurisdiction in the case, but only over the property seized on board the "pirate" ship captured by Capt. Trotter within an African river. According to the recitation of facts, within a week after Pedro Gilbert and his friends had been convicted in the United States in October 1834 their personal property, which had been seized and held by Captain Trotter, was paid into the Registry of the appropriate British Admiralty Court by order of the Lords Commissioners of the Treasury. The question was whether the property, being "*bona piratarum*," was to be accounted by the Crown as miscellaneous Treasury receipts or as part of the "droits" of Admiralty. Dr. Lushington held for the Lord High Admiral. The Panda [1842] 1 W. Rob. 423; 3 BILC 771. The jurisdiction of an Admiralty Court to pass on title to property before the court was not in question and Lushington's reasoning sheds no light on British jurisdiction over accused "pirates." It is not clear why it took eight years from the time Pedro Gilbert was convicted until his property was legally disposed of.

71. 1 AG 15. It is instructive to read this opinion and speculate on the reasons its logic struck Americans as unpersuasive when uttered by Libya with regard to the Gulf of Sidra in August 1981.

72. U.S. vs. Peter Wiltberger, 3 Washington 515 (1819) at 515-518, 524.

73. U.S. v. Wiltberger, 18 U.S. (5 Wheaton) 76 (1820) at 94-95, 104.

74. *Id.* 106-116.

75. Cited note 62 above.

76. The violence in U.S. v. Palmer et al. was actually committed ashore, and there can be no doubt of the jurisdiction of the United States to make the perpetrators subject to American criminal penalties regardless of the definition of "piracy" under international law. The pronouncements for which the case is so often cited are dicta unnecessary for the decision.

77. *Id.*, p. 630-631, 632-633.

78. *Id.* 641-642.

79. *Id.* 643.

80. See text at note 86 below.

81. U.S. v. Klintock, 18 U.S. (5 Wheaton) 144 (1820), Marshall's words.

82. *Id.* 152.

83. *Id.* 153.

84. This possibility was not farfetched. See text at note 138 and see note 140 below.

85. 3 Stat. 510, 15th Cong., 2d Sess. ch. 77. It is reproduced at Appendix II. A below with Wheaton's notes.

86. *Id.* 513-514.

87. 3 Stat. 600, 16th Cong. 1st Sess. ch. 113. It is reproduced at Appendix II.B below.

88. 18 U.S. Code Sec. 1651: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." The entire text of this part of the current U.S. Code is reproduced at Appendix II.C below.

89. U.S. v. Chapels, 25 Fed. Cas. 399 at 403, Case No. 14,782 (1819).

90. *Id.* 404.

91. U.S. v. Smith, 18 U.S. (5 Wheaton) 20 (1820) at 161.

92. *Id.* Note a, p. 163-180.

93. See text above notes II-60 and II-70 above. Story's references to Wynne, *The Life of Sir Leoline Jenkins* (1724), seem consistently off by two pages from the original (1724) copy of Wynne available to me.

94. *Id.* 161-162.

95. *Id.* 164, 181-182.

96. *Id.* 183.

97. U.S. v. Pirates, 18 U.S. (5 Wheaton) 184 (1820).

98. *Id.* 203.

99. *Id.*

100. *Id.* 205.

101. *Id.* 195-197.

102. *Id.* 199-201.

103. See text at notes 65 and 66 above.

104. 1 Moore, *Digest of International Law*, 702-705 (1906), statements by Jefferson (1793), Pickering (1796) and Madison (1805). On the various bases claimed by states for exclusive zones of one sort or another, and the loss of persuasiveness for the distinctions during the 19th century, and the apprehension that they are now coming back into vogue again as the need for simplicity and certainty is overborne by various other considerations, see Rubin, Evolution and Self-Defense at Sea, in 7 *Thesaurus Acroasium* 107-116 (1977).

105. See text at note 54 above.

106. The degree to which Story had to retreat on this is made clear by reading his elaborate opinion for a unanimous Supreme Court in 1844 on the question of whether a ship was "piratical" whose undoubted depredations were prompted by a vindictive and petty captain more than by any desire for gold. Story applied the precise language of the statute of 1819, section 4, which makes it a "piracy" at United States Federal law to engage in any "piratical aggression, or piratical search, or piratical restraint, or piratical seizure, as well as a piratical depredation," to hold the ship condemnable as a piratical vessel. He released the cargo to its owners, who had had no part in the aberrations of the captain. But he did not attempt to find the "piracy" to be such at international law by virtue of being a "felony" within the jurisdiction of Admiralty as he had in U.S. v. Tully and Dalton. U.S. v. Brig Malek Adhel, 43 U.S. (2 Howard) 209 (1844), reproduced in 1 Deak 56. The case is analyzed at greater length in the text at notes 217-219 below.

107. 1 Stat. 347, 3rd Cong., 1st Sess., ch. 11.

108. 2 Stat. 70, 6th Cong. 1st Sess. ch. 51. The penalty for serving in a foreign slaver was up to 2 years imprisonment and $2,000 fine; the fine for holding a business interest in the foreign slave trade was double the value of the interest held. American vessels involved in that detestable trade were forfeit with half the value going to the government and the other half distributed to the captors as prize.

109. Cited at note 87 above, secs. 4 and 5, 3 Stat. 600-601. Quoted in Appendix II.B below.

110. See *The Antelope*, 23 U.S. (10 Wheaton) 66 (1825). The unanimous opinion written by Chief Justice Marshall, a Virginian, held the slave trade not to be a violation of the law of nations despite the American and British statutes calling it "piracy." For the analogous British case see The Le Louis [1817] 2 Dods. 210: "No lawyer, I presume, could be found hardy enough to maintain that an indictment for piracy could be supported by the mere evidence of trading in slaves. Be the malignity of the practice what it may, it is not that of piracy in legal consideration" (opinion by Sir William Scott). The British anti-slavery movement was spurred to other efforts, and the brilliant memorandum by Lord Castlereagh at the Congress of Aix-la-Chapelle in 1818 argued:

> If the moment should have arrived when the Traffic in Slaves shall have been universally prohibited, and if, under these circumstances, the mode shall have been devised by which this offence shall be raised in the Criminal Code of all civilized Nations to the standard of Piracy; they conceive that this species of Piracy, like any other act falling within the same legal principle, will, by the Law of Nations, be amenable to the ordinary Tribunals of any or every particular State; . . . the verification of the fact of Piracy, by sufficient evidence, brings them at once within the reach of the first Criminal Tribunal of competent authority . . .

6 BFSP 77-85 at p. 79. This argument failed, as Portugal refused to agree and other states, principally France, took the position that without Portugal there could be no consensus, and as a matter of positive law Portuguese conceptions of the permissability of the slave trade were as persuasive as British conceptions of its impermissability. Eventually the British were successful in suppressing the international slave trade not by natural law arguments based on the horrors of the practice and natural rights of all humans, but by treaties with Portugal, France and the others in which, in return for other things, permission was given to Great Britain to stop the trade in each country's vessels.

111. See ch. II above.

112. See note 110 above.

113. U.S. v. La Jeune Eugenie, 26 Fed. Cas. 832, No. 15,551 (D. Mass.) (1822). Story was sitting as judge in the Federal District Court in Massachusetts under the Judicature Act of 1789. The quoted language is taken from the photographic reproduction of the case in 1 Deak 144 at p. 153. As mentioned in note 69 above, Story's great work on Conflict of Laws, effectively destroying the logical underpinning of Cicero's natural law of nations, *jus gentium*, as an operative municipal law theory in a world of legally equal and independent states, did not appear until 1834.

114. Appendix II.B below.

115. U.S. v. Darnaud, 3 Wallace 143 (3rd Circ.) (1855) at p. 160-163.

116. *Id.* 178.

117. See note 110 above. France had insisted at Aix-la-Chapelle that whatever the moral evils of the slave trade, and whatever the French legislation on the subject, Great Britain could derive therefrom no legal right in the international legal order to stop French vessels on the high seas in order to suppress that detestable traffic. The French position was upheld by Sir William Scott in the *Le Louis*, cited above at the same note. It also underlay his refusal to consider condemning the *Hercules* [1819] 165 Eng. Rep. 1511, also in 2 Dods. 353. See text at notes 206-207 below.

118. See notes 110 and 117 above.

119. Quoted in part in note 110 above.

120. If the evils inherent in slavery could not be shown to be inconsistent with natural law in 1817 or 1825, and counterargument regarding racial superiority and moral benefits conferred on the slaves could block legislation in the United States to abolish the entire practice state by state, or forbid implementation

of the Fugitive Slave Law (see The Dred Scott Case, Scott v. Sandford, 60 U.S. (19 Howard) 393 (1857)), it is hardly surprising that doubts exist today as to the sanctity of private property or even the impermissability of torture as a matter of human rights law. But this is not the place for further analysis of the inability of the legal order to create a consensus through natural law reasoning where the conscience of mankind does not in fact agree.

121. Statute of the International Court of Justice, art. 38 (1) (c). This formula has its own history, of course, but it is not necessary for present purposes to trace it.

122. The case is cited at note 113 above. The statute is reproduced at Appendix II.B below.

123. Story, *Commentaries, loc. cit.* note 69 above.

124. Cited at note 87 above; reproduced at Appendix II.B below.

125. Set out in the text at note 86 above; reproduced in full at Appendix II.A below.

126. This would, of course, include the port of London.

127. This provision is still statutory law in the United States. 18 U.S. Code sec. 1653. Minor amendments were made in 1909 and 1948. The entire body of current United States positive law relating to "piracy" in the sense discussed in this study is in 18 U.S. Code secs. 1651-1661 and reproduced in Appendix II.C below. Those provisions of the Code relating to the President's authority to direct naval activity against "pirates" but not defining the term, are in 33 U.S. Code secs. 381-387.

128. The high seas enforcement jurisdiction of the United States remains vested in the District Court of the district of the United States in which the offender is arrested or first landed. 18 U.S. Code sec. 3238.

129. Consular courts with jurisdiction to settle legal disputes between nationals of the sending state alone are a very old Mediterranean institution. The first American consular court was established in Algiers by treaty dated 5 September 1795. 1 Malloy, *Treaties, Conventions* . . . (1910) 1. The treaty of 4 November 1796 with the Bey of Tripoli permits the establishment of consular "jurisdictions" by each party "on the same footing with those of the most favoured nations respectively." 2 Malloy, *op. cit.* 1784 art. IX at p. 1786. The treaty of August 1797 (no specific date in August) with the Bey of Tunis provides for the respective consuls to judge of "disputes" involving solely persons under his "protection," but if there is an offense that crosses nationality lines and involves killing, wounding or striking, the territorial sovereign has jurisdiction over the case and the consul a right merely to be present at the trial. Id. 1794, arts. XX-XXII at p. 1799.

130. The first American experience of this was in reaction to activities of "Citizen" Edmond C. Genet, the Minister of the revolutionary government of France to the United States 1792-1794. Among the exercises of French "sovereignty" in American territory which Secretary of State Thomas Jefferson complained of and which led to a demand for Genet's recall was the condemnation at his direction by French consuls in the United States of British vessels captured by French revolutionary privateers and sold by them to American buyers. Jefferson regarded the establishment of Prize Courts without the permission of the territorial sovereign as a violation of international law; Genet regarded that a mere quibble based on "aphorisms of Vattel." After protest, Genet was recalled by the French authorites. This affair is concisely summarized in 4 Moore, *Digest of International Law* (1906) 485-487.

131. The tale of American continental expansion at the expense of the Indian population and political organization of the continent is far beyond the scope of this study. American reluctance to assume the obligations of sovereignty outside the continent was not overcome until the very end of the 19th century. It took over forty years of policy argument and political manipulation for those interested in establishing American rule in Hawaii to convince an administration and two thirds of the Senate necessary for advice and consent to the ratification of an annexation treaty, to achieve it. 1 Moore, *Digest* 481-504.

132. 1 Kent, *Commentaries on American Law* (1826) Lecture IX at p. 169-179 focuses on "Offences against the Law of Nations."

133. *Id.* 170. He considered the slave trade to be "condemned by the general principles of justice and humanity," but *not* "piratical" or "absolutely unlawful by the law of nations." *Id.*

134. *Id.* 171.

135. *Id.* 174.

136. *Id.* 175.

137. The most nearly comprehensive study of this use of the term "piracy" in Anglo-American practice remains Lauterpacht, *Recognition in International Law* (1947, reprinted 1948) ch. XVIII. As was noted above at note 31 with regard to Dickinson's treatment of the American municipal statutes, Lauterpacht's balanced work suffers somewhat from a lack of historical perspective and seems to miss the depth of the jurisprudential argument. It has been felt necessary to duplicate and supplement his research with regard to the early materials and my conclusions are somewhat different.

138. 16 Geo. III c. ix (1777). This statute was renewed annually until 1782. 18 Geo. III c. i (1779); 19 Geo. III c. i (1780); 20 Geo. III c. v (1781); 21 Geo. III c. ii (1782). These statutes are published in 31 Pickering 312; 32 Pickering 1; *id.* 175; 33 Pickering 3; and *id.* 183.

139. 1 Moore, *Digest* 168-169. By 1779 the British were considered to have demonstrated by their applying the law of war to land engagements with the Continental Army that they considered the land

forces contacts to be governed by international law, not merely British municipal law as it might apply under the Statute of Treasons quoted at note I-201 above. Cp. the treatment of James II's land forces in Ireland in the 1690s, above esp. text at note II-20.

140. The British Ambassador in the Netherlands requested the Dutch to expel from Texel one "pirate, Paul Jones, of Scotland, who is a rebel subject and a criminal of the state" in October 1779. 10 *Dictionary of American Biography* 185. The Dutch did expel him, but did not arrest him for "piracy" or any other crime. They seem to have regarded the issue as solely one of maintaining Dutch neutrality in a "war" between others, even though the British regarded the situation as one of internal criminality among British subjects. The British view that "rebels" might be regarded as "pirates" seems consistent with the British legislation cited in note 138 above. The apparent rejection of this position by all the other European powers who were addressed on the issue is ambiguous. It might merely have been a denial by each power individually that the facts warranted the legal conclusion asserted by the British; it does not necessarily deny that rebels before achieving a degree of organization and success might be properly treated as "pirates" at international law as well as at the municipal law of the defending sovereign.

141. See text at notes 40-52 above.

142. Some are cited in another context at note 129 above. The treaties were that with Algiers of 5 September 1795 (8 Stat. 133); Tripoli of 4 November 1796 (8 Stat. 154); and Tunis concluded on an unspecified date in late August 1797 and 26 March 1799 (8 Stat. 157). The Treaty with Algiers was superseded in June/July 1815 (8 Stat. 224), and that new treaty superseded in turn on 23-24 December 1816 (8 Stat. 244). The Treaty with Tunis was amended in a Convention dated 24 February 1824 (8 Stat. 298). Treaty relations with Morocco were begun in January 1787 under the Articles of Confederation (1 Malloy 1206) and that Treaty remained in force for the new United States until superseded on 16 September 1836 (8 Stat. 484).

143. The confusion in thought represented by the glib use of the word "pirate" in connection with the Barbary states began in the last decade of the eighteenth century and lasts until today. For an interesting example of the rhetoric as it reached scholarly circles, see Paullin, *Commodore John Rodgers, 1773-1838* (1910, republished by the United States Naval Institute 1967) 93-169. Commodore Rodgers was actively involved in the "war" against the "pirates" of Tripoli that began in 1802 and ended in 1805. A parallel not involving the word "pirate" might be drawn to treaty relations and "wars" with the American Indian tribes at this time. All the early treaties between the United States and the Indian tribes of North America are collected in volume 7 of the American *Statutes at Large.* The legal relationships reflected in the treaty form were analyzed by Chief Justice Marshall in The Cherokee Nation v. The State of Georgia, 30 U.S. (5 Pet.) 1 (1831), concluding that "an Indian tribe or nation within the United States is not a foreign state, in the sense of the constitution, and cannot maintain an action in the courts of the United States" (p. 183). A more elaborate opinion resulting from an appeal by a citizen of Vermont from a conviction by a Georgia court applying its law to events within Cherokee territory, is Worcester v. The State of Georgia, 31 U.S. (6 Pet.) 515 (1832). In that case Marshall found jurisdiction in the Supreme Court and overturned the conviction on the ground that under the Constitution, treaties and federal statutes, the law of Georgia did not apply in the territory set aside for the Cherokee nation by the law of the United States. In a later case, the Supreme Court held that Federal legislation could supersede treaty stipulations with the Indian tribes, and there was no violation of either American municipal law or international law in that event. The Cherokee Tobacco, 78 U.S. (11 Wall.) 616 (1871). The Supreme Court in that case held that the Indians' sole redress was to appeal the questions of policy to the Congress (p. 621). It can be seen that while the legal label "pirate" was not used, the result implied by the use of the term—the submerging of the organized society to which it was attached to the legal system of its dominant neighbor—was achieved by interpretation of the Constitution and the subordination of the branch of law governing "treaties" with the victim society to the overarching law of the conqueror. In this way, the law of war could be argued to be not applicable to military relations with the victim society, but only a special category of the municipal law of the expanding state seeking to submerge its neighbor. Further analysis of this legal technique of engulfment as it applied to Indian tribes in North America is beyond the scope of this work.

144. Cited at note 35 above.

145. See note 44 above. This provision, with minor changes, is still law in the United States. 18 U.S. Code sec. 1652. It is reproduced in Appendix II.C below.

146. Stat. 175, Act of 3 March 1847, 29th Cong., 2d Sess., ch. 51. This statute is still law in the United States. 18 U.S. Code sec. 1653. It is reproduced in Appendix II.C below.

147. 2 Moore, *Digest* 974, citing a letter dated 23 October 1794 by Edmund Randolph as Secretary of State.

148. *Id.*, citing a report dated 25 January 1806 by James Madison as Secretary of State.

149. The Act of 5 June 1794, 3rd Cong., 1st. Sess., ch. 50, 1 Stat. 381, was extended for two years by the Act of 2 March 1797, 5th Cong., 1st Sess., ch. 1, 1 Stat. 523, and further extended indefinitely by the Act of 24 April 1800, 6th Cong., 2d Sess., ch. 35, 2 Stat. 54. All three statutes were repealed by the Act of 20 April 1818, 15th Cong., 1st Sess., ch. 88, 3 Stat. 447. Also replaced by the Act of 1818 was another Neutrality Act,

An Act to Prevent Privateering Against Nations in Amity with, or Against Citizens of, the United States, dated 14 June 1797, 5th Cong., 1st Sess., ch. 5, 1 Stat. 523. The Act of 1818 also repealed the Neutrality Act of 3 March 1817, 14th Cong., 2d Sess., ch. 58, 3 Stat. 370. See note 175 below.

The Act of 1818 replaced these earlier statutes with a comprehensive Neutrality Act, preserving many of the terms of the previous legislation. The current annotated edition of the U.S. Code traces the provisions of 18 U.S. Code secs. 961 and 962 back to the Act of 1794. The language of secs. 958 and 959 also seems to have had its origin then. It would be tedious in this place to attempt to trace back to original sources all the terms in titles 18 and 22 of the U.S. Code that trace back to the Neutrality Acts of 1797-1818 and later.

150. John Paul Jones himself sailed under Russian commission against Turkey and Sweden as a regular officer of the Russian Navy in 1788 while maintaining in full his American citizenship. 10 *Dictionary of American Biography* 187. The Confederated American States were neutral in that conflict.

151. 2 Moore, *Digest* 976-977, memorandum of 16 March 1854 recording a conversation between the American Minister (Ambassador) at London, James Buchanan, and the British Foreign Secretary, Lord Clarendon.

152. *Id.* Buchanan does not appear to have cited the cases he had in mind.

153. See text at notes 81-83 above. That was the case in which section 8 of the Act of 1790 was construed to apply to foreigners acknowledging no state authority and attacking all victims indiscriminately, even if none of the immediate victims was American. Its logic rested on the Zouche-Blackstone-Story conception of the "law of nations."

154. Of course, in a sense the issues arose much earlier, in the licensing of privateers and the commissioning of Naval officers like John Paul Jones to raid British shipping during the revolution, when in British contemplation the American states and Continental Congress lacked legal authority to issue commissions without the express approval of the Crown. But Jones was not caught and there is no record of any American privateers actually being tried for "piracy" by an English court. See text at notes 138-140 above.

155. U.S. Constitution, Article I, sec. 8, cl. 11.

156. 5th Cong., 2d Sess., ch. 67, 1 Stat. 578. This American municipal legislation was not binding in France or on the French state as a matter of international law—the law between states. Presumably France and the United States Congress speaking for the entire union differed at this point as to the continued force of the alliance of 1778 (1 Malloy 479) and the Convention of 14 November 1788 (*id.* 490), which was formally ratified in 1790, after the new Constitution had gone into effect. The United States Supreme Court held in 1801 that the Act of 7 July 1798 abrogated this latter Convention as far as the United States was concerned even if France disagreed. Talbot v. Seeman, 5 U.S. (2 L. Ed.) 15, 1 Cranch 1 (1801).

157. Act of 9 July 1798, 5th Cong., 2d Sess., ch. 68, 1 Stat. 578.

158. See the classification system of Henry Marten, at note II-43 above.

159. 1 AG 49. As I read the penultimate quoted sentence an American acting against the United States with or without a French commission would be committing "treason;" a foreigner within the United States would be committing treason *unless* he had a French commission, in which case he would be a lawful combatant.

160. See text at note 52 above. Perhaps Pinckney's Treaty was disregarded because Marshall foresaw the problems that became evident in 1821. See text at notes 193-197 below.

161. U.S. v. Hutchings, 26 Fed. Cas. 440, No. 15,429 (1817) at pp. 441-442.

162. See text at note 35 above.

163. U.S. v. Palmer et al. cited note 62 above, at p. 636-637.

164. *Id.* at p. 641-624. See text at note 78 above.

165. *Id.*, dissent by Johnson 636 sq. at p. 641.

166. *Id.* 643, quoted in text at note 79 above.

167. *Id.* 635.

168. *Id.* 643-644.

169. Obviously, this result was identical to that reached by English jurists by 1729. See text at note II-47 above. From this point on, it seems clear that the classification of "pirate" for a person depredating at sea without the license of a recognized government was regarded as coming from specific treaty law or from municipal law applicable to nationals or purported nationals of the depredator's state only. No cases indicating a contrary view have been found, and the theoretical writings making broader assertions of the requirement of a license contain no argument or precedent beyond those fully considered above. Cf. Supreme Court's decision (by Justice Henry Livingston) in the *Josepha Seconda* discussed in the text at notes 198-200 below.

170. Cited at note 149 above.

171. *Id.*, p. 384. See note 149 above.

172. 1 AG 35 at 36. The opinion is dated 20 January 1796. The addressee is not specified; presumably it was Secretary of State Pickering.

173. 1 AG 181 at 182. William Wirt to Elias Glenn, opinion dated 6 November 1818.

174. Wirt cited Vattel, *op. cit.* note II-137 above, Book III, ch. ii, sec. 15: "[N]o one may recruit soldiers in a foreign country without the permission of the sovereign [*personne ne peut en enroller en pays étranger, sans la permission du Souverain*]."

175. Cited and placed in context at note 149 above. The quoted language is in the Act of 3 March 1817 and is repeated with a minor change in section 3 of the Act of 20 April 1818 that repealed the Act of 1817.

176. Similar limitations appear in the replacement statute of 1818.

177. Walker Lewis, John Quincy Adams and the Baltimore "Pirates," 67 *Am. Bar Assoc. Journal* 1011 (1981) at 1013. I am grateful to Professor Edward Gordon of Albany Law School and The Fletcher School of Law & Diplomacy for bringing this article to my attention. Apparently, the outcome of the case continued to rankle in the mind of John Quincy Adams. As Secretary of State in the Monroe Administration and author of the parts of Monroe's State of the Union Address announcing the Monroe Doctrine on 2 December 1823, he was probably responsible for the reiteration of Executive dominance over what the courts might call "piracy" by referring to both commissioned and "unlicensed" piracies being suppressed by American Naval action:

> Although our expedition, cooperating with an invigorated administration of the government of the island of Cuba, and with the corresponding active exertions of a British naval force in the same seas, have almost entirely destroyed the *unlicensed* piracies [emphasis added] from that island, the success of our exertions has not been equally effectual to suppress the same crime, under other pretenses and colors, in the neighborhood of Porto Rico. They have been committed there under the abusive issue of Spanish commissions. At an early period of the present year remonstrances were made to the governor of that island, by an agent who was sent for the purpose, against those outrages on the peaceful commerce of the United States, of which many had occurred.

2 J. Richardson, ed., *Messages and Papers of the Presidents* (1896, 1910) 776 at 783. It seems notable that both acts done unlicensed and acts done under "the abusive issue of" "commissions" are denominated "piracies," but that their legal results differ; the former were regarded as subject to immediate political action by the Navy, and the latter as subject to diplomatic remonstrance only, in the first instance. Despite the use of the word "crime," there is no mention of tribunals or their jurisdictional and substantive problems. This approach can be usefully compared with the British approach at the same period, when the word "pirate" was changing meaning and becoming a legal justification for political action in disregard of municipal criminal law and in increasing disregard of what had been thought to be the international law on the subject. See chapter IV below. I am indebted to my colleague, Professor Alan Henrikson of the Fletcher School of Law & Diplomacy, for bringing this paragraph of President Monroe's "Doctrine" speech to my attention.

178. Text at notes 53 sq. above.

179. See text at note 35 above.

180. U.S. v. Jones, 3 Washington 209 (1813).

181. Washington called it the Kyd case and cited 5 *State Trials* 313. No such case appears in *How. St. Tr.* (which was not in any event published until 1816) at that place, but from the context it seems clear that Washington was referring to the Kidd case rehearsed at length in chapter II above as it was reported in some earlier compilation.

182. U.S. v. Jones at p. 216. Of course, the Kidd case was decided not by Common Law but by an Admiralty commission using Common Law procedures under the Act of 1536. See chapter II above.

183. *Id.*, p. 215, 220. Cp. Story's naturalist expansion of the law he asserted to be the international law of "piracy" in U.S. v. Tully and Dalton discussed in the text at notes 54-59 above. The precise language of the Act is in the text at note 35 above: "... murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death." Story had expanded another clause of the definition relating to "piratically or feloniously" running away with a ship to include such running away even without the physical putting into fear that was necessary to meet the English Common Law of "robbery" definition normally used in English Admiralty courts. The Common Law definition of "felony" is complex: "Embezzlement" was not a felony, but a taking "*animo furandi*" by anybody not lawfully possessed could be. See 1 Hale, *Pleas of the Crown* (1685 ed.) 61-62. See notes I-134, I-165 and II-49 above.

184. U.S. v. Jones, p. 223.

185. See text at notes 91-96 above.

186. See note 149 above. The Act of 20 April 1818 was in force in 1820.

187. Presumably under the act of 1790, section 9. See notes 44, 135 and 18 U.S. Code sec. 1652 in Appendix II.C. below. U.S. v. Griffen and Brailsford, 18 U.S. (5 Wheaton) 184 (1820) at 204-205.

188. U.S. v. Holmes et al., 18 U.S. (5 Wheaton) 412 (1820).

189. Cited above at note 81.

190. U.S. v. Holmes at pp. 419–420. The last phrase, "any government whatsoever," seems to imply that the Buenos Ayres authorities would have been taken to be empowered legally to issue a commission, but the court believed that the jury might find that the depredation had occurred regardless of it. The position taken was essentially the same as in U.S. v. Klintock a few months earlier. See text at notes 81–83 above.

191. Wheaton cited for this only the letter by Jenkins analyzed at notes II-73 sq. above.

192. Wheaton, *Elements of International Law* (Text of 1836 with Dana's commentary of 1866 and additional commentary by George Grafton Wilson) (CECIL 1936) secs. 124–125 at p. 162–164. Wheaton's view was by 1836 somewhat narrower than that expressed in his comment on U.S. v. Wiltberger analyzed in the text at note 74 above.

193. Cited at note 149 above.

194. See text at note 52 above.

195. Cited at note 149 above.

196. The case was remanded to the Circuit Court for further proceedings on that point.

197. The Bello Corrunes, 19 U.S. (6 Wheaton) 152 (1821) at 171.

198. The Josefa Segunda, 18 U.S. (5 Wheaton) 338 (1820).

199. *Id.* at p. 358.

200. *Id.*

201. 20 U.S. (7 Wheaton) 283 (1822).

202. *Id.* 337.

203. See note 52 and text at notes 194 and 195 above. Not only was Chaytor's nationality unclear, and thus his being a "citizen of the United States" within the terms of article 14 doubtful, but Story, apparently erroneously, categorized the *Independencia* as a public warship of Buenos Ayres and not a mere privateer. *Id.* 346.

204. *Id.* 348–349.

205. *Id.* 355.

206. The *Hercules*, cited note 117 above, at 1519.

207. *Id.* 1518–1519.

208. See text at notes I-170 to I-172 above.

209. The *Marianna Flora*, 24 U.S. (11 Wheaton) 1 (1826) at p. 41.

210. The *Palmyra*, 25 U.S. (12 Wheaton) 1 (1827). Story did not speculate as to whether France might have had a valid claim against Spain for what he apparently conceived to be a violation of the laws of maritime warfare.

211. Statute of 3 March 1819, 15th Cong., 2d Sess., ch. 77 sec. 2, 3 Stat. 510 at pp. 512–513, extended by the statute of 15 May 1820, 16th Cong., 1st Sess., ch. 113 sec. 1, 3 Stat. 600. Story refers to them as chs. 75 and 112 respectively but there seems to be no doubt as to the language to which he was referring.

212. The *Palmyra* at 16–17.

213. *Id.* 16.

214. U.S. v. Kessler (Circ. Ct., D. Penn.) 26 Fed. Cas. 766, No. 15,528 (1829).

215. *Id.* 772.

216. *Id.* 774.

217. U.S. v. Brig Malek Adhel, cited at note 106 above, at 1 Deak 58–59.

218. *Id.*, 1 Deak 59.

219. *Id.* 64–65.

220. See text in note 44 and in text at note 145 above. Section 9 of the Act applies only to "any citizen" of the United States. Since it directs treatment as a "pirate" to any citizen who commits "piracy" or "robbery" against any other American citizen on the high seas "under color of any commission from any foreign Prince or State," the charge would stick even if there were no legal question of the capacity of the revolutionary government of Texas to issue such a commission. Of course, if there were no valid commission, section 8 of the Act of 1790, or section 5 of the Act of 1819, would apply and the Americans would have been "pirates" as far as the law of the United States was concerned. Section 8 of the Act of 1790 is quoted in pertinent part at note 35 above. The Act of 1819 is reproduced in full in Appendix II.A below.

221. 3 AG 120 at pp. 121–122, opinion dated 17 May 1836.

222. *Id.*, p. 122.

223. *Id.*

224. Accessory Transit Co. Claim, 2 Moore, *International Arbitrations* . . . 1551 (1898) at p. 1561.

225. It is highly relevant to an understanding of such later cases as the Delagoa Bay Arbitration, in which a Swiss arbitral tribunal reluctantly held itself to be bound by the terms of an arbitral *compromis* to accord to British and American investors in a Portuguese Corporation in Mozambique the very protection refused to American investors in Nicaragua in this case. See 5 Parry, ed., *British Digest of International Law* 535 at 560. The literature on the Delagoa Bay Arbitration is voluminous and seems to be comprised mostly of claimants' arguments that the *compromis* forced on Portugal represents a better expression of the underlying natural law protecting investors than the constitutional phases of the legal order protecting national

discretion with regard to national corporations in which foreigners have invested. The degree to which the international legal order gives an investor's state standing to protect investments made through companies of a nationalizing state, or a third state, is still a matter of considerable dispute. See The Barcelona Traction, Light and Power Company Case, (Belgium v. Spain), *I.C.J. Reports 1970* 1.

226. Accessory Transit Co. Claim, cited note 224 above. Quotations are from p. 1561-1563, italicized words *sic*.

227. Letter from Fox to Webster, 12 March 1841, 29 BFSP 1126 at 1127. This was the beginning of the famous correspondence in which Daniel Webster first formulated the phrase that has been taken to set forth the general international law of self-defense. It involved a band of British and Americans in a ship, the *Caroline*, planning a raid across the Niagara River from the New York shore. A British expedition raided the *Caroline* first in "self-defense" and sent her flaming over the falls. See 2 Moore, *Digest* 409-414.

228. Letter from Webster to Fox, 24 April 1841, 29 BFSP 1129 at 1135.

229. *Id.*

230. 12 Stat. 1258-1259. Proclamations No. 4 and 5.

231. The history of the word "efficient" in this context is complex and beyond the scope of this study. It reflects most immediately the language of the Declaration of Paris of 16 April 1856 by which 51 parties, including all the major European maritime states but not the United States, agreed that "Blockades, in order to be binding, must be effective, that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." The American refusal to accept the Declaration went to other points than this. Roberts and Guelff, *Documents on the Laws of War* (1982) 24-27.

232. 12 Stat. 255 sq., 37th Cong., 1st Sess., ch. 3 sec. 4 at p. 256.

233. *Id.* sec. 5 at p. 257.

234. This provision of the Constitution is cited at note 155 above. Its relationship to definitions of "piracy" was not considered at the Constitutional Convention of 1787 as far as available records show.

235. The Proclamation of 19 April recites that "[A] combination of persons, engaged in such insurrection, have threatened to grant pretended letters of marque to authorize the bearers thereof to commit assaults on the lives, vessels, and property of good citizens of the country lawfully engaged in commerce on the high seas." Proclamation No. 4 cited at note 230 above. The Proclamation seems to assume that the Confederate States' authorities had no legal powers at all.

236. The Prize Cases, 67 U.S. (2 Black) 635 (1862).

237. He was joined by Justices James Wayne of Georgia, Noah Swayne of Ohio, Samuel Miller of Iowa and David Davis of Illinois.

238. *Op. cit.* note 236 at pp. 666, 669.

239. *Id.* 669, citing the *Santissima Trinidad* discussed in text at notes 201 sq. above.

240. *Id.* 673.

241. *Id.*

242. That question created serious difficulties between the Union and Great Britain, when an American warship exercising belligerent rights to interdict contraband on neutral ships on the high seas removed as such "contraband" from the "Trent," a British ship, two Confederate emissaries, James Murray Mason and John Slidell. They were released after strenous British protest regarding the belligerent right of the Confederacy to send representatives abroad with diplomatic status, even if not received as the representatives of a "state" by any host government, and the impermissability of the Union exercising "belligerent" rights against neutrals while denying that a legal status of "belligerency" existed which would endow the other side with symmetrical rights. 7 Moore, *Digest* 626-630, 768-779; Adams, *The Education of Henry Adams* (1907-1918) 119-127. The Union Government (Secretary of State Seward) quickly apologized to Great Britain on the ground that even if there were a status of belligerency, this capture would have gone too far because there was no Prize court condemnation of Mason and Slidell as contraband. Mason and Slidell were released, thus implying the British were right, but avoiding a clear resolution of the labeling dilemma.

243. The Prize Cases, cited note 236 above, 647-680. There is much interesting detail omitted concerning the law of blockade, but that is not the subject of this study. The release of the *Crenshaw*'s cargo seems to confuse the law of blockade with the law permitting belligerent interdiction of only enemy property and neutral or friendly contraband on high seas.

244. The others joining with Justice Nelson were Roger Taney of Maryland (the Chief Justice and author of the Dred Scott decision), John Catron of Tennessee and Nathan Clifford of Maine.

245. The Prize Cases, cited note 236 above, 685-698.

246. Dole v. New England Mutual Marine Ins. Co., 88 Mass. (6 Allen) 373 (1863), 18 Deak 301.

247. *Id.* 309-310.

248. Dole v. Merchants' Mutual Ins. Co., 51 Me. 465 (1863), 18 Deak 314.

249. *Id.* 318, 326. Six judges concurred in the majority decision. Two dissented "holding that the taking was piratical, but not a capture . . . as understood in contracts of insurance." *Id.* 326.

250. Fifield v. Insurance Co. of State of Pennsylvania, 47 Pa. 166 (1864), 18 Deak 327.

251. *Id.* 329.
252. *Id.* 332.
253. *Id.* 332-333. See also 2 Moore, *Digest*, 1082-1083.
254. *Id.* 333.
255. See text at note 253 above. For a bit more on the incident, see 2 Moore, *Digest* 1082-1083, where it is also noted that problems of third countries classifying Confederate commissioners as "privateers" led the Confederacy to place all its raiders under the command of regularly commissioned Confederate Navy officers. Those problems did not relate to "recognition," or they would have survived the switch in subordination. They related instead to the terms of the 1856 Paris Declaration, cited at note 231 above, under which it had been agreed by the signatories (not including the United States) that "Privateering is, and remains, abolished." The Confederate States were obviously not in a political position that would enable them to carry on the diplomatic correspondence necessary to contest the application to them of this statement of general international law ("and remains") regardless of the arguments available to the United States and the Confederate States on the point.
256. 2 Moore, *Digest* 1079-1080.
257. The jury nonetheless found him guilty; Burley was either permitted to escape or to forfeit a small bail (the facts are not clear). 2 Moore, *Digest* 1081-1082.
258. 30 Fed. Cas. 1049, No. 18,277 (16 October 1861).
259. *Id.* 1049-1050.
260. Cited above at notes 35, 87 (extending the Act of 1819, cited at note 85) and 146.
261. U.S. v. Baker and Others (1861), 5 Blatchford, *Cases in Prize* 6 (1866) at 12, 14.
262. *Id.* 14.
263. *Id.* 15.
264. In re Tivnan and others, 5 Best and Smith 645 (1864). Lauterpacht, *Recognition in International Law* (1947) 302 note 3 refers to this case as In re Ternan and Others, citing 33 L.J.M.C. 201. It is not known whether the difference in name is an error by Best & Smith, the *Law Journal for Maritime Cases*, or Lauterpacht himself. 2 Moore, *Digest* 1080 refers to it as In re Tivnan.
265. 93 CTS 415; the treaty had been enacted as statute law in England by 6 & 7 Vict. c. 76 (1843).
266. Both England and the United States restrict the powers of their respective executives to "extradite" anybody for anything to those situations in which the executive authorities are authorized by municipal law under the respective constitutions to seize and transfer custody of an individual. 6 Whiteman, *Digest of International Law* (1968) 727 sq..
267. See above at notes II-32, III-44.
268. In re Tivnan, *op. cit.* note 264 above, at 685.
269. *Id.* 686 at 689 (Blackburn), 690-696 (Shee).
270. *Id.* 675 at 679-681.
271. U.S. v. Pedro Gilbert & Others, cited at note 69 above.
272. An identical result was reached in a Canadian case in 1863, the *Chesapeake, 2 Moore, Digest* 1080-1081.
273. Ford v. Surget, 97 U.S. 594 (1878). As a matter of executive interpretation, within the United States, the decision was made by 1872 not to try the Confederate privateers, including Captain Semmes of the *Alabama*, as pirates, at least in part on the ground that the blockade of 1861 had established a status of belligerency with which the legal notion of "piracy" was considered incompatible. 2 Moore, *Digest* 1082-1083.
274. Ford v. Surget, p. 605.
275. *Id.* 608.
276. *Id.* 618-620, citing the two Dole cases and the Fifield case discussed briefly at notes 246-254 above, and, among others: Dole v. New England Ins. Co., 2 Cliff. 394; Planters' Bank v. Union Bank, 83 U.S. (16 Wall.) 495 (1872); Mauran v. Insurance Co., 73 U.S. (6 Wall.) 1 (1868), 17 Deak 408; Monongahela Ins. Co. v. Chester, 43 Pa. St. 49; Hamilton v. Dillin, 88 U.S. (21 Wall.) 78 (1875); and Horn v. Lockhart, 84 U.S. (17 Wall.) 578 (1873).
277. Ford v. Surget, cited note 273 above, 622.
278. Dana was no stranger to the perils of navigation. In his great narrative of adventure as a sailor in 1834 he mentions outrunning "a small clipper-built brig with a black hull . . . armed, and full of men, and [who] showed no colours" in the South Atlantic about halfway between the Cape Verde Islands and Cape San Roque (Brazil). Dana, *Two Years Before the Mast* (1840) (Enlarged ed. 1869, Everyman reprint 1969) 16-17.
279. Wheaton, *op. cit.* note 192 above.
280. *Id.* 164 note 84 at p. 168.
281. 2 Moore, *Digest* 1086.
282. See note 261 above.
283. 2 Moore, *Digest* 1087.
284. *Id.* 1088.

