'Discredit upon the British name and rule': British Suppression of Piracy and the History of International Law in the South China Sea

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Introduction

The word 'piracy' evokes rum-swilling swashbucklers in the Caribbean who have since been romanticised as counter cultural figures and commercialised in popular culture such as in Disney's franchise, *Pirates of the Caribbean*. Suppressing such pirates entailed the mobilisation of the state and its institutions, including law, in defence of capitalism and trade.[1] The suppression of piracy allowed municipal law, as dictated in Europe, to have international implications. At the turn of the eighteenth century, Charles Hedges, a judge in the English Admiralty Court, declared that 'the king of England hath not only an empire and sovereignty over the British seas, but 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'.[2] To facilitate the extension of jurisdiction to the most remote parts of the world, the British Parliament passed 'An Act for the more effectual Suppression of Piracy' (11 Wil III c 7), permitting the establishment of Vice Admiralty commissions 'in any Place at Sea or upon the Land of His Majesties Islands Plantations Colonies Dominions Forts or Factories' to try pirates on the spot rather than having them sent to the Admiralty Court in London.

To deal with sea rovers on the 'Pirate Round', who obtained privateering commissions in the Atlantic world but proceeded to commit depredations in the Indian Ocean, the British extended Vice Admiralty jurisdiction into

[1] Sharon Lee Dawdy and Joe Bonni, 'Towards a General Theory of Piracy' (2012) 85 Anthropological Quarterly 673.
[2] *Rex v Dawson* [1696] quoted in Alfred Rubin, *The Law of Piracy* (Naval War College Press 1988) 85.

foreign waters.[3] The extension of British law into Asian waters had profound implications for imperialism and international law in the China Seas.[4] British suppression of piracy was thus wrapped up in the globalisation of international law and the expansion of empire. The connotations of international law and British imperial activity have coloured the reception of international law in the South China Sea, which was particularly affected by British imperial activity. The British used the suppression of piracy in the South China Sea to justify imperial expansion in Southeast Asia and infringing Chinese sovereignty, producing suspicions and awareness about the implications of international law and sovereignty in the region. As is evidenced by the Philippines' challenging Chinese maritime claims at the Permanent Court of Arbitration and China's rejection of the resulting legal decision, the effects of the British deployment of international law against pirates in South China Sea during the nineteenth century resonate to this day.

1. Suppression of Piracy and Imperialism in Southeast Asia

The British were not the first to introduce European international law into the Straits of Malacca connecting the Indian Ocean to the China Seas. Shortly after Columbus' expedition to the Americas, the Treaty of Tordesillas divided the world into spheres of influence for Spain and Portugal.[5] This

[3] Michael Kempe, '"Even in the remotest corners of the world": Globalized Piracy and International Law, 1500-1900' (2010) 5 Journal of Global History 353, 363-364. Michael Pearson, 'Piracy in Asian Waters: Problems of Definition' in John Kleinen and Manon Osseweijer (eds) *Pirates, Ports and Coasts in Asia: Historical and Contemporary Perspectives* (Institute of Southeast Asian Studies 2010). On privateers and other forms of private naval warfare see N A M Rodger, 'The Law and Language of Private Naval Warfare', (2014) 10 The Mariner's Mirror 5.

[4] By the early-twentieth century, the 'China seas' were defined as 'that portion of the ocean included between China, Japan, the Philippines and the Malay Archipelago'; S Charles Hill, 'Pirates of the China Seas: Adventures of East and West in Quelling Sea-Roving Enemies of the Human Race' (1924) 24 Asia Magazine, 24 in Douglas Sellick (ed), *Pirate Outrages: True Stories of Terror on the China Seas* (Fremantle Press, 2010) 14.

[5] Alfred Rubin, *The International Personality of the Malay Peninsula: A Study of the International Law of Imperialism* (Penerbit University Malaya Press 1974) 21; Lauren

European treaty had implications for sovereignty and international relations far beyond the Iberian Peninsula. Capitalising on the privileges granted by the Treaty of Tordesillas, the Portuguese sent Vasco da Gama to round the Cape of Good Hope, which he did in 1498. By 1511, through a combination of piracy, politicking, and proselytisation, often by violent means, the Portuguese had established an imperial presence in India and Malacca, from which they attempted to impose a monopoly on trade with the East Indies.[6] In addition to treaties, however, the Portuguese Empire in Asia also depended on Portugal's command of the sea, which was increasingly challenged by the Dutch and the English by the late-sixteenth century.

