# 'God's Friend, the Whole World's Enemy'

## Reconsidering the role of piracy in the development of universal jurisdiction.

*Louis Sicking*

> *'And so if justice is left out, what are kingdoms except great robber bands? For what are robber bands except little kingdoms? The band also is a group of men governed by the orders of a leader, bound by a social compact, and its booty is divided according to a law agreed upon. (...)*
> *Alexander the Great (...) [asked] a certain pirate whom he had captured (...) what he was thinking of, that he should molest the sea, he said with defiant independence: "The same as you when you molest the world! Since I do this with a little ship I am called a pirate. You do it with a great fleet and are called an emperor."'*
> *Augustine, The City of God.*[1]

## 1 Introduction

Piracy, including the ways in which it was viewed over time, is predominantly considered the way David Luban does in his article with the telling title 'The Enemy of All Humanity.'[2] This common approach takes Cicero's concept 'enemy of all' (*communis hostis omnium*) as a point of departure and ends with the special place piracy holds today within the field of international law because of the universal jurisdiction that applies. In between legal scholars are mentioned who used or adapted Cicero's expression, including the medieval jurist Bartolus Saxoferrato (1314-1357) and the early modern jurist Alberico Gentili (1552-1608) who connected piracy with the law of nations.

This so-called Cicero paradigm can be summarized as follows: According to the Roman philosopher a pirate was a person who committed robberies at sea to his own advantage. A pirate is not an enemy of the state, so not a hostile state or a rebel movement, but an 'enemy of all,' that is of all mankind.[3] Indeed, not a single word exchanged with a pirate and no oath made by him could be considered bind-

---

1   Augustine, *The City of God*, trans. William M. Green (London/Cambridge, MA: William Heineman and Harvard University Press, 1963), Book IV, ch. IV, 16-17; Thomas K. Heebøll-Holm, *Ports, Piracy and Maritime War: Piracy in the English Channel and the Atlantic, c. 1280-c. 1330* (Leiden/Boston: Brill, 2013), 3-5.
2   David Luban, 'The Enemy of All Humanity,' *Netherlands Journal of Legal Philosophy* 2 (2018): 112-137.
3   '*nam pirate non est ex perduellium numero definitus, sed communis hostis omnium: cum hoc nec fides nec ius iurandum esse commune,*' Cicero, *De officiis*, ed. W. Miller (Cambridge, MA: Harvard University Press, 1968), III, 29. Heebøll-Holm, *Ports*, 2.

ing. Pirates were thus literally 'outlaws.' They were placed outside the law, legally unprotected. In short, they were without rights. This way of thinking emphasized the inhumane nature of the pirate. The Cicero paradigm is based on a strict separation between peaceful merchants and ruthless pirates. Pirates are objectified as a necessary evil. Crime is inherent to their existence. The Cicero paradigm links up with a dominant regime wielding the power to determine what is right and wrong. It declared the pirate an enemy of the community, as in the Roman Empire. In today's world this is reflected in the international state system.[4]

Complementary to the Cicero paradigm is the Augustine paradigm, named after the late antique African church father. According to this view, the word 'pirate' was used to denote an enemy, and 'piracy' to condemn enemy action. 'Enemy' here does not entail the specific meaning that the word would get later in international law. Whether reference was made to a rival state or rebels was immaterial, as the term 'pirate' was used solely to put down an enemy as a criminal. Robbery at sea was piracy and was only a crime if committed by an enemy. Piracy by members of their own community was not necessarily reprehensible. The Greek philosopher Aristotle, for example, regarded piracy as a normal way to earn a living. This Augustine paradigm is particularly applicable to regions and periods without obvious or undisputed dominant power as the Greek period, the Middle Ages and the early modern period.[5]

Both paradigms indicate that the image of pirates as 'enemy of all' or as 'enemy of humanity' does not run in a direct line from the Roman empire to the present. Rather, the Cicero paradigm made a comeback in the discourse of lawyers as part of a renewed interest in the study of Roman law from the Renaissance of the twelfth century. This is evident, for instance, in the work of the fourteenth-century lawyer Bartolus who saw pirates as unworthy opponents, untrustworthy and thus not comparable with the acknowledged enemies of the state. As David Luban explains, Bartolus reworded 'enemy of all' to 'enemies of the human species' (*hostes humani generis*). Bartolus is often used as evidence for continuity of Cicero's concept. Although the modern-sounding distinction between legitimate enemies and pirates was in line with the Ciceronian paradigm, his discourse was not followed or applied.[6] It has recently been argued that the conception of pirates as

