Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law

MATTHEW GARROD

It is widely asserted by courts and in legal scholarship that for hundreds of years universal jurisdiction has applied to the crime of piracy. However, the alleged historical legal foundations of universality need challenge. The central argument of this analysis is that jurisdiction over “piracy” is better understood under the protective principle, which arose out of the necessity of maritime Powers roughly between the seventeenth and eighteenth centuries to protect certain of their vital interests, not least their overseas trade routes and colonial trade and settlements. It follows that there is a need to re-conceptualise jurisdiction over piracy as the protection of vital State interests shared by the international community, a concept misinterpreted as universal jurisdiction.

It is widely asserted by courts and in legal scholarship that for hundreds of years, universal jurisdiction has applied to the crime of piracy. Whilst there is no internationally codified definition of universal jurisdiction, the concept permits States under international law to prosecute certain crimes that are committed abroad regardless of any nexus with the offence and in the absence of any link provided by other grounds of prescriptive jurisdiction recognised by international law. The rationale for this jurisdiction finds basis upon the supposed “heinous” nature of the alleged conduct, the perpetrators of which may be prosecuted by every State to protect the “vital interests” or “fundamental values” of the international community. Given that universal jurisdiction is supposed to have had as its foundation, and, indeed, its very legitimacy, the suppression of piracy, it is rather surprising that it has not been subject to greater scrutiny. Even commentators who have claimed to study the concept have not examined its alleged origins.

This analysis challenges the alleged historical legal foundations of universality. Jurisdiction over “piracy” is better understood under the protective principle, which arose out of the necessity of maritime Powers roughly
between the seventeenth and eighteenth centuries to protect certain of their vital interests, not least their overseas trade routes and colonial trade and settlements. Little understood, the protective principle has tended to be contested or defined in overly narrow terms by courts and in legal scholarship.\textsuperscript{5} Whilst its definition awaits international codification,\textsuperscript{6} the protective principle permits States under international law to give extraterritorial effect to legislation criminalising conduct abroad that poses a threat to their vital interests, irrespective of any other nexus with the offence.\textsuperscript{7} It is important, therefore, to shed important light on the origins of the protective principle and its contemporary scope of application.

The rise of the centralised government and the mercantilist system in the sixteenth and seventeenth centuries made the economic strength of the State through the pursuit of colonial trade a matter of great importance. The development of jurisdiction occurred not only by the need to protect trade from pirates, whose conduct amounted to waging unlawful war and which could not be attributed to any recognised sovereign, but also by the rivalry and war between and amongst sovereigns to monopolise the right to navigate the high seas and conduct trade. In seeking to safeguard trade from each other, claims were also made about upholding the law of nations, supposedly universal values, and, indeed, “humanity” itself. As the disruption of navigation and trade on the high seas was treated as violating the law of nations, and every State was permitted to enforce jurisdiction over “pirates” on the high seas, the maritime Powers had the widest possible jurisdiction under international law to protect their vital interests without having to provide any jurisdictional nexus with the alleged offence.

The so-called “golden age of piracy” spanned roughly the period 1670–1730.\textsuperscript{8} Between the fourteenth and seventeenth centuries, before the development of large national standing navies, European sovereigns used large numbers of privateers as instruments for waging war.\textsuperscript{9} They issued privateering vessels—private armed merchantmen—with licences called “letters of marque,” permitting them to use force to capture enemy warships and merchant vessels.\textsuperscript{10} Privateers played a vitally important part in warfare, particularly in weakening the economic and military strength of enemy Powers.\textsuperscript{11} After discovering the West Indies and America in the fifteenth century and based on a Papal ruling, Spain claimed sovereignty over the high seas and all territories west of an imaginary line off the Azores to exclude potential European rivals from navigating the high seas and developing trade.\textsuperscript{12} It treated as “pirates” any but Spanish vessels sailing in the West Indies.\textsuperscript{13} Based on the same papal decree, Portugal claimed the region east of the Azores.\textsuperscript{14} Not unsurprisingly in reaction to the vast wealth realised by Spain, France, England, and the Netherlands rejected this claim of sovereignty and waged war against Spain in the West Indies by licensing privateers to attack its colonial settlements and capture its merchant vessels.\textsuperscript{15} The same reaction occurred in the East Indies against Portugal, not least by
the Netherlands, which provided the broader context for the publication by the Dutch legal scholar, Hugo Grotius, of *Mare Liberum*.

