THE BRITISH HOVERING ACTS : A CONTRIBUTION TO THE STUDY OF THE CONTIGUOUS ZONE

by

Alan M. FROMMER

Assistant at the Faculty of Social, Political and Economic Sciences
of the Université Libre de Bruxelles.

I. INTRODUCTION

THE CONCEPT OF THE CONTIGUOUS ZONE

The Convention on the Territorial Sea and the Contiguous Zone signed in Geneva in 1958 established formally in International Law and for the first time, the concept of the contiguous zone. The relevant article of the Convention states :

> « Article 24
>
> 1. In a zone of the high sea contiguous to its territorial sea, the coastal state may exercise the control necessary to :
>
> (a) prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
>
> (b) punish infringement of the above regulations committed within its territory or territorial sea.
>
> 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.
>
> 3. [...] »

It had taken about a century to arrive at the recognition of the concept of the contiguous zone and to strictly define the jurisdictions which the coastal state might exercise within it, as well as the exact limits of the zone. Around the middle of the 19th century the 3-mile limit of territorial waters became the widely accepted norm of International Law. There was, therefore, a need to establish a clear position in International Law for those jurisdictions which many coastal states effectively exercised beyond the 3-mile limit. Initially, some authorities on International Law argued that each coastal state possessed a variety of territorial waters - one for fishing, one for sanitary regulations, one for customs control, one for neutrality, etc. - each having diffe-

rent geographical limits (1). Gradually, the idea of a contiguous zone as part of the high seas, legally separate from the territorial waters, and with defined and fixed limits, came to dominate discussion of this subject.

THE VIEWS OF CERTAIN EXPERTS

One, and perhaps the main, jurisdiction exercised beyond the 3-mile limit of territorial waters was that of customs regulation. Every expert that we have studied on the subject of the contiguous zone cited the British « hovering acts » as the classic example of such Municipal Law. These laws were passed in Britain in the 18th century. They gave the British customs and revenue authorities ever-greater jurisdictions, around Britain and its colonies, to combat the smuggling of specific goods. This legislation was repealed in 1876 by the Customs Consolidation Act. It is worth noting the views of some leading authorities on International Law on the subjects of the contiguous zone and the British « hovering acts ».

The legality of hovering legislation was defended by Oppenheim in 1905 on the basis of the existence of an international custom :

> « I believe that, since Municipal Laws of the above kind [revenue and sanitary laws...] have been in existence for more than a hundred years and have not been opposed by other States, a customary rule of the Law of Nations may be said to exist which allows Riparian States in the interest of their revenue and sanitary laws to impose certain duties on such foreign vessels bound to their ports as are approaching, although not yet within, their territorial maritime belt » (2).

In 1906 Moore quoted Wheaton's views on the British and United States hovering legislation :

> « they have been declared by judicial authority in each country to be consistent with the law and usage of nations » (3).

Moore himself took a different view :

> « [...] it will not be found that any consent of nations can be shown in favour of extending what may be strictly called territoriality, for any purpose whatever, beyond the marine league or cannon shot. Doubtless States have made laws for revenue purposes touching acts done beyond territorial waters, but it will not be found that, in later times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign States or that a clear and unequivocal judicial precedent now stands sustaining such seizures when the question of jurisdiction has been presented » (4).

Masterson's 1929 study of hovering legislation still constitutes the major work on the subject. He justified these laws on the grounds of the theory of interests :

(1) GIDEL, G., *Le Droit international public de la Mer* (Paris, 1934), tome 3, pp. 16-17.
(2) OPPENHEIM, L., *International Law* (Ist. Ed. 1905), Vol. 1, pp. 245-246.
(3) MOORE, J.B., *Digest of International Law* (Washington, 1906), Vol. 1, p. 725.
(4) *Ibid.*, p. 726.

« The state must clearly exercise jurisdiction in the waters adjacent to its coasts for the purpose of protecting its various interests; one such interest is in the revenue, which is protected by jurisdiction taken under the hovering laws over illicit trade from the seas. [...] It should be asked, then, if any interest of the flag state or of the community of nations is violated by the enforcement of the hovering laws [...]. (5).

« The smuggler can show no such interest [innocent trade or commerce or the economic interests of foreign powers]. This principle [freedom of the seas] therefore, has no application in this connection. There are, therefore, no interests of the flag state or of the community of states to be balanced against the interests of the littoral state secured by the hovering laws. These laws would, thus, seem to be sound in principle » (6).

Prof. Gidel played a leading role in the acceptance of the concept of the contiguous zone. In 1934 he argued :

« Does the setting up of a contiguous zone by a coastal state constitute the exercise of a subjective right recognized by International Law or does this exercise only depend on the always-revocable tolerance of other states ? The reply to this question requires making certain distinctions.

These distinctions are based on the nature of the interests that the coastal states claim to protect via their Municipal legislation beyond the territorial waters [...].

The laws of customs and fiscal protection by which a state gives itself the right to exercise, in relation to foreign vessels, certain acts of authority [...] beyond the limits of its territorial waters (territorial sea) must be considered as having, in principle, an international value » (7).

When referring to the British « hovering acts » Gidel wrote :

« These laws date back more than two hundred years. Their great age constitutes the best response to certain reproaches sometimes made against the contiguous zone by its present opponents » (8).

In 1950 the British author Smith applied a theory of self-defence to justify revenue jurisdiction beyond the 3-mile limit :

« If the width of territorial waters is fixed, are states entitled to exercise jurisdiction beyond the zone for special purposes, such as self-defence, customs inspection, or the protection of fisheries ? [...] The clue to a solution lies in the fact, which is admitted on all sides that under modern conditions the three-mile limit is not wide enough to afford protection for all legitimate interests of the shore state. The protection of lawful interests is the proper function of all law, national or international [...]. The basic principle upon which the right to exercise jurisdiction outside territorial waters rests is that of self-defence [...]. In practice the laws which it is necessary to enforce by action at sea are those dealing with customs and revenue, sanitary control and immigration. In all these cases experience shows that effective enforcement involves the right to take action at distances of more than three miles from the shore » (9).

De Ferron's view in 1958 was that the contiguous zone was the result of a double necessity :

(5) MASTERSON, W.E., *Jurisdiction in Marginal Seas, with special reference to Smuggling* (N.Y. 1929) p. 381.
(6) *Ibid.*, p. 384.
(7) GIDEL G., *supra*, pp. 369-370 (translated from French by us)
(8) *Ibid.*, p. 381 (translated from French by us).
(9) SMITH, H.A., *The Law and Custom of the Sea* (2nd Ed. London, 1950), p. 17.

> « The history of maritime law helps to clarify the origins and nature of the concept of the contiguous zone. It developed slowly due to a double necessity. On the one hand, an economic necessity in order to reinforce the coastal state's customs and fiscal control with the intention of repressing smuggling more efficiently [...]. Certain nations were thus led to exercising their police control beyond the traditional limits of their territorial seas. On the other hand, a political necessity in order to safeguard the rights of neutrals and the freedom of navigation in wartime » (10).

In the 1967 edition of his book, Colombos justified the British « hovering acts » on the grounds that :

> « These laws were enacted, however, at a time when the marine league had hardly been fully adopted and when there was no known case of foreign Governments complaining of measures taken under these statutes » (11).

THE PURPOSES OF THIS ARTICLE

As can already be seen from the above quotations, writers on the subject of the British « hovering acts » usually refer to the « interests » involved. None of the many works which we have consulted offers an analysis of the nature and evolution of these « interests ». If the « hovering acts » were passed in the 18th century we must assume that smuggling became rife at that time. For smuggling to occur there must have been customs duties imposed on certain articles. Why were they imposed at that time and on what goods ? Who benefited and who did not from these duties ? What was the relation between the State and the various social classes effected by these duties ? What was the interaction between the growth of the smuggling industry - for example its technical aspects - and the extension of the hovering legislation ?

