

## 2 “Publique Enemies to Mankind”

International Pirates as a Product of International Politics

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### Abstract

The origins of modern international law are frequently sought in the Early Modern period, and piracy has often been accorded a major role in this development, as well as in the emergence of an international system of states. The chapter highlights how international law developed through a process that Kempe calls “integration by exclusion.” Specifically, the author focuses on the piratical exploits and subsequent trial of John Cusack, executed in 1675. The case illustrates how accusations of piracy as a crime against all nations was a central element in the emergence of international law in Europe and in the establishment of England’s claim to be an effective global sea power. This demonstrated its ability to project its jurisdiction at sea far beyond the country’s shorelines.

**Keywords:** John Cusack, international law, sea power, maritime jurisdiction, Early Modern

### Introduction

In recent years, scholars of the global history of piracy have begun to question the traditional view that piracy was mainly a European concept, spread around the world during the European expansion in the Early Modern period.<sup>1</sup> While there have been attempts to understand piracy from a global, cross-cultural perspective, there has been less attention given to how the

<sup>1</sup> See for instance, Patricia Risso, “Cross-Cultural Perceptions of Piracy: Maritime Violence in the Western Indian Ocean and Persian Gulf Region during a Long Eighteenth Century,” *Journal of World History* (2001): 293–319; Stefan Eklöf Amirell and Leos Müller (eds), *Persistent Piracy: Maritime Violence and State-Formation in Global Historical Perspective* (New York: Palgrave,

European and non-European concepts of piracy developed concurrently within the period of European expansion in the seventeenth and eighteenth centuries. Especially noteworthy has been the work of historians of international law who have pioneered important studies of the meaning of piracy.<sup>2</sup> Comparatively neglected within this work, however, is an explanation of how piracy functioned as an integrating factor in forming the public law of European nations. This paper will explain why the international pirate played a significant role as a figure of *negative integration* in the *Ius Publicum Europaeum*. In forming an international community of nations bound by law in the seventeenth century, the pirate as the common enemy of all was a crucial ingredient.

On 30 August 1674, after several months of pursuit, the English Admiralty finally succeeded in capturing George Cusack, one of the most sought and feared pirates in Europe, in the Thames estuary. Soon after, a short treatise was published detailing the arrest of Cusack. In it, he was classified among the most evil kinds of criminal, namely, a pirate and sea robber. Pirates were the direst enemies of the human race, who must be wiped out like troublesome vermin:

Amongst all the rapacious violencies practised by wicked Men, there is scarce any more destructive to Society and Commerce then that of Piracy, or Robbers of the Sea, whence in all Ages they have been esteemed, *humani generis hostes*, Publique Enemies to Mankind whom every one was obliged to oppose and destroy, as we do Common vermine that Infest and trouble us.<sup>3</sup>

In this chapter, I will place Cusack's history in the context of piracy's place in the rapid development of international relations and international law in this period. In previous scholarship on the history of the community of nations as a legal concept, attention has primarily been directed at

2014); and Stefan Eklöf Amirell, *Pirates of Empire: Colonisation and Maritime Violence in Southeast Asia* (Cambridge: Cambridge University Press 2019), 34–40.

2 See for instance, Alfred P. Rubin, *The Law of Piracy* (New Port, RI: US Naval War College Press, 1988); Lauren Benton, *Law and Colonial Cultures. Legal Regimes in World History, 1400–1900* (Cambridge: Cambridge University Press, 2002); Michael Kempe, *Fluch der Weltmeere. Piraterie, Völkerrecht und internationale Beziehungen, 1500–1900*, (Frankfurt / New York: Campus Verlag, 2010); and *idem*, “Even in the Remotest Corners of the World’: Globalized Piracy and International Law, 1500–1900,” *Journal of Global History*, no. 5 (2010): 353–372; persistent link: <https://doi.org/10.1017/S1740022810000185>.

3 *News from Sea, Or The Taking of the Cruel Pirate, being a Full and True Relation how Captain Cewsicke, alias Dixon, alias Smith, an Irish-Pyrate [...]* (London: printed for R.W., 1674), 1.

*inward* integration, for example by reference to universals, such as shared customs, habits, or treaties.<sup>4</sup> In contrast, I will draw attention here to the question of *outward* delimitation, or integration by exclusion. What is at issue here is the constitution of an international legal community through the conceptualization of the pirate as the common enemy of humankind.

The history of piracy in this period charts a complicated terrain of subtle meanings and mendacious matters of state. The suppression of piracy was used in England, for example, as a way of implementing claims to sea power. Yet, those same pirates were executed precisely by those authorities and institutions that had formerly promoted them. It was comparatively easy for sea captains to obtain letters of marque or other licences to take booty at sea, so long as it was taken from the authorizing sovereign's enemies. The widespread practice of international privateering created a class of nationally unattached privateers who might obtain legitimate employment from different sovereigns. The activities of these international troublemakers inevitably led to an agreement between the European nations to set limits to the privateering system. They did so by extending the concept of piracy. Whereas the question at issue at the beginning of the seventeenth century was how to establish the most extensive right as possible to take booty at sea, as formulated by, for example, Hugo Grotius,<sup>5</sup> from the second half of the seventeenth century, European sea powers sought to regulate this right of booty more strictly. The price paid for this change in international prize and privateering policy was that the not inconsiderable reservoir of battle-hardened sea robbers it created began to operate independently. This ultimately led to the phenomenon of a globalized European piracy that connected the Atlantic with the Pacific and the Indian Ocean in the so called "Golden Age of Piracy" at the beginning of the eighteenth century.

4 Important milestones on the way to this development are seen in research in Grotius's concept of a "communitas inter civitates ex consensus," Theodor Graswinckel's "societas gentium," the "civitas maxima" in Christian Wolff or Emer de Vattel's concept of a "société des nations." For a fundamental treatment, see Ernst Reibstein, "Deutsche Grotius-Kommentatoren bis zu Christian Wolff," *Zeitschrift für Ausländisches und Öffentliches Recht und Völkerrecht*, no. 15 (1953/54): 77–102.

5 See Michael Kempe, "Beyond the Law. The Image of Piracy in the Legal Writings of Hugo Grotius," in *Property, Piracy and Punishment: Hugo Grotius on War and Booty in De iure praedae: Concepts and Contexts*, ed. by Hans W. Blom (Leiden: Brill, 2009), 379–395. Also in: *Grotiana* 26–28 (2005–2007): 379–395.

