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Pirate Imageries and the Law: Utopias, Seven Seas and Sunken Treasures

Mirosław Michał Sadowski[1,2,3,4]

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Abstract

Few phenomena in world history have such a vivid imagery in popular culture as piracy. Law is a major element of those images, whether looking through its lens one considers pirates as lawless or, conversely, as free of the shackles of society. This article proposes to investigate the relationship between the two, choosing three eponymous images as the focus of its investigations. Beginning with the study of the ways in which images of piracy were created in popular culture, the author then turns his attention to the question of the ways in which law has framed pirates throughout the ages. Thus, he looks into each of the three pre-selected images: of pirates as symbols of liberty (focusing on the question of pirate's social organisation and pirate utopias), of pirates as outlaws (focusing on the question of how international law has treated pirates throughout history to the present day) and of pirates as treasure hunters (focusing on the question of legal rights to sunken treasures). In the final part of the article the author ponders the endurance of images of piracy, asking the question as to what this phenomenon reveals about law in particular and society in general.

Keywords Piracy · Popular culture · Utopia · Law of the sea · Underwater cultural heritage

✉ Mirosław Michał Sadowski
miroslaw.sadowski@strath.ac.uk

[1] School of Law, University of Strathclyde, Glasgow, Scotland

[2] Centre for Global Studies, Aberta University in Lisbon, Lisbon, Portugal

[3] CEBRAP – Brazilian Center of Analysis and Planning, Sao Paulo, Brazil

[4] INP PAN – Institute of Legal Sciences, Polish Academy of Sciences, Warsaw, Poland

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1 Introduction

Rarely is one inspired by a video game to take their research in a direction they have not thought about. Such is the case of this article, the idea for which was born following a rather intense couple of days engaging with the remastered version of 'Uncharted 4: A Thief's End' [77]. Finding myself with unusual amounts of free time in the weeks following the defence of my doctorate, I dove headfirst into the world of treasure hunters searching for Libertalia, the fabled pirate utopia, whereby they hoped to find the treasures of some of the most famous pirates in history.

The game has reignited my—as is common at that age—childhood interest in all matters piracy; as an adult, however, I approached the question from the viewpoint of a legal theoretician, beginning with the investigations of Libertalia as an example of a utopia. Seemingly nudging me into delving deeper into the topic, precisely at that time, the English edition of David Graeber's 'Pirate Enlightenment, or the Real Libertalia' [35] came out. This article stems directly from this initial attempt at a socio-legal engagement with piracy.

An engagement, it needs to be stressed already here, on the one hand further fuelled by the recent resurgence of piracy off the African coast, which I remark upon below, but on the other restricted by the inherently limited realms of an article. Choosing the most relevant social and cultural aspects of piracy from the legal perspective was not an easy task, given the veritable cornucopia of images of pirates in popular culture today, permanently enshrined in our collective memory—this phenomenon of social, and not merely individual, remembering of past events through one's participation in various groups, which becomes easily influenced by those in power and with power [93, p. 211], including the media. Importantly, not only real events and places but also fictional ones may become a part of collective memory such as *mnemotopoi*, which are symbolic spaces of memory in which "certain memories have been placed" [92, p. 145].

Over hundreds of years (see Fig. 1), pirates and piracy have been objects of study of different disciplines. To these investigations, I propose adding a legal engagement, asking how law frames piracy through the selection of three classical images from popular culture, which are points of intersection between the two: pirates as symbols of liberty, pirates as outlaws, and pirates as treasure hunters. All three carry with them powerful associations: the first two of the somewhat contradictory perception of pirates, on the one hand freedom fighters who are able to lead their lives free from social conventions, amongst them the law, on the other brutal criminals; with the third in a way linking the other ones, making the promise of a way out of the mundane everyday and a better future through a life of crime.

Such cultural-legal investigations are of major importance for both fields: as poignantly noted by Naomi Mezey, focusing on culture in law allows us "to locate the ways in which law influences who we are and who we aspire to be, and moves us beyond the standard critique of what the law is and what we want it to be" [73, p. 66]. Moreover, given that law and collective memory have a myriad of points of junction, both influencing and relying on each other [95, p. 165], a legal analysis of the *mnemotpoi* of piracy should have particular value.

Thus, this article will be divided into four parts, the first asking where the prevalent pirate images come from in general, focusing on the development of piracy as a common element of popular culture; then, each of the following parts engaging with one *mnemotopos*-image point of intersection between law and piracy: the image of pirates as free from the shackles of society, focusing on their conceptual—and to a certain extent realised—utopias from the viewpoint of legal theory in part one; the image of pirates as outlaws sailing the seven seas, focusing on the legal approaches to piracy in international law and the law of the sea in part two; and the image of pirate treasures, concentrating on legal responses to issues surrounding the excavation of sunken treasures in the present day. In the conclusions, I intend to bring the different strands of my investigations together, venturing to answer not only the question what this cultural engagement with law can tell us about pirates but also what piracy may tell us about law as the phenomenon tests it—both literally and figuratively—at law's limits.

Importantly, in my investigations, I will take Mezey's aforementioned law as a culture approach enhanced with a legal semiotics perspective, which will allow me to further study the dynamic relationships that law has with society and culture while focusing on the visual [97, p. 4–5]—in this case, the images of piracy—as well as with Paul Ricoeur's understanding of cultural memory as a veritable "living tradition" relating to "the sphere of culture" that anchors us in the past among the various elements impacting our identities, the task of which is characterised by "dynamism and perpetual activity" [2, p. 113; 118]. As the following section clearly shows, the *mnemotopos* of piracy perseveres, despite changing times and eras.

2 Part 1. The Call of Piracy in Popular Culture, or Historical Accuracy be Damned

Contrary to popular perceptions which situate pirates primarily in the early modern era, the relationship between piracy and culture spans not only centuries but also whole millennia. Already Homer, Thucydides and Strabo spoke about pirates [110, p. 2–5]—importantly, not necessarily in a negative light, as piracy in ancient Greece was often perceived as a possibility for social growth (provided that the raids were conducted in the interest of the *polis*), although those attitudes were already changing to generally unfavourable back in the day [68, p. 45–47]. Additionally, in ancient times, one of the most renowned stories involving Julius Caesar, covered (with certain discrepancies) by both Plutarch and Suetonius, regarded his kidnapping by the pirates as a young man, with Ceasar first demanding that the corsairs ask for a higher ransom than they originally envisaged and then, after being freed, taking command of a nearby fleet, capturing and ultimately crucifying his kidnappers [83].

The cementing of the pirates' role as staples of popular culture occurred much later, however, with the arrival of the so-called Golden Age of Piracy (the late 17th-first half of the eighteenth century) [116, p. 83]. It was precisely that time of early globalisation and colonial expansion that gave us the uniquely enduring social construct of piracy in popular culture: beginning with "the first travelogues of former privateers and buccaneers such as Raveneau de Lussan, Alexandre de Exquemelin

Fig. 1 B. Cole, '*Captain* Bartho. Roberts *with two Ships,* Viz. *the* Royal Fortune *and* Ranger, *takes a Sail in* Whydah *Road on the Coast of* Guiney, January 11th 172½' (1724). Source: Project Gutenberg [21]. (This media file is in the public domain.)

and William Dampier" [86, p. 31], it was the text of a certain Captain Johnson—whose real identity has been a matter of wide disputes, with certain researchers suspecting Daniel Defoe—'A General History of the Robberies and Murders of the Most Notorious Pyrates', that enshrined the likes of such outlaws as Blackbeard, Anne Bonny, Mary Read, Calico Jack, and many others in our collective memory [3, p. 9–11]. Since the 1690 s, pirates have also become heroes of various street ballads, bringing their adventures to illiterate people [63, p. 167]. It was also at that time that pirates became immediately associated with the Caribbean (even though they were just as active on the Indian Ocean and the Western African coast [86, p. 32], also present historically within other bodies of water, such as the Baltic Sea [112, p. 201]), buried treasures (following the hiding of his loot by William Kidd, even though it was not a typical practice at the time) [3, p. 8], and the black Jolly Roger flag, the use of which was widespread at that time (at least 2,500 pirates sailed under this banner) [116, p. 87–88].

Importantly, it is "no coincidence that the height of pirate activities in the 1700s paralleled with the height of" European colonisation [3, p. 3]; pirate narratives established at that time "helped to advertise the adventure of the 'New World' and legitimised these early colonial efforts," with the constructed images of adventures and great treasures inadvertently serving "the expansion of the later European empires" [86, p. 32]. These were further enhanced by the fact that, just as in ancient Greece, there were two contrasting images of piracy: of good (legal) privateers and buccaneers who acted in the colonial interest of the state they represented and of (illegal) pirates—even though the distinctions between the two were often fluid [3, p. 2–3; 8], as I intend to show further in the article.

The pirate narratives became so significant this quickly because they were rapidly appropriated and immortalised in the literature. In addition to the first- and second-hand accounts written by seafarers mentioned before, in 1640, the first fictionalised

work came out, Jean Mariet's 'L'Illustre Corsaire', firmly establishing the motive of the wronged hero forced to become a (nonetheless gallant) pirate, which soon became "a global cultural phenomenon" [86, p. 33]. The pirate narratives grew truly universal by the turn of the nineteenth and twentieth centuries following the successes of the 1879 comic opera 'The Pirates of Penzance' by Gilbert and Sullivan, the 1883 'Treasure Island' by Robert Louis Stevenson, responsible for immortalising various staples of piracy, such as "maps and buried treasures, talking parrots, wooden legs, and the punishment of walking the plank," and the 1904 'Peter Pan' by James Matthew Barry [116, p. 86]. These literary images of pirates were further strengthened at that time by artwork produced by the American artist Howard Pye, who is credited with creating "the iconic look of the mythical pirate" by putting together the "seafarer imagery from the era with a Spanish gypsy look to create the exotic and menacing guise of a dangerous nautical rogue" we know well today [106]: "wiry and unkempt, they wear headscarves and sashes over their tattered clothing while their captain sports a tri-cornered hat and long coat" [64, p. 2]. Despite not being "technically accurate," Pyle's illustrations "almost single-handedly changed the world's view of pirates by making them picturesque and romantic" [58, p. 5], through the creation of "a realm of vicarious adventure, immersing his heroes—and therefore his fin-de-siècle readers—in exotic, violent fantasy," beginning with the 1887 'Walking the plank' (see Fig. 6). On these images, Pyle's students, N. C. Wyeth (see Fig. 2) and Frank E. Schoonover, soon added other 'iconic' elements, such as a pet parrot or a peg leg [64, p. 2–3], thus establishing the pirate we know today in our collective memory.

