The Criminalisation of Piracy – Between Heinousness and Imperialism

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The high seas have been a scene for piracy since maritime commerce existed between states. From the Persian Gulf, Caribbean, North America, China and the ‘Barbary States’ of North Africa to modern-day piracy in the Horn of Africa, piracy has provided a substantive threat to trade as well as an ideological one by challenging the law and order of empires and sovereign nation-states. The pirate was labelled as a threat not to one state or all states but to mankind and was consequently made the first subject of international criminal law through universal jurisdiction.

By examining different legal and normative definitions of the pirate, this Article will analyse why pirates were treated as the first international criminals and what contributions this criminalisation has made to aspects of international criminal law. Through the work of theorists like Giorgio Agamben, Ernesto Laclau, and Carl Schmitt, this Article will examine the jurisdictional position of the figure of the pirate in order to provide a theoretical framework for its criminalisation under international law.

It will be argued that although piracy was criminalised under universal jurisdiction because of its alleged heinousness, the role pirates played in undermining capitalist expansion should be considered. Pirates, in other words, were anti-territorial figures who posed challenges to imperialist paradigms and nation-state boundaries. This Article will conclude that pirates are political actors whose criminalisation cannot be reduced to the charge of heinousness.

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I. INTRODUCTION

There is a close relationship between flowers and convicts. The fragility and delicacy of the former are of the same nature as the brutal insensitivity of the latter.

Jean Genet

II. THE FIGURE OF THE PIRATE: DECONSTRUCTING THE ENEMY OF MANKIND

The figure of the pirate often invokes images of greedy treasure hunting outlaws with an unrefined appearance and a criminal lifestyle. In popular culture and imagination, however, the maritime pirate of the Golden Age\(^2\) is regularly\(^3\) seen as a rebellious and clever figure who operated outside the restricting structures of modern nation-states. From a legal perspective, piracy has multiple, though interrelated, definitions. For the purposes of this Article, two definitions of piracy will be examined. These definitions underline the legal continuity of the idea of jurisdiction as an overarching paradigm in which pirates have been positioned.

The present international law definition of piracy is set out in Articles 100 to 107 and 110 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS).\(^4\) These Articles, with almost exact wording, repeat Articles 14 to 22 of the 1958 Geneva Convention on the High Seas.\(^5\) According to UNCLOS Article 101, piracy consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
   (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
   (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

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\(^1\) Jean Genet, *The Thief's Journal* (Faber & Faber 1949) 7.
\(^2\) Golden age of piracy 17th and 18th century piracy, particularly 1688-1725.
(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

The UNCLOS definition limits acts of piracy to the high seas, thus excluding those acts which take place in territorial waters expanding 12 nautical miles off the coast of a nation-state. High seas, it is important to note, encompass economic zones that span from ‘the edge of the territorial sea to 200 nautical miles’. This effectively means that UNCLOS not only provides a legal definition of piracy, but also organises the world’s waters into the various jurisdictions of coastal nation-states. This definition also excludes politically motivated acts from piracy by referring to ‘private ends’. According to UNCLOS, ‘political acts’ are equated to state sponsored acts, therefore assuming that non-state actors, like pirates, could not act for political ends.

The jurisdiction’s centrality to the legal definition of piracy is articulated, though in a different way, in a 1696 definition proposed by Justice Sir Charles Hedges. This definition was then adopted as a working legal definition of piracy:

Now piracy is only a term for sea-robbery, piracy being committed within the jurisdiction of the Admiralty. If a man shall be assaulted within that jurisdiction, and his ship or goods violently taken away without legal authority, this is robbery and piracy.

Absent from Justice Hedges’ definition is the exact extent of the jurisdiction as well as the difference between state-licensed privateers and non-state pirates. Nevertheless, the definition interestingly argues that piracy is robbery, taking place at sea, and as such the legality of piracy is regarded from the perspective of the act itself. Contrasting views emphasise the effects and nature of piracy.