These sovereigns used privateers to force access to colonial trade and protect their own settlements in the West Indies from being destroyed by Spanish naval forces. While these Powers were formally at peace in Europe, there developed a principle of “no peace beyond the line”—the imaginary line claimed by Spain dividing Europe from the New World. Under this principle, there existed “beyond the line” a *de facto* war throughout much of the sixteenth and seventeenth centuries. The use of privateers proved so effective that by the close of the seventeenth century it forced Spain to negotiate peace treaties. Accordingly, Spain agreed formally to recognise the territories that each rival Power occupied in the East and West Indies, as well as in Africa and America, on the basis that in turn, they restrain their privateers from attacking Spanish settlements and trade and that the subjects of the three sovereigns refrain from travelling to and trading with each other’s colonies.

The signing of these treaties, nevertheless, led to the abandonment of “no peace beyond the line” in favour of a policy of “trade by diplomacy”—built and maintained with African slave labour, the development of plantation economies could accumulate far greater and stable wealth. This important political and economic development made large numbers of privateers employed in the West Indies superfluous. And the belief emerged that unless restrained effectively, privateers endangered the peaceful relations amongst all the Powers and the development of trade. The collapse of this formerly reciprocally beneficial relationship led to widespread outbreaks of piracy, as privateers continued to wage unlawful warfare by attacking without licence not only the settlements and trade of Spain, but also those of their former sponsors. Although the waging of war by European Powers competing to develop trade caused the problem of piracy, it was exacerbated by a series of further colonial wars, each of which involved the licensing of privateers and, in turn, greater outbreaks of piracy. The War of the League of Augsburg (1689–1696), the War of the Spanish Succession (1701–1713), and the War of Quadruple Alliance (1718–1720) are examples. None of this suggests that other more widespread outbreaks of non-“Western” piracy having nothing to do with European colonialism did not occur in other parts of the world both in earlier and later periods; they did.

Still, the way in which the European Powers used privateers to wage war in the pursuit of colonial trade raises important considerations about the relationship between privateers and pirates under international law. Pirates engaged in the same conduct as privateers by using force to attack and capture merchant shipping. The only difference between them under the developing code of international law in the seventeenth century was that privateers acted under the authority and in the interests of a particular sovereign and, in return, received that sovereign’s protection under
the laws of war. Sovereign authorisation legitimised the acts of privateers, making them immune from criminal proceedings by the injured Power. International law developed around the assumption that only sovereigns had the right to wage war, which meant that a resort to force without sovereign authority became an act of hostility and unlawful warfare. Importantly, the demarcation between privateers and pirates proved ironic: on one hand, European sovereigns sought to protect their growing economic interests in colonial trade from pirates and, on the other, to expand them at the expense of their colonial rivals by using privateers.

The rise of European centralised States and the advent of the mercantile system during the sixteenth and seventeenth centuries made the economic strength of each Power a matter of great importance. Whilst the concept of the “State” in this period centred on the person of the sovereign, who enjoyed absolute political and economic power over a relatively well-defined territory, the sovereign’s joint objectives under mercantilist doctrine were to increase his or her wealth and power relative to that of all others. To that end, mercantilism stressed the development, monopoly, and protection by the sovereign of colonial trade; and it found basis on the idea that trade produced wealth, which was an essential means to power, including prestige, honour, and respect. In turn, power proved indispensable for securing the State from external attack and safeguarding seaborne lines of communication and protecting colonial trade. Predictably, trade was a major source of competition and war among European sovereigns.

One of the ways in which sovereigns pursued colonial trade was through chartered mercantilist companies. Private wealthy investors funded these companies and, for a share of their profits, sovereigns granted them trade monopolies and gave them quasi-sovereign powers, including the right to build forts and even wage war by, for example, licensing privateers. Sovereigns were also prepared to protect by force the freedom of their companies to navigate the high seas and develop trade “against all and everybody in special who should hinder and damage them”; and, indeed, wage war against each other to secure the trade of their companies. The development of economic interests through colonial trade was thus of great importance, and it drove both the emergence and the expansion of European empires.