Importantly, these static images were soon joined by those in the movies, with the 1922 bestselling Italian novel 'Capitain Blood' by Rafael Sabatini (credited with the establishment of—then ironic—term Golden Age of Piracy) [58, p. 4] adapted in 1935 under the same title bringing fame to Errol Flynn, who later appeared in other pirate motion pictures, such as 'The Sea Hawk' in 1940, further cementing the fictional pirate imagery in collective memory [86, p. 33–34]. The aforementioned illustrations were brought to life in Disney's 1950 adaptation of Stevenson's 'Treasure Island', which added the common perception regarding the way in which pirates talk, with Robert Newton's Long John Silver having a particular "penchant for growling 'r' sounds," thus creating the now prevalent "Arrrr!" [43, p. 1]. In general, however, soon after World War II, the pirate "narrative, which had been successfully reproduced for more than three centuries, abruptly lost its appeal to Western audiences" [86, p. 33–34].

While pirate *leitmotifs* still appeared in popular culture, they often had self-depreciating qualities, such as in the case of Albert Uderzo and René Goscinny's 'Asterix' comic books (appearing from 1959 to this day), which playfully adapted various pirate tropes [115, p. 58–59], or Walt Disney's 1967 'Pirates of the Caribbean' attraction in his theme-park, which was described as "grotesque." Little could Disney suspect when opening the new ride, uncharacteristically for Disneyland non-connected with any of his movies but rather tenuously linked to the "historical events in the colonisation-era Caribbean" [85, p. 63–64; 67; 69], that it would revive the whole pirate genre and return it to the popular culture, through the widely-watched series of movies [86, p. 34; 111, p. 89]. It needs to be noted,

however, that *Pirates of the Caribbean* have a narrative adapted for the twenty-first century, whereby the morally good hero (Will Turner) wronged by the fate is opposed by not an evil, but a morally ambiguous character (Jack Sparrow). It is the latter that came to epitomise the pirate image in the present [85, p. 73; 77], at the same time still visually modelled on old pirate narratives—in this case most likely regarding the aforementioned Calico Jack [3, p. 9–10]—thus linking the past with the present.

Today, piracy is once again in full swing in the Western popular culture (Ubisoft's 'Skull and Bones' was one of the most highly anticipated video games of 2024 [117]), as pirates continue to "make audiences question loyalty and social cohesion in the face of an opportunistic materialist culture," a sentiment further strengthened by the fact that "the range and scope of national and governmental order is always at stake with pirates," as well as by their "liminality […] and the threshold experiences they stand for—being outside the law as well as constantly threatened by and threatening others with death," all part of their allure [116, p. 94]. These aspects of the pirate narrative lay at the basis of the first legal point intersection investigated below.

3 Part 2. The Call of Libertalia, or the Case for Legal Theoretical Engagement with Piracy

> The image of Libertalia, the utopian pirate experiment, has remained a major source of inspiration […]; it has always been felt that even if it did not exist, it should have existed; or even of it did not exist in any literal sense, even if there was never any actual settlement that bore that name, the very existence of pirates and pirate societies was itself a kind of experiment, and that even at the deepest origins of what has come to be known as the Enlightenment project, one now seen in revolutionary quarters as a false dream of liberation that has instead unleashed unspeakable cruelty upon the world, there was a kind of redemptive promise of a genuine alternative [35, p. ix].

As the opening citation to this section shows, while pirates and piracy may not be an obvious choice for legal theoretical discussions, in reality, the ideas they encapsulated may be linked directly to the major philosophical issues of their day—and, as this part of the article demonstrates, remain relevant today for our deliberations of what democracy actually means.

Thus, let us ponder here how real is the first analysed image, that of a pirate as an individual entity, free from the shackles of society. As becomes clear upon a closer study, this collective memory has more than a grain of truth in itself—especially in comparison with the prevailing social order in the seventeenth and eighteenth centuries, which was replicated on both merchant and naval vessels.

As noted by Chris Land, compared to the no smaller difficulties of other seafaring careers, choosing to become a pirate (or a buccaneer, or a privateer; these distinctions will be analysed in the next part of the article) offered both a lesser workload and a more relaxed discipline, with revenge on gruesome merchant captains oftentimes

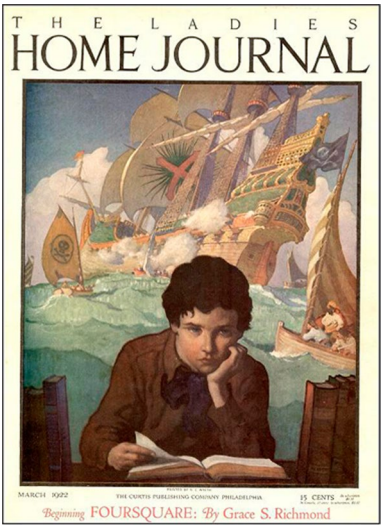

Fig. 2 N. C. Wyeth, 'Ladies Home Journal March 1922 cover' (c. 1921). Source: Wikimedia Commons [114]. (This media file is in the public domain.)

the main motivation for becoming a pirate—rather than profit, which, rarely an archetypical treasure (and if so, typically rapidly squandered), usually took the form of "food, drink, spare sail cloth and the tools necessary to perpetuate" the pirate lifestyle [60, p. 176].

These freedom-related, democratic, even anarchistic motives with an origin in protestant thought and the emergence of the concept of individual autonomy [13, p. 278] were later reflected in the organisation of the life on board—as pointed out by John Markoff—these were visible through the election of a pirate captain, as well as more general ways of "countervailing power (in the forms of the quartermaster and ship's council) and contractual relations of individual and collectivity (in the form of written ship's articles specifying shares of booty and rates of compensation for on-the-job injury) [67, p. 673 n 62]—together creating an alternative system of governance, which Peter T. Leeson ironically called "an-arrgh-chy" [61, p. 1090].

The crew themselves represented the breaking of national and traditional norms of that time, as alongside one another there could have been "Swedes, escaped African slaves, Caribbean Creoles, Native Americans, and Arabs" [35, p. xxiii], with certain studies showing that depending on the ship, 13–98% of the crew were black, meaning 25–30% on average per pirate ship [61, p. 1054]. Importantly, in addition to shared ideals, there were certain symbols that united all pirates—the aforementioned Jolly Roger flag, the pirate creole (infused with swear words and nautical expressions), and the perception of being the "brethren of the seas"—together creating "a form of community and mode of belonging that was radically opposed to the dominant ascriptive forms of association based on nationality" [60, p. 178], as well as "race, though rarely gender" [51, p. 359].

Among these, the questions of on-board organisation are particularly interesting from the legal perspective, demonstrating how direct democracy may work on a small scale: the elected captain had absolute authority only during a chase or a battle; always held in check by the quartermaster (both "the second in command"

and "something like an early version of the trade union shop-steward"), the main decisions were made by the general council, i.e., all the pirates on board. The split of any loot was performed according to responsibility and expertise, with the captain and the quartermaster, as well as various specialists receiving more shares. The ship's articles typically also regulated issues regarding discipline, the resolving of disputes, bans on prostitution, gambling, intoxication in battle and "the rape of female captives." Furthermore, the "early form of industrial injury compensation scheme" mentioned above, as well as the possibility of finding alternative work for the wounded colleagues [60, p. 179–180], thus putting the fabled pirate codes, or Chasse-Parties, way ahead of the Western legislation in place at the time.

Importantly, these ideas were also applied off-board in various pirate settlements, including the renowned Tortuga, an island off the coast of Haiti, which, Violet Barbour remarks, at one point in the seventeenth century "became a sort of piratical fraternity with a peculiar code of laws and customs," including e.g., the injury payments of ""6oo pieces of eight or six slaves" for the loss of the right arm, "500 pieces of eight or five slaves" for the left arm,", etc. [8, p. 539; 539 n 40]. Another notorious pirate outpost was the Republic of Salé, or the Republic of Bou Regreg' (1627–1641/1666), a confederation of three cities in and around present-day Rabat, Marocco, established by Muslims forced to leave Spain in the early seventeenth century. The Republic remained outside of the political control of Istanbul, with a particular system of power in place, including an elected for a period of one year "governor or chief," ruling with the assistance of "a council or Divan of 16 elected members," with the whole organisational framework based on the community's customs brought from Spain [62, p. 3; 5; 10].

Ultimately, however, it was not on the coast of the Atlantic Ocean, which is typically associated with piracy's Golden Age, that the most radical ideas of pirate governance were realised (or at least placed in the collective memory) but rather on Madagascar. Following unsuccessful attempts at colonisation of the island by the English, in the second half of the 17th and the beginning of the eighteenth centuries, it became a safe haven for pirates, whose settlements "sprung up throughout Madagascar, especially St Maries Island on the northeast coast." These are particularly interesting objects of study, at the same time developing "their own utopian characteristics" and a veritable testament to "a deeper, more complex layering of Indo-Atlantic connections beyond the officially sanctioned ventures, as most of the pirate-settlers were veteran buccaneers and privateers from the Atlantic and its tropical extension, the Caribbean Sea" [69, p. 97–98].

Among these utopian settlements, no other was more famous than the one that most likely did not exist: Libertalia. Known only from a description in the aforementioned 'General History of the Pyrates', it was supposedly established by the quixotic Captain Mission together with his advisor and deputy, a lapsed Italian priest Lieutenant Caraccioli [30, p. 2] —compared by Maximillian E. Novak to Lenin and Trotsky. Taking command of his ship after the superior officers died in battle, Mission rallied other sailors with his criticism of the unequal distribution of wealth and the greed of the rich, with Caraccioli complementing the proto-communist narrative with his remarks that "the obedience to rulers is necessary only when there is true equality" [80, p. 108–109].

Debunking also slavery, Mission liberated seventeen slaves encountered on one of the captured ships, clothing them in the garments belonging to the Dutch sailors previously manning the vessel, once again delivering a rousing speech, presenting a particular eighteenth century attempt at racial equality:

> the Trading for those of our own Species, cou'd never be agreeable to the Eyes of divine Justice: That no Man had Power of the Liberty of another; and while those who profess'd a more enlightened Knowledge of the Deity, sold Men like Beasts; they prov'd that their Religion was no more than Grimace, and that they differ'd from the *Barbarians* in Name only, since their Practice was in nothing more humane […]. [While] these Men were distinguish'd from the *Europeans* by their Colour, Customs, or religious Rites, they were the Work of the same omnipotent Being, and endued with equal Reason: Wherefore, he desired they might be treated like Freemen (for he wou'd banish even the Name of Slavery from among them) and divided into Messes among them, to the End they might the sooner learn their Language, be sensible of the Obligation they had to them, and more capable and zealous to defend that Liberty they owed to their Justice and Humanity [50].