In 1603, ships of the Dutch East India Company (*Vereenigde Oostindische Compagnie*, hereafter VOC) captured the Portuguese ship 'Santa Catarina' in the Straits of Malacca. To defend the legality of its actions, the VOC hired Hugo Grotius, widely considered the father of international law, as a legal counsel.[7] Grotius argued for the free navigation of the seas. He labeled those who impinged on this right, namely the Portuguese, as pirates. This was the first use of the label of piracy, with its uniquely European origins, in Southeast Asia.[8] Though maritime raiding had long existed in Southeast Asia, it was often a form of warfare or statecraft. Europeans also labelled these depredations as piracy.[9] In addition to asserting that those who impeded free navigation were pirates, Grotius argued that all maritime powers had a responsibility to protect free navigation and suppress those who challenged it.[10]

Benton, 'Legal Spaces of Empire: Piracy and the Origins of Ocean Regionalism' (2005) 47 Comparative Studies in Society and History 700, 702.

[6] Rubin. *International Personality* (n 5) 23; R P Anand, *Origin and Development of the Law of the Sea* (Martinus Nijhoff, 1983) 47-60.

[7] Anand (n 6) 77-79.

[8] C H Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th, and 18th Centuries)* (Oxford University Press 1967) 48-49; Rubin (n 5) 100. Anand (n 6) 80-88.

[9] Rubin, (n 5) 100-101; Anthony Reid, 'Violence at Sea: Unpacking "Piracy" in the Claims of States over Asian Seas' in Robert Antony (ed), *Elusive Pirates, Pervasive Smugglers: Violence and Clandestine Trade in the Greater China Seas* (Hong Kong University Press, 2010) 18-19.

[10] Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires 1400-1900* (Cambridge University Press 2010) 131.

Claiming a right to act against piracy and other activities impeding the freedom of the seas expanded the range of European action in Southeast Asian waters with implications for the various sovereignties in the Malay Archipelago. Accusations of piracy could be leveled against the Portuguese and other naval forces to justify violence. VOC actions against the 'piratical' Portuguese resulted in the cession of Portuguese territories in Southeast Asia to the Dutch in 1641.[11] A different East India Company, that of the British (hereafter the EIC), used the suppression of piracy, a right granted by British municipal and international law, as a pretext for imperial expansion at the expense of Asian sovereignties. After 1784, the British government forbade the EIC from declaring war without approval from London. EIC employees instead used accusations of piracy against polities in the Malay Archipelago to justify recourse to violence.[12]

By the nineteenth century, Europe, and particularly Britain, had achieved maritime dominance and could unilaterally impose and enforce maritime law. Conflating maritime raiding under the auspices of Southeast Asian polities with piracy, EIC officials could declare entire peoples and polities as piratical, and thus 'enemies of all' according to international law, to justify the use of excessive force against them.[13] In 1828, Robert Fullerton, governor of Prince of Wales Island (now Penang in Malaysia), wrote that

> The suppression of piracy can only be the result of an extensive and systematic arrangement in which all the neighbouring states must bear their parts… should it be discovered that protection is afforded to Pirates by any native states they must be required to expel them, and if unable or unwilling, means must be taken to do it for them.[14]

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[11] Rubin (n 5) 68-69.

[12] Rubin (n 2) 222; Lauren Benton, 'Towards a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction' (2011) 12 International Journal of Maritime History 225, 233.

[13] Simon Layton, 'Discourses of Piracy in an Age of Revolution' (2011) 35 *Itinerario* 81, 82-83. On pirates as enemies of all, see Christopher Harding, '"*Hostis Humani Generis*" The Pirate as Outlaw in the Early Modern Law of the Sea' in Claire Jowitt (ed) *Pirates? The Politics of Plunder, 1550-1650* (Palgrave Macmillan 2007) 20-24.

[14] Robert Fullerton (3 November 1828) in Nicholas Tarling, *Piracy and Politics in the Malay World: A Study of British Imperialism in Nineteenth-Century South-East Asia* (F W Cheshire, 1963) 36.

