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# Piracy: A Treasure Box of Otherness

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## Abstract

*This article explores the connection between maritime and digital piracy, and pursues the thought that the common moniker is more than a rhetorical flourish. Golden Age maritime piracy (1650–1730) and today's piracy in cyberspace are by no means identical; there is no one ideal form of piracy. And yet, pirates of the literal and virtual high seas share a crucial feature: their social role as others. Piracy itself is a social function; its content is otherness. Dominant accounts of piracy note its character as a mode of resistance, but frame that resistance as either economic or political. Neither of these explanations of piracy's resistance is sufficient on its own. The comparison of Golden Age maritime piracy with current digital piracy is telling, because what these two modes of piracy have in common is the way they highlight the relationship between capital and the state system. In other words, piracy's political attack is not simply an assault on the idea of sovereignty, but rather a more specific critique of the way the system of sovereign states advances the interests of capital. The legal treatment of piracy, making it the pillar of universal jurisdiction, highlights the particular threat that piracy presents to the world order: the crime is political because it is an affront to the economic-political alliance that is capitalism, old or new.*

Every later opinion regarding the 'how?' would be deceptive, even though, in and of itself, it would be a pardonable curiosity to ask on which wave of this sea we are presently being borne along.

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<sup>1</sup> J. Burckhardt, *Historische Fragmente* (E. Dürr ed., 1942), quoted in H. Blumenberg, *Shipwreck with Spectator: Paradigm of a Metaphor for Existence* (S. Rendall trans., Massachusetts Institute of Technology 1997), at 72–73.

# 1 Prologue

## I

Second mate Bartholomew Roberts left London on a merchant's slave ship that was captured by pirates off the Gold Coast of West Africa in June 1719. After a preliminary hesitation, Roberts decided to join the Brotherhood and sail under the Black Flag. Black Bart became the most successful pirate of his time.<sup>2</sup> He was quoted saying that in the merchant service, 'there is thin Commons, low Wages, and hard Labour; in this, Plenty and Satiety, Pleasure and Ease, Liberty and Power . . . No, *a merry Life and a short one*, shall be my Motto'.<sup>3</sup>

Roberts, who allegedly despised the cruel methods prevalent among the slave industry's captains, terrorized the African coast. Among the slave traders who took the trouble to persuade the British Parliament to increase naval patrols on West Africa shores, one stands out: MP Humphrey Morris, the leading slave trader in London at the beginning of the 18th century.<sup>4</sup> Morris spared no effort persuading Parliament to send Her Majesty's ship *Swallow* to the Atlantic. Captain Bart Roberts was defeated by *Swallow* near the African coast in February 1722, in what is regarded as one of the most decisive moments in the decline of Golden Age piracy. Maritime historian Marcus Rediker concluded that '[t]he defeat of Roberts . . . represented a turning point in the slave trade and even in the larger history of capitalism'.<sup>5</sup>

## II

In January 2011, the *Silk Road* site was launched, allowing Darknet users to anonymously buy and sell drugs, arms and other illegal services and goods. *Silk Road* became the largest illegal market on the Darknet, and in March 2013 it offered 10,000 items, of which 7,000 were drugs such as MDMA and heroin. The site's admin username was Dread Pirate Roberts, alias DPR.<sup>6</sup> He ran forums that discussed free market philosophy and encouraged users to choose freedom rather than tyranny, because 'we are not animals that are taxed and controlled' and because 'we are in UNCHARTED waters'.<sup>7</sup> During the two years until Ross Ulbricht – according to the authorities, the man behind *Silk Road* – was arrested, the site generated about USD1.2 billion in sales, and about USD 13 million in commission was

<sup>2</sup> As measured by vessels captured, see M. Rediker, *Villains of all Nations: Atlantic Pirates in the Golden Age* (2004), at 33.

<sup>3</sup> C. Johnson/D. Defoe, *A General History of the Robberies and Murders of the Most Notorious Pyrates* (Dover Publications, Inc., 1999 [1724]), at 244.

<sup>4</sup> M. Rediker, *The Slave Ship: A Human History* (2007), at 33.

<sup>5</sup> See Rediker, *supra* note 2, at 143.

<sup>6</sup> See Thielman, 'Silk Road Operator Ross Ulbricht Sentenced to Life in Prison', *The Guardian* (29 May 2015), available at <https://bit.ly/3mQ50v8>.

<sup>7</sup> See Grinberg, 'An Interview with A Digital Drug Lord: The Silk Road's Dread Pirate Roberts', *Forbes* (14 August 2013), available at <https://bit.ly/2JFcrLl>.

charged by DPR for these sales.<sup>8</sup> In May 2015, Ulbricht was sentenced to double life imprisonment plus 40 years, without parole. While reading the verdict, Judge Catherine Forrest of the Southern District of New York addressed Ulbricht: ‘The stated purpose [of *Silk Road*] was to be beyond the law. In the world you created over time, democracy didn’t exist. You were captain of the ship, the dread Pirate Roberts. You made your own laws’.<sup>9</sup>

Judge Forrest clung to the alias that Ulbricht had voluntarily picked for himself and turned it against him.<sup>10</sup> She found no need to further explain how or whether digital piracy was attached to the legal concept of maritime piracy. This rhetoric enabled Judge Forrest to inflict on Ulbricht a punishment second only to the gallows which awaited the pirates of the Golden Age.<sup>11</sup>

DPR explained his choice of moniker as a tribute to a fictional character of that name from the 1987 film *The Princess Bride*. In the book on which the film was based, the character ‘Dread Pirate Roberts’ was openly inspired by the figure of Bartholomew Roberts.<sup>12</sup> Setting aside the fact that Ulbricht identified himself with a fictional metamorphosis of Roberts, rather than with Roberts himself, he is a well-educated American nightmare, but indeed no robber. However, and without underestimating any differences, I believe there is one fundamental similarity between Roberts and his digital successor: both are embodiments of the pirate as the *other* against which prevailing concepts, such as sovereignty or property, are defined. Moreover, the functional similarities between figures such as Roberts and Ulbricht reveal the convergence of these prevailing concepts.

It seems that there is no one form of piracy; piracy is rather a conceptual treasure trove: greedy robbers, world reformers, ruthless libertarians and merciful socialists. All Captain Hooks and Robin Hoods of the literal and virtual high seas have one thing in common: their social function as *others*. Indeed, piracy is a function. Its real content is *otherness*.

<sup>8</sup> Doward, ‘Is Ross Ulbricht, Silk Road’s Pirate King, a Mobster or a Martyr?’, *The Guardian* (31 May 2015), available at <https://bit.ly/3601dUY>.

<sup>9</sup> Thielman, *supra* note 6. For the sentence, see *United States v. Ulbricht*, 1:14-cr-00068, no. 269 (S.D.N.Y. 1 June 2015).

<sup>10</sup> For simplicity’s sake, Silk Road’s admin will be called ‘Ulbricht’ from now on.

<sup>11</sup> Ulbricht was convicted by a jury in February 2015 on seven counts, including using the Internet to distribute narcotics, conspiring to obtain unauthorized access to a computer for private financial gain and conspiring to launder money. See *United States v. Ulbricht*, a.k.a ‘Dread Pirate Roberts’, a.k.a. ‘DPR’, a.k.a. ‘Silk Road’, 31 F. Supp. 3d 540 (S.D.N.Y. 2014).

<sup>12</sup> W. Goldman, *The Princess Bride* (1973); R. Reiner, dir., *The Princess Bride* (20th Century Fox, 1987). In the film, the peculiarity of the moniker DPR is that it is inherited, from one DPR to his successor, until the end of days. The anonymizing function of the title was probably one of its appealing features for *Silk Road* operators. Ulbricht and DPR both claimed that *Silk Road* was not operated by a single person and that there were several users of the moniker on the site. See Grinberg, *supra* note 7. Immediately after Ulbricht’s arrest, the site administration was taken over by someone who claimed that his predecessor appointed him to be DPR’s successor. A year later, the FBI arrested Blake Benthall, aka ‘Defcon’, allegedly *Silk Road*’s new operator. See Mattise, ‘FBI Arrests Blake “Defcon” Benthall, Alleged Operator of Silk Road 2.0 [Updated]’, *arstechnica* (6 November 2014), available at <https://bit.ly/37EijDj>.

This article is an attempt to unpack the content of piracy's function by analysing possible connections between digital piracy and maritime piracy.<sup>13</sup> The comparison is made possible by the assumption that, like Golden Age piracy, contemporary digital piracy is a counter-culture phenomenon, and therefore they both share sociological and anthropological characteristics.<sup>14</sup> Rather than implying that there is one pirate culture continuously existing from the 17th century to the present, the comparison suggests that pirate cultures share common features defined by their resistance to dominant political and economic structures.<sup>15</sup> If, as some claim and I agree, Golden Age pirates were the pioneers of resistance to global capitalism, then digital piracy is another link in this chain of resistance.

To meet this article's quest, I use a methodology which is based on two pillars: historical-interpretative and comparative. First, I examine the period of the Golden Age of piracy – c.1650–1730, geographically located in the Atlantic – and the political and economic changes that led to the total incrimination of piracy in domestic and international law at the end of this period. I then compare the conclusions to some current processes and trends relating to digital piracy.

## 2 How It Came to This

For elegant and excellent was the pirate's answer to the great Macedonian Alexander, who had taken him: the king asking him how he durst molest the seas so, he replied with a free spirit, 'How darest thou molest the whole world? But because I do with a little ship only, I am called a thief: thou doing it with a great navy, art called an emperor'.

St Augustine<sup>16</sup>

There were times when theft was a respectable way of making a living. Thucydides described the motives of ancient communities' leaders for engaging in maritime looting

<sup>13</sup> There has been little attention in academic literature paid to the historical, legal and cultural connection between maritime and digital piracy, with the exception of a handful of articles written mainly within the discipline of organizational management or by anthropologists. Organizational management studies are Land, 'Flying the Black Flag: Revolt, Revolution and the Social Organization of Piracy in the "Golden Age"', 2 *Management & Organizational History (MOH)* (2007) 169, and Parker, 'Pirates, Merchants and Anarchists: Representations of International Business', 4 *MOH* (2009) 167, which largely follows the path outlined by Land. Iain Munro established the connection between contemporary hackers and Atlantic pirates in terms of the choice of a nomadic lifestyle, the ethical search for a 'life of freedom' and a common approach to tactics of resistance. See Munro, 'Non-Disciplinary Power and the Network Society', 7 *Organization* (2000) 679. The work of anthropologists Shannon Lee Dowdy and Joe Bonnie rests in part on a course they gave at the University of Chicago in 2009: see Dawdy and Bonni, 'Towards a General Theory of Piracy', 85 *Anthropological Quarterly (AQ)* (2012) 673.

<sup>14</sup> The assumption is based on James Scott's claim according to which, if power structures operate in comparable ways, they will also provoke comparable patterns of resistance: see J. C. Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (1990), at xi. Buried here in a footnote is the explanation for the attempt – which is to follow in the next pages – to compare the forces confronting past and present pirate resistance practices.

<sup>15</sup> See also Dawdy and Bonni, *supra* note 13, at 677.