4    Heebøll-Holm, *Ports*, 2-5. Daniel Heller-Roazen, *The Enemy of All: Piracy and the Law of Nations* (New York: Zone Books, 2009), 16.
5    It is based on the quotes at the start of this article. The Danish historian Thomas K. Heebøll-Holm, *Ports,* introduced the two paradigms for his study of medieval piracy in the Channel. For their application from the Middle Ages to the present, see Louis Sicking, *De piraat en de admiraal* (Leiden/Boston: Brill, 2014) and in English, 'The Pirate and the Admiral: Europeanisation and Globalisation of Maritime Conflict Management,' *Journal of the History of International Law* 20 (2018) 1-42.
6    Heebøll-Holm, *Ports*, 13-14. See also C. Gauvard, 'Punir le crime,' in idem, *Violence et ordre publique au Moyen Âge* (Paris: Picard, 2005), 48-65 and P. Prétou, 'Du "larron écumeur de mer" aux "pirathes": les genèses de l'accusation en piraterie à la fin du Moyen Âge français,' in *La piraterie au fil de l'histoire. Un défi pour l'État*, ed. M. Battesti (Paris: Presses Sorbonne Université, 2014), 37-47.

the enemy of mankind has a late medieval rather than a late Roman origin. One could also say that Bartolus was ahead of his time because as a legal term 'piracy' was only introduced towards the end of the Middle Ages.[7]

This paper discusses the criminalisation of piracy in the late Middle Ages, a phenomenon which has attracted attention in current research by medievalists on the history of piracy.[8] This will allow to better understand the late medieval context within which the concept 'enemy of the human species' should be understood. Then a few remarks will be made on the so-called 'piracy analogy' and on the present-day anti-piracy measures. But first it is necessary to show that for most of the Middle Ages piracy or robbing was not considered to be criminal.

## 2 'to rob is no shame, the best of the land do it'

Piracy as an act of violence at sea committed for private gain (without any commission of a public authority) has not always been looked upon as criminal. Unlike today, violence at sea was endemic in medieval Europe. Even more so, piracy was the norm. Maritime trade and violence went hand in hand, as the thirteenth-century Catalan *Llibre del Consolat de Mar* aptly illustrates. According to this compilation of medieval maritime and customary law, the skipper and merchants on board merchant ships could collectively decide to attack an enemy ship and then divide the loot taken.[9] This may be seen as piracy 'in war time.' In the Middle Ages in theory a distinction existed between piracy in times of war or the

---

7    Heebøll-Holm, *Ports*, 13-14. A.P. Rubin, *The Law of Piracy* (New Port: Naval War College Press, 1988), 32-36; P. Earle, *The Pirate Wars* (London: Methuen, 2003), 21 and 56; Reginald G. Marsden, ed., *Law and Custom of the Sea* 1 (London: Printed for the Navy Records Society, 1915), 99-100; Emily Sohmer Tai, 'The Legal Status of Piracy in Medieval Europe,' *History Compass* 10, no. 11 (2012): 838-51, at 838. Prétou, 'Du "larron écumeur de mer."'

8    Heebøll-Holm, *Ports* and idem, 'Law, Order and Plunder at Sea: A Comparison of England and France in the Fourteenth Century,' *Continuity and Change: A Journal of Social Structure, Law and Demography in Past Societies* 32, no. 1 (2017): 37-58; Prétou, 'Du "larron écumeur de mer"'; idem, 'L'essor de la piraterie en Europe du XIIIe siècle au XVe siècle,' in *Histoire des pirates et des corsaires de l'Antiquité à nos jours*, eds. Gilbert Buti and Philippe Hrodej (Paris: CNRS editions, 2016), 93-127; Sicking, *Piraat*, 23-27. For other examples of recent literature on medieval piracy Gregor Rohmann, 'Jenseits von Piraterie und Kaperfahrt. Für einem Paradigmenwechsel in der Geschichte der Gewalt im maritimen Spätmittelalter,' *Historische Zeitschrift* 304 (2017): 1-49 and N. Jaspert, '"Piracy," Connectivity and Seaborne Power in the Middle Ages,' in *The Sea in History: The Medieval World*, ed. Michel Balard (Woodbridge/Rochester: Boydell & Brewer, 2017), 45-57.