In suppressing piracy, Britain claimed a right to interfere in foreign jurisdictions. The expulsion of such pirates, however required an understanding of piracy in Asia. The British did this by the introducing their system of international and maritime law as it had been developed in Europe.

The British upheld their version of maritime law abroad through Vice Admiralty courts as established in the abovementioned 'An Act for the more effectual Suppression of Piracy'. EIC courts in India gained Admiralty jurisdiction in 1739.[15] This made it easier for the British to exert jurisdiction over piracy in the East Indies. Instead of being sent to the Admiralty Court in London, pirates captured in Southeast Asia could be tried in Calcutta (Kolkata) instead.[16] The British government further extended Admiralty jurisdiction to EIC courts in the Straits Settlements (Penang, Malacca, and Singapore) in 1837. These courts allowed the British to apply their interpretation and understanding of piracy more strictly.[17] By defining various forms of maritime violence, including those with state sanction from local sovereigns, as piracy, the British exercised a right to suppress and exercise jurisdiction over pirates in foreign waters. Through such means, British agents could delegitimise Southeast Asian sovereigns by declaring them piratical.[18] The British used international law to attack Southeast Asian polities as pirates and conquer their territories; Simon Layton calls this expansion of empire through the suppression of alleged piracy the 'imperialism of free seas'.[19]

The activities of James Brooke (1803-1868) exemplify this idea. Brooke initially went to Borneo to help the Sultan of Brunei suppress piracy, which threatened British trade. Brooke noted the difficulty in determining what

[15] Benton, *Search for Sovereignty* (n 10) 148
[16] Rubin, *International Personality* (n 5) 165.
[17] ibid 251, 280.
[18] Jennifer Gaynor, 'Piracy in the Offing: The Law of Lands and the Limits of Sovereignty at Sea' (2012) 85 Anthropological Quarterly 817, 840.
[19] Simon Layton, 'Hydras and Leviathans in the Indian Ocean World' (2013) 25 International Journal of Maritime History 213, 224.

constituted piracy in Southeast Asia, pointing out that 'folks, naval officers in particular, talk about native states, international law, and the right of native nations to war on one another'. He concludes, however, that 'some broad and general principle should be laid down, and native states or no native states, I would punish them if they dared to seize a trader on the high seas'.[20] In return for assistance in punishing 'pirates', the Sultan of Brunei appointed Brooke as governor of Sarawak, over which Brooke ruled as a self-styled 'rajah'. He also pressured the sultan to cede Labuan to the British as a naval station.[21] Brooke's suppression of what he defined as piracy resulted in the expansion of the British Empire in the South China Sea.

Brooke's pugnacity towards any threat to a 'trader on the high seas' reveals an important British motive for suppressing piracy: pirates threatened trade. The suppression of 'piracy' in an age of economic liberalism and free trade had ideological, and even moral, implications.[22] Trade was an integral part of British foreign and imperial policy in the nineteenth century. The British expanded their empire to protect trade and access markets for their manufactures, the production of which increased substantially during the Industrial Revolution. The imperialism of free seas complimented the 'imperialism of free trade'.[23] British imperial interest in Southeast Asia, however, lay not in trade with the region itself but in the routes and goods it provided for trade with China, then as now, the largest market in the world.[24]

[20] Letter from Brooke to Templer (10 April 1845) quoted in Tarling (n 14) 123.
[21] Tarling (n 14) 118-122. Lauren Benton and Lisa Ford, *Rage for Order: The British Empire and the Origins of International Law 1800-1850* (Harvard University Press, 2016) 140-142. Sarawak was ruled by descendants of James Brooke, who acted as rajahs over the territory until its capture by the Japanese during the Second World War. Ashley Jackson, *The British Empire and the Second World War* (Hambledon Continuum 2006), 440.
[22] Layton, 'Discourses' (n 13) 93.
[23] John Gallagher and Ronald Robinson 'The Imperialism of Free Trade', (1953) 6 Economic History Review.
[24] Gaynor (n 18) 842.

