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On Mobile Legal Spaces and Maritime Empires: The Pillage of the East Indiaman *Osterley* (1779)

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This article uses a legal case from the French Indian Ocean empire during the American Revolutionary War (ca. 1778–1780) to explore the operation of mobile legal spaces: that is, law-filled spaces that moved (such as ships) or which were highly shaped by movement in and out of them (ports). These types of spaces, characteristic of early modern seaborne European empires, created distinctive problems and opportunities for those navigating imperial rule, both rulers and ruled. In particular, the essay argues that the mobility of legal spaces added significant spatial and temporal dimensions to the well-known legal diversity and pluralism of the early modern world. In mobile spaces, legal regimes might overlap or conflict temporarily, be relevant for only a fixed period of time, or come into force when a ship reached a particular location. Recognising the ubiquity of these mobile legal spaces and the powerful effects that they had can change how we understand the functioning of law in colonial empires.

Keywords: Legal pluralism, legal spaces, maritime law, Mauritius, French empire.

Introduction

In 1779, in the midst of the global American Revolutionary War, two French vessels sailed from Île de France (present-day Mauritius, an island in the Indian Ocean) with instructions to attack and capture British shipping. They were fortunate to quickly happen upon a British East Indiaman, the *Osterley,* which they took after a short combat. French maritime law prescribed a set of procedures for the captors to follow in order to have the prize judged and condemned as a valid prize of war, with its value to be divided among the captors. But according to allegations that surfaced soon after, the French officers and crew did not follow the rules that the law prescribed. Instead, they pillaged the British vessel of its valuables before its validity as a prize could be judged. Alerted to these alleged misdeeds, the royal tribunal (*Juridiction royale*) in Île de France began an investigation of the matter, which it entrusted to an

experienced and locally prominent magistrate, Ignace Brunel. Over the course of several months in late 1779 and early 1780, he conducted an extensive criminal inquiry targeting a number of the French officers and seamen who were among the *Osterley*'s captors. (Like many other criminal trials of the old regime, it did not come to a final disposition.[1]) At issue in the inquiry was not the legality of the prize itself. Brunel was investigating whether the French sailors had committed criminal acts by despoiling a captured vessel without judicial process, and whether any other criminal acts had occurred in the commission of this alleged crime.

The criminal case brought in 1779-1780 turned on the creation and use of several kinds of knowledge by both the magistrate and the mariners. Brunel sought to document the people, things, and events involved in the case: he searched for witnesses and the stolen goods and worked to craft an orderly narrative of the events around the capture. He deployed his knowledge of the law to assert that particular legal regimes and rules had applied during the events surrounding the *Osterley*'s capture. Yet Brunel was not alone in relying on specialized knowledge in the course of the case. Mariners had their own notions about the legal regimes that existed on and near the water's edge and how they functioned. The French mariners proved to have highly developed understandings of the legal spaces involved in the case. They deployed this spatial knowledge to avoid surveillance of their activities and relied on it in their efforts to avoid judicial chastisement.

The central place that knowledge occupied in the *Osterley* prosecution positions the case as an illuminating episode in the larger historical narrative of early modern European empires' efforts to control their far-flung domains. (Though it is only one case on the periphery of the French empire, the *Osterley* has the qualities of what micro-historians call a "normal exception": a singular instance that can shed light on wider issues.[2]) It is by now a commonplace of imperial history that colonial power and knowledge depended on each other—and that knowledge was made not only from the top down but also from the bottom up.[3] A number of scholars have argued, moreover, that these early modern European knowledge practices played a crucial role in shaping the modern state.[4] Curiously, however, very little of the work in either of these scholarly conversations has explicitly acknowledged or accounted for the maritime character of early modern European empires, which were built on seaborne trade and warfare. An important question remains largely unaddressed by this scholarship: how did the aqueous nature of early modern European empires shape the interaction between knowledge and power? As Lauren Benton's body of scholarship on piracy, ocean regionalism and international law has shown, addressing this question is vital if we are to understand early modern empire and its role in the emergence of modern states and governance.[5]

This essay uses the case of the *Osterley* to examine the form and function of mobile legal spaces in early modern empires: that is, law-filled spaces that moved (ships) or which were highly shaped by movement in and out of them (ports). These spaces, though present in prior examinations of imperial law, have not been considered as a distinctive kind of object with their own spatial and legal logics. Though such mobile

legal spaces were not unique to the maritime world, they were omnipresent within it. They thus suffused the fabric of seaborne early modern European empires. Within such spaces, the creation and use of legal knowledge became difficult in distinctive ways. Mobility, in the simplest sense, radically limited jurists' ability to pin down facts, events, and objects, while multiplying the opportunities individuals had to avoid the state's gaze or confound its efforts to control them. Even more consequentially, the mobility of legal spaces added geographic and temporal dimensions to the legal diversity of the early modern world. In mobile spaces, legal regimes might overlap or conflict temporarily, be relevant for only a fixed period of time, or come into force when a ship reached a particular location. These dimensions of mobility proved crucial in determining how well-informed ordinary people evaded the will of the imperial state and shaped how European jurists (like Brunel) tried to maintain legal authority and impose imperial law on the margins of empire. The importance of mobile legal spaces in shaping the legal and political strategies of European officials during the early modern era, in turn, raises questions about the putative genealogy that influential scholars have sketched leading from early modern state knowledge practices to the modern administrative state.

A Voyage, a Capture…a Crime?