285. The *Ambrose Light*, 24 F. 408 (S.D. N.Y. 1885), 18 Deak 112.
286. *Id.* 114.
287. *Id.* 117.
288. Cf. 2 Moore, *Digest* 1098-1099.
289. The " positivist" solution to the problem of "recognition" or "non-recognition" reflecting political interests rather than underlying perceptions of law motivating actual state behavior, evidenced well in the Union's giving captured Confederate soldiers and sea raiders *treatment* as prisoners of war, while withholding the formal grant of that *status* and calling them traitors and "pirates," did not come until the 20th century. It is implicit in the reasoning of William Howard Taft as Arbitrator between Great Britain and Costa Rica in the Tinoco Arbitration (1923), 18 AJIL 147 (1924), holding the British refusal to "recognize" Tinoco as the government of Costa Rica for political reasons did not derogate from the legal effect of British acts implying acceptance of Tinoco's position in Costa Rica. It is explicit in Kelsen's clear separation of "recognition" as a political act from "recognition" as a legal act. Kelsen, Recognition in International Law—Theoretical Observations, 35 AJIL 605 (1941). It is possible to go even further to distinguish "recognition" as a moral act from the other spheres. But that brings us to a realm of discussion unnecessary to enter in this study.

IV

British Practice in the Nineteenth Century

Eurocentrism and British Imperial Law

British 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.[1]

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)[2] 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,[3] 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.[4]

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

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,[5] 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.[6] 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.[7]

In the United Kingdom as in the United States in the 1780s to 1820s[8] 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.[9] 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 Wroclau, 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."[10] 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."[11] 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.[12]

"Pirates" as Permanent Enemies in British Imperial Law

The Legal Rationale for Naval Action. It was noted above[13] 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.[14]

As has been seen, this argument was rejected by France, Portugal and the leading British Admiralty judge of the time, Sir William Scott.[15] 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"[16] 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,[17] 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[18] on the other hand.[19] 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,[20] Parliament in 1803 introduced a substantial money inducement. The Act of 1803[21] 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 . . . . [22]

This statute was superseded two years later but the language of this section was repeated verbatim in Section V of the new statute.[23]

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.[24]

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.[25] 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*"[26] 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.[27] 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.[28]

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."[29] 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.[30] 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.[31]

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 . . .[32]

Pending their acceding to this agreement, other Persian Gulf Sheikdoms agreed to various "preliminary treaties" at about the same time.[33] 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.[34] 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."[35]

A sixth "preliminary treaty," with the Sheikh of "Aboo Dhebbee" 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 Dhebbee 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.[36]

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."[37]

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.[38]

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,[39] 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.[40] 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.[41] 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.[42]

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,[43] 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,[44] and it can be suggested in light of the remarks of Sir T.S. Raffles[45] 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."[46] 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."[47] 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.[48] 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.[49] 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 . . . ?"[50]

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.[51]

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.[52] 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 . . . "[53]

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[54] 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.[55] 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 Sheikhdoms 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.[56] 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."[57] 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 . . ."[58] and a formal Proclamation of Neutrality for the Ionian Islands was issued by the High Commissioner on 7 October 1821.[59] Interestingly, there is no record of any equivalent formal British announcement near this time although internal British documents imply it.[60]

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.[61] Lord Liverpool, the Prime Minister,[62] 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.[63] 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 cruizing 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.[64]

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,[65] and on 25 March of that year the new "Provisional Government" of Greece declared a "blockade" of some Turkish ports.[66] 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.[67]

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]occasionally 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.[68]

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."[69] 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.[70] 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."[71]

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"[72] 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."[73] 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."[74]

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.[75]

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.[76]

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.[77]

It was apparently but a short step for British naval officers, encouraged by the Bounty Act of 1825[78] 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.[79] 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).[80]

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] Goverment is principally occasioned by their refusing to sanction cruising.[81]

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 Suitto 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.[82]

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.[83]

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.[84]

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.[85]

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.[86]

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."[87] 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.[88]

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. . . . [89]

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.[90] 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.[91]

The "plunder" was promised to be restored to its rightful owners by the Greek authorities.[92] 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.[93] 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,[94] 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[95] 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.[96] The word was used in 1717 by William Dampier to refer to Malays who interfered with shipping in the Straits of Malacca in 1689.[97] 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.[98]

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.[99] 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.[100] 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.[101]

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."[102] 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.[103]

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.[104]

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."[105] 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.[106] 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.[107] 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.[108] 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.[109]

In fact, the easy "legal" solution suggested after the fact by Nahuijs would not likely have left the Dutch with no counterarguments,[110] 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.[111] 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.[112]

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,"[113] 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."[114] 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.[115]

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.[116] The raid was repeated in April and May 1827.[117] 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.[118]

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."[119]

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.[120]

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.[121]

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.[122] 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."[123]

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,[124] 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.[125]

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.[126] 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."[127] "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 politicl 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.[128]

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.[129] 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.[130] The Supreme Government did not accept this Thai classification,[131] 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.[132]

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."[133] The result was an acquittal for Mohamed Saad and his companions.[134]

The specific charge was the forcible capture of a boat on "the high seas" on 8 July 1840,[135] 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.[136] 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[137] and a charge by Leoline Jenkins[138] appear among other citations.[139] 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.[140]

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.[141] 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.[142]

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[143] and in Scotland for forty years after the Act of Union of 1707[144] 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.[145]

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.[146]

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.[147]

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.[148]

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.[149]

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.[150]

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[151] who could contrive to fit out a prow [native vessel; usually spelled prahu in modern writings] was at liberty to cruize 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.[152]

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.[153] 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.[154]

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,[155] 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[156] and in the waters adjacent to the Malay Peninsula.[157] It is, of course, unnecessary to repeat that story here. But the implications on the evolution of legal conceptions have never been fully analyzed[158] 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.[159]

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.[160] The decision of the Court of Admiralty was written by Dr. Lushington and delivered in 1845 under the name *Serhassan (Pirates)*.[161] 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."[162]

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.[163]

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 . . . [164]

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.[165]

The Bounty Act of 1825 was in fact repealed on 25 June 1850[166] 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)[167] 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.[168] 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.[169] 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 . . . [170]

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[171] Dr. Lushington held that it was irrelevant whether the taking in Chile had been by insurgents or "pirates"[172] 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.[173]

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."[174] 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.[175]

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.[176]

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[177] 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.[178]

This view, directly at odds with the American position adopted in U.S. v. Klintock,[179] 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)[180] 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.[181]

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."[182] 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.[183]

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.[184]

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"[185] 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."[186]

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.[187]

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.[188] 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,[189] 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,[190] and their jurisdiction to apply Chilean law to Chilean nationals acting in Chilean territory, despite the claims of belligerent rights, was undoubtable.[191]

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,[192] the representatives of Venice,[193] and the original British owner of the *Helena* before Lord Stowell in 1801.[194] The vernacular use of the word "pirate" by the East India Company people in the Persian Gulf in the 1820s, as has been seen,[195] 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.[196] 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,[197] and in disregard of the same factors that led to the acquittal of Mohamed Saad in Penang in 1840,[198] 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.[199] 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.[200]

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.[201] 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.[202]

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.[203] 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 jursidiction" than that paragraph. Obviously, there had been a complete reversal of position from the days of the *Mohamed Saad* case[204] 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.[205]

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.[206] 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.[207] 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.[208] 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.[209]

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[210] 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*.[211] 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.[212] The article of that treaty requiring China to capture and punish "pirates" who plunder any British merchant vessel[213] 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."[214] 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.[215] 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*.[216] Kwok-a-Sing was held for trial as a "pirate" *jure gentium* in Hong Kong.[217] 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*[218] 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).[219] 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 *animum 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.[220]

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.[221]

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.[222]

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 cruizers or troops, and they will hand over to the Turkish officials all offenders captured in Turkish jurisdiction.[223]

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,[224] 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,[225] 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 what 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.[226]

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.[227] 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 cruizing 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.[228]

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[229] 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[230] after the Mohamed Saad case[231] 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[232] and a dip into some primary sources of the early 1870s that have been misconstrued or ignored by historians will make the argument complete.[233]

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[234] 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.[235] 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[236] 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[237] 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.[238]

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."[239] 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 . . .,[240] 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.[241]
>
> 1 P.M., . . . proceeded, with junk in tow, for Penang, where she now lays [*sic*; lies?] in safety.[242]

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.[243]

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.[244]
>
> [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.[245]

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.[245]

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.[247]

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.[248] 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 sulanate.[249] Lord Kimberley approved "general countenance and support" for the Sultan and Oodin, but drew the line at "material assistance."[250] Nonetheless, Commander obinson 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.[251]

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.[252]

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.[253] 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[254] 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,[255] 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.[256] 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.[257] 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."[258]

Maxwell, responding directly to "Singaporean" in the Times, apparently before he had seen the Times lead article,[259] 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.[260] 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,[261] 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 Malayria.'[262]

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,[263] 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.[264]

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.[265]

Commander Blomfield[266] 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.[267]

Without resolving the question of who was or was not a "pirate" in the contemplation of British naval authorities,[268] 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."[269] 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.[270] 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."[271] 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."[272] Ord asked Logan to reconsider his opinion on the ground that the authority of the Sultan had been effectively superseded by anarchy.[273] 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."[274] 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.[275]

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.[276]

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.[277]

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.[278]

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.[279] 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."[280]

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.[281]

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.[282]

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.[283] 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.[284] 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."[285]

On 15 February 1874 the tribunal under Tunku Dia Oodin and in the presence of the two British Commissioners found all eight accused[286] 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.[287]

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 concommitant 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.[288] 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 pretentions 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.[289] 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.[290] 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 sultantates 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.[291]

The Huascar Incident. On 6 May 1877 the crew of the Peruvian warship *Huascar* mutinied an 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.[292] 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.[293] 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.[294]

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),[295] 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.[296]

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.[297]

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.[298]

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.[299] 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.[300]

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.[301] 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.[302]

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.[303] 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.[304]

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.[305]

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[306] 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.[307]

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.[303]

This view was debated twice in Parliament on 7 August and 11 August 1877, primarily by Sir William Harcourt,[309] who attacked the Attorney General, Sir John Holker,[310] 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."[311]

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.*"[312] It does not appear to have been noticed in the debate that the original language does not refer to "*pirata*" at all, but "*latrones*;"[313] 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.[314] 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.[315]

This language, clearly taken verbatim from Drummond-Hay's translation of Zegarra's note of 22 May 1877,[316] 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.[317]

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.[318] 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."[319] 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.[320] 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 *animum 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 *animo furandi*, and an excuse for political action against unrecognized "rebels" with regard to those without that *animo*. 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"[321] 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.[322]

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."[323] 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 permissable 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,[324] 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.[325] 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.[326]

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.[327]

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,[328] 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.[329]

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,[330] 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.[331] 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 recaption. 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.[332] 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."[333] 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.

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 Sultantate 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 arcere, 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 châtiment sont les seules régles 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 conserve 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 route 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 Wheation) 144 (1820). These cases are discussed in the text at notes III-75 sq. above.

17. R. Zouche, *Iuris et Indiciis Fecialis* (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; but 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 impermissable 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 Coccocci 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) x1iv, x1vii.

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. Nahuijs, 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 Nahuijs 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 pretentions 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 pretentions 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. Dido 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 exhorbitant 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 pretentions 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 *animum 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, Paramountcy 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. Klintock, 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 1985. 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).

V

"Piracy" in the Twentieth Century

"Piracy" by Analogy

Rebels and War Criminals. It was observed above[1] that Dr. Stephen Lushington interpreted the British Bounty Acts of 1825 and 1850 to incorporate into British legislation an intention of the Parliament to label any acts of robbery or murder upon the high seas, as "piratical acts" for the purposes of the bounty and further applied the 1850 act to "murder" not on the high seas but in the territory of Chile. It has been seen at some length that this particularly British confusion between "piracy" as a vague pejorative and a "piracy" as a technical word applicable to criminal offenses within the historical jurisdiction of British Admiralty tribunals, underlay many political decisions. The word was applied to acts outside of any British jurisdiction under the normal distribution of legal powers in the international legal order; it came to be used routinely by British policy-makers and naval officers with regard to nearly any acts of foreigners against whom some forcible political action was directed. Although the implied reference to criminal law seemed to confuse only the British users of the word "piracy," who frequently found themselves in the political difficulties their use of a word drawn from the criminal law had been intended to avoid, the word appears to have re-entered the vocabulary of international lawyers by the end of the nineteenth century with meanings varying from the technical one relating to the criminal law applied in Admiralty tribunals to the most vague and general. It is not the object of this study to re-examine the definitions of "piracy" proposed, or simply asserted, by learned publicists in order to criticize their knowledge of history or their legal scholarship, but the reader must be warned that the word was used increasingly towards the end of the nineteenth century in ways totally unsupported by scholarly analysis. Lushington's usage gradually became the common usage of statesmen and publicists, while in fact never applied in any known cases when the issue of definition as a matter of international law was squarely presented. Indeed, even the usage of statesmen in contexts in which a negotiation among European states was involved was evasive and not the usage approved so offhandedly by Lushington and the less contemplative men of action.

The use of the word "piracy" with regard to foreign officials remained as it existed in the nearly nineteenth century and supported by the *Magellan Pirates* decision's dicta, a pejorative applied to non-European and unrecognized rebel military forces to which the statesmen wished to attach a sense of illegality under international law. The Barbary states came to be routinely considered "piratical" in late nineteenth century writings without analysis of the actual treatment given their governments by European statesmen or the legal writings of scholars of the seventeenth and eighteenth centuries distinguishing between the common pejorative usage and the position in the international legal order actually accorded in practice to the governments, title adjudications, privateering licenses and other official acts performed by the constitutional authorities of those "states" affecting foreign interests. The failures in practice to encourage non-European societies to conform their behavior to the needs of European commerce by calling their military arms, or even their governments, "piratical," appears not to have been noticed by statesmen, who persisted in using the word "piracy" and its derivatives to refer generally to illegality under international law, but in the ultimate moment in every known case either to withdraw from that usage, withhold the legal results that they had argued should flow from it, or to apply the law of war to the conflicts that ensued.[2]

At the same time, the use of the word "piratical" to describe acts that would be "war crimes" were it conceded that the law of war applied, seemed to increase. Ironically, the first known usage clearly in that context was in the Lieber Code, General Orders No. 100 of the United States Federal Army promulgated by President Lincoln on 24 April 1863.[3] The irony exists in the fact that the Lieber Code itself was regarded from the very first as a codification of the international law of war, although issued in a conflict in which the Federal Government of the United States did not consider the Confederate forces to be entitled to the status implied by the application of that body of law.[4] The distinction drawn between enemy soldiers who fit the form of classical soldierdom and enemy irregulars, those who commit acts that would be within a soldier's privilege but "without any commission, without being part and portion of the organized army, and without sharing continuously in the war," seems strange in a code issued at a time the Federal authorities insisted that all Confederate soldiers had no privileges by right but were treated as if they had such privileges only as a matter of political concession by the Federal Government. But, assuming that the Federal Government had by implication accepted the law appropriate to true "belligerency" by 1863 as the legal regime best suited to the facts even without expressly saying so, it is interesting to note the reference to "pirates:"

> Men, or squads of men, who commit hostilities, whether by fighting . . . or by raids of any kind, without commission, without being part and portion of the organized army, and without sharing continuously in the war, but who do so with intermittent return to

> their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers—such men, or squads of men, are not public enemies, and, therefore, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.[5]

It is noteworthy that these "unprivileged belligerents" were not considered to be "highwaymen or pirates," but only to be treated as if they were; their status was determined by analogy and the legal label was not given them directly.

It is tempting to see in this innovative usage a compromise between the excessive language of polemicists and the scholarship of Francis Lieber and his learned panel of revisers.[6]

The analogy is dropped without explanation in the succeeding partial codifications of the laws of war and there is no mention of "pirates" in the Brussels Rules of 1874, the Oxford Manual of 1880 or the great Hague Conventions of 1899 and 1907.[7] Instead, those who act beyond the privileges of soldiers may legally be treated as war criminals under the laws of war as administered by the courts of the capturing power, and those who are determined not to have the privileges of soldiers at all are subject to the "normal" criminal laws of the state into whose hands they have fallen; the charges against them would not be "piracy" or "highway robbery" unless those laws so provided as a matter of municipal law, and no implication of international purview over the definition of their offenses would exist.

The word "piracy" pops up again in connection with the laws of war as a semi-learned response to the excesses felt by the British to flow from the invention of the submarine as a commerce-destroying weapon applied during the First World war. At the Washington Conference of 1922 on the Limitation of Armaments, the United States, Great Britain, France, Italy and Japan agreed that the general international law of war forbade the destruction of a merchant ship "unless the crew and passengers have been first placed in safety," and specifically affirmed that this rule applied to belligerent submarines.[8] Going further, the signatories declared that:

> [A]ny person in the service of any Power who shall violate any of those rules, whether or not such person is under orders of a governmental superior, shall be deemed to have violated the laws of war and shall be liable to trial and punishment as if for an act of piracy and may be brought to trial before the civil or military authorities of any Power within the jurisdiction of which he may be found.[9]

This language seems extremely confusing. "Piracy" is not a "war crime" historically or by any known definition applied in diplomatic practice or court case. Indeed, the term "piracy" was historically used to distinguish those who fought as privateers under the laws of war and those who had no valid commissions or sailed under the commissions of unrecognized powers and thus were subject not at all to the laws of war but to the normal criminal law of some state with the necessary legal interest to try them.[10]

It has been noted that the form of commission lost importance over time, and the essential question in the universal "natural" municipal laws of "piracy" became whether the accused "pirate" had an intention to rob for his own ends (*animo furandi*), failing which he was not a "pirate" regardless of defects in his commission.[11] It has also been noted that as a matter of public international law, attempts to draw the legal results of municipal law "piracy" with the added twist of universal jurisdiction failed both as to the expansion of jurisdiction beyond the case of stateless "pirates" and as to the extension of any protective jurisdiction on the high seas beyond ships of the flag and individuals who are nationals of the state seeking to exercise that jurisdiction.[12] Now, under the 1922 formula, the major victorious allies of the First World War seem to have tried by treaty among themselves alone to forbid states even to issue commissions or order the use of submarines against merchant ships, and to make those acting under the authority of those invalid commissions or illegal orders not only "war criminals," who would be subject to punishment only by a state with the requisite "standing" to apply the law of war to the individual concerned, but in other ways analogous to a "pirate." This presumed that as a matter of international law "piracy" and "war criminality" were somehow similar, which is not evident, and that one legal result of attaching the label "pirate" by analogy ("*as if* for an act of piracy") was universal jurisdiction in states with no legal interest in the matter beyond finding the accused within their territory.[13] The language of the 1922 Conference has been variously construed, but in fact has never been applied to a submariner.[14] In the Treaty for the Limitation and Reduction of Naval Armaments signed at London on 22 April 1930, Part IV, article 22 repeats the substance of article 1 of the 1922 Conference's Final Act, but does not repeat the analogy to "piracy."[15] Nor does that analogy reappear in the Procès-Verbal of 6 November 1936 which continued the terms of the 1930 Treaty and vastly expanded the number of states parties to that statement of substantive law.[16]

The analogy of submarine warfare against merchant ships to "piracy" was revived to some extent by the Nyon Agreement of 1937. That Agreement among nine "Mediterranean" states, including Bulgaria, Rumania and the USSR, but excluding the United States, Germany and Italy, repeats the "piracy" analogy in its Preamble:

> Whereas arising out of the Spanish conflict attacks have been repeatedly committed in the Mediterranean by submarines against merchant ships not belonging to either of the conflicting Spanish parties; and
>
> Whereas these attacks are violations of the rules of international law referred to in Part IV of the Treaty of London of 22 April 1930 . . . and constitute acts contrary to the most elementary dictates of humanity, which should be justly treated as acts of piracy; and
>
> Whereas . . . it is necessary in the first place to agree upon certain special collective measures against piratical acts by submarines . . .[17]

But in the operative text, there is no mention of "piracy" or "piratical acts." Submarines believed to have attacked neutral merchant vessels in disregard of the 1930 and 1936 Rules, it is provided, "shall be counter-attacked and, if possible, destroyed," but there is no provision for criminal trials of their officers or crew. Nor is there any assertion of universal jurisdiction, although special rights of operation are asserted by the British and French fleets on the high seas within the Mediterranean, and access to the Mediterranean ports of other states parties to the Agreement is provided. Whether those special rights went beyond the bounds of British and French rights under general international law seems doubtful, and, of course, the access provisions are a matter of agreement only. On the other hand, the assumption of a legal authority to clear the seas of commerce-destroying submarines that had not attacked the merchant ships of Great Britain or France or any of the other parties to the Nyon Agreement does seem to have assumed some special jurisdiction in Great Britain and France outside the scope of the Agreement itself. Unless Great Britain and France were willing to concede the same military jurisdiction to a non-party, like Italy, however, the jurisdiction would not seem properly to be considered an extension of "universal" jurisdiction to "piratical" submarines, but a continued British assertion, now shared with France, of a special authority to safeguard international commerce based on the special interest, military strength and moral assertiveness of the British alone.[18] There is no known evidence of the British and French attitude towards Italian or other non-party assertions of the jurisdiction asserted by the British and French, but it may be noteworthy that the Nyon Agreement itself does not mention "universal jurisdiction" or give any legal basis for the British and French activities outside of the operative terms of the document. If an analogy is sought to prior state practice in the face of asserted belligerent rights against neutral merchant shipping, under which the affected neutrals banded together to police the seas, the closest historically might be the so-called "armed neutralities" of 1780 and 1800.[19]

Without excessive research in England it is impossible to discover the origin of the references to "piracy" and "piratical acts" in the Preamble to the Nyon Agreement, but the clauses in which they appear both look like late additions to the text and seem to reflect British positions trying to turn the political use of the word "piracy" into some legal rule. Since the words do not appear in the operative text, and the legal conception that might underlie them seems unnecessary to explain the conceptions that support the Agreement itself, the point seems not worth further discussion. It might be significant that three days after the conclusion of the Nyon Agreement, a Supplementary Agreement was concluded at Geneva by the same nine powers which again in the Preamble refers to "piratical acts by submarines in the Mediterranean," but extends the terms of the Nyon Agreements, including its special policing authority for the British and French, to "similar

attacks" on neutral merchant ships in the Mediterranean by surface ships or aircraft.[20] No legal basis or legal result seems to exist to give meaning in law to the phrase "piratical acts" in this context. It looks more like the attempts seen in the United States and Great Britain throughout the nineteenth century to somehow involve "war criminals," or unrecognized belligerents not acting *animo furandi* while interfering with peaceful commerce, in a legal category of common crime, with the enforcement left to British or American ships as a matter of immediate political and military action, to the exclusion of the courts. As such, rather than reflecting universal jurisdiction to apply municipal criminal law, it seems to reflect a conception of special military or political rights to impose order on the high seas in the interests of general commerce and to confine rebellion to national borders of a single state, to the profit of third country merchants. It seems clear from the silence of the operative texts concluded at Nyon that not all of the countries represented there agreed that the word "piratical" had any place in the legal rationale for their concurrences.

In the Western Hemisphere, there is direct evidence that states rejected the concept of "piracy" as appropriate to acts that did not involve the *animum furandi* without in any way limiting the legal power of a state to call its rebels "pirates" for the purposes of its own municipal law, as England had done in the 1690s and for some purposes under the Act of 1700,[21] and the Federal Government of the United States had done in 1861-1864,[22] and as Peru had *not* done in 1877.[23] On 20 February 1928, 20 states of Latin America plus the United States signed[24] the Havana Convention on Civil Strife.[25] Ratifications include 13 between 1929 and 1937, 2 in 1945, 2 in 1950 and 1 in 1957. Article 2 of that Convention says: "The declaration of piracy against vessels which have risen in arms, emanating from a Government, is not binding upon the other States." On the one hand, this could be regarded as a mere statement of the self-evident positivist position that each state has an equal power with all other states to classify events in legal terms as suits each classifying state's policy and perceptions; it does not prevent any state from labeling rebel ships as "piratical." On the other hand, article 2 of the Convention continues:

> The State that may be injured by depredations originating from insurgent vessels is entitled to adopt the following punitive measures against them: Should the authors of the damages be warships, it may capture and return them to the Government of the State to which they belong, for their trial; should the damage originate with merchantmen, the injured State may capture and subject them to the appropriate penal laws.
>
> The insurgent vessel . . . which flies the flag of a foreign country . . . may also be captured and tried by the State of said flag.[26]

This specification of the state receiving the injury and the state whose flag is flown as the states to apply their criminal laws to the insurgents strongly implies that third states have no business in the affair; that universal

jurisdiction does not exist and that the law to be applied is the municipal law of the capturing state.

This impression is confirmed by article 3 of the Convention, which provides that an insurgent vessel arriving in a foreign country (presumably any country not suffering depredations and not the flag state of the vessel) shall return the vessel and consider the crew "as political refugees."[27] There is no hint of criminality.

Aircraft Hijacking. Aside from polemical writings, there appears to be only one other situation in the twentieth century in which "piracy" has been spoken of seriously as a living legal conception applicable in circumstances analogous to what was presumed to be "classical" "piracy." That was the situation of aerial hijacking.

The notion that aircraft could be seized by people of unknown nationality or no nationality, or subordinate to no recognized licensing authority, and that such seized aircraft could interfere with air navigation over the high seas, Antarctica or other parts of the globe outside the territorial jurisdiction of any particular state, makes it possible to consider that the reasons supporting an international law of "piracy" might apply as well to aircraft as to ships. In the attempts to codify the supposed public international law of "piracy" culminating in articles 14-22 of the 1958 Geneva Convention on the High Seas[28] aircraft came to be included with ships as if equally susceptible to "piratical" seizure and uses. Thus, when in the 1960s several incidents arose involving the seizure of commercial aircraft by passengers seeking to divert them for their own purposes to some country other than the one which their operators had intended, and some commercial aircraft seizures were made with the apparent intention of making some political statement, or drawing public attention to the real or fancied grievances of some political movement or individual, the phrase "aircraft piracy" came into vogue in the United States and elsewhere.[29] Nonetheless, in the legal action taken by states in the international plane to control this interference with international commerce, the word "piracy" and its presumed legal results were not used.[30] Instead, in the Convention on Offenses and Certain Other Acts Committed on Board Aircraft signed at Tokyo on 14 September 1963[31] municipal jurisdiction and municipal substantive law were taken as the basis for the control of unauthorized actions on board aircraft in flight or outside national territorial jurisdiction. As to jurisdiction, the state of registry of the aircraft was confirmed in its competence to exercise jurisdiction to enforce its municipal criminal law prescriptions over offenses and acts committed on board. In addition, "universal" jurisdiction to prescribe was impliedly rejected as contracting states which are not states of registry of the aircraft in which the reprehended act has occurred were forbidden to interfere with the aircraft in flight, even over their territory, thus within the enforcement jurisdiction of

the state, except for five situations: (a) the offense has effect on the territory of the interfering state; (b) the offense has been committed against a national or permanent resident of that state; (c) the offense is against the security of that state; (d) the offense consists of a breach of rules relating to the flight of the aircraft within that state; or (e) the exercise of jurisdiction is necessary to ensure the observation of a multilateral international agreement by that state.[32] All of these categories seem vague enough, but all seem linked to traditional bases for municipal criminal law prescriptive jurisdiction[33] and require legal "standing," some special interest in the situation to warrant action other than the general interest of all states in the safety of international civil aviation.

The most far-reaching provisions of the Tokyo Convention do not really go to questions of criminal jurisdiction at all, but to the authority of an aircraft commander to discharge a passenger on foreign territory, and the obligation of the state in whose territory the person is disembarked to receive him and detain him until the normal criminal law of some state with jurisdiction to prescribe has been examined and extradition, if appropriate, or trial in the state of disembarkation, if appropriate, has been set in motion.[34]

The offenses coming within this jurisdictional arrangement are any offenses against the penal law of any state which, under the Convention, has jurisdiction to prescribe, and "acts which, whether or not they are offenses, may or do jeopardize the safety of the aircraft or of persons or property therein . . . "[35] The conceptual framework thus seems not to involve any abstract uniform definition of "piracy" unless acts which may jeopardize the safety of the aircraft or of persons or property in it are classified by some pertinent state's municipal law with that label. But since those acts might well include acts which are not criminal under any known conception of criminal law, such as the uncontrollable fit of a person incompetent to control his actions, or simply obstreperous drunkenness, it is very difficult to see in this language an attempt to define "piracy." The reference to offenses against the penal law of any state having jurisdiction under the Convention to prescribe offenses seems reminiscent of the most expansive position taken by Justice Story in the United States in 1812[36] and rejected by the Supreme Court including Story himself.[37]

It would appear that the Tokyo Convention viewed this way is not addressed to any questions of substantive criminal law, but to questions of the safety of civil aviation. It resolves those questions by encouraging states to exercise their existing prescriptive jurisdictions based on linkages between the place of the act, the nationality of the actors and their victims, and the impact of the act on the territory of the state involved, but does not assert any "universal jurisdiction" that could involve states which are strangers to the incident in the enforcement processes of the law. It does not define any criminal acts at all, but encourages states to use their existing penal codes in

cases within their jurisdiction, and, in its one innovation, requires states to receive obstreperous passengers or crew members whose acts might endanger flight safety; but not for the purpose of criminal proceedings (unless otherwise based). The obstreperous passenger, if not otherwise to be tried or extradited for trial on the basis of existing national penal laws and extradition treaties, is to be released promptly.[38]

A far more innovative approach was taken in the Hague Convention of 16 December 1970 for the Suppression of Unlawful Seizure of Aircraft.[39] That Convention does not use the word "piracy," but instead defines in general terms "the offense":

Any person who on board an aircraft in flight:

(a) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act, or
(b) is an accomplice of a person who performs or attempts to perform any such act,
(c) commits an offense (hereinafter referred to as "the offense").[40]

Each contracting party is bound to make "the offense" punishable "by severe penalties."[41] The United States has done so by directly referring to the Convention in a statute making the commission of "'an offense,' as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft" punishable by "not less than 20 years" imprisonment.[42] Oddly, the American statute goes on to repeat verbatim the definition of the offense as set out above.[43] Presumably the intention was merely to set out in American municipal law what the elements of the offense were to be, and the incorporation by reference to the Convention was to assure that the definition would be regarded as the discharge of American obligations under Article 2 of the Convention and to assure that the definition of the offense would be interpreted in the light of the international negotiation, not merely the American interpretation of it.[44]

In fact, the interpretation of the Convention's definitional article is not free from doubt. What, for example, does the word "unlawfully" refer to? If "unlawful" under the law of the flag state alone, the definition would seem to require states to cooperate in the suppression of revolution, where the rebels seize the aircraft as an act of what they regard as lawful war not subject to the flag state's municipal law, and the defending government regards as an act of municipal law robbery or treason. Indeed, rebellion is not the only situation in which the question would arise; any enemy seizure in the claimed exercise of belligerent rights would be "unlawful" under the law of the state whose aircraft is seized. yet it is most unlikely that the parties to the Convention were attempting to insulate civil aviation entirely from the vicissitudes of military action.

If, on the other hand, "unlawful" is intended to refer to "international law," then belligerents might have the authority to seize enemy flag civil aircraft (or even neutral flag civil aircraft in some circumstances, for

example, to prevent the flow of contraband to blockaded territory). But then the legitimacy of the seizure would seem to depend on whether the state interpreting the Convention in any particular case "recognized" the belligerent status of the organization authorizing the seizure. It seems unlikely that much additional security to international civil aviation would result as long as the group doing the seizing had influential political sympathizers in a potential state of landing. Moreover, questions such as the validity and extent of the "authorization" would become significant, and the same issues would arise that resulted in the eventual abandonment of the "lack of license" condition as an element of the classical British (and possibly international) law of "piracy."[45] These doubts are in large part resolved as a result of dropping the *animo furandi* qualification of British municipal law as it had been applied in British assertions of international law, and then abandoned as the world "piracy" came increasingly to be used as a mere excuse for political action unjustifiable under any concept of legal tradition limiting the policing jurisdiction of states with no direct legal interest in a particular incident.[46] The legal effect of dropping "*animo furandi*" as an essential element of the "international crime" of civil aircraft hijacking is apparently to inject the international community into political matters that might have been confined to a single state or small group of states.

That is the Convention's great innovation. Civil aviation by widely accepted treaty seems now to be, at least among the parties to the Convention not uttering reservations dealing with political motivation,[47] legally protected from interference on the basis of substantive law analogous to the legal rules asserted to underlie the protection maritime states claimed was owed to merchant shipping on the high seas in the seventeenth and eighteenth centuries. Civil aviation is, as it were, "neutral" with regard to political struggles among recognized belligerents and its liability to seizure determined by the laws and customs of war in that context. In the absence of "belligerency," the "lawfulness" of the seizure by a group whose status in the international legal order is "unrecognized" by another state is, as far as that other state is concerned, non-existent for lack of an authority competent to issue a license either under any municipal law or under international law. In neither case is motive or intention, *animus furandi*, pertinent to triggering the legal obligations of the states parties to the Convention.

The jurisdictional provisions, article 4, of the Convention approach "universality" in a way that only Justice Joseph Story and other extreme "naturalists" would have found congenial:

> 1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offense or any other act of violence against passengers or crew committed by the alleged offender in connection with the offense, in the following cases:
>
> (a) when the offense is committed on board an aircraft registered in that State;

(b) when the aircraft on board which the offense is committed lands in its territory with the alleged offender still on board;

(c) when the offense is committed on board an aircraft leased without crew to a lessee who has his principal place of business . . . in that State.

2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offense in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article . . . [48]

Article 8, in pertinent part, says:

1. The offense shall be deemed to be included as an extraditable offense in any extradition treaty existing between Contracting States . . .

But the full impact of Article 4.2 cannot be understood unless read inconjunction with yet another provision of the Convention, article 7:

The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offense was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offense of a serious nature under the law of the State.[49]

The intention seems clear to make the state in which the offender is found legally competent to try him even in the absence of other contacts between the offender or the offense and that state. This is the jurisdiction asserted historically in the case of piracy only by "naturalist" jurists, and applied as far as can be told from the present research, only very few times.[50]

Since the "universal" jurisdiction provided in the case of aerial hijacking is provided by treaty, and is not necessarily a reflection of any underlying conviction of law, the precise legal situation is less clear than might at first appear. If, for example, the "asylum" state refuses to extradite the accused, perhaps for lack of an extradition treaty which article 8 can be considered to amend, there is no obligation in article 7 to try him in the exercise of "universal" jurisdiction, but only to submit the case to the "asylum" state's competent authorities for prosecution. They can still find prosecution undesirable or impossible for lack of evidence or even for lack of jurisdiction over the offense regardless of article 4.2. For example, in the American legislation to implement the Convention in the United States, it is provided:

The subsection shall only be applicable if the place of takeoff or the place of actual landing of the aircraft on board which the offense, as defined . . . [above], is committed is situated outside the territory of the State of registration of that aircraft.[51]

Taken together with other provisions that define the "special aircraft jurisdiction of the United States,"[52] this seems to mean that if a civil aircraft registered outside the United States, and flying between one third state and another, not actually landing in the United States, and not leased to a lessee with a principal place of business or permanent residence in the United States, is hijacked, the United States will still lack a court competent to try the

accused for his offense. It is not known how the United States can argue persuasively that this restrictive view of American jurisdiction in the case of aircraft hijacking discharges American obligations under article 4.2 of the Convention, but if the American legislation is consistent and complete and does discharge American obligations under the Convention, the United States can legally still be a haven state for hijackers who have managed to flee there after the initial landing elsewhere. And if the American legislation is regarded as consistent and complete to discharge American obligations under the Convention, the same haven possibilities must legally exist for other states parties to the Convention. Thus, it appears that the United States, and other states interpreting the Convention as the United States seems to, still reject "universal jurisdiction" in principle, but apply their legal prescriptions in criminal cases only to alleged criminals and acts that have some territorial connection with the "asylum" state.

Two ironies must be pointed out. The establishment of an international consensus requiring states to enact municipal "criminal" laws to forbid acts analogous to the interference with shipping that formed the basis of the British municipal law of "piracy" and the British view of the purported international law of "piracy," reintroduced the conception that to be a "crime" under international law, the taking had to be unauthorized by some sovereign's license, and abandoned the British municipal criminal law requirement that the taking to be "piracy" had to be "*animo furandi.*" This is the reverse of the evolution of the municipal law definition, which had, for reasons and in ways amply discussed above, abandoned the notion of passing on the validity of a foreign license and emphasized instead the motive of private profit as an essential element of the municipal law offense. It remains to be seen whether the word "unlawful" in the Convention and the American implementing legislation will eviscerate the definition, or turn it into a political or international law matter in which the existence of a "license" from a party legally empowered to give it will depend on "recognition" of the "belligerent" status of the hijackers' organization by political officers of the government with custody of the hijackers.

More striking, the rejection in practice by the United States of the "universal jurisdiction" not only permitted, but apparently required, by the Convention, highlights the underlying power of the Westphalian legal order and its implied limits on the prescriptive jurisdiction of states. Story and Wheaton maintained the theoretical possibility that American jurisdiction under the Constitution might extend to the acts of foreigners abroad despite the uneasiness of Marshall, Johnson and others who in practice limited the assertions of jurisdiction to cases in which some American interest could be shown to support that jurisdictional assertion. The limits that the international legal order places upon the reach of any single state's constitution were not bluntly acknowledged by the American courts, although hinted at

often enough. Now, with every reason, including the positive commitments of the United States, to extend American legislative competence to the acts of international pariahs, and no apparent reason not to exercise that prescriptive jurisdiction, the Congress withheld its legislative hand, restricting its grant of jurisdiction to American courts to cases in which that jurisdiction could be supported by reference to ancient and deep traditions of the limits to prescriptive authority. It remains to be seen whether this self-denying approach to prescriptive jurisdiction will be applied in other areas in which the American "naturalist," "universal law" courts have taken a less restrained position.[53] Foreign sovereigns have already begun to make known their unhappiness with the unrestrained American assertions of the legal power to make rules for the conduct of foreigners abroad on the basis of some territorial effects which might or might not pass the threshold of legal interest necessary to support the jurisdictional assertion.[54]

A third recent international Convention dealing with acts done outside of a belligerency context which endanger international civil aviation is the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, concluded in Montreal on 23 September 1971.[55] The substantive offenses covered by the Convention are listed:

> 1. Any person commits an offense if he unlawfully and intentionally:
>
> (a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or
>
> (b) destroys an aircraft in service . . .; or
>
> (c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft . . .; or
>
> (d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or
>
> (e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight . . .[56]

The jurisdictional provisions of the 1971 Montreal Convention are, with minor changes not relevant to the subject of "piracy" or "universal jurisdiction," identical with the jurisdictional provisions at the Hague Convention of 1970 analyzed above. To the extent the offenses listed in the 1971 Convention cannot be construed to be included already in the 1970 Convention's terms, they are not within the definition of "aircraft piracy" in the municipal law of the United States.[57] There is no special statute bringing the substantive or jurisdictional terms of the 1971 Convention into the municipal law of the United States; its substantive terms are apparently regarded as included already in American legislation making it a crime under the municipal law of the United States for "Whoever," other than a law enforcement officer:

> . . . while aboard, or while attempting to board, any aircraft in, or intended for operation in, air transportation or intrastate air transportation, [to have] on or about his person or his property a concealed deadly or dangerous weapon, which is, or would be,

> accessible to such person in flight, . . . [or to have] placed . . . or attempted to have placed aboard such aircraft any bomb or similar explosive or incendiary device . . . [58]

There is no reflection in the American municipal legislation that this language was intended to discharge any international commitment or bring into American municipal law the conceptions of a treaty whose meaning would have to include a study of the intentions of its other parties and drafters.[59]

Although there have been other attempts by individual scholars and some statesmen speaking in non-legal contexts to analogize various actions of unrecognized belligerents or "criminals" to "piracy," apparently for the purpose of encouraging concerted international action to suppress those activities, none has succeeded in actually bringing the concept of "piracy" or the word into the international legal arena with meaningful consequences.[60]

Attempts to Codify the International Law of Piracy

Introduction. Throughout the preceding pages little reference is made to the writings of learned publicists dealing with their conceptions of the international law of "piracy" except for those publicists who, by virtue of their eminence and their influence on later writers and state practice, have participated in the law-making process more or less directly. Some, such as Grotius and Gentili, established or applied patterns of legal thought that have been influential regardless of the superficiality (in the case of Grotius) or frankly adversary twist (in the case of Gentili) of their conclusions. Others, such as Molloy, Jenkins, Blackstone and Wooddeson, have been so influential on the course of Anglo-American jurisprudence and practice that some detailed analysis of both their patterns of thought and their substantive summaries of the law of "piracy" have been necessary. Still others, such as Wheaton and Dana, were so directly involved in the legal evaluation of events and so prestigious within the narrow intellectual world of their place and time that it may be taken that their views represented major trends of official thought. Of course, many publicists of lesser influence or lesser direct involvement in affairs addressed the definition of the law of "piracy" and its legal consequences in monographs of more or less cogency. Fortunately for the length and coherence of this study, expert analyses of those lesser writings were made as part of a codification movement during the first third of the 20th century and it is unnecessary to repeat those analyses here. It is necessary to look at the results of those analyses.