Ultimately, Mission established the settlement of Libertalia for those under his command (most likely in the area of the Antsiranana, or Diego-Suarez Bay) [13, p. 282–283], giving them "the Name of Liberi" in hopes of ensuring the erasure of any nationalistic sentiment between them—"desiring in that might be drown'd the distinguish'd Names of French, English, Dutch, Africans, &c." A sort of Esperanto was also created, as "the different Languages began to be incorporated, and one made out of the many" [50], completing the "Peter Pan atmosphere" [74, p. 134].

The town was supposedly created around an octagonal harbour and protected by two forts equipped with armour gained from the captured ships [50]. The land was equally divided [80, p. 168 n 16], and there was a "common Treasury, Money being of no Use where every Thing was in common, and no Hedge bounded any particular Man's Property." The liberated slaves "were employ'd in the perfecting the Dock, and treated on the Foot of free People" [50].

As the settlement grew, changes to the utopian system had to be made: Libertalia became governed by a Lord Conservator holding commanding power elected for a period of three years, with Mission chosen for that position first [30, p. 3]. He soon convened "a Council of the ablest among them, without Distinction of Nation or Colour." There were still "no coercive Laws," with the settlers proposing "they would divide themselves into Companies of ten Men, and every such Company chuse one to assist in the settling a Form of Government, and in making wholesome Laws for the Good of the whole" [50], in that realising, as Joachim Möller notes, the Lockean democratic ideal [74, p. 141]. Interestingly, while the death penalty was at first absent from Libertalia's legal system, it had to be reinstituted after Portuguese sailors earlier released on parole attacked the settlement for the second time—"however much it violates natural law, even Libertalia needs to impose capital punishment if it's to protect an otherwise maximally free social order" [30, p. 5].

Taking further steps in the construction of statehood, in that once again seemingly following John Locke's thought [74, p. 142], private property was reinstituted, as

"an equal Division was made of their Treasure and Cattle," with "such Lands as any particular Man would enclose, should, for the future, be deem'd his Property, which no other should lay any Claim to, if not alienated by a Sale" [50]. At the same time, despite its egalitarian ideals, the pirate settlement engaged in the exploitation and manipulation of the "pre-existing tensions among the natives of Madagascar" for its own benefit and ultimately Libertalia fell to their invasion [31, p. 476], with just a handful of pirates and Mission himself surviving the attack, only to disappear forever during a storm near the Cape of Good Hope [30, p. 4].

The ultimate classification of this unique egalitarian utopia, which went from a prototypical communist settlement to a budding Lockean democracy—this "amalgamation of concepts conceived elsewhere and then transferred to an unsuspecting place on the other side of the world" [74, p. 143]—poses particular challenges. In Thomas More's utopia, slaves lay at the basis of the social system [69, p. 98]; at the same time, the eighteenth century author of 'The General History of the Pyrates' seems to be telling us that Libertalia "fails because it is too idealistic. There is too much democracy and not enough leadership. Mission trusts the natives instead of enslaving them, and they treacherously destroy their benefactors" [80, p. 145]. As Lincoln Faller acutely remarks, Libertalia's downfall brought upon from "some unimaginable heart of darkness" seemingly implies that "the pursuit of liberty under natural law will inevitably require some repression of some people" [30, p. 6]. As such, the story of Libertalia serves as a lesson that, as the many horrific attempts at such projects in the twentieth century demonstrated in practice much later, an attempt at construction of an ideal society will always either have to be built on the subjugation of some part of the population or end in its downfall.

Although, as Graeber notes in the opening citation of this section, it is perhaps not important whether Libertalia actually existed or not, it still needs to be observed that there might be some truth to that story. What we know for sure is that: (1) pirates began to settle on Madagascar in approximately 1690; (2) they functioned "in similar form" throughout the island "until about 1730, when they seem to have disappeared, died off, or to have been subsumed by the more dominant Malagasy culture" [69, p. 112]; (3) their descendants with local women, known as the Zana-Malata (children of the Mulattoes), distinguish themselves on this basis as separate groups to this day [13, p. 283]; (4) the settling of the pirates on Madagascar resulted in a chain of events leading to the creation of the Betsimisaraka Confederation, supposedly led by a son of an English pirate and a Malagasy woman, with those living in its former territory known for their egalitarianism and considering themselves as Betsimisaraka also today [35, p. xviii–xix], showing the prevalence of certain utopian collective memories first established by pirates.

Even if Libertalia did not exist as described, and its tale "merged into a single and coherent story a whole series of experiences lived by pirates" in Madagascar [13, p. 284], it needs to be stressed that the more extremist ideas purported by pirates actually came into effect, albeit for a rather short period of time, between 1716 and 1726, when "a radical potential in the social organisation of piracy was actualised in a large scale insurrection that involved […] some 5000 pirates in the plunder of vessels of all nations" in the Atlantic and led to a "disruption of flows of mercantile capital and in the constitution of an alternative, radically democratic organisation

of the maritime labour process" [60, p. 172–173]. As Leeson acutely noted, the pirate "floating societies" established institutions in a way mirroring those of the contemporary governments [61, p. 1088; 1090]. These merits a much closer study in our present-day analysis of the origins of the ideas that led to the American and French revolutions and ultimately our modern concepts of freedom and democracy.

As such, to return once again to Graeber, it must be acknowledged in legal and political theory that

> the toothless or peg-legged buccaneer hoisting a flag of defiance against the world, drinking and feasting to a stupor on a stolen loot, fleeting at the first sign of serious opposition, leaving only tall tales and confusion in his wake, is, perhaps, just as much a figure of Enlightenment as Voltaire or Adam Smith, but also represents a profoundly proletarian version of liberation, necessarily violent and ephemeral [35, p. xvi].

The popular image of the pirate-freedom fighter (see Fig. 3) is thus not simply a creation of our culture; rather, it has been carried by our collective memory through the ages, an almost tangible illustration of the living link culture provided between the past and the present, as proposed by Paul Ricoeur, upon which I remarked at the beginning of this paper. As this part of the study shows, instead of what legal theory can tell us about the pirates, we may actually engage with a different issue, as to what pirates can tell us about legal theory. The next section of this article will ask a similar question in regard to international law.

4 Part 3. The Call of the Seven Seas, or International Law's Punishing (?) Hand

As established in the previous section, the well-known image of pirates as freedom fighters in popular culture is not as far from the truth as one might suspect. What about the image of pirates as outlaw kings of the seven seas? Were—and are—pirates always, as stipulated by Cicero, "*communis hostis omnium*" [19, p. 657–658], the common enemy of all (mankind), or can their legal status be recognised in certain situations? Importantly, as noted by James S. Reeves, "it is late in the history of English law that the term 'pirate' is associated with lawlessness," being directly linked with the 'vindication' of the admiralty jurisdiction and the inception of modern navies in the second half of the seventeenth century [91, p. 538–539].

As often in the matters at the intersection of law, politics and profit, the answer to this question has not been historically straightforward and, as I will note below, poses certain issues even today. Historically, four groups of sea plunderers have been distinguished: pirates, buccaneers, corsairs and privateers (see Fig. 4). Not only has each of these groups had a particular relationship with law but also, as I show below, the boundaries between them (barring corsairs, which should be treated separately due to their particular, localised origin) have often been fluid.

Among the different groups, the one used as a general denomination of all the different kinds of pillaging seafarers—also throughout this article—is also the one whose actions are also clearly prohibited in the eyes of law: pirates. Piracy is a term

specifically referring to "the arbitrary and indiscriminate seizure of vessels, goods and persons at sea" [11, p. 52]. Virginia W. Lunsford proposes six interconnected factors that lead to the rise of piracy: (1) availability of potential recruits; (2) availability of goods to plunder; (3) availability of a secure base (or bases) of operation; (4) an intricate internal organisation; (5) certain external support; and (6) "cultural bonds engendering vibrant group solidarity" [65, p. 130–131].

All of these factors were either already in place in the sixteenth and seventeenth centuries in the Atlantic and Indian Oceans or were soon created by pirates themselves (e.g., their social organisation on the ship and on land), with the history of piracy, as noted before, directly tied to the colonial and economic expansion of the European countries and early globalisation. As the international fight against piracy followed to protect the economic interests of the different powers, piracy may be seen as one of the main factors in the development of contemporary international law. It became a problem of not only European but also various local powers, for example, in South East Asia, where the Mughal rulers "recognised European maritime law in Indian waters", with consequences of this decision reverberating through the region [19, p. 660], constituting an important step in the establishment of a truly common *ius gentium*.

Furthermore, the first red notice in history was issued by England in the form of an international warrant to capture a pirate, Henry Avery (or Every, also known as Ben Bridgman, or Long Ben). By overtaking two Mughal empire ships on their way to Mecca in 1695, Avery managed to gather what was probably the greatest loot in the history of piracy, estimated by Mughal authorities at £600,000.[1] The country's emperor demanded that the English take action and an international manhunt followed as he was declared "an enemy of all mankind." However, while some of Avery's men were later located in various North American colonies and in Ireland, with several of them even tried and sentenced to death [35, p. 9–11], Avery himself was never found, despite many different claims as to his fate, suggesting that "he may have been one of the very few pirates to ger clean away with his booty" [63, p. 170–171].

The clearly illegal, in the eyes of law, pirates were only the first on the ladder of plunderers. Next from the perspective of legality were buccaneers, "specific groups of marauders" composed of former sailors, hunters, soldiers and indentured servants sent to the Caribbean by England, France and the Netherlands [65, p. 131–136], who found themselves in a precarious economic and personal situation, "without the sponsorship of a European monarch or state-sanctioned trading company," settled on the various Caribbean islands [99, p. 594].

With their name coming from the Native American *boucan*, or a traditional wooden grill used to smoke and dry meat, buccaneers linked the hunting on Caribbean islands with plundering mostly Spanish ships [35, p. 194; 196], creating a "mixture of trade, smuggling and low-level hostilities" [11, p. 53]. Their actions were perceived as fully illegal piracy by the Spanish [99, p. 594], already firmly

[1] Over £97,000,000 in present-day value (see: https://measuringworth.com/datasets/ukearncpi/; accessed 15.04.2024).

Fig. 3 Howard Pyle, 'The buccaneer was a picturesque fellow' (1905). Source: Illustration History [88]. (This media file is in the public domain.)