Early treatises of modern international law recognised the importance of trade and the right of sovereigns to wage war in its pursuit and protection. Molloy’s 1690 treatise suggested that “Trade and Commerce are now become the only Object and Care of all Princes”; it provided sovereigns with the wealth for “fortifying their Countries with Reputation and Strength.” For Grotius, writing earlier, colonial trade was the sovereign’s “sole source of support, renown, and protection.” And his celebrated treatise on Mare Liberum, which formed part of a wider unpublished work, defended the waging of war by the Dutch East India Company against Portugal in the East Indies to gain access to and eventually monopolise that region’s lucrative
trade. Emer de Vattel, the eighteenth century Swiss philosopher and legal scholar, regarded trade as vital for the State’s wealth, strength, and security.\textsuperscript{37} Considering themselves “free princes,” “autonomous sovereigns,” and the “Lords of the Sea,” pirates posed a serious threat to the authority and certain vital interests of sovereigns.\textsuperscript{38} Pirates not only claimed to be sovereigns in their own right, but also practiced its prerogatives by waging war against colonial settlements. Colonial governors in the West Indies and North America reported that their coasts were “infested with pirates” and in a “continual state of war.”\textsuperscript{39} Piracy stood as the antithesis of mercantilism: creating insecurity for vital trade routes and threatening to destroy trade routes to the West Indies, America, Africa, and the East Indies.\textsuperscript{40} The English governor of Virginia reported that pirates “doth ruin trade ten times worse than a war.”\textsuperscript{41} The torrent of petitions by colonial governors and merchants to London and the King for an increase in the number and strength of naval warships to protect their trade illustrates best the threat to trade.\textsuperscript{42} Without convoy support by naval warships, trading vessels would otherwise leave plantations “at the mercy of the pyrates.”\textsuperscript{43} In the \textit{Tryals of Eight}, the King’s Advocate asserted in 1717 that “English Trade is in the utmost danger at present in America from the prodigious Number of Ships exercised in Piracies” and that it threatened to “put a full stop to our Commerce.”\textsuperscript{44} He also asserted that the threat to trade was “Destructive of Government” and “in Violation of the Rights of Nations.”\textsuperscript{45} This argument signifies the importance of trade to the State and denotes that only sovereigns had the right to wage war by disrupting enemy trade.\textsuperscript{46}

It has been widely suggested by courts and in legal scholarship that piracy was suppressed during the “golden age” through universal jurisdiction, and that the rationale for this principle was based upon the supposed “heinous” nature of the alleged conduct.\textsuperscript{47} Adopted uncritically, this view has found basis on tentative secondary sources or primary ones interpreted wholly out of context. The following example is illustrative. Scharf boldly asserts that “(f)or 500 years, States have exercised (universal) jurisdiction over piratical acts on the high seas.”\textsuperscript{48} The only evidence cited in support of this assertion is Randall’s work. Unlike the majority of courts and commentators who have done little historical research, Randall did cite a single case to support his argument that piracy was subject to universal jurisdiction because it constituted “particularly heinous and wicked acts.”\textsuperscript{49} However, Randall cited only one-half the court’s reasoning and misinterpreted jurisdiction. The court did not recognise the existence of universal jurisdiction and declared piracy “heinous and wicked” because it was “destructive of all trade and commerce between nation and nations”—namely, between England and its colonies.\textsuperscript{50} The court proceeded to assert that “the interest of all sovereign Princes” is to suppress piracy for the protection of their trade. The King’s Advocate in that case also described piracy as “odious and horrid” because it threatened trade in America, which “is no small advantage to the crown of Great Britain.” He
also asserted that “if no stop be put to those depredations, and our trade no better protected, not only Carolina, but all the English plantations in America will be totally ruined in a very short time.” Thus, suppressing piracy for “the preservation of our trade” was necessary—and several other cases declared piracy odious for the same reason. The threat to trade by persons acting without sovereign authority saw pirates sometimes also called “hostes humani generis” and “beasts of prey.” Nevertheless, it is important not to place too much weight on these euphemistic labels, none of which courts interpreted as permitting universal jurisdiction or gave any legal meaning in national laws.