9    Sohmer Tai, 'Legal Status,' 842-43 and idem, 'Marking Water: Piracy and Property in the Pre-Modern West,' in *Seascapes: Maritime Histories, Littoral Cultures, and Transoceanic Exchanges*, eds. Jerry H. Bentley, Renate Bridenthal, and Kären Wigen (Honolulu: University of Hawaii Press, 2007), http://webdoc.sub.gwdg.de/ebook/p/2005/history_cooperative/www.historycooperative. org/proceedings/seascapes/tai.html, 5 (accessed 13 March 2017); Damien Coulon, *Barcelone et le grand commerce d'orient au Moyen Âge. Un siècle de relations avec l'Égypte et la Syrie-Palestine (ca. 1330 - ca. 1430)* (Madrid/Barcelona: Casa de Velázquez, 2004), 202. In medieval Northern Europe trading and looting were two sides of the same coin as well. Wilfried Ehbrecht, 'Ruten, roven, dat en is gheyn schande, dat doynt de besten van dem lande. Bemerkungen zu adligem Land- und Seeraub,' in *Störtebeker – 600 Jahre nach seinem Tod*, Hansische Studien XV, ed. W. Ehbrecht (Trier: Porta Alba, 2005), 253-71, at 255.

---

use of force by privates without a (stately) mandate during an armed conflict and piracy in times of peace or the use of force by privates without a (stately) mandate in peace times. This distinction was more complex and often impossible to distinguish in medieval reality as many parties – like noblemen – had a legitimate right to the use of armed force whereas the prince or the state did not (yet) have a monopoly of violence. So even though robbery at sea in peace time was to be severely punished it is hard to find examples before the late Middle Ages.

This corresponds with the way in which pirates were perceived until around the middle of the fourteenth century. In English and French chronicles the terms 'pirata' and 'piratica' were used in a neutral sense rather than pejoratively, until about 1350.[10] The predicate pirate and gaining loot by robbery were initially not necessarily emotionally charged in a negative way. This is not surprising when one considers that in medieval Europe the use of force was not exclusive to the domain of public authority. In other words, there was no monopoly of violence exerted by a sovereign or state. Nobles fought for honour and gain, on land and at sea. This was their *raison d'être*. Also, they engaged in private wars or allowed themselves to be hired as mercenaries.[11] Others followed their example under the motto '(…) to rob is no shame, the best of the land do it' (*[…] roven, dat en is gheyn schande, dat doynt de besten van dem lande*').[12] In exchange for material gain and honour pirates offered their expertise to princes and city states.

## 3    The criminalization of the pirate

Thus, in medieval Europe the punishment of pirates was *not* the norm. In the Holy Roman Empire for example, with the Perpetual Peace or Eternal Peace (*Ewiger Landfriede*) of 1495, which abolished feuding, (sea) robbery, until then a common means in a feud, became an offense punishable by death.[13] Piracy issues were dismissed as civil lawsuits aimed at compensation. Moreover pirates, noblemen but also others who occupied a prominent position in society – in the maritime community of a port – or had served well earlier, received pardon relatively easily. Ship ownership, experience and expertise in maritime force could thereby be of decisive importance.[14]

