The sea has always been a legally problematic space. It lies between established territories, beyond the watchful eyes of rulers, and is ill-suited to the imposition of fixed boundaries; it is a place where jurisdiction is difficult to define and enforce. Sometimes it has been thought of as inherently lawless, or subject to a separate and distinct ‘law of the sea’. In fact, neither is entirely true; rather, rival powers have staked competing claims over the sea or areas of it, while seafarers have selectively endorsed, mediated, or challenged these claims. During the early modern period in particular, as seaborne activity intensified and maritime empires expanded globally, these questions of jurisdiction became highly charged, with a series of disputes between rulers, seafarers, lawyers, and theorists playing out on ships, in print, and in throne rooms and courtrooms. While there was no universal ‘law of the sea’, these debates (which essentially concerned the question of whose law and authority should preside at sea), were crucial to the emergence of international law, and continue to influence it today.

This process is best documented for Europe because, as Elizabeth Mancke writes, ‘expanding European powers defined the world’s oceans, and not just territorial waters, as political space over which they attempted to exert their jurisdiction’. She adds, crucially, that ‘the nature of that jurisdiction was tenuous, ill defined, and under frequent negotiation’. This negotiation, which involved African, American, and Asian rulers and their own claims to maritime sovereignty, is a vital part of the story. Though European governments asserted wide powers at sea and the ultimate outcome was a system of international and maritime law dominated by European empires, this result was not inevitable. It occurred slowly, and only in the nineteenth century were some Europeans able to impose their claims with any consistent success. Even then, they faced considerable resistance.

In this chapter, I examine the development of maritime law from the late medieval period to the beginning of the nineteenth century. First, I discuss codes and practices of law in medieval Europe, and I then consider how these developed in the sixteenth and seventeenth centuries, when European rulers sought to exert greater authority at sea. As Mancke noted, this occurred both for territorial waters and more widely, and the third part of the chapter looks first at maritime jurisdiction in the Atlantic and
Indian Oceans prior to European expansion, before turning to the claims that European governments began to articulate as a result of this expansion. Finally, I explore the legal arguments and developments of the seventeenth and eighteenth centuries, especially concerning piracy, which eventually transformed maritime law.

**Lex mercatoria and lex maritima in medieval Europe**

A particular controversy among lawyers and legal historians has dominated much discussion of medieval maritime law: whether there existed, during this period, a transnational and universal ‘law merchant’ and corresponding ‘law maritime’. Some legal scholars have perceived this body of law, and especially *lex mercatoria*, as distinct, emerging spontaneously from commercial custom (rather than legislated by any government), and uniform across all of Europe.³ In this interpretation, ‘The primary aim of the Law Merchant was to construct law out of merchant practice and to render it both comprehensible and acceptable to those who were most impacted by it, merchants themselves’.⁴ Similarly, ‘general maritime law is composed of [...] maritime customs, codes, conventions, and practices [with] no particular national boundary [...] *lex maritima* was quite uniform throughout Western Europe’.⁵ Some historians have readily accepted this idea when writing on both the medieval and early modern eras.⁶

There have also been critics of this understanding of *lex mercatoria*, not least because some of its supporters have had an ulterior motive: to argue in favour of transnational and customary law in the present day, especially in areas beyond the traditional jurisdictions of state governments, such as the internet.⁷ The counter-argument maintains that, although laws drew upon merchant customs, these customs were both local and divergent; moreover, while medieval merchants participated in forming and enforcing law, ‘they rarely, if ever, did it totally independently of local political power’.⁸ The situation, Emily Kadens argues, was not one of *lex mercatoria* but ‘rather *iura mercatorum*, the laws of merchants: bundles of public privileges and private practices, public statutes and private customs [...] a hybrid creation dependent upon a scaffolding of legislation and intimately tied to local municipal and guild law’.⁹ Medieval lawyers and merchants certainly spoke of a *lex mercatoria*, but there is no evidence of a single and universally applicable legal code or court system actually operating in practice.¹⁰

Maritime law might be a different matter because a series of written codes existed and were widely employed, developing in two traditions – one in the Mediterranean, the other in northern Europe. In the Mediterranean, the earliest significant legal code was the Rhodian sea law, probably first written between the seventh and ninth centuries and subsequently adopted into Roman law, although its origins and nature have been the subject of some debate.¹¹ This code was followed later by the *Consort de Mar*, first published in Catalan in 1494, but probably in use earlier by urban officials generally known as Sea Consuls.¹² There were in fact various other Mediterranean codes developed by ports such as Amalfi, Trani, Messina, Valencia, and Trapani, some of them also referred to as *Consolati*, but the Catalan compilation became the most influential.¹³ Probably produced during the fourteenth century, it acquired the
name *Lo Llibre de Consolat de Mar* in a manuscript of 1435, and contained regulations on electing Sea Consuls and by-laws on seafaring, trade, privateering, and maritime insurance.\textsuperscript{14}