2. Suppression of Piracy and International Law in China

As in Europe, robbery at sea has a long history in China.[25] The Chinese, however, understood violent theft at sea in a different legal context than the one in which European concepts of piracy developed. Whereas Europeans saw pirates as stateless enemies of all, the Chinese considered it a form of banditry solely within the jurisdiction of the Chinese state.[26] British and Chinese understandings of piracy came to a head in February 1800, when the crew of a Chinese boat allegedly attempted to cut the anchor cable of HMS Providence, resulting in the officer on watch firing at the boat and causing casualties. Captain John Dilkes, senior naval officer in China, considered the actions of the Chinese boat piratical and reasoned that 'the laws of all civilized Countries on this head… were nearly similar', and he 'had no doubt but the persons who had made such an attempt of HM Vessel would be brought to Punishment'.[27] Chinese officials conceded that British had 'mistaken a boat for the pirate'.[28] These officials, however, refused to concede that the British had the right to take action against pirates, ordering that 'all Europeans might be forbidden to fire with Ball at Boats that approached the Ships with however suspicious a design'.[29] The government of the Qing dynasty (1644-1912) thus forbade British actions against Chinese pirates. Chinese municipal law clashed with British and international law stipulations of pirates as common enemies of all.

Though they insisted on exercising exclusive jurisdiction over Chinese piracy, Qing officials proved incapable of suppressing it on their own. A

[25] For a general history, see Guangnan Zheng, *Zhongguo haidao shi* [A History of Chinese Piracy] (Huadong ligong daxue chubanshe, 1998).
[26] Reid (n 9) 15-18. On European understandings of pirates as the enemy of all see Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (Zone Books, 2009).
[27] Entry on 24 February 1800, British Library India Office Records, Consultations and Transactions of the Select Committee of the East India Company in China, IOR/G/12/128, 73.
[28] Edict from the Canton Authorities, Jiaqing (JQ) reign, 5th year/2nd month/8th day (3 March 1800) in Foreign Office Records, Miscellaneous China Papers, FO 233/189, 40.
[29] Entry on 22 March 1800, IOR/G/128, 139.

piracy crisis during the reign of Emperor Jiaqing (r 1796-1820), during which a massive Chinese pirate confederation virtually ruled the South China coast, revealed the weakness and limitations of the Qing state at sea.[30] At the height of this crisis, desperation led Qing officials to request the assistance of the Royal Navy against pirates. In September 1809, a Qing magistrate requested support from HMS *Dedaigneuse*, offering to give the ship special permission to proceed upriver to attack pirates.[31] Qing officials thus proved willing to cooperate with the British and compromise on legal understandings of piracy during times of crisis. The Qing Empire's next maritime crisis, however, would come not from Chinese pirates, but British ones.[32]

In the interest of global trade and the economy of its Indian territories, the British Empire decided to challenge Qing restrictions on trade, particularly in opium, in 1839 by initiating the first Opium War (1839-1842).[33] With the most powerful navy in the world, the British successfully conducted a war on the other side of the world and forced the Qing to sign the Treaty of Nanking (Nanjing).[34] The Treaty of Nanking was the first of many 'unequal treaties' that China signed during the late Qing period, which introduced a European-dictated system of international law to China.[35] The unequal treaties with Western powers created a regime governing China's relation with the West. In interpreting treaty stipulations, however, China produced what Arnulf Becker Lorca calls a 'mestizo international law', in which non-Western states contributed to international law through engagement with

[30] Dian Murray, *Pirates of the South China Coast, 1790-1810* (Stanford University Press, 1987). Robert Antony, 'Pacification of the Seas: Qing Anti-Piracy Policies in Guangdong, 1794-1810' (1994) 32 Journal of Oriental Studies 16; Wensheng Wang, *White Lotus Rebels and South China Pirates: Crisis and Reform in the Qing Empire* (Harvard University Press 2014).

[31] Entry on 10 September 1809 IOR/G/12/167, 187

[32] The Qing officials considered British and other foreign merchants who attempted to subvert Chinese maritime restrictions as a type of pirate; Reid (n 9) 18.

[33] Rebecca Berens Matzke, *Deterrence through Strength: British Naval Power and Foreign Policy under Pax Britannica* (University of Nebraska Press 2011) 108-109.

[34] ibid 150-151.

[35] Rune Svarverud, *International Law as World Order in Late Imperial China: Translation, Reception and Discourse, 1847-1911* (Brill 2007) 14.

it.[36] Understandings of Chinese piracy, and the jurisdiction the British and Qing states had over it, is one example of the mestizo international law that emerged out of China's unequal treaties with Britain.