<sup>16</sup> St Augustine, *The City of God*, bk IV, ch. 4.

as stemming from their desire ‘both to enrich themselves and to fetch in maintenance for the weak’.<sup>17</sup> This art was not despicable; moreover, it was ‘carrying with it something of glory’, as proven by ancient poets’ introducing the habit of questioning travellers who came by sea whether they are thieves or not ‘as a thing neither scorned by such as were asked, nor upbraided by those that were desirous to know’.<sup>18</sup> Thucydides goes on to describe the transition from a long war against land and sea robbers, to Athenian life whose inhabitants no longer had to take up arms.<sup>19</sup> It seems that Thucydides linked piracy with a kind of ‘state of nature’, a war of all against all, the abandonment of which he associated with the progress of civilization to a more subtle state of development, partly due to the success of actions aimed at eradicating early piracy.<sup>20</sup> (But who will provide for the poor now?)

The term ‘pirate’ and its derivatives denoted traditional Eastern Mediterranean societies that operated in legitimate ways for at least a millennium. The ancient term was not used to describe brigands, or others outside the legal order, but referred to small communities that were considered competent to form alliances and participate in wars between recognized political leaders within the legal order of the period.<sup>21</sup> But the Roman concept of order made the existence of these communities unacceptable. Piracy, for the Romans, was a descriptive noun, referring to communities whose tradition had become an obstacle to Roman trade.<sup>22</sup>

In medieval Europe, piracy seemed to be the norm, and until around the middle of the 14th century the term ‘pirate’ was used in a neutral rather than pejorative sense.<sup>23</sup> Louis Sicking claimed that this should come as no surprise since in medieval Europe no political power had monopoly over the exercise of violence.<sup>24</sup> The Italian maritime city-states and Hanseatic cities led the way in criminalizing the actions of robbers in the service of political opponents (aka privateers), and labelling them as pirates. A privateer was anyone who held an official permit (a ‘letter of marque and reprisal’) to engage in looting on the high seas.<sup>25</sup> A prominent example is the Victual Brothers, privateers who fought against Queen Margaret of Denmark with the support of the Duke

<sup>17</sup> Thucydides, *The History of the Grecian War*, trans. T. Hobbes, in T. Hobbes, *The English Works of Thomas Hobbes*, vol. 8 (W. Molesworth ed., 1839–45), bk I, para. V.

<sup>18</sup> *Ibid.* An example can be found in Homer’s *Odyssey*, when Nestor, seeking to know who his anonymous guests are, turns to Telemachus and Pallas-Athena with the following words: ‘Strangers, who are ye? Whence do ye sail over the watery ways? Is it on some business, or do ye wander at random over the sea, even as pirates, who wander hazarding their lives and bringing evil to men of other lands?’. Homer, *The Odyssey* (A. T. Murray trans., 1919), bk III, at 73.

<sup>19</sup> Thucydides, *supra* note 17, para. IV.

<sup>20</sup> Imagine Hobbes’s cheerfulness at translating this paragraph.

<sup>21</sup> See Rubin, ‘The Law of Piracy’, 15 *Denver Journal of International Law & Policy* (1986–1987) 173, at 179.

<sup>22</sup> *Ibid.*, at 187.

<sup>23</sup> Sicking, ‘God’s Friends, the Whole World’s Enemy’, 47 *Netherlands Journal of Legal Philosophy (NJLP)* (2018) 177, at 178–179.

<sup>24</sup> *Ibid.*, at 179.

<sup>25</sup> Rubin, *supra* note 21, at 194. In Elizabethan England, privateering was considered a noble and profitable occupation, and the queen addressed the famous privateer Sir Francis Drake as ‘my dear pirate’. See Parker, *supra* note 13, at 170.

of Mecklenburg until 1395, when they were criminalized as pirates by the Hanseatic cities.<sup>26</sup> Leaping into the beginning of the 17th century, the term ‘piracy’ was still mainly used to denote the practice of privateering. However, whereas at the beginning of the century the term was used in a derogatory manner to designate the activities of non-British privateers who seized British ships, from the middle of the century it became synonymous with outlawry.<sup>27</sup>

The period known as the Golden Age of piracy is said to span between 1650 and 1730,<sup>28</sup> and its mythological location is the Atlantic Ocean.<sup>29</sup> Some maritime history of this period is well documented, including the intensification of maritime violence as an inherent component of global warfare.<sup>30</sup> Piracy as a distinct phenomenon is less documented, and the dearth of reliable primary sources makes the work of historiography highly interpretative.<sup>31</sup> Despite disagreements about when the Golden Age actually ended, there is no dispute about the fact that it had indeed come to an end. This fact was reflected in the transformation of pirate activities into something considered normatively despicable, and in terms of positive law, punishable by death. The end of the Golden Age had seen legislative changes, states sending naval forces to ‘pirate-stricken’ areas and mass executions of captured pirates. Between 1716 and 1726, some 500–600 alleged pirates were hanged, and the last captain of the Golden Age, Olivier La Buse, was hanged in July 1730 on the Bourbon shore in front of a cheering crowd.<sup>32</sup>

Although pirates and privateers engaged in similar activities, only towards the end of the 17th century did the formal differentiation between them become clearer. Thus, the English Piracy Act in 1698 did not criminalize privateering (which was outlawed only in 1856,<sup>33</sup> when it was no real sacrifice since practically it was non-existent much earlier). Prior to the 1698 legislation, numerous local laws concretely dealt with piracy;<sup>34</sup> and in the international arena, the issue was left mainly to scholars and to local and international customary law.<sup>35</sup> Alberico Gentili was probably the first to

<sup>26</sup> Sicking, *supra* note 23, at 181.

<sup>27</sup> Rubin, *supra* note 21, at 193–194.

<sup>28</sup> Depending on the account of the historian one relies on. The preference for a certain periodic delimitation has numerous implications; for example, including the years 1650–1680 entails the inclusion of buccaneers like Henry Morgan, whose activity blurs the already fuzzy distinction between privateering and piracy even further. On the implications of the chronological delimitation of the Golden Age, see Land, *supra* note 13, at 171. In this article the period in question was delineated in the widest possible manner.

<sup>29</sup> Parker, *supra* note 13, at 169.

<sup>30</sup> L. Benton, *A Search for Sovereignty: Law and Geography in European Empires, 1400–1900* (2010), at 111.

<sup>31</sup> See Schweikart and Burg, ‘Stand by to Repel Historians: Modern Scholarship and Caribbean Pirates, 1650–1725’, 46 *Historian* (1984) 219.

<sup>32</sup> P. Earle, *The Pirate Wars* (2004), at 206.

<sup>33</sup> See Mabee, ‘Pirates, Privateers and the Political Economy of Private Violence’, 21 *Global Change, Peace & Security* (2009) 139, at 149.

<sup>34</sup> The 1698 Act still dealt with a crime under national rather than international law, and came in a long line of English statutes going back to the 1536 Offences at Sea Act. As long as maritime crimes were perpetrated within jurisdiction of the British Empire, they were treated as inland crimes: see E. Coke, *Institutions of the Laws of England* (1644) vol. 3, ch. 49.

<sup>35</sup> Keyuan, ‘New Developments in the International Law of Piracy’, 8 *Chinese Journal of International Law* (2009) 323.

link Cicero's ill-interpreted definition of the pirate as *hostis humani generis* (enemy of mankind) and international law.<sup>36</sup> Although both the Mediterranean maritime city-republics and the Hanseatic cities may have preceded royal state power in criminalizing pirates,<sup>37</sup> it seems that only by the end of the Golden Age did the legal concept of piracy take on the form still current in international law, later to become a pillar of the *universal criminal jurisdiction* doctrine.<sup>38</sup>

The doctrine holds that every state has the power to prosecute violations that are classified as *jus cogens*, even when there is no connection between the prosecuting state and the offence or the offender.<sup>39</sup> Other crimes that cannot be conditioned, apart from piracy, are slavery, war crimes, crimes against humanity, genocide, apartheid and torture.<sup>40</sup> Some modern theories that support universal jurisdiction take the monstrosity of the crime to be the common denominator of the offences to which the doctrine applies. These are crimes that are considered despicable by all nations,<sup>41</sup> or in Cherif Bassiouni's words, crimes that 'shock the conscience of humanity'.<sup>42</sup> That nowadays no one will seriously associate piracy with a violation of *jus cogens* begs the question: How did pirates, once an inseparable part of the trade and violence economy of the oceans, become superfluous to the point of exclusion from humankind? The definition of the offence of piracy in international law is somewhat ambiguous, but robbery at the high seas remains the paradigmatic act of piracy. Is a property offence indeed a monstrous crime, worthy of loathing by all of humanity? The existence of

<sup>36</sup> Kempe, 'Beyond the Law: The Image of Piracy in the Legal Writings of Hugo Grotius', 26–28 *Grotiana* (2005–2007) 379, at 388. Rubin argued convincingly that the late use of Cicero's description of pirates as 'enemies of mankind' is a misleading reading of Cicero's intentions, who in fact meant that pirates were legitimate legal enemies. See Rubin, *supra* note 21, at 184–187.

<sup>37</sup> Sicking, *supra* note 23, at 186.

<sup>38</sup> See Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspective and Contemporary Practice', 42 *Virginia Journal of International Law* (2001–2002) 81, at 108.

<sup>39</sup> On this category, see Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*', 59 *Law and Contemporary Problems* (1996) 63, at 67–72. However, the conditions for the doctrine's application are debatable, as illustrated by Roger O'Keefe's critical analysis of the *Arrest Warrant* case: O'Keefe, 'Universal Jurisdiction: Clarifying the Basic Concept', 2 *Journal of International Criminal Justice* (2004) 735.

<sup>40</sup> See Bassiouni, *supra* note 38.

<sup>41</sup> Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation', 45 *Harvard International Law Journal* (2004) 183, at 205.

<sup>42</sup> See Bassiouni, *supra* note 39, at 69. However, when reflecting on the question of why the international community accepted piracy as a Universal Jurisdiction offence, Bassiouni suggested a real-politik rationale, namely that since piracy had practically disappeared by the 19th century and only appeared once during the 20th, it became more acceptable to bring it under universal jurisdiction. See Bassiouni, *supra* note 38, at 111. Indeed, since the open seas do not belong to the territorial waters of any state, universal jurisdiction is an inevitable, practical solution for suppressing piracy; however, as David Luban argues, this might explain the need to apply universal jurisdiction to piracy, but not why the pirate is the 'enemy of mankind'. See Luban, 'The Enemy of All Humanity', 47 *NJLP* (2018) 112, at 118. Although the perspectives are different, I find the spirit of Luban's analysis very close to the spirit of this article: he suggests that a pirate's way of life was seen as an insult to state authority as such, which accounts for pirates being the enemy of all states, but not necessarily of them being the enemy of all people. See *ibid.*, at 118–119.

privateering makes the ‘abominable’ behaviour justification not very convincing.<sup>43</sup> It is hard to name a key behavioural difference between the privateer and the ‘proper’ pirate, except, of course, for sovereign licensing.<sup>44</sup> How, then, if not due to bad behaviour, did pirates become the enemy of humankind?