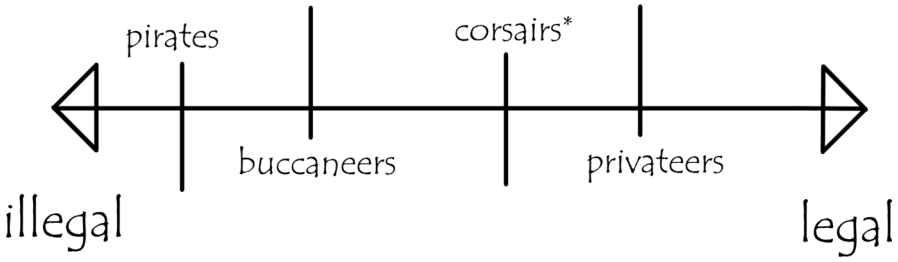

Fig. 4 The pirate level of legality: various categories of sea plunderers arranged according to their status in the eyes of law from illegal to legal. Source: Author

established in the region on the basis of the Treaty of Tordesillas [35, p. 48–50]; however, since through their actions, the buccaneers furthered the colonial-economic interest of England, France and the Netherlands, clearly divergent from those of Spain, they received unofficial support from the three countries, who perceived them as a much needed "quasi-military" reinforcement in the region, also providing plausible deniability in contacts with the indignant Spanish authorities [65, p. 137–138].

Among the various strongholds of buccaneers, particularly infamous was the island of Tortuga, already mentioned in the previous part of the article, whose story is a testament to the cosmopolitan nature of the pirate settlements: laying close to the established trade routes, the authority over it changed a number of times, falling under English, French and Spanish influence over the years [99, p. 589]. As such,

according to a 1653 Spanish estimate, it was home to both protestants and Catholics, approximately seven hundred Frenchman, two hundred and fifty Native Americans and two hundred Blacks, including their spouses and children [35, p. 211; 224].

Importantly, when the English gained power over Jamaica, they organised another buccaneer base in Port-Royal [65, p. 137], while Tortuga remained of major importance for piracy, with all the best buccaneer captains said to have been schooled there at some point, and the two strongholds collaborating together at various occasions, e.g., when organising more challenging raids [34, p. 225; 242–243].

Buccaneers represent a particular case of quasi-legalised piracy, a demonstration of difficulties at the limits of international law: the most famous among buccaneers, Henry Morgan, was knighted and made the lieutenant governor of Jamaica in light of his actions as a pirate [65, p. 144]. A step above them in terms of legality were privateers: fully state-sanctioned pirates tasked with "attacking and plundering enemy shipping," who supplemented "the nation's sea power" [11, p. 53].

Sailing "under letters of marque or reprisal," privateers were "legally authorised" to plunder vessels under certain flags [8, p. 531], with, following the raids, "varying proportions of goods accumulated […] shared between the King, ship owners, the Captain and his crew" [3, p. 11]. In practice, to use the example of England, the Court of Admiralty was not only responsible for verifying whether the capture of a ship took place within the realms of the latter of marque but also for conducting "the legal selling of the captured property and distribution of proceeds, all of this conferring the good title to the property of the subsequent purchaser," to an internationally binding effect [41, p. 25].

The border between buccaneering and privateering was particularly fluid, with, for example, the British and French colonial authorities at certain points offering amnesties "for all pirates who surrendered themselves to the imperial authorities and agreed to take an oath of allegiance," providing ample opportunity to, at least temporarily, return on the side of the law [11, p. 58; 62]. British actions from Jamaica have also been at times described as privateering, rather than buccaneering, with the island, in the absence of the state navy, relying on defence by privateers [8, p. 542]. Thus, privateering may be considered a "privatisation of state warfare," a legally regulated "joint venture between state and private entrepreneur" [41, p. 25], not unlike private military contractors (PMCs) in the present day—and similarly abused in certain instances by nefarious individuals in the metropole for particular political gain, oftentimes to the detriment of those directly involved (e.g., William Kidd) [111].

In a way somewhere between buccaneers and privateers on the pirate level of legality stood corsairs, the "state-sponsored raiders" coming from Malta, as well as the Barbary States of Tripoli, Tunis, Algiers and the aforementioned Republic of Salé, who, acting independently from the nominally sovereign Ottoman Empire, at certain instances entered directly into bilateral treaties with certain European nations, agreeing for a cessation of attacks in exchange for "protection money or the provision of maritime supplies" [41, p. 29–30]. Their persistent attacks were the impulse behind the creation of the navy in the US, with the First (1801–1805) and Second (1815) Barbary Wars being the first overseas conflicts of

the newly-independent country. The end of corsairs ultimately came through these [33, p. 79–83] and other global powers' (British 1816, French 1830) actions directed at eradicating them [26, p. 141], with Algiers (1830) and Tunis (1881) becoming the latter's colonies and Tripoli first returning to the Ottoman Empire (1835) and ultiamtely becoming an Italian colony (1911) [33, p. 83].

Looking at the big picture, as C. Alasdair Macfarlane acutely notes, "in the competitive realm of early modern maritime trade and empires, the definition of a pirate often appears as a transient state of being" [66, p. 1]. At that particular time period and geographical space (see Fig. 5), piracy in general was considered a natural, and at certain times welcome element of the colonial life [40], as a number of new colonies were dependent on pirates for their survival, furthermore with their own development fuelled by "the free exchange of goods and supplies they provided, often in defiance of the mercantilist policies of the nominally governing authorities" [66, p. 3]. Boiled down to details, for the most part, the behaviour of pirates, buccaneers and privateers, as well as corsairs, was usually one and the same: plundering (enemy) ships. What differed was their state-sanctioned legal status or lack thereof, with all its implications for the individuals in question [51, p. 361; [31, p. 24]. It is clear that, as David Head poignantly remarked, "the definition of piracy was also always a political act meant to advance an empire's interests vis-à-vis its rivals and not a value-free tool to fight crime" [44, p. 241].

These findings do not mean, of course, that various means were not used over the years either nationally or internationally to combat piracy; these included laws and sentencing, transnational cooperation, co-optation and actions on a local level [19, p. 662]. Among these, of particular interest is one remaining outside the scope of this article—the trials of pirates. These in England, since 1536, were a matter of the Court of Admirably mentioned above, which used a particular "common law procedure which included the use of juries" [41, p. 33], with the lawyers supplied from the College of Advocates [84, p. 32]. A remnant of the past, the British law considered attempted murder during an act of piracy to be punishable by death until 1998.[2]

These legal developments, as well as the regulations of the different legal statuses of various pirates, were also an element of the process of establishing international law in which piracy played an important part, as noted above. For example, the 1667 Peace of Breda confirmed the customary rules surrounding privateering:

> that a subject of one of the contracting states, wronged by subjects of the other, must first seek redress through the medium of the law; if justice were refused him there, his king might bring the matter before the deputies or commissioners of the king of the offending state; but if justice were still denied, or delayed six months after the demand was preferred, then and only then was the granting of letters of marque permissible [8, p. 553].

In the 1713 Treaty of Utrecht, the different "maritime powers agreed jointly to combat piracy," but at the same time, in the eighteenth century, there was no British

[2] Article 36 of the Crime and Disorder Act 1998 (c. 27) amending the Piracy Act 1837 (c. 88).

legislation, e.g., prohibiting commercial relations with pirates [11, p. 54; 61], with even clear rules as to the prosecution of pirates in the colonies introduced only in 1700 [41, p. 33]. Privateering was ultimately abolished by the 1856 Declaration of Paris respecting Maritime Law, and the different bilateral treaties and European laws relating to bans on various forms of piracy adopted in the second half of the nineteenth century laid a foundation for the later codification of international maritime law [19, p. 658–659], with one notable exception—that of the US. Article I, Sect. 8, clause 11 of the American Constitution to this day states that "The Congress shall have Power […] To declare War, *grant Letters of Marque and Reprisal*, and make Rules concerning Captures on Land and Water."[3] On this basis, certain researchers have recently postulated employing privateers against China on the South China Sea, citing previous experience with PMCs in the Middle East [16].

The legal crackdown on piracy in the nineteenth century led to a sharp decrease in pirate activities and, "backed up by the steam-engine and telegraph," was supposed to bring the end of pirates [Gosse cited in 72, p. 310]. This success was ultimately short-lived, however, as in the second half of the twentieth century, piracy once again became a major international issue. By that time, however, maritime law had already been codified, lending it a somewhat outdated character in regard to piracy.

The origins of a comprehensive codification of the law of the sea in this regard date back to the work of the League of Nations [39, p. 17] and, in particular, the group of lawyers associated with Harvard Research in International Law Group (the differences in the municipal law of piracy in the different countries remain outside of the scope of this article). In the 1930s, the Group was tasked by the League [25, p. 1214] with the preparation of the Draft Convention on Piracy, known as the Harvard Draft, which proved highly influential in later international documents [45, p. 51]. These include the first major codification of the laws concerning piracy, the 1958 Geneva Convention on the High Seas.[4] Referring to piracy in Articles 14–21, it was considered to have been written in a confusing language and rather old-fashioned in this regard [81, p. 106–107], with, for example, the Czechoslovakian proposals "to include political ends in the definition of piracy […] rejected at the drafting stages" [9, p. 154], leading, as I note below, to major issues in the fight against piracy in the present day.

Despite the questions surrounding the provisions relating to pirates, the 1982 United Nations (UN) Convention on the Law of the Sea[5] (hereinafter UNCLOS), which replaced the Convention, does not change much of the language in regard to piracy [73, p. 311] (which is why countries that are party only to the Geneva Convention, e.g., the US, nonetheless have a complimentary regime [107, p. 401]). Mainly regulated in Articles 100–107 and 110, four elements constitute the provisions of the UNCLOS: (1) an illegal act involving violence, detention, or depredation; which is (2) committed for private gain; while (3) on the high seas; and necessarily (4) including at least two ships [18, p. 275]. Thus, acts that may

[3] Article I, Sect. 8 of the Constitution of the United States (1789).
[4] 1958 Convention on the High Seas 450 U.N.T.S. 11, 13 UST 2312.
[5] 1982 Convention on the Law of the Sea 1833 U.N.T.S. 397.