Describing acts of piracy as “heinous” has nothing to do with universal jurisdiction that in itself is incapable of providing a theoretical basis for universality. The disruption of a sovereign’s navigation and trade on the high seas was not only a “hostile” act, but also a method of “lawful warfare” when committed by another sovereign’s licensed privateers. It should be of little surprise that the same acts when committed by “pirates”—persons acting without a valid licence—were condemned in the strongest terms and called “enemies.” A lack of sovereign authority explains why such condemnatory labels failed to attach generally to privateers, engaged in the exact same conduct as pirates. It may even be the case that such labels devolved from an endeavour to distinguish pirates from privateers. As the two practices are distinguishable only in nomine and with regard to State sanction, it is illogical to say that as a matter of international law, one of them gave rise to universal jurisdiction because it is “heinous,” while the other was lawful and honourable. It is perhaps for this reason that even some of the most ardent proponents of universal jurisdiction have rejected the “heinous” rationale. These and other commentators have either not been able to find any other rationale to support the development of universal jurisdiction over piracy or, instead, have argued that universal jurisdiction developed as other “traditional” grounds of jurisdiction did not cover piracy. This view is not only simplistic; unsupported by primary evidence, it assumes that sovereigns had the willingness and capacity to protect each other’s trade. Perhaps more important, it does not consider sufficiently the development of jurisdiction under the theory of protection—appearing to misinterpret the protection of vital State interests shared by the international community—and calls it by a different name: universal jurisdiction. The idea that grounds of jurisdiction other than universality did not cover piracy seems based on a misreading of the work of Grotius—discussed below.

The locus of piracy on the high seas did not inhibit the maritime Powers from establishing jurisdiction to protect their trade, even “in the most remote parts of the world.” Nothing better illustrates this turn than contemporaneous municipal English law governing the trial of pirates. In the final years of the seventeenth century, the King’s Advocate abruptly informed Whitehall that Vice-Admiralty courts in English colonies working under
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English municipal law lacked extraterritorial adjudicatory jurisdiction over “offences committed on the high sea.” Moreover, Vice-Admiralty courts could not be granted jurisdiction by way of commission to try such offences as English law “doth not extend to the Plantations, and so no Commission can be granted thither upon that law.” The report concluded, on the other hand, “Governors and Vice-Admirals in the Plantations have sufficient power to fit out ships for apprehending of pirates.” The law governing the trial of pirates in England was the Offences at Sea Act of 1536. This meant that colonial governors had jurisdiction to capture pirates on the high seas, but any persons taken alive required transport to England for trial. The law seemed wholly inadequate to protect expanding trade in the East and West Indies. Accordingly, in 1700, as war with France ended, Parliament endorsed the Act for the More Effectual Suppression of Piracy. Its “Preamble” stated the intention to protect “Trade and Navigation,” particularly in “the East and West Indies, and in Places very remote,” from rising numbers of pirates. Section 1 provided:

all Piracies, Felonies and Robberies committed in or upon the Sea, or in any Haven, River, Creek or Place, where the Admiral or Admirals have Power, Authority or Jurisdiction, may be examined, inquired of, tried, heard and determined, and adjudged, according to the Directions of this Act, in any Place at Sea, or upon the Land, in any of his Majesty’s Islands, Plantations, Colonies, Dominions, Forts or Factories... by the King’s Commission... or any of the Admirals, Vice Admirals, Rear Admirals, Judges or Vice Admiralities, or Commanders of Any of his Majesty’s Ships of War (or any other Persons and Officers his Majesty shall think fit to appoint).