The League of Nations Effort. On 22 September 1924 the Assembly of the League of Nations formally requested the Council of the League to convene a committee of experts to prepare a provisional list of the subjects of international law the regulation of which by international agreement would seem to be most desirable and realizable, to circulate that list to the

international community, and to report to the Council on the results.[61] "Piracy" was among the subjects chosen by the "Committee of Experts for the Progressive Codification of International Law" set up under this arrangement. A Sub-Committee consisting of M. Matsuda of Japan as Rapporteur and M. Wang Chung-Hui of China delivered its Report to the Committee in January 1926, and the Report, amended by M. Matsuda on 26 January 1926 as a result of the Committee's deliberations,[62] was circulated to Governments for their comments on 29 January 1926.

The Report contains no citations to learned texts or specific state practice or cases, thus there is no distinction between those elements that might be considered to codify well-based existing international law and those that might be new. It is acknowledged in the Report that there is considerable "confusion of opinion" among scholars on the subject of "piracy," but that confusion is not traced to doctrinal differences or the changing perceptions of states over time or any other of the sources of differing opinion analyzed above. It is attributed instead "to failure to draw a clear distinction between piracy in the strict sense of the word, as defined by international law, and piracy coming under the private laws and treaties of individual states."[63] Thus, the eight articles of the "Draft Provisions for the Suppression of Piracy" proposed by the Committee and drafted in final form by M. Matsuda on 26 January 1926 reflect the assumption that there is a single conception of "piracy" in the international legal order reflecting a stable natural law that did not change over time.

The key provisions of this purported codification for purposes of this study are the following:

> *Article 1:* Piracy occurs only on the high seas and consists of the commission for private ends of depredations upon property or acts of violence against persons.
>
> It is not involved in the notion of piracy that the above-mentioned acts should be committed for the purpose of gain, but acts committed with a purely political object will not be regarded as constituting piracy.
>
> *Article 2:* It is not involved in the notion of piracy that the ship should not have the right to fly a recognized flag, but in committing an act of piracy the pirate loses the protection of the State whose flag the ship flies.
>
> *Article 3:* Only private ships can commit acts of piracy. Where a warship, after mutiny, cruises on its own account and commits acts of the kind mentioned in Article 1, it thereby loses its public character.
>
> *Article 4:* Where, during a civil war, warships of insurgents who are not recognized as belligerents are regarded by the regular Government as pirates, third powers are not thereby obliged to treat them as such.
>
> Insurgents committing acts of the kind mentioned in Article 1 must be considered as pirates, unless such acts are inspired by purely political motives.
>
> *Article 5:* If the crew of a ship has committed an act of piracy, every warship has the right to stop and capture the ship on the high sea.

On the condition that the affair shall be remitted for judgment to the competent authorities of the littoral State, a pursuit commenced on the high sea may be continued even within territorial waters unless the littoral state is in a position to continue such pursuit itself.

Article 6: Where suspicions of piracy exist, every warship, on the responsibility of its commander, has authority to ascertain the real character of the ship in question. If after the examination the suspicions are proved to be unfounded, the captain of the suspected ship will be entitled to reparation or to an indemnity, as the case may be. If, on the contrary, the suspicions of piracy are confirmed, the commander of the warship may either proceed to try the pirates, if the arrest took place on the high sea, or deliver the accused to the competent authorities.

Article 7: Jurisdiction in piracy belongs to the State of the ship making the capture, except: (a) in the case of pursuit mentioned in Article 5, paragraph 2; (b) in the case where the domestic legislation or an international convention otherwise decides.

Article 8: The consequences of capture, such as the validity of the prize, the right of recovery of the lawful owners, the reward of the captors, are governed by the law of the State to which jurisdiction belongs.[64]

The replies of Governments to which the Report was sent are very lengthy and serious questions were raised with regard to each of the draft articles.[65] Only one country, Portugal, commented on the definition in the light of historical usages of the word "piracy." The Portuguese response noted that "the Norman [Viking?] pirates acted on the western coasts of Europe, and later the Barbary pirates in the Mediterranean" attacked shore points; did not confine their piratical activities to the "high seas."[66] But aside from the implication that the Committee of Experts/Matsuda definition was not a codification of the entire body of pre-existing international law relating to "piracy," no deeper analysis was offered. Nor was there any significant discussion of the universality principle of Article 7. There is no explanation available as to whether the second paragraphs of Articles 4 and 5 were added with the *Huascar* incident in mind;[67] it looks as if somebody was trying to present as if a rule of established law some assertions of principle that would cover the British action without unduly upsetting the Government of Peru or those scholars, including eminent British scholars, who found the actual British position as presented publicly to be argumentative and unconvincing.

The way around the questions of historical and juristic analysis that the Committee and its Rapporteur seemed unwilling to try to resolve, or unable to resolve in the light of the strong jurisprudential assertions and policy positions of many states, was to present the draft without historical or jurisprudential analysis, as a draft treaty *de lege ferenda*; *i.e.*, as a proposal for new law regardless of history and theory. This was permissable as "progressive" codification within the terms of reference of the Committee, and some alteration in the previous conceptions of law is inevitable in any

codification exercise. Thus, the focus being forward, the consistency of the new proposal with history and theory became unimportant.[68]

But this orientation raised questions with regard to the utility of the Committee's work on "piracy." Despite the continued use of the word in some political and municipal law contexts, it was felt that "piracy" under that name was no longer a pressing issue to the international community. In the words of the Polish Representative (M. Zaleski) approved by the League Council on 13 June 1927:

> It is perhaps doubtful whether the question of Piracy is of sufficient real interest in the present state of the world to justify its inclusion in the programme of the conference, if the scope of the conference ought to be cut down. The subject is in any case not one of vital interest for every State, or one the treatment of which can be regarded as in any way urgent, and the replies of certain Governments with regard to it indicate that there are difficulties in the way of concluding a universal agreement.[69]

This view was adopted by Nicholas Politis as Rapporteur for a Sub-Committee of the First Committee of the Assembly of the League of Nations, who wrote with regard to "piracy," that this question "on which the conclusion of a universal agreement seems somewhat difficult at the present time, is [not] important enough to warrant . . . insertion in the agenda of the proposed Conference."[70] Accordingly, the Assembly of the League of Nations, in its Resolution of 27 September 1927 requesting the Council to arrange with the Netherlands for the Codification Conference, did not include "piracy" in the proposed agenda[71] and nothing more came of M. Matsuda's Report or the documentation it provoked.

The Harvard Research in International Law

Introduction. The initiative of the League of Nations in proposing activities preparatory to what was expected to be a major codification effort prompted the faculty of the Harvard Law School to organize its own research effort to contribute to the Codification Conference. A Committee was set up by the Harvard Research program to consider the international law of "Piracy" independently of the efforts of Matsuda and the League. The Reporter was Professor Joseph W. Bingham of Stanford University, who chose as his advisers a learned body composed almost exclusively of residents of California.[72]

The result of the new effort was a full draft Convention of 19 articles, the last one, obviously irrelevant to "piracy" and *de lege ferenda*, being a commitment to peaceful settlement of disputes arising out of the interpretation or application of the Convention and referring to arbitration or adjudication by the Permanent Court of International Justice set up in 1920 or the arbitration procedures provided in the Hague Convention of 18 October 1907 for the Pacific Settlement of International Disputes.[73] It is thus obvious that the drafters of the Convention regarded it as not merely codifying, but

also as blending the international law of "piracy" in to the system of legal relationships that they believed applied in the world of their time. The draft could thus reflect formulations *de lege ferenda* without violating the fundamental conception of its function, as an aid to the attempts of the time to "codify" the rules of international law as they ought to exist rather than as they could be shown to exist by an examination of theory and past practice.

The Theory Behind the Harvard Draft. The Harvard Researchers recognized immediately that the public international law relating to "piracy," if any such existed, had to be analyzed separately from the municipal law said in various countries to apply to "piracy": "[P]iracy under the law of nations and piracy under municipal law are entirely different subject matters and . . . there is no necessary coincidence of fact-categories covered by the term in any two systems of law."[74] One aspect of the jurisprudential split between "naturalists" and "positivists" analyzed at such length above, is summarized as "a decided difference of fundamental theories" between those jurists (whom I have denominated "naturalists") who view the "law of nations" as a legal order directly applicable to individuals, merely lacking enforcement mechanisms outside of the state system, and those jurists (whom I have denominated "positivists") who adopt "the modern orthodox theory" that the law of nations is a law between states only.[75]

The view that international law is a legal order that applies directly to individuals, that states serve only to enforce that law, is considered "naturalist" because in the absence of practices indicating that states actually adopt that view, and in the absence of legislative machinery in the legal order other than treaty and practice to create or exemplify legal rules, the formulation of the "rules" is left to scholars without the interposition of the kinds of policy considerations that differentiate legislation from moralization. The logic is that of Molloy.[76] It is part of the "rule of reason" in English Common Law.[77] The notion traces back ultimately to Cicero and, in a rather more strained way, to Aristotle or even Plato. But an analysis of the roots of "natural law" theory and the evolution of the concept through all its ramifications is far beyond the scope of this study and, when pursued deeply enough, trenches on philosophical postulates regarding the nature of ideas and the relationship between abstractions and reality.[78]

The view that international law can be conceived as a "legal" order only if restricted to relations among states and other group actors on a stage that disregards the notions of individuals who are not members of the cast with whom the actors choose to deal, is "positivist" because of the interposition of policy judgments in the process by which certain perceived moral rules or policy preferences become binding as if "law."

A rule of thumb for distinguishing between the assertions of "law" on the basis of "reason" and assertions of "law" on the basis of the implications of

policy-based consent, lies in the pattern of legal argument. Arguments based on "reason" assume moral underpinnings and aim at defining the "issues" (or moral principles) touched by a proposed "rule," finding the highest virtue or social function in the formulation favored by the arguer. Arguments based on "positive law" disregard "principles" which are viewed as part of the law-creating legislative process, not part of the process of finding and applying established law. "Positivist" jurists look instead for express or implied consent in diplomatic correspondence (in the case of international law) and behavior implying the acceptance of rules as an exercise of policy judgment regardless of morality. Little weight is given to behavior in the obvious interest of the acting state; much to behavior that seems against the immediate interest of the state but which the state performs out of an apparent sense of obligation, or of a desire to conform to some rules regardless of immediate interest. From this point of view, the attitudes of states and their courts towards individuals called "pirates" by that state or its judges, are impressive most where the acting state has no basis for jurisdiction, no direct legal interest, in the activities complained of. From this point of view, British assertions of jurisdiction over foreigners on the high seas or in non-European or American territory are of doubtful legal value, because the British self-interest in those assertions is so obviously great. But British deference to the better-based jurisdiction of others, as in the handing over to the United States in 1834 of the "piratical" Captain and crew of a Spanish ship whose depredations had Americans as victims and not English people,[79] and the equivalent relinquishment by the Americans to France in 1822 of the accused slave traders of the *Jeune Eugenie*[80] are far more persuasive as to rules of law restricting the legal powers of states precisely because the self-denials were so clearly performed against the inclinations of the naturalist jurists involved.

All this jurisprudential thought implied a division between, on the one hand, publicists classifying the international law of "piracy" as a valid set of rules established by universal reason and immediately applicable to individuals but enforced only through the intermediacy of states, implying universal jurisdiction and only technical procedural problems of "standing;" and, on the other hand, publicists classifying the facts and precedents to deny the very existence of an international law of "piracy," but asserting the existence of merely a subset of the municipal maritime laws of many states by which jurisdiction over foreigners could be asserted on the basis of the nationality of the victim of a depredation that did not occur solely within a single vessel or other specific jurisdiction that could be claimed to be exclusive.

The Harvard Researchers adopted the latter, "positivist" view:

> Since, then, pirates are not criminals by the laws of nations, since there is no international agency to capture them and no international tribunal to punish them and no provision in the laws of many states for punishing foreigners whose piratical offense was committed outside the state's ordinary jurisdiction, it cannot truly be said that piracy is a crime or an offense by the law of nations.[81]

The Harvard Researchers adopted this view not only for purposes of discussion, but as the jurisprudential basis for their draft Convention:

> The theory of this draft convention, then, is that piracy is not a crime by the law of nations. It is the basis of an extraordinary jurisdiction in every state to seize and to prosecute and punish persons, and to seize and dispose of property, for factual offenses which are committed outside the territorial and other ordinary jurisdiction of the prosecuting state and which do not involve attacks on its peculiar interests.[82]

As to the key jurisdictional point, the Harvard Researchers do not seem to have undertaken the research that forms the body of this work. Instead, resting on argumentative secondary analyses, much of it by scholars who do not seem to have done much primary research either, the Harvard Researchers said:

> Indeed it is difficult to find cases of exercise of jurisdiction over piracy which would not be supported on one or more of the ordinary grounds. They are very rare.[83]

Recourse is had to writers then who support "universal jurisdiction" not on the basis of state practice, real incidents, diplomatic correspondence and municipal court cases referring to what was asserted to be international law by a municipal judge, but on the basis only of the writers' conceptions of the structure of the international legal order and filtered interpretations of state practice asserted to exist but difficult to demonstrate in particulars. These "naturalist" scholars, like Story, are quoted extensively, but their conclusions and jurisprudential viewpoint are not adopted. Instead, the most influential single publicist whose views are cited at length and for many points of approach is a German "positivist," Paul Stiel.[84] Stiel regarded the jurisprudential split between "naturalists" and "positivists" as a split between Anglo-American jurists, whom he regarded as "naturalist" despite the cases and the writings of John Marshall, Dana and the others,[85] and the "*Kontinentalen*" as "positivists" despite the writings of Grotius, Pufendorf and the others.[86] From this point of view, and without the detailed analysis attempted above, he concluded that a definition is possible: "Piracy is a non-political professional course of forcible robbery against nearly all countries undertaken at sea."[87] From this he isolated the elements of the legal concept, including location (high sea), physical means (force), intention (to take property), against whom (anybody), purpose (private enrichment), etc. Since this framework excludes privateering or the regular course of raiding attributed (falsely) by many European publicists to the Barbary states before 1830 and to others, and yet such activities had routinely been called "piracy" by many scholars and some courts, Stiel had some difficulty. He resolved this not by reconsidering his definition, or breaking the concept into two parts, as we have done above in the light of the historical evolution of the word "piracy" and its usage in different legal and political contexts, but by simply asserting the old state-authorized "piracy" to be obsolete, even though there seemed to him to be some similarities between the acts for which a "piracy"

conviction was obtained by English officials in Singapore in 1858 and the Roman practice against Illyrian raiders. His analysis is not deep and his assertion about the Malayan case of 1858 is unattributed and not evidenced in any other known source; his citation to Roman practice is not to any original source, but to the great nineteenth century German historian of Rome, Theodore Mommsen.[88] This leads Stiel into some difficulties when he finally comes to consider the doctrinal impact of Sir Stephen Lushington's opinion in the *Serhassan (Pirates)* case,[89] and those difficulties are avoided rather than solved by relegating the discussion to the section on political ends, denying that the legal concept of "piracy" applies to political actors, but finding some states to be capable of being classified "piratical" because they lack political goals for their takings.[90] It is not at all clear that the desire of the Serhassan communities to be free of British visits and other influences, which prompted the attack on British warships that led to the punitive raid held by Lushington to entitle the victors to the bounty paid to those who engage "pirates," was non-political, and Stiel does not explain why he classifies it as such.

Similarly, the British position in the *Huascar* correspondence[91] is not analyzed; instead the British suggestion that unrecognized "rebels" can be properly considered "pirates" as a matter of international law is dismissed as questionable because as long as the rebels' victims are only government vessels of their own state nobody would consider them "pirates," and an *ad hoc* denomination as "pirates" solely because of the nationality of the victim vessel seems more than any criminal law conception should bear.[92]

Now, none of this analysis of Stiel diminishes the utility of Stiel's proposal as useful *de lege ferenda* for the law of "piracy" as it might have been acceptable to states in the early years of the 20th century, and the use of Stiel's suggestions regardless of the doubtful soundness of the historical and legal evidence on which they rest is justified for that purpose. Indeed, there is much in Stiel's work that could as well have been based on a more thorough analysis, and, regardless of soundness, seems consistent with the conclusions possible to reach from the cases and jurisprudential discussions above. In taking the general orientation proposed by Stiel as the basis for their own draft, the Harvard Researchers thus did not necessarily diminish the value of their proposal as an exercise *de lege ferenda*.

In their use of earlier scholarship in general, however, the Harvard Researchers themselves seemed somewhat confused. Long quotations from Stiel[93] are preceded or followed with what appear to be supporting quotations from a variety of sources addressing different problems from different jurisprudential perspectives and at different times. Article 3, the definition of "piracy" for purposes of the draft Convention, quotes at some length from what seem to be 54 different sources in addition to Stiel, mostly European publicists of the 19th century, who were supposed to support in one way or another various parts of the proposed definition. There is no apparent attempt

to evaluate those writings by jurisprudential view or any other clue as to relative persuasiveness; there is no chronological consistency or indication that perhaps the rules found persuasive in Italy or other states deriving their experience from Roman or Mediterranean interactions were rejected by world-stage actors, like England in the 17th century and later, because of possible differences in the political structure of the overall society whose trade was to be protected from interference, or the self-image of the state accepting or denying the role of world policeman against "piracy."[94] Thus, the Harvard draft must be evaluated on its own merits as a legislative proposal, and cannot be supported as a reflection of a scholarly analysis of precedent and theory. Indeed, the Researchers themselves seem to throw up their hands in dismay with regard to the definition of "piracy":

> An investigation finds that instead of a single relatively simple problem, there are a series of difficult problems which have occasioned a great diversity of professional opinion. In studying the content of the [definition] article, it is useful to bear in mind the chaos of expert opinion as to what the law of nations includes, or should include, in piracy. There is no authoritative definition. Of the many definitions which have been proposed, most are inaccurate, both as to what they literally include and as to what they omit. Some are impromptu, rough descriptions of a typical piracy.[95]

In these circumstances, the legal analysis implicit in the Harvard draft is of minimal interest to this study; indeed it is almost wholly lacking in the Report itself.

The Text of the Harvard Research Draft Convention. As an exercise in proposing legal formulations taking due account of the confusions of the period regarding the concept of "piracy" and the persistence of the concept as a factor in justifying some legal results, the Harvard draft has had a major impact on the development of legal thought. For the sake of completeness, the entire text is reproduced in Appendix III.A below. But for present purposes only the definitional article and the articles dealing with jurisdiction are important. They follow:

> *Article 3:* Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:
>
> 1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without a bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.
>
> 2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.
>
> 3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.
>
> *Article 4:*
>
> 1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3,

or to the purpose of committing any similar act within the territory of a state by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs . . .

Article 6: In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.

Article 7:

1. In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure be made there, unless prohibited by the other state . . .

Article 9: If a seizure because of piracy is made by a state in violation of the jurisdiction of another state, the state making the seizure shall, upon the demand of the other state, surrender or release the ship, things and persons seized, and shall make appropriate reparation.

Article 13:

1. A state, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.
2. The law of the state must conform to the following principles:

. . . (b) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims. . . .

Article 14:

1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.
2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty . . .
3. A state may intercede diplomatically to assure [fair and humane treatment] to one of its nationals who is accused in another state.

Weaknesses in the draft are immediately apparent. As to the substance of the offense, why are "rape," "wound," "enslave" and "imprison" there? There seem to be no cases supporting any such inclusions; the English Common Law of "robbery" had become the bedrock of the municipal law maritime offense that had come to be called "piracy" in England and America since the jurisdictional statute of 1536 was adopted; and "kill" could be conceived to have entered the definition in practice. Participation in the slave trade had been expressly ruled out of European (including British) definitions when that trade was a serious matter in international commerce.[96] And if "rape," "wound" and "imprison" should be included merely because they are serious and violent offenses, why not "torture" or even generally "assault?"

Why is there a distinction drawn between acts "committed in a place not within the territorial jurisdiction of any state" for the purpose of defining the offense, and an act otherwise within the definition (indeed, more broadly stated in article four also to include "any similar act") "within the territory of a state by descent from the high sea" for the purpose of defining a "pirate ship?" The definition of *what* is "piracy" in article three includes an implied definition of *who* is a "pirate" (whoever commits an act of defined "piracy," as well as any of the fringe connections specified in paragraphs 2 and 3 of that article). Article four defines a "pirate ship" more broadly. It would seem that there could be conceivably a "pirate ship" with no "pirates" on board and that had never been involved in the commission of an act of "piracy," if all its assaults were raids ashore. Presumably, to make some sense of this, it was to establish a category for ships *not* wholly lacking nationality from which an act of piracy within the definition of article three could be committed. But why, if the attacking vessel had national character, should the law of "piracy" come into play at all? At least, it is not clear why a ship which had been involved in shore raids should be considered a base for piratical acts when it acted at sea, and the identical vessel that had not previously committed shore raids would not be considered a base for piratical acts on the high sea unless it had first lost is national character. And if any vessel had first lost its national character, it would seem to be within the definition of a base for "piratical" acts at sea whether or not it had first been involved in shore raids. Article four seems senseless.

As to jurisdiction, clearly territorial jurisdiction is dominant and, contrary to the position of the Disraeli government in support of the actions of Admiral de Horsey in the *Huascar* incident,[97] pursuit into the territorial waters of any state can be forbidden under article seven. The language shifts the burden to the territorial sovereign to prohibit the chase, rather than limiting the authority of the policing state to pursue the "pirate," but that seems to be as far as the Harvard Researchers were willing to go to meet the British position in principle.[98] And Article nine seems to take even that concession back by providing not only for a turning over to the territorial sovereign of the persons and property seized, but even the paying of reparations.

Finally, as to "universal" jurisdiction, article 13 refers back to the lawfulness of the seizure to determine if the seizing state can apply its own law to property seized. If the seizure was "lawful," then it can apply its own law, apparently even if there is no identifiable national interest in the incident beyond the fact of the seizure by its officials. Article six appears to make lawful (although the word is not used) the seizure of "a pirate ship" or a ship "taken by piracy and possessed by pirates," and the property connected with it; but the same seizure of the same ship and property would appear to be unlawful if the ship had been used for depredations only "against ships or territory subject to the jurisdiction of the state to which the ship belongs"

(article four). In that latter case, the ship would not be classifiable as a "pirate ship," and whether the ship's company were "pirates" could not be determined until after the seizure; the seizure itself could not be regarded as "lawful" when done. And if the ship was not in the first instance "taken by piracy," but had been lawfully acquired, or even taken by robbery under the law of some territorial state while not on the high sea and not by descent from the high sea, then it is not clear that any taking by a second country's officials would be "lawful" in the sense of article six. And if article six did not make the seizure "lawful," then article 13 would apparently not apply. This construction opens up complications of a magnitude that cannot repay further analysis in this place since the Convention has never been adopted. But it is clear that the provisions as drafted do not represent a simple assertion of universal jurisdiction over ships and property involved in "piracy," or of universal jurisdiction with a simple exception. This gingerly handling of ships and property involved in alleged "piracy" is particularly interesting as showing a complete denial of the concepts of a universal law of nations in the sense used by Blackstone and the framers of the American Constitution; concepts which included all maritime law within the law of nations and denied the legal significance of the place, or sovereign authority, of the tribunal erected to apply that universal law. The implication is not only that there is a cloud on the notion of universal jurisdiction over the goods involved in suspected "piracy," but that the same rules of "standing" applied to determine which sovereigns' courts could even hear the case; that standing *ratione materiae* and standing *ratione personae* must both be present in any piracy adjudication.

Article 14 seems to attempt to change that situation with regard to criminal trials, but again the universality of the jurisdiction is made to rest on the "lawfulness" of the "custody;" and that "lawfulness" seems to depend on the interpretation of article six. In the Researchers' commentary to article six no clue is given as to the complications involved; they seem to have thought that article six merely codified an ancient "right of any state to capture on the high sea a foreign ship which has committed piracy or is the booty of pirates."[99] But there is no citation to any case or writer to support this grand assertion, and, as has been amply demonstrated above, it seems wrong both historically and legally to the degree it ignores the general international law of "standing." It seems to reflect the misconceptions of the time growing out of British assertions of a world-wide policing jurisdiction taken as a matter of policy and applied to foreign military vessels of non-European subordination in the absence of *animum furandi*, and not applied by any state to "pirates" in the context of the Harvard Research, *i.e.*, "persons" acting *animo furandi* within article three as "criminals" under the laws of all states.

There are many other peculiarities and questions raised by the Harvard Research draft Convention on Piracy, but since it was presented as an

exercise *de lege ferenda* and was not in fact adopted as such, it seems unnecessary to analyze it further in this place.

The Anglo-American Position. In 1931, while the Harvard Research was still underway, there was an incident in the Far East that resulted in the third known instance after 1705[100] of jurisdiction over accused "pirates" being exercised in the absence of a link to some traditional basis for jurisdiction to prescribe. The incident occurred between Chinese vessels on the high seas, and a capture of the accused "pirates" was effected by a British naval vessel, H.M.S. Somme, apparently (the report is not entirely clear) also on the high sea. The accused were taken in to the British tribunal in Hong Kong and there convicted of "piracy" subject only to the technical legal question of whether a mere attempt without an actual robbery was sufficient to constitute "piracy" for purposes of a British criminal conviction. The question was referred all the way to the highest British tribunal with jurisdiction over colonial courts, the Judicial Committee of the Privy Council. The opinion was unanimous among the five judges, and delivered by Viscount Sankey, the Lord Chancellor. It does not mention any jurisdictional doubts.[101] As to the point of substance, the opinion seems to treat British precedents and writings, including those of Coke, Molloy, Jenkins, and the charge of Sir Charles Hedges in R. v. Joseph Dawson[102] as if evidentiary of the evolving public international law regarding "piracy," and not merely evidence of an evolving British municipal law. The *Huascar* correspondence is referred to with a single sentence reciting the facts followed by another single sentence saying merely: "The British Admiral justly considered the *Huascar* was a pirate, and attacked her."[103] Dr. Lushington's opinions in both the *Serhassan (Pirates)* and the *Magellan Pirates* cases, and the American case *The Ambrose Light*[104] are cited for the proposition that an actual robbery is not required for the crime of "piracy" to be completed. There is no notice of the fact that in all three cases there was no *animus furandi* at all, and that this lack might indicate that something other than the English crime of "piracy" might have been involved; the assumption is unstated that the legal word "piracy" covers both the acts descended from the English notion of robbery within the jurisdiction of English Admiralty tribunals and acts of interference with ocean shipping whatever the motive, and some assumption of British legal rights to police the sea. The confusion of concepts seems to have been complete.

It is noteworthy that the case is a British case and adopts the British view of natural law and British jurisdiction as an incident of an assumed universal jurisdiction. Although both the Harvard Research draft Convention and the League of Nations draft are cited with approval, there is no analysis of either except on the most superficial level. Other European publicists are cited; it appears all the citations to sources other than the usual English sources were taken from the Harvard Research, at least all those cited seem on cursory

inspection to appear also in the Harvard Research and the comprehensiveness of the Harvard Research is praised by Viscount Sankey.[105]

The Privy Council's conclusion was:

> A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurisconsults were expressing their opinions.... [T]heir Lordships... having examined all the various cases, all the various statutes and all the opinions of the various jurisconsults cited to them, they have come to the conclusion that the better view and the proper answer to give to the question addressed to them is ... that actual robbery is not an essential element in the crime of piracy *jure gentium*.[106]

One other case was rescued from oblivion in 1932 and should be mentioned as evidentiary of the tendency of Anglo-Americans at the time to assert universal jurisdiction even where unnecessary to support the particular adjudication, and to cover all "piracy" cases with verbiage of a generality unnecessary and inappropriate to criminal proceedings. In 1922 an American court in the Philippine Islands affirmed a conviction for "piracy" against "certain Moros from the Philippines" who boarded a Dutch boat in the territorial waters of an island in the Dutch East Indies, raped the women and sank the boat with the men on board (who escaped to shore). An appeal on the basis of lack of jurisdiction was disallowed and the prison term was changed to a death penalty for the one of the two defendants who had committed the rape.[107] As reported, the decision says: "Nor does it matter that the crime was committed within the jurisdictional 3-mile limit of a foreign state," because "The jurisdiction of piracy unlike all other crimes has no territorial limits." Since the actual conviction of Lol-Lo was for rape, and it was for the rape and not the piracy that he was sentenced to death, this is very difficult to understand. Why was a rape within the territorial jurisdiction of the Dutch authorities within the jurisdiction of the American authorities also? It is especially difficult to understand when the definition given by the tribunal for the "crime of piracy" was: "Piracy is robbery or forcible depredation on the high seas, without lawful authority and done *animo furandi*, and in the spirit of universal hostility." Even if "rape" fits within the concept of "forcible depredation" (which seems doubtful not only as a matter of definition, but because the sentence for "piracy" was life imprisonment and the sentence for rape was death; it is hard to see a crime with a greater penalty as a lesser included offense of a crime with a lighter penalty), it is incomprehensible that "on the high seas" means also "within the territorial waters of a foreign state."

In fact, if the Spanish-rooted law of the Philippines, which is reported to have been the law applied, could have been construed to apply to Philippine defendants acting abroad, and jurisdiction could have been based on the personal power of a sovereign to prescribe rules binding on his subjects

wherever they are, the jurisdiction was easily supportable on the basis of the nationality of the actors, not universality. As reported, no mention is made of the established Constitutional limits to American prescriptive jurisdiction as pronounced by the United States Supreme Court in 1820,[108] or the long course of American practice that by 1922 for a hundred years had followed that result despite the constant reiteration of the theoretical possibility of universal jurisdiction which was in fact never asserted to lie within the territorial jurisdiction of a foreign sovereign, but only on the high sea. It must be concluded that the case is a unique, or nearly unique, example of a colonial court, this time an American one, making up a convenient law for itself regardless or precedent, logic or the political need to accommodate to the legal powers of neighboring sovereigns. It is probably not accidental that the incident occurred and was decided on the far fringes of two empires where the legal and political problems would not be likely to be significant.

Nonetheless, it is odd and significant for the trend of thinking in the United States that the "Piracy" section in the major compilation of American (and some foreign) legally significant practice published in 1941,[109] normally a source of balanced reportage and minimal comment,[110] quotes the passages set out about from both *In re Piracy jure gentium* and *People v. Lol-Lo and Saraw* without any counterbalancing comment.[111] Universal jurisdiction seems to have been adopted at the official American position by 1941, and the contrary cases and logic forgotten.

The Law of Sea Codification of 1958

The International Law Commission Draft. As part of a more or less complete review of the law of the sea, with an eye to eventual codification, the United Nations General Assembly asked the International Law Commission to prepare a text that could form the basis for international agreement on the law of the sea.[112] The text originally prepared in French by J.P.A. François, the Commission's Special Reporter, titled *Regime of the High Seas*, was published on 1 March 1954[113] and contains six articles dealing directly with "piracy." Article 23 is the definition. It is François's French translation of article three of the Harvard Research draft Convention.[114] The other five articles are French translations of articles 4(1), 5, 6, 10 and 12 of the Harvard Research draft.[115] The provisions set out above dealing with jurisdiction and the disposition of goods and persons seized as "piratical" simply do not appear in the François draft. In his commentary, the Reporter acknowledges that his draft is incomplete, saying that only those provisions necessary for protection against "piracy" seemed appropriate for the purpose of his assignment from the International Law Commission, but that if a more elaborate section on "piracy" were desired, the Harvard Research draft Convention with its 19 articles would be the best starting point.[116]

The International Law Commission began its discussion of "piracy" at its 289th meeting on 11 May 1955. At that session, the Commission adopted a proposal to include "piracy" in the article drafted by François in connection with the slave trade, requiring as a matter of abstract principle the cooperation of all states in suppressing both activities.[117]

The Commission began its discussion of the substantive "piracy" provisions of the François text, i.e., the Harvard Research draft Convention articles defining "piracy" and authorizing foreign state vessels to apprehend "pirates," at its 290th meeting the next day.

It was apparent from the very beginning that the word "piracy" had such an overlay of emotion and conflicting meaning that many political compromises would have to be made. On 6 May 1955 the Government of Poland had submitted formal "observations" on the draft and accused the Republic of China of "piracy" in language reminiscent of the translators' interpretation of Grotius's charges against Portugal in the early 17th century:[118]

> Foreign men-of-war assisted by airplanes forced to stop Polish ships maintaining peaceful commercial communication with the Chinese People's Republic. . . . The[se] acts committed in the China seas constitute a most serious crime—namely, piracy. . . . The formulation of article 23 of the draft is in conflict with established views on piracy. It should be clear that the words "*bona fide* purpose of asserting a claim of right" cannot be used in connexion with such actions as robbery, rape, wounding, enslavement and killing. Similarly the words "for private ends" should be omitted, since no ends, even when described by the perpetrators as not being "private" (*i.e.*, "public") can justify acts of piracy.[119]

After an acrimonious exchange among the Chinese, Czech and Soviet members of the Commission, it was decided that the Polish note was actually a complaint against the Republic of China lying outside the competence of the Commission.[120] The subject of nationalist Chinese naval vessels intercepting Soviet, Polish and other countries' vessels heading for mainland Chinese ports after the Communist victories had resulted in the establishment of a Communist government in China in 1949, had already been raised in the United Nations, and attempts there to call the Republic of China's actions "piratical" had been rejected in December 1954 by the Ad Hoc Political Committee (composed of all the members of the General Assembly).[121] Nonetheless, in introducing the substantive definition of his article 23, the Reporter reintroduced the subject. He set out the debate between those jurists who regard *animum furandi* as an essential element of the international (as distinct from the municipal) law "offense," and those who do not. François rejected the argument of the Polish memorandum on the ground that the Chinese vessels interfering with Polish shipping were public vessels.[122] He sided with those who regard the *animum furandi* as an essential element of the international law offense. Other essential elements in his view were a location on the high seas, and that the offense be committed by one ship

against another. Since his own draft, copied from the Harvard Research draft, includes some land activity within the definition, it is hard to understand the rigidity of François's presentation on the second point. All three of his "essential elements" seem to be derived from the opinions of others with no analysis of their consistency with actual state practice, cases and the deeper levels of theory. There seems to be no reflection of the possibility that the requirement of *animo furandi* is historically derived from municipal law concepts and in practice not applied to limit the activities of the British in their attempts in the late 19th and early 20th centuries to keep open the sea lanes for peaceful traffic. Most disturbing, there seems to be no reflection in the presentation of M. François that the Harvard Research which he was presenting as the basis for discussion was drafted by its authors *de lege ferenda* and that those authors themselves regarded their disordered compilation of quotations as evidence not of any clear underlying concept of "piracy" in the international legal order, but just the opposite, as evidence that no clear conception could be derived directly from the writings of publicists or an examination of historical correspondence and cases. And while the research set out in some detail above seems to indicate that the Harvard Researchers were wrong, that there is indeed a complex order in the many uses of the word "piracy," equivalent research and jurisprudential analysis are not found in the Harvard Research nor were they supplied by François.

The Commissioners themselves quickly made it clear that each had his own special conception of "piracy," and his own notion of the historical and theoretical bases for that conception, excluding other conceptions as incorrect. For example, M. Georges Scelle (France) argued that "piracy" must include land-based activity, because otherwise the Barbary corsairs "would not have been pirates." On this basis he accused M. François of "a methodological error."[123] Mr. Zourek asserted that *animus furandi* was not an essential element on the ground that in his view the Nyon Treaty[124] included within the notion of "piracy" actions by submarines as state-owned vessels acting for what they conceived to be a public purpose.[125] These and other arguments were made and the 290th meeting broke up in some polite confusion. The next day, M. François presented a redraft, and a new draft based on the previous day's discussion was also presented by one of the Commissioners, Mr. Douglas L. Edmonds (United States of America). The Commission then decided to postpone the discussion of the definition of "piracy" while the two new drafts were examined.[126]

At its 292nd meeting, on 16 May 1955, the International Law Commission finally began to discuss substantive questions on the basis of a working draft. The draft prepared by M. François was immediately challenged by Mr. A. E. F. Sandström (Sweden), who presented yet another counter-draft. The first point at issue was whether it would be proper to call "pirates" those who descended from the sea to perform their raids on land; François said not, on

the basis of "the Harvard report, together with the whole weight of jurisprudence."[127] Sandström did not challenge this patently erroneous interpretation of both the Harvard Research draft[128] and such precedents as the treatment of the Barbary states and such cases as the *Serhassan (Pirates)* (which François seems to have simply ignored), but defended his view as within the Commission's responsibility "to promote the progressive development of international law rather than its codification," arguing as a matter of policy that it was "inadmissable" that a warship should have to refrain from seizing "a pirate vessel" on the high sea because the act of piracy had been committed in territorial waters or on land.[129] The Commission then voted by 6 to 4 with 1 abstention to reject the Sandström draft and work from the François redraft.[130] But although the implication of this might seem to be that the Commissioners felt they were codifying a more or less clear legal conception, in fact the entire discussion that followed was based on policy considerations; there are no citations to cases or accepted rules of law that might apply by analogy. The International Law Commission seems in silence to have construed itself into a legislative session, while on the surface accepting François's view that codification was its function. Nobody noted that François's view was itself inconsistent with his basing his "codifying" text on another text, prepared by the Harvard Researchers, which was frankly non-codifying but *de lege ferenda*.

Acting thus as a legislative session, the International Law Commission agreed that territory not subject to the jurisdiction of any particular state, such as guano islands, should be assimilated to the high sea for the purpose of defining the location in which the law regarding "piracy" should apply.[131] A proposal that ships which were suspected of being "pirate ships" within the sense of the draft should be subject to seizure only on the high sea and there only by properly authorized warships, but not police boats, was adopted 9 to 1 with 2 abstentions on the stated ground that a different rule "might encourage abuse,"[132] although why police vessels should abuse their authority more than warships seems difficult to grasp and was not addressed. A short discussion of the differences between "piracy" and "mutiny" occurred, François taking the position that an attack on a second vessel should be necessary and Sandström that if the entire vessel were seized on the high sea by passengers or crew, not merely property within it, then acts of "piracy" would have occurred and should be treated as such in the draft.[133] Sir Gerald Fitzmaurice (United Kingdom) referred to the primacy of the law of the flag state in cases of mutiny, concluding that until the seized vessel acted against some other, committed a different and later "act of piracy," it would be premature to classify its seizure as "piracy" even if the whole vessel were taken. Although no vote was reported, there seems to have been a consensus that the approach taken by Fitzmaurice was persuasive.[134] Fitzmaurice's precise language, as recorded, seems excessively cautious: "[I]t would be preferable to make it

clear that piracy was not confined to acts committed on the ship itself, but that it essentially consisted in acts committed against another ship or persons not on the pirate vessel itself."[135] Indeed, read carefully, this seems to mean the opposite of what was apparently intended; that acts within a single vessel might well be denominated "piracy"—the first clause seems to say that that was the normal case, which is wholly inconsistent with the context; the second that the normal case involved a second ship or persons, but not necessarily so.[136] The point was not raised again, and the two-ships approach was taken in all the later drafts.