In northern Europe, the most important code was the *rôles d’Oléron*, a thirteenth-century compilation of judgments from the seafaring community of the Île d’Oléron off the west coast of France.\textsuperscript{15} This code provides a set of rules that define the rights and obligations of the parties to the maritime adventure [i.e. the merchants, shipmaster, and crew] during the outward voyage of a ship that would have loaded a cargo of wine at La Rochelle or Bordeaux and sailed north to Brittany, Normandy, England, Scotland or Flanders.\textsuperscript{16}

Despite its connection to a specific trade route, copies of the *rôles* proliferated: they were entered into the Black Book of the English admiralty, and translated into Flemish, French dialects, and Scots, though with alterations in some versions.\textsuperscript{17} A second northern maritime code became known as the Laws of Wisby, a town on the island of Gotland in the Baltic, but this text in fact combined a fourteenth-century Dutch *ordonnante* (regulating shipping in the Zuiderzee and possibly originating in Amsterdam) with a Flemish translation of the *rôles* and some Lübeck law.\textsuperscript{18} The erroneous title ‘water recht van Wisbij’ was appended by the 1500s, and manuscript and printed copies of this text continued to appear thereafter.\textsuperscript{19}

The wide circulation of and similarities between these codes suggest the existence and acceptance of a universal *lex maritima*, but, as with the *lex mercatoria*, we must be wary of such assumptions. Edda Frankot’s detailed research on medieval northern Europe throws serious doubt upon the existence of a general law of the sea. There were major discrepancies between each of the written law codes, and no one code was available everywhere in Europe.\textsuperscript{20} The *rôles* were indeed accepted in England, France, and Spain by the middle of the fourteenth century, while the Wisby compilation influenced Dutch, Hanse, and Scandinavian law. However, these codes were approved by local rulers, rather than holding any inherent legal authority of their own, and they became part of the larger body of municipal law in each place.\textsuperscript{21} The printed version of the *Consolat* added an appendix of royal proclamations by Peter III of Aragon, as well as the ordinances of Barcelona’s city council.\textsuperscript{22} Though references to the *rôles* appear in some Scottish courts, they too were combined with Scottish legislation and consideration of the ‘use and prettick’ of mariners.\textsuperscript{23} The English admiralty court also observed some principles of the *rôles* when passing judgment, but modified others.\textsuperscript{24} Even where certain authorities did issue widely applicable regulations, such as the statutes of the Hanse towns, they were not gathered together in an official or systematic body of law.\textsuperscript{25} Though Lübeck, seat of the Hansetag from the early fifteenth century, sought to establish a general sea law in response to problems with piracy, the effort was unsuccessful because not all the Hanse towns adopted the new rules.\textsuperscript{26}

The practice of local courts also varied, and their judgments did not always follow the written laws or accord with those of other courts, while skippers’ guilds played a judicial role in several ports.\textsuperscript{27} Moreover, within a number of European realms there were tensions between different authorities. In France, many legal powers belonged
to harbour officials, or to landlords whose seigneurie included the coastline, although the French monarchy sought increasingly to subject them to the amirauté de France.\textsuperscript{28} A similar trend occurred in fourteenth-century England, when the king's admirals were granted the authority to hold maritime courts, but towns' complaints about encroachments into their franchises, and protests from aggrieved litigants who felt the admirals' decisions were biased, led to statutes in the 1390s that officially limited admiralty jurisdiction.\textsuperscript{29} In the Burgundian Netherlands, an office of admiral was also established, initially in Flanders during the fourteenth century. The Duke of Burgundy's efforts to extend this official's power to other provinces in the fifteenth century met with resistance in Holland and Zeeland, even after an admiralty of the Netherlands, with its own court and 'full jurisdiction in maritime affairs', was established at Veere in 1488.\textsuperscript{30} These tensions emphasize the fragmentary nature of maritime law in medieval Europe, but simultaneously reveal the increasing interest of central governments in controlling maritime law, which, together with the concept of a universal law of the sea, became even more important in the early modern period.

**Maritime laws in early modern Europe**

Friction between local legal autonomy and the growth of centralized power, and the complex interaction between written codes and court practice, continued to characterize the sixteenth century and afterwards. For example, beginning in the 1530s, Charles V and Philip II, as overlords of the Netherlands, issued a series of plakkaten governing maritime law in those provinces. However, this legislation often confirmed pre-existing practice: the most important proclamation, in 1563, republished both earlier plakkaten and the so-called Laws of Wisby.\textsuperscript{31} These measures failed to end jurisdictional disputes and, despite the monarchs' efforts, the idea of a centralized admiralty was eventually abandoned.\textsuperscript{32} The plakkaten were not revoked after the Dutch revolt began in the 1570s but, in the federal republic that emerged, each maritime city, especially the major ports of Amsterdam, Rotterdam, and Middelburg, also issued their own regulations and organized their own courts.\textsuperscript{33} Amsterdam established commissarissen voor zeezaken (commissioners for maritime affairs) in 1641, and Rotterdam followed suit in 1655, with further reforms in 1721.\textsuperscript{34} These and other Dutch cities continued to order their own affairs for most of the eighteenth century. Elsewhere, Frederick II of Denmark enforced a maritime code in 1561, while a series of Hanseatic Schifferordnungen were issued in 1530, 1572, and 1591, again drawing on earlier statutes, though this did not lead to uniformity between the cities' courts.\textsuperscript{35}

