Chapter Two. Shaping of a Prerogative, 1831–1863

I. Introduction

The State practice of reprisals prior to the nineteenth century had mainly led to the obliteration of the significance of the ancient law of reprisals. The weight of national policy in the decision to resort to reprisals gained ascendency over the strict observance of some rules. Therefore, there was, in a way, a gap between State practice and doctrine as lawyers sometimes still emphasised the importance of some requirements like a denial of justice. Moreover, the difference between war and reprisals was almost non-existent. It was in this context that Vattel warned against the practice that prevailed in his days, around the middle of the eighteenth century. Although he regarded reprisals as a milder means than war and thus maintained that they had to be preferred over the latter measure whenever possible, he did not fail to observe that the employment of reprisals against a Power of equal strength was almost impossible without creating a state of war. However, between 1831 and 1863, reprisals were actually about to become a measure claimed to be consistent with peace and employed only by great Powers against small and weak States against which the enterprise of war was not worthwhile.

The present chapter argues that, during those three decades when the frequency of occurrences of acts of coercion classified as reprisals was high, the State practice of the great Powers shaped armed reprisals into a privilege in international law. Indeed, by playing on the asymmetric power relation existing to their advantage, the great Powers claimed the non-interruption of peace while at the same time using a vast amount of force as a form of coercion, even the kind of violence typically confined to wartime. Reprisals were an alternative to war, but reserved only to the strongest countries acting against weaker States. If the conditions of power relations were different —viz, when the target country was of equal or superior strength as the reprisal-taking State—, the employment of reprisals involving armed force would inexorably be treated as an act of war and then lead to open warfare. The resort to armed reprisals was consequently reserved to a limited group of countries, i.e. those that always had the upper hand when an issue occurred with a weaker State: the great Powers.

II. Asymmetric Power Relation

1. Portrait of Target Countries

(a) Preliminary Observation: 'Reprisal Clause' in Bilateral Treaties

Until the end of the eighteenth century, bilateral treaties of peace and commerce between European States systematically included a standard clause that governed the lawful use of reprisals between them.[266] Nonetheless, by the turn of the next century, this practice was discontinued, at least between Western Powers.[267]

In the course of the nineteenth century, Western Powers and the newly founded Latin American countries concluded amongst themselves many bilateral treaties of amity and peace which were modelled on the U.S.–French treaty of peace, friendship and commerce of 30 September 1800.[268]

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266 Cf. Stephen C. Neff, *Justice among Nations*: *A History of International Law* (Cambridge, Mass.: HUP, 2014), 202.

267 Indeed, the standard clause is nowhere to be found in Georg Friedrich von Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent*, 16 vols. (Göttingen: Dans la librairie de Dieterich, 1817–1842). However, there were still occasional references to reprisals in some treaties between Western Powers, such as Art. 11 of a project of convention in 1825 between Spain and the United States (Great Britain, F. O., *BFSP 1830–1831* (18th vol.; London: James Ridgway, 1833), 6f.). But this kind of mention became more seldom as the nineteenth century moved on. Quite peculiar in this respect are the custom union treaties between German principalities which stipulated the adoption of measures of reprisals or retorsion (mostly in the form of an increase of custom duties), either by the union as a whole or by each Member State separately, against non-Member States. See, e.g., Art. 9 and 18 of the Treaty of Kassel, 24 September 1828: Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent* (above, n. 267), VII/2, 697f. and 701; Separate Article 20 Para. 3 to Art. 39 of the Treaty of Berlin, 4 April 1853: Great Britain, F. O., *BFSP 1855–1856* (46th vol.; London: William Ridgway, 1865), 1176.

268 Alejandro Álvarez, *Le droit international américain*: *Son fondement – sa nature, d'après l'Histoire diplomatique des Etats du Nouveau Monde et leur Vie Politique et Économique* (Paris: A. Pedone, 1910), 89. See the said U.S.-French Convention in

However, while the latter convention did not contain any reference to reprisals, it is striking that a 'reprisal clause' ordinarily figured in those bilateral treaties with a Latin American State. The provision —a kind of standard clause due to the identical wording, with sometimes slight modifications— stipulated that, if any article of the said treaty should be infringed or violated, neither reprisals nor war could be resorted to, unless justice and satisfaction were refused or unduly delayed despite the fact that a formal complaint substantiated by proof had been presented.[269]

Miller, *Treaties and other international acts of the United States of America* (above, n. 195), 457ff.

269 The standard clause was generally the same as Art. 31 Sec. 3, of the U.S.–Colombia treaty of 3 October 1824. See Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent* (above, n. 267), 6th vol., Part II, 1008. Without claiming to be exhaustive, cf. the conventions between U.S.A.–Confederation of Central America, 5 December 1825, Art. 33 Sec. 3 (Ibid., VI/2, 839); U.S.A.–Brazil, 12 December 1828, Art. 33 Sec. 3 (Ibid., 9th vol., 67); U.S.A.–Mexico, 5 April 1831, Art. 34 Sec. 3 (Great Britain, F. O., *BFSP 1831–1832* (19th vol.; London: James Ridgway, 1834), 231); U.S.A.–Chile, 16 May 1832, Art. 31 Sec. 3 (Great Britain, F. O., *BFSP 1833–1834* (22nd vol.; London: James Ridgway and sons, 1847), 1363); France–Bolivia, 9 December 1834, Art. 31 (Great Britain, F. O., *BFSP 1834–1835* (23rd vol.; London: James Ridgway and sons, 1852), 186f.); U.S.A.–Venezuela, 20 January 1836, Art. 34 Sec. 3 (Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent* (above, n. 267), 13th vol., 570); U.S.A.–Peru-Bolivian Confederation, 13 November 1836, Art. 29 Sec. 3 (Ibid., 15th vol., 125f.); Hanse Towns–Venezuela, 27 May 1837, Art. 25 (Ibid., 14th vol., 248); U.S.A.–Ecuador, 13 June 1839, Art. 35 Sec. 3 (Great Britain, F. O., *BFSP 1840–1841* (29th vol.; London: James Ridgway and sons, 1857), 1305f.); Spain–Ecuador, 16 February 1840, Art. 19 Sec. 2 (Ibid., 1319); U.S.A.–Portugal, 26 August 1840, Art. 14 Sec. 3 (Ibid., 1311f.); France–Venezuela, 3 April 1843, Art. 30 (Alexandre Jehan Henry de Clercq and Jules de Clercq, *Recueil des traités de la France*, publié sous les auspices de S. Exc. M. Drouyn de Lhuys, Ministre des Affaires Étrangères, 23 vols. (Paris: Amyot, 1864–1917), 5th vol., 16f.); France–Ecuador, 6 June 1843, Art. 28 Sec. 2 (Ibid., 5th vol., 99); Spain–Chile, 25 April 1844, Art. 12 (Great Britain, F. O., *BFSP 1845–1846* (34th vol.; London: Harrison and sons, 1860), 1111); France–New Granada, 28 October 1844, Art. 27 Para. 2 (Great Britain, F. O., *BFSP 1846–1847* (35th vol.; London: Printed by Harrison and sons, 1860), 1026); Spain–Venezuela, 30 March 1845, Art. 19 Sec. 2 (Ibid., 305); Spain–Uruguay, 26 March

The Latin American countries might have wished to insert this 'reprisal

1846, Art. 19 Sec. 2 (Murhard et al., *Nouveau recueil général de traités, conventions et autres transactions remarquables, servant à la connaissance des relations étrangères des puissances et États dans leurs rapports mutuels.* (above, n. 46), 9th vol., 97); U.S.A.–New Granada, 12 December 1846, Art. 35 Sec. 5 (Great Britain, F. O., *BFSP 1847–1848* (36th vol.; London: Harrison and sons, 1861), 1005); Hanse Towns–Guatemala, 25 June 1847, Art. 27 (Great Britain, F. O., *BFSP 1850–1851* (40th vol.; London: James Ridgway and sons, 1863), 1366); Sardinia–New Granada, 18 August 1847, Art. 15 and 24 Para. 2 (Great Britain, F. O., *BFSP 1848–1849* (37th vol., London: Harrison and sons, 1862), 766 and 769); France–Guatemala, 8 March 1848, Art. 28 Sec. 2 (Ibid., 1374f.); U.S.A.–Guatemala, 3 March 1849, Art. 33 Sec. 3 (Great Britain, F. O., *BFSP 1849–1850. [2]* (39th vol.; London: Harrison and sons, 1863), 60); U.S.A.–Nicaragua, 3 September 1849, Art. 36 Sec. 4 (Great Britain, F. O., *BFSP 1850–1851* (above, n. 269), 1063); U.S.A.–San Salvador, 2 January 1850, Art. 35 Sec. 3 (Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 71); Spain–Costa Rica, 10 May 1850, Art. 16 Sec. 2 (Ibid., 1346); Spain–Nicaragua, 25 July 1850, Art. 16 Sec. 2 (Ibid., 1338); U.S.A.–Peru, 26 July 1851, Art. 40 Sec. 3 (Great Britain, F. O., *BFSP 1850–1851* (above, n. 269), 1108); France–Dominican Republic, 8 May 1852, Art. 31 Para. 2 (Great Britain, F. O., *BFSP 1851–1852* (41st vol.; London: William Ridgway, 1864), 917); Spain–Dominican Republic, 18 February 1855, Art. 45 Sec. 2 (Great Britain, F. O., *BFSP 1855–1856* (above, n. 267), 1296); France–Honduras, 22 February 1856, Art. 28 Sec. 2 (Great Britain, F. O., *BFSP 1856–1857* (47th vol.; London: William Ridgway, 1866), 816); France–New Granada, 15 May 1856, Art. 27 Para. 2 (Ibid., 781); France–Venezuela, 24 October 1856, Art. 15 (Clercq & Clercq, *Recueil des traités de la France* (above, n. 269), 7th vol., 185); France–Salvador, 2 January 1858, Art. 33 (Great Britain, F. O., *BFSP 1859–1860* (50th vol.; London: William Ridgway, 1867), 399); U.S.A.–Bolivia, 13 May 1858, Art. 36 Sec. 3 (Great Britain, F. O., *BFSP 1857–1858* (48th vol.; London: William Ridgway, 1866), 771); France–Nicaragua, 11 April 1859, Art. 35 Sec. 2 (Great Britain, F. O., *BFSP 1859–1860* (above, n. 269), 377); Hanse Towns–Venezuela, 31 March 1860, Art. 27 (Great Britain, F. O., *BFSP 1861–1862* (52nd vol.; London: William Ridgway, 1868), 518); France–Peru, 9 March 1861, Art. 49 Sec. 2 (Clercq & Clercq, *Recueil des traités de la France* (above, n. 269), 8th vol., 209). Later in the nineteenth century when it became a strong continental Power in Europe, Germany signed bilateral treaties with Latin American Governments containing a similar provision. See, e.g., Germany–Dominican Republic, 30 January 1885, Art. 30 (Great Britain, F. O., *BFSP 1884–1885* (76th vol.; London: William Ridgway, 1892), 136).

It should be pointed out that the Western Powers also signed unequal treaties with 'inferior' nations. These conventions often stated quite bluntly that the right to take reprisals was reserved to the Western Power if the other contracting party failed to give redress when demanded. See, e.g., Art. 7 Para. 2 of the Treaty of Andrinople between Russia and the Ottoman Empire, 14 September 1829 (Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans*

clause', as it was not uncommon at the time in conventions between them to add an arbitration clause. The underlying idea was to preclude the use of reprisals or the beginning of hostilities before the exhaustion of all remedies available.[270] Viewed in this light, the insertion of a 'reprisal clause' in bilateral treaties concluded with Western Powers responded perhaps to the Latin American desire to assert the importance of the rule of exhaustion of local remedies.[271] Maybe, Great Britain did not sign any treaty that contained such a provision limiting the use of reprisals to clear cases of denial of justice, precisely because it did not want to lay down an intangible principle that would have restricted its freedom of decision and action.[272]

On the other hand, the presence of this 'reprisal clause' might also strongly suggest that the contracting Western Powers pursued the legitimisation of potential future acts of reprisals against the Latin American countries.[273] As a matter of fact, the use of reprisals was likelier to happen

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leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent (above, n. 267), 8th vol., 148); Art. 5 of the Treaty between France and Khasso chiefs (in actual Mali and Senegal), 30 September 1855 (Clercq & Clercq, *Recueil des traités de la France* (above, n. 269), 6th vol., 578).

270 For some examples, see William Ray Manning, *Arbitration Treaties among the American Nations*: *To the Close of the Year 1910* (Publications of the Carnegie Endowment for International Peace: Division of International Law (Washington); New York: OUP, 1924), 9, 35, 42, 49, etc. The so-called U.S.–Mexican treaty of Guadalupe Hidalgo of 2 February 1848, e.g., incorporated an arbitration clause which limited the resort to reprisals or hostility of any kind. See Art. 21: Great Britain, F. O., *BFSP 1848–1849* (above, n. 269), 577. However, arbitration in this agreement was by no means mandatory (James Brown Scott, 'Mexico and the United States and Arbitration', *AJIL* 10 (1916), 577–80, at 578). More generally about the interplay between reprisals and arbitration, see u.a. Müller, *Wandlungen im Repressalienrecht* (above, n. 21), 75–9; Förster, *Schiedssprechung und Repressalie* (above, n. 81).

271 The Latin American notion of State responsibility carries weight in favour of this interpretation. Cf. J.-M. Yepes, 'Les problèmes fondamentaux du droit des gens en Amérique', *RdC* 47/I (1934), 1–143, at 97–105; Chittharanjan Felix Amerasinghe, *Local Remedies in International Law* (Cambridge Studies in International and Comparative Law; 2nd edn., Cambridge: CUP, 2004), 32–3.

272 Cf. Álvarez, *Le droit international américain* (above, n. 268), 122–3; Yepes, 'Les problèmes fondamentaux du droit des gens en Amérique' (above, n. 271), 105.

273 Although the clause theoretically applied against the contracting Western Power too, the latter was in actual fact in a position of strength due to the existence of an asymmetry of power. More generally, Latin American countries were not

against such latter States than against a European Power (apart from some exceptions) for the reasons that should be now examined.

(b) Characteristics of Inferiority

The explanations regarding the importance of the said clause in bilateral treaties between the South American States and the Western Powers belong to the realm of conjecture. Yet, nineteenth-century armed reprisals were, in actual fact, invariably taken by a first-rank Power against an inferior State. Indeed, in all the main instances listed in textbooks, the reprisal-taking country was either France or Great Britain, or to a much lesser extent, the United States.[274] Since these Powers were the world hegemons of their time, all the countries inferior to them could, in principle, be targeted by reprisals. Nevertheless, the target countries generally shared common characteristics.

The location of the target countries does not indicate much since European, Latin American, and even sometimes Asian countries were subject to acts of armed reprisals in the nineteenth century. From a geographical per-

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considered in the nineteenth century as fully responsible members of the family of nations (Gros Espiell, 'La doctrine du Droit international en Amérique Latine avant la première conférence panaméricaine (Washington, 1889)' (above, n. 42), 4). So, the international agreements, which the Governments of Western Powers negotiated with them supposedly under the principle of sovereign equality, were actually in many respects unequal. This situation allowed Western Powers to make extensive use of diplomatic protection, which sometimes amounted to the actual use of force with the aim of securing redress for injured subjects or collecting public debt. See Arnulf Becker Lorca, *Mestizo International Law*: *A Global Intellectual History 1842–1933* (Cambridge Studies in International and Comparative Law, 115; Cambridge: CUP, 2014), 88–93; and also Álvarez, *Le droit international américain* (above, n. 268), 91–101.

274 Cf. Colbert, *Retaliation in international law* (above, n. 6), 61f. Statesmen who attempted to justify the lawfulness of acts of reprisals never failed to stress that all the great European Powers and the United States made frequent use of such means. See, e.g., the Marquess of Lansdowne, House of Lords, 17 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates*: *Third Series, commencing with the accession of William IV.* (111th vol.; London: Cornelius Buck, 1850), col. 1335–1336; Lord J. Russell, House of Commons, 20 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates*: *Third Series, commencing with the accession of William IV.* (112th vol.; London: Cornelius Buck, 1850), col. 102f.

spective, they generally had a maritime border and may be considered to be 'peripheral'.