At the 293rd meeting on 17 May 1955, three minor points were resolved first. An attack by one aircraft against another was excluded from the definition of "piracy" by a vote of 8 to 3 with 1 abstention. Immediately afterwards, it was decided by consensus that an attack by an aircraft against a vessel should be denominated "piracy," and that provision should be included in the draft allowing military aircraft to take steps against ships committing "acts of piracy."[137]

The longest discussion was reserved for a renewed consideration of the Chinese seizure of Polish merchant vessels and the question of "state piracy." S. B. Krylov (Soviet Union) pressed hard to have his view of the Nyon Agreement adopted as containing the "seeds of a new principle" regardless of the precedent of the Barbary corsairs. Jaroslav Zourek (Czechoslovakia) concurred on the basis of the inadmissability of "superior orders" to exculpate a war criminal, although why he thought that "pirate" was an appropriate synonym for "war criminal" was not made clear. Fitzmaurice objected on the ground that the Nyon Agreement was based on the assumption that the parties had agreed not to authorize the kind of submarine warfare that was involved, and that therefore the acts could only be classified as for "private ends;" that the Nyon Agreement was therefore irrelevant to the argument made by Krylov. He also pointed out that acts of aggression or acts of war were not "piracy" in any known sense. Several members then questioned the impact of the concept of "public ends" on revolutions, denying that revolutionaries should properly be classified as "pirates" for any purpose and that in any case it was beyond the Commission's charge to attempt at this time to codify rules appropriate to the conduct of civil wars. After active discussion, Krylov's proposal was defeated by 10 votes to 2 with 1 abstention, and the words "for private ends" were specifically approved by 11 votes to 2. At this point, the entire text was referred to the Commission's drafting committee as non-controversial.[138]

The Product of the drafting committee was reported at the close of the 7th session.[139] The changes from the Harvard Research draft are substantial, and seem to reach far beyond the normal scope of a drafting committee's authority, but there is no record of the reasons for those changes beyond what has been related above.

Article 13 begins the section on "piracy:"

> *Article 13:* All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas.

Obviously, the general provision drafted to apply only to the slave trade, then expanded to include "piracy," had been shrunk back to its original size by dropping its original inspiration and leaving it applicable only to the afterthought, "piracy." In the commentary, the debt to the Harvard Research is repeated but no support is given for this article except the assertion that it "lays down a sound principle."

The most important changes are, of course, in the definition:

> *Article 14:* Piracy is any of the following acts:
>
> 1. Any illegal act of violence, detention, or any act of depredation directed against persons or property and committed for private ends by the cew [*sic*: presumably *crew*] or the passengers of a private vessel or a private aircraft:
>
> (a) Against a vessel on the high seas other than that on which the act was committed, or
>
> (b) Against vessels, persons or property in territory outside the jurisdiction of any states . . .[140]

Six points of substance were specifically noted by the Commission in its formal commentary:

First, that "the intention to rob (*animo furandi*) is not required." Hatred or revenge are cited as motives equally appropriate for "piracy." Of course, *animo furandi* has always meant something a bit more complex than the intention to rob,[141] but the drafting committee cannot be faulted for petty overgenerality in a mere comment. Presumably the reference to hatred and revenge reflected some knowledge of the views of Joseph Story in 1844[142] but precisely what knowledge is unclear.

Second, the Commission simply stated without discussion: "The acts must be committed for private ends," thus crystalizing the rejection of Poland's complaint against the Republic of China.

Third, the Commission reported, "Save in the case provided for in article 15 [mutiny by the crew] piracy can be committed only by merchant vessels, not by warships." This assertion split the Commission, some of whose members cited the "Nyon Arrangement" of 1937[143] as evidence of a development of general international law giving all states a new right, or even an obligation, to suppress certain violations of the laws of war by one party during a civil war in order to safeguard freedom of navigation by neutrals on the high seas. The Commission as a whole rejected that view solely on policy grounds:

> In view of the immunity from interference by other ships which warships are entitled to claim, the seizure of such vessels [warships] on suspicion of piracy might involve the gravest consequences. Hence the Commission feels that to assimilate unlawful acts committed by warships to acts of piracy would be prejudicial to the interests of the international community.[144]

This judgment, that the enforcement of the laws and customs of war at sea in situations of belligerency, whether or not recognized, is less important to the world community than freedom of third party navigation on the high seas, does not seem to rest on any expressed legal analysis. As an unreasoned perception of the priority of two different values protected by the international legal order it seems entitled to some respect but not much. The same conclusion could have been reached along more traditional legal lines by noting that no states not parties to the Nyon Agreement appear to have modified their behavior in reliance on its formulation[145] and that its formulation itself does not make the unlawful acts "piracy" as such, but only attributes to them the legal results of "piracy" as a matter of analogy. But the penchant of international lawyers, even arbitral tribunals and persons acting officially within the authority of the International Law Commission, to pretend to the authority of legislators despite restrictions on their actual authority and their place in the legal order has been frequently documented and needs no further comment here.[146] There is no hint from the records of the International Law Commission that the concept of warships as "piratical" might have ancient roots implying imperial authority to suppress the activities of "states" or purporting to defend a world order analogous to the Roman *hegemonias* or the British vision of free seas in the nineteenth century, and it seems safe to speculate that the split among the Commissioners reflected instead a Soviet position aimed at the rump Government of China in Taiwan without much thought to possible legal implications beyond the immediate horizon. It is, of course, possible that some Soviet or Polish or other jurists were driving toward a world order model in which the legal power to go to war would be restricted by community consensus, or by some natural law perception making legal some changes of government in a "progressive" direction and making resistance to those changes somehow illegal. But this begins to carry speculation too far. There is no hint of such logic in the records of the Commission or its references to Nyon.

Fourth, the Commission rejected the late eighteenth and early nineteenth century American and later British notion that "piracy" could be a proper label for depredations on land even if by bands based on ships:

> Piracy can be committed only on the high seas or in a place situated outside the territorial jurisdiction of any State, and cannot be committed within the territory of a State or in its territorial sea.

In commenting on its own conclusion, the Commission recorded the fact of some dissent, did not attempt to justify the extension of the definition from the "high seas" to "a place situated outside the territorial jurisdiction of any State," and simply referred acts within the territorial jurisdiction of a state, including its territorial waters, to "the State affected."[147] For legal support the Commission mentioned only "the line taken by most writers on the subject." There was no attempt to explain away the *Serhassan (Pirates)* case[148]

and the many writings flowing from it, and British practice using the word "piracy" to justify Imperial adventures. Nor was any nod made in the direction of *People v. Lol-Lo and Saraw*[149] in which an American tribunal had rejected Dutch territorial jurisdiction as possibly removing the case from the "piracy" jurisdiction of the United States.

The Commission addressed its extension of the definition of "Piracy" to include acts by aircraft against vessels on the high seas also by mere assertion:

> Acts of piracy can be committed not only by vessels on the high seas, but also by aircraft, if such acts are committed against vessels on the high seas.[150]

In what purports to be an explanation, there is merely a denial that air-to-air acts anywhere can be regarded as acts of piracy, and an affirmation that air to sea depredations "might, in the Commission's view, be assimilated to acts committed by a pirate vessel." The only hint of an explanation or logic is the purely technical one that air to air acts "are outside the scope of these draft articles" which are presumably confined to the law of the sea. But why acts in airspace over the high seas are not regarded as part of the law of the sea for the purpose of defining "piracy" while Antarctica and guano islands are part of that law for that purpose, and why, if all aspects of air law are regarded as beyond the limits of investigation, the "effects" doctrine is thought sufficient to bring some airborne action into the law of the sea but not other airborne action, are questions not asked or answered in the Commission's report. *Quaere*, an airborne attack on an Antarctic base? There is an obvious inconsistency between this section and the preceding one unaddressed by the Commision.

Finally, the Commission excluded mutiny from its definition:

> Acts committed on board a vessel by the crew or passengers and directed against the vessel itself, or against the persons or property on the vessel cannot be regarded as acts of piracy.[151]

This is explained as tallying "with the opinions of most writers."

Article 15 is a mere technical article assimilating "acts of piracy" committed by a warship or military aircraft whose crew has mutinied to acts committed by private vessels. The official comment explains that this is necessary legally in order that a state aircraft or vessel can be treated as one engaging in "acts of piracy," implying that without such a provision the acts might be classifiable as acts of war.

Article 16 is another technical article defining "pirate ship" for purposes of the codification as a ship "devoted by the persons in dominant control to the purpose of committing an act described" in the part of article 14 analyzed above.

Article 17 reverses the American naturalist approach that Justice Story had been most successful with, the one that gave to American courts jurisdiction over foreign vessels that in the opinion of the Supreme Court had lost national character as a result of their piratical depredations;[152] it also made clear the

rejection by the Commission of whatever persuasiveness the logic of the British Government had in the *Huascar* correspondence:[153]

> *Article 17.* A ship or aircraft may retain its national character although it has become a pirate ship or aircraft. The retention or loss of national character is determined by the law of the State from which it was originally derived.[154]

But while reserving to the flag state the legal power to apply its prescriptive and enforcement jurisdiction to the vessel, the classification as a "pirate ship or aircraft" gives to a third state all that it would need in the way of legal authority to arrest the vessel and, subject to other terms of the purported codification, try the crew for "piracy" and distribute the seized property. Since the law of Prize would not seem to apply outside of a "war," and the entire approach negates any implication that the struggle against "pirates" is to be regarded as involvement in "war" in any sense—indeed, at least in England and America in the nineteenth century the word "piracy" was deliberately used to avoid the application of the law of war to foreign vessels interfering with seaborne commerce,[155]—it would seem that this preservation of flag state jurisdiction would be inconsistent with any provisions allowing a capturing state to apply its law to the persons of property on board the vessel. This inconsistency is created for the draft by article 18, and does not seem to have been noticed by the Commission.

Article 18 is the one containing the legal results of all the labeling that was the subject of the previous articles:

> *Article 18.* On the high seas or in any other place not within the territorial jurisdiction of another State, any State may seize a pirate ship or aircraft or a ship taken by piracy and under the control of pirates, and property or persons on board. The courts of that state [lower case *sic*] may decide upon the penalties to be imposed, and determine the action to be taken with regard to the property, subject to rights of third parties acting in good faith.[156]

The Commission's commentary on this draft article says merely that it "gives any State the right to seize pirate ships (and ships seized by pirates) and to have them tried by its courts," going on to emphasize that a ship flying a flag to which it is not entitled is not thereby a pirate ship; it must commit acts of piracy first. Except for the obscure reference to rights of third parties acting in good faith, there seems to be no notice that the substantive law of the seizing states might be inappropriate as the law to measure property rights in the pirate ship or goods taken in it; that the preservation of flag state jurisdiction in the previous article makes its law the proper governing law in cases in which that state maintains its national interest in the character of the vessel or aircraft. There is no explanation of the reference to "third parties acting in good faith;" whether that relates to states or individuals, prior owners or later transferees of property taken by "pirates," or anything else. No guidance is given either as to a conflict of laws rule to determine which law a court should apply to a determination of substantive property rights in

property possessed by "pirates," or as to whatever substantive law might be found in the international legal order regarding such goods.[157] The "penalties to be imposed" in the second sentence seem to relate to the formal action to be taken by the courts of the capturing state against "pirates." Taken in context, it illustrates the way in which the Commission resolved the conflict between "naturalist" jurists who view "piracy" as a crime against international law seeking only a tribunal with jurisdiction to apply that law and punish the criminal, and "positivist" jurists who view "piracy" as solely a municipal law crime, the only question of international law being the extent of a state's jurisdiction to apply its criminal law to an accused foreigner acting outside the territorial jurisdiction of the prescribing state. This conflict was noted at the beginning of the Harvard Research which was the basis for the International Law Commission's work.[158] The resolution was to leave unexpressed the frankly "positivist" conclusion of the Harvard Research[159] and to treat "piracy" as if a "crime" whose elements were defined by international law (set out in article 14 of the Commission's draft) but whose enforcement was left to municipal law: the "naturalist" model. Presumably, the failure of a state to conform its municipal law definition of "piracy" to that proposed by the Commission as if a codification of existing international law in the absence of prior legislative acts except such as might be considered to flow in the international legal order from the municipal criminal law practices of states, would be considered itself a violation by the state of its obligations under general international law. This approach avoids all considerations of "standing," the legal link between the incident or the accused or his victim on the one side, and the state seeking to extend its jurisdiction on the other. It adopts the *locus deprehendatis* rule of *R. v. Green*,[160] merely restricting the legal power of a state to seize "pirates" to the high seas and other places "not within the territorial jurisdiction of another state," which seems to coincide with the maximum reach of enforcement jurisdiction anyhow, since no state has the legal power to make an arrest in the territory of another state without that other state's permission. What would happen if a state operating under the law as purportedly codified by the Commission made an arrest in foreign territory *with* the consent of the territorial sovereign is left unmentioned. It is therefore unclear whether the Commission envisaged that sort of cooperation and would regard it as proper but outside the framework it felt required codification, or intended to restrict extraterritorial jurisdiction by requiring each sovereign to enforce the general international law of "piracy" without help in its own territory, or simply did not consider the lacunae in its conceptual framework for a draft codification of the law. There is no explanation as to why this "natural law" approach was taken by the Commission, and no attempt to grapple with the conceptual difficulties that persuaded the Harvard Research drafters to take a different approach.

Article 19 provides that a state seizing as if for "piracy" a vessel or aircraft whose behavior had not provided adequate grounds for such an interference with rights of navigation on the high seas, is liable to the flag state for any damage caused by that seizure. And article 20 restricts the right of seizure because of "piracy" to "warships and military aircraft." The reason for this latter provision is explained on the basis that "other state-owned vessels do not provide the same safeguards against abuse."[161] No consideration is given to police or coast guard arrests or to the possible survival of the "natural right" asserted by Molloy for private vessels to make the equivalent of a "citizen's arrest,"[162] and no explanation is offered for that "codification."

The final article of this section of the International Law Commission's draft Convention on the Law of the Sea, Article 21, deals with the right of visit on the high sea, limiting that right to warships (without mention of military aircraft, a possibility specifically included in Article 20) and restricting it to three circumstances, of which one is that there is "reasonable ground for suspecting . . . that the vessel is engaged in piracy."[163]

The draft and commentary were distributed by the International Law Commission to Governments with replies requested before 1 January 1956[164] and six Governments addressed the articles dealing with "piracy."[165] Those replies were summarized by the Special Rapporteur (J. P. A. François) with his own comments on them and distributed on 1 May 1956 to the members of the Commission.[166] These new documents were further considered by the Commission on 9 May 1956.[167]

Regarding the introductory general article, article 13, The Netherlands suggested that "piracy on the high seas" seems inconsistent with article 14's definition of "piracy," which allows for the legal word to apply to some activities not on the high seas. The Rapporteur suggested deleting the reference to "the high seas" in article 13, pointing out that "piracy" is fully defined for purposes of the draft in article 14; thus the Rapporteur agreed with The Netherlands' position.[168] But the Commission adopted the suggestion of Mr. Jean Spiropoulos (Greece) to add: "or in any other place not within territorial jurisdiction of another State."[169] The reason for choosing this rather prolix and not entirely grammatical solution to the problem raised by the comment of The Netherlands is clear from the report of the International Law Commission. Sir Gerald Fitzmaurice (United Kingdom) had pointed out that the intention of article 14(1)(b) in referring to acts "outside the jurisdiction of any State" had been to allow the definition to cover the case of "piracy committed on desert islands," and that from this point of view the proposal of The Netherlands merely to delete the restrictive language of the draft article 13 was logical. The counter-argument apparently was that posed by Mr. Radhabinod Pal (India), who pointed out that the phrase "on the high seas" refers not to the definition of "piracy" but to the place in which measures of cooperation among states would be

required. In order to carry this affirmative duty, he suggested that that phrase should be retained and supported Spiropoulos's proposal to add language referring to other places in which that cooperation would be required.[170] A drafting committee eventually cleaned up the grammar, and the following language was incorporated in the final draft submitted by the International Law Commission to the United Nations General Assembly and ultimately adopted without change as article 14 of the 1958 Geneva Convention on the High Seas:

> All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.[171]

It is repeated with a minor stylistic change ("possible extent" changed to "extent possible") as article 100 of the 1982 United Nations Convention on the Law of the Sea.[172]

The definition article, article 14, received substantive comments from China, the Union of South Africa and The Netherlands. China suggested expanding the definition to include all shipboard violence and threats of violence when coupled with taking over command of the vessel, thus making "mutiny" a subspecies of "piracy." The Chinese argument to support this position was not based on history or legal precedent or the needs of the international order, but solely on the existence of two definitions of "piracy" in the Chinese Criminal Code[173] and uncited, unquoted, asserted "opinions" of unnamed authorities. These provisions seem to assume universal standing unless, as with the American definition of about 115 years earlier,[174] some basis for restricting the reach of Chinese law is assumed to exist in the international legal order. If not, every mutiny in any foreign vessel anywhere in the world involving persons of solely non-Chinese (even solely ascertained foreign nationality in their own flag vessel) would come within the scope of the Chinese criminal law system. Since the offense we call "mutiny" is, in the Chinese Criminal Code, merely "deemed" to be piracy, it is very difficult to attribute this possible reading of the Code to some notion of piracy *jure gentium*. Thus, in the absence of any precedents for Chinese exercise of jurisdiction over the acts of foreign mutineers in foreign vessels outside Chinese waters, it must be supposed that the expansive interpretation given to the reach of Chinese legislation by the Government of the Republic of China reflected similar expansive British assertion during the heyday of colonial enterprise, and not the intentions of the Chinese legislators of the Code (who used the word "deemed") or the experience of the United States and other powers who found such broad assertions to be unworkable in practice in the absence of complete dominance of the seas because inconsistent with international legal principle.

The Netherlands comment on article 14 also referred to "mutiny" (although not with that word) as a subspecies of "piracy," referring to Higgins-Colombos,[175] Ortolan,[176] Oppenheim-Lauterpacht,[177] Gidel[178] and

the British case of the *Attorney General of Hong Kong v. Kwok-a-Sing.*[179] But The Netherlands did not press the point, concluding that the prior language of the Commission was correct as a matter of policy growing out of the distribution of jurisdiction under the international legal order. "The community of States need not interfere with a change of authority on board the ship so long as the acts of the mutineers are not directed outwards."[180]

The Rapporteur's comment dated 1 May 1956 says merely that "The Commission did not wish to adopt the broad definition of piracy advocated by the Chinese Government,"[181] and does not mention the position of The Netherlands. In the Commission's discussion of 9 May 1956 there is only passing mention of the point, and the provision of article 14 that to be "piracy" the act must be committed by the personnel of one vessel (or aircraft) against another, was retained without substantive modification.

Other matters were discussed by the Commission in connection with article 14 on 9 May 1956. The Union of South Africa had rai definition affect state vessels operated for commercial purposes? In addition, Mr. Yuen-li Liang, Director of the Codification Division of the United Nations Secretariat Office of Legal Affairs, acting as Secretary of the International Law Commission, raised again the question of whether the definition should include acts done any place other than the high seas.[183] The Netherlands had also noted the point made by South Africa about state-owned vessels suggesting that article 14 be reworded to make it clear that it does not apply to "State-owned vessels having a public function."[184] In his report of 1 May 1956 the Rapporteur had agreed with both the South African and Netherlands points in substance. He suggested a redrafted article 14 eliminating "persons or property" as objects of "piratical" attack from the draft; supplementing the original reference to "private vessel or . . . aircraft" with a reference to any "vessel or aircraft in commercial service" (thus including some state-owned vessels or aircraft)[185] and inserting the words "persons or property" as possible objects of piratical attack in subparagraph (a) to parallel the language of subparagraph (b).[186]

In the discussions of the Commission on 9 May 1956, Mr. S. B. Krylov (U.S.S.R.) and Mr. Jaroslav Zourek (Czechoslovakia) repeated their objections previously stated.[187] Mr. Zourek in particular made an elaborate argument for revising the definition to include as an "act of piracy" all peace-time depredations even when committed for political ends, by warships or military aircraft, when committed from the high seas even if against ships, persons or goods located in territorial waters, internal waters or on land, unless those acts were denominated acts of aggression.[188] This suggestion seems to have provoked no response in the Commission despite its being consistent with a traditional use of the word "piracy" prior to and even during the nineteenth century; probably, the earlier Czech-Soviet political attempt to embarrass the Republic of China dominated the thinking of the

non-Communist members of the Commission, and the basic criminal law definition of "piracy" seemed incompatible with a world order model in which there was no imperial legislator. Much more could, of course be said about the possible attractiveness of this definition when the consequences of universal criminality are sought to be imposed on foreign "terrorists" acting abroad but this seems not the place to elaborate further on the theme.[189]

The bulk of the Commission's energy was spent discussing the desirability of including aircraft within the definition. As to that, an interjection by Sir Gerald Fitzmaurice proved the most influential. He pointed out that the main legal result of the definition was to determine which vessels (and aircraft) a warship of any nation would have the legal right to visit and seize. For that reason, it was necessary that the definition be precise as to its physical locus: high sea and territory not subject to the jurisdiction of any state. As to aircraft, the problem of depredations by aircraft was both novel and potentially real, and enforcement of the law by aircraft was also feasible. There seemed to be consensus that these arguments for progressive development of the law in the Commission's draft were persuasive, although Messrs. Krylov and Zourek preserved their opposition to the entire conception. With two dissents, therefore, the article was adopted subject to "drafting changes in the light of the discussion."

The changes wrought by the drafting committee were major but seem not to have been discussed in published documents. The redrafted article, article 39 of the Commission's final draft, appears as Article 15 in the 1958 Geneva Convention of the High Seas and, with stylistic changes, as article 101 of the 1982 United Nations Convention:[190]

> Piracy consists in any of the following acts:
>
> 1. Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (a) On the high seas, against another ship or aircaft, or against persons or property on board such [a] ship *or aircraft*;
>
> (b) Against a ship, *aircraft*, persons or property in a place outside the jurisdiction of any State.
>
> 2. Any act of voluntary participation in the operation of a ship *or of an aircraft* with knowledge of facts making it a pirate ship *or aircraft*;
>
> 3. Any act of incitement or of international facilitation of an act described in subparagraph 1 or subparagraph 2 of this article.

In the final version adopted into the Geneva Convention the only changes are the addition of the italicized words and the deletion of the bracketed "a." The stylistic changes in the 1982 Convention were to change the period at the end of paragraph 1(b) to a semicolon, and to change the passive "incitement" and "intentional facilitation" in paragraph 3 to the active "inciting" and "intentionally facilitating."

This final version appears to be at least as much the product of exhaustion and the dynamics of a group drafting committee as of logic or a knowledge of jurisprudence and history. Read carefully, it seems to revive the law of privateering by its reference to "illegal" acts, implying that some depredations for private ends might be "legal,"[191] and leaving no explanation of how sense is to be made of a purported definition of a "crime" that rests on an undefined and unreferenced concept of prior "illegality": Illegal under what law? By whose determination?[192] An attempt by the United Kingdom to rectify its own oversight in not raising the question earlier as to whether an "attempt" should not have been included with "voluntary participation" as part of the "crime" of "piracy"[193] was defeated during the Geneva negotiating session, indicating surely that by then nobody was willing to focus seriously on the formulation. Further comment seems unnecessary regarding the irony that the International Law Commission failed throughout its deliberations concerning article 14 to focus on the evolving patterns of jurisprudential thought and political and economic activity that lay behind the writings some of the Commissioners seem to have found persuasive; that instead primary reliance for background information was placed on the Harvard Research, which had enough jurisprudential analysis to take a positivist position and deny the consistency of contending schools of thought, but too little analysis of deeper jurisprudential currents and historical movement to make it possible to organize the mass of material in a form fit for codification except *de lege ferenda*; and that, even after some discussion by the Commission of one of the very few substantive points discussed with any depth at all, relating to the inclusion *de lege ferenda* of aircraft within the definition of vehicles that might be called "piratical" for the purpose of allowing official search and seizure on the high seas, the point was relegated to a drafting committee that then ignored it while engaging in major redrafting that it had not been supposed to undertake.

Article 15 in draft assimilated acts against third country vessels or warships and aircraft whose crews had mutinied to acts of "pirate" ships and aircraft. Some minor drafting changes were proposed by the Governments of Belgium, The Netherlands and Yugoslavia. In addition, The Netherlands proposed language to harmonize the article with their proposal for a specific reference to state-owned vessels in non-commercial service in article 14, and Yugoslavia made a similar proposal. The Rapporteur accepted this notion and redrafted the article.[194] At the meeting of the International Law Commission on 9 May 1956 Krylov rejected the new wording, saying that The Netherlands' proposal was "quite unrealistic," presumably in light of the Soviet position making all government vessels legally identical, whether engaged in commercial, military or other service.[195] Fitzmaurice noted that the problem would be the same whether or not the government vessel taken over by mutineers and committing acts of "piracy" were in commercial or

non-commercial service prior to the mutiny. He suggested the question "be ventilated in the Subcommittee" for drafting, and that suggestion was adopted.[196] There are no records available of the drafting committee's reasoning, but apparently The Netherlands' suggestion supported by Fitzmaurice but modified to eliminate the distinction between warships and other government vessels, won out. The distinction between a "warship" and other government vessel was reinserted at the diplomatic conference in Geneva, but with no apparent legal reason, since both military and non-military government vessels are put in the same category and no distinction between military and commercial aircraft was similarly inserted. The final version appears as article 16 of the 1958 Convention and article 102 of the 1982 Convention:

> The acts of piracy, as defined in article 101 [15] [39],[197] committed by a *warship*, government ship or [a] government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private [vessel] *ship*.[198]

Article 16 of the draft was believed to be superfluous by the Government of The Netherlands, which argued that if retained it should refer to all acts of "piracy," not only those referred to in the first part of the definition. The Government of Belgium in its written comments proposed new wording whose result was to delete the time limit on the denomination of a vessel or aircraft as a "pirate ship or aircraft," thus subject to search and seizure on the high seas. The Belgian suggestion replaced "when it is devoted by the persons in dominant control to the purpose of committing" a piratical act, with "if it has committed . . . or is intended to be used" by those persons for that purpose. The Rapporteur proposed to accept both the Belgian and Netherlands' suggestions,[199] and when Mr. A. E. F. Sandström (Sweden) pointed out the substantive effect of the Belgian proposal, the article was referred to the drafting committee.[200] The result of the unrecorded deliberations of the drafting committee was to adopt the Belgian form but retain the original meaning:

> A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article *102* [15] [39]. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

This version appears unaltered as article 17 of the 1958 Convention and article 103 of the 1982 Convention.[201]

Article 17, codifying in part the Peruvian view of the *Huascar* incident, received no comment from governments and was adopted by the Commission on 9 May 1956 without further discussion. It appears as article 42 of the Commission's final draft with petty drafting changes, and as article 18 of the 1958 Convention and article 104 of the 1982 Convention:

> A ship or aircraft may retain its [national character] *nationality* although it has become a pirate ship or aircraft. The retention or loss of [national character] *nationality* is determined by the law of the State from which [the national character] *such nationality* was [originally] derived.[202]

Article 18 was the article authorizing universal jurisdiction to seize "a pirate ship or aircraft" and dispose of the persons and property on board. The Government of Belgium made its approval conditional on approval of the Belgian revision of article 16. The United Kingdom suggested a minor amendment to make clear that capturing states had complete discretion as to the legal disposal of the "pirate ship" after seizure. The Rapporteur preferred not to raise that issue which he seemed to feel would involve complications.[203] At the meeting of the International Law Commission on 9 May 1956, Fitzmaurice repeated the British position, pointing out that there might be particular difficulties arising out of the specification in the draft that the capturing state could dispose of the seized property while not mentioning the "pirate" vessel or aircraft itself. As so interpreted, the British objection appeared to be a minor drafting point, and Mr. L. Padilla-Nervo (Mexico) suggested it be solved by inserting the words "ships, aircraft or" before the word "property" in the part of the article dealing with disposal. The amendment was adopted.[204] In the drafting committee some further minor changes were made, and the final version of the article reported as article 43 by the Commission, was adopted without amendment by the Geneva Conference as article 19 of the 1958 High Seas Convention and now appears as article 105 of the 1982 Convention:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.[205]

The difficulties with this language noted above in connection with the International Law Commission's first drafting session[206] appear to have been overlooked, and all the criticisms mentioned there seem still to apply.

Article 19 specifying the legal result (international liability) for a seizure on suspicion of "piracy" without adequate grounds, drew comments from The Netherlands and Norway concerning an apparent minor inconsistency in language with a non-piracy article (article 21 of the draft) concerning claims resulting from any unjustified official boarding on the high seas.[207] The Rapporteur and the members of the Commission all agreed.[208] The minor drafting change was referred to the drafting committee. The result was article 44 of the Commission's final draft and, without any further modification, article 20 of the 1958 Geneva Convention and article 106 of the 1982 Convention:

> Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.[209]

The final article dealing directly with "piracy" was article 20, limiting the right of seizure to warships and military aircraft. The Government of the Union of South Africa in its comment on the draft pointed out that to withhold from private vessels the legal right to arrest a "pirate" on the high sea would favor "pirate vessels *vis-à-vis* States with small fleets and a long coastline." Nevertheless, South Africa was prepared to accept the draft on the grounds that it was "justified by necessity," presumably meaning that the alternative, allowing all vessels to seize suspected "pirates" as Molloy had believed was justified by natural law,[210] would open the way to incidents it would be better to avoid; on the basis of an interpretation of another article of the draft,[211] which seems of doubtful applicability; and on the ground that nothing in the draft limits the right of self-defense, under which "the master of the vessel against which the act of piracy was committed would presumably be entitled to seize the vessel and its crew pending the arrival of a warship or military aircraft."[212] The Rapporteur, noting that he agreed with this interpretation of the law of self-defense, recommended no change in the draft article 20.[213] At its meeting on 9 May 1956, M. Georges Scelle (France) disagreed that the municipal law concerning self-defense permitted such an arrest, implying that the international law of self-defense unamplified could go no further, but he concurred in the final position taken by the Rapporteur on the ground that he believed the law allowed the functions of public authorities to be discharged by others when those authorities were absent.[214] Mr. F. V. Garcia Amador (Cuba), the Chairman of the International Law Commission, suggested that some language be added to the Commission's commentary on its draft to be forwarded to the U.N. General Assembly to make clear that private vessels would be authorized to effect a provisional seizure of an attacking "pirate" vessel in the exercise of rights of self-defense, but not generally to police the sea. It was agreed that an appropriate statement would be put in the commentary, and article 20 was passed without change.[215] The official commentary was then adjusted by adding the following paragraph:

> Clearly this article does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal State. This is not a "seizure" within the meaning of this article.[216]

This language presumably the product of the drafting committee, does not mention aircraft and seems much more narrow than appropriate to respond to the problem raised by the Government of the Union of South Africa. It may be supposed that the members of the Commission were simply too tired by this time.

The final version of article 20, numbered article 45 in the Report to the General Assembly, is slightly different from the draft that is reported to have been approved on 9 May 1956, and it is possible to suppose that the drafting

committee had broadly construed its authority again; the changes seem nonsubstantive. At the 1958 Geneva Conference a new clause was added at the end of that article to take care more directly of the South African point by adding other authorized ships or aircraft to the class "warships or military aircraft" authorized to seize "pirates." It was adopted as article 21 of the 1958 Convention (107 of 1982):

> A seizure on account of piracy may only be carried out by warships or military aircraft, *or other ships or aircraft on government service authorized to that effect.*[217]

The articles adopted in Geneva in 1958 as set out above were inserted with unexplained minor changes in the United Nations Convention on the Law of the Sea concluded at Montego Bay, 10 December 1982[218] and appear in that Convention as articles 100-107. None of the changes addresses any of the substantive points discussed above; only one seems significant. In the last quoted article the additional language patched in to the text by the 1958 Conference was further amended, apparently to narrow the scope for possible abuse, as follows:

> A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft *clearly marked and identifiable as being* on government service *and* authorized to that effect.

The complete text of the 1982 version is reproduced below at Appendix III.B.

"Piracy" Today

Having decided to reanalyze primary sources in order to discover why it seems so difficult to codify a concept as frequently mentioned as "piracy," analysis of the secondary sources, the writings of learned publicists, has seemed out of place. Indeed, fitted in to historical and jurisprudential context, it early became clear that the voluminous writings contributed little to an understanding of the behavior of statesmen and courts, but illustrated instead the mental agility and theoretical bent of writers who, with varying degrees of subtlety, had sharp axes to grind; wanted to make a debating point or fit practice into some preconceived pattern of legal theory rather than examine with open eyes the concepts actually motivating statesmen and jurists when they used the word "piracy." Indeed, it has never been far from my own mind that this work itself, if it is ever read by anybody, will be sharply criticized for what must appear to be departures from orthodoxy to some, and biased preconceived argument based on false models of the nature of the international legal order by others. My assurances are sure to be dismissed as irrelevant or even misleading that I began work with no notion of where it would lead, and that my primary sources are quoted at inordinate length to make clear the evidence for my rather complex view of the evolution of at

least two major streams of meaning and a half-dozen lesser technical meanings to the word "pirate" and its derivatives in commonly cited literature.

Nonetheless, I am loath to dissect the most commonly cited secondary and tertiary sources. Partly, this is because such a dissection would necessarily lead to a wider analysis of the jurisprudential thought of complex minds, like that of Sir Hersch Lauterpacht, with whom I find myself in profound disagreement. I should have thought that such an analysis were better done by a disciple than by one whose deepest respect is not uncritical. Nor do I imagine that the world will be much improved by a critical study of Lauterpacht's thought approached through the narrow path of a study of "piracy," which was peripheral to Lauterpacht's own main stream of ideas. Thus, Lauterpacht's complex but logical structure built upon the *Huascar* and other cases,[219] while defensible, seems shallow; more a manipulation of received ideas and immense reading of current literature than an analysis of roots, and somehow finds British practice always correct and consistent. But consistency among statesmen of different times, with different aims, and under different historical and cultural conditions cannot be expected, while the research set out in chapters I, II and IV above should respond amply to notions that England has been so lucky in its leaders that principled action was always taken.

The deepest commentary on the place of "piracy" in the web of the law is probably that of Professor Georg Schwarzenberger, predating the discussions of the International Law Commission, but ignored by the Commission.[220] Perhaps it is only because he and I have come to similar conclusions independently that his work seems to make such sense, but to those who find the current study interesting, Schwarzenberger's analysis should be more so.

He finds six quite different meanings to the phrase "international criminal law": (a) Municipal criminal law applied to persons abroad, mitigated by limits in the international legal order on the power to arrest and try the accused; (b) international law requiring states to prescribe municipal criminal law consequences to various acts, such as treaty or custom forbidding the slave trade or exceeding fishery limits; (c) "piracy" *jure gentium* and war crimes, as acts which international law requires states to punish by their municipal criminal law in all cases within their enforcement jurisdiction; (d) municipal criminal laws common to all states, possibly the residue of Coke's natural law theory that would withhold immunities even from foreign ambassadors when they commit *mala in se*;[221, 222] (e) matters of customary cooperation such as extradition, in all cases based on treaty; and (f) international crimes strictly speaking, acts punishable by the international community more or less directly such as the "crime" of waging aggressive war punished by an international tribunal at Nuremberg. "Piracy," to Schwarzenberger, fits only category (c), and if there is a question about the

classification, it is only that the authorization international law gives to municipal authorities to prescribe and punish "piracy" and "war crimes" is not clear as to precisely what "piracy" is. Neither "piracy" nor "war crimes" in the normal sense fit category (f), because their definition and punishment is left to municipal law entirely; there has never been an international tribunal set up to define and punish "piracy" as such, and the novelty of Nuremberg was its new definition of crimes not included in the traditional notion of violations of the laws and customs of war; it was because of the new crimes and the fact that no national tribunal was competent to apply them to German officials except a German tribunal, and none existed in Germany with the requisite authority in 1945, that made the Nuremberg tribunal necessary and created a new class of international "crimes."[223]

With this in mind, it is interesting to ponder for a moment the uses of the word "piracy" in recent years.

The first notorious incident after 1958 in which "piracy" was an issue was the seizure of the Portuguese passenger ship *Santa Maria* by a Portuguese political figure, Dr. Enrique Galvâo. Portugal appealed for some foreign naval help, calling the politically-motivated captors of the vessel "pirates." That label, or, at least, its legal results, was uniformly denied by all states whose assistance might have been involved. Very little attention was paid to the definition in article 15 of the 1958 Geneva Convention on the High Seas, at least in the United States.[224] Brazil gave political asylum to Dr. Galvâo and his band to end the incident; no criminal proceedings followed.

On 12 May 1975 the American container ship Mayagüez was captured by government forces of Kampuchea off Tang (Wei) a small island whose sovereignty was in dispute but which was at the time occupied by Kampuchea. President Ford immediately called the capture an "act of piracy" and ordered military measures. His use of the word "piracy" was reminiscent of the British late nineteenth century practice of using the word "piratical" as an adjective to describe foreign government action, then turning the adjective into a noun for the purpose of asserting an enforcement jurisdiction in themselves, thus calling foreign military forces "pirates" by implication, and themselves policemen enforcing substantive public international law rather than British Imperial law or British military policy. But the American State Department came very quickly to the rescue and on 13 May 1975 an unnamed "State Department lawyer" was quoted as denying that the Kampuchean act was "piracy" in the sense of the 1958 Convention, implying as far as a loyal civil servant could that the legal rationale chosen by the Chief Executive officer of government was not correct.[225] The issue was quickly permitted to drop as a military action by the United States was condemned widely an excessive, dangerous and unnecessary to procure the release of the crew.[226] In fact, in tort actions against the vessel's owner before American courts in the years that followed, it became clear that the ship had in fact been

within three miles of land legally claimed and in fact occupied by Kampuchea at the time of the incident, and that among its cargo were sealed containers consigned to the U.S. military.[227] It is, of course, possible that President Ford's use of the word "piracy" reflected a vernacular usage that had never been wholly dropped since the 16th century, or a conception of "state piracy" as the word was used in Roman times and revived for use against the Barbary states from time to time. But the *Mayagüez* was within any definition of Kampuchean territorial waters except one that would deny legal effect to the Kampuchean legal claim and physical occupation of Tang Island, and she was carrying cargo consigned to the American military in time of military activity and great stress in the area, with the United States ranged against the revolutionary government of Pol Pot in Kampuchea. It thus seems much more likely that President Ford was simply overreacting in words as in military deeds, and he used the word "piracy" as a mere pejorative without any thought to meaning at all.

There have been many incidents in the South China Sea and elsewhere of what many have called "piracy" since the end of the war in Vietnam on terms favorable to the Communist Government there. About a million refugees, particularly but not exclusively ethnic Chinese, have left Vietnam, Kampuchea and Laos, about half of them by ship, in a flow that reached flood proportions in 1978 and 1979. In their struggle to reach haven in Malaysia by sea, many were beset by "pirates" based in Thailand, and many others by other attackers at sea.[228] There are other reported incidents in West African waters, Indonesian waters, Philippine waters (particularly among the Muslim inhabitants of the southern islands of the Philippines), the Straits of Singapore and elsewhere.[229] The word "piracy" appears frequently in the reports. From the point of view of this study, the important point is not the vernacular use of the word, or even its occasional use by naval or other governmental personnel arguing for international cooperation or even unilateral action to suppress this dreadful feature of our time. It is the refusal of states in fact to cooperate or even to acknowledge that there is any international obligation to cooperate in suppressing the acts called "piracy." Indeed, there has been a notable refusal even to discuss the possibility of international cooperation in this context. For example, at a Conference on the problems of the Association of South East Asian Nations (ASEAN) held at the Fletcher School of Law & Diplomacy on 12 November 1981, a very high Malaysian official acknowledged that "piracy" existed in the area, but in response to a question about whether ASEAN could protect "boat people" on the high seas at least from predators putting out from the ASEAN countries themselves or flying the flags of ASEAN countries, he replied carefully that American traders need not fear "pirates" or lack of police in the "territorial waters" of his country, and the Chairman of the session quickly shifted the subject in what seemed an attempt to avoid embarrassing the distinguished speaker any further.