The *Osterley* set sail from British Bengal in the spring of 1779 under the command of Captain Samuel Rogers. It was laden as Indiamen usually were with copious quantities of Indian and Far Eastern manufactures (nankeens, muslins, and the like) and also carried a substantial quantity of silver specie and passengers who ranged in age from toddlers to the elderly. (A large part of the silver was in several chests bearing the initials of the *Osterley*'s captain—a detail that would become significant during the trial.) Indiamen were powerful ships as a rule, and the *Osterley* was no exception.[6] Though certainly not invulnerable, Indiamen were designed to repel all but the largest and most determined attackers. The *Osterley*, then, was unlucky to encounter two French frigates, *La Pourvoyeuse*, commanded by Louis Bernard, chevalier de St. Orens, and *l'Elisabeth*, captain Julien Crozet, near the Cape of Good Hope. After a day-long chase, the French vessels came near enough to fire on the *Osterley*. Though Captain Rogers first tried to escape, and then offered resistance once he was overtaken, he found himself outgunned and was forced to yield after a relatively brief firefight.[7]

French prize law provided the legal framework for the seizure of the *Osterley* and set out the procedures that were supposed to be followed for the capture and adjudication of the ship's status. Taking property as its main object, prize law made prescriptions in three areas. It first lay out the rules and procedures that the captors of an enemy vessel should follow while at sea: the most important were that the capturing vessel had to have a sovereign's authorisation to cruise against enemy shipping and that the captors were obliged to bring the seized vessel and its cargo back to port intact. Prize law then set out a second set of rules, applied by a specialised tribunal, to

determine whether the seized ship was a "good" (valid) prize or not. Third, prize law described how the seized goods were to be divided up or shared among the captors, the crown, and sometimes other parties. Prize regulations were issued by individual sovereigns and could be revised by them at will, but in practice they were quite similar from one European empire to another.[8] The application of prize law in this case followed from the orders that *La Pourvoyeuse* and *l'Elisabeth* had received from the governor-general of Mauritius, which authorised royal vessels in the king's name to attack British vessels and seize British-owned cargoes in retaliation for recent British attacks on French interests in India.[9]

At first, the seizure of the *Osterley* proceeded by the book. The captors inspected the Indiaman, examined its papers and shifted enough of their crew aboard the British vessel to navigate it. The capturing captains appointed the sieur de St. Mandé, an officer on *l'Elisabeth*, to command the prize. In the course of these procedures, the captors should have been at pains to preserve any papers belonging to the captured ship and to avoid touching the cargo.[10] The ships then set out in company back towards Mauritius. A few days after the prize was taken, the ships encountered the *Vaillant*, another French vessel, headed for the Cape of Good Hope. The captors permitted a handful of the prisoners from the *Osterley* to go aboard the *Vaillant*. This decision was somewhat unusual, since captors usually brought back all of the prisoners from a seized vessel to their home ports. But it was not a clear-cut violation of prize regulations.[11] Shortly after the encounter with the *Vaillant*, the three vessels arrived not in Mauritius but on the southwest coast of Madagascar. The French captains had explicit authorisation from their superior, the chevalier de la Brillanne, to make a stop there, so their actions again appear to have been entirely licit. They came to anchor in the baie St. Augustin, a slave trading area and former pirate haven.[12]

In the baie St. Augustin the story of the *Osterley* began to diverge from the script that prize regulations set out for the seizure of enemy property. At some point during their stay in Madagascar, the captors moved a large number of chests and bundles of merchandise from the *Osterley* to *La Pourvoyeuse*. This action appeared to contravene privateering regulations, which usually prohibited unloading or even touching the cargo of a captured vessel before it had been brought into port. The aim of this rule, which had been part of French prize regulations for centuries, was to prevent any illicit plunder of the captured ship before the legality of the seizure had been determined by a tribunal.[13] There were exceptions to this rule, albeit ones that were narrow and rarely invoked; so even though this activity was irregular and unusual, it was not ipso facto a criminal act. Some witnesses, however, claimed to have heard of more serious allegations during the stay in Madagascar. There were rumours that the French officers had taken some part of the captured ship's cargo for themselves and perhaps even distributed some among the crew. If true, these acts would almost certainly have constituted an illegal despoiling of the captured ship.[14]

The last phase of the voyage saw a series of events that, if they occurred as described, could only be described as criminal violations of the prize code. After a brief stay in Madagascar, the three ships set out again for Mauritius, arriving on

5 May 1779. Not long after—most witnesses put it at a few days—five large chests were moved from *La Pourvoyeuse* to *l'Elisabeth*. These chests, which appeared to be the ones containing silver and some of which were marked with Captain Rogers' initials, were placed in the council chamber of *l'Elisabeth*. The following day, Crozet and his officers and the officers of *La Pourvoyeuse* met in the council chamber behind closed doors. According to multiple witnesses, loud sounds were heard throughout the ship, and when the officers left the room, each one carried multiple mysterious bundles with him. A day later, Crozet and the other officers gave a sack of rupees to one of *La Pourvoyeuse*'s petty officers, Pierre Grenier, to distribute among the crew.[15] Early one morning a few days later, a pirogue came out to *l'Elisabeth* and returned to shore with two officers and several of the chests that had contained silver, which they delivered to the warehouse of a powerful local merchant, Pierre Paul de La Bauve d'Arifat. The strong inference that one could make from these facts was that the captors had illegally pillaged the *Osterley*'s most valuable cargo, sought to buy the silence of their crews, and fenced the goods.[16] Around the same time, two sailors were found dead in the harbour of Port Louis, both with "signs of violence" (they appeared to have been shot). One of them, Pierre Savo, known as La Bastille, had had the keys to the hold of the *Osterley,* raising suspicions that his death was connected to the alleged pillage.[17]

The legal case against the crews of *La Pourvoyeuse* and *l'Elisabeth* began soon after these events. The royal prosecutor in Port Louis became aware of "rumours" coursing through the port about possible theft from the captured vessel and presented a formal complaint in June 1779 to the island's royal tribunal. His complaint was passed on to Brunel as investigating judge (*juge d'instruction*).