What is more relevant is that the reprisal-taking Powers held the target countries with contempt for "being neither wholly respectable nor wholly responsible members of the family of nations".[275] They generally had a bad opinion of the latter's political organisation. The Latin American countries, e.g., were frequently shaken by instability, crises and civil conflicts.[276] As a result, the successive domestic upheavals gave rise to claims engaging the responsibility of the local Governments. Still, as they quickly changed, the next Government in office rarely consented to assume responsibility for the acts of the overthrown predecessors.[277] Regarding the European target countries —namely Portugal, the Two Sicilies and Greece—, the problem was of a quite different nature. Although being constitutional States, they were said to be governed by monarchs exercising despotic and arbitrary powers.[278] As a consequence, the administration of justice in those countries could not be wholly trusted.[279]

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275 Colbert, *Retaliation in international law* (above, n. 6), 62.

276 Cf. Álvarez, *Le droit international américain* (above, n. 268), 92.

277 Mr Sanford to Mr Cass, 10 August 1857: Sanford, *The Aves Island Case* (above, n. 43), 239.

278 Such was, e.g., the opinion of Palmerston. See Viscount Palmerston to Count Ludolf, 12 October 1838: Great Britain, F. O., *BFSP 1839–1840* (28th vol.; London: Printed by Harrison and sons, 1857), 1218; Viscount Palmerston to Sir Edmund Lyons, 7 August 1846: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 431–2. It has also been reported that British diplomatic agents spoke of Ferdinand II of the Two Sicilies as a "petty monarch" (François Guizot, *An Embassy to the Court of St. James's in 1840* (London: Richard Bentley, 1862), 89) or called Dom Miguel of Portugal a "Monster and Usurper, Tyrant, and [other terms] in use by the newspaper writers, but surely most indecent in the mouth of a diplomatic Agent." (Brigadier-General Sir John Campbell to the Marquis of Londonderry, 1831: Great Britain, F. O., *BFSP 1830–1831* (above, n. 267), 323).

279 This is the position that Palmerston defended in the House of Commons in 1850. He argued that Don Pacifico did not go before the Greek tribunals because he would not have obtained compensation for the injury he suffered because "the tribunals are at the mercy of the advisers of the crown, the judges being liable to be removed, and being often actually removed upon grounds of private interest and personal feeling." In fact, the Greek Government made no attempt to either prosecute or identify the looters as powerful persons were involved. Besides, no witness would have thus testified in favour of Don Pacifico. So, "[i]f the man I prosecute is rich, he is sure to be acquitted; if he is poor, he has nothing out of which to afford me compensation if he is condemned." Viscount Palmerston, House of Commons, 25 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 395–396.

Another reason of disdain was also the fact that those States were regularly unable to fulfil their pledges because of misappropriation of government revenue, mismanagement of public funds and a protectionist economic policy detrimental to general wealth.[280] More generally, a factor of inferiority was the situation of economic or financial dependency on the great Powers. The South American and Southern European countries were massively indebted to the Western Powers or private investors and companies under the latter's protection.[281] This economic dependence was precisely an argument of leverage in the negotiations that the great Powers used to compel the target countries to accede to their demands. For example, Viscount Palmerston, the British Secretary of State for Foreign Affairs, threatened the Two Sicilies that Great Britain would search for new sources of sulphur if the Southern Italian kingdom persisted in refusing to consent to the withdrawal of a monopoly on Sicilian sulphur.[282] Also, when Brazil suspended the diplomatic relations with Great Britain because of the latter's refusal to indemnify damage caused in the exercise of reprisals in 1862–1863, the British Prime Minister, Earl Russell, was of the opinion that Great Britain should not give in because British trade could go on without commercial intercourses with Brazil, unlike the latter.[283] Altogether, it was in the interest of the target countries to yield, lest they might lose an important commercial partner. It can thus be said that the reprisal-taking States enjoyed a degree of impunity regarding the use of armed reprisals on account of this commercial superiority.

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280 See, e.g., the remarks of Viscount Palmerston, House of Commons, 6 July 1847: Great Britain, Parliament, *Hansard's Parliamentary Debates*: *Third Series, commencing with the accession of William IV.* (93rd vol.; London: G. Woodfall and son, 1847), col. 1300–1303.

281 The demands made by the reprisal-taking States prove the enormous debts owed by the target countries. See, e.g., the one owed by Gran Colombia to the merchant James Mackintosh (Paulsson, *Denial of Justice in International Law* (above, n. 61), 18–9); or by Venezuela to British and German companies in 1902 (see Memorandum communicated by Count Metternich, 13 November 1902: Great Britain, F. O., *BFSP 1901–1902* (95th vol.; London: His Majesty's Stationery Office, 1905), 1084).

282 Viscount Palmerston to Count Ludolf, 12 October 1838: Great Britain, F. O., *BFSP 1839–1840* (above, n. 278), 1222f.

283 Earl Russell to Countr Lavradio, 10 October 1864: Great Britain, F. O., *Papers respecting the Renewal of Diplomatic Relations with Brazil* (London: Harrison and sons, 1866), 12.

Finally, the military weakness of the target countries in comparison to the strong Powers was crucial to make the employment of armed reprisals expedient. For instance, Great Britain did not hesitate to send fourteen vessels for an operation of reprisals against Greece in the *Don Pacifico* affair in 1850, whereas the whole Greek navy only comprised about ten ships of war.[284] So, it is not without reason that Lord Stanley could regard Greece as being "defenceless".[285] At any rate, the target country was often fully aware of its weakness.[286]

2. Informal Imperialism through Reprisals

(a) Issues of Commercial Nature

The great Powers had an interest to exploit the inferiority of the other countries and keep them in a situation of dependence and deference: it allowed them to achieve their own ends. For this purpose, reprisals presented for the great Powers with an excellent instrument of informal imperialism when one of those small countries refused to give way to their will.[287] As a matter of fact, this measure was employed in cases when grounds of public policy were at stake. The *Sulphur Monopoly* incident is illustrative of the importance of reprisals to settle issues of commercial nature between a

284 Mr Wyse to Viscount Palmerston, 28 January 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 524–5; Falcke, *Le blocus pacifique* (above, n. 40), 14. Another example is the British reprisals against the Two Sicilies in 1840. Although that Kingdom made preparations to repel a British attack, it was manifestly not in position to stand up militarily to Great Britain and had ultimately to give in. Cf. Dennis W. Thomson, 'Prelude to the Sulphur War of 1840. The Neapolitan Perspective', *EHQ* 25 (1995), 163–80, at 175; Guizot, *An Embassy to the Court of St. James's in 1840* (above, n. 278), 85.

285 Lord Stanley, House of Lords, 17 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 1332.

286 See, e.g., Mr Londos to Mr Wyse, 19 January 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 515.

287 So, reprisals were sometimes employed to provoke a change in the target country's policy. For instance, British reprisals against Brazil in 1862–1863 were believed to strive for the abolition of slavery. See Falcke, *Le blocus pacifique* (above, n. 40), 110 fn. 9. Cf. the debate in the House of Commons, 16 July 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates*: *Third Series, Commencing with the accession of William IV.* (172nd vol.; London: Cornelius Buck, 1863), col. 879–928; Earl Russell to Mr Eliot, 6 June 1863: Great Britain, F. O., *BFSP 1863–1864* (54th vol.; London: William Ridgway, 1869), 843.

great Power —in the present case, Great Britain— and an inferior one — namely, the Kingdom of the Two Sicilies.

When in the summer of 1838 the Neapolitan Government granted a monopoly on Sicilian sulphur to a private company chiefly made up of Frenchmen, Great Britain protested and sought the revocation of the grant by invoking the bilateral treaty of 1816, which, in addition to the most favoured nation clause, stipulated that no privileges detrimental to British trade could be granted to subjects of other nations. The monopoly was thus construed as a breach of the said treaty.[288]

As a matter of fact, the use of reprisals was inadequate to pursue formal imperialism, unlike war. Nevertheless, he operations of reprisals, indeed, often hid expansionist ambitions or territorial claims. For example, it was believed that Great Britain had views on Panama when it exercised reprisals against New Granada in 1836 (see Ulysse Tencé, *Annuaire historique universel pour 1836*: *Avec un Appendice contenant les actes publics, traités, notes diplomatiques, papiers d'états et tableaux statistiques, financiers, administratifs et nécrologiques; – une Chronique offrant les événements les plus piquants, les causes les plus célèbres, etc; et des notes pour servir à l'histoire des sciences, des lettres et des arts*, Nouvelle série (Paris: Thoisnier-Desplaces, 1837), 649). British reprisals against Greece in 1850 in the *Don Pacifico* case took also place against the background of claims over two Greek islands, viz. Sapienza and Cervi (see the diplomatic correspondence about the dispute over these islands between Greece and the Ionian Islands under British protectorate: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 932–73). Yet, the acts of reprisals against Greece did not officially seek a settlement of these territorial claims (see Viscount Palmerston to Mr Wyse, 25 February 1850: Ibid., 604). Art. IV of the convention of 18 July 1850 between Great Britain and Greece explicitly excluded these claims from the settlement (Great Britain, F. O., *BFSP 1849–1850. (1)* (38th vol.; London: Harrison and sons, 1862), 19). For an assessment of the real causes behind the *Don Pacifico* affair, see David Hannell, 'Lord Palmerston and the 'Don Pacifico Affair' of 1850. The Ionian Connection', *EHQ* 19 (1989), 495–507.

288 See the diplomatic correspondence on the issue: Great Britain, F. O., *BFSP 1839–1840* (above, n. 278), 1163ff.; Great Britain, F. O., *BFSP 1840–1841* (above, n. 269), 175ff.; and also the treaty between Great Britain and the Two Sicilies, 26 September 1816: Jonathan Elliot, *The American Diplomatic Code, Embracing A Collection of Treaties and Conventions between the United States and Foreign Powers*: *From 1778 to 1834. With an Abstract of Important Judicial Decisions on Points connected with Our Foreign Relations. Also, A Concise Diplomatic Manual, containing a Summary of the Law of Nations, from the Works of Wicquefort, Martens, Kent, Vattel, Ward, Story, &c. &c. and Other Diplomatic Writings on Questions of International Law.*, 2nd vol. (Washington: Printed by Jonathan Elliot, 1834), 198–200. However, according to the Law Officers of the Crown, the monopoly did not violate the provisions of the treaty of 1816. See the separate opinions of Sir Frederick Pollock and Joseph Phillimore, 12 and 26 March 1840 respectively: Great Britain, Parliament, *Documents and statements respecting the Sulphur Monopoly,*

Indeed, the monopoly had a proven disastrous effect on British trade. The customs revenues registered a significant drop from 35.000£ a year to almost nothing.[289] Import of sulphur decreased by 50 per cent compared with 1838 before the introduction of the monopoly and consequently, the price of sulphur increased by 100 per cent.[290] Now, Great Britain's industry heavily relied on sulphur to produce sulphuric acid and other sorts of acids employed in various industrial processes such as bleaching and dyeing, manufacturing gunpowder and for medical purposes.[291] Finally, the introduction of the monopoly prejudiced British mine owners and holders of Sicilian sulphur as well as the shipping industry.[292]

The issue of the monopoly was thus no insignificant cause of complaint. It evolved into an economic doctrinal dispute that opposed protectionism and free trade. On the one hand, since 1823, the Neapolitan Government had pursued a model of economic protectionism, which explains why it considered the monopoly as a way to limit the exports of Sicilian sulphur and increase control over this trade which was *de facto* in British hands.[293] On the other hand, Great Britain advocated a free trade system. Palmerston argued that free trade enabled the discovery of alternatives to Sicilian sulphur: new mines will open in other regions of the world, what would

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constituting grounds for Parliamentary inquiry into the conduct of the Foreign Secretary. (London: John Reid and Co., 1841), 76–7.

289 Phillimore, *Commentaries Upon International Law* (above, n. 46), 36.

290 R., 'On the Sulphur Trade of Sicily, and the Commercial Relations between that Country and Great Britain', *JSSL* 2/6 (1840), 446–57, at 446.

291 Ibid., 446.

292 See Ibid., 453–5. For the French ambassador in London, François Guizot, Great Britain was entitled to complain because the cause was just. However, he was of the opinion that the argument of a violation of the treaty of commerce weakened its claim. Great Britain should instead have based the demands solely on the losses incurred by British nationals and on the Neapolitan false promises to abrogate the monopoly (Guizot, *An Embassy to the Court of St. James's in 1840* (above, n. 278), 88–9). Indeed, only a breach of the law could justify reprisals, but not a decision detrimental to some mere interests. See Christian Friedrich Wurm, 'Selbsthilfe (völkerrechtliche)', in Carl von Rotteck and Carl Welcker (eds.), *Das Staats-Lexikon. Encyklopädie der sämmtlichen Staatswissenschaften für alle Stände*, 12th vol. (2nd edn., Altona: Johann Friedrich Hammerich, 1845–1848), 111–32, at 126–127.

293 Marcello De Cecco, 'The Italian Economy Seen from Abroad', in Gianni Toniolo (ed.), *The Oxford Handbook of the Italian Economy Since Unification* (Oxford: OUP, 2013), 134–54, at 136. See Thomson, 'Prelude to the Sulphur War of 1840. The Neapolitan Perspective' (above, n. 284), on the tension between free trade and protectionism partisans within the Neapolitan government up to 1840.

lead Sicilian mines to lose value.[294] So, for him, the Neapolitan Government was mistaken to suppose that monopolies contributed to the public good; an ignorance he ascribed to the political system of the Two Sicilies, i.e. a despotic monarchy.[295] In conclusion, "Palmerston showed that the Neapolitan Crown was scientifically backward and incorrect, politically offensive, ungrateful, and would also be easily proved to be militarily weak compared with Britain."[296]

On 12 March 1840, Palmerston instructed the ambassador in Naples — his brother, William Temple— to formally demand the immediate abolition of the monopoly and to seek compensation for losses sustained by British subjects as a result of this monopoly. The Neapolitan Government had a week to comply with the demands, failing which reprisals in the form of seizure and detention of Neapolitan and Sicilian ships would be ordered.[297] However, the answer being unsatisfactory, reprisals began on 17 April 1840. A number of Neapolitan and Sicilian vessels were seized in the Mediterranean Sea and detained by way of embargo in the ports of Malta.[298] Nonetheless, the dispute was eventually settled through the mediation of France that wished to avert the oppression of the Two Sicilies by Great Britain.[299]

A monopoly was also in the interest of the Frenchmen behind the project. In fact, the increased demand for sulphur from France and Great Britain caused price inflation in 1832 and an overproduction of Sicilian sulphur. Consequently, the markets were overstocked and the price significantly slumped in 1835. In this process, Frenchmen who had speculated on the price of sulphur almost went bankrupt. Hence, they sought from the Neapolitan Government the granting of a monopoly. See R., 'On the Sulphur Trade of Sicily, and the Commercial Relations between that Country and Great Britain' (above, n. 290), 449–50.

294 Viscount Palmerston to Count Ludolf, 12 October 1838: Great Britain, F. O., *BFSP 1839–1840* (above, n. 278), 1222–3.

295 Viscount Palmerston to Count Ludolf, 12 October 1838: Ibid., 1218–21.

296 De Cecco, 'The Italian Economy Seen from Abroad' (above, n. 293), 138.

297 Viscount Palmerston to Mr Temple, 12 March 1840: Great Britain, F. O., *BFSP 1840–1841* (above, n. 269), 187. See also Viscount Palmerston to the Lords Commissioners of the Admiralty, 12 March 1840: Ibid., 187–8.

298 Phillimore, *Commentaries Upon International Law* (above, n. 46), 37; Twiss, *The law of nations considered as independent political communities* (above, n. 224), 35.

