

# **The London School of Economics and Political Science**

*The ideological origins of piracy in international legal thought*

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## **Abstract**

This thesis explores the origins of the pirate in international legal thought. It takes as its starting point the recent wave of piracy off the coast of Somalia, mapping the image of the pirate constructed by contemporary legal commentators. The figure of the pirate that takes shape is the archetype of illegitimacy and epitome of enmity in international law: *hostis humani generis*. Where and when did this figure first emerge in international legal thought? My argument is twofold. First, against dominant transhistorical accounts which project the pirate backwards in an unbroken arc from the present to antiquity, I show that its juridical identity has been marked by fundamental discontinuities and transformations. Second, I locate the construction of a distinctly modern figure of the pirate in the emergence of a capitalist world economy in the long 16th century. The pirate's universal enmity, I suggest, was initially religious in nature, an ideology rooted in inter-imperial rivalries confronting Habsburg Spain with Ottoman, in the Mediterranean, and Protestant, in the Atlantic, threats to a universalising Christendom. With the development of an early capitalist economy and the growing coincidence of imperial interests with trade, the image of the pirate began to change. In the work of Grotius, I argue, its enmity was transformed, the pirate rendered not as religious foe, but as enemy of a universal right to commerce. It is this new secular figure of enmity, the thesis concludes, that is produced and reproduced in modern legal thought.

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# Introduction

In the wake of the events of 11 September, 2001 and the US's advertisement of a 'war on terror', lawyers grappled with competing legal paradigms under which terrorists might be treated. How should this figure, neither ordinary criminal nor recognised state actor, be understood? How might the war on terror, with its seemingly unlimited licence for imperial violence, be justified? International lawyers quickly found a homology with another figure of enmity, the pirate. Writing in the *New York Times*, two months after the events of 9/11, Anne-Marie Slaughter declared 'Al Qaeda members are international outlaws, like pirates'.<sup>1</sup> Others went further, declaring the two figures one and the same: '200 years ago, everyone called terrorists by another name: pirates';<sup>2</sup> '[t]wo centuries ago the fledgling United States prosecuted a similar war against terrorism. Only, we didn't call it "terrorism", but piracy'.<sup>3</sup>

The pirate loomed large, too, in President George W. Bush's 2002 *National Security Strategy of the United States*.<sup>4</sup> The document set out the US's security strategy for the 'war on terror', one premised on a policy of pre-emptive strikes against an expanding universe of enemies.<sup>5</sup> But the strategy also advocated waging 'a war of ideas' in which terrorism would be assimilated with other forms of illegitimate violence: 'terrorism will be viewed in the same light as slavery, piracy, or genocide'.<sup>6</sup> Like its doppelgänger, terrorism was a ubiquitous threat to be universally condemned.

In the *National Security Strategy*, the invocation of piracy, like slavery and genocide, served as a rhetorical shorthand for illegitimacy and censure. But it also implied a license for unrestrained violence against those labelled terrorists—for their extirpation at will. As one legal scholar put it in the immediate wake of 9/11: 'On the high seas if you saw a pirate, you sank the bastard. You assault pirates, you don't arrest

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<sup>1</sup> Anne-Marie Slaughter, 'Al Qaeda Should Be Tried Before the World', *New York Times*, 17 November 2001, A23.

<sup>2</sup> Richard Leiby, 'Terrorists by Another Name: The Barbary Pirates', *Washington Post*, 15 October 2001, C01.

<sup>3</sup> Chris Mooney, 'The Barbary Analogy', *American Prospect*, 19 December 2001.

<sup>4</sup> *National Security Strategy of the United States* (White House, 2002) (NSSUS).

<sup>5</sup> 'We must be prepared to stop rogue states and their terrorist clients before they are able to threaten or use weapons of mass destruction against the United States and our allies and friends': NSSUS 14.

<sup>6</sup> *Ibid.*

[them].<sup>7</sup> The pirate, and by extension the terrorist, was *hostis humani generis*, the enemy of humankind: a figure who, by his exceptional violence, places himself outside of humanity and the protection of legal and moral limits.

The analogy to piracy served, one critic observes, to legitimise ‘a more brutal and unconventional anti-terrorist policy’.<sup>8</sup> It was to the figure of the pirate that John Yoo, the influential architect of US torture policies, appealed in defending the construct of the ‘illegal enemy combatant’, a figure who forfeits all rights of both combatant and civilian. ‘Why is it so hard for people to understand that there is a category of behavior not covered by the legal system’, he asked in a 2005 interview. ‘What were pirates? . . . Historically, there were people so bad that they were not given protection of the laws. There were no specific provisions for their trial, or imprisonment.’ Pirates and illegal combatants: neither ‘deserve the protection of the laws of war.’<sup>9</sup>

Yoo was not alone in invoking the pirate as model. Terrorists, former NATO commander Wesley K. Clark has argued, are ‘like modern-day pirates’ and should be treated as such.<sup>10</sup> Legal historian Douglas Burgess Jr similarly suggests terrorism should be defined ‘as a species of piracy’.<sup>11</sup> His recent book is unequivocal, its subtitle reading simply: ‘Piracy is Terrorism, Terrorism is Piracy’.<sup>12</sup> A plethora of work repeats the equation.

As the ‘war on terror’ continues, invocation of the ‘piracy precedent’ still provides the basis for justifications for exceptional treatment of suspected terrorists

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<sup>7</sup> Dave McIntyre quoted in Leiby (2001) C01.

<sup>8</sup> Mikkel Thorup, *An Intellectual History of Terror: War, Violence and the State* (Routledge, 2010) 156. For a similar warning, see Alan Clarke, ‘Creating a Torture Culture’ 32 *Suffolk Transnational Law Review* (2008) 1, 18.

<sup>9</sup> Jane Mayer, ‘Outsourcing Torture’, *The New Yorker*, 14 February 2005, 106, 114. Yoo has repeated this argument on various occasions. See ‘Interview with John Yoo’, *Frontline*, 18 October 2005, transcript available at [www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html](http://www.pbs.org/wgbh/pages/frontline/torture/interviews/yoo.html) (last visited 30 March 2018); John Yoo, ‘Obama Made a Rash Decision on Gitmo’, *Wall Street Journal*, 29 January 2009, A15.

<sup>10</sup> Wesley K. Clark & Kal Raustiala, ‘Why Terrorists Aren’t Soldiers’, *New York Times*, 8 August 2007, A19.

<sup>11</sup> Douglas R. Burgess Jr, ‘The Dread Pirate Bin Laden’, *Legal Affairs*, July/August 2005, available at [www.legalaffairs.org/issues/July-August-2005/feature\\_burgess\\_julaug05.msp](http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp) (last visited 30 March 2018).

<sup>12</sup> Douglas R. Burgess Jr, *The World for Ransom: Piracy is Terrorism, Terrorism is Piracy* (Prometheus Books, 2010). See also Douglas R. Burgess Jr, ‘Hostis Humani Generi: Piracy, Terrorism and a New International Law’, *University of Miami International & Comparative Law Review* 13 (2005) 293.



such as the practice of ‘targeted killing’, torture, and extraordinary rendition.<sup>13</sup> Ingrid Detter argues that terrorists are, ‘*ipso facto*, excluded from the protection of the law of war. . . . Like pirates, [they] place themselves outside the family of nations and make themselves *enemies of mankind*.’<sup>14</sup> Both, Anthony Colangelo concurs, ‘have opted out of the “law of society”’.<sup>15</sup> Pirate and terrorist alike, Louis René Beres insists, are to be understood as *hostes humani generis*, with all nations enjoying a right to exterminate them: ‘the only lawful alternative to extraordinary means of remediation, including assassination or extrajudicial execution, may sometimes be craven surrender to barbarism’.<sup>16</sup>

### A FIGURE OF ENMITY

The association of terrorism with piracy may seem an odd connection to make. Pirates have long held a prominent place in the popular imagination, from Gay’s *Polly* to Gilbert and Sullivan’s *The Pirates of Penzance*, Robert Louis Stevenson’s *Treasure Island* to Barrie’s *Peter Pan*, Errol Flynn’s swashbuckling Captain Blood to Johnny Depp’s dashing Captain Jack Sparrow. Popular cultural representations suggest a figure at once heroic and morally ambiguous: daring and cunning, yet sometimes also ruthless and violent. Pirates have been celebrated for their oppositional culture, as rebellious outcasts seeking to pose a radical democratic challenge to an imperial and exploitative social order,<sup>17</sup> an inspiration for modern radical groups—the Paris

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<sup>13</sup> See, e.g., Mark V. Vlasic, ‘Assassination & Targeted Killing—A Historical and Post-Bin Laden Legal Analysis’ 43 *Georgetown Journal of International Law* (2011) 259; Frank A. Biggio, ‘Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism’ 34 *Case Western Reserve Journal of International Law* (2002) 1. The Bush Administration’s original justification for the lawfulness of targeted killing relied on a 1989 advisory memorandum issued by the then Special Assistant for Law of War Matters, W. Hays Parks. Amongst the historical examples cited by Parks was an early 19th-century Marine expedition to kill ‘Barbary pirates’ in Libya: W. Hays Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, reprinted in *The Army Lawyer*, December 1989, 4 available at [www.loc.gov/rr/frd/Military\\_Law/pdf/12-1989.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/12-1989.pdf) (last visited 31 March 2018). On the history of targeted killing, see Markus Gunneflo, *Targeted Killing: A Legal and Political History* (Cambridge University Press, 2016).

<sup>14</sup> Ingrid Detter, ‘The Law of War and Illegal Combatants’ 75 *The George Washington Law Review* (2007) 1049, 1096-97.

<sup>15</sup> Anthony J. Colangelo, ‘Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law’ 48 *Harvard International Law Journal* (2007) 121, 145.

<sup>16</sup> Louis René Beres, ‘After Osama Bin Laden: assassination, terrorism, war, and international law’ 44 *Case Western Reserve Journal of International Law* (2011) 93, 135.

<sup>17</sup> See Marcus Rediker, *Villains of all Nations: Atlantic Pirates in the Golden Age* (Verso, 2004) 176; Peter Linebaugh & Marcus Rediker, *The Many Headed Hydra: Sailors, Slaves, Commoners, and the Hidden History of the Revolutionary Atlantic* (Beacon Press, 2000); Gabriel Kuhn, *Life Under the Jolly*

Commune, its daily paper bearing the title *Le Pirate*; the *Edelweißpiraten*, a prominent resistance movement in Nazi Germany; today's various political Pirate Parties, with their calls for civil rights and direct democracy; anti-capitalist protestors hoisting pirate emblems.<sup>18</sup> Professional sports teams and fan groups bear their name or image—Orlando Pirates in Johannesburg; FC St Pauli in Hamburg—and children cavort in pirate dress, with eyepatch and sabre in hand.

This is all a far cry from terrorists—or *génocidaires* and slavers, in the continuum suggested by the *National Security Strategy*. Indeed, the invocation of the pirate as a figure of vituperation in anti-terrorism discourse is all the more striking for its contrast with today's popular cultural representations. Striking, but not surprising. For international lawyers, there is little novel in the image of pirate-cum-terrorist. The appeal to the pirate as analogy in the context of terrorism was made possible precisely because of his longstanding place in the legal imaginary as a figure of extreme enmity. Already in 1769, William Blackstone had opined that piracy is 'an offence against the universal law of society'. The pirate, in renouncing 'all the benefits of society', is reduced 'to the savage state of nature' and 'all mankind must declare war against him'.<sup>19</sup> Beltway planners and their legal propagandists did not have to look far for a model justifying unfettered repression.

It is this figure of the pirate—an international scourge deserving universal reprobation—with which the present study is concerned. The last decade has brought its distinctive role in international legal thought once more into sharp relief. Much of the recent interest emerged in reaction to the dramatic rise—an 'epidemic' if some commentators are to be believed<sup>20</sup>—of maritime violence around the Horn of Africa and, in particular, off the coast of Somalia. Peaking in activity between 2008 and 2012, these new pirates, commentators warned, were 'a plague' that demanded 'immediate

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*Roger: Reflections on Golden Age Piracy* (PM Press, 2010); Christopher Hill, 'Radical Pirates?', in *Collected Essays*, vol. 3 (Harvester Press, 1986) 161; Christopher Hill, *Liberty Against the Law: Some Seventeenth-Century Controversies* (Allen Lane, 1996); Anon, 'Pirate Utopias: Under the Banner of King Death', 8 *Do or Die* (1999) 63.

<sup>18</sup> Radical authors also invoke the opposition spirit of the pirate: see, e.g., Tariq Ali, *Pirates of the Caribbean* (Verso, 2006).

<sup>19</sup> William Blackstone, *Commentaries on the Laws of England*, vol. 4 (University of Chicago Press, 1979) [1769] 71.

<sup>20</sup> Eugene Kontorovich, "'A Guantánamo on the Sea': The Difficulty of Prosecuting Pirates and Terrorists' 98 *California Law Review* (2010) 243, 243.

and aggressive action'.<sup>21</sup> 'Pirates are not ordinary criminals', a typical intervention held; they are exceptional and 'can be seized at will by anyone, at any time, anywhere they are found'.<sup>22</sup> Again, as in the wake of 9/11, the historical identification of the pirate as *hostis humani generis*, enemy of mankind and humanity, was invoked: his is an 'extraordinary, inexplicable villainy'.<sup>23</sup>

The image of the pirate that emerges from these international legal discourses—from Blackstone to Yoo—is that of a dangerous other: 'pathogens' and 'parasites', in the words of some commentators, to be expunged from the body of humanity, biological metaphors evoking the exterminationism inherent in their legal identity.<sup>24</sup> The pirate in modern international legal thought, in short, is the epitome of enmity. But not just any enmity: *universal* enmity. He is a paragon of evil, opposed *to* all and demanding perfunctory annihilation *by* all. It is this figure of the pirate that has become a paradigmatic category in modern international legal thought such that to identify the terrorist with the pirate is to legitimise his elimination.

## HISTORICISING THE PIRATE

The origins of this figure of the pirate and the treatment it evokes is the focus of this thesis. The ideological figure of the pirate that emerges from international legal thought, as is perhaps already clear from the discussion above, is more than the sum total of its modern legal definitions. For example, under the 1982 UN Convention on the Law of the Sea (UNCLOS), *piracy* is defined as an act of robbery, or other illegal act of violence or deprivation, committed for 'private ends' on the 'high seas' or elsewhere outside the jurisdiction of any state.<sup>25</sup> (The *pirate*, by way of contrast, is not defined at all.) In a strict definitional sense, then, the assimilation of terrorism to piracy makes no sense: the former is said to be inherently political in nature, while the latter

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<sup>21</sup> Peter Eichstaedt, *Pirate State: Inside Somalia's Terrorism at Sea* (Lawrence Hill, 2010) 1, 4.

<sup>22</sup> Douglas R. Burgess Jr, 'Thar Be Terrorists!', *New York Times*, 5 December 2008, A33.

<sup>23</sup> Shannon Lee Dawdy, 'Why Pirates Are Back' 7 *Annual Review of Law and Social Science* (2011) 361, 374.

<sup>24</sup> William Langeweische, 'Anarchy at Sea', *Atlantic Monthly*, September 2003, 50; Oded Löwenheim, 'Do Ourselves Credit and Render a Lasting Service to Mankind: British Moral Prestige, Humanitarian Intervention, and the Barbary Pirates', 47 *International Studies Quarterly* (2003) 23.

<sup>25</sup> United Nations Convention on the Law of the Sea (10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) arts 100 to 107 and 110.

is explicitly defined as apolitical.<sup>26</sup> Leaving aside the ideological content of the *political* in this formulation, it is apparent that the pirate performs ideological work in international legal thought beyond its strict legal definition—work, for instance, that makes it possible to be invoked in the name of fighting and eliminating terrorism. Certainly, robbery on land, whether or not for ‘private ends’, has never attracted the same opprobrium. Similarly, other forms of maritime violence—the trafficking of refugees, say—have a much larger cost in human lives, yet attract nothing like the rhetorical or material responses to piracy. What is it about this figure and his depredation at sea that calls forth such enmity—that casts the pirate as the mould of illegitimacy?

This thesis argues that the extreme hostility attaching to the pirate lies in the threat he poses to capital. The pirate’s depredations—his violence against private property—is deemed illegitimate because it imperils international commerce and challenges global processes of capital accumulation. *Expulsis Piratis, Restituta Commercium*—pirates expelled, commerce restored—as the official motto of the Bahamas had it until recently.<sup>27</sup> We can see this in the context of Somali piracy too. Its volume—hundreds of attacks on vessels in a period of a few years—was certainly dramatic, but the international response it attracted was far more striking. What other issue could have united US, EU, NATO, Chinese, Japanese, Iranian and Russian navies against a common enemy? Securing commercial circulation over the world’s vast ocean spaces requires force: the legitimate violence safeguarding a pelagic plane of commercial circulation, the violence of the pirate its illegitimate other. In other words, the construction of the pirate as universal enemy in international legal thought and the construction of the market as universal norm are two sides of the same coin. In this respect, then, the history of piracy and history of capitalism go hand in hand. It is onto that history that this thesis seeks to shed light.

Curiously, that history is almost entirely absent from legal treatments of piracy. Contemporary debates around Somali pirates revolve predominantly around the *adequacy* of international law, taking that law as largely given and leaving

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<sup>26</sup> See discussions around the *Achille Lauro* affair in, e.g., Antonio Cassese, *Terrorism, Politics and Law: The Achille Lauro Affair* (Wiley, 1991); Malvina Halberstam, ‘Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety’ 82 *American Journal of International Law* (1988) 269.

<sup>27</sup> Until independence in 1973: Mark Neocleous, *The Universal Adversary: Security, Capital and ‘The Enemies of All Mankind’* (Routledge, 2016) 169 note 25.

unscrutinised its origins. In this respect, scholarship on piracy in international law treads a familiar path: the international law discipline has long borne the stamp of a preoccupation with pragmatic, policy- and practice-focused concerns, with an attendant poverty in systematic historical inquiry.<sup>28</sup> Doctrinal exegesis, ‘foreign office’ histories,<sup>29</sup> and narratives of progress<sup>30</sup> dominate the field. In the case specifically of the pirate, it emerges, in effect, as a category seemingly without a history, a stable and static legal concept stretching backwards in time. Piracy, one lawyer tells us, has existed for over three thousand years.<sup>31</sup> Another insists that ‘[v]irtually all oceans of the world have had a long history of maritime piracy, from the early days of seafaring in small, coast-hugging vessels all through the age of oared and sailed ships up to the heydays of imperialism.’<sup>32</sup>

What is it exactly that international lawyers claim has existed across time? ‘One great difficulty’, wrote the historian Philip Gosse in 1924, ‘is to decide who was, and who was not, a pirate’.<sup>33</sup> A certain polysemy is characteristic of the term in its everyday usage, at once legal concept, political smear, and cultural signifier. Historians frequently apply the term to a range of actions across time involving some form of violence against shipping at sea, while presuming an inherent, consistent meaning. Is piracy simply the physical act of pillage at sea? It certainly takes that character in many popular histories of piracy, a phenomenon existing in these accounts so long as humans have travelled by sea.<sup>34</sup> As Gosse wrote, ‘piracy, like murder, is one of the earliest of recorded human activities.’<sup>35</sup>

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<sup>28</sup> See Randall Lesaffer, ‘International Law and Its History: The Story of an Unrequited Love’, in Matthew Craven, Malgosia Fitzmaurice & Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff, 2006) 27. Martti Koskenniemi’s work has gone some way to reorienting attention on the discipline’s history: see, e.g., Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press, 2001). See also Bardo Fassbender & Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012).

<sup>29</sup> David Bederman, ‘Foreign Office International Legal History’, in Craven et al. (eds) (2006) 43.

<sup>30</sup> On the idea of progress in international law, see Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Asser, 2010).

<sup>31</sup> Robert M. Jarvis, ‘Maritime Piracy in the Modern World’ 6(3) *Insights on Law and Society* (2006) 1.

<sup>32</sup> Peter Lehr, ‘Introduction’, in Peter Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism* (Routledge, 2007) vii, vii.

<sup>33</sup> Philip Gosse, *The Pirate’s Who’s Who* (Floating Press, 2012) [1924] 12.

<sup>34</sup> See, e.g., Angus Konstam, *Piracy: The Complete History* (Osprey, 2008).

<sup>35</sup> Philip Gosse, *The History of Piracy* (Dover, 2007) [1932] 1. See also Konstam (2008) 10.

But in international legal treatments, if piracy has existed across time, so too has it borne a specifically *legal* impress, the stamp of illegality or, at the very least, illegitimacy. Bemoaning the obstacles posed by international human rights law to the capture of Somali pirates, for instance, Eugene Kontorovich argues that these ‘make it harder for nations to perform the *oldest and perhaps most basic law enforcement function in international law: preventing piracy*’.<sup>36</sup> Patricia Birnie’s account is also typical in this regard. Pirates, she writes, ‘were robbers who attacked and plundered other vessels indiscriminately and violently, roaming the oceans for this nefarious purpose’. It is, she insists, ‘an age old offence’ dating to antiquity.<sup>37</sup> In her sweeping historical gloss, periodic reference to piracy in historical texts is taken as evidence of both its timeless existence and its unchanging status as a heinous offense under law.

Not only is the pirate a timeless figure, but so too, as Kontorovich’s remark implies, does his *legal* identity stretch backwards through time in a smooth arc. ‘More than 2,000 years ago’, writes Burgess Jr, ‘Marcus Tullius Cicero defined pirates in Roman law as *hostis humani generis*, “enemies of the human race.” *From that day until now*, pirates have held a unique status in the law as international criminals.’<sup>38</sup> While locating its origins not as distant as antiquity, Mahmoud Cherif Bassiouni suggests that piracy ‘has been recognized as an international crime under customary international law since the 1600s, and has continued to be deemed a customary as well as a conventional international crime’.<sup>39</sup> ‘For centuries there has been universal jurisdiction to try pirates’, Michael Akehurst agrees,<sup>40</sup> while Kontorovich discerns an unchanging consensus on the pirate’s identity as *hostis humani generis*.<sup>41</sup> And Samuel Issacharoff, drawing out the concomitant implications of the designation, states simply that ‘nothing is more settled than the fact that pirates are *hostis humani generis*,

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<sup>36</sup> Kontorovich (2010) 246 (emphasis added).

<sup>37</sup> P.W. Birnie, ‘Piracy: Past, present, future’ 11 *Marine Policy* (1987) 163.

<sup>38</sup> Burgess Jr, ‘The Dread Pirate Bin Laden’ (2005) (emphasis added). As I discuss in Chapter 1, Cicero did not in fact use the term *hostis humani generis* to describe pirates.

<sup>39</sup> M. Cherif Bassiouni, ‘Sources and Content of International Criminal Law: A Theoretical Framework’, in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 1, 2nd ed. (Transnational Publishers, 1999) 3, 83.

<sup>40</sup> Michael Akehurst, ‘Jurisdiction in International Law’ 46 *British Year Book of International Law* (1972-73) 145, 160.

<sup>41</sup> Kontorovich (2010) 251.

enemies of all mankind, for whom jurisdiction is universal and punishment merciless'.<sup>42</sup>

The rhetorical pattern that emerges is striking for its presentism. The pirate's timeless legal disapprobation and transhistorical insidiousness—and the attendant license for his extirpation—is invoked as legitimation for his status and treatment under international law *today*. In the very act of invoking history, contemporary assumptions about pirates are projected backwards to create a pseudohistory of universal enmity. That it is so inherent in the idea of the pirate today makes it hard to conceptualise a time where it might have been otherwise. Such presentism is nowhere clearer than in Donald Puchala's suggestion that the English pirate Henry Morgan's 1671 attack on Panama 'must have been for the Spanish colonists . . . what 11 September 2001 was for the people of New York.'<sup>43</sup>

These international legal discourses blur the historical specificity of the pirate, producing and reproducing the pirate as a timeless figure abstracted from any concrete historical referent. This treatment of the pirate in contemporary international legal thought recalls Marx's criticism of bourgeois political economy. Economists, he wrote in *The Poverty of Philosophy*, 'express the relations of bourgeois production, the division of labour, credit, money, etc., as fixed, immutable, eternal categories'. They explain how production takes place *in* these relations, Marx accepted, but they leave unexplained—and unexplored—'how these relations themselves are produced, that is, the historical movement which gave them birth'.<sup>44</sup> But as Marx went on to show in ample detail, production relations are not static. The mistake of the economists, such as Proudhon to whom Marx was responding, was (and is) to ignore the historical movement underpinning and throwing up the categories given theoretical expression in bourgeois economic theories. History is transformed into a set of static categories—the market, reified and projected backwards into all human history as 'exchange' and 'barter'. So too the pirate is reproduced as a transhistorical figure of enmity, the enemy of humanity from antiquity to the present. Even those scholars who root the pirate's

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<sup>42</sup> Samuel Issacharoff, 'Pirates Then and Now', *Jotwell*, 24 November 2010, available at [conlaw.jotwell.com/pirates-then-and-now/](http://conlaw.jotwell.com/pirates-then-and-now/) (last visited 30 March 2018).

<sup>43</sup> Donald J. Puchala, 'Of Pirates and Terrorists: What Experience and History Teach' 26(1) *Contemporary Security Policy* (2005) 1, 3.

<sup>44</sup> Karl Marx, *The Poverty of Philosophy* (Progress Publishers, 1955) [1847] available at [www.marxists.org/archive/marx/works/1847/poverty-philosophy](http://www.marxists.org/archive/marx/works/1847/poverty-philosophy) (last visited 2 May 2018) (emphasis added). I am grateful to Robert Knox for pointing me to Marx's discussion of this point.

association with illegitimate violence in a concrete juncture—the 1600s, say, as in Bassiouni’s brief squib—offer no insight into *why* it emerged as such. Dominant disciplinary discourses abstract from a set of historically specific conditions facing international jurists, thus remaining silent on issues to do with the relationship between capitalism, interstate competition and international law and expunging from analyses questions of political economy.

How then did the pirate emerge as the archetype of illegitimacy and enmity in international legal thought? This thesis takes the pirate in contemporary thought as its starting point and seeks to excavate the history behind that category—to identify the ‘historical movement’, to use Marx’s phrase, which gave it birth. Its focus, then, is not simply a prevailing set of ideas about the pirate, but also the material and ideological circumstances that generated them, circumstances which the idea of the pirate in turn both reflects and distorts. Surprisingly few studies have, until now, sought to do so. In the field of law, Alfred Rubin’s *The Law of Piracy* remains the seminal work.<sup>45</sup> Rubin traces developments in the legal treatment of piracy across the modern era (with particular focus on Britain and the United States), emphasising distinctions between natural law and positive law traditions. As a guide to the shifting topography of legal argument, doctrine and case law, Rubin’s work remains invaluable. However, Rubin’s approach conforms to the standard conventions of legal history, tracing legal doctrine and state practice largely abstracted from their material context; international legal arguments are presented as free-floating ideas, rather than embedded in changing social orders. To the extent that Rubin offers hints as to underlying political-economic transformations and specific historical circumstances that make certain legal ideas and practices possible and against which they are disseminated and gain purchase, they remain just that, hints.

More recently, in the context of a study of Emer de Vattel’s collective security doctrine, Walter Rech offers a lapidary overview of the *hostis humani generis* concept in early modern legal thought, an important supplement to Rubin’s more doctrinal account.<sup>46</sup> But here too the analysis remains at the level of a history of ideas. In Rech’s gloss, we move quickly from Roman enmity towards robbers and other enemies of Rome to its marriage with Christian notions of universal enmity associated with the

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<sup>45</sup> Alfred P. Rubin, *The Law of Piracy* (University Press of the Pacific, 2006) [1988].

<sup>46</sup> Walter Rech, *Enemies of Mankind: Vattel’s Theory of Collective Security* (Martinus Nijhoff, 2013).



devil. Jumping to the 16th century, the now theologically-inflected concept of an enemy of humankind is invoked to define the pirate in English admiralty law, as it would also be by Locke to define tyrants and anarchists. Rech's focus is a study of the enemy of humankind concept specifically in Vattel's work, so we can hardly fault him for a skeletal preliminary sketch, but like other international legal studies, in vain can we search for an *explanation* for these juridico-intellectual transformations he sets out in schematic fashion. Why, on Rech's account, should the figure of the devil, and the religious enmity he represented, come to be associated with the pirate? And why specifically at that juncture?

Beyond the legal field, a number of historical sociological and political studies have highlighted the historical specificity of piracy, but paid little attention to its ideological role in international legal thought. Janice Thomson's influential *Mercenaries, Pirates and Sovereigns*, for instance, locates the *practice* of piracy within concrete historical processes such as the emergence and consolidation of territorial states in Europe. Efforts to combat piracy, on Thomson's telling, were part of a secular process by which various forms of 'privately' owned means of violence were suppressed as territorial states consolidated their monopoly on legitimate violence.<sup>47</sup> Yet in this Weberian narrative, the pirate quickly loses any specificity vis-à-vis other forms of private violence, while the historically-contingent nature of distinctions between, say, 'public' and 'private' or 'state' and 'non-state' are elided, these categories, like the pirate in international legal thought, unhelpfully naturalised.

A quite different approach is suggested by a number of social historians. The work of scholars such as Marcus Rediker and Peter Linebaugh, as well as the earlier work of Christopher Hill, for instance, situate 17th and early 18th century piracy within a story about the origins of capitalism and the building of empire.<sup>48</sup> On this approach, pirates are understood not simply as purveyors of private violence, but rather as part of a new proletariat, the outcome of fundamental changes in the organisation of a transatlantic political economy. State efforts to suppress piracy, including legal penalties, emerged in this story coeval with the reorganisation of labour and society around capitalist social relations and the creation of the Atlantic as

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<sup>47</sup> Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns* (Princeton University Press, 1994) 3.

<sup>48</sup> Linebaugh & Rediker (2000); Rediker (2004); Marcus Rediker, *Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates and the Anglo-American Maritime World, 1700-1750* (Cambridge University Press, 1987); Hill (1986).

‘a zone for the accumulation of capital’.<sup>49</sup> Yet, if they locate piracy within and in relation to concrete historical processes—decline of private violence vis-à-vis the state’s emerging monopoly on violence; transition in modes of imperialism; construction of a capitalist hydrarchy—these literatures have little to say about *international legal* developments. That is, while they accurately direct our attention to material processes and concrete historical transitions underlying the changing legal landscape as it concerns piracy, they have little to tell us about the legal topography itself.

Finally, two recent books are particularly relevant to this study and it is worth distinguishing my own approach. *The Enemy of All: Piracy and the Law of Nations*, by the literary scholar and translator of Agamben, Daniel Heller-Roazen, attempts a wide-ranging history of piracy in international law from antiquity to the present.<sup>50</sup> Yet it falls short of its ambition, its schematic chapters, no more than vignettes really, offering at best fleeting windows onto the intellectual and legal idea of the pirate at various historical junctures. Although Heller-Roazen’s study captures elements of a changing figure in legal thought, he nonetheless insists on generalising from concrete historical instantiations to posit a universal—and once more transhistorical—pirate paradigm, one abstract enough to endure over time and capture in its definitional net not only maritime plunder but, once more, today’s terrorist.

A second book, this one from the international relations discipline, is far richer in historical detail and theoretical sophistication, but nonetheless falls into a similar trap. Nonetheless, it is worth considering in some detail, if only for its influence on my own study. How is it, Amedeo Policante asks in *The Pirate Myth: Genealogies of an Imperial Concept*, that the littoral figure of the pirate came to be excoriated as the enemy of humanity, to be hunted down and eliminated from the world’s pelagic spaces?<sup>51</sup> Policante offers an ambitious and erudite genealogy of the concept of piracy and its constitutive role in international relations. Yet, like the legal scholars discussed above, his focus is on continuity: tracing the arc of enmity from antiquity to the present day, he suggests a ‘structural relationship’, across historical epochs, between empire and piracy. Empire, according to Policante, has always required the pirate, an

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<sup>49</sup> Linebaugh & Rediker (2000) 144.

<sup>50</sup> Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (Zone Books, 2009).

<sup>51</sup> Amedeo Policante, *The Pirate Myth: Genealogies of an Imperial Concept* (Routledge, 2015). I discuss this book in more detail in Tor Krever, ‘Hostis humani’ 195 *Radical Philosophy* (2016) 62.

untameable Other against which imperial power is called to action. ‘Over and over again in history’, he writes, ‘hegemonic forces have tried to legitimize their claims to some form of global Imperial authority by appealing to the existence of pirates’.<sup>52</sup>

Yet there is a tension at the heart of *The Pirate Myth* between the historical continuities in piracy’s relationship to empire that Policante wishes to emphasise and the fundamental discontinuities in the juridical constructions he describes. At the discursive level, certainly, empires have consistently couched their violence in a rhetoric of service to humanity. The thread that connects political communities on the margins of the ancient Mediterranean, Protestant adventurers challenging Catholic hegemony in the New World, a denationalised Atlantic proletariat, and indigenous Malay communities subjected to colonial genocide is just that: discursive. However, a careful reading of Policante’s own historical examples reveals, as I argue in this thesis, that the juridical identity of the pirate and the legal concomitants attaching to that identity have been marked by fundamental discontinuities and transformations coeval with the political-economic upheavals of the past millennium. As both Policante and I argue, the distinctly modern construction of the pirate as enemy of a universal right to trade and the attendant license to extirpate them through the unfolding of a universal jurisdiction was the juridical concomitant specifically to the making of a capitalist world economy. And yet, Policante nonetheless seeks to force these new legal developments into the theoretical straightjacket of his empire-pirate dyad. So, for example, in describing nineteenth-century British hegemony, Policante wants to map classical imperialism onto past forms. Roman efforts to suppress Cilicians, we learn, were part of the very same nineteenth-century paradigm of violence ‘concerned with the perpetual securitization of the world-market’.<sup>53</sup> In seeking to interpret the imperial Rome of antiquity, the Habsburg empire of the ‘discoveries’, the classical imperialism of the nineteenth and early twentieth centuries, and American hegemony in the advanced capitalist world all in terms of his empire-pirate dyad, Policante elides the fundamental differences between imperial formations, their contrasting logics dissolving into the background against which a supposedly transhistorical paradigm stands in sharp relief. While *The Pirate Myth* rescues the pirate from the marginalia of international relations, throwing a light on his role as a

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<sup>52</sup> Policante (2015) xii.

<sup>53</sup> Ibid 88.

constant lodestar in a fluid seascape of imperial violence, once more historical specificity is lost to an under-theorised transhistoricism.

## CHAPTER OUTLINE

This thesis seeks to understand the origins of the pirate, an archetypal figure of enmity, in international legal thought, offering an account of its emergence and development that, in contrast with the ahistoricism of much legal literature, emphasises the historical specificity of the concept and its historical rootedness in particular social and political-economic conditions. Its methodological focus is not on the minutiae of original archival, epigraphic and archaeological records of the past. Nor does it seek to rewrite the history of piracy or entertain pretensions to exhaustive totalization. Rather, through a synthesis of historical developments and drawing on an array of literatures—historical, political, cultural, and legal texts—this study emphasises the contingent character of the pirate in international legal thought and locates its origins in the concrete context of inter-imperial rivalry and the world historical transformations of the long 16th-century.<sup>54</sup>

The thesis begins, in Chapter 1, with the modern figure of the pirate in international legal thought and fleshes out the brief sketch offered above. Reflecting on both popular cultural and legal reactions to the recent wave of Somali piracy, I show how these responses reproduce a particular image of the pirate as the epitome of enmity. Stepping back from Somali piracy, I trace this figure through international legal thought more generally, mapping its defining features and its privileged position as a paradigm for approaching various other phenomena—slavery, torture, war crimes, etc.

Where then did this figure emerge in international legal thought? Can it, as some international lawyers suggest, already be discerned in the texts of antiquity or the tides of the medieval Mediterranean? In Chapters 2 and 3, I show that, contrary to the timelessly unequivocal figure of evil depicted in modern international legal thought, the pirate was in fact for much of its history a far more ambiguous, liminal

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<sup>54</sup> For the influence of inter-imperial rivalry on international law more generally, see Robert Knox, 'Race, racialisation and rivalry in the international legal order', in Alexander Anievas, Nivi Manchanda & Robbie Shilliam, *Race and Racism in International Relations: Confronting the Global Colour Line* (Routledge, 2015) 175; James Thuo Gathii, 'Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations' 15 *Leiden Journal of International Law* (2002) 581.

figure. While the term has been applied to a whole host of characters, from predatory coastal communities of antiquity to the Somali fishermen-turned-raiders of today—by way of Vikings, mutineers, nautical adventurers, merchants and even sovereign states—it has not always carried the same legal and ideological concomitants. In the ancient Greek and Roman words, I show in Chapter 2, a variety of terms were used to describe individuals and groups who took to the sea to plunder including various cognates of ‘pirate’. Such terms did not necessarily imply criminality let alone universal hostility; the most prominent pirates of Classical Rome, the Cilicians, were coastal raiding communities, engaged by the Roman navy as legitimate enemies in war. Even by the late middle ages, Chapter 3 reveals, distinctions between legitimate and illegitimate violence at sea, and the association of sovereign states with the former and piracy with the latter, was only slowly beginning to emerge. Piracy might result in the award of a right of reprisal to recover material losses, but hardly evoked universal hostility or its annihilationist implications.

If the pirate of modern legal thought, with his extreme enmity, is absent from earlier historical epochs, when did he emerge onto his pelagic stage? A great deal of literature has privileged the ‘golden age’ of Atlantic piracy in the late 17th and early 18th centuries, when pirates were systematically hunted by the British navy and hanged *en masse*. Certainly by the 18th century, the pirate was regularly defined as a universal enemy, as in Blackstone’s philippic quoted above. The globalisation of the norm against piracy and the pirate’s characterisation as *hostis humani generis* would continue over the following centuries, promoted greatly by British naval hegemony and the extension of a British legal order to the world’s oceans so as to secure its empire of free trade. Yet, while the crystallisation of the pirate as *hostis humani generis* in the legal imagination was a secular process extending forwards from the ‘golden age’ of piracy, I trace the *origins* of this process to an *earlier* juncture, namely the long-16th century.

Chapter 4 traces the emergence of the pirate as a figure of universal enmity to the religious confrontations of 16th century Europe. The enmity attaching to the pirate, I suggest, has its origins not in earlier legal treatments of the pirate but in medieval theological notions of universal enmity associated with the devil. The universal enmity that would come to be associated with the pirate, in short, was in its initial conception religious in nature. I show how the pirate came to embody religious enmity specifically in the context of Habsburg-Ottoman inter-imperial rivalry. The pirates that most

captivated the European imagination in this period were the Muslim raiders of the Barbary coast in North Africa, viewed by Christian Europeans as both heretical Other and vanguard of Ottoman expansion. In the religious ideology thrown up by inter-imperial rivalry, these individuals came to be closely associated with the religious enmity directed towards Islam in general, and the Ottoman empire in particular, as satanic forces threatening Christian souls and posing an existential danger to a universal Christian commonwealth.

Chapter 5 shifts focus to the Atlantic where the figure of the pirate as religious enemy is detached from its Mediterranean origins and brought to bear on other heretical enemies, namely English Protestant interlopers in the New World. Here, inter-imperial rivalry is once more the context for political-juridical developments, now between an absolutist Habsburg empire and an emerging mercantile English empire. While English depredations were cast in the Spanish imagination as the heretical attacks of a religious enemy akin to the Muslim pirates of North Africa, in London they were viewed as a legitimate response to exclusion from trade with the Americas.

Finally, in Chapter 6, I turn to the work of the Dutch jurist Hugo Grotius at the start of the 17th century—or end of the *long* 16th century, in my periodisation—setting his defence of Dutch maritime violence, *De iure praedae*, in the context of an expanding Dutch commercial imperialism and its clash with Portuguese claims to a monopoly on trade with the East Indies. Grotius, I argue, secularises the figure of the pirate, his enmity not directed at a universal Christian commonwealth but rather at a universalising capitalist economy. Here, then, lies the origins of the pirate in modern international legal thought: the enemy of capital, to be violently expelled from humanity in defence of a universal right to trade.

# CHAPTER 1

## The pirate in modern international legal thought

‘Boat approaching, three point one miles out, astern.’ The sea was calm and the sun high on the morning of 8 April 2009, and the small white skiff cutting through the turquoise water was clearly visible from the bridge of the *MV Maersk Alabama*, some 240 nautical miles from Somalia. Carrying a crew of 20, the larger vessel was on route from Salalah, Oman to Mombasa, Kenya with 17 thousand tons of cargo. Warnings about pirate activity in the area had reached the ship’s captain, Richard Phillips, but he had elected to maintain a direct course rather than lose time diverting the recommended 600 miles from the Somali coastline.<sup>1</sup>

As the skiff reached the *Maersk Alabama*, a long, makeshift ladder was raised and four young Somali men scrambled aboard, seizing control of the bridge and several crew including the captain. The remaining crew took shelter in the engine room, disabling the bridge controls and overpowering one of the Somalis, Abduwali Abdukhadir Muse. An attempted exchange of Muse for the captain saw the interlopers leave the ship in one of its lifeboats, but with Phillips as hostage. A tense standoff ensued between two US Navy vessels dispatched to the scene—the destroyer *USS Bainbridge* and frigate *USS Halyburton*—and the small lifeboat. The siege was finally ended on 12 April with US Navy SEAL snipers killing three of the Somalis and rescuing Phillips. A fourth Somali, Muse, was rendered to a New York courtroom where he became subject to the first piracy charges brought in the US in over a century.<sup>2</sup>

The attack on the *Maersk Alabama* in early 2009 was in many ways unexceptional. It was one of more than 200 attempts on ships in East African waters

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<sup>1</sup> For Phillips’ account of the attack, see Richard Phillips & Stephan Talty, *A Captain’s Duty: Somali Piracy, Navy SEALs, and Dangerous Days at Sea* (Hyperion, 2010).

<sup>2</sup> Ed Pilkington, ‘Somali teen faces first US piracy charges in over a century’, *The Guardian*, 22 April 2009, available at [www.theguardian.com/world/2009/apr/21/somali-pirate-trial-new-york](http://www.theguardian.com/world/2009/apr/21/somali-pirate-trial-new-york) (last visited 30 April 2018). The *Ambrose Light*, a brigantine taken by Colombian rebels, was captured in 1885 and its crew charged with piracy. Muse later pleaded guilty to charges of hijacking, kidnapping and hostage-taking—the piracy charges were dropped—and is currently serving a 33 year prison sentence. See ‘Somali pirate sentenced to 33 years in US prison’, *BBC News*, 16 February 2011, available at [www.bbc.co.uk/news/world-us-canada-12486129](http://www.bbc.co.uk/news/world-us-canada-12486129) (last visited 30 April 2018).

in 2009, while Richard Phillips was one of some 668 maritime crew taken hostage that year.<sup>3</sup> At most sporadic in *fin de siècle* East Africa, piracy around the Horn of Africa had by 2006 attracted international attention. Between 2007 and 2009, attacks off the coast of Somalia increased 200 per cent; in the first half of 2009 pirates attacked almost one ship per day.<sup>4</sup> While piracy is a global issue—worldwide, attacks reached a peak in 2010, with 445 reported acts of piracy; the following year saw slightly fewer at 439<sup>5</sup>—it is Somali piracy that has garnered the greatest international attention in recent years, due in large part to its dramatic impact on global trade. Up to 90 per cent of world trade is by sea and the passage from the Gulf of Aden into the Indian Ocean is especially prominent in the geography of global production: it is one of the most important sea lanes in the world with approximately 30 thousand vessels passing around the Horn of Africa each year.<sup>6</sup> Whereas the early 1990s saw Somali pirates target small fishing and recreational vessels, the new century saw large cargo ships and tankers held for ransoms in the millions of dollars—up to US\$300 million collectively in 2009; a single payment of US\$10 million for a South Korean supertanker in 2010.<sup>7</sup> While even these dramatic figures are small compared to the total value of goods shipped daily, the economic cost of maritime piracy is potentially much higher—as much as US\$25 billion on some analyses<sup>8</sup>—with Somali insecurity creating a potential ‘chokepoint’, the ‘blockage of which would quickly and seriously

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<sup>3</sup> International Maritime Organization, ‘Reports on Acts of Piracy and Armed Robbery Against Ships: Annual Report—2009’, MSC.4/Circ.152, 29 March 2010, Annex 2. IMO data record 59 acts of piracy and armed robbery against ships in East Africa in 2009 and a further 163 attempted acts.

<sup>4</sup> Shannon Lee Dawdy, ‘Why Pirates are Back’ 7 *Annual Review of Law and Social Sciences* (2011) 361, 363; Report of the Special Advisor to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia, 24 January 2011, UN Doc. S/2011/30; Peter Eichstaedt, *Pirate State: Inside Somalia’s Terrorism at Sea* (Lawrence Hill, 2010) 55.

<sup>5</sup> In the narrow shipping lanes of Southeast Asia, such as the Strait of Malacca, maritime plunder has long been endemic, while the oil-rich waters of the Gulf of Guinea are increasingly subject to maritime insecurity and violence. See J.N. Mak, ‘Pirates, renegades, and fishermen: the politics of “sustainable” piracy in the Strait of Malacca’, in Peter Lehr (ed.), *Violence at Sea: Piracy in the Age of Global Terrorism* (Routledge, 2007) 199; Stefan Eklöf, *Pirates in Paradise: A Modern History of Southeast Asia’s Maritime Marauders* (NIAS Press, 2006); Martin N. Murphy, ‘Petro-piracy: predation and counter-predation in Nigerian waters’, in Douglas Guilfoyle (ed.), *Modern Piracy: Legal Challenges and Responses* (Edward Elgar, 2013) 61; Robert Beckman, ‘Piracy and armed robbery against ships in Southeast Asia’, in Guilfoyle (ed.) (2013) 13.

<sup>6</sup> Eichstaedt (2010) 55.

<sup>7</sup> Jeffrey Gettleman, ‘Money in piracy attracts more Somalis’, *New York Times*, 10 November 2010, A10; Jeffrey Gettleman, ‘Somalia: pirates attack fishing boats’. *New York Times*, 21 April 2010, A9.

<sup>8</sup> Mark T. Nance & Michael J. Struett, ‘Conflicting Constructions: Maritime Piracy and Cooperation under Regime Complexes’, in Michael J. Struett, Jon D. Carlson & Mark T. Nance (eds), *Maritime Piracy and the Construction of Global Governance* (Routledge, 2013) 125, 127.



endanger global supply chains'.<sup>9</sup> In fact, commentators insist, so great was the potential disruption to the world's commercial flows that it presented a fundamental threat to the very stability of global capitalism.<sup>10</sup>

Such a threat elicited a dramatic response—rapid military action, as in the attempted hijacking of the *Maersk Alabama*, followed by new forms of international naval cooperation. NATO had a continuous presence in the Gulf of Aden and in waters off Somalia's eastern coast from October 2008 to December 2016.<sup>11</sup> The European Union's Operation Atalanta, launched in December 2008 with the creation of a new naval force, EU NAVFOR, continues today. In addition to its NATO operations, the US Navy also continues to command Combined Task Force 151, established in January 2009 and involving naval vessels from 25 countries. Russia, India, China, and South Korea have also deployed their own missions to the cortège of naval ships along the Arabian littoral.<sup>12</sup> In total, these operations have involved more than 30 countries, projecting military power not only along international sea routes but also into Somali sovereign maritime and territorial space. In May 2012, for instance, EU attack helicopters bombed a village in the Mudug region of Somalia's central coastline—'Disruption of Pirate Logistic Dumps' in Brussels' preferred nomenclature<sup>13</sup>—the operation against a 'notorious pirate den' striking, the *New York Times* reported, an important blow against 'the scourge of Somali piracy'.<sup>14</sup>

While some see in the exercise of North Atlantic military power the spectre of imperialism—recalling, for instance, the 1920 British bombing of Somaliland: 21 days of ordinance following two decades of failed ground operations<sup>15</sup>—it has been largely

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<sup>9</sup> Michael J. Struett & Mark T. Nance, 'Constructing Pirates, Piracy, and Governance: An Introduction', in Struett et al. (eds) (2013) 1, 4-5.

<sup>10</sup> See, e.g., Nance & Struett (2013) 127.

<sup>11</sup> From August 2009, NATO activities went by the name Operation Ocean Shield. See NATO, 'Operation OCEAN SHEILD', available at [mc.nato.int/missions/operation-ocean-shield.aspx](http://mc.nato.int/missions/operation-ocean-shield.aspx) (last visited 12 April 2018).

<sup>12</sup> Douglas Guilfoyle, 'Piracy off Somalia and counter-piracy efforts', in Guilfoyle (ed.) (2013) 35, 48. For a detailed mapping of counter-piracy operations and various efforts at international cooperation for the suppression of piracy in the Gulf of Aden, see various contributions in Guilfoyle (ed.) (2013).

<sup>13</sup> European Union Military Committee, 'EUMC Glossary of Acronyms and Definitions, Revision 2017', European External Action Service Working Document EEAS(2018) 133 REV1, 20 February 2018.

<sup>14</sup> Jeffrey Gettleman, 'Toughening Its Stand, European Union Sends Forces to Strike Somali Pirate Base', *New York Times*, 16 May 2012, A4.

<sup>15</sup> See Deborah Cowen, *The Deadly Life of Logistics: Mapping Violence in Global Trade* (University of Minnesota Press, 2014) 133. On the Dervish wars in Somaliland, see Said S. Samatar, *Oral Poetry and Somali Nationalism: The case of Sayyid Maḥammad 'Abdille Ḥasan* (Cambridge University Press,

successful in suppressing piracy. Since 2012, Somali pirate attacks have decreased dramatically, bringing down global averages with it: from a high of 445 attacks worldwide in 2010 to 263 per year between 2012 and 2015 and just under 200 in each of the last two years. As of 20 May, there have been 89 attacks so far in 2018.<sup>16</sup> This represents a significant decline since the phenomenon's height at the end of the last decade, although piracy remains of concern for the maritime industry, academic commentators, and international policymakers. In July 2016, NATO warned that 'Somalia-based piracy has been suppressed, but not eliminated. Pirates still seek, and have the capacity, to mount attacks.'<sup>17</sup> Last year saw three vessels hijacked along the Somali coast, while a number more were fired upon<sup>18</sup> and insurance underwriters are reportedly concerned that the maritime industry may be 'letting its guard down'.<sup>19</sup>

At its height, Somali piracy was notable not only for the military response it attracted, but also the prodigious literature it generated. In this chapter, I consider some of these responses, both popular and academic, tracing the figure of the pirate that emerges. Stepping back from the specific instance of Somali maritime violence, I then turn to the treatment of the pirate in international legal thought more generally, drawing out the defining characteristics of what has become a paradigmatic figure.

## CAPTAIN PHILLIPS AND THE CINEMATIC DEPICTION OF PIRATES

If events in Somalia thrust piracy once more onto the international agenda, the attack on the *Maersk Alabama* attracted particular attention as the first American-flagged ship seized by pirates since the early 19th century. In the wake of the hostage standoff and his rescue by US Navy SEALs, Phillips was widely celebrated as a hero who had put his own life at risk to save those of his crew. US President Barack Obama publicly

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1982); Abdi Sheik-Abdi, *Divine Madness: Mohammed 'Abdulle Hassan (1856-1920)* (Zed Books, 1993). Thanks to Safia Aidid for drawing my attention to these important works.

<sup>16</sup> International Chamber of Commerce Commercial Crime Services, 'Live Piracy & Armed Robbery Report 2018', available at [www.icc-ccs.org/piracy-reporting-centre/live-piracy-report](http://www.icc-ccs.org/piracy-reporting-centre/live-piracy-report) (last visited 9 April 2018).

<sup>17</sup> NATO, *NATO Summit Guide*, Warsaw, 8-9 July 2016, available at [www.nato.int/nato\\_static\\_fl2014/assets/pdf/pdf\\_2016\\_07/20160715\\_1607-Warsaw-Summit-Guide\\_2016\\_ENG.pdf](http://www.nato.int/nato_static_fl2014/assets/pdf/pdf_2016_07/20160715_1607-Warsaw-Summit-Guide_2016_ENG.pdf) (last visited 10 April 2018) 189.

<sup>18</sup> International Chamber of Commerce Commercial Crime Services, 'IMB Piracy & Armed Robbery Map 2017', available at [www.icc-ccs.org/index.php/piracy-reporting-centre/live-piracy-map/piracy-map-2017](http://www.icc-ccs.org/index.php/piracy-reporting-centre/live-piracy-map/piracy-map-2017) (last visited 9 April 2018).

<sup>19</sup> Stuart Casey-Maslen & Sean Connolly, *Police Use of Force under International Law* (Cambridge University Press, 2017) 346.

commended him, stating ‘I share the country’s admiration for the bravery of Captain Phillips and his selfless concern for his crew. His courage is a model for all Americans.’<sup>20</sup> Many of his crew were less charitable, filing a lawsuit against the ship’s owner, Maersk Line Limited, claiming Phillips had acted irresponsibly, ignoring warnings about pirates in the area and failing to take reasonable precautions to move further from the Somali coast.<sup>21</sup> The suit was later settled, but in the wake of his rescue, it was not only Phillip’s purported selfless heroism that captured the popular imagination. The military operation launched to rescue him and, in particular, the Navy SEAL Team Six—the same team that would kill Osama Bin Laden two years later—were lavished with praise. ‘How Navy SEALs managed a daring rescue of Captain Richard Phillips from gun-toting Somali pirates’, read one headline the following day.<sup>22</sup> Phillips too joined the chorus: ‘the real heroes are the Navy, the SEALs, those who have brought me home’.<sup>23</sup>

Perhaps unsurprisingly, this story of personal heroism, military triumph and piratical evil, also captured the imagination of filmmakers. Released in late 2013 to critical acclaim, *Captain Phillips* is directed by Paul Greengrass and stars Tom Hanks as the eponymous protagonist.<sup>24</sup> Although the film’s narrative focus is the drama of attack and rescue—the screenplay is based closely on Phillips’s own account<sup>25</sup>—Greengrass seeks to set the immediate events within a broader geopolitical and economic context. As the film’s distributor, Sony Pictures Entertainment, puts it, *Captain Phillips* is ‘simultaneously a pulse-pounding thriller, and a complex portrait

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<sup>20</sup> Barack Obama, ‘Statement on the Rescue of Richard Phillips off the Coast of Somalia’, 12 April 2009, in *Public Papers of the Presidents of the United States: Barack Obama, 2009* (GPO, 2011) 475, 475.

<sup>21</sup> Paul M. Barrett, ‘Hero of Captain Phillips Movie Portrayed as Villain in Lawsuit’, *Businessweek*, 11 October 2013, available at [www.businessweek.com/articles/2013-10-11/hero-of-captain-phillips-movie-portrayed-as-villain-in-lawsuit](http://www.businessweek.com/articles/2013-10-11/hero-of-captain-phillips-movie-portrayed-as-villain-in-lawsuit) (last visited 20 April 2018).

<sup>22</sup> ‘How NAVY Seals managed a daring rescue of Captain Richard Phillips from gun-toting Somali pirates’, *New York Daily News*, 13 April 2009, available at [www.nydailynews.com/news/world/navy-seals-managed-daring-rescue-captain-richard-phillips-gun-toting-somali-pirates-article-1.360394](http://www.nydailynews.com/news/world/navy-seals-managed-daring-rescue-captain-richard-phillips-gun-toting-somali-pirates-article-1.360394) (last visited 2 May 2018).

<sup>23</sup> Stephanie McCrummen & Ann Scott Tyson, ‘Navy Kills 3 Pirates, Rescues Ship Captain off Somalia’s Coast’, *Washington Post*, 13 April 2009, available at [www.washingtonpost.com/wp-dyn/content/article/2009/04/12/AR2009041200467.html](http://www.washingtonpost.com/wp-dyn/content/article/2009/04/12/AR2009041200467.html) (last visited 2 May 2018).

<sup>24</sup> *Captain Phillips*, dir. Paul Greengrass, screenpl. Billy Ray (2013).

<sup>25</sup> Phillips & Talty (2010).

of the myriad effects of globalization'.<sup>26</sup> Greengrass himself has argued that the film goes 'to the heart of the emerging global economy'.<sup>27</sup>

The movie opens in Phillips' New England home as he prepares to depart for the Middle East where he will take command of the *Maersk Alabama*. He speaks to his wife of his fears for a new generation of Americans as an unpredictable global economy sees jobs outsourced: '50 qualified people fight for the same job, but only one will get it'. Cut to Somalia where gaunt, impoverished Somalis squabble for the job of hijacking container ships. 'We want money', they chant. Cut again, now to the Maersk shipyard and the unceasing movement of thousands of containers setting out along the sea highways of commerce. The two remote worlds of Phillips and the Somali pirates here intersect: both, Greengrass wants to suggest, are driven by, and exist at the whim of, global capitalism.

'I wanted to show that these were desperate young men with no chance of employment', Greengrass has remarked of the Somali pirates.<sup>28</sup> Muse, played in the film by Barkhad Abdi, explains at one point that they are merely 'fishermen whose lives have been destroyed by industrial fishing boats'. But why piracy?, Phillips asks when Muse hints at the need for money that has driven him, and others like him, to plunder; 'if only there was an other way', Muse responds. In inviting us to empathise with Muse as well as Phillips, Greengrass shows us that the pirates are driven not simply by some atavistic savagery. In so doing, the film departs dramatically from previous Hollywood depictions of Somalis. One need merely recall Ridley Scott's racist and chauvinist *Black Hawk Down* in which hordes of inexplicably American-hating Somalis—'a pack of snarling dark-skinned beasts', in the words of one reviewer—serve as the 'depraved and savage foil to the innocence and nobility' of US soldiers.<sup>29</sup> In *Captain Phillips*, by way of contrast, Muse is not so different from his

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<sup>26</sup> 'Captain Phillips', *IMDb*, available at [www.imdb.com/title/tt1535109](http://www.imdb.com/title/tt1535109) (last visited 30 April 2018)

<sup>27</sup> 'On making "Captain Phillips"', *The Economist*, 18 October 2013, available at [www.economist.com/blogs/prospero/2013/10/qa-paul-greengrass](http://www.economist.com/blogs/prospero/2013/10/qa-paul-greengrass) (last visited 30 April 2018)

<sup>28</sup> *Ibid.* This is a regular theme in Greengrass's interviews: see, e.g., Mike Fleming, Jr, 'Fleming Q&As Paul Greengrass', *Deadline*, 13 December 2013, available at [deadline.com/2013/12/paul-greengrass-interview-captain-phillips-bourne-mlk-652006](http://deadline.com/2013/12/paul-greengrass-interview-captain-phillips-bourne-mlk-652006) (last visited 30 April 2018).

<sup>29</sup> Elvis Mitchell, 'Mission of Mercy Goes Bad in Africa', *New York Times*, 28 December 2001, available at [www.nytimes.com/2001/12/28/movies/film-review-mission-of-mercy-goes-bad-in-africa.html](http://www.nytimes.com/2001/12/28/movies/film-review-mission-of-mercy-goes-bad-in-africa.html) (last visited 2 May 2018); Lidwien Kapteijns, 'Black Hawk Down: Recasting U.S. Military History at Somali Expense', in Nigel Eltringham (ed.), *Framing Africa: Portrayals of a Continent in Contemporary Mainstream Cinema* (Berghahn, 2013) 39, 40. See also John Shelton Lawrence & John G. McGarrah, 'Operation Restore Honor in *Black Hawk Down*', in Peter C. Rollins & John E. O'Connor (eds), *Why We Fought: America's Wars in Film and History* (University Press of Kentucky,

American counterpart: ‘I’ve got bosses’, he remarks at one point, explaining his refusal to take the \$30,000 in the ship’s safe and need to extract a much larger ransom; ‘we all got bosses’, Phillips replies. Both are ultimately at the whim of political-economic forces far larger than themselves and, in Muse’s case, the poverty and political instability thrown up by those forces.

If this is the background against which the attack of the *Maersk Alabama* is set, the film itself quickly devolves into more classic Hollywood fare, the ‘pulse-pounding’ genre piece that Sony Pictures promises. With the arrival of the US Navy on the scene, concerns about the global economy are forgotten altogether as the focus shifts, in the now fast-paced action sequences, to the calm efficiency with which the Navy SEALs take charge, dispatching the four pirates and rescuing their hostage. The situation is resolved by a highly coordinated, technically sophisticated and overwhelmingly superior military response. If Phillips is a hero, the film is no less about the heroism of the military apparatus that saves him.