## The Sea Robber as *Hostis Humani Generis*

In European history, the understanding of the pirate as a universal enemy had developed in the context of considerations of the laws of war, which had their beginnings in Roman antiquity. In the last century before Christ, the spread of piracy in the Mediterranean had led scholars and lawyers of the Late Republic to embark on a legal clarification of the difference between war and piracy. Once war had been understood as a legal process, the next step was to distinguish between legal war enemies (*perduelles* or *hostes*) and non-legal enemies. In the case of the former, fundamental norms had to be observed, including the principle of contractual fidelity and, in particular, the observance of promises made under oath. The same did not apply to irregular opponents.<sup>6</sup> The classical lawyers defined legal wartime enemies by the criterion of official warfare. Enemies were those against whom the Roman people had publicly declared war. Hostile peoples against whom war could not be declared were termed robbers or bandits.<sup>7</sup> Regarding this latter category, Cicero pointed to the pirate, whom he defined not as a legal wartime enemy but the common enemy of all (*communis hostis omnium*), as standing outside all legal order.<sup>8</sup>

This concept of the pirate established itself in legal traditions derived from Roman Law, but was extended in the medieval period by descriptions, in the writings of Bartolus of Saxoferrato<sup>9</sup> for instance, of the sea robber as *hostis humani generis*. Canon Law further stamped the pirate as a heretic who must be expelled from the Christian community. In the *Bullae Coenae Domini*, all pirates, corsairs, and sea robbers (*omnes piratas, cursarios, ac latrunculos maritimos*), and the receivers of their stolen goods

6 See Karl-Heinz Ziegler, "Pirata communis hostis omnium," in *De iustitia et iure. Festgabe für Ulrich von Lübtow zum 80. Geburtstag*, ed. by Manfred Harder and Georg Thielmann (Berlin: Duncker und Humblot, 1980), 93–103, 97.

7 "Hostes sunt, quibus bellum publice populus Romanus decreuit uel ipsi populo Romano: ceteri latrunculi uel praedones appellantur." Digest 49, 15, 24. See also Digest 50, 16, 118: "Hostes' hi sunt, qui nobis aut quibus nos publice bellum decreuimus: ceteri 'latrones' aut 'praedones' sunt" (its not Cicero but Digest (Roman Law).

8 Cicero, *De officio*, 3, 29/107: "nam pirata non est ex perduellium numero definitus, sed communis hostis omnium; cum hoc nec fides debet nec ius iurandum esse commune."

9 See Emily Sohmer Tai, "Marking Water: Piracy and Property in the Premodern West," in *Seascapes: Maritime Histories, Littoral Cultures and Transoceanic Exchanges*, ed. by Jerry H. Bentley, Renate Bridenthal, and Kären Wigen (Honolulu University of Hawaii Press, 2007), 205–220, 215, n. 6.

(*receptatores*), are anathematized.<sup>10</sup> What was assumed here was that pirates were indiscriminate in attacking anybody, regardless of origin, nation, or religion. But it was also sufficient cause for the anathema if the pirate cruised the seas with the intention of plundering people from one nation, for example if French pirates preyed on the Portuguese alone.<sup>11</sup>

It was only towards the end of the sixteenth century, however, that piracy was first conceptualized in the context of international law. In 1588/89, the Italian lawyer Alberico Gentili took up Cicero's definition of the pirate in his *De iure belli libri tres*, explicitly linking the hitherto unspecific general concept of an enemy with international law.<sup>12</sup> According to Gentili, war on pirates is just because they have violated the *commune ius gentium*: "*Piratica est contra ius gentium, & contra humanae societatis communione.*"<sup>13</sup> The pirate violates the laws of war as a part of international law and therefore cannot enjoy its protection.<sup>14</sup> Gentili agrees with the legal tradition that a war against pirates can neither be officially declared, nor concluded by a treaty, and can only end with the death of the pirates or their victory.<sup>15</sup> The Italian lawyer went beyond previous tradition in seeing the pirate – even more so than the robber in general – as the general enemy of humanity *par excellence*.

10 Quoted here from Martino Azpilcueta, *Enchiridion sive Manuale Confessariorum et Poenitentium* (Würzburg, 1593), 878; and Molina, *De Iustitia*, col. 663. This document is a collection of sentences of excommunication announced by the popes on Holy Thursday, dating from the thirteenth century.

11 "Satis tamen est, ut quis pirata dicatur, incurratque proinde hanc excommunicationem, si intuitu depraedandi homines unius nationis dumtaxat discurrat per mare, ut si Galli discurrant animo praedandi solos Lusitanos." Molina, *De Iustitia*, col. 664.

12 "Piratae omnium mortalium hostes sunt communes. Et itaque negat Cicero, posse cum istis intercedere iura belli." Alberico Gentili, *De iure belli libri tres*, 2 vols (Oxford/London, 1933), vol. 1: The photographic reproduction of the edition of 1612; vol. 2: the translation of the edition of 1612, l. 1. ch. 4, 33.

13 Gentili, *De iure belli* (1612), l. 1. ch. 25, 201–202. On Gentili's understanding of the pirate, see also Gesina H. J. van der Molen, *Alberico Gentili and the Development of International Law*, 2nd edn. (Leiden: Sijthoff, 1968), 168–178; and Alain Wijffels, "Alberico Gentili e i pirati," in: *idem* (ed.), *Alberico Gentili Consiliatore. Atti del convegno quinta giornata gentiliana 19 settembre 1992* (Milano: Dott. A. Giuffrè, 1999), 85–131.

14 "Cum piratis, & latrunculis bellum non est. [...] Et alia ratione nec ius belli habent: quia ius belli à gentium iure est: & tales non fruuntur illo iure, cui hostes sunt." Gentili, *De iure belli* (1612), l. 1. ch. 4, 32–33.

15 "Nunquam pactis bellum cum praedonibus compositum, neque foederibus finitum: sed aut superstitibus fuere victores; aut victi necesse mori habuerunt." Gentili, *De iure belli* (1612), l. 1, ch. 4, 33–34.

Although one could assume that street robbers also prey on all people without distinction, the pirate alone did so on seas open to all nations,<sup>16</sup> and was thus, at least potentially, in a position to reach and to afflict members of virtually any country. The strategy and tactics of piratical activities were characterized by unpredictable spatial behaviour, namely, sudden appearance, immediate attack, and swift disappearance. The unlocalizable spatial presence, the emergence and then retreat into invisibility, made pirates a universal danger. The fact that this aggressor was simultaneously nowhere and everywhere made the pirate the enemy of all nations. What linked the people of all nations to one another was the fact that they could all become the victims of pirates. As the virtual assailant of all nations, the pirate thus became, as it were, the negative integrational figure for the community of all people and nations.