Recalcitrant Maritime Spaces

Brunel's first responsibilities in the case were seemingly straightforward: assembling physical evidence and witnesses in order to determine whether a crime had been committed and who the guilty party or parties might be.[18] What he discovered, however, was that the officers of *l'Elisabeth* and *La Pourvoyeuse* had made systematic use of their knowledge of mobile legal spaces to make their thefts from the *Osterley* exceptionally difficult to uncover. The mariners knew that ships experienced different degrees of translucency to imperial officials' surveillance as they moved about. While at sea or in a foreign port, a ship was quite opaque: even basic facts such as where it was going or who was aboard could easily be concealed from the state's gaze. Once it returned to a home port, however, the ship became much more translucent in both absolute and relative terms. The ship itself became a virtual open book to officials, who could board or search it without difficulty. By comparison to the ship at anchor, though, the port town itself appeared to be quite opaque. Its warren of streets and businesses, homes and fields, provided many places in which people or objects could be concealed. Port Louis, a town far from the centres of official power, with a small police force and a mobile population of mixed race and varied legal status, would

have had a particularly high degree of shadow.[19] The French officers showed themselves to be adept users of these gaps and fissures in imperial authority.

The initial theft and division of part of the *Osterley*'s cargo in Mauritius suggests that the officers of *l'Elisabeth* and *La Pourvoyeuse* were acting from the start with an acute knowledge of how maritime spaces could help them evade detection and punishment. Their choice of Madagascar's baie St. Augustin as the site of the first theft was indicative: a former pirate haven, the bay remained outside the control of European empires in the later eighteenth century, and thus an ideal site for illicit activity.[20] Their choice of which goods to take at this point is also highly suggestive. Witnesses indicated that while in Madagascar the officers divided up only the bulky merchandise (primarily cloth and clothes) rather than the more valuable but more compact specie. Why? The officers surely knew how hard it would be to conceal the bulky parcels of cloth materials from inquiring officials once they returned to Port Louis—at which point the ships' holds would be searched. Divided up among the crew, however, these objects could be made to disappear: hundreds of individual pockets, bundles, and sea chests would conceal the stolen cargo. The distribution of merchandize, in effect, made ordinary seamen's personal effects into a collective hiding place in plain sight. Once they arrived in Port Louis, the individual seamen helped to spirit the stolen goods from the suddenly translucent spaces of the ship into the opacity of the port town. Most of the objects that the officers shared from the prize were luxury goods, which sailors would likely treat as a form of private "venture" (small personal trade that seamen habitually carried on during their voyages). As they sold their share of the stolen goods to merchants in Port Louis, the individual seamen injected the stolen goods into the circuits of legitimate commerce in the port town.[21]

The officers' decision to divide the stolen goods up among the crew may also have been intended to reduce the risk that members of the crew would report the theft to other imperial officials once they returned to Port Louiss. Witnesses reported that there were some "murmurs" among the crew—a euphemism for discontent or near-revolt—about the thefts from the *Osterley*. One explanation for these "murmurs" is that the crew expected their officers to respect maritime customs (instantiated most fully on pirate vessels) that encouraged them to share any property taken from enemy vessels among the crew. By promptly executing such a division of the spoils, the officers may have been pragmatically trying to secure the crew's cooperation (and silence) about the thefts.[22] This choice also reflected an awareness on the officers' part that if the crew were openly discontented when they returned to Port Louis, their crime would be more likely to come to light.

In practice, the wide distribution of the merchandise in the *Osterley*'s cargo among the crew proved very effective in concealing it from the authorities. As far as the case file indicates, Brunel had no success in tracking down the missing goods once they had spread out into the town. This point is illustrated vividly by a moment in the interrogation of one of the suspects, Jean de Tony—one of the few instances in which Brunel made reference to a piece of physical evidence. De Tony, who had served as

chaplain on board one of the capturing vessels, had already repeatedly denied any involvement in the pillage of the *Osterley*. After yet another one of these denials, Brunel asked him whether he had not sold a particular roll of ribbon to a merchant in town. This ribbon, Brunel knew—though the record does not indicate how he knew it—had been part of the *Osterley*'s cargo. De Tony seems to have been surprised that Brunel had knowledge of the physical evidence: a long pause ensued, which the clerk who was taking down the testimony specifically noted. The ex-chaplain then admitted the deed, though with a caveat: he claimed to have simply taken the roll from atop a desk aboard *l'Elisabeth* without knowing anything about its provenance.[23] The combination of de Tony's surprise at the physical evidence and the alacrity with which he admitted his guilt when confronted with it suggests the power of such evidence—and puts in sharp relief Brunel's near-total inability to muster it.