In France, the control of maritime law remained a source of conflict between the royal government and coastal regions. In the 1550s, the Crown issued several edicts relating to maritime affairs, and claimed the right to nominate officers for local admiralty courts; in 1563, 'specialized, corporate commercial tribunals' were also established.\textsuperscript{36} Two decades later, sweeping powers over fortifications, finances, fleets, and maritime justice were granted to the office of the admiral, but this met with resistance in provinces like Brittany and Normandy.\textsuperscript{37} Cardinal Richelieu faced the same problems when he tried to concentrate naval and maritime authority during the 1620s, in his role as grand-maître de la navigation.\textsuperscript{38} The wreck of two richly
laden Portuguese ships on the Guyenne coast in 1627 prompted a particularly thorny tussle over salvage between the Crown, local parties including the duc d’Épernon, and representatives of the Spanish government (Portugal was under Spanish rule at the time). This incident highlighted ‘the hybrid nature of the regulations over ship wreckages, which existed at the crossroads of medieval collections of maritime law, French regional customary law, and a more recent body of French royal decrees and ordinances’.39 Although Richelieu did achieve some success, such as imposing admiralty courts on Brittany, it took him until 1640 to do so, and the system did not long outlive him.40 It was only in the 1670s and 1680s, with major reforms by Louis XIV’s minister Jean Colbert, that maritime and naval authority were systematized in France, and even then these largely reflected a mixture of earlier legislation.41 Colbert’s ordonnance de la marine is the most famous of maritime law codes issued by European monarchs in these years, but it was not the only one: Charles XI of Sweden promulgated such a code in 1667, and Christian V of Denmark included maritime regulations in the national laws he issued in 1683.42

In the Mediterranean, too, individual governments dictated maritime law. The Ottoman Empire, a growing sea power, imposed its control on trade within its maritime territories. Joshua White has demonstrated that litigants made use of a number of Ottoman courts for seaborne affairs, including the local courts of Galata and Candia (Crete), as well as petitioning the kazasker or military judge, a member of the Imperial Council.43 The same was true of the Ottomans’ determined foes, the Knights of St John, who they forced to move from Rhodes to Malta. There the Knights established courts to adjudicate on privateering and trade: first the Tribuni degli Armamenti in 1605 and, almost a century later, a tribunal called the Consolato del Mare.44 The dukes of Tuscany, who sought to develop Livorno as a shipping centre, allowed the Captain’s (later Governor’s) Court of the city to take on jurisdiction over maritime affairs, although this caused some argument with the already-established Sea Consuls of Pisa.45

Particular issues arose in this region during the seventeenth century, as northern European shipping became ever more important, and local powers therefore had to handle cases dealing with northern seafarers, particularly in the Giudici del Forestier of Venice and the Conservatori del Mare of Genoa. In 1646, Venice decreed that foreign sailors should only use Venetian courts to enforce contracts that had been agreed under their own laws, but this failed to stem the rising tide of such litigation through the later seventeenth century. In 1682, the Senate authorized a new collection of all Venetian laws concerning sailors’ employment, but they also repeatedly appealed to foreign consuls and governments for elucidation of their national laws, highlighting, once again, the absence of a universal lex maritima.46

England was especially problematic for the Venetians because its sailors were highly litigious, but it still lacked a unified body of maritime law like Colbert’s 1681 ordonnance into the eighteenth century.47 This was partially a result of England’s own legal politics. Judges of the common law courts objected to the jurisdictional ambitions of the High Court of Admiralty and other civil law institutions, leading to a series of disputations in print and in person between the admiralty lawyers and their common law opponents.48 The eventual outcome was a victory for the common lawyers: by the end of the seventeenth century, the admiralty conceded cognizance
on a range of commercial matters, though continuing to judge cases relating to some maritime issues, including prize law, which acquired its own separate court. As well as the common law and admiralty courts, however, other maritime jurisdictions were active in early modern Britain. The lord warden of the Cinque Ports seems to have maintained some of his legal role, at least until the early seventeenth century, and while England and Scotland shared a monarch after 1603, the hereditary lord high admiral of Scotland continued to have his own court until the political union of the kingdoms in 1707. Ireland also had its own admiralty court, established in the 1570s, although it handled little business before the late eighteenth century.