The concept of universal enmity referred not only to a potential hostility towards all people, but also to the inhumanity of the crime itself. As Bruce Buchan discusses at greater length in his contribution to this book, in London in 1693 some legal experts refused to treat the privateers of the deposed James II as pirates because they were not enemies of all humanity but only of the new English government. The supporters of the ruling king, William III, objected however: "*Hostis humani generis*, is neither a Definition, or as much as a Description of a Pirat, but a Rhetorical Invective to shew the Odiousness of that Crime."<sup>17</sup> By placing themselves in opposition to the laws of sovereigns and nations, pirates were cast as opponents of the very possibility of laws between sovereigns and nations, and thus as a universal antagonist of all humanity. Accordingly, in the English legal literature of the seventeenth and eighteenth centuries, pirates were often depicted as "beasts of prey" or "savage beasts."<sup>18</sup> Piracy was regarded in English criminal law as a comprehensive crime. As an accumulative crime, piracy included accusations of robbery, murder, barbarity, treason, and atheism.<sup>19</sup> Contemporary observers accused the sea robbers of savageness and disgusting bestiality, denied that they possessed a national character, held their ethnic heterogeneity

16 See Gentili, *De iure belli* (1612), l. 1, ch. 4, 36–37.

17 Matthew Tindal, *An Essay Concerning the Laws of Nations, And the Rights of Sovereigns. With an Account of what was said at the Council-Board by the Civilians upon the Question, Whether their Majesties Subjects taken at Sea acting by the late King's Commission [original spelling or typo?], might not be looked on as Pirates?*, 2nd edn. (1694), 27–28 [Italics in the original].

18 See Joel H. Baer, "The complicated Plot of Piracy: Aspects of the English Criminal Law and the Image of the Pirate in Defoe," in: *Eighteenth Century. Theory and Interpretation* 23, no. 1 (1982): 3–26.

19 See Baer, *Plot of Piracy*, 13–16.

against them, and associated them with cannibals. The inhumanity of the crime, its indiscriminate choice of victims, and the omnipresence of the danger thus made pirates the most hostile of all the enemies of humanity, the most dangerous of all universal enemies.

## Penal law on Pirates, Universal Jurisdiction, and the Right of Intervention

From the concept of universal enmity, Gentili derived the universal right to pursue and punish pirates. All human beings were affected by their violations no matter where or against whom they were committed. Therefore, any person was empowered to fight against pirates wherever they may be found.<sup>20</sup> To the present day, piracy is regarded as the first international crime or – in the words of Carl Schmitt – as “the archetype of the so-called world crimes.”<sup>21</sup> These are criminal actions for which the law enforcement authorities of all states have the responsibility to prosecute in international waters.<sup>22</sup> Gentili reasoned that all states should be on a warlike footing against piracy everywhere, which later helped to promote the acceptability of the principle of intervention in international law. Some have drawn the connection between the justification of a *bellum piraticum* and the beginnings of international police and punitive expeditions, which were controversial in the nineteenth century and have remained so to the present day.<sup>23</sup>

It was the pirate who made the seas unsafe, “*qui prius maria infestavit*,” as the humanist lawyer Johannes Drosaeus put it in 1564.<sup>24</sup> Time and again in the Early Modern period, the restlessness of the pirate, the uninterrupted wandering from coast to coast, island to island, beyond the horizon, attracted particular condemnation. The leading judge in the case against Joseph Dawson and others accused of piracy in 1696 emphasized that the concept

20 See Gentili, *De iure belli* (1612), l. 1. ch. 25, 202.

21 Carl Schmitt, “Völkerrecht [Ein juristisches Repetitorium] (1948/50),” in: *idem, Frieden oder Pazifismus? Arbeiten zum Völkerrecht und zur internationalen Politik 1924–1978*, ed. Günter Maschke (Berlin: Duncker & Humblott, 2005), 701–839, 765.

22 For example, Kenneth C. Randall, “Universal Jurisdiction under International Law,” in: *Texas Law Review*, no. 66 (1988): 785–841, 791: “Piracy is the oldest offence that invokes universal jurisdiction.”

23 See for example, Eugenio Di Rienzo, “‘Bellum Piraticum’ e guerra al terrore. Qualche considerazione problematica,” in: *Filosofia politica* 19, no. 3 (2005): 460–470.

24 Ioanne Drosaeo [Drosaeus], *Methodvs Ivris Vniversi Ivstiniana*, Coloniae 1564, fol. 193r.

of the pirate referred to “their wandering up and down, and resting in no place, but coasting hither and thither to do mischief.”<sup>25</sup> Restlessness and perpetual wandering became central characteristics of a corsair’s life, and seemed to magnify the dangerousness of the crime.

Thus, pirates personified the restlessness of the sea itself. Since the medieval period, the French expression “écumeurs de la mer” has been applied to pirates and others who struck terror into peoples’ hearts.<sup>26</sup> The sea was accessible for use by all,<sup>27</sup> and this necessarily meant that trade, war, and plunder existed inseparably side by side. In this way, in the concept of the pirate in international law, the sea represented *ex negativo* the shared traffic space of nations. The sea was the medium, the topographical precondition, for understanding pirates as virtual assailants of all people and all nations.

### From Africa via the West Indies to the North Sea: A Privateering and Pirate Voyage

Around the mid-seventeenth century, a systematically elaborated concept of piracy was available in legal theory, which ensured that sea robbers could be legally treated as universal enemies. But what was the situation in legal practice? To whom was this concept applied in international contexts? How did one become such an enemy of all peoples and nations in the second half of the seventeenth century? The above-mentioned George Cusack was explicitly reckoned among the *humani generis hostes*, the “Public Enemies to Mankind,” when he was brought before court as a pirate after his arrest in 1674. Cusack’s career as a privateer and a pirate is not untypical and yet also unusual at the time. It is not untypical because many elements can be found in his biography that are characteristic of contemporary privateering and piracy. Similar biographies can be found in archives on pirate trials such as those documented for the London Admiralty Court.

At the same time, the case is unusual because these characteristic elements are bundled and concentrated in the person of Cusack in such an untypical way that he was already perceived by his contemporaries as an extreme example of the prevailing conditions. It is possible to reconstruct

25 Charles Hedges’ Charge, “Trial of Joseph Dawson and Others,” in: *Howell’s State Trials*, London 1696, vol. 13, 455, quoted in Robert Phillimore, *Commentaries upon International Law*, vol 1, Philadelphia 1854 (ND Littleton, CO, 1985), vol 1, 286.