The fate of the silver and gold aboard the *Osterley* offers a second illustration of the French mariners' deft understanding of how the juridical and surveillance landscape of their ships evolved as they moved about. Shortly after they returned to Port Louis, the officers of *l'Elisabeth* and *La Pourvoyeuse* shifted the chests of silver and gold from one ship to another. This looks very much like an expedient to slow down any attempt by officials in the town to find the chests full of precious metals: even if someone revealed their location, a search would not immediately have found them. But the officers knew that ships in port were still highly translucent to the state's gaze, so they took steps to transfer the silver and gold to land. In the dead of night, the officers transferred it to the warehouse of d'Arifat, the local merchant, in a boat rowed by enslaved mariners. They were met at d'Arifat's wharf by one of his employees, Simon Martin, who temporarily put it in his private chambers. With the help of another group of enslaved men, they put the chests on carts and, around four in the morning, set out through town. They then unloaded the chests into a house—Martin seemed unable to say which one exactly, though he was sure it was near the rue Desforges.[24] In spite of all of his efforts, Brunel proved unable to trace the silver any further. Once it had entered the opaque spaces of the town, in other words, it quickly became invisible to him.[25]

Clashing Legal Regimes

The case against the crews of *l'Elisabeth* and *La Pourvoyeuse* rested, it seems obvious enough, on the notion that a crime had been committed: that some act had taken place, that is, in contravention of the law. In spite of the substantial gaps and fissures in the record, the judge could muster considerable evidence that the captors had done something to the cargo of the *Osterley*. But for these acts to constitute a crime, Brunel had to show that they had violated the law. But what *was* the relevant law in this case? Early modern European empires were rife with overlapping or competing jurisdictions; the question of which law to apply was not an unfamiliar one.[26] Even by the plural norms of European colonial law, however, ships presented an exceptional case in at least two ways. First, unlike classically pluralistic scenes in which distinct legal

order overlapped, on board ships individuals and objects were simultaneously subject to multiple superimposed legal regimes, which claimed authority to regulate the same conduct or things. Second, the legal regimes governing a ship were not only multiple but also changed over time and varied according to the physical location of the ship: shipboard legal regimes, that is, were not only plural in any given moment but also in flux on a short timescale of days or even hours. Different levels of familiarity with legal norms, and different interpretations of them, further muddied the waters. This exceptional legal density and malleability—tied to the mobility of the ship itself—complicated even the simplest argument that Brunel could hope to make about the culpability of the accused in the case of the *Osterley*.

European powers in the early modern period recognised ships as a distinctive kind of legal space and instituted special legal regimes to suit the needs of governing them. Most European empires had a separate system of maritime law and maritime tribunals that had jurisdiction over seagoing ships and most matters arising from them. The French maritime code in the eighteenth century was based on the *Ordonnance de la marine* originally promulgated in 1681 by Louis XIV and revised several times during the subsequent century. The codes treated both civil and criminal matters, and sometimes extended to have authority over sailors or cargoes ashore.[27] In general terms, there were two main axes along which maritime law differed from terrestrial law: the subjects it treated and its legal procedures. Maritime legal jurisdiction focused on a handful of subjects that were frequently relevant at sea, including wage and labour relations; crimes occurring at sea; matters involving cargoes and insurance; and the administration of ships and ports.[28] Maritime law, often administered by specialised tribunals, had distinct rules of evidence and procedure that made it easier for jurists to arrive at decisions with only limited information—a common occurrence when the events under examination took place hundreds or thousands of miles away. British Admiralty courts, for instance, which drew their rules largely from civil law, employed a jury in criminal cases only and in general operated as courts of equity, which were bound to arrive at fair outcomes rather than follow the strict rule of the law.[29]

In the case of the *Osterley*—and in this respect the ship was typical rather than exceptional—this account of the maritime world's legal distinctiveness seriously understates the case. At least three other types of law overlapped with ordinary maritime law at various points in time aboard the ships involved in the case, creating a dense layering of legal regimes that claimed the authority to regulate the same conduct. The first of these overlapping legal regimes was prize law. Though formally part of the broader landscape of maritime law, prize law is more accurately seen as a distinct legal regime from regular maritime jurisdiction. Sovereigns issued new privateering regulations at the start of each conflict; this was not the case with most forms of maritime law. The adjudication of prizes was the responsibility of either dedicated tribunals or (if delegated to the regular maritime tribunals) called on them to act in a distinct capacity as prize courts and apply a discrete body of law.[30]

Brunel was at pains to inquire into how the witnesses and the accused he interviewed understood the tenets of prize law. Under interrogation, higher-ranking officers (including Crozet, captain of *l'Elisabeth*) adverted to a knowledge of formal prize law, though they were often less than precise about the details.[31] The lower-ranking officers, on the other hand, by and large expressed near-total ignorance of the prize code. Master gunner Pierre Grenier, for instance, declared that he "does not know the law about prizes." He would only admit to having a general sense that it was "wrong [*c'est mal fait*] to take a part of [the prize] for oneself."[32]

Naval or military law was a second type of legal regime in force aboard the French vessels that captured the *Osterley*. (The ships were subject to military law because they were either regular naval vessels or had been temporarily pressed into the royal service.) Like prize law, naval law was a fully-fledged legal regime that operated through a parallel set of codes and tribunals not subject to the jurisdiction of ordinary criminal or civil courts. It took the form of a code of conduct (like the Articles of War in the British Navy) that prescribed relations among those in the service, outlined potential crimes (some familiar, some distinctive to the military), and set out punishments for disobedience. Naval law, unlike the property-focused prize law, had strong social and quasi-political dimensions. It aimed to foster a hierarchical socio-political structure aboard ship, ruled over by captains thought of as mini-sovereigns.[33]

Some of the individuals involved in the case invoked the presence of a third form of legal practice, customary law, aboard their vessels. Customary law remained in widespread use in this period and was even considered authoritative in many areas of European life, from the regulation of employment to the enforcement of contracts to the supply of food.[34] It was well established in the maritime world, where it often played a role in governing the relations between captains and their crew, as well as the relationships between crews and government officials.[35] As a set of unwritten rules, though, the interpretation of custom could vary considerably from person to person and from one moment to another.