299 See the speech of Alphonse Jobez, *Assemblée nationale*, 2 September 1848: Félix Wouters, *Histoire parlementaire de l'Assemblée nationale, précédée du récit de la révolution de Paris*, sous la surveillance de M. Alexandre Gendebien et de M. Maynz, 4th vol. (Bruxelles: Aux bureaux de l'association des ouvriers typographes, 1848), 453; and the ordinance of the King of Two Sicilies abolishing the monopoly, 21 July 1840: Great Britain, F. O., *BFSP 1840–1841* (above, n. 269), 1225–6. Apart from the political aspects of the incident, the French

The *Sulphur Monopoly* incident is noteworthy because it shows that great Powers used reprisals to keep and strengthen control over the target country in commercial matters, without having to turn to the extremity of war. Indeed, Great Britain came out on top as the monopoly was abolished and the British mine owners and holders of sulphur were compensated. Incidentally, it offered Palmerston the opportunity to teach the Two Sicilies a lesson about Neapolitan military inferiority and misconception about political economy.

Nevertheless, in other cases of commercial nature, armed reprisals were resorted to with the aim of imposing a dominant position over the target country. It happened in 1838 when France blockaded Mexican ports or with the so-called First Opium War (1839–1842) between Great Britain and China. Both operations started at first as acts of reprisals allegedly in response to the mistreatment of French and British nationals, respectively. However, the primary purpose since the beginning seemed to have been the concession of commercial privileges.[300] In fact, in the ultimatum addressed to the Mexican Government, France demanded —apart from damages for the French victims— the treatment of the most favoured nation and some commercial guarantees.[301] Although reprisals ultimately evolved into war in both cases, the peace treaties concluded with the defeated nations, namely Mexico and China, finally yielded the commercial advantages that the victors coveted: the most favoured nation principle was introduced in the mutual relations of France and Mexico while Great Britain

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Government was really concerned about the Sicilian sulphur trade and sought the abolition of the monopoly, too. As a matter of fact, France also consumed Sicilian sulphur, although half less than Great Britain. See R., 'On the Sulphur Trade of Sicily, and the Commercial Relations between that Country and Great Britain' (above, n. 290), 446–448; 450f. French merchants suffered important losses as a consequence of this monopoly. But while the British use of reprisals achieved their end, namely the abolition of the monopoly and the settlement of the private British claims through a mixed arbitral tribunal, the aggrieved French merchants' claims remained unsettled until 1844. See France, *Pétition des réclamans français contre le gouvernement napolitain adressée à MM. les membres de la Chambre des Députés* (Marseille: Imprimerie Ed. Buret et Co, 1845); Thomson, 'Prelude to the Sulphur War of 1840. The Neapolitan Perspective' (above, n. 284), 176.

300 About the so-called Pastry War between France and Mexico, see Jacques Penot, 'L'expansion commerciale française au Mexique et les causes du conflit franco-mexicain de 1838–1839', *Bulletin Hispanique* 75 (1973), 169–201.

301 See Clercq & Clercq, *Recueil des traités de la France* (above, n. 269), 4th vol., 403–416, esp. 412.

obtained the opening of Chinese ports to British trade as well as the transfer of Hong Kong.[302]

(b) Assertion of National Dignity: 'Civis Romanus Sum', 1850

Not only commercial considerations were used to keep an inferior country in line. The great Powers also extended their influence and domination by demanding respect to their national dignity. If the inferior country showed disrespect towards the agents of the State, nationals or things representing the national sovereignty such as ships, the great Power sometimes had to demand obedience. Reprisals presented then an interesting option to reach such a goal. The *Don Pacifico* case of 1850 links the idea of maintenance of national honour with the taking of reprisals.[303]

When in Easter 1847 the Greek Government banned the burning of Judas Iscariot's effigy out of respect for the visit of Baron Rothschild in Athens,[304] an angry Greek mob looted the house and assaulted the household of David Ricardo, a Jewish Gibraltar-born British national nicknamed Don Pacifico, while the police remained passive.[305] The British minister at Athens immediately made representations to the Greek Government, but the Greek Foreign Minister denied him the right to demand redress on behalf of Don Pacifico as long as the latter had not exhausted the domestic

302 See Art. 3 of the Peace Treaty between France and Mexico, 9 March 1839 (Great Britain, F. O., *BFSP 1840–1841* (above, n. 269), 223); the Treaty of Nanking between Great Britain and China, 29 August 1842 (Great Britain, F. O., *BFSP 1841–1842* (30th vol.; London: James Ridgway and sons, 1858), 389–92). See thereupon Stephen C. Neff, 'Peace and prosperity: commercial aspects of peacemaking', in Randall Lesaffer (ed.), *Peace Treaties and International Law in European History. From the Late Middle Ages to World War One* (Cambridge: CUP, 2004), 365–81, at 374; Neff, *War and the Law of Nations* (above, n. 2), 230.

303 However, Cussy, *Phases et causes célèbres du droit maritime des nations* (above, n. 223), 2nd vol., 490, believed that Great Britain exercised reprisals in this case as an attempt to curb the growth of the Greek merchant navy.

304 Sir Edmund Lyons to Viscount Palmerston, 20 May 1847: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 332.

305 See the account of the facts as told by Mr Pacifico himself to Sir Edmund Lyons, 7 April 1847: Ibid., 333–4.

remedies.[306] Nevertheless, convinced of the justness of the cause, Palmerston instructed to keep pressing Greece for compensation.[307]

Negotiations remained in a stalemate for a long time until the new British minister at Athens, Thomas Wyse, presented the Greek Government with a 24-hour ultimatum in early 1850.[308] But Greece refused. For that reason, Vice-Admiral Sir William Parker, Commander-in-Chief in the Mediterranean, who had already been enjoined by Palmerston to adopt coercive measures if the demands were not complied with, began a blockade of the port of Piraeus which applied at first only against the Greek ships of war.[309] Yet, the obstinacy of the Greek Government compelled Great Britain to take more stringent measures. The blockade was thus extended to other Greek ports and also enforced against Greek merchant vessels, provided they exclusively transported Greek property.[310]

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306 Mr Glarakis to Sir Edmund Lyons, 27 December 1847 (O.S.)/8 January 1848 (N.S.): Ibid., 347–9. For this reason, Lassa Oppenheim viewed the British reprisals in this case as unjustified (Oppenheim, *International Law* (above, n. 25), 36). On the other hand, Freeman Snow considered that Don Pacifico's claims would, in all likelihood, be dismissed due to anti-Semitism in Greece and the fact that the attacking mob was numerous and hence 'faceless' (Freeman Snow, *Cases and opinions on international law*: *with notes and a syllabus* (Boston: The Boston Book Company, 1893), 248). In a letter to Sir Edmund Lyons, dated 24 January 1848, Don Pacifico refuted Glarakis's allegations and explained in detail the motives why he did not elect to pursue a judicial remedy. See Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 352–67.

307 Viscount Palmerston to Sir Edmund Lyons, 24 March 1848: Ibid., 370–1. Besides reparation on behalf of Don Pacifico, Great Britain claimed redress in other cases: (1) the uncompensated expropriation of Mr Finlay's land which had been inclosed within the gardens of the royal palace in Athens, (2) the ill-treatment of Ionians by Greek authorities —the Ionian Islands were at the time under British protectorate—, (3) the injurious detention of an officer and crewmen of the H.M.S. Fantome in Patras. See respectively Ibid., 410–479, 254–331, 216–253; and Falcke, *Le blocus pacifique* (above, n. 40), 88 fn. 2. This last complaint touched directly Great Britain's national honour and contrarily to the other claims was not of private origin.

308 Mr Wyse to Mr Londos, 17 January 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 491.

309 See Viscount Palmerston to the Lords Commissioners of the Admiralty, 30 November 1849: Ibid., 483–4; Mr Wyse to Viscount Palmerston, 18 January 1850: Ibid., 495–6.

310 See Mr Wyse to Viscount Palmerston, 25 January and 18 February 1850: Ibid., 525–526 and 653. The underlying idea of this measure was to avoid hindering trade of third Powers. Nevertheless, some complaints were formulated. See, e.g., Baron Brunnow to Viscount Palmerston, 20 March (O.S.)/1 April (N.S.) 1850: Ibid., 750–3.

The operation aroused outcry and condemnation abroad. Great Britain's co-guarantors of Greek independence, viz. France and Russia,[311] vehemently protested. Palmerston thus felt constrained to accept the French good offices. In the meantime, the harshness of the coercive means ought not to be increased.[312] The blockade remained effective; yet, vessels were not to be captured.[313]

However, the French mission failed. Reprisals were, therefore, resumed. But shortly after, in April 1850, the Greek Government agreed to come to terms. All the demands were unconditionally accepted.[314] In return, the blockade was lifted, and the detained vessels were released.[315] In total, the operation of reprisals lasted a little bit more than three months.

Although the whole issue with Greece was ultimately settled, the affair still caused great commotion in Great Britain. Indeed, Palmerston's light handling of the matter was strongly disapproved.[316] France judged that its good offices were mocked and for this reason recalled its ambassador from London. It created a climate of tension which augured war between both

311 See Art. IV of the convention signed on 7 May 1832 between the three Powers, on one hand, and Bavaria, on the other: Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent* (above, n. 267), 10th vol., 554.

312 Viscount Palmerston to Mr Wyse, 5 February 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 505–6.

313 Order of Vice-Admiral Sir W. Parker to Commander Foote, 24 February 1850: Ibid., 673.

314 See the convention signed on 18 July 1850 between Great Britain and Greece for the settlement of the claims: Great Britain, F. O., *BFSP 1849–1850. (1)* (above, n. 287), 16–9. Art. II stipulated though that the amount of compensation owed by the Greek Government for the destruction of documents connected with Don Pacifico's claims on the Portuguese Government had to be determined by a mixed commission. Such a mixed commission met in Lisbon in 1851 and valued the loss at only 150£. See Great Britain, F. O., *BFSP 1850–1851* (above, n. 269), 617–42.

315 Mr Wyse to Viscount Palmerston, 28 April 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 877–8.

316 However, Palmerston had referred the question of the legality of the operation to the consideration of the Advocate-General who validated it. See Viscount Palmerston to Mr Wyse, 6 March 1850: Ibid., 661.

countries.[317] In this context, the British Parliament saw with great preoccupation the interruption of diplomatic relations with France.[318] Therefore, a motion of censure on the British Government was moved in the House of Lords.[319] Lord Stanley, who presented the resolution, argued that the policy followed by Palmerston had endangered peace with the other continental Powers.[320]

During the ensuing debate, the question of national dignity was central. All the Peers concurred with the view that Great Britain was a great and mighty Power. The laudatory expressions they used bear testament to the strong national pride and belief in their country's ascendancy. So, the British maritime superiority was often stressed as well as Great Britain's status as a leading commercial nation.[321] Nevertheless, many Peers considered that the show of force against a comparatively weak State like Greece was beneath Great Britain's dignity.[322] The abusive use of Great Britain's

317 Mr de La Hitte to Mr Drouyn de Lhuys, 14 May 1850: Martens, *Causes célèbres du droit des gens* (above, n. 199), 5th vol., 518–519. See also Mr Wyse to Viscount Palmerston, 31 May 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 921. Already since the beginning of the acts of reprisals, the French seemed to have entertained hostile feelings towards Great Britain. See, e.g., Lord Bloomfield to Viscount Palmerston, 12 February 1850: Ibid., 611.

318 See the parliamentarian discussion of this matter: House of Lords, 17 May 1850 (Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 159–166); House of Commons, 23 May 1850 (Ibid., col. 237–268).

319 For a contextualisation of the debate, a summary of the discussions as well as nuances and correction of some information given in speeches, see Taylor, *Don Pacifico* (above, n. 49), 218–33.

320 Lord Stanley's motion read: "To resolve, that while the House fully recognizes the right and duty of the Government to secure to Her Majesty's subjects residing in foreign States the full protection of the laws of those States, it regrets to find, by the correspondence recently laid upon the table by Her Majesty's command, that various claims against the Greek Government, doubtful in point of justice or exaggerated in amount, have been enforced by coercive measures directed against the commerce and people of Greece, and calculated to endanger the continuance of our friendly relations with other Powers." (Lord Stanley, House of Lords, 17 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 1332).

321 For example, Lord Eddisbury held Great Britain as "a great commercial country […], with interests spread over every quarter of the globe, with our merchants in every port, and our ships on every sea," and Lord Stanley insisted on "her immense maritime superiority," (House of Lords, 17 June 1850: Ibid., col. 1388 and 1323, respectively).

322 See, e.g., Lord Stanley, House of Lords, 17 June 1850: Ibid., col. 1295.

superior naval might for such petty and doubtful claims was, thus, considered a "prostitut[ion]" of the honour of the British flag.[323]

Still, not all the Peers shared this view. Many defended the concordance of the measures with national dignity. The Marquess of Lansdowne, the then Lord President of the Council, contended that the presence of a large force in the Greek waters was not only efficacious to enforce the demands but also imparted prestige to the Greek Government for submitting to Sir William Parker, who was backed by a considerable fleet rather than a small squadron.[324] Lord Eddisbury added that a large fleet served the double goal to demonstrate British determination and prevent resistance. Besides, a wrongdoing State could not hide behind its weakness to escape reparation for the violation of the law of nations and the commission of injustices.[325] However, these latter arguments did not convince as the adoption of Lord Stanley's resolution passed by a majority of 37 votes (For: 169; Against: 132).[326]

Following this vote, Lord John Russell, who was Prime Minister at the time, was asked in the House of Commons if the Government would resign. He answered that not only the Government had no intention of resigning but also that it would not follow the policy laid down in the Peers' motion, i.e. to refrain from interfering on behalf of aggrieved British subjects.[327] This reply prompted a second round of debates that lasted from Monday 24 June until Friday 28 June 1850.[328] The Members of Parliament were well aware of the paramount importance of the issue under discussion. They knew that they were about to lay down some principles of foreign policy for the British Government, while it was usually not the custom of the Parliament to address such issues.[329]

John Roebuck, MP for Sheffield, introduced then a motion in the House of Commons by which the foreign policy conducted by the British Government would receive the approval of that House for being oriented to-

323 Lord Stanley, House of Lords, 17 June 1850: Ibid., col. 1321.
324 The Marquess of Lansdowne, House of Lords, 17 June 1850: Ibid., col. 1346.
325 Lord Eddisbury, House of Lords, 17 June 1850: Ibid., col. 1395–1396.
326 House of Lords, 17 June 1850: Ibid., col. 1401.
327 Lord J. Russell, House of Commons, 20 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 102 and 104–105.
328 On these debates, see Taylor, *Don Pacifico* (above, n. 49), 234–51.
329 See, e.g., Sir W. Molesworth, House of Commons, 27 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 505.

wards the maintenance of the national honour and dignity.[330] So, instead of focusing on the acts of reprisals against Greece, Roebuck widened the debate to fifteen years of foreign policy led by Palmerston. The real *tour de force* of this resolution was, indeed, to shift the centre of gravity of the discussion from the limited operation against Greece to Palmerston's foreign policy as a whole.[331]

The intervention of the British Government, and more precisely Palmerston's, into the internal affairs of foreign countries was amply discussed. A large part of the House professed a doctrine of non-intervention. William Ewart Gladstone, for instance, supported the principles of independence and equality between nations.[332] Thence, he believed that the passing of Roebuck's motion would establish a two-speed rule: a foreign policy accommodating towards strong Powers, on the one hand, and a bullying attitude towards weak nations, on the other.[333] Such a feature of Palmerston's foreign policy was reprehended by the opposition.[334] He even earned the nickname 'lucifer match' for his quick temper against weak countries when they failed to comply with his demands.[335]

However, when Palmerston took the floor, he held a memorable speech, the so-called '*Civis Romanus Sum*' speech, where he set forth the doctrine that British citizens deserved as much respect as the citizens of Rome in ancient times:

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330 Roebuck's motion read: "That the principles on which the Foreign Policy of Her Majesty's Government has been regulated, have been such as were calculated to maintain the honour and dignity of this country; and, in times of unexampled difficulty, to preserve peace between England and the various nations of the world." (House of Commons, 24 June 1850: Ibid., col. 255).