The Malaysian position requires a deeper analysis. The problem of controlling these depredations appears not to be one of definition alone, although it might help if either the 1958 Geneva Convention on the High Seas or the 1982 United Nations Convention on the Law of the Sea had a comprehensible definition of "piracy." But discussions do not get even that far. The problem instead relates to the strength of the international legal order and its emphasis on "standing," the legal link between an act and the state within the order trying to apply its view of the law to that act. In theory, there is no way to avoid the question of "standing;" all states would deny the legal authority of any to govern the acts of foreigners outside the prescribing state's territory if the denying state itself had "standing" to object, were itself affected by the exercise of the prescribing state's jurisdiction. This was discussed above[230] in connection with the United States Supreme Court rejecting universality as the proper extent of American criminal law jurisdiction with regard to "piracy." In practice, aside from British actions of doubtful legal significance analyzed in such detail above,[231] and a handful of oft-cited judicial decisions that seem badly reasoned and internally inconsistent or inconsistent with known facts,[232] the evidence is simply not there. The reason is clear. The international law of "standing" reflects general theory forbidding intermeddling in the quarrels of others. The sovereign equality of states, the lack of a superior to judge the facts, the law or the relative importance of conflicting national interests, and the overall system's interest in limiting disputes to the narrowest possible compass involving the fewest possible people, are summarized in the Latin maxim "*res inter alios acta* [a thing involving (only) others]." Such intermeddling would thus be indignantly rejected by the states involved in the absence of agreement to arbitration, an agreement establishing some international organization's purview, or some other legal basis for the intervention. As a matter of customary law and practice, very few states in very few circumstances have engaged, or would even have considered engaging, the lives of their mariners, the money of their taxpayers, or the prestige of their rulers in policing activities with regard to acts that have no clear impact on the material interests of influential constituencies.

British expanding and aggressive mercantile interest, overwhelming naval dominance, and self-perception as a law-abiding race bringing justice to benighted parts of the globe from the time of the end of the Napoeonic Wars to the World War of 1914–1918, brought together a combination of factors making universal "standing" under the law, with Great Britain the only country likely to be able to exercise it, seem a compelling legal rationale for police actions. An added benefit was that those actions so rationalized would give the British discretion to keep order or not as the British chose. The supposed "obligation" to "cooperate" in suppressing "piracy" implied that somebody else was shouldering the primary burden in cases actually far from

British trade routes or ambitions; and in cases in which the British wanted to be the prime actors, they could call on the help of others under this supposed "obligation," amounting to an obligation of others to help support British military actions in British interest. To those for whom security of life, property and international trade was a higher value than national self-rule and the equality of legal persons under the law, the British rationale combined morality with interest and must have been very compelling indeed, while still not saddling British governments with any obligation to risk blood, treasure or prestige on police actions beyond their constituencies' interest.

But in many parts of the world today, particularly parts that had at one time in the not too distant past been parts of the British Empire, the value of national self-rule and the equality of legal persons under the law, *i.e.*, of states under international law, now seem higher in cases of conflict than the value of life and property, particularly the life and property of foreigners. The Malaysian, indeed ASEAN, refusal to exercise jurisdiction over the acts of even their own nationals to protect "boat people" in the South China Sea area, thus seems to rest on a denial of American and presumably British and other third countries' legal basis for complaint; it is a reservation of discretion comparable to that of the British during the heyday of Empire, but without the world-wide commercial interest and pride that led to British assertions of universal jurisdiction when it suited British interest. To make matters worse for the victims of "piracy" today, as long as the social, economic and political orders of the ASEAN states are not affected by the attacks on the "boat people," the same factors that lead third countries to abstain from action must also lead the leaders of the ASEAN nations to abstain from direct action. While their own jurisdiction over their own nationals committing these depredations on the high seas is not denied, neither is it exercised. Since the states which have undeniable "standing," Vietnam and China, apparently make no complaints about atrocities committed against those whom the international legal order allows them to protect on the high seas, and take no police action of their own to raise the issues with the ASEAN countries, the ASEAN countries feel neither internal nor external pressures to act themselves.

An added factor in the policy question of whether the United States should try to assume the former British position, arguing universality of jurisdiction and a right under international law to apply national criminal prescriptions to the acts of foreigners against other foreigners on the high seas when no clear American legally protected interest is affected, is the basic rule of the sovereign equality of states in the international legal order. What the United States can legally do, the Soviet Union can legally do; and the Soviet base in Cam Ranh Bay is closer to the scene of the action than American bases in the Philippines. There seems to be no convincing legal rationale that would permit American action and forbid Soviet action in the South China Sea, so

the better course might be to forbid the action of both as long as the legally protected interests of both are not threatened. Thus, the policy reasons that give rise to statements and acts evidencing positive international law dictate abstention.

It can be concluded that "universal jurisdiction" was at best a rule of international law only for a limited period of time and under political circumstances that no longer apply; at worst it was merely a British attribution to the international legal order of substantive rules forbidding "piracy" and authorizing all nations to apply their laws against it on the high seas, based on a model of imperial Rome, and British racial and commercial ambitions that never did reflect deeper realities, as part of the rationalization of imperialism never really persuasive outside of England alone.

If either view is correct, or any view between the two extremes, then even Schwarzenberger seems to overstate the role of public international law regarding "piracy." The legal order is better reflected by the unsuccessful initiative of Peru at a late meeting of the Third United Nations Law of the Sea Conference, proposing to delete the words "or in any other place outside the jurisdiction of any State" from the two articles in the United Nations draft in which they appear, articles 100 and 105.[233] It may be remembered that the person most forcefully and successfully arguing for the inclusion of those words in the International Law Commission's draft had been Sir Gerald Fitzmaurice, whose perceptions of the needs of the international legal order as they relate to the high seas derived more directly from British experience than from the experience of smaller states seeking to establish and maintain their own authority and limit legal justifications for the incursions of others. It may be no accident that the state making the new proposal was the state most aggrieved by the British position in the *Huascar* incident. From this point of view, it is possible to assert with some confidence that there is no international law of "piracy" at all, and it is possible that there never has been any such law except in the autointerpretive projections of some states from time to time seeking either to expand their jurisdiction to safeguard their own trade or establish imperial interests, or in the theories of those who prefer to call their personal moral insights "law" as if universally applicable and not requiring a legislative decision by a "legislator" empowered within a legal order.

There are many other reasons in theory for denying the present day existence of an international law of "piracy," such as the general acknowledgment today that all criminal acts must be so defined by statute before they can be punished, *nulla crimen sine lege; nulla poena sine lege*.[234] Thus, the very notion of there being an "international crime" in the absence of a statute binding on the tribunal before which the accused is brought, is inconsistent with basic theory for those accepting the validity of the platitudinous rule.[235] Indeed, it is possible to argue further that the roots of the

confusion lie in the attempt by "natural law" jurists, reversing the original meanings of the Latin words, to turn the moral imperatives, the "*jus*" (as in "*jus*tice"), into legal imperatives, "*legis*" (as in "*legis*lation"). In the case of "piracy," this seems to have been attempted through denominating judges as legislators for more than the case before them; by construing every precedent into a legislative act regardless of political reasons that might dissuade the community from accepting that form of legislation; reasons from the particular, such as the quality of trial advocacy and the impossibility of presenting general, community interests before a court in a single case, to the general, resting on the selection process of "judges" and their function under the constitution that empowers them to resolve cases. But these questions take us far beyond the bounds of a study of the law of "piracy" and into areas of jurisprudence better left for another occasion.

It may be concluded that both in current practice and in current theory built upon ancient roots and the evolution of the international political and legal orders, there is no public international law defining "piracy;" that the only legal definitions of "piracy" exist in municipal law and are applicable only in municipal tribunals bound to apply that law; that these examples of municipal law do not represent any universal "law of nations" based on moral principle and right reason exemplified through identical laws of different countries, but rather rest on national policies made law by the constitutional processes of the different countries; and that such other uses of the word "piracy" as exist in international communication reflect vernacular usages, pejoratives, and perhaps memories of Imperial Rome and Imperial Britain inconsistent with the current legal order and of doubtful legal effect even when used most emphatically in the heyday of both empires.

It is possible to argue, of course, that regardless of the weakness of the precedents taken in full context the conference process both in 1958 and 1982 produced widely acceptable formulations that must reflect some consensus. There might be some substance to this argument as it applies to rules actually discussed at the conferences, such as rules relating to passage through international straits and innocent passage through territorial waters. But as has been shown at great length above, the formulations relating to "piracy" reflect no such process and no such discussion. And if the 1958 formulation in its current version were in fact regarded as codifying acceptable rules regarding "piracy," it should now be apparent that the rules so codified, when read carefully, are incomprehensible and therefore codify nothing.

It is also possible to argue that the persistence over two millenia of some concept of "piracy," universal jurisdiction and a common criminal law applicable to persons outside the state system who interrupt commerce, creates a presumption that there is some "law" forbidding "piracy" and authorizing states to do something about it. But, as has been shown, the basic premise is wrong. The "piracy" of ancient Rome was a form of belligerency,

not criminal behavior; the "piracy" of Admiralty tribunals reflected municipal law and was restricted by underlying rules of the international legal order limiting national jurisdiction. The rhetoric seems always overdrawn or political; the cases seem narrow and, where used as a vehicle for expressing great generalities, a forerunner to political action that in practice proved disastrous to those who tried to use their view of the law to justify political movement. The actual practice of states, resting on the state system as it has existed more or less since the time of Gentili and Grotius, evidences unwritten "constitutional" rules in the international order that are disregarded only at the cost of futility or failure.

On the other hand, it is possible that there are small cracks in that order that permit something like the concept of "piracy" and universal jurisdiction in some very narrow circumstances. For example, where there is a *lacuna*, a gap, in the rules of national jurisdiction so that no state has the legal power to apply its law to an incident, the universal interest in international commerce might authorize any state to apply its law. But the pattern is not one of overlapping jurisdictions then, it is the hunt for "standing," some basis in the legal order for action. From this point of view, there is no substantive international law defining "piracy" to be enforced by states directly; there is an international law distributing the legal power to apply municipal law to the acts of foreigners. It would seem that if there is any international law relating to "piracy" it is the legal power given to all states to apply their municipal laws to foreigners, even acting in foreign vessels or aircraft, in those cases in which the acts of those foreigners can be considered to injure the prescribing state more or less directly under the general international law restricting "standing." Thus the international law relating to "piracy" comes down to the adoption of principles of "passive personality" to activities in which the prescribing state's only connection with the act to which it attaches legal consequences is the nationality of the victim or the property affected by the act. Since the international law regarding the extent of national jurisdiction subordinates passive personality jurisdiction to jurisdiction based on the nationality of the actors and the legal subordination of the territory or vehicle in which the act occurs, what is left is a small residue of legal power which, if exercised beyond the bounds of legal "standing" to apply national prescriptions, embroils the prescribing state in legal complications that easily slip into attempts to extend general prescriptive jurisdiction beyond the bounds the legal order accepts. That is the path to imperial adventures that states embark on at their peril.

It bears repeating that both words "*per*il" and "em*pire*" have the same Greek root as the word "*pir*ate." From the point of view of this study, all three words have evolved in meaning over time, and "empire" and "pirate" now relate more to a disregard of the legal powers of others than to the Greek

word relating to *experiments* and *experience*. It is the disregard of the legal powers of others to determine property and personal rights that is common to both "piracy" and "imperialism." The use of the word by Roman and British empire-builders to classify the equally disdainful depredations of those whose political organizations lay outside the imperial jurisdiction, and then, in the latter case, the assumption of an authority to apply English municipal criminal law to those persons called "pirates" without nationality, territorial, or passive personality victims as links to the prescriptive order, was the result of a logical confusion and in practice ironical. It did not increase respect for British "justice" or for international law, and embroiled the British in the expense and bloodshed of colonial wars while rationalized as a police action to enforce the law without recourse to war. It was an assumption of legal authority by those whose conception of law made it indistinguishable from a mere policy to use physical force. From this point of view, the fatal sin of the "pirates" and empire-builders was the same. It was not avarice, but "*hybris*"—the overweening pride of Greek myth that leads ultimately to destruction via the path of power.

Notes

1. Text at notes IV-171 sq. above.

2. The American Civil War experience and the British attempts to label the non-European or rebel obstructors of their commerce or political ambition as "pirates" have been amply cited and analyzed above. Only one instance has been found in which the political officers of a government not able to dominate the military and diplomatic situation actually used the word "pirate" and a court upheld that usage. That case involved the temporary imprisonment in Penang in 1815 of a claimant to the sultanate of Achin in Sumatra who had let his ambitions bring him into difficulties with the British authorities at a moment when his own fortunes were at an ebb, and when his enemies were in control of the "recognized" government in Achin and certainly had no interest in intervening diplomatically on his behalf with the British. The situation is doubtful as a matter of legal precedent, and was not even considered by the court in the influential Mohamed Saad case analyzed in the text at notes IV-133 sq. above. The incident is summarized and analyzed briefly in the text at notes IV-102 sq. above and in Rubin, *International Personality of the Malay Peninsula* (1974) 161-167.

3. Instructions for the Government of the Armies of the United States in the Field, Schindler & Toman, *The Laws of Armed Conflicts* (2nd rev'd ed. 1981) 3.

4. See text at notes III-230 sq., esp. Dana's summary at note III-280 above

5. Article 82, in Schindler & Toman, *op. cit.* 3 at 14.

6. In form, Lieber, then a Professor at Columbia College (now Columbia University) in New York, submitted his draft for revision and approval to a board of Army officers headed by the Army Chief of Staff, General H.W. Halleck, himself a considerable scholar of international law. E. Root, Francis Lieber, 7 AJIL 453 (1913).

7. Project of an International Declaration Concerning the Laws and Customs of War, 27 August 1874, Schindler & Toman, *op. cit.* 25 sq.; Institute of International Law, *The Laws of War on Land* (The Oxford Manual), 1880, in *id.* 35 sq.; Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899, and Convention (IV) on the same subject, 18 October 1907, both in *id.* 57 sq.

8. Treaty Relating to the Use of Submarines and Noxious Gases in Wartime, Washington, 6 February 1922, in *id.* 789, article 1. The quoted language is from paragraph 1 on p. 790, the affirmation regarding belligerent submarines is in paragraph 2 on the same page.

9. *Id.*, article 3.

10. See passim, esp. text at notes II-4 sq., II-91 sq., III-160 sq. and III-230 sq. above.

11. See above text at notes II-48 sq.

12. See above *passim*, esp. text at notes II-80 sq., III-64 sq., III-85 sq. and III-122 sq.

13. The only known case prior to 1922 in which true "universal" standing was applied was the 1705 Scots case R. v. Green analyzed in pertinent part in the text at notes II-87 sq. above; a case notorious for its

prejudiced result implying the reasons why such "universal" jurisdiction is not conducive to justice. In other cases in which the point was made, like the British cases, *In re Tivnan* 5 Best & Smith's Q.B. Rep. 645 (1864), and Attorney-General of Hong Kong and Kwok-A-Sing (1873), L.R. 5 P.C., 3 BILC 812, analyzed in the text at notes III-259 sq. and IV-211 sq. above, other factors seem to have dominated the thinking of the court, and "universal" jurisdiction was mentioned as mere dicta by "naturalist" judges speaking beyond the confines of the case as a basis for not discharging an extradition obligation in circumstances when the "universal" jurisdiction asserted to rest in the responding state was not to be exercised either, or was a mere assertion of jurisdiction not supported by argument.

14. For some analyses, see G.G. Wilson, *International Law Situations* (NWC Blue Book 1930-1931) 25-36; W.T. Mallison, (NWC Blue Book 1968) 41-43. An extraordinarily vehement article supporting the characterization of submariners as "pirates" before the convening of the 1922 Conference on the basis of an analogy to the supposed "piratical" character of the Barbary states is de Montmorency, Piracy and the Barbary Corsairs, 35 *Law Quarterly Review* 133 (1919). An incisive criticism of the analogy to "piracy" in the 1922 Conference appeared immediately afterwards. Roxburgh, Submarines at the Washington Conference, 3 BYIL (1922-23) 179, reports how the chief American delegate, Elihu Root, blocked a referral of the "piracy" analogy to legal experts. Root apparently took the position that the word was useful for its pejorative overtones, and the analogy was political not legal; that the legal results that should flow from the use of the word were only those agreed in the Conference Final Act (i.e., the Treaty Relating to the Use of Submarines and Noxious Gases in Warfare of 6 February 1922), set out in the text at note 9 above. Of course, under this view, the Final Act is in no way a codification of pre-existing general international law, but only a contract among the parties to the Final Act of the Washington Conference. France refused to ratify that Final Act, and none of the defeated Central Powers was a party. See the list of signatures, ratifications and accessions in Schindler & Toman, *op. cit.* 791.

15. Treaty for the Limitation and Reduction of Naval Armaments, London, 22 April 1930, in Schindler & Toman, *op. cit.* 793-794.

16. Procès-Verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, London, 6 November 1936, in Schindler & Toman, *op. cit.* 795-796. By the end of 1938 there were 48 parties, including all the major powers of the world and the major belligerents of the impending Second World War. See the list in *id.*, 796-797.

17. The Nyon Agreement, Nyon, 14 September 1937, in Schindler & Toman, *op. cit.* 799.

18. There are several rationales for the British and French position that seem more persuasive in full context than the universal jurisdiction rationale. For some suggestions with regard to the analogous British assertions in the early nineteenth century, see text at the start of ch. IV above.

19. The more or less standard collection of documents and analyses compiled when the United States was a neutral commercial power before entering the First World War in 1917, is Scott, *The Armed Neutralities of 1780 and 1800* (1918).

20. Agreement Supplementary to the Nyon Agreement, Geneva, 17 September 1937, in Schindler & Toman, *op. cit.* 801-802.

21. See text at notes II-4 sq. above. The statute of 1700 is set out in Appendix I.B below.

22. See text at notes III-230 sq. above.

23. See text at notes IV-302 and IV-307 above.

24. Three of the signing states ultimately failed to ratify: Chile, Guatemala and Venezuela. See list in Schindler & Toman, *op. cit.* 807.

25. Convention on Duties and Rights of States in the Event of Civil Strife, Havana, 20 February 1928, in Schindler & Toman, *op. cit.* 805.

26. *Id.*, 806.

27. *Id.*

28. Convention on the High Seas, Geneva, 29 April 1958, T.I.A.S. 5200, 13 U.S.T. 2312, 450 U.N.T.S. 82. On the codification attempt, see text at notes 61 sq. below.

29. According to the statistical table in Evans & Murphy, *Legal Aspects of International Terrorism* (1978) 5, there were nine non-United States registered civil aircraft "hijacked" in 1960, no American aircraft; a total of 11 in 1961 (five American, six non-American); then seven or fewer total through 1967. In 1968 the total jumped to 35 (21 American); in 1969, 89 (40 American); then it declined slowly as pre-flight inspection procedures and other pressures made civil aviation less inviting as a target to people and groups with private or political grievances.

30. The phrase "aircraft piracy" was defined and used in American municipal legislation enacted on 5 September 1961; P.L. 87-197, 75 Stat. 466. That legislation will be discussed below.

31. Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Tokyo, 14 September 1963, T.I.A.S. 6768; 20 U.S.T. 2941; 704 U.N.T.S. 219. At this writing there are over 100 parties to the Convention.

32. *Id.*, arts. 3 and 4.

33. This is not the place for a more elaborate re-examination of the public international law regarding the legal bases for extending municipal criminal law prescriptive jurisdiction. In The Lotus Case, P.C.I.J. Ser. A, No. 10 (1927), Part IV, the Permanent Court of International Justice at the Hague specifically reserved its position, refusing to either accept or reject a French contention that the nationality of the victim taken by itself was insufficient as a basis in law for a state to exercise jurisdiction to prescribe over a foreign individual acting outside the territory of the prescribing state. As has been amply documented above, whatever the limits of this so-called "passive personality" as a basis for asserting jurisdiction to prescribe municipal criminal consequences for the acts of a foreigner outside the territorial or Admiralty jurisdiction to enforce of the prescribing state, "passive personality," *i.e.*, injury to a national of the prescribing state, has been accepted from the earliest days as a basis for the assertion of jurisdiction to prescribe with regard to the acts of foreigners on foreign vessels sailing the high seas when two or more vessels of different flag or no flag were involved. It is possible to suggest that if "piracy" is a substantive "crime" under international law at all, one legal effect is to endow states with jurisdiction to enforce their municipal laws relating to it on the basis of "passive personality," i.e., the nationality of the victim. Whether that extension of jurisdiction on the basis of "passive personality" is better regarded as the maximum extension of national jurisdiction, with or without the quite separate jurisdiction asserted over stateless "pirates" to fill a jurisdictional gap (see text at notes II-61 sq., II-80 sq., III-64 sq. and III-85 sq. above), or as merely the only type of "universal jurisdiction" that is undoubtedly exercised by states in view of the policy reasons why jurisdiction is declined in other cases involving the acts of foreigners abroad (see, *e.g.*, *U.S. v. Pedro Gilbert*, 2 Sumner 19 (1834), analyzed in text at notes III-69 sq. above; *In re Tivnan* in text at notes III-259 sq. above) seems to depend on whether the analyst takes fundamentally a "naturalist" or "positivist" stance as to the basis of the rules relating to "piracy" in public international law.

34. The basic articles of the 1963 Tokyo Convention are Article 9.1:

> The aircraft commander may deliver to the competent authorities of any Contracting State in the territory of which the aircraft lands any person who he has reasonable grounds to believe has committed, or is about to commit, on board the aircraft an act contemplated in [the Convention].

and Article 13.1:

> Any Contracting State shall take delivery of any person whom the aircraft commander delivers pursuant to Article 9, paragraph 1.

The custody assumed under this provision is stated in Article 13.2 to last only "for such time as is reasonably necessary to enable any criminal or extradition proceedings to be instituted."

35. *Id.*, art. 1.1.

36. U.S. v. Tully and Dalton, 1 Gallison 247 (1812), discussed immediately after note III-54 above.

37. U.S. v. Wiltberger, 18 U.S. (5 Wheaton) 76 (1820), discussed in text at notes III-73 sq. above; U.S. v. Klintock, 18 U.S. (5 Wheaton) 144 (1820), discussed in text at notes III-81 sq. above.

38. The release from custody provision is art. 13.2, quoted in part in note 34 above.

39. Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970, T.I.A.S. 7192; 22 U.S.T. 1641; 860 U.N.T.S. 105. As of this writing there are well over 100 parties to this Convention, including Israel, Uganda, the United States and the USSR, Jordan, Libya, but not Algeria or Cuba.

40. Article 1.

41. Article 2.

42. 49 U.S. Code sec. 1472(n)(1), added by P.L. 93-366 sec. 103(b) on 5 August 1974, 88 Stat. 410 at 411.

43. Text at note 40 above.

44. This is not the place for a deeper analysis of the American legislative process or the technicalities surrounding the enactment of this particular Act.

45. See text at notes II-91 sq. and IV-292 sq. above for use "licensing" and "recognition" as the basis for the accusation of "piracy" at international law.

46. See text at notes IV-270 sq. above.

47. None of the states parties has uttered such a reservation.

48. *Op. cit.* note 39 above, article 4.

49. *Id.*, article 7.

50. See note 13 above. Two other cases, in 1922 and 1934, will be discussed at notes 101 sq. and 107 sq. below.

51. 49 U.S. Code sec. 1472(n)(3), cited at note 42 above.

52. The term "special aircraft jurisdiction of the United States" is defined in 49 U.S. Code sec. 1301(34) to include only:

(a) civil aircraft of [i.e., registered in—*id.*, sec. 1301(15)] the United States; . . .

(c) any other aircraft within the United States;

(d) any other aircraft outside the United States—

(i) that has its next scheduled destination or last point of departure in the United States, if that aircraft next actually lands in the United States; or

(ii) having "an offense," as defined in the Convention . . . committed aboard, if that aircraft lands in the United States with the alleged offender still aboard; and

(e) other aircraft leased without crew to a lessee who has his principal place of business in the United States, or if none, who has his permanent residence in the United States . . .

53. For example, in enforcing American antitrust laws. See United States v. Aluminum Company of America, 148 F.2d 416 (2d Cir. 1945). The broad statement on p. 443 by Judge Learned Hand has become the stated basis for much later American assertion of prescriptive jurisdiction:

> On the other hand, it is settled law—as [the defendant] itself agrees—that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.

Cf. A.L.I., *Restatement, Second, Foreign Relations Law of the United States* Sec. 18 (1965); *Foreign Relations Law of the United States (Revised)* Sec. 402 (1980). This is not the place to analyze why many foreign commentators find this statement far too broad to be properly called "settled law" except in the narrowest American Constitutional law context as law for American courts only, and as law which can be denied legal effect abroad without impinging on any American legally protected interest. They would presumably argue that to the extent other states "ordinarily recognize" the liabilities Hand mentions, it is as a matter of political expediency, not of law.

More important for present purposes, Judge Hand's summary of what he regards as settled law is limited by his own statement to some vague "effects doctrine;" the conduct of foreigners abroad to be within Hand's notion of American prescriptive jurisdiction must have "consequences within" the United States. Precisely how severe those consequences must be, and of what kinds, are not specified. From the American aircraft hijacking legislation cited at note 42 above and quoted in pertinent part in the text at notes 48, 49 and 51 above, it can be supposed that the Congress did not think the "chilling effect" on international, including American, civil aviation from allowing the United States to be an asylum state for foreign hijackers confining their acts to foreign aircraft and climes was enough.

54. See, for example, House of Lords (U.K.) decision of 2 December 1977 in Westinghouse Electric Corporation Uranium Contract Litigation, 17(1) ILM 38 (1978). See also the (U.K.) Protection of Trading Interests Act, 1980, reproduced in 21(4) ILM 834 (1982). This again is not the place to attempt even a summary listing of the actions of foreign governments to maintain what they regard as their national prescriptive jurisdiction against the broader assertions of the United States to make rules for the conduct of foreign enterprises outside the United States.

55. T.I.A.S. 7570; 24 U.S.T. 564. There are 99 listed parties to the Convention as this is written. All but five of the parties to the Hague Convention of 1970 are also parties to the Montreal Convention of 1971; two states are parties to the Montreal Convention and not the Hague Convention. Lillich, *Transnational Terrorism: Conventions and Commentary* (1982) 38. The list of parties is at p. 48-50.

56. Article 1.

57. U.S. v. Pliskow, 354 F. Supp. 369 (D.C. Mich. 1973), aff'd 480 F.2d 927.

58. 49 U.S. Code sec. 1472 (1)(1). The language in this provision traces back to P.L. 85-726 of 1958, 72 Stat. 784, but reached its present (1986) form through P.L. 93-366 sec. 203 in 1974, which reorganized the earlier provisions, restricted their effect by adding the requirement that the weapon is, or would be, accessible in flight, and expanded their coverage to include the final provision about placing a bomb or similar explosive or incendiary device aboard the aircraft.

59. A useful study of the entire range of international and American aircraft hijacking reactions, although taking a view of "piracy" that seems to rest on Wheaton without much concern for the differences between Wheaton and other publicists' definitions of "piracy" and the reasons for those differences, is N. Joyner, *A Contemporary Concept of Piracy in International Law: The Status of Aerial Hijacking as an International Crime* (1973).

60. As to statesmen, see the reported Portuguese appeal in connection with the Santa Maria incident of 22 January 1961. Forman, International Law of Piracy and the Santa Maria Incident, 15(8) *The JAG Journal* 143 (1961). To the extent the Portuguese appeal reflected a considered legal opinion, it appears that no other country agreed, including the United States, which refused to treat the incident as one involving any criminal activity outside of Portuguese municipal law, and Brazil, which eventually gave haven free of criminal charges to the Portuguese political leaders who had participated in the seizure of the vessel.

As to scholars, aside from Joyner, *op. cit.* note 59 above, a proposal *de lege ferenda* apparently supporting a world-police role on the 19th century British model for unnamed naval powers today, but shallow in its analysis of law and skimpy in its history, is B.H. Dubner, *The Law of International Sea Piracy* (1980). Dubner

attributes by mere assertion greater clarity and force to a "natural law" concept of "piracy" than any research has ever demonstrated, and concludes: "Obviously, the ultimate goal would be the elimination of the competence of municipal law to prescribe and enforce penalties regarding the law of international sea piracy (and acts of terrorism)" [*sic*]. *Id.*, p. 162. Dubner's definition of "sea piracy" seems to derive wholly from the Harvard draft of 1932, 26 AJIL *Spec. Supp.* 739 (1932), and works quoted there. *Id.*, p. 45. See text at notes 72 sq. below. The approach is legislative despite some attempt to make it appear a modest extension of existing law: "The competing claims and interests will be, *inter alia*, the principle of state sovereignty versus the interest of the international community in preventing and controlling sea piracy and terrorism." Dubner, *op. cit.* 161.

A better researched presentation built on Dubner and proposing further elaboration of the concept of "piracy" as it might apply to modern "terrorism" (another undefined term) is J.W. Boulton, Modern International Law of Piracy: Content and Contemporary Relevance, 7(6) *International Relations* 2493 (November 1983), supplementing an even more historical article, J.W. Boulton, Maritime Order and the Development of the International Law of Piracy, 7(5) *International Relations* 2335 (May 1983). But the history in both seems to be a collection without critical analysis, like that of the Harvard Research, to be discussed below, which posits a simple, linear historical and jurisprudential movement, and contains huge gaps.

Another approach, frankly *de lege ferenda* and, sadly, quite wrong in its superficial historical analysis in the light of the research set forth above, is Rubin, Terrorism and Piracy: A Legal View, 3(1-2) *Terrorism: An International Journal* 117 (1979). There might be some merit to the draft treaty proposed to replace the patently defective articles relating to "piracy" in the 1958 Geneva Convention on the High Seas, cited note 28 above, arts. 14-22. See note 189 below.

Of the many other articles on the subject in recent years, perhaps the best researched, although resting largely on secondary sources, but with many references to European precedents and history that for reasons of space and organization have been neglected in the current work, is Sundberg, Piracy and Terrorism, 20 *De Paul L. Rev.* 337 (1971), reproduced in part in 1 Bassiouni and Nanda, *A Treatise on International Criminal Law* (1973) 455. Sundberg suggests a revival of the legal label "piracy" and its application to unrecognized "belligerents," but through an international criminal court rather than through the application of municipal law and "universal" jurisdiction.

Perhaps the most incisive analytical recent article precedes the current excitement about terrorism. It will be discussed at notes 220 sq. below: Schwarzenberger, The Problem of an International Criminal Law, 3 *Current Legal Problems* 263 (1950).

61. 20 AJIL *Spec. Supp.* 2-3 (1926).

62. M. Wang was not able to attend the Committee's meeting and the amendments were made in Committee by M. Matsuda without his concurrence. *Id.* 222 note 2.

63. *Id.* 228.

64. *Id.* 228-229. League of Nations pub. C.196.M.70.1927.V at p. 119.

65. The replies are set out in their entirety in League of Nations pub. cited note 64 above at pp. 136-260.

66. The Portuguese comment is conveniently reproduced verbatim in the Analysis of Replies submitted to the Committee of Experts by M. Matsuda and reprinted in 22 AJIL *Spec. Supp.* 25 at 29-31 (1928).

67. See text at notes IV-292 sq. above.

68. There is no direct evidence for this reconstruction of the logic of the Committee, but that has been the universal experience of "codification" committees and my own experience. Cf. H. Lauterpacht, Codification and Development of International Law, 49 AJIL 16 (1955). The Committee's probable logic is in fact dubious. Codification proposals that are not well-founded in history and theory tend quickly to become legislative sessions in which each participant seeks to maximize his benefits in disregard of "progressive development." Cf. R. Baxter, Treaties and Custom, 129 *Hague Recueil* 25 (1969).

69. League of Nations Doc. C.254.1927.V, reproduced in 22 AJIL *Spec. Supp.* 216 at 222 (1928). The Conference mentioned by M. Zaleski was held in 1930 at the Hague as the "First Conference for the Progressive Codification of International Law." It was regarded as a failure when it could not produce any treaties that states would ratify. See J.L. Brierly, *The Basis of Obligation in International Law* (1958) 341. In fact the 1930 Conference produced a Convention on Certain Questions Relations to the Conflict of Nationality Laws; a Protocol relating to Military Obligations in Certain Cases of Double Nationality; a Protocol relating to a Certain Case of Statelessness; and a Special Protocol concerning Statelessness, all dated 12 April 1930. It failed to produce agreement on the width of territorial waters. A Second Codification Conference was proposed but never held.

70. League of Nations pub. V.Legal.1927.V.28; reproduced in 22 AJIL Spec. Supp. 345 at 346 (1928).

71. League of Nations Official Journal, Spec. Supp. No. 53, Oct. 1927, p. 9; reproduced in 22 AJIL *Spec. Supp.* 231 (1928).

72. *Harvard Research,* 26 AJIL *Spec. Supp.* 5 (giving the background of the Harvard Research effort), 738 (the list of those concerned with the "Piracy" Report) (1932) (hereafter cited as *Harvard Research*). With no disrespect intended towards the Californians, who included such scholars as Max Radin of Berkeley, of 15

named Advisers only three were resident outside of California: Charles E. Martin of the University of Washington, W.E. Masterson of the University of Idaho, and Harold Sprout of Princeton University.

73. The Protocol of Signature to the Statue of the Permanent Court of International Justice and other relevant documents are conveniently reproduced in Hudson, *The World Court, 1922-1929* (rev'd ed. 1929) 103 sq. The Hague Convention of 1907 was Convention I of the Second Codification Conference (the first was 1899) that climaxed pre-League of Nations attempts to reduce general international law to treaty texts and commitments to the peaceful settlement of international disputes. 1 Bevans 577. The Permanent Court of Arbitration and the procedures established under the Convention of 1907 are still in effect for the United States and 48 other countries.

74. *Harvard Research* 749.

75. *Id.* 752, 754.

76. See text at notes II-61 to II-69 above.

77. F. Pollock, The History of the Law of Nature, 3 *J. of the Soc. of Comp. Leg.* (new ser.) 204 (1901).

78. See, for an ascerbic introduction and criticism of the Platonic view of reality, K. Popper, *The Open Society and Its Enemies* (rev'd ed. 1950) 58-85.

79. U.S. v. Pedro Gilbert & Others, cited in note 33 and discussed at notes III-69 sq. above.

80. U.S. v. La Jeune Eugenie, 26 Fed. Cas. 832, No. 15,551 (D. Mass.) (1822), discussed at note III-117 above.

81. *Harvard Research* 756.

82. *Id.* 760.

83. *Id.* 761.

84. Stiel, *Der Tatbestand der Piraterie nach Geltendem Völkerrecht* . . . (1905).

85. Stiel cites none of them, merely asserting about "*englisch-amerikanischen*" approaches: "*. . . ihm ist die Piraterie ein Tatbestand des völkerrechtlichen international Strafrechts.*" *Id.*, p. 14.

86. "*[D]ie Piraterie is ihm ein seepolizeilicher Tatbestand.*" *Id.*

87. The translation (mine) is difficult and barely conveys the technical implications of the original German: "*Piraterie ist ein unpolitisches auf die gewerbsmässige Ausübung räuberischer Gewaltakte gegen prinzipiell alle Nationen gerichtetes Seeunternehmen.*" *Id.* 28.

88. *Id.* 30 note 1:

> *Nur ist die alte staatliche autorisierte Piraterie nunmehr verschwunden. Aber wenn noch im Jahre 1858 von den englischen Behörden in Singapore zum Tode verurteilte malayische Piraten erklärten, dass sie lediglich den Befehlen ihrer Herrscher gehorsam gewesen seien und nur getan hätten was in ihren Lande herkommlich und erlaubt sei . . ., so besteht kein Unterschied der Anschauung gegen die des Illyrierkonigs Agron, der 229 v. Chr. den römischen Gesandten erklärte, nach illyrischem Rechte sei der Seeraub ein erlaubtes Gewerbe.*

I think I have read every reported case decided in Singapore during the 19th century, and the unattributed reference to something in 1858 baffles me. The reference to Roman precedent seems only marginally relevant and is wrong. The original source (not cited by Stiel) seems to be Polybius, *The Histories* (LCL 1954) ii, 8. The transaction involved Teuta, Agron's widow (Agron died in 231 B.C.), and relates to the concept of state responsibility for private injury, implying a justification for Roman hegemony in the default of Illyria accepting responsibility for controlling Illyrian raiders:

> She [Teuta] had quickly put down the revolt of the Illyrians but was engaged in besieging Issa . . . when the Roman commissioners arrived by sea. . . . When they had finished speaking, she told them she would see to it that Rome suffered no public wrong at the hands of Illyrians, but that so far as private wrongs were concerned, it was not the custom of the Illyrian Kings to prevent their subjects from taking plunder at sea. The younger of the Roman ambassadors . . . said, "The Romans have an excellent tradition, which is that the state should concern itself with punishing those who commit private wrongs, and helping those who suffer them. With the gods' help we shall do our utmost, and that very soon, to make you reform the dealings of the Kings of Illyria with their subjects."

Polybius, *The Rise of the Roman Empire* (I. Scott-Kilvert transl., F.W. Walbank ed. Penguin Classics 1979), 118-119. Since Teuta had disclaimed responsibility apparently denying that she had licensed Illyrian raiders, and Roman action was threatened against Illyria, not against the raiders, it is hard to see how "piracy" in any sense pertinent to Stiel's point was involved.

89. The *Serhassan (Pirates)* [1845] 2 W. Rob. 354, 3 BILC 778. See text at notes IV-159 sq. above.

90. Stiel, *op. cit.* 80: "*Ein Unternehmen, das politische Zwecke verfolgt . . . is nicht Piraterie.*" As to "*Raubstaaten,*" "*der politische Zweck fehlt ihnen*" (p. 83).

91. See text at notes IV-292 sq. above.

92. Stiel, *op. cit.* 94-96.

93. Although not the material set out at note 88 above.
94. *Harvard Research* 769-822.
95. *Id.* 769.
96. See note III-110 above.
97. See text at notes IV-292 sq. above.
98. It remains a question of some academic interest why the British so staunchly maintained their weak position on this when, at least in unpublished opinions by their own law officers, they had abandoned that position as legally untenable as soon as the question squarely arose in calmness. See text at notes IV-220 sq. above.
99. *Harvard Research* 832.
100. See note 13 above; the first was R. v. Green cited there, and the second is discussed and cited at note 107 below.
101. *In re Piracy jure gentium* [1934] A.C. 586; 3 BILC 836.
102. Coke, see text at notes I-197, I-200 sq. above; Molloy and Jenkins, see text at notes II-61 sq. above; Hedges, see text at note II-60 above. All the quotations and analyses above are far more detailed than the selective and unanalyzed references and quotations retailed in the case report itself.
103. The sole citation in the case is to the Parliamentary Paper, Peru No. 1 1877, presumably Parliamentary Papers 1877 LXXXVIII 613, Peru No. 1 (C. 1833) discussed in text at notes IV-292 sq. above and cited at note IV-293.
104. Discussed in text at notes III-285 sq. and IV-156 sq. above.
105. *Op. cit.* note 101 above 599 (842).
106. *Id.* 600 (843).
107. *People v. Lol-Lo and Saraw,* 43 Philippine Islands 19 as reported in 1 *Annual Digest of Public International Law Cases* (1919-1922)(Williams and Lauterpacht, eds. 1932) 164-165, Case No. 112.
108. Wiltberger, cited note 37 above. See text at notes III-72 sq. above.
109. 2 Hackworth, *Digest of International Law* (1941) 681-695 (sec. 203).
110. For example, a statement that U.S. v. Smith is the leading American case supporting the notion that there is such a thing as an international law of "piracy" and that it is properly incorporated into American law by mere reference in the Act of 1819 (see text at notes III-91 sq. above) is immediately followed by a long excerpt from Lenoir, Piracy Cases in the Supreme Court, 25 *J. Crim. L. and Criminology* 532 (1934-35), including the passage: "It is doubtful whether the Court would hold this view today, nor is it considered a correct statement of the present international law on piracy," reasoning that Justice Livingston's dissent was more persuasive than the majority opinion and that in near universal practice "piracy" was not only punished, but, for sound jurisprudential reasons, defined only by municipal law. *Id.* 552-553.
111. Hackworth, *op. cit.* 686, 687.
112. A review of the procedure seems unnecessary here. See Briggs, *The International Law Commission* (1965) 298-301.
113. 2 YBILC. *6th Session, 1954* 7. The Report is denominated Doc. A/CN.4/79 in the United Nations archives.
114. *Op. cit.* note 113 above at p. 15. The French text is not directly identified as a mere translation in the Report, but in the discussion at the International Law Commission's 290th meeting on 12 May 1955, the English text is set out. 1 YBILC, *7th Session, 1955* 39 note 3. It is verbatim the text of the Harvard article quoted above except for changing the word "a" to "the" in the phrase "for private ends without *a* [the] bona fide purpose of asserting a claim of right." Oddly, in the unannotated text of the Harvard Research draft Convention, reproduced at Appendix III.A below, the text of art. three differs from the annotated text set out above with a third variation on that sentence; the unannotated text has neither "a" nor "the," but says merely "private ends without bona fide purpose." The confusion seems inconsequential.
115. The English version of M. François's draft, identical to the corresponding articles of the Harvard Research draft except for stylistic changes, is set out in 1 YBILC, *7th Session, 1955* 31 at 51 note 1.
116. *Op. cit.* note 113 above 46.
117. 1 YBILC, *7th Session, 1955* 31 at 36. No precedents or legal argument appear to have been presented in support of this amendment proposed by Mr. Jaroslav Zourek (Czechoslovakia — but all members of the International Law Commission serve in their private capacities, not as representatives of states); indeed, the suggestion seems to have been passed without any substantive discussion at all, 8-0 with 2 abstentions.
118. See notes I-126 and I-127 above.
119. Document A/CN.4/L.53 paras. 9, 11 and 17, in 1 YBILC, *7th Session, 1955* 1 and 2.
120. 1 YBILC, *7th Session, 1955* 39. It should be repeated here that membership in the International Law Commission is formally not by country but by individual merit. There is ample evidence in this colloquy that the members of the various nationalities in some cases shared the views of their respective governments as to the proper legal classifications to be attached to events. This is not improper; indeed, it would be odd if it were not so, considering that individual eminence in law is in fact achieved by success within a national legal and educational system in nearly all cases, and thinkers of too much originality are unlikely to be selected for prestigious public positions by the representatives of states.