Despite this institutional diversity, English admiralty judges and lawyers responded to the challenge of the common lawyers and justified the need for their own expertise by appealing to the old idea of a single and coherent ‘law of the sea’. The notes of Sir Julius Caesar, admiralty judge in the late sixteenth and early seventeenth centuries, indicate that counsels in his court referenced both European legal authorities and English statutes in their pleadings; his notes may themselves have represented an attempt to compile ‘a collection of decisiones according to the continental model’. Gerard Malynes, an English merchant who in 1622 published a volume entitled *Con-suetudo, vel Lex Mercatoria* (*Custom, or the Law Merchant*), wrote of ‘a Customary Law, approved by the authoritie of all Kingdomes and Commonweales, and not a Law established by the Soveraigntie of any Prince’. Civil lawyers and merchants in the later seventeenth century continued to depict the *lex mercatoria* as ‘a legal system that had been and remained in force in all countries and at all times, regardless of the will of any national legislator’, and admiralty judges made similar statements about maritime law.

Whatever its relationship to actual court practice, the idea of *lex mercatoria* and *lex maritima* remained compelling, and not just among lawyers in England, although Francesca Trivellato has pointed out that the term *lex mercatoria* was used infrequently in continental Europe. Many courts continued to draw upon medieval written codes including the *Consolat* in Livorno, Malta, and Marseille, and the *rôles* in England. Indeed, a significant trend in this period was the publication of compilations that both advertised the existence of, and sought to summarize, a supposed ‘law of the sea’. In so doing they almost began to fabricate one, and the volume of these texts, and their frequent reprinting of and borrowing from one another, suggests a thriving interest in the topic. A number of European scholars produced tracts explaining Roman maritime law, which was still in force in many countries. Editions of the Rhodian law, the *Consolat*, and the Hanseatic laws were all printed in the sixteenth and seventeenth centuries. An anonymous Dutch compilation of maritime laws first appeared in 1594, containing principally the Wisby code and the *plakkaten*; it was regularly reprinted well into the eighteenth century. Several Scottish lawyers also wrote about their national maritime law and one of them, William Welwod, then expanded his *Sea-Law of Scotland* into *An Abridgement of All Sea-Lawes*, the first general synthesis of the separate codes. Welwod’s *Abridgement* was quite concise, and a more complete collection appeared in Étienne Cleirac’s *Us et Costumes de la Mer* in 1647, inspired by the affair of the Guyenne shipwrecks (in which Cleirac acted as Richelieu’s representative). This volume ‘included every major European medieval compilation’
Except the Consolat, as well as both French and foreign statutes, upon which Cleirac offered detailed if sometimes confused commentary. In 1661, an expanded version was published, and it was reprinted four times over the course of the next century and translated into English, showing the enduring appeal of this text. Other syntheses, both in Latin and vernacular languages, long continued to appear with reprinting, translation, and reproduction of material being commonplace.

While the practice of maritime law and its exact status within municipal systems remained heterogeneous across early modern Europe, the idea of a universal maritime law retained its purchase, and this relates to the emerging idea of a ‘law of nations’. As Shavana Musa has written, this concept has ‘a complex semantic history’, but it was an idea that lawyers and politicians increasingly accepted, and maritime law featured heavily in it. Cleirac, for example, categorized maritime customs as part of the law of nations. Ironically, this development of international law had a distinctly nationalist streak: there were arguments, for example, over whether a French or English monarch had first authorized the rôles d’Oléron, or whether the rôles or the Wisby code was older and thus a more prestigious text. Similarly, disputes about the nature of maritime sovereignty simultaneously contested specific aspects of the ‘law of nations’ while forming a constitutive part of it, and these disputes intensified in response to European imperial expansion.

Closed and open seas: imperial expansion and maritime law

Little evidence survives for the legal frameworks that regulated maritime activities in the Indian and Pacific Oceans, and along the coasts of Africa and the Americas, before the early modern period. Yet such frameworks certainly existed, because there had been extensive seafaring in these areas for centuries. The Indian Ocean, especially, was an arena of seaborne trade, and there were numerous important entrepôts, including Aden, Kilwa, and Hormuz, and several cities along the Malabar Coast. It seems that, as in medieval Europe, these ports were legally autonomous, although there were also some centralizing tendencies. Melaka adopted a written law code in the thirteenth century that dealt with many of the same issues as the medieval European codes, and the sultans of Melaka later ‘sought to regularize trade’. The port regulations of Aden under the Ayyubid dynasty ‘speak of a certain bureaucratic orderliness’. Many of these regulations guaranteed equal treatment for all traders, although there has been some debate about whether the Indian Ocean was essentially peaceful before the arrival of Europeans, given that seaborne raiding in these waters in earlier centuries was both well documented and encouraged by some rulers. China represents a unique situation, as the empire claimed authority over territorial waters and, briefly in the early fifteenth century, seemed about to establish a long-distance imperial network. However, the Ming emperors subsequently prohibited maritime commerce, which led instead to ‘flourishing clandestine trade and large-scale piracy’.