### 3 The Way to Tortuga

We have forsaken the land and gone to sea! We have destroyed the bridge behind us – more so, we have demolished the land behind us! Now, little ship, look out! . . . there is no more ‘land’!

Friedrich Nietzsche<sup>45</sup>

Scholars have attempted to draw connections between this extreme dissociation of pirates from other subjects of positive law and the dramatic political, economic and cultural processes that took place in the 17th and 18th centuries, within and among the states and empires involved in the pirate tale. For simplicity, I divide the main narratives – somewhat arbitrarily – into two: one portrays piracy mainly as a violent property offence; the other portrays it as a political one. Nonetheless, although each narrative portrays the construction of a seemingly different piratical ‘other’ and emphasizes differently the potential of political resistance inherent in piracy, both reveal the motivations and strategies of ‘othering’ as a political engine of the hegemonic vehicle.

#### *A Piracy as a Violent Property Offence*

The first narrative links economic changes – conspicuously, the alleged transition from mercantilism to capitalism – with the transformation of the institutional attitude towards piracy. And so the story goes: In the pre-capitalist trading system, where surplus accumulation was achieved by controlling distribution rather than by production, both piracy and privateering were joints in a sequence of aggressive actions that were part of the rivalries between powers, and in which the pursuit of traded goods was perceived as a form, albeit a mild one, of war.<sup>46</sup> The line between ‘proper’ piracy and privateering was vague partly because it depended on the distinction between

<sup>43</sup> For a very similar reasoning, see Kontorovich, *supra* note 41, at 210. Kontorovich inferred that the ‘monstrosity’ assumption has no historical basis. Parker, following Kontorovich, argued that the mere possibility of granting permission to privateering raises doubts as to the principle of ‘common enemies of mankind’ being a principle at all. This, according to Parker, indicates instead the question of ‘where does the money go’; Parker, *supra* note 13, at 182.

<sup>44</sup> See also Ramsey, ‘Textualism and War Powers’, 69 *University of Chicago Law Review* (2002) 1543, at 1615–1616.

<sup>45</sup> Friedrich Nietzsche, *The Gay Science* (B. Williams, ed., J. Nauckhoff trans., Cambridge University Press 2001 [1882]), at 119.

<sup>46</sup> Mabee, *supra* note 33, at 146. Unlike buccaneers, or ‘proper’ pirates, privateers were a decisive addition to European states’ naval forces during the competitive colonization that followed the ‘discovery’ of the Americas in 1498. See Land, *supra* note 13, at 171. This mode of operation exempted monarchs from large fleets’ maintenance costs, and at the same time served as an effective way to train future naval personnel. See also Earle, *supra* note 32, at 23.



states of war and peace at a given time, or, as stated by the author of *A General History of the Pyrates*, Captain Charles Johnson (aka Daniel Defoe): '[That] privateers in time of war are a nursery for pyrates against a peace.'<sup>47</sup> While during wartime, the demand for privateers was on the rise, in peacetime they were left without funding, and were thus pushed to support themselves by raiding ships.<sup>48</sup> Differentiating between piracy and privateering was practically an act of choice: to recognize – or not – the legitimacy of the body that financed maritime violence.<sup>49</sup>

The story of William Kidd manifests the legal vagueness behind maritime affairs in this period. Kidd sailed from Britain as a privateer with documents confirming his authority to seize French ships. Captain Kidd's journey was funded by a number of powerful people, including the King; but in 1701 he was tried and hanged as a pirate, following his activities in the Indian Ocean, where he raided a ship that was not within the scope of protection provided by his letter of marque.<sup>50</sup>

The 1670 Treaty of Madrid led to a temporary reduction of possibilities for licensed looting in the name of the crown. In the early 18th century, the Spanish succession war revived the violent practices of accumulation. Its conclusion, with the 1713 Utrecht Treaty, led, along with the decline in hostilities between England, France and Spain, to a further decline in the possibilities of legitimate sea robbery.<sup>51</sup> These states' ambition to secure accumulation through a more open trade made piracy a problem to be 'eradicated'.<sup>52</sup>

<sup>47</sup> Johnson/Defoe, *supra* note 3, at 4. For the sake of convenience and amusement I shall treat the assumption that Captain Charles Johnson is a pseudonym of Daniel Defoe as a fact. In the above-mentioned edition, the author name printed on the cover is Daniel Defoe.

<sup>48</sup> Benton, *supra* note 30, at 113.

<sup>49</sup> The pioneering role of Italian city states and Hanseatic cities in these practices was mentioned earlier: see *supra* text accompanying notes 23–26. At the beginning of the 17th century, Grotius established his justifications for the capture of the ship *St Catherine* by Dutch Admiral Jacob Van Heemskerck, by distinguishing between the legitimate Dutch privateer and his enemies, the Portuguese, whom Grotius systematically labelled 'pirates'. Grotius used a report on Dutch sailors executed for piracy by the Portuguese a year earlier to stigmatize the venom and cruelty of the Portuguese and to justify Van Heemskerck and his team's wrath against them: see Kempe, *supra* note 36, at 380. Grotius's rhetoric might sound more familiar to contemporary ears merely by replacing *pirate* with *terrorist*.

<sup>50</sup> Benton noted that Kidd's trial took place after the enactment of the British Piracy Act of 1698 which signified the change in the institutional attitude towards piracy at the beginning of the 18th century: see Benton, *supra* note 30, at 117. What Benton does not mention is that Kidd's trial was apparently a milestone in the transformation of the popular attitude towards piracy. The trial was perceived as an injustice inflicted on a working-class sailor by a monopolistic corporation that ruled the Empire's legal system, as well as a severe case of the British Crown's appeal against one of its own loyalists. On this aspect of the trial, see Dawdy and Bonni, *supra* note 13, at 684. Anne Pérotin-Dumon pointed out that Kidd's punishment succeeded in effectively suppressing piracy precisely because the British East India Company had successfully turned the affair into a political issue – as a part of the conflict between the Whigs and the Tories. See Pérotin-Dumon, 'The Pirate and the Emperor: Power and the Law on the Seas, 1450–1850', in R. C. Pennell (ed.), *Bandits at Sea: A Pirates Reader* (2001) 25, at 42.

<sup>51</sup> Land, *supra* note 13, at 174.

<sup>52</sup> See Earle, *supra* note 32. According to Mabee, the Utrecht peace was a turning point in the phenomenon of Atlantic violence not because piracy was not illegal before – but because prior to that point piracy was ignored since it could not be fought effectively: see Mabee, *supra* note 33, at 151.

The economic narrative also depicts the transformations of private and semi-private market players' power.<sup>53</sup> The interests of trading companies were key in turning the pirates into the common enemy of the human species, or at least the bitter enemy of the merchant species.<sup>54</sup> Indeed, Rediker points out the centrality of the slave trade in the eradication of piracy at the beginning of the 18th century.<sup>55</sup> But even if pirates' resistance to the slave trade was not that significant,<sup>56</sup> it is likely that their activity sabotaged the commercial interests of various actors, including private traders, slave ships' captains, African rulers who had captured and sold their own people into slavery and colonies' plantation owners, as well as states. At the end of the 17th century, a growing network of piracy, supported by colonial officials, connected British North America with the Indian Ocean, thus disrupting England's profitable India trade.<sup>57</sup> The resulting desire for eliminating the piracy problem was legally realized by the Parliament passing the 1698 Piracy Act,<sup>58</sup> and later effectively transformed into the killing of Captain Roberts, an event that was a fatal blow to Caribbean piracy largely due to the enormous moral damage it caused.

Nevertheless, active commerce is a necessary – albeit not sufficient – empirical condition for the existence of piracy. Even if the profit from piracy was expressed in economic terms, it still was, as a historical phenomenon, the product of political dynamics.<sup>59</sup> Given the assumption that piracy was detrimental to the economic order that was deemed desirable by a system of imperial forces, the economic narrative is deficient as a sole explanation for the rise and fall of the Golden Age of piracy. This deficiency points to the true nature of the discursive power structures which gave rise to the self-interest requirement in the definition of the offence.<sup>60</sup> If pirates were merely

<sup>53</sup> The difficulty in applying the modern distinction between the private and the public with respect to the royal charters of the discussed period is yet another complication beyond the scope of this article.

<sup>54</sup> The East India Company has a place of honour here. The company was key in deciding Captain Kidd's fate, and, with great talent, acted as the main villain in the *Pirates of the Caribbean* feature films series.

<sup>55</sup> Rediker, *supra* note 4. Rediker described the ship as 'the historic vessel for the emergence of capitalism': *ibid.*, at 41.

<sup>56</sup> Defoe's detailed description of Roberts and his experiences reveals nothing of a particular objection to slave trade. If anything, Roberts and his crew seemed to be fed up with the behaviour of any captain of any conventional vessel, without discriminating based on the cargo's contents. The author of *A GENERAL HISTORY* describes a case in which Roberts' crew ignited a ship and for lack of time did not release the 80 prisoners destined for slavery who were bound by couples on deck. Those who were not burned to death jumped into the sea and were eaten by sharks. See Defoe, *supra* note 3, at 235–236.

<sup>57</sup> See Nutting, 'The Madagascar Connection: Parliament and Piracy, 1690–1701', 22 *American Journal of Legal History* (1978) 202, at 215.

<sup>58</sup> *Ibid.*

<sup>59</sup> For more on this point, see Pérotin-Dumon, *supra* note 50, at 26.

<sup>60</sup> The first international law document on piracy was the Paris Convention of 1856. The Montevideo Convention of 1889 accepted the principle that suppressing piracy was the responsibility of the entire human race. But the most important treaty codifying international law on piracy was the Geneva 1958 Open Sea Convention. The 1982 UN Convention on the Law of the Sea incorporated the anti-piracy provisions of the Geneva Convention without any change. It reads: 'Piracy consists of . . . any illegal acts of violence, detention or any act of depredation, committed *for private ends* [emphasis added] . . . on the High Seas, against another ship or aircraft, or against persons or property on board such ship or aircraft . . .'. See Convention on the High Seas, 29 April 1958, Art. 15, 13 UST 2312; 450 UNTS 82.

self-interested actors, how come the efficient economy did not find a way to integrate them so that the system could keep using their acknowledged power? If pirates were indeed actors interested in economic gain, why could they not be persuaded to act rationally by directing them to act alongside the forces in whose way they stood, and more so given the understanding that their refusal to integrate into the burgeoning economic system might lead to their annihilation? These questions lead to a parallel narrative, which focuses on the political radicalism of Golden Age pirates, and in this sense, at least ostensibly, questions the definition of piracy as a property offence aimed at satisfying personal interests, or in other words – clearly not political.<sup>61</sup>

## B Piracy as a Political Offence

The assumption that the self-interest component in the definition of piracy reflected customary norms is inconsistent with the scholarship on the political radicalism of pirate communities during the Golden Age.<sup>62</sup> This scholarship generally finds pirates' anarchism to be expressed first and foremost by their ideological refusal to be subordinated to the rules of a new political-economic order.