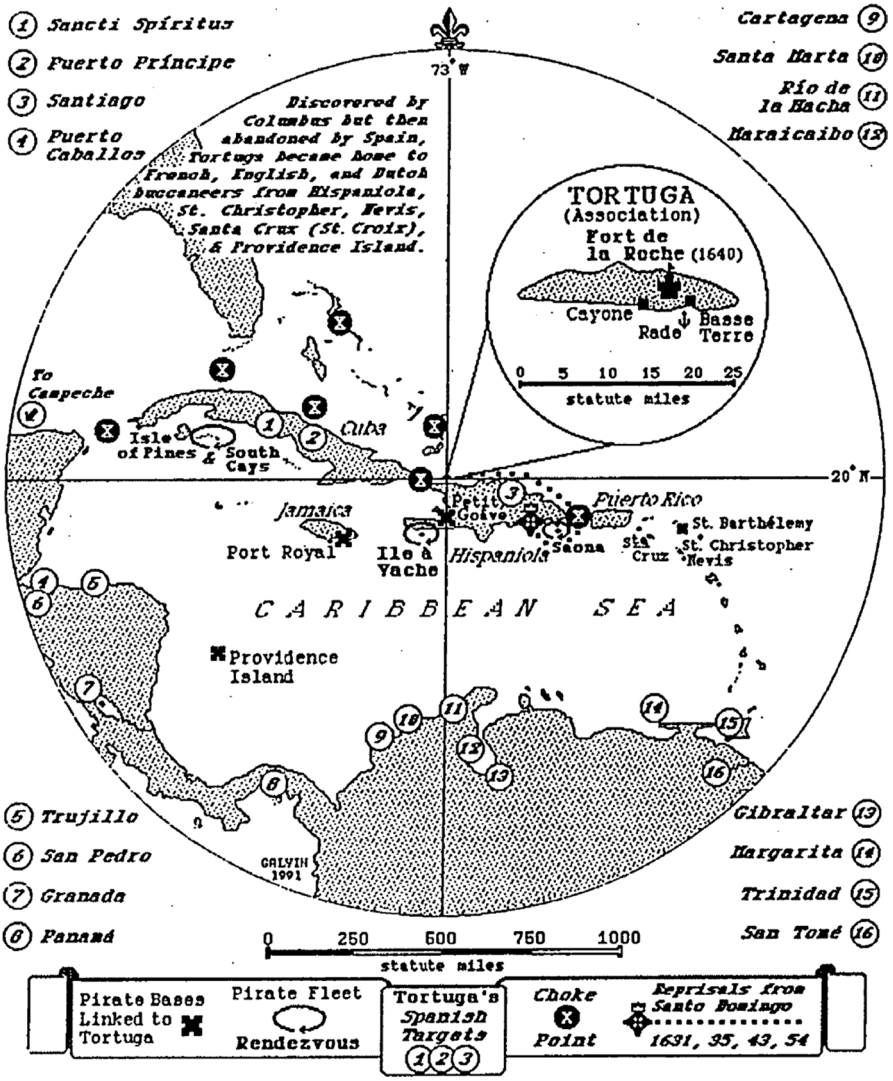

Fig. 5 The Tortuga-centred map of the Caribbean showing the different aspects of the colonial interactions realised by pirates against Spain. Source: Peter Reppert Galvin [35, p. 272]. (Reproduced with the permission of its author.)

be classified as piracy are very limited: those committed in territorial waters, for political reasons [45, p. 52–53] or by embarked passengers [107, p. 402] may not be classified as piracy, which poses a number of notable issues.

Among these, one of the main problems arises in regard to the question of jurisdiction: every state (but only a state, not, for example, shipping vessels) has the jurisdiction to seize a pirate vessel, but only in their own territorial or international waters (Articles 105 and 107), with even a hot pursuit (Article 111) allowed only

from one's own territorial waters to the high seas, meaning that pirates may use waters of a neighbouring country as a "de facto sanctuary," particularly in areas with contested borders, such as the South China Sea [22, p. 102–104]. At the same time, the issue of Exclusive Economic Zones (EEZs), which were first introduced by UNCLOS, raises questions as to whether "acts of depredation committed against another ship outside a state's territorial waters but inside its EEZ would qualify as piracy" [81, p. 108], with Rytis Satkauskas, for example, considering them to be included in the UNCLOS definition of the high seas and as such subject to universal jurisdiction [98, p. 220].

It also needs to be noted that governmental ships are excluded from the definition of piracy, even though certain official vessels, including those from China and Indonesia, have been involved in acts of theft at sea and hijacking in the recent past [14, p. 264]. Furthermore, the wording of Article 105 seems to suggest that active combat of piracy is only an option, with a more general duty imposed in Article 100 referring only to cooperation in the fight against pirates—which, as I note below, is problematic in itself.

Already before the UNCLOS came into force in 1994, it became clear that its wording in respect to piracy being committed for private gain will not stand the test of the changing world: terrorist attacks, such as in the 1985 case of Achille Lauro, when embarked Palestinian highjacks seized an Italian ship with international passengers [39, p. 12–13], cannot be classified as piracy [42, p. 53], rather veering "into the area of common crime," whereas environmental movements' conduct "may be considered private in nature" [72, p. 312], and thus classified as piracy.

Such was the 1986 case of Greenpeace attacking two Dutch ships attempting to release waste into the water, which involved boarding the vessels and threatening the crew with a knife (considered by the Belgian Court of Cassation a case of piracy because the organisations' members were "taking violent action based on their personal beliefs") [56], or the 2013 case of two Greenpeace activists scaling a Gazprom platform in a protest against the exploitation of the North Pole waters, who were first arrested on the charges of piracy (later diminished to those of hooliganism) [105]. Importantly, in the following European Court of Human Rights case of Bryan and Others v. Russia, the Court classified these actions as protected under the freedom of speech provisions of the Convention and not amounting to piracy.[6] Conversely, in the 2013 decision in the case of the Institute of Cetacean Research v. Sea Shepherd Conservation Society, the US Court of Appeals for the Ninth Circuit followed the earlier Belgian reasoning that "acts taken for private ends [mean] those not taken on behalf of a state," thus including "those pursued on personal, moral or philosophical grounds,"[7] meaning that the environmentalists' actions consisting of disruption of whaling for research constituted piracy [9]. (The case ultimately ended in a 2016

[6] Bryan and Others v. Russia European Court of Human Rights (Application no. 22515/14).

[7] Institute of Cetacean Research v Sea Shepherd Conservation Soc (2013) 725 F 3d 940 (9th Cir.) 943–944.

settlement prohibiting the conservationist organisation from coming in proximity to the whaling ships [49]; however, the association vowed to continue its activities [1].)

Some of the deficiencies of UNCLOS were supposed to be alleviated by the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation[8] (hereinafter: SUA), which "expands the types of activity that may be prosecuted while limiting the jurisdictional requirements necessary to prosecute," simply defining in Article 3 an offence as either intentionally seizing, exercising control over or damaging a ship or attempting to do so, thus including also acts committed not for private ends, however limiting the jurisdiction to only those cases where there is a link to the state in question [18, p. 275]. Furthermore, those prosecuted under the SUA cannot be clearly classified as pirates but rather as "civilian criminals subject to prosecution by states" [45, p. 54], although offences under the SUA "are not coextensive with the crime of piracy" under the UNCLOS, with certain acts potentially classifiable under both [98, p. 222].

Importantly, the UNCLOS provisions came to be further tested at the end of the twentieth century: following the aforementioned decline, the recent past has seen the appearance of not only terrorist and illegal environmental acts on the sea that began appearing in the 1980s but also the return of traditional mercantile-oriented piracy on a larger scale, with, as Michael Davey acutely remarked, pirates active today "in the exact same places in which they thrived three hundred years ago: environments of lax law enforcement, advantageous geography, and sometimes even public complicity that allow them to ply their trade out of sight and out of mind" [25, p. 1197–1198], still fulfilling the aforementioned Lunsford criteria regarding classical piracy.

On a larger scale, piracy reappeared first in the South-East Asia, particularly in the Straits of Malacca and Singapore, and later on the coast of Somalia and in the Gulf of Eden [59, p. 44], due to socio-political troubles in the region [107, p. 400]. These phenomena further evidenced major deficiencies of present-day international maritime law in regard to piracy when it comes to international cooperation. At first, in response to the growing threat from the Somali coast, an unprecedented in modern history international cooperation saw the deployment of warships from "the United Kingdom, Canada, Turkey, Germany, Denmark, the Netherlands, France, Pakistan, India, Iran, Russia," as well as other countries [59, p. 42], various issues surrounding its functioning soon appeared, including the question of entering into the—in this case Somali—territorial waters and the matters of prosecution.

In regard to the former question, in 2007 and 2008, the UN Security Council adopted a number of temporary Resolutions under its "authority to address threats or breaches of international peace or security" [45, p. 55] —Resolutions 1816, 1846, 1851, 1897 and 1814 and 1838—allowing, *inter alia*, the countries involved in the fight against piracy in the area ("cooperating states," that is, with the consent of the then Transitional Federal Government of Somalia and with the notification of the UN Secretary General) the entering of Somalia's territorial waters (as a, in

[8] 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 U.N.T.S. 221, 27 I.L.M. 668.

a way, "reverse hot pursuit" from the high sea to the territorial waters), and even the engaging "in counter-piracy action on Somali soil," as well as granting other capabilities to the cooperating states [37, p. 145–148].

These Resolutions, although never defining piracy and always adding the notion of armed robbery when referring to it [107, p. 403], clearly extended the rather limited UNCLOS provisions, in a way returning to the customary classification of pirates as *communis hostis omnium*, showing the deficiencies of current international law of the sea in regard to situations when the country in the territorial waters from which pirates take refuge or originate is unwilling or unable to combat the problem.

In regard to the question of prosecution, the Somali case illustrated the issues arising in regard to dealing with the caught perpetrators of an attack: as James Kraska and Brian Wilson note, due to the realities of the present-day globalised international maritime trade, "although any country may assert jurisdiction in the case of a universal crime, each has a special interest in the outcome of the prosecution" [59, p. 45]. This presents an issue by itself, given that once detained by a vessel, the question of a pirate's own citizenship customarily becomes a moot point from the perspective of their prosecution: only once "a pirate has been duly punished, his citizenship is [de facto] reinstated, and, *ceteris paribus*, the pirate should be returned to the state of which he is a citizen" [25, p. 1204; 1223–1224].

There also comes the question of the costs of bringing pirates to justice, typically detained by navies operating a long distance from their home country [82, p. 869], with the military in some cases known to release some of the captured pirates at sea to avoid dealing with them [27, p. 451]. At one point, due to its proximity and vital interest in the fights against piracy, an international agreement was reached with Kenya for prosecuting some of the piracy cases there, with seventy-seven cases of piracy heard in the 2006–2009 period. However, due to the high costs of the legal proceedings and insufficient international support, it was short-lived, with the country engaging in them only on an *ad hoc* basis after March 2010 [7, p. 3–4]. In addition to Kenya, Mauritius and the Seychelles have also succeeded in prosecuting pirates under their national law, supported in that "with financial support from the international community, and technical assistance from the United Nations Office on Drugs and Crime (UNODC) Counter-Piracy Programme and the Public International Law and Policy Group" [7, p. 2]. There is still no global permanent solution, however, to the issue of the prosecution of pirates.