Evidence is even scarcer for Africa and the Americas, but there was certainly substantial coastal voyaging, and local rulers exercised some recognized legal authority over it. For Caribbean leaders, for example, ownership of a piragua or canoe was a marker of power because it provided command over military force and ‘ownership
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conferred extra shares of trading surplus and captives’. In Africa, rulers continued to claim extensive powers long after the arrival of Europeans: in 1525, the king of Kongo seized a French ship for trading illegally along his coast, and he was not the only one to do so. On the coast of Senegambia during the sixteenth and seventeenth centuries, rulers including the ten of Baol and the damel of Cayor, as well as the alkati (governor) of each coastal town, levied customs duties. Lut-Sukaabe Faal, who ruled both Baol and Cayor in the years 1695–1720, prevented any European nation from establishing a monopoly along his coasts. As Ousmane Traoré has argued, ‘Senegambian conceptions of royal power had social, political and economic aspects that concentrated on the regulation of trade as well as maritime and inland waterways’. Similarly, Europeans in the Indian Ocean recognized and accepted indigenous jurisdictions in the early modern period. The Dutch only received passes to trade in Japan after careful diplomacy with the shogun, while the Raad van Justitie of the Dutch East India Company (Vereenigde Oost-Indische Compagnie, or VOC) recognized the judgments of Indian courts in Bengal, Surat, and Coromandel. A central part of Hugo Grotius’ defence of the VOC’s actions against the Portuguese – to which I will turn shortly – was a Dutch alliance with the king of Johor, whose sovereign rights, Grotius contended, included the authority to wage war at sea.

Despite these elements of continuity, European maritime activity from the late fifteenth century onwards had a transformative impact upon maritime legal regimes across the globe. The Spanish and Portuguese, the first to establish large commercial and imperial networks, claimed sovereignty over the sea in new ways, based partially on the right of ‘discovery’ and partially on authorization by the pope. In the Indian Ocean, the Portuguese insisted that all vessels had to purchase a cartaz or pass, without which ships were considered a legitimate target for seizure. Some Indian rulers, such as the Mughal emperors Akbar and Jahangir, accepted this system; others resisted, including the port of Aceh, which became ‘the focus of an entire maritime system, rival to that of the Portuguese’. On the Malabar Coast, the Zamorin of Calicut initially fought against the Portuguese, but allied with them in 1583. When Kunjali Marakkar, who had previously served the Zamorin as admiral, proclaimed himself ‘Lord of the Indian Seas’ and continued to resist the Portuguese, it was the Zamorin’s forces who defeated him. Lakshmi Subramaniam has argued that the actions of Kunjali, and other similar leaders such as the Angrias of Kolaba, the Malvans of Sindhudrug, and the Desais of Savantwadi, show how Indian rulers began to adopt the same approach to maritime sovereignty and ‘cartaz-based politics’ that the Portuguese had introduced. However, Sebastian Prange has pointed out that the origin of the Anglicized ‘Zamorin’ (samudri raya) also meant ‘Lord of the Seas’, and that cartaz-like systems existed in earlier centuries (albeit on a smaller scale), suggesting that these politics were not totally new, even if they were profoundly altered by the arrival of the Portuguese.

Over the course of the sixteenth century, European competitors also began to challenge Spanish and Portuguese assertions of hegemony. In the Atlantic, where first French and then Dutch and English ships began to voyage during the sixteenth century, the Spanish met all foreign interlopers with brutally hostile policies: after a Spanish force seized several Dutch ships in 1605, they executed most of their captives...
without trial. Still, the Spanish could not prevent African rulers or even their own colonists in the Americas from trading with other nations, although they did not surrender their jurisdictional claims until late in the seventeenth century. From around the start of that century, Dutch and English voyages to the Indian Ocean also became more common, and there they entered into conflict with the Portuguese and all who carried a cartaz, sometimes joining in alliance with Indian rulers such as the Susuhunan of Mataram and the sultan of Makassar. The main challengers to Spanish and Portuguese dominance were trading companies like the VOC and English East India Company (EIC), to which northern European governments granted extensive legal powers, including the authority to make war.

While relying upon negotiation with local rulers, such as the Mughal emperors, who sometimes sought to utilize European forces for their own purposes, the companies also developed their own legal systems and jurisdictional claims. The VOC sought to impose their own cartaz system and, in the later seventeenth century, the EIC fought with the Angrias and Marathas for maritime control. By that time, the EIC in Bombay had also established civil and admiralty courts; in 1678 a High Court was set up at Madras for both civil and criminal cases. Significantly, in the early years of this court two Indian judges were present to advise on local law, and later, after this practice was dropped, Brahman specialists were still consulted and cases were referred to Indian arbitration. As well as recognizing local authorities, in both India and the Americas these companies often competed for jurisdiction with other nations and with other companies or communities of the same nationality, echoing the fragmented and competitive situation in early modern Europe.

The VOC’s war with the Portuguese Empire sparked off one of the most significant legal debates of the period. In 1603, the Dutch Captain, Jacob van Heemskerck, seized the Portuguese ship Santa Catarina in the straits of Singapore, provoking a furious response from the Spanish-Portuguese government. The VOC engaged the influential jurist Grotius to represent them in court; unsurprisingly, the Amsterdam admiralty ruled in the VOC’s favour, but this was only the beginning. Grotius also composed a weighty treatise in the VOC’s defence, De Jure Praedae (On the Law of Prize), which argued, among other things, that the sea could not be possessed, and therefore no one ruler could exercise sole sovereignty over it. The Portuguese attempt to do so represented an injury against the Dutch and all other nations, Grotius claimed, and Heemskerck’s actions were therefore a legally justified retaliation to this injury, as well as being authorized by an alliance with the king of Johor. De Jure Praedae was not published until the nineteenth century, but a modified chapter of it was printed anonymously in 1609 as Mare Liberum (The Free Sea).