Paul Virilio has written of cinema as the production of ‘war paintings’ whose task is ‘to imbue audiences with fresh energy, to wrench them out of apathy in the face of danger or distress, to overcome the wide-scale demoralization which was so feared by generals and statesmen alike’.<sup>30</sup> Drawing on Virilio, Mark Lacy has argued that cinema is ‘a space where “commonsense” ideas about global politics and history are (re)produced and where stories about what is acceptable behavior from states and individuals are naturalized and legitimated.’<sup>31</sup> Focusing on war films, he notes that in some productions, this involves simply rewriting history such that ‘historical and moral ambiguity are [sic] replaced by certainty’.<sup>32</sup> Cinema places ‘visual order onto chaos’ and offers an ideological technology that distances viewers from the moral anxiety that might otherwise accompany an intimate acquaintance with war—while also subtly affirming the values and instrumental rationality of capitalist modernity: ‘speed, efficiency, mobility, domination’. At the same time, Lacy notes, ‘there has

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2008) 431, 444. That film, based on Mark Bowden’s book, had dealt with the famed extraction operation by US Delta Force and Army Rangers in October 1993, ending in a 17-hour firefight, the downing of three Black Hawk helicopters and the death of 19 soldiers and some 500 Somalis. See Mark Bowden, *Black Hawk Down: A Story of Modern War* (Penguin, 2000).

<sup>30</sup> Paul Virilio, *War and Cinema: The Logistics of Perception*, trans. Patrick Camiller (Verso, 1989) 10.

<sup>31</sup> Mark Lacy, ‘War, Cinema, and Moral Anxiety’ 28(5) *Alternatives: Global, Local, Political* (2003) 611, 614.

<sup>32</sup> *Ibid* 614

always been an alternative cinema that uses the power of images to give the viewer moral proximity to lives and situations that they may be distanced from'. Gillo Pontecorvo's *The Battle of Algiers* is the classic example, offering the viewer an often disturbing proximity to colonial violence 'silenced in hegemonic representations of history'.<sup>33</sup>

*Captain Phillips* does not give us moral proximity to distant suffering in Somalia, only the discrete situation faced by western mariners and soldiers when confronted with the consequences of that suffering. Phillips is the likeable everyman confronted with the terror of the pirate who, if not the irrational savage of some depictions, bursts no less violently and traumatically into the mariner's innocent, morally certain life. We are offered intimacy only with the terror of American hostages and the cool heroics and stealthy efficiency of American soldiers. Moreover, in sharp contrast with, say, *The Battle of Algiers*, there is no historical context offered for the events depicted—merely the abstract economic context of 'globalization', and at best a prefatory hint at that. As one reviewer observes, we are offered 'a tantalising glimpse into the lousy choices available to ordinary people in a wartorn, painfully impoverished land', but a glimpse is all it remains. The film's fleeting attention to the socio-economic environment from which the pirates emerge—one marked by impoverishment and the desperation of caterwauling Somali villagers—still elides the material political-economic forces which gives rise to that environment. Former fishermen are no longer able to fish, warlords force and/or entice them to go to sea as pirates, and this is all abstractly connected to 'globalisation'. One might speculate that globalisation has contributed to the immediate Somali context, but all that the film makes explicit is that global trade has put Phillips and his crew on a collision course with the angry, if understandably so, black men. The filmic strategies that offer viewers proximity produce certain events—Phillips' experience and his rescue—as accurate and unmediated, while displacing and excluding others—the production of poverty in Somalia, say, or the repeated US and US-sponsored military interventions that have contributed to the country's chronic instability. The abstract indictment of 'globalisation' ultimately risks merely inviting a fatalism about the production of Somali piracy and the need—and legitimacy—of a military solution: 'The tiny flicker of understanding for Muse's predicament that sparked at the beginning sparks no

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<sup>33</sup> Ibid 616.

more. But the US navy is awesome.’<sup>34</sup> In the final analysis, then, *Captain Phillips* is not so different than its cinematic antecedents, just one more movement in the ‘visual score for imperial violence’.<sup>35</sup>

### SOMALIA’S ‘ENEMIES OF MANKIND’

Who are the pirates portrayed in *Captain Phillips*? At one level, they are individuals produced by a concrete set of social relations, forced by the vagaries of global forces into a life of violence. And yet, by the time the film concludes, Muse and his fellow Somalis have been reduced to mere ciphers, one half of a Manichean dyad. Their portrayal outside the cinema largely mirrored this. In his 2010 book on Somali pirates, journalist Peter Eichstaedt writes of these men as a ‘menace’, attacking ‘anything of value that floats’. They are, in his words, ‘a plague’ that demands ‘immediate and aggressive action’.<sup>36</sup> Many in Washington had already said as much immediately following Phillips’ rescue. Then Bush (and now Trump) administration official John Bolton urged air strikes and a ground invasion of Somalia to target pirate strongholds. ‘Unless we go in and really end this problem once and for all, we will simply see it grow over time’, he told one interviewer. The use of force, he insisted, was ‘the prudential response’ to piracy.<sup>37</sup> Even before the attack on the *Maersk Alabama*, Bolton, along with others in the outgoing Bush administration, was calling for military intervention in Somalia. Two hundred years ago, he observed in January 2009, ‘the young United States decided to use force to stop attacks on its commerce [by Barbary pirates]. America was right then, and it would be right today to use force to destroy the Somali pirate bases and ships.’<sup>38</sup>

The academic response to Somali piracy largely mirrored Bolton in tone if not always policy prescription. Pirates, commentators opined, are *hostes humani*

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<sup>34</sup> Alex von Tunzelmann, ‘Captain Phillips proves that America is awesome. Got it? Awesome!’, *The Guardian*, 23 October 2013, available at [www.theguardian.com/film/2013/oct/23/captain-phillips-america-awesome-tom-hanks](http://www.theguardian.com/film/2013/oct/23/captain-phillips-america-awesome-tom-hanks) (last visited 30 April 2018).

<sup>35</sup> The phrase is Deborah Cowen’s, albeit one used in a different context: Cowen (2014) 134.

<sup>36</sup> Eichstaedt (2010) 1, 4.

<sup>37</sup> ‘Bolton Calls Invading Somalia with a “Coalition of the Willing” “The Prudential Response” to Piracy’, *Think Progress*, 13 April 2009, available at [thinkprogress.org/security/2009/04/13/37499/bolton-somalia-war](http://thinkprogress.org/security/2009/04/13/37499/bolton-somalia-war) (last visited 30 April 2018).

<sup>38</sup> John R. Bolton, ‘Dealing with Somalia and its piracy’, *San Diego Union-Tribune*, 11 January 2009, available at [www.utsandiego.com/news/2009/Jan/11/lz1e11bolton23223-dealing-somalia-and-its-piracy/](http://www.utsandiego.com/news/2009/Jan/11/lz1e11bolton23223-dealing-somalia-and-its-piracy/) (last visited 30 April 2018).

*generis*—the ‘enemies of all mankind’—or, as some legal scholars put it, ‘enemies of civilization itself’<sup>39</sup> and ‘enemies of the human race’.<sup>40</sup> Only three years after defining terrorism as ‘a species of piracy’, Douglas Burgess Jr now insisted pirates were a ‘species of terrorist’.<sup>41</sup> This was a common theme. Writing of the surge in Somali piracy in late 2008, David Rivkin Jr and Lee Casey described piracy as, ‘like terrorism, part of a broad challenge to civilization and international order’.<sup>42</sup> Eichstaedt, too, was eager to link the two evils, insisting that Somali pirates were part of a far-reaching terrorist network, ‘the tentacles’ of which ‘extend across the Gulf of Aden into Yemen’ and as far as Pakistan and Afghanistan.<sup>43</sup> Piracy, as his subtitle implied—*Somalia’s Terrorism at Sea*—was of a piece with international terrorism, merely ‘the edges of an underground network determined to make Somalia not only a haven for madness but a platform for a global jihad’.<sup>44</sup>

Hyperbolic vituperation, in short, was the norm. Writing in 2011, Shannon Lee Dawdy already observed that most analysts ‘begin with the presumption that pirates are arch criminals, foreclosing historical and social analysis with a flat-footed vilification of those committing piratical acts.’<sup>45</sup> Yet few Somalis involved in the maritime contestations of the last decade referred to themselves as pirates or, in their native tongue, *burcad badeed* (a close translation, literally meaning ‘ocean robber’). Rather, they preferred the term *badaadinta badah*—‘saviours of the sea’—or what the Anglophone media, if they reported the attitudes of Somalis at all, translated as ‘coast guard’.<sup>46</sup> Many claimed that in harassing foreign vessels, they were responding to the ‘rapacious destruction’ of their waters and traditional livelihoods by western powers: overfishing by unlicensed foreign vessels compounded by the offshore dumping of

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<sup>39</sup> Lawrence Azubuike, ‘International Law Regime Against Piracy’ 15 *Annual Survey of International and Comparative Law* (2009) 43.

<sup>40</sup> Douglas R. Burgess Jr, ‘Thar Be Terrorists!’, *New York Times*, 5 December 2008, A33.

<sup>41</sup> Compare *ibid* with the earlier Douglas R. Burgess Jr, ‘The Dread Pirate Bin Laden’, *Legal Affairs*, July/August 2005, available at [www.legalaffairs.org/issues/July-August-2005/feature\\_burgess\\_julaug05.msp](http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp) (last visited 30 April 2018).

<sup>42</sup> David B. Rivkin, Jr & Lee A. Casey, ‘Pirates Exploit Confusion About International Law’, *Wall Street Journal*, 19 November 2008, available at [www.wsj.com/articles/SB122705719422839565](http://www.wsj.com/articles/SB122705719422839565) (last visited 30 April 2018).

<sup>43</sup> Eichstaedt (2010) 5.

<sup>44</sup> *Ibid*.

<sup>45</sup> Dawdy (2011) 374.

<sup>46</sup> Jay Bahadur, *Deadly Waters: Inside the Hidden World of Somalia’s Pirates* (Profile Books, 2011) 15.



industrial waste.<sup>47</sup> Yet, as Dawdy noted, such context is easily forgotten once the figure of the pirate is invoked. To name the pirate is already to condemn—as enemy of civilization, of mankind, of the human race—with elimination, not nuanced understanding, the necessary corollary. The production of poverty, uneven development, political instability and Somalia’s desperate economic and social conditions; a history of foreign intervention from British territorial partition to the US’s actual and proxy wars of the 1990s and 2000s; European states’ overfishing and the dumping of industrial waste devastating coastal communities’ livelihoods: all are rendered irrelevant to the problem of piracy.<sup>48</sup> If the geographical modifier in ‘Somali piracy’ is relevant at all, it is simply to invoke the imagery of ‘failed states’, anarchy, and atavistic savagery.<sup>49</sup>

The association of Somalia with illegitimate violence, piratical or otherwise, is a familiar trope in the European imagination, from British colonial writing to the cinematic tableaux of *Black Hawk Down* and *Captain Phillips*. Writing in the mid-90s, the ethnographer of the Somali clan system, IM Lewis, could maintain that little had changed in the country’s political geography since the 1800s, but for ‘spears replaced by Kalashnikovs and bazookas’.<sup>50</sup> Lewis was not alone in seeing in the Somali civil war a straightforward dissolution of the Somali state back into anarchic inter-clan warfare.<sup>51</sup> Patricia Williams has written of western media coverage of the war as casting ‘every fragment of institutional Somali power in annihilatingly delegitimizing

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<sup>47</sup> Ibid 16.

<sup>48</sup> For a brief overview of some of this context, see Cowen (2014) 145-49.

<sup>49</sup> Pilkington (2009); McCrummen & Tyson (2009); Eichstaedt (2010) 4, 179; ‘Somali piracy: EU forces in first mainland raid’, *BBC News*, 15 May 2012, available at [www.bbc.co.uk/news/world-africa-18069685](http://www.bbc.co.uk/news/world-africa-18069685) (last visited 8 May 2018). Even Douglas Guilfoyle, otherwise so measured in his analysis of Somali piracy, writes of the ‘culture of physical bravery among young Somali men’, the kind of racialised, if euphemistic, essentialism that recalls Mark Bowden’s radical othering of Somalis in his account of the *Black Hawk Down* incident, the basis for Ridley Scott’s film: ‘famous for braving enemy fire, for almost suicidal, frontal assaults. . . . They entered the fight with cunning and courage and gave themselves over to the savage emotion of it. Retreat, even before overwhelming fire, was considered unmanly. For the clan, they were always ready to die.’ Guilfoyle (2013) 40 and again at 43; Bowden (2000) 110.

<sup>50</sup> Ioan M. Lewis, *Blood and Bone: The Call of Kinship in Somali Society* (Red Sea Press, 1994) 232. Lewis is best known for *A Pastoral Democracy: A Study of Pastoralism and Politics Among the Northern Somali of the Horn of Africa* (Oxford University Press, 1961). For critiques of Lewis, see Safia Aidid, ‘The New Somali Studies’, *The New Inquiry*, 14 April 2015, available at [thenewinquiry.com/essays/the-new-somali-studies/](http://thenewinquiry.com/essays/the-new-somali-studies/) (last visited 30 April 2018); Lidwien Kapteijns, ‘I. M. Lewis and Somali Clanship: A Critique’ 11(1) *Northeast African Studies* (2004-2010) 1;

<sup>51</sup> See, e.g., Anthony Vinci, *Armed Groups and the Balance of Power: The International Relations of Terrorists, Warlords and Insurgents* (Routledge, 2009) 71.

terms': a local governor became a 'guntoting thug', for instance, and 'Somalis, all Somalis, were described as "undisciplined", "criminal elements", whose criminality involved "stealing from their own".<sup>52</sup> It takes no great leap of imagination to uncritically accept an image of Somalis as pirates, now stealing not only 'from their own', but from foreign mariners too, with all the connotations of criminality and illegitimacy the epithet carries.

Yet the invocation of the pirate, as already suggested, does more than simply reproduce a narrative of innate Somali violence. It is a figure which licenses as much as it condemns. For Dawdy, the pirate, with his 'extraordinary, inexplicable villainy', serves to produce 'a sort of international "state of exception"', grouping these Somali fishermen-cum-coast guards with 'terrorists and other enemies of mankind to justify the extrajudicial use of force in nonsovereign spaces' and extend 'extralegal sovereignty'.<sup>53</sup> While much of the academic response to piracy has certainly been hyperbolic in its invocation of pirates' status as 'arch criminals', the attendant call to arms has arguably been anything but *extralegal*. Rather, the very villainy of which Dawdy writes, and which justifies the antipiracy operations described at the start of this chapter, is itself a frame of reference imported from international law with its presumption that pirates are 'enemies of mankind' requiring intervention and, ultimately, elimination.

While Bolton himself was silent on international law, others arguing for an equally dramatic projection of western military power were explicit in their appeal to international legal authorisation. Much scholarly commentary focused precisely on the legal framework for countering piracy, with analyses quick to seize on international law's sanction of the use of force against those identified as pirates. One volume, *Modern Piracy*, edited by Douglas Guilfoyle and bringing together a number of prominent legal scholars and practitioners, was almost entirely concerned with surveying international legal instruments with a view to elucidating precisely what powers are granted to suppress piracy.<sup>54</sup> International law, readers were assured,

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<sup>52</sup> Patricia J. Williams, *The Rooster's Egg: on the Persistence of Prejudice* (Harvard University Press, 1995) 202.

<sup>53</sup> Dawdy (2011) 374-75.

<sup>54</sup> Guilfoyle (ed.) (2013).

authorises naval warships to intervene ‘pro-actively against pirates’.<sup>55</sup> Roger Middleton, noting that within the shipping industry there was ‘a perception that international law leaves navies weak and able to do little to combat pirates’, was quick to set doubters straight: ‘navies do have sufficient powers under international law to combat piracy and they are permitted to use reasonable force against pirates. It is important that this fact is well publicized.’<sup>56</sup> Others went further still. Writing recently in the *American Journal of International Law*, Tomy Ruys suggests that, taking into account both UNCLOS and the UN Charter regime, ‘no breach of Article 2(4) normally takes place . . . [even] when a state uses *excessive* force when arresting a vessel genuinely suspected of engaging in piracy’.<sup>57</sup>

Even Bolton’s call for a ground invasion, most commentators agreed, was not outside the realm of legally permissible responses. Andrew DeMaio, for example, was in no doubt that the US ‘may lawfully strike Somali pirates in their safe havens’,<sup>58</sup> as the EU in fact did in May 2012. The projection of military power into Somali sovereign territory was pursued and justified in international legal terms. The UN Security Council authorised the use of force within Somalia’s territorial waters and even land territory in a series of Resolutions invoking Chapter VII authority to use ‘all necessary means’ to repress piracy.<sup>59</sup> In fact, some legal commentators argued that the US and the EU did not actually require this authorisation for ‘pursuing today’s pirates into their lairs, and destroying these outposts of lawlessness’.<sup>60</sup> Complaining that western militaries were failing to take advantage of the legal solutions already at their disposal, Rivkin and Casey argued that naval forces had ‘effectively abandoned the historical legal rules’ treating pirates as *hostes humani generis*. ‘[W]hat is lacking is

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<sup>55</sup> Andrew Murdoch & Douglas Guilfoyle, ‘Capture and disruption operations: the use of force in counter-piracy off Somalia’, in Guilfoyle (ed.) (2013) 147, 147.

<sup>56</sup> Roger Middleton, ‘Pirates and How to Deal With Them’, Chatham House, Africa Programme/International Law Briefing Note AFP/IL BN 2009/01, 22 April 2009, 4.

<sup>57</sup> Tomy Ruys, ‘The Meaning of “Force” and the Boundaries of the *Jus ad Bellum*: Are “Minimal” Uses of Force Excluded from UN Charter Article 2(4)?’ 108(2) *American Journal of International Law* (2014) 159, 208 (emphasis in original).

<sup>58</sup> Andrew DeMaio, ‘Upping the Stakes to Win the War Against Somali Piracy: Justifications for a New Strategy Based on International Humanitarian Law’ 22 *George Mason Law Review* (2015) 387, 389.

<sup>59</sup> UNSC Res. 1816 (2 June 2008); UNSC Res. 1846 (2 December 2008); UNSC Res. 1851 (16 December 2008).

<sup>60</sup> David B. Rivkin, Jr, ‘Can We End Piracy?’, *National Review*, 9 April 2009, available at [www.nationalreview.com/corner/can-we-end-piracy-david-b-rivkin-jr-lee-casey/](http://www.nationalreview.com/corner/can-we-end-piracy-david-b-rivkin-jr-lee-casey/) (last visited 30 April 2018)

the willingness to use deadly force, manifested through enormously restricted and impractical rules of engagement'.<sup>61</sup> Burgess Jr similarly insisted that 'the law is surprisingly clear' but 'we just seem to have forgotten about it'.<sup>62</sup> International law 'cuts through the Gordian knot of individual states' engagement rules. Pirates are not ordinary criminals. They are not enemy combatants. They are a hybrid, recognized as such for thousands of years, and can be seized at will by anyone, at any time, anywhere they are found.<sup>63</sup> Michael Bahar was equally adamant that since at least the 18th century, '[a]ny nation had a right and obligation to repress pirates, with their warships, wherever on the seas they were found—a rule still in effect today'.<sup>64</sup>

### INTERNATIONAL LEGAL THOUGHT

Who then is this figure about whom the law is 'surprisingly clear'? Piracy is a specific crime under modern international law, as well as the name of variously defined crimes under the municipal law of a number of states.<sup>65</sup> Its international legal definition is set out in the 1982 UN Convention on the Law of the Sea (UNCLOS), which defines piracy as an act of robbery, or other illegal act of violence or deprivation, committed for 'private ends' on the 'high seas' or elsewhere outside the jurisdiction of any state.<sup>66</sup>

Although today UNCLOS also includes air piracy in its definition, the pirate is generally understood to act on the sea—under international law, specifically on the 'high seas' or elsewhere outside the jurisdiction of any state. He is distinct, then, from other thieves or bandits on land or even the brigand who attacks by sea *on* a coastal target. Indeed, under customary international law, pirates' actions must be directed

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<sup>61</sup> Ibid.

<sup>62</sup> Burgess Jr (2008) A33.

<sup>63</sup> Ibid.

<sup>64</sup> Michael Bahar, 'As Necessity Creates the Rule: *Eisenstrager*, *Boumediene*, and the Enemy—How Strategic Realities Can Constitutionally Require Greater Rights for Detainees in the Wars of the Twenty-First Century' 11 *University of Pennsylvania Journal of Constitutional Law* (2009) 277, 287.

<sup>65</sup> Cases before municipal courts have often become entangled in parsing the differences between the differing scopes of international and municipal definitions of piracy. See D.H.N. Johnson, 'Piracy in modern international law' 43 *Grotius Society Transactions* (1957) 63, 71-78.

<sup>66</sup> UNCLOS art 101. The Convention also includes air piracy in its definition, although here I focus only on maritime piracy. The relevant articles of UNCLOS dealing with piracy repeats almost verbatim those of the 1958 Geneva Convention on the High Seas: Geneva Convention on the High Seas (29 April 1958, entered into force 30 September 1962) 450 UNTS 11 (Geneva Convention) arts 14 to 22. While a number of states such as the United States, Israel, Switzerland and Venezuela are not signatories to UNCLOS, they are signatories to the earlier Geneva Convention.

specifically against *another* ship—‘against another ship or aircraft, or against persons or property on board such ship or aircraft’, in the words of UNCLOS.<sup>67</sup> An attack against passengers on board the *same* ship, for example, or seizure of a vessel by its own crew or passengers is not understood to be piracy.

Furthermore, the pirate acts for ‘private ends’.<sup>68</sup> Pirates are typically imagined as small bands of individuals seeking their own private gain. Piracy is thus distinct most obviously from warfare, but also from various other forms of public violence. The pirate is thus sharply juxtaposed not only with the soldier, but also the mercenary or the privateer who act with the authorisation of the state. Of course, parsing the line between private and public ends is often difficult or even artificial, but nonetheless, one of the most prominent distinguishing features of the pirate in international legal thought is that his actions cannot be attributed to a state.<sup>69</sup> Similarly, the pirate does not act for political ends (although, as with the distinction between private and public ends, the line between political and non-political ends is at best murky). A theft, hijacking or other attack on the high seas for *political* reasons is distinct from the privately motivated acts constituting piracy.<sup>70</sup> This trait has, perhaps unsurprisingly, led to significant debate over whether pirates may commit acts of terrorism—a terrorist being understood to act with a political purpose—or whether the pirate and terrorist are distinct and mutually exclusive identities.<sup>71</sup>

The pirate is a sea-faring, unauthorised plunderer pursuing private gain. And yet, taking international legal thought more broadly, the pirate also stands for something more than that contained in a formal legal definition. He is no mere criminal, but rather is understood to be engaged in ‘an exceptional and seriously offensive kind of . . . activity’.<sup>72</sup> To invoke the label pirate is to identify an individual not merely as illegitimate or criminal, acting in contravention of international law, but as the embodiment of enmity itself: *hostis humani generis*. ‘Pirates are renowned

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<sup>67</sup> UNCLOS art 101.

<sup>68</sup> Ibid.

<sup>69</sup> See Azubuike (2009) 47.

<sup>70</sup> See Malcolm N. Shaw, *International Law*, 6th ed. (Cambridge University Press, 2008) 615.

<sup>71</sup> See, e.g., the discussion in Ömer F. Direk, Martin D.A. Hamilton, Karen S. Openshaw & Patrick C.R. Terry, ‘Somalia and the Problem of Piracy in International Law’ 6 *Review of International Law and Politics* (2010) 115.

<sup>72</sup> Christopher Harding, ‘Hostis Humani Generis: The Pirate as Outlaw in the Early Modern Law of the Sea’, in Claire Jowitt (ed.), *Pirates? The Politics of Plunder 1550-1650* (Palgrave Macmillan, 2007) 20, 23.

within international law for being . . . enemies of the entire human race’, writes Dino Kritsiotis.<sup>73</sup> Almost two centuries earlier, the US Supreme Court had said much the same: piracy is an ‘offence against the universal law of society’ and the pirate an ‘enemy of the human race’.<sup>74</sup> The pirate stands for universal enmity, the paragon of evil and heinousness, opposed to all humanity and civilization.

An important corollary of this standing is the legal treatment that flows from the identification of pirates. As Judge Moore explained in his dissenting opinion in the *Lotus* case, the pirate is ‘treated as an outlaw, as the enemy of mankind . . . whom any nation may in the interest of all capture and punish’.<sup>75</sup> This leap from *outlaw* to *enemy of mankind*—regularly reproduced in international legal thought but seldom explained—is offered as justification for the pirate’s status as subject to universal jurisdiction and the license to seize, try and punish him granted to any and every state. In Judge Moore’s words, ‘there has been conceded a universal jurisdiction, under which the person charged with the offence [of piracy] may be tried and punished by any nation into whose jurisdiction he may come’.<sup>76</sup> The consensus around the appropriateness of such license is today reflected in article 105 of UNCLOS, which provides that on the high seas (or any place outside the jurisdiction of any state) every state may seize a pirate ship, or one taken by pirates, and arrest those responsible.<sup>77</sup>

The figure that emerges from international legal thought is invested with an exceptional status by legal scholars, a paradigmatic example of enmity demanding extirpation. Gerry Simpson puts it succinctly: where the pirate is concerned, it is simply ‘a case of naming them and eliminating them.’<sup>78</sup> The pirate is a figure attracting universal opprobrium and uncompromising treatment, invoked as evidence of law’s progressive potential to stamp out crime and extend a pacific rule of law across the globe. The pirate is heralded as the original international criminal, the first individual subjected to criminal responsibility under international law.<sup>79</sup> Piracy alone was an

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<sup>73</sup> Dino Kritsiotis, ‘The Contingencies of Piracy’ 41 *California Western International Law Journal* (2011) 305, 305.

<sup>74</sup> *United States v. Smith*, 18 US 153, 157 (1820)

<sup>75</sup> *S.S. Lotus (France v. Turkey)* [1927] PCIJ Rep Ser A No 10, Separate Opinion of Judge Moore.

<sup>76</sup> *Ibid.*

<sup>77</sup> UNCLOS art 105.

<sup>78</sup> Gerry Simpson, *Law, War & Crime* (Polity, 2007) 161.

<sup>79</sup> ‘Piracy is regularly invoked as the first international crime’: *ibid.* See, e.g., John Dugard, *International Law: A South African Perspective*, 3rd ed. (JUTA, 2005) 159; Barbara M. Yarnold, ‘The Doctrinal Basis for the International Criminalization Process’ 8 *Temple International and Comparative*

exception to the general presumption against individual responsibility.<sup>80</sup> The pirate's violence is not only the original international crime. Its prohibition is heralded also as one of the very first *jus cogens* norms of international law, from which none may derogate.<sup>81</sup> Moreover, as Malcolm Shaw explains in his leading textbook, piracy is one of the few such norms on which there is complete agreement. This is in juxtaposition to other potential *jus cogens* norms where 'no clear agreement has been manifested'.<sup>82</sup>

The pirate features in yet another origins story as the first figure to attract universal jurisdiction.<sup>83</sup> In fact, a reference to piracy is almost *de rigueur* in scholarly discussions of the doctrine. It is, Eugene Kontorovich proclaims, 'the paradigmatic crime for which international law authorizes and even requires universal enforcement and punishment'.<sup>84</sup> As Rebecca Wallace explains, the very idea of a 'universal crime over which all states could exercise jurisdiction, regardless of the alleged offender's nationality', evolved specifically with piracy and its applicability is a rule of customary international law.<sup>85</sup> Judge Moore had already said as much in the *Lotus*

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*Law Journal* (1994) 85; Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford University Press, 2008) 51 note 169; Mark W. Janis, 'Individuals as Subjects of International Law' 17 *Cornell International Law Journal* (1984) 61; Geoffrey Robertson, *Crimes Against Humanity: The Struggle for Global Justice*, 3rd ed. (Penguin, 2006); M. Cherif Bassiouni, *Introduction to International Criminal Law*, 2nd ed. (Martinus Nijhoff, 2013) ch. 3; Rebecca M.M. Wallace, *International Law* (Sweet & Maxwell, 2002) 71.

<sup>80</sup> Gerry Simpson, 'Politics, Sovereignty, Remembrance', in Dominic McGoldrick, Peter J. Rowe & Eric Donnelly (eds), *The Permanent International Criminal Court: Legal and Policy Issues* (Hart, 2004) 47, 53; Shaw (2008) 397.

<sup>81</sup> M. Cherif Bassiouni, 'Sources and Content of International Criminal Law: A Theoretical Framework', in M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 1, 2nd ed. (Transnational Publishers, 1999) 3, 40.

<sup>82</sup> Shaw (2008) 125.

<sup>83</sup> *Ibid* 397: '[U]niversal jurisdiction over piracy constitutes a long-established principle of the world community'; Eugene Kontorovich & Steven Art, 'An Empirical Examination of Universal Jurisdiction for Piracy' 104 *American Journal of International Law* (2010) 436, 437: 'Piracy is the original UJ crime'; M. Cherif Bassiouni, 'The History of Universal Jurisdiction and its Place in International Law, in Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, 2004) 39; Kenneth C. Randall, 'Universal Jurisdiction Under International Law' 66 *Texas Law Review* (1988) 791; Michael Akehurst, 'Jurisdiction in International Law' 46 *British Year Book of International Law* (1972-73) 145; J.D. Fry, 'Terrorism as a Crime Against Humanity and Genocide: The Back door to Universal Jurisdiction' 7 *UCLA Journal of International Law and Foreign Affairs* (2002) 169; Eugene Kontorovich, "'A Guantánamo on the Sea': The Difficulty of Prosecuting Pirates and Terrorists' 98 *California Law Review* (2010) 243; Eugene Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' 45 *Harvard International Law Journal* (2004) 183.

<sup>84</sup> Kontorovich (2010) 246.

<sup>85</sup> Wallace (2002) 113. See also Geneva Convention art 19; UNCLOS art 105.

case,<sup>86</sup> and seven decades later, in the *Arrest Warrant Case*, concerning a dispute between the Democratic Republic of Congo (DRC) and Belgium, the International Court of Justice (ICJ) again remarked on the exceptionality of piracy. Indeed, President Guillaume argued not simply that piracy was the quintessential case of universal jurisdiction but that it is the ‘only one true case of universal jurisdiction’.<sup>87</sup> If several of his fellow judges disagreed that piracy was alone in attracting universal jurisdiction, they certainly agreed that it was the origin of the doctrine and, ‘in the past the only clear example of an agreed exercise of universal jurisdiction.’<sup>88</sup> Similar statements can also be found in the pronouncements of municipal courts, such as those of the United States. Universal jurisdiction, as one judge put it, ‘had its origins in the special problems and characteristics of piracy. It is only in recent times that nations have begun to extend this type of jurisdiction to other crimes.’<sup>89</sup>

The pirate takes on further significance in international legal thought, as we saw already in the thesis’s introduction, as the paradigm or model for a whole host of further crimes and their treatment under international law. ‘The right of any state to try and punish pirates as enemies of humanity’, Gould writes, ‘provides the model for modern prosecution and punishment of international criminals’.<sup>90</sup> Kontorovich calls this the ‘piracy analogy’: the characterisation of the pirate as *hostis humani generis* established a precedent for doing likewise with other criminals, their actions analogised with piracy. The slave trade, hijacking, torture, genocide, war crimes: all are subject to universal jurisdiction, many jurists argue—despite Guillaume’s pronouncement to the contrary—*because* the perpetrators of these crimes can also be understood as enemies of humanity; any state should be able to punish the most serious crimes.<sup>91</sup>

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<sup>86</sup> *S.S. Lotus (France v. Turkey)* [1927] PCIJ Rep Ser A No 10.

<sup>87</sup> *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* [2002] ICJ Rep 3, Separate Opinion of President Guillaume.

<sup>88</sup> *Ibid*, Separate Opinion of Judges Higgins, Kooijmans and Buergenthal.

<sup>89</sup> *United States v. Layton*, 509 F Supp 212, 223 (ND Cal 1981).

<sup>90</sup> Harry D. Gould, *The Legacy of Punishment in International Law* (Palgrave Macmillan, 2010) 11. See also Kontorovich & Art (2010) 437: ‘Piracy is the original UJ crime, and it has been an inspiration for the modern expansion of universal jurisdiction.’

<sup>91</sup> Kontorovich (2004) 185. See also Harry D. Gould, ‘Cicero’s Ghost: Rethinking the Social Construction of Piracy’, in Michael J. Struett, Jon D. Carlson & Mark T. Nance (eds) (2003) *Maritime Piracy and the Construction of Global Governance* (Routledge, 2013) 23, 24.



One of the first figures to be analogised to the pirate was the slave trader. At the Congress of Aix-la-Chapelle in 1818, Lord Castlereagh proposed the trade should be considered a crime against the law of nations, ‘raised in the criminal code of all civilized nations to the standard of piracy’. By the mid-19th century, a number of European powers had declared the slave trader, like the pirate, *hostis humani generis*.<sup>92</sup> In the post-war era, as a generation came to terms with the horrors of the Second World War, it was again to the pirate that many turned as a model for the perpetrators of atrocities. Rafael Lemkin would invoke the this figure in 1946 in arguing for a crime of genocide in the pages of the *New York Times*.<sup>93</sup> Others saw in Nazi war criminals the latest avatars of the pirate.<sup>94</sup> Crimes against humanity, Adolf Eichmann’s prosecutors told an Israeli district court in 1961, were like piracy: ‘he who commits them’, in Hannah Arendt’s paraphrase, ‘has become, like the pirate in traditional international law, *hostis humani generis*’.<sup>95</sup> So too the torturer. In the case of *Filártiga v Peña-Irala*, the US Second Circuit ruled that it could exercise jurisdiction over a Paraguayan citizen found to have committed torture against another Paraguayan citizen. The court observed, at least for the purpose of civil liability, that ‘the torturer has become *like the pirate* and slave trader before him *hostis humani generis*, an enemy of all mankind’.<sup>96</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) would later quote the court’s analogy approvingly in its own insistence that the prohibition on torture had acquired ‘a particularly high status in the international normative system’.<sup>97</sup> More recently, in his concurring opinion in *Kiobel v Royal Dutch Petroleum*, US Supreme Court Justice Breyer insisted that ‘today’s pirates include torturers and perpetrators of genocide. And today, like the pirates of old, they are “fair game” where they are found. Like those pirates, they are “common

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<sup>92</sup> Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (Oxford University Press, 2012) 45, 114.

<sup>93</sup> Rafael Lemkin, ‘Letter to the Editor: Genocide Before the U.N.’ *New York Times*, 8 November 1946, 22.

<sup>94</sup> See Randall (1988) 803-804; Diane Orentlicher, ‘Striking a Balance: Mixed Law Tribunals and Conflicts of Jurisdiction’, in Mark Lattimer & Philippe Sands (eds), *Justice for Crimes Against Humanity* (Hart, 2003) 211, 226.

<sup>95</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin, 1977) 261.

<sup>96</sup> *Filártiga v. Peña-Irala*, 630 F 2d 876, 890 (2d Cir 1980) (emphasis added).

<sup>97</sup> *Prosecutor v Furundžija* (Judgment) ICTY-95-17/1-T (10 December 1998) [147].

enemies of all mankind” and all nations have an equal interest in their apprehension and punishment.’<sup>98</sup>

### IN SEARCH OF THE ORIGINS OF ENMITY

The pirate in modern international legal thought is the epitome of universal enmity, a model for those demanding unconditional condemnation and extirpation. But if the pirate is an exceptional, paradigmatic figure, how did he come by this status? How did he become the model for all figures of enmity, from the slave trader to the torturer? From where, in short, does his status as *hostis humani generis* come?

For many legal thinkers, as noted in the thesis’s introduction, the pirate is a timeless figure, his exceptional status extending backwards in time indefinitely, or at least long enough that such questions hold no practical value. Others, though, have attempted to offer a rationalisation. One answer suggested in the literature is the ‘need for order’ in international affairs, to which the pirate posed and continues to pose a challenge. Piracy, J.W. Boulton thus observes, was a particularly insidious form of disorder: ‘its control was rendered particularly difficult by the peculiar conditions of the maritime environment’ and ‘states experienced great difficulty in imposing uniform order on the sea, long after they had brought order to the land’.<sup>99</sup> This ‘disruptive threat to the . . . activities of states’ posed by the pirate gave rise to his peculiar legal status.<sup>100</sup> Mahmoud Cherif Bassiouni, too, points to the ‘interest of preserving world order’.<sup>101</sup>

Others trace the pirate’s exceptional status to the recognition and acceptance by states of ‘fundamental and superior values’—values which the pirate offends, as reflected in the prohibition of piracy’s *jus cogens* status.<sup>102</sup> The pirate, on this view, is ‘regarded as particularly offensive to the international community as a whole’.<sup>103</sup> This argument often makes reference to the pirate’s alleged heinousness. As P.G. Widd

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<sup>98</sup> *Kiobel v Royal Dutch Petroleum Co.*, 569 US 108 (2013).

<sup>99</sup> J.W. Boulton, ‘Maritime Order and the Development of the International Law of Piracy’ 7 *International Relations* (1983) 2335, 2335, 2337.

<sup>100</sup> *Ibid* 2335.

<sup>101</sup> Bassiouni (1999) 59. See also *United States v. Yousef*, 327 F 3d 56, 104 (2d Cir 2003) observing that piracy has long been subject to universal jurisdiction in part ‘because of the threat that piracy poses to orderly transport and commerce between nations’.

<sup>102</sup> Shaw (2008) 125.

<sup>103</sup> *Ibid* 668.

explains, piracy came to be understood as a crime against humanity attracting universal jurisdiction because of ‘the particularly savage way in which the attacks are carried out against an exposed population. Piracy consists of murder, rape, assault and other inhuman acts which have the character of *erga omnes*, that is valid against all the world’.<sup>104</sup> Or, as Zou Keyuan puts it, ‘[p]irates commit murder, robbery, plunder, rape, and other villainous deeds at sea. *Because of its nature*, piracy [sic] traditionally has been regarded as *hostis humani generis* and deemed punishable wherever encountered’.<sup>105</sup> Patricia Birnie, too, argues that pirates came to be regarded as ‘enemies of the whole human race’ because of their ‘unbridled savagery in the attacking of vessels, crews and passengers’.<sup>106</sup> Judges Higgins, Kooijmans and Buergenthal appear to also have taken such a view in their joint separate opinion in the *Arrest Warrant* case when they stated universal jurisdiction is to be exercised ‘only over those crimes regarded as the most heinous by the international community’.<sup>107</sup>

What appear at first blush to provide some explanatory power, however, are again largely ahistorical generalisations. The need for order, in Boulton’s exposition, is a universal imperative—‘a common theme from Antiquity to modernity’.<sup>108</sup> The ‘superior values’ reflected in piracy’s peremptory prohibition appear intrinsic to the existence of an ‘international community’, its existence taken for granted. The need for order and the existence of universal values, as well as piracy’s antagonism with them, are, on these approaches, universal and timeless, no less so than the figure of the pirate itself. These theories assume the very things that call for explanation and can tell us nothing about the specificity of the pirate in international legal thought. So too with the attribution of the pirate’s unique status to the heinousness of his crime. Why did acts of robbery, say, on the high seas come to be regarded as especially heinous, when the same crime on land attracts none of the same hyperbole? How is it

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<sup>104</sup> P.G. Widd, ‘The Seafarer, Piracy and the Law: A Human Rights Approach’, PhD diss. (University of Greenwich, 2008) 18.

<sup>105</sup> Zou Keyuan, ‘Enforcing the Law of Piracy in the South China Sea’ 31 *Journal of Maritime Law and Commerce* (2000) 107, 107 (emphasis added).

<sup>106</sup> P.W. Birnie, ‘Piracy: Past, present, future’ 11 *Marine Policy* (1987) 163, 164. See also *Lotus*, Separate Opinion of Judge Moore.

<sup>107</sup> *Arrest Warrant* [59].

<sup>108</sup> Boulton (1983) 2335. Interestingly, for Boulton, if the motivation behind the law of piracy is timeless, the content of the law has been marked by disagreement over ‘the character and treatment of piracy, [which] has left pirates free to pillage relatively unhindered on the lawless maritime frontiers between different systems of states’. Ibid 2338.

that the pirate—and not other figures—come to be associated in international legal thought with the idea of depravity and extreme offence and enmity towards all of humankind?

To answer these questions, we must look not to theoretical abstractions but to concrete historical developments. The figure of the pirate in international legal thought, and its association with universal enmity, is not timeless, but nor did it emerge suddenly fully formed. Like a palimpsest, earlier meanings and identities lurk beneath the new, but all emerged within specific conjunctures and reflect the concrete social and political-economic conditions prevailing at those moments. In the next chapter, I turn to the world of antiquity and the earliest origins of the pirate.

## CHAPTER 2

# The pirate of the ancients compared with that of the moderns

In his *Lives of the Noble Greeks and Romans*, the Roman biographer Plutarch recounts an incident involving a young Gaius Julius Caesar in 80 BC. Sent to the court of Nicomedes in Bithynia to procure a fleet for his commander, Minucius Thermus, Caesar was returning through the Aegean when he was accosted by Cilician pirates and taken prisoner.<sup>1</sup> The pirates demanded a ransom of 20 talents of silver but the young aristocrat laughed, insisting sardonically that he was worth at least 50. Caesar sent his companions to procure money, while remaining the pirates' captive for the next six weeks. Plutarch writes of a bold prisoner, happily socialising with his captors, yet demanding quiet when he wished to sleep and threatening to hang them all upon his release. Finally ransomed and free, Caesar immediately set about gathering a small fleet in Miletos and put to sea once more, now in search of his former captors. Quickly locating their base, Caesar attacked the pirates and took a number prisoner, demanding that Junius, the local praetor, punish them. But when Junius failed to act expediently, seemingly more interested in the thieves' loot, Caesar took matters into his own hands and ordered the pirates crucified.<sup>2</sup>

The story of Caesar and the pirates is a popular anecdote. Although Plutarch's account is brief and offers few details about Caesar's captors other than that they were from Cilicia, the south coastal region of Asia Minor, the events described have been seized on by many modern legal scholars as evidence of piracy's ancient roots and even historical precedent for the swift and violent measures to be taken against

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<sup>1</sup> Plut. *Caes.* 1; Plutarch, *Plutarch's Lives*, vol. 7, trans. Bernadotte Perrin (Harvard University Press, 1919) 444. In citing to ancient sources, here and below, I follow the standard scholarly abbreviations, while also indicating the translated editions on which I have relied. For original Greek and Latin texts, I have referred to editions included in the *Perseus Digital Library* at Tufts University, available at [www.perseus.tufts.edu](http://www.perseus.tufts.edu) (last visited 20 April 2018).

<sup>2</sup> Plut. *Caes.* 2. Other accounts relate similar events although with some differences. Polyaeus has the incident occur while Caesar was en route to Nicomedes. Polyaeus. *Strat.* 8. 23. 1; Polyaeus, *Strategems of War*, trans. R. Shepherd (George Nicol, 1793). Others, such as Velleius Paterculus, date it significantly later, during Caesar's trip to Rhodes in 75 BC. Vell. Pat. 2.42; Velleius Paterculus, *The Roman History*, trans. J.C. Yardley & Anthony A. Barrett (Hackett, 2011). Polyaeus also differs on how Caesar punished his captors, claiming that upon payment of the ransom, Caesar gave the pirates a banquet, during which he drugged their wine. He and his companions then killed them with swords smuggled into the camp with the food and money. Polyaeus. *Strat.* 8. 23. 1. For a comparison of accounts, see Allen M. Ward, 'Caesar and the Pirates' 70(4) *Classical Philology* (1975) 267.

pirates.<sup>3</sup> Modern legal discourse, as noted in the thesis's introduction, tends to represent both piracy and its legal treatment as an unchanging phenomenon spanning human history, certainly extending at least to antiquity. Some scholars date piracy's illegality as far back as the Babylonian Code of Hammurabi (second millennium BC),<sup>4</sup> but a more common point of reference is the ancient world of Greece and Rome. The *Max Planck Encyclopedia of Public International Law* rehearses the familiar characteristics of piracy under international law, declaring it 'the first crime to have been recognized as a crime against international law and subject to universal jurisdiction' before quickly stressing that this crime extends 'back to ancient times.'<sup>5</sup>

Reference to the classical roots of piracy and its legal treatment in today's scholarly interventions is almost *de rigueur* and continues to reproduce an understanding of piracy as universally and transhistorically proscribed. Modern jurists attribute to classical lawyers, and in particular Marcus Tullius Cicero, the characterisation of pirates as *hostes humani generis*.<sup>6</sup> 'It was the Roman Republic which first gave definition to the crime of piracy, and much of its law still holds true today', explains one scholar.<sup>7</sup> Another recent commentator argues that '[t]he legal understanding of piracy nowadays and more than two thousand years ago . . . seems to be strikingly similar.'<sup>8</sup> Typical also is a straightforward equation of the concept of *hostis humani generis* with universal jurisdiction.<sup>9</sup> In declaring pirates enemies of

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<sup>3</sup> See, e.g., José Luis Jesus, 'Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects' 18(3) *International Journal of Marine and Coastal Law* (2003) 363, 364; James Kraska & Brian Wilson, 'Piracy Repression, Partnering and the Law' 40(1) *Journal of Maritime Law & Commerce* (2009) 43, 44; Thaine Lennox-Gentle, 'Piracy, Sea Robbery, and Terrorism: Enforcing Laws to Deter Ransom Payments and Hijacking' 37 *Transportation Law Journal* (2010) 199, 202-203; Andrew DeMaio, 'Upping the Stakes to Win the War against Somali Piracy: Justifications for a New Strategy Based on International Humanitarian Law' 22 *George Mason Law Review* (2015) 387, 393.

<sup>4</sup> Menefee, Samuel Pyeatt. 'Scourges of the sea: piracy and violent maritime crime', 1 *Marine Policy Reports* (1989) 13.

<sup>5</sup> Ivan Shearer, 'Piracy', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2010) available at [www.mpepil.com/](http://www.mpepil.com/) (last visited 30 April 2018).

<sup>6</sup> See, e.g., Robert M. Jarvis, 'Maritime Piracy in the Modern World' 6(3) *Insights on Law and Society* (2006) 1, 2; DeMaio (2015) 392-94.

<sup>7</sup> Douglas R. Burgess Jr, 'Hostis Humani Generis: Piracy, Terrorism and a New International Law' 13 *University of Miami International and Comparative Law Review* (2006) 293, 301.

<sup>8</sup> Anna Tarwacka, *Romans and Pirates: Legal Perspective* (Uniwersytetu Kardynała Stefana Wyszyńskiego, 2009) 12.

<sup>9</sup> See, e.g., Rebecca Fantauzzi, 'Rascals, Scoundrels, Villains, and Knaves: The Evolution of the Law of Piracy from Ancient Times to the Present' 39 *International Journal of Legal Information* (2011) 346, 347. Fantauzzi is more circumspect than many other commentators, acknowledging the elusiveness of a 'stable [legal] definition of what constitutes "piracy"'.

humankind, we can read, ‘Cicero and the Romans introduced the element of universal jurisdiction into the law of piracy’.<sup>10</sup> And in a similar vein: ‘More than 2,000 years ago, Marcus Tullius Cicero defined pirates in Roman law as *hostis humani generis* . . . . From that day until now, pirates have held a unique status in the law as international criminals subject to universal jurisdiction’.<sup>11</sup>

Citations to Greek and Latin sources have historically enjoyed an important place in legal argument. Yet there is a risk in modern writing about piracy of attributing distinctly modern legal conclusions to ancient writers. To what extent can the modern conception of the pirate be found in the early legal world adumbrated in the texts of antiquity? Are the pirates who held Julius Caesar captive and those who took Captain Phillips hostage really one and the same? Or have international legal scholars today projected backwards in time a contemporary view of pirates and piratical activity, reading back into the ancient world something actually quite modern?

This chapter considers to what extent the modern pirate in international legal thought in fact maps on to ancient avatars. Analysing both ancient sources and secondary literature, from Archaic Greece through to the Roman Empire, it calls some of the assumptions of modern writers—such as the invocation of an unbroken history linking the modern and ancient pirate—into question. It suggests that a variety of phenomena in the ancient world have been brought into the category of piracy. Some of these map onto modern piracy and the pirate partially, but others bear a more uncertain relationship with them.

## COMPARING HISTORICAL PHENOMENA

Piecing together a coherent picture of legal attitudes in antiquity is complicated by the fragmentary nature of sources. Much modern commentary draws on literary texts with legal conclusions extrapolated from the attitudes expressed or from fragmentary epigraphical sources that mention various acts of maritime violence only in passing and seldom in a specifically legal context.

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<sup>10</sup> Michael Davey, ‘A Pirate Looks at the Twenty-First Century: The Legal Status of Somali Pirates in an Age of Sovereign Seas and Human Rights’ 85 *Notre Dame Law Review* (2010) 1197, 1200.

<sup>11</sup> Douglas R. Burgess Jr, ‘The Dread Pirate Bin Laden’, *Legal Affairs*, July/August 2005, available at [www.legalaffairs.org/issues/July-August-2005/feature\\_burgess\\_julaug05.msp](http://www.legalaffairs.org/issues/July-August-2005/feature_burgess_julaug05.msp).

Where such references are found, ‘piracy’ and ‘pirate’ have been used by modern scholars as translations of a variety of different Greek and Latin terms. But these terms are used in ancient sources to refer to and describe various phenomena, some bearing a greater resemblance to modern piracy than others. Alfred Rubin begins his seminal work on the law of piracy with a warning that ‘[t]ime changes the meaning of words, and it is an error in scholarship to attribute to ancient or even not very ancient authors the full range of implication that a word carries in current usage.’<sup>12</sup> When it is not the same word but a variety of terms, some etymologically related, but others not so, even greater caution seems warranted. There is a need, Rubin insists, for ‘great circumspection’ in drawing legal conclusions on the basis of Greek or Latin words in ancient sources.<sup>13</sup>

Rubin’s warning points to the historical specificity of concepts and their historical rootedness in specific social and historical conditions. ‘If the Greeks did not “have a word for” something we want to talk about’, Geoffrey de Ste. Croix observes, ‘it may be a salutary warning to us that the phenomena we are looking for may not have existed in Greek times, or at any rate not in the same form as today’.<sup>14</sup> By the same token, Neil Davidson notes, the reverse is also true: ‘some of the things for which the Greeks did have words are almost impossible to accurately convey in modern languages’.<sup>15</sup> In the case of piracy and the pirate, modern authors have assimilated a variety of Greek and Latin terms to these modern English categories. But as Alasdair MacIntyre has warned, ‘[t]o understand a concept, to grasp the meaning of the words which express it, is always at least to learn what the rules are which govern the use of such words and so to grasp the role of the concept in language and social life. This in itself would suggest strongly that different forms of social life will provide different roles for concepts to play’.<sup>16</sup> That we have a translation for a word does not mean that we share the same conceptual elements.

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<sup>12</sup> Alfred P. Rubin, *The Law of Piracy* (University Press of the Pacific, 2006) [1988] 2.

<sup>13</sup> *Ibid* 4.

<sup>14</sup> Geoffrey E.M. de Ste Croix, *The Class Struggle in the Ancient Greek World: From the Archaic Age to the Arab Conquests* (Duckworth, 1981) 35.

<sup>15</sup> Neil Davidson, *How Revolutionary were the Bourgeois Revolutions?* (Haymarket Books, 2012) 5.

<sup>16</sup> Alasdair C. MacIntyre, *A Short History of Ethics: A History of Moral Philosophy from the Homeric Age to the Twentieth Century* (Routledge, 1967) 2.



Certainly the etymology of the words pirate and piracy can be traced to early Greek and Roman cognates, but the more important question is whether such cognates conveyed the same concept, let alone the same legal consequences.<sup>17</sup> There is little doubt that violent theft and pillaging by seaborne raiders was familiar in the Mediterranean in ancient times. Many classicists have tended to follow—or more likely lead—legal scholars in treating piracy as a ‘relatively straightforward and unchanging phenomenon, assuming, implicitly or explicitly, that terms pirate and piracy meant much the same in the Graeco-Roman world as they did up to the end of the nineteenth century’.<sup>18</sup> Recent scholarship in the classics has begun to problematise such assumptions, placing emphasis on the historical and cultural contexts in which particular labels are used and encourages a ‘sceptical approach’.<sup>19</sup> This chapter adopts such an approach in considering the various and changing forms of violence in the ancient world labelled by modern authors as piracy.

### THE ARCHAIC PERIOD

Montesquieu famously remarked ‘Les premiers grecs étaient tous pirates’,<sup>20</sup> but who exactly were the pirates of ancient Greece? The earliest Greek term regularly rendered as pirate in modern translations is ληστής or *leistes*. The term emerged in regular use in the archaic period of Greek history (c. 800-500 BC), although its use continued into the first millennium. It is found repeatedly, for instance, in the work of Homer. Who was the *leistes* and what were contemporary attitudes towards him? In the Homeric poems, the term and its derivatives are applied to persons engaged in some form of plunder. Odysseus, in the guise of the Cretan son of Kastor, uses the term to describe his companions on his plundering raids.<sup>21</sup> The term recurs too in the formulaic greeting repeated more than once in the *Odyssey*: ‘Strangers, who are ye? Whence do ye sail

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<sup>17</sup> For etymological discussions, see Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (Zone Books, 2009); Rubin (2006); Philip de Souza, *Piracy in the Graeco-Roman World* (Cambridge University Press, 2002).

<sup>18</sup> de Souza (2002) 2. See, e.g., Henry A. Ormerod, *Piracy in the Ancient World* (Johns Hopkins University Press, 1997) [1924].

<sup>19</sup> See, e.g., de Souza (2002) 2.

<sup>20</sup> Montesquieu, *Esprit des lois* (Firmin Didot Frères, 1845) 291.

<sup>21</sup> See, e.g., Hom. *Od.* 17.425; Homer, *The Odyssey*, trans. A.T. Murray (Harvard University Press, 1919): ‘But Zeus, son of Cronos, brought all to naught—so, I ween, was his good pleasure—who sent me forth with roaming pirates [ληϊστῆρσι]’. The Harvard University Press edition is typical in translating *leistes* as pirate.

over the watery ways? Is it on some business, or do ye wander at random over the sea, even as pirates [ληιστῆρες], who wander hazarding their lives and bringing evil to men of other lands?’<sup>22</sup> Such a greeting seems to imply a negative connotation for the latter who, after all, are ‘bringing harm’. And yet, there is little in terms of concrete actions to distinguish the *leistēs* from those celebrated in the *Odyssey* as heroes engaged in warfare: both ‘set off in their long ships to distant shores to plunder and kill’.<sup>23</sup>

The line between one form of plunder and the other appears at best indistinct, their ‘aims and methods . . . virtually indistinguishable’—an ‘essential aspect of Homeric warfare’, de Souza explains, is the accumulation of booty with a ‘direct equation of booty with status’.<sup>24</sup> Odysseus’s distinction in battle, for instance, as Heller-Roazen observes, was ‘measured by the magnitude of that which he would take back with him from his raids’.<sup>25</sup> But the *leistēs*, too, could attain high status and prestige, as Thucydides later observed in his *Archaeologia*.<sup>26</sup> Odysseus himself, in Cretan guise, for instance, explains how his standing grew as a result of his raiding: ‘I had nine times led warriors and swift-faring ships against foreign folk, and great spoil had ever fallen to my hands. . . . Thus my house straightway grew rich, and thereafter I became one feared and honored among the Cretans.’<sup>27</sup> Moreover, the violent acquisition of plunder set both off from the far less honourable occupation of trader. While raider and warrior both can attain high status in the Homeric poems, Phoenician traders maintain a uniformly low status; the label ‘trader’ or ‘merchant’ is directed at Odysseus as an explicit insult.<sup>28</sup>

If the Homeric *leistēs* often travelled by ship, he was not uniquely a sea-borne depredator; the term was used to refer no less to those plundering by land. As de Souza

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<sup>22</sup> Hom. *Od.* 3.71-74; 9.252-255. De Souza suggests that the question might be understood along the lines of ‘Are you friend or foe?’ or ‘Are you good or bad?’: de Souza (2002) 18.

<sup>23</sup> de Souza (2002) 19.

<sup>24</sup> *Ibid.* 18-20.

<sup>25</sup> Heller-Roazen (2009) 77.

<sup>26</sup> Thuc. 1.5; Thucydides, *The Peloponnesian War*, trans. Martin Hammond (Oxford University Press, 2009) 5: ‘Such occupation did not yet carry any stigma: rather it even brought some glory.’

<sup>27</sup> Hom. *Od.* 14.230-234.

<sup>28</sup> Hom. *Od.* 8.159-164: ‘Nay verily, stranger, for I do not liken thee to a man that is skilled in contests, such as abound among men, but to one who, faring to and fro with his benched ship, is a captain of sailors who are merchantmen, one who is mindful of his freight, and has charge of a home-borne cargo, and the gains of his greed. Thou dost not look like an athlete.’ See also Elton T.E. Barker, *Entering the Agon: Dissent and Authority in Homer, Historiography and Tragedy* (Oxford University Press, 2009) 116.

remarks, '[t]he clear semantic difference which is found in modern English', between say pirates operating on sea and bandits operating on land, is 'not inherent in the ancient Greek words as they are used in the surviving sources'.<sup>29</sup> Similarly, the raids taken by Odysseus could be described, in present day terminology, as banditry, piracy or even warfare. Sharp distinctions between these characterisations were not yet possible. Indeed, where to draw the line between warfare and other activities involving the violent acquisition of booty in the Homeric world remains the subject of significant debate. Some scholars have argued for a clear distinction between warfare and other forms of raiding in the Homeric poems.<sup>30</sup> Others insist that they are largely indistinguishable.<sup>31</sup> Even the former, however, if insisting that warfare brought greater status, tend to accept that the methods and conduct of both are essentially the same. As Otto Brunner observes, 'In Homeric times booty was the main reason for war, and to destroy a city was also to plunder it . . . . The Greek "*leis*" covers both such military booty and the fruits of brigandage, indiscriminately'.<sup>32</sup>

## CLASSICAL GREECE

References to maritime raiding and plunder continue in sources from the Classical period, particularly in those relating to the Peloponnesian War (431-404 BC). The war, Thucydides tells us, involved thousands of soldiers and sailors and hundreds of ships, ranging from 'full-scale hoplite and trireme battles' to "guerrilla" actions and plundering raids'.<sup>33</sup> In the case of the latter, Thucydides refers repeatedly to *leistes* or one of its derivatives.<sup>34</sup> For instance, in one case Thucydides describes Athenian attempts 'to prevent the Peloponnesians launching triremes from the harbour of Megara unobserved, as they had done before, or sending out privateers [ληστῶν]'.<sup>35</sup> Here, multiple translators of Thucydides have chosen to render the plural of *leistes* as

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<sup>29</sup> de Souza (2002) 9.

<sup>30</sup> See, e.g., Hans van Wees, *Status Warriors: War, Violence and Society in Homer and History* (Gieben, 1992) 208-17.

<sup>31</sup> de Souza (2002) 21.

<sup>32</sup> Otto Brunner, *Land and Lordship: Structures of Governance in Medieval Austria*, trans. Howard Kaminsky & James Van Horn Melton (University of Pennsylvania Press, 1992) 74.

<sup>33</sup> de Souza (2002) 31.

<sup>34</sup> See, e.g., Thuc. 2.32 (ληστᾶς), 2.69 (ληστικὸν), 3.51 (ληστῶν), 7.26 (ληστᾶι), cited in de Souza (2002) 31.

<sup>35</sup> Thuc. 3.51.

‘privateers’ rather than ‘pirates’ or ‘bandits’.<sup>36</sup> Certainly the individuals described by Thucydides in this instance appear more akin to what today might be considered guerrillas or mercenaries accompanying regular naval forces. Yet such a distinction, while making sense on today’s legal understanding, arguably did not exist in Thucydides’ own era, where the concept of *leistēs* could encapsulate a range of behaviours.