International law, as introduced through unequal treaties, implicated imperialism. Hong Kong became a British colony per Article III of the Treaty of Nanking in 1842. Before the establishment of a court with Admiralty jurisdiction in Hong Kong, colonial officials worried they were not 'authorized to award a sentence of the requisite severity' for piracy and other capital crimes.[37] The colonial government decided to send pirates and other criminals across Victoria Harbour to Kowloon on the Chinese mainland.[38] The principle of universal jurisdiction over piracy helped justify this measure. As the British considered piracy as a crime against the law of nations, a corollary was that any state with a competent tribunal, Qing courts in the case of the Hong Kong pirates, could exercise jurisdiction it.[39] Qing officials did not recognise universal jurisdiction over piracy and saw Chinese piracy as a crime solely within their jurisdiction. Such officials, however, were happy to receive Chinese pirates captured by others. Nguyen Vietnam (1802-1945), which was a tributary relation of the Qing Empire, cooperated with Qing officials and usually forwarded captured Chinese pirates to China.[40] What the British saw as an exercise in universal jurisdiction, the

[36] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2004) 73; Arnulf Becker Lorca, *Mestizo International Law: A Global History, 1842-1933* (Cambridge University Press 2014) 86-87.
[37] A B Johnston to Earl of Aberdeen (21 October 1842) TNA, Colonial Office Records: Hong Kong Correspondence, CO 129/3, 148.
[38] Richard Woosnam to William Caine (24 April 1844) Hong Kong Public Record Office (HKPRO), 'Correspondence received by the Chief Police Magistrate from the Colonial Secretary, 2 Feb 1844-31 Dec. 1846', HKRS 100, 46.
[39] Rubin, *The Law of Piracy* (n 2) 94; see also Benton, 'Towards a New Legal History' (n 12) 225-240.
[40] Yuxiang Chen 'Qingdai yu Yuenan bianjing de haidao qingxing [The Problem of Piracy at the Sino-Vietnamese Border' in Shanghai Zhongguo hanghai bowuguan [The Shanghai Chinese Maritime Museum] (ed.) *Hanghai: wenming zhi ji* [Navigation: Traces of Civilisation] (Shanghai guji chubanshe 2011) 2-6; Thi My Hanh Nguyen, 'The Anti-Piracy Activities of the Nguyen Dynasty in the South China Sea, 1802-1858' (2019) 31 International Journal of Maritime History 50, 79.

Qing likely interpreted as an affirmation of their authority over Chinese pirates.

A legal mechanism for the rendition of pirates and other criminals from Hong Kong to Qing officials was established in Article IX of the Supplementary Treaty of the Bogue (Humen), signed in 1843. The treaty stipulated that 'Lawless Natives of China' who 'committed crimes, or Offences, against their own Government' and fled to 'Hongkong or to the English Ships of War or English Merchant Ships for refuge' were to 'be handed over at once to the Chinese Officers for trial and punishment'.[41] Pirates captured by the Royal Navy fell into this category of extraditable Chinese criminals. Misunderstandings of legal concepts addressed in the treaty, however, led to disagreements over interpretation over the treaty's contents. The British tried to exercise treaty rights to their advantage, using extradition of criminals, particularly pirates, to lessen the burden on Hong Kong's beleaguered criminal justice system.[42]

Qing officials willingly accepted Chinese criminals extradited through the treaty. They did not, however, understand the principle of universal jurisdiction over piracy by which the British extradited pirates to China but also occasionally tried to exercise jurisdiction over Chinese pirates. For example, in May 1844, the British captured Chen Yatai, who admitted to committing piracy against a British ship in Hong Kong. They extradited Chen to Kowloon with the hopes that he could provide information to Qing authorities about his accomplices. Governor John Davis later requested that Chen Yatai be returned to Hong Kong custody for further examination.[43] The senior Qing official in Canton (Guangzhou) who had responsibility for Chinese foreign relations, Governor-General Qiying, refused. Qiying

[41] 'Supplementary Treaty of Hoomun Chai (1843)' in Inspector General of Customs (IGC), *Treaties, Conventions, etc., between China and Foreign States* (Statistical Department of the Inspectorate General of Customs, 1908) 201.