We are informed that around the beginning of the 19th century the 3-mile limit for territorial waters became Anglo-American policy. Why did this occur then and in those countries ? We are told that smuggling remained rife until the 1820, and then declined rapidly. Was this due to more effective policing by the State or due to a change in customs tariffs ? If it was the latter, then why did this change of policy occur ?

The British « hovering acts » were repealed in 1876. Why did this happen at that particular moment ? What were the interests and events which brought this about ? How did experts view the « hovering acts » after they had been repealed ?

These are some of the questions that this article will seek to elucidate. In other words, the initial aim of this article is to analyse the economic, social and political context in which the « hovering acts » were established and then repealed so that we can clearly see the situations to which they corresponded.

(10) DE FERRON, O., *Le Droit international de la Mer* (Geneva & Paris, 1958) tome 1, p. 63 (translated from French by us).

(11) COLOMBOS, C.J., *The International Law of the Sea* (6th Rev., Ed. London, 1967), p. 137.

Having established the nature of this context, our second aim will be to examine how lawyers, legal experts and politicians presented and justified the « hovering acts ». We shall try to see whether they did so in terms of the context which we shall have analysed or in purely legal terms, which made no reference to it.

I. THE BRITISCH HOVERING ACTS
THE HISTORICAL CONTEXT AT THE TIME OF THE FIRST « HOVERING ACTS »

At the beginning of the 18th century Great Britain was in colonial competition with France, Spain, Holland and Portugal (12). The merchant class was heterogeneous. There were occasional conflicts of interests between those who owned land in the colonies and those who merely traded with them (13). Yet others played no role in overseas trade. Some of the richest city merchants were also the main creditors of the Crown and, as such, an ever-more powerful economic and political force. Yet Parliament and government were still dominated by the landed, domestically-orientated aristocracy. In these circumstances it is almost impossible to define a « dominant social class » for that period. The colonial-orientated fraction of the London-based merchant class represented a rising social group, whose increasing economic power enabled it to influence the politically ruling landed class but which had to compromise with this latter group.

Between 1690 and 1704 the general level of duties on consumer goods imported into Great Britain rose by 300 % (14). The purpose was to finance « King William's Wars', which were of colonial significance since they resulted in the near destruction of the French fleet and the establishment of British naval superiority (15). The form of these import duties is relevant to our study. In 1688 all goods were subject to a 5 % import duty but for each type of good an official price was set, upon which this duty was levied. It was in reality a « fixed », and not an « ad valorem », tax. For example, tobacco's official price was set so high in relation to its current market price that the 5 % import duty represented a tax of 100 % on its true market price (16). If these goods were imported from British colonies they were subject to lower duties. This gave British colonists a preference in the British market and was a compensation for their disadvantages under the Navigation Acts.

(12) PLUMB, J.H., *England in the Eighteenth Century (1714-1815),* (Penguin Books, 1963) pp. 14-16.

(13) PENSON, L.M., « The London West India Interest in the Eighteenth Century » in *English Historical Review,* XXXVI, July 1921, pp. 373-392.

(14) DAVIS, R., « The Rise of Protection in England, 1689-1786 », in *Economic History Review,* 2nd Series, Vol. XIX, N° 2,n1916,np.n306.

(15) *The Cambridge Modern History,* (Cambridge, 1908) Vol V, p. 260 *et seq.*

(16) DAVIS, *op. cit.*, p. 308.

By 1704 the basic rate of import duty had reached 15 % (17). From 1702 until 1712 Britain was involved in the War of the Spanish Succession, which marked a further step in her colonial expansion. It also resulted in a National Debt of £ 54 million in 1714. The above-mentioned rise in import duties led to a rapid growth of smuggling around Britain's coasts and a resultant loss of revenue to the Exchequer, i.e. to those creditors of the Crown who depended upon the full collection of import duties for repayment of their loans. In 1709 the first « hovering act » was passed (18), which penalised the illicit unlading and landing of dutiable goods. At this time there was no agreement in International Law as to the extent of the jurisdiction of a littoral state over its coastal waters. The 17th century had seen the conflict between Grotius (1608-*Mare Librum*) and Selden (1635-*Mare Clausum*) which expressed the conflicting fishing interests of Holland and Britain. In 1702 Bynkerhoek *(Dominion of the Sea)* had advocated the « cannon-shot » rule as the criterion for the extent of coastal jurisdiction but one cannot contend that, at the time of the first « hovering act », there was an established rule of International Law on this matter. In any case, the 1709 law did not lay down any limit within which the unlading of dutiable goods was prohibited.

THE HOVERING ACTS : 1715-1750

From 1714 until 1742 Sir Robert Walpole dominated British politics (19). He sponsored a series of « hovering acts », which were severe in their, largely unsuccessful, attempts to combat smuggling. Between 1690 and 1750 British governments fought a series of overseas wars, which solidly established the foundations of the British Empire at the expense of its main colonial rivals. The main beneficiaries of these wars were the colonists and those merchants who handled trade between Britain and its colonies. These merchants lent large sums of money to the Crown in order to finance these wars and needed some guarantee of repayment. Walpole could not increase the land tax as the aristocratic landed interest dominated Parliament but he could maintain and extend the excise duties on imported consumer goods since the demand for these outstripped the supply from the colonies. Given the inelasticity of demand for these goods, the merchants were able to pass on the cost of import duties to the consumer, i.e. to the poorer social classes, without risking losing their trade. In other words, the British consumers of colonial products paid for the wars which enabled British merchants and colonists to establish their empires.

In 1718 a second « hovering act » (20) was passed. Its preamble stated that existing legislation against smuggling had been « ineffectual, whereby His

(17) *Ibid.*, p. 309.
(18) 8 Anne, c. 7 sec. 17.
(19) PLUMB, J.H., *Sir Robert Walpole,* 2 vols., (London, 1956-1960).
(20) 5 Geo. I. c. 11.

Majesty had been greatly defrauded in his duties » (21). This terminology was ideologically mystifying since it hid the fact that the Crown's creditors' interests were being protected. Colonial products were shipped across the oceans in large vessels which were too deep and slow for running smuggled goods ashore. Therefore, these goods were unloaded off the British coast into small, rapid boats which waited or « hovered » until the conditions were right for the landing of the goods. The 1718 Act (22) penalised the illicit unlading of dutiable goods at sea. It did not specify any distance from the coast within which such unlading was illegal or where the goods could be seized or the masters of the vessels arrested. Given the state of International Law and Britain's claim to jurisdiction over the « English Seas » (23), there would have been no need in law to establish such a limit.

However, in 1719, the next « hovering act » (24) empowered the Customs authorities to force any vessel of 50 tons or under, carrying brandy, found at anchor or hovering within 2 leagues from the shore, to come into port. Smuggling vessels used to hover just off the coast until their accomplices on land signalled that it was safe to land the goods. The provision in this act for a 2 league jurisdiction was dictated by the material realities of the time. Two leagues was considered to be the limit beyond which hovering vessels were unable to communicate with the shore. This was a case of the legal superstructure being determined by the realities of the material infrastructure.