Elsewhere Thucydides distinguishes formal warfare from what he calls *ληστεία* or *leisteia*.<sup>37</sup> The latter, rendered as ‘predatory warfare’ in a new Oxford University Press edition, appears from Thucydides’ description to involve a series of plundering raids on the enemy’s territory. Such raids, de Souza notes, might be carried out to undermine the authority of political opponents by harassing their subjects or be carried out in reprisal for perceived injuries by an enemy.<sup>38</sup> As in Homeric times, the *leistēs* engaged in such raids operated by ship and land. But in both cases—seaborne raids and terrestrial banditry—such plunder was arguably political in objective: ‘Wherever raiding was carried out those who claimed to be the legitimate political leaders would naturally be expected to justify their authority by protecting the local population from the attackers. Failure to do so could result in their downfall.’<sup>39</sup> The exact identity of the raiders is not always clear from Thucydides’ descriptions, but it is apparent that they operated on behalf of a belligerent in the war, ‘sent out’, for example as described above, by the Peloponnesians.<sup>40</sup>

Such use of the *leistēs* by Greek city-states continued into the fourth century BC. Xenophon describes his use by both the Athenian general Iphikrates and his opponents during the Corinthian War (395-387 BC), for instance when Iphikrates and Anaxibius ‘made war upon one another by sending out raiding parties [ληστὰς]’.<sup>41</sup> Those sent on raids might be regular soldiers, but they might just as often be locals, as in 389 BC when the Spartan Eteonikos invited volunteers from the population of the

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<sup>36</sup> This is true of both Martin Hammond’s translation, quoted here, and that of Richard Crawley: Thucydides, *The History of the Peloponnesian War*, trans. Richard Crawley (J.M. Dent, 1910).

<sup>37</sup> See, e.g., Thuc. 4.41.

<sup>38</sup> de Souza (2002) 31. See, e.g., Thuc. 3.85, 5.115.

<sup>39</sup> de Souza (2002) 31.

<sup>40</sup> Thucydides uses the term in a similar manner on other occasions such as at Thuc. 2.69, rendered in that instance as ‘Peloponnesian freebooters’ by Hammond and ‘Peloponnesian privateers’ by Crawley.

<sup>41</sup> Xen. *Hell.* 4.8.35; Xenophon, *Hellenica, Books I-IV*, trans. C.L. Brownson (Harvard University Press, 1968). See also discussions in de Souza (2002) 33 and W. Kendrick Pritchett, *The Greek State at War*, vol. 2 (University of California Press, 1974) 82.

island Aigina to plunder Attica.<sup>42</sup> Similarly, in the face of the growing power (and army) of the Macedon kingdom under Philip II, the Athenian Demosthenes called for the use of such tactics: ‘it is not in our power now to provide [a force] fit to meet [Philip] in pitched battle: we must adopt guerrilla tactics [ληστεύειν] to start with’.<sup>43</sup> What the translator of the 1930 Harvard University Press edition of Demosthenes’ orations renders ‘guerrilla’ tactics, de Souza translates as ‘piratical’ tactics.<sup>44</sup>

Such semantic disagreements, and the practices underlying them, illustrate how ambiguous the distinction between warfare and banditry or plunder remained in the Classical period. If contemporaries such as Thucydides regarded such plundering now distinct from formal warfare, it remained, in de Souza’s words, ‘a common feature of warfare and, in the form of reprisals, an alternative or supplement to larger-scale conflict’.<sup>45</sup> However, a change in attitudes was underway. De Souza suggests that although attackers ‘might have considered themselves to be engaged in legitimate raiding or warfare, their victims (and their allies) were likely to label them pirate [or more literally *leistes*] as a way of illegitimizing their actions’.<sup>46</sup> *Leistes* was increasingly a term employed to justify one’s opposition to the thus labelled group.

## THE HELLENISTIC PERIOD

From the third century BC a new term can be found in Greek language sources, *πειρατής* or *peirates*, likely derived from the noun *peira* meaning trial or attempt and the verb *peirao*, meaning to make an attempt.<sup>47</sup> The new term did not replace *leistes*; rather, the two appear to have been used, at least initially, synonymously and interchangeably.<sup>48</sup>

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<sup>42</sup> de Souza (2002) 34 citing Xen. *Hell.* 5.1.1-5.

<sup>43</sup> Demo. 4.23; Demosthenes, *Demosthenes: With an English Translation*, trans. J.H. Vince (Harvard University Press, 1930).

<sup>44</sup> de Souza (2002) 36.

<sup>45</sup> Ibid 42.

<sup>46</sup> Ibid.

<sup>47</sup> Heller-Roazen (2009) 34-35. De Souza notes that given the strong oral tradition in ancient Greece, the word may have existed earlier than its first written context: de Souza (2002) 9. There is some suggestion that *peirates* may be derived from *prasso*, meaning to pass through or achieve, although de Souza is sceptical.

<sup>48</sup> Polybius and Strabo, for instance, both use *leistes*, *peirates* and their cognates as synonyms.

The earliest use of *peirates* is found in an inscription from the mid-third century at Rhamnous on Attica. The inscription records a decree honouring the general Epichares during the Chremonidean war and ‘mentions a ransoming or exchange of prisoners arranged by Epichares and that the prisoners were taken by *peiratai* [pl.]’.<sup>49</sup> Who were these *peiratai*? De Souza explains that the episode took place during war with the Macedonian king Antigonos Gonatas and ‘it may be that the *peiratai* were allied in some way to Antigonos’. Alternatively, the exact identity of the raiders may have been unknown to their victims and, indeed, de Souza concludes that the ‘simplest and most logical interpretation of the use of *peirates* is that it is a pejorative term for a raider or plunderer, as it is found in later texts’.<sup>50</sup>

As with *leistēs*, the term *peirates* is neutral as to whether the episodes involving *peiratai* (pl.) occur on land or sea. For instance, in the case of the Attic inscription, while Rhamnous is a coastal town, it could also be easily accessed by land and there is insufficient context to determine whether the *peiratai* raided by land or sea. Another inscription from Aigiale on the island of Amorgos describes a raid on a town in which the individuals concerned ‘made an incursion *into the countryside* at night’.<sup>51</sup> Many such references to *peirates* from the Hellenistic period provide little information on the actual identity of the perpetrators of attacks or whether they came by sea or land. In some cases, though, it is apparent that the term extends to both media. *Peirates* and its derivatives are used by Polybius in his *Histories*, from the mid-second century BC, to describe groups both land-based and active at sea. In one case, Polybius describes *peiratōn* (πειρατῶν) following the command of Dorimachos in the Peloponnese in 222 BC. Here the term is used to describe the individuals engaged in what are clearly raids on land: ‘These injurious acts were at first confined to the sheep on the border lands; but becoming more and more reckless and audacious, they even ventured to break into the farm-houses by sudden attacks at night.’<sup>52</sup> Elsewhere a variation of the same term is used to describe a group involved in battle at sea: ‘When the [*peiratai*] saw the Roman fleet was coming they turned and fled’.<sup>53</sup>

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<sup>49</sup> de Souza (2002) 3.

<sup>50</sup> Ibid 4.

<sup>51</sup> Quoted and translated in *ibid* (emphasis added).

<sup>52</sup> Plb. 4.3; Polybius, *Histories*, trans. E.S. Shuckburgh (Macmillan, 1889).

<sup>53</sup> Plb. 21.12. Both incidents are mentioned by de Souza (2002) 8.

References to *peirates* in this period generally appear in the context of warfare. Many of the groups mentioned in the sources are in the employ of various Hellenistic monarchs, acting essentially, it seems, as mercenaries of one sort or another.<sup>54</sup> Polybius, for example, writes of Euripidas's attack on Sicyon in 218 BC, in which his army included 'two companies of Eleans, who combined with the pirates [*peiratón*] and mercenaries made up an army of two thousand two hundred men, besides a hundred horse'. Evelyn Shuckburgh, whose edition I quote here, translates *peiratón* as pirates, while William Paton, renders the word as 'freebooters'.<sup>55</sup>

Diodorus Siculus, writing slightly later in around 60 BC, also uses the term when recounting Demetrios of Macedon's attempt to capture Rhodes in 305 BC. Demetrios, he writes, travelled to Rhodes with 'two hundred warships of all sizes and more than one hundred and seventy auxiliary vessels; on these were transported not quite forty thousand soldiers besides the cavalry and the pirates [*peiratai*] who were his allies.' Arriving at the island, he 'at once sent out fit and proper men from the pirates [*peiratón*] and others to plunder the island both by land and by sea'.<sup>56</sup> Later in his account, Diodorus writes of *peiratai* 'fighting as allies' of Demetrius, overpowered by the Rhodians in a 'naval battle'.<sup>57</sup>

In the examples of both Polybius and Diodorus, *peirates* and its derivatives appear to be applied not to robbers or pirates as we understand the term today, but to groups understood as participants in wars between recognised political leaders, capable of forming recognised alliances with those leaders.<sup>58</sup> Whether or not these groups were, as de Souza argues in the case of Demetrios, motivated by the prospect of wartime booty, is of little consequence.<sup>59</sup>

## THE ROMAN WORLD

With the emergence of Rome as a power, one finds a growing number of references in Latin sources to what modern scholars have translated as pirate. In Latin, as in

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<sup>54</sup> See G.T. Griffith *The Mercenaries of the Hellenistic World* (Bouma's Boekhuis, 1968) [1935].

<sup>55</sup> Plb. 4.68; Polybius, *The Histories*, vol. 2, trans. W.R. Paton (Harvard University Press, 1954) 461.

<sup>56</sup> Diod. 20.82-83; Diodorus Siculus, *The Library of History*, vol 10, trans. R.M. Greer (Harvard University Press, 1954).

<sup>57</sup> Diod. 20.97.

<sup>58</sup> Rubin, surveying similar material, reaches the same conclusion. Rubin (2006) 5.

<sup>59</sup> de Souza (2002) 44.

Greek, multiple terms appear to have been used synonymously. *Praedo* and *latro* have both been regularly translated as both pirate and bandit and are used in the extant sources in much the same way as their Greek counterparts to refer, often interchangeably, to various forms of banditry and plunder.<sup>60</sup> And like their Greek counterparts, both terms were similarly ambiguous as to the nature of the plunder involved. To distinguish between bandits operating, for instance, on sea and land, the addition of a qualifying adjective or phrase might be used, as in plunder *at sea*, or *maritimos praedones*.<sup>61</sup>

Once more, we can ask who were the *praedones* and *latrones* of the Roman world. However, as with Greek sources, one is again confronted with the difficulties inherent in parsing the distinct ways in which a given term is used. As Brent Shaw observes of *latrones*—which he translates as bandits—and *latrocinium*—the phenomenon of banditry—‘almost every kind of violent opposition to established authority short of war was subsumed under the catch-all rubric . . . with little or no conscious differentiation of the subcategories of violence beneath that umbrella term’.<sup>62</sup> A review of contemporary sources suggests that banditry, including its maritime forms, was a ubiquitous concern. Not only were many laws, for instance, directed at repressing banditry, but so too were many unrelated legal acts nonetheless directly affected by banditry. For instance, ‘[a]mong the common causes of death recognized by the laws are old age, sickness and attacks by bandits.’<sup>63</sup> If the *Digest* is full of references to *latrones* and *praedones*, it makes no distinction between robbers and brigands acting on land and those plundering by sea. As Shaw observes, Roman law gave ‘formal recognition to the type of organized violence conducted by the Roman state itself, or directed against it by other states, by labelling it “war” or *bellum*.’ All other forms of violence, though, were ‘lumped together under the rubric of banditry or *latrocinium*’.<sup>64</sup>

The line, then, between warfare and other forms of plunder or banditry, indistinct in the ancient Greek world, took on greater clarity in Rome. The distinction

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<sup>60</sup> For etymologies, see Heller-Roazen (2009) 35; Brent D. Shaw, ‘Bandits in the Roman Empire’ 105 *Past and Present* (1984) 3, 27-28.

<sup>61</sup> Heller-Roazen (2009) 36.

<sup>62</sup> Shaw (1984) 6.

<sup>63</sup> *Ibid* 8-9 citing *Dig.* 13.6.5.4.

<sup>64</sup> *Ibid* 9.



between legitimate war and illicit violence can be seen in an opinion contained in Justinian's *Digest*, often cited as evidence of Roman jurists' conception of the pirate. Ulpian held that 'Enemies [*hostes*] are those against whom the Roman people have publicly declared war, or who themselves have declared war against the Roman people; others are called robbers [*latrunculi*] or brigands [*praedones*].'<sup>65</sup> *Praedones*, here, is regularly translated as 'pirates', rather than the more general 'brigands' or 'bandits' or 'plunderers', and Policante, amongst others, reads this as a statement about the arch-criminality specifically of the pirate in Roman law. Unlike lawful *hostes*, against whom legal war [*bellum*] was to be waged according to rituals of the *ius fetiale*, pirates are outside the *ius gentium*—literally outlaws, their acts are not merely improper but render them 'Universal criminals'.<sup>66</sup> Coleman Phillipson, in his wide-ranging study of international law and ancient Greece and Rome, also cites this same passage when arguing that pirates in both Greece and Rome 'were not regarded as "regular enemies", *iusti hostes*, but as enemies of mankind generally'.

Yet a closer reading of Ulpian's remarks suggests his concern is quite narrow, specifically the issue of property rights following legal capture. He continues immediately following the passage quoted above: 'Therefore, anyone who is captured by robbers [*latronibus*] does not become their slave, nor has any need of the right of *postliminium*.'<sup>67</sup> An individual captured by persons defined as bandits or robbers, in other words, remains legally free and retains her rights and privileges as a Roman citizen. Were she taken by recognised *hostes*, such as Germans or Parthians, Ulpian further clarifies, she would become their slave and would, at the conclusion of war or upon recapture, recover her former status by right of *postliminium*.

If the implications of Ulpian's comments are narrower than Policante or Phillipson would wish, they do suggest that the *latro* and *praedo* were not seen simply as common criminals. As Shaw remarks, there existed 'quite separate definitions of them' that placed them in 'a penumbral category between persons within the scope of the law (criminal and civil, largely overlapping) and enemies of the state'.<sup>68</sup> Indeed,

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<sup>65</sup> *Dig.* 49.15.24

<sup>66</sup> Amedeo Policante, *The Pirate Myth: Genealogies of an Imperial Concept* (Routledge, 2015) 15.

<sup>67</sup> The *ius postliminii* in Roman law was the right by which persons taken by the enemy were restored to their former status once he or she came once more under the power of the polity to which he or she belonged.

<sup>68</sup> Shaw (1984) 22.

he notes, Roman law in general denied to the *latro* ‘all legal rights of citizens, even those normally retained by criminal defendants’.<sup>69</sup> Normal legal procedures were discarded, torture was the norm, and *latrones* were signalled out for the *summa supplicia*—burning alive, crucifixion, and throwing to the beasts.<sup>70</sup>

To summarise, by at least the early Roman Empire, and likely already in the Republic, banditry, including acts of depredation and violence at sea, was considered illegitimate, even especially so, and deserving of harsh treatment. But there is little to suggest in Roman law that seaborne plunder was considered any different from other forms of banditry, at least insofar as its authors were identified as *latrones* or *praedones*.

Starting in the first century BC, a further Latin term, *pirata*, from the Greek *peirates*, emerged: it was this term specifically that is the source of the English word pirate. The new term appears to have carried a narrower meaning than *latro* and *praedo*, used specifically to describe sea-based groups. Its exact nature, and distinctiveness from the other terms, is, though, a matter of some confusion. Modern translators tend to render all three terms, at least when related to sea-based activity, as ‘pirate’ and legal scholars have similarly tended to treat the terms as synonymous. Rubin, though, insists on a significant distinction between *latro* and *praedo*, on the one hand, and *pirata*, on the other. Whereas clear impropriety attached to the former, as discussed above, *pirata* carried no implication of criminality, let alone exceptional punishment.<sup>71</sup>

That conclusion is complicated, however, by Cicero’s use of *pirata* in *De Officiis*, his handbook on moral duties for Roman aristocrats. Discussing the sanctity of oaths, Cicero makes a distinction between oaths that must be kept and those that may be broken without dishonour. ‘[F]idelity to an oath’, he explains ‘must often be observed in dealings with an enemy [*hoste*]’. An exception, however, may be made for the *praedo* or *pirata* (Cicero appears to use the terms interchangeably): ‘suppose that one does not deliver the amount agreed upon with [*praedonibus*] as the price of one’s life, that would be accounted no deception’. One need not keep one’s word, ‘for a [*pirata*] is not included in the number of lawful enemies [*perduellium*], but is the

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid 21.

<sup>71</sup> Rubin (2006) 13.

common foe of all the world [*communis hostis omnium*]; and with him there ought not to be any pledged word nor any oath mutually binding'.<sup>72</sup>

Much significance, as we have seen, has been attached by modern scholars to his characterisation of *pirata* as 'common foe of all the world' (in Walter Miller's translation quoted above) or, in an alternative translation, 'enemy of all communities'. Policante, for example, reads in Cicero's brief remark on the keeping of oaths an explicit condemnation of pirates as disqualified from a universal *ius gentium*, excluded from the 'human community' such that they must be 'ruthlessly persecuted'.<sup>73</sup> Other scholars have even conjured from Cicero's words an established theory, and even practice, of universal jurisdiction. Rubin, by way of contrast, suggests that Cicero here 'merely denies any legal obligation to keep an oath to "pirates"'.<sup>74</sup> If they are enemies of all communities, then they must not be subject to whatever overarching law of a broader society makes oaths binding between different communities.

Cicero certainly elaborated elsewhere a philosophy positing a universal law binding all communities. Drawing on early Stoic cosmopolitanism, he spoke of a *ius gentium* rooted in nature with Rome the enforcer of this law. It is possible to read his remarks on the keeping oaths as implying that the *pirata* is excluded from this *societas omnium inter omnes*, but it is a leap to read Cicero's *communis hostis omnium* as synonymous with the more famous *bon mot* enemy of humankind or humanity. Cicero's notion of universal community does not clearly map onto a modern concept of humanity. Walter Rech provides clarity when he suggests that, despite his cosmopolitan prose, Cicero's society of all communities in reality was a far narrower conception, coinciding with Rome and its political allies, not an actual universal humanity. Moreover, Rech stresses, it in no way followed from Cicero's remarks that he was suggesting all nations should repress *piratae* or, in Policante's phrasing, persecute them 'ruthlessly'.<sup>75</sup>

Whatever Cicero's understanding of the *pirata*, he appears to be alone in conflating the term with *praedo*. The term *pirata* and its derivatives are used in the extant sources almost entirely with reference specifically to the Cilicians of Asia Minor

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<sup>72</sup> Cic. *Off.* 3.107; Marcus Tullius Cicero, *De Officiis: with an English Translation*, trans W. Miller (Harvard UP, 1913).

<sup>73</sup> Policante (2015) 12-13.

<sup>74</sup> Rubin (2006) 10.

<sup>75</sup> Rech (2013) 30.

in ways quite distinct from contemporaneous uses of *praedo* and *latro*. The same appears to be true of the Greek *peirates*, as it continued to be used in the Roman period. Who, then, were the Cilicians? In many accounts, they are cast as bands of sea raiders, attacking ships passing along the rugged Cilician coast since time immemorial. Some ancient sources go so far as to suggest the Cilicians, as a people, were naturally inclined to plunder—an ethnic trait, Strabo seems to imply, when he writes that ‘the Pamphylians, who share much in the traits of the Cilician stock of people, do not wholly abstain from the business of piracy [ληστρικῶν].’<sup>76</sup> Strabo here uses a derivative of *leistes*, which the editor of the *Loeb Classical Library* edition translates as piracy, but later, in referring directly to the Cilicians, Strabo uses a derivative of *peirates*. The Pamphylians, he writes, ‘used their places as bases of operation for the business of robbery [ληστήρια]’, offering them to ‘pirates [πειρατής] as markets for the sale of booty and as naval stations’. The pirates in question, now identified as *peiratai*, are quickly identified: ‘In Side, at any rate, a city in Pamphylia, the dockyards stood open to the Cilicians’.<sup>77</sup> It was Cilicians, too, who held Julius Caesar for ransom in 80 BC. Plutarch, with whose account the chapter opened, refers to Caesar’s captors as *peiratón* (πειρατῶν), identified thereafter as Cilicians (*Kilissi*).<sup>78</sup> And Velleius Paterculus, in recounting the same incident, uses *piratis* to describe the Cilician aggressors.<sup>79</sup>

The actual origins of the Cilicians and their apparently habitual plunder are somewhat unclear owing to a lack of contemporary sources, particularly for the Eastern Mediterranean—Strabo and Plutarch, for instance, wrote of events before their own time. Surveying the available sources, Avi Avidov suggests that most in fact associated the appearance of Cilician *piratae* with the outbreak of the Mithridatic wars. He concludes that the Cilicians’ ‘imputed past record may be no more than the retrojection of Roman allegations stemming from precisely’ the period in which the Romans met the Cilicians in war.<sup>80</sup> What limited evidence is available, De Souza suggests, indicates a region populated by ‘fiefdoms’ of varying sizes along the Cilician

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<sup>76</sup> Strab. 12.7.2; Strabo, *The Geography of Strabo*, trans. H.L. Jones (Harvard University Press, 1924).

<sup>77</sup> Strab. 14.3.2.

<sup>78</sup> Plut. *Caes.* 2.2.

<sup>79</sup> Vell. Pat. 2.42.

<sup>80</sup> Avi Avidov, ‘Were the Cilicians a Nation of Pirates?’ *12 Mediterranean Historical Review* (1997) 15.

coast in which ‘individual leaders exercise autocratic power and from which (it is implied) they direct piratical forces against their neighbours and more distant targets’.<sup>81</sup> Appian, for instance, writes of communities led by ‘tyrants’ and ‘kings’, some of whom, de Souza notes, were powerful enough to enter the historical record.<sup>82</sup> These small polities acknowledged neither the authority of the Seleucids, the nominal rulers of Anatolia after Alexander’s death, nor that of Rome.<sup>83</sup> Instead, they followed their own traditions and religion worship, with ‘strange sacrifices’ and ‘secret rites’ Plutarch records.<sup>84</sup>

The Romans, for their part, seem for a long time to have been largely indifferent to Cilician raiding. Some scholars such as Henry Ormerod suggest this was due to the role of the Cilicians as a source of slaves.<sup>85</sup> Alternatively, such indifference may have been maintained simply because the Romans did not, until at least the end of the second century BC, ‘consider themselves responsible for the general “security” of this region’.<sup>86</sup> By the outbreak of the Mithridatic wars, this situation had changed. Mithridates VI Eupator, king of Pontos (120-63 BC) fought a series of wars from 88 BC to his death in 63 BC challenging Roman domination over the Eastern Mediterranean. The Cilicians, it seems, were drawn into this war as active belligerents. According to Appian, when Mithridates went to war with Rome, he ‘sent out [*peiratás*] on the sea’ and, with their help, invaded the Roman protectorate in Asia Minor.<sup>87</sup> Under Mithridates, the Cilicians assembled a large war fleet and, at one point, according to Plutarch, garrisoned Sinope against Roman attack ‘for the king’.<sup>88</sup>

Modern scholars have largely agreed with these sources, painting similar pictures of Mithridates and the Cilicians working in unison. Ormerod writes that ‘[t]he

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<sup>81</sup> de Souza (2002) 99.

<sup>82</sup> Ibid citing App. *Mith.* 92, 117.

<sup>83</sup> de Souza (2002) 99.

<sup>84</sup> Plut. *Pomp.* 25.1; Plutarch (1919).

<sup>85</sup> Ormerod (1997) 206-207.

<sup>86</sup> de Souza (2002) 100.

<sup>87</sup> App., *Mith.* 92; Appianus (of Alexandria), *The Roman History of Appian of Alexandria*, vol. 1, trans. H. White (Macmillan, 1899). See also discussions in Jean Rougé, *Ships and Fleets of the Ancient Mediterranean*, trans. Susan Frazer (Wesleyan University Press, 1981) 110; B.C. McGing, *The Foreign Policy of Mithridates VI Eupator King of Pontus* (Brill, 1986) 139; Philip Gosse, *The History of Piracy* (Dover, 2007) [1932] 307.

<sup>88</sup> Plut. *Luc.* 23.2; Plutarch (1919).

war against the pirates became, in fact, identical with the war against Mithridates'<sup>89</sup>, while Harry Gould suggests that the Cilicians were 'the formal allies of Mithridates; their fleet effectively constituted his navy.'<sup>90</sup> Surveying the source material, Avidov observes that, although they are referred to as 'pirates', wherever the Cilicians' actions are described in any detail, 'they are seen to be engaged in large scale operations that do not seem to be aimed primarily at obtaining plunder, but rather to the attainment of strategic objectives'. They are described as organised in large fleets, with 'hierarchies of command and all other trappings of ordinary fighting forces'. Moreover, Avidov concludes, their actions were directed solely at the enemies of Mithridates.<sup>91</sup>

With defeat against Sulla's Roman army on land in 85 BC, Mithridates had lost much of Asia Minor and it is unclear to what extent Mithridates continued to direct the Cilicians' operations.<sup>92</sup> Nonetheless, hostilities between Rome and the Cilicians continued, with the latter attacking a Roman fleet in Ostia, sacking Caietae and even capturing two Roman praetors. The Cilicians had come to appear, in Kallet-Marx's words, 'a standing refutation of Rome's claim to *imperium*, above all in the East, where many notable cities had been captured and plundered, including Cnidus, Colophon, Samos, and Delos'.<sup>93</sup> Cicero could thus write 'did you think this was *imperium*, when legates, quaestors, and praetors of the Roman People were being seized, when we were cut off from public and private communication with all the provinces?'<sup>94</sup> At the same time, the Cilicians' hostilities frustrated Roman trade, in grain especially, which by the late Republican period had taken on great importance. The Romans, Plutarch wrote, were short of food and feared famine;<sup>95</sup> the Cilicians, Livy recorded, had 'blocked the grain-trade'.<sup>96</sup> Massive grain imports were required

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<sup>89</sup> Ormerod (1997) 210-11.

<sup>90</sup> Harry D. Gould, 'Cicero's Ghost: Rethinking the Social Construction of Piracy', in Michael J. Struett, Jon D. Carlson & Mark T. Nance (eds) (2003) *Maritime Piracy and the Construction of Global Governance* (Routledge, 2013) 23, 28. De Souza is the exception, expressing skepticism about cooperation between Mithridates and Cilician raiders: see de Souza (2002) 116-28.

<sup>91</sup> Avidov (1997) 14.

<sup>92</sup> See McGing (1986) 139.

<sup>93</sup> Robert Kallet-Marx, *Hegemony to Empire: The Development of the Roman Imperium in the East from 148 to 62 B.C.* (University of California Press, 1995) 316-17.

<sup>94</sup> Cic. *Leg. Man.* 53 quoted in Kallet-Marx (1995) 316.

<sup>95</sup> Plut. *Pomp.* 25.1.

<sup>96</sup> Liv. 99; Livy, *Rome's Mediterranean Empire: Books Forty-One to Forty-Five and the Periochae*, trans. Jane D. Chaplin (Oxford University Press, 2007) 291.

to feed the slave labour on which the Roman economy relied as well as a growing urban population of plebeians.<sup>97</sup>

It was in this context that, in 67 BC, Pompey, otherwise known as Gnaeus Pompeius Magnus,<sup>98</sup> was granted a sweeping military command (*imperium maius*) to fight a ‘war against the pirates’ under the *lex Gabinia de piratis persequendis*.<sup>99</sup> As Appian explains, ‘[w]hen the Romans could no longer endure the damage and disgrace, they made Gnaeus Pompey, who was then their man of greatest reputation, commander by law . . . with absolute power over the whole sea within the Pillars of Hercules, and of the land for a distance of 75 kilometres from the coast.’<sup>100</sup> Again, the question is whether this was, as many modern commentators are quick to argue, an operation of ‘global policing’ against piracy, in the modern sense of brigandage at sea, as Policante suggests, or whether it conformed, as Gould puts it, to a ‘quodidian inter-polity conflict’ with political agenda and strategic goals.<sup>101</sup>

Analysis of contemporaneous sources suggests that the Romans themselves took the latter view, writing of the Cilicians, if at the same time labelling them *pirata* or, in the Greek, *peirates*, in terms more akin to wartime belligerents than the pirates of the modern legal imagination. Velleius Paterculus, for instance, clearly noted that the Cilicians were not organising individual raids for plunder but rather moved in large fleets.<sup>102</sup> Livy certainly referred to the conflict as ‘war’ (*bello*).<sup>103</sup> Even Cicero, in reference to Pompey’s role in the war, speaks not of actions against criminals or even pirates but of a naval war—‘*bellum maritimum*’ and ‘*bellum navale*’, not *bellum contra piratas* or *contra praedones*.<sup>104</sup>

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<sup>97</sup> See David Kessler & Peter Temin, ‘The organization of the grain trade in the early Roman Empire’ 60(2) *Economic History Review* (2007) 313; G.E. Rickman, ‘The Grain Trade under the Roman Empire’ 36 *Memoirs of the American Academy in Rome* (1980) 261.

<sup>98</sup> Pompey had gained prominence fighting in Italy, Sicily and North Africa with legions raised from his family’s estates and veterans of his father Pompeius Strabo’s campaigns. Returning victorious from Spain in 71 BC, he had become a consul in the Senate at the young age of 36. He would later become enemy to Julius Caesar during the Roman Civil War. See Jane Penrose (ed.), *Rome and Her Enemies: An Empire Created and Destroyed by War* (Osprey Publishing, 2005) 97-98.

<sup>99</sup> See generally W.R. Loader, ‘Pompey’s Command under the *Lex Gabinia*’ 54 *The Classical Review* (1940) 34; Kallet-Marx (1995) 317.

<sup>100</sup> App. *Mith.* 94 quoted in Heller-Roazen (2009) 53.

<sup>101</sup> Policante (2015) 15; Gould (2013) 28.

<sup>102</sup> Vell. Pat. 2.31 cited in Tarwacka (2009) 43.

<sup>103</sup> Heller-Roazen (2009) 37 citing Liv. 37.11.6-7.

<sup>104</sup> de Souza (2002) 172 quoting Cic. *Leg. Man.* 28, 44, 58. See also Gosse (2007) 307 arguing the Cilicians ‘were no longer an aggregate of furtive cut-throats; they had grown into the semblance of a

Finally, such a view is further supported by accounts of the conclusion of the war in what appears as a negotiated surrender. Livy's description of the war ends with an account of how Pompey, 'having ended the war against [the Cilicians], . . . accepted the surrender of the pirates [*piratis*] and assigned them land and towns'.<sup>105</sup> Plutarch, too, writes of the surrender: 'Some . . . begged for mercy, and since [Pompey] treated them humanely, and after seizing their ships and persons did them no further harm, the rest became hopeful of mercy too and . . . betook themselves to Pompey with their wives and children, and surrendered to him.'<sup>106</sup> Again, the clear impression from these authors is that Rome treated the Cilicians not as brigands or outlaws, subjected to the particularly severe punishment reserved for *latrones* and *praeodones*, but as 'enemies to be met in war and defeated'.<sup>107</sup> The 'results of Roman victory', Rubin writes, 'were the normal results of a victorious war at that time and in that place'; in short, relations with the *piratae* were relations of war.<sup>108</sup>

### THE PIRATE OF ANTIQUITY

A variety of both Greek and Latin terms found in ancient sources have been regularly rendered as 'pirate' by modern scholars—*leistēs*, *peirates*, *praedo*, *latro*, *pirata*. Some appear only at particular junctures, while others overlap in their usage. There are some resemblances between the individuals these terms described and the pirates of the modern era, but also distinctions, just as there are distinctions between the ancient terms themselves. All appear to have been used to refer to various instances of raiding and plunder, but only *pirata* was limited to seafaring individuals. The *peirates* and *leistēs* of the ancient Greek world could raid by land, while the *latro* and *praedo* of the Roman world included a diverse range of individuals who did violence to Rome. Nor were any labels, including *pirata*, used solely to refer to private individuals pursuing their own private ends; political actors pursuing strategic goals were also encompassed by such terms.

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naval organisation, attacking according to a considered strategy instead of . . . without order or unity of command. This, from the point of view of the lawyers at least, begins to resemble war more nearly than piracy'.

<sup>105</sup> Liv. 99.

<sup>106</sup> Plut. *Pomp.* 27.4.

<sup>107</sup> Rubin (2006) 7. See also Penrose (2005) 98.

<sup>108</sup> Rubin (2006) 8.



Moreover, in ancient Greece, there was nothing inherently criminal about these groups. *Leistai* could attain high status and prestige and there was little to distinguish the raids of, say, Odysseus from contemporary modes of warfare. In the Classical period, one finds the term used to describe what might today be understood as individuals and groups employing guerrilla tactics, often alongside and in the service of larger military forces. The ambiguous distinction between warfare and plunder continued into the Roman era. The *piratae* against whom Pompey went to battle resembled at times forces in Mithridates' army and at other times autonomous communities, albeit ones on the margins of, and violently opposed to, Roman *imperium*. It is difficult to escape Rubin's conclusion that, by this time, the Greek term *peirates* and its Latin cognate *pirata* were applied 'to traditional Eastern Mediterranean societies operating in ways that had been accepted as legitimate for at least a millennium' but which were increasingly at odds with a growing Roman hegemony.<sup>109</sup> These were certainly communities against whom great hostility was directed, disparaged by Cicero as *hostes communis omnium*, enemies of all civilised communities: that is, enemies of Rome and its allies. But they were not yet figures of universal enmity, persecuted in the name of humanity. Efforts to suppress the maritime violence traditional to the Cilicians took on the character of littoral warfare typical of the period, with the Cilicians engaged, in practice, as lawful belligerents. Against the variety of phenomena and actors of the ancient world, the pirate of modern international legal thought appears quite distinct.

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<sup>109</sup> Ibid 6.

## CHAPTER 3

### Depredation in the medieval Mediterranean

In October 1397, Francesc Colomer was returning to his native Catalonia with a rich cargo from Sicily. A native of Barcelona, Colomer had spent much of the 1390s in Genoa and had become a prominent member of the Catalan merchant colony there. A 1230 treaty had opened Genoa to Aragonese and Catalan merchants and large numbers from southern France and eastern Spain took advantage of these commercial privileges.<sup>1</sup> Catalan merchants from the city of Tortosa were particularly prominent in the sale of Muslim slaves, with Genoa an important market in the western Mediterranean slave trade. The sale of Spanish slaves in Genoa had declined after 1250, but the city's colony of Catalan merchants had remained.

Colomer's ships plied a regular trade across the western Mediterranean carrying such cargo as wool for Pisan merchants and the Datini company of Prato. On this trip he was accompanied by a Valencian, Ramon Almenar, who had chartered the voyage, and a number of fellow merchants and nobles. As the ship passed close to Sardinia, poor weather forced Colomer and his companions to weigh anchor off the small island of San Macário, south of the port of Cagliari. Before they could once more make sail, the Catalans came under attack from a light galley commanded by Sologrus de Nigro, a native of Genoa. Accompanying de Nigro was a motley crew including merchants from Genoa, Montpellier, Avignon and Arles, as well as a group of knights from the French priories of the Order of Saint John of Jerusalem—better known as the Knights Hospitallers—including the Grand Prior of France, Regnault de Giresme. The attackers seized the ship's merchandise as well as the belongings of all aboard—'to the last stitch of clothing', de Nigro's victims would later complain.<sup>2</sup>

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<sup>1</sup> Olivia Remie Constable, 'Muslim Spain and Mediterranean slavery: the medieval slave trade as an aspect of Muslim-Christian relations', in Scott L. Waugh & Peter D. Diehl (eds), *Christendom and its Discontents: Exclusion, Persecution, and Rebellion, 1000-1500* (Cambridge University Press, 1996) 264, 278-81.

<sup>2</sup> '[A]d ultimate vestimenta': quoted in Emily S. Tai, 'Honor Among Thieves: Piracy, Restitution, and Reprisal in Genoa, Venice, and the Crown of Catalonia-Aragon, 1339-1417', PhD diss. (Harvard University, 1996) 522. The details of the attack and subsequent legal proceedings are recounted in Tai (1996) 510-85, as well as Emily S. Tai, 'Restitution and the Definition of a Pirate: The Case of Sologrus de Nigro' 19(2) *Mediterranean Historical Review* (2004) 34, 48-53. Her account is taken from contemporary legal and government documents in the Archivo de la Corona de Aragón and the Genoese archives. De Nigro's raiding activities are also documented in Venetian and French sources. De Nigro is not to be confused with his earlier namesake, the admiral Sologrus de Nigro who commanded a Genoese fleet of 10 galleys against the Catalans in 1334. For the latter, see Michel Balard, 'Genoese

De Nigro's act of plunder was by no means exceptional. Banished from his native Genoa earlier the same year for defying a communal official, de Nigro had taken to attacking merchant vessels along the French Riviera and in the Tyrrhenian. In the months that followed his attack on Colomer's ship, de Nigro would sail east to Zara (now Zadar in Croatia), using the port as a base for raids on Venetian shipping in the Adriatic and as far east as the Levant. By the summer of 1399, he had become such a nuisance that the Venetian Senate awarded Hermolao Lombardo command of a three-galley fleet to patrol the Adriatic with the mission of ending de Nigro's harassment. By the autumn, de Nigro had returned west to harry shipping along the Ligurian and French Rivas.<sup>3</sup>

Nor were de Nigro's actions exceptional in the context of late medieval Europe. Violence and plunder were endemic, a staple of political and economic life. Heavy wagons followed armies to battle to collect the spoils of war. Merchants were robbed on highways. In a memorable passage from his *Feudal Society*, Marc Bloch writes of William Marshal, a 'valiant knight' who, nonetheless, when encountering a monk on the road, 'did not scruple to rob the poor devil of his cash . . . . One of his companions even reproached him for not having seized the horse as well.'<sup>4</sup> But merchants were not only victims. If 'burgess', as Bloch suggests, was 'employed in unequivocal opposition to the words knight, cleric, *villein*', merchants 'shared with the knight a warlike disposition and the practice of bearing arms'.<sup>5</sup> No meaningful distinction, Nicholas Rodger remarks, could reasonably be drawn between violent and peaceful trade.<sup>6</sup>

In southern Europe, much of that trade was conducted along the watery highways of the Mediterranean. Here too commerce and violence went hand in hand in a fierce rivalry for the fruits of the medieval trading system. But if acts of plunder

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naval forces in the Mediterranean during the fifteenth and sixteenth centuries', in John B. Hattendorf & Ricahrd W. Unger (eds), *War at Sea in the Middle Ages and Renaissance* (Boydell Press, 2003) 137, 148. Tai's work represents a synthesis of a large body of primary sources, as well as a significant collection of non-English scholarship on this subject. Her work remains the leading scholarship on piracy and maritime depredation in late medieval Europe and I have drawn on it significantly in this chapter, while attempting to set her empirical observations within a political-economic context on which she herself remains largely silent.

<sup>3</sup> Tai (2004) 56.

<sup>4</sup> Marc Bloch, *Feudal Society, Volume II: Social Classes and Political Organization*, 2nd ed., trans L.A. Manyon (Routledge, 1962) 16.

<sup>5</sup> Ibid 77.

<sup>6</sup> N.A.M. Rodger, *The Safeguard of the Sea: A Naval History of Britain 660-1649* (W.W. Norton, 1997).

such as that off San Macário were hardly exceptional, how were they understood by contemporary legal thinkers? Was this an act of piracy and de Nigro a pirate in the modern sense of these terms? Such legal categories, this chapter argues, still did not yet exist in the medieval Mediterranean. With the dissolution of the Roman empire, the pirate had lost its association with Cilicia in particular and banditry in general. The pirate remained a figure associated with maritime violence, but one that carried no inherent pejorative connotation. A pirate might be celebrated or condemned, championed by a political community or repudiated as an enemy. Normative judgements, though, were exogenous to the piratical identity itself.

This did not mean, however, that all depredation was treated alike. If violence was endemic to economic life, a distinction between legitimate and illegitimate plunder was beginning, in the late medieval period, to take shape. That distinction, the chapter argues, would turn on sovereign license and was adumbrated initially within a theory of reprisals that sought to both justify and limit maritime seizure. Using the example of de Nigro's attack and the reactions it provoked, the chapter charts how maritime plunder was conceived by contemporary legal thinkers and situates the emerging distinctions between legitimacy and illegitimacy within a conjuncture marked by the expansion of merchant capital and the proliferation of politically autonomous centres of trade and accumulation. This was the crucible in which such a distinction was formed—a necessary first step towards the pirate's eventual association with one half of that equation.

## MERCHANT CAPITALISM AND INTER-STATE RIVALRY

The medieval European economy was based primarily on agrarian production, with aristocratic rule exploiting the peasantry and extracting a surplus for lordly consumption. Yet the political, ideological and military means of exploitation were not concentrated in a centralised and unified state, but rather were spread across the nobility.<sup>7</sup> The fragmented character of political power meant both that war was constant and that lords wishing to make war would have to look beyond the 'day-to-day mechanisms of ruling class reproduction' for financing.<sup>8</sup> To raise an army required

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<sup>7</sup> Perry Anderson, *Passages from Antiquity to Feudalism* (New Left Books, 1974) 148.

<sup>8</sup> Alex Anievas & Kerem Nişancıoğlu, *How the West Came to Rule: The Geopolitical Origins of Capitalism* (Pluto Press, 2015) 104.

borrowing, usually from the emerging merchant-entrepreneurial class in the cities. One by-product of feudal war-making, then, Alex Anievas and Kerem Nişancıoğlu remark, was an ‘attendant rise in the political autonomy, power and influence of merchants, with increasing degrees of representation in the decision-making structures of states’.<sup>9</sup>

Medieval towns thus formed ‘urban enclaves’ within a sea of feudal social relations, with merchant capital exercising ever greater political influence.<sup>10</sup> Yet within the political geography of medieval Europe, North and Central Italy formed an exceptional zone, with the alienation of city-states to moneyed interests exceeding that seen anywhere else at this time. By the 14th century, for example, the same merchant families in Venice controlled trade, transport, and finance and exercised significant political power.<sup>11</sup> Philip Curtin observes that Venice was ‘a commercial republic that systematically used state power, not merely to increase state income, but also to increase the income of the Venetian merchants’.<sup>12</sup> Genoa was much the same. Administration of its Black Sea colonies, for example, was ceded to the private *Banco di San Giorgio*, its merchant owners exercising exclusive political power in those territories.<sup>13</sup>

The success of these islands of merchant capitalism rested, in the first place, on trade, with the accumulation of wealth deriving from unequal exchange. As Marx put it: ‘the major profit was made not by supplying a specific national product, but rather by mediating the exchange of products between commercially—and generally economically—undeveloped communities and by exploiting both the producing countries’.<sup>14</sup> Genoa, on the Ligurian coast of Italy, created a network of colonies and outposts across the Mediterranean. *Civis ianuensis, ergo mercator*, a popular aphorism

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<sup>9</sup> Ibid 105. See also Eric Mielants, *The Origins of Capitalism and the ‘Rise of the West’* (Temple University Press, 2008) 70-79.

<sup>10</sup> Perry Anderson, *Lineages of the Absolutist State* (New Left Books, 1974) 151.

<sup>11</sup> Jairus Banaji, *Theory as History: Essays on Modes of Production and Exploitation* (Haymarket Books, 2011) 260.

<sup>12</sup> Phillip D. Curtin, *Cross-Cultural Trade in World History* (Cambridge University Press, 1984) 116.

<sup>13</sup> Angelo Piero Sereni, *The Italian Conception of International Law* (Columbia University Press, 1943) 27. See also Benjamin Z. Kedar, *Merchants in Crisis: Genoese and Venetian Men of Affairs and the Fourteenth-Century Depression* (New Haven, 1976) 10, 30.

<sup>14</sup> Karl Marx, *Capital: A Critique of Political Economy*, vol. 3, trans. David Fernbach (Penguin Books, 1981). See also Peter Kriedte, *Peasants, Landlords and Merchant Capitalists: Europe and the World Economy, 1500-1800* (Cambridge University Press, 1983); Christopher Chase-Dunn, *Global Formation: Structures of the World-Economy*, 2nd ed. (Rowman & Littlefield, 1998) 143.

held: a Genoese citizen, therefore a merchant.<sup>15</sup> From the east, Genoese ships brought spices, grain and Tartar slaves to the Italian peninsula's market ports, while from the west, Genoese merchants plied the coasts of the Iberian peninsula as well as those of Sicily, Corsica and the Balearic islands. Meanwhile, on the eastern coast of the Italian peninsula, Venice continued to enjoy hegemony in trade with Byzantium stretching back to the 11th century.<sup>16</sup>

The 13th century saw a massive expansion in trade across Eurasia with transcontinental trading links stretching from England to China.<sup>17</sup> This was in part a product of the *Pax Mongolica*, with the Mongols allowing 'unhindered access for foreigners in the lands which they governed' and offering safe passage for traders.<sup>18</sup> Trade flowed from east to west as never before.<sup>19</sup> Although the Mongol empire was at the fore of this expansion of trade, the primary promoters and organisers, and the main beneficiaries, were the northern Italian city-states. These politically autonomous trading centres played a crucial role in creating the regional links made possible by Mongolian protection in Central Asia and the Black Sea region.<sup>20</sup>

While trade was in its expansionary phase, these emerging centres of accumulation could enjoy its benefits more or less harmoniously based on a division of labour, with each city-state enjoying its own niche in the trading system: a 'specialization', as Giovanni Arrighi puts it, 'in interrelated but spatially or functionally distinct circuits of trade'.<sup>21</sup> Florence and Milan were primarily engaged in overland trade with north-western Europe—Florence focused on textile trades and Milan on metal trades—while Venice and Genoa shared maritime trade with the east—

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<sup>15</sup> Tai (1996) 41.

<sup>16</sup> See Irene B. Katele, 'Piracy and the Venetian State: The Dilemma of Maritime Defense in the Fourteenth Century' 63 *Speculum: A Journal of Medieval Studies* (1988) 865; Sereni (1943) 19-20.

<sup>17</sup> Giovanni Arrighi, *The Long Twentieth Century: Money, Power and the Origins of Our Times*, 2nd ed. (Verso, 2010) 88-89; Janet L. Abu-Lughod, *Before European Hegemony: The World System A.D. 1250-1350* (Oxford University Press, 1989).

<sup>18</sup> Virgil Ciocîltan, *The Mongols and the Black Sea Trade in the Thirteenth and Fourteenth Centuries* (Brill, 2011) 11. For an extended discussion of the influence of the Mongol empire on political-economic developments in Europe, see Anievas & Nişancioğlu (2015) 64-90. See also Bira Shagdar, 'The Mongol Empire in the thirteenth and fourteenth centuries: East-West relations', in Vadime Elisseff (ed.), *The Silk Roads: Highways of Culture and Commerce* (Berghahn Books, 2000) 127; David Christian, 'Inner Eurasia as a unit of world history' 5(2) *Journal of World History* (1994) 172.

<sup>19</sup> Anievas & Nişancioğlu (2015) 74.

<sup>20</sup> Arrighi (2010) 89; Anievas & Nişancioğlu (2015) 75.

<sup>21</sup> Arrighi (2010) 90.

Venice focused on the spice trade and Genoa on the silk trade.<sup>22</sup> To the Italian city-states were added newcomers, most importantly Catalonia and Aragon to the west.<sup>23</sup>

By the early 14th century, however, the expansion of trade made possible by the Mongol empire had tapered off. Competition between the autonomous centres of trade, once tolerated, increasingly became a source of friction. Decreasing returns from trade led the city-states to invest, Arrighi observes, in ‘the hostile takeover of the markets or of the territories of competitors’.<sup>24</sup> An escalation of inter-mercantile struggle followed such that the late 13th and 14th centuries were marked by near constant warfare as the cities sought to shore up their trade routes and assert control over the Mediterranean beyond their territorial waters. Pisa claimed dominion over the Tyrrhenian sea, Genoa over the Gulf of Liguria, Venice over the Adriatic. Any foreign merchants wishing to make passage through the Adriatic, the Venetians demanded, would have to pay a toll.<sup>25</sup>

The Battle of Meloria, in 1284, saw the Genoese push Pisan trade out of the Black Sea, only for Genoa to engage in a running series of conflicts over the course of the next century with Venice, each vying for control of trade with the eastern stretches of the Mediterranean and a monopoly on trade in the Black Sea.<sup>26</sup> Their rivalry would culminate in the War of Chioggia (1376-1381), ending with the Peace of Turin in 1381 which saw Genoa ousted from the most profitable eastern Mediterranean markets. In the western Mediterranean, Genoese attempts to monopolise trade ran up against an expanding Catalan-Aragonese power leading, for example, to war between 1331 and 1335 over control of Sardinia.

Even in the absence of formal war, violence was a constant. In fact, formal military operations and more haphazard commercial raiding were not always easily distinguished. Commune and crown alike relied on private citizens—the same merchant captains who plied the trade routes—to secure their jurisdictional claims.

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<sup>22</sup> Ibid 89.

<sup>23</sup> On history of the Kingdom of Catalonia-Aragon, see J. Lee Shneidman, *The Rise of the Aragonese-Catalan Empire, 1200-1350*, 2 vols (NYU Press, 1970).

<sup>24</sup> Arrighi (2010) 94.

<sup>25</sup> Sereni (1943) 29-30.

<sup>26</sup> See Abu-Lughod (1989) 102.

The Mediterranean, in short, was marked by what Janet Abu-Loghud has called ‘endemic war on the high seas’.<sup>27</sup>

### THE PIRATE IN THE MEDIEVAL MEDITERRANEAN

Francesc Colomer, along with the merchants and nobles whose cargo he was carrying, had suffered significant losses at the hands of de Nigro. If such attacks were a constant risk to merchants—who might themselves, on another occasion, turn perpetrator—how were they treated under law? The example of Colomer and di Nigro offers an insight into how maritime depredation was understood and treated by legal thinkers, as well as its relationship with the figure of the pirate in this juncture.

The response to depredation at sea was, by the late 13th century, remarkably uniform across much of southern Europe, with legal authorities drawing on traditions rooted in Roman law. Yet it was not to Roman criminal law or the treatment of the *latrones* or *praedones* that they looked but to the law of delicts (*delicta*)—private wrongs such as theft (*furtum*) and theft by force (*rapina*) which entitled a victim to compensation. Under Roman law, *furtum* involved either the removal of another’s property or an intentional handling thereof with a particular intention: stealing but also, say, collecting money from another’s debtor. It could be prosecuted only by the person suffering the loss.<sup>28</sup> *Rapina*, by way of contrast, was a theft committed with the use of violence. Moveables alone could be the object of *rapina* and like its non-violent counterpart, it was to be prosecuted only by the injured individual.<sup>29</sup>

In the medieval Mediterranean, maritime seizures were treated, in the first place, as instances of *furtum* and *rapina*. A plaintiff, on whom the burden of proof fell, was to set out the details of her complaint in a written deposition, to be supported by witnesses to whom the defendant could then respond.<sup>30</sup> But to whom should a plaintiff bring her complaint? Under the Roman *Imperium*, all were subject to a single central juridical authority. If the Holy Roman Emperor still maintained a *de iure* claim to such

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<sup>27</sup> Ibid 113.

<sup>28</sup> Adolf Berger, *Encyclopedic Dictionary of Roman Law* (American Philosophical Society, 1953) 480. See also Alan Watson, *The Law of Obligations in the Later Roman Republic* (Clarendon Press, 1965) 220-27; George Long, ‘Furtum’, in William Smith, *A Dictionary of Greek and Roman Antiquities* (John Murray, 1875) 563.

<sup>29</sup> Berger (1953) 667. On civil penalties for theft in Roman law, see *The Digest of Justinian*, vol. 4, ed. Theodor Mommsen & Paul Krueger, trans. Alan Watson (Philadelphia, 1985) 737–59, 761, 765–68.

<sup>30</sup> Tai (2004) 37.



authority, the reality of medieval Europe was a plurality of autonomous and semi-autonomous political communities. Victim and attacker seldom shared any political allegiance.

One option was to seek redress directly from the attacker's own authorities, but more commonly, plaintiffs approached first their own authorities who might then intercede on their behalf. Such was the course of action pursued by Colomer and his fellow plaintiffs, the merchants and nobles whose cargo Colomer had carried, when they brought their case before the royal curia of King Martí I of Catalonia-Aragon. In their written depositions, or *libelli*, to the curia, Colomer claimed he had incurred some 9,000 gold Aragonese florins worth of damage to his ship and provisions, while the Valencian Ramon Almenar, who had chartered the voyage, claimed 6,000 florins worth of loss. In addition, the various merchants who had lost cargo aboard the ship and the shareholders in Colomer's venture claimed damages totalling more than 31 thousand florins. In total, more than 28 merchants and petty nobles came forward as plaintiffs.<sup>31</sup>

Convinced of the veracity of their claims, the royal curia took up the plaintiffs' case. Letters were dispatched to Genoa in January and May of 1339 petitioning the commune's French governor, Colart de Calleville, for restitution—de Nigro was, after all, a native of Genoa, as were several of his accomplices. Such restitution, the royal curia suggested, should be drawn from whatever assets de Nigro and his Genoese merchant-collaborators held in Genoa. At the same time, another letter was sent to the bailiff of Montpellier: Jean Cerda, another of de Nigro's companions, was a merchant from the city. Finally, the attack had also involved members of the French priories of the Knights Hospitallers. Martí's curia therefore dispatched additional letters to both the Grand Master of the Knights at Rhodes, Philibert de Nailac, under whose jurisdiction the order fell, and to King Charles VI of France as sovereign over the French merchants and Knights Hospitaller.<sup>32</sup>

Each letter named the plaintiffs and described the attack at Saint Macaró, providing a detailed statement of damages drawn from the depositions submitted before the curia. In describing the attack, the letters identified de Nigro and his accomplices as having perpetrated their plunder *in modo piratico* (in a piratical

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<sup>31</sup> Tai (1996) 523.

<sup>32</sup> Tai (1996) 559-60; Tai (2004) 49-50.

fashion) against ‘friends’.<sup>33</sup> This characterisation was important as belligerent rights during war existed as a matter of course; Genoa owed nothing to an *enemy*. It was therefore essential to establish that an attack had been perpetrated on *friends* who were owed the protection of treaty, alliance or simply truce.

It is tempting to read a modern meaning of piracy into the description of de Nigro’s attack as *in modo piratico*. But the expression ‘piratical’ carried with it a much narrower meaning, not pejorative or even invoking illegitimacy, but rather describing the *manner* of an attack. Thus, as Tai observes, in many situations the term was used interchangeably with *violenter* (violently) or *hostiliter* (in a hostile manner).<sup>34</sup> Indeed, Thomas Heebøll-Holm suggests that the term seems to refer simply to the waterborne nature of attack, such as in Abbot Suger’s chronicle of 12th-century France in which he described forces attacking Gournay Castle on the river Marne as fighting *piratarum more*.<sup>35</sup>

In fact, King Martí’s correspondence itself, while describing the act of depredation as ‘piratical’, contained no suggestion that the seizure might be considered criminal in any way. His letter to Governor Colart de Calleville had requested restitution for the losses caused by de Nigro’s seizure, but was altogether silent on the treatment of de Nigro himself. It contained no request for de Nigro’s capture or punishment. Likewise, his letters to Montpellier, King Charles VI, and Philibert de Nailac mentioned only the restitution demanded by Martí’s subjects. Moreover, his apparent indifference to the treatment of de Nigro was by no means exceptional. The legal sources from this period that deal with maritime plunder are almost entirely related to civil and prize disputes, not criminal prosecutions. Restitution of ship and cargo was a plaintiff’s primary concern, not punishment of the attacker.

This ambivalence towards the treatment of seaborne depredators is echoed in various codifications of maritime law at this time, such as the Catalan *Consolat de*

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<sup>33</sup> Tai (1996) 558-59.

<sup>34</sup> Tai (2004) 69

<sup>35</sup> Thomas K. Heebøll-Holm, *Ports, Piracy, and Maritime War: Piracy in the English Channel and the Atlantic, c. 1280 – c. 1330* (Brill, 2013) 15 citing Suger, *Oeuvres complètes de Suger*, ed. A. Lecoy de la Marche (Société de l’histoire de France, 1847) 42: ‘*Loricati et galeati de classe, piratarum more, audacissime committunt, repellents repellent*’.

*Mar.*<sup>36</sup> Drawn up in mid-13th-century Barcelona, the *Consolat de Mar* was the first comprehensive codification of maritime law in the Middle Ages. Writing in 1874, A.T. Whatley remarked that, in the *Consolat*, ‘we should, perhaps, expect to find the subject of piracy largely treated of and condemned, but it is not so’.<sup>37</sup> In dealing with instances of plunder, the *Consolat* referred to vessels engaged in an assault as ‘armed enemy ships’ (*lenys armats de enemichs*), and also characterised them as ‘evil ships’ (*mals lenys*) carrying ‘evil men’ (*males gents*).<sup>38</sup> Yet there is no suggestion that the depredation involved constituted any internationally proscribed crime or that the *mals gents* who committed acts of plunder were anything more than morally dubious. In short, the code’s specific provisions in no way proscribed maritime seizure, but merely sought to regulate its practice and the attendant commercial consequences. As J.W. Boulton puts it, the tendency of the *Consolat* and other codes during this period was ‘to regulate from the shore in order to mitigate the consequences of piracy rather than repress upon the sea’.<sup>39</sup>

Like its adjectival form, the term ‘pirate’, appears to have also been used in medieval Europe without any pejorative implication. In the 13th-century *Chronicle of Bury St. Edmunds*, the Genoese merchant Benedetto Zaccaria is identified as a ‘pirate from Genoa’ (*pirate de Ianuensibus*) and praised for his 1293 attack on a Muslim vessel and his seizure of the infidels’ possessions as booty.<sup>40</sup> Indeed, where one finds condemnation expressed in texts of the period, the term ‘pirate’ is conspicuously absent, as when Hugh Despenser the Younger is condemned for his acts of plunder in the *Vita Edwardi Secundi*. He is described not as a *pirate*, but a *belua marina* or sea

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<sup>36</sup> *Les costums marítimes de Barcelona universalment conegudes per Llibre del Consolat de mar*, available at [www.luisvives.com/servlet/SirveObras/jlv/09255007699869439647857/index.htm](http://www.luisvives.com/servlet/SirveObras/jlv/09255007699869439647857/index.htm) (last visited 30 April 2018). An English translation has been published as *Consulate of the Sea and Related Documents*, ed. & trans. Stanley S. Jados (University of Alabama Press, 1975).

<sup>37</sup> A.T. Whatley, ‘Historical Sketch of the Law of Piracy’ 3 *The Law Magazine and Review* (1874) 536, 540.

<sup>38</sup> Tai (1996) 74.

<sup>39</sup> J.W. Boulton, ‘Maritime Order and the Development of the International Law of Piracy’ 7 *International Relations* (1983) 2335, 2340.

<sup>40</sup> Heebøll-Holm (2013) 18 quoting *The Chronicle of Bury St. Edmunds, 1212-1301*, ed. & trans. Antonia Gransden (Nelson’s Medieval Texts, 1964) 118: *Habita uictoria de paganis in mari Mediterraneo quidam pirata de Ianuensibus, Benedictus Zacharie dictus, eorumque spoliis potitus cuilibet quinque regum Christianorum uidelicet Francie, Anglie, Alemannie, Hysppannie et Cypri, duodecim paganos transmisit captiuos.*

monster.<sup>41</sup> Heebøll-Holm, in his detailed study of 13th and 14th century legal, diplomatic and narrative sources concludes that ‘pirate’ was used strictly ‘*terminus technicus*’ and invoked most often simply to mean nothing more than a ‘warrior specialized in maritime warfare’.<sup>42</sup>

Certainly, efforts were made to curb plunder. Genoa, for instance, promulgated a new civil and criminal code in 1375. Citizens were forbidden to arm without formal authorisation and those who did so were subject to capital and corporal sanction.<sup>43</sup> Indeed, even before the promulgation of the new code, Genoa had executed an unlicensed depredator in 1346. Yet across western Europe, the enforcement of criminal penalties for maritime depredation was at best haphazard. Reginald Marsden, in his oft-cited collection of historical *Documents Relating to Law and Custom of the Sea*, could find only a single recorded death sentence for piracy in English sources before the 16th century: the hanging of William Briggeho in 1228.<sup>44</sup> More recently, Heebøll-Holm, analysing English and French legal and diplomatic records, reports finding only a handful of additional cases.<sup>45</sup> ‘Cases of persons punished for piracy in the Middle Ages’, he writes, defining piracy simply as seaborne appropriation, ‘are rather hard to come by’.<sup>46</sup> Despite employing violence and even killing in the course of their maritime theft—crimes which, on land certainly, would attract punishment—‘pirates’ were rarely indicted of any crime.<sup>47</sup>

Further complicating matters is the fact that even when plunder at sea was followed by legal penalty, it is difficult to separate out in the sources what specific acts were being punished. In 1369, for instance, the Catalonia-Aragon crown tortured and executed Jean Bayonne (Jean de Bourguignon) of Provence for an assault on the merchant ship *Saint Anthony*. It was certainly a violent robbery: the captain, Guillem Arius, had been thrown overboard to his death. Yet Bayonne had

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<sup>41</sup> Heebøll-Holm (2013) 18-19 quoting *Vita Edwardi Secundi: The Life of Edward the Second*, ed. & trans. Wendy Childs (Clarendon Press, 2005) 196.