From the point of jurisdiction, this legislation is significant: the Crown and Admiralty could issue special commissions for trial in the King’s colonies of “Piracies, Felonies and Robberies committed in or upon the Sea.” It also allowed trials on Royal Navy warships in “any Place at Sea.” However, this did not mean the high seas. To be sure, in 1720, the King’s Advocate issued a legal opinion that stated that “pyrates” captured on the high seas may be tried and executed on “His Majesty’s Ships of War” on the coast of plantations, but there was no precedent “for the tryal of pyrats, to be executed at any place on the high sea at large.” The Act provided for expansive jurisdiction for the more effective protection of England’s trade, and colonial governors in any part of the world had authority to hold commissions for the trial of pirates whenever their trade needed protection. Importantly, there existed no jurisdiction for the trial of pirates other than that provided for under English municipal law. The Act was not concerned with protecting the trade of foreign sovereigns and left it lawful for England to licence privateers to attack such commerce. Nor did it recognise piracy to be a crime under
the law of nations or subject to universal jurisdiction whereby all sovereigns
could exercise their jurisdiction over all “pirates.” This reflected the national
laws of the other maritime Powers. The only provisions in national laws
for prosecuting crimes against a foreign sovereign were those committed by
the prescribing State’s subjects. Such persons acted either without or beyond
the terms of a privateering licence and attacked the flag vessel of an allied,
friendly, or neutral sovereign, rather than that of an enemy, or served under
the privateering licences of a foreign sovereign; both circumstances risked
causing reprisals and hostilities.

In sum, no State practice existed to support the development of universal
jurisdiction over piracy during the “golden age.” In its place, jurisdiction
developed out of the necessity by States to secure vital trade routes and pro-
tect colonial trade and settlements from unlicensed privateers, whose acts
of unlawful warfare were attributable to any sovereign. Notwithstanding
the development of protective jurisdiction over piracy, in some piracy trials
courts not only described pirates as the “enemy of all mankind” but also
claimed that piracy is “a crime against the law of nations” that is suppressed
to protect “humanity” and to “preserve Mankind.” In turn, jurisdiction over
piracy appears neutral and objective, based on the protection of higher,
supposedly “universal” values. Yet, this is misleading. The “pirates” of one
sovereign were not the pirates of each and every sovereign elsewhere;
States also tolerated and even colluded with “pirates.” British and Spanish
colonial governors accused each other in “Breach of the Law of Nations”
for harbouring “pirates” who had committed attacks against their trade. It
is therefore not credible to say that “pirates” were the enemy of mankind
and punished for mankind; rather, pirates were the enemies of the State that
labelled them as such. And it is this rhetoric upon which subsequent courts
and commentators have focused and misinterpreted jurisdiction as based
upon universality. To better understand why the disruption by pirates of
navigation and trade on the high seas was claimed to violate the law of
nations—and were suppressed in the interest of mankind—it is useful to
examine some of those early treatises on international law.

Grotius proved one of the most influential writers on modern interna-
tional law. The most pressing issue for him in the early seventeenth century
involved Dutch rights to navigate freely and conduct trade on the high seas
to the East Indies. These rights faced threat not by “piracy” but, rather, by
Portugal, which had since the late fifteenth century claimed sovereignty over
the high seas and all territories in that region to monopolise European trade.
Complicating matters, the King of Spain had ruled Portugal since 1580, and
he treated the Dutch Republic, involved in a war of independence against
Spain since 1568, as a rebellious region of the Spanish Empire.

In 1603, in the Straits of Singapore, the Dutch East India Company cap-
tured a Portuguese ship, the Santa Catarina, carrying precious metals valued
at over three million guilders. The Dutch Company retained Grotius in
1604 to write a legal treatise defending the capture and acquisition of the *Santa Catarina* as lawful prize. The broader legal and political context of Grotius’s work involved justifying the waging of war by the Dutch Republic against Spain and Portugal in the East Indies—as Grotius put it, in the “zeal for commerce and for enterprise in foreign lands.” Against this contextual backdrop, he prepared a manuscript, “Commentary on the Law of Prize and Booty.” Although this document in its entirety was not published until the nineteenth century, Grotius printed Chapter XII separately and anonymously in 1609 at the request of the Dutch Company; it was entitled “Freedom of the Seas or the Right which belongs to the Dutch to take part in East Indian Trade” (*Mare Liberum*). Arguing that “the right to engage in commerce pertains equally to all peoples,” Grotius believed that “humanity is united” by trade and that trade is a “necessity” for the “human race.” Thus, preventing trade is an offence against “nature herself” and “must constitute an injury.”