This text provoked a series of responses arguing that the sea could be possessed and, more to the point, that certain monarchs controlled specific parts of it. Serafin de Freitas wrote a defence of Portugal’s position in 1625, but the most sustained challenge to Grotius’ ideas came from Britain, first from Welwod in 1613, and then, most famously, by John Selden in Mare Clausum (The Closed Sea), written in 1619 and published in 1635. Both English and Scottish monarchs had long asserted a degree of maritime sovereignty, which was threatened by Grotius’ arguments, but Anglo-Dutch rivalry over commerce and North Sea fisheries also prompted these
Dutch writers, such as Theodore Graswinkel, defended Grotius, and the print debate rumbled on throughout the Anglo-Dutch wars between the 1650s and 1670s, and later. Nevertheless, even British writers eventually moderated the more expansive claims to maritime dominance. A principle primarily championed by Cornelis van Bijnkershoek, that sovereignty extended only as far as it was enforceable (at the time, as far as a cannon-shot could reach from shore), was generally adopted.

Although these disputes affected government policies around Europe, they were not rigid positions, and there was surprising flexibility at times. In arguably the most extreme example, Grotius, leading a Dutch delegation during negotiations with the English over trade in the Indian Ocean in 1613, argued in favour of a Dutch trade monopoly, while the English diplomats cited *Mare Liberum* against its author. Grotius’ arguments in favour of the ‘freedom of the sea’ nevertheless became more widely accepted, especially during the eighteenth century, although some monarchs continued to articulate claims to maritime sovereignty much later. This does not mean that rulers surrendered their authority over maritime activity: during this period, many governments increasingly demanded jurisdiction over their seafaring subjects regardless of their whereabouts, although in many places the local authorities resisted this intrusion for as long as they could. Instead, Grotius’ writings contributed to the idea of a ‘law of nations’ to which European governments subscribed, and through which they continued to pursue their imperial ambitions. One of the most significant dimensions of this was in the developing law of piracy.

**Emperors and pirates**

Controlling violence at sea has been a perpetual concern of lawmakers. As with other aspects of maritime law, this is best documented in relation to Europe, and although other regions, such as the Caribbean and the Indian Ocean, witnessed maritime violence and developed legal systems relating to it, here too the impact of early modern European empires was profound. This played out in the emerging concept of a ‘pirate’, a maritime criminal who plunders illegally and indiscriminately. The term has its origins in the ancient Greek ‘peirato’, although in the classical and medieval periods this term and its Latin and vernacular descendants and cognates often just described maritime raiders; ‘pirate’ acquired firmly negative legal and moral connotations in late medieval and early modern Europe. Indeed, though historians have stressed the ambiguous nature of early modern piracy, in legal terms the core principle was relatively clear, articulated both in municipal laws and by theorists, such as Alberico Gentili in the late sixteenth century, Grotius some decades afterwards, Charles Molloy and Leoline Jenkins in the later seventeenth century, and van Bijnkershoek in the early eighteenth century. Violent plundering at sea by those who were not authorized by a sovereign was piracy. In England, piracy was a felony from the fourteenth century onwards, and in 1536, a statute established a special tribunal of the admiralty court to prosecute it, followed later in the century by further measures to encourage prosecution. Similarly, the States General, provincial authorities, and admiralties of the Dutch republic repeatedly condemned ‘zeeroverij’ in the seventeenth century.
Ambiguity therefore existed, at least in legal terms, not over what a pirate was, but rather over *who* was a pirate. In the medieval period, European rulers authorized their subjects to carry out seaborne violence either against their enemies during times of war, or as an act of ‘reprisal’ or retaliation against a maritime aggressor when other legal recourse had failed. Later these two types of warfare blurred, but still required a commission from a government, and such commissions were readily available. Sailors who were intent on plunder rarely sailed without such a document, sometimes adopting the authorization of another sovereign (or several) besides their own. 111 ‘It was only in exceptional moments’, Lauren Benton has pointed out, ‘that mariners purposefully assumed the status of outlaws’. 112 Disputes, therefore, centred on the legitimacy of sovereigns and their commissions; predictably, most governments considered their own authorizations to be legitimate or took a lenient line with their own subjects, but regarded others as pirates. 113 Some groups were even considered inherently ‘piratical’, and the most significant of these for early modern European rulers were the North African corsairs, who were authorized by the Ottoman regencies of Algiers and Tunis, or the sultan of Morocco, but were ‘rendered “piratical” by simply withholding recognition of [their] governmental position’. 114 However, even this attitude changed in the late seventeenth century as European states concluded treaties that recognized the regencies’ sovereignty. 115 If the legal principle was clear, its application was variable.