<sup>42</sup> Heebøll-Holm (2013) 17.

<sup>43</sup> Tai (1996) 213.

<sup>44</sup> Reginald G. Marsden (ed.), *Documents Relating to Law and Custom of the Sea*, vol. 1 (Lawbook Exchange, 1999) [1915] 6.

<sup>45</sup> Heebøll-Holm (2013) 239.

<sup>46</sup> *Ibid* 238. Heebøll-Holm’s study focuses primarily on Bayonne, the Cinque Ports, and the Norman ports.

<sup>47</sup> *Ibid* 236, 238.

been engaged by the rebel Judges of Arborea to challenge Catalan-Aragonese authority on Sardinia.<sup>48</sup> Did his punishment stem from his violent seizure or from his rebel status? Contemporaneous sources are ambiguous.

What can we conclude about the pirate in late medieval southern Europe? The pirate remained, as in Rome, a figure associated with maritime violence, one that carried no inherent criminal or even pejorative connotation. Indeed, a pirate could be celebrated for his acts of plunder, as with the Genoese Benedetto Zaccaria. The term, and its adjectival counterpart, *in modo piratico*, appear to have had no specific meaning beyond a general invocation of maritime violence. This is perhaps nowhere clearer than in the 13th century *Law of Aragon*, which held that '[a]ny pirate who arms against enemies must give security not to hurt friends, and to bring captures to the place from which he started'. The term 'pirate' here explicitly encompassing state-sanctioned mariners—'privateers', as such individuals would come to be known in the modern era.<sup>49</sup>

### LEGITIMATE AND ILLEGITIMATE PLUNDER

The extant sources do not record what, if any, response King Martí's letters received from the Governor of Genoa, the bailiff of Montpellier or the King of France. Faced with an earlier similar petition from the Venetian Doge, the Genoese governor, de Calleville, had offered the exculpatory argument that de Nigro had acted without the consent of the commune, citing his banishment and alleged attacks upon fellow Genoese.<sup>50</sup> No doubt this remained the governor's position. A response was, however, received from the Knights Hospitaller. Writing to Martí in June 1399, the Grand Master denied the accusations against the order. Acknowledging that several knights, including the Grand Prior of France, had been on board a vessel present during de Nigro's attack on Colomer, he nonetheless insisted that none had been complicit in the attack itself.<sup>51</sup>

Responses such as those from de Calleville to the Doge or de Nailac to Martí were not uncommon. In the Mediterranean of the 14th century, when maritime theft

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<sup>48</sup> Emily S. Tai, 'The Legal Status of Piracy in Medieval Europe' 10 *History Compass* (2012) 838, 841.

<sup>49</sup> Whatley (1874) 540.

<sup>50</sup> Tai (1996) 562

<sup>51</sup> *Ibid* 564.

was common and plunder frequent, authorities were in no rush to offer restitution to every alleged victim. In such situations, plaintiffs were not without recourse. Martí's letters to de Calleville et al. had closed with the threat of reprisal should redress not be provided in good speed.<sup>52</sup>

Reprisals—*repraesalia* in contemporary Latin sources—sought to provide compensation for injuries and hostile acts by foreigners.<sup>53</sup> A reprisal opened the way to such compensation by entitling its holder to recover her losses not from her attacker directly, but from that attacker's *compatriots*.<sup>54</sup> They had their origin in the Germanic laws and customs of the Teutonic tribes, originally in the context of family feuding: revenge for a wrong was permitted not only against the perpetrator but also against his family members. Their extension to inter-polity relations occurred only gradually and by no means displaced this earlier form of reprisal. As late as 1260, the principle arose in a trial before the Parlement in Paris. Marc Bloch describes how the knight Louis Defeux demanded compensation from one Thomas d'Ouzouer who had attacked and wounded him. D'Ouzouer's defence rested on the fact that he himself had been previously attacked by Defeux's nephew. The court, Bloch recounts, sided with d'Ouzouer: Defeux was indeed liable for his relative's actions.<sup>55</sup>

Already in the ninth century some basic forms of reprisal could be found in northern Italy, although they would become common features of inter-polity relations only from the late-12th century.<sup>56</sup> In the 13th century, their use spread west from Mediterranean Italy to Aragon and France and, by the 14th century, their use had spread as far as England: the earliest mention of reprisal in English sources is from

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<sup>52</sup> Ibid 558-59.

<sup>53</sup> The institution of reprisals would develop further as remedies for breaches of international obligations, especially within the context of the law of war and the use of force. On armed reprisals in modern international law, see Dino Kritsiotis, 'Topographies of Force', in Michael N. Schmitt & Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Martinus Nijhoff, 2007) 29 and Dino Kritsiotis, 'International law and the relativities of enforcement', in James Crawford & Martti Koskeniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 245.

<sup>54</sup> M.H. Keen, *The Laws of War in the Late Middle Ages* (Routledge, 1965) 218.

<sup>55</sup> Marc Bloch, *Feudal Society, Volume I: The Growth of Ties of Dependence*, 2nd ed., trans. L.A. Manyon (Routledge, 1962) 126.

<sup>56</sup> Hans Spiegel identifies several treaties from this period limiting reprisals: Hans Spiegel, 'Origin and Development of Denial of Justice' 32 *American Journal of International Law* (1938) 63, 64-65.

1293,<sup>57</sup> while an ordinance from 1354 provides formal provisions for the granting of reprisals.<sup>58</sup>

In practice, reprisals allowed a merchant or traveller robbed on foreign territory by the subjects of a foreign prince, or a creditor seeking payment from a foreign debtor, to recover her losses. Where redress was denied by the foreign prince, the victim or creditor could seek authorisation from her own political masters to exact a reprisal against citizens of the offending polity.<sup>59</sup> Authorisation for reprisal was given in the form of a letter of reprisal or *marque*—*licentia marchandi* or simply *marcha*, derived from the German *mark* meaning frontier—the license a commission, in effect, for private justice along the fluid borders of medieval polities.

Reprisals, however, presented a difficulty for jurists schooled in the Roman tradition. In their narrowest sense, when exercised immediately and directly against the original malefactor, a reprisal might be understood as on par with self-defence. But the collective responsibility implied by their common, more expansive meaning, and found in early Teutonic legal culture, ran contrary to Roman law. Mediterranean jurists could cite numerous examples, such as Justinian's *Novella 52*, which appeared to leave no room for ambiguity: 'Nor shall one man be troubled or injured because some other man struck or injured some one.'<sup>60</sup> Yet a reprisal specifically involved making the innocent suffer for the guilty: on the view of many 14th-century jurists such as Albericus de Rosate, they were simply contrary to natural law.<sup>61</sup> Writing at the end of the century, Honoré Bonet likewise insisted that a reprisal should be 'by no means permitted, and the law does not allow its exercise; for on this theory one person suffers loss for another, and receives damage and molestation for the deeds of another, which ought not to be, either according to reason or written law'.<sup>62</sup> Albericus and likeminded thinkers could cite not only Roman authorities but also canon law. The Second Council of Lyon in 1274 had damned the practice as against 'law and natural

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<sup>57</sup> Marsden (ed.) (1999) ix-x, 19.

<sup>58</sup> Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge University Press, 2005) 79 citing 27 Edw. 3 c.17. On reprisals in England more generally, see Rodger (1997) 199-200.

<sup>59</sup> Neff (2005) 77; Sereni (1943) 44. On the origins of reprisals, see also Spiegel (1938).

<sup>60</sup> 'Justinian's Novels', *Annotated Justinian Code*, available at [www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/novels/](http://www.uwyo.edu/lawlib/blume-justinian/ajc-edition-2/novels/) (last visited 30 April 2018).

<sup>61</sup> Stephen C. Neff, *Justice Among Nations: A History of International Law* (Harvard University Press, 2014) 89.

<sup>62</sup> Honoré Bonet, *The Tree of Battles*, trans. G.W. Coopland (Harvard University Press, 1949) [1387] 173.

equity’ and threatened excommunication to those who took or even allowed reprisals against ecclesiastical persons or church property.<sup>63</sup>

Such prohibitions failed to eliminate reprisals and the late 13th and early 14th centuries in fact saw a steady increase in their incidence.<sup>64</sup> The first efforts to legitimise the practice came with the identification of exceptions to their prohibition. The 13th-century French canonist Guilielmus Durantis, or William Durand, set out a number of exemptions to the Council of Lyon’s ban: ‘heirs punished for the crimes of their parents, lords punished for the crimes of their slaves, illegitimate children punished for the sins of their fathers’.<sup>65</sup>

Exceptions went only so far to justifying the very real incidence of reprisals. One of the first thinkers to offer a systematic justification for reprisals was Giovanni d’Andrea (Johannes Andreae).<sup>66</sup> Giovanni was faced with Roman and canon law clearly holding that innocent victims were not to be punished for the misdeeds of others. How, then, could the apparently innocent victims of reprisals in fact be understood to be legitimate targets? They would have to be implicated, Giovanni realised, in the original injustice giving rise to the reprisal.

The injustice punished by a reprisal, Giovanni argued, was not the original robbery, but rather the failure of a prince or judge to do justice—that is, to make right the original wrong. And a community, Giovanni sought to show, could be held responsible for its ruler’s actions. St Augustine had argued that a war is just where it ‘avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly’.<sup>67</sup> Since it was legitimate to wage war against a city refusing to make amends or do justice for the wrongs of its citizens, it was surely legitimate also, Giovanni reasoned, to take *reprisal* against that city. Thus, Giovanni could conclude, a reprisal was allowed ‘against a negligent lord and city, after they have been summoned [to do

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<sup>63</sup> ‘Second Council of Lyons – 1274’, *Papal Encyclicals Online*, available at [www.papalencyclicals.net/councils/ecum14.htm](http://www.papalencyclicals.net/councils/ecum14.htm) (last visited 30 April 2018).

<sup>64</sup> Jasonne Grabher O’Brien, ‘In defense of the mystical body: Giovanni da Legnano’s theory of reprisals’ 1 *Roman Legal Tradition* (2002) 26, 26.

<sup>65</sup> Quoted in Frederic L. Cheyette, ‘The Sovereign and the Pirates, 1332’ 45 *Speculum* (1970) 40, 59.

<sup>66</sup> Johannes Andreae’s *De regulis iuris* of the *Liber Sextus*, published in Pavia in 1483 although dating from the start of the 14th century, is discussed in Cheyette (1970) 59-61 and it is on the latter that I rely here.

<sup>67</sup> St Augustine quoted in Thomas Aquinas, *Summa Theologica*, vol. 3 (Cosimo Classics, 2007) 1354.



justice] and after the injured party's judge has declared the guilty city and lord negligent and in default.'<sup>68</sup>

Giovanni's formulation pointed, however, to a further problem. If the innocent were, under particular circumstances, implicated in the guilt of their ruler, who had the authority to punish them? Innocent IV had made clear that a war 'properly so called' could be declared only by a prince with no superior: a just war was the prerogative of an independent prince alone.<sup>69</sup> The grantor of a reprisal, it followed, must also be a sovereign with no superior. But what of the negligent judge? Could the injured party's ruler not still appeal to that judge's superior? As Giovanni himself noted, 'in the absence of a secular judge an ecclesiastical judge can always be called upon'.<sup>70</sup> The issue was further complicated as, at least *de iure*, rulers of the Italian communes remained subjects of the Holy Roman Emperor.

### THEORISING REPRISALS

In practice, officially sanctioned reprisals along the Mediterranean coast were still relatively limited at the close of the 13th century. Much as in Colomer's case, the Italian communes and other Mediterranean princes, as well as the Parlement of Paris, issued reprisals only when other attempts at recovery had failed. 'The correspondence from court to court,' Cheyette notes, 'even when the individuals originally involved were of no great account, could sometimes become voluminous and continue for years.'<sup>71</sup>

As the new century progressed, however, the pressures militating in favour of the granting of reprisals increased. In the first place, the rise of the Italian city-states throughout the century contributed to the Holy Roman Emperor's *de facto* loss of power. If *de iure* the Italian communes could exercise jurisdiction only within their walls, the Emperor was 'often *de facto* unable to adjudicate disputes that were outside

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<sup>68</sup> Quoted in Cheyette (1970) 60.

<sup>69</sup> Innocent IV, *Commentaria*, cited in Frederick H. Russell, *The Just War in the Middle Ages* (Cambridge University Press, 1975) 145-46.

<sup>70</sup> Quoted in Cheyette (1970) 61.

<sup>71</sup> Cheyette (1970) 62.

the scope of the jurisdiction of individual city-states. This led to a dramatic rise in the use of reprisals as a means of individual self-help'.<sup>72</sup>

At the same time, the resort to self-help became particularly important in view of the increasing alienation of the city-states to merchant capital. As Frederic Chayette observes, 'the control the great [merchant banking] houses exercised over their communal governments virtually immunized them to judicial attacks in their local courts'. The Florentine bankruptcies of the 1340s—the collapse of the Bardi and Peruzzi companies most notable—brought such concerns to a head. Reprisal was 'thus in practice not the last but sometimes the only recourse'.<sup>73</sup>

These were the realities facing legal thinkers by mid-century. The most important such thinker was Bartolus de Saxoferrato, a professor at Pisa and the most famous of the postglossators. In 1353, Bartolus set out his own answer to the question of reprisals in a treatise titled *Tractatus represaliarum*.<sup>74</sup> Like Giovanni, Bartolus could find no license for reprisals under Roman or canon law.<sup>75</sup> But this was hardly surprising, he noted, as reprisals were not necessary in Rome at its apex when centralised power was strong. Only with the collapse of centralised power was there no longer a 'supervisory authority' to oversee relations amongst the empire's various communities. Indeed, in the face of *de facto* imperial decline, the Italian communes had, from the 13th century, sought to extend their traditionally limited jurisdiction. Their tribunals increasingly developed inquisitorial functions and by the time Bartolus was writing, many communal cities were asserting the same 'judicial solidity', with their own policing and judicial institutions, as other polities possessing 'regalia or imperial rights'.<sup>76</sup> Indeed, in Venice, the *Signori di Notte* was already exercising policing functions by the late 13th century.

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<sup>72</sup> Jacob Giltaij, 'Roman Law and the *causa legitima* for reprisals in Bartolus' 20 *Fundamina* (2014) 349, 352.

<sup>73</sup> Chayette (1970) 62. See also Marvin B. Becker, *Florence in Transition*, vol. 1 (Johns Hopkins Press, 1967) 158-59.

<sup>74</sup> The fullest engagement with Bartolus remains Cecil N. Sidney Woolf, *Bartolus of Sassoferrato: His Position in the History of Medieval Political Thought* (Cambridge University Press, 1913). For a briefer biography of Bartolus, see Augusto P. Miceli, 'Forum Juridicum: Bartolus of Sassoferrato' 37 *Louisiana Law Review* (1977) 1027. See also J. Neville Figgis, 'Bartolus and the Development of European Political Ideas' 19 *Transactions of the Royal Historical Society* (1905) 147; Anna Toole Sheedy, *Bartolus on Social Conditions in the Fourteenth Century* (Columbia University Press, 1942).

<sup>75</sup> For a detailed discussion of the role of Roman law in Bartolus's treatment of the *causa legitima* for reprisal, see Giltaij (2014). See also Laurens Winkel 'Francisco de Vitoria on just war on both sides and on the legal position of Burgundy' 75 *The Legal History Review* (2007) 355, 358.

<sup>76</sup> John Watts, *The Making of Polities: Europe, 1300-1500* (Cambridge University Press, 2009) 215.

The resulting tension between *de iure* imperial power and increasing independence of the Italian cities was ‘one of the central dilemmas of Italian urban politics’ at this time.<sup>77</sup> It was also one in which Bartolus was immersed. Already before tackling the question of reprisals, Bartolus had been concerned with establishing municipal sovereignty, an issue which he addressed in his numerous *consilia* as well as his commentaries on Justinian’s *Corpus Iuris Civilis* and works such as ‘On the Government of the City’. The motivation undergirding much of this work was to offer the northern Italian communes a legal defence of independence against the Holy Roman Empire.<sup>78</sup> In his commentary on the Code, for instance, Bartolus accepted that *de iure*, the Emperor remained sovereign and that the Empire constituted, in Quentin Skinner’s paraphrase, ‘the sole jurisdictional unit in Europe, with the independent kingdoms or *regna* being no more than Imperial provinces, while the City Republics or *civitates* are equivalent to Roman Imperial cities’.<sup>79</sup> But regardless of the Emperor’s *de iure* status, there were, Bartolus observed, ‘many peoples who *de facto* do not obey him.’<sup>80</sup> Likewise, he insisted, if it was hardly in doubt that *de iure* the Emperor alone enjoyed the power to make laws, ‘in our day all the governors of cities throughout Italy’ *de facto* exercise that power.<sup>81</sup> Regardless of what claims to jurisdiction the Emperor might make, a commune which in practice wielded its own *imperium* and recognised no superior should be treated *sibi princeps*, a prince unto itself.<sup>82</sup>

This was, Skinner suggests, nothing short of a ‘revolutionary political claim’, one which was soon generalised to all of Europe: *Rex in regno suo est Imperator*—‘every king within his own kingdom is equivalent in authority to the Emperor’.<sup>83</sup> What did this mean for reprisals and the delimitation of legitimate maritime depredation? If the new political communities in northern Italy and along the Mediterranean coast

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<sup>77</sup> Ibid 257-58.

<sup>78</sup> Quentin Skinner, *The Foundations of Modern Political Thought*, vol. 1 (Cambridge University Press, 1978) 9.

<sup>79</sup> Ibid.

<sup>80</sup> Quoted in *ibid*.

<sup>81</sup> Quoted in *ibid* 9-10. As Woolf puts it, ‘the effective superiority of the Emperor over the whole Empire is *de facto* wanting’: Woolf (1913) 201. See also Leo Mucha Mladen, ‘Bartolus the Man’, 314 *Annals of the New York Academy of Sciences* (1978) 311, 334-35.

<sup>82</sup> Magnus Ryan, ‘Bartolus of Sassoferrato and Free Cities’ 10 *Transactions of the Royal Historical Society* (2000) 65, 66.

<sup>83</sup> Skinner (1978) 11. On the novelty of Bartolus’s argument, see also Jo Canning, *The Political Thought of Baldus de Ubaldis* (Cambridge University Press, 1987) 97.

were understood as *civitates superiorem non recognoscentes*, then their leaders were in a position to issue reprisals: in short, to determine the legitimacy of violence at sea. A reprisal was to be granted by a sovereign prince and justified on the same grounds as would render a war just. Indeed, on Bartolus's view reprisals were a species of public war: *concedere repraesalias est indicere bellum*.<sup>84</sup> Like a public war, then, a reprisal was the act of one sovereign against another.

In taking up the task of setting out a legal framework for the practice of reprisals, Bartolus and his contemporaries were not starry-eyed about this recourse to violence. While the threat of reprisal encouraged royal courts and communal rulers to address the grievances of foreign merchants, left unregulated they could easily lead to a state of continuous violence.<sup>85</sup> If reprisals were granted too easily, the injured would likewise resort to violence to recover their losses, with a quick descent into an endless series of reprisal and counter-reprisal. An 'odious' expedient, Bartolus recognised, reprisals were not to be granted lightly.<sup>86</sup>

In linking the practice to the *ius belli* and just war, the Pisan jurist had found both a source of legitimation for reprisals but also an apparent check: just as waging war required the authorisation of a superior authority, so too did reprisals. Only a prince who has no superior may grant them: *ex parte concedentis repraesalias, requiritur quod sit talis qui superiorem non habet*.<sup>87</sup> Yet, in the face of the plurality of polities claiming de facto sovereignty, the formal requirements of *civitas sibi princeps* and a *causa legitima* would go only so far in limiting reprisals.

One answer was to insist on a strict procedure for the granting of reprisals. The importance of procedural rectitude was already a feature of Bartolus's writing. In one of his numerous *consilia*, Bartolus considered a case involving self-defence and stated that the judgment was void due to improper consideration of the plea and the failure to hear witnesses. His conclusion rested on these procedural aspects alone, not the legality of the alleged act or plea themselves.<sup>88</sup>

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<sup>84</sup> Bartolus de Saxoferrato, *Tractatus Repraesalium* (*Tractatus*) Quaestio. III. 2 quoted in Woolf (1913) 204.

<sup>85</sup> Jens Bartelson, *A Genealogy of Sovereignty* (Cambridge University Press, 1995) 106-107.

<sup>86</sup> *Tractatus*, Quaestio. II. 4 quoted in Woolf (1913) 206.

<sup>87</sup> *Tractatus*, Quaestio. III. 2, quoted in Giltaij (2014) 353 note 25.

<sup>88</sup> Bartolus of Saxoferrato, *Consilia* 228 cited in Giltaij (2014) note 352 note 20.

In the case of reprisals, Bartolus set down a careful procedure to be followed. An injured individual must first approach an accused's *civitas* requesting judgment from the authorities there: that is, from a judge with authority over the accused. Like Giovanni, Bartolus was adamant that the only justification for a reprisal was the failure of the foreign judge or prince to render justice. Reprisals, he explained, echoing Giovanni, 'are not granted by reason of the wrongful act of the private person [who actually committed the wrong], but by reason of the wrong of the whole city in refusing to do justice'.<sup>89</sup> Only when the injured party fails to gain redress abroad may he seek a reprisal from his own sovereign who, in turn, should consider all the evidence presented before him and establish that an injustice has indeed been done.<sup>90</sup> Bartolus further indicated that the accused should also be allowed, where possible, to offer a defence.<sup>91</sup> If justice was still denied, then a reprisal could be licensed on behalf of the injured party, the loss to be recovered from the subjects of the sovereign who has allowed the injustice—the failure to provide redress—to be perpetrated.<sup>92</sup>

Bartolus's formulae were highly influential. Giovanni da Legnano, following quickly on his heels, would repeat much of the latter's reasoning in his own *Tractatus*.<sup>93</sup> Bartolus's influence could also be found well beyond the Italian communes or even the Mediterranean. More than three centuries after Bartolus wrote his tract, much the same reasoning could be found in the writings of Irish jurist Charles Molloy.<sup>94</sup> In England, already from the early 15th century, the issuing of reprisals was regulated by statute, while in France, Parlement heard requests for reprisal, dispatching letters requesting justice and, if unanswered, issuing letters of marque under the King's seal.<sup>95</sup>

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<sup>89</sup> '*non exigitur propter delictum illius private sed propter delictum totius civitatis denegantis facere justitiam*': quoted in Sereni (1943) 47.

<sup>90</sup> *Tractatus*, Quaestio. IV. 1 cited in Keen (1965) 221.

<sup>91</sup> '*item quod eis, contra quos conceduntur, sit salva defensionis facultas, quod est de jure naturali vel gentium, quod per principem tolli non potest*': *Tractatus*, Quaestio. IV. 1 quoted in Keen (1965) 221 note 1.

<sup>92</sup> The procedure set out by Bartolus is discussed in further detail by Keen (1965) 219-21. See also Giltaij (2014).

<sup>93</sup> Giovanni da Legnano, *De bello, de represaliis et de duello*, ed. Thomas E. Holland, trans. James L. Brierly (Carnegie Institution, 1917). For a discussion of this tract, see O'Brien (2002). Bonet also relied on Bartolus in his own discussion of reprisals: see Bonet (1949) 173-87.

<sup>94</sup> Charles Molloy, *De jure maritimo et navali: or a Treatise of Affairs Maritime, and of Commerce*, 2 vols, 9th ed. (T. Waller, 1769) [1676].

<sup>95</sup> Keen (1965) 221.

### ‘A SEQUENCE OF MUTUAL REPRISALS’

Bartolus would no doubt have approved of the Catalan-Aragonese procedures for the granting of reprisal on display in the case of Colomer and de Nigro. King Martí’s royal curia had carefully considered the *libelli* offered by Colomer and his fellow plaintiffs before dispatching letters to Genoa and elsewhere. In the event, their efforts to gain redress from the Genoese were thwarted by changing political imperatives. In 1396, Genoa had become a French protectorate. The ‘long shadow of the French Crown’ would have made Martí hesitant to antagonise his northern neighbour by granting a reprisal that would hurt the crown’s subjects in Genoa. Nor was Martí likely inclined to pursue a reprisal more doggedly in the face of diplomatic negotiations with Genoa which would ultimately lead to a treaty in December 1402.<sup>96</sup>

Philibert de Naillac and the Knights Hospitaller were another matter. The Catalan-Aragonese crown and the Hospitallers were bitter rivals throughout much of the fourteenth century. Faced now with Colomer’s suit, de Naillac had denied any liability for the attack; according to him, the presence of Knights aboard de Nigro’s ship did not make them accomplices to the seizure. The royal curia was not persuaded and, in June 1400, King Martí circulated instructions to royal officials throughout the kingdom informing them that a reprisal had been issued against the Knights of Saint John of Jerusalem for a duration of five years and up to a value of more than 30 million Aragonese pounds. The Order enjoyed an extensive network of priories throughout western Europe, including many in Catalonia-Aragon, from which it amassed sizeable revenues through annual collections. The indemnity would thus be drawn from the Hospitaller’s collections, to be seized from the Order’s priories throughout the kingdom.<sup>97</sup>

Often, as in this case, reprisals were collected by state officials on behalf of their beneficiaries. Were a merchant awarded reprisal for an illegitimate seizure by a Genoese depredator, for instance, this might take the form of an import duty levied on Genoese merchants. Alternatively, it might take the shape of seizure of goods directly from merchants of the offending polity—Genoese merchants based in Catalonia-

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<sup>96</sup> Tai (1996) 563; Tai (2004) 50.

<sup>97</sup> Tai (1996) 565; Tai (2004) 50-51. On relations between the Hospitallers and Catalonia-Aragon, see Anthony Luttrell, ‘The Aragonese Crown and the Knights Hospitallers of Rhodes: 1291-1350’ 76 *English Historical Review* (1961) 1.

Aragon, for instance. No less often, however, a reprisal might be effected by the injured party herself. With a writ of reprisal in hand, she could seize goods equal to the value of the indemnity claimed in what was in effect a retaliatory act of plunder.

Of course, in practice reprisals often led to further retaliation—precisely as Giovanni and Bartolus feared. In May 1401, the Grand Prior of France, Regnault de Giresme, put into port at San Feliu de Guixolls on his way to Rhodes. Citing the *marque* issued the previous year, King Martí's officials seized the Hospitaller property. The Order, however, had a friend in the French crown and Charles VI threatened 'retaliatory reprisals against the subjects of Catalonia-Aragon' were the *marque* not retracted. It was subsequently suspended and, in 1405, rescinded altogether.<sup>98</sup>

Similarly, when an individual merchant in possession of a writ of reprisal took to the sea to extract an indemnity from his own attacker's compatriots, his subsequent victims were no happier knowing that their loss had been authorised by some foreign prince. To the Knight Hospitaller whose goods were seized in an Aragonese port, or whose ship was sacked by a Catalan merchant, the licensed act of plunder appeared no more legitimate than an unlicensed seizure. Indeed, in the eyes of the new victim and his own political authorities, the retaliatory attack lacked all legitimacy. The new victim's judge—in our example, Philibert de Naillac—had, after all, already denied the legitimacy of the original victim's claim to restitution. It was precisely that denial that constituted the 'injustice' to which the reprisal was to rectify. In practice, then, one reprisal often begat another.

The same act of plunder could appear as both a violent injustice and a justified act of vengeance. The legitimacy of plunder was not rooted in the act itself, but the political recognition bestowed on it. As Spiegel notes, 'whether justice had actually been denied in a particular case was . . . purely a question of power.' Once one community had authorised its members to make reprisals against another polity, one alleged to have denied justice, 'there was no impartial judge who might have been entitled to investigate the underlying facts'.<sup>99</sup> The consequences of the denial of justice in practice overshadowed the actual doctrine set out so painstakingly by Bartolus and his contemporaries. One consequence of this state of affairs, Mark Hanna observes, is

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<sup>98</sup> Tai (1996) 572-73.

<sup>99</sup> Spiegel (1938) 71

that much ‘early modern maritime violence and plunder’ might best be understood as ‘a sequence of mutual reprisals’.<sup>100</sup>

What might we conclude about the pirate in this period? As with antiquity, one can conclude that the modern figure of the pirate had not yet taken form. A distinction was starting to take shape between legitimate and illegitimate depredation, albeit one that in practice left much scope for conflicting judgements. This distinction, based in a theory of legitimate reprisals rooted in sovereign authority, was still primarily concerned with the resolution of property disputes—the determination of prize and claims to restitution, in essence an extension of the rules of postliminy to private disputes. At the same time, determinations of legitimacy remained framed in terms of the law of war. The theory of reprisals was fundamentally rooted in just war concepts, not criminal law: official license by a sovereign could qualify civilians involved in maritime depredation as public enemies, granting them the rights of a belligerent including the right to retain booty. While the framing of *unauthorised* maritime depredation as illegitimate vaguely gestures to certain modern elements of the piratical identity, the figure of the *hostis humani generis* remained beyond the horizon.

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<sup>100</sup> Mark G. Hanna, *Pirate Nests and the Rise of the British Empire, 1570-1740* (University of North Carolina Press, 2015) 35.



## CHAPTER 4

### The pirate, the devil and universal enmity

In 1504, two galleys made their way across the Tyrrhenian Sea. Flying the colours of Pope Julius II, not long enthroned in St Peter's chair, the galleys were richly laden with cargo from Genoa destined for Rome's port at Civitavecchia. As they passed in sight of the island of Elba, off the coast of Tuscany, they encountered a small galliot captained by one Arūj Barbarossa, named for his scarlet beard. Arūj and his brother Khair ad-Dīn, originally from the Aegean island of Lesbos, had achieved a degree of fame in the eastern Mediterranean raiding Christian trading galleys before moving west to the North African coast. The island of Djerba, in the Gulf of Tunis, provided a base for raiding trips into the Tyrrhenian.

Despite the much larger size of the papal galleys, Arūj enjoyed the element of surprise. The 18th-century English historian Joseph Morgan, drawing on contemporary accounts, describes the attack. As the galliot pulled alongside the first galley, the papal sailors broke into 'the utmost Hurry and apparent Consternation' upon seeing the 'Turkish Habits' of Arūj's men.

The Turks, encouraged by the Confusion in which they perceived those on board the Galley, got as near the Enemy as they could, and pouring in their Shot and Arrows very smartly, killed some Christians, wounded many, and terrified all the rest; so that with small Opposition and less Damage, they immediately boarded, and forced her to a Surrendry.<sup>1</sup>

The second galley was taken with equal ease and Arūj returned triumphant to the Tunisian port of La Goulette. The Spanish chronicler Diego Haedo, in his *Topographia e Historia General de Argel*, describes the reaction on both sides of the Mediterranean:

The wonder and astonishment that this notable exploit caused in Tunis, and even in Christendom, is not to be expressed, nor how celebrated the name of Arūj Rais was become from that very moment; he being

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<sup>1</sup> Joseph Morgan, *A Complete History of Algiers* (A. Bettesworth & C. Hitch, 1731) 224. Morgan draws heavily on Luis del Marmol Curvajal's *Descripción de Africa* (1573), and Diego de Haedo's *Topographia e Historia General de Argel* (1612).

held and accounted, by all the world, as a most valiant and enterprising commander.<sup>2</sup>

Further attacks would follow. The next year, off the coast of Sicily, the brothers took the *Cavalleria*, a Sardinian warship bound for Naples. By 1510, the Barbarossas commanded eight galliots and were harassing Christian shipping across the western Mediterranean, quickly establishing themselves as the most famous Barbary raiders of the early 16th century.

We have seen in the previous chapter that, by the 15th century, a distinction had emerged between legitimate and illegitimate maritime depredation. The latter had become synonymous with an absence of authorisation by a recognised sovereign, although pirate and piratical—*in modo piratico*—remained ambiguous as terms, not clearly mapping onto either side of the juridical divide. Chapter 3 focused on the development of this distinction within the context of an emerging plurality of Mediterranean polities dominated by merchant capitalist interests. Increasingly, however, maritime depredation was evaluated not solely through the lens of sovereignty, but also against a background of religious enmity. Thus, while Haedo could commend Arūj as a ‘valiant and enterprising commander’, he could also demonise him as a figure of malevolence. The Muslims of the North African littoral, of whom the Barbarossas were exemplars, were, in Haedo’s view, an uncivilised, brutish population, sadistic with an atavistic propensity to greed and violence. The mere sight of their ‘Turkish Habits’ was enough to instil fear and loathing in the Christian sailors. Such attitudes were a staple of anti-Muslim polemics in a 16th century marked by Christian chauvinism and racism rooted in theological hostility to Islam.

This religious aspect of maritime depredation is largely absent from dominant accounts of the epoch. Piracy, in the standard Weberian narrative, is synonymous with unauthorised plunder, suppression becoming easier with the emergence and consolidation, in the 16th century, of sovereign territorial states and the concomitant transition from a religiously defined order to a secular order of inter-state intercourse.<sup>3</sup> Such accounts, however, overlook the extent to which the Mediterranean continued to

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<sup>2</sup> Diego de Haedo’s *Topographia e Historia General de Argel* quoted in Ernle Bradford, *The Sultan’s Admiral: The Life of Barbarossa* (Hodder & Stoughton, 1968) 13.

<sup>3</sup> See Janice E. Thomson, *Mercenaries, Pirates, and Sovereigns* (Princeton University Press, 1994).

reflect an enduring ambiguity between what Molly Greene has called ‘two competing visions . . . one territorial, the other religious’.<sup>4</sup> The merchants, ‘pirates’ and other individuals who traversed the ‘inland sea’ were the subjects of sovereigns, but they were also Muslims, Christians and Jews. And many of these actors themselves continued to define friends and enemies, and the legitimacy of depredations, in religious terms. ‘Time and again’, Greene observes, ‘they insisted on a world divided into Christians and infidels’.<sup>5</sup>

The Mediterranean, in short, was not only a collection of sovereign states but also a frontier where ‘two hostile religions face[d] each other in perpetual enmity’.<sup>6</sup> This was the ‘forgotten frontier’, as Andrew Hess famously called it.<sup>7</sup> Whereas Braudel had emphasised the geographical unity imposed by the Mediterranean on its people and polities, Hess insisted that the region in the 15th and 16th centuries was in fact marked by a separation of ‘well-defined cultural spheres’.<sup>8</sup> Reflexive identification of Europe with Christendom, as in Haedo’s account of Barbarossa, was the norm.

This chapter argues that these religious identities and ideologies were important in shaping emerging conceptions, popular and legal, of maritime depredation and the figure of the pirate. Specifically, it suggests that the association of the pirate with universal enmity has its roots in Christian theology and its identification of a universal enemy of the Christian community. This tradition, the chapter argues, came to inform Christian views of the Muslim pirates of the 16th-century Mediterranean, such as the Barbarossas, against the background of Ottoman expansion and the perceived existential threat it, and they, posed to a universal Christian community. The universal enmity of the pirate, in other words, was in its initial conception rooted in religious ideology.

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<sup>4</sup> Molly Greene, *Catholic Pirates and Greek Merchants: A Maritime History of the Mediterranean* (Princeton University Press, 2010) 9.

<sup>5</sup> *Ibid* 59.

<sup>6</sup> *Ibid* 15.

<sup>7</sup> Andrew C. Hess, *The Forgotten Frontier: A History of the Sixteenth-Century Ibero-African Frontier* (University of Chicago Press, 1978).

<sup>8</sup> *Ibid* 3.

## MUSLIM PIRATES AND CHRISTIAN KNIGHTS

Maritime depredation, as we have already seen in the previous chapter, was a common feature of the medieval Mediterranean. ‘It was endemic’, writes Braudel, with all, ‘from the most wretched to the most powerful, rich and poor alike, cities, lords and states’ caught up in ‘a web of operations cast over the whole sea’.<sup>9</sup> Many of those who sailed *in modo piratico* were motivated by the need to make a living, as Braudel puts it,<sup>10</sup> and, like de Nigro in the 14th century, were opportunistic in selecting their targets. Others, however, were motivated by confessional identities.

Muslim depredators based in the ports of the North African littoral, and attacking Christian vessels, are recorded as far back as the 8th century.<sup>11</sup> In the 13th century, though, their incidence increased. The *Cantigas de Santa Maria*, a Galician collection of poems from that century, record several clashes with ‘Moorish’ pirates.<sup>12</sup> Cantiga 35, titled *De liberatione clericorum Sanctae Mariae in mari a piratis* or ‘The Clerics Saved from Pirates’, tells of a ship carrying priests and merchants attacked by Moorish corsairs (*cossairos*), only for a sudden mighty wind to destroy the corsair galleys, the mast of one galley striking dead the Moorish admiral.

The following century, Ibn Khaldun, the noted Arab historian, wrote of Muslims ‘on the coasts of Ifriqiya’—the region today stretching from Tunisia to eastern Algeria—raiding the lands of ‘the Christian Franks’ and attacking ‘unbelievers’ ships, often taking them away from them, and return[ing] with booty, slaves, and captives’.<sup>13</sup> Khaldun dated the emergence of Maghrebin pirates as a serious presence in the Mediterranean from around 1360,<sup>14</sup> although the contemporary

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<sup>9</sup> Fernand Braudel, *The Mediterranean and the Mediterranean World in the Age of Philip II*, vol. 2, trans. Siân Reynolds (University of California Press, 1995) 867.

<sup>10</sup> Ibid.

<sup>11</sup> Rech reports Arab and Saracen raids in the western Mediterranean as early as the 8th century: Walter Rech, *Enemies of Mankind: Vattel’s Theory of Collective Security* (Martinus Nijhoff, 2013) 43.

<sup>12</sup> The collection contains 420 poems with musical notation and was composed during the reign of Alfonso X, King of Castile, León and Galicia. For an English translation, see *Songs of Holy Mary of Alfonso X, the Wise: A Translation of the Cantigas de Santa Maria*, ed. & trans. Kathleen Kulp-Hill (Arizona Center for Medieval and Renaissance Studies, 2000).

<sup>13</sup> Ibn Khaldun quoted in Monique O’Connell & Eric R. Dursteler, *The Mediterranean World: From the Fall of Rome to the Rise of Napoleon* (Johns Hopkins University Press, 2016) 141.

<sup>14</sup> Pryor (1988) 193.

chronicler Marino Sanudo Teorsello already reported Muslim raiders active three decades earlier.<sup>15</sup>

Christian raiders, too, were active in the Mediterranean, although they have traditionally been overlooked in modern accounts. As Molly Greene observes, ‘within the already tiny space that is allotted to the Mediterranean in studies of early modern piracy, there is no mention of anything other than Muslim violence’.<sup>16</sup> Stanley Lane-Poole’s *Barbary Corsairs*, published in 1890, is exemplary of this historiographical tradition, portraying an early modern Mediterranean plagued by parasitical North African violence.<sup>17</sup> In the works of Lane Poole and other 19th-century historians, one finds a complete erasure of non-Muslim depredation. European states are presented, in one critic’s words, as ‘peaceful commercial powers harassed by bloodthirsty African mobs’.<sup>18</sup>

Godfrey Fisher’s *Barbary Legend*, published in 1957, started to correct such misconceptions, showing that there was little unique to Muslim-authored depredation.<sup>19</sup> One-sided accounts were, Fisher suggested, a corollary to nineteenth-century western chauvinism that drew ‘a rigid dividing-line in the Mediterranean between Christians and Moslems, or between Western civilization and oriental or African barbarianism’.<sup>20</sup> Braudel, too, criticised those historians who ‘taught us to see only the Muslims, only the Barbary corsairs’ whose ‘fate overshadows the rest of the landscape’. Christian pirates were also active in ‘Malta, Leghorn [Livorno] . . . with their prisons, their slave markets, their sordid procurements’.<sup>21</sup>

Especially prominent in the history of Christian depredation were several Catholic military orders. The Knights of St Stephen, founded by Cosimo de’ Medici, operated out of the port of Livorno wreaking havoc on Ottoman trade. More notorious

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<sup>15</sup> O’Connell & Dursteler (2016) 144.

<sup>16</sup> Greene (2010) 2.

<sup>17</sup> Stanley Lane-Poole, *The Story of the Barbary Corsairs* (G.P. Putnam’s Sons, 1890).

<sup>18</sup> Amedeo Policante, *The Pirate Myth: Genealogies of an Imperial Concept* (Routledge, 2015) 149. The tradition continues today: see Oded Löwenheim, *Predators and Parasites: Persistent Agents of Transnational Harm and Great Power Authority* (University of Michigan Press, 2007).

<sup>19</sup> Godfrey Fisher, *Barbary Legend: War, Trade, and Piracy in North Africa, 1415–1830* (Clarendon Press, 1957).

<sup>20</sup> Ibid 23. Note that some critics have suggested Fisher errs too much in the other direction, presenting an ‘overly generous and sanguine portrayal’ of Barbary piracy: William J. Brenner, *Confounding Powers: Anarchy and International Society from the Assassins to Al Qaeda* (Cambridge University Press, 2016) 153 note 8.

<sup>21</sup> Braudel 1996: 867.

still were the Knights of Malta, formed in the mid-11th century as the Knights Hospitaller of Jerusalem to provide care for pilgrims in the holy city before turning to a martial role during the First Crusade of 1099. Pushed out of Jerusalem by Saladin's armies in 1291, the Knights re-established themselves first on Cyprus and, in 1308, on the island of Rhodes, from where they began maritime attacks on Muslim (and some Christian) shipping in the Levant. When Rhodes was lost in 1522 to Ottoman forces, Charles V granted the order the island of Malta, which they would establish as the 'capital *par excellence*' of Christian raiding in the Mediterranean.<sup>22</sup>

In short, Muslim and Christian alike took to the seas to plunder. Each, Braudel suggests, were two sides of the same coin, both participants in a perpetual religious war—a 'secondary form of war', as he put it—between two inimical communities. Their depredation, he argues was an 'ancient institution', one termed *la course*, from the Latin *cursus*, denoting voyaging in search of plunder.<sup>23</sup> The derivative term corsair—*corsario* in Spanish, *corsaire* in French—in turn, was used to describe those who sailed *la course*. With time, corsair would come to denote legitimacy, used synonymously with privateer to indicate the possession of a sovereign's licence, a meaning Braudel tries to read into the early modern Mediterranean. In the 16th century, however, the term was still used to describe anyone who systematically undertook voyages of depredation, licensed or otherwise. Contemporaries referred to both Muslim and Christian depredators as corsairs and both also as pirates. The French jurist, Jean Bodin, for instance, used *corsaire* and *pirate* interchangeably, the former used to invoke both sovereign-sanctioned and unlicensed depredation. Still, Braudel's important point is that these were not the pirates of modern legal thought, their raiding, and legal treatment, more akin to that of low-intensity warfare. While certainly not welcomed by its victims, *la course* was nonetheless accepted as an unavoidable staple of Mediterranean life.

Attitudes were, however, beginning to change. With the westward projection of Ottoman power and the confrontation it presaged, the Barbary raiders took on a new significance in the Christian imagination.

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<sup>22</sup> Greene (2010) 3. The knights would remain on Malta until 1798. For the Knights of Malta see, in addition to Greene's book, Peter Earle, *Corsairs of Malta and Barbary* (London: Sidgwick and Jackson, 1970); Anthony Luttrell, *The Hospitallers of Rhodes and Their Mediterranean World* (Routledge, 1992).

<sup>23</sup> Braudel (1995) 865.

## THE OTTOMAN THREAT

Ottoman power first emerged in the late 13th century and quickly proved a formidable geopolitical force. While Christendom remained largely confined to the continental area bounded by the North Atlantic and Mediterranean in the 14th century, the Ottomans had penetrated the Indian Ocean and established a network of trading routes.<sup>24</sup> They would soon push westward, too, into Christian Europe. Viewed by contemporary Christians as a religiously-fuelled holy war, the Ottoman Empire's expansionary impulse in fact lay in the political-economic foundations of the imperial formation.

Resting on a tributary mode of production, Ottoman society was composed of a ruling class around the Sultan and a peasant class comprising the majority of the population from whom production surpluses were appropriated.<sup>25</sup> The Sultan's control of land and the rotation of land allocations amongst the ruling class served to prevent the growth of provincial power centres, while institutionalising land holders and Sultan in a relationship of dependence: tributary ruling class relations between a patrimonial authority in the Sultan and his household and a local nobility dependent on the former.<sup>26</sup>

The potential for conflict could be curtailed—and the tributary mode reproduced—so long as the surplus was expanded. At the same time, as Anievas and Nişancıoğlu observe, 'the burgeoning central state required greater access to taxes, tributes and a population from which to recruit slave elites. Both objectives were possible only through continual territorial accumulation.'<sup>27</sup> Only by conquering more land could the tributary state extend its control of the means of production—land—

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<sup>24</sup> Giancarlo Casale provides an account of Ottoman exploration and expansion in *The Ottoman Age of Exploration* (Oxford University Press, 2010) 5. On Muslim penetration of the Indian Ocean trading world, see George Hourani, *Arab Seafaring in the Indian Ocean in Ancient and Early Medieval Times*, 2nd ed. (Princeton University Press, 1995).

<sup>25</sup> Halil İnalcık, 'The Nature of Traditional Society: Turkey', in Robert E. Ward & Dankwart A. Rustow (eds), *Political Modernization in Japan and Turkey* (Princeton University Press, 1964) 42, 44; Huri İslamoğlu-İnan, *State and Peasant in the Ottoman Empire: Agrarian Power Relations and Regional Economic Development in Ottoman Anatolia During the Sixteenth Century* (Brill, 1994) 2-3. On the tributary mode of production, see Jairus Banaji, *Theory as History: Essays on Modes of Production and Exploitation* (Haymarket Books, 2011) 23-24 and, for a contrasting approach, John Haldon, *The State and the Tributary Mode of Production* (Verso, 1993).

<sup>26</sup> Alex Anievas & Kerem Nişancıoğlu, *How the West Came to Rule: The Geopolitical Origins of Capitalism* (Pluto Press, 2015) 101.

<sup>27</sup> *Ibid.*

and thereby extract further tribute. Territorial conquest, put simply, provided the means for the Ottoman state to control the ruling class. In this way, territorial accumulation operated as an externalisation of internal contradictions.<sup>28</sup> As Perry Anderson put it some years ago, '[t]he structure of the *Osmanlilar* ruling class had rested on perpetual military conquest'—'so long as the frontier unwound before the march of the Ottoman armies', the internal balance of power could be maintained.<sup>29</sup>

By the late 14th century, Ottoman expansion had seen Turkish forces pushing deep into Christian Europe, taking much of the Balkan peninsula: in 1389 Serbian, Bosnian and Bulgarian forces were defeated at Kosovo. In 1453, Constantinople fell and Sultan Mehmed II established the empire's new seat in the former Byzantine capital. In the following decades, Mehmed's armies consolidated control of Anatolia and pressed westwards into Greece, Serbia and Bosnia. Egypt and Syria fell to Selim I in 1517 and, with them, a key axis in the Eurasian trade routes.<sup>30</sup> By 1520, the Ottomans, now under the suzerainty of Süleyman I, were the leading power in the Muslim world and had also penetrated deep into south-eastern Europe: Belgrade fell in 1521 and by 1529 Vienna was under siege.<sup>31</sup>

The Ottoman expansion established control over the highways of trade connecting Europe with Russia, Central Asia and the Indian Ocean. The Osmanlı realm thus formed 'the hinge that connected the rapidly growing economies of Europe with those of the East'.<sup>32</sup> Within this realm, Ottoman rule facilitated inter-regional trade through the building of roads and canal routes, to the benefit of both European and Ottoman merchants.<sup>33</sup> Yet for Christian Europe, Ottoman incursions were widely experienced as a 'semi-apocalyptic event'.<sup>34</sup> With a standing army unmatched by any

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<sup>28</sup> Ibid 102.

<sup>29</sup> Perry Anderson, *Lineages of the Absolutist State* (New Left Books, 1974) 378

<sup>30</sup> See Andrew C. Hess, 'The Ottoman conquest of Egypt (1517) and the Beginning of the Sixteenth-Century World War', 4 *International Journal of Middle East Studies* (1973) 55.

<sup>31</sup> On the Ottoman advance, see Colin Imber, *The Ottoman Empire 1300-1481* (Isis, 1990); Cemal Kafadar, *Between Two Worlds: The Construction of the Ottoman State* (University of California Press, 1995); Norman Itzkowitz, *Ottoman Empire and Islamic Tradition* (University of Chicago Press, 1972); Halil İnalcık, *The Ottoman Empire: The Classical Age, 1300-1600* (Weidenfeld & Nicolson, 1973).

<sup>32</sup> Thomas W. Gallant, 'Europe and the Mediterranean: a reassessment', in Gerard Delanty (ed.), *Europe and Asia beyond East and West* (Routledge, 2006) 120, 126.

<sup>33</sup> Anievas & Nişancıoğlu (2015) 108. See also James Mather, *Pashas: Traders and Travellers in the Islamic World* (Yale University Press, 2009).

<sup>34</sup> Anievas & Nişancıoğlu (2015) 109.



European monarch and a revenue twice that of his nearest rival,<sup>35</sup> Süleyman posed a formidable military threat to Christian Europe and, with his forces moving on Vienna, a direct challenge, in particular, to Habsburg pretensions.

With the death of his paternal grandfather Maximilian I in 1519, Charles I of Spain had inherited the Habsburg territories in central Europe, bringing under his rule an extensive European empire, in addition to Spanish viceroalties in the Americas and Asia. His election as Holy Roman Emperor—making him Charles V—the same year cemented his status as the most powerful monarch in Christendom. The encroachment of the Ottoman Empire thus coincided with the near-simultaneous expansion of the Habsburg Empire. This inter-imperial rivalry would be staged across multiple fronts. In central Europe, Charles’s brother Ferdinand would hold off the Ottoman advance at Vienna. The Mediterranean, meanwhile, would see a series of long-running battles, by sea and by land, over the lucrative trading routes connecting Europe to the Levant and Asia—battles in which the Barbary pirates would play a prominent part.

### A UNIVERSAL ENEMY

The idea of a universal human community could be found already in nascent form in the Stoic cosmopolitanism of the Greco-Roman world, a moderate rendering of which is evident in Cicero’s *De Officiis*, as discussed in Chapter 2. While Rome regularly claimed to act in the interests of a broader community, especially in the imperial era, in Cicero’s writing, as in that of contemporaries such as Appian, Florus, and Pliny, any larger philosophical cosmopolis quickly collapsed back into the Roman *patria* itself. With the universalism of early Christianity, however, the Stoic cosmopolis took on both theological stamp and concrete shape.<sup>36</sup> As Francisco de Vitoria would put it in *On Civil Power* (1528), ‘Christendom is in some sense a single commonwealth and a single body, according to the Apostle’s words: “we, being many,

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<sup>35</sup> Anderson (1974) 364-65.

<sup>36</sup> Pauline Kleingeld & Eric Brown, ‘Cosmopolitanism’, in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University, 2014) available at [plato.stanford.edu/archives/fall2014/entries/cosmopolitanism/](http://plato.stanford.edu/archives/fall2014/entries/cosmopolitanism/) (last visited 5 May 2018); Daniel W. Rossides, *Social Theory: Its Origins, History, and Contemporary Relevance* (General Hall, 1998) 82.

are one body in Christ”.<sup>37</sup> A universal human community might gain salvation and ascend to the City of God, but so too, theological writings asserted, did humankind face an existential threat: the first true universal enemy in the shape of the devil.

This figure of universal enmity emerged only gradually in Christian theology. The ‘satan’ of the Old Testament was originally conceived not as evil but, quite to the contrary, as one of God’s obedient servants. Satan, from the Hebrew ‘har-Shatan’ meaning ‘the Adversary’, acted in alliance with God, under his command, testing humans’ faith.<sup>38</sup> As Christianity was consolidated, though, and its reach spread, the figure of satan transmogrified from God’s angel into a malevolent figure, one invoked increasingly to characterise the Church’s opponents.<sup>39</sup> In its efforts to suppress paganism, Christianity now placed the devil in a narrative of ‘primordial combat between gods’.<sup>40</sup> Satan, on this view, was ‘a god rebelling against Yahweh’ who made earth an extension of his empire in order to reign there by the power of sin and of death.’ Here he was ‘opposed by the son of the Creator, Christ’ who fought a ‘battle, which would end only at the end of time’ in the role of ‘potential liberator of humanity, in the face of Satan, his chief opponent’.<sup>41</sup>

In this newly emerging demonology, God and satan appear in opposition, the various satanic figures of the Old Testament now reinterpreted as a single rebel against God.<sup>42</sup> He is ‘less and less one of God’s faithful servants and more and more . . . God’s rival, God’s antagonist, God’s Adversary.’<sup>43</sup> What was created, Mark Neocleous observes, was ‘a set of claims and assumptions about not just *a* satan of the kind who tests [Old Testament figures], but *Satan*; not just *a* devil but *the Devil*; not just an

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<sup>37</sup> Francisco de Vitoria, ‘On Civil Power’, in *Political Writings*, ed. Anthony Pagden & Jeremy Lawrance (Cambridge University Press, 1991) 1, 31.

<sup>38</sup> Mark Neocleous, *The Universal Adversary: Security, Capital and ‘The Enemies of All Mankind’* (Routledge, 2016) 78.

<sup>39</sup> See Elaine Pagels, *The Origin of Satan* (Random House, 1995) 8. See also Jeffrey Burton Russell, *Lucifer: The Devil in the Middle Ages* (Cornell University Press, 1984); Jeffrey Burton Russell, *The Prince of Darkness: Radical Evil and the Power of Good in History* (Cornell University Press, 1988); Norman Cohn, *Europe’s Inner Demons: The Demonization of Christians in Medieval Christendom*, 2nd ed. (Pimlico, 1993).

<sup>40</sup> Robert Muchembled, *A History of the Devil: From the Middle Ages to the Present*, trans. Jean Birrell (Polity, 2003) 11.

<sup>41</sup> Ibid.

<sup>42</sup> See Henry Ansgar Kelly, *Satan: A Biography* (Cambridge University Press, 2006) 2.

<sup>43</sup> Neocleous (2016) 79

enemy, but a *Demonic Enemy*; not just *an* adversary but a *Universal Adversary* with which there can be nothing but absolute enmity.<sup>44</sup>

The devil, already invoked as an enemy or '*hostis*' throughout the Catholic liturgy, increasingly became known by the longer epithet *hostis humani generis*: enemy of humankind. The *Sacramentarium Veronense*, attributed to Pope Leo I (440-61), contains numerous references to the devil as both *hostis humani generis* and *humani generis hoste*.<sup>45</sup> The following century, in the *Sacramentarium Gregorianum*, attributed to Pope Gregory I (590-604), the epithet is again used: *ut de hoste generis humani maior Victoria duceretur*.<sup>46</sup> And it is by that term, amongst his various other names, that the devil is summoned in the Church's official exorcism ritual, set down in the *Rituale Romanum*, the Vatican's service manual:

Hear then and obey, Satan, attacker of the faith, enemy of the human race [*hostis generi humani*], messenger of death, robber of life, destroyer of justice, root of all evils, spark of vices, seducer of men, merchant of peoples, rouser of hatred, origin of avarice, cause of discord, instigator of deceit.<sup>47</sup>

By the end of the first Christian millennium, Satan had become a fundamentally evil enemy, not only marked by hatred of God but also associated now with, and responsible for, the downfall of humankind—no longer perceived as an abstract idea but a concrete, Christian, entity. He was an Enemy that threatened every

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<sup>44</sup> Ibid (emphasis in original).

<sup>45</sup> E.g., '*deceptionemque Evae matris ulciscens, de hoste generis humani, qui aditum per illam mortis invenerat, triumpharet*': quoted in G.M. Lukken, *Original Sin in the Roman Liturgy: Research into the Theology of Original Sin in the Roman Sacramentaria and the Early Baptismal Liturgy* (Brill, 1973) 45. On the *Varense*, see Cassian Folsom, 'Liturgical Books of the Roman Rite', in Anscar J. Chupungco (ed.), *Handbook for Liturgical Studies: Introduction to the Liturgy*, vol. 1 (Liturgical Press, 1997) 245, 245-48.

<sup>46</sup> Gerard Bartelink, 'Denominations of the Devil and Demons in the *Missale Gothicum*', in Nienke Vos & Willemien Otten (eds), *Demons and the Devil in Ancient and Medieval Christianity* (Brill, 2011) 195, 199. Gregory is also attributed with calling the devil the *Antiquus vero hostis humani generis*: Dan Edelstein, *The Terror of Natural Right: Republicanism, the Cult of Nature & the French Revolution* (University of Chicago Press, 2009) 31. Other references to the devil in the liturgy include the closely related appellation *humani generis adversarius*, in connection, for instance, with the devil's role in man's Fall: see Lukken (1973) 45 note 122.

<sup>47</sup> '*Audi ergo, et time satana, inimice fidei, hostis generis humani, mortis adductor, vitæ raptor, justitiæ declinator, malorum radix, fomes vitiorum, seductor hominum, proditor gentium, incitator invidiæ, origo avaritiæ, causa discordiæ, excitator dolorum*': Dan Edelstein 'Hostis Human Generis: Devils, Natural Right, and Terror in the French Revolution' 2007(141) *Telos* (2007) 63-64 quoting the '*Rituale Romanum*', in *Manuel d'exorcismes de l'Église* (GVP, 2000) [1626].

Christian soul—‘no one was safe from the devil’s temptations’<sup>48</sup>—but also an existential threat to Christendom, with its claims to universality, itself.<sup>49</sup> The battle against the devil was henceforth a universal struggle, with the *hostis humani generis* an adversary to Christian power embodied by the Universal Church and the Universal Holy Roman Empire.<sup>50</sup>

The construction of the devil as universal enemy was, as already noted, rooted in the church’s early political struggles against paganism. But its invocation proved of further use to a Church threatened by the dissent of heretical sects against ecclesiastical authorities. These groups were inevitably castigated as worshippers of the Devil. Founded in the 13th century, the Inquisition was to seek out heretics in league with the universal enemy. The following century Pope John XII issued three bulls justifying the persecution of the Templars on anti-Satanic grounds. Later still, in the 16th century, the Inquisition would turn its focus to Protestants, castigated as heretical devil-worshippers, as well as forced converts from Islam and Judaism. Throughout, the Church held fast to a Manichean view of a demonic army pitted in universal war against God and Christianity.

### **‘OF THE DEVIL’: OTTOMANS IN THE EUROPEAN IMAGINATION**

The devil and his army were to be found not only within Christendom, amongst heretical sects and converts, but also closing in on Christendom’s frontiers from without. As noted in Chapter 3, the belief in a literal universal Christian commonwealth had begun to wane in the Middle Ages. The ideal remained, though, reproduced in crusading ideology with Christian unity embodied, if not in a single religio-political empire, then in the efforts of pious princes united under the spiritual power of the pope. Even then, while temporal power was divided, Christians might still desire, Vitoria observed, a common political ruler to protect Christendom against threats, especially that of the Muslim infidel.<sup>51</sup>

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<sup>48</sup> Edelstein (2009) 31.