These disparate shipboard legal regimes, which frequently purported to regulate the same conduct, created legal overlaps that interfered with Brunel's efforts to identify illegal conduct. One of the overlaps, between customary practices and prize law, revealed itself when Brunel charged that the captors had stolen the chests of silver. Crozet, the chevalier de St. Orens, and others responded to this accusation not (as might have seemed the obvious choice) by disputing Brunel's account of the facts but by claiming that their actions were nonetheless legal under customary law. The silver, as many witnesses noted, bore the initials of Samuel Rogers, captain of the *Osterley,* rather than the insignia of the East India Company.[36] Crozet admitted, under Brunel's questioning, that he knew that captors were required to turn over absolutely everything on board a captured vessel to the authorities in port. But he claimed that "there is nonetheless an exception to this rule, because it is considered [*Reputé*] that the chest of the captured captain belongs of right to the capturing captain." He claimed, that is, that he was personally entitled to take Captain Rogers'

personal property.[37] St. Orens agreed: "he had always seen it be the practice during the last war that the chest of the captured captain belonged to the captor."[38] In their interpretation, prize law gave way in this instance to customary law.

Though Brunel sternly rejected the officers' attempted defence, he had to admit that it had a certain plausibility. The fact that the chests seemed to be the personal property of a mariner (Rogers) gave credence to the idea that customary law might be the type of law most applicable to their fate. For although prize law spelled out clear prohibitions against pillaging the cargo of a prize, it was much less explicit about the personal property of enemy seamen, which usually lacked any kind of inventory or official paperwork. French privateering regulations before 1778, in fact, had explicitly granted the captain of a privateer the right to take personal ownership of the sea chest of his vanquished opponent. (This was permitted, however, only after the cargo had been inventoried by the Admiralty and provided that the contests of the chest were worth less than 500 *écus*.) This exception had been withdrawn by the new prize regulations issued in 1778.[39] Yet as Brunel seemed to recognise, this recently-abrogated rule gave grounds for thinking that maritime custom could reasonably be seen as a *more* appropriate legal regime than prize law to apply to deciding the fate of the chests of silver.

Substantial overlaps between military law and prize law also became apparent in the course of the inquiry. Though somewhat more subtle in nature than the overlap between customary and prize law, this overlap of jurisdictions was potentially more difficult to resolve because it involved two formally instituted legal regimes. At issue was which of these legal regimes ought to be considered to have governed the behaviour of the crew once the pillage of the *Osterley* had begun. Prize law dictated that each of the officers and men aboard the capturing vessels should have refused to take any part in the pillage. But naval law, which put a premium on obedience to orders, pointed in the opposite direction: the orders of superior officers, perhaps even if they violated prize law, were supposed to be followed. Complicating the issue further was the temporary nature of prize law. Unlike military law, which was in operation on board the ships continually, most of the directives of prize law were only activated once *l'Elisabeth* and *La Pourvoyeuse* captured the *Osterley*. In order to determine the applicability of prize law to a given act, then—and thus whether there was a conflict between the two legal regimes—one had to know whether it had taken place before or after the capture of the *Osterley*. And such reliable information about events at sea, as we have already seen, Brunel found to be in very short supply.

Mariners played on the opposition between military and prize law by claiming that if they had violated tenets of prize law, they had done so only because they were following orders. This was a plausible defence for anyone in the fleet and even Crozet, a ship's captain, did not hesitate to use it. When Brunel asked him detailed questions about why he had moved particular objects from the prize, Crozet lapsed into the third person passive voice ("he had been sent from the prize") and stated that he "received orders" to shift goods from the prize to his ship. In one exchange, he responded to questions by claiming that St. Orens was the "master of his [Crozet's]

actions."[40] (Crozet may have been particularly inclined to shift blame to St. Orens during his interrogation because the commander could not blame him back: a week before, St. Orens had died in a duel related to the *Osterley*.[41]) Inferior officers had an even easier time disculpating themselves on the grounds that they were following orders. One officer, the sieur de Chateauneuf, claimed during his interrogation "that he had not done anything except execute the orders that the sieur de St. Orens had given him."[42] Pierre Grenier explained that he participated in the pillage because he was "conforming himself to the orders of sieur Crozet."[43] Jean Tourneboeuf, boatswain on *La Pourvoyeuse,* made this logic explicit in his response to Brunel's questions about why he had engaged in the pillage. He did not know, he said, "what he could have done to excuse himself from it [the pillaging]." In the Navy, "one is considered a mutineer . . . if one resists the desires of an officer, even when one is in the right."[44]