The debates over maritime sovereignty and legitimacy discussed above related to, and were inspired by, questions of piracy and imperial expansion. The French, Dutch, and English in particular relied upon private enterprise, both by independent actors and trading companies (as we have seen), and sometimes in alliance with local forces, such as the VOC’s mixture of co-operation and conflict with the smugglers and raiders of the Chinese coast. 116 This approach provoked accusations of piracy from the Spanish and Portuguese, as part of their claims to total maritime dominion; the Dutch, English, and French replied that it was the Spanish and Portuguese who were in fact pirates, against whom the newer empires retaliated. 117 State governments, company directors, and colonial officials continued to support and sponsor maritime raiders in the sixteenth and seventeenth centuries, particularly in the Caribbean, where they became known as ‘buccaneers’. 118 The principle developed of ‘no peace beyond the line’, a convention that violence in the Atlantic or Indian Oceans was not an act of war, as it was in Europe. 119

That is not to say that there were no legal restrictions on seaborne violence, even ‘beyond the line’. Many states developed theoretically strict rules regarding plunder and prizes, which followed the general pattern of maritime law in that they shared some similarities across countries and were indebted to earlier codes like the Consolat, but were locally specific and periodically revised or altered by municipal authorities. 120 Authorized ‘privateers’ (a term that was coined in the late seventeenth century) were supposed to seize only enemy ships, and prize cases had to be adjudicated by admiralty courts, offering aggrieved merchants and shippers an opportunity to seek the restitution of their goods if these had been wrongfully seized, and giving rulers some measure of control. 121 Negotiations over rules concerning prize, and contentious issues such as the status of neutral vessels, ‘contributed heavily into translating the theoretical law of nations into practice’. 122
There were clearly specific interests at play, however, and most governments favoured their own subjects in these cases, not least because they stood to gain a cut of the profits. In the sixteenth century, the English monarchy was notoriously lax in disciplining its private maritime forces, and Virginia Lunsford has shown that the Dutch authorities were regularly lenient toward those accused of, and even those convicted of, *zeeoverij*. Moreover, as Benton has argued, seafarers themselves played an important role in developing these legal systems, acting as ‘lawyers’ who ‘cultivated a certain expertise in representing their commissions as legitimate … [and] engaged in frequent legal posturing’. Evidently not all of them were successful at ‘posturing’, because some seafarers were prosecuted and executed as pirates, while others elected to act wholly outside the law. Nevertheless, it is important to recognize that for much of the early modern period seafarers’ choices and actions also shaped these laws, and so too did the role of local authorities who claimed jurisdiction. For example, the first lawsuit judged in the fledgling English colony of Maryland was an accusation of piracy (although this was more about territorial rivalry with neighbouring Virginia than it was about seaborne plunder).

Yet the balance of power shifted more decisively toward state governments, as they built up the naval resources to police the sea and as the role of other agents, such as trading companies, eventually declined, and this too was an intrinsic part of imperial expansion. During the late seventeenth century, even as the activities of privateers and buccaneers peaked, the attitudes of metropolitan governments and merchant elites changed, spurred by a greater interest in controlling both commerce and maritime warfare. In tracking this change, scholars have focused particularly on the British imperial outposts of the Caribbean and North America, where ‘Concerted efforts to root out the multinational sea-robbers […] began in earnest in the 1680s’, although previously there had been colonial reluctance to participate. At about the same time French colonial governors in the Caribbean were similarly tasked with prosecuting buccaneers, though for them too ‘the local situation and a lack of judicial tools made this task impossible’. By the end of the seventeenth century, Britain had imposed new vice-admiralty courts and new anti-piracy laws upon its colonies, and French regulations also tightened.

As a response to this changing legal situation, some buccaneers became outright pirates, although others acquired new commissions, including from indigenous rulers in Central America. Many abandoned the Caribbean and moved their base of operations to Madagascar, where they allied with Malagasy rulers and preyed upon passing shipping for several decades. Complaints by the Mughal emperor, as well as concern for their own trading interests, compelled the EIC to take stronger anti-piracy measures; they sent a squadron to Madagascar, as did French colonists in the neighbouring Mascarenes. Although not immediately or entirely successful, the combined measures in the Atlantic and Indian Oceans resulted in well-publicized pirate trials around the turn of the eighteenth century, and in subsequent decades the British navy continued to suppress pirates in the Atlantic.

