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'Even in the remotest corners of the world': globalized piracy and international law, 1500–1900*

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Abstract

As a phenomenon accompanying European expansion, piracy and privateering spread globally, beginning in the sixteenth century. These activities, and their handling within transnational relations, shed light on several issues of modern international law, then under formation. They reflect different basic problems that both challenged and structured central aspects of legal relations on an international level: the transformation of ocean spaces into areas of colliding legal strategies, the use of privateers ('legalized' pirates) as a tool for extraterritorial expansion, the involvement of non-state players in international legal relations, the fragmentation of maritime sovereignty, and the application of international law to criminalize political resistance as piracy. That said, the international management of piracy shows that international law had the potential to resist its abuse as a mere instrument of politics and special interests. By focusing on piracy and privateering in early modern times, this article suggests a tension within modern international law, between its instrumentalization by particular interests and its status as an independent normative authority to correct or regulate such interests.

Introduction

When we consider the interaction between piracy, international law, and transnational relations in a global perspective, the period between the sixteenth and early nineteenth century is of salient interest. Europe's grasp on the globe in early modern times brought with it the development of a trans-maritime intercontinental trade, and, in its wake, the formation of

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an industrial civilization.[1] The epoch also marked the broadening of Europe's *ius gentium* to become an international law for the world.[2] It is now commonplace to view the centuries in question as marked by interaction rather than merely by European expansion, and non-European influences on international law certainly merit acknowledgment.[3] Nevertheless, it is clear that international relations changed irreversibly under the hegemony of European colonialism and imperialism, and that today's international law is largely a Western creation.

Beginning in the sixteenth century, the high seas became a locus for international encounter and conflict to an unprecedented degree. This was a direct result of the opening of the world's oceans, the spread of maritime trade, and the seaborne colonial expansion of European states. Sea robbery, as old as maritime trade itself, developed into a global phenomenon, contributing not only to the transfer of inner-European conflicts around the world but also to the universalizing of European ideas of international law. I argue that, in the international confrontation with 'piracy', we can observe the formation of central features and basic structures of modern interstate relations and international law.[4] In particular, the treatment of 'piracy' in transnational legal affairs shows, *pars pro toto*, the bipolarity of modern international law, oscillating between instrumentalization and autonomy.

The reconstruction of the bipolar history of early modern international law in relation to private violence at sea is based on relatively new research. Alfred P. Rubin has convincingly argued that, since antiquity, different legal concepts of 'piracy' were repeatedly adjusted by Europeans to suit their immediate aims, such as legitimizing imperial politics.[5] Rubin's distinction between legal doctrine and political rhetoric is rightly stressed again by Daniel Heller-Roazen in his more recent literary treatment of the history of law and piracy.[6] In a clearly developed argument, Lauren Benton has added to these approaches, arguing not only that the techniques of sponsoring privateering (or anti-piracy) campaigns were used for political purposes but also that piracy itself should be interpreted as a legal strategy. For instance, captains legitimized 'maritime shopping' by obtaining letters of marque and reprisal. As agents of sovereign states, these captains carried law across the sea in imagined

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1 See Jürgen Osterhammel, 'Weltgeschichte: ein Propädeutikum', *Geschichte in Wissenschaft und Unterricht*, 56, 2005, pp. 452–79.

2 See Randall Lesaffer, 'The Grotian tradition revisited: change and continuity in the history of international law', *British Yearbook of International Law*, 73, 2002, pp. 103–39.

3 See for example Charles Henry Alexandrowicz, *An introduction to the history of the law of nations in the East Indies (16th, 17th and 18th centuries)*, Oxford: Clarendon Press, 1967; Ram Prakash Anand, *Development of modern international law in India*, Baden-Baden: Nomos Verlag, 2005. See also Christoph A. Stumpf, 'Christian and Islamic traditions of public international law', *Journal of the History of International Law*, 7, 1, 2005, pp. 69–80.

4 See also Michael Kempe, 'Seeraub als Broterwerb: bewaffnete Auseinandersetzungen zwischen Freibeutern und Kauffahrern aus völkerrechtlicher Perspektive', in Eberhard Schmitt, ed., *Indienfahrer 2: Seeleute und Leben an Bord im ersten Kolonialzeitalter (15. bis 18. Jahrhundert)*, Dokumente zur Geschichte der europäischen Expansion, vol. 7, Wiesbaden: C.H. Beck, 2008, pp. 387–412; idem, 'Teufelswerk der Tiefsee: Piraterie und die Repräsentation des Meeres als Raum im Recht', in Hannah Baader and Gerhard Wolf, eds., *Das Meer, der Tausch und die Grenzen der Repräsentation*, Zürich and Berlin: Diaphanes, 2010, pp. 379–411.

5 Alfred P. Rubin, *The law of piracy*, Newport, RI: Naval War College Press, 1988.

6 Daniel Heller-Roazen, *The enemy of all: piracy and the law of nations*, New York: Zone Books, 2009.

corridors that corresponded to areas of spectacular, if sporadic, sea raiding.[7] Inspired by these fruitful scholarly concepts, the phenomenon of private maritime violence, both in its legal form as privateering and in its illegal form as piracy, is here used as a medium to show core features and elements of evolving modern international law, especially those concerning its weaknesses and strengths in confronting state interests and their particular political strategies.

Many works placing privateering and piracy in a larger political-legal context have tended to reduce the subject to a marginal position, defined in a variety of ways. For some, it was manifestation of a maritime cultural space understood to be in decline.[8] For others, it was something that accompanied empire building.[9] Alternatively, it was a sign of the erosion of empires.[10] Or again, it was a transitional process in the state's monopolization of power.[11] It has also been seen as a secondary product of wars of independence.[12] In contrast, I am interested in placing the complex at the centre of the spectrum of transnational relations that it mirrors. I argue that a modern transnational order did not only emerge from the Westphalian System of co-equal states,[13] or from the European colonization of newly discovered peoples.[14] Basic elements arose from the confrontation with privateering and piracy on the high seas and along various coasts.

'Enemies of humankind' and 'legitimate' privateers and corsairs

An Italian jurist, Alberico Gentili, was the first systematically to develop a concept of piracy located in a formal framework of international law. In *De iure belli* of 1588–89, Gentili (who would later be active in London's Admiralty Court), took up Cicero's definition of

7 Lauren Benton, *A search for sovereignty: law and geography in European empires, 1400–1900*, Cambridge: Cambridge University Press, 2010, pp. 104–61.

8 See Fernand Braudel, *The Mediterranean and the Mediterranean world in the age of Philip II*, vol. 2, London: Collins, 1973.

9 Robert C. Ritchie, 'Government measures against piracy and privateering in the Atlantic area, 1750–1850', in David J. Starkey, ed., *Pirates and privateers: new perspectives on the war on trade in the eighteenth and nineteenth centuries*, Exeter: University of Exeter Press, 1997, pp. 10–28.

10 Anne Pérotin-Dumon, 'The pirate and the emperor: power and the law on the seas, 1450–1850', in James D. Tracy, ed., *The political economy of merchant empires*, Cambridge: Cambridge University Press, 1991, pp. 196–227.

11 Janice E. Thomson, *Mercenaries, pirates, and sovereigns: state-building and extraterritorial violence in early modern Europe*, Princeton, NJ: Princeton University Press, 1994.