10    Heebøll-Holm, *Ports*, 15-19. Prétou, 'Du "larron écumeur de mer,"' 40-43.
11    Maurice H. Keen, *Chivalry* (New Haven/London: Yale University Press, 1984), 146, 152-53, 225, 229-34. Felipe Fernández-Armesto, 'Naval Warfare after the Viking Age, c. 1100-1500,' in *Medieval Warfare: A History*, ed. Maurice H. Keen (Oxford: Oxford University Press, 1999), 230-52, 240-42.
12    Ehbrecht, 'Ruten, roven,' 256.
13    Ulrich Andermann, 'Spätmittelalterlicher Seeraub als Kriminaldelikt und seine Bestrafung,' in *Störtebeker*, ed. Ehbrecht, 23-24, 29-30. Rolf Sprandel, 'Das Raubrittertum und die Entstehung des öffentlichen Strafrechts,' *Saeculum* 57, no. 1 (2006): 61-76, at 69.
14    Heebøll-Holm, *Ports*, 242-43; Marc Russon, *Les Côtes guerrières. Mer, guerre et pouvoirs au Moyen Âge. France-Façade océanique XIIIe-XVe siècle* (Rennes: Presses Universitaires de Rennes, 2004), 314-16, 328.

Louis Sicking

The criminalization of the pirate is part of a gradual process of criminalization of violence that took place in the late Middle Ages. This process can be seen in the context of the emerging sovereign power that tried to establish itself partly through law.[15]

The French medievalist Pierre Prétou has retraced the criminalization of piracy for the case of France.[16] He states that the use of the term 'pirate' in historical and political literature is increasing in the late Middle Ages, but no special significance is being granted in the legal sense. Courts of justice use the usual expressions 'larronage de mer' and 'crime d'escumerie' for maritime theft. Whereas from the late thirteenth and early fourteenth centuries local elites in harbours apply the rhetoric of 'larrons' which infest the country to the maritime space, the royal courts only take over this rhetoric in the fifteenth century and connect it with 'crimen maiestatis.' Pirates are no longer simple sea robbers who have been targeting merchandise, but they become hostile elements that go against the divine charisma of the monarch. The classic-inspired rhetoric of 'purifying the sea of pirates' (re)appears. Sovereigns do in fact make a political reading of maritime actions of sea robbers. While the one is beheaded, the other gets pardon. These are the two faces of a monarch who tries to assert himself at sea.[17]

The political dimension of 'groups of pirates' can be recognized in the fact that such groups were seldom or never completely devoid of bonds of loyalty. The Franco-English royal rivalry – the Hundred Years War – is usually conceived in this context as responsible for the appearance of pirates along the shores of Atlantic Europe in the late Middle Ages. In the same way, the *Vitalienbrüder* (Victual Brothers) were conceived by Prétou as a group standing at the basis of piracy in the Baltic Sea as a result of the emerging Nordic crowns.[18] Although this interpretation is not in itself incorrect, it ignores the fact that in the Baltic Sea region it were first and foremost the Hanseatic cities that have been at the basis of the accusation of piracy.

There are indications, that in the Italian maritime republics, around the middle of the fourteenth century, and possibly even earlier, piracy carried capital punishments, but the question is to what extent these have actually been applied.[19] The Hanseatic cities of Hamburg (1359) and Lübeck (1374) received the imperial privilege to arrest and condemn *pyratas et spoliatores* (looters) or *wasser rawber* (sea

---

15    Wim Blockmans and Peter Hoppenbrouwers, *Introduction to Medieval Europe, 300-1500* (London/ New York: Taylor & Francis, 2014), 186-87, 384-86; Xavier Rousseaux, 'Conclusion. Violence et judiciaire en Occident: des traces aux interprétations,' in *La violence et le judiciaire du Moyen Âge à nos jours. Discours, perceptions, pratiques*, eds. Antoine Follain et al. (Rennes, Presses Universitaires de Rennes, 2008), 345-62, at 348.
16    Prétou, 'Du "larron écumeur de mer,"' 37-47; idem, 'L'essor,' 93-115.
17    Prétou, 'L'essor,' 94, 96-97, 103.
18    Prétou, 'L'essor,' 111.
19    Irene B. Katele, 'Piracy and the Venetian State: The Dilemma of Maritime Defense in the Fourteenth Century,' *Speculum* 63 (1988): 865-69, at 869. Sohmer Tai, 'Legal Status,' 839, 845 n. 14. Sohmer Tai, 'Marking Water,' 2-3, 8-9.