<sup>49</sup> See, e.g., Lactantius, *Divine Institutes*, trans. Anthony Bowen & Peter Garnsey (Liverpool University Press, 2003) 37.

<sup>50</sup> See Neocleous (2016) 80.

<sup>51</sup> Vitoria (1991) 31.

By the start of the 16th century, then, the universal enemy of medieval theology had come to be embodied in the Christian imagination by the infidel and, in particular, the forces of the Ottoman empire, pushing at the eastern and southern borders of Christendom. As Ottoman armies marched west, authorities increasingly cast their appeals for military action in religious terms and western thinkers put an eschatological cast on Ottoman expansion.

Already before the fall of Constantinople, relations with the Osmanlı foe were viewed in terms of religious-military confrontation, a view only strengthened with the fall of the Byzantine capital.<sup>52</sup> This was, one could read in Matteo Pisano's *Lamento di Constantinopoli*, bemoaning the loss of the eastern Christian Empire, one more chapter in the retreat of Christendom since the loss of the Holy Land.<sup>53</sup> In a Europe marked by a history of crusading, the Ottomans were easily cast as the latest infidel threat to Christendom. Europeans, as Robert Schwoebel has noted, drew on a large medieval corpus dealing with Islam, clinging 'tenaciously to established categories' and reading the new Ottoman threat into the 'forms of thought and expression developed in the anti-Moslem and crusading literature of the Middle Ages'.<sup>54</sup>

Most western Christians' knowledge of Muslims was rooted in medieval crusade propaganda. In sermons and *chansons de geste*, such as the *Song of Roland* (c. 1100), Muslims were styled as 'impious idolaters' and associated with animalistic and demonic characteristics.<sup>55</sup> And yet, in the 14th century, a growing body of literature in the vernacular began reaching a wide audience, especially among the mercantile classes, offering them new depictions of Muslims and their faith, not all negative. Dante's *Divine Comedy*, for instance, while treating Muslims on the whole as enemies, nonetheless acknowledged 'the talents of certain individuals who greatly

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<sup>52</sup> M.E. Yapp, 'Europe in the Turkish Mirror', 137 *Past and Present* (1992) 134, 140.

<sup>53</sup> Robert Schwoebel, *The Shadow of the Crescent: The Renaissance Image of the Turk (1453-1517)* (Nieuwkoop, 1967) 20-21. Schwoebel identifies either Pisano or Bernardino Cinglano as the writer of the *Lamento*, although Pisano is more often cited as author: see, e.g., Florence Alazard, 'Ahimé, ahi, o, deh: Interjections and Orality in *Lamentii* during the Italian Wars', in Luca Degl'innocenti, Brian Richardson & Chiara Sbordoni (eds), *Interactions between Orality and Writing in Early Modern Italian Culture* (Routledge, 2016) 67, 68.

<sup>54</sup> Schwoebel (1967) x.

<sup>55</sup> *Song of Roland*, trans. Glyn Burgess (Penguin Books, 1990). See Emily M.N. Kugler, *Sway of the Ottoman Empire on English Identity in the Long Eighteenth Century* (Brill, 2012) 92; Nancy Bisaha, *Creating East and West: Renaissance Humanists and the Ottoman Turks* (University of Pennsylvania Press, 2004) 17.

distinguished themselves'.<sup>56</sup> In Giovanni Boccaccio's *Decameron* (c. 1351), Muslims appear as 'benevolent rulers' and 'partners in trade', or 'simply as regular characters caught up in tragic and comic circumstances'.<sup>57</sup> On the whole, Bisaha suggests, by the mid-14th century European views of Islam had 'acquired a complexity and richness' in which intolerance and compassion could be found in equal measure.

With the fall of Constantinople in 1453, however, the ideal of a united Christendom under attack by demonic forces was revived and the existential threat posed by the Muslim infidel reasserted. As the Ottoman Empire expanded westward, Renaissance thinkers fell back on the hostile religious-racial representations of crusading rhetoric.<sup>58</sup> When news of Mehmed's sacking of Constantinople reached western Europe, commentators responded with a newly inflamed rhetoric. The Turks, Cardinal Bessarion, the titular Latin Patriarch of Constantinople opined, were 'the most inhuman barbarians [*immanes barbari*] and the most savage enemies of the faith'. 'Men have been butchered like cattle women abducted, virgins ravished, and children snatched from the arms of their parents'.<sup>59</sup> Some, such as Vespasiano writing in 1480, saw in the infidels' advance God's punishment for the 'spiritual poverty' of Italians living 'obstinate in sin'.<sup>60</sup> In general, however, the Turks were described with reference to a set of formulaic descriptions of Islam: infidels (*infideles*), enemies of the faith (*fidei hostes*), barbarians (*barbari*).<sup>61</sup> As such they were juxtaposed with a Europe cast in religious terms, a *res publica christiana*, against which they posed an existential threat—the destruction of the Christian religion, warned Pope Pius II from Rome.

Where once 'Saracen' had stood in the medieval Christian vernacular for Muslims in general, now 'Turk' became synonymous with the infidels, regardless of

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<sup>56</sup> Bisaha (2004) 18 citing Dante, *The Divine Comedy (Inferno)*, trans. Charles S. Singleton (Princeton University Press, 1970).

<sup>57</sup> Bisaha (2004) 18-19 citing Giovanni Boccaccio, *Decameron*, ed. Charles Singleton (Giuseppe Laterza e Figli, 1955).

<sup>58</sup> Kugler (2012) 92; Bisaha (2004) 19.

<sup>59</sup> Bisaha (2004) 2 quoting Letter to the Doge of Venice, 13 July 1453: 'Viri instar pecudum trucidati; abductee mulieres; raptae virgins: Infantes e parentum complexibus sublati. Si qui ex tanta clade superfuerunt, vel in vinculis ut aere redimerentur servati, vel omni genere cruciatus affecti, vel ad turpissimam servitutum reducti'. An English translation of the letter is printed in James Bruce Ross & Mary M. McLaughlin (eds), *The Portable Renaissance Reader* (Penguin Books 1953) 71.

<sup>60</sup> Bisaha (2004) 160 quoting Vespasiano, *Lamento d'Italia per la presa d'Otranto*.

<sup>61</sup> *Ibid* 162.

their geographic origin. For instance, in texts such as Wynkyn de Worde's, *Treatyse of the Turkes Lawe called Alcoran* (1519), the first English publication on Islam, we find Muhammad presented as a prophet of the 'Turks'.<sup>62</sup> And just as representations of Ottomans drew on the crusading rhetoric pitting Christian against infidel, so too was Islam now viewed through the prism of an expansionist Ottoman empire with a 'superimposition of the Ottomans' imperial danger onto religion so that Islam became synonymous with Ottoman military expansion'.<sup>63</sup> Muslims were reproduced in the European imaginary once more as 'a tribe of warring anti-Christians'.<sup>64</sup>

As enemies of the faith, the 'Turks' were quickly associated with that other *hostis* of medieval Christian theology: they not only shed the 'innocent blood' of the faithful (*fidelium*), but destroyed also their souls 'in detestable sacrifice to Satan', wrote the Italian humanist Poggio Bracciolini in 1448.<sup>65</sup> In Pope Pius II's words, Islam was 'of the devil',<sup>66</sup> while in the epic poetry of Leonardo Dati, Mehmed II was cast as the devil's minion, recalling a poetic conceit already familiar, as noted above, in *Song of Roland*.<sup>67</sup> Dati's *Carmen ad Nicolaum*, likely written in late 1453, pitches Satan and Mehmed II in battle against the Virgin and Christ. Opening with the fall of Constantinople, we find the devil emerging from the underworld to meet 'the harsh Mehmed, that victor stained with the blood of Constantinople coming from the despoiled city'.<sup>68</sup> Mehmed has been chosen by Satan as his accomplice in destroying Christianity: 'he is mine', proclaims the devil, 'the one whom I desired with all my heart. This is that sharer of evil deeds to whom I will give ghastly sceptres of the

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<sup>62</sup> Gerald MacLean & Nabil Matar, *Britain and the Islamic World, 1558-1713* (Oxford University Press, 2011) 32. MacLean and Matar note that this is also the case with the first English translation of the Qur'an in 1649.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid 26.

<sup>65</sup> Bisaha (2004) 162 quoting Poggio Bracciolini, *Lettere*, vol. 3, ed. Helene Harth (Leo S Olschki Editore, 1984) 67: 'Quid deo odibilis quam effundere sanguinem innocentium, quam fidelium non solum corpora sed animas perditum ire in Sathane sacrificium detestandum'.

<sup>66</sup> Quoted in Bisaha (2004) 162.

<sup>67</sup> Ibid 163. Dati's poem is reproduced in James Hankins, *Humanism and Platonism in the Italian Renaissance*, vol. 1 (Edizioni di Storia e Letteratura, 2003) 375.

<sup>68</sup> *Aspicit inमितem Mahomet: nuda ille cruentus / Constantinopoli victor veniebat ab urbe*: quoted in Bisaha (2004) 163.

world.’<sup>69</sup> The pact is sealed: Mehmet will rule as Satan’s servant, the mirror to Christendom’s temporal princes pledge of allegiance to God.

Confronted not merely by the danger of military attack but also fear of an ideological religious onslaught, the papacy called for Christian unity. In the wake of Constantinople’s fall, Aeneas Sylvius, future Pope Pius II, bemoaned a Christendom that was like ‘a body without a head’, one in which ‘every state has a separate prince, and every prince has a separate interest. . . . Who will make the English love the French? Who will unite the Genoese and the Aragonese? Who will reconcile the Germans with the Hungarians and Bohemians? . . . If you lead a small army against the Turks you will easily be overcome; if a large one, it will soon fall into confusion.’<sup>70</sup> In popular literature, too, the threat posed to a fragmenting Christendom by Mohammed and his followers was emphasised, as in Sebastian Brant’s *Ship of Fools* (1494):

At first the cruel heretic  
did tear and wound it to the quick  
and then Mohammed shamefully  
abused its noble sanctity  
with heresy and base intent. . . .  
So strong the Turks have grown to be  
they hold the ocean not alone,  
the Danube too is now their own . . . .<sup>71</sup>

In the early 16th century, the call for a defence of Christendom was taken up by Charles V. His election as Emperor of the Holy Roman Empire was based, at least in part, on his ostensible ability to repel the feared ‘Turk’, his legitimacy premised on a view of the Habsburg Empire as the new bulwark of the *res publica Christiana*.<sup>72</sup> Charles, the Navarrese jurist Miguel de Ulzurum opined in his *Catholicum opus imperial regiminis mundi* (1525), was the emperor of a new universal Roman

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<sup>69</sup> *Hic, ait ille, meus quem tota mente poposci / Hic est ille comes scelerum cui lurida mundi / Sceptra dabo et poterit nihil exitale videri:* quoted in Bisaha (2004) 163.

<sup>70</sup> Quoted in Paul Coles, *The Ottoman Impact on Europe* (Harcourt, Brace & World, 1968) 100.

<sup>71</sup> Sebastian Brant, *The Ship of Fools*, trans. Edwin H. Zeydel (Columbia University Press, 1944) 315.

<sup>72</sup> İnalçık (1973) 35.



Empire.<sup>73</sup> If the pope enjoyed spiritual authority over the ‘congregation of the faithful’, it was the emperor who was the ‘one sole lord of the world’ and who enjoyed world dominion, his power extending to believers and unbelievers alike.<sup>74</sup> The Turkish infidels, in resisting the emperor’s authority, would be ‘reduce[d] . . . to obedience’.<sup>75</sup> Three years later, Gonzalo de Arredondo y Alvarado would write, at the emperor’s behest, the *Castillo inexpugnable de la fe*, a call for a renewed crusade against the ‘Turk’ to stop the spread of the *maldicta secta mahometana*.<sup>76</sup>

Increasingly, the conflict between Christendom and ‘Turk’ was marked in the Christian imagination not so much by a spatial divide as one ‘between those chosen by heaven and those serving the interests of the devil’.<sup>77</sup> With the fall of Belgrade in 1521 and Süleyman’s forces at the gates of Vienna, Christian thinkers increasingly cast the ‘Turk’/Muslim in apocalyptic terms as the scourge of God. Arredondo y Alvarado, for instance, portrayed the Ottomans not only as violent, cruel and lustful; they were also, he insisted, followers of the devil.<sup>78</sup>

Religious imagery abounded, a focus the depiction of Ottoman armies as Islamic infidels and devotees of Satan—emphasised by the horrendousness of their cruelty—fighting against the Christian Habsburg armies. In 1530, for instance, the German Hans Guldenmundt produced a series of woodcut images by Erhard Schoen with a view to rallying imperial troops. Depictions include mounted Turkish warriors leading Christian captives on foot, a baby carried by one infidel upon his spear. The accompanying text laments ‘the evil, gruesome Turk’, who kills children and

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<sup>73</sup> David A. Lupton, *Romans in a New World: Classical Models in Sixteenth-Century Spanish America* (University of Michigan Press, 2003) 46.

<sup>74</sup> *Ibid* 48.

<sup>75</sup> Quoted in *Ibid* 49. Although Las Casas would read de Ulzurum’s arguments in the context of Spanish claims to the Indies, Lupton argues that the latter had specifically Turks, not the natives of the New World, in mind.

<sup>76</sup> John Victor Tolan, ‘Introduction’, in John Victor Tolan (ed.) *Medieval Christian Perceptions of Islam* (Routledge, 2000) xi, xviii.

<sup>77</sup> Palmira Brummett, ‘“Turks” and “Christians”: The Iconography of Possession in the Depiction of the Ottoman-Venetian Habsburg Frontiers, 1550-1689’, in Matthew Dimmock & Andrew Halden (eds.), *The Religions of the Book: Christian Perceptions, 1400-1660* (Palgrave Macmillan, 2008) 110, 112. Space permits only a few examples in the following paragraphs. For further instances of the medieval and early modern demonization of Islam, see Nasir Khan, *Perceptions of Islam in the Christendom: A Historical Survey* (Solum, 2006); Norman Daniel, *Islam and the West: the Making of an Image* (Oneworld, 1993).

<sup>78</sup> Tolan (2000) xviii.

condemns Christians to slavery.<sup>79</sup> Another Guldenmundt and Schoen collaboration depicts ‘Turks’ killing babies by impaling them on stakes or slicing them with scimitars.<sup>80</sup> Two decades later, the Hungarian pilgrim Bartholomew Georgiewitz would offer the same image of the ‘Turk’ as demonic foe of Christ. In his *De Turcorum moribus epitome* (1553), Georgiewitz describes savage, bloodthirsty infidels lacking all restraint, tearing Christian children from their weeping parents’ arms.<sup>81</sup>

By the mid-16th century, the Reformation had undermined the idea of a united Christendom. And yet, in the Protestant imagination too, the ‘Turk’ figured prominently as existential threat and agent of the devil, albeit now alongside the Catholic. ‘[P]apacy and empire’, ‘Mohammed and the Saracens’, ‘Turk, Gog and Magog’: each, Luther decried, were part of the ‘devil’s final wrath’ such that ‘Christendom is plagued most terribly and miserably, everywhere and on all sides’.<sup>82</sup> Similarly, in his ‘On War Against the Turk’, Luther argued that ‘the Turk . . . is the servant of the devil, who not only devastates land and people with the sword . . . but lays waste the Christian faith and our dear Lord Jesus Christ’.<sup>83</sup> Whereas pope and emperor employed the demonization of Ottomans as a call to arms, Luther was more ambiguous. If servant of the devil, the ‘Turk’ was also the ‘rod’ of ‘God’s Fury’, the instrument of his divine wrath and a punishment for the deterioration of Christianity. For Luther, to take up arms against the Ottomans might be considered resistance to God, but despite such caution, he was nonetheless committed to the same bellicose rhetoric as his Catholic counterparts in demonizing Islam and the Ottomans.<sup>84</sup>

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<sup>79</sup> Larry Silver, ‘Europe’s Turkish Nemesis’, in Barbara Fuchs & Emily Weissbourd (eds), *Representing Imperial Rivalry in the Early Modern Mediterranean* (University of Toronto Press, 2015) 58, 64. The image is reprinted in Charlotte Colding Smith, *Images of Islam, 1453-1600: Turks in Germany and Central Europe* (Routledge, 2016) 44.

<sup>80</sup> Smith (2016) 45.

<sup>81</sup> Yapp (1992) 148.

<sup>82</sup> Martin Luther, ‘Preface to the Revelation of St. John’ [1530], in *Prefaces to the New Testament*, trans. Charles M. Jacobs (Wildside Press, 2010) 48, 53.

<sup>83</sup> Martin Luther, ‘On war against the Turk’ [1529], in *Luther’s Works*, vol. 46, ed. Helmut T. Lehmann & Robert C. Schultz (Fortress Press, 1967) 155 quoted in Daniel Goffman, *The Ottoman Empire and Early Modern Europe* (Cambridge University Press, 2002) 109.

<sup>84</sup> See George W. Forell, ‘Luther and the War against the Turks’ 14 *Church History* (1945) 256; Adam S. Francisco, *Martin Luther and Islam: A Study of Sixteenth-Century Polemics and Apologetics* (Brill, 2007).

In 16th-century Germany, Protestant congregations implored God ‘graciously to preserve us from the monstrous designs of the Turk’.<sup>85</sup> Their ministers warned of ‘an enemy who not only robs us of money and possessions, wife and child, and maltreats people in the most horrible manner, but whose purpose and intention is to root out the name of Christ and put his own devil, Mahomet, in His place’.<sup>86</sup> Even in Protestant England, where the excommunicated Elizabeth courted Ottoman support for her war against Spain, calls for holy war against the ‘Turks’ were a commonplace. De Worde’s *Treatyse of the Turkes Lawe called Alcoran* was illustrated with an image of a Muslim preacher before the figure of a horned, beast-like devil.<sup>87</sup> And Thomas More wrote widely of the ‘Turks’ who, he insisted, posed both theological and military danger.<sup>88</sup> The most popular text in 16th-century England, after the bible, was John Foxe’s stridently anti-Catholic *Acts and Monuments*. Although written in response to Mary Tudor’s persecution of English Protestants, the work included, from its 1570 edition onwards, a section on ‘The History of the Turks’, which offered readers lurid depictions of dangerous Muslims committed to anti-Christian violence.<sup>89</sup> Further cementing the existential threat posed by Muslims in the English imaginary was Foxe’s ‘Prayer against the Turks’, which ended the section:

O Lord God of hosts, grant to thy church strength and victory against the malicious fury of these Turks, Saracens, Tartarians, against Gog and Magog, and all the malignant rabble of Antichrist, enemies to thy Son Jesus, our Lord and Saviour. Prevent their devices, overthrow their power, and dissolve their kingdom.<sup>90</sup>

The struggle with the infidel enemy was, on Foxe’s telling, in fact a cosmic struggle, Christian and Turk merely standing in for God and the devil: ‘the whole power of

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<sup>85</sup> John W. Bohnstedt, ‘The Infidel Scourge of God: The Turkish Menace as Seen by German Pamphleteers of the Reformation Era’ 58(9) *Transactions of the American Philosophical Society* (1968) 1, 50.

<sup>86</sup> *Ibid* 51.

<sup>87</sup> Linn Normand, *Demonization in International Politics: A Barrier to Peace in the Israeli-Palestinian Conflict* (Palgrave Macmillan, 2016) 34.

<sup>88</sup> Matthew Dimmock, *New Turkes: Dramatizing Islam and the Ottomans in Early Modern England* (Routledge, 2005) 25.

<sup>89</sup> MacLean & Matar (2011) 26-27. See also John N. King, *Foxe’s Book of Martyrs and Early Modern Print Culture* (Cambridge University Press, 2006).

<sup>90</sup> John Fox, *Fox’s Book of Martyrs: The Acts and Monuments of the Church*, vol. 1, ed. John Cumming (G. Virtue, 1844) [1563] 1127-28.

Satan, the prince of this world, goeth wyth the Turkes; which to resist, no strength of man's army is sufficient, but only the name, spirit, and power of our Lord Jesus, the Son of God, going with us in our battles'.<sup>91</sup> Wild theologically-driven depictions of Muslims would remain the norm in English texts into the 17th century with Turks and 'Mahometans' denounced as agents of the devil. Church sermons, political polemics and pamphlets, devotional tracts: all bore the stamp of such imagery.<sup>92</sup>

### **'ENEMYES OF THE CHRISTEN FAYTH': BARBARY PIRATES AT THE OTTOMAN VANGUARD**

It was through this larger geopolitical and religious prism that the pirate took further shape in the European imagination. Maritime depredation, as already discussed, was far from an 'Islamic' phenomenon, yet it was the plunder associated with the Muslim 'Barbary' raiders of North Africa that came to be inextricably linked with piracy in European thinking. The identity of the pirate in the European mind came to be infused with Europeans' racialised religious ideology so that the actions of Islamic pirates were interpreted within the general fear and animosity toward Islam and the Ottomans outlined above. The depredators of North Africa, in particular, came to be seen in the western Mediterranean as the primary avatars of Muslim expansion, the Maghreb frontier the privileged site of inter-imperial confrontation.

The fall of Granada in 1492, completing the *Reconquista* of the Iberian peninsula, had given Ferdinand and Isabella control of the Andalusian littoral from which they continued their war against the infidel across the new frontier marked by the Strait of Gibraltar. The stage was set, as Barbara Fuchs puts it, 'for an increasingly expansionist Spain . . . as the crusading fervor of campaigns on the peninsula was furthered on the coasts of the Maghreb'.<sup>93</sup> In 1494, the Spanish crown received papal blessing for this African crusade; Pope Alexander VI also authorised a continuation of the *cruzada*, the extraordinary tax paid by clergy and laity to fund the campaign of conquest. Isabella's testament upon her death in 1504 urged Castilians to devote

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<sup>91</sup> Ibid 1080.

<sup>92</sup> MacLean & Matar (2011) 26-27. See, more generally, Kenneth M. Setton, *Western Hostility to Islam and Prophecies of Turkish Doom* (American Philosophical Society, 1992).

<sup>93</sup> Barbara Fuchs & Aaron J. Ilika, Introduction to Miguel de Cervantes, *'The Bagnios of Algiers' and 'The Great Sultana': Two Plays of Captivity*, ed. Barbara Fuchs & Aaron J. Ilika (University of Pennsylvania Press, 2010) ix, xiv.

themselves to the war against Islam and the conquest of Africa. Six months later, Ferdinand had prepared an army of seven thousand to ‘make war on the Moors’. By 1510 the Spanish had established enclaves and fortresses—*presidios*—along the Barbary coast including at Peñón de Vélez, Orán and Tripoli.<sup>94</sup>

Around the same time, Muslim depredation increased dramatically. The raiders along the Barbary coast, long engaged in *le course*, now grew in number as they were joined by Moors expelled by the *Reconquista* or fleeing the repression that followed Granada’s fall. Although Ferdinand and Isabella had promised cultural and religious freedom upon surrender, by the turn of the century the Moors faced a choice of conversion or expulsion; forced baptisms were instituted in 1501 with the neophytes known as Moriscos or ‘little Moors’.<sup>95</sup> From Tripoli to Morocco, the émigrés fought a guerrilla war, assaulting the Spanish coast in a mirror image of the Christian assault on the Maghrebin littoral.

Support came from the Ottomans, happy to open a new front against the Habsburg empire and harness the Moors and Moriscos to their cause. Already in 1487, Kemal Reis had been sent by Sultan Bayezid II to support Muslim Granada, landing Ottoman troops at Málaga and briefly capturing the city.<sup>96</sup> With Granada’s fall in 1492, other Ottoman subjects soon followed, most famously the Barbarossa brothers, Arūj and Khair ad-Dīn, described memorably by Haedo at the start of this chapter. Basing themselves on the Tunisian island of Djerba, the brothers spent the 1510s attacking Spanish *presidios* along the Maghribi coast under Ottoman patronage and rallying followers against the Spanish under the banner of Islam.

Local political leaders along the North African coast welcomed the growing bands of depredators, providing them with markets for the sale of prize and safe harbour, in the belief that they might protect local ports from Spanish attack. For instance, in 1513, Sultan Muhammad V of Tunis allowed the Barbarossas use of the port of La Goletta: they would sail under his protection while paying a percentage of the booty seized from the infidel.<sup>97</sup> In 1516, Arūj seized control of Algiers,

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<sup>94</sup> María Antonia Garcés, *Cervantes in Algiers: A Captive’s Tale* (Vanderbilt University Press, 2002) 19-20, 265 note 14.

<sup>95</sup> Barbara Fuchs *Mimesis and Empire: The New World, Islam, and European Identities* (Cambridge University Press, 2004) 49; Anwar G. Chejne, *Islam and the West: The Moriscos, a Cultural and Social History* (State University of New York Press, 1983) 7.

<sup>96</sup> Pryor (1988) 193.

<sup>97</sup> Hess (1978) 60-61.

proclaiming himself king. ‘A certain Copper Beard—vulgarly called Barbarossa—has turned from a pirate into a terrestrial troublemaker in Africa’, wrote Pietro Martire d’Anghiera from the Spanish court.<sup>98</sup>

When Arūj died in battle with the Spanish two years later, he was succeeded by his brother. Looking to counter the threat of an Iberian invasion, he sought protection from the Turkish sultan and placed Algiers under Ottoman suzerainty, the city becoming a new Ottoman *sancak* or province, quickly bolstered by Ottoman janissaries. Khair ad-Dīn was appointed *beylerbey* (provincial governor) and spent the following two decades conducting campaigns of pillage on Italian and Spanish shipping and coasts, nominally on behalf of Sultan Süleyman. He would eventually be appointed grand admiral of the Ottoman fleet in 1534, capturing Tunis from the Spanish the same year.<sup>99</sup>

Under Khair ad-Dīn, Algiers became a major maritime power, one, María Antonia Garcés suggests, ‘more dreaded by Christian nations and people than its nominal superior, the Ottoman Porte’.<sup>100</sup> Khair ad-Dīn’s ranks were filled with refugees from Andalucía and, increasingly, Christian renegades who arrived in increasingly large numbers as the century progressed. By mid-century, Algiers had become a powerful community organised around maritime depredation, ‘a dungeon of corsairs and robbers’, wrote one contemporary, ‘and a strong post, from which Barbarossa had done so much damage inside and outside of Spain’.<sup>101</sup>

In 1541 Charles V launched an attack against Algiers only for a tempest to destroy the entire imperial fleet, some 400 vessels shattered by hail. In the aftermath, Nicholas Durand de Villegagnon, a witness to the defeat, published a widely circulated pamphlet. Entitled *Carlo V Emperatoris Expeditio in Africam ad Algeriam*, its subtitle stressed once more that this battle against the ‘Turkish’ corsairs, ‘the Enemies of the Christen Fayth’, was one in defence of Christendom.<sup>102</sup>

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<sup>98</sup> Quoted in Garcés (2002) 22. D’Anghiera’s letter is dated 31 July 1516.

<sup>99</sup> Fuchs & Ilika (2010) xv. Hess describes the Barbarossa brothers’ Maghribi activities in some detail: see Hess (1978) 61–65.

<sup>100</sup> Garcés (2002) 21.

<sup>101</sup> ‘Argel, que era cueva de corsarios y ladrones y lugar fuerte, de donde Barbarroja había hecho tantos daños en España y fuera de ella’: Garcés (2002) 23 quoting Lopez de Gómara, *Crónica de los Barbarroja: Memorial histórico español*, vol. 6 (Rea Academia de Historia, 1853) 487–88.

<sup>102</sup> Garcés (2002) 24–25.

The Ottoman advance westwards would be checked only in 1571. The conquest of Cyprus the previous year illuminated the crisis for Christendom and, under Pope Pius V's urging, a confederation of Christian states was formed to create a bulwark against the infidel threat. This Holy League, comprised of the Papal States, Spain, Venice, Genoa, Tuscany, Savoy, Parma, Urbino and Malta, formed an armada which, in October 1571, confronted the Ottoman fleet in the Gulf of Lepanto.<sup>103</sup> Almost 300 vessels with 44,000 sailors and 28,000 soldiers—the largest naval force mounted by Christendom<sup>104</sup>—defeated an Ottoman force of similar size. '[T]hat day which was so fortunate for Christendom', Miguel de Cervantes, who was present at the battle, would later have a character recount in *Don Quijote*, 'all nations were then undeceived of their error in believing that the Turks were invincible by sea . . . . on that day . . . Ottoman pride and haughtiness were broken'.<sup>105</sup>

The Ottoman defeat at Lepanto has long been a popular trope for those advocating an enlightened Christendom's victory over a despotic Islam.<sup>106</sup> In actual fact, though, the Ottomans quickly rebounded from Lepanto, retaking Tunis in 1574 with a naval force larger than that at Lepanto. Christendom, by way of contrast, faced as many internal divisions as external threats. The Holy League, disbanded only a year after Lepanto, proved exceptional. Venice, looking to protect its commercial interests in the Mediterranean, sought peace with the Ottomans, abandoning its support for the continuing Habsburg military campaign in North Africa.<sup>107</sup> Yet that campaign itself dampened after Lepanto as both Spanish and Ottoman empires turned their attention away from the western Mediterranean, the former to the consolidation of its New World territories and the latter to its land borders.

If fears that the Ottoman infidel would once again launch an invasion of Christianised Spain waned, depredations by his perceived proxies in North Africa did not. Large military confrontations decreased but small-scale raiding was on the rise.

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<sup>103</sup> Braudel (1995) 1080-103.

<sup>104</sup> Mark Greengrass, *Christendom Destroyed: Europe 1517-1648* (Allen Lane, 2014) 505.

<sup>105</sup> Miguel de Cervantes, *Don Quixote de la Mancha*, trans. Charles Jarvis, ed. E.C. Riley (Oxford University Press, 1992) [1605] 346. Braudel likewise sees Lepanto as marking 'the end of a period of profound depression, the end of a genuine inferiority complex on the part of Christendom and a no less real Turkish supremacy': Braudel (1995) 1103.

<sup>106</sup> See Hans-Georg Betz & Susi Meret, 'Revisiting Lepanto: the political mobilization against Islam in contemporary Western Europe', 43(3-4) *Patterns of Prejudice* (2009) 313.

<sup>107</sup> Greengrass (2014) 506.

By the mid-16th century, Barbary depredators had consolidated themselves not only in Algiers but also in the neighbouring regencies of Tripoli and Tunis, both also acknowledging Ottoman suzerainty, as well as independent Salé in Morocco. Although nominally Ottoman provinces, the Barbary polities enjoyed a devolved power relationship with the Sublime Porte. Their actions were motivated less now by Ottoman expansionary aims or religious interests, and more by the economic opportunities offered by growing Mediterranean commerce. In theory, the Sublime Porte expected the Barbary corsairs to honour Ottoman treaties and not attack nationals of Christian nations at peace with the Sultan. In practice, attempts to discipline those who broke with the treaties—and they were many—were half-hearted.<sup>108</sup> Moreover, as the Sublime Porte focused its attentions eastwards after Lepanto, the Barbary regencies' autonomy vis-à-vis the Sublime Porte increased, their economies more and more dependent on corsair depredations.

As the century progressed and the growing autonomy of the Barbary powers was asserted, their depredations became increasingly organised and systematic. For the victims of those depredations, the raiders of Barbary represented the western wing of the enemy's front line in its war on Christendom. But they represented also a more immediate danger which kept them prominently in the popular imagination: the threat of enslavement and forced conversion.

### THE BAÑOS OF BARBARY: PIRATES AND CAPTIVITY

The Ottoman empire, in general, and the Muslim pirates of North Africa, in particular, were by the mid-16th century well established in the European imagination as the universal enemy of Christendom. Yet they also began to represent a more prosaic threat: not to Christendom as a whole, but to *individual* Christians. Maritime plunder in the popular imagination became indelibly linked with captivity, encouraged by the emergence of the captivity narrative as a pervasive literary topos.

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<sup>108</sup> Peter Lamborn Wilson, *Pirate Utopias: Moorish Corsairs & European Renegades*, 2nd ed. (Autonomedia, 2003) 143. Tinniswood similarly argues that 'Istanbul turned a blind eye: it suited Ottoman foreign policy to allow the Barbary states to chip away at the economic might of Christian powers, disrupting their trade, frightening their merchants, and intimidating their coastal settlements': Adrian Tinniswood, *Pirates of Barbary* (Vintage Books, 2011) 11.



From the mid-16th century onwards, tales of captives held by Muslims in North Africa were published widely and regularly.<sup>109</sup> Some of the earliest accounts of Barbary captivity were published by Richard Hakluyt in his *Principall Navigations* (1589),<sup>110</sup> a volume which offered English readers a glimpse of the geographically expanding world including ‘vivid, but also intimidating, descriptions of North Africa’.<sup>111</sup> One narrative included by Hakluyt concerns the seizure of John Foxe in 1563. Foxe would spend 14 years as a galley slave based in Alexandria before escaping with some 266 other Christian captives.<sup>112</sup> Ballads soon joined narrative accounts in warning of the fate of Christians at the hands of Muslim pirates. ‘The Lamentable Cries of Prisoners in Algiers’ tells of Christians ‘dragged’ to Algiers for a life of captivity, often as a galley slave:

O wretched state of Christian souls so taken!  
To look upon whose torments would awaken  
Tyrants to thrust their arms up, through their graves,  
To guard from blows these Christian galley slaves.  
...  
Being boarded so, and robbed, then are they tied  
On chains, and dragged t’Argiers to feed the pride.<sup>113</sup>

Captivity tales were by no means an English species. In Spain, Cervantes contributed to the genre. In 1570, he had enlisted in the Habsburg military offensive against ‘the Turk’ and participated in various campaigns including the Battle of Lepanto. Returning to Spain in 1575, his ship was attacked by North African corsairs

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<sup>109</sup> MacLean & Matar (2011) 124, on which I draw in this section. See, e.g., the narratives compiled in Daniel J. Vitkus (ed.), *Piracy, Slavery, and Redemption: Barbary Captivity Narratives from Early Modern England* (Columbia University Press, 2001). Linda Colley’s *Captives: Britain, Empire and the World 1600-1850* (Jonathan Cape, 2002) remains the most prominent study of captivity narratives. Nabil Matar, *Turks, Moors, and Englishmen in the Age of Discovery* (Columbia University Press, 1999) contains, in an appendix, a chronological bibliography of publications on captivity in English.

<sup>110</sup> Richard Hakluyt, *The Principall Navigations, Voiages and Discoveries of the English Nation, Made by Sea or over Land to the Most Remote and Farthest Distant Quarters of the Earth at Any Time within the Compass of these 1600 Years* ed. D.B. Quinn & R.A. Skelton (Hakluyt Society, 1965) [1589].

<sup>111</sup> MacLean & Matar (2011) 128.

<sup>112</sup> John Foxe, ‘The Worthy Enterprise of John Foxe, in Delivering 266 Christians Out of the Captivity of the Turks’ [1589], in Vitkus (ed.) (2001) 58.

<sup>113</sup> ‘The Lamentable Cries of at Least 1500 Christians (Prisoners in Algiers under the Turks)’ [1624], in Vitkus (ed.) (2001) 344.

off Catalonia and he was taken captive and sold as a slave in Algiers.<sup>114</sup> Cervantes remained a slave in the *baños* of Algiers for a further five years, eventually ransomed for some 300 ducats.<sup>115</sup> His experience in Algiers would leave an indelible mark on his thought—‘the most transcendental event in his spiritual career’, says Américo Castro; ‘the hinge which forcefully organizes [his] entire life’, affirms Juan Bautista Avallé-Arce.<sup>116</sup> Certainly, Christian captive and Algerian pirate are figures who constantly reappear in his work—in *Don Quixote*, but also his popular dramas such as *The Bagnios of Algiers* and *The Great Sultana*, each reflecting his own experience of captivity.<sup>117</sup> Although these were popular works with happy endings, they emphasised themes of Christian submission and martyrdom, while depicting the repeated attacks by Barbary depredators faced by the Spanish. ‘Captivity, on stage as in autobiography’, note MacLean and Matar, ‘illustrated both the power of the Ottoman Muslims and how dangerous they were’.<sup>118</sup>

That danger was no mere literary trope. Although many popular accounts were embellished and exaggerated, captivity was nonetheless a very real concern for Spaniards and Europeans further afield.<sup>119</sup> The sustained threat of Barbary raiding led many Spaniards to abandon coastal areas; by 1600 long sections of the Spanish littoral, in particular the Granadan and Murcian coasts, had been deserted. Fears of North African slavery extended well beyond Iberia. In Italy, Cosimo I de’ Medici founded the Knights of the Order of St Stephen specifically to combat captivity at the hands of Muslim pirates increasingly penetrating the Tyrrhenian Sea and appearing alarmingly close to Livorno.<sup>120</sup> In Sicily today, William Brenner reports, the saying ‘*pigliato dai turchi*’ (‘taken by the Turks’, although in its origin referring specifically to Barbary raiders) is still used to indicate being caught off guard.<sup>121</sup> To the west, as the North African depredators made inroads into the Atlantic, even English shores were not

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<sup>114</sup> Alejandro Colas, ‘Barbary Coast in the expansion of international society: Piracy, privateering, and corsairing as primary institutions’ 42 *Review of International Studies* (2016) 840, 849-50.

<sup>115</sup> On Cervantes and his experience of captivity, see Jean Canavaggio, *Cervantes* (W.W. Norton, 1990).

<sup>116</sup> Both are quoted in Garcés (2002) 15.

<sup>117</sup> See Fuchs & Ilika (2010) xiii. Both plays are contained in Fuchs & Ilika (eds) (2010).

<sup>118</sup> MacLean & Matar (2011) 133.

<sup>119</sup> See, e.g., Robert C. Davis, ‘Counting European Slaves on the Barbary Coast’ 172 *Past and Present* (2001) 89.

<sup>120</sup> See Molly Greene, ‘The Ottomans in the Mediterranean’, in Virginia H. Aksan & Daniel Goffman (eds), *The Early Modern Ottomans: Remapping the Empire* (Cambridge University Press, 2007) 104.

<sup>121</sup> Brenner (2016) 152.

immune. The reign of Elizabeth I saw England's maritime and commercial expansion into the Mediterranean and the Atlantic, exposing English merchants and sailors to capture and enslavement, as reflected in Hakluyt's compilation. But in the early 17th century, Barbary raiding itself extended as far as the British Isles. In 1625 Cornwall was attacked, while in 1631, Barbary pirates based in Morocco sacked the town of Baltimore, taking 107 captives. Barbary corsairs could even be seen in the Thames estuary. So feared were Barbary pirates that special prayers for protection therefrom were incorporated into Anglican church services.<sup>122</sup>

An economy of capture and ransom developed with its own unique institutions. Some were continuations of the religious orders set up for the redemption of Christian crusader captives—for example, the Order of the Most Holy Trinity and of the Captives, also known simply as the Trinitarians (1198) and the Order of the Blessed Virgin Mary of Mercy, also known as Our Lady of Ransom or the Mercedarians (1218).<sup>123</sup> In the 16th century, these served as templates for further redemptive confraternities across the Mediterranean sponsored by the Spanish crown, the Papal states and the major Italian republics. Large campaigns to raise funds for the rescue of captives were a common occurrence.<sup>124</sup>

### **'TURNING TURK' AND THE THREAT TO CHRISTIAN SOULS**

The risk of capture by Barbary depredators loomed large in the European imagination. Loss of ship and freight to raiders had long been a risk faced by merchants, hence the development of a regime of restitution and reprisal as discussed in Chapter 3. The

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<sup>122</sup> Roger Perkins & Kenneth J. Douglas-Morris, *Gunfire in Barbary* (K. Mason, 1982) 22

<sup>123</sup> MacLean & Matar (2011) 125. Muslim rulers had established their own emissaries, the *fakkakin*, around the same time to negotiate the release of coreligionists. Indeed, although overlooked in a lot of the historiography, Christian forces were no less invested in the taking of slaves. Magharibi slaves were highly valued commodities; according to Matar, almost 60,000 Moroccans were taken captive in 1521-22 alone, many sold in the slave markets of Europe. Nabil Matar, 'Piracy and Captivity in the Early Modern Mediterranean: The Perspective from Barbary', in Claire Jowitt (ed.), *Pirates? The Politics of Plunder 1550-1650* (Palgrave Macmillan, 2007) 56, 57. Venice and Genoa were both centres of the slave trade in Italy, while Barcelona and Valencia were focal points of the Iberian trade. Majorca, Sardinia, Sicily, Crete, Rhodes, Cyprus and Chios also served as slave emporia at varying times. O'Connell & Dursteler (2016) 146. As with Christian enslavement narratives, an Arab *corpus captivitis* emerged about the experience of Muslims in Christian captivity. Surveying the body of early modern Magharibi Arabic biographies, jurisprudential decisions, royal letters, and others documents, Matar finds the recurring motif of descriptions of 'the danger of Euro-Christian invasions and the destructive impact of captivity on Magharibi stability, both political and social'. Matar (2007) 62.

<sup>124</sup> Noel Malcolm, *Agents of Empire: Knights, Corsairs, Jesuits and Spies in the Sixteenth-Century Mediterranean World* (Oxford University Press, 2015) 211.

surge of maritime violence and attendant imagery of captivity associated with the Barbary coast, however, changed the character of piracy in the popular imagination. Here was the Ottoman enemy of Christendom, not an abstract threat to the east but very much incarnate; at any moment one might be *pigliato dai turchi*. Yet the danger posed by the raider was not limited to captivity and life as a galley slave. A worse fate still awaited many of the ‘Christian souls so taken’, publicists warned: the pirate was to be feared not only for his power to seize Christian subjects against their will, but also for the threat he posed to those subjects’ very Christian identity.

Renegade, or in Spanish *renegado*, referred to an apostate who renounced his or her faith—‘one that was first a Christian’, explained Richard Hakluyt, ‘and afterwards becommeth a Turke’.<sup>125</sup> Writing of his captivity in Algiers in the late 1570s, the Portuguese-born cleric Antonio de Sosa argued that over half of the inhabitants of the city were ‘Turks by profession’, that is, ‘renegades who, descending from Christian blood and parents, have voluntarily converted into Turks. . . . Both these Turks and their children are more (numerous) than the other inhabitants, the Moors, Turks, and Jews of Algiers’.<sup>126</sup> The renegades’ origins, de Sosa suggested, were diverse: ‘There is no Christian nation in the world from which there are no renegades in Algiers.’<sup>127</sup> By the early 17th century, Paul Baepler suggests, as many as two-thirds of the corsair captains based in Algiers were renegades.<sup>128</sup>

The renegade pirates touched on an already well-honed fear of apostasy in Christian Europe, coinciding with similar anxieties. In England, for instance, the growing fashion of drinking coffee created consternation, the imbibing of the drink quickly linked with the image of apostasy.<sup>129</sup> Coffee, one anonymous detractor warned, was ‘Turkish Renegade berry while water was English and loyal: their mix or

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<sup>125</sup> Quoted in Nabil Matar, *Islam in Britain, 1558-1685* (Cambridge University Press, 1998) 23.

<sup>126</sup> ‘*Los turcos de profesión son todos los renegados que, siendo de sangre y de padres cristianos, de su libre voluntad se hicieron turcos. . . . Estos y sus hijos, por sí solos, son más que todos los otros vecinos moros, turcos y judíos de Argel*’: quoted in Garcés (2002) 34. De Sosa’s account is published in translation in Antonio de Sosa, *An Early Modern Dialogue with Islam: Antonio de Sosa’s Topography of Algiers (1612)*, ed. María Antonia Garcés, trans. Diana de Armas Wilson (University of Notre Dame Press, 2011).

<sup>127</sup> ‘*No hay nación de cristianos en el mundo de la cual no haya renegade y renegados en Argel*’: quoted in Garcés (2002) 35.

<sup>128</sup> Paul Baepler, Introduction to Paul Baepler (ed.), *White Slaves, African Masters: An Anthology of American Barbary Captivity Narratives* (University of Chicago Press, 1999) 1, 42.

<sup>129</sup> Kugler (2012) 27-28.

marriage was the befouling of the latter'. The imbibing of coffee, he further warned, makes the drinker as 'faithless as a Jew or infidel'.<sup>130</sup>

The Barbary pirate, like the beverage, conjured an Ottoman force invading and defiling Christian waters and threatening Christian identity. Anxieties over 'turning Turk' were ever present in literary accounts of captivity in Ottoman territories and the resulting renegades were presented in much the same register as the indigenous 'Turks'. They too were marked by depravity. 'Most of those who are called Turkes of Alger', wrote the 16th-century French geographer Nicolas de Nicolay, 'are Christians renied, or Mahumetised, of all Nations, . . . giuen all to whoredome, sodometrie, theft, and all other most detestable vices'.<sup>131</sup> An English contemporary, Thomas Dallam, suggested that many of those captured by pirates were compelled to convert so as to avoid living 'in moche more slaverie and myserie'. In time, though, he warned, the 'Renied cristians' too become 'most berberus and villanus'. Their Christian souls lost, they take 'pleasur in all sinfull actions' and, in the ultimate betrayal, 'take moste delite' in capturing and selling into slavery their former co-religionists.<sup>132</sup> In the 1580s, Christopher Marlowe would reference the renegades in *Tamburlaine*.

. . . the cruel pirates of Argier,  
That damned train, the scum of Africa,  
Inhabited with stragglng runagates  
That make quick havoc of the Christian blood.<sup>133</sup>

The 'scandalous confusion' of Moors and renegades shocked many a contemporary. Samuel Purchase, the chronicler of voyages, saw in Algiers 'the Whirlepoole of these Seas, the Throne of Pyracie, the Sinke of Trade and the Stinke of Slavery; the Cage of uncleane Birds of Prey, the Habitation of Sea-Devils, the Receptacle of Renegadoes of God, and Traytors to their Country'.<sup>134</sup> As much as the threat posed by pirates to the bodies of the captured, Purchase and his contemporaries

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<sup>130</sup> Matar (1998) 112-13.

<sup>131</sup> Nicolas de Nicolay, *Les Navigations, pérégrinations et voyages, faicts en la Turquie* (Guillaume Silvius, 1577) 16-17. The English translation is quoted in Benedict S. Robinson, *Islam and Early Modern English Literature: The Politics of Romance from Spenser to Milton* (Palgrave Macmillan, 2007) 82.

<sup>132</sup> Thomas Dallam, 'The Diary of Master Thomas Dallam, 1599-1600', in J. Theodore Bent (ed.), *Early Voyages and Travels in the Levant* (Cambridge University Press, 1893) 1, 14-15.

<sup>133</sup> Christopher Marlowe, *Tamburlaine the Great: Parts I and II*, ed. John D. Jump (University of Nebraska Press, 1967) [1590] III.iii.55-58.

<sup>134</sup> Quoted in Thomas Christensen, *1616: The World in Motion* 275; Fuchs *Mimesis?*

feared the threat to Christian souls.

By the end of the 16th century, the danger of the renegade had only added to the evil and religious enmity epitomised by the Barbary pirate. In fact, as one popular ballad had it, the renegades with ‘their Christ denying’ were ‘worse than Turkes’.<sup>135</sup> In Robert Daborne’s *A Christian Turn’d Turk*, the English dramatist denounced the religious apostasy of the renegade as ‘the heart itself of villainy’.<sup>136</sup> His 1612 play dramatized the historical exploits of John Ward, an Englishman pressed into Royal Navy service only to mutiny and seek refuge in Tunis, where he converts to Islam and pursues a campaign of depredation against Christian shipping.<sup>137</sup> Ward, and others like him, provoked righteous fury amongst English audiences. As Tinniswood writes, ‘[t]his was the ultimate betrayal, as far as the English were concerned—worse, even, than robbery or murder. Turning to crime was bad, but for Ward to compound his crimes by voluntarily handing over his immortal soul to the enemy was horrible.’<sup>138</sup> Ward the pirate was, as the satirist Samuel Rowlands put it in a poem, also penned in 1612, ‘[a] villain, worse than he that Christ betray’d’.<sup>139</sup>

None of this is to claim that the image of the Barbary pirate in popular consciousness was in any sense ‘objective’. Hostilities coexisted with regular commercial and diplomatic contact and certainly other depictions of Barbary and the Islamic world were in circulation. Diplomatic correspondence by ‘hardnosed businessmen serving in consular roles’ lacked the ‘melodrama of accounts by captives, who always presented themselves as suffering Christian heroes’.<sup>140</sup> But it was the captivity narrative which captured the public imagination and shaped the way generations understood the Islamic world—and the pirate.

Captivity and conversion, as threat and lived experience, disseminated in narratives both sober and embellished—and hyperbole was certainly the norm—

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<sup>135</sup> ‘The Lamentable Cries’ (2001).

<sup>136</sup> Robert Daborne, ‘A Christian Turned Turk’ [1612], in Daniel J. Vitkus (ed.), *Three Turk Plays from Early Modern England: Selimus, A Christian Turned Turk, and The Renegado* (Columbia University Press, 2000) 149, 155.

<sup>137</sup> For historical details of Ward’s exploits, see Peter Earle, *The Pirate Wars* (Methuen, 2003) 28-29. For an extended discussion of Daborne’s play, see Claire Jowitt, *The Culture of Piracy, 1580-1630: English Literature and Seaborne Crime* (Ashgate, 2010) 141-46.

<sup>138</sup> Tinniswood (2011) 43.

<sup>139</sup> Samuel Rowlands, ‘To a Reprobate Pirate that Hath Renounced Christ and Is Turn’d Turk’, quoted in *ibid* 44.

<sup>140</sup> MacLean & Matar (2011) 124.

contributed to the production and reproduction of the Barbary pirate as demonic enemy in popular European consciousness. For the Spanish, reminders were constant. ‘From the massive campaigns led by the ransomer monks to raise funds for the rescue of captives’, writes Garcés, ‘to the processions held when these ransomed men and women returned home, to the chains and shackles hung in churches and public buildings to signify liberation, the cruel reality of captivity in Barbary was ever present for the Spaniards’.<sup>141</sup> Similarly, observe MacLean and Matar, the first image that the English public encountered of Muslims in general, and Barbary pirates in particular, was one ‘imbued with danger, violence, and religious opposition’.<sup>142</sup> Accounts of piracy and captivity—the two were inevitably one and the same—both authentic and fictional, wielded great influence on the popular imagination, affirming the ‘hostile stereotypes about the “Mahometans” that appeared in sermons and chronicles’.<sup>143</sup>

Authors, dramatists, painters, preachers: all depicted in print, on stage, on canvas and from pulpit the brutality, anti-Christian violence, and universal enmity of Muslim pirates. The Barbary pirate represented a threat more troubling than the unauthorised pillage of di Negro and his ilk in the medieval Mediterranean. And, in the shape of the renegade, he represented not merely the satanic other of Islam and the threat of captivity and slavery: he was the embodiment of the ultimate corollary of Islamic encroachment, the abandonment of Christianity and the ‘ever-present possibility of apostasy’.<sup>144</sup>

### THE BARBARY PIRATE IN LEGAL THOUGHT

The pirate was no longer an abstract figure of depredation, one who merely robbed at sea: he was a figure of *religious* enmity associated with the infidel threat to Christendom and the *baños* of Barbary. As Jean-Baptiste Gramaye of Flanders put it following his own captivity in Algiers, the pirates’ base was ‘[t]he Whip of the Christian World, the terror Europe’.<sup>145</sup> It was against this popular sentiment and concomitant literary topos that legal thinkers grappled with the issue of piracy and that

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<sup>141</sup> Garcés (2002) 172.

<sup>142</sup> MacLean & Matar (2011) 134.

<sup>143</sup> Ibid 127.

<sup>144</sup> Kugler (2012) 60

<sup>145</sup> Quoted in Thomas Christensen, *1616: The World in Motion* (Counterpoint, 2012) 275.

they too began to identify the pirate with universal enmity, ultimately rendering him *hostis humani generis*.

One of the first prefigurations of this new identity, and the first step in a move from a paradigm based on the laws of war and sovereign licence to one premised on universal enmity, was found in the work of the northern Italian jurist Pierino Belli. Belli discussed piracy in the context of his major 1563 work on war, *De Re Militari et Bello tractatus*. Citing Cicero's command that war should begin only with a formal declaration, Belli suggested that an exception should nonetheless be made 'in the case of pirates [*piratae*], since they are both technically and in fact already at war'. The pirate 'whose hand is against every man should expect a like return from all men, and it should be permissible for any one to attack them.'<sup>146</sup> Yet Belli nonetheless affirmed 'the applicability of the law of war to relations with pirates'.<sup>147</sup> Pirates are to be distinguished from those outside the law, *sint extra omne legum*: only public enemies branded such by the Pope or Holy Roman Emperor—*latrones*, say—are 'outlaws' to whom those laws of war do not apply.<sup>148</sup>

Almost two decades later, Balthasar de Ayala would advance the pirate's conceptual move into outlawry and universal enmity. Ayala was Jurisconsult and Judge Advocate General of the Habsburg Royal Army in the Low Countries, his *De iure et officiis bellicis et disciplina militari* (1582) written to justify and bolster Philip II's imperial project in the Low Countries and polemically attack the Protestant Dutch rebels who sought secession from the Habsburg Empire.<sup>149</sup> Philip, like his predecessor Charles, saw himself as 'God's standard bearer', the protector of Christendom from the both Turk and Lutheran heresy. In this context, Ayala drew an explicit equation

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<sup>146</sup> Pierino Belli, *De Re Militari et Bello tractatus*, trans. Herbert C. Nutting (Clarendon Press, 1936) [1563] 83.

<sup>147</sup> Alfred P. Rubin, *The Law of Piracy* (University Press of the Pacific, 2006) [1988] 19.

<sup>148</sup> Belli (1936) 83. Gould is mistaken when he states that Belli insisted the rules of war *tout court* 'do not apply to conflicts against pirates'. Harry D. Gould, 'Cicero's Ghost: Rethinking the Social Construction of Piracy', in Michael J. Struett, Jon D. Carlson & Mark T. Nance (eds) (2003) *Maritime Piracy and the Construction of Global Governance* (Routledge, 2013) 23, 30. Rubin notes that Belli went on to argue, contrary to the historical example of Pompey and Marc Antony vis-à-vis the Cilicians, that no treaty may be signed with pirates, a view in tension with his earlier affirmation of the law of war's applicability and one reflecting 'some confusion of thought': Rubin (2006) 19.

<sup>149</sup> Balthasar de Ayala, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline*, vol. 2, trans. John Pawley Bate (Carnegie Institution, 1912) [1582]. On Ayala's discussion of rebels and pirates, see Keith David Howard, *The Reception of Machiavelli in Early Modern Spain* (Tamesis, 2014) 63-68; Georg Cavallar, *Imperfect Cosmopolis: Studies in the History of International Legal Theory and Cosmopolitan Ideas* (University of Wales Press, 2011) 86.



between rebel and pirate: neither, he insisted, could fight a *bellum iustum*. Just as Bartolus had argued that the illegitimate depredator lacked the authority of a sovereign, a *summus princeps*, so too, argued Ayala, did the rebel. Only a sovereign authority enjoyed the power of making war; rebels were no legitimate authority and had no *ius belli*. Whereas two sovereigns at war each enjoyed the legal status of belligerent—*hostis*—such status could not apply to rebels. As such, Ayala argued, rebels were not protected by the laws of war and were to be treated like robbers and pirates.

Pirate and brigand, *pirata* and *latro*, had, as we saw previously, remained conceptually distinct in Roman law—with the most severe treatment reserved for the latter. On Ayala’s reading, however, references to *latrones* in the *Digest* were taken to apply equally to *piratae*, thus going one step further than Belli and denying altogether the status of lawful enemy, *hostis*, to pirates. ‘[T]he laws of war and of captivity and of postliminy, which apply to enemies, do not apply to rebels, any more than they apply to pirates [*piratis*] and robbers [*latronibus*] (these not being included in the term “enemy” [*hostes*])’.<sup>150</sup> Pirates, robbers, and rebels were not protected by the laws of war: they could be enslaved and could ‘not acquire the ownership of what they capture, this only being admitted in the case of enemies’. Still, Ayala insisted ‘all the modes of stress known to the laws of war may be employed against them, even more than in the case of enemies’.<sup>151</sup> The rebel and robber, he suggested—and presumably the pirate, although this third figure is not listed again—‘merit severer reprobation than an enemy who is carrying on a regular and just war and their condition ought not to be better than his’.<sup>152</sup>

In collapsing any distinction between brigand and pirate, Ayala offered a justification for a discriminatory legal regime—only the just belligerent, the sovereign, could benefit from the protections of the laws of war—reminiscent of the medieval ‘holy war’.<sup>153</sup> Extending that unequal treatment beyond questions of postliminy and the legality of prize, as had preoccupied Bartolus’s generation, Ayala rendered the pirate (and rebel) much like the heretic and infidel of the medieval laws

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<sup>150</sup> de Ayala (1912) 11.

<sup>151</sup> Ibid 11-12.

<sup>152</sup> Ibid 12.

<sup>153</sup> See Wilhelm G. Grewe, *The Epochs of International Law*, trans. Michael Byers (Walter De Gruyter, 2000) 209.

of war. This was surely no coincidence for, as we have seen, the pirate was by the late 16th century, synonymous in the Christian imagination with the Moorish infidels of North Africa.

The discriminatory approach to those labelled pirates was adopted likewise by Alberico Gentili. Following those before him, Gentili maintained that only sovereign princes enjoyed the legal power to resort to war, war being ‘a just and public contest of arms’ between equal parties.<sup>154</sup> Private individuals cannot resort to war—‘to the arbitrament of Mars’—since they can always ‘obtain their legal rights before their superiors’ tribunal’.<sup>155</sup> Only the sovereign has ‘no earthly judge’ and can be rightly considered an enemy (*hostis*).<sup>156</sup> Here, Gentili looked to Roman authorities, citing Ulpian’s insistence that ‘[e]nemies are those against whom the Roman people have publicly declared war, or who themselves have declared war against the Roman people; others are called robbers or brigands.’<sup>157</sup> The latter do not wage war: *latrones bellum non gerunt*. Pomponius is likewise offered as authority: ‘Those are enemies who declare war against us, or against whom we publicly declare war; others are robbers [*latrones*] or brigands [*praedones*].’<sup>158</sup> Like Ayala, however, Gentili once again collapsed the Roman law distinction between *pirata*, on the one hand, and *latrone* and *praedone*, on the other; the pirate was assimilated to the status of the latter, a criminal, not a lawful belligerent: ‘[a] state of war cannot exist with pirates and robbers [*cum piratis & latrunculis bellum non est*]’.<sup>159</sup>

As with Bartolus, the license of a recognised sovereign was central to Gentili’s identification of a lawful belligerent (and, in the inverse, a pirate). An enemy (*hostis*) is one ‘who has a state, a senate, a treasury, united and harmonious citizens, and some basis for a treaty of peace, should matters so shape themselves’.<sup>160</sup> Writing of Frenchmen captured by the Spaniards following the expulsion of António, pretender to the throne, from Portugal in 1580, Gentili maintained that it was wrong to have

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<sup>154</sup> Alberico Gentili, *De Jure Belli Libri Tres*, trans. John Carew Rolfe (Clarendon Press, 1933) [1588] 12.

<sup>155</sup> *Ibid.* 20.

<sup>156</sup> *Ibid.* 15.

<sup>157</sup> *Dig.* 49.15.24.

<sup>158</sup> *Dig.* 50.16.118.

<sup>159</sup> Gentili (1933) 22.

<sup>160</sup> *Ibid.* 25.

treated them as pirates [*piratae*]: ‘I say this because of no argument derived from the number and quality of the men and ships, but from the letters of their king which they exhibited’.<sup>161</sup> The written authority of the French king, establishing that ‘it was that king whom they served, not Antonio’, was sufficient to remove them from the category of pirate.<sup>162</sup> For Gentili, as for Ayala, those who lacked the sovereign authority to issue an authorisation could be treated as pirates. The King of France enjoyed such authority, whereas the pretender to the Portuguese throne and the Dutch rebels did not.