12 J. C. A. De Meij, *De watergeuzen: piraten en bevijders*, Haarlem: Fibula-Van Dishoeck, 1980.

13 See Heinz Duchhardt, 'Westfälischer Friede und internationales System im Ancien Régime', *Historische Zeitschrift*, 249, 1989, pp. 529–43.

14 See Anthony Pagden, *European encounters with the new world: from Renaissance to romanticism*, New Haven, CT: Yale University Press, 1993; Edward Keene, *Beyond the anarchical society: Grotius, colonialism and order in world politics*, Cambridge: Cambridge University Press, 2002; Antony Anghie, *Imperialism, sovereignty and the making of international law*, Cambridge: Cambridge University Press, 2004.

pirates as everyone's common enemy (*communis hostis omnium*).[15] This formula was a topos that, in Gentili's time, already had a long tradition behind it. In Henry VIII's Offence at Sea Act of 1536, pirates were duly described as the 'common enemy of all nations'. However, Gentili endowed the previous concept of universal enmity with greater precision, referring to *piratica* as *contra ius gentium, et contra humanae societatis communione* ('against the law of nations and against the community of human society').[16]

From this point on, the concept that Gentili developed would dominate European juridical thinking. It formed the basis of what Daniel Heller-Roazen has recently called the 'piratical paradigm'.[17] In 1644, the English common law judge Sir Edward Coke declared that *pirata est hostis humani generis* ('a pirate is the enemy of all mankind'),[18] a definition already present in the Middle Ages in the work of Bartolus de Saxoferrato.[19] This quickly became a fixed formula, which was found in both legislation and charge sheets in pirate trials conducted by various European countries. Through the expression *hostis humani generis*, pirates were placed outside humanity, in a realm otherwise reserved for wild animals.[20]

In addition, early modern efforts to punish 'pirates' often treated them as criminals under municipal law, rather than international law. They were accused of committing acts outside a state of war, or of exceeding the terms of privateering commissions. This strand of legal writings on piracy coexisted with the definition of sea robbers as enemies of all mankind in international law, as Alfred P. Rubin has correctly pointed out.[21] By concentrating on this latter tradition, however, Rubin tends to understate the strong significance of the international law tradition.

From such universal enmity, early modern legal scholars derived a universal right to prosecute and punish pirates. Gentili spoke of a war of all men against pirates, a 'pirate war' shared by all nations.[22] In his *Mare liberum* of 1609, Hugo Grotius expressed a similar

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15 Cicero, *De officio*, 3.29.107: *nam pirata non est ex perduellium numero definitus, sed communis hostis omnium; cum hoc nec fides debet nec ius iurandum esse commune* ('For a pirate is not included in the list of lawful enemies, but is the common enemy of all; among pirates and other men there ought be neither mutual faith nor binding oath').

16 Alberico Gentili, *De iure belli libri tres* (1612), 2 vols., Oxford: Clarendon Press, 1933, vol. 1: the photographic reproduction of the edition of 1612, l. 1. ch. 25, p. 202.

17 See Heller-Roazen, *Enemy*. See also Gerry Simpson, 'Piracy and the origins of enmity', in Matthew Craven, Malgosia Fitzmaurice, and Maria Vogiatzi, eds., *Time, history and international law*, Leiden: M. Nijhoff, 2007, pp. 219–30.

18 Edward Coke, *The third part of the institutes of the law of England*, London: M. Flesher for W. Lee and D. Pakeman, 1644, p. 113.

19 See Emily Sohmer Tai, 'Marking water: piracy and property in the pre-modern West', in Debbie Ann Doyle and Brandon Schneider, comp., *Seascapes, littoral cultures, and trans-oceanic exchanges*, Washington DC: Library of Congress, 2003, www.historycooperative.org/proceedings/seascapes/benton.html (consulted 17 August 2010), n. 9.

20 Joel H. Baer, 'The complicated plot of piracy: aspects of the English criminal law and the image of the pirate Defoe', *Eighteenth Century: Theory and Interpretation*, 23, 1, 1982, pp. 3–26. As the pirate's semantic descendant, the international terrorist has taken up the mantle of *hostis humani generis*. On this point, see in more detail Michael Kempe and Olivier Gänswein, 'Die Rückkehr der Universalfeinde: Terroristen als hostes humani generis – und was Piraten damit zu tun haben', *Zeitschrift für Neuere Rechtsgeschichte*, 32, 2, 2010, pp. 91–106.

21 Rubin, *Law*.

22 Gentili, *De iure belli,* l. 1, ch. 25, p. 202.

concept.[23] Many jurists, including Johannes Loccenius in *De iure maritimo* of 1650, considered anti-pirate expeditions on foreign territory as permissible, as long as there was cooperation with the local authorities.[24] At present, this conceptualization of a *bellum piraticum* is viewed by a number of authors as the beginning of reflections on international policing and punitive expeditions, although these continue to be controversial.

This universally reprehensible type of violence at sea coexisted with the much more ambiguous activities of corsairs, or privateers. Since the thirteenth and fourteenth centuries, the practice of issuing letters of marque and reprisal had been part of European understanding of legitimate warfare.[25]

Europe's early modern expansion and international piracy and privateering

In the course of the sixteenth century, English and Dutch corsairs followed the French, transforming the newly opened seas into what seemed like a 'great free zone in the sense of caprice; a space of lawlessness', in the words of Gustav Adolf Rein, writing in 1930.[26] For Carl Schmitt, the high point of Atlantic 'piracy' in the sixteenth and seventeenth centuries was, similarly, evidence that, on the high seas, the only extant law was that of the stronger party.[27] Such assumptions are deeply anchored, both academically and popularly.

There can be little doubt that violently acquired indemnification, on the basis of previous booty-taking, generated new plundering raids, the seizure and re-seizure of goods, damage, and forced recompense. This formed a self-intensifying cycle.[28] The resulting spiral of booty contributed to the Atlantic emerging as a Europe-dominated area stamped by permanent fighting. In the early phase of the European confrontation tied to the conquest of the New World, what unfolded was less a process of colonization and trade than one of smuggling, plunder, and extortion.

However, privateering was more central than piracy in the political practice informing maritime relations in that period. While returning to Europe from his third voyage through the western Atlantic in 1498, Christopher Columbus took measures near the island of Madeira to prevent a feared attack by French corsairs.[29] With the Spanish conquests in

23 See Michael Kempe, 'Beyond the law: the image of piracy in the legal writings of Hugo Grotius', *Grotiana*, 27–28, 1, 2005–07, pp. 379–95.

24 Johannes Loccenius, *Jo. Loccenii ius maritimum (1650)*, Halle, 1740, ch. 3, § 2, p. 963.

25 See R. G. Marsden, 'Early prize jurisdiction and prize law in England', *English Historical Review*, 24, 97, 1909, pp. 675–97; 25, 98, 1910, pp. 243–63; and 26, 101, 1911, pp. 34–56; see also Frederic L. Cheyette, 'The sovereign and the pirates', *Speculum*, 45, 1, 1970, pp. 40–68.

26 Gustav Adolf Rein, 'Zur Geschichte der völkerrechtlichen Trennungslinie zwischen Amerika und Europa', *Ibero-Amerikanisches Archiv*, 4, 4, 1930, p. 536.

27 Carl Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*, 2nd edition, Berlin: Duncker & Humblot, 1974.

28 Between 1536 and 1568, there is evidence for at least 74 coastal attacks and 189 vessel plunderings by French corsairs, 152 of them in the western Atlantic. See Manuel Lucena Salmoral, *Piratas, bucaneros, filibusteros y corsarios en América: perros, mendigos y otros malditos del mar*, 2nd edition, Madrid: Ed. Mapfre, 1994; pp. 51–2.