robbers) in the second half of the fourteenth century, but the punishment to be assigned was not mentioned.[20] Executions because of piracy have been documented in Hamburg from 1400. They took place on the island Grasbrook in the Elbe, at the entrance to the port, as a deterrent. On the spot, several skulls have been unearthed with holes at the top which leave no doubt as to how they were set on display on poles or beams.[21] The infamous Klaus Störtebeker and Gottfried Michels found their end here.[22]

In the North German Hanseatic cities the rise of the Cicero paradigm as a normative framework was reflected in the expression of the pirate as 'God's friend and all the world's enemy' ('*Godes vrende unde al der werlt vyande*').[23] While it is still too early for definitive conclusions, large autonomous sea faring cities – the Italian maritime city-states and Hanseatic cities – seem to have taken the lead in the criminalization of pirates, followed by princes aspiring to sovereignty. Actually, research has established for France, as we have seen, but also for England[24] and Brittany[25] that the death penalty for piracy was never or seldom applied before the end of the fifteenth century.

With the criminalization of piracy the Cicero paradigm seems to prevail. But appearances are deceiving because also the pirates according to the Augustine paradigm were criminalized. As mentioned, pirates according to this view were enemies of their own community, whether they were subjects of enemy states or insurgent rebels. Concretely, privateers in the service of political opponents were criminalized as pirates. The Victual Brothers for example, before 1395 were privateers who with the support of the Duke of Mecklenburg battled against Queen Margaret of Denmark. They were, nevertheless, criminalized as pirates by the Hanseatic cities.[26] Likewise, the designation and trial of the Sea Beggars as pirates

---

20 Andermann, 'Seeraub,' 28-29.
21 Ralf Wiechmann, Eilin Einfeldt, and Klaus Püschel, "'… men scholde en ere hovede afhowen und negele se uppe den stok'. Die Piratenschedel vom Grasbrook,' in *Gottes Freund aller Welt Feind. Von Seeraub und Konvoifahrt. Störtebeker und die Folgen*, eds. Jörgen Bracker and Gregor Rohmann (Bremen/Hamburg: Museum for Hamburgische Geschichte, 2001), 52-79, at 55, 61.
22 W. Ehbrecht, 'Die Ereignisse von 1400/1401/1402 in den Quellen,' in *Störtebeker*, 37-56, at 55.
23 The phrase is used in a letter dated 4 May 1398 of Hanseatic merchants in Bruges on a Hanseatic Diet in Lübeck. *Hanserecesse* first series, IV, ed. Karl Koppmann (Leipzig: Von Duncker & Humblot, 1877), 432, no. 453; Jörgen Bracker, 'Klaus Störtebeker – nur einer von ihnen. Die Geschichte der Vitalienbrüder,' in *Störtebeker*, ed. Ehbrecht, 57-84, at 81-82.
24 Rubin, *Law of Piracy*, 32-36. Nicholas A.M. Rodger, *The Safeguard of the Sea: A Naval History of Britain, 660-1649* (London: W.W. Norton, 1997), 149.
25 Russon, *Les Côtes guerrières,* 328.
26 Matthias Puhle, 'Die Vitalienbrüder – Söldner, Seeräuber,' in *Störtebeker*, ed. Ehbrecht, 15-21, at 18 and 20. Andermann, 'Seeraub,' 26-27. Philippe Dollinger, *La Hanse (XIIe – XVIIe siècles)* (Paris: Aubier, 1964), 104-6; Klaus Friedland, 'Maritime Law and Piracy: Advantages and Inconveniences of Shipping in the Baltic,' in *Ships, Guns and Bibles in the North Sea and Baltic States, c. 1350-c. 1700*, eds. Allan I. Macinnes, Thomas Riis, and Frederik Pedersen (East Linton: Tuckwell Press, 2000), 30-37, at 35; Matthias Puhle, *Die Vitalienbrüder* (Frankfurt on the Main/New York: Campus Verlag, 1994); Gregor Rohmann, 'Did the Activity of the "Vitalian Brethren" Prevent Trade in the Baltic Area?,' in *The Sea in History,* ed. Balard, 585-95.