Throughout the 1720's and 1730's smuggling was rife and on the increase (25). A study of tea smuggling (26) helps us to understand why this occurred and throws light on the interaction between the form of the revenue laws and the material development of smuggling. From 1725 until 1745 the duty on tea was 4 shillings per pound. Between 1726-30 and 1741-45 the average real price of tea fell from index 95 to index 78. Therefore, over the same period, the duty on tea rose from 84 % of net cost to 119 % of net cost, and in 1735 it actually represented 156 % of net cost (27). This meant that, if smuggled tea could be sold at the market price some 50 % to 60 % of the selling price could be distributed as profits among those involved in its smuggling. Thus, the revenue laws - the superstructure - imposing de facto « fixed » duties, coupled with a falling market price, created profits for a smuggling industry - the infrastructure - which naturally expanded in these circumstances. The same was true of sugar and tobacco.

(21) MASTERSON, *op. cit.*, p. 6.
(22) Section 3.
(23) MASTERSON, *op. cit.*, p. 7.
(24) 6 Geo. I., c. 21, Section 31.
(25) MASTERSON, *op. cit.*, pp. 15-17.
(26) COLE, W.A., « Trends in Eighteenth Century Smuggling » in W.E. MINCHINTON (Ed.), *The growth of English Overseas Trade in the 17th and 18th Centuries,* (London, 1969), pp. 121-143.
(27) *Ibid.*, p. 128.

In 1736 a new « hovering act » (28) created a jurisdiction of 2 leagues for any vessel hovering with goods on which duty had not been paid (29) and one of 4 leagues (30) for vessels of up to 100 tons taking in foreign goods at sea. The improvement in smuggling techniques meant that larger vessels were being used to run goods ashore and that the transfer was taking place further out from the coast. This development of the material infrastructure had necessitated a change in the legal superstructure. The class interests which lay behind the whole fiscal structure which, in turn, led to smuggling and thus the « hovering acts », were clearly stated by the Lord Chancellor in the debate on this act :

> « The imposing of any tax or duty, and allowing any man, [...] to escape paying that share of it which is due from him by law, is not only a breach of our duty towards our king and country, but a piece of injustice done to every particular man in the kingdom, who honestly and fairly contributes his share. Yea further, any sort of neglect in this particular [...] may likewise be called a sort of breach of the public faith; for as most of our duties, especially in the customs, are mortgaged, [...], to the creditors of the public, the allowing the produce of any of those duties to be diminished by fraudulent practices, [...], is the same with taking from them a part of that security which was given them by parliament [...] » (31).

The 1730's also saw commercial rivalry between Britain and Spain which led to war in the 1740's. British exporters were trying to break the Spanish monopoly of trade within the Spanish American Empire and the Spaniards were protecting it by searching and seizing British vessels at varying distances from the coast. While British politicians sought to deny Spain's right to act in this way they had to justify the ever-increasing jurisdiction which the « hovering acts » created around Britain. In a parliamentary debate, in 1739, the Earl of Illay sought to overcome this contradiction :

> « [...] the liberty which every nation enjoys, of searching, on suspicion of unlawful trade, the ships of foreigners that approach near to their coast without any necessity, is a liberty that is not only established by the law of nations, but is generally regulated by the particular laws or customs of each respective society. In this country it is established and regulated, not only by immemorial custom, but by several acts of parliament [...].
>
> « [...] it is absolutely necessary to make some sort of search, and we have always done so, without any nation having complained of our making, by such a practice, any encroachment upon the freedom of their navigation and commerce.
>
> « The case, my Lords, is the same with regard to smuggling [...] we have, by several acts of parliament, enforced and regulated the right we have by the law of nations, of searching, as well as visiting, such foreign ships as approach our coasts and give just cause for suspecting their being concerned in, or designed for carrying on any contraband trade [...].
>
> « Whether we ought to allow the Spaniards a right or privilege to search, upon just grounds of suspicion, any of our ships that shall approach their coasts without necessity, seems to be a question that may admit of some sort of difficulty. They may insist upon it, as a right derived to them from the law of nations, and confirmed by our

(28) 9 Geo. II., c. 35.
(29) *Ibid.*, Section 22.
(30) *Ibid.*, Section 23.
(31) *The Parliamentary History of England... to 1803* (Hansard), vol. IX, cols. 1241-2.

> own practices in similar cases; and it is a privilege which we may allow them, without acknowledging that they have anything like an *imperium maris,* with regard to the seas of America [...].
>
> « With regard to any liberty or privilege we may take with the ships of foreigners sailing upon the British seas, we may justly say, my Lords, that no argument can, from hence, be drawn in favour of any right the Spaniards may pretend to in the seas of America; because we have an *imperium* or dominion over the British seas, established to us by custom immemorial and acknowledged by almost all nations of Europe : whereas the Spaniards can pretend to no such *imperium* over the American seas, nor ought we to allow them to exercise any liberty or privilege that may be a foundation for their claiming such an *imperium* in any future time » (32).

This speech offers some interesting examples of the techniques of legal ideology applied to the justification of the « hovering acts ». By referring to the « liberty which every nation enjoys » to search foreign ships the orator gave an idealized image of international relations. Firstly, in 1739, there was no agreement in International Law as to whether such a right existed and, if it did, up to what distance from the shore it could be exercised. Secondly, this implied equality between states is contradicted by the final part of the above quotation, which seeks to establish a difference between British and Spanish rights in these matters. Thirdly, he stated in the first paragraph that the British had made such searches :

> « [...] without any nation having complained of our making, by such a practice, any encroachment upon the freedom of their navigation and commerce ».

This freedom of navigation, in fact, justified the monopoly held by the most powerful seafaring nations of the period, of which Britain was one, and which only benefited those nations having the means of effecting such liberties. In addition, it is not true to say that there had been no opposition to British claims of dominion over the British seas. Illay himself said that it was :

> « acknowledged by *almost* (33) all nations of Europe [...] »

This « almost » is crucial since in the 17th century the Dutch and the Scandinavians regularly opposed British pretensions to a monopoly of the exploitation of the British seas and these were the nations most directly affected by such pretensions (34).

Illay also referred to « immemorial custom » as a justification for searching foreign ships approaching the British coasts. This implies that a general practice had existed for centuries and had been generally accepted by all nations. It gives a false picture of international harmony in an area where discord dominates the history of these questions. The « several acts of parliament » to which he referred predated his speech by less than 50 years and were a direct consequence of the fiscal system established within that period. It was a fiscal system designed to expand and protect the interests of a

(32) *Ibid.*, vol. X, col. 1232.
(33) Emphasis added.
(34) See : RAESTAD, A., *La mer territoriale,* (Paris, 1913), pp. 72 et *seq.* SWARZTRAUBER, S.A., *The Three-Mile Limit of Territorial Seas,* (USA, 1972) pp. 18 et *seq.*

given social class, the overseas traders, and thus could not have been defended by « immemorial custom ». Lord Illay was using an abstract concept and applying it to different situations and reasoning in terms of categories. The initial pretension to dominion over the British seas was to prevent Dutch fishermen from fishing in them. Illay was applying this original concept to a new situation, namely the prevention of smuggling into Britain.

The wars of « Jenkin's Ear », 1739, and of the « Austrian Succession », 1740-48, were further examples of British colonial expansion, the cost of which was partly covered by an increase in the basic rate of import duties from 15 % to 20 % in 1747 (35). The cost of the Seven Years War, 1756-1763, was partly met by an increase of the basic import duty rate to 25 % in 1759 (36) and by the imposition of an import duty, in 1764, on sugar entering Britain's North American colonies (37). This led immediately to the smuggling of sugar into these colonies as is made obvious by the « hovering act » of 1764 (38) which applied a jurisdiction of 2 leagues off the coasts of Britain's North American colonies. In 1765 two new « hovering acts » were passed, the second of which (39) established a jurisdiction of 3 leagues around the Isle of Man, a notorious centre of smuggling activities. This shows that the extension of the legal jurisdiction - the superstructure - was in this case determined by the need to seize hovering vessels further out from the shore.