[42] Ivan Lee, 'British Extradition Practice in Early Colonial Hong Kong' (2019) 6 Law & History 85, 89, 94; On the limitations of Hong Kong's criminal justice system, see Christopher Munn, 'The Criminal Trial under Early Colonial Rule' in Tak-wing Ngo (ed) *Hong Kong's History: State and Society under Colonial Rule* (Routledge 1999) 46-73.

[43] Davis to Keying (Qiying, 20 June 1844) CO 129/6, 287.

justified his refusal for rendition by citing the Treaty of the Bogue and asserting that 'in cases implicating British merchants and inhabitants of the mainland, the British merchants are under the jurisdiction of British officials, and the Chinese are to be tried in China'. He promised to conduct the trial of Chen Yatai himself and report the results to Davis.[44] Though Chen Yatai was guilty of piracy, Qiying decided to try him as a common Chinese criminal.[45] Governor Davis reported his dismay over the failed attempt to exercise universal jurisdiction over the Chinese pirate Chen Yatai and concluded that 'though the ends of Justice will be equally answered, I cannot but look upon this as a breach of good faith'.[46]

To address such a breach of good faith and for other 'diverse good causes', Queen Victoria 'deemed it right that a Court of Vice Admiralty should be established in our Island of Hong Kong' in January 1846.[47] While it took over fifty years from the time the British flag was raised at Penang in 1786 to the establishment of a court with Admiralty jurisdiction in the Straits Settlements, the same process took only four years in Hong Kong.[48] The British seemed more concerned about enforcing their maritime jurisdiction on the China coast than in Southeast Asia. Qing China's resistance to Britain's claims of universal jurisdiction over pirates may have helped catalyse this process. The authority of Hong Kong's Vice Admiralty court relied on the might of the Royal Navy, which had a significant presence in China, for its enforcement. The significance of the China Seas for British interests is reflected in the fact that the Royal Navy's East Indies and China Station, headquartered in Hong Kong, was its second largest after the Mediterranean Station, which was much closer to British home waters. Having a massive fleet off the coast of China had a deterrent effect on the Qing.[49] Enforcing international law in China was thus tied up with gunboat

[44] Qiying to Davis (DG) reign, 24/5/6 (Daoguang 21 June 1844), TNA, Foreign Office Records: Chinese Secretary's Office, Chinese Correspondence FO 682/1977/87.
[45] Qiying to Davis, DG 24/5/13 (28 June 1844) FO 682/1977/94.
[46] Davis to Aberdeen (5 July 1844) CO 129/6, 362.
[47] Charter of the Hong Kong Vice Admiralty Court (23 January 1846) TNA Admiralty Records: Letters Patent, ADM 5/71.
[48] Rubin (n 5) 130.
[49]Gerald Graham, *The China Station: War and Diplomacy, 1830-1860* (Oxford University Press 1978) 248; Matzke (n 33) 150.

diplomacy, which has had a controversial history in China since the first Opium War.[50]

The Vice Admiralty Court of Hong Kong claimed the ability to exercise jurisdiction over pirates captured in Hong Kong's territorial waters and selectively over pirates captured on the high seas, more than three miles from land. Pirates captured in Chinese territorial waters and in Chinese rivers, according to international law as practiced by Britain, were strictly under Qing jurisdiction. In practice, however, Hong Kong's criminal justice system could not deal with the number of pirates captured by the Royal Navy.[51] Extradition was one way for colonial officials to deal with this problem. Handing pirates to the Qing often entailed cooperation between colonial officials in Hong Kong and their Chinese counterparts on the other side of Victoria Harbour despite mutual mistrust.[52] Qing and British officials indeed cooperated against the common problem of piracy. By 1847, cooperation with Qing authorities in dealing with pirates became codified in naval orders. The commander-in-chief of the East Indies and China Station, Rear-Admiral Samuel Hood Inglefield ordered that 'in the event of any of HM Ships, and Vessels, under my Command, capturing Chinese Piratical Vessels… the Crews are to be given up to the Chinese Authorities at the nearest Port of Trade, from whom, a receipt is to be taken for the number of Pirates so delivered up' for use in determining head money at the Vice Admiralty court in Hong Kong.[53] In this way a mestizo international law of piracy emerged in which the British exercised a right to suppress piracy but delivered captured pirates to Qing officials at the treaty ports while the Royal Navy still claimed head money at British Hong Kong for pirates captured and killed.