29 See Kris E. Lane: *Pillaging the empire: piracy in the Americas*, Armonk, NY, M. E. Sharpe, 1998, p. 12.

America and the expansion of Spain's sphere of power, the radius of privateering activities in the Atlantic expanded correspondingly. Setting sail from France in particular, corsair ships repeatedly penetrated deep into the Caribbean on regular pillaging offensives. When the first reports from the New World arrived in Europe, the Europeans not only learned of unknown peoples but also of the violent battles between Frenchmen and Spaniards in the western Atlantic.[30]

In the struggle over overseas resources, piracy was rather a mutual reproach made by all participants against each other. The Spanish and Portuguese crowns fixed demarcation lines between their overseas empires in the treaties of Tordesillas in 1494 and Saragosa in 1529.[31] They then treated all those crossing these lines without their express permission as criminal intruders, no different from pirates. However, France, England, the Netherlands, and other excluded parties accorded no international validity to these demarcation lines running through the middle of the Atlantic and Pacific. These nations accordingly demanded unlimited freedom of trade and free passage on the open seas, in turn defining every measure taken by Spain or Portugal to hinder such passage as itself an act of piracy.

In reality, what was at stake was the legitimacy of privateering. After Portuguese ships captured the trading frigate *Maria* in 1529, a ship belonging to the Dieppe merchant Jean Ango, he accused the Portuguese of piracy. He then had King François I issue a *lettre de marque*, allowing him to seize Portuguese property and receive restitution for the damage suffered.[32] Subsequently, the king issued such certificates to many French captains, before sending them hunting for Portuguese and Spanish East Indiamen in the Atlantic. This practice was transmitted into the waters of the New World. Private maritime pillaging, licensed by governmental patents, thus became the main weapon to challenge Iberian hegemony in the Americas.

The French, English, and Dutch navigators who engaged in such voyages of reprisal prompted a corresponding reaction by Spaniards and Portuguese, who requested similar certificates from their own sovereigns. Some ship-owners and captains received special licences for hunting northern European corsairs, such 'pirate-hunters' being known as *contra-corsarios*.[33] In one of these royal commissions to hunt pirates, issued by Charles V in 1549, Pedro Menéndez de Avilés was authorized to equip and arm a galleon for pursuing *corsarios y robadores* ('pirates and robbers').[34] To a large degree, transatlantic politics consisted of the direct or indirect steering of plundering expeditions, and the struggle to contain those of rivals. Whether a hunt for corsairs or a reprisal voyage, in almost all

30 See Renate Pieper, *Die Vermittlung einer neuen Welt: Amerika im Nachrichtennetz des Habsburgischen Imperiums 1493–1598*, Mainz: Verlag Philipp von Zabern, 2000.

31 See James Muldoon, 'Christendom, the Americas and world order', in Horst Pietschmann, ed., *Atlantic history: history of the Atlantic system 1580–1830*, Göttingen: Vandenhoeck & Ruprecht, 2002, pp. 65–82.

32 See Eugène Guénin, *Ango et ses pilotes: d'après des documents inédits tirés des archives de France, de Portugal et d'Espagne*, Paris: Imprimerie nationale, 1901, pp. 71–2.

33 See Eugene Lyon, *The enterprise of Florida: Pedro Menéndez de Avilés and the Spanish conquest of 1565–1568*, Gainsville, FL: University Press of Florida, 1976, p. 10.

34 See Archivo General de Simancas (henceforth AGS), MS. Guerra y Marina, legajo 35, documents 152 and 153.

cases the violence was claimed to be just and lawful. Evidently, no one caught up in this maritime vicious circle initially wished to rely solely on strength. The regular issuing of documents permitting reprisal and pirate-hunting shows that all sides consistently tried to wrap such activities in a cloak of legality, for law was also meant to be present on the high seas.

It is thus clear that it is important to distinguish between law and rhetoric in the matter of piracy.[35] Crossing the Tordesillas line without the permission of Spain, a non-Iberian captain automatically became a 'pirate', no matter if he committed sea robbery or not. Here, being a pirate was mainly a question of international politics, not of international law. Moreover, letters of marque and reprisal were frequently issued by European governments, whether or not their captains had first suffered damages by a foreign ship, and sometimes even after return from a successful pillaging voyage.[36] The political use of violence was thus often disguised by its legal labelling.

If we consider European relationships in the Americas against the background of the self-perpetuating circle of 'piracy', reprisal forays, and 'pirate'-hunting, we see that the newly opened maritime zones were by no means treated as lawless, or subject to the rule of force alone. Instead the oceans were filled with conflicting legal strategies. Like 'vectors', they crossed the maritime sphere, and thus transformed the ocean into a 'legal space', in the words of Lauren Benton, a space characterized as a complex tangle of such strategies.[37] The high seas were, in fact, a focus of international legal controversy. However, the legal understanding at work here was purely instrumental, turning the seas into a transnational realm, in which contradictory, mutually exclusive legal postulates competed and collided. In this way, in the course of their opening by the Europeans, the worldwide oceans became a legal space of global fragmentation, which sharpened desires for the creation of an international legal order among Europeans.

However, Europeans were not unchallenged in the Atlantic Ocean. Muslim corsairs from Morocco, reinforced by northern European renegades, also preyed on the sea lanes of the eastern Atlantic, particularly between the Azores and the Canary Islands. Like the English corsairs, they waylaid the West and East Indiamen of the Portuguese and Spanish returning from America and Asia.[38] Corsairs moving out from North Africa's Barbary states joined their Moroccan colleagues. Thus, at the start of 1587, high-ranking Spanish officials discussed strengthening measures of defence in the Canaries against the '*Ingleses, o los cossarios de Argel*'.[39] The threat of cooperation between northern European Protestants and North African Muslims, against Catholic Iberians, prompted a recent pointed observation that 'England and Morocco were joined in jihad against Spain'.[40]

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35 This distinction is particularly stressed by Rubin, *Law* and Heller-Roazen, *Enemy*.

36 See N. A. M. Rodger, *The safeguard of the sea: a naval history of Britain, 660–1649*, New York: W.W. Norton, 1997, p. 345.

37 See Benton, *Search*, pp. 104–41.

38 See Anton Lamborn Wilson, *Pirate utopias. Moorish corsairs & European renegadoes*, 2. ed., Brooklyn, NY: Autonomedia, 2003.

39 The 'English and the pirates from Algiers': AGS, MS. Guerra y Marina, legajo 208, document 239.

40 Nabil Matar, *Britain and Barbary, 1589–1689*, Gainsville, FL: University Press of Florida, 2005, pp. 21.

State-sponsored privateering and political challengers as 'pirates' in Asian waters

Changing the perspective from the Atlantic to the Pacific and the China Sea, we can observe a similar pattern of mixed activities of trade combined with smuggling and pillaging during the sixteenth century. The Ming administration's prohibition of overseas trade in response to local piracy had criminalized large segments of the maritime population,[41] and later the Jiajing emperor's enforcement of the maritime bans led to a flourishing clandestine trade and large-scale piracy. By the 1540s many small pirate gangs had evolved into larger, well-organized fleets, characterized by officials as *wokou*. Although the term means 'Japanese pirate', in reality *wokou* gangs were composed of motley crews of Japanese, Chinese, Thai, Malays, Portuguese, Spanish, and even Africans.[42] This cycle of piracy declined when the maritime bans were removed after the death of the Jiajing emperor in 1567, and Chinese overseas trade was legalized, albeit still restricted.