---

by the Duke of Alva can be considered in this way.[27] The treaty of 1615 between Portugal and the Moghul Empire, in which it was agreed to not only counter the Dutch and the English but also the independent inhabitants of the Malabar Coast as pirates can be seen in this perspective.[28] When peace was concluded the former adversaries could retroactively be rehabilitated from illegal pirates to recognized privateers of the former opponent. This happened at the end of the fourteenth century with many captains from Savona, a port city which challenged the dominance of Genoa. These captains infested the Ligurian Riviera to the detriment of the Genoese. Initially they were criminalized by Genoa as pirates, amongst others by the so-called *Officium Robarie*. This Robbery Office had been reorganized after 1339 into a domestic agency where it was no longer foreigners but the Genoese themselves, who claimed to have been victim of piracy and submitted petitions. Between 1394 and 1397, the office settled no less than 130 cases concerning looting by rebels along the Riviera. In the peace treaty concluded between the two cities in 1397 Genoa recognized the captains from Savona as privateers by considering the period in which they were active not as revolt but as war.[29]

The judgement or punishment of privateers in violation could be deployed in diplomatic relations. In 1386 for example King Peter IV of Aragon distanced himself vis-à-vis the Mamluk Sultan al-Zahir Barkūk of Egypt from the nobleman Guillem Ramon de Montcada after the latter had been found guilty of piracy. The purpose of the Aragonese monarch was to prevent trade relations between Barcelona and Alexandria from suffering adverse consequences.[30] Fearing the prince of the Moghul Empire, Aurangzeb, would hold the British government accountable for piracy by the English with all its consequences for the trade of the East India Company, the English gave off a clear signal by the hanging in 1701 of Captain Kidd in London. This Scotsman had been appointed to combat pirates, but had succumbed to piracy himself.[31]

Though the distinction between the criminal pirate on the one hand and the recognized admiral and privateer on the other, may have become formally clear with the rise of the sovereign prince or state, everyday practice proved intransigent. The sixteenth-century English admiral Charles Howard benefited personally from the many prize cases for the English Admiralty by using the judge of this institution as his franchise manager. Captured pirates could obtain pardon by payment of a fee which disappeared into the pockets of the admiral. He sold pre-dated letters of reprisal to pirates returning from sea enabling them to give their activities retrospectively a semblance of legality. He also equipped ships himself, often at

27   Cornelis de Meij, *De watergeuzen en de Nederlanden, 1568-1572* (Amsterdam/London: Noord-Hollandsche Uitgeverij, 1972), 4, 202-5.
28   Michael Kempe, '"Even in the Remotest Corners of the World": Globalized Piracy and International Law,' *Journal of Global History* 5 (2010): 353-72, at 357, 361.
29   Sohmer Tai, 'Marking Water,' 9.
30   Coulon, *Barcelone*, 51, 203-4.
31   Kempe, 'Even in the Remotest Corners,' 363-64. See also David Wilson, 'Piracy, Patronage & Political Economy: Captain Kidd and the East India Trade,' *International Journal of Maritime History* 27, no. 1 (2015): 26-40.

the expense of the monarch, which committed piracy under the pretext of combating piracy.[32]

The fight against piracy fits in the pursuit of a monopoly of violence by the prince or the (city) state. The pirate was gradually criminalized as an enemy of all mankind from the late Middle Ages. Beheading, gallows or the wheel marked his fate. But not only pirates eager for booty, also political opponents were criminalized as pirates. Alongside the Cicero paradigm for the normative framework, the Augustine paradigm continued to be meaningful to everyday practice. At the same time, by no means all pirates ended on the scaffold or the gallows. Many got away unscathed and were 'only' sued (according to civil law) under prize law, were exempt from punishment through a pardon or benefited from the support of local administrators or a corrupt admiral as Charles Howard.

As long as the monarch or the (city) state made use of private expertise and resources for warfare at sea in the form of privateering, piracy was just around the corner: when at the end of a war letters of marque were revoked former privateers had indeed to look for other work. Many an ex-privateer continued his usual 'business' as a pirate.