The tension between serving an established hierarchy and autonomous self-rule – a tension that led to the 19th century's romanticization of piracy and its identification with liberty in general – was apparent mainly between 1716 and 1726, when about 5,000 seamen realized the social potential of piracy by organizing the maritime labour process in a radically democratic way.<sup>63</sup> This tension peaked in the short period between 1718 and 1720, when it was possible to find, among the buccaneers, an egalitarian form of proto-anarchist social organization, and even revolutionary awareness aimed at an autonomous life of freedom rather than property accumulation.<sup>64</sup>

Rediker has argued that whoever declared that pirate ships lacked organization and order confused one form of social order – different from the one found on conventional vessels – with disorder.<sup>65</sup> Most Golden Age pirates ran their ships in an open and democratic manner that directly contradicted the hierarchy of conventional vessels.<sup>66</sup> A sailor who chose to join the Brotherhood signed documents called articles, which formulated the boundaries of legitimate authority agreed upon by the community.<sup>67</sup> Most pirate ships' captains were elected by a democratic vote, and their authority was

<sup>61</sup> Traditionally, liberal jurisprudence has formulated the distinction between political disobedience and criminal disobedience in terms of the perpetrator's interests. To the extent that this interest was recognized as self-interest, a breach of law was considered criminal, while political acts were defined as those carried out for the common good.

<sup>62</sup> In general, the central narrative about the political aspect of piratical practices is not concerned with the question of the connection between the politics of these practices and their legal status. Apparently jurists did not find the issue very attractive.

<sup>63</sup> Land, *supra* note 13, at 173.

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

<sup>65</sup> Rediker, "'Under the Banner of King Death'": The Social World of Anglo-American Pirates, 1716 to 1726', 38 *William and Mary Quarterly* (1981) 203, at 208.

<sup>66</sup> Land, *supra* note 13, at 179–180.

<sup>67</sup> Rediker, *supra* note 65, at 209.

absolute only during combat or while chasing a specific target.<sup>68</sup> In fact, the highest authority on a typical pirate ship was the council, which usually contained the whole crew.<sup>69</sup> Despite differences in documents' wording, they all share the idea – radical at the time – that authority depends on consent.<sup>70</sup>

The distribution of loot, as well, was relatively egalitarian and was carried out according to the duties and abilities of the various crew members, in complete contrast to the wages of sailors on other vessels, and to the disproportion between these sailors' wages and their employers' salaries.<sup>71</sup> One of the most impressive practices developed by pirates at the time was an early form of injury compensation scheme, in which part of the community's collective profit was set aside to compensate injured pirates for their loss of earning capacity.<sup>72</sup> Such practice was unheard of in labour relations on conventional vessels of the period, and according to Rediker this was probably one of the most egalitarian forms of resource allocation to be found in the early 18th century.<sup>73</sup> Is it necessary to note that pirates, almost without exception, came from the lowest social and economic classes?<sup>74</sup>

This positive 'otherness' of pirates could indeed challenge the existing principles of the societal order and motivate hegemonic normative 'othering'. One powerful strategy of constructing this otherness exploited the framing of 'sovereignty' in order to exclude pirates from the evolving community of sovereign states. Antony Anghie claimed that the positivist insistence that sovereignty is the fundamental concept of the international system led to a careful examination of the decision as to which entities could be considered 'sovereign'.<sup>75</sup> The positivist mission demanded a distinction between 'proper sovereignty' and other entities – pirates, non-European states and nomadic communities – that seemed to analytically fit nonetheless the Austinian

<sup>68</sup> On the limited powers of the captain, see, e.g., the document signed by Roberts and his crew, cited in *A General History of the Pyrates*, *supra* note 3, at 214. On the democratic practices that were exercised in pirate vessels, see Rediker, *supra* note 65, at 207.

<sup>69</sup> Rediker, *supra* note 65, at 209–210. In addition, in order to prevent abuse of the captain's authority, many powers were given to the quartermaster chosen for this purpose by the crew: *ibid.*

<sup>70</sup> Parker, *supra* note 13, at 176. The author of *A General History of the Pyrates* pointed to the irony inherent in a pirate's belief in the power of contract between robbers: 'How indeed *Roberts* could think that an oath would be obligatory, where Defiance had been given to the Laws of God and Man, I can't tell ...': see Defoe, *supra* note 3, at 210. The author of *Robinson Crusoe*, not surprisingly, can't; but others might say that this is the only true instance of an oath being obligatory.

<sup>71</sup> Parker, *supra* note 13. See also Rediker, *supra* note 65, at 210.

<sup>72</sup> Rediker, *supra* note 65, at 211. For example, a pirate in Roberts' crew was not allowed to retire before he was able to deposit at least 1,000 dollars into the shared fund, see Defoe, *supra* note 3, at 212.

<sup>73</sup> Rediker, *supra* note 65, at 210.

<sup>74</sup> Probably not: see *ibid.* Yet, there were exceptions; one such notable unlikely pirate was Major Steed Bonnet, 'a Gentleman of good Reputation in the Island of Barbados, [who] was Master of a Plentiful Fortune, and had the Advantage of a liberal Education'. Bonnet decided to leave his family and turned to piracy due to 'some Discomforts he found in a married State'. See Defoe, *supra* note 3, at 95.

<sup>75</sup> A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 56.

characteristics of sovereignty. That mission led to the definition of sovereignty as requiring control over territory, in addition to control over human populations.<sup>76</sup>

Traditional European law saw the spatial order as derived from the antithesis of land order and sea order.<sup>77</sup> Pirates had no state because they ‘came from the sea’. To the ruling parties, this meant that pirates, like predators, were a part of wild nature, separate from culture. The next step was logically simple: if sovereignty was defined as control over terrestrial territory, the lack of land was tantamount to lawlessness. Furthermore, when, as Angie claimed, the sea-versus-land arguments were insufficient for excluding some entities from the patronage of positive law,<sup>78</sup> the polity-versus-community rhetoric came to the aid, and the distinction between the civilized and the uncivilized was drawn in terms of society, rather than sovereignty.<sup>79</sup> Although many pirates were originally members of a recognized polity, they went rogue, abandoned civilization and therefore lacked the characteristics essential to membership of international society.<sup>80</sup>

However, underlying the political narrative of pirates’ anarchism making them the *other* of modern nation-states is the (perhaps too general) presumption that piracy had an anarchic function. Bolstered by the fact that piracy threatened to disturb the existing order, its anarchic function actually helped to define – by opposition – the concept of territorial sovereignty.<sup>81</sup> The problem with this presumption is the idea that there existed, fully formed, such a concept of sovereignty, advanced by a group of would-be sovereigns with stakes in its establishment. However, it turns out that most political entities involved in the piracy debacle during the Golden Age were not sovereign states in the modern sense; nor were their economy systems capitalist in the modern sense. At the beginning of the 18th century, there was but one such political entity – England, the first state to wed the political to the economic, thus becoming

<sup>76</sup> *Ibid.* at 57. For this reason, I believe that supposedly challenges to pirates’ anarchism – such as historian Ed Fox’s claim that key Golden Age pirate captains were supporters of the Stuart House, and some of them collaborated and even actually assisted in Jacobite revolts and coup attempts – can be, in fact, flipped over and indicate the piratical flavour of, in this case, Jacobitism. For Fox’s argument, see Fox, ‘Jacobitism and the “Golden Age” of Piracy, 1715–1725’, 22 *International Journal of Maritime History* (2010) 277. As a side note, I will add that, surprisingly, Fox neglects the fact that the word *Tory* derives from the Old Gaelic for ‘outlaw’ or ‘robber’.

<sup>77</sup> See C. Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (G. L. Ulmen trans., Publisher Telos Press, Ltd. 2003 [1950]), at 53.

<sup>78</sup> Anghie, *supra* note 75, at 58, stated that by meeting both the Austinian definition of sovereignty and the requirement of control over territory, many ‘uncivilized’ Asiatic and African states posed a problem to positivist attempts to distinguish between civilized and uncivilized societies.

<sup>79</sup> *Ibid.*, at 59.

<sup>80</sup> *Ibid.* Thus, Anghie claimed that ‘notwithstanding positivist assertions of the primacy of sovereignty, the concept of society is at least equally central to the whole system’: *ibid.*, at 63. It should be noted that pirates do have a flag that marks them as a community – the Jolly Roger – which ironically signifies the absence of a specific nation-state’s flag.

<sup>81</sup> Paraphrasing Robert M. Cover’s classical anarchism, whereby anarchy is understood to imply the absence of rulers rather than the absence of laws, perhaps we could take Golden Age pirates’ anarchism as entailing the absence of laws rather than the absence of rulers. For Cover’s position, see Cover, ‘The Folktales of Justice: Tales of Jurisdiction’, 14 *Capital University Law Review* (1985) 179, at 181.

sovereign par excellence. Indeed, it seems that England was responsible for the flourishing of piracy in the mid-17th century, as well as being the greatest breeding ground for pirates, only to later become the political actor most determined to destroy them.<sup>82</sup>

### C *Melding the Economic with the Political*

The transformation of the logic of territorial accumulation in international relations came along with the rise of capitalism in England.<sup>83</sup> Capitalism was ‘born into’ a system of absolutist dynastic politics, and only the institutionalization of the property relations of agricultural capitalism in England in the 17th century enabled the separation between a non-coercive economy and a ‘pure’ political state – what Benno Teschke called ‘the birth of modern sovereignty in one state’.<sup>84</sup> This narrative of the modern state’s marriage to capitalism, with England as its herald and role model, mitigates some apparent deficiencies of either narrative – the economic or the political – on its own.

At the beginning of the 17th century, England still claimed sovereignty over the oceanic space within the Kingdom (*Mare Anglicum*).<sup>85</sup> In 1609, Grotius published his *Mare Liberum*, countering Spanish and Portuguese monopolistic claims over parts of oceanic trade routes by claiming that the high seas were neither a private nor a public property, but rather a common good that should be open for all to use, beyond the reach of any territorial sovereignty.<sup>86</sup> At the time, Grotius’s logic – based on free global trade as the means to human salvation – legitimized the Dutch East-Indian corporation and served very well the Dutch de-facto oceanic monopoly.<sup>87</sup> As Egon Friedell remarked, ‘. . . as the sea was in fact in the possession of the Dutch, this liberal philosophy was no more than the hypocritical mask for an economic terrorism’.<sup>88</sup>

Initially, England explicitly adhered to the *Mare Clausum* position in the debate ignited by Grotius’ publication, namely that with regards to coastal waters, the *Mare Liberum* is unjustified and even dangerous.<sup>89</sup> The debate about the freedom of the seas

<sup>82</sup> Piracy scholar Edward Kritzer described Cromwell’s involvement in making Jamaica the New World’s pirate capital in 1657, by using the ‘watchdogs’ kept by the English island rulers: the buccaneers. See E. Kritzer, *Jewish Pirates of the Caribbean* (2008), at 202. Authorized by Jamaican authorities, captains like Henry Morgan commanded ships belonging to merchants, while serving as a military deterrent against attempts, mainly Spanish, to invade the island. This is how, according to Kritzer, the Golden Age of piracy began. *Ibid.*, at 206.