The merchant warriors of the English and Dutch East India Companies also combined maritime trade with violence in the Indian Ocean and the China Sea, but, unlike the *wokou* gangs, powerful shareholder companies directly sponsored raiders from England and the young Dutch Republic. The companies operated with a state monopoly from East Africa to Southeast Asia and Japan, as sovereign subjects in international law. On the one hand, English and Dutch privateers were engaged in a permanent battle over sea booty with the Portuguese and Spaniards.[43] On the other hand, they feared being identified by local Persian, Indian, or other indigenous merchants as pirates, which put them in danger of losing their trading posts as a result of local pressure. Compared to their position in the Atlantic world, Europeans faced a much greater chance of being accused of being pirates by non-Europeans in the Indian Ocean world. In view of the bad reputation of the European navigators among Muslims, the Dutch in Surat feared that the navigators of the company would be seen 'as pirates and worse as sea-rovers'.[44] This would above all profit English competitors.

The legal history of early modern piracy in the Indian Ocean world shows that the Europeans were far from being in a position of superior or hegemonic power during the first stages of their expansion in Asia. In the seventeenth century, pirates, privateers, and the fight against them formed an important medium of contact and conflict for international relations. It was a medium that all sides, European as well as non-European, made use of, without any side being in a position of overall control. Contests were never fully predictable and generated, in phases, a regular vortex of international complications.

Sometimes, the intruders from Europe could be drawn in to the point of losing the ground under their feet. For example, after the Dutch had fruitlessly tried for years to

41 See Robert J. Antony, *Like froth floating on the sea: the world of pirates and seafarers in late imperial south China*, Berkeley, CA: Institute of East Asian Studies, 2003, pp. 21–4.

42 Ibid., p. 22.

43 See Peter Borschberg, 'The seizure of the *Santo António* at Patani: VOC freebooting, the Estado da Índia and Peninsular Politics, 1602–1609', *Journal of the Siam Society*, 90, 2002, pp. 59–72.

44 'Als piratten en slijmer als zeerovers': Pieter van den Broecke, 'Journaal, Oktober 1621', in W. P. Coolhaas (ed.), *Pieter van den Broecke in Azië*, vol. 2, The Hague: Martinus Nijhoff, 1963, p. 263.

receive official trading privileges in China, they hit on the idea of instrumentalizing Chinese pirates in their struggle with the Middle Kingdom.[45] But since they did not succeed in uniting all pirate groups under their leadership, the pirates' war against China showed scant success. True, it did lead to the opening of official trade links with China. But when, in 1644, after the end of the Ming Dynasty, the former Chinese pirate leader, Zheng Chenggong, began to build up his own empire with pronounced maritime ambitions, he drove the VOC out of Taiwan with short shrift. The Dutch had been caught in the trap of their own politics of piracy.[46]

There was some consensus between European and non-European powers in treating political challengers as 'pirates'. In 1615, the Mughal emperor Jahangir signed a treaty with the Portuguese, which named not only the Dutch and English as thieves and plunderers but also the independent inhabitants of the Malabar coasts. Thus the partners in the treaty mutually agreed to classify these coastal Malabarese as *piratas*, and promised each other not to trade with them, but to fight against them wherever they showed up.[47] Arguably, independent Malabar Indians were a political threat for the Mughal empire, as well as for the Lusitanians, although there is also much evidence concerning the piratical forays of some Malalabar coastal communities. A similar delegitimizing of political opponents can be observed in China during the Ming–Qing transition. As a rebel fighting for the restoration of the Ming empire, Zheng Chenggong was considered by the Manchus not as a political opponent but as a criminal pirate.[48] Indeed, the practice of divesting rebels and other political challengers of legitimate political agency by calling them pirates or bandits was a global phenomenon, and there were close parallels between the policies of Western and non-Western powers. Neither an exclusively European phenomenon, nor one that had its origins in the seventeenth century, this became a basic feature of colonial expansion.

From 'freelance privateering' to piracy proper

In the second half of the seventeenth century, privateering began to give way to true piracy. The Irishman George Cusack was a striking example of a captain who became one of the '*Humani Generis hostes*, Publique Enemies to Mankind'.[49] After leaving the service of the English crown, the privateer turned pirate by raiding in the North Sea in 1674 under a counterfeit French letter of marque. Cusack and his crew were charged with piracy against the

45 See Tonio Andrade, 'The Company's Chinese pirates: how the Dutch East India Company tried to lead a coalition of pirates to war against China, 1621–1662', *Journal of World History*, 15, 4, 2004, pp. 415–44.

46 Ibid., pp. 441–4.

47 'Capitulos das pazes que se fizeram entre os vassallos de El-Rey Jahanguir e os Portuguezes, por Nauabo Mucarreb-Xhan e Gonçalo Pinto da Fonseca, 7 Junho 1615', in Júlio Firmino Júdice Biker, ed., *Collecção de tratados e concertos de pazes*, vol. 1, Lisbon: Imprensa Nacional, 1881, p. 191.

48 See Jonathan Clements, *Coxinga and the fall of the Ming Dynasty*, Stroud, Glos.: Sutton Publishing, 2004.

49 Anon., *News from sea or, the takeing of the cruel pirate, being a full and true relation how Captain Cewsicke, alias Dixon, alias Smith, an Irish-pyrate took an English ship of 500 tuns called the Saint Anne*, London: R. W., 1674, p. 1.

'English Laws' and the 'Laws, Customs and Usages of the Admiralty'.[50] They were thus treated as criminals under municipal law, although they were also accused of the crime of piracy 'against the Law of Nations', owing to their status as enemies of all mankind.[51] In piracy trials of early modern times we often find a similar double charge.

The emergence of piracy proper was partly due to the legal system of letters of marque and reprisal having reached truly inflationary proportions. Such licences were not only easy to acquire for the immediate subjects of a sovereign, but were also issued to the subjects of other nations. After the peace of 1604 between England and Spain, for example, English privateers continued their activities with the help of commissions freely provided by the Dutch, who were still at war with Spain.[52] In Caribbean waters, the so-called buccaneers and filibusters – groups that emerged from dispersed European settlers repeatedly pillaging the West Indies – had the option of acquiring letters of marque from the English, Dutch, or French.[53] It was said of the governors of the French Antilles that for many years they had given full discretionary powers to captains, entitling them to seize any ship that came their way.[54] When colonial governments gradually abandoned the policy of supporting the buccaneers and filibusters, some captains then organized the acquisition of privateering commissions from indigenous tribal chiefs in Central America.[55]

In this way, privateering practice led to the development of a particular type of sea robber, who, unlike the corsairs and merchant warriors of the sixteenth and early seventeenth centuries, was not committed to serve a single nation but operated on a 'freelance' basis for one sovereign after another, or for several at the same time. With the emergence of 'freelance privateers' such as George Cusack, the national links of licensed sea robbers gradually began to dissolve. Unscrupulous sea robbers of this kind were so dangerous precisely because they always found the support of some nation or other, and were never the enemies of all nations at once.

In the second half of the seventeenth century, Europeans started to draw legal consequences from the international privateering system getting out of hand. At the end of the third naval war against the Netherlands, the English government began to forbid their state subjects from accepting letters of marque issued by foreign potentates, in order to control freelance privateering.[56] In the Anglo-Dutch Commercial and Maritime Treaty of December

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50 Anon., *The grand pyrate: or, the life and death of Capt. George Cvsack the great sea-robber*, London: Printed for Jonathan Edwin, 1676, p. 29.