Just as they claimed innocence on the grounds that they had been following orders, officers invoked the need to maintain military discipline in order to explain away apparent violations of prize law. This manifestation of the clash between prize law and military law came out most clearly during an episode that took place aboard *l'Elisabeth* shortly after the little fleet had arrived in Madagascar. The chests of silver had been broken open and the crews of the two ships were again "murmur[ing]" in protest. At this point, a number of witnesses mentioned, Crozet had threatened Pierre Grenier with either death or demotion. Grenier, backed up by others, asserted that Crozet's "threats [*menaces*]" had been intended to silence him about the thefts from the *Osterley*.[45] Crozet countered these accusations by claiming that he had been enforcing discipline aboard ship: Grenier, he said, had been fomenting a mutiny, which he (Crozet) had been duty bound to repress. Crozet offered a similar response when Brunel asked him about his alleged mistreatment of several other mariners, including Saturnin Jauselin, Julieu Rou and one we know only as Bonneau. Brunel's theory was that Crozet had maltreated each of these men in order to ensure their silence. But Crozet claimed that his treatment of them had to do with enforcing military discipline, often concerning issues that he implied dated back well before the capture of the *Osterley* and the activation of prize law aboard ship. Crozet asserted, for instance, that he had punished Rou not for threatening to reveal the theft but for raising a hand to a superior officer. And he accused Bonneau of being a "bad subject [*mauvais sujet*]," a term reserved for habitually insubordinate ordinary people.[46]

Just as maritime mobility made it especially hard to track down the evidence of crimes committed at sea and the witnesses to them, the complex array of legal regimes packed into the tight spaces of early modern ships made it difficult to say with certainty which kind of law applied in any given instance. This legal complexity or confusion (depending on one's standpoint) meant different things to the actors in this drama. For the crews of *l'Elisabeth* and *La Pourvoyeuse*, the shifting legal landscape of the ship and the legal regimes competing for dominance within it were a gift: they offered a potential aegis against accusations of criminal behaviour. The officers

and seamen proved quite expert, as they showed in their responses to Brunel's questioning, in explaining how actions that were criminal under one legal system were perfectly innocent under another. In so doing, they showed a canny understanding of the relationships among the various legal orders and the nuances of their functioning. For Brunel, on the other hand, the legal complexity of the shipboard environment—and the relative legal ignorance of the mariners—were challenges to be overcome. His case, and the prospects for enforcing European law on the imperial periphery more generally, depended on his ability to determine which law applied when and where aboard ship. Yet in spite of the vital importance of the task, Brunel does not seem to have gotten close to accomplishing it. His scepticism about the mariners' defence strategies was clear enough, but he had little success in forcing them to recant or in securing their assent to his more orderly vision of the shipboard legal scene.

Conclusion

Historians are already well accustomed to thinking about the European imperial world as a landscape that was resistant to control. Empires, in Frederick Cooper's memorable phrase, had "long arms and weak fingers": they had grand designs but little ability to carry them out on the ground.[47] The case of the *Osterley* suggests that this dictum may, if anything, underestimate the challenges that imperial officials faced in making legal knowledge in the maritime world that lay at the heart of early modern empires. The key legal spaces of the maritime world were not merely (as many colonial landscapes were) far away from the metropole and thinly populated with reliable informants and enforcers of the law. They were also legal spaces in motion, and their motion made them exponentially harder to govern. Some of these mutations, such as when prize law became applicable to a ship, were prescribed by the empire itself and could serve its efforts to master the maritime world. But others, such as the shifting translucency of ports and ships, and the complex mixture of legal regimes on board ships, were powerful impediments to imperial control. And insofar as they were a product of physical geography and legal necessity, they could not be easily remedied.

The case of the *Osterley*'s pillage was no run-of-the mill legal process, to be sure. The richness of the surviving record alone sets it apart from most of the countless other instances of wartime plunder that took place during the early modern era. Yet the overall contours of the incident and the legal case that emerged from it are entirely typical: they concerned maritime warfare, commerce raiding, and the legal governance of ships. If we accept the centrality of seafaring and in particular these forms of maritime warfare to the making of the early modern world, then the story of the *Osterley*'s pillage and Brunel's investigation of it both suggest that scholars ought to pay closer attention than they have to the distinctive legal contours of the maritime world—and of ships in particular—as we seek to understand early modern colonial rule. (Most scholarship on shipboard law has focused on labor relations; as the case of the *Osterley* shows, that was far from the only kind of law operating

aboard ship.[48]) Early modern European empire cannot be understood properly if we do not reckon with the uniquely mobile and mutable maritime legal spaces that lay at its core, and at the complex interactions that took place between the ship and the shore.

If we take cognizance of the distinctiveness of early modern seagoing empires, in turn, we will need to reconsider some of the links that scholars like Michel Foucault and James C. Scott have posited between eighteenth-century empire and the modern state. In his influential *Seeing Like a State*, Scott argued that modern techniques for ordering and abstracting people and land, central to how modern states work, can be traced back to the eighteenth century (citing forestry management or urban planning and policing). This thesis, however, rests on a presumption of continuity between the objects of knowledge and the kinds of administrative problems faced by early modern and modern states.[49] Brunel's investigation suggests that this notion of continuity is unwarranted: the problems of knowledge that the maritime world's mobile legal spaces created were quite distinctive from those of later territorial states. The knowledge practices of early modern imperial officials would have to be profoundly transformed in order to serve the purpose of knowing in a wholly different kind of imperial world.[50]

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Notes

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1 For the case's abrupt interruption, see the joint letter from the governor-general and the intendant in Arrêtés et délibérations du 4 nov and 7 nov 1780 [misdated 1781 in one place], 6 DPPC 3088.