Among this myriad of the different international provisions, there is also the question of whether the "customary international law of piracy […] that is different from or broader than the conventional law" still exists, with some researchers perceiving the customary *ius gentium* as the answer for classifying, for example, terrorism acts as piracy [81, p. 109]. This would be a potentially welcome possibility in regard to prosecuting some of the hard cases, given that the customary definition is so broad "as to include any acts that further the pirate industry, but still retains tremendous flexibility by allowing for municipal specification of acts constituting piracy" [25, p. 1204], however, one that raises certain questions about an exact delineation of this customary law.

Certain international organisations are attempting to clarify the complicated legal situation in regard to piracy in their work. Among these, none is more important

than the International Maritime Organisation (IMO), which has 175 member states, taking responsibility for providing "assistance in combating piracy and creating awareness, support, and frameworks for combating piracy" [27, p. 460–461]. Its capabilities are necessarily limited, as it may pass guidelines and recommendations for its member states [18, p. 277]; among these, the IMO notably put forward the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships, which proposes a definition of armed robbery complimentary to the UNCLOS's definition of piracy (para 2.2), considering the acts committed "within a State's internal waters, archipelagic waters and territorial sea."[9]

Additionally, several countries have engaged in establishing regional agreements, most notably the 2004 Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP), which encompasses twenty-one members not only from South-East Asia but also including United Kingdom, the US, Denmark and Norway [90] and has an Information Sharing Centre in Singapore [18, p. 278]. There also exists the Maritime Organisation for West and Central Africa (MOWCA), established in 1999 on the basis of an earlier, 1975 Ministerial Conference of West and Central African States on Maritime Transport, which, grouping twenty-five members, provides assistance to shippers in the region [4].

Furthermore, particularly important work is conducted by the International Chamber of Commerce's International Maritime Bureau (IMB) with a Piracy Reporting Centre in Kuala Lumpur, Malaysia, attempting to "monitor and provide advice on the growing piracy problem worldwide" [18, p. 276]. Through their work, a highly impactful and regularly updated Piracy and Armed Robbery against Ships report is produced, which gives details as to the global situation, e.g., recording 120 actual and attempted incidents globally in 2023 and 33 in the first three months of 2024 [48, p. 6], also providing comprehensive information on piracy in different places around the world, e.g., "Brazil (Macapa): Incidents have dropped. Waters remain risky. Stay vigilant," or

> Red Sea / Gulf of Aden / Somalia / Arabian Sea / Indian Ocean: Five recent piracy incidents and hijacking reported off Somalia. The incident last year on 14 December 2023 is the first successful hijacking of a merchant vessel by alleged Somali pirates since 2017. Somali pirates have the capability to target vessels over 1000nm from coast using mother vessels [48, p. 22].

Recent events off the coast of Yemen, including Houthi rebels [42], which see pirates using advanced technology, such as helicopters, drones and missiles, prove that the issues surrounding the UNCLOS continue: not only due to a different geopolitical situation today, it is difficult to organise a large-scale international operation against the group but also the political motivation of their attacks and a potential classification as armed non-state actors [38] further muddy the waters as delineated by the convention.

The problem of piracy continues and, as evocatively remarked by Lawrence J. Kahn, "today's merchant marine fears the modem pirates with as much trepidation

[9] IMO Resolution A.1025(26).

as his seagoing brethren of yesteryear, and with good reason" [53, p. 294]. Importantly, and somewhat counterintuitively, while carried within our cultural memory through the ages, since antiquity, the historical image of pirates as outlaws (Fig. 6) is actually a simplification of a rather complicated situation in situ—during the Golden Age of Piracy, despite the timeless general classification of pirates as *communis hostis omnium*, there existed several different degrees of 'legal piracy', with fluid boundaries between privateers, corsairs, buccaneers and 'proper' pirates. It is only once again today, under contemporary international law, that pirates are clearly classified as criminals, with the in this case tainted collective memories in cultural images providing Ricoeur's living link between the past and the present—although if we were to see the return of privateers in the South China Sea, the situation would become further complicated once again. A different aspect of the convolutedness of the maritime legal framework is explored in the following section, focusing on the final of the three pirate *mnemotopoi*.

5 Part 4. The Call of the Treasure, or Property Law Havoc

Unlike in the two previous sections of this article, the question of the correspondence of the third analysed image with reality has inadvertently already been answered—as noted before, pirates rarely looted real treasure and even less often buried it, usually squandering it rather quickly (with the aforementioned Captain Kidd being a notable exception). At the same time, as Adam Fortner observes, the hunt for Blackbeard's [28], Kidd's and other pirates' treasures has become a staple in the American—and later global—collective imagery since the inception of the republic [32]. The main question remains, however, as to how law frames this image.

Rather than focusing on the question of buried treasures, which is less interesting from an international legal perspective due to the dependence on each municipal law (and in certain instances, also agreements with landowners) [71] and thus requires a mundane case-by-case study, in the analysis of this final image, I propose to turn to the question of sunken treasures. As noted in the previous section, the Spanish ships in the Caribbean transporting valuables to the metropole were particularly vulnerable to attacks by pirates, whether acting on their own or in the service of one of the other colonial empires. A large number of these sunk, be that as a result of the action of pirates (see Fig. 7), opposing navies or simply the weather [108, p. 3–4], with an estimated 3,000,000 wrecks waiting to be found globally [46, p. 142]. Once coveted by pirates, today these ships, or rather the cultural objects—in particular treasures—within are subjected to salvage operations, usually opening a veritable Pandora's Box of legal issues.

Similar to piracy, salvage laws date back historically to antiquity and the 900 BCE Code of Rhodes [76, p. 384 n 50], and today constitute one of the many surviving elements of the Roman Empire and its impactful legislation, which, in regard to the law of the sea, was brought together in the Byzantine Rhodian Sea Law, allowing the salvager to retain parts of the salvage "as private property, with the rest to be delivered to the civil authorities, who, in turn, would hold it until the appearance of the rightful owner(s)" [55, p. 52]. The natural progression of the current *ius gentium*

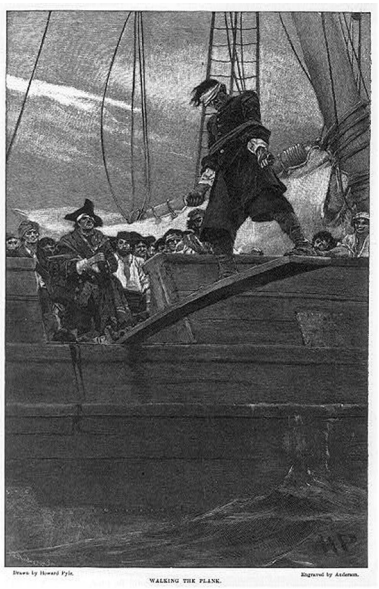

Fig. 6 Howard Pyle, 'Walking the plank' (1887). Source: Library of Congress [87]. (This media file is in the public domain.)

in relation to salvage from Roman law [46, p. 161] was confirmed, for example, in the US in the 1999 case of *RMS Titanic Inc. v Haver*.[10]

Currently, salvage refers to both "the actual service rendered by the salvors and the reward payable to them for such work" [57, p. 274]. Legal analyses of the situation involving salvage rest on the investigation of two distinct approaches in *ius gentium*—the law of salvage and the law of find—and two separate common law rules—the British rule and the American rule—developed over the centuries.

The driving force behind the law of salvage is to provide "incentives to render voluntary and effective aid to people and property in distress at sea," which is why rather than the salvaged property itself, the salvor will receive a salvage award up to the value [24, p. 188] of the saved items.[11] The law of salvage is applied whenever three conditions are passed consecutively: (1) there is a marine peril (applicable also to shipwrecks, as now found, they may once again be lost); (2) the service is voluntary (there is no preexisting condition upon which the salvor is obliged to help[12]); and (3) the recovery is (at least in some way) successful [24, p. 188–189]. As observed by Robert A. Koening, "the raising of a sunken ship or its cargo comes within any definition of a salvage service" [57, p. 275]; however, this is the case only in regard to the US, with other jurisdictions oftentimes interpreting the question of peril differently [57, p. 275].

[10] RMS Titanic Inc. v Haver 171 F 3d 943 (4th Cir 1999), 1999 AMC 1330.

[11] "Money, bullion, precious metals and jewels are property against which salvage awards can be granted," however there is no established standard of calculating the award; see: [57, p. 280–281].

[12] In that there is a difference with the terrene common law with someone acting to recover property "at a great risk […] from a natural disaster or great peril upon the land" [57, p. 276].

Fig. 7 Howard Pyle, 'Captain Keitt' (1907). Source: The New York Public Library [89]. (This media file is in the public domain.)

In turn, the law of finds, ironically called by Douglas S. Cohen *noli forfendi* (after the Flintstones' use of the term as a supposedly legal equivalent of 'finders keepers, losers weepers') [20, p. 193 n 1], focuses on the question of the ownership of the found property. Stemming from the perspective that lost objects are "returned to the state of nature," akin to "fish or ocean plants," three conditions need to be passed consecutively for the law of finds to be applied: (1) intent to reduce property to possession and (2) actual possession (both of which, in regard to shipwrecks, may involve only certain elements rather than the whole wreck, as I note further below); and (3) abandonment. It is the latter condition which is typically difficult to pass in regard to shipwrecks, as in addition to the relinquishment of possession, it requires an expressly stated abandonment of the title, which is rare [24], p.189–192]—as I note below in the *San José* case study, even in those instances whereby several hundred years have passed, various claims to ownership may be made.

In addition to the customary *ius gentium*, there are two particularities between the main common law jurisdictions. The so-called British rule gives the title of ownership of a 'wreck' unclaimed for over one year and a day to the crown since the 1275 Statute of Westminster, with the 1616 Constable's Case[13] providing a further interpretation that wreck also includes three categories of goods [54, p. 386–387]: flotsam ("items in the water, washed by the waves"); jetsam ("goods thrown overboard to lighten a vessel in a storm were jetsam, on their way to becoming flotsam"); and lagan ("special category of weighty things, such as ordnance and anchors, that were lost and sunk in the sea, their positions

[13] Constable's Case, 77 Eng. Rep. 218, 221 (K.B. 1601).

sometimes marked with buoys or other floating indicators") [23, p. 62]. Additional clarifications and restrictions were provided through the eighteenth century work of William Blackstone, which limited the crown's rights to only salvage washed ashore (*wreccum maris*), with the British rule further developed between 1798 and 1837, when it became "well-settled that, in the absence of the original owner, the English common law would decide ownership for all property lost at sea in favour of the crown by virtue of the sovereign prerogative." However, the common law classifications might not necessarily be applicable to sunken property, and as such, the "title to recovered treasure could arguably be decided in favour of the finder solely on the basis of possession" (rule of finds) rather than the crown [57, p. 283–285].