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7 ibid.
9 Privateering refers to the practise of persons or ships authorised by government to attack foreign vessels.
such as heinousness, rather than the act itself. In this scenario, the pirate is seen as a threat to the nation-state.

Agamben’s ‘Homo Sacer’ \(^\text{11}\) is useful in further analysing both definitions. Building on Michel Foucault, \(^\text{12}\) Agamben posits that biopolitics, that is, the inclusion of the biological life of the human being (\textit{zoe}) into the nation-state’s political calculations and mechanisms (\textit{polis}), is the ‘foundational event of modernity’. \(^\text{13}\) He argues that this inclusion is bound to dispossess certain populations of their political significance as legitimate members of a nation-state. The concept Agamben proposes to describe this condition is homo sacer. Homo sacer involves the reduction of the life of a citizen into \textit{zoe}, by means of stripping off the \textit{polis}. This figure, no longer a citizen entitled to legal protection, becomes depoliticised and is reduced to her/his biological being. Homo sacer, according to Agamben, can be unceremoniously killed, but not sacrificed. \(^\text{14}\) Within the scope of this Article, it will be demonstrated that while pirates fit the paradigm of homo sacer, they are political actors who actively challenge it by contesting the sovereignty and jurisdiction of the nation-state(s) in question.

Although Agamben’s homo sacer has the refugee as its primary figure, arguably, pirates can be seen as a particular strand of homo sacer. Pirates were hunted and killed by the British Admiralty’s Royal Navy \(^\text{15}\) and the killing of individuals involved in acts of piracy was standard practice. Interestingly, while these killings were taking place, the British Parliament in 1700 started to set up special courts that could convene abroad to try pirates. In these courts, defendants were not given any legal representation and the courts were composed of ‘commissioners’ who were not legal professionals but colonial officers. These courts are responsible for the execution of at least ten percent of active pirates at the time. \(^\text{16}\)

The peculiarity of piracy to homo sacer lies in Carl Schmitt’s ‘state of exception’ where ‘the sovereign stands outside the judicial order and, nevertheless,

\(^1\) ‘Homo sacer’ is used interchangeably with ‘bare life’ by Agamben and throughout this essay.
\(^3\) Giorgio Agamben, \textit{Homo Sacer Sovereign Power and Bare Life} (Stanford University Press 1998) 10.
\(^4\) ibid 85.
\(^5\) See Jameson cited in Burgess (n 10).
belongs to it’. It is noteworthy here that the two definitions highlighted above have the state of exception as their underlying principle; piracy is defined according to its distance from (or proximity to) the physical boundaries that delineate the nation-state and its legal foundation, namely, the jurisdiction. ‘Sovereignty only rules over’, Deleuze and Guattari write, ‘what it is capable of interiorizing’. Interestingly, the 1696 definition of piracy places pirates inside its jurisdiction by paradoxically excluding them from it; pirates are seen as outside invaders who, by virtue of their invasion of the jurisdiction of the Admiralty become included in it. The UN definition, on the other hand, directly places acts of piracy outside the territorial jurisdiction of nation-states. In both definitions, the state of exception positions pirates outside the jurisdiction of the nation-state while simultaneously including them in their political mechanisms which legitimise their unceremonious killing, or capture and trial. Agamben describes this condition of existence as a ‘zone of indistinction between outside [the jurisdiction] and inside, exclusion and inclusion’. This zone, he argues, constitutes ‘the original political relation’, namely, ‘the ban’. However, Agamben’s conceptualisation of the ‘ban’ does not take into consideration the positionality of homo sacer as political actors par excellence.