To justify the Dutch Company as a private entity waging war against the subjects of a foreign sovereign, Grotius contended that in a state of nature, such as the high seas where judicial recourse is lacking, private individuals and sovereigns share the same powers under the fundamental “precepts” of the law of nature: self-defence and the protection of trade. The interdiction of Dutch trade was, moreover, not merely an attack against the Netherlands, but an injury to the “human race.” In turn, he portrayed the Dutch Company and the Dutch Republic as waging war to open up overseas trade routes and punish the Portuguese in the interest of the law of nature and for the “benefit of humanity.”

Apart from arguing that the freedom of trade is an “incontrovertible right” protected by natural law, Grotius went further by arguing that the law of nations established a “foundational” rule: “the right to engage in commerce pertains equally to all peoples, and no state or prince has the power to issue a general prohibition forbidding others to enjoy access.” Thus, he asserted, “*access to all nations is open to all, not merely by the permission of the law of nations but by the command of the law of nations.*” To prevent Dutch Company access to trade routes, Portugal would have to demonstrate that it had established sovereignty and, therefore, ownership over the “immense” and “infinite” high seas. There are some things, argued Grotius, that belong to nature and are “impossible” to possess privately, including air, fish, and the sea. Just as Spain and Portugal had claimed sovereignty over the high seas under the authority of the Papal decree, which Grotius rejected as the Pope lacked such authority, he buttressed his argument with higher, binding authority—the law of nations. As disrupting trade violated the law of nations, sovereigns—and more particularly the Dutch—had permission to punish foreign nationals and even use military force in a “just war” to protect their navigation and trade under the authority and in the *interest* of the law of nations.
Mare Liberum meant that no sovereign could lawfully claim ownership over vital trade routes on the high seas.\(^{94}\) According to Grotius, “if princes possess a right over the sea, it is merely a right of jurisdiction and protection.”\(^{95}\) In a subsequent manuscript defending Mare Liberum, he asserted that as the seas cannot be “occupied” through claims of sovereignty, “(a)ll peoples or their princes in common can punish pirates and others, who commit delicts on the sea against the law of nations.”\(^{96}\) Grotius seems to have made a fundamental distinction between the “common” right of sovereigns to punish disruption to their navigation and trade, as violations against the law of nations, and universal jurisdiction.\(^{97}\) Nevertheless, in accordance with the thesis in De Jure Praedae, Grotius concluded, “if a prince has real jurisdiction over the sea and indeed the Ocean, this would not have anything to do with his claiming ownership of the sea, but with his guarding its community.”\(^{98}\) Grotius discussed piracy only to the extent of accusing the Portuguese as being “pirates” for preventing Dutch trade with the Indies, which was “harmful to all mankind” and therefore justified the Dutch in “inflicting punishment on them.”\(^{99}\) For Grotius, “piracy” was little more than a label attached by sovereigns to persons that “blockade the high seas and impede the progress of international commerce,” which violated the law of nations.\(^{100}\) It was thus perfectly just for the Dutch Company to wage war against the Portuguese, as violators of the law of nations, and to punish them by attacking and seizing the Santa Catarina and its cargo.

Grotius later developed his argument in 1625 with “On the Law of War and Peace”:

Kings . . . have a Right to exact Punishments (on foreign nationals), not only for Injures committed against themselves, or their Subjects, but likewise, for those which do not particularly concern them, but which are, in any Persons whatsoever, grievous Violations of the Law of Nature or Nations.\(^{101}\)

He included within this statement the right to punish “pirates.” Though Grotius did not discuss piracy in any meaningful way, he suggested that wars can be justly waged against pirates as offenders of the laws of nature and of nations.\(^{102}\) While some courts and commentators have interpreted the above passage as “the modern theory of universal jurisdiction” over piracy,\(^{103}\) others argued that it is a general theory of universal jurisdiction, not specifically relating to piracy.\(^{104}\) However, neither interpretation seems accurate. Rather, the statement has to be set within the argument first developed in Mare Liberum and the “universal” right of every sovereign to punish violators of the law of nations, including labelling such persons as “pirates,” without having to prove “Injuries committed against themselves.” Elsewhere, Grotius asserted that sovereigns are “permitted by the Law of Nations” to grant “Commissions to People going to Sea, to attack Pirates wherever they
The reason that sovereigns granted such commissions lay with the protection of their navigation and trade. It also has to be borne in mind that the right of “Kings” to exact punishment, to which Grotius referred, belonged to European sovereigns able to punish their enemies, not least those in the colonial world as “pirates” and violators of the law of nations.