26 From the French *écumer*, to foam, but also to plunder.

27 See Gentili, *De iure belli* (1612), l. 1, ch. 4, 36–37.



Cusack's career as privateer and pirate, and his later trial at the High Court of Admiralty, with the help of two anonymously authored printed texts – *News from the Sea* and *The Grand Pyrate*,<sup>28</sup> in addition to the court documents, which have hitherto remained unresearched.<sup>29</sup>

Born in East Meath in Ireland, George Cusack went to Flanders in 1653, serving as a mercenary during the first Anglo-Dutch Naval War (1652–1654), in which, by his own account, he made use of the name "Smith." He also served as a mate or helmsman on several privateers, thus remaining in the service of the English sovereign until the end of the war.<sup>30</sup> During the second Anglo-Dutch War in 1665, Cusack again served as a privateer for the English, but was captured and imprisoned by the Dutch after a sea battle and subsequently interned in Guinea.<sup>31</sup> After the end of the war in 1667, he left Guinea on board a Spanish merchant ship heading for Cadiz, where he joined the *Hopewell*, a 250-ton ship with 24 cannons, richly laden with textiles, manufactured goods, tools, and weapons.<sup>32</sup>

After the ship set out on the high seas Cusack and four Englishmen seized control of the ship. The Captain and officers were set adrift in a boat and left to their fate.<sup>33</sup> The merchant Thomas Power was kept prisoner on board. On 4 November 1668, the pirates reached the island of Barbados in the Lesser Antilles, which was then an English colony. Here, they were informed that

28 *News from Sea* (London: Printed for R. W. 1674) and *The Grand Pyrate: Or, the Life and Death of Capt. George Cvsack The great Sea-Robber. With An Accompt of all his notorious Robberies both at Sea and Land. Together With his Tryal, Condemnation, and Execution. Taken by an Impartial Hand* (London, 1676).

29 In detail: The National Archives (TNA) London: Records of the Admiralty (ADM) 106/305, fols. 9r–9v: 17.02.1674, Note on investigations on an Irishman named Cusack; fol. 19r–19v: 28.02.1674, further research on Cusack; ADM 106/299, fol. 120r–121v: 31.08.1674, Report of Cusack's arrest; High Court of Admiralty (HCA) 1/10, 6: Marshal of Marshalsea, warrant of arrest for George Cusack, 1.09.1674; HCA 1/10, 19: charge brought against Cusack and others; HCA 1/10; HCA 1/28, 7: list of prisoners; HCA 1/28, 41, 42 and 44: death warrant (several copies) of George Cusack and Simon Harker; HCA 1/101, 121: French letter of marque to George Dixon [George Cusack]; HCA 1/101, 122: documentary evidence for the trial of Cusack, confiscated from the ship *Robert*; HCA 13/142, fol. 143r–fol. 175r, fols. 184r, 193v, 201r–201v, 203r: interrogation protocols of the accused and protocols of the testimony of witnesses in the Cusack trial.

30 *Grand Pyrate*, S. 4; and HCA 13/142, Protocol of the interrogation of George Cusack, 4.09.1674, fols. 145v–150r, fol. 145v.

31 HCA 13/142, Protocol, of the interrogation of George Cusack, 4.09.1674, fols. 145v–150r, fol. 145v.

32 *Grand Pyrate*, p. 5; and HCA 13/142, Protocol of the interrogation of George Cusack, 4.09.1674, fols. 145v–150r, fol. 146r.

33 HCA 13/142, Protocol of the interrogation of George Cusack, 4.09.1674, fols. 145v–150r, fols. 146r–146v.

the captain had been rescued.<sup>34</sup> A few days later, on 8 November, they called at the French island of Martinique, pretending that their ship was an English warship. During a conversation with the authorities, Thomas Power betrayed Cusack to the French Governor, who, however, refused to arrest him.<sup>35</sup>

Not far from the island of Anguilla, the *Hopewell*, (now renamed *The Valiant Prince*) encountered an English naval ship. Cusack and his men were arrested, brought back to Barbados, from which he subsequently escaped.<sup>36</sup> He then made his way to Tortuga, where, in March 1669, he signed on the Lisbon-based *São José*, which set sail for La Rochelle on 1 April. The 250-ton ship, equipped with 28 cannons, carried a valuable cargo of campeachy wood, tobacco, cotton, and coconuts. Shortly after departure, the crew was overwhelmed by Cusack and some of the other sailors whom he had engaged beforehand as his accomplices. The overwhelmed crew, mostly Frenchmen, were set ashore in Cartagena, where they were imprisoned by the Spanish for seventeenth months.<sup>37</sup> The *São José* was renamed the *Flying Devil* and set course for New England. After reaching the coast close to Boston, the crew unloaded the cargo and the ship was burnt. According to the author of *The Grand Pyrate*, Cusack then re-crossed the Atlantic to Ireland.<sup>38</sup>

In the final phase of the third Anglo-Dutch Naval War (1672–1674), Cusack returned to England. In December 1673, he again acquired a licence as a privateer of the Crown and cruised along the coast of Scotland, where he took several Dutch ships as prizes.<sup>39</sup> After the end of the war, Cusack, operating from London, managed to acquire a French letter of marque in order to operate as a plunderer against the enemies of France.<sup>40</sup> He persuaded seven seamen to join him on a booty hunt, using the French letter of marque as the legal basis for their operations. Cusack now called himself Captain George Dixon, which was the name in which the letter of marque was issued.<sup>41</sup>

As they did not possess a ship of their own, Cusack and his crew signed on several different merchant ships in order to reach Amsterdam.<sup>42</sup> Here,

34 *Grand Pyrate*, 8–10.

35 *Ibid.*, 11–12.

36 HCA 13/142, Protocol of the interrogation of George Cusack, 4.09.1674, fols. 145v–150r, fols. 146v.

37 *Grand Pyrate*, 15–16.

38 *Ibid.*, 16 and 18.

39 *News from Sea*, 2.

40 HCA 13/142, Protocol of the interrogation of George Cusack, 4.09.1674, fols. 145v–150r, fol. 147r.

41 HCA 13/142, Protocol of the interrogation of Michael Fitz Gerrard, fols. 150v–152v, fol. 150v.

42 *Grand Pyrate*, 19–20.

acting independently in several groups, they succeeded in signing on the ship *Robert*.<sup>43</sup> According to a statement made by one of Cusack's accomplices, the ship was going to transport weapons (carbines, swords, and pistols) to Newcastle.<sup>44</sup> Shortly after leaving the harbour, Cusack and his accomplices proceeded in the usual fashion and overwhelmed the crew, some of whom took their side (as was also customary).<sup>45</sup> According to the concordant statements of two of those interrogated at the later trial, Cusack then showed all on board his French "commission" in order to legitimise the seizure of the ship.<sup>46</sup> Shortly afterwards, they seized a Danish and two Swedish ships in the North Sea. By taking away the sails, the rigging, and the anchor, they made the ships unseaworthy, gave the crews a small amount of provisions, and left them to their fate on the open sea. The booty was sold on the east coast of England, and after the proceeds had been divided up, Cusack and his accomplices went into hiding for a time.<sup>47</sup>