In turn, the American rule generally awards the title of ownership to the finder rather than the sovereign in most instances when there are no counterclaims made by the original owner; however, there were instances of the application of the British rule by US courts [57, p. 293–298], such as in the case of the *State ex rel. Ervin v Massachusetts Co.*,[14] with the legal situation further complicated by the adoption of the Antiquities Act[15] and the Abandoned Shipwrecks Act in 1976,[16] the particularities of which remain outside of the scope of this article. It should be noted that countries other than the UK and the US have often developed their own innovative legal frameworks for dealing with shipwrecks in their territorial waters [30, p. 433].

Another potential legal issue in regard to treasures sunken in the high seas is the matter of jurisdiction—when the sovereign prerogative is not applicable, rather than asserting jurisdiction of the country of the flag under which the ship is registered (which may be potentially problematic due to the state's in question own legal particularities). To make a claim for ownership in a selected jurisdiction, an *in rem* claim needs to be made. It takes the form of bringing at least an item from the wreckage to the jurisdiction of the court (then known as the *quasi in rem* claim); however, the technological advances also saw the appearance of the so-called telepossession, whereby it is possible to show a video image of the shipwreck to the court *in lieu* of making an *in rem* claim [78, p. 142; 146–148].

The technological development of the twentieth century has also amplified the legal issues surrounding maritime salvage, given that not only wrecks close to the coast, and as such subject to the laws of the country in the territorial waters of which they sank but also a significantly larger number than before of those in the high seas came to be salvageable [12, p. 367]. Beginning in the 1950s [100, p. 371–404], advances in salvage technology entered the collective imagination with the discovery of Titanic in 1985 [12, p. 367–368]. While a year later the US Congress passed a specific Act aiming to protect the shipwreck by establishing an international agreement designating the vessel as a memorial and regulating any

[14] State ex rel. Ervin v. Massachusetts Co., 95 So.2d 902, 906 (Fla. 1956), cert. denied, 355 U.S. 881 (1957).

[15] 16 U.S.C. §§ 431–433 (1976).

[16] 43 U.S.C. §§ 2101–2106 (1976).

salvage attempts,[17] it was ratified by only one other country—the UK, in 2003—and entered into force only upon US ratification in 2019 [79].

The Titanic issue made the deficiencies of maritime law in regard to shipwrecks blatantly obvious. The 1958 Hague Convention on the High Seas did not explicitly refer to shipwrecks; however, the interpretation of its provisions relating to high seas has led to a more general understanding that "states are clearly restricted from asserting claims to objects lying on the seabed located on the high seas" [78, p. 145].

In turn, UNCLOS engages with the question of shipwrecks in the high seas in two articles: 149 and 303. The former states that all cultural objects found in high seas "shall be preserved or disposed of for the benefit of mankind as a whole," with a "particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin." The latter stipulates that there should be an international effort to protect these objects and that it does not impact "the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges."[18] Thus, David Curfman remarks that on the basis of UNCLOS neither the law of salvage nor the law of finds are abrogated and that if a wreck found in the high seas has a known owner, the former will be applied, and if not, the latter [24, p. 193–194]. In any case, the vague language of the provisions does little to help the fate of the cultural objects found on the high seas [78, p. 154].

In 1989, to the already complicated legal picture, the IMO added the then promulgated International Convention on Salvage, which, while providing specific rules for salvage, including that of historic shipwrecks [47, p. 825], permits under Article 30(1)(d)state parties to contract to enter reservations "when the property involved is maritime cultural property of prehistoric, archaeological or historic interest and is situated on the sea-bed."[19] Such a reservation was contracted by a number of states, including Germany, the Netherlands, Poland, Russia, Spain, Sweden and the UK [76, p. 385]. It also needs to be noted that the Salvage Convention, which replaced the earlier 1910 Brussels Convention, "governs private law relationships between salvors and those with whom they enter into contracts—it does not address issues of public law" [52, p. 1032].

Another dimension of the legal issues surrounding shipwrecks concerns the competing interests of several different groups, which often clash in regard to wreckage. Given that a "shipwreck is a time capsule, a sealed self-sufficient social unit from a past age," it presents great archaeological value [100, p. 371–372]. This might clash with the public interest in cultural education, which requires the recovery of cultural objects rather than preservation in situ, which is favoured by some archaeologists [46, p. 154–155]. At the same time, artificial reefs that appear around shipwrecks are of interest to "scientists to explore and understand the effects of human intervention in the ocean's ecology" and would require preservation without disturbance [78, p. 139].

[17] The R.M.S. Titanic Maritime Memorial Act of 1986 (100 Stat. 2082, 16 U.S.C. §§ 450rr–450rr-6).

[18] 1982 Convention on the Law of the Sea 1833 U.N.T.S. 397.

[19] 1989 International Convention on Salvage 1953 U. N. T. S. 193.

Furthermore, the sunken vessels are "also graves—the final resting places of crewmembers and passengers unlucky enough to go down with the vessel"—a fact that, Kristen van de Bizenbos notes, "receives somewhat less time in popular imagination" [12, p. 367], being rather conspicuously absent from our cultural memories of lost treasures; however, they are still important to the living relatives of those who perished at sea. Therefore, any grave sites are "protected by general rules protecting human remains, including *ius in bello* rules" [6, p. 234]. On the other hand, survivors and relatives may also "have claims to any personal possessions that were lost in the sinking of the ship under a property claim" [78, p. 140; 149]. Furthermore, in certain cases, the insurance company may have acquired a title to the wreckage if its previous owners made a successful claim [78, p. 149].

Governments may also have a vested interest in salvage, on the basis of British rule or Article 149 of UNCLOS (the ambiguity of which has, however, seen the clash between the claims of former colonies and former metropoles based on state succession) [30, p. 434]. The authorities' claims in regard to shipwrecks of vessels that were part of the navy or involved in government service may be further strengthened on the basis of Articles 95 and 96 of UNCLOS, upon which sovereign immunity on the high seas is explicitly conferred [46, p. 168]. This was the basis for the successful claim of Spain against a salvage company, which was ordered to return the salvaged treasure, and Peru, its former colony, in the *Nuestra Señora de las Mercedes* case, which saw the arguments made on the basis of the legislation dating back to Peru's independence in 1824 [29, p. 434–436], as well as the rights of the descendants of the perished sailors [6, p. 215]. The sovereign immunity approach was confirmed in this and other cases in US jurisprudence, albeit rather on the basis of municipal legislation protecting sovereign immunity.[20]

At the same time, commercial salvage companies actually engage in salvage, often at enormous cost, as "locating a wreck can take years and can involve combing through old archives to examine letters and ships' manifests" [101, p. 313]. A number of dangers, including weather, underwater currents, marine wildlife, water pressure, and "the physical deterioration of the sunken wreck" [57, p. 272–273], make the salvaging process extremely difficult and expensive: the cost of a deep-sea expedition may reach US $35,000 a day, with a total cost of up to US $30,000,000 [101, p. 313]. This is why, in many instances, governments enter into agreements with salvage companies rather than engaging in recovery themselves [47, p. 817; 837]. On the other hand, archaeologists claim that "given the pristine condition in which many ancient shipwrecks are preserved," the salvage companies actually put the vessels "in peril through their rush excavating and looting, which causes the loss of significant scientific and contextual information" [46, p. 165], with the question of salvage thus entering the field of cultural heritage law.

[20] Philip A. Berns provides an overview of the veritable mosaic of the various governmental agencies involved in deciding the question of the ownership of salvage. See: Berns [10].

Given that the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict[21] and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property had little impact on the protection of shipwrecks, the former only applicable to conflict and the latter not referring to shipwrecks directly (barring Denmark's reservations),[22] the conservationists' concerns were supposed to be alleviated by the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage[23] (hereinafter: CPUCH).

Defining underwater cultural heritage very broadly in Article 1 as "all traces of human existence having a cultural, historical or archaeological character which have been partially or totally under water, periodically or continuously, for at least 100 years," it specifically includes shipwrecks in this definition. State cooperation, as well as the reporting of findings of underwater cultural heritage and looting by a country's nationals, are limited not only to a state's territorial waters but also to the high seas (Articles 9–12). Sovereign immunity over governmental vessels is confirmed (Article 13).

According to its preamble and the Rules put forward in the Annex, the conservationist approach is the main goal of the CPUCH: "the protection of underwater cultural heritage through in situ preservation shall be considered as the first option" (Rule 1), with "the commercial exploitation of underwater cultural heritage […] fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods," with the exception of authorised archaeological and research services (Rule 2). Importantly, paid activity that does not harm underwater cultural heritage (e.g., sale of films and photographs) is allowed under CPUCH [109, p. 412].

Admittedly, one of the most significant achievements of the CPUCH is that "there is a concrete legal framework in place before any intervention of a third person, so that the management of the area can take place on the basis of the principles of archaeological research and not on the basis of the law of salvage" [75, p. 415–416]. CPUCH expressly states in its Article 4 that the law of salvage or the law of the find do not apply to underwater cultural heritage unless three conditions are passed: the salvage is (1) "authorised by the competent authorities;" (2) it is conducted "in full conformity" with the Convention; and (3) it is ensured "that any recovery of the underwater cultural heritage achieves its maximum protection."

Thus, salvage under CPUCH will only be permitted if the competent authorities allow it upon ensuring that "the convention's first option of in situ preservation has been thoroughly considered;" (2) "the proposed salvage has been determined not to be commercially exploitative;" and that (3) the salvage activities are "in line with

[21] 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict 249 U. N. T. S. 240.

[22] 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 823 U. N. T. S. 231.

[23] 2001 Convention on the Protection of the Underwater Cultural Heritage 2562 U. N. T. S. 3.

the broader conservation, research, recovery, restoration and curation values of the" Convention [15, p. 392]. *Nota bene*, the seemingly conflicting nature of Article 4 is a testament to the difficulties in codifying international law, stemming from "an attempt at compromise between civil law countries, which overwhelmingly rejected the application of the law of salvage to [underwater cultural heritage], and common law countries, which supported salvage" [52, p. 1033].