Grotius’s argument for *Mare Liberum* did not occur in a legal vacuum. It is little different from that of the Spanish theorist of international law, Francisco de Vitoria, who argued in the previous century for the right of the Spanish sovereign under the law of nations to wage war in self-defence and to punish American Indians for opposing the freedom of Spanish trade. Writing in the late sixteenth century, Alberico Gentili, an Italian Protestant legal scholar at Oxford University, shared the view that Spain had justly waged war against the Indians for refusing to trade with them. The first modern jurist to discuss piracy under the law of nations, he framed his argument within the context of the law of war that seems to have been implicitly made, at least in part, in response to attacks committed against Spanish colonial trade in the Mediterranean by the so-called “Barbary” States of North Africa. With this in mind, Gentili argued that under the law of nations, sovereigns are permitted to wage war justly against persons who disrupt their navigation and trade on the high seas and, where such persons act without sovereign authority, they may be treated as “brigands or pirates.” For Gentili, only sovereigns are entitled to wage war under the law of nations, which means that “pirates and robbers,” unlike privateers, “do not come under the law of war” and may be destroyed. As pirates do not act under the authority of sovereigns in a state of war, he defined pirates simply as “the common enemies of all mankind”; still, what he appears to have really meant is that as the common enemies of sovereigns, pirates fall outside the law of nations, which is an agreement and compact amongst sovereigns.

Of course, treating an offender as a “pirate” depended upon the recognition of the sovereignty of the licensing authority; this involved a political rather than legal decision made by the injured sovereign. Gentili recognised that the high seas were “common to all” sovereigns under the law of nations, and he argued that it is therefore “right” for all sovereigns to wage war against pirates because “piracy is contrary to the law of nations” and a “violation of the common law of humanity and a wrong done to mankind.” It seems to have been the disruption of a sovereign’s navigation and trade on the high seas by unlicensed privateers in time of peace that Gentili considered a violation of the law of nations, rather than “piracy” per se. He was not detailing the practice of sovereigns at that time but, instead, prescribing that sovereigns “should” wage war against pirates. This was an argument attractive to sovereigns for the protection of their navigation and trade; it also favoured the Spanish Crown, for whom Gentili subsequently worked as
an advocate and which was at war with the Dutch Republic as well as the Barbary States and treated their privateers as “pirates.” Thus, in similar terms to Grotius’s argument, sovereigns are permitted by the law of nations to wage war against their enemies as “pirates” and enforce jurisdiction over them on the high seas as violators of the law of nations to secure vital trade routes and protect trade. What is more, it could occur in the interest of “humanity.”

Grotius was a major influence on Vattel who, writing on the “Law of Nations” in the mid-eighteenth century, described the law of nations as the law of nature applied to the relations of independent sovereigns living in a state of nature. He made the general proposition that the law of nations is “of such importance to the safety of all states” that all nations have the right to use “forcible means” to repress any nation that tramples it “under foot.”

Writing more specifically on “the Sea,” he suggested that a Power that violates the law of nations by claiming sovereignty over the high seas “does an injury to all nations; it infringes their common right.” Although not discussed in detail, Vattel’s “common right” included navigation and trade, particularly given that he referred to Grotius’s *Mare Liberum* and the “exceeding importance” of trade to the wealth, strength, and security of the State. The “common enemy” claiming sovereignty over the seas, moreover, may be punished by injured States in the interest of the law of nations and to “discharge their duty” to “human society,” including by the use of military force. For Vattel, “Nations have the greatest interest in causing the law of nations, which is the basis of their tranquillity, to be universally respected.”

Within this context lays the understanding of Vattel’s passage on piracy:

> . . . although the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories, we ought to except from this rule those villains, who, by the nature and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized; for they attack and injure all nations, by trampling under foot the foundations of their common safety. Thus pirates are sent to the gibbet by the first into whose hands they fall.