51 Ibid., p. 29.

52 See Ivo van Loo, 'For freedom and fortune: the rise of Dutch privateering in the first half of the Dutch revolt, 1568–1609', in Marco van der Hoeven, ed., *Exercise of arms: warfare in the Netherlands, 1568–1648*, Leiden: Brill, 1998, pp. 173–95.

53 See *Calendar of state papers, colonial series, America and West Indies, 1661–1668*, London: Longman, Green, Longman & Roberts, 1880 (New edition, Vaduz 1964), 20 February 1665, p. 280 (no. 942).

54 See Peter T. Bradley, *The lure of Peru: maritime intrusion into the South Sea, 1598–1700*, Houndmills: Macmillian, 1989, p. 136.

55 [Alexandre Exquemelin], *Bucaniers of America*, London: William Crooke, 1684–85, pp. 33–9. On cooperation between pirates and the native Indian population, see also Ignacio J. Gallup-Diaz, *The door of the seas and the key to the universe: Indian politics and imperial rivalry in the Darién, 1640–1750*, New York: Columbia University Press, 2005, pp. 53–74.

56 See Reginald G. Marsden, ed., *Documents relating to law and custom of the sea, vol. 2: 1649–1767*, Colchester: Printed for the Navy Records Society, 1916, introduction, pp. xi–xii.

1674, bilateral agreement was reached on such a prohibition.[57] The States General achieved a similar agreement with France in the Trade and Navigation Treaty of Nijmegen in 1678.[58] In this way, the room for manoeuvre of booty hunters, who used competition between leading sea powers to acquire documents legalizing their plundering raids from rulers whose own authority remained dubious, was increasingly narrowed down in the final third of the seventeenth century.

The 'Pirate Round': transnational politics under the sign of globalized sea robbery

One effect of the more regulated privateering laws, both in Europe and in the Americas, was the development of a new type of pirate, who was even more independent than the freelance privateer. Autonomous captains and cosmopolitan ship crews, many of them with a buccaneer's background, swarmed out of the Caribbean into the Indian Ocean in the years around 1700, marking the climax of what is today called the 'golden age of piracy'. These men sailed from America around Africa into the Arabian Sea and, after plundering attacks, back to America, thus performing the 'Pirate Round'.

The excesses of these pirates led to action being taken against them. In September 1695, the English pirate Henry Every plundered the rich holdings of the *Ganj-i-Sawai*, a pilgrims' ship of the Mughal emperor Awrangzib. The latter then held the English government responsible, although Every did not have an English privateering commission and his crew was mostly not English.[59] Fearing that the Mughal emperor would take revenge on the English East India Company, the English felt forced to act against Indian Ocean piracy. New anti-piracy laws were passed. When William Kidd, who had been sent to the Indian Ocean with a royal authorization to hunt pirates, exceeded his competence by engaging in his own plundering, the British decided to send a clear signal to Awrangzib by having Kidd executed in London in 1701. What now emerged was a set of repressive policies regarding piracy, leading eventually to its demise in the Caribbean also.[60]

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57 'Tractatus Navigationis & Commercii inter Carolum II. Regem Angliae & Ordines Generales Uniti Belgii per Commissarios sex ab utraque Parte, in sequelam Articuli VIII. Tractatus Pacis, initus; quô certis Legibus, Terrâ Marique observandis, cautum est, ut in posterum Discordiae & simultates omnimodè cessent ac penitus extinguantur. Actum Londini, I. Decembris 1674', in Jean Dumont, ed., *Corps universel diplomatique du droit des gens*, vol. 7, part 1, Amsterdam 1731, no. 132, pp. 282a–5a; Art. 5–7, pp. 283a–b.

58 'Commissions pour des Armements particuliers ou Lettres de Represailles des Princes et Estats Ennemis desdits Seigneurs Estats Generaux, et moins les troubler ny endommager d'aucune sorte, en vertu de telles Commissions ou Lettres de Represailles, ny mesme aller en course avec elles, sous peine d'estre poursuivis et chastiez comme pirates.' Art. 2, NA Den Haag, Staten General, Inv. Nr. 12587.186, http://www.ieg-mainz.de/likecms/likecms.php?site=transliteration.htm&dir=&ieg2sess=c8t5di1babfl4323d8l12kqqb5&treaty=234 (consulted 18 August 2010).

59 See the documentary collection of the East India Company concerning witnesses and interrogated piracy suspects, in British Library, Asia, Pacific and Africa Collections, India Office Records (henceforth BL, IOR), MS Home Miscellaneous, IOR/H/36. See also Robert C. Ritchie, *Captain Kidd and the war against the pirates*, Cambridge, MA: Harvard University Press, 1986.

60 See Arne Bialuschewski, 'Between Newfoundland and the Malacca strait: a survey of the golden age of piracy, 1695–1725', *Mariner's Mirror*, 90, 2004, pp. 167–86.

In contrast to the Westphalian System of international relations, marked above all by the primacy of states as responsible for a particular order, in the 'Roundsmen' system of piracy, semi-state or non-state subjects played at least as great a role. It would fall short of the mark here to reduce the circumstances surrounding the 'Pirate Round' to a purely transitional phenomenon of state formation, a process accompanied by war and piracy. Rather, the opposite seems to be the case, for, at the start of the eighteenth century, the incursion of Caribbean and European sea robbers into the East Indies was a highly significant source of the sharp increase in non-state players there.[61] Seen in the framework of international law, this resulted in a readily apparent situation of divided and fractured sovereignties, a situation that Europeans knew how to deal with, employing Grotius' idea of 'divisible sovereignty'.[62] In the course of the eighteenth and early nineteenth centuries, they undermined the sovereign rights and monopoly on political power of indigenous governments, thus beginning to establish themselves as overarching sovereign powers. The sea robbers of the 'Round' thus contributed to the corrosion of political and legal autonomy in the non-European realm.

Those wishing to arrive at something on one side of the globe must begin on the other side. The British empire saw itself prompted to proceed according to this principle of global politics by the 'Pirate Round', having noticed early on that most pirate ships in the Indian Ocean came 'from our plantations in the West Indies'.[63] Having become virtually a worldwide danger, trans-oceanic piracy forced the London government to organize the suppression of the scourge of East Indian trade on an equally global scale. Battling the causes of the problem thus not only happened in the Indian Ocean but was simultaneously imposed in North America and the West Indies. In order to put a stop to piracy stemming from Madagascar and the Horn of Africa, the British dismissed governors in Boston and the Bahamas, and harbours were monitored. Relying solely on pirate-hunters and marine units sent to the Arabian Sea was not considered advisable. In the end, it was thanks to controls over West Indian markets that, at the close of the second phase of the 'Round', pirates had to leave sacks of valuable Asian spices behind on East African beaches. Seen from London, the West and East Indies had come considerable closer in the time of the 'Pirate Round'.

With the suppression of the 'Pirate Round', the era of piracy as a phenomenon connected on a worldwide scale, as an ocean-spanning international danger, receded. Nonetheless, piracy remains a threat for those organizing travel by sea. Indeed in many areas, such as the Horn of Africa and Southeast Asia, the enterprise seems to be expanding dangerously in our own times.