Pirates surf and attack on international waters, outside nation-state boundaries, in both the physical and legal senses. That they are outside, however, does not mean that they have lost their relationship to nation-state jurisdictions; rather, it means that they are tied to these jurisdictions through a relationship of antagonism, or exclusion. This antagonism can be seen in light of Laclau’s ‘mutual ban’ where two opposing laws seek to subvert each other thereby creating a political relation. The mutual ban does not materialise when one force exists outside the nation-state jurisdiction. Rather, it bursts forward when this force is in opposition, through an antagonistic relationship, to the jurisdiction. Pirates, therefore, are anti-juridical actors that cannot be reduced into extra-legal or extra-juridical figures. Agamben’s theory, however, places homo sacer in the realm of the extra-juridical rather than examining the ways in which homo sacer can be an active producer of the mutual ban. I argue that pirates, precisely because they are excluded from the normative structures of the nation-state, are political actors who, by virtue of their anti-juridical

17 Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty (George Schwab tr, MIT Press 1985) 13.
19 Agamben (n 13) 181.
20 Ernesto Laclau, ‘Bare Life or Social Indeterminacy?’ in Matthew Calarco and Steven DeCaroli (eds), Giorgio Agamben: Sovereignty and Life (Stanford University Press 2007) 15.
existence, undermine the legal foundations of nation-states. The threat pirates pose to the modern order underwrites the nation-states’ impulse to criminalise and eradicate them.

III. PIRATES AGAINST UNIVERSAL JURISDICTION: CHALLENGING SOVEREIGNTY

At the core of the criminalisation of piracy, as has been demonstrated, lie questions of jurisdiction and sovereignty, both of which are inextricably linked. It is therefore the case that criminal jurisdiction is regarded in international law as an entitlement of sovereign states. In terms of maritime sovereignty, the freedom of the high seas undermines the notion of sovereignty over entire sea spaces. However, this freedom was limited to policing the seas, rather than to capturing and/or executing pirates; notably, the absence of sovereign control over the high seas initiated the practice of states patrolling these spaces against pirates without violating any other state’s territorial sovereignty. This practice lasted throughout the age of Elizabethan privateering as a laissez-faire attitude. During the Renaissance, however, a shift occurred in the perception of pirates who came to be seen as active hostile enemies. It was particularly in 1718 that pirates could be, with reference to law, ‘captured and executed by any one that takes them’, with the scant provision that the captors must attempt to bring them to ‘some government to be tried’. This made piracy a crime of universal jurisdiction (similar to what it had been in the Roman Republic). The argument for the criminalisation of piracy was based on its alleged extraordinary heinousness, barbarity, and their being a collective threat to mankind. Piracy was further criminalised in the 1721 Piracy Act, under which mere affiliation or trading with a pirate was made to constitute a crime.

Universal jurisdiction typically holds that a nation can prosecute offences to which it does not have any connection on the basis of the extraordinary heinousness of the alleged conduct. For hundreds of years, the crime of piracy

24 Piracy Act 1721 8 Geo 1 c 24 (UK).

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was the only offence to which universal jurisdiction applied.\(^{26}\) In recent decades, however, the scope of the universal jurisdiction has been expanded to include several human rights offences, including torture, genocide, and crimes against humanity.

In 1856, most imperial powers signed the Declaration of Paris that abolished all forms of piracy, privateering, and government sponsorship.\(^{27}\) This Declaration marked the labelling of pirates as *hostis humani generi*, the enemy of mankind, subject to capture and trial when found.\(^{28}\) It is no surprise that the Declaration was signed; firstly, the practice of states using privateers as a political tool against each other had become more difficult to control, and secondly, non-state pirates became a growing menace for imperial expansion. The Declaration is also interesting because until 1856 international law only recognised two legal entities: persons and states.\(^{29}\) One consequence of making piracy a universal crime and labelling pirates as enemies of not one state, or even all states, but of mankind, was the creation of a third legal category. This third category for a figure that is not a state or an individual meant that pirates were neither entitled to the benefits of the sovereignty of states nor to the protections of citizenship. Pirates were effectively placed within the jurisdiction by means of excluding them from the legal categories of citizenship. By pitting pirates against mankind, universal jurisdiction excluded pirates from the normative legal categories, mankind here being the nation-state citizen who, due to citizenship, has the right to have rights. Pirates, then, became the figures who can be killed without being sacrificed, a bare life, I argue, whose political qualities cannot be minimised.

