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'*Hostis Humani Generis*' – The Pirate as Outlaw in the Early Modern Law of the Sea

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The purpose of this discussion is to explore the legal perception of maritime piracy, primarily with reference to English source material, during the period 1550–1650. How was piracy characterized and defined as a matter of legal regulation and what was the nature and extent of the enforcement of such law dealing with piracy during that period? The starting point for this enquiry is the conventional legal view of maritime piracy as a distinctive form of criminal behaviour. According to this view, historically piracy has represented an unusual case of personal and individual behaviour directly subject to rules of international as well as national law, as a species of 'international crime', the pirate being the 'enemy of all humankind' – '*hostis humani generis*'. In accounts of legal history and international law, this categorization has elevated the pirate offender to a special status, as an exceptional and serious kind of criminal, whose behaviour has been subject to universal condemnation – almost a precursor of the archetypal international criminal of the later twentieth century, the war criminal. First this chapter considers the validity of this standard depiction of the pirate as an exceptional type of criminal, before examining in more detail the early modern legal view of piracy. My argument will seek to qualify and clarify what is often understood by the description '*hostis humani generis*', and then point to the ambivalent view of piratical activity during the sixteenth and earlier seventeenth centuries, prior to the much more definite criminalization of piracy at the turn of the eighteenth century.

The pirate as '*hostis humani generis*' and the subject of 'universal jurisdiction'

As students of international law are frequently told, piracy is an early example of individual conduct directly regulated by international law,

the rules of which stipulated a universal jurisdiction for all states over acts of maritime piracy committed on the high seas outside national jurisdiction. As such piracy has sometimes been characterized as an 'international crime'. This in turn has created an impression of serious criminality – based upon an imperative for all states to take action against the common threat posed by such banditry beyond their territorial borders. This conventional view of the pirate as common but special enemy is encapsulated in L. Oppenheim's classic international law treatise:

Before a Law of Nations in the modern sense of the term was in existence, a pirate was already considered an outlaw, a '*hostis humani generis*'. According to the Law of Nations the act of piracy makes the pirate lose the protection of his home state, and thereby his national character; and his vessel, although she may formerly have possessed a claim to sail under a certain State's flag, loses such claim. Piracy is a so-called 'international crime'; the pirate is considered the enemy of every State, and can be brought to justice anywhere.¹

This is a dramatic assertion of outlaw status for both pirates and their ships. The act of piracy strips from the perpetrator the normal legal protection of his or her home state, and thereby exposes the pirate to the jurisdiction of all other countries, which are encouraged and even obliged by international law to take legal action against pirates whenever possible.² Moreover, the penalties following conviction for piracy were frequently severe. Tellingly, as a matter of English law, attempting murder during an act of piracy was still on the statute books as a capital offence until 1998, well after the abolition of capital punishment for murder more generally.³ A high degree of opprobrium also emerges from some judicial statements regarding piracy. For instance, according to Sir William Scott, a judge in the High Court of Admiralty:

With professed pirates there is no state of peace. They are the enemies of every country, and at all times, and therefore are universally subject to the extreme rights of war [...].⁴

In the light of such legal presentation, it is unsurprising that there emerged a conventional view of the pirate as a notorious and egregious category of criminal. This perception has been reinforced by textbook accounts which discuss piracy not only as a topic under the heading of 'law of the sea' but also under the heading of 'universal jurisdiction'. In