Having collapsed any distinction between pirate and brigand and denying both the status of *hostis*, Gentili’s formulation meant that the labelling of rebels, or any other group, ‘pirates’ denied them the benefits of the status of belligerency. ‘With pirates and brigands who violate all laws, no laws remain in force.’<sup>163</sup> Even when they follow the customs of warfare, ‘yet they do not wage war’: they are not lawful enemies with the privileges of a just war (*iusti hostes*).<sup>164</sup> ‘Such men’, Gentili opined, citing Cicero, ‘are no more deserving of consideration in establishing a code of laws than wild beasts . . . “Such savagery in human form and bestial cruelty should be banished from what we may call the body of human society”.’<sup>165</sup> Pirates are quite literally outlaws, existing outside the law: they are outside of and enemy to the universal society of that make up the *societas gentium*: ‘the common enemies of all’, *hostes sunt communes*.<sup>166</sup> And against such common enemies, all war is just. On this Gentili was quite insistent, repeating it in various forms: ‘If war is made against the wicked’, he argued, for instance, ‘it is not disgraceful to make war’.<sup>167</sup> Finally, with an appeal to Roman precedent, Gentili insisted that ‘[i]t is right to make war upon pirates, and the Romans justly took up arms against the Illyrians, Balearans, and Cilicians, even though those people had touched nothing belonging to the Romans, to their allies, or to anyone connected with them; for they had violated the common law of nations’. Piracy, he went on, ‘is contrary to the law of nations and the league of human society.

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<sup>161</sup> Ibid 26.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid 24.

<sup>164</sup> Ibid 25.

<sup>165</sup> Ibid 7.

<sup>166</sup> Ibid 22.

<sup>167</sup> Ibid 122.

Therefore war should be made against pirates by all men, because in the violation of that law we are all injured'.<sup>168</sup>

As Gould is quick to note, Gentili was mistaken in asserting that Rome moved against the Illyrians, Balearans, and Cilicians as pirates and in the absence of prior injuries.<sup>169</sup> These were recognised polities—*piratae* in the Roman meaning of the word, not *latrones* or *praedones*, as in Gentili's rendering—with whom the Romans engaged in war. Illyria, for instance, was regarded as a 'predatory state' by the Romans,<sup>170</sup> and as Polybius' *Histories* makes clear, the immediate cause for war was the assassination of Roman ambassadors on the orders of Illyrian queen Teuta.<sup>171</sup> As with the Cilicians in the context of the Mithridatic wars, the conflict with the Illyrians should be understood as part of Rome's broader struggle against the Macedonians. Certainly Roman historians—Plutarch, Velleius Paterculus, among others—wrote of these conflicts as outright wars: *bella piratica*.<sup>172</sup>

In Gentili, then, we find one of the earliest formulations of the pirate as a universal enemy. And yet, as his historical allusions, although sometimes confused, affirm, Gentili's legal construction of the pirate did not in fact rest on its supposed universal enmity. As Rech has observed, Gentili's 'common enemies of all' rhetoric, and even his invocation of a *societas gentium*, had no radical implications for his anti-piracy position, which remained, like that of antecedent thinkers, grounded on the Roman dichotomy between lawful and unlawful belligerents.<sup>173</sup> Moreover, while Gentili went some way in advancing the pirate's status as a universal enemy, he was in practice still, like those antecedents, most directly concerned with questions of postliminy in its modern form. The identification of depredation as the work of pirates remained, for *legal* thinkers, primarily of relevance in disputes over the determination of title to goods seized at sea.

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<sup>168</sup> Ibid 124.

<sup>169</sup> Gould (2003) 31.

<sup>170</sup> Gerry Simpson, 'Piracy and the Origins of Enmity', in Matthew Craven, Malgosia Fitzmaurice & Maria Vogiatzi (eds), *Time, History and International Law* (Martinus Nijhoff, 2006) 219, 229.

<sup>171</sup> Plb. 2.7-11; Polybius, *Histories*, trans. E.S. Shuckburgh (Macmillan, 1889).

<sup>172</sup> See Rech (2013) 57.

<sup>173</sup> Ibid.

This is nowhere clearer than in his role as the Spanish crown's advocate before the Royal Council Chamber in London.<sup>174</sup> In his pleadings before the Royal Chamber, Gentili argued once again that pirates are the enemies of all: '*piratae sunt hostes omnium*'.<sup>175</sup> Such status, however, was now explicitly linked to a determination of title following capture. Lawful title might only pass to the captor of goods, Gentili insisted, 'once the capture is perfected by the captive people, goods or vessel being brought to the territory controlled by the capturing person's sovereign and the capture declared good there.'<sup>176</sup> But pirates have no territory or sovereign to which to take their prize, being the enemy of all legitimate sovereigns: '[t]o pirates and wild beasts no territory offers safety'<sup>177</sup>. They cannot thus alter legal title. So, for example, in a case in which Gentili represented the interests of Spanish traders who had fallen prey to Barbary corsairs, he argued that the subsequent sale of their plundered goods to English merchants did not pass title. Although Barbary officials had overseen the sale, giving it an appearance of legality, this was at best a legal fiction and did not bestow sovereign authority onto the pirates' seizure: 'the substance of the contract was with the pirates'.<sup>178</sup> It followed that legal title remained that of the original Spanish traders.

Who were the contemporary pirates that Gentili had in mind who, 'wearing the human form, live the life of the most brutal of beasts'? As in the work of so many of his antecedents, the pirate existed in Gentili's theoretical work—namely *De iure belli*—more as an abstract category to which others were assimilated—rebels, say—or from which others were differentiated—the Frenchmen fighting with the pretender António, for instance. But here, in his collected pleadings, the recurring embodiments of the pirate are specifically the Barbary raiders, the seamen of the North African coast who were the major antagonist of Christian shipping in the Mediterranean at this time.

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<sup>174</sup> Many of his pleadings were collected posthumously in Alberico Gentili, *Hispanicis Advocationis Libri Dvo*, trans. Frank Frost Abbott (Oxford University Press, 1921) [1613]. For detailed discussions of this text, see Lauren Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400-1900* (Cambridge University Press, 2010) 126-30 and Lauren Benton, 'Legalities of the Sea in Gentili's *Hispanica Advocatio*', in Benedict Kingsbury & Benjamin Straumann, *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (Oxford University Press, 2010) 269.

<sup>175</sup> Gentili (1921) 18.

<sup>176</sup> Rubin (2006) 23.

<sup>177</sup> Gentili (1921) 18.

<sup>178</sup> *Ibid* 55.

The two strands running through Gentili's work, the pirate as unlawful belligerent/unauthorised depredator and the pirate as universal enemy, are likewise found in the work of his contemporaries. Bodin described pirates as enemies of humankind ('*ennemis du genre humain*') at the start of his 1576 *Six Books of the Commonwealth*.<sup>179</sup> Like Gentili, Bodin cites both Ulpian and Pomponius' remarks on brigands to distinguish *both* robbers and pirates from 'lawful enemies'. While the 'rightly ordered commonwealths' with 'well-ordered government' are correctly recognised as sovereign, robber and pirate communities are at best criminal organisations and do not enjoy the right to make treaties or declare war—or authorise depredations.<sup>180</sup>

Perhaps unsurprisingly, many of the thinkers who would demonise the pirate as a universal enemy and even embrace the designation of the pirate as *hostis humani generis* were familiar with the epithet's theological origins. Jean Bodin, although today famous as a theorist of sovereignty, was in his own time a noted author of demonological tracts, most notably *On the Demon-Mania of Witches*, published four years after his *Six Books of the Republic*.<sup>181</sup> Modern legal commentators have tended to dismiss Bodin's concern with devil-worship and the chthonian world as an embarrassing footnote, but as Mark Neocleous has recently shown, Bodin's defence of absolute sovereignty and his concern with 'demon-mania' in fact went hand in hand.<sup>182</sup>

Bodin, like many pious Christians, was deeply invested in rooting out the enemies of Christendom. Pope Innocent VIII's bull of 1484 had warned of persons who 'have abandoned themselves to devils, incubi and seccubi . . . at the instigation of the Enemy of Mankind' and set the groundwork, further developed in the *Malleus Maleficarum* published two years later, for an organised campaign of witch-hunting.<sup>183</sup> A century later, Bodin and his contemporaries would echo the same concerns. Satan, Bodin wrote in *Demon-Mania*, seeks, through his servants, to destroy the human race: he is, in fact, the 'great Enemy of the human race', *hostis humani*

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<sup>179</sup> Jean Bodin, *Six Books of the Commonwealth*, trans. M.J. Tooley (Blackwell, 1955) [1576].

<sup>180</sup> *Ibid* 1-2.

<sup>181</sup> Jean Bodin, *On the Demon-Mania of Witches*, trans. Randy A. Scott (Centre for Reformation and Renaissance Studies, 1995) [1580].

<sup>182</sup> Neocleous (2016) 87-88.

<sup>183</sup> *Ibid* 86.

*generis*—‘unseen he flies everywhere to deceive and destroy the human race’.<sup>184</sup> Most prominent amongst his servants were witches, the devil’s ministers, who Bodin argues must be rooted out: ‘to secure the safety of the good, and to punish the most despicable wickedness that the human mind can imagine, it is [necessary] to chastise witches with the utmost rigour’.<sup>185</sup>

The key agent in the war against witches—and their master in Satan—is the state and the magistrate, the latter imbued with the power of the former. Bodin’s book on witches is, as Neocleous puts it, essentially ‘a handbook for how to mobilise the state and its law against an Adversary with seemingly universal and demonic powers’.<sup>186</sup> The witch here occupies the same role as those who challenge the order and security of the state in Bodin’s political theory: ‘The Witch and the rebel constitute one kind of enemy and thus one kind of threat’.<sup>187</sup> And, by the same token, these *internal* enemies also have their *external* counterparts. Like the witch who hides often in plain sight inside the Christian state, outside it is through ‘pagans and infidels’ that the devil works.<sup>188</sup> They too are seduced by the devil for the destruction of the Christian state. In the *Six Books*, these are joined by the pirate—and it is precisely the infidel pirates of Barbary who Bodin invokes. Indeed, Bodin explicitly juxtaposes the well-ordered commonwealth that is the sovereign state with the pirate community which, despite what trappings of internal organisation they may enjoy, are the polar opposite of the state. (No doubt influenced by France’s own diplomatic priorities, Bodin nonetheless allowed for the transformation of pirates from *hostes humani generis* into sovereign princes, conceding that Algiers and the other Barbary regencies, despite home to pirates, were, by the late 16th century, to be recognised as states). Like the witch, the pirate was *hostis humani generis*, the same language deployed in both demonological and political treatise. As Lyndal Roper has observed, what united Bodin’s concerns was a determination ‘to root out the enemies of Christendom and the state’, internal and external.<sup>189</sup>

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<sup>184</sup> Bodin (1995) 46, 48, 109.

<sup>185</sup> Ibid 204.

<sup>186</sup> Neocleous (2016) 89.

<sup>187</sup> Ibid 88.

<sup>188</sup> Bodin (1995) 107.

<sup>189</sup> Lyndal Roper, *Witch Craze: Terror and Fantasy in Baroque Germany* (Yale University Press 2004) 20.

At the very least, then, in the Barbary depredators, religious and legal identities coincided. Some commentators have gone further, though, and argued that the religious character of the Barbary pirates explicitly influenced the development of the *hostis humani generis* concept in legal thought. In a recent intervention, Sonja Schillings suggests that the fact that so many Barbary pirates were European renegades was of central importance. ‘The conspicuous mix of native and renegade Barbary corsairs’, she notes, complicated what was essentially a question of contractual legitimacy.<sup>190</sup> The depredators condemned by Bartolus fell into illegitimacy when their attacks were not licensed by a sovereign. Could the Barbary regencies be considered sovereigns capable of authorising reprisal? As Rech shows in compelling detail, the status of the Barbary polities was a matter of great debate and would remain a central preoccupation of legal thinkers for several centuries.<sup>191</sup> But it was at least conceivable for Europeans, as Schillings argues, that the North African depredator ‘acted loyally in the name of his native faith and sovereign’ even if ‘faith and sovereign were not deemed civilized’.<sup>192</sup> The same, however, Schillings suggests, could not be said of the renegade, ‘someone who had treacherously abandoned his native faith and sovereign and turned against them (at least if these original allegiances were European and had been abandoned for a barbarous alternative)’.<sup>193</sup> Here, in the Barbary renegades, Schillings suggests, lie the origins of a conception of pirates as individual transgressors at war with all states. ‘Whereas the native Barbary corsair was collectively Muslim’, she argues, ‘the renegade Barbary corsair had to convert individually. Native Barbary corsairs could claim to represent a cultural collective that was larger than themselves and epitomized by Islam; they could claim to represent a common public cause and were imagined as culturally homogenous, a collective bloc of Otherness.’<sup>194</sup> Not so the renegades, who were, Schillings writes, ‘solely compared to other converts to Islam and thus legally grouped with other individual, isolated transgressors like them: people who were originally European and Christian but acted

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<sup>190</sup> Sonja Schillings, *Enemies of all Humankind: Fictions of Legitimate Violence* (Dartmouth College Press, 2017) 73.

<sup>191</sup> Rech (2013).

<sup>192</sup> Schillings (2017) 73.

<sup>193</sup> Ibid.

<sup>194</sup> Ibid 77.



as if they were not, and who did so only because they wanted to serve their private ends of personal profit.<sup>195</sup>

It is unclear on what basis Schillings ascribes ‘personal profit’ as the sole motive for Christians to ‘turn Turk’. Nonetheless, her work is interesting in drawing particular attention to the renegade. He alone, she suggests, was the prototype of the modern pirate: with his ‘explicit spiritual abandonment of the Christian God’ he was ‘a true renegade to barbarism for the entire world to see. Therefore, he could become the prototype of the *pirata*, the epitome of civilization-abandoning degradation.’<sup>196</sup> At once a traitor to their nation and to their faith, the renegades recall the pirate-rebel nexus of Ayala. And in Spain and Portugal, it was the Inquisition, an institution established for the suppression of heresy, that tried thousands of Barbary pirates.<sup>197</sup>

This important kernel gives way to less convincing theoretical abstraction in which the pirate is in fact a secondary figure of enmity after the *praedon*. If the renegade is the model of the pirate, Schillings suggests that he ‘remained a side-show’ to the true ‘king of evil’, the indigenous Barbary raider, whom he merely imitated.<sup>198</sup> She attempts to map this hierarchy onto the Roman conceptions of *praedon* and *pirata*, which she projects into the modern era as distinct legal identities within a broader ‘*hostis humani generis* constellation’. Whatever merit this theoretical abstraction has for her subsequent analysis of the *hostis humani generis* concept in various literary works, it has no basis in either Roman law or early modern legal thinkers who, as we have seen, in fact collapsed the classical distinction.

Still, if we take Schillings’ broader observation seriously, she can be understood simply to argue that the Barbary pirate—encompassing both Moor and renegade—could simultaneously embody two piratical identities. On the one hand, the pirate represented Islam, the ‘agent of moral bankruptcy’ and an avatar of ‘the central, gruesome antagonist’, the infidel.<sup>199</sup> And, on the other, he was a Christian who had ‘turned against his homeland’. ‘Turning Turk’ was at once conversion and treason: ‘simultaneous acts, the political and religious sides of one and the same

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<sup>195</sup> Ibid.

<sup>196</sup> Schillings 81.

<sup>197</sup> Garcés (2002) 35.

<sup>198</sup> Schillings (2017) 78.

<sup>199</sup> Ibid.

abandonment'.<sup>200</sup> As such, he epitomised the universal enemy both as threat the universal pretensions of Christendom and enemy to all nations, having rejected and rebelled against the authority of all Christian princes.

By the early 17th century, the pirate as the enemy of all humankind, regularly called *hostis humani generis*, was well established. Francis Bacon's discussion in his *An Advertisement Touching a Holy War*, written in 1622, reflects the growing consensus.<sup>201</sup> Here, Bacon closely follows Gentili, although without explicit reference. Pompey's campaign against the Cilicians is offered once more as an illustration that '[i]t was never doubted but a war upon pirates may be lawfully made by any nation, though not infested or violated by them.'<sup>202</sup> So too was one justified in making war on 'the pirates now being', namely the Barbary raiding communities of North Africa: they may have the appearance of organised states, with 'a receptacle and mansion in Algiers', Bacon acknowledges, but they are pirates all the same, just as '[b]east[s] are not the less savage because they have dens.'<sup>203</sup> They are '*communes humani generis hostes*; whom all nations are to prosecute, not so much in the right of their own fears, as upon the band of human society'. It is worth noting that Bacon's militant denunciation of piracy came in the context of an extended dialogue canvassing the wisdom of a holy war against the Ottomans and their proxies in North Africa.

### THE PIRATE AS FIGURE OF RELIGIOUS ENMITY

Attempts to recover past attitudes are fraught with difficulties and misapprehension of an earlier period by presentist concerns is never far. There is a risk, especially in light of today's 'deepened fault lines' between Christianity and Islam, of seeing the Mediterranean as a hypostasized border between two existentially opposed religions.<sup>204</sup> Many scholars have certainly read a 'clash of civilizations' *avant la lettre* into the 16th-century Mediterranean. Andrew Hess's influential *Forgotten Frontier* did much to shape 20th-century attitudes toward the Ibero-Ottoman confrontation in

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<sup>200</sup> Ibid.

<sup>201</sup> Francis Bacon, *An Advertisement Touch a Holy War* (Waveland Press, 2000) [1622].

<sup>202</sup> Bacon (2000) 34-35.

<sup>203</sup> Ibid 35.

<sup>204</sup> Ania Loomba, 'Mediterranean Borderlands and the Global Early Modern', in Barbara Fuchs & Emily Weissbourd (eds), *Representing Imperial Rivalry in the Early Modern Mediterranean* (University of Toronto Press, 2015) 13, 21.

the Mediterranean, describing the emergence of ‘two increasingly different civilizations’ with the ‘wide belt of cultural pluralism’ of the 15th century shrinking to ‘a thin line’.<sup>205</sup> A long tradition of Eurocentric mythologizing has depicted the Ottomans as savagely martial, frenzied soldiers committed to holy war. The Ottoman Empire, one late-20th century historian writes, ‘lived for war’.<sup>206</sup> Another insists that the Ottomans, ‘[f]rom the point of their first entrance into history as a nomadic war-band’, pursued a ‘ruthless dedication to conquest and predation’, not as a matter of considered policy but as ‘a law of life, the principle that animated’ an entire society.<sup>207</sup> In the late 19th and 20th centuries, it was a commonplace to locate the Barbary pirates at the frontlines of this clash between Christian and Islamic civilizations.<sup>208</sup> In such accounts, the Ottomans, Barbary pirates, and Islam in general, with their atavistic violence, stand in sharp contrast with an advanced, pacific Christian Europe. Implicit in the ‘fixation on divergence’, Daniel Goffman notes, is ‘an assumption of inferiority, of uncivilized savagery (such as the conventional if hackneyed argument that plunder was the exclusive stimulus for Ottoman empire-building)’.<sup>209</sup>

It is certainly the case that this was a juncture marked by conflict between imperial powers with strong confessional identities. And the focus on religion in the historiography of Ottoman-European relations is not without foundation, given the role of such identities in shaping popular attitudes towards the conflict and its agents in the western Mediterranean. Certainly, as Goffman notes, early modern Europe ‘emerged from a Christian ecumene that had helped define and grant legitimacy to a medieval Europe that presided over several crusades against Islam. . . . Christian Europe—particularly in its relations with non-Christian societies—continued to cast its existence in terms of a “universal” faith.’<sup>210</sup> While confessional hostilities were longstanding on the margins of Europe, religious anxiety was heightened in the 16th century by fear of the Ottoman Empire. With their impressive military prowess and

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<sup>205</sup> Hess (1978) 10.

<sup>206</sup> Jason Goodwin, *Lords of the Horizons: A History of the Ottoman Empire* (Vintage, 1999) 65.

<sup>207</sup> Paul Coles, *The Ottoman Impact on Europe* (Harvard, Brace & World, 1968) 77.

<sup>208</sup> See, e.g., Robert L. Playfair, *The Scourge of Christendom: Annals of British Relations with Algiers Prior to the French Conquest* (Books for Libraries Press, 1972) [1884]; Lane-Poole (1890); Edward H. Currey, *Sea-wolves of the Mediterranean: The Grand Period of the Moslem Corsairs* (Dutton, 1910).

<sup>209</sup> Daniel Goffman, *The Ottoman Empire and Early Modern Europe* (Cambridge University Press, 2002) 5.

<sup>210</sup> *Ibid* 7.

rapid westward expansion, the Ottomans represented not only a formidable geopolitical adversary but also a menace to Christendom.<sup>211</sup>

Piracy was not, of course, the exclusive preserve of Islamic mariners. Yet, in the early modern European imagination, piracy was associated primarily with the North African corsairs—and the Europeans ‘turned Turk’ who joined them in large numbers—who plundered Christian shipping and shoreline alike. Alongside the view of piracy as unlicensed belligerency, the pirate as a figure of universal enmity in international legal thought began to emerge and, this chapter has argued, can only be understood against the backdrop of religious enmity in the 16th century. Through this larger geopolitical and religious prism, the identity of the pirate in the European mind came to be infused with Europeans’ racialised religious ideology so that the actions of Islamic pirates were interpreted within the general fear and animosity toward Islam outlined above. The pirates of North Africa, in particular, came to be seen in the western Mediterranean as the primary avatars of Islamic expansion.

The expression *hostis humani generis*—which had initially gained currency in early Christian theological and demonological writings, where it was used as a common epithet for the devil—now reappeared in jurisprudence to project a ‘supreme degree of hostility’ onto new universal enemies.<sup>212</sup> As this chapter shows, the universal enmity represented by the pirate in the 16th century, like earlier incarnations of the *hostis humani generis*, was still very much religious in nature. As figures of religious enmity and piratical plunder, the Muslim pirates of northern Africa were central to popular and literary accounts of piracy. These Islamic pirates were easily assimilated in the popular Christian imagination with other demonic foes of Christendom—an ideological association encouraged by the imperial powers of Europe, tasked with defending Europe against the infidel and holding threats at bay. Rooted in imperial rivalries and the religious ideological formations produced and encouraged by

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<sup>211</sup> In fact, many European observers were at once terrified of Ottoman conquest and, at the same time, envious of Ottoman religious unity, administrative organisation and military discipline and strength. For example, the first history of Turkey published in English, Paolo Giòvio’s *Comentario de le cose de Turchi* (1532), translated by Peter Ashton as *Short Treatise upon the Turkes Chronicles* in 1546, described the impressive military organisation and discipline of the Ottomans: Paolo Giòvio, *A shorte treatise upon the Turkes chronicles, compyled by Paulus Iouius byshop of Nucerne, and dedicated to Charles the V. Emperour*, trans. Peter Ashton (Edward Whitchurch, 1546).

<sup>212</sup> Dan Edelstein ‘Hostis Human Generis: Devils, Natural Right, and Terror in the French Revolution’ 2007(141) *Telos* (2007) 65. Edelstein is himself primarily concerned with these new enemies in the context of revolutionary France.

Habsburg-Ottoman hostility, the universal enmity of the pirate took hold in the legal imagination. It was only here, within this specific social and geopolitical context, and not earlier, that this enmity characteristic of the pirate in modern legal thought first emerged. It retained, however, its theological character, the pirate a figure specifically of *religious* enmity. The idea of the pirate as a secular figure and *hostis humani generis* as a secular legal concept was yet to take shape.

## CHAPTER 5

# The pirate in the New World

Early on the afternoon of 1 March 1579, a cry came from the lookout at the masthead of the *Golden Hind*. John Drake, a younger cousin of the ship's commander, Francis Drake, had caught sight of the Spanish treasure ship the *Nuestra Señora de la Concepción*. Under the command of Captain San Juan de Anton, it was bound for Panama, heavily laden with silver from the Potosí mines in Peru. Slowing his own vessel so as not to startle the Spanish, Drake had his crew trail ropes and cables behind the *Hind*. As it drew closer, there was little alarm amongst the Spanish. Depredation, while common in the Caribbean and Atlantic, was unheard of in Pacific waters. In fact, Spanish ships on the Pacific leg of the silver train were rarely armed. Yet, as the *Hind* slowly flanked the Spanish ship, a cry rang out: 'Strike sail in the name of the Queen of England!'<sup>1</sup> A volley of artillery fire brought down the *Concepción*'s mizen mast and before long Drake's men had scrambled aboard the Spanish prey. The treasure found on the Spanish ship was greater than anything taken thus far on Drake's voyage: 'we found in her great riches, as jewels and precious stones, thirteen chests full of royals of plate [silver *reales*], fourscore pound weight [80 pounds] of gold, and six and twenty ton of silver'.<sup>2</sup> So voluminous was the cargo that it took six days to transfer the cargo to the *Hind*, after which the *Concepción* was set free.<sup>3</sup>

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<sup>1</sup> 'Second Narrative of the Voyage of Circumnavigation Given by John Drake' [1587], in Zelia Nuttall (ed.), *New Light on Drake: A Collection of Documents Relating to his Voyage of Circumnavigation, 1577-1580* (Hakluyt Society, 1914) 34, 49. The narrative is an extract from the official records of the Tribunal of the Inquisition at Lima, Peru.

<sup>2</sup> Richard Hakluyt, 'The famous voyage of Sir Francis Drake into the South Sea, and there hence about the whole globe of the earth, begun in the year of our Lord, 1577' [1589], in *The Voyage of Sir Francis Drake Around the Whole Globe* (Penguin, 2015) 1, 11

<sup>3</sup> The taking of the *Nuestra Señora de la Concepción* was recounted by John Drake in depositions before the Tribunal of the Spanish Inquisition, cited above. San Juan de Anton also made a sworn deposition before the Royal Court of Panama: see 'Testimony and Sworn Deposition of San Juan de Anton, the Master of the Treasure-ship taken Prisoner by Drake on March 1st, 1579', in Zelia Nuttall (ed.), *New Light on Drake: A Collection of Documents Relating to his Voyage of Circumnavigation, 1577-1580* (Hakluyt Society, 1914) 155. Hakluyt's account, also cited above, was originally published in 1589 as a 12-page insert in his *Principall Navigations: Voyages and Discoveries of the English Nation*, ed. D.B. Quinn & R.A. Skelton (Hakluyt Society, 1965) [1589]. On the publication of Hakluyt's account, see David B. Quinn, 'Early Accounts of the Famous Voyage', in Norman J.W. Thrower (ed.), *Sir Francis Drake and the Famous Voyage, 1577-1580: Essays Commemorating the Quadricentennial of Drake's Circumnavigation of the Earth* (University of California Press, 1984) 33. For two recent secondary accounts of Drake's attack, see Harry Kelsey, *Sir Francis Drake: The Queen's Pirate* (Yale University Press, 1998) 156-58 and John Sugden, *Sir Francis Drake* (Pimlico, 2006) 125-29.

If the *Nuestra Señora de la Concepción* was the richest prize taken by Drake on his circumnavigation of the globe, it was by no means the only. He had set out from Plymouth on 15 November 1577 aboard the *Pelican*, accompanied by a further four vessels. In January, a Portuguese merchant ship, the *Santa Maria*, was captured off the African coast near the Cape Verde islands. Crossing the Atlantic, the fleet made land in Brazil and followed the coast south to Patagonia. By September, Drake had passed through the Magellan Strait, continuing into the Pacific in the *Pelican*, now renamed the *Golden Hind*. Sailing north, he attacked Spanish ports and ships along the Chilean coast, sacking Valparaiso, the port of Santiago, on 5 December 1578. At Arica, the first port on the treasure route which took silver from Potosí to Panama, Nombre de Dios, and ultimately Spain, Drake took two further prizes.<sup>4</sup> Continuing north, Drake raided Callao, the port of Lima, where he learned of the *Nuestra Señora de la Concepción*, heavily laden with silver and recently departed for Panama. Several weeks later, the younger Drake sighted the Spanish vessel off Cape San Francisco in what is now Colombia. After securing his prize, Drake continued north before setting west across the Pacific, returning to England by way of the Cape of Good Hope nearly three years after departing Plymouth.<sup>5</sup> The booty carried back to England by Drake was significant—Elizabeth’s share alone was enough, John Maynard Keynes has observed, to pay off the entirety of her foreign debt.<sup>6</sup>

Upon his triumphant return, Drake was met with enthusiasm and praise. The queen feasted aboard the *Golden Hind*, consecrating the ship ‘with great ceremonie, pompe, and magnificence, eternally to be remembered’, and, in 1581, knighting Drake.<sup>7</sup> Unsurprisingly, the Spanish were unimpressed. Drake’s raids on Spanish vessels and ports outraged the Spanish king, Philip II: Drake was a pirate and, the king’s ambassador in London, Bernadino Mendoza, demanded, should be punished

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<sup>4</sup> Under the *Carrera de las Indias*, the Spanish fleet system, the silver of Peru was carried across the Panama isthmus and then taken by escort to Havana, where it met the silver fleet from Veracruz, and from there the fleet would make sail for Spain.

<sup>5</sup> On Drake’s circumnavigation, see John H. Parry, ‘Drake and the World Encompassed’, in Norman J.W. Thrower (ed.), *Sir Francis Drake and the Famous Voyage, 1577-1580: Essays Commemorating the Quadricentennial of Drake’s Circumnavigation of the Earth* (University of California Press, 1984) 1.

<sup>6</sup> John Maynard Keynes, *A Treatise on Money*, vol. 2 (Macmillan, 1930) 156-57.

<sup>7</sup> William Camden, *Annales: The True and Royall History of the Famous Empress Elizabeth* (Beniamin Fisher, 1625) 426.

accordingly. Wars, Mendoza warned the English queen, had started with less provocation.<sup>8</sup>

This chapter uses Drake's depredations as a starting point to consider the contrasting English and Spanish attitudes towards piracy in the late-16th century. It begins by considering contemporaneous Spanish accounts which present Drake as a pirate, a figure, the chapter shows, not only associated with illegitimate depredation, but, as with its counterpart in the Mediterranean, epitomising religious enmity and embodying the confrontation between two religio-political orders. As in Europe, the Spanish state cast its imperial ambitions in religious terms, as it did its geopolitical rivals—the Ottomans, but so too now newly emerging English and Dutch imperial formations. In the New World, these challengers sought to rival Spanish hegemony over the extraction of wealth, a challenge cast in ideological terms as a threat to the Iberians' universal mission. The chapter then turns to contemporaneous English depictions of Drake, situating these within the context of emergent English mercantile imperialism and attendant outrage at England's exclusion from profitable trade in the Americas.

### DRAKE IN THE SPANISH IMAGINATION

Drake's exploits were recorded in numerous contemporaneous cultural texts including several epic poems, the most important genre of Spanish American colonial literature. Maritime violence featured prominently in many poetic chronicles of Spanish colonisation. The first such account to feature Drake was by Juan de Castellanos, a Spanish priest who arrived in the New World around 1534. His *Elegías de varones ilustres de Indias*, first published in Madrid in 1589, totals some 113,609 verses and chronicles the early colonisation of the Caribbean and Spanish Main. In the third volume of the *Elegías*, Castellanos included five cantos on Drake—the *Discurso de el Capitán Francisco Draque*—which recount his various voyages of pillage against the Spanish. Written shortly after Drake's sacking of Cartagena de Indias in 1586 and focusing primarily on that event, it nonetheless also includes details of his

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<sup>8</sup> Peter C. Mancall, *Hakluyt's Promise: An Elizabethan's Obsession for an English America* (Yale University Press, 2007) 90-91; Amanda Joyce Snyder, 'Pirates, Exiles, and Empire: English Seamen, Atlantic Expansion, and Jamaican Settlement, 1558-1658', PhD diss. (Florida International University, 2013) 59-60.



circumnavigation.<sup>9</sup> The poem opens by placing the threat of piracy to Spanish ports squarely at the centre of New World concerns:

A hard, sad, and frightful case  
a furious assault and a deplorable calamity  
to some ports in this New World,  
I sing with hoarse and woeful voice  
to which my tongue sends forth  
from the depths of my constricted breast  
but who could sing if not to Spain's dishonour?<sup>10</sup>

Drake's assaults are then given a specifically religious character by Castellanos who identifies the authors of this 'calamity' as Lutherans.

and the destruction  
that with Lutheran troops at his command  
the English Captain Francis inflicted  
in this our new sacred sheepfold.<sup>11</sup>

A short biographical sketch of Drake follows, before a description of Drake's various incursions into the New World including the circumnavigation. While bemoaning the 'destruction . . . Captain Francis inflicted', Castellano's criticism is directed also at the administrative situation of the colonies. A recurring theme is thus the ease with which Drake is able to attack poorly defended Spanish ports and vessels. This can be seen specifically in the taking of the *Nuestra Señora de la Concepción*. Here, Castellano is at pains to stress the absence of weapons and soldiers to defend the Spanish treasure ship and the lack of precautions taken by Spanish authorities.<sup>12</sup>

If the poem is in one sense an extended harangue against the Habsburg administration in the Indies, its central figure of enmity nonetheless remains Drake. He is described at various times as a pirate, a thief and a tyrant. Interestingly, though, the enmity attaching to Drake rests in large part on his religious identity, his

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<sup>9</sup> Juan de Castellanos, *Discurso de el Capitán Francisco Draque* (Instituto de Valencia de D. Juan, 1921) [1586-1587]. The Spanish censor cut the Drake canto and it was only discovered in 1886: Nina Gerassi-Navarro, *Pirate Novels: Fictions of Nation Building in Spanish America* (Duke University Press, 1999) 41.

<sup>10</sup> de Castellanos (1921) stanza 1; translation in Emiro Martínez-Osorio, *Authority, Piracy, and Captivity in Colonial Spanish American Writing: Juan de Castellanos's Elegies of Illustrious Men of the Indies* (Rowman & Littlefield, 2016) 45.

<sup>11</sup> de Castellanos (1921) stanza 2; Martínez-Osorio (2016) 45.

<sup>12</sup> de Castellanos (1921) stanzas 39-42.

depredations placed squarely in the context of an inter-imperial confrontation between Catholic Spain and Protestant England. Already in the poem's opening stanzas, quoted above, he is identified as Lutheran, as he is repeatedly throughout. Then, in attacking the *Nuestra Señora de la Concepción*, Castellano has Drake openly challenge Spain's claim to sovereignty over the New World, a claim rooted in the papal bulls of donation issued by Pope Alexander VI in 1493:

And as you are said to have such enlightened minds  
please free me from this doubt,  
did Adam leave a will and testament  
whereby he entrusted these lands to Spain alone?  
If so, show me the deed and the decree  
and I will renounce to all my claims  
because if the opposite is true,  
he who can takes all.<sup>13</sup>

Drake's heretical identity is increasingly emphasised as the poem progresses. He acts in the name of England: '*Amayna, amayna, por Ingalaterra*'—'lower the sails, lower the sails, for England'.<sup>14</sup> Drake's, Castellanos stresses, is a 'perfidious nation, blindly malignant, wretched enemy of the divine honor'.<sup>15</sup> Both pirate and nation have been 'guided to the deep inferno / by a false and soulless beast: / that great chatterbox and fierce monster / who was Martin Luder or mean Luther'.<sup>16</sup>

In his careful analysis of Castellanos's poem, Martínez-Osorio has catalogued the various epithets used to depict Drake and his fellow heretics as demonic enemies. The list is extensive and includes such terms as 'evil army' (*ejército maligno*), 'ministers of hell' (*ministros del infierno*), 'cruel beasts' (*bestias fieras*), 'Lutherans from hell' (*luteranos infernales*), and 'allies of the devil' (*miembros del demonio*).<sup>17</sup> Such language, on Martínez-Osorio's analysis, lends 'the ubiquitous conflict underlying Castellanos's narrative' the tone of 'a religious war against a demonic enemy', with the fundamental opposition between English and Spaniards resting on

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<sup>13</sup> Ibid stanza 42; Martínez-Osorio (2016) 56.

<sup>14</sup> de Castellanos (1921) stanza 40; Martínez-Osorio (2016) 55.

<sup>15</sup> de Castellanos (1921) stanza 88; translation in Gerassi-Navarro (1999) 42.

<sup>16</sup> de Castellanos (1921) stanza 93; Gerassi-Navarro (1999) 195-96.

<sup>17</sup> Martínez-Osorio (2016) 67 note 42.

‘their adherence [to] or disdain for the Catholic faith’.<sup>18</sup> Nina Gerassi-Navarro similarly notes the moral opposition reiterated constantly between Spanish Catholics and English Protestants, a line running through the poem delineating ‘good and evil, religious and heretical’.<sup>19</sup> The coincidence of monstrousness and heresy is affirmed when Drake sacks Santo Domingo in 1586: Castallano has him pillage churches and desecrate religious art and, in an episode of Christian martyrdom, brutally execute two Dominican friars.

The religious enmity with which Drake’s piracy is identified can be found also in subsequent Spanish accounts. Martín del Barco Centenera’s poem *La Argentina*, published in Lisbon in 1602, describes Drake’s passage through the Strait of Magellan and his depredations along the Chilean and Peruvian coasts. As in Castellanos’s account, Drake’s moral failing lies in his Lutheran identity: ‘But what’s most important and most necessary / He lacks: the love of Jesus Christ’.<sup>20</sup> Likewise in the *Armas antárticas* of Juan de Miramontes y Zuázola, published in 1921, where Drake is portrayed as a violent pirate and even Satan’s ally, juxtaposed with the faithful Catholics determined to defend their lands against heretics. Here, again, pirate and heretic are two sides of the same coin who, having ‘refused obedience to the Holy Father’ had become ‘hateful to the world and to God’.<sup>21</sup>

## ENEMIES IN THE NEW WORLD

These accounts of Drake presented him as a demonic figure and heretical foe. In this aspect, he fit into a tradition of religious foes facing the Spanish in the New World. Iberian colonisation had long been understood through a religious lens.<sup>22</sup> Columbus’s arrival in the Americas in 1492 coincided with the fall of the Nasrid kingdom of Granada, the culmination of the *Reconquista* of the Iberian Peninsula. There could be little doubt, in the Spanish imagination, that both were part of a divinely inspired

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<sup>18</sup> Ibid 57.

<sup>19</sup> Gerassi-Navarro (1999) 43.

<sup>20</sup> Quoted in ibid 46.

<sup>21</sup> Quoted in ibid 52.

<sup>22</sup> On the importance of crusading as an ideological driving force in Spanish and Portuguese colonialism in the New World, see, e.g., Sanjay Subrahmanyam, *The Career and Legend of Vasco da Gama* (Cambridge University Press, 1997); Felipe Fernández-Armesto, *Columbus* (Oxford University Press, 1991).

Christian expansion, a process, in Edmondo Lupieri's words, 'towards a Christian kingdom covering the entire globe'.<sup>23</sup> But just as Christianity and Christendom were threatened by hostile (Islamic) forces in Europe, as discussed in the previous chapter, so too was it under threat from the devil in the New World, which had, Spanish colonists believed, long been under Satan's control. The Spanish would have to continue the *Reconquista* here, too, to 'recover the continent for God'.<sup>24</sup> Indeed, Castellanos himself wrote, in his *Elegías*, of the 'discovery' of America pitting the forces of evil against the heroic Christian conquistador.

Almost immediately the devil was encountered in the form of Amerindians. In later 16th-century debates amongst Spanish jurists over the ontological status of the indigenous population, Vitoria would posit a universal framework in which both European and Amerindian shared a universal humanity and reason. Yet, as Silvia Federici has noted, such debates were only conceivable against the background of an already successful 'ideological campaign representing the latter as animals and demons'.<sup>25</sup>

One of the earliest Iberian depictions of Amerindians is the *Inferno* (c. 1510-1520) by an unknown Portuguese master. In that painting, we see the devil presiding over the torture of Europeans adorned with Amerindian headdress.<sup>26</sup> The early *conquistadores* may have begun, in one colonist's words, 'the process of liberating the natives from Satan's brutal, unrelenting tyrannical rule',<sup>27</sup> yet Satan was still very much a threat, 'scorching, drying, and destroying the fruit of virtue growing in the hearts and souls of the Indians'.<sup>28</sup> Colonists such as Gonzalo Fernández de Oviedo,

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<sup>23</sup> Edmondo Lupieri, *In the Name of God: The Making of Global Christianity*, trans. Giovanna Lammers (William B. Eerdmans, 2011) 13.

<sup>24</sup> Jorge Cañizares-Esguerra, *Puritan Conquistadors: Iberianizing the Atlantic, 1550-1700* (Stanford University Press, 2006) 12. This was not unique to the Spanish colonialists. As Robin Blackburn has observed of their Iberian neighbours, '[f]rom the patriotic piety of Camões's *Lusiades* [sic] to the picaresque saga of Fernão Mendes Pinto's *The Peregrination*, it is clear that in this era the Portuguese felt that their country's destiny, its mission to spread the faith, rendered permissible many a bloody or sordid undertaking.' Robin Blackburn, *The Making of New World Slavery: From the Baroque to the Modern, 1492-1800* (Verso, 1997) 119. On the equation between the *Reconquista* of Peninsular territory and the *Conquista* of the New World, see Barbara Fuchs, *Mimesis and Empire: The New World, Islam, and European Identities* (Cambridge University Press, 2004) 140-41.

<sup>25</sup> Silvia Federici, *Caliban and the Witch: Women, the Body and Primitive Accumulation* (Autonomedia, 2004) 222.

<sup>26</sup> I am grateful to Nuno Teles for drawing my attention to the painting in the Museu Nacional de Arte Antiga, Lisbon, Portugal.

<sup>27</sup> Cañizares-Esguerra (2006) 2.

<sup>28</sup> Quoted in *Ibid* 97.

governor of the Ozama fort on Santo Domingo in the early 16th century, wrote of the indigenous population as ‘bestial and evilly inclined’.<sup>29</sup> Throughout the 16th century, Iberians would author numerous chronicles and epic poems pitting heroic Christian conquistadors confronting a tyrannical devil ruling over hordes of demonic Amerindian minions.<sup>30</sup> Biblically sanctioned violence against these demonic enemies was common: the torture and execution of Amerindians under charges of diabolism and devil worship was widespread.<sup>31</sup> Colonisation was, as Cañizares-Esguerra puts it, ‘an ongoing epic struggle against a stubbornly resistant Satan’.<sup>32</sup>

This epic struggle against the devil in the New World would continue, while the satanic enemy came to take on different forms. If Amerindians were initially viewed as Satan’s most powerful allies, they were soon joined—or even replaced, as the colonial regime in Mexico, Peru and elsewhere was firmly established—by new foes.<sup>33</sup> Most prominent amongst these demonic agents, though, was the pirate. The pirate, more than any other figure, came to embody the religious alterity threatening the universalising Christian expansionism of the Habsburg empire.

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<sup>29</sup> Quoted in Anthony Pagden, *European Encounters with the New World* (Yale University Press, 1993) 57.

<sup>30</sup> E.g., José de Anchieta’s *De gestis Mendi de Saa* (1563) and Gabriel Lobo Lasso de la Veja’s *Mexicana* (1594).

<sup>31</sup> See Claude F. Baudez & Sydney Picasso, *Lost Cities of the Maya* (Harry N. Abrams, 1992) 21. Of course, this was not just religious ideology, but rather a means of ‘establishing control over production and strengthening the grip of colonial rule’ through the destruction of indigenous ownership practices—a ‘strategy of enclosure’, in Federici’s words. Alex Anievas & Kerem Nişancıoğlu, *How the West Came to Rule: The Geopolitical Origins of Capitalism* (Pluto Press, 2015) 132; Federici (2004) 220.

<sup>32</sup> Cañizares-Esguerra (2006) 5. The association of Amerindian with devil was not limited to the Spanish imagination. In 1557, the Huguenot pastor Jean de Léry, living among the Tupinamba in the Bay of Rio in Brazil, witnessed a religious assembly: ‘Not only did they howl, but also, leaping violently in the air, they made their breasts shake and they foamed at the mouth—in fact, some, like those who have the falling-sickness over here, fell in a dead faint; I can only believe that the devil entered their body and that they fell into a fit of madness’. Citing Bodin’s description of witches in Europe, Léry concluded that ‘they have the same master: that is, the Brazilian women and the witches over here were guided by the same spirit of Satan; neither the distance between the places nor the long passage over the sea keeps the father of lies from working both here and there on those who are handed over to him by the just judgment of God.’ Quoted in Stephen Greenblatt, *Marvelous Possessions: The Wonder of the New World* (University of Chicago Press, 1991) 14, 16.

<sup>33</sup> *Ibid* 73-74. Even the Spanish themselves could be cast on the side of the devil, as in Bartolomé de las Casas’ *Historia de las Indias* (1552), the New World staged as a prelapsarian paradise attacked by the devil’s agents, the Spanish *conquistadors*, ‘Christian only in name’.

## CHRISTENDOM UNDER SIEGE

In the pre-1492 inter-polity order of medieval Europe, Wilhelm Grewe writes, the international legal community was ‘identical to the Christian community, united in the Roman Church.’<sup>34</sup> Christianity formed a ‘close-knit occidental community’ in which the Pope determined the ‘common good’ for the *societas Christiana* and the Holy Roman Emperor served it with temporal power.<sup>35</sup> As we saw in Chapter 4, when Charles V became Emperor, he took on the mantle of ‘the defender of Christendom against all its enemies, both external and internal’.<sup>36</sup> Although this system had been collapsing already by the time Columbus arrived in the Americas, the Papacy and Holy Roman Empire remained important symbols—both insisted on an ‘overarching agency’, albeit a weakened one, with the Pope continuing to claim ‘a legislative power binding upon all Christian nations’.<sup>37</sup>

In 1493, the papal bull *Inter Caetera* had called for a universal mission, setting out that ‘the Catholic faith and the Christian religion be exalted and be everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself’.<sup>38</sup> The Treaty of Alcaçovas between Portugal and Spain had already, in 1479, divided the Atlantic Ocean into two spheres of influence but now Pope Alexander VI set out a formal line of demarcation. Exhorting them to spread the faith, Alexander granted to the Crowns of Castile and Aragon all lands west and south of a pole-to-pole line drawn ‘one hundred leagues towards the west and south from any of the islands commonly known as the Azores and Cape Verde’.<sup>39</sup> The Treaty of Tordesillas in 1494 affirmed the division between respective Spanish and Portuguese missionary zones.<sup>40</sup>

The Spanish empire, then, was understood, at least in the imperial ideology, as not merely a matter of territorial aggrandisement but of a piece with the religious

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<sup>34</sup> Wilhelm G. Grewe, *The Epochs of International Law*, trans. Michael Byers (Walter De Gruyter, 2000) 51

<sup>35</sup> Amedeo Policante, *The Pirate Myth: Genealogies of an Imperial Concept* (Routledge, 2015) 36.

<sup>36</sup> Anthony Pagden, *Peoples and Empires: A Short History of European Migration, Exploration, and Conquest, from Greece to the Present* (Modern Library, 2001) 69.

<sup>37</sup> Grewe (2000) 88.

<sup>38</sup> Pope Alexander VI, ‘Inter Caetera’ [1493], in Jennifer Reid (ed.), *Religion, Postcolonialism, and Globalization: A Sourcebook* (Bloomsbury, 2015) 15, 15.

<sup>39</sup> Ibid 17.

<sup>40</sup> Grewe (2000) 234.

mission of salvation and of enlarging the Christian commonwealth.<sup>41</sup> While the Salamanca jurists would reject Rome's authority as legitimate grounds for Spanish conquest, the Castilian crown nonetheless continued to rely on papal donation for legitimacy of Spanish claims to the Americas. The donation's 'continuing importance in the official historiography of the Spanish Empire' served, Anthony Pagden writes, 'to keep the continuity between the Spanish monarchy and the ancient *Christian Imperium romanum* firmly on the agenda'.<sup>42</sup> The ideological construction of a missionary impetus behind territorial expansion would continue in the service of Iberian colonialism until the late 17th century. Even then, the Spanish jurist Diego Andrés Rocha would insist that Spain's claims to the New World derived from 'God's providential design to propagate the true faith through the agency of the Spanish'.<sup>43</sup>

Yet already in the 16th century, the authority of the Pope could no longer guarantee an Iberian claim to *imperium* would be recognised by all European powers. Christendom was not the monolithic community it had once been; ecclesiastical discipline had dissolved, the Protestant Reformation creating a lasting schism in Christianity, not to mention over a century of wars of religion. The supremacy of Pope and Emperor had been undermined: so too the latter's claimed monopoly on the New World. As Francis I of France declared—the *bon mot* placed in Drake's mouth by Castellanos—'The sun shines for me as for others. I should very much like to see the clause in Adam's will that excludes me from a share of the world'.<sup>44</sup> William Cecil, the Elizabethan statesman, likewise dismissed the Pope's right 'to give and take kingdoms to whomsoever he pleased'.<sup>45</sup> The result, Carl Schmitt observed, was a world historical struggle 'between Reformation and Counter-Reformation, between

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<sup>41</sup> See, generally, John H. Elliott, *Empires of the Atlantic World: Britain and Spain in America, 1492-1830* (Yale University Press, 2006); Marie Tanner, *The Last Descendant of Aeneas: The Hapsburgs and the Mythic Image of the Emperor* (Yale University Press, 1993).

<sup>42</sup> Anthony Pagden, *Lords of all the World: Ideologies of Empire in Spain, Britain and France c.1500-1800* (Yale University Press, 1995) 32. Pagden goes on to note that 'the Bulls of Donation offered the Castilians an historical link with the empire as the second sword of Christendom which no argument from natural law could ever provide.' Ibid 48-49.

<sup>43</sup> Greenblatt (1991) 62.

<sup>44</sup> Quoted in Eric Williams, *Capitalism and Slavery* (University of North Carolina Press, 1994) [1944] 28.

<sup>45</sup> Quoted in Anievas & Nişancıoğlu (2015) 137.

the world Catholicism of the Spaniards and the world Protestantism of the Huguenots, the Dutch, and the English'.<sup>46</sup>

It was against this background that the quickly growing penetration by Protestants—Elizabethans, Huguenots and Dutch—into Catholic missionary zones was interpreted by Spain. As Policante writes, mariners from these countries, in pursuing trade or, like Drake, preying on the Spanish colonies of the New World or simply plundering the Spanish galleons returning with gold and silver from the Americas, 'refused to respect the orders imposed by papal authority'. In doing so, Policante suggests, they 'endangered the welfare of the entire Christian community'.<sup>47</sup> It was, after all, as Vitoria argued, in the interest of all Christianity that the Pope had granted a monopoly on travel to the Americas. Although the Pope was not temporal lord, he nonetheless, insisted Vitoria, 'has power in temporal things insofar as they concern spiritual things'. It is the Pope's 'special business to promote the Gospel throughout the world' and, 'if the princes of Spain are in the best position to see to the preaching of the Gospel in [the Americas], the pope may entrust the task to them, *and deny it to all others*'. In fact, Vitoria stressed, he may 'restrict not only the right to preach, but *also the right to trade*' if such restriction is 'convenient for the spreading of the Christian religion'. And indeed, Vitoria believed, it was convenient, for if there were 'an indiscriminate rush to the lands of these barbarians from other Christian countries, the Christians might very well get in each other's way and start to quarrel', frustrating the 'business of the faith and the conversion of the barbarians'.<sup>48</sup>

It was quite logical then, in *Inter Caetera*, for the Pope to have threatened anyone crossing the line of demarcation for 'trade or any other reason' with 'immediate excommunication'.<sup>49</sup> But excommunication was no mere spiritual sanction. As Grewe explains, in the late medieval world, it meant 'not only exclusion from all sacraments, from mass, from an ecclesiastical burial', and so on, but also 'absolute exclusion from the community of the faithful, with the result that no one was permitted to communicate with the banned person and that temporal powers were

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<sup>46</sup> Carl Schmitt, *Land and Sea*, trans. Simona Draghici (Plutarch Press, 1997) [1954] 42.

<sup>47</sup> Policante (2015) 37

<sup>48</sup> Francisco de Vitoria, 'On the American Indians (*De Indis*)' [1539], in *Political Writings*, ed. Anthony Pagden & Jeremy Lawrance (Cambridge University Press, 1991) 231, 284-85 (emphasis added).

<sup>49</sup> Pope Alexander VI (2000) 17.



obliged to outlaw him'.<sup>50</sup> For the Spanish, then—indeed for medieval Catholicism more generally—as Policante argues, drawing on Grewe, excommunication and outlawry were two sides of the same coin. To cross the line into the Spanish missionary zone was not only to incur ecclesiastical sanction but to step outside of, and to abandon, the *res publica Christiana*. In Policante's words, 'outlawry' is 'the secularization of the theological notion of excommunication'.<sup>51</sup>

On the Spanish view, it followed, Protestants that crossed the papal lines of demarcation, be they merchants or depredators, were not merely contesting an Iberian monopoly on the New World, but challenging the very authority of the Pope, whose role it was to determine the common good of the universal Christian community—threatening, that is, not only Spanish colonialism but the juridico-political structure of Christendom.

## PROTESTANT PIRATES

Drake, if the most famous trespasser, was by no means the first. French Huguenot raiders based in the Protestant stronghold of La Rochelle had been active in the Atlantic Triangle since Columbus first arrived in the Americas. With Cortés's conquest of Mexico from 1519-21, the volume of treasure flowing from America to Spain increased dramatically.<sup>52</sup> In 1523, Jean Florin, a Norman raider, captured several Spanish ships off the southwest coast of Portugal returning with treasure. By 1536, French predation had entered the Caribbean, with at least one French raid on a Spanish ship off the north coast of the Panamanian isthmus.<sup>53</sup> The next year, reports of French depredation came from the ports of Tierra Firme, in particular Cartagena and Nombre de Diós, as well as nearby Havana and Santo Domingo. Paul Hoffman reports some 22 French raids on settlements in the Indies between 1535 and 1547, while 66 ships were lost in the same period, although of these more than half were attacked off the coast of Spain.<sup>54</sup>

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<sup>50</sup> Grewe (2000) 113.

<sup>51</sup> Policante (2015) 38.

<sup>52</sup> Kris Lane, *Pillaging the Empire: Global Piracy on the High Seas, 1500-1750*, 2nd ed. (Routledge, 2016) 18.

<sup>53</sup> The identity of the French depredator is unknown: *ibid* 20-21.

<sup>54</sup> Paul Hoffman, *The Spanish Crown and the Defense of the Caribbean, 1535-1585: Precedent, Patrimonialism, and Royal Parsimony* (Louisiana State University Press, 1980) 25.

If the French were the vanguard of Protestant attacks on Spain's New World empire, they were soon joined by the English and, following revolt in the Low Countries from 1568, the Dutch. Their numbers would increase steadily so that by October 1595, the treasurer of Santo Domingo could report that pirates were 'as numerous and assiduous as though these were ports of their own countries. They lie in wait on all the sailing routes to the Indies . . . . Not a ship coming up from the outside escapes them; nor does any which leaves the harbour get past them.'<sup>55</sup> The Indies had become one more theatre in the European wars of religion which threatened the stability of the Spanish Christian empire. The Protestant interlopers in Catholic missionary zones were no mere annoyance but, like the devil's agents amongst the indigenous populations of the Americas, or the Islamic pirates in the Mediterranean, a threat to the universal Christian commonwealth in which name Spanish imperialism operated. Indeed, depredation in the New World was easily assimilated to the overarching battle against Christianity's Others—especially against Islam in the Mediterranean which remained, in Barbara Fuchs's words, the 'satanic other of Christian Europe'.<sup>56</sup> The Protestant depredators, excommunicated from the *societas Christiana*, were thus also pirates—*piratas luteranos* or *corsarios luteranos*, the Spanish still using both terms interchangeably, rather than *piratas islámicos* or *corsarios islámicos*—and, like their Islamic counterparts, not mere public criminals but enemies of all Christian civilization, the refusal to recognise, let alone obey, papal dispositions endangering the entire Christian community, albeit a crumbling one.

Fernão Oliveira's 1555 treatise on methods of naval warfare, *Arte da Guerra do Mar*, was unexceptional in lumping English, French and Algerians together as dangerous piratical foe.<sup>57</sup> These were joined, in Balthasar de Ayala's *De iure et officiis bellicis et disciplina militari* (1582), as we saw in Chapter 4, by Protestant Dutch insurgents. Neither pirate nor rebel, the Judge Advocate General of the Habsburg army in the Low Countries insisted, enjoyed the rights of belligerents—both could legitimately be treated like earlier heretics and infidels of medieval holy wars.<sup>58</sup>

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<sup>55</sup> Quoted in Andrews, *The Spanish Caribbean: Trade and Plunder, 1530-1630* (Yale University Press, 1978) 168.

<sup>56</sup> Fuchs (2004) 122.

<sup>57</sup> Blackburn (1997) 121.

<sup>58</sup> Balthasar de Ayala, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline*, vol. 2, trans. John Pawley Bate (Carnegie Institution, 1912) [1582].

Christianity, at least as imagined by the Iberians, was now threatened on three fronts: the Ottomans in the Mediterranean, the Dutch in northern Europe, and various Protestant pirates in the Atlantic.

The connection was only strengthened in the early 17th century when many English pirates began using the Barbary Coast as a base of operations and, especially, when the English state entertained the North African Moors as ‘a probable ally against Catholic Spain’.<sup>59</sup> In at least one Spanish ballad from 1611, Englishmen, Turks, and Moors all sail together as pirates.<sup>60</sup> Already in the 16th century, though, Spanish representations of Atlantic piracy incorporated these attacks into the ‘grand narrative’ of Spain’s imperial mission. In this narrative, Fuchs observes, English incursions into Spanish zones were ‘a heavenly scourge visited upon Spain, to be endured as were the attacks of Islam’.<sup>61</sup>

Such representations are clear in various Spanish texts from the 16th century in which Protestant pirates take on a truly demonic form alongside and in tandem with the continuing threat of an encroaching Islam. One of the most famous epic poems from the period, published a decade after Castellanos’s *Elegías*, is Lope de Vega’s *La Dragontea*.<sup>62</sup> Born in 1562, Lope was a Spanish playwright, poet and novelist, today held in Spain in much the same esteem as Cervantes. *La Dragontea* recounts Drake’s final raid on the Spanish Main, his attempt to capture Nombre de Dios, the port in Panama from which silver was sent back to Spain. The poem opens with a description of the Christian religion under attack:

Look at my face, blind with tears,  
the Christian religion under siege  
Spain, Italy, and America disturbed  
with native and barbarian swords.<sup>63</sup>

Spain is represented by the figure of the Christian religion, *la religión cristiana*, under

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<sup>59</sup> Fuchs (2004) 122.

<sup>60</sup> Ibid 151.

<sup>61</sup> Ibid 140.

<sup>62</sup> Lope de Vega, ‘La Dragontea’ [1598], in *Collecion de las Obras sueltas, assi em prosa, como en verso, de D. Frey Lope Felix de Vega Carpio, del Habito de San Juan* (Antonio de Sancha, 1751) 183.

<sup>63</sup> Ibid 186: *Mira en mi rostro de mi llanto ciego / la religión cristiana perseguida, / a España, a Italia, a América turbadas / de propias, y de bárbaras espadas*. Translation in Elizabeth R. Wright, *Pilgrimage to Patronage: Lope de Vega and the Court of Philip III, 1598-1621* (Bucknell University Press, 2001) 28. Note that Wright translates *bárbaras* as ‘foreign’, while I have rendered it instead as barbarian.

attack in both Europe and America. Drake's raid on Panama stands, then, as a metaphor for the larger siege of Catholicism, with Spain's imperial struggle—valiantly extending Christianity into the New World and fending off heretics and infidels—transposed into a biblical frame of reference. Drake is cast by Lope as a satanic dragon, the Beast of the Apocalypse, with the struggle against him, as Fuchs puts it, 'a cosmological battle of good against evil'.<sup>64</sup>

*La religión cristiana*, already under attack by Islamic pirates in the Mediterranean, begs God to spare her the Dragon's attack.

'Is not Mohammed's domination enough,  
which causes Italy and Spain so much anxiety?  
Do you also want to grow and spread  
the vile seed of infamous Luther?'<sup>65</sup>

Again the connection is made between Muslim attacks on Spain and Italy—in the latter, Spain controlled Sicily, Naples, Sardinia, and Milan—and piratical Lutheran attacks in the New World. If Drake is a creature of Satan, his actions mirror those of the Barbary pirates in Algiers and 'Tripoli, Tunis and Bizerta'. These, Lope writes, with reference to the Barbary captivity discussed in Chapter 4, are responsible for the 'lost souls who cry for / sad Italy and miserable Spain / captives of the Barbarians who adore / the deplorable theft of bodies'.<sup>66</sup>

Later, in describing Drake's attack on Nombre de Dios, Lope draws on imagery from the fall of Gothic Spain to invading Moors—the destruction, for instance, of the town's church and relics, a motif common to 16th-century chronicles recounting the Moorish invasion.<sup>67</sup> Further connections are drawn when the Spaniard, Don Diego Suárez de Amaya, exhorts his troops to resist Drake.