By mid-July, Cusack planned a further plundering raid in London. Together with Henry Lovewell and Simon Harker, who had taken part in the seizure of the *Robert*, Cusack hired sixteen Irish seamen aged between 20 and 31. The *Robert* was renamed *Fortune*, and with it they seized the *St Anne* off the Norwegian coast, a ship commanded by an English captain but sailing under the Danish flag. The ship was on its way to London with a cargo of wood, the crew was set adrift in an open boat without a compass. However, a Dutch ship rescued them and brought them to a beach in Norfolk. Cusack's crew sold a part of the cargo of the *St Anne* in Aberdeen, but meanwhile the rescued crew of the looted ship had reported the robbery to London. Cusack and his men left Aberdeen and abandoned the *St Anne*, which was confiscated by the Scottish Admiralty.<sup>48</sup> At the beginning of August, Cusack

43 HCA 13/142, Protocol of the interrogation of Henry Lovewell, 7.09.1674, 5.09.1674, fols. 168v–169r.

44 HCA 13/142, Protocol of the interrogation of Simon Harker, 8.10.1674, fols. 165r–168r, fol. 166r. The interrogees obviously wished to create the impression that the *Robert* was smuggling weapons on an illegal voyage, in order to exonerate themselves of the charge of piracy. HCA 13/142, Protocol of the interrogation of George Cusack, 4.09.1674, fols. 145v–150r, fol. 148r.

45 HCA 13/142, Protocol of the testimony of Edward Creswell, 30.10.1674, fols. 172v–173r.

46 HCA 13/142, Protocol of the interrogation of Michael Fitz Gerrard, fols. 150v–152v, fol. 150v: "Captaine Dixon then showing him a French Comission to take ye ships of ye Enemeyes of France"; and TNA London, HCA 13/142, Protocol of the interrogation of Simon Harker, 8.10.1674, fols. 165r–168r, 167r: "Ye said Smith alias Cusack yen showing a French Comission to ye Examinater and saying hee seized his ship by virtue of ye same."

47 HCA 13/142, Protocol of the interrogation of James Dawson, 7.09.1674, fols. 143r–145r, fol. 145r; and HCA 13/142, Protocol of the interrogation of Simon Harker, 8.10.1674, fols. 165r–168r, 167r.

48 *Grand Pyrate*, pp. 21–22.

reached Lee (Essex) in the Thames estuary and made his way from there to London in order to recruit more crewmembers for a new “privateering voyage.”<sup>49</sup> On 30 August 1674, however, a Royal Naval ship arrested Cusack in the Thames estuary. Together with thirteen accomplices, he was brought to the Marshalsea prison in London.

## The Trial of George Cusack for Piracy

Cusack’s transfer to prison and the warrant of arrest for “piracy and robbery” in several cases are dated 1 September 1674.<sup>50</sup> In the following two months, the questioning of the accused and the witnesses took place. All of those accused of serious robbery and piracy referred to Cusack’s French letter of marque as a legitimization of their plundering raids. They presented themselves throughout as legitimate “privateers.”<sup>51</sup> The court proceedings were led by Sir Leoline Jenkins, senior judge of the Admiralty Court. Jenkins later made a career as a top-ranking diplomat of the English Crown, participating, among other things, as envoy at the negotiations for the peace of Nijmegen in 1678–1679. He is widely regarded as a central figure in the history of international law and many of his verdicts developed into precedence cases of modern international maritime law, in particular of prize law.<sup>52</sup>

The court proceedings took place on 7 and 9 January 1675. The accused were Cusack (“alias Dixon, alias Smith”) and six members of his crew.<sup>53</sup> The charge was piracy “against the Law of Nations” on account of the seizure of the *Robert* and other ships.<sup>54</sup> Cusack defended himself by claiming that he had only undertaken privateering raids as authorized by the letter of marque issued by the French king. The court, however, insisted on not recognizing the “French commission.”<sup>55</sup> After consulting for an hour, the

49 HCA 13/142, Protocol of the interrogation of George Cusack, 4.09.1674, fols. 145v–150r, fol. 149v.

50 HCA 1/10, 6: Marshal of Marshalsea, Warrant of arrest for George Cusack, 1.09.1674; HCA 1/10, 19: the charge against George Cusack and others.

51 See, for example HCA 13/142, Protocol of the interrogation of Maurice Fitz Gerrard, fols. 152v–154r, fol. 155r.

52 See John B. Hattendorf, “Maritime Conflict,” in: Michael Howard *et al.* (ed.), *The Laws of War. Constraints on Warfare in the Western World* (New Haven, CT, and London: Yale University Press, 1994), 98–115, 105.

53 The crew first hired in August in London was not accused, as they had been arrested before the planned plundering raid could take place. *Grand Pyrate*, 29.

54 *Ibid.*

55 *Ibid.*, 30–31.

Admiralty Court found all the accused guilty and sentenced them to death by hanging. The accused then presented a mercy petition.<sup>56</sup> Initially, the petition was rejected but on 9 January, all of the accused were pardoned, except Cusack and Simon Harker, his closest confidant.<sup>57</sup> On 16 January 1675, they were both hanged at Execution Dock (now Wapping High Street) in the London harbour.<sup>58</sup>

The anonymous author of *The Grand Pyrate* excoriated Cusack. In the account of this short text he becomes the prototype of a *hostis humani generis*. The seriousness of his crimes was unmistakably denounced. The author underlined not only that the victims of his plundering raids were of many different nations – English French, Dutch, Danes, and Swedes – but also that he and his accomplices were particularly perfidious, as they disguised themselves as ordinary sailors in order to join and then seize ships and crews. Cusack was depicted as a notorious serial offender with a high level of criminal energy, whose privateering voyages extended over many years and covered a wide radius of action – Africa, the West Indies, the Atlantic, the North Sea – and whose readiness to use violence was always high. For example, in Barbados, when his disguise was revealed, he had not hesitated to open fire immediately on a warship. It appeared particularly unscrupulous that he had set the crews of the captured ships adrift in small boats or left them behind in unseaworthy ships, which meant their almost certain death. It was also emphasized that Cusack had explicitly declared his intention to wage battle against (almost) the entire world. He was said to have called upon his accomplices after the capture of the *Hopewell* to swear in writing that they would seize or sink ships and vessels of all nations apart from England.<sup>59</sup> The description of the universal hostility of Cusack's pirates culminated in the recital of a drinking song that the deep-sea devils supposedly sang daily, intoxicated by alcohol and their own evil:

Hang sorrow, let's cast away care,  
 The World is bound to find us:  
 Thou and I, and all must die;  
 And leave this World behind us.

<sup>56</sup> *Ibid.*, 31.

<sup>57</sup> See Calendar of State Papers, Domestic Series, Charles II, November 1st, 1673, to February 28th, 1675, London 1904 (ND Nendeln, Liechtenstein 1968), Whitehall, 10.01.1675, 526.

<sup>58</sup> HCA 1/28, 41, 42, and 44: Execution warrant (in several copies) for George Cusack and Simon Harker.