As a clear step "away from a reliance on national salvage law of a few countries [the US and UK] toward an international regime to manage and protect" underwater cultural heritage [76, p. 400], there is nonetheless a major issue surrounding the efficacy of CPUCH: the question of ratification. Although ratified by 76 states, it does not include some of the nations that may have a key interest in salvage, such as the UK, the Netherlands, Denmark or the US.[24] While the US "has stated support for the Convention's preamble, its Annex Rules for responsible underwater archaeology, and most of its general principles of historic preservation" [76, p. 376] it is the country where a significant number of salvage companies are based and in the jurisdiction of which many *in rem* claims are made; as such, the lack of ratification on its part may be considered key for the survival of customary *ius gentium* rules in regard to salvage in high seas. Furthermore, it needs to be acknowledged that during the CPUCH drafting process, the US "represented the salvage friendly countries in part because its delegation was intensely lobbied by the salvors' community" [52, p. 1033].

The different legal provisions and conflicting interests regarding sunken treasures have recently come together in the case of the *San José* galleon, sunken by the British navy in 1708 in the battle of Barú off the coast of Cartagena [5]. The vessel was an element of the Spanish treasure fleet that brought goods to Europe to fund the Spanish and French war effort in the War of the Spanish Succession. Carrying "approximately three times Spain's annual income" [104, p. 157–159], or an estimated "200 tonnes of silver, emeralds and eleven million gold coins," its treasure is currently valued at up to US $20,000,000,000 [70].

An element of popular culture in its own right (it featured in *Love in the Time of Cholera* [104, p. 157–158]), *San José* has become an object of a legal battle between the original salvage company, Columbia, Spain, and the indigenous peoples of Bolivia. The question over its ownership is further complicated by the fact that rather than in the high seas, the galleon most likely sunk in what are currently territorial waters of Colombia [118, p, 330], meaning that in addition to international law, the country's municipal rules also need to be considered.

An American salvage company claimed to have been contracted by the Colombian government to salvage the wreck in 1984; however, rather than honouring the agreement, in 1989, the country passed a law granting it all rights to the shipwreck [101, p. 332]. Complicated litigation before the Colombian [118, p. 330–337] and later US courts ensued [101, p. 332–333], the legal analysis of which

[24] State Parties to the UNESCO Convention on the Protection of the Underwater Cultural Heritage. See: https://www.unesco.org/en/legal-affairs/convention-protection-underwater-cultural-heritage?hub=66535#item-2.

remains outside of the scope of this article; however, it needs to be noted that it continues before the UN's Permanent Court of Arbitration [17]. Furthermore, Spain attempted to invoke its sovereign immunity over the ship, which was an element of its navy; however, Spain ultimately entered into cooperation with Colombia to resolve the matter [118, p. 337–342]. Conservationists were somewhat placated by a governmental declaration that it will "not share the treasure from the shipwreck to finance the salvage operation," given that "all the pieces that would be rescued are of enormous and incomparable cultural value for Colombia and for the world" [75, p. 418–419] (however, it needs to be noted that Columbia is not a party to CPUCH[25]). At the same time, the question of the wreck being a war grave [17] (out of 600 sailors on board, only 11 survived [70]) has also been raised.

Finally, several Bolivian indigenous groups (the Caranga, Chicha and Killaka peoples) whose ancestors were forced to mine silver from Potosí mines invoked their right to memory[26] by arguing that "the memory of our people is attached to those remains that rest on those sunken ships, in a way that we do not choose, as one of the peoples who gave their work and their own history" to mine precious metals [103]. This argument is not without merits, given that Article 149 of UNCLOS promotes cultural nationalism [24, p. 200], and the 1970 Convention "explicitly recognised that property transferred from colonised people to a colonising state is illicitly transferred and should be returned to its country of origin" [101, p. 321].

Ultimately, however, the indigenous calls were ignored, and following a 2015 declaration that the Colombian government found *San José*'s location independently (and has kept it a secret), the country is currently attempting to salvage and raise the wreckage with the help of underwater robots, with the work beginning in April 2024 [102]. Thus, the *San José* case illustrates not only the issues surrounding the ownership of cultural heritage (which is always problematic, not only in the case of shipwrecks, as I noted elsewhere) [94, p. 105] but also the perpetuation of the colonial cycles of violence towards indigenous peoples.

Looking at the big picture of this third image, it needs to be remarked that while the legal framing of sunken treasures is removed from the specific questions of piracy, I argue that it is the association of piracy with lost treasures that, surviving as an element of Ricoeur's living tradition in our collective memory, motivates the salvage of wrecks over their preservation. As a general interest in the recovery of sunken treasures is immense (a Google search in English regarding the *San José* galleon for only the month of April 2024 brought up approximately 7,000 results),[27] our cultural memories necessarily raise questions regarding conservationist attempts at preservation in situ: does the whole mankind benefit more from the preservation of shipwrecks on the sea floor where they are accessible only to select few or from

[25] State Parties to the UNESCO Convention on the Protection of the Underwater Cultural Heritage. See: https://www.unesco.org/en/legal-affairs/convention-protection-underwater-cultural-heritage?hub=66535#item-2.

[26] The right to memory is a multi-faced right, one whose different forms are found in various international conventions, with the indigenous groups in this case invoking their right to be remembered; see [95, p. 164–178].

[27] The search was conducted by the author on 27.04.2024.

Table 1 X: yes; –: no; ~: potentially. *Source*: Author

	Communis hostis omnium	Driven (mostly) by economic circumstances	Proxies for conflict between global powers	(Mostly) mercantile disposition	Symbols of freedom	Present in popular culture
Historical pirates (collectively)	~	X	~	X	X	X
Present-day pirates	X	X	~	X	–	~

their salvage and display in the museum for all to see? Hundreds years later, pirates' proletarian and egalitarian spirit clearly continues to impact our perceptions.

6 Conclusions

This article, looking into the ways in which law has framed pirates and piracy in the modern era (see Table 1), proposed an engagement with these questions through the eyes of popular culture, focusing on three key images of pirates that, living on in our collective memories as *mnemotopi*, provide a particular link with the not necessarily always historically true, but oftentimes imagined past. Thus, I devoted the first part of the paper to investigations of the cultural construction of pirate *leitmotifs* through the times from antiquity to the Golden Age of Piracy to the birth of contemporary popular culture in the nineteenth and twentieth centuries. This research revealed that while certain symbols associated with piracy were actually used by historical pirates (e.g., the Jolly Roger flag), many others were created by literature (from the early modern street ballads, memoirs and novels to the contemporary novels and comic books) and the visual arts (with a particular influence of the US artists and filmmakers).

The following parts of the article were each devoted to one of the earlier distinguished images of piracy, and each revealed something about the law. The first, that of pirates as freedom fighters, demonstrated that the legal theoretical perceptions of the development of the Enlightenment, focusing on the theories put forward by the great thinkers of that period, overlooked the proto-democratic practical instruments established by pirates. The second, that of pirates as outlaws, demonstrated that contrary to popular belief, rather than easily classified as criminals, many historic pirates had a certain degree of involvement with the state. The third, of pirates as treasure hunters, demonstrated that, while the majority of sunken shipwrecks had little to do with pirates, the squabbles over them, aided in that by the inner complexities of international law, represent a repetition of historical conflicts by great powers regarding the goods coming from the so-called New World.

Furthermore, all three images demonstrate in different ways how not only pirates have committed violence but also how the state—and the larger global community through international law—has engaged in committing both physical and symbolic violence (as understood by Pierre Bourdieu [96]) against pirates. Because ultimately, piracy has always threatened "to pry open the identity, […] the manufacture of jurisdiction" [36, p. 211] of the state over the seas, which has been—and, as the

second and perhaps particularly third image demonstrate, still is—subject of major debate between legal scholars and the powers behind them.[28]

As this article has shown, the state's behaviour towards pirates took different forms throughout the ages. Historically, at times, they used them as proxies to settle the various imperial conflicts by creating the aforementioned different degrees of legality but at other times they treated them as *communis hostis omnium* (a practice that continues to this day through the aforementioned de facto suspension of citizens' rights of captured pirates) at the same time using their imagery to promote the opportunities of the 'New World'. More recently, they bent their own convoluted international legal framework through the passing of UN Security Council Resolutions to address the problem swiftly rather than focusing on supporting the Somali government in stabilising the situation in the country and thus resolving the underlying issues in Somalia—removing the Lunsford criteria mentioned above— that are driving people to piracy.

Thus, both the historical and contemporary analyses conducted here clearly demonstrate that the current legal framework, which lays on yesteryear foundations, fails to properly respond to the problem piracy poses to the international community. Lack of not only clear but also truly universal rules regarding the treatment of those who are supposed to be the enemies of all mankind, a *de facto* suspension of their rights in case of capture, the unwillingness to aid the local authorities to resolve endemic issues in certain regions of the world clearly show the deficiencies of the current international law. The various problems stemming from the issues surrounding the matters of ownership of underwater cultural heritage only further amplify the difficult situation posed by the state of the maritime law. While aiming for a new convention of the law of the sea which would address the deficiencies of UNCLOS, furthermore one that would be universally adopted, is an unrealistic goal given the current state of the international relations, the United Nations should nonetheless initiate the works on a specific convention regulating the matters of piracy in the hopes that the recent increase in attacks will motivate the global community to act. At the same time, UNESCO should not only redouble its efforts for the broader adoption of CPUCH but also consider the possibilities of its clarification in matters relating to salvage.

Lastly, looking at the big picture that became visible alongside my other ruminations here, it needs to be stressed that the three pirate *mnemotopoi* may also reveal something about us—as acutely noted by Alford Pollock, "the society of yesterday is very similar to the society of today in relation to imperialism and colonialism of the past with neoliberal interpretations of globalisation and neocolonial control of

[28] These links are visible also in the most influential of these debates which was inspired on the one hand by the Portuguese and Spanish Empires' claims of sovereignty "over the boundless ocean", and on the other by the issues surrounding the rights over the "British herring fisheries," that took place in the seventeenth century between Hugo Grotius (author of the *Mare Liberum*, proposing that "the Great Ocean was free by the law of nature, and that the liberty to trade thereon was (or should be) free to all men by the law of nations") and John Selden (author of the *Mare Clausum*, focused on "the nearer seas, though he does not limit their extent" [91, p. 536–538].

Fig. 8 N. C. Wyeth, 'Treasure Island, title page illustration' (1919). Source: Brandywine Museum of Art [113]. (This media file is in the public domain.)

developing nations of the present" [3, p. 5]. Perhaps, living in a way vicariously (see Fig. 8) through the pirate stories of yesteryear, books, films, comic books, amusement park rides, and every salvaged sunken treasure, we take a small mental step against the established order, even if we are doing it from the safety of our home rather than on board a ship flying the Jolly Roger flag.

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