Universal jurisdiction is a subject of many thought-provoking debates. However, due to the limited scope of this Article, not all aspects of the universal jurisdiction can be thoroughly considered. For the purposes of this Article, the interest in analysing sovereignty and jurisdiction in relation to piracy lies in the lingering legacy of the latter to international criminal law. It has been noted that piracy has often been summoned as a ‘precedent for what would otherwise appear to be unprecedented’.\(^{30}\) For example, the unusual cases of extraterritorial jurisdiction find their missing genealogy in early piracy trials.

\(^{26}\) Kontorovich (n 21) 184.
\(^{27}\) Burgess (n 10) 314.
\(^{28}\) ibid.
\(^{29}\) ibid 315.
\(^{30}\) Kevin Heller and Gerry Simpson (eds), *The Hidden Histories of War Crimes Trials* (OUP 2013) 6.
Eugene Kontorovich uses the term ‘piracy analogy’ to refer to the assertion that ‘new universal jurisdiction’\textsuperscript{31} is based on the ‘old universal jurisdiction’ that saw piracy’s heinousness as so extraordinary that it required a universal jurisdiction to exterminate it.\textsuperscript{32} He argues that universal jurisdiction over piracy ‘had nothing to do with the heinousness or moral gravity of the offence’\textsuperscript{33} and, in fact, piracy was not regarded as exclusively atrocious in a manner that could explain its exceptional jurisdictional status. Heinousness is not an essential trait of piracy. That sovereign powers sponsored privateers to achieve certain ends on their behalf undermines claims to heinousness, as an essential characteristic, of acts of piracy: state-sponsored piracy was not regarded as heinous when the same legal definitions which criminalise non-state pirates could be applied to it.\textsuperscript{34} Therefore ‘heinousness’ was selectively deployed to criminalise piracy that did not serve the interests of the sovereigns. Despite providing a critique of universal jurisdiction and its precept on the heinousness of piracy, Kontorovich in his paper does not explicitly provide alternative grounds for the criminalisation of piracy. The desire for imperial expansion, as will be demonstrated, is one conceivable motivating rationale.

IV. IMPERIAL EXPANSION AND DEMONISING THE RADICAL ‘OTHER’

To fully understand the rationale behind the criminalisation of piracy for sovereigns, it is important to analyse how piracy worked against imperial aspirations. Pirates back in the Golden Age were a source of serious economic threat to the imperial powers and continue to be perceived as such today. From an economic perspective, piracy was a lucrative business during the Golden Age and presently according to World Bank estimations, Somali piracy alone results in an assessed loss of $18 billion for the global economy annually.\textsuperscript{35}

Furthermore, there is a parallel between the emergence of modern international law and the emergence of the capitalist market. The ways in which international law introduced universal jurisdiction to criminalise piracy tells a story of exploitation and marginalisation of those who were seen as a threat to colonial

\textsuperscript{31} Kontorovich (n 21). Kontorovich distinguished between the ‘new universal jurisdiction’ that includes human rights offences from the ‘old’ or ‘traditional’ universal jurisdiction that applied to piracy only.
\textsuperscript{32} ibid 185.
\textsuperscript{33} ibid 236.
\textsuperscript{34} ibid.
expansion and the formation of a stable world market. The aforementioned 1856 Declaration, in addition to making piracy an international crime under universal jurisdiction, is interesting because it established that piracy was no longer a tool for states to deploy. The Declaration effectively illustrates the paradox in the perceived criminality and barbarity of piracy on one hand, and the need for piracy by privateers as an adjunct to states’ armed operations on the other. It is important to note here that prior to the signing of the Declaration, piracy (in the form of privateering) was used as a political tool by states against enemy states. Indeed, pirates and privateers operated in an analogous manner, the only difference being that the latter were state sponsored and therefore perceived to be legal, while the former were, in the normative sense of jurisdiction, outside the law. Privateers were deployed to distract an enemy’s navy, frustrate its relations with its empire, hinder its trade, and even drive it toward open warfare. In other words, piracy was seen as a legitimate tool, a useful asset for the imperial powers that only became criminal when it ceased to serve imperial aspirations.