121. I am indebted to LCDR John Petrie, USN, for bringing this incident to my attention and providing me with the handy summary of the United Nations procedures and the politics involved in Jessup, Parliamentary Diplomacy, 89 *Hague Recueil* 185 (1956) at 189-201. The legal situation was reminiscent of the American Civil War situation with the exception that the Chinese Civil War, if it can be called that, created an occasion for constructing a legal model based on labels that departed so far from reality that it is possible to doubt the sanity of those involved. The Republic of China, continuing to regard the Communist forces as bandits, exercised the legal powers of visit and search at sea that normally flow only to belligerents seeking to interdict contraband. The "neutral" countries were in the same position as the United Kingdom protesting the equivalent acts of the Federal Government of the United States in 1861 on the ground that without a state of war there could be no status of "neutrality" and no "belligerent rights" in the defending government's forces. To call the defending government's forces "pirates," however, implies not merely that they had breached international law rules regarding peaceful commerce, but that they had no legal privileges at all. That seems to imply that the Communist government in Beijing was the sole government in China and that the Republic of China government in Taiwan was an unrecognized group of rebels or, worse yet, "bandits" violating the law of China and international law. This is not the place to point out all the ironies and distortions involved on all sides, or to trace their roots in British Imperial practice and the contradictory positions taken by the Federal Government of the United States during our Civil War.

122. 1 YBILC, *7th Session, 1955* 41.

123. *Id.* 43.

124. See text at and following note 17 above.

125. 1 YBILC, *7th Session, 1955* 43. M. Zourek seems to have misread the Nyon Agreement.

126. *Id.* 44-45.

127. *Id.* 53.

128. Article 4 of the Harvard draft set out above and in Appendix III.A defines "pirate ship" to include a ship devoted by its company "to the purpose of committing any similar act within the territory of a state by descent from the high sea." This provision was repeated in the first François draft.

129. 1 YBILC, *7th Session, 1955* 53.

130. *Id.*

131. *Id.* The proposal had come from Sir Gerald Fitzmaurice (United Kingdom).

132. *Id.* 54.

133. *Id.* 53.

134. No reference was made to the historical background or jurisprudential basis for this position. The evolution of the idea in English law began in 1680, as far as available records indicate. See text at and after note II-45 above. The Kwok-A-Sing case analyzed at notes IV-211 sq. above seems to hold directly the opposite of Fitzmaurice's views, but was not mentioned.

135. 1 YBILC. *7th Session, 1955* 54.

136. In English, the word "essentially" in this sort of context does not necessarily relate to essences in a philosophical sense, but can relate to normal conditions. There is little logic to the English language.

137. 1 YBILC, *7th Session, 1955* 55.

138. *Id.* 55-57.

139. U.N. Doc. A/2934, in 2 YBILC, *7th Session, 1955* 19. The "Piracy" articles are articles 13-20 at pp. 25-26.

140. Two single-sentence paragraphs follow, identical except for minor polishing with paragraphs 2 and 3 of the Harvard Researchers' draft article 3. See Appendix III.A. With additional minor alterations in the drafting committee, thus with no known discussion of any possible intention to change substance, those two paragraphs form the text of paragraphs 2 and 3 of article 15 of the 1958 Geneva Convention on the High Seas cited at note 28 above, and paragraphs (b) and (c) of the UN Convention on the Law of the Sea, Montego Bay, 10 December 1982, article 102. See below and text reproduced at Appendix III.B.

141. See note II-49 above.

142. In U.S. v. Brig Malek Adhel, 43 U.S. (2 Howard) 209 (1844), 1 Deak 56. Hatred and revenge are specifically mentioned as "piratical" motives in the text of Story's opinion quoted at note III-218 above.

143. See text at note 17 above. It is not clear why the International Law Commission referred to the treaty as an "Arrangement."

144. *Op. cit.* note 139 at p. 25.

145. On the use of unrestricted submarine warfare during the Second World War, and the ignoring of the legal restrictions by both allied and German Admirals, see W.T. Mallison, Jr., *Submarines in General and Limited Wars*, (NWC Blue Book 1966, Vol. LVIII) (1968), esp. p. 47-51 and 192-195 (Interrogation of Fleet Admiral Chester W. Nimitz in connection with the prosecution of German Grand Admiral Doenitz at Nuremberg, 1946, reprinted from 40 *International Military Tribunal [Nuremberg]* 109-111).

146. See e.g., Dissenting Opinion by Commissioner F.K. Nielsen in International Fisheries Co. Case (1931) (U.S. v. Mexico) 4 *U.N. R.I.A.A.* 691 at 703 sq.; Rubin, Pollution by Analogy: The Trail Smelter Arbitration, 53 *Oregon Law Review* 259 (1971).

147. *Op. cit.* note 139 above 25.
148. Cited at note 89 above, discussed in text at notes IV-159 sq. above.
149. Cited at note 107 above.
150. *Op. cit.* note 139 above 25.
151. *Id.*
152. U.S. v. Klintock, 18 U.S. (5 Wheaton) 144 (1820), 8 Deak 20. See Marshall's language, his furthest concession to the naturalist views of his friend and colleague, Story, in the text at note III-82 above.
153. See text at notes IV-292 sq. above.
154. *Op. cit.* note 139 above 26.
155. See text at notes III-230 sq. and IV-156 sq. above.
156. *Op. cit.* note 139 above 26.
157. For a brief analysis of the origins in English law of the use of the term "piracy" to justify changes in the title to property, see above ch. I *passim,* esp. text at notes I-153 and 173 sq. For a scholarly tracing of the use of the word "piracy" in English property law, see Wortley *Pirata Non Mutat Dominium,* 24 BYIL (1948) 258 at 260-272. Wortley does not address the jurisdictional questions, assuming *in rem* jurisdiction in an English Admiralty tribunal, and apparently assuming that the English cases either reflect universal law, in the Blackstone-naturalist tradition, or that it is irrelevant to English decisions what the law might be in other countries. Like the other secondary studies cited in this work, Wortley's asserts definitions of "piracy" that seem inconsistent with a deeper analysis of the international usages, practice and writings other than his own.
158. See text at notes 116-117 above.
159. See text at notes 81-82 above.
160. Cited at note 13 above. See generally text at notes II-85 sq. above.
161. *Op. cit.* note 139 above 26.
162. See text at note II-68. As to police and coast guard or equivalent vessels, the Commission eventually decided to solve the apparent inconsistency of authorizing warships to "police" the seas against "pirates" while not authorizing "police" vessels of a state to do the same, by making "police" vessels into "warships" for purpose of exercising public authority on the high sea. This was done in art. eight of the draft and involved discussion not pertinent to "piracy" as such. It is mentioned again in connection with the discussion of art. 20 at note 211 below.
163. *Op. cit.* note 139 above 26. The other two categories involve suspicion of violating treaties abolishing the slave trade, and suspicion that the vessel visited is actually of the nationality of the visiting warship although flying (falsely) other colors. They seem irrelevant to this study.
164. UN Doc. A/CN.4/97 reprinted with corrections in 2 YBILC, *8th Session, 1956* 1.
165. *Id.* 37 sq., UN Doc. A/CN.4/99 and its addenda.
166. *Id.* 13 sq., UN Doc. A/CN.4/97/Add. 1, 1 May 1956.
167. 1 YBILC, *8th Session, 1956* 45, 343rd Meeting.
168. 2 YBILC, *8th Session, 1956* 18, 64.
169. 1 YBILC, *8th Session, 1956* 46.
170. *Id.*
171. Report of the International Law Commission to the General Assembly, UN Doc. A/3159, in 2 YBILC, *8th Session, 1956* 253. The article appears as article 38 of the draft. The 1958 Geneva Convention is cited at note 28 above. It entered into force for the United States on 30 September 1962. As this is written it has 46 parties.
172. Cited at note 140 above and reproduced in pertinent part at Appendix III.B below.
173. The provisions are articles 5(8) and 333(1) and (2), for which a translation supplied by the Legal Department of the Shanghai Municipal Council had been published in China in 1935. They are reprinted in 2 YBILC, *8th Session, 1956* 44:

> *Article 5.* This Code shall apply to any one of the following offences committed beyond the territorial limits of the Republic of China . . .:
> 8. Offences of piracy, as specified in articles 333 and 334.
>
> *Article 333.* Whoever navigates any vessel not being commissioned by a belligerent State or not being part of the naval forces of any State, with intent to commit violence or employ threats against any other vessel or against any person or thing on board such other vessel, is said to commit piracy, and shall be punished with death, or imprisonment . . . for not less than 7 years.
>
> Whoever being a ship's officer [ftn. 'A member of the crew' and 'another member of the crew' would be closer to the meaning of the original expressions—*id.*] or a passenger on board a ship, with intent to plunder or rob, commits violence or employs threats against any other officer [ftn. *id.*] or passenger and navigates or takes command of the ship shall be deemed to have committed piracy. . . .

Article 334 does not seem to have been reprinted. These provisions seem to be identical in intention, although not in translated English, to articles 1(14) and 352 of the Chinese Criminal Code of 10 March 1928 set out in Professor Stanley Morrison's compilation of national laws referring to "piracy" in the *Harvard Research*, 26 AJIL *Spec. Supp.* 887 (1932) at 952-954.

174. See text at notes III-64 sq., III-85 sq. and III-122 sq. above.

175. Presumably Higgins, *The International Law of the Sea* (Colombos, ed.) (3rd ed. 1954).

176. Presumably Ortolan, *Regles Internationales et Diplomatie de la Mer* (2 vols.) (3rd ed. 1856).

177. Presumably 1 Oppenheim, *International Law* (Lauterpacht ed.) (8th ed. 1954).

178. Presumably Gidel, *Le Droit International Public de la Mer* (3 vols.; only vol. 1 refers to the law of the high sea) (1932).

179. Cited note 13 above. See text at notes IV-211 sq. above.

180. 2 YBILC, *8th Session, 1956* 64.

181. *Id.* 28.

182. *Id.* 79.

183. 1 YBILC, *8th Session, 1956* 46-47.

184. 2 YBILC, *8th Session, 1956* 64.

185. This seems to be a reverse formulation of the well-established exclusion from the benefits of the 1944 International Civil Aviation Convention of aircraft "used in military, customs and police services." 15 U.N.T.S. 295, T.I.A.S. 1591, 3 Bevans 944, article 3.

186. 2 YBILC, *8th Session, 1956* 19.

187. See discussions following note 120 and preceding note 138 above.

188. 2 YBILC, *8th Session, 1956* 47.

189. This is the proposal made on more but still inadequate, data in Rubin, *op cit.* note 60 above. A more or less thorough acquaintance with British 19th century practice in Malayan waters, coupled with a superficial knowledge of the jurisprudential issues and the leading cases and writings, lay in the background of a proposal to respond to increasing "terrorism" by application of the British Imperial law of "piracy." I propounded a complete treaty text.

Zourek repeated his objection to the approach taken by the Commission again at the Commission's final public review of the draft, its 376th meeting on 27 June 1956, reported in 1 YBILC, *8th Session, 1956* 265, but again gave no reasons to add to his known policy preferences. A deeper awareness of the *lex lata* might have helped us both.

Works by Dubner and Boulton cited note 60 above have similar arguments based almost wholly on natural law speculation and unanalyzed precedents.

190. Cited respectively at notes 28 and 140 above.

191. This and other difficulties surely not intended by the drafters are pointed out in Rubin, Is Piracy Illegal?, 70(1) AJIL 92 (1976).

192. This anomaly was raised at the Geneva Conference in 1958 by the delegate of Greece, but the proposal to delete the word "illegal" was defeated, 4 votes in favor, 30 opposed, with 16 abstentions. UN Doc. A/CONF. 13/40 at 84. There was no reported discussion of the merits.

193. The British proposal was defeated by 13 for, 22 against, with 7 abstentions. The British argument rested primarily on the decision in *In re Piracy jure gentium* cited at note 101 above.

194. 2 YBILC, *8th Session, 1956* 19, 38, 65, 97.

195. Of course, the Soviet position on this is not only shared by other countries with similar ties between government and economic enterprise, but were strongly asserted by the English themselves at one time. See text at and following note II-78 above.

196. 1 YBILC, *8th Session, 1956* 48.

197. The numbering was changed twice.

198. 1958 and 1982 Conventions are cited notes 28 and 140 above.

199. 2 YBILC, *8th Session, 1956* 19, 39, 65.

200. *Id.* 48. The anomaly of referring substantive questions to a drafting committee needs no further comment here. Some further drafting changes to this article were urged by A.E.F. Sandström (Sweden) at the Commission's 376th meeting on 27 June 1956, but relegated at that time to elaboration in the official "comment" to accompany the text. *Id.* 265.

201. 1958 and 1982 Conventions cited notes 28 and 140 above.

202. *Id.*

203. 2 YBILC, *8th Session, 1956* 19, 39, 81.

204. 1 YBILC, *8th Session, 1956* 48.

205. 1958 and 1982 Conventions cited notes 28 and 140 above.

206. See text following note 156 above.

207. 2 YBILC, *8th Session, 1956* 65, 67. Article 21 included suspicion of "piracy" along with "slave trade" and suspicion that the vessel is actually of the same nationality as the interfering warship although flying a foreign flag or no flag, as grounds for boarding. The Netherlands and Norwegian governments were

obviously correct in seeing an overlap between that article and article 19 of the draft, and in trying to minimize the confusions that would arise from inconsistencies in language.

208. 1 YBILC, *8th Session 1956* 48.

209. 1958 and 1982 Conventions cited notes 28 and 140 above.

210. See text at note II-68 above.

211. Article 8, which assimilated all state vessels to warships for the purpose of exercising public authority on the high sea. The evolution of art. eight seems to be beyond the scope of this study.

212. 2 YBILC, *8th Session, 1956* 79.

213. *Id.* 20.

214. 1 YBILC, *8th Session, 1956* 48. The legal position taken by M. Scelle seems sound in rejecting an expansion of the normal tight restrictions of international law on the authority of a state acting in self-defense. His notion that a third person should be regarded as legally empowered to act for public authority in cases of default seems overstated, but consistent with a line of precedent and argument adverted to at note IV-222 above. The international law regarding self-defense is very narrowly defined. See Bowett, *Self-Defence in International Law* (1958) for a start on the tremendous volume of learned writing in this area.

215. 1 YBILC, *8th Session, 1956* 48.

216. 2 YBILC, *8th Session, 1956* 283. This language was to some degree adjusted to make clear that a merchant ship need not have had it in mind to hand a "pirate ship" over to proper authorities in order to exercise its own rights of self-defense. The point was raised by Fitzmaurice at the 376th Meeting and the suggestion of an amendment to the official comment on the article was there approved, the text to be drafted later. 1 YBILC, *8th Session, 1956* 166.

217. 1958 Convention cited note 28 above.

218. 1982 Convention cited note 140 above.

219. Compare text at notes IV-292 sq. above with 1 Oppenheim, *International Law* (Lauterpacht, ed.) (8th ed. 1955) 608-617 (secs. 272-280).

220. Schwarzenberger, *op. cit.* note 60 above.

221. See Palachie's Case, 1 Rolle 175 (1615), reproduced in pertinent part at note I-197 above, holding a taking under a foreign king's commission not to be *malum in se* and thus upholding the Moroccan Ambassador's immunities in an English court. This rule is set out in Coke's usual direct simplicity in Coke, *Fourth Institute of the Laws of England* (1644) 153:

> But if a foreign Ambassador being *Prorex* commiteth here any crime which is *contra jus gentium* [i.e., against the reason-based law common to all nations], as Treason, Felony, Adultery, or any other crime which is against the Law of Nations, he loseth the privilege and dignity of an Ambassador, as unworthy of so high a place, and may be punished here as any other private Alien, and not to be remanded to his Sovereign but [as a matter] of curtesie.

222. Coke's views on this were interpreted to the reverse conclusion by 1710. See statute 7 Anne c. 12 (1708) and the argument based on Coke's writings by Attorney General Sir James Montague in the *Case of Andrew Artemonowitz Mattueoff, Ambassador of Muscovy*, Q.B., 8 Queen Anne (1710), 10 Mod. 4, reproduced in Scott, *Cases on International Law* (1922) 286.

223. I trust that Professor Schwarzenberger will forgive the misstatement that inevitably flows from an attempt to digest somebody else's thought. The interested reader is encouraged to view the original for himself.

224. I was the action officer within the Office of the Assistant General Counsel (International Affairs) in the Department of Defense at the time. The legal position that guided the Defense Department's reaction to the *Santa Maria* incident was an early version of the analysis set out in Forman, *op. cit.* note 60 above.

225. *New York Times*, 13 May 1975, p. 1 col. 8 (President Ford "considers this seizure an act of piracy"); p. 19, col. 7, (unnamed State Department lawyer).

226. *Id.*, 15 May 1975, p. 1., col. 5-6 (Thailand protests American troop movements related to the *Mayagüez* incident).

227. 6 *International Practitioner's Notebook* 3 (April 1979).

228. The facts have appeared in many newspaper stories from 1975 to the present. A useful retelling based on those reports is "Age," *The Boat People* (Bruce Grant, ed.) (Penguin Books 1979). Many stories are told orally by American naval personnel who witnessed atrocities in the area, and by refugees and relief workers with experience in Malaysian and Thai refugee camps.

229. For example, off the West coast of Africa. See 61 *African Business* 77 (September 1983). And, on the commercial importance of the problem and the inadequacy of current legal approaches, see UNCTAD Doc. TD (B) C.4/AC.4/2 of 21 September 1983, Report by the UNCTAD Secretariat, *Review and Analysis of Possible Measures to Minimize the Occurrence of Maritime Fraud and Piracy*, p. 12, 63-66. I am indebted to

Professor Martin Glassner of Southern Connecticut State College for bringing these items to my attention. Mr. Lawrence W. White has kindly sent me a copy of an article asserting with some likelihood of accuracy that the "piracy" in the southern Philippines is at least in part politically motivated, and that local authorities might be more upset at the use of firearms by foreign yachtsmen defending themselves than by the "pirates." Scott, Pirate Attack in Paradise, *Yachting* (May 1984) 25 at 28, and see the Note, Some Afterthoughts on Piracy, *id.*, at 31.

230. Ch. text at notes III-64 sq., III-85 sq. and III-122 sq. above.

231. See text at notes IV-230 sq. above.

232. Like The *Serhassan (Pirates)*, cited at note 89 above, and *People v. Lol-Lo and Saraw*, cited at note 107 above.

233. See Appendix III.B below. The articles are set out above at notes 171 and 205 in their earlier incarnation as articles 14 and 19 of the 1958 Convention. The Peruvian proposal is reported in UNCLOS III Doc. C.2/Informal Meeting/64/Rev. 1 dated 13 August 1980. I am deeply indebted to Professor Martin Glassner of Southern Connecticut State College for bringing this document to my attention and making it available to me.

234. Literally, no crime exists without a statute creating it; no punishment can be imposed without a statute authorizing it. This modern translation equating "*lege*" to "statute" is not quite right, since the word "*lege*" (and "lex") were used by Cicero to include the natural or moral "*vera lex* [true law]" discoverable by "*recta ratio* [right reason]" and supreme even when inconsistent with positive law adopted by the senate or the people of Rome: "*Huic legi nec obrogari fas est neque potest, nec vero aut per senatum aut per populum solvi hac lege possumus* [We cannot be freed from its obligations by senate or people]." Cicero, *De Re Publica* III, xxii. On the other hand, the Fetial law under which war could be declared and which according to Livy was adopted as a matter of policy choice by the early King Ancus from the Aequicolae, was called by both Cicero and Livy "*fetiali . . . iure.*" Cicero, *De Officiis* I, xi, 36 quoted in note I-46 above. But this is not the place to attempt even a summary of the very complex Roman distinction between "lex" and "jus," and the even more complex relationships between natural law, moral law, divine law and positive law purportedly resting on Greek and Roman writings and argued with vigor and inconsistency by 2500 years of jurists (and legists).

The English word "law" is not now generally believed to be cognate with the Latin "lex," although such words as "legislation" were imported into English later and are clearly Latin-rooted (from "*legis*," the nominative plural of "*lex*"). The *American Heritage Dictionary* traces the English words "law" and "legislate" to different Indogermanic roots, *leg-* and *legh-* (*American Heritage Dictionary*, p. 1525), meaning to col*lect* and to *lay* flat respectively. But, as the editors of the *Oxford English Dictionary* (OED) point out, "As *law* is the usual English rendering of L[atin] *lex*, and to some extent of L[atin] *jus* . . ., its development of senses has been in some degree affected by the uses of these words." OED, Vol. "L" p. 113. A multivolume analysis would be necessary if the word "law" in English were to be given the same sort of etymological and jurisprudential investigation that I have attempted to give to the word "piracy" here.

235. For a modern example, see the attempts to create an international criminal law and an international criminal court by various lobbies within the United Nations, incisively analyzed in Gross, Some Observations on the Draft Code of Offences Against the Peace and Security of Mankind, 13 *Israel Yearbook on Human Rights* 9 (1983).

APPENDICES

I ENGLISH STATUES

I.A Offences at Sea Act
28 Henry VIII c. 15 (1536)
2 Statutes at Large (1763 ed.) 258

For Pirates.

Where Traytors, Pirates, Thieves, Robbers, Murtherers and Confederates upon the Sea, many Times escaped unpunished, because the Trial of their Offences hath heretofore been ordered, judged and determined before the Admiral, or his Lieutenant or Commissary, after the course of the Civil Laws, (2) the Nature whereof is, that before any Judgment of Death can be given against the Offenders, either they must plainly confess their Offences (which they will never do without Torture or Pains) or else their Offences be so plainly and directly proved by Witness indifferent, such as saw their Offences committed, which cannot be gotten but by Chance at few Times, because such Offenders commit their Offences upon the Sea, and at many Times murther and kill such Persons being in the Ship or Boat where they commit their Offences, which should witness against them in that Behalf; and also such as should bear witness be commonly Mariners and Shipmen, which, because of their often Voyages and Passages in the Seas, depart without long tarrying and Protraction of Time, to the great Costs and Charges as well of the King's Highness, as such as would pursue such Offenders: (3) For Reformation whereof, be it enacted by the Authority of this present Parliament, That all Treasons, Felonies, Robberies, Murthers and Confederacies hereafter to be committed in or upon the Sea, or in any other Haven, River, Creek or Place where the Admiral or Admirals have or pretend to have Power, Authority or Jurisdiction, shall be inquired, tried, heard, determined and judged, in such Shires and Places in the Realm, as shall be limited by the King's Commission or Commissions to be directed for the same, in like Form and Condition, as if any such Offence or Offences had been committed or done in or upon the Land; (4) and such Commissions shall be had under the King's Great Seal, directed to the Admiral or Admirals, or to his or their Lieutenant, Deputy and Deputies, and to three or four such other substantial

Persons, as shall be named or appointed by the Lord Chancellor of *England* for the Time being, from Time to Time, and as oft as Need shall require, to hear and determine such Offences after the common Course of the Laws of this Realm, used for Treasons , Felonies, Murthers, Robberies and Confederacies of the same, done and committed upon the Land within this Realm.

II. And be it enacted by the Authority aforesaid, That such Persons to whom such Commission or Commissions shall be directed, or four of them at the least, shall have full Power and Authority to enquire of such Offences, and of every of them, by the Oaths of twelve good and lawful Inhabitants in the Shire limited in their Commission, in such like Manner and Form, as if such Offences had been committed upon the Land within the same Shire; (2) and that every Indictment, found and presented before such Commissioners, of any Treasons, Felonies, Robberies, Murthers, Manslaughters, or such other Offences, being committed or done in or upon the Seas, or in or upon any other Haven, River or Creek, shall be good and effectual in the Law; (3) and if any Person or Persons happen to be indicted for any such Offence done or hereafter to be done upon the Seas, or in any other place above limited, that then such Order, Process, Judgment and Execution shall be used, had, done and made, to and against every such Person and Persons so being indicted, as against Traytors, Felons and Murtherers, for Treason, Felony, Robbery, Murther or other such Offences done upon the Land, as by the Laws of this Realm is accustomed; (4) and that the trial of such Offence or Offences, if it be denied by the Offender or Offenders, shall be had by twelve lawful Men inhabited in the Shire limited within such Commission, which shall be directed as is aforesaid, and no Challenge or Challenges to be had for the Hundred; (5) and such as shall be convict of any such Offence or Offences, by Verdict, Confession or Process, by Authority of any such Commission, shall have and suffer such Pains of Death, Losses of Lands, Goods and Chattels, as if they had been attainted and convicted of any Treasons, Felonies, Robberies, or other the said Offences done upon the Lands.

III. And be it enacted by Authority aforesaid, That for Treasons, Robberies, Felonies, Murthers and Confederacies done upon the Sea or Seas, or in any Place above rehearsed, the Offenders shall not be admitted to have the Benefit of his or their Clergy, but be utterly excluded thereof and from the same, and also of the Privilege of any Sanctuary.

IV. Provided alway, That this Act extend not to be prejudicial or hurtful to any Person or Persons for taking any Victual, Cables, Ropes, Anchors or Sails, which any such Person or Persons (compelled by Necessity) taketh of or in any Ship which may conveniently spare the same, so the same Person or Persons pay out of Hand for the same Victual, Cables, Ropes, Anchors or Sails, Money or Money-worth to the Value of the Thing so taken, or do deliver for the same a sufficient Bill obligatory to be paid in Form following, that is to say, If the taking of the same Things be on this Side, the Straits of

Marroke, then to be paid within four Months, and if it be beyond the said Straits of *Marroke*, then to be paid within twelve Month next ensuing the making of such Bills, and that the Makers of such Bills well and truly pay the same Debt at the Day to be limited within the said Bills.

V. Provided alway, That whensoever any such Commission for the Punishment of Offences aforesaid, or of any of them, shall be directed or sent to any Place within the Jurisdiction of the Five Ports, that then every such Commission shall be directed unto the Lord Warden of the said Ports for the Time being, or to his Deputy, and unto three or four such other Person or Persons, as the Lord Chancellor for the Time being shall name and appoint; any Thing in this present Act to the contrary notwithstanding.

VI. Provided alway, That whensoever any Commission shall be directed unto the Five Ports for the Inquisition and Trials of any the Offences expressed in this Act, that every such Inquisition and Trial to be had by Virtue of such Commission, shall be made and had by the Inhabitants in the said Five Ports, or the Members of the same; any Thing in this act to the contrary thereof notwithstanding.

I.B Piracy Act
11 & 12 William III c. 7 (1700)
4 Statutes at Large (1769 ed.) 40

An Act for the more effectual Suppression of Piracy.

WHEREAS by an act of Parliament made in the twenty-eighth Year of the Reign of King HENRY the Eighth, it is enacted, That Treasons, Felonies, Robberies, Murders, and Confederacies committed on the Sea, shall be enquired of, tried, and determined according to the common Course of the Laws of this Land used for such Offences upon the Land within this Realm; whereupon the Trial of those Offenders before the Admiral, or his Lieutenant, or his Commissary, hath been altogether disused. And whereas, that since the making of the said Act, and especially of late Years, it hath been found by Experience, that Persons committing Piracies, Robberies, and Felonies on the Seas, in or near the *East* and *West Indies*, and in Places very remote, cannot be brought to condign Punishment without great Trouble and Charges in sending them into *England* to be tried within the Realm, as the said Statute directs, insomuch that many idle and profligate Persons have been thereby encouraged to turn Pirates, and betake themselves to that Sort of wicked Life, trusting that they shall not, or at least cannot easily, be questioned for such their Piracies and Robberies, by reason of the great Trouble and Expence that will necessarily fall upon such as shall attempt to apprehend and prosecute them for the same. And whereas the Numbers of them are of late very much increased, and their Insolencies so great, that unless some speedy Remedy be provided to suppress them, by a strict and more easy Way for putting the ancient Laws in that Behalf in Execution, the Trade and Navigation into remote Parts will very much suffer thereby; Be it therefore declared and enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That all Piracies, Felonies, and Robberies committed in or upon the Sea, or in any Haven, River, Creek, or Place, where the Admiral or Admirals have Power, Authority, or Jurisdiction, may be examined, inquired of, tried, heard and determined, and adjudged, according to the Directions of this Act, in any Place at Sea, or upon the Land, in any of his Majesty's Islands, Plantations, Colonies, Dominions, Forts or Factories, to be appointed for that Purpose by the King's Commission or Commissions under the Great Seal of *England*, or the Seal of the Admiralty of *England*, directed to all or any of the Admirals, Vice-Admirals, Rear-Admirals, Judges of Vice-Admiralties, or Commanders

of any of his Majesty's Ships of War, and also to all or any such Person or Persons, Officer or Officers, by Name, or for the Time being, as his Majesty shall think fit to appoint; which said Commissioners shall have full Power jointly or severally, by Warrant under the Hand and Seal of them, or any one of them, to commit to safe Custody any Person or Persons, against whom Information of Piracy, Robbery, or Felony upon the Sea, shall be given upon Oath (which Oath they or any one of them shall have full Power, and are hereby required to administer), and to call and assemble a Court of Admiralty on Ship-board, or upon the Land, when and as often as Occasion shall require; which Court shall consist of seven Persons at the least.

II. And if so many of the Persons aforesaid cannot conveniently be assembled, Be it further enacted by the Authority aforesaid, That any three of the aforesaid Persons (whereof the President or Chief of some *English* Factory, or the Governor, Lieutenant Governor, or Member of his Majesty's Councils in any of the Plantations or Colonies aforesaid, or Commander of one of his Majesty's Ships, is always to be one), shall have full Power and Authority, by virtue of this Act, to call and assemble any other Persons on Ship-board, or upon the Land, to make up the Number of seven.

III. Provided, That no Persons but such as are known Merchants, Factors, or Planters, or such as are Captains, Lieutenants, or Warrant Officers in any of his Majesty's Ships of War, or Captains, Masters, or Mates of some *English* Ship, shall be capable of being so called, and sitting and voting in the said Court.

IV. And be it enacted by the Authority aforesaid, That such persons called and assembled as aforesaid, shall have full Power and Authority, according to the Course of the Admiralty, to issue Warrants for bringing any Persons accused of Piracy or Robbery, before them to be tried, heard, and adjudged; and to summon Witnesses, and to take Informations and Examinations of Witnesses upon their Oath; and to do all Things necessary for the Hearing and final Determination of any Case of Piracy, Robbery, and Felony; and to give Sentence and Judgment of Death, and to award Execution of the Offenders convicted and attainted as aforesaid, according to the Civil Law, and the Methods and Rules of the Admiralty; and that all and every Person and Persons so convicted and attainted of Piracy or Robbery, shall have and suffer such Losses of Lands, Goods and Chattels, as if they had been attainted and convicted of any Piracies, Felonies, and Robberies, according to the aforementioned Statute made in the Reign of King HENRY the Eighth.

V. Provided always, and be it further enacted by the Authority aforesaid, That so soon as any Court shall be assembled as aforesaid, either on Ship-board or upon the Land, the King's Commissions shall first be openly read, and the said Court then and there shall be solemnly and publickly called and proclaimed; and then the President of the Court shall, in the first Place, publickly in open Court take the following Oath, *viz.* I *A. B.* do swear in the Presence of Almighty God, That I will truly and impartially try and adjudge

the Prisoner or Prisoners which shall be brought upon his or their Trials before this Court, and honestly and duly, on my part, put his Majesty's Commission for the trying of them in Execution, according to the best of my Skill and Knowledge: And that I have no Interest, directly or indirectly, in any Ship or Goods, for the Piratically taking of which any Person stands accused, and is now to be tried: '*So help me God.*'

VI. And he having taken the Oath in Manner aforesaid, shall immediately administer the same Oath to every Person who shall sit, and have and give a Voice in the said Court upon the Trial of such Prisoner brought before them; and then the Register of the said Court shall openly and distinctly read the Articles against such Prisoner or Prisoners, upon which they or any of them is or are to be tried; wherein shall be set forth the particular Fact or Facts of Piracy, Robbery, and Felony, with the Time and Place when and where, and in what Manner it was committed; and then each Prisoner shall be asked, Whether he be guilty of the said Piracy and Robbery, or Felony, or not guilty? Whereupon every such Prisoner shall immediately plead thereunto, Guilty, or Not guilty, or else it shall be taken as confessed, and he shall suffer such Pains of Death, Loss of Lands, Goods, and Chattels, and in like Manner, as if he or they had been attainted or convicted upon the Oath of Witnesses, or his own Confession; but if any Prisoner shall plead Not guilty, Witnesses shall be produced by the Register, and duly sworn and examined openly, *viva voce*, in the Prisoner's Presence; and after a Witness hath answered all the Questions proposed by the President of the Court, and given his Evidence, it shall and may be lawful for the Prisoner to have the Witness cross-examined, by first declaring to the Court what Questions he would have asked, and thereupon the President of the Court shall interrogate the Witness accordingly; and every Prisoner shall have Liberty to bring Witnesses for his Defence, who shall be sworn, and examined upon Oath, as the Witnesses were that testified against him; and afterwards the Prisoner shall be fairly heard what he can say for himself; all which being done, the Prisoner shall be taken away and kept in safe Custody, and all other Persons, except the Register, shall withdraw from the said Court, and then the Court shall consider of the Evidence which hath been given, and debate the Matters and Circumstances of the Prisoner's Case, and the President of the Court shall collect all the Votes of the Persons who do sit and have Voices in the said Court, beginning at the Junior first, and ending with himself; and according to the Plurality of Voices, Sentence and Judgment shall be then given and pronounced publickly in the Presence of the Prisoner or Prisoners, being called in again; and according to such Sentence and Judgment the Person or Persons attainted shall be executed and put to Death, at such Time, in such Manner, and in such Place upon the Sea, or within the ebbing or flowing thereof, as the President, or the major Part of the Court, by Warrant directed to a Provost Marshal (which the President or said major Part shall have Power to constitute) shall appoint.

VII. And be it further enacted by the Authority aforesaid, That some Person, being a Publick Notary, shall be Register of the Court; and in case of his Absence, Death, or Incapacity, or for Want of a Person so qualified, the President of the Court shall and may appoint a Register, giving him an Oath (which he is hereby empowered to administer), duly, faithfully, and impartially to execute his Office; which Register shall prepare all Warrants and Articles, and take care to provide all Things requisite for any Trial, according to the substantial and essential Parts of Proceedings in a Court of Admiralty, in the most summary Way; and shall take Minutes of the whole Proceedings, and enter them duly in a Book by him to be kept for that Purpose; and shall from Time to Time, as Opportunity offers, transmit the same, with the Copies of all Articles and Judgments given in any such Cases, in any Court whereof he shall be Register, unto the High Court of Admiralty of *England*.

VIII. And be it further enacted, by the Authority aforesaid, That if any of his Majesty's natural-born Subjects, or Denizens of this Kingdom, shall commit any Piracy or Robbery, or any Act of Hostility, against others his Majesty's Subjects upon the Sea, under Colour of any Commission from any foreign Prince or State, or Pretence of Authority from any Person whatsoever, such Offender and Offenders, and every of them, shall be deemed, adjudged, and taken to be Pirates, Felons, and Robbers; and they and every of them being duly convicted thereof, according to this Act, or the aforesaid Statute of King HENRY the Eighth, shall have and suffer such Pains of Death, Loss of Lands, Goods, and Chattels, as Pirates, Felons, and Robbers upon the Seas ought to have and suffer.

IX. And be it further enacted, That if any Commander or Master of any Ship, or any Seaman or Mariner, shall in any place where the Admiral hath Jurisdiction, betray his Trust, and turn Pirate, Enemy, or Rebel, and piratically and feloniously run away with his or their Ship or Ships; or any Barge, Boat, Ordnance, Ammunition, Goods, or Merchandizes, or yield them up voluntarily to any Pirate, or shall bring any seducing Messages from any Pirate, Enemy, or Rebel, or consult, combine, or confederate with, or attempt or endeavour to corrupt any Commander, Master, Officer, or Mariner to yield up or run away with any Ship, Goods, or Merchandizes, or turn Pirate, or go over to Pirates, or if any Person shall lay violent Hands on his Commander, whereby to hinder him from fighting in Defence of his Ship and Goods committed to his Trust, or that shall confine his Master, or make, or endeavour to make a Revolt in the Ship, shall be adjudged, deemed, and taken to be a Pirate, Felon, and Robber, and being convicted thereof, according to the Directions of this Act, shall have and suffer Pains of Death, Loss of Lands, Goods, and Chattels, as Pirates, Felons, and Robbers upon the Seas ought to have and suffer.

X. And whereas several evil-disposed Persons, in the Plantations and elsewhere, have contributed very much towards the Increase and Encouragement

of Pirates, by setting them forth, and by aiding, abetting, receiving, and concealing them and their Goods, and there being some Defects in the Laws for bringing such evil-disposed Persons to condign Punishment; Be it enacted by the Authority aforesaid, That all and every Person and Persons whatsoever, who, after the twenty-ninth Day of *September* in the Year of our Lord one thousand seven hundred, shall either on the Land, or upon the Seas, knowingly or wittingly set forth any Pirate, or aid and assist, or maintain, procure, command, counsel or advise any Person or Persons whatsoever, to do or commit any Piracies or Robberies upon the Seas, and such Person and Persons shall thereupon do or commit any such Piracy or Robbery, then all and every such Person or Persons whatsoever, so as aforesaid setting forth any Pirate, or aiding, assisting, maintaining, procuring, commanding, counselling or advising the same, either on the Land or upon the Sea, shall be and are hereby declared, and shall be deemed and adjudged to be accessary to such Piracy and Robbery done and committed; and further, That after any Piracy or Robbery is or shall be committed by any Pirate or Robber whatsoever, every Person and Persons, who knowing that such Pirate or Robber has done or committed such Piracy and Robbery, shall on the Land or upon the Sea, receive, entertain or conceal any such Pirate or Robber, or receive or take into his Custody any Ship, Vessel, Goods or Chattels which have been by any such Pirate or Robber piratically and feloniously taken, shall be and are hereby likewise declared, deemed and adjudged to be accessary to such Piracy and Robbery; and that after the said nine and twentieth Day of *September*, all such Accessaries to such Piracies and Robberies shall and may be enquired of, tried, heard, determined and adjudged after the common Course of the Laws of this Land, according to the said Statute made in the twenty-eighth Year of King HENRY the Eighth, as the Principals of such Piracies and Robberies may and ought to be, and no otherwise; and being thereupon attainted, shall suffer such Pains of Death, Losses of Lands, Goods and Chattels, and in like Manner, as the Principals of such Piracies, Robberies and Felonies ought to suffer, according to the said Statute of King HENRY the Eighth which is hereby declared to be and continue in full Force; any Thing in this present Act contained to the contrary notwithstanding.