<sup>83</sup> Schmitt argued that the fact that England was the first country to march towards ‘maritime existence’ was essential to the Industrial Revolution, and it is therefore not surprising that the revolution began in England. Schmitt mentioned Hegel as the only philosopher who recognized the industrial element as the principle of the sea, in contrast to the family element which is a land principle. See Schmitt, *supra* note 77, at 49. This argument adds yet another layer of complexity to the connections between sea and capital.

<sup>84</sup> Teschke, ‘Theorizing the Westphalian System of States: International Relations from Absolutism to Capitalism’, 8 *European Journal of International Relations* (2002) 5, at 37.

<sup>85</sup> D. P. O’Connell, *The International Law of the Sea* (1982), vol. 1, at 3–4.

<sup>86</sup> R. Jennings and A. Watts, *Oppenheim’s International Law* (9th ed., 2008), at 270.

<sup>87</sup> See Hildebrandt, ‘Extraterritorial Jurisdiction to Enforce in Cyberspace?: Bodin, Schmitt, Grotius in Cyberspace’, 63 *University of Toronto Law Journal* (2013) 196, at 212.

<sup>88</sup> E. Friedell, *A Cultural History of the Modern Age* (C. F. Atkinson trans., Alfred A. Knopf 1931), vol. 2, at 29.

<sup>89</sup> Bederman, ‘The Sea’, in B. Passbender and A. Peters (eds.), *The Oxford Handbook of History of International Law* (2012) 359, at 369.

continued throughout the 17th century, but by the end of the century the ascendancy of British imperial maritime power outweighed coastal interests, and Grotius's principle triumphed.<sup>90</sup> The freedom-of-the-seas logic was now made subordinate to the British Empire's economic and political interests.

Historian Peter Earle claimed that only at the end of the 17th century did the alliance between the mercantilist classes, the governmental bureaucracy and the aristocracy mature. This alliance required creating conditions for the expansion of trade and of the Empire: the state would grant protection to maritime trade and in return receive a flow of revenue from the rising wealth and from customs, as well as gaining a reservoir of trained sailors it could exploit when needed.<sup>91</sup> Parliament's right to jointly formulate, and even establish, England's foreign policy, obtained in 1701, made it possible to sever England's foreign policy from considerations of the monarchic line of succession, and to conduct it on the basis of the 'national interest' formulated by the class of property owners represented in Parliament.<sup>92</sup> This demonstrates the connection between the political narrative (the power to determine national priority is transferred from the monarch to Parliament) and the economic one (the same power passes on to property owners). Thus, if at the beginning of the Golden Age, it seemed that the lines between legitimate and illegitimate violence and between profit and crime were blurred, then by the end of the era they were violently enforced. There was no room for individualist robbers in this new world.

Apparently, the anarchist, destabilizing potential of piracy threatened more than the cargo of a maritime vessel, however valuable; it also threatened the legitimacy of the idea of modern national sovereignty and the practices of distribution of resources it entailed. Contrary to the way contemporary imagination is used to the seemingly inevitable connection between a democratic organization and liberal capitalism, the logic of some pirate communities resisted the growing culture of savings as a central value contrasted with the evil of profligacy. Moreover, rather than concealing their wealth, pirates wasted it in a sort of exaggerated carnival that opposed the emerging economic culture of the time. Thus, even if piratical communities could be associated with greed, their type of greed was not compatible with the prevailing ethos. And while the alliance between bourgeois economy and the state masqueraded the 'allied' capitalist self-interest as a benign contribution to the general welfare, it simultaneously paired profit and crime by portraying 'piratical' self-interest as malignant greed.

A possible way to relieve the tension between the definition of piracy as a property offence, on the one hand, and as a threat to the entire world community, on the other, is to realize that resisting certain proprietary principles became tantamount to resisting principles considered almost universal. In comparison, opposing the supremacy of a particular political community may be more local and therefore less consensual. It raises controversy over the nature of the legitimate authority that allows

<sup>90</sup> *Ibid.*

<sup>91</sup> Earle, *supra* note 32, at 146. Prior to the development of centralized national fleets, the merchants themselves carried most protection costs. See Pérotin-Dumon, *supra* note 50, at 42.

<sup>92</sup> Teschke, *supra* note 84, at 32.

the community to unite and define itself as a political community. Thus, while a property offence may be accepted as an offence against humanity as a whole, a political offence is an offence merely against a local, particular order.

If the enemy is, indeed, an entity against which a war can be publicly declared, it follows that such an enemy is entitled to be considered a political entity in every respect.<sup>93</sup> Even the enemy of humanity mounts its opposition as a political entity and not as an individual criminal acting merely out of self-interest.<sup>94</sup> And although Grotius argued that a group that has come together to make profit at the expense of others, such as an organized crime family, cannot be considered a political community founded for the enjoyment of rights,<sup>95</sup> it is hard to believe that he trusted the distinction to survive rigorous scrutiny.<sup>96</sup> In fact, it seems that pirates' alleged criminal self-interest did not reflect reality; instead, it intended to overcome the difficulty of granting recognition to forms of political organization that threatened the hegemonic order and its aspirations. The impassable abyss between the anarchism of the paradigmatic pirate and the pirate's role as the demonic *other* of property or sovereignty, and the pirate's definition as a criminal whose economic delinquency makes him the enemy of mankind, turns out to be a manifestation of the firm handshake between the modern state and the economic system that made its realization inevitable. In any case, the trial of Black Bart's crew in 1722 signified the symbolic defeat of one form of organization and the victory of the other.<sup>97</sup>

Here we might recall the relationship between piracy and an earlier empire – that of the Romans. Even if the label 'pirate' implied, from a certain point onward, an inappropriate way of life, it had nothing to do with criminality, but rather with the problematic place of an old-fashioned way of life within a new political-economic order that would not tolerate any disruption to the holy practice of trade. It seems that the ability of a political power to impose its desired classification and naming on others – as the British Empire succeeded in doing both when exploiting pirates for its own purposes, and when deciding to jettison their services – indicates the degree of hegemony of this power on the political power map. Pirates were the enemy of mankind to the

<sup>93</sup> As Schmitt pointed out, Roman law distinguished between the enemy, '*hostis*', and the thief and the criminal. Schmitt was quoting Pomponius's words that 'there are enemies who declare war against us or against whom we declare war publicly. The others are robbers ...': Schmitt, *supra* note 77, at 51.

<sup>94</sup> As already hinted, the distortion of Cicero's remarks in the theoretical history of international law led to a conceptual merger between 'enemy' and 'pirate' in a manner inconsistent with the definition of the offence. See *supra* note 36, and also Rubin, *supra* note 21, at 196–201.

<sup>95</sup> Similarly, Jean Bodin, defining political sovereignty in 1576, began his argument with the question whether a sovereign state could be distinguished from a community of bandits or pirates: see Kempe, *supra* note 36, at 389. Grotius believed that agreements with pirates were restrictive, since as human beings pirates had a part in the law of nature; however, since pirates have no legal status as a community they cannot benefit from the law of nations: see *ibid.* I therefore assume that Grotius believed that piracy was located on the side of illegality, but not outside the law.

<sup>96</sup> See *supra* note 49.

<sup>97</sup> Or, as Parker ironically suggested when analysing the words of one of the judges who tried Roberts's crew, 'God's will was alongside the law, alongside the state, and alongside the East Indian company'. See Parker, *supra* note 13, at 181.



extent that they were a stick in the wheel of the Empire economy. Not surprisingly then, the story of digital piracy also seems to exude a flavour of confrontation between a counter-culture and an Empire.

## 4 Digitizing the Black Flag

Enlightenment traveled atop a cascade of reprints. No piracy, we might say, no Enlightenment.  
Adrian Jones<sup>98</sup>

### A *Virtually Pirate*

Metaphoric use of the term ‘piratical’ to describe unauthorized copying and distribution of content came to the world together with the invention of print and the mechanical reproduction of texts.<sup>99</sup> Apparently, the first time certain copies of literary works were consistently referred to as ‘pirate’ copies was in the mid-17th century in England.<sup>100</sup> Daniel Defoe – the author, the journalist, but also the merchant and the bankrupt – embodies the connection between the two phenomena and the diffusion of the linguistic concept. Defoe, author of *Robinson Crusoe* and probably of *A General History of the Pyrates*, was also the author of a 1718 published article<sup>101</sup> which contained, according to historian Adrian Jones, the first taxonomy of journalistic piracy.<sup>102</sup>

In common parlance, the term ‘piracy’ refers mainly to the ‘theft’ of goods that are protected by intellectual property laws,<sup>103</sup> i.e. illegal copying and distributing of copyrighted cultural contents, such as code, software, music, games, films or academic papers, but also patents, trademarks and trade secrets. Piracy is defined here alongside, and against, the concept of property, only now property itself is virtual. ‘Intellectual property’, a fine metaphor in its own right, enfolds a normative choice: to consider intellectual products as property, and moreover as private property.

In the 1980s, the paradigmatic pirate would be Stephen Wozniak, who, together with Steve Jobs, built and sold blue-boxes used for phone-phreaking, i.e. for making phone calls for free, before they built the Apple I computer.<sup>104</sup> This mode of operation

<sup>98</sup> A. Jones, *Piracy: The Intellectual Property Wars from Gutenberg to Gates* (2009), at 50.

<sup>99</sup> *Ibid.*, at 23.

<sup>100</sup> *Ibid.* From the mid-17th century one can encounter the term in the writings of prominent authors such as Defoe, Swift and Pope; and in the dictionary definition of ‘pirate’ the following possibility appeared: ‘one who unjustly prints another person’s copy.’ *Ibid.*

<sup>101</sup> D. Defoe, *A Vindication of the Press* (1718).

<sup>102</sup> Jones, *supra* note 98, at 44.

<sup>103</sup> It seems that no legislature has used the term ‘theft’, reserved for tangible property, to denote the practice of unauthorized copying or distribution of intangible property. Usually, the term ‘infringement’ is used to refer to offences in the domain of intellectual property. For more on this peculiarity, see Ludlow, ‘Piracy, Property Rights, etc.: Does Information “Want to Be Free?”’, in P. Ludlow (ed.), *High Noon on the Electronic Frontier: Conceptual Issues in Cyberspace* (1996) 1, at 3.

<sup>104</sup> Gomes, ‘Secrets of the Software Pirates’, *Esquire* (1 January 1982), available at <https://bit.ly/3gjrQ04>.

manifests one form of the profound connection between piracy and capitalism: challenging prevailing modes of property distribution, while fully accepting the dominant capitalist logic. Later, free software and open source (F/OSS) projects, along with file-sharing programs, were dubbed ‘piratical’.<sup>105</sup> These forms of piracy, often driven by a free culture ethos, oppose the underlying assumption of central control over information distribution, but also challenge the desirability of a pervasive private property regime in the context of cultural content.