This passage gives the impression that “pirates” are punished by every State on behalf of all nations and, predictably, has been cited in support of universal jurisdiction. On closer inspection, Vattel’s theory has nothing to do with universality and is no different from that of Grotius. Indeed, for Vattel, “pirates” are persons that violate the law of nations by disrupting the freedom of navigation and trade on the high seas. Defining “pirates” as the “enemies of the human race” appears little different from his description of a State claiming sovereignty over the high seas as a “common enemy.” As the law of nations, in Vattel’s view, provides States with the “foundations of their
common safety,” all States are permitted as an exception to the territoriability of jurisdiction to punish “pirates,” to protect their “common right” of navigation and trade and “defence and safety.” What is more, they could so in the interest of enforcing the law of nations and for the benefit of all nations. Vattel treated the law of nations as the law of nature applied to sovereigns and, like Grotius, viewed trade as beneficial to the “human race”; therefore, he suggested that States are under a general obligation to protect and foster trade, presumably against “pirates” who, disrupting navigation and trade, could be punished for the benefit of humanity.

At the heart of these early treatises on international law is the theory of protection, which reconciled the protection of navigation and trade with the law of nations and supposedly universal principles and, indeed, humanity itself. As the law of nations protected navigation and trade, no State could claim sovereignty over the high seas. Under the authority and in the interest of the law of nations, all States had permission to enforce jurisdiction on the high seas, even using military force to secure vital trade routes and protect trade from violators of the law of nations. Within this intellectual framework, the maritime Powers legitimised the protection of their navigation and trade, both from each other and “pirates” during the “golden age” and beyond.

This analysis has challenged the common understanding that universal jurisdiction emerged out of the suppression of piracy and suggests that jurisdiction instead represents one of the earliest and most important developments of the protective principle, the origins of which have rarely been examined and are little understood. States treated the disruption of navigation and trade on the high seas as a violation of the law of nations and harmful to humanity; to safeguard their trade from each other during disputes and rivalry, claims were also made to suppress “pirates” in the interest of the law of nations and for the benefit of humanity. Importantly, all States could enforce jurisdiction on the high seas over piracy. Given that any one particular sovereign could not own the high seas, and that pirates fell outside the protection of any sovereign power, it was therefore unnecessary, as a matter of international law, to justify the prescription of national laws extraterritorially by providing a nexus with an offence under a particular ground of jurisdiction. The upshot is that each maritime Power possessed, in time of peace, the widest possible jurisdiction under international law for the protection of its vital interests on the high seas without having to prove any nexus with alleged pirates. At the same time, restricting jurisdiction to “piracy” protected their sovereign rights of navigation and trade from interference by each other. Importantly, the 1982 United Nations Convention for the Law of the Sea codified this broad right of protective jurisdiction over piracy, which does not require a jurisdictional nexus between a prescribing State and an alleged offence.

There is a need to reconceptualise jurisdiction over piracy based on the protection of vital State interests that are shared by the international
community, which has been widely misinterpreted by courts and in legal scholarship—and called by a different name: universal jurisdiction. This is due largely to the persistent reliance upon tentative secondary sources or the use of primary sources wholly out of context. Consequently, universal jurisdiction finds basis on false foundations and has developed as a hollow concept. The implications are twofold. First, as a matter of international law, it raises serious doubts about the validity and legal basis of universality over piracy, invoked in recent years by maritime Powers seeking to protect their vital trade routes and flag vessels off the coast of Somalia. To that end, the UN Security Council has affirmed it. Second, there should not be an expansion of universal jurisdiction to encompass crimes under international law by making them analogous with piracy. The reason is simple. Jurisdiction has traditionally developed over piracy on the high seas under the protective principle, and the attempts made by a handful of States in recent years to exercise universality over crimes other than piracy, allegedly committed in the territory of other States, has given rise to inter-State disputes. Consequently, it has led to the concept's validity and scope being the subject of needless heated debate before the UN General Assembly.

NOTES

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Matthew Garrod is senior lecturer at the School of Law, University of Portsmouth. His primary research interests are in the areas of Public International Law and International Criminal Law, generally, and jurisdiction in international law, history of international law, international terrorism, piracy, and international and transnational crimes, more specifically.