<sup>59</sup> *Grand Pyrate*, 6.

The Bell shall ring, the Clark shall sing,  
 The Good old Wife shall wind us.  
 The Sexton shall lay our Bodies in Clay  
 Where the Devil in Hell shall find us.<sup>60</sup>

*The Grand Pyrate's* presentation of Cusack as the enemy of humankind freely blended fact and fiction. It was built on the ascription of negative attributes to his personal character and behaviour. It was said that Cusack was always aggressive and treacherous, that he had stolen £6 and a watch from a close relative as a child.<sup>61</sup> Furthermore, he was accused of blatant atheism and contempt of God, symbolized by the renaming of the *São José* as *Flying Devil*. Moreover, when some of his pirates supposedly tried to prevent him from throwing the *Hopewell's* ship Bible overboard, he is said to have called out to them, "You Cowards, what do you think to go to Heaven and do such Actions as these? No, I will make you Officers in Hell under me."<sup>62</sup> He was also regarded as immoral and totally antisocial. In New England, he apparently even cheated his own crew of their share of the booty.<sup>63</sup> Some even went as far as to accuse him of breaking sexual taboos. After his escape from arrest, he was supposedly rearrested in the bed of a woman whom some claimed to be his sister.<sup>64</sup>

## International Criminals and National Politics

Leaving aside for the moment the stylization of Cusack as a universal bogeyman, one could ask what the decisive reason was for his condemnation and execution as a pirate. He and his crew had without doubt repeatedly violated the existing law of prize and the customary rules of most countries on the seizure of booty.<sup>65</sup> The manipulation of a letter of marque was just as impermissible as the setting adrift of the captured crews on the open sea. In addition, the legality of the seizure of goods from the ships he had

<sup>60</sup> *Ibid.*, 8–9.

<sup>61</sup> *Ibid.*, 4.

<sup>62</sup> *Ibid.*, p. 7. See also Richard Frohock, "Bible overboard: the word and the grand pirate, Captain George Cusack," *Early American Literature* 42, no. 2 (2007): 263–283.

<sup>63</sup> *Ibid.*, 18.

<sup>64</sup> *Ibid.*, 28.

<sup>65</sup> On English "prize law" and the international regulations on prize law customary at the time, see especially R.G. Marsden, "Introduction," in: *idem* (ed.), *Documents relating to Law and Custom of the Sea*, vol. 2: 1649–1767 (Colchester [etc.]: Navy Records Society, 1916), vii–xxii.

captured ought to have been examined by due process of law in a prize court. Cusack's accomplices knew this and in the interrogation into the wild plundering of the two Swedish vessels and the Danish ship each denied his own participation and tried to incriminate the others.<sup>66</sup> These violations of the law were at the most necessary but by no means sufficient conditions for condemnation as a pirate. Far weightier than these offences was the fact that Cusack's international raids, by which the subjects of a number of nations were affected, redounded upon the reputation of the English Crown and must have negatively affected the relations of England with other countries.

In the West Indies, Cusack's activities led to tension with Portugal at the highest political level. When the French crew who had been imprisoned by the Spanish after the seizure of the *São José* heard, after their release, that their ship had landed near Boston they informed the owner in Lisbon, who then demanded compensation from the government in New England. The complaint was coolly rejected by the Boston authorities, who pointed out that the time limit of one year for appeal had elapsed. The case then even came up before the Crown in London, as the Portuguese owner officially demanded that the English King should order the Boston Governor to compensate for his losses.<sup>67</sup> Furthermore, Cusack's activities had also fuelled the flames of the conflict between the English Crown and its American colonies. The support for Cusack in Montserrat and Boston painfully reminded the London government that the English in the overseas colonies, who were bound by the Navigation Acts of 1651 to restrict the import and export trade of the colonies to the mother country, were willing to cooperate with pirates and smugglers in order to circumvent the monopoly and to acquire highly desired raw materials and commercial goods.<sup>68</sup>

However, the disturbances caused by Cusack in European waters were much more serious than the conflicts overseas. They created a turmoil that threatened to embroil England in disputes with its neighbours. The capture of the *Robert*, which was sailing from Amsterdam with Dutch papers, seriously endangered the new and still fragile peace with the United Provinces. The part played by the French letter of marque in the seizure of the *Robert* complicated the already difficult relationships with the French Crown. Finally, the capture of the three Scandinavian vessels and the *Saint*

66 See for example HCA 13/142, Protocol of the interrogation of Henry Lovewell, 5.09.1674, fols. 168v–169r, fol. 168v.

67 See *Calendar of State Papers, Colonial Series, America and West Indies, 1669–1674* (London, 1889) (ND Vaduz: Kraus Reprint Ltd, 1964), 1672?, 457 (Nr. 1007).

68 *Grand Pyrate*, 16–18. On the protectionist monopoly policy in England, see also Oliver M. Dickerson, *The Navigation Acts and the American Revolution* (New York: Octagon Books, 1978).

*Anne* by the *Robert* near the Norwegian coast put a strain on relationships with friendly or at least neutral nations.

England therefore had to undertake urgent measures to rid itself of a reputation as a “pirate nation” that had stuck to it since the times of the Elizabethan buccaneers. In order to demonstrate that the English government was seriously committed to fighting such troublemakers, “advertisements” calling for the arrest of Cusack’s band of pirates were sent to all the larger harbours in England, Scotland, Ireland, Holland, and France.<sup>69</sup> The Admiralty in London thus stamped Cusack as a universal criminal above all because he had done international damage to the national interests of England. By adopting these severe measures, England could also present itself to neighbouring sovereigns as the deliverer from a universal scourge of humanity.

In addition, the Cusack trial was designed to clearly underline the royal claim to naval supremacy over England’s coastal areas. The decisive point was that the claim to sovereignty was not restricted to the immediate coastal waters, the “narrow seas.” Instead, England extended the so-called “royal chambers” far into the open sea, “even to the very Shoars of his Neighbours”.<sup>70</sup> Cusack’s trial and execution was meant, moreover, to make it clear that the English Admiralty was in a position to assert this claim in reality. By demonstrating its ability to send such enemies of all nations to their doom, England at the same time legitimated its claim to be an effective sea power.

### **Freelance Privateers and Privateering Enterprises**

Cusack’s attempt to legitimize his bold raiding voyages with the help of a counterfeit – the French letter of marque – characteristically illuminates the development of privateering policy in the seventeenth century. In the competition for maritime supremacy – both in the New World and in Europe – the legal system of letters of marque and reprisal had long become a central feature of international disputes at sea. In the course of the seventeenth century, the issue of such licences had reached truly inflationary proportions. They were not only easy to acquire for the immediate subjects of a sovereign, but were also issued to the subjects of other nations. After the peace of 1604 between England and Spain, for example, English privateers continued their activities with the help of commissions freely provided by the Dutch, who

69 *News from Sea*, 4.