1750-1800 : A TRANSITION PERIOD IN INTERNATIONAL SOCIETY AND LAW

Between 1750 and 1815 there occurred an important shift in the dominant trend of International Law on the question of the extent of territorial waters. This period was dominated by naval wars, which made the question of neutral and belligerent rights paramount. As the emerging supreme naval and colonial power, Britain's interests demanded the greatest freedom for its merchant and naval fleets on the high seas and therefore the greatest possible limitation of the territorial waters of other states (40). However, to prevent the further growth of smuggling into Britain required an extension of British jurisdiction over its adjoining waters. These conflicting material developments held the potential of a contradictory British attitude to the development of International Law on this subject.

A « hovering act » of 1779 (41) increased the upper weight of vessels subject to forfeiture from 100 tons to 200 tons. Earlier legislation had led to technical innovations which allowed larger vessels to be used to run smug-

(35) DAVIS, *op. cit.*, p. 313.
(36) *Ibid.*, p. 313.
(37) ROBERTSON, R.M., *History of the American Economy,* (USA, 1973) pp. 90-91.
(38) 4 Geo. III, c. 15, Section 33.
(39) 5. Geo. III., c. 39, Section 7.
(40) See : O'CONNELL, D.P., International Law, (London, 1965) Vol. 1, pp. 525-527. POTTER, P.B., *The* Freedom *of the Seas,* (London, 1924) pp. 81 *et seq.*
(41) 19 Geo. III, c. 69.

gled goods ashore. In other words, elements of the legal superstructure had influenced the evolution of the material infrastructure. A House of Commons Committee investigated smuggling in 1784 and recommended three measures. It suggested extending jurisdiction to 4 leagues from the coast; applying sanctions to vessels specifically designed for smuggling and reducing the duties on tea (42). The « hovering act » (43) and the Commutation Act (44) of 1784 carried these proposals into law. Masterson wrote of these acts :

> « [...] all new legislation [...] was designed to reach smuggling on the high seas wherever it was carried on. As the smuggling vessels moved farther out to sea, new legislation went out to meet them. As new types of vessels were employed in this practice, they were brought within the forfeiture clauses of the new laws [...]. The laws were adjusted and re-adjusted to meet a nation's needs. There was no principal of International Law to which they were made to conform » (45).

The 1784 « hovering act » brought several types of smuggling craft into the 4 league jurisdiction. Technical development of such vessels had rendered necessary this adjustment of the legal superstructure. The criterion which determined whether vessels were subject to forfeiture was that they should « belong in whole or in part to British subjects » (46). Since British law only admitted wholly British-owned ships to the British registry, those vessels which were only owned in part by British subjects must have been foreign vessels. They must have been flying flags other than that of Britain and in International Law it is the flag of the vessel which determines its nationality. This provision was repeated in all subsequent « hovering acts » and will be pertinent to our analysis of them. The reason for including this clause was that English law required British shipowners to deposit a heavy bond which was forfeited if the vessel was found to be involved in smuggling. This legislation had led to the establishment of British-owned shipyards on the French coast which built vessels specially designed for smuggling and which were allowed to fly the French flag as long as at least one-third of the crew were French (47). Again the legal superstructure had provoked a change in the material infrastructure.

The period of the French Revolutionary Wars, 1793-1815, saw the crystallization of the 3-mile limit of territorial waters as Anglo-American policy. This limit applied, at this stage, to questions of belligerent and neutral rights and not to matters of revenue jurisdiction. These were also economic and trade wars. Both Britain and France hoped to gain ultimate victory by destroying the enemy's economy, especially its trade with third parties. The USA was the main neutral trading nation during these wars. As the main naval, colonial and industrial power, Britain sought to limit territorial waters

(42) *Parliamentary Papers from 1731 to 1800,* vol. 36, N° 60.
(43) 24 Geo. III, (2d Session) c. 47.
(44) *The Oxford History of England,* (Oxford, 1960), vol. 12, p. 288.
(45) MASTERSON, *op. cit.*, p. 58.
(46) *Ibid.*, p. 61.
(47) *Ibid.*, p. 63.

as narrowly as possible. Its vessels could thus take the shortest route to foreign ports, especially through narrow straits. Its blocading vessels could approach as near as possible enemy ports and could capture and destroy neutral shipping trading with the enemy, over as wide an area of sea as possible. The only contradiction to this policy was the revenue jurisdiction. While a narrow stretch of territorial waters off foreign coasts would aid the smuggling of British-manufactured goods into European and South American markets, a wider jurisdiction was needed off the British coast. The wars were partly financed by increased import duties and this encouraged smuggling into Britain, which could only be combatted by a wide anti-hovering jurisdiction. It was thus necessary for Britain to establish revenue jurisdiction as an exception to the general rule of the 3-mile limit.

Between 1781 and 1789 the USA were a confederation of states, each one establishing its own customs duties and maritime jurisdictions. The outbreak of war in 1793 forced President Washington to fix a provisional 3-mile limit to the USA's territorial waters and an act of 1794 (48) confirmed this in law. In 1790 an act (49) had created a 4 league jurisdiction off the US coast within which the unlading of goods was illegal and the main American « hovering act », that of 1799 (50), maintained 4 leagues as the American limit of revenue jurisdiction.

In 1794 a new British « hovering act » (51) extended jurisdiction off certain defined parts of the coast to distances which, in some cases, were 50 miles from land. Unlike those parts of the British coast facing the Channel, these areas had wide stretches of open sea before them and were thus harder to police from a revenue point of view. In 1802 the anti-hovering jurisdiction was doubled to 8 leagues from the coast (52) for ships of all nationalities.

In 1804 we find the first major statement of Anglo-American jurisprudence which seeks to justify the « hovering acts » as being compatible with International Law. In the subsequently often-quoted case of *Church v. Hubbart,* concerning the capture of an American vessel 4 or 5 leagues from the Brazilian coast, for illicit trading, the US Chief Justice Marshall, delivered a unanimous opinion which contained the following points :

> « [...] its [a nation's] power to secure itself from injury, may certainly be exercised beyond the limits of its territory ».
>
> « [...] so, too, a nation has a right to prohibit any commerce with its colonies. Any attempt to violate the laws made to protect this right is an injury to itself, which it may prevent and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be

(48) Section 6, Act of June 5, 1794, *1 Stat. at Large,* 384.
(49) *1 Stat. at Large,* 2d Session, c. 35.
(50) *Ibid.,* 3d Session, 1799, c. 22, p. 627.
(51) 34 Geo. III, c. 50.
(52) 42 Geo. III, c. 82.

> submitted to. In different seas and on different coasts a wider or more contracted range in which to exercise the vigilance of the government will be assented to. Thus in the channel, where a very great part of the commerce to and from all the north of Europe passes through a very narrow sea, the seizure of vessels on suspicion of attempting illicit trade must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels but for the purpose of illicit trade, the vigilance of the government may be extended somewhat further, and foreign nations submit to such regulations as are reasonable in themselves and are really necessary to secure that monopoly of colonial commerce which is claimed by all nations holding distant possessions.
>
> If this right be extended too far, the exercise of it will be resisted. It has occasioned long and frequent contests, which have sometimes ended in open war. The English [...] complained of the right claimed by Spain to search their vessels on the high seas, which was carried so far that the *guarda costas* of that nation, seized vessels not in the neighbourhood of their coasts [...]. The right of the Spaniards was supposed to be exercised unreasonably and vexatiously, but it never was contended that it could only be exercised within the range of the cannon from their batteries. Indeed the right given to our own revenue cutters, to visit vessels four leagues from our coast, is declaration that in the opinion of the American government, no such principal as that contended for, has a real existence » (53).