And beyond the fact that Heaven protects us,  
simply our being Spanish compels us  
not to turn the other cheek from the fierce Englishman,  
when with greatest might he seeks and follows us.

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<sup>64</sup> Fuchs (2004) 143.

<sup>65</sup> de Vega (1751) 188: '¿No basta de Mahoma el señorío / Que causa a Italia, a España tal desvelo, / También quieres que crezca y se derrame / La vil simiente de Lutero infame?' Translation in Fuchs (2004) 145.

<sup>66</sup> de Vega (1751) 189: '... las almas que perdidas lloran / Italia triste, España miserable, / Cautivas de los Bárbaros que adoran / La rapiña de cuerpos lamentable.' Translation in Fuchs (2004) 145.

<sup>67</sup> See Wright (2001) 29.

For per chance the arrow will return  
to the Arabic bow and hand of the enemy,  
and, should it not, we are born to die,  
and will live after death.<sup>68</sup>

If they should not resist Drake and turn back the demonic dragon, they risk not only capitulation to the heretics in the New World, but also a new Muslim threat to Spain.

The poem closes with Drake's death, slain finally by Philip II, a scene depicted on the frontispiece of the work's 1598 edition. Drake, here again cast as the Dragon of the Apocalypse, wrestles with an eagle, his slayer: Philip II as the archangel Michael.<sup>69</sup> With Drake dead, Philip III—Lope authored the poem shortly after Philip II's death—is free to turn back to the Mediterranean, to Christianity's other enemies. *La religión cristiana* makes a final plea, singling out once more the Muslim pirate that he too may now be crushed:

Oh Great Lord, who humiliates the giant,  
turn your eyes to the humble David,  
to the Moor turned arrogant pirate  
loaded with Catholic spoils:  
turn, eternal thunderous Jupiter,  
the rays of your strength and fury  
onto my enemies and those of Spain  
whose harm, Lord, afflicts and hurts me.<sup>70</sup>

Lope's poem was far from unique. *La Dragontea*, Cañizares-Esguerra suggests, was characteristic of efforts to cast 'the battles against Satan in the New World as episodes in a global struggle', one in which Muslim pirates in the Mediterranean and Protestant pirates in the Caribbean, each played a role.<sup>71</sup> These and other similar narratives

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<sup>68</sup> de Veja (1751) 319: 'Y fuera de que el cielo nos ampara, / Sólo el ser españoles nos obligue / A no volver al fiero inglés la cara, / Cuando con más poder nos busque y siga. / Que por ventura volverá la jara / Al arco y mano alarbe y enemiga, / Y cuando no, para morir nacemos, / Y después de la muerte viviremos.' Translation in Fuchs (2004) 147.

<sup>69</sup> See Cañizares-Esguerra (2006) 25.

<sup>70</sup> de Veja (1751) 372: 'O gran Señor, que humillas al gigante, / al humilde David vuelve tus ojos, / al Moro ahora pirata arrogante / cargado de Catholicos despojos: / revuelve, eterno Jupiter Tonante, / los rayos de tus impetus y enojos / sobre mis enemigos y de España, que su daño, Señor, me aflige y daña.' My translation.

<sup>71</sup> Cañizares-Esguerra (2006) 23.

enabled, to use Fuchs's phrase, 'the discursive consolidation of a Spanish identity eternally committed to the defense of the Faith'.<sup>72</sup>

This religious identity attaching to the pirate overshadowed the legal distinctions developing elsewhere in Europe. Bartolus's 1354 treatise on reprisals, discussed in Chapter 3, would only be printed for the first time in 1588 in Basel.<sup>73</sup> Its influence, of course, was already widespread and, as we have seen, the legitimacy of maritime depredation turned for many legal thinkers on sovereign license. Some of the Protestant pirates making sail for the New World carried letters of marque or enjoyed official crown support, covert or open. Many more did not. The degree of crown support enjoyed by Drake—and the extent to which Elizabeth appreciated his voyage would be one of plunder—has been the subject of extensive debate. Yet such nuances were of minor importance in Spanish determinations. Certainly, Spanish victims of English piracy on occasion took their complaints to the English Admiralty Court seeking the return of booty or reprisal for spoiled goods.<sup>74</sup> But for Spanish authorities, it mattered little whether a Protestant interloper held an official commission from a European prince. Whether Drake, say, was plundering in his own name or that of the queen was neither here nor there: in either case he was impeding Spain's missionary activity and undermining the Catholic Church's authority.

The piratical identity attaching to Drake and others, and the enmity in which they were held, rested primarily on their heretical character and incorporation into a grand religious narrative. It is telling, as Policante observes, that one finds few references in historical records to a *corsario inglés, francés* or *holandés*. Those captured were defined not by their nationality but by their religious beliefs: *corsarios luteranos*.<sup>75</sup> Moreover, they were tried not before regular colonial courts but by the Inquisition. By the time the Holy Office of the Inquisition arrived in Spanish America in the mid-16th century, Lutheranism had become a common charge, used to denounce various beliefs and non-orthodox practices.<sup>76</sup> Indeed, the establishment of Inquisitorial

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<sup>72</sup> Fuchs (2004) 140.

<sup>73</sup> Mark G. Hanna, *Pirate Nests and the Rise of the British Empire, 1570-1740* (University of North Carolina Press, 2015) 40.

<sup>74</sup> See, e.g., Reginald G. Marsden (ed.), *Select Pleas in the Court of the Admiralty*, vol. 2 (Selden Society, 1897) 40.

<sup>75</sup> Policante (2015) 46.

<sup>76</sup> Helen Rawlings, *The Spanish Inquisition* (Blackwell, 2006) 102.

tribunals in the Americas was motivated, in the first place, by the threat of Protestantism within urban colonial communities—a threat posed by *alumbrados*, for instance, whose practice of silent prayer and direct communion with God looked suspiciously Lutheran, but also by contact with foreign heretics arriving in the Indies.<sup>77</sup> In 1570, 38 English sailors were tried for heresy by the Inquisition in Mexico. In 1578, the Lima tribunal confirmed that any English corsairs captured would be treated and tried as heretics.<sup>78</sup> Two years later it found John Oxenham, one-time companion of Drake, guilty of heresy, for which he was hanged and, as legend has it, his body burned on the stake.<sup>79</sup> The records of the Inquisition are replete with similar trials of *luteranos*—records in which the terms *luteranos*, *corsarios*, and *piratas* are used interchangeably.<sup>80</sup>

### ENGLISH ATTITUDES TOWARDS DEPREDAATION AT SEA

Drake's depredations against the Spanish empire in the Americas were, we have seen, incorporated into a religious narrative of Spain's imperial mission. This ideological frame reproduced the figure of the pirates once more as a demonic, heretical foe—an enemy of a universal Christendom now extended to the New World. Like all ideologies, however, it was rooted in the concrete conjuncture, one in which the Habsburg empire faced not only a religious but also a material threat from new imperial formations, most importantly a nascent English empire.

In England, imperial interests also took on religious shape. Thomas Dekker's play, *The Whore of Babylon*, offered an allegory of Elizabethan England at war with Rome, the latter cast, in keeping with a long anti-papal tradition, as the empress of Babylon, the 'whore' of the play's title.<sup>81</sup> John Foxe's violently anti-Catholic *Acts and Monuments*,<sup>82</sup> cited in Chapter 4, fuelled the view of English raiders as 'seaborne

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<sup>77</sup> Bruno Feitler, 'The Inquisition in the New World', in Virginia Garrand-Burnett, Paul Freston & Stephen C. Dove (eds), *The Cambridge History of Religions in Latin America* (Cambridge University Press, 2016) 133, 140; Cañizares-Esguerra (2006) 26.

<sup>78</sup> Henry Charles Lea, *The Inquisition in the Spanish Dependencies* (Macmillan, 1908) 414.

<sup>79</sup> Lane (2016) 43.

<sup>80</sup> Snyder (2013) 28-29 note 34.

<sup>81</sup> Thomas Dekker, *The Whore of Babylon* [1606], in *The Dramatic Works of Thomas Dekker*, ed. Fredson Bowers (Cambridge University Press, 1955) 493.

<sup>82</sup> John Fox, *Fox's Book of Martyrs: The Acts and Monuments of the Church*, ed. John Cumming (G. Virtue, 1844) [1563]

crusaders of the Protestant Reformation'.<sup>83</sup> Thus for some, as John Appleby writes, 'the plunder of Spain was projected as a patriotic duty, as a means of defending the Protestant cause while weakening the "great whore of Babylon"'.<sup>84</sup> Indeed, Foxe and Drake themselves were close friends, the former viewing Drake as a 'true warrior of the faith', while the latter is reported to have read extracts from *Acts and Monuments* to Spanish prisoners during his 1587 Caribbean expedition.<sup>85</sup> Yet, while in both Spain and England imperial interests were given expression in religious discourses, attitudes towards the figure of the pirate differed. Whereas in Spanish legal thought, the pirate remained in the 16th century a figure of extreme religious enmity, the English position was more ambiguous.

English maritime depredation in the early 1500s varied in pattern. In local waters around England, especially on the country's southern coast, 'petty plunder' flourished and was indiscriminate and widespread. Small-scale, short-range venturing by poorly armed ships was common, often supported by coastal communities and protected by local officials.<sup>86</sup> In some regions, such as south-west England, sea-raiding was a long-standing tradition, whereas elsewhere, such as in the north-east of the country, plunder was more opportunistic and occasional.<sup>87</sup>

Efforts were taken to suppress such depredation. In 1443, Henry VI had ordered that restitution be made to Englishmen so accosted. Much like other early laws in the Mediterranean discussed in Chapter 3, this order was concerned entirely with the question of property rights, with no suggestion of criminal penalty attaching to those identified as a pirate (*pirata*).<sup>88</sup> A 1490 Proclamation by Henry VII went somewhat further, complaining of 'divers and moneyfold spoliations and robberies' committed by 'enemies as by other pirattis and robbers'.<sup>89</sup> The term pirates (or

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<sup>83</sup> Hanna (2015) 63.

<sup>84</sup> John C. Appleby, *Under the Bloody Flag: Pirates of the Tudor Age* (The History Press, 2009) 145.

<sup>85</sup> David Loades, 'The Early Reception', *John Foxe's The Acts and Monuments Online* (2011) available at [www.johnfoxe.org/index.php?realm=more&gototype=&type=essay&book=essay7](http://www.johnfoxe.org/index.php?realm=more&gototype=&type=essay&book=essay7) (last visited 18 May 2018). See also David Loades, *John Foxe: An Historical Perspective* (Ashgate, 1999).

<sup>86</sup> Kenneth R. Andrews 'Elizabethan Privateering', in Joyce Youings (ed.), *Raleigh in Exeter 1985: Privateering and Colonisation in the Reign of Elizabeth I* (University of Exeter, 1985) 1, 3; Appleby, *Under the Bloody Flag* (2009) 11.

<sup>87</sup> Andrews (1985) 3.

<sup>88</sup> 'Writ directing that a ship and goods . . .' [1443], in Reginald G. Marsden, (ed.), *Documents Relating to Law and Custom of the Sea*, vol. 1 (Lawbook Exchange, 1999) [1915] 132.

<sup>89</sup> 'Proclamation against harbouring pirates, or buying their goods' [1490], in Marsden (ed.) (1999) 145, 145.



pirattis) is left undefined, and no distinction is made between these and the other enemies and robbers referenced. Nor is the immediate concern the acts of depredation themselves, but rather that the condemned ‘daily resorte into divers portes and places of this his realme of England’ where the parties in question ‘sell their prises, spoiles, and pillages’.<sup>90</sup> The Proclamation thus commands that no one in the king’s realm shall comfort, take or receive ‘any of the said mysdoers, ne any merchandisez or goodes by them spoiled or takyn’.<sup>91</sup> Punishment for the ‘enemyes’, ‘pirattis’ and ‘robbers’ is not mentioned, only for the receivers of their goods in England. Indeed, no legal consequences attach to the pirates at all.

In short, acts of theft at sea attracted no exceptional treatment under English law at this time. Indeed, repression of maritime plunder in English waters was largely left to local interests. As early as 1486 Henry VII reached an agreement with the northern port of Hull under which the mayor and aldermen would take sureties from English ships against piratical activity.<sup>92</sup> Suppression of robbery, both on sea and land, depended on the power of local gentry. These, however, were often the very same people responsible for the depredation of which they were tasked with stamping out.<sup>93</sup>

The first suggestion of criminality attaching to ‘pirates’ is found in a 1535 statute, complaining in its preamble of ‘pirates, thieves, robbers and murders upon the sea’ who ‘many times escape unpunished’.<sup>94</sup> Yet reference to pirates is dropped in the substantive text of the statute. A nearly identical statute the following year again dropped reference to pirates in its substantive text, the invocation in both preambles apparently used as a general pejorative rather than in any technical legal sense.<sup>95</sup> The

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<sup>90</sup> Ibid 145-46.

<sup>91</sup> Ibid 146.

<sup>92</sup> John C. Appleby ‘Pirates and Communities: Scenes from Elizabethan England and Wales’, in John C. Appleby & Paul Dalton (eds), *Outlaws in Medieval and Early Modern England: Crime, Government and Society, c.1066d–c.1600* (Ashgate, 2009) 149, 149.

<sup>93</sup> Hannes Kleineke, ‘Poachers and Gamekeepers: Four Fifteenth-Century West Country Criminals’, in Appleby & Dalton (eds) (2009) 129, 130. In 1470s Cornwall, for instance, members of the gentry commissioned to curb crime were themselves implicated in acts of violent theft both on land and sea. One Cornish landowner, Henry Bodrugan was regularly appointed to royal commissions and went so far as to become the ‘sheff reulere of Cornwayle’. At the same, he was accused of various ‘robberies, dispoyleries of marchauntes straungers’ and of ‘murthers, robberyes as well by water as by lond, ravysshements of women, extorcions, oppressions, riottes, unlawfull assemblies, entres with force and wrongfull enprisonementes’. Ibid 139-40. On Bodrugan, see A.L. Rowse, ‘The Turbulent Career of sir Henry de Bodrugan’ 29 *History* (1944) 17.

<sup>94</sup> An Act concerning Pirates and Robbers of the Sea, 27 Hen. VIII, c. 4 (1535).

<sup>95</sup> Offences at Sea Act, 28 Hen. VIII, c. 15 (1536).

statute sought to extend common law punishment of robbery, murder, etc. to those acts committed on the sea (i.e., outside the common law courts' jurisdiction). It did not create any new common law offense or felony, but rather gave a means of trying, before Admiralty commissions, robbery, murder, etc. at sea by the common law, with attendant criminal penalties, *as if* they had been 'done upon the land'.<sup>96</sup> There is no suggestion that the statutes enjoyed any extraterritorial reach beyond the jurisdiction already enjoyed by the Admiral, which included vessels flying English colours outside the realm, but not foreign vessels.

As the 16th century progressed, English depredation grew more varied. Small-scale, opportunistic spoil in English waters continued, but was joined by more systematic plunder of trade routes further afield. Two factors were central to this development. First, the aggressive foreign policy of Henry VIII, from the 1520s to the 1540s, saw the state encourage depredations against French shipping in and beyond the Channel.<sup>97</sup> Reprisals, by now firmly rooted in international relations as a legitimate means for merchants to recover losses from the subjects of foreign states, were dispensed indiscriminately in times of war, any concern for the careful rationalizations of Bartolus's *concilia* long forgotten. This private, commercial depredation, deployed for strategic purposes in the absence of large-scale professional navies, became known as 'privateering'. Of course, the line between legitimate privateering and illegitimate plunder was fluid, the spoils of war no less attractive when unsanctioned in peacetime.

Second, for a growing London bourgeoisie with aggressive commercial ambitions, organised large-scale plunder promised exciting opportunities for profit. Localised plunder thus gave way to more ambitious depredation reaching ever further into the Atlantic, epitomised by the voyages of trade-cum-plunder by individuals such as John Hawkins.<sup>98</sup> In October 1562, a fleet under Hawkins's command set out from Plymouth, financed by investments from London, including from the royal court. Stopping in Tenerife, the fleet sailed on to Cape Verde and continued down the Guinea coast. There, Hawkins filled his ships with slaves, 'stealing some from Portuguese traders, capturing others on his own, and finally taking a Portuguese vessel to carry

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<sup>96</sup> Alfred P. Rubin, *The Law of Piracy* (University Press of the Pacific, 2006) [1988] 36-37.

<sup>97</sup> Appleby, *Under the Bloody Flag* (2009) 12, 13.

<sup>98</sup> *Ibid* 79, 87; Appleby, 'Pirates and Communities' (2009) 151.

the slaves that could not be crammed into his own holds'.<sup>99</sup> The Triangular trade took Hawkins on to the West Indies and South America where his human cargo was sold to Spanish colonists, happy for the English slavers to undercut the Iberian monopoly.

Throughout the 1560s, English depredations swelled with Spanish shipping increasingly its target. As early as 1560, the Spanish ambassador complained that 80 subjects, primarily from the Low Countries, had been victims of English pirates.<sup>100</sup> The renewal of Anglo-French hostilities in 1562 saw a new wave of privateering commissions, under the cover of which English depredators intensified their entrepreneurial plunder also of Iberian shipping. Spanish ports—peninsular and in the Canary Islands—were increasingly their target. Returning from a slaving voyage to London in 1564, Hawkins found strenuous protests by the Portuguese and Spanish ambassadors to his intrusions into the Indies, on the Iberian view, as we have seen, the exclusive preserve of Catholic merchants.<sup>101</sup> Elizabeth and her counsellors were happy to earn a generous return on their investments in Hawkins' voyages but could not openly support depredation. Hawkins was called upon to post a £500 bond and promise to not travel again to the Indies that year.<sup>102</sup>

Tensions between England and the Iberian monarchies increased throughout the 1560s, centred initially around English penetration of the Guinea trade, its opportunities for both commerce and pillage attractive to promoters in London. For the Spanish and Portuguese, as we have seen, interlopers were pirates. The English court, though, defended its merchants' freedom to trade in West Africa. A pattern emerged wherein tacit approval of depredation from the English crown went hand in hand with public proclamations condemning plunder of Spanish shipping. In November 1564, with Philip II's remonstrations ever louder, Elizabeth reported to the Spanish ambassador that 'she had ordered her subjects not to go to places where the [Spanish] King held sway, and if they contravened these orders she would have them punished'.<sup>103</sup> And in 1569, she denounced 'all pyrats and rovers upon the seas', pronouncing them 'to be out of her protection, and lawfully to be by any person taken,

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<sup>99</sup> Kelsey (1998) 17.

<sup>100</sup> Appleby, *Under the Bloody Flag* (2009) 85.

<sup>101</sup> Kelsey (1998) 20.

<sup>102</sup> *Ibid* 20-21.

<sup>103</sup> Appleby, *Under the Bloody Flag* (2009) 104.

punished, and suppressed with extremity'.<sup>104</sup> Meanwhile, though, members of her court were increasingly active in the Guinea trade: the Queen loaned ships to Guinea traders and her councillors were members of the trading syndicates sponsoring their voyages.<sup>105</sup>

The Guinea trade, and the attendant efforts of Hawkins and others to break into the transatlantic slave trade, promoted an ambiguous intermingling of aggressive commercial trade and outright depredation. Hawkins' voyages to the Caribbean had highlighted Iberian intransigence to peaceful commercial relations in the New World, while also flagging the vulnerability of colonial settlements to pillage. The 1570s saw what Appleby describes as an 'outburst of marauding in the Caribbean by the English', of which Drake was at the forefront.<sup>106</sup> In 1569 and again in 1571 and 1572, Drake set out on raiding voyages to the Caribbean. Working with Huguenot rovers and assisted by cimarrons—escaped African slaves—he plundered the Panama isthmus, returning to England with sizeable booty.

Needless to say, Drake's depredations lacked any legitimacy, legal or otherwise, in Spanish eyes. Although he presented his voyages as exercises in reprisal—the Battle of San Juan de Ulúa (1568), during which five English ships were lost to the Spanish, was regularly cited—Drake in fact possessed no commission. Nor, despite growing animosity, were Spain and England at war. On the by now longstanding rules of reprisal, the Spanish were quite justified in seeing Drake's acts of plunder as clearly illegitimate (in addition to the illegitimacy they attached to him as a Lutheran interloper). But so too did Drake's actions appear illegitimate under the approach taken by the English admiralty towards robbery and plunder in English waters. Was this not robbery as extended to the sea by the 1535 and 1536 statutes?

Schmitt has argued that in the 16th century, starting with the lines of amity agreed at Cateau-Cambrésis in 1559, the New World was conceptually and juridically set off from Europe. A new frontier delineated the 'open spaces' of the New World and the free seas:

At this 'line', Europe ended and the 'New World' began. At any rate, European law, i.e., 'European public law', ended here. Consequently,

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<sup>104</sup> Rubin (2006) 40.

<sup>105</sup> Appleby, *Under the Bloody Flag* (2009) 104. See also Kenneth R. Andrews, *The Spanish Caribbean: Trade and Plunder, 1530-1630* (Yale University Press, 1978) 162.

<sup>106</sup> Appleby, *Under the Bloody Flag* (2009) 127.

so, too, did the bracketing of war achieved by traditional European international law, meaning that here the struggle for land-appropriation knew no bounds. Beyond the line was an ‘overseas’ zone in which, for want of any legal limits to war, only the law of the stronger applied.<sup>107</sup>

In the anomic space beyond the line, ‘force could be used freely and ruthlessly’ in the appropriation of new land by Europeans.<sup>108</sup> But this division also, Schmitt observed, gave ‘free rein’ for looting, piratical plunder and pillage outside the *jus publicum Europaeum*.<sup>109</sup>

Without citing Schmitt, Eliga Gould describes a remarkably similar conception of a division of planetary space, one with a hold specifically on English thinkers. Starting in the 16th century, they ‘accepted an image of Britain’s Atlantic periphery as a region “beyond the line,” a zone of conflicting laws where Britons were free to engage in forms of violence and exploitation that were unacceptable whether in Britain proper or in Europe’s law-bound state system’.<sup>110</sup>

Acts of violence and plunder in the New World, like those of Drake, were most certainly ‘beyond the line’. For the English, such violence directed at the Spanish was not only legitimate, then, but even increasingly necessary in light of their growing imperial ambitions.

### **PLUNDER IN THE SERVICE OF EMPIRE**

Until the middle of the 16th century, London had been largely peripheral to the nascent world economy. The great majority of England’s overseas trade was carried by foreign merchants, the country’s connection to Mediterranean markets dependent on Florence, Genoa and Venice. A single merchant organisation, the Company of Merchant Adventurers, sold the country’s only significant export, cloth, primarily through Antwerp. In the second half of the century, however, as Ottoman power weakened the

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<sup>107</sup> Carl Schmitt, *Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. G.L. Ulmen (Telos, 2006) [1950] 93-94.

<sup>108</sup> Ibid 94.

<sup>109</sup> ‘The fact that the thoroughly Catholic King of France aligned himself with dangerous heretics and wild pirates . . . against the Catholic King of Spain and, together with such allies, pillaged Spanish cities in the Americas, can be explained only by the fact that these pirate raids were undertakings “beyond the line”.’ Ibid 93.

<sup>110</sup> Eliga H. Gould, ‘Zones of Law, Zones of Violence: The Legal Geography of the British Atlantic, circa 1772’ 60 *The William and Mary Quarterly* (2003) 471, 474.

Italian grip on Mediterranean trade, English merchants became increasingly active. The 1570s, in particular, saw a dramatic expansion of English merchant capital as new overseas links were forged. New forms of collective investment, systems of credit and joint-stock companies such as the Levant Company allowed the London merchant community to open up long-distance commerce and cement England's role in an expanding global system of trade.<sup>111</sup>

While trade with the Levant market, in particular, flourished, Habsburg hegemony in the New World closed off potentially valuable markets for English exports, especially English cloth. In his 1580 pamphlet 'A Discourse of the Commodity of the Taking of the Strait of Magellanus', Hakluyt warned of the dangers of the Spanish monopoly: 'whenever the rule and government of the East & West Indies, and there several isles and territories shalbe in one Prince, they neither will receive English cloth nor yet care for anie vente of their commodities to us, having then so manie places of their owne to make vente and enterchange of ther commodities'.<sup>112</sup> The need to secure new markets for textiles, Claire Jowitt notes, was especially acute following the loss of access to the overseas Antwerp trade routes. English support for the Dutch in their rebellion against Spanish rule had seen them barred and the Americas offered 'potentially illimitable' new markets.<sup>113</sup>

The 1570s and 80s saw a surge of propaganda in support of, on the one hand, English expansion and, on the other hand, violent efforts to undermine the Spanish monopoly. In his *Discourse Concerning Western Planting* (1584), Hakluyt opined on the benefits of colonial settlement in the New World, lauding Walter Raleigh's efforts to establish a colony at Roanoke.<sup>114</sup> Westward expansion that challenged the Spanish

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<sup>111</sup> Theodore K. Rabb, *Enterprise and Empire: Merchant and Gentry Investment in the Expansion of England* (Harvard University Press, 1967) 1-3; Daniel Vitkus, "'The Common Market of All the World': English Theater, The Global System, and the Ottoman Empire in the Early Modern Period", in Barbara Sebek & Stephen Deng, *Global Traffic: Discourses and Practices of Trade in English Literature and Culture from 1550 to 1700* (Palgrave Macmillan, 2008) 20, 21-23. See also, generally, Robert Brenner, *Merchants and Revolution: Commercial Change, Political Conflict and London's Overseas Traders, 1550-1653* (Cambridge University Press, 1993).

<sup>112</sup> Richard Hakluyt, 'A Discourse of the Commodity of the Taking of the Strait of Magellanus' [1579-80], in E.G.R. Taylor (ed.), *The Original Writings & Correspondence of the Two Richard Hakluyts*, vol. 1 (Hakluyt Society, 1935) 139, 143.

<sup>113</sup> Claire Jowitt, *The Culture of Piracy, 1580-1630: English Literature and Seaborne Crime* (Ashgate, 2010) 52.

<sup>114</sup> Richard Hakluyt, *A Discourse Concerning Western Planting*, ed. Charles Deane (Maine Historical Society, 1877) [1584]. On Walter Raleigh, see essays in Joyce Youings (ed.), *Raleigh in Exeter 1985: Privateering and Colonisation in the Reign of Elizabeth I* (University of Exeter, 1985).

monopoly on the West Indies, Hakluyt argued, might 'bringe King Phillippe from his highe throne' and 'make him equall to the princes his neighbours'.<sup>115</sup> The limits of Spanish dominion in the West Indies, he insisted, was 'nothinge so large as is generally ymaged and surmized'.<sup>116</sup> Here was an explicit rejection of the papal donations and an insistence that Elizabeth's own title to the West Indies was 'more lawfull and righte than the Spaniardes'.<sup>117</sup>

Already in 1562 Elizabeth had insisted on English access to the Americas. '[N]othing will bring these people to their senses', wrote Philip's ambassador when informed of the queen's refusal to accept Spanish claims to monopoly backed by papal award.<sup>118</sup> Seven years later, Antonio de Guaras, a Spanish agent in London, wrote to the Duke of Alba to report Elizabeth's continued insistence 'that Englishmen abroad shall enjoy their liberties . . . that they shall be free to go with merchandise to the Indies, and that neither in Flanders nor Spain, shall they be molested in person or property for their heresies'.<sup>119</sup> Unsurprisingly, de Guaras dismissed the queen's demands as 'absurd pretensions'.<sup>120</sup> For colonial promoters like Hakluyt, violent conflict with Spain, in the face of their intransigence, was an inevitable corollary of English attempts to access new markets and fashion a maritime empire.

Still, Elizabeth was not willing to countenance a direct assault on Spanish possessions in the New World, preferring covert support for plunder by English depredators. As Ludwig Dehio puts it, 'Elizabeth, manoeuvring cautiously, disavowed them as need arose, while silently furthering their ends'.<sup>121</sup> Drake's 1577 voyage, famous for his circumnavigation of the globe, epitomised this stance. Elizabeth and her ministers' support for Drake remained secret; publicly, this was to be a voyage of

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<sup>115</sup> Hakluyt (1877) 55.

<sup>116</sup> Ibid 60.

<sup>117</sup> Ibid 5.

<sup>118</sup> 'Bishop Quadra to the King', 6 June 1562, reprinted in Martin A.S. Hume (ed.), *Calendar of Letters and State Papers Relating to English Affairs* vol. 1 (Cambridge University Press, 1894) 239, 240.

<sup>119</sup> 'Antonio de Guaras to the Duke of Alba', 18 September 1569, reprinted in Martin A.S. Hume (ed.), *Calendar of Letters and State Papers Relating to English Affairs* vol. 2 (Cambridge University Press, 1894) 193, 194-95.

<sup>120</sup> Ibid 195.

<sup>121</sup> Ludwig Dehio, *The Precarious Balance: Four Centuries of the European Power Struggle* (Vintage, 1962) 56.

trade to Alexandria and Constantinople.<sup>122</sup> In reality, the plunder of Spanish wealth in the New World was Drake's chief concern.<sup>123</sup>

The earliest English accounts of Drake's voyage were notably sparse, likely constrained by fears of Spanish retaliation. The first published commemoration of his circumnavigation was Nicholas Breton's brief encomium, *A discourse in commendation of the valiant gentleman, maister Frauncis Drake, with a reioysing of his happy adventures* (1581).<sup>124</sup> A poem of 18 lines followed by a short eulogy, the work celebrated Drake finding 'the Land where Treasure lyes, the way to come by it and honor by the getting of it' but was otherwise short on details.<sup>125</sup> After the outbreak of war between England and Spain in 1585, such concerns were no longer pressing. A lengthier account, already quoted at the start of this chapter, followed in Hakluyt's *The Principall Navigations* (1589), celebrating Drake's voyage and depredations.<sup>126</sup>

In her close reading of Hakluyt's account, Jowitt shows how the ideologue for English empire placed Drake's voyage within a broader narrative construction of English imperial aspirations. Hakluyt championed an English 'mercantile nationalism', seeing in commercial expansion the means both to future economic prosperity—through the export of English cloth to new markets—and to challenge Iberian dominance.<sup>127</sup> In this context, Drake's violence against an imperial rival, especially one intent on excluding England from potentially profitable new markets, was presented 'not as criminal activity, but as a standard aspect of early modern mercantile behaviour in disputed colonial regions'.<sup>128</sup> Violent depredation, at least

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<sup>122</sup> Kenneth R. Andrews, 'The Aims of Drake's Expedition of 1577-1580' 73 *American Historical Review* (1968) 724, 734.

<sup>123</sup> Appleby, *Under the Bloody Flag* (2009). The true motivation of Drake's voyage has been the subject of some debate. Julian Stafford Corbett, for instance, argued that Drake's voyage was primarily a 'project for an attack by sea upon Panama'. Julian Stafford Corbett, *Drake and the Tudor Navy, with a History of the Rise of England as a Maritime Power*, vol. 1 (Longmans, Green & Co., 1898) 212. Zelia Nuttall, by way of contrast, argued that Drake's main aim was to explore the Pacific coast of America with a view to colonisation. Nuttall (ed.) (1914) xxxix. For a summary of the debate, including other views, see Andrews (1968).

<sup>124</sup> See David B. Quinn, *Sir Francis Drake as Seen by his Contemporaries* (John Carter Brown Library, 1996) 9-10.

<sup>125</sup> Quoted in Helen Wallis, 'The Cartography of Drake's Voyage', in Norman J.W. Thrower (ed.), *Sir Francis Drake and the Famous Voyage, 1577-1580: Essays Commemorating the Quadricentennial of Drake's Circumnavigation of the Earth* (University of California Press, 1984) 121, 136.

<sup>126</sup> Hakluyt (1965). David Quinn suggests that Hakluyt was nonetheless still 'cautious. . . in regard to the more controversial aspects of the circumnavigation'. Quinn (1984) 43.

<sup>127</sup> Jowitt (2010) 47-49.

<sup>128</sup> *Ibid* 49.



when pursued ‘beyond the line’, was, in Hakluyt’s construction, simply a ‘form of business practise . . . designed to ensure a share of profitable markets overseas’.<sup>129</sup> For the English, it was Iberian monopoly that was illegitimate, Drake’s ‘piracy’ understood, and celebrated, as an anti-monopolistic practice, a ‘type of patriotic trade’ central to the country’s new imperial and commercial project.<sup>130</sup>

### A NEW IMPERIAL FORMATION

That project, premised, in Hakluyt’s vision on violent depredation, represented the rising influence of merchant capital in the English state. ‘Commercial capital’, Marx would write, ‘when it holds a dominant position, is thus in all cases a system of plunder’, its development ‘directly bound up with violent plunder [and] piracy’.<sup>131</sup> With the outbreak of the Anglo-Spanish war in 1585, depredations increased further—some 200 ships dispatched each year to ‘hunt and rob the Spaniards in the West Indies and on the high seas’.<sup>132</sup> By 1588, Elizabeth I was ‘mistress of the most powerful navy Europe had ever seen’,<sup>133</sup> largely thanks to the long rehearsal of seaborne violence by depredators like Drake. Depredation, in short, laid the foundations for English maritime power.

Yet the nascent English commercial expansion spurred by merchant capital would fundamentally transform the nature of English economic power.<sup>134</sup> By early in the 17th century, the country had developed ‘a complex network of trade, involving products of many lands’ and exchanged its ‘passive, dependent role in Europe’s trading system for an active, independent role in the world’.<sup>135</sup> Increasingly, piratical raiding appeared anachronistic to English imperialism. As Robin Blackburn puts it, Drake and his fellow depredators belonged ‘to the prehistory of English colonialism’,

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<sup>129</sup> Ibid.

<sup>130</sup> Ibid 58, 66.

<sup>131</sup> Karl Marx, *Capital: A Critique of Political Economy*, vol. 3, trans. David Fernbach (Penguin Books, 1981) [1867] 448-49.

<sup>132</sup> Quinn (1984) 24.

<sup>133</sup> Garrett Mattingly quoted in Perry Anderson, *Lineages of the Absolutist State* (New Left Books, 1974) 134.

<sup>134</sup> See Rabb (1967) 2-3.

<sup>135</sup> Kenneth R. Andrews, *Trade, Plunder and Settlement: Maritime Enterprise and the Genesis of the British Empire, 1480-1630* (Cambridge University Press, 1984) 8-9.

their ‘gold lust and preference for booty . . . inimical to regular commerce’.<sup>136</sup> Piracy, even ‘beyond the line’, came to be viewed as at odds with trade and England’s self-perception as a merchant nation. Maritime depredation, once handmaiden to English imperialism, was now a threat. This new attitude would soon find formal expression in the work of a young Dutch jurist, Hugo Grotius, to whom the next chapter now turns.

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<sup>136</sup> Robin Blackburn, *The Making of New World Slavery: From the Baroque to the Modern, 1492-1800* (Verso, 1997) 219.

## CHAPTER 6

# The pirate as universal enemy of commerce

Early on 25 February 1603, three Dutch ships under the command of Jacob van Heemskerck sighted a Portuguese carrack anchored in the mouth of the Johor River estuary to the east of the island of Singapore. The carrack, the *Santa Catarina*, was large by the standards of the time, about 1400 tons. Van Heemskerck's trading voyage had thus far been disappointing and, after almost two years at sea, his cargo holds remained empty. The Portuguese ship would likely be heavily laden with goods from China and its capture would turn his fortunes. A decision was made: the Dutch would seize the ship and its cargo. A battle ensued for much of the day until, as night was falling, the Portuguese captain surrendered. The crew's lives were spared, but the ship and its cargo were forfeited and returned with van Heemskerck to Amsterdam where they were auctioned for some 3.5 million Dutch guilders, approximately three hundred thousand pounds sterling.<sup>1</sup>

In Amsterdam, van Heemskerck's attack was greeted with some consternation. As the young jurist Hugo Grotius would soon write, many 'hesitate to approve of the prize, apparently regarding it as something wrongfully acquired and illegitimate'.<sup>2</sup> Although trade and plunder still often went hand in hand, Van Heemskerck's voyage to the East Indies was understood by many to have been foremost a trading venture; his commission from Prince Maurice, the Lord High Admiral of Holland, did not authorize him to engage in offensive warfare. Nor did his instructions from his employers, the United Dutch East India Company (*Vereenigde Oost-Indische*

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<sup>1</sup> Martine Julia van Ittersum, 'Introduction', in Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum, trans. Gwladys L. Williams (Liberty Fund, 2006) xiii, xiii; Peter Borschberg, *Hugo Grotius, the Portuguese and Free Trade in the East Indies* (NUS Press, 2011) 78. For details of the attack, see also Peter Borschberg, 'The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (c. 1602–1616)' 33 *Journal for Southeast Asian Studies* (2002) 31, 37–38. Van Heemskerck's capture of the *Santa Catarina* is also described in detail in chapter 1 of Martine Julia van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies (1595–1615)* (Brill, 2006). A pamphlet published in Amsterdam in March 1604 estimated the booty at 'sixty times a hundred thousand ducats, among which 26 hundred thousand guilders' worth of Chinese silks, besides a great weight of unrefined and unpurified gold, along with many other goods, merchandise and furniture, including a royal chair set with gems and precious stones, all marvellous to relate': quoted in van Ittersum, *Profit and Principle* (2006) 114.

<sup>2</sup> Hugo Grotius, *Commentary on the Law of Prize and Booty*, ed. Martine Julia van Ittersum, trans. Gwladys L. Williams (Liberty Fund, 2006) [1604] 15.

*Compagnie*; VOC). He was to use force only in self-defence or to obtain reparations for injuries.<sup>3</sup> There was nothing in his commission to justify the seizure of the *Santa Catarina* when he had been neither attacked nor harmed by the Portuguese. Was this not then a clear case of illegitimate depredation? Indeed, as Martine van Ittersum shows in her careful study of the Dutch captain's extant correspondence, van Heemskerck himself recognised that it would be considered such, were he not to present it otherwise.<sup>4</sup>

Either the seizure was a legitimate prize in which van Heemskerck and the VOC held a legal right, or the attack was an ignoble act of piracy and the ship and cargo should be returned to its owners. In September 1604, the Amsterdam Admiralty Court validated the *Santa Catarina* and its wares as legitimate prize.<sup>5</sup> Shortly before the Court's decision was handed down, the VOC commissioned the precocious jurist Hugo Grotius, or Huig de Groot, to author an *apologia* for the seizure.

The Admiralty Court's verdict, while settling the legal status of the prize, was an unfortunate tangle of 'loosely related arguments'—self-defence, just war doctrine, natural law and the law of nations were all invoked, albeit not always coherently.<sup>6</sup> The VOC directors looked to Grotius to put some order into the legal justification for the seizure, not so much for reasons of legal pedantry but, more importantly, to garner 'widespread political support for their cause, both domestically and internationally'.<sup>7</sup> The diplomatic support of France and England, for instance, was essential in the young Dutch Republic's rebellion against Habsburg Spain (and Portugal, united as it was with Spain under one crown from 1580 until 1640), as well as in the VOC's increasingly forceful penetration of the East Indies.

The VOC thus sought an advertisement of Portuguese iniquity, an account of 'perfidy, tyranny and hostility' that justified the seizure. Yet Grotius had other designs: what was initially intended to be a brief and quickly published pamphlet became, in

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<sup>3</sup> van Ittersum, *Profit and Principle* (2006) 10, 22.

<sup>4</sup> Ibid 53.

<sup>5</sup> The court's decision is reproduced in Grotius (2006) 510-14. As in England, captains were to bring any seized goods back to their home port where it would be inventoried and a determination made whether the captain's commission was legal and thus whether any plunder was legal prize.

<sup>6</sup> Martine Julia van Ittersum, 'Hugo Grotius in Context: Van Heemskerck's Capture of the *Santa Catarina* and its Justification in *De Jure Praedae* (1604-1606)' 31 *Asian Journal of Social Science* (2003) 511, 521; van Ittersum, *Profit and Principle* (2006) 53.

<sup>7</sup> van Ittersum, *Profit and Principle* (2006) 25.

Grotius's hands, an extended study of the 'universal laws of war' which would ultimately 'revolutionis[e] natural law and natural rights theories'.<sup>8</sup> The resulting treatise is commonly known as *De iure praedae commentarius* or *Commentary on the Law of Prize and Booty* and remained unpublished in Grotius's lifetime.<sup>9</sup>

If paled in comparison to the attention paid to Grotius's other major texts, *De iure praedae* has in recent years been subjected to a number of close readings.<sup>10</sup> Although it remained unpublished during his own lifetime, a single chapter was published anonymously in 1609 as *De mare liberum (The Free Sea)* sparking heated debate with leading legal contemporaries—John Selden, William Welwood, Seraphim de Freitas—disputing Grotius's thesis on the freedom of the seas.<sup>11</sup> No less significantly, *De iure praedae* already set out the framework for Grotius's major contribution to international law in *De iure belli ac Pacis*, first published in Paris in 1625.

More importantly, however, for present purposes, is the role piracy plays in *De iure praedae*. Grotius's foremost concern in this work, this chapter argues, is to establish the legitimacy of Dutch commercial expansion into the East Indies and the violence attendant on, and implicit in, that expansion. Grotius's thinking clearly

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<sup>8</sup> van Ittersum, 'Introduction' (2006) xvii; see also Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford University Press, 1999) 78-108.

<sup>9</sup> Grotius's manuscript itself bore no title; *De iure praedae commentarius* was the title given the text by its first editor. Grotius himself referred to the text in his correspondence as *De rebus Indicis* (On Indian Matters). The work consists of 15 chapters. Grotius began, in chapters one and two, with an elaboration of a theory of justice. This led in the following eight chapters to an analysis of just war. Chapter 11 is concerned with setting out the historical background leading to the seizure of the *Santa Catarina*. Grotius then applies the law of war, developed in the earlier chapters, to the facts of the seizure. Chapter 12 explains the seizure as a case of just private war, while the following chapter considers the taking as a case of just public war. The work concludes with two chapters justifying the seizure as not only legitimate, but also honourable and beneficial.

<sup>10</sup> The leading study is van Ittersum, *Profit and Principle* (2006). Other important works include Borschberg (2011), Tuck (1999); Ileana M. Porras, 'Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius' *De Iure Praedae*—The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates"' 31 *Brooklyn Journal of International Law* 741 (2006) 741; Eric Wilson, *Savage Republic: De Indis of Hugo Grotius, Republicanism and Dutch Hegemony within the Early Modern World-System (c. 1600-1619)* (Martinus Nijhoff, 2008).

<sup>11</sup> *Mare liberum* is in essence a revision of chapter 12 of *De iure praedae*. Its publication in 1609, at the urging of the VOC, came in the context of Spanish-Dutch truce negotiations. While the larger tract focused on a specific case of maritime plunder (as discussed below), *Mare liberum* instead was concerned with the broader issue of the Dutch's claim to a sweeping right of access to the seas. See Martine Julia van Ittersum, 'The long goodbye: Hugo Grotius' justification of Dutch expansion overseas, 1615-1645' 36(4) *History of European Ideas* (2010) 386, 388; Porras (2007) 747. On Grotius's contribution to the freedom of the seas doctrine, see W.E. Butler, 'Grotius and the Law of the Sea', in Hedley Bull, Benedict Kingsbury & Adam Roberts (eds), *Hugo Grotius and International Relations* (Clarendon, 1992) 212.

emerged in a particular conjuncture. Martine van Ittersum's *Profit and Principle* reconstructs the origins of Grotius's manuscript against the background of Dutch commercial penetration of the East Indies, identifying him as an ardent advocate of Dutch imperialism. But Dutch commercial expansion was itself connected with a broader phenomenon, namely the consolidation of merchant capitalism in western Europe and the emergence of a capitalist world economy. As Martti Koskenniemi has noted, Grotius 'gave legal articulation' to a particular world, one marked by the 'emergence of new types of economic relationship'.<sup>12</sup> Koskenniemi traces Grotius's contribution to the legal forms undergirding 'the expansion over the whole world of that system of productive and mercantile relations that we are used to calling "capitalism"'.<sup>13</sup>

The novelty of Grotius's argument, this chapter suggests, lay in his claiming for a private commercial company certain rights—for instance, the right to undertake armed aggression on the high seas—usually associated with state sovereignty. Grotius's task was to establish the legitimacy of an act of violent acquisition that was otherwise not just legally, but also morally, dubious. In doing so, he set out a doctrine of natural rights legitimising mercantile violence with far-reaching implications for world-historical processes of accumulation. But legitimacy and illegitimacy are two sides of the same coin: the legitimacy of certain practices was necessarily structured by a corresponding notion of illegitimacy, represented in Grotius's treatise by the figure of the pirate. In grounding the legitimacy of commercial violence in a theory of natural rights, Grotius did more than simply reproduce the pirate as illegitimate depredator. Rather, the pirate was invested, as the chapter argues, with new opprobrium, the transgressor of natural law and the 'other' to the legitimate violence of mercantile capitalism.

### A NEW KIND OF STATE

The rise of Dutch commercial power in the late 16th and early 17th century was a defining moment in the emergence of capitalism in western Europe that would

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<sup>12</sup> Martti Koskenniemi, 'International Law and the Emergence of Mercantile Capitalism: Grotius to Smith', in Pierre-Marie Dupuy & Vincent Chetail (eds), *The Roots of International Law / Les fondements du droit international: Liber Amicorum Peter Haggenmacher* (Brill, 2013) 1, 26.

<sup>13</sup> *Ibid* 11-12.

eventually see the ascendance of a ‘new bourgeois society that gradually came to dominate all spheres of human activity’.<sup>14</sup> The emergence of capitalism was a gradual and uneven process, a ‘series of stages and transitions’, in Braudel’s words.<sup>15</sup> Many of the features we associate with capitalist society existed in the pre-capitalist world, as did basic legal forms such as property and contract.<sup>16</sup> Markets and commodity exchange had existed under feudalism—‘[f]eudal production relations, like those of the tributary mode, are consistent with extensive commodity exchanges’<sup>17</sup>—and small centres of merchant capitalism had crystallised, as we saw in Chapter 3, in urban centres in Northern and Central Italy even before the 15th century, as well as in the Netherlands, England, and parts of France, Germany, Bohemia and Catalonia. But these were sporadic moments and did not represent ‘the subsumption of significant numbers of economic actors under capitalist relations’.<sup>18</sup>

The ‘most decisive moment’ in the emergence of capitalism as a world-historical force, then, was not the mere ‘proliferation of elements of capitalist enterprise across Europe’—as Giovanni Arrighi observes, ‘[e]lements of this kind had occurred throughout the Eurasian trading system’.<sup>19</sup> Unique, though, to Europe in the 16th century, was the coalescence of these elements of capitalism ‘into the powerful mix that propelled European states towards the territorial conquest of the world and the formation of an all-powerful and truly global capitalist world-economy’.<sup>20</sup> An essential element in this process—perhaps even the most important, as Arrighi has it—was the transition from ‘scattered to concentrated capitalist power’ leading to ‘the unique fusion of state and capital, which was realized nowhere more favorably for capitalism than in Europe.’<sup>21</sup>

If it was in the city-states of northern Italy where state and capital first fused—in Venice, Genoa and Florence, in particular—it was in the United Provinces where

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<sup>14</sup> Ernest Mandel, *The Place of Marxism in History* (Humanity Books, 1996) 1.

<sup>15</sup> Fernand Braudel, *The Perspective of the World* (Harper & Row, 1984) 92.

<sup>16</sup> Tor Krever, ‘The rule of law and the rise of capitalism’, in Christopher May & Adam Winchester (eds), *Handbook on the Rule of Law* (Edward Elgar, forthcoming).

<sup>17</sup> Alex Callinicos, *Imperialism and the Global Political Economy* (Wiley, 2013) 127.

<sup>18</sup> *Ibid* 127.

<sup>19</sup> Giovanni Arrighi, *The Long Twentieth Century: Money, Power and the Origins of our Times*, 2nd ed. (Verso, 2010) 11.

<sup>20</sup> *Ibid* 12.

<sup>21</sup> *Ibid*.

this alliance reached its early apogee. The Netherlands had long been home to major trading centres in the European economy. Antwerp, in particular, was a centre for trade in spices, textiles, sugar and metals, while Amsterdam, further north, was by the late 15th century becoming a major trading port. From the mid-1500s, the largely Protestant Provinces of the Netherlands struggled against the rule of Catholic Philip II, who acceded to the Spanish throne in 1556. Although the northern Provinces declared independence in 1581—the southern Provinces, initially joining the revolt, submitted to Spain—an end to the war, and *de jure* Dutch independence, came only in 1648.

With *de facto* freedom from absolutist Habsburg Spain, a new form of state emerged in the nascent Dutch Republic, ‘a confederation of provinces that maintained their autonomy and were governed largely by civic administrations in the cities’.<sup>22</sup> This novel juridico-political form of state had important implications for the economic development of the United Provinces and their eventual dominance, along with England, of the world economy. As Christopher Hill has observed, ‘[a]n absolute monarch with a standing army and a permanent bureaucracy may intermittently favour trade and industry for its own military purposes; but it can control them. The looser, freer Dutch and English states allowed capitalist interest to dominate permanently.’<sup>23</sup> Or in Braudel’s words, in the United Provinces, the state ‘governed for the benefit and even according to the directives of the businessmen, merchants, and money-lenders’.<sup>24</sup>

The Dutch state was, in short, ‘a federation of urban mercantile elites’.<sup>25</sup> Here, with the alienation of the state to a merchant capitalist oligarchy, was the quintessential embodiment of Marx and Engels’ description of the capitalist state, ‘but a committee for managing the common affairs of the whole bourgeoisie’.<sup>26</sup> ‘In no other society’, Ellen Wood writes, ‘not even the Italian city-states, was public authority so intricately

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<sup>22</sup> Ellen Meiksins Wood, *Liberty & Property: A Social History of Western Political Thought from Renaissance to Enlightenment* (Verso, 2012) 111.

<sup>23</sup> Christopher Hill, ‘Braudel and the State’, in *Collected Essays*, vol. 3 (Harvester Press, 1986) 132, 140.

<sup>24</sup> Braudel (1977) 64-65. Like Hill, Braudel sees the same phenomenon, if later in England: ‘Likewise, in England the Glorious Revolution of 1688 marked the accession of business similar to that in Holland.’ *Ibid.* Harvey makes a similar point: ‘The British state, being influenced far more by merchant capitalists, played a quite different role in relation to accumulation to France, where landed interests predominated’: David Harvey, *The New Imperialism* (Oxford University Press, 2005) 91-92.

<sup>25</sup> Callinicos (2013) 130.

<sup>26</sup> Karl Marx & Friedrich Engels, *The Communist Manifesto* (Verso, 2012) [1848] 37.



bound up with commercial dominance.’ Ruled by commercial interests, ‘who identified the public interest with commercial profit’, there was at best a ‘hazy line’ between the state and commercial enterprise.<sup>27</sup>

The emergence of the United Provinces as one of the first capitalist states was not solely the result of intra-European developments. The latter, as Alex Callinicos observes, were themselves closely entwined with ‘geopolitical conflict and mercantile ambitions’ pushing ‘European states and private adventurers to seek wealth in the rest of the world’.<sup>28</sup> The ‘reorganization of [national] political space in the interest of capital accumulation’<sup>29</sup> allowed the Dutch state to pursue overseas commerce. The United Provinces’ development of capitalism, and their prosperity, rested, in the final analysis, on commercial expansion into the extra-European world. By the mid-17th century, Amsterdam would become the centre of world trade: ‘Except for Britain after around 1780’, writes Jonathan Israel, ‘no one power in history ever achieved so great a preponderance over the processes of world trade as did the Dutch, for a century and a half, from the end of the sixteenth century down to the early eighteenth century.’<sup>30</sup>

Trade abroad, in turn, generated industrial production at home—in fine textiles, for example, the skilled producers of which had migrated north *en masse* from the southern provinces early in the Dutch Revolt, and in shipbuilding.<sup>31</sup> But the relationship between trade and economic development was not unidirectional: the Dutch dominance of global mercantile trade itself rested on the development in the United Provinces of a capitalist economy with a dynamic of rising productivity.<sup>32</sup>

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<sup>27</sup> Wood (2012) 129. Koskenniemi, too, observes that ‘public interest in the United Provinces was intertwined with the interests of the merchant classes and the growth of commerce’. Koskenniemi (2013) 19.

<sup>28</sup> Callinicos (2013) 127.

<sup>29</sup> Arrighi (2010) 45.

<sup>30</sup> Jonathan I. Israel, *Dutch Primacy in World Trade, 1585-1740* (Clarendon Press, 1989) 12.

<sup>31</sup> Wood (2012) 113-14. Note, though that Wood herself does not understand such production to have been ‘capitalist’. She argues that ‘the Dutch Republic enjoyed its Golden Age not as a capitalist economy but as the last and most highly developed non-capitalist commercial society’. Ellen Meiksins Wood, *The Origins of Capitalism: A Longer View* (Verso, 2002) 94.

<sup>32</sup> Callinicos (2013) 130. See also Jan de Vries & Ad van der Woude, *The First Modern Economy: Success, failure and perseverance of the Dutch economy, 1500-1815* (Cambridge University Press, 1997). Robert Brenner has written that ‘The Dutch economy as it emerged in the Early Modern Period thus appears to have been quite fully capitalist. It was unburdened by systems of ruling class surplus extraction by extra-economic compulsions. . . . Moreover, its producers, notably its agricultural producers, were entirely dependent on the market and subject to competition in production to survive, so it had no choice but to maximize their price-cost ratio by specializing, moving from line to line in response to market signals, and seeking to bring in the latest techniques.’ Robert P. Brenner, ‘The Low Countries in the Transition to Capitalism’ 1 *Journal of Agrarian Change* (2001) 169, 231. Interestingly,

If the United Provinces represented the early emergence of a new kind of capitalist state, the Dutch mercantile empire represented a new kind of imperial logic, a ‘genuinely capitalist version of extra-European expansion’.<sup>33</sup> While Spain and Portugal had long dominated the seas and trade, Dutch accumulation was different in scale and character than that of the Iberian empires. Portuguese extra-European penetration, for instance, was initially motivated by crusading ambitions against the Muslim states of north Africa and a desire for west African gold, leading eventually eastwards to control of seaborne trade in the Indian Ocean. But like the Spaniards in their conquest of the Americas, the Portuguese were driven by a territorial logic of imperialism, concerned with the extent of their domain; capital was merely a means to territorial expansion. The Dutch, by way of contrast, with a nascent capitalist economy and bourgeois control of the state at home, were driven by an entirely new capitalist logic. The merchants-cum-rulers of the United Provinces understood power in terms of their command over resources; territorial acquisitions was merely a means for the accumulation of capital.<sup>34</sup> In short, as Arrighi observes, Iberian imperialism ‘was missing . . . an obsession with profit and “economizing,” rather than with crusade; a systematic avoidance of military involvements and territorial acquisition that had no direct or indirect justification in the “maximization of profit”’.<sup>35</sup> The result of the new capitalist logic of the Dutch, ‘a fully fledged world entrepôt, not just linking, but dominating, the markets of all continents, was something totally outside human experience. The fact is that never before—or perhaps since—has the world witnessed such prodigious concentration of economic power at a single point.’<sup>36</sup>

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the capitalist nature of the United Provinces is one of the few subjects where Wood’s analysis departs markedly from that of Brenner.

<sup>33</sup> Callinicos (2013) 128.

<sup>34</sup> Arrighi (2010) 35.

<sup>35</sup> Ibid 155. Callinicos has also written of the rise of the United Provinces (and England) as marking a transformation in the nature of geopolitical competition: ‘What began as a process of political accumulation—of territorial and dynastic rivalries among state-building magnates driven into expansion by the late mediaeval crisis of feudalism—is drastically changed by the emergence of a new kind of actor, the first capitalist states in Holland and England’. Callinicos (2013) 133-34.

<sup>36</sup> Israel (1989) 13.

## DUTCH COMMERCIAL EXPANSION

The full extent of Dutch commercial power would take time to emerge, a process dependent in no small part on Dutch control of the ‘rich trades’ from the East Indies. The growth of the early modern European economy created demand for such luxuries as spices and silks, creating an opportunity for European traders with access to the entrepôts of Southeast Asia to secure significant profits. The incentive was great for the Dutch capitalist oligarchy to carve its own share of this trade out of the Iberian seaborne empires. Already a main trading force in northern Europe by the late 16th century, Dutch merchants in fin de siècle Europe turned in search of further profits to the promise of new commercial ventures in the East Indies.

The immediate catalyst for Dutch ventures in the East Indies was Jan Huygen van Linschoten’s publication, in 1595, of his *Reysgheschrift*. Having spent time in the service of the Archbishop of Goa in *Ásia portuguesa* and the Azores, van Linschoten had amassed an encyclopaedic knowledge of Iberian trade and the *roteiros*, or navigational instructions, employed by Portuguese pilots. His publication of these materials, Benjamin Schmidt observes, ‘vastly expanded the world of Dutch readers, sailors, and merchants alike’. Van Linschoten, Schmidt suggests, ‘revealed the wonders of the world while also charting the ways to reach them’.<sup>37</sup> The first major Dutch expedition to the Indian Ocean, led by Cornelis de Houtman in 1595, carried the newly printed *Reysgheschrift*, as did subsequent expeditions such as that, in 1598, of Jacob Cornel van Neck, of whom Grotius would write in *De iure praedae*.<sup>38</sup>

In all, between 1595 and 1602, the trading companies of the United Provinces commissioned some 65 merchant vessels to sail to the East Indies.<sup>39</sup> When Van Heemskerck set sail for the East Indies, his was merely the latest such venture. He had been commissioned by the United Amsterdam Company (*Gede Amsterdamse Oostindische Compagnie*; UAC) to buy spices in the East Indies. But in 1602, while van Heemskerck was at sea, the UAC merged with other regional trading companies of Holland and Zeeland and was subsumed under a new United Dutch East India Company, the VOC.

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<sup>37</sup> Benjamin Schmidt, *Innocence Abroad: The Dutch Imagination and the New World, 1570-1670* (Cambridge University Press, 2001) 154.

<sup>38</sup> *Ibid.*

<sup>39</sup> Porras (2006) 745 note 9.

The United Provinces' supreme legislative body, the Estates General, had granted a monopoly on trade with extra-European regions to the newly formed VOC. This commercial organisation was entirely novel: it was 'a chartered, joint-stock monopoly', financed with private capital and in search of commercial profit, but at the same time strongly backed by the state.<sup>40</sup> Under its charter, the company enjoyed not only a monopoly on trade but also sweeping powers usually associated with the sovereign state. It could 'maintain troops and garrisons, fit out warships, impose governors upon Asian populations, and conduct diplomacy with Eastern potentates, as well as sign treaties and make alliances'.<sup>41</sup>

The creation of the VOC had marked not only the merger of rival trading firms, but also a shift in Dutch imperial ambitions. It would be the vehicle for the United Provinces' empire of commerce. Van Heemskerck's seizure of a Portuguese carrack presaged a new wave of aggressive policies on the part of the VOC's merchant sailors—an 'irrevocable shift', writes Eric Wilson, 'from orthodox—and legitimate—self-defence to more legally and morally ambivalent forms of armed aggression'.<sup>42</sup> The Estates General, in turn, expected to share in prize goods and would benefit further from the VOC's disruption of Iberian commerce in the East Indies, thus aiding the Dutch war effort in Europe.<sup>43</sup>

Perhaps encouraged by van Heemskerck's profitable attack, the Estates General passed a resolution on 1 November 1603 instructing deputies of the VOC to 'damage the enemies and inflict harm on their persons, ships and goods by all means possible, so that they may with reputation not only continue their trade, but also expand it and make it grow'.<sup>44</sup> In 1605, four Portuguese merchant vessels were seized

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<sup>40</sup> On the VOC, see Jonathan I. Israel, *The Dutch Republic: Its Rise, Greatness and Fall, 1477-1806* (Clarendon Press, 1995) 321. Elsewhere Israel writes that the VOC was 'essentially the work of the Dutch State'. Israel (1989) 72.