XI. And forasmuch as it will also conduce to the suppressing of Robberies on the Sea, if due Encouragement be given, and Rewards allowed to such Commanders, Masters, and other Officers, Seamen, and Mariners, as shall either bravely defend their own Ships, or take, seize and destroy Pirates, Sea Rovers, and Enemies; Be it further enacted by the Authority aforesaid, That when any *English* Ship shall have been defended against any Pirates, Enemies, or Sea Rovers by Fight, and brought to her designed Port in which Fight any of the Officers or Seamen shall have been killed or wounded, it shall and may be lawful to and for the judge of his Majesty's High Court of Admiralty, or his Surrogate in the Port of *London*, or the Mayor, Bailiff, or Chief Officer in the

several Out Ports of this Kingdom, upon the Petition of the Master or Seamen of such Ship so defended as aforesaid, to call unto him four or more good and substantial Merchants, and such as are no Adventurers or Owners of the Ship or Goods so defended, and have no Manner of Interest therein, and by Advice with them to raise and levy upon the respective Adventures and Owners of the Ship and Goods so defended, by Process out of the said Court, such Sum or Sums of Money as himself and the said Merchants, by Plurality of Voices, shall determine and judge reasonable, not exceeding two Pounds *per Centum* of the Freight, and of the Ship and Goods so defended, according to the first Costs of the Goods; which Sum or Sums of Money so raised, shall be distributed among the Captain, Master, Officers, and Seamen of the said Ship, or Widows and Children of the slain, according to the Direction of the Judge of the said Court, or his Surrogate in the Port of *London*, or the Mayor, Bailiff or Chief Officer in the several Out-ports of this Kingdom, with the Approbation of the merchants aforesaid, who shall proportion the same, according to their best Judgment, unto the Ship's Company as aforesaid, having special Regard unto the Widows and Children of such as shall have been slain in that Service, and such as have been wounded or maimed.

XII. And for the better and more effectual Prevention of Combinations and Confederacies, for the running away with or destroying of any Ship, Goods or Merchandizes; Be it further enacted by the Authority aforesaid, That a Reward of ten Pounds for every Ship or Vessel of one hundred Tuns or under, and fifteen Pounds for every Ship or Vessel of a greater Burthen, shall be paid by the Captain, Commander, or Master of every Ship or Vessel, wherein any such Combination or Confederacy shall be set on Foot, for the running away with or destroying any such Ship, or the Goods and Merchandizes therein laden, to such Person as shall first make a Discovery thereof, upon due Proof of such Combination or Confederacy; the same to be paid at the Port where the Wages of the Seamen of the said Ship are or ought to be paid, after such Discovery and Proof made.

XIII. Provided also, That this Act shall be in Force for seven Years, and to the End of the next Session of Parliament after the Expiration of the said seven Years, and no longer.

XIV. And for the more effectual Prosecution and Punishment of Piracies, Felonies and Robberies upon the Sea, and of all other Offences aforementioned; Be it declared and enacted by the Authority aforesaid, That the Commissioners appointed or to be appointed by the aforementioned Statute of King HENRY the Eighth, or the Commissioners for Trial of Pirates appointed by this Act, shall, from and after the said nine and twentieth Day of *September* one thousand seven hundred, have the sole Power and Authority of trying, hearing, and determining the said Crimes and Offences, within all or any of the Colonies and Plantations in *America*, governed by Proprietors, or under Grants or Charters from the Crown, and of bringing the Offenders to

condign Punishment; and shall and may issue forth their Warrant or Warrants for the seizing and apprehending of any Pirates, Felons, or Robbers upon the sea or their Confederates or Accessaries, being within any of the said Colonies and Plantations, in order to their being brought to Trial within the same, or any other Plantation in *America*, according to this Act, or sent into *England* to be tried there; and that all and every Governor and Governors, Person and Persons in Authority in the said Colonies and Plantations governed by Proprietors, or under Charters as aforesaid, shall assist the Commissioners and the subordinate Officers in doing their Duty, and also in the Execution of such Warrants and otherwise, and shall deliver up to such Commissioner or Commissioners, Officer or Officers, any Pirates, Felons and Robbers upon the Sea, and their Confederates and Accessaries, in order to their being tried or sent into *England* as aforesaid; any Letters Patents, Grants or Charters of Government, in and about the said Plantations, or other Usages heretofore had or made to the contrary notwithstanding.

XV. And be it hereby further declared and enacted, That if any of the Governors in the said Plantations, or any Person or Persons in Authority there, shall refuse to yield Obedience to this Act, such Refusal is hereby declared to be a Forfeiture of all and every the Charters granted for the Government or Propriety of such Plantation.

XVI. Provided always, and be it enacted by the Authority aforesaid, That whensoever any Commission for the Trial and Punishment of the Offences aforesaid, or any of them, shall be directed or sent to any Place within the Jurisdiction of the Cinque Ports, that then every such Commission shall be directed unto the Lord Warden of the Cinque Ports for the Time being, or to his Lieutenant, and unto such other Persons as the Lord High Chancellor, or Keeper of the Great Seal of *England* for the Time being, or Commissioners for the Custody of the Great Seal, shall name and appoint; and likewise that every Inquisition and Trial, to be had by virtue of such Commission so directed and sent to any Place in said Cinque Ports, shall be made and had by the Inhabitants of the said Cinque Ports, or the Members of the same; any Thing in this Act to the contrary thereof notwithstanding.

XVII. And for the Prevention of Seamen deserting of Merchant Ships abroad in Parts beyond the Seas, which is the chief Occasion of their turning Pirates, and of great Detriment to Trade and Navigation in general; Be it enacted by the Authority aforesaid, That all such Seamen, Officers or Sailors, who shall desert the Ships or Vessels wherein they are hired to serve for that Voyage, shall for such Offence forfeit all such Wages as shall be then due to him or them.

XVIII. And be it further enacted by the Authority aforesaid, That in case any Master of a Merchant Ship or Vessel shall, after the nine and twentieth Day of *September* one thousand and seven hundred, during his being abroad, force any Man on Shore, or wilfully leave him behind in any of his Majesty's

Plantations, or elsewhere, or shall refuse to bring Home with him again all such of the Men which he carried out with him as are in a Condition to return, when he shall be ready to proceed in his Homeward-bound Voyage, every such Master shall, being thereof legally convicted, suffer three Months Imprisonment without Bail or Mainprize.

I.C The Bounty Act
6 George IV c. 49 (1825)
Statutes at Large 1825, 453

An Act for encouraging the Capture or Destruction of piratical Ships and Vessels. [22d *June* 1825]

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: Be it therefore enacted by the King's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, That from and after the passing of this Act there shall be paid by the Treasurer of His Majesty's Navy, upon Bills to be made forth by the Commissioners of the Navy, to be paid according to the Course thereof, without Fee or Reward, 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, since the First Day of *January* One thousand eight hundred and twenty, 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; the Numbers of such piratical Men respectively to be proved by the Ships Papers taken on board such piratical Ship, Vessel, or Boat, verified by the Oaths of Two or more of the Persons who shall have found and taken Possession of such Papers, or by such other Evidence as under the Circumstances of the Case shall, by the Judge of the High Court of Admiralty, or by the Judge of any other Court authorized to take Cognizance of such Matter, be deemed sufficient Proof thereof.

II. And for the more speedy Distribution of such Reward payable in respect of Pirates or Pirate Vessels, taken or destroyed in distant Parts; be it further enacted, That when and so soon as the Amount of the Bounty so to be paid, and the Numbers of Men in respect of whom it shall be payable, shall have been ascertained in manner aforesaid, it shall and may be lawful for the Commissioner of the Navy resident at any of His Majesty's Dock Yards abroad, or in the Absence of a Commissioner of the Navy, for the Naval Officer and Storekeeper, or if there shall be no such Commissioner or Naval

Officer, then for the Commander in Chief or Senior Officer of His Majesty's Ships and Vessels at the Port or Place into which the piratical Ship, Vessel, or Boat shall be taken to be proceeded against, or in case of the Destruction of the Vessel, the Place into which the piratical Persons seized shall be carried, to draw upon the Commissioners of the Navy a Bill or Bills Thirty Days Sight for the Amount of such Bounty, which Bill or Bills shall, upon the said Commissioners being satisfied of the Correctness and Amount thereof by the Production to them of the Proof herein-before required, be by them assigned for Payment on the Treasurer of the Navy, and when paid be charged as an Imprest on the Person so drawing the same; and that all Bills so to be made out by the Commissioners of the Navy, or to be drawn upon them as aforesaid, shall be made payable to such Person or Persons as shall be authorized and appointed Agents for the Appraisement and Sales of such piratical Ships or Boats in respect of which such Bounty shall be payable, or for the Receipt of such Bounty only, in case such piratical Ships, Vessels, or Boats shall have been sunk, burnt, or destroyed, in like manner as by an Act made in the Forty-fifth Year of the Reign of His late Majesty King *George* the Third, intituled *An Act for the Encouragement of Seamen, and for the better and more effectually manning His Majesty's Navy during the present War*, was directed with respect to the Appointment of Agents for the Appraisement and Sale of Prizes taken from the Enemy; and that the same Bounty shall be paid, distributed, and divided by such authorized and appointed Agent or Agents, to and amongst such Persons, and in such Manner, Form, and Proportion as His Majesty, His Heirs or Successors, by any Order or Orders in Council for that Purpose, shall think fit to declare and direct.

III. And be it further enacted, That if any Ship, Vessel, Boat, Goods, Merchandize, or other Property found and taken in the Possession of Pirates, shall be duly proved in and adjudged by Court of Admiralty or other Court having competent Jurisdiction therein to have belonged to and to have been taken from any of His Majesty's Subjects, then such Ship, Vessel, Boat, Goods, Merchandize, and other Property, and every Part thereof so proved, shall by the Decree of the said Court be adjudged to be restored, and shall be accordingly restored to the former Owner or Owners, Proprietor or Proprietors thereof respectively, he or they paying for or in lieu of Salvage a Sum of Money equal to One-eighth Part of the true Value of such Ship, Vessel, Boat, Goods, Merchandize, and other Property respectively; which Money shall be paid to and divided and distributed amongst such Persons, and in such Manner, Form, and Proportion, as shall by any Proclamation or Order of His Majesty in Council be directed for the Distribution of the Produce of any Ship, Vessel, Boat, Goods, or other Property of Pirates.

IV. And be it further enacted, That no Person or Persons who shall desert from any of His Majesty's Ships or hired armed Vessels, or otherwise from

His Majesty's Service, shall be entitled to receive any Proportion of Bounty Money, Salvage, or other Monies payable by virtue of this Act; but that the Shares of all such Persons, as well as all other Shares which shall not be legally demanded within the Times prescribed by the said Act of the Forty-fifth Year of his late Majesty's Reign for the Demand of Prize Money, shall be paid over to the Treasurer of the Royal Hospital at *Greenwich*, within such Times, in such Manner, and to and for such Uses and Purposes, and subject to such Provisions, Regulations, and Exceptions, as in the said Act is mentioned with respect to Prize Money.

V. And be it further enacted, That all and every Person and Persons who shall be so nominated and appointed Agent or Agents as aforesaid, for the Appraisement and Sale of any piratical Ships, Vessels, or Boats taken by any of His Majesty's Ships or Vessels, or hired armed Ships, or for the Distribution of the Bounty Money by this Act given, shall exhibit and cause to be registered their Letter or Letters of Attorney in the respective Courts wherein the Proceedings touching the Vessels so taken, or touching such Bounty or Salvage, shall be had; and all such Agents shall be subject to such Forfeitures and Disqualifications for not registering the same as in and by the said Act of the Forty-fifth of His late Majesty's Reign are enacted and provided.

II American Statutes

II.A Piracy Act of March 3, 1819
15th Cong., 2nd Sess., ch. 77
3 Statutes at Large (1850 ed.) 510

CHAP. LXXVII.—*An Act to protect the commerce of the United States, and punish the crime of piracy.* (a) [See Peters's notes at end.]

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the President of the United States be, and hereby is, authorized and requested to employ so many of the public armed vessels, as, in his judgment, the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations.

SEC 2. *And be it further enacted,* That the President of the United States be, and hereby is, authorized to instruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.

SEC. 3. *And be it further enacted,* That the commander and crew of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States; and may subdue and capture the same; and may also retake any vessel, owned as aforesaid, which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.

SEC. 4. *And be it further enacted,* That whenever any vessel or boat, from which any piratical aggression, search, restraint, depredation or seizure shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty

jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.

SEC. 5. *And be it further enacted*, That if any person or persons soever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.

SEC. 6. *And be it further enacted*, That this act shall be in force until the end of the next session of Congress.

APPROVED, March 3, 1819.

(*a*) [Note by Peters from 3 Statutes at Large 510-513 (1850)
The decisions of the courts of the United States upon prosecutions for piracy, have been:

Piracy.—A robbery committed on the high seas, although such robbery, if committed on land, would not, by the laws of the United States, be punishable with death, is piracy, under the act of Congress of 1790; and the circuit courts have jurisdiction thereof. United States *v*. Palmer, 3 Wheat. 610; 4 Cond. Rep. 352.

The crime of robbery, as mentioned in the act, is the crime of robbery as recognized and defined at common law. *Ibid.*

The crime of robbery, committed by a person who is not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, or on persons in a foreign vessel, is not piracy under the act, and is not punishable in the courts of the United States. *Ibid.*

When a civil war rages in a foreign nation, one part of which separates itself from the old established government, and erects itself into a distinct government, the courts of the United States must view such newly constituted government as it is viewed by the legislative and executive departments of the government of the United States. If that government remains neutral, but recognises the existence of a civil war, the courts of the Union cannot consider as criminal, those acts of hostility which war authorizes, and which the new government may direct against its enemy. *Ibid.*

The same testimony which would be sufficient to prove that a vessel or person is in the service of an acknowledged state, is admissible to prove that they are in the service of such newly created government. Its seal cannot be allowed to prove itself, but may be proved by such testimony as the nature of the case admits; and the fact that a vessel or person is in the service of such government may be established otherwise, should it be impracticable to prove the seal. *Ibid.*

A commission issued by Aury, as "brigadier of the Mexican republic," (a republic whose existence is unknown and unacknowledged,) or as "generalissimo of the Floridas," (a province in the possession of Spain,) will not authorize armed vessels to make captures at sea. United States *v.* Klintock, 5 Wheat. 144; 4 Cond. Rep. 614.

Query, Whether a person, acting with good faith under such a commission, may be guilty of piracy? *Ibid.*

However this may be, in general, under the particular circumstances of this case, showing that the seizure was made not jure belli, but animo furandi, the commission was held not to exempt the prisoner from the charge of piracy.

The act of the 30th of April, 1790, ch. 9, extends to all persons, on board all vessels, which throw off their national character by cruising piratically, and committing piracy on other vessels. *Ibid.*

The act of the 3rd March, 1819, ch. 77, sec. 5, referring to the law of nations for a definition of the crime of piracy, is a constitutional exercise of the power of Congress to define and punish that crime. United States *v.* Smith, 5 Wheat. 153; 4 Cond. Rep. 619.

The crime of piracy is defined by the law of nations with reasonable certainty. *Ibid.*

Robbery, or forcible depredation, upon the sea, animo furandi, is piracy by the law of nations and by the act of Congress. *Ibid.*

The eighth section of the act of the 30th of April, 1790, ch. 9, for the punishment of certain crimes against the United States, is not repealed by the act of the 3d of March, 1819, ch. 77, to protect the commerce of the United States, and to punish the crime of piracy. United States v. Furlong, alias Hobson et al., 5 Wheat. 184; 4 Cond. Rep. 623.

In an indictment for a piratical murder (under the act of the 30th of April, 1790, ch. 9 sec. 8), it is not necessary that it should allege the prisoner to be a citizen of the United States, nor that the crime was committed on board a vessel belonging to citizens of the United States; but it is sufficient to charge it as committed from on board such a vessel, by a mariner sailing on board such a vessel. *Ibid.*

The words "out of the jurisdiction of any particular state," in the act of the 30th of April, 1790, ch. 9, sec. 8, are construed to mean, out of the jurisdiction of any particular state of the Union. *Ibid.*

A vessel lying in an open roadstead of a foreign country, is "upon the high seas" within the act of 1790, ch. 9, sec. 8. *Ibid.*

A citizen of the United States fitting out a vessel in a port of the United States, to cruise against a power in amity with the United States, is not protected by a foreign commission from punishment for any offence committed against the property of citizens of the United States. *Ibid.*

The courts of the United States have jurisdiction of a murder committed on the high seas from a vessel belonging to the United States, by a foreigner

being on board such vessel, upon another foreigner being on board of a foreign vessel. It is not necessary to produce documentary evidence, in order to prove the national character of a vessel, on an indictment for piracy. *Ibid.*

The courts of the United States have not jurisdiction of a murder committed by one foreigner on another foreigner, both being on board a foreign vessel. *Ibid.*

It is competent in an indictment for piracy, for the jury to find that a vessel within a marine league of the shore, at anchor, in an open roadstead, where vessels only ride under shelter of the land at a season when the course of the winds is invariable, is upon the high seas. *Ibid.*

The act of the 3d of March, 1819, ch. 77, sec. 5, furnishes a sufficient definition of piracy; and it is defined to be "robbery on the seas." *Ibid.*

A vessel loses her national character by assuming a piratical character; and a piracy committed by a foreigner from on board such a vessel, upon any other vessel whatever, is punishable under the eighth section of the act of the 30th of April, 1790, ch. 9. *Ibid.*

On an indictment for piracy, the jury may find the national character of a vessel upon such evidence as will satisfy their minds; without the certificate of registry, or other documentary evidence being produced; and without proof of their having been seen on board. *Ibid.*

On an indictment for piracy, the national character of a merchant vessel of the United States may be proved without evidence of her certificate of registry. *Ibid.*

The courts of the United States have jurisdiction under the act of the 30th of April, 1790, ch. 9, of murder or robbery committed on the high seas; although not committed on board a vessel belonging to citizens of the United States, as if she had not national character; but was held by pirates, or persons not lawfully sailing under the flag of any foreign nation. United States *v.* Holmes, 5 Wheat. 412; 4 Cond. Rep. 708.

In the same case, and under the same act, if the offence be committed on board of a foreign vessel by a citizen of the United States; or on board a vessel of the United States by a foreigner; or by a citizen or foreigner on board of a piratical vessel; the offence is equally cognisable by the courts of the United States. *Ibid.*

It makes no difference in such a case, and under the same act, whether the offence was committed on board of a vessel, or on the sea; as by throwing the deceased overboard and drowning him, or by shooting him when in the sea though he was not thrown overboard. *Ibid.*

In such a case, and under the same act, where the vessel from on board of which the offence was committed, sailed from Buenos Ayres, where she had enlisted her crew; but it did not appear by legal proof that she had a commission from the government of Buenos Ayres, or any ships' papers or documents from that government, or that she was ever recognised as a ship of

that nation, or of its subjects, or who were the owners, where they resided, or when or where the vessel was armed and equipped; but it did appear in proof, that the captain and crew were chiefly Englishmen, Frenchmen, and citizens of the United States; that the captain was by birth a citizen of the United States, domiciled at Baltimore, where the privateer was built: *Held*, that the burthen of proof of the national character of the vessel, was on the prisoners. *Ibid.*

General piracy, or murder, or robbery, committed by persons on board a vessel, not at the time belonging to the subjects of any foreign power, but in possession of a crew, acting in defiance of all law, and acknowledging obedience to no government whatever, is within the 8th section of the act of Congress of April 30th, 1790, ch. 9, and is punishable in the courts of the United States. United States v. Furlong, 5 Wheat. 185; 4 Cond. Rep. 623.

There is a distinction between the crimes of murder and piracy. The latter is an offence within the criminal jurisdiction of all nations: not so with murder, it is punishable under the laws of each state. *Ibid.*

It is not necessary to produce documentary evidence, to prove the national character of a vessel, on an indictment for piracy. *Ibid.*

Upon a piratical capture, the property of the original owners cannot be forfeited for the misconduct of the captors, in violating the municipal laws of the country where the captors have carried the property. The Josefa Segunda, 5 Wheat. 338; 4 Cond. Rep. 672.

Pirates may be lawfully captured by the public or private ships of any nation, in peace or in war; for they are hostes humani generis. The Marianna Flora, 11 Wheat. 1; 6 Cond. Rep. 201.

On a question of probable cause of seizure, under the piracy acts of 3d of March, 1819, ch. 77, and of the 15th of May, 1820, ch. 113; although the crew may be protected by a commission bona fide received, and acted under, from the consequences attaching to the offence of piracy by the general law of nations; although such commission was irregularly issued; yet if the defects in the commission be such as, connected with the insubordination and predatory spirit of the crew, to excite a justly founded suspicion, it is sufficient, under the act of Congress, to justify the captors for bringing in the vessel for adjudication, and to exempt them from costs and damages. The Palmyra, 12 Wheat. 1; 6 Cond. Rep. 397.

Whatever difficulty there may be, under our municipal institutions, in punishing as pirates, citizens of the United States who take from a state at war with Spain, a commission to cruise against that power, contrary to the 14th article of the Spanish treaty: yet there is no doubt that such acts are to be considered as piratical acts for all civil purposes, and the offending parties cannot appear, and claim in our courts the property thus taken. The Bello Corrunes, 6 Wheat. 152; 5 Cond. Rep. 45.

To constitute the offence of piracy, within the act of 1790, ch. 9, by "piratically and feloniously" running away with a vessel, personal force and violence is not necessary. United States v. Tully, 1 Gallis. C. C. R. 247.

The "piratically and feloniously" running away with a vessel, within the act, is the running away with a vessel, with an intent to convert the same to the taker's own use, against the will of the owner. The intent must be animo furandi. *Ibid.*

The circuit court has cognisance, under the act of 1790, ch. 9, sec. 8, of piracy on board an American ship, although committed in an open roadstead, adjacent to a foreign territory, and within half a mile of the shore. United States *v.* Ross, 1 Gallis. C. C. R. 624.

Where the defendant was indicted for robbery and piracy, on the high seas, on board a brig called L'Eclair, a foreign vessel, belonging exclusively to French owners, and sailing under the French flag: *Held*, that under the acts of Congress, the circuit court had no jurisdiction to try and punish the offence. United States *v.* Kessler, 1 Baldwin's C. C. R. 25.

Whether the offence was committed within or without a marine league of the coast of the United States, makes no difference. *Ibid.*

The defendant who was the first lieutenant of an American privateer, the Revenge, was indicted for piracy committed on a Portuguese vessel, and for assaulting the crew, and putting them in bodily fear, &c. The defendant was charged with boarding the vessel, and by force and intimidation, taking from her money and other articles, not claiming the vessel as prize; but pretending that the Revenge was an English vessel, and that the articles would be paid for by an order on the English consul. *Held*, that the eighth section of the act for the punishment of certain crimes, makes murder and robbery on the high seas acts of piracy. The words, "which if committed in the body of a county," do not relate to "murder and robbery," but to the words immediately preceding them, or any other offence. United States *v.* Jones, 3 Wash. C. C. R. 209.

To define the meaning of "robbery," the common law must be resorted to: wherever a statute of the United States uses a technical term, which is known, and its meaning clearly ascertained by the common law or civil law, from one or other of which it is obviously borrowed, it is proper to refer for its meaning to the source from which it is taken. *Ibid.*

The act of Congress of 1812, for the government of the navy of the United States, does not repeal the provisions of the law relating to piracy, contained in the act of Congress passed 30th April, 1790. The general rule of law, that robbery on the high seas is piracy, has no exception or qualification in favour of commissioned privateers, in any act of Congress, in the common law, or in the law of nations. Robbery is the felonious taking of goods from the person of another; or in his presence by violence; or by putting him in fear, and against his will. *Ibid.*

As there was not proof under the indictment, that in the first instance any unlawful acts were meditated by the commander of the Revenge, and his officers; it was held to be insufficient to charge the defendants, who were part of the crew, with piracy, by proving acts of robbery committed by the crew in general. It must be proved that the defendants, who were part of the crew, participated in the taking; and that they did it feloniously. The captain of the Revenge may have been guilty of robbery, and those who executed his orders may have been innocent. *Ibid.*

The crimes of piracy mentioned in the 8th section of the act for the punishment of certain crimes, passed 30th April, 1790, are such as are committed by citizens of the United States, or on board of vessels of the United States; and the 10th and 11th sections of the act, which refer to accessaries, refer to acts of piracy mentioned in the 8th section. United States *v.* Howard et al., 3 Wash. C. C. R. 340.

An endeavour by a mariner to corrupt the master of a vessel, and to induce him to go over to pirates, is within the provisions of the eighth section of the law. *Ibid.*

To establish the crime of confederacy, there must some proof of criminal intentions in the persons charged. *Ibid.*

The language of the 12th section of the law, implies compact and association with pirates, as well in relation to the past as to the future. Any intercourse with them which is calculated to promote their views, is within the provisions of the law. *Ibid.*

In order to affect all the officers and crew of a piratical vessel with guilt, the original voyage must have been undertaken with a piratical design; and the officers and crew have acted upon such design; otherwise those only are guilty who co-operated actively in the piracy. United States *v.* Gilbert, 2 Sumner's C. C. R. 19.

It would not be sufficient to affect them with such, if they had known the voyage was to be an illegal one, as in the slave trade, contrary to the laws of Spain. *Ibid.*

The simple fact of presence on board the piratical vessel, where there was no original piratical design, is not of itself sufficient to affect a party with the crime. All who are present, acting and assisting in the piracy, are to be deemed principals. *Ibid.*

The act of 1790, ch. 9, sec. 8, for the punishment of certain crimes, passed by Congress, as well as the act of 1820, ch. 113, applies to all murders and robberies committed on board of, or upon American ships on the high seas. *Ibid.*

The indictment charged the piracy to have been committed "on the high seas within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of a particular state." Held, that this was a sufficient statement of the venue, without a further specification of the place. *Ibid.*

Under the act of Congress of 1819, ch. 77, any armed vessel may be seized which shall have attempted or committed any piratical aggression, &c., and the proceeds of the vessel when sold divided between the United States and the captors at the discretion of the court. Harmony et al. *v.* The United States, 2 Howard, 210.

It is no matter whether the vessel be armed for offence or defence, provided she commits the unlawful acts specified. *Ibid.*

To bring a vessel within the act, it is not necessary that there should be actual plunder or intent to plunder; if the act be committed from hatred or an abuse of power, or a spirit of mischief, it is sufficient. *Ibid.*

The word "piratical" in the act is not to be limited in its construction to such acts as by the laws of nations are denominated piracy, but includes such as pirates are in the habit of committing. *Ibid.*

A piratical aggression, search, restraint or seizure, is as much within the act, as a piratical depredation. *Ibid.*

The innocence or ignorance on the part of the owner of the vessel, of these prohibited acts, will not exempt the vessel from condemnation. *Ibid.*

The condemnation of the cargo is not authorized by the act of 1819. Neither does the law of nations require the condemnation of the cargo for petty offences, unless the owner thereof co-operates in and authorizes the unlawful act. An exception exists in the enforcement of belligerent rights. *Ibid.*

Where the innocence of the owners was established, it was proper to throw the costs on the vessel which was condemned, to the exception of the cargo which was liberated. *Ibid.*

II.B Piracy Act of May 15, 1820
16th Cong., 1st Sess., ch. 113
3 Statutes at Large (1850 ed.) 600

CHAP. CXIII.—*An Act to continue in force "An act to protect the commerce of the United States, and punish the crime of piracy," and also to make further provisions for punishing the crime of piracy.*

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the first, second, third, and fourth, sections of an act, entitled "An act to protect the commerce of the United States and punish the crime of piracy," passed on the third day of March, one thousand eight hundred and nineteen, be, and the same are hereby, continued in force, from the passing of this act for the term of two years, and from thence to the end of the next session of Congress, and no longer.

SEC. 2. *And be it further enacted,* That the fifth section of the said act be, and the same is hereby, continued in force, as to all crimes made punishable by the same, and heretofore committed, in all respects as fully as if the duration of the said section had been without limitation.

SEC. 3. *And be it further enacted,* That, if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate: and, being thereof convicted before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate: and on conviction thereof before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death: *Provided,* That nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offences, when committed within the body of a county, or authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offence, in a state court.

SEC. 4. *And be it further enacted,* That if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned in the whole or part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land, from any such ship

or vessel, and, on any foreign shore, seize any negro or mulatto, not held to service or labour by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive, such negro or mulatto on board any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate; and, on conviction thereof before the circuit court of the United States for the district wherein he may be brought or found, shall suffer death.

SEC. 5. *And be it further enacted,* That if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned wholly or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall forcibly confine or detain, or aid and abet in forcibly confining or detaining, on board such ship or vessel, any negro or mulatto not held to service by the laws of either of the states or territories of the United States, with intent to make such negro or mulatto a slave, or shall, on board any such ship or vessel, offer to attempt to sell, as a slave, any negro or mulatto not held to service as aforesaid, or shall, on the high seas, or any where on tide water, transfer or deliver over, to any other ship or vessel, any negro or mulatto, not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land, or deliver on shore, from on board any such ship or vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto, as a slave, such citizen or person shall be adjudged a pirate; and, on conviction thereof before the circuit court of the United States for the district wherein he shall be brought or found, shall suffer death.

APPROVED, May 15, 1820.

II.C Title 18 United States Code (1982 ed.)

CHAPTER 81—PIRACY AND PRIVATEERING

Sec.
1651. Piracy under law of nations.
1652. Citizens as pirates
1653. Aliens as pirates.
1654. Arming or serving on privateers.
1655. Assault on commander as piracy.
1656. Conversion or surrender of vessel.
1657. Corruption of seamen and confederating with pirates
1658. Plunder of distressed vessel.
1659. Attack to plunder vessel.
1660. Receipt of pirate property.
1661. Robbery ashore.

HISTORICAL AND REVISION NOTES

In the light of far-reaching developments in the field of international law and foreign relations, the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by way of modification and expansion. Such a task may be regarded as beyond the scope of this project. The present revision is, therefore, confined to the making of some obvious and patent corrections. It is recommended, however, that at some opportune time in the near future, the subject of piracy be entirely reconsidered and the law bearing on it modified and restated in accordance with the needs of the times.

1651. Piracy under law of nations

Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United states, shall be imprisoned for life.

1652. Citizens as pirates

Whoever, being a citizen of the United States, commits any murder or robbery, or any act of hostility against the United States, or against any citizen thereof, on the high seas, under color of any commission from any foreign prince, or state, or on pretense of authority from any person, is a pirate, and shall be imprisoned for life.

1653. Aliens as pirates

Whoever, being a citizen or subject of any foreign state, is found and taken on the sea making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the state of which the offender is a citizen or subject, when by such treaty such acts are declared to be piracy, is a pirate, and shall be imprisoned for life.

1654. Arming or serving on privateers

Whoever, being a citizen of the United States, without the limits thereof, fits out and arms, or attempts to fit out and arm or is concerned in furnishing, fitting out, or arming any private vessel of war or privateer, with intent that such vessel shall be employed to cruise or commit hostilities upon the citizens of the United States of their property; or

Whoever takes the command of or enters on board of any such vessel with such intent; or

Whoever purchases any interest in any such vessel with a view to share in the profits thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

1655. Assault on commander as piracy

Whoever, being a seaman, lays violent hands upon his commander, to hinder and prevent his fighting in defense of his vessel or the goods intrusted to him, is a pirate, and shall be imprisoned for life.

1656. Conversion or surrender of vessel

Whoever, being a captain or other officer or mariner of a vessel upon the high seas or on any other waters within the admiralty and maritime jurisdiction of the United States, piratically or feloniously runs away with such vessel, or with any goods or merchandise thereof, to the value of $50 or over; or

Whoever yields up such vessel voluntarily to any pirate—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

1657. Corruption of seamen and confederating with pirates

Whoever attempts to corrupt any commander, master, officer, or mariner to yield up or to run away with any vessel, or any goods, wares, or merchandise, or to turn pirate or to go over to or confederate with pirates, or in any wise to trade with any pirate, knowing him to be such; or

Whoever furnishes such pirate with any ammunition, stores, or provisions of any kind; or

Whoever fits out any vessel knowingly and, with a design to trade with, supply, or correspond with any pirate or robber upon the seas; or

Whoever consults, combines, confederates, or corresponds with any pirate or robber upon the seas, knowing him to be guilty of any piracy or robbery; or

Whoever, being a seaman, confines the master of any vessel—

Shall be fined not more than $1,000 or imprisoned not more than three years, or both.

1658. Plunder of distressed vessel

(a) Whoever plunders, steals, or destroys any money, goods, merchandise, or other effects from or belonging to any vessel in distress, or wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks of the sea, or in any other place within the admirality and maritime jurisdiction of the United States, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

(b) Whoever willfully obstructs the escape of any person endeavoring to save his life from such vessel, or the wreck thereof; or

Whoever holds out or shows any false light, or extinguishes any true light, with intent to bring any vessel sailing upon the sea into danger or distress or shipwreck—

Shall be imprisoned not less than ten years and may be imprisoned for life.

1659. Attack to plunder vessel

Whoever, upon the high seas or other waters within the admiralty and maritime jurisdiction of the United States, by surprise or open force, maliciously attacks or sets upon any vessel belonging to another, with an intent unlawfully to plunder the same, or to despoil any owner thereof of any moneys, goods, or merchandise laden on board thereof, shall be fined not more than $5,000 or imprisoned not more than ten years, or both.

1660. Receipt of pirate property

Whoever, without lawful authority, receives or takes into custody any vessel, goods, or other property, feloniously taken by any robber or pirate against the laws of the United States, knowing the same to have been feloniously taken, shall be imprisoned not more than ten years.

1661. Robbery ashore

Whoever, being engaged in any piratical cruise or enterprise, or being of the crew of any piratical vessel, lands from such vessel and commits robbery on shore, is a pirate, and shall be imprisoned for life.

III CODIFICATIONS

III. A Harvard Research in International Law Draft Convention on Piracy 26 American Journal of International Law Supplement 743 (1932)

PIRACY

Article 1

As the terms are used in this convention:

1. The term "jurisdiction" means the jurisdiction of a state under international law as distinguished from municipal law.

2. The term "territorial jurisdiction" means the jurisdiction of a state under international law over its land, its territorial waters and the air above its land and territorial waters. The term does not include the jurisdiction of a state over its ships outside its territory.

3. The term "territorial sea" means that part of the sea which is included in the territorial waters of a state.

4. The term "high sea" means that part of the sea which is not included in the territorial waters of any state.

5. The term "ship" means any water craft or air craft of whatever size.

Article 2

Every state has jurisdiction to prevent piracy and to seize and punish persons and to seize and dispose of property because of piracy. This jurisdiction is defined and limited by this convention.

Article 3

Piracy is any of the following acts, committed in a place not within the territorial jurisdiction of any state:

1. Any act of violence or of depredation committed with intent to rob, rape, wound, enslave, imprison or kill a person or with intent to steal or destroy property, for private ends without bona fide purpose of asserting a claim of right, provided that the act is connected with an attack on or from the sea or in or from the air. If the act is connected with an attack which starts from on board ship, either that ship or another ship which is involved must be a pirate ship or a ship without national character.

2. Any act of voluntary participation in the operation of a ship with knowledge of facts which make it a pirate ship.

3. Any act of instigation or of intentional facilitation of an act described in paragraph 1 or paragraph 2 of this article.

Article 4

1. A ship is a pirate ship when it is devoted by the persons in dominant control to the purpose of committing an act described in the first sentence of paragraph 1 of Article 3, or to the purpose of committing any similar act within the territory of a state by descent from the high sea, provided in either case that the purposes of the persons in dominant control are not definitely limited to committing such acts against ships or territory subject to the jurisdiction of the state to which the ship belongs.

2. A ship does not cease to be a pirate ship after the commission of an act described in paragraph 1 of Article 3, or after the commission of any similar act within the territory of a state by descent from the high sea, as long as it continues under the same control.

Article 5

A ship may retain its national character although it has become a pirate ship. The retention or loss of national character is determined by the law of the state from which it was derived.

Article 6

In a place not within the territorial jurisdiction of another state, a state may seize a pirate ship or a ship taken by piracy and possessed by pirates, and things or persons on board.

Article 7

1. In a place within the territorial jurisdiction of another state, a state may not pursue or seize a pirate ship or a ship taken by piracy and possessed by pirates; except that if pursuit of such a ship is commenced by a state within its own territorial jurisdiction or in a place not within the territorial jurisdiction of any state, the pursuit may be continued into or over the territorial sea of another state and seizure may be made there, unless prohibited by the other state.

2. If a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of this article, the state making the seizure shall give prompt notice to the other state, and shall tender possession of the ship and other things seized and the custody of persons seized.

3. If the tender provided for in paragraph 2 of this article is not accepted, the state making the seizure may proceed as if the seizure had been made on the high sea.

Article 8

If a pursuit is continued or a seizure is made within the territorial jurisdiction of another state in accordance with the provisions of paragraph 1 of Article 7,

the state continuing the pursuit or making the seizure is liable to the other state for any damage done by the pursuing ship, other than damage done to the pirate ship or the ship possessed by pirates, or to persons and things on board.

Article 9

If a seizure because of piracy is made by a state in violation of the jurisdiction of another state, the state making the seizure shall, upon the demand of the other state, surrender or release the ship, things and persons seized, and shall make appropriate reparation.

Article 10

If a ship seized on suspicion of piracy outside the territorial jurisdiction of the state making the seizure, is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if the ship is not subject to seizure on other grounds, the state making the seizure shall be liable to the state to which the ship belongs for any damage caused by the seizure.

Article 11

1. In a place not within the territorial jurisdiction of any state, a foreign ship may be approached and on reasonable suspicion that it is a pirate ship or a ship taken by piracy and possessed by pirates, it may be stopped and questioned to ascertain its character.

2. If the ship is neither a pirate ship nor a ship taken by piracy and possessed by pirates, and if it is not subject to such interference on other grounds, the state making the interference shall be liable to the state to which the ship belongs for any damage caused by the interference.

Article 12

A seizure because of piracy may be made only on behalf of a state, and only by a person who has been authorized to act on its behalf.

Article 13

1. A state, in accordance with its law, may dispose of ships and other property lawfully seized because of piracy.

2. The law of the state must conform to the following principles:

(a) The interests of innocent persons are not affected by the piratical possession or use of property, nor by seizure because of such possession or use.

(b) Claimants of any interest in the property are entitled to a reasonable opportunity to prove their claims.

(c) A claimant who establishes the validity of his claim is entitled to receive the property or compensation therefor, subject to a fair charge for salvage and expenses of administration.

Article 14

1. A state which has lawful custody of a person suspected of piracy may prosecute and punish that person.

2. Subject to the provisions of this convention, the law of the state which exercises such jurisdiction defines the crime, governs the procedure and prescribes the penalty.

3. The law of the state must, however, assure protection to accused aliens as follows:

(a) The accused person must be given a fair trial before an impartial tribunal without unreasonable delay.

b) The accused person must be given humane treatment during his confinement pending trial.

(c) No cruel and unusual punishment may be inflicted.

(d) No discrimination may be made against the nationals of any state.

4. A state may intercede diplomatically to assure this protection to one of its nationals who is accused in another state.

Article 15

A state may not prosecute an alien for an act of piracy for which he has been charged and convicted or acquitted in a prosecution in another state.

Article 16

The provisions of this convention do not diminish a state's right under international law to take measures for the protection of its nationals, its ships and its commerce against interference on or over the high sea, when such measures are not based upon jurisdiction over piracy.

Article 17

1. The provisions of this convention shall supersede any inconsistent provisions relating to piracy in treaties in force among parties to this convention, except that such inconsistent provisions shall not be superseded in so far as they affect only the interests of the parties to such treaties *inter se.*

2. The provisions of this convention shall not prevent a party from entering into an agreement concerning piracy containing provisions inconsistent with this convention which affect only the interests of the parties to that agreement *inter se.*

Article 18

The parties to this convention agree to make every expedient use of their powers to prevent piracy, separately and in co-operation.

Article 19

1. If there should arise between the High Contracting Parties a dispute of any kind relating to the interpretation or application of the present

convention, and if such dispute cannot be satisfactorily settled by diplomacy, it shall be settled in accordance with any applicable agreements in force between the parties to the dispute providing for the settlement of international disputes.