331 Dolphus Whitten, 'The Don Pacifico Affair', *The Historian* 48 (1986), 255–67, at 264.

332 William Ewart Gladstone, House of Commons, 27 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 589.

333 "I conclude that this House will not be of opinion that there is to be one rule for the weak and another for the strong, and that, because Greece is a kingdom of small extent and resources, therefore we are to establish for resident Englishmen immunities as against her, which we should not claim from Russia, or from Austria, or from France, and which we never should concede, as against ourselves, to any Power upon earth." (William Ewart Gladstone, House of Commons, 27 June 1850: Ibid., col. 561).

334 See, e.g., Lord John Manners, House of Commons, 25 June 1850: Ibid., col. 342–355 passim, esp. 343–344 and 355.

335 "No sooner does he meet with an obstruction than a flame immediately bursts forth." (Sir F. Thesiger, House of Commons, 24 June 1850: Ibid., col. 260).

> "as the Roman, in days of old, held himself free from indignity, when he could say *Civis Romanus sum*; so also a British subject, in whatever land he may be, shall feel confident that the watchful eye and the strong arm of England, will protect him against injustice and wrong."[336]

This doctrine, which strikingly echoed the verses "Rule, Britannia, rule the wave/ Britons never will be slaves" of James Thompson's eighteenth-century poem, raised the protection of British nationals abroad as a pillar of the British Government's foreign policy. Through it all, Palmerston's speech means that the other countries of the globe, and particularly those of inferior rank, had to show obedience to Great Britain. Therefore, under such circumstances, the employment of reprisals appears as a display of strength and superiority, which aimed to assert the national honour and impose the respect expected from weak and small States.

Palmerston's eloquent speech bore fruit because the motion passed by a majority of 46 votes (For: 310; Against: 264).[337] Beyond the political implications of this vote for the Government's survival, Palmerston's legacy lived on. So, when Great Britain made reprisals against Brazil in 1863, the connection between the taking of reprisals and the maintenance of national dignity was reaffirmed. Earl Russell, the Secretary of State for Foreign Affairs at the time, stated in the House of Lords that the '*Civis Romanus Sum*' doctrine had achieved to make the name of England respected. Indeed, it had become a duty for the British Government to interfere and demand redress on behalf of aggrieved nationals: "we, when a wrong is done, must, without regard to the wrong-doing Power being strong or weak, demand redress; and by demanding redress, depend upon it, we shall insure the protection of our commerce in all parts of the world."[338] When the Power failing to provide redress was weak, reprisals were undoubtedly a weapon of choice.

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336 Viscount Palmerston, House of Commons, 25 June 1850: Ibid., col. 444.
337 House of Commons, 28 June 1850: Ibid., col. 739.
338 Earl Russell, House of Lords, 19 June 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates*: *Third Series. Commencing with the accession of William IV*. (171st vol.; London: Cornelius Buck, 1863), col. 1145.

III. Unrestricted Resort to Reprisals

1. A Question of Political Opportunism: Palmerston's Policy, 1847

The process of politicisation of reprisals which began in the sixteenth century caused the departure of the practice of States from the legal theory framework that had been developed in the Middle Ages to govern the use of this self-help measure. In the nineteenth century, this state of affairs favoured the ends of the great Powers since the resort to reprisals was hardly restricted. The only limitations which they agreed to abide by were mainly those dictated by circumspection and public policy. It was actually in their interest that the law governing reprisals remained rudimentary.

The first important step regarding reprisals was the decision to have recourse to them. It was primarily a matter of expediency, i.e. a political question, but certainly no legal one.[339] Palmerston made quite clear what was the British Government's policy in that respect, on the occasion of a discussion in the House of Commons about the preoccupying situation of the so-called Spanish bondholders in Summer 1847.

On 6 July 1847, Lord George Bentinck brought to the attention of the House of Commons a petition presented by British bondholders who asked for redress and assistance on account of the sizeable unpaid debt owed by the Spanish Government. He demonstrated that Spain was actually in a position to fulfil its financial obligations. Therefore, he supported the view that Great Britain should not fear to take forcible measures for the recovery of the bondholders' just debts since the law of nations allowed such way to proceed. The motion Lord Bentinck moved forward aimed thus to invite the British Government to adopt the necessary steps

339 This is what the U.S. Secretary of State, Daniel Webster, stressed in a letter he wrote in the context of the well-known *Caroline* affair (1837) which strained the relations between the United States and Great Britain for many years: "All that is intended to be said at present is, that since the attack on the *Caroline* is avowed as a national act which may justify reprisals, or even general war, if the Government of The United States, in the judgment which it shall form of the transaction and of its own duty, should see fit so to decide, yet that it raises a question entirely public and political—a question between independent nations, […]." (Mr Webster to Mr Crittenden, 15 March 1841: Great Britain, F. O., *BFSP 1840–1841* (above, n. 269), 1140).

to secure redress from Spain. He pointed out, furthermore, that no real resistance should be expected due to the weakness of the Spanish navy.[340]

However, the then-Minister of Foreign Affairs Viscount Palmerston, present that day, urged the House to withdraw this motion "upon grounds of public policy". Although agreeing with the principles of the law of nations set out by Lord Bentinck, he differed as to their application. Indeed, the British Government generally interposed on behalf of British citizens, who had entered into commercial transactions with foreign subjects, when the law in the latter's country was not properly administered. If, however, the contracting party was a foreign Government —e.g., in the case of loans —, the British Government could not give the assurance to step in so readily, should the former fail to meet its obligations. That would, otherwise, amount to the adoption of a binding policy for the future. Palmerston elaborated on the case of Spain. In his opinion, any private investment in that country, although being in principle a solvent and trustworthy Government, was actually a venture due to the Spanish economic protectionism and the inadequate public expenditures. Under such circumstances, Great Britain could not just have recourse to force to blindly defend the interests of speculators. Nevertheless, he supported the idea of sending a warning to those foreign Governments that owed money to British nationals.[341] He thus concluded saying the following:

> "That we have the means of enforcing the rights of British subjects, I am not prepared to dispute. It is not because we are afraid of these States, or all of them put together, that we have refrained from taking the steps to which my noble Friend would urge us. England, I trust, will always have the means of obtaining justice for its subjects from any country upon the face of the earth. *But this is a question of expediency, and not a question of power*; therefore let no foreign country who has done wrong to British subjects deceive itself by a false impression either that the British nation or the British Parliament will for ever remain patient under the wrong; or that, if called upon to enforce the rights of the people of England, the Government of England will not have ample power and means at its command to obtain justice for them."[342]

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340 Lord Bentinck, House of Commons, 6 July 1847: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 280), col. 1285–1298.

341 Viscount Palmerston, House of Commons, 6 July 1847: Ibid., col. 1298–1305.

342 Viscount Palmerston, House of Commons, 6 July 1847: Ibid., col. 1305–1306 (emphasis added).

In other words, Palmerston asserted that weakness or phlegm were not the reasons of the British Government's inaction. Foreign Governments should not then test the patience of Great Britain because the day might come that the taking of forceful reprisals should be decided. It was all about expedience and public policy.

The result was that Palmerston's speech and determination convinced the assembly to withdraw the motion.[343] However, this withdrawal also means that the House of Commons agreed not to dispute the broad discretionary power of the Foreign Minister to decide in the circumstances of each case when he saw fit to have recourse to acts of reprisals against a delinquent country.

2. Eluding Legal Requirements

(a) Denial of Justice debated in the British Parliament, 1850

Not all disputes led to the making of reprisals. However, once a Government had decided to have recourse to this measure when the grounds of public policy were favourable, it expected not to be hindered by a series of legal requirements.

Before the nineteenth century, there was a gap between State practice and legal theory regarding the conditions governing the use of reprisals. While bilateral treaties often reminded that justice had to be denied or neglected in order to resort to reprisals, the practice of States actually shows that it was generally not expected from the victim to exhaust the local remedies or even to seek reparations before national courts in the wrongdoer's country. The failure of the Sovereign's diplomatic interposition instead gave the justification for having recourse to reprisals.

This situation did not evolve much in the first half of the nineteenth century, notwithstanding that the bilateral treaties concluded between Western Powers and Latin American countries stressed the importance of denial of justice as a condition *sine qua non* for reprisals. In fact, the Gov-

343 Peter Borthwick, MP for Evesham, even believed that "the speech of the noble Lord [Palmerston] would be more effectual than the sending of an army to enforce the rights of British subjects." House of Commons, 6 July 1847: Ibid., col. 1307.

ernment rarely waited until the victim exhausted all the local remedies.[344] But at a time when the independence of States was a cornerstone of international law and the division of powers a fundamental constitutional principle, such a way of acting was unacceptable. Yet, the argument which the reprisal-taking States usually put forward in order to elude the observance of the requirement, consisted of drawing up a value judgement on the lack of independence of the judiciary in the target country or on the iniquity of the local laws.

Indeed, in the *Don Pacifico* affair, the British Government supported the view that the Greek tribunals did not offer sufficient guarantees of impartiality and independence.[345] However, this opinion was disputed by the opposition in the British Parliament.

On the one side, the opposition maintained in both Houses of the Parliament that, *de lege lata*, the recourse to reprisals could only be justified by a denial of justice. In support of this view, Peers and MPs of the opposition referred to Vattel's *The Law of Nations* and Lord Mansfield's authoritative opinion in the *Silesian Loan* case.[346] That is why Palmerston's proceeding against Greece was strongly disapproved. For example, Viscount Canning argued that not reprimanding the course pursued by the British Government in this affair could establish a dangerous precedent in the practice of nations, a "new principle of international law". Redress would then be demanded only through extrajudicial channels, and the aggrieved country would be its own judge to fix the compensation.[347] Sir John Walsh, MP for Radnorshire, concurred with this view when he said that the British Gov-

344 Colbert, *Retaliation in international law* (above, n. 6), 69. Cf. Amerasinghe, *Local Remedies in International Law* (above, n. 271), 28–9.

345 As Phillimore rightly pointed out, "the real question of International Law at issue in this case was, whether the state of the Greek tribunals was such as to warrant the English Foreign Minister in insisting upon Mr Pacifico's demand being satisfied by the Greek Government, before that person had exhausted the legal remedies which, it must be *presumed*, are afforded by the ordinary legal tribunals of every civilized State." (Phillimore, *Commentaries Upon International Law* (above, n. 46), 38 (emphasis in original)).

346 See the Earl of Aberdeen and Viscount Canning, House of Lords, 17 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 1353–1354 and 1379; Sir F. Thesiger and Mr Gladstone, House of Commons, 24 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 266–267 and 556–557.

347 Viscount Canning, House of Lords, 17 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 1378ff., esp. 1381 and 1385–1386.

ernment would be "not merely a court of appeal, but a sort of court of *premiere instance*, totally setting aside the laws and tribunals of all foreign States. No doctrine could be more dangerous, or more infallibly lead to collision with great States, or to aggressive movements on small ones."[348] Nevertheless, Lord Stanley, Leader of the Opposition in the House of Lords, acknowledged that in some exceptional cases, i.e. when "the full protection of the laws of those States" could not be guaranteed —because either the foreign Government was despotic or the laws were corruptly administered—, the British Government could act without requiring the injured British nationals to exhaust local remedies.[349]

The supporters of the Government used this concession to their advantage. They criticised Lord Stanley for implicitly admitting such an exception to the rule, yet without explicitly adding it in the resolution he presented to the House of Lords. For the Peers and MPs in favour of the British Government, it was clear that the Greek judiciary was corrupted and lacked independence. Under such circumstances, it would be inconsistent with Great Britain's honour and primacy as a great Power and a leading commercial nation to wait until the prior exhaustion of local remedies. Furthermore, they referred to the recent practice of all the major Powers (France, Great Britain and the United States) in order to evidence the fact that denial of justice was no prerequisite for reprisals.[350]

The debate has some merit because it enables the assessment of the evolution of the law of reprisals in practice and the departure from long-established theoretical standards. Albeit the argumentation of the opposition can mainly be regarded as a political ploy,[351] the vast majority of British parliamentarians agreed, whether expressly or tacitly, on the point that the exhaustion of local remedies was not required in every case before making

348 Sir J. Walsh, House of Commons, 27 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 480 (emphasis added).

349 Lord Stanley, House of Lords, 17 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 1296–1297.

350 See the Marquess of Lansdowne and Lord Beaumont, House of Lords, 17 June 1850: Ibid., col. 1333–1335 and 1368–1369; Mr Roebuck, House of Commons, 24 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 238ff.; Mr C. Anstey and Viscount Palmerston, House of Commons, 25 June 1850: Ibid., col. 370–371 and 381–382; Lord J. Russell, House of Commons, 28 June 1850: Ibid., col. 711.

351 Falcke, *Le blocus pacifique* (above, n. 40), 258. See, on this subject, Geoffrey Hicks, 'Don Pacifico, Democracy, and Danger. The Protectionist Party Critique of British Foreign Policy, 1850–1852', *The International History Review* 26 (2004), 515–40.

use of reprisals. That means that this condition was actually *à la carte*, namely contingent upon the very own impression that the reprisal-taking Power had of the target country and its judicial system. Indeed, it was Palmerston's opinion that only the British Government could judge whether the tribunals of the offending State were free.[352] In the context of asymmetric power relation, it signified that great Powers could cynically allege that the standards of justice were not met in the latter country in order to directly press the demands through diplomatic channel and, then eventually, have recourse to reprisals.

So, it can be said that the requirement of denial of justice meant nothing more than the refusal by the Government of the wrongdoing country to accede to the demands of the offended State.[353]

(b) Preventive Recourse to Amicable Means of Settlement

i) The Principle laid down in the 23rd Paris Protocol of 1856

The exhaustion of local remedies was therefore not an imperative prerequisite for the diplomatic action of the State on behalf of aggrieved nationals. So, when the wrongdoing country failed to fulfil the demands of redress, there was no impediment to the employment of reprisals, except for some possible grounds of public policy. This implies that there was no legal obligation to prefer amicable means of settlement —like good offices, mediation or arbitration— over a resort to armed reprisals, unless provided by treaty. The offended State enjoyed a wide margin of appreciation with regard to the measure which it deemed best fitted to carry out.

Nonetheless, the European Powers, convened at the Paris Peace Congress to discuss the end of the Crimean War, signed on 30 March 1856 a multilateral treaty which provided in Article 8 that any dispute which might arise between Turkey and one or several contracting parties ought to be referred to the other Powers' mediation ("*action médiatrice*") previous

352 Viscount Palmerston, House of Commons, 25 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 382.

353 Already at the time when U.S. President Jackson threatened France to take reprisals if the latter kept withholding payment of compensation, the distinguished U.S. statesman Albert Gallatin likened denial of justice to the refusal by a political body, such as the French Chambers in that case, to give in to the demands. See Albert Gallatin to Edward Everett, January 1835: Adams, *The Writings of Albert Gallatin* (above, n. 241), 478.

to any use of force.[354] At the Plenipotentiaries' session on 14 April 1856, this provision was declared of general application at the suggestion of the Earl of Clarendon, yet without binding effect. Thus, Protocol 23 recommended that the use of good offices ought to precede the recourse to force. It stipulated, furthermore, that the Governments not represented at the Congress were invited to associate with this statement.[355]

The following year, an incident involving the Two Sicilies and Great Britain arose and gave rise to the practical application of the Protocol.

ii) The Cagliari affair, 1857–1858

The *Cagliari* was a Sardinian mail steamer that sailed from Genoa to Tunis on 25 June 1857. During the journey, partisans of Guiseppe Mazzini took over the ship, attacked the Neapolitan island of Ponza, liberated about 300 political prisoners and took ammunition before landing at Sapri to continue their revolution in the Kingdom of the Two Sicilies. The response of the Neapolitan authorities consisted of seizing the steamer and imprisoning the crew amongst whom were two British engineers.[356] The Secretary of State for Foreign Affairs of Great Britain at the time was precisely the Earl of Clarendon, who thus instructed the acting consul at Naples to afford protection to them since they were probably ignorant of the insur-

354 Great Britain, F. O., *BFSP 1855–1856* (above, n. 267), 12.

355 Édouard Gourdon, *Histoire du Congrès de Paris*, avec une introduction par M. J. Cohen (Paris: Librairie nouvelle, 1857), 124–6. The Protocol only spoke of the good offices of a friendly Power, but not of arbitration. And yet, the assembled Powers did not commit to having recourse to this step if they believed that it would be contrary to their dignity. For the British historian and lawyer Frederic Seebohm, this declaration showed that arbitration was not viewed as an appropriate means to settle disputes between sovereign States. Therefore, he argued that international law needed first to be laid down before thinking of mandatory arbitration, so that arbitral decisions would offer greater predictability (Frederic Seebohm, *On International Reform* (London: Longmans, Green, and Co., 1871), 104–8). But see Christian Friedrich Wurm, 'Selbsthülfe der Staaten in Friedenszeiten.', *Deutsche Vierteljahrs-Schrift* 21/4 (1858), 71–94, at 87.