2 See Muir, *Microhistory,* 8. The case closely followed the procedures prescribed by French law for a criminal prosecution and Brunel, though prominent, had a typical professional trajectory: see Kuscinski, *Dictionnaire des conventionnels*, 1:95 and *Dictionnaire de biographie mauricienne* 27:795–6. What is most exceptional about the case is the large volume of archival material it produced, likely a result of the enormous sums of money involved.

3 A survey of this vast literature is not possible here, but see the useful summary in Drayton, "Knowledge and Empire," esp. 244–9; as well as Bayly, *Empire and Information*; and McClellan, *Colonialism and Science*.

4 See below, note 49.

5 See especially Benton, *A Search for Sovereignty* and Benton and Ford, *Rage for Order*, 117-147. See also Morieux, *Une mer pour deux royaumes*; Gould, "Zones of Law, Zones of Violence."

6 Item 1020 in Chelin, *Maurice, une île et son passé*, 112.

7 British officials suggested later that foul play might have enabled the French ships to take the *Osterley*. There were allegations that British officials held investments in the *Elisabeth* and that French officers had been given information about the *Osterley*'s route. See IOR/H/143, 459-460, and Lieutenant-General Grinfield to Lord Hobart, 11 Aug 1803, printed in *The Anti-Jacobin Review and Magazine*, vol. XXVI (1807), 188–196.

8 For a discussion of prize law, see below, note 30.

9 [Antoine Guiran, chevalier de la Brillanne] "Instructions de M le Cher de St Orens…pour sa croisiere sur le Cap des Aiguilles," 28 Dec 1778, MAR B/4/150.

10 Pistoye and Duverdy, *Traité des prises maritimes*, 243–5.

11 See Messrs. Edward Parry and Daniel Barwell to Directors of the EIC, 17 Mar 1779, IOR/H/143. This was also reported, though less precisely, in the testimony before Brunel.

12 [Antoine Guiran, chevalier de la Brillanne] "Instructions de M le Cher de St Orens…pour sa croisiere sur le Cap des Aiguilles," 28 Dec 1778, MAR B/4/150.

13 See Pistoye and Duverdy, *Traité des prises maritimes*, 243–4 and 248–9.

14 See Information of Louis Labour, 6 DPPC 3086. Narrative of capture by St Orens et al. and Information of John Still, 6 DPPC 3086, have a different timeline, claiming that the objects were moved while still at sea, before they arrived in Madagascar. On alleged pillage in Madagascar, see Information of John Still, 6 DPPC 3086.

15 For arrival date, see Chelin, *Maurice, une île et son passé*, 112. Events aboard the ship: see Interrogation of Jean Tourneboeuf (first), 2 Sept 1780, 6 DPPC 3087, and Interrogation of Pierre Grenier (first), 1 Sept 1780, 6 DPPC 3087. For the timing of the meeting, see Information of Etienne Fromal, matelot a bord du Flamand, 6 DPPC 3086.

16 Interrogation of Simon Martin, 27 Sept 1780, 6 DPPC 3088. On d'Arifat, see Vaughan, *Creating the Creole Island*, 79–80; Allen, *Slaves, Freedmen, and Indentured Laborers in Colonial Mauritius*, 20–1; and Keber, *Seas of Gold, Seas of Cotton*, 95–121.

17 Plainte par addition, 13 Jun 1780, 6 DPPC 3086.

18 For initial procedures, see *Elemens de la procedure criminelle* 1:182, 189, 196. He could then make preliminary identification of suspects; subject those individuals to further questioning (*interrogation*) and confrontations with other witnesses; and secure confessions. On criminal procedure in the old regime, see Andrews, *Law, Magistracy, and Crime in Old Regime Paris, 1735–1789*, esp. Part III and 439; on confessions, which French criminal procedure required in most instances to convict someone of a serious crime, see also Ploscowe, "Development," 375–6. For the Mauritius tribunal in particular, see Wood, "Îles de France," 69–77.

19 On Port Louis in particular, see Toussaint, *Une cité tropicale*, 25ff; Vaughan, *Creating the Creole Island*, passim; and Allen, *Slaves, Freedmen, and Indentured Laborers*, ch. 4. The witness accounts in the *Osterley* reflect the land/ship difference: the facts became fuzzier whenever the case touched a port: see, e.g., Informations of John Still and Thomas Grant, both in 6 DPPC 3086. For Brunel's authority over the police in Port Louis, see Paul, *Deux siècles d'histoire,* 32–7.

20 See Tillette de Mautort, *Mémoires du chevalier de Mautort*, 336.

21 This process is of a piece with scholarship that shows how many early modern ports relied on a mixture of legal, semi-licit and illegal activities. Ports engaged in legal trade often needed illegally-acquired primary materials: the New England ports and their molasses-to-rum industry are a classic example (see McCusker, *Rum and the American Revolution*). Others relied on pirates for vital supplies or as an economic engine for licit activities such as victualing, hospitality, or sex trades: see esp. Ritchie, *Captain Kidd and the War against the Pirates*; Truxes, *Defying Empire*; and Pérotin-Dumon, *La ville aux Iles*.

22 For "murmurs," see Interrogation of Crozet, 6 DPPC 3087. On egalitarian shipboard traditions, see Niklas Frykman on "lower deck republicanism" in his forthcoming "The Marine Republic: Maritime Radicalism and the Revolutionary Atlantic" and Linebaugh and Rediker, *The Many-Headed Hydra*, ch. 5. See also Dening, *Mr. Bligh's Bad Language*.

