

# Piracy and the Origins of Universal Jurisdiction

*On Stranger Tides?*

PAR 12558/5

By

Mark Chadwick

|   |
|---|
| Dipartimento di Scienze Politiche<br>Biblioteca |
| Inv. DSP 4091                                   |
| Coll. DP XVIII.A. 105                           |



BRILL  
NIJHOFF

LEIDEN | BOSTON

# Contents

|                  |   |           |
|------------------|---|-----------|
| Acknowledgements | xii   |           |
| <b>1</b>         | <b><i>Of Pirates and Nazis: Introducing the “Piracy Analogy”</i></b>                                | <b>1</b>  |
| 1.1              | Defining Key Terms  | 6         |
| 1.2              | Understanding the “Piracy Analogy”: Core Themes and Questions                                       | 10        |
| 1.2.1            | <i>Beyond Piracy: the Emergence and Growth of “New” Universal Jurisdiction</i>                      | 10        |
| 1.2.2            | <i>Questioning Universal Jurisdiction</i>   | 16        |
| 1.2.3            | <i>The Continued Relevance of the “Piracy Analogy”</i>  | 19        |
| 1.3              | Scope, Methodology, and Structure   | 20        |
| 1.4              | On Stranger Tides   | 25        |
| <b>2</b>         | <b><i>Crime of the Ancient Mariner: Legal and Political Perspectives on Piracy in Antiquity</i></b> | <b>26</b> |
| 2.1              | Roman Hegemony and the Downfall of “Piracy”   | 31        |
| 2.1.1            | <i>Heroes and Antagonists: Early Histories of “Piracy”</i>  | 31        |
| 2.1.2            | <i>The Rise of Commerce</i>   | 33        |
| 2.1.3            | <i>The Ascendance of Territory</i>  | 36        |
| 2.1.4            | <i>Law on Piracy</i>  | 40        |
| 2.1.5            | <i>War on Piracy</i>  | 42        |
| 2.2              | The “Ciceronian Paradigm” of Piracy   | 45        |
| 2.3              | Roman Legacies: Conclusions from the Original Annihilation of Piracy                                | 49        |
| 2.3.1            | <i>History’s Battle Lines</i>   | 49        |
| 2.3.2            | <i>A Roman Conception of Universal Jurisdiction?</i>  | 52        |
| <b>3</b>         | <b><i>Dimensions of Piracy: States, Privateers and <i>Hostes Humanis Generis</i></i></b>            | <b>55</b> |
| 3.1              | <i>Authorised Plunder: Deconstructing the “Privateer”</i>   | 58        |
| 3.2              | <i>Beyond the State: Defining and Responding to Piracy</i>  | 65        |
| 3.2.1            | <i>Pirate Politics and Society</i>  | 65        |
| 3.2.2            | <i>Responding to Piracy: Law beyond Territory</i>   | 72        |
| 3.2.3            | <i>Lord Coke and “<i>Hostes Humani Generis</i>”</i>   | 76        |
| 3.3              | Conclusion  | 81        |

|  |     |
|--|-----|
| <i>The Philosophical Foundations of Universal Jurisdiction: Piracy in the Works of Alberico Gentili and Hugo Grotius</i> | 83  |
| 4.1 Defining the Pirate  | 88  |
| 4.1.1 <i>The Pirate and the State in Gentili's De Jure Belli Libri Tres</i>  | 89  |
| 4.1.2 <i>Piracy, Commerce and the Free Sea in Grotius' De Jure Praedae</i>   | 94  |
| 4.1.3 "Confederated only to do Mischief": the Pirate in Grotius' <i>De Jure Belli ac Pacis</i>                           | 99  |
| 4.2 Responding to Piracy   | 103 |
| 4.2.1 "The Common Enemies of all Mankind": Implementing the "Gentili Divide"   | 103 |
| 4.2.2 <i>Hugo Grotius and the Philosophical Underpinnings of Universal Jurisdiction</i>                                  | 104 |
| 4.3 Conclusion   | 108 |
| <br><i>The Ballad of Captain Kidd: the Fall of Piracy and the Rise of Universal Jurisdiction (1625–1856)</i>             | 113 |
| 5.1 Piracy "beyond the Line": the Age of the Buccaneers (1625–1690)  | 117 |
| 5.2 Captain Kidd and the Anti-piracy "Revolution" of the 1690s   | 122 |
| 5.3 The "Golden Age" of Piracy (1700–1730)   | 132 |
| 5.4 Defeating Piracy: the Legacy of Captain Kidd (1730–1855)   | 137 |
| 5.5 The Demise of Privateering   | 143 |
| 5.6 Conclusion   | 145 |
| <br><i>Rationalising Universal Jurisdiction: the Provenance of the "Piracy Analogy"</i>                                  | 147 |
| 6.1 Piracy as a "Heinous" Offence  | 149 |
| 6.1.1 <i>Libertas Commerciorum: Universal Jurisdiction, Piracy and the Commercial Imperative</i>                         | 151 |
| 6.1.2 <i>Piracy's Indiscriminate Effect</i>  | 155 |
| 6.1.3 "Beyond all Borders"   | 156 |
| 6.1.4 <i>Consensus</i>   | 160 |
| 6.2 Against "Heinousness"  | 162 |
| 6.2.1 "Reverse Heinousness"  | 163 |
| 6.2.2 <i>Forum Conveniens</i>  | 165 |
| 6.3 Conclusion   | 168 |

|          |   |            |
|----------|---|------------|
| <b>7</b> | <b><i>Uncertain Waters: Combating Piracy in the 21st Century</i></b>                | <b>171</b> |
| 7.1      | The Modern Legal Framework  | 174        |
| 7.1.1    | <i>Defining Piracy</i>  | 175        |
| 7.1.2    | <i>Universal Jurisdiction</i>   | 179        |
| 7.1.3    | <i>Duty to Cooperate</i>  | 181        |
| 7.1.4    | <i>Issues Arising</i>   | 182        |
| 7.2      | "Universalising" Universal Jurisdiction over Piracy                                 | 186        |
| 7.3      | Conclusion  | 193        |
| <b>8</b> | <b><i>Ancient Promise or False Hope?: the Legacy of the Piracy Analogy</i></b>      | <b>195</b> |
| 8.1      | Ancient Promise? The Piracy Analogy and "New" Universal Jurisdiction                | 199        |
| 8.2      | False Hope? The Limitations of Universal Jurisdiction                               | 209        |
| 8.2.1    | <i>The Shape of "New" Universal Jurisdiction: the Position in International Law</i> | 211        |
| 8.2.2    | <i>W(h)ither Universal Jurisdiction? Recognising and Overcoming Issues</i>          | 218        |
| 8.3      | Conclusion  | 227        |
| <b>9</b> | <b><i>On Stranger Tides: Conclusion</i></b>   | <b>230</b> |
|          | <b>Bibliography</b>   | <b>239</b> |
|          | <b>Index</b>  | <b>274</b> |