356 See Sir J. Hudson to the Earl of Clarendon, 2 July 1857: Great Britain, F. O., *BFSP 1857–1858* (above, n. 269), 326; Acting Consul Barbar to the Earl of Clarendon, 30 June 1857: Ibid., 327–8. See the whole diplomatic correspondence regarding this incident: Ibid., 326–557.

gents' plot.[357] In March and April 1858, both engineers were released on account of their health.[358]

With the favourable opinion of the Law Officers of the Crown,[359] the Earl of Malmesbury, who had succeeded the Earl of Clarendon at the head of the Foreign Office, demanded compensation from the Neapolitan Government.[360] Great Britain claimed 3.000£ as Naples had declined the offer to fix the amount of compensation itself.[361] The British Government warned that if the Two Sicilies persisted in refusing this reparation, Great Britain would be fully entitled to take measures of embargo or reprisals to enforce compliance with the demands. However, as proof of moderation, it was ready to refer the issue to a third State's mediation, pursuant to the 23rd Protocol of Paris to which the Neapolitan Government had subscribed.[362] In fact, apart from moderation, the British Government felt in some way morally bound to abide by the Protocol, given that this public act was of great importance in Europe and that a British minister pushed for the adoption of the principle laid down in it.[363] Regarding the identity of the mediator, the Earl of Malmesbury proposed Sweden or another second-rank Power like the Netherlands, Belgium or Portugal. He, nevertheless, expressly ruled out the choice of a great Power. Arbitration, likewise, was altogether out of the question.[364]

In the end, mediation proved unnecessary, for the Neapolitan Government consented to fulfil the demands entirely.[365] The fear of British reprisals could explain the payment of 3.000£ since the force of the Two

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357 Mr Hammond to Acting Consul Barbar, 24 July and 14 August 1857: Ibid., 331.

358 Mr Lyons to the Earl of Malmesbury, 19 March and 10 April 1858: Ibid., 433 and 462.

359 The Law Officers of the Crown to the Earl of Malmesbury, 29 January and 12 April 1858: Ibid., 391–392; 463–464.

360 The Earl of Malmesbury to Mr Carafa, 15 April 1858: Ibid., 472.

361 The Earl of Malmesbury to Mr Carafa, 25 May 1858: Ibid., 538.

362 The Earl of Malmesbury to Mr Carafa, 25 May 1858: Ibid.

363 "Had not so public and important an act received the assent of Europe, Her Majesty's Government might, perhaps, have proceeded, on receiving the refusal of the Neapolitan Government to satisfy their just demands, to take such measures as would at once have secured the pecuniary payment required; but they do not, under the present circumstances, consider themselves justified in resorting to extremities until they have first appealed to the good offices of a friendly Power to assist them in settling their claim on the Neapolitan Government." (The Earl of Malmesbury to Mr Lyons, 25 May 1858: Ibid., 541).

364 Earl of Malmesbury to Mr Lyons, 25 May 1858: Ibid., 541–2.

365 Mr Carafa to the Earl of Malmesbury, 8 June 1858: Ibid., 552.

Sicilies did not match Great Britain's.[366] As for the release of the Sardinian crew and the restitution of the *Cagliari*, the Neapolitan Government certainly knew —without acknowledging it formally, though— that the capture of the steamer and the imprisonment of its company were hardly lawful in terms of international law. For these reasons, it probably gave up.

So, the system of conflict resolution enacted in the Protocol revealed successful in this case, and reprisals did not make beyond mere threats. Nevertheless, Great Britain's course of action here was justified by the general context of the affair that called for much caution. As a matter of fact, the reference to the Protocol aimed to avert a general European war owing to the fear that the Kingdom of Sardinia would resolve to wage war on the Two Sicilies for the insult.[367] That is why the termination of the dispute was received with relief at the British Parliament.[368]

iii) The Prince of Wales case: British Reprisals against Brazil, 1862–1863

However, in another instance where the political situation was not so dire, the British Government showed less readiness to abide by the principle of the Protocol.

When the British barque *Prince of Wales* was shipwrecked off the Brazilian coast in June 1861, the circumstances surrounding the discovery of the wreck led the British consul at Rio Grande do Sul to suspect that the locals murdered the surviving sailors and plundered the remaining cargo, while the Brazilian authorities either colluded with them or acted with gross negligence.[369] Therefore, the British Government was firmly convinced that Brazil's responsibility was engaged. Hence, the former demanded the latter's commitment to pay compensation. Although the losses were estimated at 6.525,19£, Great Britain was ready to accept arbitration at the request of the Brazilian Government, yet on the sole issue of the amount of com-

366 See Mr Carafa to the Earl of Malmesbury, 8 June 1858: Ibid.

367 Earl of Malmesbury, House of Lords, 29 April 1858: Great Britain, Parliament, *Hansard's Parliamentary Debates*: *Third Series. Commencing with the accession of William IV.* (149th vol.; London: Cornelius Buck, 1858), col. 1938f.

368 Entry for 12 June 1858: James Howard Harris, Earl of Malmesbury, *Memoirs of an ex-minister*: *An autobiography*, 2nd vol. (3rd edn., London: Longmans, Green, and Co., 1884), 123.

369 Consul Vereker to the Secretary to the Board of Trade, 25 June 1861: Great Britain, F. O., *BFSP 1863–1864* (above, n. 287), 579–83.

pensation to be paid.[370] If, however, Brazil refused the demands and made no proposal for arbitration, Brazilian ships or property should be seized by way of reprisals.[371]

The Brazilian Government turned down the demands, which compelled Great Britain to make use of force. Thus, Admiral Warren, in accordance with the British ambassador to Brazil William Christie, blockaded the port of Rio de Janeiro from 31 December 1862 until 6 January 1863, when the Brazilian Government finally agreed under protest to pay whatever sum. Three warships closed off the entrance of the bay while two steamers were dispatched to capture Brazilian vessels, resulting in five prizes valued at about 13.000£. Following the announcement of the settlement of the dispute, the detained vessels were at once released.[372]

After revaluation, the British Government fixed the compensation at 3.200£.[373] Brazil paid the sum but stressed that the payment was the result of coercion and not the admission of responsibility in the plunder of the *Prince of Wales*.[374] Besides, the Brazilian Government directly challenged the conduct of reprisals. Indeed, it regarded the blockade of Rio de Janeiro harbour and the capture and detention of vessels in Brazilian territorial waters as being acts of war and a wanton affront since captures on the high seas would perfectly have attained their goal and remained within the

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370 Mr Christie to the Marquis of Abrantes, 5 December 1862: Ibid., 736–7. See Seymour FitzGerald's criticism of such settlement terms, House of Commons, 16 July 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 287), col. 884.

371 Earl Russell to Mr Christie, 8 November 1862: Great Britain, F. O., *BFSP 1863–1864* (above, n. 287), 718.
Another cause of complaint was the supposed ill-treatment of three British naval officers who were arrested and put in a cell for many hours. They were accused of aggression on a Brazilian policeman while they were reportedly drunk on leave. The British Government demanded satisfaction for the outrage in the form of the punishment of the culprits and an official apology. See Mr Christie to the Marquis of Abrantes, 5 December 1862: Ibid., 732–4.

372 See Mr Christie to Earl Russell, 8 January 1863: Ibid., 740–9; Rear-Admiral Warren to the Secretary to the Admiralty, 8 January 1863: Ibid., 802. Regarding the ill-treatment of the officers of H.M.S. *Forte*, the issue was referred to the arbitration of Leopold I, King of the Belgians. On 18 June 1863, he ruled that the application of Brazilian municipal laws to the British officers neither was intended nor amounted to an insult to the British Navy. See the award: Great Britain, F. O., *BFSP 1862–1863* (53rd vol.; London: William Ridgway, 1868), 150–1.

373 Earl Russell to Mr Moreira, 24 February 1863: Great Britain, F. O., *BFSP 1863–1864* (above, n. 287), 818.

374 Mr Moreira to Earl Russell, 26 February 1863: Ibid., 819–20.

bounds of a state of peace. Therefore, the Brazilian Government demanded satisfaction for the violation of its national territory as well as compensation for the damage caused to the prizes.[375] In other words, the point of contention was the manner in which the acts of reprisals had been executed, not their cause.[376]

Nevertheless, the British Secretary of State for Foreign Affairs, Earl Russell, rejected the Brazilian demands on the grounds that the question of the expediency or execution of reprisals was indivisible from the issue that led to their adoption. He, thus, contended that since Great Britain was entitled to exercise reprisals and did not attempt to humiliate or attack Brazil, the issue should remain closed.[377] But this answer was deemed unsatisfactory and, consequently, the Brazilian plenipotentiary minister at London announced the suspension of diplomatic relations between the two countries.[378]

The crisis triggered a lively debate in the British Parliament about the impropriety of reprisals in the present case. The opposition strongly criticised Earl Russell's behaviour in the affair. For example, the Earl of Malmesbury accused his successor at the head of the Foreign Office of neglecting the principle of the 23rd Protocol of 1856. According to him, the right course of action would have been to refer the issue to mediation or arbitration.[379] At the sitting of the House of Commons on 16 July 1863, Seymour FitzGerald, MP for Horsham, also argued that the Protocol could not be interpreted —unlike the assertion of the Under Secretary for Foreign Affairs, Austen Henry Layard— as ascribing to the target country the duty to propose arbitration. For FitzGerald, this interpretation was against the spirit of the Protocol. He instead defended the view that the State which intended to resort to forcible measures first had to propose arbitration. That is why he condemned the British Government for omitting to

375 Mr Moreira to Earl Russell, 5 May 1863: Ibid., 835–7.

376 This was made very clear in Mr Moreira's letter to Earl Russell, 25 May 1863: Ibid., 838–40. He wrote: "C'est cette série d'actes de guerre pratiqués dans un état de profonde paix, actes aussi offensifs que superflus; ce sont ces représailles prétendues "pacifiques," avec lesquelles on a fermé toute discussion entre les deux Gouvernements, qui établissent le droit du Gouvernement Impérial à la réparation demandée dans la note du 5 courant, droit que rien ne saurait infirmer, quelles que soient d'ailleurs les raisons qui aient pu amener le Gouvernement Britannique à avoir recours à l'expédient de la force." (Ibid., 839f.).

377 Earl Russell to Mr Moreira, 19 May 1863: Ibid., 838.

378 Mr Moreira to Earl Russell, 25 May 1863: Ibid., 841.

379 The Earl of Malmesbury, House of Lords, 19 June 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 338), col. 1135.

make such a formal offer of arbitration. This was clear evidence for him that rules only bound weak parties, whereas stronger Powers would not hesitate over departing from the stipulations if they judged it necessary or more convenient.[380]

Another charge against the British Government was the uncritical acceptance of ambassador Christie's conduct in this affair. FitzGerald drew to the attention of the House of Commons that the last instruction which Christie received contained the British Government's consent to submit the whole issue to arbitration if Brazil would request it. Instead, the British ambassador deliberately communicated a previous despatch that limited the scope of arbitration to the sole question of the amount of compensation.[381] For another MP, Mr Henley, "[t]he facts were just as much a matter for arbitration as the amount of damages." Otherwise, it would deprive the Protocol of its original meaning.[382]

Finally, the execution of reprisals was blamed, too. The Earl of Malmesbury argued that Great Britain abused its power. If reprisals had to be taken, the least offensive acts of reprisals like an embargo on the hundred Brazilian vessels present in British harbours ought to have been preferred.[383]

The British Government refuted these accusations and attempted to justify the course of action against Brazil. Earl Russell maintained that an offer of arbitration would have prompted the Brazilian Government to delay settlement further. Moreover, referring to Viscount Palmerston's doctrine and policy towards other nations against which claims existed, he contend-

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380 Seymour FitzGerald, House of Commons, 16 July 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 287), col. 882–883. Cf. Paulsson, *Denial of Justice in International Law* (above, n. 61), 19: "It has often been observed in international relations, and elsewhere, that the weak seek the protection of the law, while the strong do not need to be punctilious about its observance."

381 Seymour FitzGerald, House of Commons, 16 July 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 287), col. 884–886. On the other hand, Charles Buxton, MP for Maidstone, regarded as an effective precedent for future disputes the offer of arbitration by Great Britain, a powerful nation, on the principle of the claim. (House of Commons, 6 March 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates*: *Third Series. Commencing with the accession of William IV.* (169th vol.; London: Cornelius Buck, 1863), col. 1160–1161).

382 Mr Henley, House of Commons, 16 July 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 287), col. 923.

383 The Earl of Malmesbury, House of Lords, 19 June 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 338), col. 1135.

ed that Great Britain was entitled to seek redress to ensure the protection of its commerce in every part of the world. Weak nations, thus, could not hide behind their weakness to evade responsibility.[384] In the House of Commons, Layard also laid emphasis on the incentive effect that reprisals against Brazil had upon the South American countries against which Great Britain had many pending claims. He pointed out the improvement of Great Britain's relations with those countries and their readiness to provide redress. However, he noted that the recent protest of Brazil seemed to have reversed this trend.[385]

In the negotiations with Brazil under the good offices of the King of Portugal, Earl Russell stressed the legality of the proceeding. He maintained that neither the blockade of Rio de Janeiro nor the capture of Brazilian vessels in the territorial waters amounted to war because, on the one hand, this blockade did not impede the ingress and egress of vessels under a foreign flag and, on the other, legal experts made no difference between seizures on the high seas and in the territorial waters. He also added that Great Britain's reprisals were less questionable than the Brazilian military occupation of Uruguayan territories as reprisals. As for the indemnification for losses suffered as a result of reprisals, Earl Russell firmly rejected any compensation. He argued that it would, otherwise, be as if Great Britain confessed that the acts of reprisals were, in actual fact, unjust.[386] For the Secretary of State for Foreign Affairs, "we can never admit that the power given by the Law of Nations, which the Emperor of Brazil has exercised, Her Majesty, as the Sovereign of a great maritime Power, should not also possess."[387]

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384 Earl Russell, House of Lords, 19 June 1863: Ibid., col. 1143–1145.

385 Mr Layard, House of Commons, 16 July 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 287), col. 898–899.

386 Earl Russell to Count Lavradio, 10 October 1864: Great Britain, F. O., *Papers respecting the Renewal of Diplomatic Relations with Brazil* (above, n. 283), 10–2. On this last point, the *Institut de Droit International* in 1887 laid down the rule that the vessels detained in the course of a pacific blockade had to be restored after its termination, "but without any compensation whatsoever." See James Brown Scott (ed.), *Resolutions of the Institute of International Law dealing with the Law of Nations*: *With an Historical Introduction and Explanatory Notes*, Collected and translated under the supervision of and edited by James Scott Brown (Carnegie Endowment for International Peace: Division of International Law; New York: OUP, 1916), 69f.