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61 See René J. Barendse, *The Arabian Seas: the Indian Ocean world of the seventeenth century*, Armonk, NY: Sharpe, 2002, pp. 460–86.

62 See Keene, *Beyond the anarchical society*.

63 BL, IOR, MS. Home Miscellaneous, IOR/H/36, Robert Blackborne, 'To the R. Hon. The lords commission for executing the office of L: High Admlt. of England, The humble petition of the Governour & Comp: of merchants of London trading to the East Indies', 26 February 1696/97, fol. 228r; and idem, 'To their excell: the lords justices of England. The humble petition of the govern: and company of merchants of London trading into the East Indies', fol. 291r.

'La guerra corsara': international legal culture in the Mediterranean

If the danger of globally organized piracy seemed banished by the mid eighteenth century, the problem of sea robbery nonetheless remained virulent for international relations in the Mediterranean. After the sea battle of Lepanto in 1571, the Ottoman empire's operational radius became largely circumscribed to the eastern Mediterranean.[64] In the western Mediterranean and eastern Atlantic, however, the presence of North African corsairs markedly increased. Freebooters from Morocco, Tunis, Algiers, and Tripoli were sometimes called *ghazis*, warriors in a *jihād* against infidels, although there is little evidence that corsair activities were generally considered to be a form of holy war.[65]

For a long time the 'pirate states' of North Africa, the Barbary states, succeeded in playing the European powers off against each other through skilful political tactics.[66] They would consistently only offer a small number of European countries papers protecting them from attack by their corsairs. However, as Neapolitan diplomatic correspondence shows, they would sometimes break these assurances.[67] Giovanni De Thomas, delegate of the Kingdom of the Two Sicilies, negotiated a two-month ceasefire in March 1786 in Algiers. But it turned out soon after that the Algerian Dey was using the treaty as a ruse to deliver merchant ships from Naples, ships thought to be protected by their flag, to the open swords of his corsairs. The explanations later offered by the Dey showed that, although the treaty had only served as an excuse, he nevertheless basically adhered to the principle of *pacta sunt servanda* ('promises are binding').

In the early modern period, the politics of mutually ransoming slaves belonging to either Christian or Muslim corsairs generated regular, and increasingly institutionalized, diplomatic encounters.[68] In the waning seventeenth century, de facto international recognition of the North African corsair states, achieved through treaties and diplomacy, was gradually confirmed by recognition in legal theory. Already in the writings of Gentili and Grotius we can find implications indicating that these scholars did not completely follow the widespread legal opinion about the North African regencies as mere 'nests of pirates'.[69] Yet their views as jurists remained incoherent, for no clear statement of a full recognition of the Barbary states as sovereign political entities was given, perhaps in part because they remained under Ottoman suzerainty. At the latest, the gradual process of recognition in legal theory was fully complete by the beginning of the eighteenth

64 Molly Greene, 'The Ottomans in the Mediterranean', in Virginia H. Aksan and Daniel Goffman, eds., *The early modern Ottomans: remapping the empire*, Cambridge: Cambridge University Press, 2007, pp. 104–16.

65 William G. Clarence-Smith, *Islam and the abolition of slavery*, London: Hurst, 2006, pp. 28–30.

66 See Paul A. Silverstein, 'The new barbarians: piracy and terrorism on the North African frontier', *New Centennial Review*, 5, 1, 2005, pp. 179–212.

67 See Archivio di Stato di Napoli, Ministero Affari Esteri, MS. Fascio n. 4212, Trattato 1783–1787.

68 See Giovanna Fiume, ed., *La schiavitù nel mediterraneo*, Quaderni storici 107, 2, Rome: Il Mulino, 2001; Christian Windler, *La diplomatie comme experience de l'autre: consuls français au Maghreb (1700–1840)*, Geneva: Librairie Droz, 2002.

69 See Alain Wijffels, 'Alberico Gentili e i pirate', in Alain Wijffels, ed., *Alberico Gentili Consiliatore: atti del convegno quinta giornata gentiliana 19 settembre 1992*, Milan: Giuffrè, 1999, pp. 85–131.

century. Unmistakably, Cornelius Bijnkershoek and other theorists of international law emphasized that the North African corsairs were not pirate-outlaws but that they corresponded to European privateers. That is, they were booty-taking warriors, authorized by a sovereign political power.[70]

While the attribute 'piratical' was still in use in many rhetorical references to Algiers, Tunis, and Tripoli, the international legal recognition of these entities as sovereign states was firmly established not only in legal theory and interstate treaty politics but also at court. In August 1780, the frigate *Stella Matina*, from Tuscany, was captured by a Tunisian galley and recaptured by a ship of the Sardinian Marine. The president of the Consolato del Mare in Nizza (Monferrato) decided that there was no duty to restore the ship to its former owner, because the people of the Barbary states could not be called pirates.[71] In 1801, in the case of the *Helena*, a purchaser of a British vessel seized by an Algerian commissioner as prize and sold in an Algerian market was given title valid against the original owner. Sir William Scott, judge of the High Court of Admiralty, held that the North African communities 'have long acquired the character of established governments, with whom we have regular treaties, acknowledging and confirming to them the relations of legal states'.[72] Once a certain opinion has been stabilized within international law, it cannot easily be altered. At the same time, the conclusion that the Maghribi communities were states in the international legal order helped to strengthen the idea of international law as an independent system or regime of law.

Nonetheless, the recognition of the North African countries as sovereign political entities did not continue for long. In the early nineteenth century, both the Europeans and the young American republic put aside their policy of recognition, and the maritime warring activity of the Barbary states was once again classified under the laws of war as irregular piracy (such pejorative rhetoric determining the propaganda against North Africa was at work in European and American foreign policy around 1800). In any event, with the military expeditions of 1815 and 1816, the fragile seventeenth-century balance between the Maghribi cities and European sovereigns was irreversibly annihilated. From the perspective of the North Africans, the Europeans had destroyed the balance with repeated unilateral and illegal bellicose actions. After the Peace of Aachen was signed in 1818, France and Great Britain together sent a fleet to the Maghribi coast. The English and French vice-admirals, Sir Thomas Francis Fremantle and Jurien de La Gravière, were authorized to impel the North Africans to abandon the 'System of Piracy' in the name of the 'sovereigns of the Powers of Europe'.[73] Otherwise they were to be subject to renewed military attacks by Europeans. While the Pasha of Tripoli acceded to these demands, the Algerian Bey responded to La Gravière that in that

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70 See Cornelius van Bynkershoek, *Quaestionum juris publici libri duo (1737)*, vol. 1: *The photographic reproduction of the edition of 1737*, Oxford: Clarendon Press, 1930, p. 124.

71 See Salvatore Bono, *I corsari barbareschi*, Turin: ERI, 1964, pp. 101–3.

72 See William W. Bishop, ed., *International law: case and materials*, 2nd edition, Boston, MA: Little, Brown, 1962, p. 211.