The criminalisation of piracy cannot be fully understood without considering the imperial formation of the world market. Access and transportation by sea have constituted a building block of capitalist trade, making maritime trade a key aspect of imperial and political projects. Privateers, for instance, played an instrumental role in the violent process of state-building. Political economist Karl Marx illustrated the importance of piracy to early modern commercial empires and for making primitive accumulation possible on a mass scale.

Moreover, privateering and imperialist plunder were based on an unbending separation between Europe and the colonised world. In this state of affairs, the colonial world was reduced to a permanent state of exception, simultaneously included and subtracted from international law. Law then became a tool used by the sovereigns in order to seize control through juridification. Foucault established a link between liberal governmentality and a new spatial thinking that originated from maritime law. He argued that ‘the history of piracy could also figure as one of the aspects of this elaboration of a worldwide space in

39 That is, governmentality that is concerned with the control of circulation rather than the defence of clear boundaries.
40 Foucault (n 12) 176.
terms of a number of legal principles’.\textsuperscript{41} He wrote that ‘in relation to the suppression of piracy we can say that there was a juridification of the world, which should be thought of in terms of the organization of a market’.\textsuperscript{42} The creation of a space where international commerce can flow freely required violent means and, in this context, the criminalisation of piracy translates into an exercise of law-making violence.

Colonial expansion was ferocious and met resistance from numerous native people, including pirates. Native peoples fought against imperial land grabs and against the order of European states, as did pirates, who were seen as an obstacle to the reduction of high seas into a suave space for commercial circulation. This reduction was a prerequisite for ‘an efficient process of expanded capitalist accumulation that would feed off the systemic exploitation of wage labour in Europe and of slave trade in the colonies’.\textsuperscript{43} Colonial exploitation, whether occurring on land or sea, motivated sovereigns to demonise, then criminalise piracy in order to secure international trade routes and transport and to juridify long-distance trade. Throughout history dehumanising the ‘other’ has been a pretext for colonialism and imperial expansion. Marcus Rediker provides an intriguing account of how pirates ‘stripped of all human characteristics’ were reduced to ‘a wild fragment of nature that could be tamed only by death’.\textsuperscript{44} Pirates were repeatedly demonised, described as savage beasts, bloodthirsty sea wolves and demons of the ocean. This rhetoric promoted the manhunt of pirates, as mere objects of jurisdiction that were a target of annihilation campaigns as enemies of mankind.

It is noteworthy that this demonisation of the ‘enemy of mankind’ was not only restricted to individuals perceived as pirates but also influenced the labelling of certain states as ‘pirate states’ and/or excluding communities from the recognised sovereign members of the international community. For instance, the Europeans did not see the Barbary cities of Northern Africa\textsuperscript{45} as sovereign states. This is evident in the European states’ refusal to consider attacks on trade by the ‘Barbary corsairs’ as acts of war carried out by an official of an

\begin{itemize}
\item \textsuperscript{41} ibid.
\item \textsuperscript{42} ibid.
\item Marcus Rediker, Villains of All Nations: Atlantic Pirates in the Golden Age (Beacon Press 2011) 146.
\item Particularly the ports of Algiers, Tunis and Tripoli.
\end{itemize}
equal sovereign state. Instead, they were condemned as crimes (of piracy) against international law that required all ‘civilised nations’ to jointly exercise universal jurisdiction to eliminate the ‘savage pirates’.