Marshall created an abstract concept - « defence of a state's interests » - and applied it to different real situations. Therefore, he was guilty of the ideological legal technique of abstraction of the content of legal concepts. He also established subjective criteria - « non-vexation of foreign commerce », « reasonableness » and « necessity » - to determine whether the exercise of a given jurisdiction beyond territorial waters was valid. Establishing the content of these criteria depends on the balance of power between nations and usually it is the defence of the interests of the most powerful which determines the content of such criteria.

When Marshall referred to a nation's right « to secure itself from injury » he was guilty of finding a source of a clear conscience by idealizing a moral value. He who breaks the law injures the innocent nation ! The nation is portrayed as a whole rather than as a group of conflicting classes. The laws are not portrayed as rules imposing a form of conduct which furthers the interests of a given class, as the British and American import duties and anti-smuggling laws were. He ignored the fact that the power to search foreign vessels on the high seas was used by the principal naval powers to police international waters. Finally, Marshall argued that the width of the sea should influence the extent of revenue jurisdiction. Perhaps he was influenced by the fact that, in 1804, the USA was the main neutral state trading with France and Britain and that, as such, its interests were furthered by limiting the maritime jurisdiction of those two states.

In 1805 a further « hovering act » (54) created jurisdictions of up to 100 leagues from the British coasts. On April 5th, 1805, the Chancellor of the Exchequer, William Pitt, introduced the bill and said :

(53) (1804) 2 Cranch. 187, 234; 2 L. Ed. 249.
(54) 45 Geo. III, c. 121.

« We had clearly a right to make any provision we pleased with regard to the navigation of our own seas by our own subjects » (55).

Pitt ignored the fact that a distance of 100 leagues from the British coast covered the whole of the Channel, the North Sea and parts of the Atlantic Ocean. These international waterways were abusively described as « our own seas ». At a time of war such legislation would be very useful to the British navy as a means of stopping shipping and policing the high seas. The bill Pitt introduced was passed unamended and the act provided for the seizure of certain defined vessels « belonging in whole or in part to His Majesty's subjects or whereof one-half the persons on board were such subjects... if found or discovered to have been within the British or Irish Channels, or elsewhere on the high seas within 100 leagues of the coasts of Great Britain or Ireland » (56). There can be no doubt therefore that this legislation applied to foreign vessels and foreign subjects, in contradiction to Pitt's statement. The act also imposed a sentence of 5 years service in the Royal Navy on any British subject arrested on such vessels. In this way experienced seamen were found to fight Britain's naval wars.

In 1808 the US Supreme Court declared illegal the capture of an American vessel 10 leagues from the coast for a breach of French municipal law. In this case, *Rose v. Himley,* Justice Johnson considered the seizure legal and, in his minority opinion, he gave the 1784 British « hovering act » as an example of an accepted municipal law creating jurisdiction beyond the 3-mile limit. He said :

« In support of my latter position, both principle, and the practice of Great Britain and our own government may be appealed to.

The ocean is the common jurisdiction of all sovereign powers; from which it does not result that their powers upon the ocean exist in a state of suspension or equipoise, but that every power is at liberty upon the ocean to exercise its sovereign right, provided it does no act inconsistent with that general equality of nations which exists upon the ocean. The seizure of a ship upon the high seas, after she has committed an act of forfeiture within a territory, is not inconsistent with the sovereign rights of the nation to which she belongs, because it is the law of reason and the general understanding of nations, that the offending individual forfeits his claim to protection, and every nation is the legal avenger of its own wrongs. Within their jurisdictional limits the rights of sovereignty are exclusive : upon the ocean they are concurrent. Whatever the great principle of self-defence in its reasonableness and necessary exercise will sanction in an individual in a state of nature, nations may lawfully perform upon the ocean. This principle, as well as most others, may be carried to an unreasonable extent; it may be made the pretence instead of the real ground of aggression, and then it will become a just cause of war. I contend only for its reasonable exercise. The act of Great Britain, of the 24 Geo III C 47 is predicated upon these principles. It subjects vessels to seizure, which approach with certain cargoes on board, within the distance of four leagues of her coast, because it would be difficult, if not impossible to execute her trade laws, if they were suffered to approach nearer in the prosecution of an illicit design. But if they have been within that distance, they are afterwards subject to be

(55) *Parliamentary Debates,* (Hansard), 1805, vol. 4, col. 224.
(56) MASTERSON, *op. cit.*, p. 77.

> seized on the high seas. They have then violated her laws and have forfeited the protection of their sovereign » (57).

In referring to the equality of nations upon the high seas, Johnson was conveying an idealized image of international relations. « Equality of nations » was a basic rule of International Law which was not in conformity with reality, for equality only existed for those nations possessing the means of exercising it. Both the « law of reason » and the « general understanding of nations » are ideological terms which hide the fact that it is the « reason » and the « understanding » of the most powerful which prevail. One cannot deduce acceptance of such criteria from the silence of weaker nations.

By arguing that whatever Municipal Law permits the individual to do in his self-defence, International Law permits nations to do on the oceans, Johnson was idealizing a doctrinal concept. In applying a concept of Municipal Law to International Law, without stating that in the latter it has a specific meaning, he was falsely implying that international and internal society are the same. Johnson referred to the British « hovering acts » in terms of a 4 league jurisdiction when at that time they applied a 100 league jurisdiction. He argued that those who had broken the British revenue laws had « forfeited the protection of their sovereign ». This was only true in as far as « their sovereign » was materially weaker than the British « sovereign » and therefore did not dare to challenge the British « hovering acts ». When British vessels had acted in this way against Spanish laws they did not forfeit the protection of the British State.

Perhaps the most important declaration on the subject of the « hovering acts » is the judgement of Sir William Scott in *Le Louis* in 1817. Not only was this case quoted regularly thereafter, but this judge's decisions in matters of prize law during the Napoleonic Wars were instrumental in establishing the 3-mile limit in International Law. In 1911 Fulton wrote :

> « It is not too much to say, that the 3-mile boundary, in its origin and development is an Anglo-American doctrine, its authors being Washington and Lord Stowell [Sir William Scott] » (58).

In this case, concerning the capture of a French slave-trading vessel 10 or 12 leagues off Sierra Leone, Scott said :

> « Upon the first question, whether the right of search exists in time of peace, I have to observe, that two principles of public law are generally recognized as fundamental. One is the perfect equality and entire independence of all distinct states [...]. The second is, that all nations being equal, all have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation [...]. No one state, or any of its subjects, has a right to assume or exercise authority over the subjects of another. I can find no authority that gives the right of interruption to the navigation of states in amity upon the high seas, excepting that which the rights of war give to both belligerents against neutrals. This right [...] has been fully established in the legal practice of nations, having for its foundation the necessities of self defence [...].
>
> [...] If it be asked why the right of search does not exist in time of peace [...] the answer is [...] it has not the same foundation [...] - the necessities of self-defence.

(57) (1808) 4 Cranch. 241.
(58) FULTON, T.W., *The Sovereignty of the Sea,* (London, 1911), p. 681.

> [...] Upon a principle much more just in itself and more temperately applied, maritime states have claimed a right of visitation and enquiry within those parts of the ocean adjoining their shores, which the common courtesy of nations has for their common convenience allowed to be considered, as parts of their dominions for various domestic purposes, and particularly for fiscal or defensive regulations more immediately affecting their safety and welfare. Such are our hovering laws, which within certain limited distances more or less moderately assigned, subject foreign vessels to such examination. This has nothing in common with a right of visitation and search upon the unappropriated parts of the ocean. A recent Swedish claim of examination on the high seas, though confined to foreign ships bound to Swedish ports and accompanied [...] with a disclaimer of all rights of visitation, was resisted by our Government, and was finally withdrawn » (59).