387 Earl Russell, House of Lords, 7 February 1865: Great Britain, Parliament, *Hansard's Parliamentary Debates*: *Third Series, Commencing with the accession of William IV.* (177th vol.; London: Cornelius Buck, 1865), col. 35. See also Earl

In the end, the diplomatic relations between Great Britain and Brazil were restored in 1865. The former obtained to pay no compensation, in return for giving the formal assurance that it did not intend to offend the latter's dignity.[388]

It should be remarked that both Great Britain and Brazil had acceded to the Protocol of Paris, the latter at the former's invitation. And yet, the Brazilian Government did not protest that Great Britain had not abided by the principle of the Protocol.[389] So, after six or seven years, the recommendation enshrined in the 23rd Protocol did not play a significant role any longer to prevent the recourse to armed reprisals. The question merely had relevance in the political debate that took place in the British Parliament.

Altogether, the resort to reprisals was barely subject to the observance of legal prerequisites. It actually depended mostly on political considerations.

IV. On the Questionable Edge of Peace

1. Disproportionate Use of Force

(a) Standard of Proportionality versus Efficacy

Nineteenth-century reprisals were generally disproportionate to the offence.[390] Indeed, because reprisals were public, States mainly pursued coercion and were little concerned about the amount of force exercised. Nevertheless, it does not mean that proportionality in the form of a general requirement ceased to apply.[391] The reprisal-taking countries were, in fact, often criticised for exercising acts of reprisals too harsh. They were, therefore, reminded of the standard of proportionality.

So, in the context of the *Don Pacifico* affair of 1850, Russia raised serious concerns about the overwhelming force used by Great Britain. Without challenging the just cause of complaint against Greece that entitled Great Britain to have recourse to reprisals, Philipp von Brunnow, the Russian ambassador at London, insisted that the acts of reprisals could not have

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Russell to Count Lavradio, 7 February 1865: Great Britain, F. O., *Papers respecting the Renewal of Diplomatic Relations with Brazil* (above, n. 283), 16.

388 See Senhor Saraiva to Senhor Vasconcellos, 23 June 1865: Ibid., 19.

389 Cf. The Earl of Malmesbury, House of Lords, 19 June 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 338), col. 1135.

390 Colbert, *Retaliation in international law* (above, n. 6), 76.

391 Neff, *War and the Law of Nations* (above, n. 2), 226.

any hostile character. The coercive measures ("*mesures comminatoires*") thus had to remain within the limits of what was necessary to secure compensation equal to the amount claimed. That is why he argued that a blockade of the Greek coasts was utterly inconsistent with mere reprisals and a state of peace.[392] The Russian foreign minister, Count Karl Nesselrode, likewise believed that the coercive measures were disproportionate to the amount claimed and the object of the action.[393] Also in the British Parliament, Lord Stanley and the Earl of Aberdeen pointed out that the naval fleet sent to Greek waters was as big as Admiral Nelson's armada at the battle of the Nile.[394]

On another occasion, in 1864 at the time of the negotiations for resuming diplomatic relations between Great Britain and Brazil, the Portuguese ambassador to the former country referred to Vattel's remark on proportionality of reprisals. In fact, he considered that out of the five vessels seized by Great Britain one alone would have sufficed to secure the amount claimed.[395]

However, the reprisal-taking countries generally defended the opinion that the only way to beat the stubbornness of a target country was to show a strong arm.[396] For that purpose, the force employed had to be considerable. Only then could reprisals be coercive while making resignation honourable for the target country.[397] As a matter of fact, the use of reprisals in

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392 Baron Brunnow to Viscount Palmerston, 22 January (O.S.)/8 February (N.S.) 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 499–504. See, thereupon, Cussy, *Phases et causes célèbres du droit maritime des nations* (above, n. 223), 2nd vol., 487.

393 Count Nesselrode to Baron Brunnow, 19 February 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 616.

394 Lord Stanley and the Earl of Aberdeen, House of Lords, 17 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 1310 and 1350, respectively. See also Cussy, *Phases et causes célèbres du droit maritime des nations* (above, n. 223), 2nd vol., 491.

395 Count Lavradio to Earl Russell, 14 October 1864: Great Britain, F. O., *Papers respecting the Renewal of Diplomatic Relations with Brazil* (above, n. 283), 14.

396 E.g. "Certain it is, that with respect to most of the Hispano-American governments, the records of the department [i.e. the U.S. Department of State] will show that amicable remonstrance, diplomatic correspondence, and negotiation are totally unavailable to procure justice for outrages upon American citizens, *unless accompanied by use of means of coercion*." (Mr Sanford to Mr Cass, 10 August 1857: Sanford, *The Aves Island Case* (above, n. 43), 239 (emphasis added)).

397 See, e.g., Mr C. Anstey, House of Commons, 25 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 371–372; Viscount Palmerston, House of Commons, 25 June 1850: Ibid., col. 397.

the nineteenth century responded to a preoccupation of coercion. Reprisals were not used as a source of compensation but rather pursued "the attainment of some satisfactory arrangement".[398] So, in the mind of the great Powers, reprisals had to be efficacious, whatever the amount of force used, before being proportionate.

As a result of this way of thinking, the acts of reprisals resorted to could be harsher than the mere seizure of property since the idea was to teach a lesson to the target country. For example, when Greytown (in today's Nicaragua) refused to comply with several demands of the United States — namely the payment of an indemnity for injuries to an American company and for outrages to American citizens, the apology for the indignity committed to the American Minister to Central America and the promise to prevent the recurrence of similar abuses—, the U.S.S. *Cyane* shelled and destroyed the town in 1854.[399] Although the U.S. Secretary of the Navy, James C. Dobbin, instructed Captain Hollins on 10 June 1854 to act with restraint, he actually believed that the people of Greytown "should be taught that the United States will not tolerate these outrages, and that they have the power and the determination to check them."[400] In the present case, the use of a considerable force aimed to deter the recurrence of unlawful acts.

So, throughout the nineteenth century, a standard of proportionality between the amount of force employed and the seriousness of the offence did not guide the exercise of reprisals, since this self-help measure pursued the main idea of compulsion. It would take until 1928 before a mixed arbitral tribunal strongly reaffirmed in the *Naulilaa* case that such a requirement is indispensable to make reprisals lawful.[401]

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398 Colbert, *Retaliation in international law* (above, n. 6), 77.

399 Moore, *A digest of international law* (above, n. 222), 112–4. See also Cussy, *Phases et causes célèbres du droit maritime des nations* (above, n. 223), 2nd vol., 528–533.

400 Quoted in Moore, *A digest of international law* (above, n. 222), 113f.

401 "Même si l'on admettait que le droit des gens n'exige pas que la représaille se mesure approximativement à l'offense, on devrait certainement considérer, comme excessives et partant illicites, des représailles hors de toute proportion avec l'acte qui les a motivées." (*Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (Sentence sur le principe de la responsabilité*), Decision of 31 July 1928, RIAA 2 (1949), 1011–33, at 1028).

(b) Widening of the Category of Reprisals

Following this logic of coercion, the acts of reprisals had to be as intimidating as possible. However, during the period 1831–1863, reprisals were often understood *sensu stricto* as the seizure of ships or property.[402] That is why they were usually accompanied by other means of duress for the sake of efficacy.[403] As a consequence, the concept of 'reprisals' progressively came to cover any kind of coercive measure taken with the aim of attaining a satisfactory agreement with the offending State.

Whereas reprisals in the form of the seizure on the highs seas or in ports (embargo) were regarded as consistent with a state of peace as long as the target country did not treat them as constituting acts of war,[404] the legality of the other measures of coercion in time of peace was in many respects doubtful.

The reprisal-taking countries often had recourse, i.a., to a naval blockade of specific ports or stretches of coastline of the target country as a means accompanying the capture of ships. However, before the nineteenth century, a blockade referred exclusively to a belligerent right sanctioned by the law of nations.[405] Therefore, the use of such blockades outside a state of

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402 See, e.g., Viscount Palmerston, House of Commons, 4 March 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates*: *Third Series, commencing with the accession of William IV.* (109th vol.; London: Cornelius Buck, 1850), col. 316; Viscount Palmerston to Baron Brunnow, 30 March 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 738; Earl Russell to Mr Christie, 8 November 1862: Great Britain, F. O., *BFSP 1863–1864* (above, n. 287), 718.

403 E.g. "[…] it was necessary at length to resort to measures of reprisal and coercion, to show a force far more than sufficient to enforce our demands." (Lord J. Russell, House of Commons, 28 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 711). As Westlake pointed out, pacific blockade and reprisals *strictu sensu* (i.e. the sequestration of properties for compensation) could be combined together, "but then any confiscation for breach of the blockade will be reprisal." (Westlake, *International Law* (above, n. 25), 17 fn. 2).

404 Thus, Mr Christie could warn the Brazilian Government not to retaliate or resist violently; otherwise, war would break out between both countries and bring unpleasant consequences. See Mr Christie to the Marquis of Abrantes, 30 December 1862: Great Britain, F. O., *BFSP 1863–1864* (above, n. 287), 774.

405 Thomas Alfred Walker, *A Manual of Public International Law* (Cambridge: CUP, 1895), 96. See also Paul Fauchille, *Du blocus maritime*: *Étude de droit international et de droit comparé* (Paris: Arthur Rousseau, 1882), 38–67, who strongly emphasised the illegality of pacific blockade as the abusive use of a right valid only in maritime warfare.

war was subject to severe criticisms.[406] Palmerston himself, who approved several times the establishment of such a coercive blockade while he was at the head of the Foreign Office, secretly confessed at the time of the Franco-British blockade of La Plata (1845–1847) that blockading the ports of another State was a belligerent right. Thus, if war was not declared between the blockading and the blockaded nations, the operation would be utterly illegal from the start.[407]

The first blockade short of war —a measure later labelled 'pacific blockade' in legal doctrine[408]—, instituted in a context of reprisals, was experimented under Palmerston's administration. This step was decided in response to the refusal by the New Granadan Government to give satisfaction for the allegedly false imprisonment of a British pro-consul and the ensuing violation of the British consulate of Panama City.[409] The blockade

406 See, e.g., Baron Brunnow to Viscount Palmerston, 22 January (O.S.)/8 February (N.S.) 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 503; Count Lavradio's memorandum, 27 May 1864: Great Britain, F. O., *Papers respecting the Renewal of Diplomatic Relations with Brazil* (above, n. 283), 3. Earl Malmesbury and Lord Chelmsford also drew the attention of the House of Lords on 19 June 1863 to the nature of blockade, namely an act of war. See Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 338), col. 1134 and 1160, respectively.

407 "The real truth is, though we had better keep the fact to ourselves, that the French and English blockade of the Plate has been from first to last illegal. Peel and Aberdeen have always declared that we have not been at war with Rosas [= Juan Manuel de Rosas, dictator of the Argentine Confederation]; but blockade is a belligerent right, and, unless you are at war with a state, you have no right to prevent ships of other states from communicating with the ports of that state —nay, you cannot prevent your own merchant ships from doing so. I think it important, therefore, in order to legalise retrospectively the operations of the blockade, to close the matter by a formal convention of peace between the two Powers and Rosas." (Viscount Palmerston to Lord Normanby, 7 December 1846: Henry Lytton Bulwer, *The Life of Henry John Temple, Viscount Palmerston: with Selections from his Correspondence*, 3rd vol. (3rd edn., London: Richard Bentley, 1874), 327). Cf. Sir William Scott's judgement in *The Fox and others*, pronounced on 30 May 1811, in which he concurred with the opinion that "a blockade, imposed for the purpose of obtaining a commercial monopoly for the private advantage of the state which lays on such blockade, is illegal and void on the very principle upon which it is founded." (Thomas Edwards, *Reports of Cases Argued and Determined in the High Court of Admiralty: Commencing with the Judgments of the Right Hon. Sir William Scott, Easter Term, 1808*, edited by George Minot (Boston: Little, Brown and Company, 1853), 320).

408 See Chapter Three.

409 See Great Britain, F. O., *BFSP 1837–1838* (26th vol.; London: Printed by Harrison and sons, 1855), 128–268.

of the whole New Granada coast began on 21 January and lasted till 2 February 1837 as the news of the pro-consul's liberation reached Commodore Peyton, anchored off Carthagena, and the Colombian general in charge of the defence of that place pledged the payment of the requested sum.[410]

The use of a blockade short of war proved to be efficient as a means of coercion since New Granada consented to provide redress. Indeed, statesmen had recognised the potent character of such a proceeding. Thus, already when reprisals were merely contemplated, the British diplomat stationed in Bogotá characterised such a blockade as compulsion not amounting to war.[411] In the context of the *Don Pacifico* affair of 1850, the MP for Sheffield also underlined the fact that a blockade could prevent war when instituted against weak nations. Still, he conceded that against a great nation, a blockade would not fail to be automatically treated as a declaration of war.[412] In the following years, the example set by Great Britain was soon to be imitated. For instance, France resorted to a similar kind of blockade against Mexico in 1838.

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410 Commodore Peyton to Consul Kelly, 21 January 1837: Ibid., 256; the former to Mr Turner, 2 February 1837: Ibid., 263–5.
It is, however, unlikely that the whole coast was effectively blockaded since Commodore Peyton had only seven ships at his disposal. Carthagena was actually one of the only places blockaded. Cf. Falcke, *Le blocus pacifique* (above, n. 40), 49. Yet, President Francisco de Paula Santander claimed in his message to the New Granadan Congress on 1 March 1837 that the blockade "was done with so much rigour, that even Letters addressed to Granadan citizens and Authorities were intercepted." (Message of the President of the Republic of New Granada on the opening of the Congress, 1 March 1837: Great Britain, F. O., *BFSP 1836–1837* (25th vol.; London: James Ridgway, 1853), 1047).

411 Mr Turner to Admiral Halkett, 11 December 1836: Great Britain, F. O., *BFSP 1837–1838* (above, n. 409), 231–2.

412 "Now mark the curious mode of proceeding, and let us consider that with great nations a blockade is a declaration of war, and must of necessity be so; but in dealing with weak and comparatively powerless nations it is really a merciful and a useful mode of avoiding war to take the preliminary step of blockade—not reprisals, be it observed, as has been too often but most erroneously stated. This, I say, in dealing with weak nations, is far better than declaring war, and thereby risking the peace of the world." (Mr Roebuck, House of Commons, 24 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 240).

Nevertheless, the legality of those blockades was very dubious. In fact, in the course of the blockade of New Granada, foreign vessels were detained and then released at the end.[413] Third States protested that outside a state of war the ingress and egress of their ships to any ports could not be impeded by a blockading force.[414] The Queen's Advocate, Sir John Dodson, also stated that, although Great Britain was entitled in that case to make reprisals by seizing ships and property of New Granadan citizens, only a state of war justified the blockade of ports and the interference with foreign merchant vessels. Therefore, he believed that Great Britain had actually been at war with New Granada.[415]

The same cause of complaint arose with the French blockade of Mexico. Indeed, according to the notification of the blockade, the so-called "neutral ships" could be detained if after special warning they attempted to break

413 See Commodore Peyton to Consul Turner, 23 January 1837: Great Britain, F. O., *BFSP 1837–1838* (above, n. 409), 257; Commodore Peyton to Mr Turner, 2 February 1837: Ibid., 263 and 265.

414 For instance, the Hanseatic towns stated the following: "En vain on feuillette les traités sur le droit des gens pour rencontrer le blocus dans l'énumération des moyens de terminer les différends nationaux sans avoir recours à la guerre. Certainement ils ne l'approuveraient guères dans une étendue qui fait souffrir d'autres nations que celle de laquelle ils [sic!] s'agit d'obtenir le redressement de quelque grief … En effet ce n'est guères [sic!] que la dernière nécessité qui jusqu'ici a justifié des mesures plus impérieuses à des tiers qu'aux belligérants. *Au moins dans un cas exceptionnel où d'autres mesures de fait ne paraissent pas applicables, le blocus diplomatique inconnu au droit des gens de nos pères devrait-il se distinguer par tous les ménagements pour la navigation des tiers qui ne le rendraient pas complètement illusoire*." (Memorandum of the Hanseatic towns, 10 September 1838, quoted in Falcke, *Le blocus pacifique* (above, n. 40), 56 fn. 10 (emphasis in original)). Cf. the letter of the New York Chamber of Commerce to the U.S. Secretary of State John Forsyth, 5 September 1838: Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent* (above, n. 267), 15th vol., 806–807.