23 Interrogation of Jean de Tony, 10 Sept 1780, 6 DPPC 3087.

24 Interrogation of Simon Martin, 27 Sept 1780, 6 DPPC 3088.

25 Within three months of the *Osterley*'s arrival in Port Louis, d'Arifat embarked on a ship-buying spree, purchasing two expensive vessels and fitting them out for sea at the expense of hundreds of thousands of livres. It was likely the silver from the *Osterley* that enabled him to build "a shipping empire virtually overnight." See Keber, *Seas of Gold*, 90, 95–6.

26 There is an enormous literature on legal pluralism in colonial contexts, both for the early modern and the modern period. Among other studies, see Benton, *Law and Colonial Cultures*, esp. 7–12 and 33–6. See also Benton, "Spatial Histories" and Franz von Benda-Beckmann and Keebet von Benda-Beckmann, "Places That Come and Go: A Legal Anthropological Perspective on the Temporalities of Space in Plural

Legal Orders," in Blomley et al., eds., *Expanding Spaces of Law*, 36–44.

27 For the ordinance and its revisions, see Valin, *Nouveau commentaire*.

28 For an historical survey of English admiralty jurisdiction, see Bourguignon, *Sir William Scott, Lord Stowell*, ch. 1; and documents in Marsden, *Documents Relating to Law and Custom*, vol. 1. On French admiralty jurisdiction, which was somewhat more capacious, see "Amirauté" in Guyot, *Répertoire universel et raisonné de jurisprudence civile* (Paris, 1784), vol. 1.

29 See Elliott and Elliott, *A Treatise on the Law of Evidence*, 589–90.

30 Prize law had its own legal codes and practitioners, for which see Le Guellaff, *Armements en course*; Valin, *Nouveau Commentaire*; Dumas, "Le Conseil des Prises"; and *Etude sur le jugement des prises maritimes*. On French prize law's temporal limits, see Pistoye and Duverdy, *Traité des prises maritimes*, vol. 1, 119-156.

31 Interrogation of Crozet et al., 16–17 Sept 1780, 6 DPPC 3087.

32 Interrogation of Pierre Grenier (first), 1 Sept 1780, 6 DPPC 3087.

33 On naval law, see esp. Cabantous, *La vergue et les fers*; Pritchard, *Louis XV's Navy*; and Rodger, *The Wooden World*. I discuss naval discipline at length in an unpublished thesis: Perl-Rosenthal, "La mise en oeuvre des libertés révolutionnaires au sein de la marine."

34 For these areas, just a few of many one could cite, see Sonenscher, *Work and Wages*, ch. 6; Kessler, *A Revolution in Commerce*, 97–101; and Kaplan, *Provisioning Paris*, ch. 7, esp. 271.

35 On private ventures, see Boucher, *Institution au droit maritime*, 73–74. On custom in maritime employment, see Boucher as well as Rediker, *Between the Devil and the Deep Blue Sea*, 116–20.

36 John Still, formerly *second cannonier* on board the *Osterley*, testified that the chests of silver, which he believed belonged to the East India Company, had nonetheless been inscribed with the initials SR, for Samuel Rogers. He offered this explanation: they were so marked "because they [*on*; the Company] wanted to facilitate his [Rogers] ability to charge freight for them."] This practice violated the norms of commercial and maritime law. Information of John Still, matelot a bord La Caroline, second canonier on *Osterley*, 6 DPPC 3086. Others claimed that the silver and the chests really belonged to Rogers: see Informations of Louis Bernard, chevalier de St Orens, and Jean Lambert, both in 6 DPPC 3086.

37 Interrogation of Crozet, 16–17 Sept 1780, 6 DPPC 3087.

38 Information of Louis Bernard, chevalier de St. Orens, capitaine of Le Flamand, 6 DPPC 3086.

39 Interrogation of Crozet, 16–17 Sept 1780, 6 DPPC 3087. For this regulation, see Valin, *Nouveau commentaire*, 2:293.

40 Interrogation of Crozet, 16–17 Sept 1780, 6 DPPC 3087.

41 Chelin, *Maurice, une île et son passé*, 114; and Foucault to Minister of the Marine, 9 sept 1780, C/7/295.

42 Interrogation of Chateauneuf, 11–12 Sept 1780, 6 DPPC 3087.

43 Interrogation of Pierre Grenier (first), 1 Sept 1780, 6 DPPC 3087.

44 Interrogation of Jean Tourneboeuf (first), 2 Sept 1780, 6 DPPC 3087. I have very loosely translated "*meme dans les choses les plus justes*" with "even when one is in the right."

45 Interrogation of Pierre Grenier (first), 1 Sept 1780, 6 DPPC 3087.

46 Interrogation of Crozet, 16–17 Sept 1780, 6 DPPC 3087.

47 Cooper, *Colonialism in Question*, 197.

48 See in particular Raffety, *The Republic Afloat*, Fusaro et al., eds., *Law, Labour, and Empire*, and Rediker, *Between the Devil and the Deep Blue Sea*.

49 Scott, *Seeing Like a State*, 14–15, 22–24, 44–45, 53–63. See also the discussion of "police" and "*raison d'état*" in Foucault,

Security, Territory, Population, esp. 323–8 and 333–58.

50 I intend here only to question the filiation between the knowledge-making and legal practices of empires and imperial officials in the two periods. Of course the two kinds of empires were deeply connected in terms of personnel and geopolitical strategy, for which see Bayly, *Imperial Meridian*.