The argument of the « necessities of self-defence » which Scott used applied equally to the necessities of the neutral nations whose commerce was interfered with, i.e. the defence of their material interests. Like Johnson in *Rose v. Himley* (60), Scott borrowed this concept of Municipal Law and applied it indiscriminately to International Law. This is an example of advancing apparently honourable reasons for breaking a rule of International Law, to the benefit of the interests of a powerful nation. Scott argued that in peacetime there was no right of visitation on the high seas as there was no necessity of self-defence. As Britain possessed the most powerful merchant navy, he needed to assure her freedom from visitation by other nations, especially as the latter were becoming more protectionist.

In 1817 Britain was exercising a revenue jurisdiction of up to 100 leagues from its coasts (61). Scott contradicted this reality when he said, « this has nothing in common with a right of visitation and search upon the unappropriated parts of the ocean ». He used « the common courtesy of nations for their common convenience » to justify these laws. International relations are not matters of « common courtesy ». They are a matter of conflicting interests and forces and, usually, the imposition, sometimes courteously, sometimes rudely, of the will of the most powerful. Since the interests of nations are conflictual, the notion of « common convenience » contradicts reality. He was guilty of using the technique of idealization. « Common courtesy and convenience » evoke an image of going beyond the real selfishness of nations to some transcendental state of affairs, presented as desirable. Scott proved that he was applying an ideological image by his reference to Sweden's unsuccessful pretensions.

WHY THE BRITISH « HOVERING ACTS » BECAME SUPERFLUOUS IN THE 19th CENTURY

1800 to 1825 has been described as the « golden age of smuggling » (62). This was so because British import duties remained high and the growth of

(59) 2 Dodson Adm. Rep. 210, 245.
(60) *Supra.* pp. 447-448.
(61) *Supra.* p. 446.
(62) MASTERSON, *op. cit.*, p. 72.

the British market made smuggling very profitable. However, after 1815 a new trend emerged. The British Empire was unrivalled, as were her industrial and naval power. These three elements of the material infrastructure influenced various aspects of the legal and ideological superstructure. There were to be no major naval and colonial wars to be fought and so government expenditure did not increase as it had over the preceding 150 years. Stable expenditure meant stable revenue needs. The need to maintain import duties for revenue purposes was less urgent and they could be reduced if other sources of revenue could be found and other factors favoured their reduction. The use of income tax during the Napoleonic Wars had shown that such an alternative did exist. British industry no longer needed protection in its own market and lower prices of untaxed, imported consumer goods might reduce the wage demands of the new industrial working class. Larger export markets could be won if foreign producers of food and raw materials had free access to the British market. The ideology of « free trade » confirms Marx's view that « the ideal is nothing other than the material when it has been transposed and translated inside the human head » (63). This explains why Britain became the champion of the interrelated theories of « free trade », « freedom of navigation » and the « 3-mile limit of territorial waters ». Between 1823 and 1850 the British tariff system was largely abolished and smuggling virtually disappeared. However, the superstructure often lags behind the progress of the infrastructure as the continued existence of the « hovering acts » after the 1840's shows.

In 1826 a new « hovering act » was passed (64). A fine could be imposed for breaking bulk within 4 leagues of the coast. The jurisdictions of 2 and 3 leagues and over the « King's Chambers » were abolished. Foreign vessels were made subject to forfeiture under three types of jurisdiction. Firstly, if they were found within or found to have been within 4 leagues of certain parts of the coast or 8 leagues of other parts, they were subject to forfeiture, in some cases if one-half of the persons aboard were British subjects, in other cases if only one person aboard was British and in yet other cases if the vessel was wholly or partly British-owned. Secondly, if found within 100 leagues of the British coast they were subject to forfeiture only when one-half of the persons aboard were British or if the vessel was wholly or partly Bri tish-owned, if goods were thrown overboard or destroyed to prevent seizure of the vessel when chase was given or signal was made to bring to. Finally, if foreign vessels were wholly foreign-owned and there was no British subject aboard, the « hovering acts » only applied to them up to one league from the British coast.

This act was an attempt to reconcile Britain's anti-smuggling needs with its championing of the 3-mile limit. This reconciliation was achieved by using the nationality of the owners and of the persons aboard as the criterion for establishing jurisdiction beyond the 3-mile limit. However, in International

(63) Preface to the 2nd Ed. of *Capital,* 1873.
(64) 6 Geo. IV, c. 107.

Law it is the flag which the vessel flies which determines its nationality. Thus this was a case of false qualification, i.e. the use by a dominant group in international society of a concept, which it had moulded itself, in a way which contradicts the usual meaning given to it.

In 1836 the British Advocate General, John Dodson, questioned the validity of the « hovering acts » in International Law. He wrote :

> « It is true that our own statute law (3 & 4 Wm 4 ch 53) [an act of 1833 codifying the « hovering acts »] purports to authorize under certain circumstances the detention of Foreign Ships in some cases as far as *Eight Leagues* and in others to the extent of even one hundred Leagues from the Coasts of this Kingdom. These distances are certainly greater than can be warranted by what I humbly conceive to be the true and correct Rule of the Law of Nations on the subject. But it must be observed that the Statute is not, in this respect, applicable to vessels purely and altogether Foreign, nor does it order their detention unless a character in some degree British is imposed upon them either by being British Owned or by having British Subjects on Board; whether a Foreign Government might not have just ground of complaint if the Provisions of this Statute should be enforced against the Vessels of its Subjects merely because the crew may be in part composed of British subjects is a Question upon which I would be most unwilling to express an opinion [...] (65).

Dodson referred to the argument that the « hovering acts » only applied to foreign vessels which had British subjects on board or were in some way British-owned but he equally doubted that this argument would stand up if challenged. This text shows the coexistence of two conflicting legal ideologies. On the one hand, there is the affirmation of the supremacy of the new doctrine of the 3-mile limit, which reflects the interests of 19th century industrialized Britain. On the other hand, the « hovering acts », representing the 18th century interests of the rising merchant class, are still defended, if somewhat artificially.

In 1850, a French smuggling vessel, the *Petit-Jules,* entirely French-owned, with 8 Frenchmen and 3 Britons aboard, was seized about 25 miles from the British shore and the same John Dodson wrote the following opinion on this arrest :

> « [...] it is now generally understood and admitted, that the Territory of a country within which the Rights of Sovereignty may be exercised, extends to a distance of Three Miles from the Shore, and that it would be an unwarrantable assumption of Power, against which other Nations would have a right to remonstrate, if a Government were to attempt to enforce its Municipal Regulations beyond those Limits. I am, therefore, of opinion that the seizure of the French Vessel, the *Petit-Jules,* upon the High Seas at a distance of not less than Twenty Three Miles from the English Coast, was not warranted by the Law of Nations, [...] (66).

Dodson was now unequivocal in his view that the « hovering acts » were in contravention of International Law. On the basis of Dodson's opinion, the Treasury instructed the Board of Customs to stop making such seizures beyond the 3-mile limit. The latter resisted this instruction, arguing that without such seizures the anti-smuggling legislation would be ineffective and

(65) LORD MCNAIR, *International Law Opinions,* (Cambridge, 1956), vol. 1, pp. 230-231.
(66) *Ibid.*, p. 232.

the government's revenue would suffer. In 1851, the Treasury seriously considered repealing the « hovering acts » but the resistance of the Board of Customs prevailed (67).