2. In case there is no such agreement in force between the parties to the dispute, the dispute shall be referred to arbitration or judicial settlement. In the absence of agreement on the choice of another tribunal, the dispute shall, at the request of any one of the parties to the dispute, be referred to the Permanent Court of International Justice, if all the parties to the dispute are parties to the Protocol of December 16, 1920, relating to the Statute of that Court; and if any of the parties to the dispute is not a party to the Protocol of December 16, 1920, to an arbitral tribunal constituted in accordance with the provisions of the Convention of the Pacific Settlement of International Disputes, signed at The Hague, October 18, 1907.

III.B United Nations Convention on the Law of the Sea Montego Bay, December 10, 1982 U.N. Doc. A/CONF.62/122, 7 October 1982

Article 100
Duty to co-operate in the repression of piracy

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any place outside the jurisdiction of any State.

Article 101
Definition of piracy

Piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Article 102
Piracy by a warship, government ship or government aircraft whose crew has mutinied

The acts of piracy, as defined in article 101, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship or aircraft.

Article 103
Definition of a pirate ship or aircraft

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 104

Retention or loss of the nationality of a pirate ship or aircraft

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationalities determined by the law of the State from which such nationality was derived.

Article 105

Seizure of a pirate ship or aircraft

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 106

Liability for seizure without adequate grounds

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft for any loss or damage caused by the seizure.

Article 107

Ships and aircraft which are entitled to seize on account of piracy

A seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect.

ABBREVIATIONS

AG	Attorneys General's Opinions (United States)
AJIL	American Journal of International Law
Bevans	*Treaties and Other International Agreements of the United States, 1776-1944* (C. Bevans, ed. 1974)
BFSP	British and Foreign State Papers
BILC	British International Law Cases (C. Parry, ed.)
BYIL	British Year Book of International Law
CECIL	Carnegie Endowment Classics of International Law
Codrington Papers	NRS, *Piracy in the Levant, 1827-8; Selected from the papers of Admiral Sir Edward Codrington, K.C.B.* (Vol. 72 of the NRS series) (1934)
CTS	Consolidated Treaty Series (C. Parry, ed.)
DAB	Dictionary of American Biography
DNB	Dictionary of National Biography (England, Great Britain, United Kingdom)
Documents Illustrative	69th Cong., 1st Sess., House Doc. No. 398, *Documents Illustrative of the Formation of the Union of the American States* (1927)
Hague Recueil	*Recueil des Cours de l'Académie de Droit International de la Haye*

Harvard Research	Harvard Research in International Law, *Draft Articles on Piracy, 26 AJIL Spec. Supp.* 738 (1932)
HMSO	His [Her] Majesty's Stationery Office (United Kingdom)
How. St. Tr.	Howell's State Trials
ILM	International Legal Materials
JIA	Journal of the Indian Archipelago (Logan's Journal)
JMBRAS	Journal of the Malayan Branch of the Royal Asian Society
Kyshe	J.W. Norton Kyshe, *Cases . . . Straits Settlements, 1808-1884 (1885)*
LCL	Loeb Classical Library (Harvard University Press)
Malloy	W. Malloy, ed., *Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers, 1776-1909* (1910)
Moore, *Digest*	J.B. Moore, *International Law Digest* (1906)
NRS	Navy Records Society
NWC	Naval War College, Newport, Rhode Island
OED	Oxford English Dictionary
PCIJ	Permanent Court of International Justice
Pickering	The Statutes at Large (England and Great Britain). Pickering's name appears in this standard compilation as editor until 1803.

UNRIAA	United Nations Reports of International Arbitral Awards
Stat.	United States Statutes at Large
YBILC	Year Book of the (U.N.) International Law Commission

In citations to compilations of judicial decisions, the usual legal abbreviations are used. A full list is given in Price & Bitner, *Effective Legal Research*, Appendix III (3rd ed. 1969).

BIBLIOGRAPHY

The chapter and footnote numbers in which each work is cited are given at the end of each entry.

Articles

R.R. Baxter, Treaties and Custom, 129 *Hague Recueil* 25 (1969), V-68

J.W. Boulton, Modern International Law of Piracy: Content and Contemporary Relevance, 7(6) *International Relations* 2493 (November 1983), V-60, 189

J.W. Boulton, Maritime Order and the Development of the International Law of Piracy, 7(5) *International Relations* 2335 (May 1983), V-60, 189

H.J. Bourguignon, Incorporation of the Law of Nations During the American Revolution . . ., 71 AJIL 270 (1977), III-33

J. Clark, The English Practice with regard to Reprisals by Private Persons, 27 *AJIL* 694 (1933), I-176

D.F. Cavers, A Critique of the Choice-of-Law Problem, 47(2) *Harvard Law Review* 173 (1933), III-69

C.D. Cowan, Governor Bannerman and the Penang Tin Scheme, 23(1) *JMBRAS* 52 (1945), IV-108

C.D. Cowan, Early Penang and the Rise of Singapore, 1805-1832, 23(2) *JMBRAS* 1 (1945), IV-101, 108

A.A. D'Amato & A.P. Rubin, What Does Tel-Oren Tell Lawyers?, 79(1) *AJIL* 92 (1985), III-33

J.G. de Montmorency, Piracy and the Barbary Corsairs, 35 *Law Quarterly Review* 133 (1919), V-14

E. Dickinson, Is the Crime of Piracy Obsolete?, 38 *Harvard Law Review* 334 (1925) III-31

B. Forman, International Law of Piracy and the Santa Maria Incident, 15(8) *The JAG Journal* 143 (1961) V-60, 224

L. Gross, Some Observations on the Draft Code of Offense Against the Peace and Security of Mankind, 13 *Israel Yearbook on Human Rights* 9 (1983) V-235

L. Gross, States as Organs of International Law and the Problem of Autointerpretation, in Gross, *Essays* and Lipsky, I-111

P.C. Jessup, Parliamentary Diplomacy, 89 *Hague Recueil* 85 (1956) V-121

H. Kelsen, Recognition in International Law—Theoretical Observations, 35 *AJIL* 604 (1941), I-111, III-289

A.W. Knauth, Prize Law Reconsidered, 46 *Columbia Law Review* 69 (1946), IV-168

Sir H. Lauterpacht, Codification and Development of International Law, 49 *AJIL* 16 (1955), V-68

J.J. Lenoir, Piracy Cases in the Supreme Court, 25 *Journal of Criminal Law and Criminology* 532 (1934-35), V-110

W. Lewis, John Quincy Adams and the Baltimore "Pirates," 67 *American Bar Association Journal* 1011 (1981), III-177

J. Low, An Account of the Origin and Progress of the British Colonies in the Straits of Malacca, 4 *JIA* 11 (1850), IV-101, 102, 117, 119

H.E. Miller, Extracts from the Letters of Col. Nahuijs, 19(2) *JMBRAS* 169 (1941), IV-109

J.M. Moessner, The Barbary Powers in International Law, in Alexandrowicz, ed., *Grotian Society Papers 1972* 197 (1972), IV-49

Sir F. Pollock, The History of the Law of Nature, 3 *Journal of the Society of Comparative Legislation* (new ser.) 204 (1901), V-114

E. Root, Francis Lieber, 7 *AJIL* 453 (1913), V-86

W. Roxburgh, Submarines at the Washington Conference, 3 *BYIL* 179 (1922-23), V-14

A.P. Rubin, Evolution and Self-Defense at Sea, 7 *Thesaurus Acroasium* 107 (1977), IV-205

A.P. Rubin, Pollution by Analogy: The Trail Smelter Arbitration, 53 *Oregon Law Review* 259 (1971), V-146

A.P. Rubin, Terrorism and the Laws of War, 12(2-3) *Denver Journal of International Law and Policy* 219 (1983), IV-333, V-60, 189

A.P. Rubin, Terrorism and Piracy: A Legal View, 3 *Terrorism: An International Journal* 117 (1979), IV-332

A.P. Rubin, Terrorism and Social Control, 6 *Ohio Northern University Law Review* 60 (1979), IV-222

G. Schwarzenberger, the Problem of an International Criminal Law, 3 *Current Legal Problems* 263 (1950), V-60, 220

Scott, Pirate Attack in Paradise, *Yachting* (May 1984) 25, V-229

J. Sheehan, the Entebbe Raid . . ., 1(2) *The Fletcher Forum* 135 (1977), IV-222

A.J. Stockwell & A.P. Rubin, *Correspondence*, 77 AJIL (1983), IV-236

J. Sundberg, Piracy and Terrorism, 20 *De Paul Law Review* 337 (1971) V-60

N. Tarling, British Policy in the Malay Peninsula and Archipelago, 1824-71, 33(3) *JMBRAS* 1 (1957), IV-157

B. Wortley, Pirata Non Mutat Dominium, 24 *BYIL* 258 (1948), V-157

Books

H. Adams, *The Education of Henry Adams* (1907-1918), III-242

"Age", *The Boat People* (Bruce Grant, ed.) (Penguin 1979), V-228

C.H. Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies* (1967), IV-42

C.H. Alexandrowicz, ed., *Grotian Society Papers* 1972 (1972), IV-49

Sir W.R. Anson, *The Law and Custom of the Constitution* (4th ed., A.B. Keith, ed.) (1935), II-92

J. Anderson, *Acheen and the Ports on the North and East Coast of Sumatra . . .* (1840), IV-99 to 105

Anon., *Extracts from the Several Treaties Subsisting Between Great Britain and Other Kingdoms and States . . .* (1741), II-79

Appian, [*Roman History; The Illyrian War*] (Horace White, transl.) (LCL 1955-1958), I-119

Aristotle, *Nichomachean Ethics* (c. 350 B.C.) (W.D. Ross, transl.) (Modern Library, undated), IV-14

Aristotle, *The Politics* (N. Rackham, transl.) (LCL 1932), I-26

Aristotle, *The Politics* (E. Barker, transl.) (1946), I-26

Jane Austen, *Persuasion* (1818), IV-19

John Austin, *The Province of Jurisprudence Determined* (1832, 1954), IV-261

Autenreith, *Homeric Dictionary* (R.P. Keep, transl.) (1885), I-15

Balthasar Ayala, *De Iure et Officiis Bellicis et Disciplina Militari* (1581, 1597) (J.P. Bate, transl.) (CECIL 1912), I-91

Andrew Barker, *A True and Certaine Report of the Beginning, Proceedings etc. of Captaine Ward and Danseker . . .* (1609), I-76

M.C. Bassiouni & V. Nanda, *A Treatise on International Criminal Law* (1973), V-60

Pierino Belli, *De Re Militari et Bello Tractatus* (1563) (H.S. Nutting, transl.) (CECIL 1936), I-80 to 90

S.F. Bemis, *Jay's Treaty* (1923, rev'd ed. 1962), III-46, 47

S.F. Bemis, *Pinckney's Treaty* (1926, rev'd ed. 1960), III-49

Jeremy Bentham, *The Works of Jeremy Bentham* (John Bowring, ed. 1838-1842, 1962), II-135

Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (1789, 1948), II-135

Beowulf (c. 1000 A.D.) (Chickering, transl.) (1977), I-131

Beowulf (c. 1000 A.D.) (Wright, transl.) (1957), I-131

William Blackstone, *Commentaries on the Laws of England* (1765-1769, American ed. 1790), I-61, 175, II-153, 155

C.D. Bowen, *The Lion and the Throne* (1956), I-61

D. Bowett, *Self-Defence in International Law* (1958), V-214

Fernand Braudel, *Le Méditerranée et le Monde Méditerranéen à l'Epoque de Philippe II* (1949), (S. Reynolds, Transl. 1973), I-65 to 71, 87

J.L. Brierly, *The Basis of Obligation in International Law* (1958), V-69

H. Briggs, *The International Law Commission* (1965), V-112

J. Brondsted, *The Vikings* (1965), I-27

Henry Burney, *The Burney Papers* (Bangkok, 1910-1914), IV-2, 116, 118 to 123, 127 to 130, 135, 136, 146 to 150, 152

Cornelisz Bynkershoek, *Questionum Juris Publici* (1737) (Tenney Frank, transl.) (CECIL 1930), II-3, 139 to 145, 147, 149, 150

Julius Caesar, *De Bello Gallico* (H.J. Edwards, transl.) (LCL 1958), I-118

John Chamberlain, *Letters* (N.E. McClure, ed. 1939), (Selection by E.M. Thomson, 1966), I-73, 77, 177, 194

Marcus Tullius Cicero, *Contra Verres* (L.H.G. Greenwood, transl.) (LCL 1948, 1953), I-19

Marcus Tullius Cicero, *De Officiis* (Walter Miller, transl.) (LCL 1928) I-46, 49, 52, V-234

Marcus Tullius Cicero, *De Re Publica* (with *De Legibus*, (C.W. Keyes, transl.) (LCL 1928, 1977), V-234

Marcus Tullius Cicero, *Letters to Atticus* (D.R. Shackleton Bailey, transl.) (1968), I-38, 39, 47

Marcus Tullius Cicero, *Selected Works* (M. Grant, transl.) (Penguin 1971), I-54

W. Pitt Cobbett, *Leading Cases in International Law* (3rd ed. 1909), (4th ed. by H.H.L. Bellot 1922), (6th ed. by W.L. Walker 1947), IV-291, 317, 323

Sir Edward Coke, *Fourth Institute of the Laws of England* (1644), I-61, 175, 195, 196, II-156, 166, V-221

Sir Edward Coke, *Third Institute of the Laws of England* (1644), I-61, 134, 200, 201, II-15, 23, 25, 29

C.J. Colombos, *International Law of the Sea* (4th ed. 1959), IV-168

E. Creasy, *The Fifteen Decisive Battles of the World* (1851), IV-263

William Dampier, *A New Voyage Round the World* (1717), in *Dampier's Voyages 1700-1726* (J. Masefield, ed.) (1906), IV-97

C.H. Dana, *Two Years Before the Mast* (1840, 1869, 1969), III-278

Daniel Defoe, *Moll Flanders* (1722, 1964), II-46

Daniel Defoe, *Robinson Crusoe* (1719), I-72

Demosthenes, *De Halonesso*, in Demosthenes [Orations] (J.H. Vince, transl.) (LCL 1954), I-17

Dio Cassius, [*Roman History*] (E. Cary, transl.) (LCL 1954-1955), I-129

Dio Chrysostom, *Discourses* (H. Lamar Crosby, transl.) (LCL 1956), I-46

Diodorus Siculus, [*History*] (R.M. Greer, transl.) (LCL 1954), I-29

B.H. Dubner, *The Law of International Sea Piracy* (1980), V-60, 189

J. Dugan, *The Great Mutiny* (1965), IV-20

E. Dumbauld, *The Life and Legal Writings of Hugo Grotius* (1969), I-112 to 115

Sir Edward Hyde East, *A Treatise of the Pleas of the Crown* (1804), II-56

Euripides, *The Trojan Women* (c. 410 B.C.), I-40

A. Evans & J. Murphy, eds., *Legal Aspects of International Terrorism* (1978), V-29

M.I. Finley, *The World of Odysseus* (2nd rev'd ed. 1978), I-24 to 26

Sir Godfrey Fisher, *Barbary Legend* (1957), I-76, 87, 194, IV-49

Grace Fox, *British Admirals and Chinese Pirates, 1832-1869* (1949), IV-156, 165

Freund's Latin Dictionary (Lewis & Short rev'n) (Andrews, ed.) (1879), I-19, 21

T. Fulton, *The Sovereignty of the Sea* (1911), IV-38

N.D. Fustel de Coulanges, *La Cité Antique* (1864) *The Ancient City* (Anchor Books 1956), I-42

Alberico Gentili, *De Iure Belli Libri Tres* (1612) (J.C. Rolfe, transl.) (CECIL 1933), I-93 to 96, 99 to 100, II-16

Alberico Gentili, *Hispanicis Advocationis* (1613, 1661) (F.F. Abbott, transl.) (CECIL 1921), I-101, 105 to 107, 110, II-3, IV-48, 192, 193

G. Gidel, *Le Droit International Public de la Mer* (1932), V-178

The Greek Anthology (Jay, ed.) (Penguin 1981), I-32

Leo Gross, *Essays on International Law and Organization* (1984), I-111

Hugo Grotius, *De Iure Belli ac Pacis* (1625, 1632) (Blaeu, Amsterdam), I-125, IV-10

Hugo Grotius, *De Iure Belli ac Pacis* (1625, 1646) (F.W. Kelsey, transl.) (CECIL 1925), I-46, 50, 115, 116, 121 to 125, 128, IV-3, 9

Hugo Grotius, *De Iure Belli ac Pacis* (1625, 1646) (Whewell, ed. 1853), I-116, 121, 123 to 125

Hugo Grotius, *De Iure Praedae Commentarius* (1604) (Williams and Zeydel, transl.) (CECIL 1950), I-126, 127, II-137

G. Hackworth, *Digest of International Law* (1941), V-109, 111

J. HaCohen, *Emek Habkha, la Vallee des Pleurs . . .* (1881), I-69

Sir Matthew Hale, *The History of the Pleas of the Crown* (Sollom Emlyn, ed. 1778), I-175

Sir Matthew Hale, *Pleas of the Crown* (1685), I-134, II-15, 49, IV-210

W.E. Hall, *A Treatise on International Law* (4th ed. 1895), IV-291, 317

A. Hamilton, J. Jay & J. Madison, *The Federalist* (1787-1788) (Cooke, ed. 1961), III-26

H.L.A. Hart, *The Concept of Law* (1961), IV-261

H. Herring, *A History of Latin America* (1955), IV-317

Herodotus, [*The Persian War*] (A.D. Godley, transl.) (LCL 1931), I-16

Hesiod, *The Homeric Hymns & Homerica* (H.G. Evelyn-White, transl.) (LCL 1954), I-12

A. Hess, *The Forgotten Frontier* (1978), I-70

A. Pearce Higgins, *The International Law of the Sea* (C.J. Colombos, ed., 3rd ed. 1954), V-175

Thomas Hobbes, *Leviathan* (1651), II-129

W.S. Holdsworth, *A History of English Law* (1922-1928), I-139

Homer, *The Iliad*, (A.T. Murray, transl.) (LCL 1971), I-8

Homer, *The Odyssey*, (A.T. Murray, transl.) (LCL 1953, 1960), I-8 12

Homer, *The Odyssey*, (T.A. Buckley, transl.) (1891), I-12, 22

M.O. Hudson, *The World Court, 1922-1929* (rev'd ed. 1929), V-73

M.O. Hudson, *World Court Reports* (Vol. II 1935), II-65

Sir C. Ilbert, *The Government of India* (1922), IV-41, 106, 167, 230

Charles Johnson, *A General History of the Pirates* (1718), I-72

N. Joyner, *A Contemporary Concept of Piracy in International Law: The Status of Aerial Hijacking as an International Crime* (1973), V-59, 60

Justinian, *Corpus Juris Civilis* (Mommsen & Krueger text, Kunkel, ed. 1954), I-56 to 58, 175

James Kent, *Commentaries on American Law* (1826), III-132 to 136

Sir Henry Keppel, *The Expedition to Borneo of H.M.S. Dido for the Suppression of Piracy . . .* (1846), IV-159

H. Lauterpacht, *Recognition in International Law* (1947), III-137, 264

Liddell & Scott, *Greek-English Lexicon* (8th ed. 1897), I-9

R.B. Lillich, *Transnational Terrorism: Conventions and Commentary* (1982), V-55

G.A. Lipsky, ed., *Law and Politics in the World Community . . .* (1953), I-111

Titus Livius (Livy), [*History of Home*], (A.C. Schlesinger, transl.) (LCL 1959), (E.T. Sage, transl.) (LCL 1935), I-20, 21, 32, 41, 42

Livy, *The Early History of Rome* (A. de Sélincourt, transl.) (Penguin 1971), I-41

Livy, *Rome and the Mediterranean*, (H. Bettenson, transl.) (Penguin 1976), I-35

E. Longford, *Wellington; The Years of the Sword* (Panther 1971), IV-5

James Lorimer, *The Institutes of Law* (1872), IV-263

J.G. Lorimer, *Gazeteer of the Persian Gulf* (1915), IV-27

James Madison, *Debates in the Federal Convention of 1787*, in *Documents Illustrative* 109-745, III-10, 12, 13, 15, 17, 18, 23 to 25, 27 to 30

W.T. Mallison, Jr., *Submarines in General and Limited Wars* (NWC 1966, Vol. LVIII) (1968), V-145

H. Marks, *The First Contest for Singapore: 1819-1824* (1959), IV-111, 113

R.G. Marsden, ed. *Documents Relating to Law and Custom of the Sea* (NRS Vols. 49, 50) (1915, 1916), I-102, 104, 133, 137, 138, 140 to 149, 151 to 158, 172, 174, 176, 179 to 192, II-7, 12, 36 to 38, 42, 43, 108, 109, 117

R.G. Marsden, ed., *Select Pleas in the Court of Admiralty (Selden Society* Vols. 6, 11) (1894, 1897), I-133, 169, 171

J. Masefield, ed., *Dampier's Voyages 1700-1726* (1906), IV-97

A.D. McNair, *Law Officers' Opinions* (1956), II-5, 47, IV-200, 205, 206, 208, 209, 220 to 223, 226, 228, 308, 314, 315, 317

H. Melville, *Billy Budd* (posthumous; written about 1890, published 1924), IV-20

H. Melville, *White Jacket* (1849) IV-20

G. Mirfendereski, *The Tamb Islands Controversy, 1887-1971* (Ph.D. Dissertation, The Fletcher School of Law & Diplomacy 1985), IV-30

J.M. Moessner, *Die Voelkerrechtspersoenlichkeit und die Voelkerrechtspraxis der Barbaresken Staaten* (1968), IV-49

Charles Molloy, *De Jure Maritimo* (1677), I-175, 176, II-44, 62 to 65, 68, 69, 160, III-59

J.B. Moore, *International Arbitrations* . . . (1898), III-224, 226.

J.B. Moore, *International Law Digest* (1906), III-104, 130, 131, 139, 147, 148, 151, 227, 242, 255 to 257, 264, 272, 273, 283, 284, 288, IV-326, 327, 329

J.L. Motley, *The Rise of the Dutch Republic* (1856), I-92

J.L. Motley, *The United Netherlands* (1860), I-92

R. Muir, *The Making of British India* (1917), IV-106

B. Nicholas, *An Introduction to Roman Law* (1969), I-55, 88, 168

Sir Harold Nicolson, *The Congress of Vienna* (1946, 1961), IV-75

NRS, *Naval Songs and Ballads* (Vol. 33 of the NRS series) (1907), I-76 to 79

NRS, *Piracy in the Levant, 1827-8 . . .* [*Codrington Papers*] (Vol. 72 of the NRS series) (1934), IV-77, 81 to 92

Arthur Nussbaum, *A Concise History of the Law of Nations* (rev'd ed. 1954), II-135, IV-11

Z. Nuttall, ed., *New Light on Drake* (Vol. 34 of the Hakluyt Society, 2nd ser.) (1914), II-117

A. Oakes & R.B. Mowat, *The Great European Treaties of the Nineteenth Century* (1918, 1970), IV-60

R.M. Ogilvie, *A Commentary on Livy Books 1-5* (1965), I-46

L. Oppenheim, *International Law* (Vol. I Peace) (H. Lauterpacht, ed.) (8th ed. 1955), IV-291, V-177, 219

T. Ortolan, *Règles Internationales et Diplomatie de la Mer* (3rd ed. 1856), V-1076

S. Osborn, . . . *The Blockade of Quedah* (2nd ed. 1860), IV-132

C.N. Parkinson, *British Intervention in Malaya 1867-1877* (1964), IV-233, 270, 288

C. Parry & J.A. Hopkins, eds., *Commonwealth International Law Cases* (Vol. I, 1974), IV-134

J.H. Parry, *The Age of Reconnaissance* (1963, 1964), I-76

C.O. Paullin, *Commodore John Rodgers, 1773-1838* (1909, 1967), III-143

Richard Peters, *Admiralty Decisions . . .* (1807), I-150

Coleman Phillipson, *The International Law and Custom of Ancient Greece and Rome* (1911), I-4

Plutarch, *Parallel Lives of Greeks and Romans* (C.B. Perrin, transl.) (LCL 1917), I-33, 34, 36, 38, 47, 53, 119

Sir F. Pollock & F.W. Maitland, *The History of English Law* (2nd ed. 1898), I-162, 165, II-49

Polybius, [*The Histories*] (W.R. Paton, transl.) (LCL 1954), I-28, V-88

Polybius, *The Rise of the Roman Empire* (I. Scott-Kilvert, transl., F.W. Walbank, ed.) (Penguin 1979), V-88

Sir K. Popper, *The Open Society and its Enemies* (rev'd ed. 1950), V-78

J.B. Pritchard, ed., *The Ancient Near East* (1958), II-33

Samuel Pufendorf, *Elementorum Jurisprudentiae Universalis* (1660) (W.A. Oldfather, transl.) (CECIL 1971), II-136

S. Purchas, *Hakluytus Postumus or Purchas His Pilgrims* (1625, 1905-7), IV-96

Samuel Rachel, *De Jure Naturae et Gentium Dissertationes* (1676) (J.P. Bate, transl.) (CECIL 1916), II-136

Lady Sophia Raffles, *Memoir of the Life and Public Services of Sir Thomas Stamford Raffles . . .* (1830), I-2

A. Roberts and R. Guelff, ed., *Documents on the Laws of War* (1982) III-231

David W. Robertson, *Admiralty and Federalism* (1970), I-166

A.P. Rubin, *International Personality of the Malay Peninsula* (1974), I-35, 126, IV-2, 33, 98, 101, 151, 256, V-2

A.P. Rubin, *Piracy, Paramountcy and Protectorates* (1974), IV-126, 133, 158, 235, 270

S. Runciman, *The White Rajahs* (1960), IV-159

Sallust (Gaius Sallustius Crispus), *The Jugurthine War* (J.C. Rolfe, transl.) (LCL 1931, 1960), I-33, 58

Sallust, *Jugurthine War; Conspiracy of Cataline* (S.A. Hanford, transl.) (Penguin 1963), I-35, 61

D. Schindler & J. Toman, *The Laws of Armed Conflicts* (rev'd ed. 1981), IV-18, 95, V-3, 5, 7 to 9, 14 to 17, 20, 24 to 27

J.B. Scott, *The Civil Law* (1933), I-56

J.B. Scott, *Law, the State, and the International Community* (1939), I-19

J.B. Scott, *The Armed Neutralities of 1780 and 1800* (1918), IV-570, V-19

J.B. Scott, *Cases on International Law* (1922), V-222

H.A. Smith, *Great Britain and the Law of Nations* (1932), IV-46, 47, 50, 51, 58, 60, 63, 64, 66 to 74, 76

L. Sohn and T. Buergenthal, *International Protection of Human Rights* (1973), I-176

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

P. Stiel, *Der Tatbestand der Piraterie nach Geltendem Voelkerrecht* (1905), V-84 to 88, 90, 92

Joseph Story, *Commentaries on the Conflict of Laws* (1834), III-69, 123

Suetonius (C. Suetonius Tranquilli), *The Lives of the Caesars* (J.C. Rolfe, transl.) (LCL 1928), I-53

Tacitus, *On the Customs and People of Germany* [*De Moribus & Populis Germaniae*] (M. Hutton, transl.; rev'd ed. by E.H. Warmington) (LCL 1970), I-118

Tacitus, *Annals* [*Annalium*] (John Jackson, transl.) (LCL 1937, 1956), I-228

Tactitus, *Histories* [*Historiae Augustae*] (John Jackson, transl.) (LCL 1925, 1956), I-118

N. Tarling, *Britain, the Brookes and Borneo* (1971), IV-159

N. Tarling, *British Policy Towards the Dutch and the Native Princes in the Malay Archipelago, 1824-1871* (Ph. D. Dissertation, University of Cambridge 1956), IV-157, 233, 238

N. Tarling, *Piracy and Politics in the Malay World* (1963), IV-157

Thucydides, *The Peloponnesian War* (C.H. Smith, transl.) (LCL 1969), I-8

Emerich de Vattel, *Le Droit des Gens* (1758) (Charles G. Fenwick, transl.) (CECIL 1916), II-137, III-174, IV-11

H.R. Wagner, *Sir Francis Drake's Voyage Around the World* (1926), II-117

Henry Wheaton, *Elements of International Law* (1836), (Dana, ed. 1866), (CECIL 1936), III-192, 279, 280

M. Whiteman, *Digest of International Law* (Vol. 6) (1968), III-266

G.G. Wilson, *International Law Situations 1930* (NWC 1931), V-14

Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatus* (1747, 1764) (Joseph H. Drake, transl.) (CECIL 1934), II-137, 138, IV-10

Richard Wooddeson, *A Systematical View of the Laws of England* (1792-1794), I-175, II-157 to 162, 164 to 167, 170

William Wynne, *The Life of Sir Leoline Jenkins . . .* (1724), II-1, 2, 45, 66, 70 to 72, 74 to 76, 78, III, 95, IV 138

Alfred Zimmern, *The Greek Commonwealth* (1931) (5th rev'd ed. 1961), I-14

Richard Zouche, *Iuris et Iudicii Fecialis* (1650) (J.L. Brierly, transl.) (CECIL 1911), II-134, IV-17

Treaties

27 April 1667, The Netherlands-France, Paris, 7 CTS 141, II-149

21/31 July 1667, Great Britain-The Netherlands, Breda, 10 CTS 255, II-77, 79

6 February 1778, United States-France, Paris, 46 CTS 447, 1 Malloy 479, III-156

25 January 1787, United States-Morocco, 1 Malloy 1206, 3 Martens, *Recueil des Traités* (lst ed.) 492, 4 Martens, *id.* (2nd ed.) 247, III-142

14 November 1788, United States-France, Versailles, 50 CTS 387, 1 Malloy 490, III-156

19 November 1794, United Sates-Great Britain (Jay's Treaty), London, 52 CTS 243, 12 Bevans 13, 8 Stat. 116, III-40, 46, 47

5 September 1795, United States-Algiers, Algiers, 52 CTS 461, 1 Malloy 1, III-129

27 October 1795, United States-Spain (Pinckney's Treaty), San Lorenzo el Real, 53 CTS 9, 11 Bevans 516, III-48 to 52, 160, 194

4 November 1796, United States-Tripoli, Tripoli, 53 CTS 315, 2 Malloy 1784, III-129

(24-31?) August 1797, United States-Tunis, Tunis, 54 CTS 119 (for note on the date, see 54 CTS 137), 2 Malloy 1794, III-129

26 March 1799, United States-Tunis, 8 Stat. 157. This Treaty is referred to as altering the 1797 Treaty in 2 Malloy 1794. It is reproduced in its entirety in 1 Tetot, *Répertoire des Traités* 105 (1866) as no. 1066 taken from 1 T. Elliot, *American Diplomatic Code* . . . 508 (1834), III-142

6 February 1806, British East India Company-Sheikh of Qawasim, 58 CTS 387, IV-28

30 June/3 July 1815, United States-Algiers, Algiers, 65 CTS 33, 8 Stat. 224, III-142

22-23 December 1816, United States-Algiers, Algiers, 66 CTS 453, 8 Stat. 244, III-142

8 January 1820, "Contract" between the British East India Company and various Persian Gulf Sheikhs, 70 CTS 464, IV-29, 32

6, 8, 9, 15 January, 5 February 1820, "Preliminary Treaties" between the British East India Company and several Persian Gulf Sheikhdoms, 70 CTS 472, IV-34 to 37, 40

24 February 1824, United States-Tunis, Bardo, 74 CTS 69, 2 Malloy 1800, 8 Stat. 298, III-142

17 March 1824, Great Britain-The Netherlands, London, 74 CTS 87, 11 BFSP 194, IV-111, 112

20 August 1825, British East India Company-Selangor, 75 CTS 353, IV-256

20 June 1826, Thailand (Siam)-Great Britain, Bangkok, 76 CTS 303, 14 Aitchison 115 (1929 ed.), 23 BFSP 1153, IV-126, 154

18 October 1826, British East India Company-Perak, 76 CTS 445, IV-114, 115

5 August 1830, Algiers-France, Algiers, 81 CTS 53, IV-55

8 August 1830, Tunis-France, Tunis, 81 CTS 99, IV-55

11 August 1830, Tripoli-France, Tripoli, 81 CTS 147, IV-55

16 September 1836, United States-Morocco, Meknes, 86 CTS 197, 1 Malloy 1212, 8 Stat. 484, III-142

8 October 1843, China-Great Britain, The Bogue (Hoomun-Chae), 95 CTS 323, 31 BFSP 132, 1 Imperial Maritime Customs, *Treaties* 198, IV-215

16 April 1856, Declaration Respecting Maritime Law, Multilateral, Paris, 115 CTS 1, 46 BFSP 26, III-231, 255

26 June 1858 Great Britain-China, Tientsin, 119 CTS 163, 48 BFSP 47, 1 Imperial Maritime Customs, *Treaties* 212, IV-212 to 215

29 July 1899, Convention on the Laws and Customs of War on Land, Multilateral, The Hague (Convention II of 1899), Schindler & Toman 57, V-7

18 October 1907, Convention on the Laws and Customs of War on Land, Multilateral, The Hague (Convention IV of 1907), Schindler & Toman 57, V-7

18 October 1907, Convention for the Pacific Settlement of International Disputes, Multilateral, The Hague (Convention I of 1907), 2 Malloy 2220, 1 Bevans 577, V-73

6 February 1922, Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Multilateral, Washington, Schindler & Toman 789, V-8, 9, 14

20 February 1928, Convention on Duties and Rights of States in the Event of Civil Strife, Multilateral, Havana, Schindler & Toman 805, V-25 to 27

22 April 1930, Treaty for the Limitation and Reduction of Naval Armaments (Part IV), Multilateral, London, Schindler & Toman 793, V-15

6 November 1936, *Procès-Verbal* Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930, Multilateral, London, Schindler & Toman 795, V-16

14 September 1937, Multilateral, Nyon, Schindler & Toman 799, V-17, 143

17 September 1937, Agreement Supplementary to the Nyon Agreement, Multilateral, Geneva, Schindler & Toman 801, V-20

7 December 1944, International Civil Aviation Convention, Multilateral, Chicago, 15 UNTS 295, TIAS 1599, 3 Bevans 944, V-185

26 June 1945, United Nations Charter, Multilateral, San Francisco, 3 Bevans 1153, 59 Stat. 1031, IV-222

29 April 1958, Convention on the High Seas, Multilateral, Geneva, 450 UNTS 82, TIAS 5200, 13 UST 2312, V-28, 60, 140, 170, 171, 190, 198, 205, 209, 217, 233

14 September 1963, Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Multilateral, Tokyo, V-31, 32, 34, 35, 38

16 December 1970, Convention for the Suppression of Unlawful Seizure of Aircraft, Multilateral, The Hague, 860 UNTS 105, TIAS 7192, 22 UST 1641, V-39 to 41, 48, 49

23 September 1971, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Multilateral, Montreal, TIAS 7570, 24 UST 564, V-55, 56

10 December 1982, United Nations Convention on the Law of the Sea, Multilateral, Montego Bay, text taken from U.S. Doc. A/CONF.62/122

dated 7 October 1982, as corrected, in 21(6) ILM 1261 (1982), V-140, 170, 172, 190, 198, 205, 209, 217, 218, 233, Appendix III.B

Cases

International Tribunals-Arbitrations

Accessory Transit Co. Claim (1861) (United States v. Nicaragua), 2 Moore, *International Arbitrations* . . . 1551 (1898), III-224, 226

International Fisheries Co. Case (1931) (United States v. Mexico), 4 U.N.R.I.A.A. 691, V-146

The Tinoco Arbitration (Great Britain v. Costa Rica) (1923), 18 AJIL 147 (1924), III-289

International Tribunals - Courts

Barcelona Traction, Light and Power Company Case (Belgium v. Spain), *I.C.J. Reports 1970*, III-225.

Legal Status of Eastern Greenland (1933) (Denmark v. Norway), P.C.I.J. Ser. A/B, No. 53, IV-1

The Lotus Case (1927) (France v. Turkey), P.C.I.J. Ser. A, No. 10, II-67, V-33

Tunis-Morocco Nationality Decrees (1923) (Advisory to the League Council), P.C.I.J. Ser B, No. 4, IV-55

National Tribunals—England, Great Britain, United Kingdom and Colonies

Case of Andrew Artemonowitz Mattueoff, Ambassador of Muscovy, Q.B., 8 Queen Anne (1710), 10 Mod. 4, reproduced in Scott, *Cases on International Law* 286, V-222

Attorney-General of Hong Kong and Kwok-A-Sing [1873] L.R. 5 P.C. 179, 3 BILC 812, IV-211, 217, 219, V-13, 100, 179

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Hildebrand, Brimston and Baker's Case, 1 Rolle 285 (1615), I-198, 199

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The Magellan Pirates [1853] 1 Spink Ecc. & Ad. 81, 3 BILC 796, IV-173 to 175, 178, 181 to 184, 186, 186, 190

Palachie's Case, 1 Rolle 175 (1615); English version in 3 Bulstrode 27 reproduced in 3 BILC 767 as *The King against Marsh*, I-168, 193, IV-14, 137, V-221

The *Panda* [1842] 1 W. Rob. 423, 3 BILC 771, III-70

In re Piracy *jure gentium* [1934] A.C. 586, 3 BILC 836, II-160, V-101, 105, 106, 193

R. v. Anon, Charge to a Grand Jury 18 February 1680, 167 Eng. Rep. 561, II-45

R. v. Dawson and others, 13 How. St. Tr. 451 (1696), II-56, 58, 60, 80, 82 to 84, IV-218

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R. v. Green and others, 14 How. St. Tr. 1199 (1705), II-85, 87 to 89, V-13, 100, 160

R. v. Keyn (The *Franconia*) [1876] L.R. Exch. Div. 63, 2 BILC 701, I-132, 136, IV-202

R. v. Kidd and others, 14 How. St. Tr. 123 (1701), II-91 to 107, III-181, 182, IV-18, 137

R. v. Lebby Lundoo & Anor., 2 Kyshe 6 (1813), IV-124

R. v. May, Bishop and others, 13 How. St. Tr. 451 (1696), II-56

R. v. Noquedah Allong & Ors., 2 Kyshe (Cr.) 3 (1811), IV-124

R. v. Quelch and others, 14 How. St. Tr. 1067 (1704), II-125, 127, 130, 132, 133

R. v. Tunkoo Mohamed Saad and ors., 2 Kyshe (Cr.) 18 (1840), IV-134, 140 to 142, 145

R. v. Vaughan, 13 How. St. Tr. 485 (1696), II-28

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Institute of International Law, *The Laws of War on Land* (Oxford 1880), Schindler & Toman 35, V-7

International Law Association, *Report of the Sixtieth Conference, Madrid, 1982* (London 1983), IV-333

League of Nations

League of Nations Committee of Experts for the Progressive Codification of International Law, *Report* (26 January 1926), C.196M.70.1927.V, V-64, 65

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League of Nations Committee of Experts for the Progressive Codification of International Law, *Analysis of Replies*, 22 AJIL *Spec. Supp.* 25 (1928), V-66

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League of Nations Official Journal, *Spec. Supp.* No. 53, October 1927, reproduced in 22 AJIL *Spec. Supp.* 231 (1928), V-71

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Doc. C.2/Informal Meeting/64/Rev. 1 dated 13 August 1980 (UNCLOS III), V-233

Doc. TC/B/C.4/AC.4/2 dated 21 September 1983, Report by the UNCTAD Secretariat, *Review and Analysis of Possible Measures to Minimize the Occurrence of Maritime Fraud and Piracy*, V-229

Doc. A/CONF.13/40 (UNCLOS I, 1958), V-192

Doc A/3159, International Law Commission Report to the General Assembly for 1956, V-171

Doc. A/CN.4/L.53, Polish submission of views to the International Law Commission, 6 May 1955, V-119

Doc. A/CN.4/97 and addenda, International Law Commission Rapporteur's summaries and comments of governmental submissions, 1956, V-166

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American Law Institute, *Restatement of the Law of Restitution* (1937), IV-222

American Law Institute, *Restatement, Second, Foreign Relations Law of the United States* (1965), V-53

American Law Institute, *Restatement of the Foreign Relations Law of the United States* (Revised) (Tentative Drafts, 1980), V-53

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Encyclopaedia Britannica (11th ed., 1910), I-64

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