These pre-modern ideas and practises may seem far removed from contemporary realities. After all, privateering was abolished with the Declaration of Paris in 1856. Compliance with the Declaration of Paris on the abolition of privateering was such that the right to issue letters of marque has practically disappeared. Thus ended a centuries-old practice by states sanctioning private warfare at sea.[33] From an international legal perspective, this put an end to the distinction between privateering and piracy, between legal and illegal capture of booty by private individuals. Any form of maritime conflict aimed at loot and carried out by persons not belonging to a navy or maritime police under the authority of a sovereign state was equated to piracy.[34] In short, the privateer disappeared; the pirate and the admiral remained. The distinction between legal and illegal maritime violence now coincided with publicly funded warfare by navies on the one hand and robbing individuals, pirates, on the other. The Cicero paradigm had become a reality, at least in the new global framework of standards of international law.

---

32    Rodger, *Safeguard*, 345.
33    Janice E. Thomson, *Mercenaries, Pirates and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe* (Princeton, NJ: Princeton University Press, 1994), 76, 106, 177. Michael Kempe, *Fluch der Weltmeere. Piraterie, Völkerrecht und internationale Beziehungen 1500-1900* (Frankfurt on the Main/New York: Campus Verlag, 2010), 348. Jan Martin Lemnitzer, *Power, Law and the End of Privateering* (London/New York: Palgrave Macmillan, 2014).
34    Kempe, *Fluch*, 349.

Louis Sicking

## 4 The supposed 'piracy analogy'

States have nevertheless repeatedly attempted to include other crimes (than piracy) under the denominator of piracy. This phenomenon is known as the 'piracy analogy.' For example, the attempts from the early nineteenth century onward, of Great Britain and the United States in particular, to declare the slave trade to be piracy. In the twentieth century, the United States have attempted to equate violations of the law of naval warfare to be piracy.[35] For example, the United States applied the concept of piracy to the actions of German submarines against merchant ships in both world wars.[36] However, this use of the term piracy was politically motivated; it did not concern piracy in the sense of public international law.[37] Following the Paris Declaration of 1856, it was generally accepted that pirates may be lawfully captured on the high seas by armed vessels of any state and brought within their territorial jurisdiction for trial before municipal courts but this should be confined to piracy as defined by the law of nations and could not be extended to offenses that were made piracy by municipal legislation.[38]

Traditionally, piracy has been considered the first and only crime under universal jurisdiction. Only after World War II, universal jurisdiction was extended to include offences such as war crimes. Again, a supposed analogy with piracy was put forward to justify this. The horrific nature of the crimes in question acted as the common denominator. The idea of piracy as a heinous crime is in line with the Ciceronian paradigm. This application of the analogy with piracy has been criticized by scholars as Eugene Kantorovich, Lauren Benton and Matthew Garrod.[39]

## 5 Anti-piracy in the twenty-first century: a return to pre-modernity?

The current anti-piracy in the Gulf of Aden and the Indian Ocean has an effect, but just as premodern anti-piracy it is not free from ulterior political motives. One of the motivations for participating in anti-piracy missions was for some states to acquire credibility on the international stage. The participation of both

---

35    Christoph Sattler, *Die Piraterie im modernen Seerecht und die Bestrebungen der Ausweitung der Pirateriebegriffes im neueren Völkerrecht* (Bonn: Dissertations druck Schmitt & Meyer, 1971), 93-101, 438-39; Kempe, *Fluch*, 318-24.

36    Joaquín Alcaide Fernández, 'Hostes humani generis: Pirates, Slavers, and Other Criminals,' in *The Oxford Handbook of History of International Law*, eds. Bardo Fassbender and Anne Peters (Oxford: Oxford University Press, 2014), 120-44, at 127.

37    Sattler, *Piraterie*, 439.

38    Alcaide Fernández, 'Hostes humani generis,' 129.

39    Eugene Kantorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation,' *Harvard International Law Journal* 45, no. 1 (2004): 183-238, at 190-192, 194, 196, 204, 207; Lauren Benton, 'Toward a New Legal History of Piracy: Maritime Legalities and the Myth of Universal Jurisdiction,' *International Journal of Maritime History* 23, no. 1 (2011): 225-40; Matthew Garrod, 'Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law,' *Diplomacy & Statecraft* 25, no. 2 (2014): 195-213.