In 1835 a new « hovering act » (68) added a 3 league jurisdiction for vessels of all nationalities to the existing 1, 4, 8 and 100 league jurisdictions. Between 1850 and 1876 there was a conflict within the British Government over the compatibility of the « hovering acts » with International Law and the expediency of abolishing them. In 1830 Spain had passed a law defining smuggling as the « mere approach within six miles of the Spanish coast by any vessel under 200 tons that had on board any dutiable goods » (69). In the 1840's use of the Royal Navy's power enabled Britain to force Spain not to apply this legislation. In 1853 the capture of British vessels off the Spanish coast again rendered this matter urgent. It is in this context that we should understand the two opinions given by Dodson (70) and the questioning of the expediency of the « hovering acts ». The dispute with Spain continued until the 1880's as the Spaniards tried to apply the 6-mile jurisdiction to their South American possessions.

Apart from the case of the *Petit-Jules* there were further examples of the arrest of French smuggling vessels at distances beyond the 3-mile limit (71). In 1859 the Foreign Office twice raised the question of the extent of British revenue jurisdiction. On the first occasion the Coast Guard Office replied referring to the jurisdictions of 1, 3, 4 and 8 leagues but ignored the 100 league jurisdiction. In reply to the second enquiry the Solicitor of the Board of Customs again failed to note the 100 league jurisdiction. He also argued that existing legislation « did not touch foreign vessels beyond the « national league » unless there was something to identify them with British sail, such as being wholly or partly British-owned or manned » (72). He was guilty of misusing International Law to suit the purposes of his argument by not referring to the flag of the vessel as the factor determining its nationality. He justified the « hovering acts » in terms of International Law on the basis that « they had, from a very early period formed part of the Customs Code and that no complaint had ever been made by any foreign power either of their existence or of the exercise of them, possibly for the obvious reason that they have never been brought to bear upon any but smuggling craft in flagrante delicto. « He added that it would be « straining the high principles and policy of International Law to hold that in such cases the prevention of a known premeditated infraction of municipal law would meet with opposition by any civilised country » (73). The civil servant who wrote this letter was presenting an image that did not correspond to reality. Was not a most « civilised

(67) MASTERSON, *op. cit.*, p. 133.
(68) 16 & 17 Vict., c. 107.
(69) SWARZTRAUBER, *op. cit.*, p. 90.
(70) *Supra.* p. 451.
(71) MASTERSON, *op. cit.*, pp. 120-135.
(72) *Ibid.*, pp. 139-140.
(73) *Ibid.*, p. 140.

country », namely Britain, conniving with its citizens to overcome the prevention of premeditated infractions of Municipal Law when it used diplomatic and naval pressure to enable them to break Spain's 6-mile revenue jurisdiction ?

During the second half of the 19th century leading experts in International Law began to discuss the « hovering acts » in their works. In 1861, Sir Travers Twiss wrote :

> « Great Britain, however, did not contend that British vessels actually engaged in illicit trade were entitled to pass unmolested by the revenue cruisers of Spain until they came within the maritime jurisdiction of that country, but she maintained that Spain enforced her right of search for the protection of her commerce with her colonies in an unreasonable and vexatious manner ».
>
> « It is only under the Comity of Nations in matters of trade and health, that a State can venture to enforce any portion of her Civil Law against foreign vessels, which have not yet come within the limits of her maritime jurisdiction ».
>
> « If, indeed, the Revenue Laws [...] of a state should be such as to vex and harass unnecessarily foreign commerce, foreign nations will resist their exercise. If, on the other hand, they are reasonable and necessary they will be deferred to *ob reciprocam utilitatem* » (74).

Thus, for Twiss, when Spain applied a « hovering » jurisdiction against British vessels it was guilty of acting in « an unreasonable and vexatious manner ». When Britain applied the same type of jurisdiction foreign powers did not object because its vessels had acted with « *mala fides* and consequently [...] forfeited all just claim to the protection of their Nation » (75). The real difference was that Britain had the power to prevent Spain from applying the law while no other power had the means of preventing Britain from doing so.

In 1865, the Solicitor to the Board of Customs was asked to comment on the « hovering acts » and he wrote :

> « [...] that he was not so satisfied as the Board of Trade that the laws were at variance with the alleged principles of International Law or that they ought to be sacrificed to some supposed incongruity with the non-written doctrines of the Law of Nations, the creatures of expediency and common consent undefined by statute and varying with circumstances.
>
> It was not so clear that a known wrongdoer apprehended in the act is not rightful prize, though taken on the common highway of nations; [...] » (76).

This is an example of the autonomy of the legal element. If one considers the state as an abstract element of the superstructure, the need to maintain itself as a state structure explains why certain legal rules, in this case the « hovering acts », are supported although they are in contradiction with the ideology officially enunciated by that state, in this case, the freedom of navigation and the 3-mile limit.

(74) TWISS, Sir T., *The Law of Nations,* (Oxford, 1861) p. 261 et *seq.*
(75) JESSUP, P.C., *The Law of Territorial Waters & Maritime Jurisdiction,* (N.Y., 1927), p. 95.
(76) MASTERSON, *op. cit.*, p. 143.

In 1874-75 the Spanish problem again became acute. The Spanish government officially cited the British « hovering acts » as justification for its claim to a 6-mile revenue jurisdiction. The British Foreign Office sought an internal government opinion on the workings of the « hovering acts ». In its reply the Board of Customs repeated the same arguments as it had advanced over the previous 25 years and no further action was taken (77). By 1876 it was clear that, at least, the 8 and 100 league jurisdictions were no longer necessary and the Customs Consolidation Act of that year only maintained the 1, 3 and 4 league jurisdictions (78). Foreign vessels were thus still subject to seizure beyond the 3-mile limit. Subsequent British governments were to claim that the 1876 act abolished the « hovering acts » and brought British Municipal Law into conformity with International Law (79). If by this they meant that British revenue jurisdiction did not apply to foreign vessels beyond the 3-mile limit, then they were terminologically inexact.

ATTITUDES ON CUSTOMS JURISDICTIONS AFTER 1876

After 1876 the main naval powers maintained a maximum of 4 leagues for their revenue jurisdictions. However, their other interests forced them to support the 3-mile limit as the basic rule of International Law. Their spokesmen sought to reconcile these two facts. The « hovering acts » were referred to at the Bering Sea Arbitration in 1893. The US government argued that they were an example of a jurisdiction beyond the 3-mile limit which was accepted as a peacetime right in International Law, since a State might undertake any act of « self-defence » or « self-preservation » which it conceived necessary to protect its property and its interests (80). The USA was not consistent in its application of this principle. It applied it to its own actions but when, in 1879, Mexican ships had attacked American vessels allegedly involved in breaking that country's revenue laws, at a distance of more than 3-miles from the coast, the US Secretary of State, Mr. Evart, described the act as « an international offense » (81).

In reply to the American argument, the British representative argued that « self-defence » was a notion limited in International Law to wartime and even then it was subject to « very clear limitations ». According to him, the « hovering acts » rested « on the principle that no civilised State will encourage offenses against laws of other states the justice of which it recognizes » (82). His argument was based on the premise that all States were free to judge the « justice » of the laws of other States. This was true of powerful States like Britain and we have seen how they were able to force weaker States like Spain to not apply laws which they considered « unjust »,

(77) *Ibid.*, pp. 144-149.
(78) 39 & 40 Vict., c. 36.
(79) JESSUP, *op. cit.*, p. 283.
(80) MOORE's, *International Arbitrations,* (Washington, 1898), vol. 1, p. 892.
(81) JESSUP, *op. cit.*, p. 80.
(82) MOORE's, *International Arbitrations, op. cit.*, p. 892 et *seq.*

i.e. harmful to British interests (83). However, the weaker States were unable to judge the « justice » of the major powers' « hovering acts ».