415 P. R. O., F. O. 83–2254, 14 March 1837, quoted in Clive Parry, 'British Practice in Some Nineteenth Century Pacific Blockades', *ZaöRV* 8 (1938), 672–88, at 676. Sir John Dodson gave a similar opinion on the Anglo-French blockade of La Plata, to wit, that a blockade was altogether incompatible with a state of peace. See P. R. O., F. O. 83–2227, 25 July 1846, quoted in Ibid., 679.

the blockade.[416] Consequently, during the enforcement of the blockade that lasted seven months, 46 ships of third States were captured while 4 Mexican vessels were sequestrated.[417] The third States likewise protested against this proceeding.[418]

To make those coercive blockades acceptable, it was then imperative not to impede the free navigation of ships of third States. That is why the blockade that Great Britain established against Greece in 1850 confined its effects to ships under the Greek flag.[419] The same concern not to interfere with foreign shipping also appeared a decade later when Great Britain

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416 Item 1 of the French notification of the blockade, 15 April 1838. Nevertheless, British packet boats used in mail service could freely ingress and egress the ports of Veracruz and Tampico (Item 3), and the vessels navigating under the flag of a third State had 15 days to leave the blockaded ports from the moment when the said blockade was established (Item 2). See Great Britain, F. O., *BFSP 1837–1838* (above, n. 409), 1100. According to Count Molé, these orders aimed to reach a balance between effective coercion and "the sincere desire to cause the least possible inconvenience to the navigation of neutral vessels." (Count Molé to Earl Granville, 1 June 1838: Ibid., 726f.).

417 Extract of Théobald de Lacrosse's report to the *Chambre des députés*, 21 June 1839: Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent* (above, n. 267), 16th vol., 614.

418 After an American master rescued his schooner which had been captured by one of the French brigs of war blockading the Mexican ports, France asked the U.S. Government for the restitution of the vessel on 20 July 1838. But the Department of State did not accede to the demand on the grounds that "[t]he writers on international law have not enumerated blockade as one of the peaceable remedies to which an injured nation might resort, but have classed it among the usual means of direct hostility." Hence the applicable rules were those of belligerent blockade, what fell within the competence of the Judiciary but not of the Executive. See Moore, *A digest of international law* (above, n. 222), 135. However, months after the termination of the conflict, a French legislator asserted that a blockade as a coercive measure did not amount to war. See the extract of Théobald de Lacrosse's report to the *Chambre des députés*, 21 June 1839: Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent* (above, n. 267), 16th vol., 614.

419 Consul Green to the Consular Body at Athens, 24 January 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 534. Besides, in order to avoid interfering with foreign commerce, Sir William Parker instructed a captain of his fleet that foreign merchants could within 24 hours produce the proof that the

blockaded the harbour of Rio de Janeiro in 1862–1863.[420] Regarding this latter incident, Earl Russell explained that the blockade had been intended to facilitate the capture of Brazilian ships. But he denied that it was equivalent to a wartime blockade because there had precisely been no effectual closing of the port of Rio de Janeiro against vessels of third States.[421]

2. Confusion between War and Peace

In the first half of the nineteenth century, a blockade short of war could still not claim a place amongst the lawful methods of coercion. In Clive Parry's own words, the cases of blockade show that at that time "there was either a state of war, real though undeclared, or a frankly illegal proceeding. [It] leads us to the conclusion that there was no such thing as pacific blockade in the sense of belligerent blockade bereft of belligerency in the time which later writers imagined to be the lusty childhood of the institution."[422] By extension, the same remark equally applies to other forceful measures like the bombardment of towns by way of reprisals.

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cargo seized on a Greek ship belonged to them. See Vice-Admiral Sir W. Parker to Captain the Hon. F. Pelham, 26 January 1850: Ibid., 573–4. Only Greek property present on a Greek vessel could then be seized. See Mr Wyse to Viscount Palmerston, 25 January 1850: Ibid., 526. Yet, as Sir William Parker reported to the Secretary to the Admiralty, "[t]he cargoes of Greek vessels being chiefly the property of foreign merchants, many of them naturalised subjects of Turkey, Russia, and England, few vessels are to be met with whose cargoes and hulls can be identified as exclusively Greek, and we have been anxious not to give any cause of complaint by interfering with any foreign property." (Vice-Admiral Sir W. Parker to the Secretary to the Admiralty, 28 January 1850: Ibid., 573). Nonetheless, about 41 Greek vessels were being sequestrated on 18 February 1850 as it results from a despatch of Mr Wyse to Viscount Palmerston. See Ibid., 653. This led to the stinging commentary of Lord Stanley that the British step targeted "a weak, unoffending people, interrupting harmless commerce, and plundering wretched, half-pauper fishermen of their sole means of subsistence." (Lord Stanley, House of Lords, 17 June 1850: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 274), col. 1321).

420 See Mr Christie to Acting Consul Hollocombe, 1 January 1869: Great Britain, F. O., *BFSP 1863–1864* (above, n. 287), 783.

421 Earl Russell to Count Lavradio, 10 October 1864: Great Britain, F. O., *Papers respecting the Renewal of Diplomatic Relations with Brazil* (above, n. 283), 10.

422 Parry, 'British Practice in Some Nineteenth Century Pacific Blockades' (above, n. 415), 682. See also August (von) Bulmerincq, 'Le blocus pacifique et ses effets sur la propriété privée', *Clunet* 11 (1884), 569–83, at 574.

Under such circumstances, the use of belligerent measures in time of peace could only create confusion between war and peace. In fact, the reprisal-taking countries never issued a declaration of war before resorting to armed reprisals.[423] It patently reveals that the great Powers did not want to assume the responsibility for declaring war or, at the very least, that they intended to delay the formality of a declaration of war as long as the inevitability of war could still be denied. And yet, a state of war could arise without a formal declaration of war by the attacking State.[424] Nonetheless, the distinction between peace and war was no easy thing to determine when armed reprisals were employed. The acts of armed reprisals were so ambiguous in character that only the subsequent events could help to classify them.

In 1831, i.e. the first known case of reprisals within the investigated period, France resolved to make reprisals against Portugal on account of the mistreatment of French citizens in the course of persecutions carried out by the self-proclaimed King of Portugal, Dom Miguel I, who sought to quell the unrest in his realm. Unlike Great Britain that successfully pressed the claims of the injured British nationals,[425] the consul of France failed in this attempt to obtain redress from the King. The French Government, thus, sent a squadron to the Tagus estuary to back up the consul's demands. Portuguese warships and merchant vessels were captured and then brought to France. Nevertheless, Dom Miguel's obstinacy compelled the French Government to dispatch a stronger naval force.[426] On 11 July 1831, an engagement between the French forces, on the one hand, and the Por-

423 Nonetheless, an examination of the cases shows that an ultimatum usually preceded the first acts of reprisals. The issuance of an ultimatum was sometimes strongly disapproved, e.g. by Count Nesselrode in 1850. See Lord Bloomfield to Viscount Palmerston, 12 February 1850: Great Britain, F. O., *BFSP 1849–1850. [2]* (above, n. 269), 612.

424 Parry, 'British Practice in Some Nineteenth Century Pacific Blockades' (above, n. 415), 680. See P. R. O., F. O. 83–2227, 25 July 1846, quoted in Ibid., 685.

425 In fact, Lord Palmerston had threatened to order the Naval Commander of the British squadron off Lisbon and Porto to take reprisals if the Portuguese Government did not accede to the demands within ten days. See Viscount Palmerston to R. B. Hoppner, 15 April 1831: Great Britain, F. O., *BFSP 1830–1831* (above, n. 267), 249.

426 Palmerston had actually warned the Portuguese diplomatic agent at London that "measures of more vigorous hostility" could supersede the acts of reprisals already made if France did not get immediate satisfaction from the Government of Portugal. See Viscount Palmerston to Viscount d'Asseca, 18 June 1831: Ibid., 380.

tuguese warships and coastal forts, on the other, took place. It ended in a decisive French victory. At last, the Portuguese Government yielded. A treaty was signed on 14 July by which Portugal gave full satisfaction to the French demands and committed to paying damages as well as a compensation for the naval expedition.[427]

The question of the existence of war had not been raised previously. It truly became of practical interest when Portugal raised the issue of the restitution of the ships captured on the day of the battle which took place on 11 July. Indeed, the Portuguese Government defended a legalistic approach to war, namely that in the absence of the formality of a preceding declaration, war could not exist *de jure*. Therefore, the ships in question could merely be detained by way of reprisals until satisfaction was given. On the other hand, France contended that the laws of war applied in the present case because there had been a war *de facto*. As a consequence, the ships should remain confiscated as good prizes of war.[428] It was obviously to France's advantage to claim the existence of a state of war despite the absence of a declaration.

When Portugal called the British Government to lend support in the controversy, the latter refused to back the Portugese claims by validating the French legal viewpoint.[429] As a matter of fact, French Admiral Roussin told the Portuguese foreign minister on 8 July that France would treat the rejection of the demands as an actual declaration of war.[430] On this basis, the King's Advocate Sir Herbert Jenner argued that, if it were not for Article 18 of the treaty of 14 July 1831 which provided the contrary, the French Government would have been entitled to retain even the ships captured since the beginning of the hostilities.[431] Yet, by referring to the terms

427 For a contemporary relation of the events, see Ulysse Tencé, *Annuaire historique universel pour 1831*: *Avec un Appendice contenant les actes publics, traités, notes diplomatiques, papiers d'états et tableaux statistiques, financiers, administratifs et nécrologiques; – une Chronique offrant les événements les plus piquants, les causes les plus célèbres, etc; et des notes pour servir à l'histoire des sciences, des lettres et des arts*, Nouvelle série (Paris: Thoisnier-Desplaces, 1833), 550–7. See also Great Britain, F. O., *BFSP 1830–1831* (above, n. 267), 43–341 and 341–440, for the diplomatic correspondence relative to the British and the French demands upon Portugal.

428 See Viscount de Santarem to Admiral Roussin, 11 August 1831: Ibid., 430–2.

429 See Viscount Palmerston to Viscount d'Asseca, 25 August 1831: Ibid., 427.

430 Admiral Roussin to Viscount de Santarem, 8 July 1831: Ibid., 407.

431 "This latter species of seizure [i.e. by way of reprisals] is resorted to, with the view of obtaining satisfaction for injuries alleged to have been received, and in order to prevent the necessity of having recourse to actual hostilities; and may

of the convention, Jenner failed to explain when and if hostilities, i.e. war, actually superseded reprisals.[432]

However, this case apart, the reprisal-taking Power generally asserted the uninterrupted state of peace and claimed that the means employed amounted to lawful coercion because of the absence of armed resistance or declaration of war by the target country. The only way for the latter to frustrate the former's contention consisted of issuing a clear statement of intention in the form of a declaration of war.

This happened in 1838 when France undertook reprisals against Mexico on account of a long list of offences against French nationals and their property over a span of thirteen years that had remained unredressed. On 21 March 1838, an ultimatum was issued: either the Mexican Government would comply with the demands it contained or France would blockade Mexican ports in order to cut the maritime custom revenues, in the same manner as an exasperated creditor would deal with a recalcitrant debtor.[433]

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be looked upon as a provisional measure, the character of which is to be determined by subsequent events. If the reprisals should produce a satisfactory result, followed by a restoration of peace between the two Countries, the property seized would be considered as having been placed under temporary sequestrations only, and would be restored to the original proprietors. But, should hostilities once commence, the seizure would then assume an hostile character *ab initio*; so that those ships which were seized before, as well as those which were captured after, that event, would become the property of the capturing State, and the title of the former Owners be divested." (The King's Advocate to Viscount Palmerston, 9 August 1831: Ibid., 421–2). This opinion actually echoed the teaching of Sir William Scott's judgement in *The Boedes Lust* case (see *supra*, fn. 255).

432 Thereupon, Colbert rightly pointed out some flaws in Jenner's opinion. Firstly, it is quite doubtful that Admiral Roussin was actually accredited, without producing his instructions, to declare his country at war with the target country in the case of the latter's failure to comply with the demands. Secondly, Jenner did not clarify if any forceful resistance to reprisals should be regarded as an implicit acceptance of the challenge of war unless the intention to resort to counter-reprisals was clearly announced. See Colbert, *Retaliation in international law* (above, n. 6), 97f. But cf. Sir William Scott's view in the judgement of 11 June 1799 in *The Maria*, which dealt with the question of the forcible resistance of a neutral vessel to the belligerent party's right of visit and search. The judge of the High Court of Admiralty considered in this case that resistance to lawful force did not constitute a right in time of peace but was allowed only in a state of war. See Robinson, *Reports of Cases Argued and Determined in the High Court of Admiralty* (above, n. 255), 1st vol., 360.

433 See the ultimatum in Clercq & Clercq, *Recueil des traités de la France* (above, n. 269), 4th vol., 403–416.

On 16 April, the blockade began.[434] This blockade, which was enforced pacifically against the sole harbour of Veracruz, did not lead to hostilities until 27 November, when the French shelled the fort of San Juan de Ulúa and landed troops to occupy the town.[435] Although France justified the capture of the fort as a pledge,[436] the Mexican Government thwarted this plan by declaring war on 30 November.[437] The hostilities lasted till 9 March 1839 with the signature of an armistice, a peace treaty and a convention for the settlement of claims between France and Mexico.[438]

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434 See the notification of the blockade to third Powers by the French foreign minister, 31 May 1838: Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent* (above, n. 267), 15th vol., 803.

435 Falcke, *Le blocus pacifique* (above, n. 40), 55–8.

436 "Si M. le Contr'-Amiral Baudin, […], se rendait maître du Château d'Ulloa, cette position, qui ne serait dans nos mains qu'un simple nantissement, serait évacuée le jour même où nous aurions obtenu du Mexique la satisfaction qui nous est due." (Count Molé to Earl Granville, 19 September 1838: Great Britain, F. O., *BFSP 1837–1838* (above, n. 409), 897). However, it is reported that Rear Admiral Baudin wrote on 27 November that his peace errand having failed, it was consequently time for war. See Falcke, *Le blocus pacifique* (above, n. 40), 57.

437 See the declaration in Great Britain, F. O., *BFSP 1837–1838* (above, n. 409), 1123.

438 See Martens, *Nouveau recueil de traités d'Alliance, de Paix, de Trêve, de Neutralité, de Commerce, de Limites, d'Echange etc. et de plusieurs autres actes servant à la connoissance des relations étrangères des Puissances et Etats de l'Europe tant dans leur rapport mutuel que dans celui envers les Puissances et Etats dans d'autres parties du globe depuis 1808 jusqu'à présent* (above, n. 267), 16th vol., 607–611.
One question left to arbitration related to the lot of the Mexican vessels seized in the course of the blockade and after the beginning of the hostilities. See Art. 2 of the Convention for the settlement of claims, 9 March 1839: Ibid., 16th vol., 610f. The young Queen Victoria agreed to arbitrate this issue and ruled on 1 August 1844 that, owing to the existence of a state of war, France had retroactively acquired the ships detained since the establishment of the blockade. See the arbitral award in Clercq & Clercq, *Recueil des traités de la France* (above, n. 269), 5th vol., 194. This decision corresponds with Jenner's opinion in 1831 and the teaching of Sir William Scott's judgement in the *Boedes Lust* case (see *supra*, fn. 255). According to John Westlake, the arbitral award conveyed the British opinion regarding the blockades short of war, namely that the ships of the blockaded country could merely be sequestrated unless war broke out. See John Westlake, 'Pacific Blockade', *The Law Quarterly Review* 25 (1909), 13–23, at 17.