However, like its maritime predecessor, this economic narrative is also insufficient. Jessica Beyer and Fenwick McKelvey claimed that framing digital piracy as a challenge to property rights under-emphasizes the broader political challenge that digital pirates, and the hacker culture more generally, pose to state authority.<sup>106</sup> Hacker cultures have traditionally promoted resisting prescribed uses of fixed technologies and the development of technology that actualizes openness, for example digital tools that are difficult for the state’s administrative gaze to monitor and control.<sup>107</sup>

While the terms might be used metaphorically, the wars over the control of intangible products of the mind are very real. The control of information and the means of its production and distribution have become key to economic success in recent decades.<sup>108</sup> No surprise then that digital piracy has become, as Jones has phrased it, ‘the definitive transgression’ of the digital age.<sup>109</sup> Since the consolidation of the Internet, which opened a huge new market for the production, distribution and exchange of information commodities, conflicts over digital piracy have turned turbulent and bitter. Accordingly, the legal protection of intellectual property in Europe and the United States has gradually become more comprehensive and rigid.<sup>110</sup>

The label ‘pirate’ is attached to all kinds of political hackers and even darknet drug-lords such as Ross Ulbricht. Such practitioners proudly call themselves pirates – as did Ulbricht – or willingly adopt the pirate label given to them by others, and in both cases defend their actions as morally justified. However, some of those accused of piracy refuse the label, claiming that piracy is a most severe crime committed at sea, and therefore there is no connection between such a crime and illegitimate or illegal copying of content; the labelling is perceived as an overt linguistic manipulation intended to gain political or economic advantage, a ‘public relations chatter’.<sup>111</sup> This opposition rejects the pre-supposition that a pirate solely promotes self-interest. Rather,

<sup>105</sup> See E. G. Coleman, *Coding Freedom: The Ethics and Aesthetics of Hacking* (2013), at 185.

<sup>106</sup> Beyer and Fenwick, ‘You Are Not Welcome Among Us: Pirates and the State’, 9 *International Journal of Communication* (2015) 890.

<sup>107</sup> *Ibid.*, at 894.

<sup>108</sup> R. Whitaker, *The End of Privacy: How Total Surveillance is Becoming a Reality* (1999), at 69.

<sup>109</sup> Jones, *supra* note 98, at 5.

<sup>110</sup> In general, the types of intellectual products protected by IP laws have multiplied, the duration of legal protection of copyrighted materials has been significantly extended and penalties for infringements have been increased.

<sup>111</sup> See, e.g., Dames, ‘Dismantling the “Piracy” Frame’, *COPYSENSE* (2007), available at [http://copycense.com/2007/04/18/dismantling\\_the/](http://copycense.com/2007/04/18/dismantling_the/).

it perceives piracy as political activism in pursuit of the common good. The contemporary debates over terminology further expose the dialectics of piracy, used to either undermine or strengthen actors' legitimacy, depending on the eye of the beholder. The case of *The Pirate Bay* exemplifies this truism.

## B *Tortuga (Digitally) Revisited*

In 2006, Swedish politics became the nursery for the first Pirate Party, which won two seats in Parliament in 2009. One of the basic premises of all pirate parties is that 'privatized monopolies are one of the worst enemies of society'.<sup>112</sup> From a cultural point of view, northern Europe's high tolerance for piratical practices might seem understandable when we recall the glorious pirate history of the Vikings or the Danes, which were the epithets the north European raiders gave themselves between the 9th and 11th centuries.<sup>113</sup> In fact, many Vikings have been, and still are, considered cultural heroes. The formidable Icelandic Sagas attest to this, and let us not forget that one of the most beloved characters in Western children's literature, Pippi Longstocking, is the proud daughter of a Swedish pirate.

Naturally then, Sweden also serves as the basis for what anthropologists Shannon Lee Dawdy and Joe Bonni called 'the virtual piracy Tortuga' – the world's largest BitTorrent site, cheerfully named *The Pirate Bay* (TPB) by its founders.<sup>114</sup> TPB was established in 2003 by a Swedish anti-copyright organization, and became a prominent platform for political initiatives against established legal copyright regimes.<sup>115</sup> As a powerful symbolic actor, TPB frames file-sharing as a political act.<sup>116</sup> TPB's pirates perceive themselves as fighting against an unfair system and responding to an escalation in legal enforcement that works hand in hand with strengthening the monopolies of media corporations. As Lawrence Lessig explained, file-sharing practitioners are often motivated to break the law because 'the law's role is less and less to support creativity, and more and more to protect certain industries against competition'.<sup>117</sup>

At the end of the 20th century, the popular peer-to-peer (p2p) file-sharing site Napster inspired the ambitions of the pirate underground and made the term 'p2p' synonymous with state-evading communication.<sup>118</sup> In 1999, US authorities acted on behalf of media industries to dismantle Napster, but the court ruling, which

<sup>112</sup> As evidenced by the principles of the Swedish party ratified in 2012: see The Pirate Party, 'Declaration of Principles' (version 4.0, May 2012), available at [https://en.wikisource.org/wiki/Pirate\\_Party\\_Declaration\\_of\\_Principles/4.0](https://en.wikisource.org/wiki/Pirate_Party_Declaration_of_Principles/4.0).

<sup>113</sup> 'Viking' described simply sailors who make a living from looting. The term was not used to indicate the appropriateness of this way of life, or the lack of it. See Rubin, *supra* note 21, at 182. The Victual Brothers are also a link in this chain of tradition: see text accompanying notes 24–27.

<sup>114</sup> Dawdy and Bonni, *supra* note 13, at 689. TPB is a search engine that searches for files containing information ('seeds') about the file the user is interested in. When it detects someone who shares the file, it directs the user to it.

<sup>115</sup> J. L. Beyer, *Expect Us: Online Communities and Political Mobilization* (2014), at 65.

<sup>116</sup> Beyer and McKelvey, *supra* note 106, at 898.

<sup>117</sup> L. Lessig, *Free Culture* (2004), at 19.

<sup>118</sup> Beyer and McKelvey, *supra* note 106, at 896.

practically killed Napster,<sup>119</sup> did not end digital piracy as they had hoped. On the contrary, Napster's demise inspired a nascent political movement intent on creating better state-evading networks.<sup>120</sup> Similar to Golden Age piracy, such networks undermine the secured distribution of property, only they do it through digital technology and by distributing responsibility among participants. Acknowledging that Napster's centralization was its critical weakness in facing state power, the next generation of p2p developers made decentralization their main ideology and strategy.<sup>121</sup> TPB's founders chose BitTorrent technology over other existing applications, thus expressing the desire to keep the network decentralized while enforcing sharing among peers.<sup>122</sup> Indeed, piracy is capitalism's *other* in yet another manner: it exposes the weak points which the market has to fix in order to improve, while at the same time bettering its own strategies to overcome new obstacles.

In 2006, TPB's servers were raided and its three founders arrested by the Swedish police, following a criminal complaint filed by the Motion Picture Association of America (MPAA). The public trial of TPB's founders ended with a one-year imprisonment for each of the defendants and fines totalling USD3.6 million. They have been found guilty of 'promoting' lawbreaking – each of them had ridiculed and provoked government and corporate institutions and representatives for years. However, while the MPAA bragged that 'Swedish authorities [sank] Pirate Bay', the site was online again three days later, and the sympathy for its cause only increased by the incident, giving rise to many more like it since then.<sup>123</sup>

From the pirate community's perspective, the global intellectual property regime is an imperialist endeavour, similar to previous imperialist projects aimed at demonizing pirates.<sup>124</sup> The TPB trial was perceived by a large community of supporters around the world as located at the heart of pressing questions concerning free exchange of information.<sup>125</sup> Every political actor involved in the dispute promotes a different concept of the domain to be – or not to be – regulated. The struggle for an open Internet somewhat naively resorts to arguments similar to Grotius's *Mare Liberum* rhetoric; for example,

<sup>119</sup> See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (2001). The court ruled that Napster had to control the communication in its p2p network in order to comply with copyright laws.

<sup>120</sup> Beyer and McKelvey, *supra* note 106, at 896.

<sup>121</sup> *Ibid.*, at 897.

<sup>122</sup> See McKelvey, 'We Like Copies, Just Don't Let the Others Fool You: The Paradox of The Pirate Bay', 16 *Television & New Media* (2014) 734, at 738.

<sup>123</sup> Sarno, 'The Internet Sure Loves its Outlaws', *Los Angeles Times* (29 April 2007), available at <https://lat.ms/2JFv4pG>.

<sup>124</sup> See Fredriksson, 'Copyright Culture and Pirate Politics', 28 *Cultural Studies* (2014) 1022.

<sup>125</sup> The protest against the Stop Online Piracy Act (SOPA) bill, presented before the US Congress in October 2011, is perhaps the largest-to-date resistance to anti-piracy legislative efforts. See Kang, 'House Introduces Internet Piracy Bill', *Washington Post* (26 October 2011), available at <https://wapo.st/3m0cycY>. The bill was widely supported by the lobby of US content industries. Its opponents claimed that it was de-facto internet censorship. On 18 January 2012, Wikipedia, Google and some 7,000 other smaller sites darkened their websites for 24 hours, in protest against SOPA. Two days later, US Congress suspended the plans to pass the bill. See 'Bill Killed: SOPA Death Celebrated as Congress Recalls Anti-Piracy Acts', *RT News* (20 January 2012), available at <https://bit.ly/3otQ4hN>.

that global free (digital) trade will liberate the world population from all kinds of oppression.<sup>126</sup> And similar to the *Mare Liberum* rhetoric, struggles surrounding control over digital commodities are metonyms for struggles over the possibility of controlling virtual trade routes in cyberspace.

### C *Putting the Genie Back into the Bottle*

The first contemporary intellectual to point out the connection between the use of cyberspace for subversive political activity and pirate practices in the early 18th century was anarchist Hakim Bey (aka Peter Lamborn Wilson), when defining the Temporary Autonomous Zone (TAZ). The TAZ includes forms of insurgency that do not directly confront the state, and the core of their strength lies in their invisibility.<sup>127</sup> Bey claimed to be inspired by the establishment of permanent settlements of Caribbean buccaneer communities and their organization according to anarchist principles. He identified the crucial role of control over information in the appearance – and even more so in the disappearance – of dissident communities. In the case of buccaneer settlements, it was the state's improved naval surveillance that led to their disappearance. Cyberspace, however, according to Bey, brought new opportunities for operating under the radar, thus raising a new hope for opposing 'the terminal State, the megacorporate information State, the empire of Spectacle and Simulation'.<sup>128</sup>

In the early days of the Internet, many leaders of digital counter-culture advocated an approach by which since the technological foundations of cyberspace resist territorial boundaries, it is – much like Grotius's high seas – practically unregulatable. The Internet was perceived as a 'sovereign for itself', subject to the sovereignty of none but the community of cyber 'natives'. This utopianism was famously manifested in the announcement made by John Perry Barlow, one of the founding members of the Electronic Frontier Foundation (EFF) and a network pioneer, who published in 1996 *the Declaration of Independence of Cyberspace* which opens with the following: 'Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather'.<sup>129</sup>

Legal scholarship was on par with this mode of exceptionalism. The same year that Barlow published his manifesto, David Johnson and David Post published their seminal paper which celebrated the possibility of a fatal attack against the hopefully outdated linking of sovereignty and territory. Johnson and Post argued that since cyberspace is not a physical space it cannot be controlled by sovereigns, whose control is limited to things that are located within their territory.<sup>130</sup> It took around a decade to 'sober up'

<sup>126</sup> For the similarities between the arguments, see Hildebrandt, *supra* note 87, at 212–213.