73 The National Archives, London, CO 2/10, Joint British and French mission to the Barbary states for the suppression of piracy, 1819, Sir Thomas Francis Fremantle to the Pascia of Tripoli, 9 October 1819, fol. 119r.

case the Europeans would be acting illegally, disregarding existing treaties, and themselves be behaving like pirates.[74]

The Europeans may have reactivated the piracy accusation in order no longer to have to accept the Barbary states as lawful enemies, and thus to pass off their use of force as simply a policing measure, although the powers also became committed to restricting, and even abolishing, privateering. This time around, there was to be no treaty of peace, but one of submission. In the end it was therefore the Europeans, not the North Africans, who cancelled the legal system shaped between the two sides since the seventeenth century. For the Maghribis, the reasons for the Europeans outlawing the Mediterranean slave trade in Vienna in 1815, despite having either expressly affirmed it or tacitly tolerated it over a long period, would have remained a mystery. Similarly, the European rejection of privateering was not matched in North Africa. However, the European decision to take energetic military measures against the North Africans probably stemmed less from concerns with slavery and privateering than from a desire to exploit Maghribi economic and political weaknesses, which had become increasingly evident. In other words, the renunciation of recognition of the North African countries as sovereign states through a resuscitation of the piracy accusation was for the most part neither a moral nor a legal matter. Rather it was grounded in a calculation of political power, which took its logical course with the French occupation of Algiers in 1830. That said, the French nearly pulled out of Algeria in the mid nineteenth century, and the colonization of the regencies and Morocco did not take place until the late nineteenth or early twentieth century.

'On privateers': the differentiation between law and politics

In the form of privateering, state-licensed sea robbery experienced a last great apogee in both the Napoleonic wars and the late eighteenth- and early nineteenth-century North and South American wars of independence. In their struggle for political autonomy from Spain and England, the North American colonies, Bolivia, Chile, and Argentina compensated for a lack of sufficient forces by issuing letters of marque. In so doing, they increasingly did away with the already indistinct dividing line between privateering and piracy. Whether or not a booty-seeking ship was authorized for such activity now hardly made any difference. The privateering war had reached such a level of irregularity that none of the participating powers on either side of the Atlantic could safely assess what was defined as legitimate privateering in terms of international standards.

Lacking any international agreement, privateering became the chronic plague of neutral sea trading. This was why the international law jurist Georg Friedrich von Martens, of the University of Göttingen, collected the main European maritime regulations, laws, and treaties regarding the prize law of privateering. Intending to give a striking example of growing

74 P. Grandchamp, *Documents relatifs aus corsaires tunisiens (2 octobre 1777–4 mai 1824)*, Tunis 1925, p. 87, cited in Taoufik Bachrouch, *Les elites Tunisiennes du pouvoir et de la devotion: contribution a l'étude des groupes sociaux dominants (1782–1881)*, Tunis: Publications de l'Université de Tunis, 1989, p. 525: 'Qu'on nomme voleur et pirate celui qui se rend maître de bâtiments et d'effects sans motif, sans justice et hors de toute règle, abolit tous les usages et annule aussi les traités.'

positive international law in Europe, he published his collection in 1795 in French as *Essai concernant les armateurs*, and in German as *Versuch über Caper*.[75] An English version followed in 1801, and it became the most important legal publication on privateering.[76] The trigger to write the essay was an incident that drew much attention in the public sphere of Europe at that time. In April 1793, the Spanish trading ship *San Jago*, laden with gold and silver from Lima, was seized near the Azores by the French privateer *Dumouriez*. Nine days later, the vessel was captured the British marine frigate *Phaeton* and brought to London. At the High Court of Admiralty, the Spanish ambassador sued for the restitution of the rich cargo.[77]

On 10 December, the judges of the court decided to return the vessel and its freight to the Spanish owner, minus a reward for the officers of the *Phaeton*, on the condition that, in the future, the Spanish king would take it upon himself to do the same in similar cases with English vessels. In his essay, Martens argued that the decision was lawful, except for the condition. In terms of European prize law, the restitution should have been granted without any conditions at all. For Martens, the decision of the English court was not made because of legal reasons but because the English government wanted to be on good terms with its new ally in the war against Revolutionary France. He interpreted the judgment of the High Court of Admiralty as an improper and inadmissible interference of law in politics. In fact, Martens argued, the decision was rightly found, but based on the wrong reasons. Legal judgments have to be made in relation to justice and not in relation to politics.[78] Therefore, international politics and international legal actions must be separated clearly and distinctly. In this way, the jurist of Göttingen insisted on the autonomy of international law. Here, the rules of privateering and their implementation in practice were used as an example to demonstrate the necessity to differentiate sharply between law and politics in international affairs.

The long end of international privateering

Privateering came into increasing international discredit from the time of the Napoleonic wars. However, an agreement between a significant numbers of powers to outlaw the practice was only signed at the 1856 Paris conference, with a multilateral declaration on maritime law.[79] In the end, the impossibility of distinguishing effectively between lawful and

75 Georg Friedrich von Martens, *Essai concernant les armateurs: les prises et surtout les reprises: d'apres les loix, les traités et les usages de puissances maritimes de l'Europe*, Göttingen, 1795; idem, *Versuch über Caper: feindliche Nehmungen und insonderheit Wiedernehmungen; nach den Gesetzen, Verträgen und Gebräuchen der Europäischen Seemächte*, Göttingen, 1795.

76 Georg Friedrich von Martens, *An essay on privateers, captures, and particularly on recaptures, according to the laws, treaties, and usages of the maritime powers of Europe, to which is subjoined a discourse, in which the rights and duties of neutral powers are briefly stated*, London, 1801.

77 See the document files of this trial in two boxes in The National Archives, London, High Court of Admiralty (=HCA) 32/834.

78 Martens, *Caper*, pp. 194–7.

79 See Francis R. Stark, *The abolition of privateering and the declaration of Paris*, New York: Columbia University Press, 1897; Francis Piggott, *The declaration of Paris 1856: a study – documented*, London: University of London Press, 1919; H. W. Malkin, 'The inner history of the declaration of Paris', *British Year Book of International Law*, 8, 1927, pp. 1–44; Olive Anderson, 'Some further light on the inner history of the Declaration of Paris', *Law Quarterly Review*, 76, 1960, pp. 379–85.

unlawful private maritime violence led to an international abolition of private taking of booty at sea, enshrined in the Declaration of Paris. Following the US Civil War, when the Confederate states had used privateers against the Union, the Americans began to follow the agreement de facto.[80] This was further reinforced internationally when three more nations signed the multilateral treaty: Japan in 1886, Spain in 1908, and Mexico in 1909.[81] With the broad recognition of the Declaration of Paris, the distinction between privateering and sea robbery, or between lawful and unlawful taking of booty on the high seas by private persons, was abolished in international law. The very form of private maritime plundering was equated with piracy, although the use of private ships to supplement a standing navy, as was for instance a German practice in the Second World War, has never been completely forbidden.

In the course of the nineteenth century, a broad definition of piracy established itself internationally, an understanding taking in any unlawful violent act, deprivation of freedom, or form of plunder. In contrast, the effort to define the use of submarines as piracy, above all by Great Britain, did not succeed in the 1920s.[82] At the same time, many aspects of the international approach to piracy remain controversial: for instance, how to distinguish piracy clearly from either armed political resistance or terror at sea. It is consequently not surprising that, following the attacks of 11 September 2001, many politicians and jurists appealed for an extension of the definition of piracy in the UN Convention on the Law of the Sea of 1982 to cover acts of terrorist violence.[83]

The fight against piracy as a tool of imperial politics

The withering away of privateering, in a corpus of international law established in the West, allowed the major colonial powers, especially Great Britain, to derive a claim to worldwide jurisdiction and rule over the high seas from the universal right to punish piracy. The British invoked this right when, in the framework of maritime policing measures, they began to develop and consolidate their position as an imperial colonial power on the Arabian Peninsula and in South Asia. Safeguarding international trading routes was the official goal that enabled the British navy to raise its flag in the Persian Gulf, by combating pirate attacks at the start of the nineteenth century. The exercise of maritime policing functions was here inseparable from the effort to gain political hegemony. As the harbours of Sharja and Ras al-Khaimah served as Persian Gulf bases for attacks on merchant shipping from the late eighteenth century, the British repeatedly accused the Bedouin Qassimi (or Qawasim) tribe,

80 See Piggott, *Declaration*, pp. 154–69.

81 See Hans Wehberg, *Land- und Seekriegsrecht: internationales Privat- und Strafrecht, erste und zweite Abteilung besonderer Teil: das Seekriegsrecht*, Berlin.: Kohlhammer, 1915, p. 44.