So, unless the target country declared war, the operation of reprisals allegedly did not interrupt the state of peace between both parties involved. However, the nature of the action remained in most cases open to interpretation. For example, the official statements made at the time of the British reprisals against New Granada in 1837 indicate the existence of an undefined state of affairs, a twilight zone mid-way between 'perfect' peace and 'perfect' war. Indeed, New Granadan President Francisco de Paula Santander, although being careful not to speak of war or overtly declare it, seemed to regard the contemplated British proceeding as unwarrantable hostilities which suspended the friendly relations between both countries.[439] In the same vein, the British naval commander's turn of phrase that the blockade "materially assisted the pacification" also hints that the 'perfect' state of peace between the parties had been disrupted.[440] For the Queen's Advocate, there was little doubt, though, that the establishment of a blockade always entailed a state of war.[441] Nevertheless, in the absence of an express declaration of war, this case has been regarded hitherto as an instance of reprisals.

During the first half of the nineteenth century, a switch regarding the concept of war happened. It was no longer the nature of the acts exercised that allowed the assessment of the existence of a state of war, but the intent of the parties to the conflict: *non ex re sed ex nomine*. The Judiciary then had power neither to proclaim the existence of war nor to apply the corresponding effects, even though the reprisal action could oddly resemble war to all appearances.[442] The consequence was that all the acts which were not followed by a declaration or recognition of the existence of a status of war

439 See the proclamation of the President of New Granada to the Nation, 12 December 1836: Great Britain, F. O., *BFSP 1837–1838* (above, n. 409), 236–8. In his message to the New Granadan Congress after the termination of the incident, he referred to the British blockade as either a measure of coercion or an act of hostility. He stated too that "an arrangement being entered into, the Blockade was raised, *and the relations of the 2 countries replaced upon their former footing*." (Message of the President of the Republic of New Granada on the opening of the Congress, 1 March 1837: Great Britain, F. O., *BFSP 1836–1837* (above, n. 410), 1047f. (emphasis added)).

440 Commodore Peyton to Mr Turner, 2 February 1837: Great Britain, F. O., *BFSP 1837–1838* (above, n. 409), 263.

441 Parry, 'British Practice in Some Nineteenth Century Pacific Blockades' (above, n. 415), 676.

442 This is what the U.S. Court of Claims pointed out in a case involving a French national who sought compensation for the destruction of her property following the bombardment of Greytown in 1854: "The claimant's case must necessar-

were presumed to remain within the limits of peace.[443] This reasoning led the *Conseil d'État*, the supreme administrative court of France, to decide in the *Comte de Thomar* case that goods seized on a neutral vessel could not be condemned as contraband when a blockade was instituted outside the time of war.[444]

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ily rest upon the assumption that the bombardment and destruction of Greytown was illegal and not justified by the law of nations. […]. [The questions raised] are international political questions, which no court of this country in a case of this kind is authorized or empowered to decide. They grew out of and relate to peace and war, and to the relations and intercourse between this country and foreign nations. *They are political in their nature and character, and under our system belong to political departments of the government to define, arrange, and determine*. And when the questions arise incidentally in our courts the judiciary follow and adopt the action of the executive and legislative departments, whatever they may be." (*Marie Louise Perrin and Trautman Perrin, her husband, v. The United States* (1868): Charles C. Nott and Samuel H. Huntington, *Cases decided in the Court of Claims of the United States*: *at the December Term for 1868. With the Acts of Congress relating to the Court*, 4th vol. (Washington, D. C.: W. H. & O. H. Morrison, [1868]), 547 (emphasis added)). Lord Macnaghten maintained a similar opinion in *Janson v. Driefontein Consolidated Mines* (1902): "In every community it must be for the supreme power, whatever it is, to determine the policy of the community in regard to peace and war." (Pollock & Stone, *The Law Reports or The Incorporated Council of Law Reporting. House of Lords, Judicial Committee of the Privy Council, and Peerage Cases* (above, n. 33), 497).

443 In *Stephen Bishop et al. v. Jones & Petty* (1866), the Supreme Court of Texas stated that "though reprisals and embargoes are forcible measures of redress, yet they do not, *per se*, constitute war. Even hostile attacks and armed invasions, although accompanied by destruction of life and property, and made by the authorized officers of one government on the soil or jurisdiction of another, do not inevitably inaugurate war; for it may be that they will be atoned for and adjusted without war ensuing. War, in its legal sense, has been aptly defined to be "the state of nations between whom there is an interruption of all pacific relations, and a general contestation of arms authorized by the sovereigns."" (George W. Paschal, *Reports of cases argued and decided in the Supreme Court of the State of Texas, during the Austin session, 1866*, 28th vol. (Washington, D.C.: W. H. & O. H. Morrison, 1869), 295).

444 On Mr Guizot's own admission, the blockade of the Río de la Plata did not amount to a declared war between France and the Argentine Government. See *Chambre des pairs*, 8 February 1841 (*Le Moniteur universel*, 9 February 1841, 316). Before the *Conseil d'État*, both the Ministers of the Navy and of Foreign Affairs asserted that a state of war could not exist in the absence of a declaration of war. Yet, the same effects towards neutral shipping applied in the case of a blockade short of war as in the case of a belligerent one, in order to not deprive the measure of its efficacy. On the other hand, the ship-owners' counsel argued that there was a distinction to be made between a belligerent blockade and a "sim-

3. A Right in Vertical Power Relations

Since the criterion of *animus* was used to differentiate peace from war, no material test was thus available. Hence, the confusion between the two activities was greater because acts of war could be exercised abusively, with complete impunity, in time of peace if the target country did not dare to declare war.[445] This state of affairs worked to the advantage of the great Powers when conducting reprisals against weak countries. As a result, the category of reprisals came to encompass a wide variety of so-called measures short of war.

However, the resort to armed reprisals was inconceivable when the dispute involved two nations of equal strength or when the target country was a great Power. Forbearance, indeed, was required because their use

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ple" one; the latter kind should be recognised as producing legal effects more advantageous to third States. See Antoine-Auguste Carette, '[Commentary on the decision *Le Comte de Thomar*]', in Jean-Baptiste Sirey, L.-M. Devilleneuve, and Antoine-Auguste Carette (eds.), *Recueil général des lois et des arrêts, en matière civile, criminelle, administrative et de droit public. 2e série. – An 1848.* (Paris: [s'adresser à M. Bachelier], 1848), 2nd part, col. 510–512, here at 511–512. In the end, the *Conseil d'État* confirmed that the capture of contraband of war found on a neutral ship was permitted only in time of war. See *Comte de Thomar*, Conseil d'État, 25 March 1848: Jean-Baptiste Sirey, L.-M. Devilleneuve, and Antoine-Auguste Carette (eds.), *Recueil général des lois et des arrêts, en matière civile, criminelle, administrative et de droit public: 2e série. – An 1848.* (Paris: [s'adresser à M. Bachelier], 1848), 2nd part, col. 511. Hence, some legal scholars were quick to regard this decision as an authoritative opinion that acknowledged the compatibility of pacific blockade with peace, although, in actual fact, the *Conseil d'État* did not conclude on the legality of the measure *per se*. For example, a French commentator argued that the establishment of a 'simple' blockade was a kind of reprisals that should be preferred because it was milder than the *ultima ratio* of war. He considered that the establishment of such blockades opened an intermediary state between peace and war since 'neutral' vessels were held to respect it insofar as a special notification was given and recorded in the logbook. See Mr Teyssier-Desfarges, 'Revue critique de la jurisprudence du conseil d'État.', *RDFE* 5 (1848), 368–76. Cf. Achille Morin, *Les lois relatives à la guerre selon le droit des gens moderne, le droit public et le droit criminel des pays civilisés*, 2nd vol. (Paris: Imprimerie et librairie générale de jurisprudence Cosse, Marchal et Billard, 1872), 109–10.

445 The reasons are quite obvious: a declaration of war on a great Power could wreak havoc, with the loss of many lives and property, in addition to the fact that a defeat might lead to subjugation, the transfer of territories or adverse peace terms imposed by the victor. Cf. Colbert, *Retaliation in international law* (above, n. 6), 94 and 98f.

would not fail to provoke generalised hostilities.[446] An illustrative example of this postulate is the following quarrel between the United States and France in 1834/35.

Between 1800 and 1817, American citizens were victims of spoliations committed by authority of the French Government. The United States pressed insistently for reparation until a treaty was signed in 1831 by which France acknowledged the claims. It fixed the French indebtedness to 25.000.000 francs and provided that the payment would spread over six annual instalments with an interest of four per cent.[447] Yet, notwithstanding the ratification and the promise of the French Government, the French Chambers neglected and later rejected the adoption of implementation measures for the assignment of money.[448]

Out of patience, U.S. President Andrew Jackson urged the Congress in December 1834 to pass a law authorising the seizure of French property by way of reprisals. He argued that the right of reprisals was a long-established institution of international law which did not bring about war. As a recent precedent, he cited the French reprisals against Portugal that took place in 1831 "under circumstances less unquestionable."[449] Nevertheless, he was aware of the danger that the proclamation of reprisals against such a strong opponent posed. Therefore, he invited France to put pride aside and acknowledge the validity of the claims. The legitimacy of reprisals was irrefutable. That is why he warned France that it would incur discredit in

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446 The Earl of Malmesbury summed up quite well this idea during the debates in the House of Lords, following the British reprisals exercised in the *Prince of Wales* case against Brazil: "Reprisals are a most serious thing; for, mark you, they can only be practically made by a strong country against a weak one. That is a very great objection to reprisals. If they are made by a strong country against one as strong, or nearly as strong, that is war—there must be war, because they will not be suffered." (House of Lords, 19 June 1863: Great Britain, Parliament, *Hansard's Parliamentary Debates* (above, n. 338), col. 1135).

447 See Art. 1 of the Convention as to Claims and Duties on Wines and Cotton, in: William M. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and Other Powers, 1776–1909*, 1st vol. (Washington: GPO, 1910), 524.

448 For a detailed account, see President Jackson, Sixth Annual Message, 2 December 1834: Andrew Jackson, *Messages of Gen. Andrew Jackson*: *With a short sketch of his life* (Concord, New Hampshire: John F. Brown and William White, 1837), 278ff. See also Moore, *A digest of international law* (above, n. 222), 123–4.

449 Sixth Annual Message, 2 December 1834: Jackson, *Messages of Gen. Andrew Jackson* (above, n. 448), 286–7.

the eyes of the civilised world if it chose to treat the measure as a menace and to undertake hostilities.[450]

However, the U.S. Senate Committee on Foreign Relations considered that the passing of such a law was ill-timed. It advocated patience since France had agreed by the treaty of 1831 to pay reparations. Besides, the recourse to reprisals would raise the question of the amount to be seized: either the whole debt or just up to the sum of the first due instalments. But the Committee mainly rejected the Bill because there was always a serious risk of slipping into a war when the target country was in position to resist. Albeit reprisals did not produce a state of war in itself, the Committee pointed out that a strong target country like France would not hesitate over retaliating, leading inevitably to war.[451] On the contrary, it stressed that the French reprisals against Portugal in 1831 were an ill-suited precedent for the present case. Indeed, the Committee believed that the acts of reprisals did not give rise to a state of war because Portugal, being weaker than France, had felt compelled to surrender.[452]

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450 "Such a measure ought not to be considered by France as a menace. Her pride and power are too well known to expect any thing from her fears, and preclude the necessity of the declaration that nothing partaking of the character of intimidation is intended by us. She ought to look upon it as the evidence only of an inflexible determination on the part of the United States to insist on their rights. […]. If she should continue to refuse that act of acknowledged justice, and, in violation of the law of nations, make reprisals on our part the occasion of hostilities against the United States, she would but add violence to injustice, and could not fail to expose herself to the just censure of civilized nations, and to the retributive judgments of Heaven." (Sixth Annual Message, 2 December 1834: Ibid., 287f.).

451 "When [reprisals] are accompanied with an authority from the Government which admits them, to employ force, they are believed invariably to have led to war in all cases where the nation against which they are directed is able to make resistance. It is wholly inconceivable that a powerful and chivalrous nation, like France, would submit, without retaliation, to the seizure of the property of her unoffending citizens, pursuing their lawful commerce, to pay a debt which the popular branch of her legislature had refused to acknowledge and provide for. It cannot be supposed that France would tacitly and quietly assent to the payment of a debt to the United States, by a forcible seizure of French property which, after full deliberation, the Chambers had expressly refused its consent to discharge. Retaliation would ensue, and retaliation would inevitably terminate in war." (quoted in Wharton, *A digest of the international law of the United States,* (above, n. 46), 92).

452 See the Committee's resolution: Ibid., 91–93.

Yet, the harm was already done. Jackson's speech caused resentment in France, where the suggestion of reprisals was deemed a threat and an insult to the national honour. France, thus, decided to suspend the diplomatic relations with the United States.[453] Furthermore, the French House of Deputies made the payment of the claims conditional on satisfactory explanations of Jackson's message.[454] In addition, the French Government asked for an official apology, too.[455] As a result, the situation worsened as the U.S. Chargé d'Affaire was recalled and news arrived in the United States that French naval forces might be dispatched to U.S. waters. And still, Jackson did not help to ease tensions as he enjoined the Congress, on the one hand, to prohibit the importation of French products and the entry of French vessels as peaceful coercive measures, and, on the other hand, to order the preparation of the navy and coastal defence.[456] Fortunately, the British who had much to lose in a war between two great allies offered mediation.[457] So, the issue was finally settled peacefully.[458]

Although U.S. President Jackson initially contemplated just non-forcible reprisals, i.e. the seizure of French property, the whole extent of the dispute shows that reprisals against a great Power (all the more so when they involved the use of armed force) were utterly impossible without giving rise to a state of war. In fact, the French indignation at the mere suggestion of reprisals in President Jackson's message and the ensuing rapid escalation of tension between both States, teetering on the verge of public war, clearly evidence that the exercise of the right of reprisals could only remain within the boundaries of peace when the reprisal-taking country was a Power enjoying a position of manifest superiority over the target country.

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453 President Jackson, Seventh Annual Message, 7 December 1835: Jackson, *Messages of Gen. Andrew Jackson* (above, n. 448), 323. See the diplomatic correspondence: Great Britain, F. O., *BFSP 1833–1834* (above, n. 269), 964–93; Great Britain, F. O., *BFSP 1834–1835* (above, n. 269), 1295–341; Great Britain, F. O., *BFSP 1835–1836* (24th vol.; London: James Ridgway and sons, 1853), 1086–156.

454 President Jackson, Seventh Annual Message, 7 December 1835: Jackson, *Messages of Gen. Andrew Jackson* (above, n. 448), 324f.

455 President Jackson's message to the Congress, 15 January 1836: Ibid., 359.

456 President Jackson's message to the Congress, 15 January 1836: Ibid., 360–1.

457 See Grenville's Journal, 10–11 December 18[3]5, quoted in Wharton, *A digest of the international law of the United States*, (above, n. 46), 96–97. See also Great Britain, F. O., *BFSP 1835–1836* (above, n. 453), 1156–65.

458 Wharton, *A digest of the international law of the United States*, (above, n. 46), 96.

V. Interim Conclusion

During the three decades of 1831–1863, Great Britain and France took advantage of their superiority to shape armed reprisals into an informal privilege which concretely allowed them to resort to belligerent measures while simultaneously claiming the benefits of peace.

Factually, the great Powers made abusive use of reprisals against small countries to assert their influence and control on them. But since the target countries were militarily too weak to fight back, the great Powers could deny the outbreak of a war when it suited them. This had a vicious effect because they could thus exercise an overwhelming, though questionable, amount of force in order to obtain satisfaction to their demands without giving rise to a state of war. As a result, reprisals ceased to refer merely to acts of seizure and progressively came to cover a wide variety of measures short of war.

At the same time, the great Powers justified their deeds by pointing out the lack of respectability and responsibility of the target countries. This discourse gave them not only a reason for action, but also the authority to challenge and elude the rules which might have governed the use of reprisals. For instance, the disproportionate amount of force was explained by the stubbornness of the target countries, and the irrelevance of denial of justice as a requirement for reprisals was accounted for by the unreliability of their judiciary system. Of course, it was sheer opportunism guided by considerations of national policy and commercial interests. But it provided the great Powers with the authority to be the judge in their own case and to shape the practice of reprisals.

It is, therefore, unsurprising that the legal aspects of reprisals did not receive clarification and that the idea of establishing binding limitations on armed reprisals was not even contemplated.