70 *Ibid.*, 28.



were still at war with Spain.<sup>71</sup> In the Caribbean, English "privateers" had the option of acquiring letters of marque from the French or the Dutch.<sup>72</sup> In the course of the seventeenth century, the buccaneers and filibusters based in the Caribbean increasingly specialized in acquiring their privateering rights from one or the other European nation, depending on the nationality of the ships they wished to attack in any particular situation. For example, the English governor of Jamaica was recommended not to treat the privateers at anchor in Port Royal too severely, as it was to be feared that they would otherwise acquire letters of marque from the French in Tortuga.<sup>73</sup> It was said of the governors of the French Antilles that they had for many years given full discretionary powers to captains entitling them to seize any ship that came their way.<sup>74</sup> When the colonial governments gradually abandoned the policy of supporting the Caribbean privateers, some captains organized the acquisition of the corresponding commissions from indigenous chiefs in Central America.<sup>75</sup>

In this way, privateering practice led to the development of a particular type of sea robber, who, unlike the corsairs and merchant warriors of the sixteenth and early seventeenth centuries, was not committed to serving a single nation but operated on a freelance basis for one sovereign after another or for several simultaneously. With freelance privateers like Cusack and the rest the national links of the licenced sea robbers gradually began to dissolve. This development was encouraged by the fact that they lived solely off their booty: "no purchase, no pay" – this was the customary international principle limiting the "pay" of a privateer to the booty taken, a principle also accepted by the young seamen from London who operated as privateers under the leadership of Cusack.<sup>76</sup> For this reason, the privateer can only be

71 See Ivo van Loo, "For Freedom and Fortune: The Rise of Dutch Privateering in the First Half of the Dutch Revolt, 1568–1609," in: Marco van der Hoeven (ed.), *Exercise of Arms: Warfare in the Netherlands, 1568–1648*, (Leiden: Brill, 1998), 173–195, 186–189.

72 See *Calendar of State Papers, Colonial Series, America and West Indies, 1661–1668* (London, 1880) (ND Vaduz: Kraus Reprint Ltd, 1964), 20.02.1665, S. 280 (N<sup>o</sup>. 942).

73 See *ibid.*, 30.06.1664, 219–220 (N<sup>o</sup>. 767); and *ibid.*, November? 1664, 253 (N<sup>o</sup>. 843).

74 See Peter T. Bradley, *The Lure of Peru. Maritime Intrusion into the South Sea, 1598–1700*, (London: Palgrave Macmillan, 1989), 136.

75 [Alexandre Olivier Exquemelin], *Bucaniers of America: Or, a true Account of the Most remarkable Assaults Committed of late years upon the Coasts of The West=Indies [...]* (London, 1684), 33–39. On cooperation between pirates and the native Indian population, see also Ignacio J. Gallup-Diaz, *The Door of the Seas and the Key to the Universe: Indian Politics and Imperial Rivalry in the Darién, 1640–1750* (New York: Columbia University Press, 2005), 53–74.

76 See HCA 13/142, Protocol of the interrogation of Maurice Fitz Gerrard, 5.09.1674, fols. 152v–154r, fol. 153r.

conditionally described as a maritime mercenary. For although he acted as a kind of private warrior for one nation – or in the case of the freelance variant for several – his situation was different from that of a mercenary soldier on land, as he received no basic pay for his services.

By using privateers equipped with letters of reprisal and *marque* uninhibitedly to support their imperialist ambitions the competing European sea powers encouraged the privateers themselves to make use of their licences in an equally uninhibited fashion for their own plundering voyages, in the hope that their operations would be somehow legalized. Many freelance privateers did not balk at making further use of authorizations that had already expired or of holding several licences from different sovereigns, or, as in the case of Cusack, of authorizing actions on the basis of a letter of *marque* that had been issued to another person,<sup>77</sup> and which, on closer examination, revealed clear traces of manipulation. Although Cusack must have been aware that this deceit would be easily seen through, he obviously felt it better to be able to present a counterfeit letter of *marque* than none at all.

International privateering brought forth the privateer as a virtually independent entrepreneur, who, as a ship-owner, specialized in hiring other privateers, often from several different countries, in the name of an individual sovereign in order to build up larger privateering units for the authority he served. These units were mostly meant to strengthen the regular navy or even to provide the foundation stone for the development of a navy. In 1674, for example, the Electoral Prince of Brandenburg, Friedrich Wilhelm II, commissioned the Dutch ship-owner and maritime trade merchant Benjamin Raule to build up an electoral navy with the help of internationally hired privateers.<sup>78</sup> Raule, who could look back on relevant experience in the Zeeland *commissievaart* succeeded, within a few years, in creating a small fleet of privateers, which was not only useful to the Great Electoral Prince in the war against Sweden (1674–1679), but also made a decisive contribution to the establishment of Prussian bases on the African coast and in the West Indies.<sup>79</sup> Privateering entrepreneurs like Raule stood in the tradition of the so-called military enterprisers.<sup>80</sup> But whereas the military entrepreneurs specialized in the creation of mercenary units for

77 See *Grand Pyrate*, 30.

78 On the correspondence between Raule, the Electoral Prince, and Prussian diplomats on the build-up of an electoral navy in Brandenburg, see Geheimes Staatsarchiv Berlin: GStA PK Berlin, I. HA Rep. 65 Marine und Afrikanische Kompagnie-Sachen, 1664–1731, Fascicle 2.

79 See the correspondence of Raule in GStA PK Berlin, I. HA Rep. 65 Fascicle 24, 26, and 27.

80 See especially Fritz Redlich, *The German Military Enterpriser and His Work Force. A Study in European Economic and Social History*, 2 vols (Wiesbaden: Franz Steiner Verlag, 1964–1965).

land operations largely disappeared in the period after the Thirty Years War (1618–1648), the enterprises specializing in the creation of maritime forces only reached their peak in the second half of the seventeenth century. They played a decisive part in the competition between the European powers for the build-up of permanent naval units until the end of the Spanish War of Succession in 1713.<sup>81</sup>

### The End of Freelance Privateering

Gradually, the dark side of internationally practised privateering became more visible. Unscrupulous sea robbers like Cusack were so dangerous precisely because they always found the support of some nation or other and were never the enemies of all nations at once. The phenomenon also enabled a degree of deniability. Responsibility for a privateer such as Cusack, operating under one sovereign's letter of marque, could be shrugged aside when found to be the subject of another sovereign. Cusack's sea robbers were ultimately condemned by the system that had produced them in the first place. Almost all of them had, like Cusack, served the English Crown in the wars against the United Provinces, either as soldiers or mercenaries, in the navy or as privateers. The end of hostilities with the Netherlands left them unemployed. Most of the men – 25 years old on average – had learned nothing but seafaring and the trade of war. Their know-how had probably protected most of them from the execution of their sentences, as Jenkins and the Admiralty judges were content to make an example of Cusack and his "right-hand man," Harker. One can easily imagine how many of the reprieved were later active again as privateers in the service of His Majesty, just as Cusack had been officially engaged as a privateer operating against Dutch ships off the coast of Scotland, despite his former activities as a Caribbean pirate. From privateer to pirate and back again: the enemies of the international community were also products of the international system as such.