82 See Christoph Sattler, *Die Piraterie im modernen Seerecht und die Bestrebungen der Ausweitung des Pirateriebegriffes im neueren Völkerrecht*, Bonn, 1971.

83 See e.g. Tina Garmon, 'International law of the sea: reconciling the law of piracy and terrorism in the wake of September 11th', *Tulane Maritime Law Journal*, 27, 1, 2002, pp. 257–75.

and others, of posing a massive threat to all sea trading, extending to India.[84] In order to protect trading from Oman and Great Britain along the Qassimi 'Pirate Coast', London organized major naval expeditions in 1809–10 and 1819–20. The goal was to secure the Gulf region's maritime routes, and possibly to establish a base in the region.

The successful second expedition ended on 8 January 1820 with a treaty forcing the sheikdoms along the Gulf's Arabian coast into close cooperation with Britain.[85] Article 1 stipulated that all forms of plundering and piracy on the Arabian side were to cease permanently.[86] Every person who violated the clause, thus engaging in a non-recognized war, was to be considered an 'enemy of all mankind', forfeiting all goods, as well as life and limb.[87] Article 7 read as follows: 'If any tribe, or others, shall not desist from plunder and piracy, the friendly Arabs shall act against them according to their ability and circumstances, and an arrangement for this purpose shall take place between the friendly Arabs and the British at the time when such plunder and piracy shall occur.'[88]

The treaty's language reveals a victor addressing a loser. If a symmetric contract had been in play, then persons from both sides could have been accused of being criminals and pirates by the authorities on both sides. However, although both Qassimi and British could pursue Qassimi sea robbers, Qassimi could not pursue British citizens, because the treaty's wording excluded this possibility a priori. The treaty's imperial character was spelled out not so much by the absence of a clear definition of what precisely was meant by piracy but rather by the very clear definition of who could be subsumed under the concept. This marked the beginning of the attempt by the East India Company and the British government to make the Persian Gulf a British sphere of influence. The anti-piracy campaign of 1819–20 led to a loose form of protectorates that would only end in 1972, when Great Britain granted independence to Ras al-Khaimah, the last of the former Trucial states.

In this way, Great Britain used the universal right of punishing pirates to legitimize the claims of the British Admiralty to universal jurisdiction. In the seventeenth century, Leoline Jenkins, the leading judge of the High Court of Admiralty, had already stated that 'his Majesty' had the power and jurisdiction to protect English subjects, or the subjects of their allies, against the offences of piracy, not only in the British Seas but also to the utmost bound of the Atlantic Ocean, the Mediterranean or the South Seas, indeed 'even in the remotest Corners of the World'.[89] Before the early nineteenth century, this jurisdictional claim was still hypothetical, but during the Age of Empire it became a powerful

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84 On the following, see above all Charles E. Davies, *The blood-red Arab flag: an investigation into Qasimi piracy 1797–1820*, Exeter: University of Exeter Press, 1997.

85 'General treaty between the East India Company (Great Britain) and the friendly Arabs (trucial sheikhdoms of Oman and Bahrein), signed at Ras al Khaimah, 8 January 1820', in Clive Parry, ed., *The consolidated treaty series*, vol. 70: *1819–1820*, Dobbs Ferry, NY: Oceana Publications, 1969, pp. 463–8.

86 'There shall be a cessation of plunder and piracy, by land and sea, on the part of the Arabs, who are parties to the contract, for ever' (ibid., p. 464, art. 1).

87 Ibid., art. 2.

88 Ibid., p. 465, art. 7.

89 Leoline Jenkins, 'Charge given to an Admiralty session held at the Old Bailey', *c.* 1669–74, in William Wynne, *The life of Sir Leoline Jenkins, judge of the High-Court of Admiralty*, 2 vols, London 1724, vol. 1, pp. xc–xci.

juridical weapon to legitimize British political and military expansion, especially in the Near East, India, and Southeast Asia (in the last of these, the British sometimes cooperated with other colonial powers).[90] Thus the political hegemony of Europeans allowed them to endorse a view of piracy in international law that gave them a wide mandate for its suppression.

Nonetheless, the political instrumentalization of this principle was not undisputed. For instance, Rear-Admiral Sir Edward Owen, the British commander-in-chief of naval forces in the East Indies, was reluctant to use the term 'pirates' for Malay forces seeking to restore a deposed sultan in a dynastic struggle in Kedah. He proposed, unsuccessfully, the establishment of an international criminal court for piracy trials in Penang or Singapore, and he refused to bring British naval forces more actively into the fight to suppress the forces of the deposed sultan as 'pirates'. In April 1832, Robert Ibbetson, governor of the Straits Settlements, showed his disappointment about insufficient support in pirate-hunting by citing the words of Owen: 'I could not treat as pirates any against whom no acts of piracy had been specifically alleged, or proof obtained.'[91] Although this may have been a rare voice, it clearly shows that the law of piracy had the capacity to resist absorption by politics.

Conclusion

The reconstruction of the main aspects of the global extension of piracy as an accompanying symptom of European expansion in early modern times demonstrates the central issues of the evolving modern international legal order in maritime affairs, in particular the problem of the ocean as an fragmented space of competing legal strategies, the menaces of state-sponsored privateering, and the use of the principle of universal jurisdiction over piracy as a tool for advancing political interests or imperial expansion. This could lead to the conclusion that the legal treatment of piracy reveals the inevitable corruptibility of modern international law. However, some of the examples in this article have also shown the potential of international law to resist its instrumentalization as an excuse for political action. In the light of the shifting legal discourse on piracy, therefore, international law cannot be identified as a mere instrument of politics, either to justify or to outlaw private maritime violence. Under certain circumstances, international law was able to express its claim to autonomy, and to attempt to resist efforts to reduce its status to that of a tool for the legitimization of political interests.

Thus, the early modern development of the legal treatment of piracy in interstate affairs reflects the inconsistency of modern international law, fluctuating between the two poles of its abuse by non-legal interests on the one hand and its independence as a normative authority on the other hand. This indissoluble tension is an inherent part of the ambivalent

90 Nicholas Tarling, *Piracy and politics in the Malay world: a study of British imperialism in nineteenth-century South-East Asia*, new edition Nendeln: Kraus, 1978; Alfred P. Rubin, *Piracy, paramountcy and protectorates*, Kuala Lumpur: University of Malaya, 1974.

91 Robert Ibbetson to the Chief Secretary, Fort William, Singapore, 25 April 1832, in *The Burney papers*, vol. 3, part 1 (March 1827 to June 1833), Bangkok, 1912; new edition Westmead, 1971, p. 309. See also the letters of Edward Owen in BL, IOR, IOR/F/1331/52585, 52586, and 52588.

structure of international law. It should be kept in mind when managing contemporary problems of international maritime affairs.

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