[50] John Y Wong, 'The Limits of Naval Power: British Gunboat Diplomacy in China from the *Nemesis* to the *Amethyst*, 1839-1869' (2000) 18 War & Society 93.
[51] Grace Estelle Fox, *British Admirals and Chinese Pirates, 1832-1869* (K Paul, Trench, Trubner & Co 1940) 85-91.
[52] Lee (n 42) 97-100.
[53] Samuel Inglefield, 'General Memo No 11' (5 August 1847) in TNA, Admiralty Records: Correspondence and Papers, ADM 1/5604.

The modus vivendi of the mestizo international law of piracy on the China coast was built on compromise and misunderstanding. The limited capacity of Hong Kong's courts and prisons as well as those imposed by international law prevented the British from trying the thousands of pirates captured by the Royal Navy. In handing pirates to Qing authorities, the British were practicing a legal principle from an international law relatively unknown in China. Chinese officials instead understood the British rendition of pirates as an affirmation of Qing jurisdiction and through the Treaty of the Bogue. These misunderstandings clashed during the *Arrow* incident, when Qing officials arrested the crew of a Hong Kong-registered vessel on suspicions of piracy. The British considered this an insult and, motivated by other grievances and aspirations, initiated the Second Opium, or *Arrow*, War with China (1856-1860).[54]

The war led to the Treaty of Tientsin (Tianjin), signed in 1858 and ratified in the Convention of Peking (Beijing) in 1860. These treaties codified an Anglo-Qing prohibition regime against piracy. The Treaty of Tientsin gave the Qing responsibility for dealing with Chinese piracy while also stipulating for cooperation in its suppression. The treaty also gave Royal Navy ships the right to visit any port in Chinese waters, not just treaty ports opened to foreign trade.[55] Suppression of piracy thus justified a violation of Qing maritime sovereignty. Furthermore, the Convention of Peking ceded Kowloon to Britain 'with a view to the maintenance of law and order in and about the harbour of Hongkong'.[56] The principle problem plaguing Victoria Harbour was piracy. One governor complained about 'the increasing boldness of the Pirates who infest' Hong Kong, concluding that 'the existence of such a state of things… in the immediate neighborhood of a British Colony, and even within British waters, reflects discredit upon the British

[54] See John Y Wong, *Deadly Dreams: Opium, Imperialism, and the* Arrow *War (1856-1860) in China* (Cambridge University Press 1998).
[55] Jonathan Chappell, 'Maritime Raiding, International Law and the Suppression of Piracy on the South China Coast, 1842-1869' (2018) 40 The International History Review 473, 483.
[56] Convention of Peking (1860) in IGC (n 41) 241.

name and rule'.[57] The British saw control of Kowloon as a means of dealing with piracy. While imperialism of free trade resulted in the colonisation of Hong Kong, the imperialism of free seas resulted in the colony's expansion. From the perspective of Qing China, discredit upon the British name and rule came not from the prevalence of piracy, but from the treaties and gunboat diplomacy the British employed for its suppression. The law and violence the British used against piracy in the South China Sea was intrinsically linked with the globalisation of international law and the expansion of empire. These associations continue to have resonance in the South China Sea today.

Conclusion: The Long Shadow of British Rule(s)

At the present, the South China Sea continues to be a contact zone between international and municipal law and site of expansionism. There are, understandably, some significant differences between the situation now and that of the nineteenth century. The European empires are gone, replaced by Asian states. Piracy, while persisting, is nowhere near as problematic as it was in the nineteenth century and its suppression is no longer seen as an existential imperative.[58] Decolonisation has allowed former colonies to participate as full members of the international community governed by international law. In the nineteenth century, international law was imposed on Southeast Asia by European empires and used to justify colonial or semi-colonial activity.[59] As sovereign, recognised states, however, Brunei, China, Indonesia, Malaysia, the Philippines, and Vietnam now subscribe to international law, including the United Nations Convention on the Law of

[57] Hercules Robinson to the Duke of Newcastle (11 May 1864) in TNA, Admiralty Records: China Station Correspondence, ADM 125/9, 901.
[58] See Catherine Zara Raymond, 'Piracy and Armed Robbery in the Malacca Strait: A Problem Solved?' in Bruce A Elleman, Andrew Forbes and David Rosenberg (eds) *Piracy and Maritime Crime: Historical and Modern Case Studies* (Naval War College Press 2010) 109-120.
[59] For a discussion of semi-colonialism in China, see Anne Reinhardt, *Navigating Semi-Colonialism: Shipping, Sovereignty, and Nation-Building in China, 1860-1937* (Harvard University Press 2018) 3-7.

the Sea (UNCLOS), to which they are all signatories.[60] The history of international law in these countries, however, has informed their engagement with UNCLOS and international law.