NATO and the EU to combat piracy in the Indian Ocean, each with its own command structure, gives the impression that the two organizations are competing to increase their international authority. For others, including China, it was a possibility for its own navy to gain experience at open sea. Also the cost of anti-piracy, which amount at several times the damage suffered as a result of piracy point in the direction of other motives than only fighting pirates.[40]

Not only for states and non-state actors such as NATO and the EU combatting piracy offers new opportunities. This is also the case for private initiatives. So-called Private Military and Security Companies (PMSC) offer their services in the context of anti-piracy. For example, the US Company Pistris Incorporated had a 'warship' of 65 meters in service with ultra modern weaponry and a combat helicopter since 2007. Among the 464 PMSC's that were registered in 2012, there are several companies based in the Netherlands that offer 'maritime security.'[41] Some of these companies claim to use former Dutch marines and police officers. The services offered by PMSC's are not limited to defence only. The company Sea Guardian for instance offers 'vessel recovery' on its website as one of its services.[42]

The international and national regulations for such profit aiming companies dealing in maritime security are still in its infancy.[43] As a result, much remains unclear about the status of these private entrepreneurs of whom the pirate and the admiral have got company. The appearance of PMSC's fit into the trend of the withdrawing government, which outsources violence as was done in pre-modern times through the use of privateers against pirates and of overseas companies. The 'legal regime' established by the Paris Declaration in 1856 is therefore under pressure. A comparative study of the pre-modern and post-modern anti-piracy becomes essential.[44] Pre-modern developments can offer insight into the fluid world of maritime security in the twenty-first century in which the boundaries between legality and illegality on the one hand and the public and private sector on the other no longer necessarily coincide.

---

40  Martin N. Murphy, *Somalia: The New Barbary? Piracy and Islam in the Horn of Africa* (New York: Columbia University Press, 2011), 129-37.
41  For example ESS&SA B.V. and THE GROUP NLD U.A. http://defensieweblog.blogspot.nl/2012/08/list-of-maritime-security-companies.html and http://www.icoc-psp.org/uploads/Signatory_Companies_-_August_2012_-_Composite_List.pdf (accessed 13 March 2017).
42  http://www.sguardian.com/(accessed 18 April 2018).
43  Carolin Liss, 'Regulating Private Military and Security Companies at Sea: New Delevopments and Challenges,' http://www.counterpiracy.ae/upload/Briefing/Carolin%20Liss-Essay-Eng-2.pdf (accessed 13 March 2017); Alain Berbouche, *Pirates, flibustiers et corsaires de René Duguay-Troüin à Robert Surcouf* (Rennes: Presses Universitaires de Rennes, 2010), 224. For the Netherlands see the report *Geweldsmonopolie en piraterij* (The Hague: Ministerie van Veiligheid en Justitie, 2011), issued by the 'Advisory Committee armed private security against piracy' and the letter from the ministers of security and justice, of defence, of foreign affairs and of infrastructure and environment to the House of 7 October 2011 (Security of sea lanes against piracy), Tweede Kamer (House of Representatives), parliamentary year 2011-12, 32706, 19.
44  See for example Martin Murphy, 'Counterpiracy in Historical Context: Paradox, Policy, and Rhetoric,' *Studies in Conflict & Terrorism* 35, no. 7-8 (2012): 507-22.

Louis Sicking

## 6 Conclusive remarks

The 'enemy of the human species' or the 'enemy of humanity' is rather a Bartolian than a Ciceronian concept. Too often it is used to establish continuity between Cicero's 'enemy of all' and modern conceptions of pirates. Although the expression of Bartolus can be understood in the wake of the Renaissance of the twelfth century and the increased interest amongst jurists for the study of Roman law, it can also be connected with the criminalization of piracy in the late Middle Ages. It has been argued that the rise of royal power has been first and foremost responsible for this process. However, there are clear indications that both the Mediterranean maritime city republics and the Hanseatic cities in the Baltic may have preceded royal state power to criminalize pirates. In this respect it is no coincidence that the expression 'God's friend, the whole world's enemy' was used at a Hanse diet in 1398. The Ciceronian or Bartolian paradigm does, however, represent only one side of the picture. The Augustinian paradigm was never absent, not even today! If we are ever to fully understand the concept 'enemy of humanity' and its practical implications both paradigms will have to be taken into consideration.