<sup>127</sup> H. Bey, *The Temporary Autonomous Zone* (1991).

<sup>128</sup> *Ibid.*, at 3.

<sup>129</sup> Barlow, 'A Declaration of the Independence of Cyberspace' (1996), available at [www.eff.org/cyberspace-independence](http://www.eff.org/cyberspace-independence).

<sup>130</sup> Johnson and Post, 'Law and Borders – The Rise of Law in Cyberspace', 48 *Stanford Law Review* (1996) 1367, at 1370.

from the dream of the practical ‘unregularability’ of cyberspace. As Milton Mueller pointed out, the early utopianism turned out to be not only naïve but also dangerous since it ignored the sophisticated ways in which states gained control over cyberspace.<sup>131</sup> The initial claims by which cyberspace is *a priori* freer than ‘real space’ prevail no more. Jack Goldsmith and Tim Wu claimed that nation-states pull the strings – or better, the cables – of cyberspace.<sup>132</sup> But, as noted by Julie Cohen, ‘the belief that [cyberspace] is nonetheless inherently different has persisted’.<sup>133</sup> This belief is evident in the call to discuss legal regulation of the Internet by using tools that were formulated in the past for dealing with (what is conceived to be) analogous spaces, namely outer space and Antarctica, and above all the high seas.<sup>134</sup>

As is clear enough, nation-states consider cyberspace as a quasi-physical expansion of their more tangible territory. It follows that the ability of states to control the actual hardware infrastructure of the Internet and its content generates their ability to regulate the Internet.<sup>135</sup> However, the United States and its allies claim that cyberspace is not, and should not, be subject to sovereign control, in contrast to China, Russia and other states that claim that it is sovereigns who need, on their own or jointly, to control cyberspace.<sup>136</sup>

The US approach perceives cyberspace as dominated by global cyber governance, consisting of multiple stakeholders – the state, non-governmental organizations (NGOs), the private sector, civil society organizations, academics and individuals.<sup>137</sup> Ostensibly, such a framework considers cyberspace as ‘global commons’, and might thus resemble a cyberspace-as-sovereign approach; but despite the declared reasons of freedom of speech for the US support of the ‘multi-stakeholder’ approach, the model serves well the interests of the United States as a superpower with perhaps the greatest degree of effective control over cyberspace. This is partly due to the fact that many of the non-governmental voices that this model empowers, including tech giants, have ties to the United States or share its values.<sup>138</sup> In this sense, the United States is probably the nation closest to having quasi-sovereign control over cyberspace,<sup>139</sup> disguised

<sup>131</sup> Mueller, ‘The New Cyber-Conservatism: Goldsmith/Wu and the Premature Triumphalism of the Territorial Nation-State – A Review of Goldsmith and Wu’s *Who Controls the Internet? Illusions of a Borderless World*’ (Internet Governance Project Paper No. IGPO6-003, 2006).

<sup>132</sup> See J. Goldsmith and T. Wu, *Who Controls the Internet? Illusions of a Borderless World* (2008).

<sup>133</sup> Cohen, ‘Cyberspace as/and Space’, 107 *Columbia Law Review* (2007) 210, at 211.

<sup>134</sup> See Eichensehr, ‘The Cyber Law of Nations’, 103 *Georgetown Law Journal* (2014) 317.

<sup>135</sup> See Kanuck, ‘Sovereign Discourse on Cyber Conflict Under International Law’, 88 *Texas Law Review* (2009–2010) 1571, at 1575. See also Eichensehr, *supra* note 135, at 327.

<sup>136</sup> Eichensehr, *supra* note 134, at 330.

<sup>137</sup> *Ibid.*, at 329.

<sup>138</sup> *Ibid.*, at 347.

<sup>139</sup> Effective US control over data-flows fuels the debate surrounding cloud computing and ‘data sovereignty’, i.e. the requirement that data be subject to the laws of the country in which it is collected or processed. In the transnational environment, cloud services – borderless by their very nature – cross various jurisdictions. See Irion, ‘Government Cloud Computing and National Data Sovereignty’, 4 *Policy & Internet* (2012) 40, at 48. The Canadian Government enacted several Data Sovereignty measures, reasoning that ‘the primary risk to data sovereignty is the US Foreign Intelligence Surveillance Act (FISA) and the US Government’s ability to compel an organization subject to US law to turn over data

by a rhetoric which makes such control inappropriate and undesirable, while annexing more and more infrastructure and content control loci.<sup>140</sup>

Here, again, the *Mare Liberum* reasoning openly supports ideals such as solidarity and openness while in fact serving imperial interests of leaving the routes open – for the Empire to rule. Grotius’s high seas were an empty promise of liberty; theoretically open to everyone, but practically open to none but those with the power to dominate it. In that sense, the early utopia of net pioneers like Barlow rather undermines *Mare Liberum*, since that utopia took at face value the assumption that cyberspace (or the high seas) are global commons, a place of passage – or a conduit – for the benefit of all.

The standpoint of information mega-corporations is worth a closer inspection. As Chris Land dryly noted, ‘those in the entertainment industry who are so busy commodifying the pirates of the Caribbean are also those most vociferously opposed to its current practice’.<sup>141</sup> Indeed, contemporary information-corporations are simultaneously pirates’ fiercest enemies and themselves licensed pirates, aka privateers. Rhetorically, the distinction between digital privateers and pirates is well understood in terms of intellectual property laws. Dawdy and Bonni believe that contemporary media conglomerates are similar to charter corporations, by having close relations with governmental systems which grant them monopolies, and by earning legendary sums of money through assets they can access ‘thanks to the modern parallel of sovereign letters of marque, aka copyright law’.<sup>142</sup> Indeed, contemporary piratical initiatives use a symbolic inversion of the piracy rhetoric, proclaiming governments and corporations to be the ‘real’ pirates, just as Friedell portrayed Golden Age trading

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under its control, regardless of the data’s location and without notifying Canada’. See Government of Canada White Paper: Data Sovereignty and Public Cloud (2018), available at <https://www.canada.ca/en/government/system/digital-government/digital-government-innovations/cloud-services/gc-white-paper-data-sovereignty-public-cloud.html>. EU Data Regulations also restrict EU citizens’ data transfer: see Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, Arts 45, 46. OJ 2016 L 19/1 (hereinafter ‘General Data Protection Regulation’, ‘GDPR’). In 2015, Russia introduced a law that forces cloud service providers to store Russian users’ information in local data centres. After Facebook and Twitter failed to comply with the law, Russian administration threatened to block their services, but ultimately fined them USD63,000 each in February 2020. See ‘Russia Fines Twitter and Facebook \$63,000 Each Over Data Law’, *Moscow Times* (13 February 2020), available at <https://bit.ly/2VKuTvW>.

<sup>140</sup> It is worth noting that China is continuously targeted as the ultimate pirate nation by US intellectual property officials, with a total disregard for deep cultural differences concerning approaches to questions of creativity, authenticity, authorship and ownership. I wish I could dwell more on the subject; however, for considerations of space, a reference to Fredriksson, *supra* note 124, will have to suffice.

<sup>141</sup> Land, *supra* note 13, at 185.

<sup>142</sup> Dawdy and Bonni, *supra* note 13, at 691. The comparison is probably more appropriate with regard to the part of intellectual property law that deals with patents, but in any case the essence of the argument demonstrates the rhetoric used by digital pirates. On the ongoing handshake between governments and corporations concerning control over information, see Birnhack and Elkin-Koren, ‘The Invisible Handshake: The Reemergence of the State in the Digital Environment’, 8 *Virginia Journal of Law and Technology* (2003) 6.

companies, those ‘concessionaires . . . for the raiding of lands overseas’, as ‘nothing but corsairs’.<sup>143</sup>

At first it might appear that these companies’ desire to liberate trade routes from governmental regulation allies them with pirates in the fight against central control over the internet. This is but a misleading appearance; the corporations’ campaign against internet regulation fits nicely with Grotius’s empty promises of liberation, since the corporations practically own the means of production of information, network infrastructures, gigantic amounts of valuable information and the most effective means to distribute it. Rather than a new mighty *other* of nation-state sovereignty, these corporations are nation-states’ bedfellows, in spirit and matter. Much like the early charter corporations, information corporations subscribe to the dominant capitalist model while collaborating with their respective nation-state. Their fight against regulation by other states – much like the growing support for Grotius’s cause once the Dutch monopoly had disintegrated – indicates a deep alignment of interests, and no doubt marks the centrality of the United States as the England of ‘Tortuga 2.0’ and the American big Internet service providers (ISPs) in defining piracy today, very much like the role played by the British Empire in the Golden Age.

It should be noted that the disengagement of the state from non-complying actors does not mean severing the relationship between sovereigns and lucrative private endeavours. Just as there is no reason to assume that the eradication of Atlantic piracy severed the connection between the state and profitable violence, so the present era is a golden age of a new kind of privateer – information mega-corporations, private mercenaries, security services and state-funded hackers.<sup>144</sup> The ever-tightening net of global IP trade agreements might remind us of 18th-century trade corporations using private armies to enforce their state-like rules in international trade.<sup>145</sup> And the show trials of media piracy in the early 2000s are reminiscent of the persecution, turned prosecution, of pirates at the beginning of the 18th century by an alliance of states and monopoly companies.<sup>146</sup>

Developers, hackers and computer experts have been instrumental in the transformation from the analogue into the digital age.<sup>147</sup> Here, the comparison with the

<sup>143</sup> See Friedell, *supra* note 88, vol. 1, at 325–326. A contemporary example of this rhetorical inversion can be found in the declaration published by the hackers collective LulzSec before their #AntiSec operation: ‘. . . the government and whitehat security terrorists across the world continue to dominate and control our Internet ocean. Sitting pretty on cargo bays full of corrupt booty, they think it’s acceptable to condition and enslave all vessels in sight . . .’. For the full declaration, see ‘Operation Anti-Security’, Pastebin (19 June 2011), available at <https://pastebin.com/9KyAOE5v>. LulzSec targeted, among others, Strategic Forecasting Inc. (Stratfor), which served as a sort of private, mercenary intelligence agency. After Wikileaks published the materials that were obtained from Stratfor, international attention was drawn to the largely invisible world of private intelligence industry. See Norton, ‘Antisecc Hits Private Intel Firm; Millions of Docs Allegedly Lifted’, *Wired* (26 December 2011), available at <https://bit.ly/33MFMBp>.

<sup>144</sup> For a similar claim, see Parker, *supra* note 13, at 182.

<sup>145</sup> Dawdy and Bonni, *supra* note 13, at 682.

<sup>146</sup> *Ibid.*, at 693.

<sup>147</sup> For a masterful account of a prominent example – the personal computer ‘revolution’ – see Pfaffenberger, ‘The Social Meaning of the Personal Computer: Or, Why the Personal Computer Revolution Was No Revolution’, 61(1) *AQ* (1988) 39.