In the course of the second half of the seventeenth century, attempts were beginning to be made in Europe to foreclose the legal consequences of the problem of international privateering. At the end of the third Anglo-Dutch War, the English government began to forbid the acceptance by its privateers

81 See Jaap R. Bruijn, "States and Their Navies from the Late Sixteenth to the End of the Eighteenth Centuries," in: Philippe Contamine (ed.), *War and Competition between States* (Oxford: Oxford University Press, 2000), 69–98.

of letters of marque issued by foreign potentates, in order to prevent freelance privateering from getting out of hand.<sup>82</sup> In the Anglo-Dutch Commercial and Maritime Treaty of 1–10 December 1674, an agreement was reached between the two parties on such a prohibition.<sup>83</sup> When Cusack presented his French letter of marque in the court, the Admiralty pointed out to him that, since the recent treaty and the newest proclamations, Englishmen were no longer allowed “to take a commission from any foreign Prince.”<sup>84</sup>

In the Trade and Navigation Treaty of Nijmegen in 1678, France and the United Provinces also reached an agreement on such a verdict.<sup>85</sup> In France, these regulations were included in the *Ordonnance touchant la marine*, proclaimed by Louis XIV, which set up binding rules for the conduct of war at sea.<sup>86</sup> It forbade French sailors from acquiring commissions from foreign governments for the equipment of warships flying under the French flag without the approval of the king. Whoever violated the regulation was to be treated as a pirate.<sup>87</sup> The *Ordonnance* broadly reflects the tendency, by then dominant in Europe, to tighten up the regulation of warfare at sea by extending the definition of piracy. In this way, the room for manoeuvre of booty hunters, who used the competition between the leading sea powers to acquire documents legalizing their plundering raids from rulers or even potentates whose own authority was dubious, was increasingly narrowed down in the final third of the seventeenth century.

82 See Marsden, *Law and Custom*, vol. 2, Introduction, xi–xii.

83 “Tractatus Navigationis & Commercii inter Carolum II. Regem Angliae & Ordines Generales Uniti Belgii ... Actum Londini, I. Decembris 1674,” in: Dumont (ed.), *Corps Universel*, vol. 7, Tl. 1, Amsterdam 1731, N<sup>o</sup>. 132, 282a–285a, Art. 5–7, 283a–283b.

84 *Grand Pyrate*, p. 30.

85 “Commissions pour des Armements particuliers ou Lettres de Represailles des Princes et Etats Ennemis desdits Seigneurs Etats Generaux [...]” Handels- und Schifffahrtsvertrag von Nijmegen 1678 zwischen Frankreich und den Generalstaaten, Art. 2, NA Den Haag, Staten General, Inv. Nr. 12587.186, accessible online via the Europäische Friedensverträge der Vormoderne data bank, Institut für Europäische Geschichte Mainz at: <http://www.ieg-mainz.de/>; last accessed: 23rd July 2021.

86 “Ordonnance touchant la marine du mois d’aout 1681. Louis, par la grace de Dieu, Roy de France et de Navarre,” in: J. M. Pardessus (ed.), *Collection de Lois Maritimes antérieures au XVIIIe siecle*, vol. 4 (Paris: l’Imprimerie Royale, 1837), 325–418.

87 “Défendons à tous nos Sujets de prendre Commission d’aucuns Roys, Princes, ou Etats estrangers, pour armer des Vaisseaux en Guerre et courir la Mer sous leur Banniere, sic e n’est par nostre permission, à peine d’estre traitez comme Pirates.” “Ordonnance touchant la marine du mois d’aout 1681, Book 3 (Des Contracts Maritimes), Titel 9 (Des Prises), Art. 3,” in: Pardessus (ed.), *Collection de Lois Maritimes*, vol. 4, 384. This regulation had already been enacted in a declaration of 1 February 1650 but had had little effect. See *ibid.*, 384, n. 6.

## The European Legal Community: Integration by Exclusion

The fact that the international community had produced its own enemies in the case of the privateers also characteristically sheds light on another respect on a European community of nations whose members were gradually growing closer together as a result of the increasingly dense network of contractual relations established after the Peace of Westphalia. What welded the various nations and peoples of Europe together was not merely the shared principles of a developing a *Ius Publicum Europaeum*, or the shared values, customs, and regulations agreed on in treaties.<sup>88</sup> A double process of integration took place not just inwardly, but by means of outward delimitation in the formation of a European community of nations under international law. Pirates, above all, were a useful means to promote integration by exclusion, as demonstrated by the European policies that tightened up the private law of prize.

A privateering system that had run out of control, whose excesses affected virtually all the nations of Europe, gave rise to a minimal legal consensus among the states concerned, which was not only expressed in unilateral enactments on privateering, but also in bilateral treaties. By declaring the freelance booty hunter a pirate, these treaties identified the sea robber as the common enemy of the community of nations in general and the European community in particular. When all sovereigns, without exception, ceased to give pirates protection in their harbours (at least officially), the policy of exclusion in the context of the law regulating naval warfare could lead to a kind of legal congruency. The exclusion of the pirate created a normative compatibility between the individual national systems of maritime law, and this provided an important component for the formation of interrelationships in international law. The exclusion of pirates was the lowest common normative denominator in a community of nations that was otherwise profoundly divided. No matter how "anarchical" an international community composed of equal, sovereign political units *internally* disrupted by competition, conflict, and the struggle for power was,<sup>89</sup> the members of this community acted in concert *externally* (at least theoretically), in order to exclude the privateer who no longer had any national attachment

88 See Arthur Nussbaum, *Geschichte des Völkerrechts in gedrängter Darstellung* (Munich and Berlin: Böhlau Verlag, 1960), 128–132.

89 On the model of the anarchical character of the international community that arose in the modern period, which has strongly influenced the theoretical discussions on international relations, see Hedley Bull, *The Anarchical Society. A Study of Order in World Politics* (1977), 3rd edn. (New York: Columbia University Press, 2002).

as a common enemy. Of course, it was mainly the community of European nations that were integrated by including factors like religion, languages, protocol, science, and codes of honour. Yet, by permanently producing an enemy of all nations in all waters, this community could achieve a wider integration by means of excluding the common enemy of all humankind.

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