In 1909 the Russian government issued a decree establishing a 12-mile customs zone and had the temerity to accompany it with « an absolute denial of the three-mile limit as a rule of International Law » (84). The British government, on whose statute books there stood a law which contained a similar revenue jurisdiction, contended that the decree was « contrary to the principles of International Law » (85). The Russian government had argued :

> « The question of the 3-mile limit has been given widely different solutions either by international treaties or the municipal laws of a state, and very often in an unequal manner for the various protected interests [...] »
>
> « Thus an examination of the laws dealing with the question shows that a great many States in Europe and America exercise undisputed jurisdiction within limits that exceed the so-called ordinary zone of three nautical miles ».
>
> « The jurisdiction of British officers in all customs and quarantine cases also covers [...] a 4-marine-league zone » (86).

After 1919 prohibition in the USA made « hovering » legislation topical again. As a major exporter of spirits, Britain was directly affected and British vessels were subject to seizure beyond 3 miles from the American coast. In 1922, in *Grace and Ruby,* Judge Morton justified the seizure of a liquor-smuggling vessel beyond the 3-mile limit basing himself mainly on the arguments of Marshall in *Church v. Hubbart.* He argued that the court « was not asserting a right generally of search and seizure on the high seas but only a limited power exercised in the waters adjacent to our coast over vessels which have broken our laws » (87). Since the prohibition laws gave a jurisdiction to check vessels suspected of intending to smuggle liquor before they entered American territorial waters, Morton gave a false impression that this jurisdiction was only ex-post facto.

The prohibition laws caused so much friction that, in 1923, the US government proposed to settle the matter by treaty. It proposed « a reciprocal right of search within twelve geographical miles off the coast of all private vessels, for the purpose of ascertaining whether the vessel was engaged in smuggling activities » (88). In its reply the British government opposed such a treaty because it would weaken the principle of the 3-mile limit as « it would form a precedent for the conclusion of further similar treaties until finally the principle would become a dead letter. » « Reference was made to the « hovering acts » and it was at this point that the British government claimed that they had been superseded by the 1876 Customs Consolidation Act, « by which British Municipal Law is made to conform with international

(83) *Supra.* p. 452.
(84) JESSUP, *op. cit.*, p. 87.
(85) *Ibid.*, p. 87.
(86) MASTERSON, *op. cit.*, pp. 288-289.
(87) JESSUP, *op. cit.*, p. 244.
(88) *Ibid.*, p. 283.

law » (89). We have shown that this statement is ambiguous (90). What is clear is that once a major power, like the USA, finds that the principle that it supports is an embarrassment to it, as the 3-mile rule had become, it finds ways of breaching that principle. An opposing power, as Britain was in this case, will use the same legal principle to support its own interests. To deal with its own embarrassment, namely the « hovering acts », Britain was prepared to stretch truthfulness to the limit by implying that they had been repealed in respect of foreign vessels beyond the 3-mile limit.

III. CONCLUSION

The initial aim of this study was to discover the true nature of the « interests » which the British « hovering acts » defended. These interests were usually portrayed as being the revenue interests of the British State. To a certain degree this is an accurate picture of what really occurred. Smugglers did deprive the British State of revenues. However, stopping the analysis at this point gives an incomplete picture of what happened in 18th and 19th century Great Britain.

The British State needed these revenues because it had financed a series of overseas wars by borrowing. There was a link between the nature of those wars, the main social group from which the State borrowed, and the political balance of forces in Great Britain. The British State had to fight those wars because the overseas expansion of its merchant classes came into conflict with that of other European merchant classes. The merchant classes had both an interest in the successful prosecution of those wars and the material means to finance them. Thus they lent willingly to the State for this purpose but insisted upon guaranties for the repayment of their loans. The political balance of forces was such that the State could not obtain revenues from the landed-aristocracy and was, therefore, forced to turn to import duties on items of mass-consumption.

The whole history of British colonial expansion is extremely complex. The commercial, industrial, demographic, political and ideological factors all played interacting roles. However, all of the various leading authorities on British colonial history whose works we have consulted, and some of which we have cited above, agree that the interests of the British merchant classes were of primary importance. This is not to say that these classes were the only ones to benefit from the establishment of the British Empire.

We are drawn to the conclusion that it is an error to study the British « hovering acts » in isolation. They form part of a legal framework which was historically determined and entirely coherent. The other element of this legal structure which must be taken into account was the fiscal element. The

(89) *Supra.* p. 454.
(90) *Ibid.*

British « hovering acts » must be seen as the consequence of a, perhaps, excessively high level of import duties which, almost inevitably stimulated smuggling - which is, in reality, merely a form of fiscal fraud. In this context, the dialectical relation between the law and the smuggling industry became apparent during the course of our study.

From the point of view of International Law we can see that, in this particular case, the protection of customs revenue at ever-greater distances from the shore was the result of a highly complex process, which went much deeper than the mere repression of smuggling. This fundamental element in the constitution of the concept of the contiguous zone has specific historical origins which we have set out to clarify. At the time of the enactment of the British « hovering acts » they were not in contradiction with International Law since the 3-mile limit of territorial waters was not yet an accepted rule.

In order to understand the desuetude and repeal of these laws, we undertook a similar examination of the economic, social, political and ideological context of 19th century Great Britain. One can only grasp the decline in smuggling if one understands why Britain abolished its system of import duties. The reasons which we have suggested which lay behind this abolition also explain why the 3-mile limit of territorial waters became Anglo-American policy in the 19th century. The International Law concept of the contiguous zone is only relevant if the extent of territorial waters is limited, say to 3 miles, and our study has shown how the practical needs of those States which applied customs tariffs led to the concept of the contiguous zone, which was ultimately fixed by the 1958 Geneva Convention.

The second purpose which we set ourself was to analyze how the British « hovering acts » were presented and justified. Our study has brought to light some of the legal ideological techniques which were used in this respect. Apart from one speech by the Lord Chancellor in 1736, we have not been able to find an example of an explanation of these laws in terms of the economic and social interests which lay behind them. Invariably they were explained in terms of the interests of the State, as if this legal institution existed in an economic and social vacuum.

From a theoretical point of view, our study analysed the legal concepts used to justify this legislation. We found cases of the use of concepts of International Law as abstractions, as sources of a clear conscience and in idealized forms. Abstraction was achieved either by using a general or abstract concept for different realities, thus forgetting what is real and reasoning in terms of categories, or by applying it to a unique situation. The concepts of International Law were used as a source of a clear conscience in respect of the British « hovering acts », thus enabling those who manipulated these concepts to hide their real intentions.

Idealization of the concepts of International Law was achieved in three ways. Firstly, the values transmitted in abstract concepts gave an idealized image of the nature of international relations. Secondly, doctrinal concepts were idealized by applying Municipal Law terms to International Law as if

international society were the same as national society. Thirdly, the fundamental rules of International Law were used to give an idealized image of reality.

We also discovered cases of the abusive qualification of certain situations, that is to say, the use of a concept of International Law in such a way as to mask the aims of those using it. In addition, we encountered examples of the fictitious qualification of some situations whereby they were qualified so as to further particular interests. Finally, we came across a case of the legal aspect-namely the State-acquiring a certain autonomy so that its need to maintain itself caused it to act in contradiction with the ideology which it was proclaiming at that time (91).

(91) For the theoretical aspects of this article see :
Réalités du droit international contemporain. vol 2.
La relation du droit international avec la structure économiue et sociale, Actes de la quatrième rencontre de Reims.
Reims, Faculté de Droit, Centre d'études des relations internationales. (1978).