In Southeast Asia, the imperialism of free seas implicated piracy and international law. The British, under the guise of suppressing piracy, a right given by the law of nations, delegitimised and conquered Southeast Asian polities. While Malaysia (a former British colony), the Philippines (a former Spanish and then American colony) and Vietnam (a former French colony) have cast off their former colonial rulers, a new threat to their sovereignty has emerged in the form of China. Having had their sovereignty violated by an international law in which they could not participate, these states have experienced the implications international law can have for sovereignty.[61] Malaysia, the Philippines, and Vietnam have all sought to use UNCLOS as a means of protecting their own maritime claims while delegitimising those of China in a manner similar to how the British delegitimised pre-colonial polities in Southeast Asia. In response to continued Chinese expansionism, the Philippines decided to take China's claims within a 'nine-dash line' in the South China Sea before an international tribunal of the Permanent Court of Arbitration at the Hague. The court largely rejected China's claims.[62] The People's Republic of China, in turn, rejected the court's ruling.[63]

China's rejection of international law reflects its own history of engaging with international law, which was introduced by gunboat diplomacy and

[60] Robert Beckman, 'The UN Convention on the Law of the Sea and Maritime Disputes in the South China Sea' (2013) 107 The American Journal of International Law 142.

[61] The Treaty of Zaragoza (1529) gave Spain the right to the Philippines. Rubin, *Law of Piracy* (n 2) 22; Incursions by the Black Flags, which the French labelled 'pirates', and treaties resulted in Nguyen Vietnam becoming a French Protectorate. See Bradley Camp Davis, *Imperial Bandits: Outlaws and Rebels in the China-Vietnam Borderlands* (University of Washington Press 2017).

[62] See Stefan A G Talmon, 'The South China Sea Arbitration: Observations on the Award on Jurisdiction and Admissibility' (2016) 15 Chinese Journal of International Law 309.

[63] Jiangtao Shi and Mai Jun, 'China's Xi Jinping Rejects any Action Based on International Court's South China Sea Ruling', *South China Morning Post* (Hong Kong, 12 July 2016).

British anti-piracy activities in Chinese waters. The law of nations, largely dictated in Europe, was foreign to China when it was introduced in the nineteenth century. Britain, in particular, used international law to erode Chinese sovereignty. After the collapse of the Qing dynasty, the Chinese still perceived the British colonisation of Hong Kong as a slight. An *Economist* correspondent noted that 'Chinese memories are almost as long as Irish'.[64] The memory of injustice at the hands of western imperialism has persisted into the communist period as China's 'century of shame'. The association international law had with imperialism has not been forgotten in China, which refused to allow the Permanent Court of Arbitration's ruling to affect Chinese claims of sovereignty in the South China Sea.[65] Nor does China accept the means of upholding international law in the South China Sea, namely 'freedom of navigation' operations led by the US Navy. There are echoes of the Royal Navy's suppression of piracy in the US Navy's actions today. Now, as before, China sees foreign actions in defence of free seas as undermining Chinese sovereignty.[66] Southeast Asia's recourse to international law and its enforcers will likely continue to be rejected by China. There are reverberations of nineteenth-century British suppression of Chinese piracy in the People's Republic of China's current wariness of international law, which will continue to destabilise the South China Sea. While piracy has largely been suppressed, the legacy of international law in the South China Sea remains a discredit upon the British name and rule.

[64] *The Economist* (London, 6 March 1948) quoted in Wm Roger Louis, 'Hong Kong: The Critical Phase, 1945-1949' (1997) 102 The American Historical Review 1052, 1054.

[65] Shi and Jun (n 63).

[66] Teddy Ng, 'US Steps up Freedom of Navigation Patrols in South China Sea to Counter Beijing's Ambitions', *SCMP* (Hong Kong, 16 February 2019).