Golden Age highlights perhaps the most striking similarity between maritime and digital piracy, which has not been discussed yet in the literature: the presence of an innovative medium that allows for the expansion and universalization of an economic system. The Golden Age was a critical period for the monetization of the European economy and the end of the barter, which came about mainly through the exploitation of the Inca and Aztec gold and silver.<sup>148</sup> In the information age, the 'digital' is the universal currency that enables the flow of information. Without digitization, the information revolution could not have been materialized. Without monetization, trade could not have become global, and industrial capitalism as we know it might not have developed. Pirates were a pioneering force in both processes of universalizing the medium of exchange. And like their Golden Age predecessors, digital pirates became superfluous to dominant political and economic powers once the latter gained sufficient control over the trade routes.

### D *No Pirate Is an Island*

Traditional resistance groups often lacked real power except for the organizing power and a certain degree of slyness and physical strength which political scientist James Scott called the 'weapons of the weak'.<sup>149</sup> In contrast, digital organization arouses anxiety due to what anthropologist Gabriella Coleman called 'weapons of the geek', i.e. the technological skills of individuals, which often match the skills of those who control governmental and economic loci of power, combined with a developed political consciousness able to put those skills to use.<sup>150</sup> Indeed, while the majority of Golden Age pirates belonged to the socially and economically weak strata of society, the typical digital pirate belongs to a highly privileged and relatively technologically sophisticated population. Thus, in contrast to the favourable public opinion, which portrayed Captain Kidd as a working-class sailor crushed by a behemoth corporation, one might say that contemporary pirates are no more than a commodified version of resistance – some spoiled brats with an expensive keyboard and romantic dreams of transgression to be later abandoned. Nonetheless, both groups of pirates play the role of the weaker party in the struggle. And both use their skills to impose terror on their opponents, whose terror gets to become the rule of the game.

Despite the fact that pirates rarely operate alone, legal literature has overlooked the social aspects of piracy.<sup>151</sup> Instead, it characterizes piracy as an individualist crime performed for the perpetrator's own benefit. By now, the analytical and practical shortcomings of this erroneous approach have been hopefully made clear. But perhaps we could stress the point and challenge the self-interest requirement a bit further by asking whether a good self-interested capitalist can be also a pirate.

<sup>148</sup> Land, *supra* note 13, at 171.

<sup>149</sup> J. C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (1985).

<sup>150</sup> E. G. Coleman, *Hacker, Hoaxer, Whistleblower, Spy: The Many Faces of Anonymous* (2014), at 106–107.

<sup>151</sup> Sicking asserted that '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'. See Sicking, *supra* note 23, at 180.

Today's romanticized idea of the pirate (ironically promoted by the commercialization of Golden-Age piracy narratives in the media) embraces TPB founder Peter Sunde, but makes it hard to accept the label 'pirate' for someone like Ross Ulbricht. While Sunde represents resistance to global monopolies flourishing under the banner of neoliberalism, and advocates a total elimination of private property, Ulbricht represents the competitive, hedonistic mentality of neoliberal capitalism. From this perspective, piracy is seen as capitalism's 'brother' – enhancing and enabling new forms of consumption.<sup>152</sup> Since *Silk Road's* admin Ulbricht charged fees for every transaction on the site, even if he aspired to present 'a simulation that will show people how a world without violence would look like',<sup>153</sup> this simulation was intended to be a profitable economic venture. The site's – and Ulbricht's – economic success was perceived by many as an unforgivable greed, and it is perhaps one of the reasons why Ulbricht garnered no supporters calling for his release, as was the case with TPB operators.<sup>154</sup>

The issue is not new: Golden Age pirates were also portrayed as successful capitalists, who implemented Adam Smith's principles out of selfish motives to maximize the material return of their investment while minimizing the risks.<sup>155</sup> But as Dawdy and Bonni noted, the apparent contradiction between the pirates' greed and their socialist tendencies can be explained by recognizing that the pirates were both: they took for themselves – as a group – and divided what they took according to a sharing ethos.<sup>156</sup> In both cases, pirates shared the desire to reverse the order of power and to challenge property rights as a part of challenging the authority of the state. As a solitary entrepreneur, Ulbricht might have lacked the sharing ethos. However, I believe that he did challenge state authority in a way that merits the label 'pirate': as an ardent advocate of crypto-anarchism.

The innovative nature of *Silk Road* lay in the novelty of combining two technological tools to achieve the site's objectives: the TOR browser which enabled anonymous surfing, and the digital currency Bitcoin, which enabled anonymous transactions.<sup>157</sup>

<sup>152</sup> One 'little brother' that reaped the benefits of *Silk Road's* innovative form of consumption was none other than the FBI. The Bureau seized approximately USD80 million in Bitcoins from Ulbricht and *Silk Road's* customers, and claimed the seizure was legal only because Bitcoin was not recognized as a currency. See Donnell, 'BitCoin Users Angry with FBI Seizure of Silk Road Funds', *eTeknix* (2013), available at <https://bit.ly/3girRlq>.

<sup>153</sup> As was stated by Ulbricht in his LinkedIn profile. See <https://www.linkedin.com/in/rossulbricht>.

<sup>154</sup> In fact, as soon as DPR was captured, Ulbricht became an ostracized person, probably following the main charge that he had ordered six assassinations on *Silk Road*, which had led to his arrest. When the indictment finally appeared, there was no mention of the assassinations, but the public opinion and the jury had already been tainted irreparably. The documentary *Deep Web* chronicles the rise and fall of *Silk Road*, along with the demonization of Ulbricht as a result of the unreliable assassination accusations. Alex Winter (dir.), *Deep Web* (epix, 2015), esp. 40–49 min. Indeed, any deliberate violation of law might be perceived as threatening the existing order. However, while file sharing is a daily practice used by generally law-abiding individuals, using the services of sites like *Silk Road* might not be perceived by the general public as normative behaviour, assuming that the 960,000 users – sellers and buyers – of *Silk Road* are not large enough a group to be recognized as part of the 'general public'.

<sup>155</sup> See, e.g., P. Leeson, *The Invisible Hook: The Hidden Economies of Pirates* (2009).

<sup>156</sup> Dawdy and Bonni, *supra* note 13, at 675.

<sup>157</sup> See Grinberg, *supra* note 7.

Indeed, from the early days of the Internet, groups such as the *Cypherpunks* were inspired by Hakim Bey's TAZ – modes of operation that are invisible to the state – hoping to avoid the fate of their Golden Age predecessors.<sup>158</sup> Beyer and McKelvey noted that darknets antagonize the state since they bypass intellectual property regulations while drawing on the Internet's capacity to remain anonymous, and thus invisible to the authorities' gaze.<sup>159</sup>

In a way, Ulbricht's darknet is thus the closest approximation of *Mare Liberum*. In cyberspace, as on the high seas, privacy is a prerequisite for keeping traffic routes out of central monitoring. The privilege to remain anonymous by using aliases (e.g. DPR) not just differentiates Ulbricht from the TPB operators; it also gives him an advantage over Captain Bart Roberts and his contemporaries. Encrypted communication networks also give digital pirates (at least temporarily) an advantage over their maritime predecessors. Denying the relative liberty afforded by online anonymity is tantamount to promoting the freedom of *Mare Liberum* without providing the means to materialize it but for the most powerful.

Teschke described the relations between types of sovereignty and political power, using two principles: the degree of decentralization of political power, and the personalization it undergoes.<sup>160</sup> The combination that does not (yet) appear in Teschke's taxonomy is de-centralization and de-personalization of political power: a new possibility of a political life that might not suffer from the old, familiar evils. This utopian political form might be the origin of the aspirations shared by cyber-communities, such as *Anonymous*, TPB and even *Silk Road*.<sup>161</sup> Pirates like Ulbricht and his *Silk Road* are vital for paving a path to materializing such aspirations.

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In October 2015, the US Court of Appeals for the second Circuit declared that Google's unauthorized copying practices in the Google Books project were compatible with the conditions of the fair use doctrine.<sup>162</sup> Was this an important victory for the pirate counter-culture? It is hard to imagine that anyone will accept the portrayal of a tech giant such as Google as a radical force of resistance without raising an eyebrow. More likely, we are witnessing the emergence of a new empire, Bey's information mega-corporation, domesticating cyberspace by appropriating the paradigmatic practice of content-piracy in the name of public service and dictating the rules of the game by choosing what will or will not be called piracy according to its own political interests.

<sup>158</sup> Beyer and McKelvey, *supra* note 106, at 897.

<sup>159</sup> *Ibid.*, at 895.

<sup>160</sup> Teschke argued that if feudalism implied the de-centralization and personalization of political power by lords, and absolutism implied centralization and personalization of political power by dynasties, capitalism implies the centralization and de-personalization of political power in the form of the modern state. See Teschke, *supra* note 84, at 31.

<sup>161</sup> The film *Deep Web* also provides evidence that the site was 'a real community of people who think the same'. See *Deep Web*, *supra* note 155, mainly at 7–8 min.

<sup>162</sup> *Authors Guild v. Google Inc.*, Docket no. 13-4829-cv (2d Cir., 16 October 2015).

Again, the function of piracy as a discursive othering mechanism serves those in power to name and define greed, self-interest or general welfare in a way that best suits their own interests. Whereas Ross Ulbricht's endeavour is framed as an outrageous self-interested avarice and TPB's as greedy robbery, Google's endeavour is an admirable contribution to the general welfare. One can take comfort in the fact that relativity has always surrounded the persona of the pirate – reviled by his enemy who enjoys the excesses of power and idolized by his fellow seafarers and beneficiaries.

## 5 Epilogue

At the end of the 20th century, David Foster Wallace was commissioned by *Harper's* magazine to document his participation in a seven-night Caribbean luxury cruise, with the instruction to deliver 'a sort of really big experiential postcard – go, plow the Caribbean in style, come back, say what you've seen'.<sup>163</sup> In his ironic, melancholy essay, Wallace described the sense of despair that he felt when thrown into 'an enormous primordial engine of death and decay', with all the efforts of this engine aimed at concealing this very death and decay, developing fantasies of victory over it and representing 'the Calvinist triumph of capital and industry over the primal decay-action of the sea'.<sup>164</sup> When the ship anchored in Jamaica, 'fake pirate ships' were anchored around it, offering tourists organized tours or serving as a backdrop for the crowd that had taken over the souvenir shops in the port.<sup>165</sup> The domestication of the ocean has reached its decadent stage. The simulation was completed, the uncanny, in the Freudian sense, was sufficiently removed; perhaps – following NASA's announcement that it had found water on Mars – into outer space. But not for long; the role of the *other* cannot remain vacant. New privateers have already set sail.<sup>166</sup> Soon another link in the chain of piracy will be forged.

<sup>163</sup> David Foster Wallace, 'A Supposedly Fun Thing I'll Never Do Again', in *A Supposedly Fun Thing I'll Never Do Again: Essays and Arguments* (1997) 256, at 257.

<sup>164</sup> *Ibid.*, at 263.

<sup>165</sup> *Ibid.*, at 312.

<sup>166</sup> The first manned NASA mission launched by a private space company, Elon Musk's SpaceX, ended successfully on 2 August 2020. See Chang, 'Thanks for Flying SpaceX: NASA Astronauts Safely Splash Down After Journey From Orbit', *The New York Times* (2 August 2020), available at <https://nyti.ms/33SGhKn>.