<sup>41</sup> Israel (1995) 322. Mukherjee similarly notes that the charter of the VOC granted it power 'to make war, conclude treaties, acquire territories and build fortresses': Ramkrishna Mukherjee, *The Rise and Fall of the East India Company: A Sociological Appraisal* (Monthly Review Press, 1974) 59. For the text of the VOC Charter, see 'The Licence Granted by the States General to the Dutch East Indian Company on March 20, 1602', in Ella Gepken-Jager, Gerard van Solinge & Levinus Timmerman (eds), *VOC 1602-2002: 400 Years of Company Law* (Kluwer, 2005) 29.

<sup>42</sup> Eric Wilson, 'Magnum Latrocinium and private avengers: Carl Schmitt and Hugo Grotius on piracy' 26(3) *Leidschrift* (2011) 75, 81.

<sup>43</sup> van Ittersum, *Profit and Principle* (2006) lii-liiii.

<sup>44</sup> Quoted in Borschberg (2011) 316 note 4.

in and around the Singapore Straits alone,<sup>45</sup> while Victor Enthoven has estimated that some 200 craft were captured by the VOC in Asian waters in first two decades of the 17th century.<sup>46</sup> Grotius's task was thus not simply to justify van Heemskerck's seizure, but also this broader campaign. The taking of the *Santa Catarina*, Grotius explained in his *prolegomena to De iure praedae*, was merely the 'most widely celebrated' of such acts of plunder and would thus be treated as 'the episode representative of all such captures'.<sup>47</sup>

### A CLASH OF IMPERIALISMS

Dutch policy quickly brought the VOC's fleets into conflict with the Portuguese and challenged their claims to *dominium* over the East Indies. The Portuguese established themselves in the East Indies in the early 16th century, with the conquest of the trading hub of Malacca in 1511. Fortified trading posts were built on the surrounding islands and, soon thereafter, the trade in spices was declared a Portuguese monopoly: the *Estado da Índia* was to be the sole trading partner for local producers with local merchants prohibited from taking part.<sup>48</sup>

Unsurprisingly, the Portuguese encountered resistance; those indigenous opponents who tried to trade outside Portuguese control were labelled 'pirates' and 'corsairs'.<sup>49</sup> This mirrored the pattern in other parts of the *Estado da Índia*. On the Malabar coast of India, for instance, in the 16th century, the Kunjalis were the main adversaries of the Portuguese and were considered *cossarios*.<sup>50</sup> So too, further north: contemporary accounts record a Portuguese siege of Bhatkal, the queen of which had failed to pay tributes to the Portuguese and was accused of harbouring 'pirates' in her

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<sup>45</sup> Ibid 80.

<sup>46</sup> Cited in *ibid* 317 note 6.

<sup>47</sup> Grotius (2006) 14-15.

<sup>48</sup> Philip D. Curtin, *Cross-Cultural Trade in World History* (Cambridge University Press, 1984) 143-44. On the Portuguese maritime empire in Asia, see Charles Ralph Boxer, *Portuguese Conquest and Commerce in Southern Asia, 1500-1750* (Variorum Reprints, 1985); K.N. Chaudhuri, *Trade and Civilisation in the Indian Ocean: An Economic History from the Rise of Islam to 1750* (Cambridge University Press, 1985) 63-79.

<sup>49</sup> Curtin (1984) 147. Wilson confirms that for the Portuguese, like the Spanish, corsair was a generic term for maritime predator used interchangeably with 'pirate'. Wilson (2011) 88.

<sup>50</sup> Anne Pérotin-Dumon, 'The Pirate and the Emperor: Power and the Law on the Seas, 1450-1850', in C.R. Pennell (ed.), *Bandits at Sea: A Pirates Reader* (New York University Press, 2001) 25, 31.

port.<sup>51</sup> The ‘pirates’, Hannah Wojciehowski suggests, were likely simply ‘rival traders . . . whose trade threatened the attempted Portuguese monopolies’.<sup>52</sup>

Like the Spanish in the New World, the Portuguese understood pirates to include all who rejected their monopoly, rooted in papal donation, on intercourse, religious or otherwise, in the Indian Ocean. The Portuguese merchants who had opened the sea routes to the East Indies claimed continued ownership; all non-Portuguese merchants who sought to trade in the area was by definition a pirate—including the indigenous mariners who had been active in the region long before the arrival of any Europeans.

As far as the Portuguese were concerned, the interloping Dutch, when they arrived, were further *cossarios*. But their piratical identity overlapped easily with other political and religious identities. Contemporary Spanish and Portuguese sources tended to characterize Dutch merchants as ‘*piratas*’ and ‘*cossarios*’, but also ‘rebels’ and ‘men without a king’, as well as ‘enemies of the Faith’, ‘faithless scoundrels’, and a ‘locust plague of heretics’.<sup>53</sup> Philip III considered the citizens of the United Provinces as simply rebellious subjects. His father, Philip II had died in 1598 and had never recognised the Estates General as enjoying any authority to depose him.<sup>54</sup> Fighting in Europe had cooled following Philip II’s death—the Spanish crown endured something of a financial crisis—but the new monarch had no intention of renouncing the Habsburg claim to sovereignty over all of the Low Countries.<sup>55</sup>

There was certainly some hyperbole in Portuguese attempts to tarnish the reputation of the Dutch, as Grotius would complain in *De iure praedae*. But when King Philip III of Spain (and II of Portugal) wrote to the King of Cananor in 1606 of pirates and rebels, these were, from his standpoint, the appropriate labels.

‘I was informed by means of a letter from my viceroy that some rebels from the states of Flanders, who are subjects of my Crown, have been

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<sup>51</sup> Hannah Chapelle Wojciehowski, ‘The Queen of Onor and her Emissaries: Fernão Mendes Pinto’s Dialogue with India’, in Brinda Charry & Gitanjali Shahani (eds), *Emissaries in Early Modern Literature and Culture: Mediation, Transmission, Traffic, 1550-1700* (Ashgate, 2009) 167, 179-81.

<sup>52</sup> Ibid 181 note 39.

<sup>53</sup> Borschberg book; Rita Bernardes de Carvalho, ‘Bitter Enemies or Machiavellian Friends? Exploring the Dutch-Portuguese Relationship in Seventeenth-Century Siam’ 10 *Anais de História de Além-Mar* (2009) 363, 364.

<sup>54</sup> See discussions of Spanish attitudes towards the Dutch rebels in Chapters 3 and 4.

<sup>55</sup> Porras (2006) 777.

going about robbing in those lands, and when they went to the port in your lands, offering you their friendship and seeking your favour and help in order to be able to load their carracks, not only did you not consent but you also helped my fortress with additional men, which is all in keeping with your noble nature and loyalty; nor would it be convenient for pirates and rebels [*piratas e aleuantados*] who do not obey their King and natural Lord to enter [that is take over] this fortress.<sup>56</sup>

As far as the Iberians were concerned, van Heemskerck and his fellow Dutch merchants were indeed rebels and, as such, necessarily pirates when committing violence against Portuguese trade. If they were resentful of competition for trade in the region—as when Bishop Ribeiro Gaio wrote that these interlopers were ‘spoiling the market for the Portuguese and Luso-Asian traders’<sup>57</sup>—it was resentment premised on a specific juridico-political understanding of their alleged *dominium* over the East Indies.

### JUSTIFYING PLUNDER

This was the background against which Grotius wrote *De iure praedae*. The dramatic emergence of Dutch maritime power and merchant capitalism, culminating in an aggressive VOC campaign to seize control of trade in the East Indies, had its counterpart in coeval changes in international legal thought: if the juncture was characterized by a new type of European commercial expansion, Grotius provided the juridical and ideological justification for that expansion. In *De iure praedae*, he sought to set out a legal framework that not only justified van Heemskerck’s seizure of the *Santa Catarina*, but also gave legal authority to Dutch merchants to seek wealth wherever they could, including by violent means.

To do so, Grotius turned to the familiar doctrine of just war, casting the Portuguese and Dutch as public enemies. As set out by Aquinas and his later

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<sup>56</sup> Letter reprinted in Borschberg (2011) 177-79. The letter was part of a packet of letters forwarded to Grotius in 1608, originally seized by Admiral Paul van Caerden from a Portuguese vessel captured off coasts of India.

<sup>57</sup> Quoted in Borschberg (2011) 130. See also the Archbishop of Goa’s complaint, in April 1603, shortly after the attack on the *Santa Catarina*, that ‘there are so many Dutch and English ships this year that all these seas are dotted with them’: quoted in *ibid* 291 note 6.

commentators, including, as we saw in Chapter 3, Bartolus, the doctrine of *bellum iustum* held that the existence of a just war rested on certain conditions, in particular a superior's authority and a just cause. Legally acceptable causes included self-defence, restitution of rights and recovery of stolen property, and the punishment of an enemy for injuries. As for authorisation, it could come only from a prince or other sovereign.<sup>58</sup>

Van Heemskerck, Grotius argued, was an agent of the Dutch Estates General and, as such, of the Dutch state. As we have seen, at least since Bartolus, it was accepted that sovereigns could grant commissions, with just cause, to private individuals in the form of a letter of reprisal or marque. With commission in hand, the individual could then pursue their just cause—the recovery of stolen goods, for instance, or, in times of war, the seizure of an enemy's property or punishment of enemy subjects. Putting aside for the moment the justness of the Dutch cause, much turned first on the legal identity of the commissioning entity: was van Heemskerck's superior in fact a sovereign? It was not sufficient that he be recognised as an agent of the Dutch Estates General—the question remained whether the Estates General itself represented a legitimate sovereign.

The United Provinces were, *de jure*, still subject to Habsburg sovereignty. The nascent Dutch Republic was engaged in a civil war with the Spanish and Portuguese crown and would only achieve formal independence in 1648. As far as the Iberians were concerned, certainly, van Heemskerck and other Dutch subjects, along with the Estates General itself, were mere rebels. Indeed, Dutch sovereignty was not formally recognised even by the Republic's most influential diplomatic backers, the French and English monarchs. Following Elizabeth's death in 1603, James I of England had quickly made peace with the King of Spain and Portugal with the Treaty of London.<sup>59</sup> Neither he nor his Bourbon counterpart were willing to undermine a fragile peace with formal recognition of Dutch independence. The Dutch might be free, Henry IV of France declared in 1609, but they were not sovereign.<sup>60</sup>

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<sup>58</sup> See generally Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law' 33 *American Journal of International Law* (1939) 665, 671.

<sup>59</sup> van Ittersum, 'Introduction' (2006) xv. Van Ittersum observes, as an example of the lack of sovereign recognition, that '[r]ight until the Twelve Years' Truce, the agents who represented the Dutch Republic at the French and English courts lacked the title and status of ambassador': van Ittersum, *Profit and Principle* (2006) 54.

<sup>60</sup> van Ittersum, 'Introduction' (2006) xviii



Grotius's solution was to enunciate a novel theory of sovereignty. In early modern Europe, sovereignty, as enunciated most famously by Bodin, emphasised territoriality. Closely tied to medieval feudal arrangements in which land was granted in return for armed support and loyalty to a monarch, sovereignty was understood as indivisible, a single whole 'preferably vested in the person of the monarch, and in only very exceptional cases within a collective body comprising multiple members'.<sup>61</sup> Grotius departed from this view, instead arguing for an approach to sovereignty that allowed for the division of sovereign rights amongst various parties within a polity.<sup>62</sup>

Princes, Grotius argued, 'are invested with no just power that has not been derived from the power of the state through election either of individual rulers or of dynasties'.<sup>63</sup> The sovereign right to wage war 'pertains to the prince only in the sense that he is acting for the state and has received a mandate from it'.<sup>64</sup> That right resides foremost in the state itself. It is clear, Grotius insisted, that the Dutch state, 'even if it was subject to a prince' still retained the sovereign power to declare a public war 'independently of that ruler'.<sup>65</sup> And just as sovereignty, and the right of just war, can be mandated to a prince, so too can it be mandated to 'inferior magistrates'.<sup>66</sup> As van Ittersum explains, on Grotius's approach, 'All magistrates, including heads of states, were simply bearers of the marks of sovereignty (judiciary, taxation, defense and so forth)'.<sup>67</sup>

On this view, as ruler of the Low Countries, Philip had never been an absolute sovereign, but merely exercised a number of powers that were ultimately derived from the Dutch commonwealth and, more specifically, from each and every Dutch citizen. Now, in violently putting down the Dutch rebellion, Philip, in his role as prince, was not only failing to defend his citizens, but in fact 'contributes toward their oppression

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<sup>61</sup> Borschberg (2011) 153-54.

<sup>62</sup> Such a theory reflected, of course, the 'mixed, oligarchic constitution of the Dutch Republic': *ibid* 154. Wilson identifies a recurring opposition between competing notions of divisible and indivisible sovereignty as the 'defining characteristic' not only of *De iure praedae* but of 'the Grotian corpus as a whole': Wilson (2011) 88. On divisible sovereignty, see also Martin van Gelderen, 'The state and its rivals in early-modern Europe', in Quentin Skinner & Bo Str ath (eds), *States and Citizens: History, Theory, Prospects* (Cambridge University Press, 2003) 79.

<sup>63</sup> Grotius (2006) 393.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.*

<sup>67</sup> van Ittersum, *Profit and Principle* (2006) 29.

his counsels, money fleets, and army.’<sup>68</sup> Any allegiance the Dutch owed him, Grotius insisted, could justifiably be renounced. Sovereignty, stemming in the first place from the state and not the prince, remained with the Dutch, now to be exercised by the Estates General. The members of the Estates General, Grotius went on, ‘in their capacity of supreme magistrates, were charged with the function of watching over the rights of both state and citizenry’.<sup>69</sup> It was their duty to defend the state and protect its citizens. ‘Philip strove to regain through war the sovereign status from which he had fallen’ and even to punish the Dutch: in such circumstances the Dutch were provided with ‘an exceedingly just motive for war, namely, the defence of their lives, property, and lawful liberty.’<sup>70</sup>

The Dutch thus enjoyed both the right to wage a public war and a just cause. ‘The Dutch are justified’, Grotius concluded, ‘in regarding Philip and the Spaniards and the Portuguese as enemies, one and all, in view of the injuries inflicted upon our people by those three parties.’<sup>71</sup> Van Heemskerck, it followed, could act as an agent of the sovereign Dutch state which could lawfully authorise attacks on Iberian shipping as part of its public war against Philip III. There remained a question of whether van Heemskerck in fact held a commission from the Estates General, an issue Grotius insisted was in fact ‘superfluous’: ‘the question of whether or not an order was given is plainly a matter which in nowise concerns the foe’. For the Portuguese, it should suffice that a just cause for the attack existed. ‘Since the Portuguese occupy the status of a foe in their relation to the Dutch’, Grotius explained, ‘and since they were indeed liable to despoliation, the problem of whether they were despoiled by command or independently of any command is no concern of theirs’.<sup>72</sup>

### **PRIVATE JUST WAR: COMMERCE AS A NATURAL RIGHT**

Grotius did not stop with a justification of Dutch plunder in terms of just public war. Van Heemskerck, he insisted, had been justified in seizing the ship both as an agent of a sovereign power engaged in a just public war *and* as a private person engaged in

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<sup>68</sup> Grotius (2006) 397.

<sup>69</sup> Ibid 396.

<sup>70</sup> Ibid 400.

<sup>71</sup> Ibid 403.

<sup>72</sup> Ibid 422.

a just private war. The latter was a strikingly original proposition. Just war had, since at least Aquinas, been the preserve of princes and other sovereigns. '[I]t is not the business of a private individual to declare war', Aquinas had insisted 'because he can seek for redress of his rights from the tribunal of his superior'.<sup>73</sup> He could not take up arms himself; 'because it takes place between private persons, being declared not by public authority, but rather by an inordinate will', private war was always a sin.<sup>74</sup> A limited exception was admitted for self-defence. In Vitoria's formulation, 'a private person is entitled . . . to defend himself and what belongs to him, but has no right to avenge a wrong done to him, nay, not even to recapture property that has been seized from him if time has been allowed to go by since the seizure.' This right to self-defence is thus quite narrow and 'can only be resorted to at the very moment of the danger, or, as the jurists say, *in continenti*, and so when the necessity of defense has passed there is an end to the lawfulness of [private] war'.<sup>75</sup> Gentili, too, in a passage quoted in part in Chapter 4, had insisted that 'private individuals, subject peoples, and petty sovereigns are never confronted with the necessity of resorting to the arbitrament of Mars, since they can obtain their legal rights before their superiors' tribunal'.<sup>76</sup>

Against these authorities, Grotius now sought to argue that private individuals could in fact engage in a just war. Even if van Heemskerck's status as a public agent of a sovereign Dutch Republic was ambiguous, he nonetheless enjoyed a right to the freedom of trade which, in the absence of an independent judge, he could enforce himself. Vitoria had understood there to be 'a single and only just cause for commencing a war, namely, a wrong received'.<sup>77</sup> Grotius went further: 'The defence of recovery of possessions, and the exaction of a debt or of penalties due, all constitute just causes of war. Under the head of "possessions", even rights should be included'.<sup>78</sup> Such rights, Grotius explained, included not only that 'due us in our capacity as private individuals' but also that which is 'due by the law of human fellowship'.<sup>79</sup> What rights

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<sup>73</sup> Thomas Aquinas, *Summa Theologica*, vol. 3 (Cosimo Classics, 2007) 1353.

<sup>74</sup> *Ibid* 1357.

<sup>75</sup> Francisco de Vitoria, *De iure belli* [1557], extracted in John Eppstein, *The Catholic Tradition of the Law of Nations* (Carnegie Endowment for International Peace, 1935) 99, 100.

<sup>76</sup> Alberico Gentili, *De Jure Belli Libri Tres*, trans. John Carew Rolfe (Clarendon Press, 1933) [1588] 20.

<sup>77</sup> Vitoria (1935) 101.

<sup>78</sup> Grotius (2006) 363.

<sup>79</sup> *Ibid* 363-64.

might stem from human fellowship? Here Grotius had in mind specifically ‘the use of whatever is common’, specifically ‘the sea and commercial opportunities’. If anyone has ‘quasi-possession’ of such a right of use, it is proper, Grotius concluded ‘to defend that claim.’<sup>80</sup>

In Grotius’s hands, then, the enjoyment of ‘commercial opportunities’ had become, in and of itself, a right, one rooted in humanity’s natural propensity to trade. Needless to say, this was a move which placed Dutch commercial interests at the heart of his juridical schema. On Grotius’s telling, the United Provinces were a community of merchants.<sup>81</sup> Bounded by water, the Dutch were compelled by nature herself to a maritime destiny, with commerce their vocation.<sup>82</sup> It was only natural that the Dutch, with the ‘eagerness for honorable gain’, should seek to expand their trading horizons. In fact, the state’s very survival, Grotius argued, rested on commerce and, in particular, commercial expansion into the East Indies:

[W]ho is so ignorant of the affairs of the Dutch as to be unaware of the fact that the sole source of support, renown, and protection for those affairs lies in navigation and trade? Among all of the Dutch enterprises in the field of trade, moreover, our business in the East Indies easily occupies first place in worth, extent, and resultant benefits.<sup>83</sup>

Not only does Grotius insist on the coincidence of state and merchant interests: the pursuit of those interests, and concomitant commercial expansion into the East Indies, is invested with a theological significance, what Ileana Porras has called ‘the providential function of commerce’.<sup>84</sup> As Grotius explains in *De iure praedae*, ‘God

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<sup>80</sup> Ibid 364.

<sup>81</sup> This characterization also went to Grotius’s argument that the United Provinces enjoyed sovereignty—a people with their own character and destiny, distinct from Habsburg Spain. Moreover, here was an ideological construction of Dutch identity not dissimilar from that of the English as a seaborne empire of liberty and commerce, in sharp contrast with the “tyranny of the land-based empires of antiquity and of Spain”: Porras (2006) 783.

<sup>82</sup> As Porras writes, ‘[f]or Grotius . . . international commerce is the life blood of the fledgling nation. He sees in it the natural character and destiny of the Dutch.’ Ibid 756. Van Ittersum similarly writes of Grotius’s ‘conceptualization of the Dutch empire as essentially maritime and mercantile in nature’: van Ittersum (2010) 387.

<sup>83</sup> Grotius (2006) 465.

<sup>84</sup> Porras (2006) 764. See also Johannes Thumfart, ‘On Grotius’s *Mare Liberum* and Vitoria’s *De Indis*, Following Agamben and Schmitt’ 30 *Grotiana* (2009) 65.

On the ‘providential’ quality long attributed to commerce and trade, see Jacob Viner, *The Role of Providence in Social Order. An Essay in Intellectual History* (Philadelphia: American Philosophical Society, 1972), pp. 55-85.

has not willed that nature shall supply every region with all the necessities of life' but rather 'has granted pre-eminence in different arts to different nations'. That one nation should supply the needs of another is 'in accordance with the design of Divine Justice' and, it follows, 'whatever has been produced in any region is regarded as a product native to all regions'.<sup>85</sup> Trade, then, not only sustains the wealth of the United Provinces, but bears the stamp of Divine Providence. Nature, Grotius explains, 'distributes the sum of her gifts throughout various regions in such a way as to make reciprocal commerce a *necessity of the members of the human race*'.<sup>86</sup>

Having located the United Provinces' national identity in seaborne commerce and imbued their pursuit of profit with a 'providential function', Grotius goes on to identify the pursuit of commerce as a natural right. Here he draws on the Spanish Scholastics and, in particular, Francisco de Vitoria. While writing *De iure praedae*, Grotius had received a 1557 edition of Vitoria's *Relecciones Theologicae XII* (*Twelve Theological Reflections*) from Jan ten Grootenhuys.<sup>87</sup> The Dominican had identified a universal *ius communicationis* or right of free communication, the denial of which was grounds for a just public war.<sup>88</sup> But where Vitoria had emphasised the right of the Spanish, under the *ius communicationis*, to travel and, especially to evangelise unimpeded by the indigenous peoples of the New World, Grotius expanded upon Vitoria and identified a natural right to engage specifically in *trade*.

Trade was not entirely absent from Vitoria's *Relecciones*: he had accepted that, much like impeding Spanish efforts to preach the Gospel, the refusal of Amerindians to allow the Spanish to engage in trade was a basis for just war. But any such right to trade was subsumed within a broader right of communication or hospitality. As Porras observes, it is far from clear that Vitoria had 'intended to assert an autonomous and distinctive "right to engage in trade," as Grotius proceeded to do.'<sup>89</sup> Vitoria's concern had been justification of the Spanish conquest of the Americas. He concluded that the Spanish enjoyed a right to 'travel and dwell in those countries, so long as they do no

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<sup>85</sup> Grotius (2006) 302-303.

<sup>86</sup> Ibid 304 (emphasis added).

<sup>87</sup> Borschberg (2011) 151-52.

<sup>88</sup> On Vitoria's *ius communicationis*, see Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005); Annabel S. Brett, *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought* (Cambridge University Press, 1997).

<sup>89</sup> Porras (2006) 771.

harm to the barbarians, and cannot be prevented by them from doing so'.<sup>90</sup> But the emphasis here was on the duty of hospitality (by the Amerindians) owed to (the Spanish) strangers. It was derivative of this duty, and the Spaniards' concomitant right to travel and sojourn, that the Iberians might 'lawfully trade among the barbarians, so long as they do no harm to their homeland'.<sup>91</sup>

Grotius, writing at a distinct conjuncture, faced a quite different set of concerns. He was not concerned with justifying the appropriation of native lands in the East Indies or the rights of settlers to claim *dominium*, but rather an attack on another European nation and, more generally, access of Dutch traders to the 'fruits of commerce': in short, the extension of Dutch commercial activities, through violent means. It is hardly surprising, then, that it is commerce, not a more general right of hospitality, at the centre of his analysis. No 'state or prince', Grotius opined, 'has the power to issue a general prohibition forbidding others to enjoy access to or trade with the subjects of that state or prince. This doctrine is the source of the sacrosanct law of hospitality'.<sup>92</sup> As Porras puts it, '[h]ospitality, the right to travel or reside, the right to share in the common ownership—all these are for Grotius merely expressions of the practice of commerce.'<sup>93</sup> Inverting Vitoria, Grotius could write that 'if the Spaniards should be prohibited by the American Indians from traveling or residing among the latter, or if they should be prevented from sharing in those things which are common property under the law of nations or by custom—if, in short, they should be debarred from the practice of commerce—these causes might serve them as just grounds for war against the Indians'.<sup>94</sup>

The reversal had important consequences when turning back to the East Indies. The Portuguese, in seeking a monopoly on trade with the East Indies, were committing no offense against hospitality as Vitoria had understood it. But they were interfering with the right of the Dutch to trade with local parties. Under Grotius's analysis, where trade and commerce had taken on the status of natural right, such offence struck at the

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<sup>90</sup> Francisco de Vitoria, 'On the American Indians (*De Indis*)' [1539], in *Political Writings*, ed. Anthony Pagden & Jeremy Lawrance (Cambridge University Press, 1991) 231, 278.

<sup>91</sup> *Ibid* 280.

<sup>92</sup> Grotius (2006) 304.

<sup>93</sup> Porras (2006) 773. Borschberg similarly observes that Grotius 'modified the *ius communicationis* into a far more comprehensive entitlement that also entailed the right to conduct trade and access emporia via the high seas': Borschberg (2011) 125.

<sup>94</sup> Grotius (2006) 304 (emphasis added).

heart of the natural order. As Grotius explained, anyone who interferes with ‘the system of exchange’, interferes also with ‘the highly prized fellowship in which humanity is united. He destroys the opportunities for mutual benefactions. In short, he does violence to nature herself.’<sup>95</sup> Commerce is a condition of survival, grounded in natural law, and so fundamental that neither the Portuguese, nor any other people, European or otherwise, may be allowed to impede it: to do so is a cause for a just war.

### DUTCH INJURIES

How then had the Portuguese committed an injury against the right of free trade and commerce? In seeking to maintain a monopoly on trade in the eastern hemisphere, the Portuguese claimed *dominium* over the pelagic spaces of the East Indies and Indian Ocean. The Portuguese nominally controlled the maritime highways necessary for transoceanic trade by issuing *cartazes* (free conduct passes) and by restricting licenses to trade to European-born Portuguese subjects.<sup>96</sup> But in claiming *dominium*, Grotius maintained, the Portuguese had sought to appropriate that which could not be appropriated. ‘the sea is included among those things which . . . cannot become part of anyone’s private domain’.<sup>97</sup> Certainly the Portuguese could not claim to occupy the sea simply because they sailed over it first. Like the air, fluid and vast, the sea is infinite and ‘bounded only by the heavens’, impossible to occupy or exhaust.<sup>98</sup> Moreover, Grotius opined, nature wills that some sites remain common to all: ‘those things which have been so constituted by nature that, even when used by a specific individual, they nevertheless suffice for general use by other persons without discrimination, retain to-day and should retain for all time that status which characterized them when first they sprang from nature.’<sup>99</sup>

If Portuguese claims to *dominium* were not tenable theoretically, they still held concrete consequences for Dutch mercantile interests. For the Dutch to enjoy their right of commerce, they required unimpeded access to trading entrepôts of the East. But in practice, at least from the view of Grotius and his Dutch merchant sponsors, the

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<sup>95</sup> Ibid 303.

<sup>96</sup> Borschberg (2011) 164.

<sup>97</sup> Grotius (2006) 328.

<sup>98</sup> Ibid 331.

<sup>99</sup> Ibid 320-21.

Portuguese were harassing Dutch shipping and thus impeding that right. In Chapter 11 of *De iure praedae*, Grotius sets out the historical events leading up to van Heemskerck's attack on the *Santa Catarina*—events that, Grotius argues, established the Portuguese as 'men of bad faith, assassins, poisoners, and betrayers'.<sup>100</sup> One example will suffice.

In 1602, the earlier expedition of van Neck, mentioned above, had landed off the Canton coast seeking to trade. The fleet had been driven close to the shore by winds and so, as Grotius recounts, '[v]an Neck decided that men should be sent to investigate the lay of the land and to give an explanation of the arrival of the Dutch, while procuring fresh provisions'.<sup>101</sup> Upon reaching shore, the men presented themselves to the local mandarins, explaining that 'the visitors were Dutch merchants and that they came to engage in trade'.<sup>102</sup> However, the Portuguese present in the area interceded, Grotius explains, and the Dutch were 'dragged off together' and 'placed under guard and bound with the heaviest of fetters'.<sup>103</sup> When six of the men were brought before the chief magistrate of Canton and 'plied with numerous questions through an interpreter who spoke in Portuguese, they lay like men without tongues, owing to their ignorance of that language and perhaps also to fear'.<sup>104</sup>

The Portuguese, Grotius reports, accused van Neck's men of 'piratical savagery' (*piraticae feritatis*).<sup>105</sup> When the latter failed to respond, 'the Portuguese insisted that their silence should be regarded as a confession'.

Thus it came to pass that six men of Holland—O fatherland! O justice and law, and liberty vainly defended at home!—were subjected to the cruellest and most hideous punishment, suited to robbers and pirates, by Portuguese sojourners in that Kingdom of China which the Hollanders had sought amid so many hardships and perils, and where their presence was in turn desired.<sup>106</sup>

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<sup>100</sup> Ibid 284.

<sup>101</sup> Ibid 279.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid 280.

<sup>104</sup> Ibid.

<sup>105</sup> Ibid.

<sup>106</sup> Ibid 281.



Lest the reader not already grasp from Grotius's hyperbolic cries of anguish the wrong inflicted on the Dutch, he continues: 'The Chinese looked on pityingly at this spectacle and afterwards prayed, with averted faces, that these men might not be left unavenged, whatsoever race and whatsoever region of the earth had sent them as guests to Chinese waters and shores, if they worshipped any divinity or had any native land.'<sup>107</sup> Already, in this one example, Grotius has made sure to spell out all the elements justifying Dutch retaliation. Here were Van Neck and his crew enjoying their natural right to trade in a land where 'their presence was in turn desired'. There could hardly be a more blatant interference with this right, one that, there could be no doubt—even the Chinese desired it—the Dutch were justified in avenging.

Charged and executed for piracy and robbery by the Portuguese, van Neck's men were but one of the many examples offered by Grotius of Portuguese treachery against the Dutch in the East Indies. If hyperbolic to the modern reader, and blatantly self-serving, Grotius's account rang true for many in the United Provinces. Bartolomé de las Casas's *Brevísima Relación*, first published in Dutch in 1578, had popularised the evils of the Spanish treatment of Amerindians in the New World.<sup>108</sup> The anti-Spanish rhetoric of the Dutch rebels transposed the *conquistadores* to the Low Countries, with Philip II intent on subjecting the Dutch to 'the most abject slavery, akin to Spanish tyranny in the Americas'.<sup>109</sup> Such rhetoric was imported by Grotius, too, in his account of the Portuguese. Drawing on the Spanish 'Black Legend', he presented Portuguese attempts to obstruct Dutch trade in the East Indies as an extension—or 'the mirror image', in van Ittersum's words<sup>110</sup>—of Spanish tyranny in the New World and northern Europe. Writing of the Portuguese arrival on the island of Ambon in 1602, Grotius draws a direct comparison between Iberian savagery in the Low Countries and the East Indies:

[T]he inhabitants were subjected to the same savage treatment that the people of the Low Countries had often suffered at the hands of the Spaniards. Slaughter was practiced without distinction of age or sex; little children and women were slain indiscriminately. Nor were they

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<sup>107</sup> Ibid 281-82.

<sup>108</sup> van Ittersum, *Profit and Principle* (2006) 59.

<sup>109</sup> Ibid 55.

<sup>110</sup> Ibid.

merely slain; for some of the Portuguese cut off the limbs of young children before the very eyes of the parents, and others searched with their swords both the wombs of pregnant women and bodies that were unquestionably innocent.<sup>111</sup>

As van Ittersum shows in her study of *De iure praedae*, the imagery was borrowed almost directly from *Brevísima Relación*.<sup>112</sup> Never one to not labour a point, Grotius make sure to contrast such horrors with the Dutch who ‘are by nature gentle and compassionate’.<sup>113</sup>

In Grotius’s philippic, Portuguese offences do not stop with discrete acts of violence against Dutch merchants (or indigenous populations). Not only were the Portuguese harassing Dutch shipping but they also incited indigenous rulers to block Dutch access to local emporia. The charge against van Neck’s men of piracy was, according to Grotius, part of a far-reaching conspiracy by the Iberians to malign Dutch merchants and bring them into disrepute amongst the region’s indigenous populations: the Portuguese ‘made a practice of declaring that pirates had come [*venisse piratas*], whose home was the sea, whose trade was robbery, and who had no peaceful dwelling-place’.<sup>114</sup>

## PORTUGUESE PIRATES AND DUTCH AVENGERS

By placing commerce at the centre of his juridical universe, Grotius elevated Portuguese offences to ‘a crime against nature, an affront to God’s design’.<sup>115</sup> Portugal’s forceful exclusion of the Dutch from East Indian trade is not merely an injury to the United Provinces: if trade is a universal right, its obstruction is ‘an affront to all of humanity’.<sup>116</sup> For this, Grotius argues, the Iberians deserved universal opprobrium, for ‘there is no stronger reason underlying our abhorrence of robbers and pirates than the fact that they besiege and render unsafe the thoroughfares of human

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<sup>111</sup> Grotius (2006) 292.

<sup>112</sup> van Ittersum, *Profit and Principle* (2006) 79.

<sup>113</sup> Grotius (2006) 293.

<sup>114</sup> *Ibid* 261.

<sup>115</sup> Porras (2006) 764.

<sup>116</sup> *Ibid*.

intercourse'.<sup>117</sup> It is not, as the Portuguese claimed, van Heemskerck who is a pirate, nor van Neck's men, condemned as such by the Iberians. Rather, it is the Portuguese themselves who deserve the epithet: 'We shall plainly perceive that the Portuguese, though they assume the guise of merchants, are not very different from pirates.'<sup>118</sup> The name 'pirate', Grotius repeats, is 'appropriately bestowed upon men who blockade the seas and impede the progress of international commerce', a description apposite for the Iberians who 'forcibly bar all European nations (even nations that have given them no cause for war) from the ocean and from access to India'.<sup>119</sup>

Like the Spanish, Grotius saw in the pirate a universal enemy. His, though, was not an enemy of a universal Christendom but rather of a universal commercial society: humankind defined not with reference to salvation but commerce. As such, the pirate, Grotius wrote, was 'harmful to all mankind' and thus worthy of 'universal hatred'.<sup>120</sup>

If the Portuguese were injuring the fundamental right of commerce, it was not only monarchs but also private merchants who could punish transgressors of natural law. For states, Grotius held, have only those powers which individuals already possess in nature. Indeed, on Grotius's view, the natural rights of states derive in the first place from those of private individuals and their natural propensity for sociability; the state cannot have any right that did not first belong to individuals including the right to punish or wage just war.

[J]ust as every right of the magistrate comes to him from the state, so has the same right come to the state from private individuals; and similarly, the power of the state is the result of collective agreement . . . . Therefore, since no one is able to transfer a thing that he never possessed, it is evident that the right of chastisement was held by private persons before it was held by the state.<sup>121</sup>

This was not an entirely open-ended license. Where individuals enter into civil society, the state exists to arbitrate disputes. But on the sea, or in extra-European lands, where there is no (recognised) civil society, individuals return, in essence, to a pre-civil state

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<sup>117</sup> Grotius (2006) 305.

<sup>118</sup> Ibid 449.

<sup>119</sup> Ibid.

<sup>120</sup> Ibid 449.

<sup>121</sup> Ibid 137.

of nature where, '[i]n the natural order . . . every individual is charged with the execution of his own rights.'<sup>122</sup> Having transgressed the natural law mandating freedom of commerce and rendered themselves pirates, the Portuguese were liable to punishment. And in the absence of independent judges in the East Indies, that punishment could be administered by private individuals such as van Heemskerck who themselves became judges in their own cause.<sup>123</sup>

The Portuguese certainly, Grotius complained, could not be trusted to take steps to punish their own transgressions. Their officials could hardly operate as independent magistrates: 'The Portuguese State and its ruler were the very parties who took the first step, not only in the public infliction of injury upon the Dutch, but also in initiating the war. This fact clearly deprived them of the power to serve as judges'.<sup>124</sup> The courts of the United Provinces, across the ocean, could be of no help either and the indigenous rulers of the East Indies had little interest in mediating. The answer, in van Ittersum's words, was 'as predictable as it was opportune: van Heemskerck had no choice but to take action himself and attack a Portuguese merchantman in revenge'.<sup>125</sup> It followed, then, as Grotius wrote, that 'it cannot be dishonourable for merchants to take well-deserved vengeance upon the violators of a public right, with the purpose of ensuring greater security for themselves in the enjoyment of that right'.<sup>126</sup>

In short, Grotius concluded, van Heemskerck's violence, an act of 'vengeance' against pirates, undertaken 'for the purpose of obtaining one's rightful due', was not only justified, it was 'honourable'.<sup>127</sup> Moreover, in doing so, van Heemskerck was not defending only his own right. For the Portuguese blockade of the sea prevented all other nations, too, from partaking in that commerce beneficial to all nations. In

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<sup>122</sup> Ibid 92.

<sup>123</sup> van Ittersum, *Profit and Principle* (2006) 53-54.

<sup>124</sup> Grotius (2006) 380. Van Ittersum suggests that Grotius exaggerates the absence of judicial recourse and that his account elided certain inconvenient facts. It was apparent from van Heemskerck's correspondence with Portuguese authorities in Malacca, which was in Grotius's possession when writing *De jure Praedae*, that 'the *Estado da India* was not devoid of upstanding magistrates who sought to administer justice impartially'. Van Ittersum concludes that, in reality, 'the Portuguese authorities in Asia did not leave the Dutch without legal remedy': van Ittersum, *Profit and Principle* (2006) 45. But then this was hardly the only detail Grotius exaggerated.

<sup>125</sup> van Ittersum, *Profit and Principle* (2006) 45.

<sup>126</sup> Grotius (2006) 450.

<sup>127</sup> Ibid 452.

attacking the Portuguese, van Heemskerck was, in fact, acting on behalf of all humanity. He was, to use Grotius's phrase, acting as a 'private avenger'. The private avenger, he who upholds the right to trade, 'has in view the good of the *whole human race*, just as he was when he slays a serpent'.<sup>128</sup>

Van Heemskerck's seizure was not an act of piracy, as the Portuguese claimed and some Dutch feared. Rather, it was the Portuguese, themselves, who should be understood as pirates. Whereas the Iberians had condemned Protestant pirates in terms of the universality of a Christian commonwealth, in Grotius's new rendering of the pirate figure, they were now themselves condemned in terms of a universal natural right. This secularised figure of the pirate is one that acts against nature's designs and natural law. And in doing so, they are not merely an enemy to the Dutch, but to all of humanity, for it is for the benefit of all that commerce should rein free.

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<sup>128</sup> Grotius (2006) 139.

## Conclusion

This thesis has traced the historical origins of the pirate as a paradigmatic figure of enmity in international legal thought. It began by mapping reactions, cultural and legal, to the rise of Somali maritime depredation at the end of the first decade of the present century. It showed how these discourses reproduce the pirate as a figure of extreme enmity—the enemy of all mankind, of civilization, and of humanity itself—demanding elimination and legitimating great violence to that end. The illegitimate violence of the pirate calls forth the legitimate violence of anti-pirate operations, two sides of the same coin. Stepping back from Somalia specifically, the chapter showed how this figure, and the discourses about it, are rooted in a tradition of international legal thought that regularly draws on, and reproduces, the pirate as an archetypal figure of enmity, the model for the treatment of other proscribed forms of violence: the slave trader, torturer, war criminal, terrorist, and so on.

As the thesis demonstrated in its introduction, much contemporary international legal writing, in reproducing the pirate as a figure of *abstract* enmity, implicitly, and often explicitly, presents him as transhistorical and timeless. Chapter 2 therefore turned to the world of antiquity, tracing the etymological origins of the term ‘pirate’ and interrogating the identity of those individuals and groups labelled ‘pirates’. The epithet’s Greek and Roman cognates, the chapter showed, did not convey the same concept, let alone the same legal consequences, as in modern legal thought: against the variety of phenomena and actors of the ancient world associated with the term, the modern pirate appears quite distinct. Considering specifically the example of the Cilicians, the group most commonly associated with piracy in Rome, the chapter suggested that the term, while already conveying hostility, described autonomous political communities engaged by the Roman navy as legitimate combatants, their enmity, far from universal, directed specifically at Rome, and born out of the context of war.

By the late middle ages, Chapter 3 showed, piracy and pirate remained fundamentally ambiguous terms. In the medieval Mediterranean, plunder and trade were intimately related, piratical acts of depredation a common, even accepted, feature of maritime life. Yet, it is here that we find the start of a distinction between legitimate and illegitimate maritime violence that would come to define the pirate’s modern

identity. This distinction, the chapter argued, was rooted in the growing competition over Mediterranean trade amongst a newly emergent plurality of autonomous mercantile centres in the 14th century. Against that background of inter-mercantile rivalry, a generalised law of reprisals took shape building on theories of just war and lawful belligerency. This early law of reprisals drew a fundamental distinction between legitimate and illegitimate depredation rooted in sovereign authorisation, while the pirate would slowly begin to be identified with the absence of such endorsement.

If the association of pirate with unauthorised, and thereby illegitimate, violence had its roots in the medieval Mediterranean, the argument here has been that it was only in the long-16th century that the modern figure of universal enmity began to take shape. Chapter 4 traced the emergence in international legal thought of a new conception of the pirate not as an individual lacking sovereign authority, but as a universal enemy, *hostis humani generis*. This enmity had its roots, the chapter argued, not in legal debates around jurisdiction, but in Christian theological traditions. Long associated with the devil as a universal enemy of Christianity, the *hostis humani generis* came to be associated with pirates in the context of the threat posed to Christian Europe by an expanding Ottoman empire. The universal enemy of medieval Christian theology, the chapter showed, came to be embodied in the Christian European imagination by the Ottoman empire and its western Mediterranean vanguard, the pirates of the Barbary coast. At once figures of religious enmity and piratical plunder, the Muslim pirates of northern Africa were assimilated to other demonic foes of Christendom, an ideological association encouraged by a Habsburg state eager to rally the faithful against the heretical threat to the east.

In the fifth chapter, the thesis turned to the extension of this religious discourse to the Atlantic and the New World. Analysis here focused on the inter-imperial rivalry between the Habsburg empire, with its claimed monopoly on the Americas rooted in papal donation, and a nascent English imperial formation seeking to challenge Habsburg power and establish a maritime empire. Within this context, the chapter showed, the pirate became a highly contested figure, refracted distinctively in the competing ideological prisms through which the conflict was viewed. For the Spanish, the colonisation of the New World, and the spiritual salvation of its native population, had been entrusted by Rome to the Iberian empires. Conceived in theological terms, this was a mission in the service of a universal Christendom. Yet by the mid-16th

century, Christendom was in crisis, faced not only by external threats from the Ottoman empire, but also internal confessional schism. Habsburg pre-eminence was increasingly challenged by Protestant powers: rebellion and civil war at home in the Low Countries, and endemic plunder in the Atlantic.

These threats, internal and external, were easily assimilated in the Spanish imperial imagination: all—Ottomans in the Mediterranean, Dutch at home, and English in the New World—were heretical foes who interfered with Spain's Providential mission. On this view, Protestant depredators such as Drake raiding the Spanish Main were little different than the Islamic pirates haranguing European waters, both adversaries of a universal Christendom and, concomitantly, epitomising a religiously-rooted universal enmity. This view contrasted markedly from that of British publicists, for whom Drake was not pirate but hero. If the British Empire was not yet synonymous with oceanic commerce, Elizabethan England, the chapter further showed, was already in the early grip of a new commercial disposition, with British merchants eager to extend English maritime power. National perceptions of Drake's depredations were shaped by outrage at England's exclusion from profitable trade in the Americas: his violence was perceived as a legitimate response.

This understanding, Chapter 6 argued, was formalised in the work of Hugo Grotius and his attempts to justify Dutch maritime violence in the face of an Iberian monopoly on trade with the East Indies. By the start of the 17th century, the chapter showed, the Dutch United Provinces, if still fighting for independence from Habsburg Spain, had emerged as one of the world's first capitalist states, with commercial expansion and the accumulation of capital its foremost concern. The chapter offered a reading of Grotius's *De iure praedae* against this background, tracing the basis for his novel grounding of the legitimacy of Dutch commercial violence in a theory of natural rights including, specifically, a right to commerce. On Grotius's telling, the chapter showed, it was not the Dutch who, in attacking Portuguese shipping, should be considered pirates. Rather, reversing the equation, Grotius insisted it was the Iberians who, in restricting access to the Indies, did violence to Dutch rights. Grotius rendered the Portuguese as pirates, secularising the figure's illegitimacy and redefining the pirate as the enemy of trade, now elevated in Grotius's schema to a universal good. The figure of the pirate with which Grotius leaves us, the chapter concluded, was the universal enemy of commerce and capital accumulation, to be extirpated no longer in



the name of a universal Christian commonwealth, but now on behalf of the universal commercial society of humanity.

### BEYOND THE LONG 16TH CENTURY

With the further crystallisation of a capitalist world economy, this figure would become a cynosure of legal thought. In the century following Grotius's defence of van Heemskerck, imperial rivalry and capitalist development continued apace, with religious war giving way to trade war. The Atlantic maritime states of northwest Europe continued to challenge Iberian power, all competing fiercely with one another for control of the seas, the key to commercial expansion, new markets, and economic growth. The Treaty of Utrecht in 1713 brought a semblance of peace to the Atlantic and the hope of stable long-distance trade. As commercial cities and manufacturing trades developed in Europe and national economies were reorganised for exchange in the world market, trade became paramount, undergirding the rise of commercial powers. The increasing importance of oceanic routes at the start of the 18th century is stressed by Marcus Rediker, who describes how they 'unified distant parts of the globe, different markets, and distinct modes of production', organising 'the flow of commodities and the movements of labor'. These 'pulsing routes', he writes, 'stretching from one port city to the next, were the most elementary material structures of empire, indeed of the whole world economy'.<sup>1</sup>

With the mass expropriations that accompanied capitalist development and the move to a system of capital accumulation based on the exploitation of slave and waged labour—enclosures in Europe; colonial dispossession in the extra-European world—a new proletariat took to the seas. 'Poor people', writes Rediker, especially highly skilled, unemployed, and desperate sailors, thronged almost every port city.'<sup>2</sup> In the late 17th and early 18th centuries, especially following the end of the War of Spanish Succession, great numbers turned to piracy. Yet pirates, by definition now impediments to the smooth flow of commerce, were out of place in a world of global circulation. Pirates, Rediker tells us, 'wreaked havoc in the Atlantic system . . . [disrupting] trade in strategic zones of capital accumulation—the West Indies, North

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<sup>1</sup> Marcus Rediker, *Between the Devil and the Deep Blue Sea: Merchant Seamen, Pirates, and the Anglo-American Maritime World, 1700-1750* (Cambridge University Press, 1987) 21.

<sup>2</sup> Marcus Rediker, *Villains of all Nations: Atlantic Pirates in the Golden Age* (Verso, 2004) 28.

America, and West Africa—at a time when the recently stabilized and expanding Atlantic economy was the source of enormous profits and renewed imperial power’.<sup>3</sup>

Unsurprisingly, then, the 17th and 18th centuries saw not only the growing importance of long-distance trade in popular consciousness, but also, coeval with that development, the consolidation and generalisation of the Grotian image of the pirate in law and legal thought. ‘Suffer pirates, and the commerce of the world must cease’, warned the Admiralty judge Sir Charles Hedges in 1696.<sup>4</sup> Pirates, Captain Charles Johnson wrote in his oft-quoted *General History of the Pirates*, published in 1724, were ‘destructive to the Navigation of the Trading World’.<sup>5</sup> As Governor Spotswood of Virginia had already warned in July 1716, ‘the whole Trade of the Continent may be endangered if timely measures be not taken to suppress this growing evil’.<sup>6</sup> Two years later, as mentioned in the thesis’s introduction, the Bahamas would choose its new motto: *expulsiis piratis, restituta commercia*—pirates expelled, commerce restored.

No longer a figure of religious enmity, the pirate was associated squarely with a threat to commerce. And it was that threat, as Grotius had first adumbrated, that made him *hostis humani generis*. Addressing a group of pirates about to be executed in 1717, Nicholas Trott, judge of the Vice-Admiralty and Chief Justice of the Province of South Carolina, explained that ‘the evil and wickedness’ of their crime ‘is evident to the reason of all men’. Pirates are ‘so destructive of all trade and commerce between nation and nation’, he intoned, that they ‘are called enemies to mankind’.<sup>7</sup> Hedges simply called them ‘Enemies of Merchants and Mankind’.<sup>8</sup> Yet, this figure was not entirely divorced from its antecedents. Like a palimpsest, its older theological meaning lurked beneath the new. Pirates, Rediker observes of the 18th century, were still held up ‘as the antithesis of the Christian way of life’.<sup>9</sup> They were agents of Satan,

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<sup>3</sup> Ibid 9.

<sup>4</sup> *Rex v. Dawson* (1696) 13 Howell’s State Trials 451, 453.

<sup>5</sup> Captain Charles Johnson, *A General History of the Robberies and Murders of the Most Notorious Pirates*, ed. Arthur L. Hayward (Routledge, 1927) [1724] vii.

<sup>6</sup> Quoted in Rediker (2004) 32.

<sup>7</sup> *The Trials of Major Stede Bonnet, and Thirty-three others, at the Court of Vice-Admiralty, at Charles-Town, in South Carolina, for Piracy* (1718) 15 Howell’s State Trials 1231, 1286.

<sup>8</sup> Quoted in Douglas R. Burgess Jr, ‘Piracy in the Public Sphere: The Henry Every Trials and the Battle for Meaning in Seventeenth-Century Print Culture’ 48 *Journal of British Studies* (2009) 887, 903.

<sup>9</sup> Rediker (2004) 132.

preachers and publicists warned: The Reverend John Barnard likened them to ‘a Herd of Wild Beasts’ no better than ‘*Devils Incarnate*’.<sup>10</sup>

The description of pirates as enemies of humanity, on both theological and commercial rationales, invited, in Mikkel Thorup’s words, a ‘total war with exterminatory intent’.<sup>11</sup> ‘All Nations agree to treat your Tribe, as the *Common Enemies of Mankind*, and extirpate them out of the World’, intoned the Puritan minister Cotton Mather to a group of pirates on the gallows in Boston in November 1717.<sup>12</sup> No longer were pirates the subject primarily of proceedings concerning postliminy; the English Admiralty courts, at the urging of a rising merchant class, began to sentence to death pirates with increasing frequency. The hanged bodies of pirates lined the Thames at Wapping—but also elsewhere: in 1721, the English Parliament extended English anti-piracy jurisdiction ‘to all his Majesty’s Dominions in *Asia, Africa, and America*’.<sup>13</sup> An international ‘campaign of terror’ in the name of eradicating piracy followed. London, Edinburgh, the Azores, Cape Coast Castle, Salvador, Curaçao, Antigua, Saint Kitts, Martinique, Kingston, Port Royal, the Bahama Islands, Bermuda, Charleston, South Carolina, Williamsburg, New York, Providence, Boston: all saw executions of pirates, the gallows used as a public performance of imperial power.<sup>14</sup> Here was the start of an outline of universal jurisdiction, or at least universal British jurisdiction (soon cemented under British naval dominance in the 19th century) driven by the imperative, as Alfred Rubin puts it, to protect ‘private property crossing national boundaries’.<sup>15</sup>

## IMPLICATIONS

The expansion and eventual hegemony of the Grotian figure of the pirate, then, might best be understood as part of the juridification of the oceans in the service of capital. To put it slightly differently, the origins of the modern figure of the pirate in Grotius, and its further development in subsequent centuries, are inseparable from the early development of a capitalist world market.

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<sup>10</sup> Quoted in *ibid.*

<sup>11</sup> Mikkel Thorup, *An Intellectual History of Terror: War, Violence and the State* (Routledge, 2010) 165.

<sup>12</sup> Quoted in Rediker (2004) 127.

<sup>13</sup> Piracy Act, 8 Geo. I, c. 24 (1721).

<sup>14</sup> Rediker (2004) 10.

<sup>15</sup> Alfred P. Rubin, *The Law of Piracy* (University Press of the Pacific, 2006) [1988] 32.

This is not the first study to suggest such a link. Rediker's history of early-18th-century piracy implies as much, while Policante, discussed at some length in the thesis's introduction, suggests an intimate link between the suppression of piracy and 18th- and 19th-century British sea-power's role in consolidating global commerce.<sup>16</sup> Michel Foucault, too, hinted as much, if only in passing, in a lecture at the Collège de France in January 1979. The history of piracy's treatment in the 18th-century, Foucault suggested, reflects 'an attempt to think of the world, or at least the sea, as a space of free competition, of free maritime circulation, and consequently as one of the necessary conditions for the organization of a world market'.<sup>17</sup> In other words, the construction and suppression of the pirate as *hostis humani generis*, according to Foucault, was concomitant with the juridical constitution of the world market and securitisation of the sea as a space safe for commercial circulation.

Yet neither Rediker, Policante, or Foucault explore how this relates to international law specifically or what it means for how we understand the pirate as epitome of enmity as an international *legal* idea. Policante does engage with international legal thought briefly, but any historical specificity in his analysis gives way ultimately to the pirate as a transhistorical figure, the Other to empire from antiquity to the present day. My own contribution therefore differs from earlier accounts in taking the pirate specifically as an international legal idea and, through a detailed historical analysis of the origins and evolution of the figure, undermines its construction in international legal thought as a timeless enemy of humankind stretching backwards through all of human history. Instead, it emphasises the contingency of the figure's emergence, tracing its origins to a concrete conjuncture of inter-imperial rivalry and merchant capitalist interests. Moreover, without denying the ideological importance of the pirate identified by Rediker et al. in the crystallisation of a capitalist world economy in the 18th and 19th centuries, my own contribution traces the figure's origins to an earlier period. The thesis shows how the roots of the pirate's universal enmity emerged specifically in the long 16th century in the service of imperial interests—first in the religious ideology of a Catholic-Habsburg imperialism and, later, in the secular ideology of a nascent commercial imperialism.

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<sup>16</sup> Amedeo Policante, *The Pirate Myth: Genealogies of an Imperial Concept* (Routledge, 2015).

<sup>17</sup> Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-79*, ed. Michel Senellart, trans. Graham Burchell (Palgrave Macmillan, 2008) 56.

This history casts new light on modern invocations of the pirate as a paradigmatic figure in international law. Once established in the juridico-political imagination, the figure of the pirate as universal enemy was invoked to target not just any adversary, but specifically other perceived enemies of *commercial* society. The pirate was a familiar trope for English colonists on the American continent. Indigenous peoples, classified as ‘savages’, were regularly compared to the pirate, both impediments to progress and the security of commerce requiring ‘conceptual and physical displacement’, to borrow Christopher Tomlins’s phrase.<sup>18</sup> Various charters for settlement from the 17th century identified the Amerindians as barbarians, pairing them with ‘other Enemies, Pirats and Robbers’ and, on that basis, allowing the colonists to ‘make warre . . . and by God’s assistance to vanquish and take them and being taken to putt them to death’.<sup>19</sup> Pirate and ‘savage’: both, as William Morris put it, were to be ‘slain in wicked resistance to the benevolence of British commerce’.<sup>20</sup>

Such analogies drew not only on the pirate’s new secular identity but also earlier theological meanings. In once more joining barbarian and pirate, colonists recalled the image of the Islamic pirates as a dangerous Other to Christian Europe. If this racialised dimension of the pirate first emerged in its association with the North African Moors, it could also be found in Atlantic discourses in the 16th century. When English ‘pirates’ like Hawkins and Drake were found to have formed strategic alliances with indigenous populations and Cimarron communities in the Americas, they were further decried by the Spanish as ‘traitors to their own race’<sup>21</sup> who were ‘infected’ with the ‘inherent barbarism of the natives’.<sup>22</sup>

In the 19th century, in particular, the pirate was regularly mobilised to racialize and denounce non-European groups and rival trading networks resistant to imperial subsumption. In the Persian Gulf, the Malay archipelago, and elsewhere, the British branded communities pirates, placing them outside humanity and the commercial

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<sup>18</sup> Christopher Tomlins, *Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580-1865* (Cambridge University Press, 2010) 175.

<sup>19</sup> ‘A Grant of the Province of Avalon’ quoted in *ibid* 176.

<sup>20</sup> Quoted in Owen Holland, *William Morris’s Utopianism: Propaganda, Politics and Prefiguration* (Palgrave Macmillan, 2017) 188.

<sup>21</sup> Gerassi-Navarro, Nina. *Pirate Novels: Fictions of Nation Building in Spanish America* (Duke University Press, 1999) 52.

<sup>22</sup> Sonja Schillings, *Enemies of all Humankind: Fictions of Legitimate Violence* (Dartmouth College Press, 2017) 80.

society of civilized states.<sup>23</sup> So too in the Mediterranean, where the states of North Africa were once more racialised as uncivilised barbarians. Deemed pirates, they were systematically denied statehood, their status as *hostes humani generis* once more legitimation for imperial violence, now US and British bombardment and French colonisation. Such invocations reproduced an already common racialised trope of international law, with non-Europeans constituted as legitimate targets for violence through their casting as ‘savage’ or ‘uncivilised’—or, increasingly, as ‘pirates’.<sup>24</sup>

Today, this rhetoric resurfaces in relation to Somali piracy, the racialised essentialism of Somalis in general, and Somali pirates in particular, reproduced, as described in Chapter 1, by popular and legal discourses alike. So too is the pirate’s relationship to commerce visible in the reactions to Somali depredation. The heinousness of the Somali pirates suggested in Paul Greengrass’s *Captain Phillips* lay in the fact that they impeded the smooth flow of commerce across the world’s pelagic highways—that they, as Alexandra Ganser puts it, ‘immobilize[d] the US protagonist and his business ventures, a professional in the mobile world of late capitalism’.<sup>25</sup> Somali pirates, like the Portuguese of Grotius’s treatise, threaten the flow of commodities and commerce. Yet if this is the pirate’s original sin, the seed of animus that pitches him against mankind, it has remained hidden in much international legal thought, lost from sight as the pirate is discursively produced and reproduced as an abstract figure of illegitimacy and enmity.

This thesis places the relationship between the pirate and commerce squarely back into the frame of analysis, inviting us to reconsider this paradigmatic figure of international legal thought. If the pirate is the enemy of humanity, how is it that humanity became synonymous with trade and commerce? In the constant rehearsal of the pirate’s perennial enmity, the history of that relationship—rooted in the emergence of commercial imperialism as celebrated by Grotius—is rendered invisible. Imperial interests are recast as universal concerns, imperial violence naturalised as necessary

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<sup>23</sup> For the Persian Gulf, see Sultan bin Muhammad al-Qasimi, *The Myth of Arab Piracy in the Gulf*, 2nd ed. (Routledge, 1988). For the Malay archipelago, see Nicholas Tarling, *Piracy and Politics in the Malay World: A Study of British Imperialism in Nineteenth-century South-East Asia* (F.W. Cheshire, 1963); Alfred P. Rubin, *Piracy, Paramountcy, and Protectorates* (Penerbit Universiti Malaya, 1974).

<sup>24</sup> See Robert Knox, ‘Valuing race? Stretched Marxism and the logic of imperialism’ 4 *London Review of International Law* (2016) 81, 84.

<sup>25</sup> Alexandra Ganser, ‘Mobility in early modern Anglo-American accounts of piracy’, in James Arvanitakis & Martin Fredriksson (eds), *Property, Place and Piracy* (Routledge, 2018) 81, 89

policing actions in defence of humanity. Today, the violence of the Somali pirate directed against transnational corporate trade is criminalised and cast as inimical to civilisation. The everyday violence produced by that trade, meanwhile, is naturalised, the figure of the pirate, and the international legal thought that reifies its exceptional status, contributing to an ideological closure. And what then of the pirate's other avatars: the torturer, the *génocidaire*, the terrorist—but also the native, the savage, the barbarian. What is lost when we uncritically accept and reproduce their identification as *hostes humani generis*?

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