The criminalisation of piracy was in the interest of imperial powers as is the case with sovereign states today. This is partly because pirates as persons existing outside the normative scope of society posed a threat to imperial order and questioned the entire idea of a nation-state. Pirates learned to live ‘outside the law and beyond sovereignty’. Intriguingly, while they contested the power of the state, they did not desire sovereign power for themselves. Rather, they provided an idea of an alternative sovereignty, that of anti-territoriality. Pirates provided not only a substantive threat (trade and mercantile) but also a formal one (posting an alternative to statism). It can therefore be argued that pirates, on all fronts, provided an ideological opposition by living a counter-life.

Finally, I want to draw attention to what is perhaps palpable, yet often left out, namely, why some decide to brave the sea. Since the beginning of this millennium, the Horn of Africa, and particularly the Coast of Somalia, has seen an increase in the number of acts of piracy. Although acts of robbery, violence, and hostage-taking cannot be minimised, it is important to understand the socio-political and economic contexts within which these acts take place. For instance, since the early 1990s, there have been several failed central governments in Somalia, and the average GDP per-capita of the country was 128.1 USD in 2012, thus making it one of the poorest countries in the world. Moreover, other states have taken advantage of Somalia’s legal waters. They have deployed sophisticated fishing fleets that have wiped out entire fish populations in the Indian Ocean destroying traditional fishery. Indeed, individuals who turn to piracy are often unemployed fishermen or sailors. Furthermore, the waters of Somalia have been used as dumps for toxic waste. This has led to considerable loss of livelihood and income for the local people. Attempting to protect their territorial waters, some individuals organised

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46 Policante (n 43).
48 See Rediker cited in Simpson (n 47).
themselves into bands to face the international ships and demand compensation for the loss of income resulting from over-fishing and illegal dumping.52

V. CONCLUSION

This Article has argued that the criminalisation of piracy under international law cannot be reduced into a depoliticised and de-historicised phenomenon, but must instead be seen in its complex historical context of imperial expansion and the formation of the world market. I have demonstrated the ways in which the pirate figure has posed a threat to sovereignty and raised questions of law and politics, space, violence and legality.

Agamben’s theorisation of homo sacer has provided an analytic lens through which the historical treatment of the pirate vis-à-vis international criminal law can be understood. In his work, Agamben places homo sacer in the realm of extra-juridical and depoliticised subjectivity. However, by drawing on Laclau’s work, I have argued that pirates are anti-juridical, that is, they are active producers of the mutual ban. Pirates are excluded from the normative structures of the nation-state and have been criminalised because they undermine legal mechanisms, such as (universal) jurisdiction.

The emergence of the universal jurisdiction to criminalise piracy over the high seas cannot be separated from questions of sovereignty and corresponding imperial prerogatives. Pirates were a threat to trade, to the creation of a stable world market and to imperial expansion more generally. As such, sovereigns were prompted to devise methods to eradicate the ‘heinous’ pirates, by making them the first international criminals through juridification. Throughout this Article, it has been illustrated that imperial calculations, rather than the ‘heinousness’ of piracy, provided the basis for the criminalisation of piracy.

The criminalisation of piracy based on its alleged ‘heinousness’ remains resonant today. The idea of a universal jurisdiction, by means of which the most shocking of offences can be prosecuted by any nation, is subjective and, as argued by Kontorovich, faulty. The alleged ‘heinousness’ of piracy on the basis of which the universal jurisdiction was organised, remains widely accepted and enforced, and as such has admonitory implications for international tribunals using universal jurisdiction, including the International Criminal Court.

52 Do (n 35) 87.
A conversation between a king and a pirate illustrates the particular position of pirates vis-à-vis sovereigns that criminalised them:

King: ‘What is your idea, in infesting the sea?’
Pirate: ‘The same as yours, in infesting the earth! But because I do it with a tiny craft, I’m called a pirate; because you have a mighty navy, you’re called an emperor’.  

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