In the Indian Ocean, moreover, the legal concept of piracy increasingly played another purpose: to condemn and eradicate indigenous maritime forces. For nearly four decades from 1718 onwards, the EIC fought a war against the Maratha
Confederacy, led by Kanhoji Angre. In the eighteenth and early nineteenth centuries, the Bombay Marine intensified this activity, completing the destruction of Kanhoji’s successors among the Angria, attacking Malagasy communities who were raiding the Comoro Islands and East Africa, and sending expeditions to the Qassimi ‘Pirate Coast’ in the Persian Gulf and to the Gulf of Kutch in Gujarat. The British, Simon Layton argues, were able to construe their own seaborne violence as a force for modernity, at the same time as they consigned those who challenged their legitimacy to a bygone era. In so doing, they pursued ‘an emerging imperialism of free seas’ in which the empire claimed the authority to define and protect this freedom, and to punish those who contravened it. The concept of piracy, and the imperial campaigns to eradicate it, were therefore not only part of ongoing debates around maritime law and sovereignty, but also contributed forcefully to ‘the universalizing of European ideas of international law’, as Michael Kempe suggests. The rising power of the United States, for example, adopted major elements of British prize law and the same imperial-legal approach to ‘piracy’.

These developments were accompanied by continued discussion about the scope and nature of maritime law. During the course of the nineteenth century, three miles was proposed as a more fixed alternative to the ‘gunshot limit’ for a state’s maritime sovereignty, but not all governments accepted this. At the same time lawyers and scholars continued to publish collections and syntheses of the medieval law codes (which were treated almost as canonical), and older books were still reprinted, while others attempted to summarize more recent developments in law. These publications, as in former centuries, indicate the locally specific nature of maritime law: British writers, for example, increasingly focused on parliamentary statutes rather than on the medieval codes. Similarly, an attempt to create an international prize court in the early twentieth century failed, and municipal courts continued to fulfil that function. Yet the nineteenth-century French lawyer Jean-Marie Pardessus, author of a collection on maritime law that is still the most substantial and extensive ever published, wrote that ‘uniformity is, I would dare to say, its essence […] this law, immutable through social upheavals, has come to us after thirty centuries as it was in the early days when navigation established relationships between peoples’. The myth of a universal maritime law had lost none of its potency.

Conclusion

The legal developments outlined here continued to have an impact in the twentieth century and afterwards. From the 1950s onwards, the United Nations held a series of meetings that resulted in the 1982 Convention on the Law of the Sea, finally creating a codified and international maritime law. The creation of this international law highlights its fundamental absence in previous centuries: despite the persistent claims of some writers, from the medieval era to the present day, maritime law was a complicated and messy jigsaw of competing jurisdictions. Individual sovereigns – even individual ports – produced their own regulations and held their own courts, while the seafarers who moved between these jurisdictions contributed, in their own way, to the continuous genesis of maritime law. Benton’s description of ships as ‘islands of
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law … [and] representatives of municipal legal authorities – vectors of law thrusting into ocean space’ captures the dynamics of this situation particularly well.147 Rather paradoxically, the intersections and collisions between these vectors contributed fundamentally to both the recurrent idea of a singular and universal law of the sea and to the ‘law of nations’, as well as being a definitive feature of the growth of European empires.

Yet the United Nations Convention is closer to its antecedents than it appears at first glance, in two senses. First of all, a number of scholars have highlighted how much this system owes to early modern writers and to Grotius in particular, as it endorsed the ‘freedom of the seas’ while recognizing limited territorial waters.148 Second, and more importantly, the Convention shows how particular interests continued to define maritime law. Though the twentieth century witnessed some remarkable optimism, with the United Nations’ efforts and advancing technology regarded as harbingers of a new ‘inclusive authority’ at sea, it took three decades to negotiate the Convention and even longer to ratify and enforce it, with the US never officially ratifying it.149 Throughout this process, smaller nations, especially those beyond Europe, resisted the universal ‘freedom of the seas’ sought by the major maritime powers, while discussion over the meaning of ‘piracy’ was similarly fraught, as there was and is ‘no public international law defining “piracy”’.150 Nor have these particular interests disappeared since 1982, as political and technological developments have left the Convention outdated, and disputes over maritime jurisdiction and sovereignty look set to continue.151 The surge in piracy off Somalia’s coast from around 2006 onwards reignited debates about international maritime law, and although privateers were abolished in most countries in the nineteenth century, non-state maritime violence persists in the form of private security firms.152 More recently, in July 2017, the British government announced that it intends to withdraw from international agreements in order to enforce greater control over its territorial waters.153 The sea remains a legally problematic space.

Notes


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Labour, and Empire: Comparative Perspectives on Seafarers, c.1500–1800, Basingstoke: Palgrave Macmillan, 2015, pp. 65–7; see also Pardessus, Collection de Lois Maritime, vol. 5, passim; Pardessus, Collection de Lois Maritime, vol. 6, 1845, ch. 36.

14 Jados, Consulate of the Sea, pp. xiv–xv; and passim.


22 Jados, Consulate of the Sea, p. xv.

23 Forte, ‘“Kenning Be Kenning”’, pp. 81–2; Frankot, ‘Maritime Law and Practice in Late Medieval Aberdeen’, pp. 138–9, 141, 146.

24 Burwash, English Merchant Shipping, pp. 60, 65.


40. James, Navy and Government, pp. 61–5, 75.


G. Malynes, *Consuetudo, vel Lex Mercatoria, Or the Ancient Law-Merchant*, London: Adam Islip, 1622, sig. A6r; C. Molloy, *De Jure Maritimo et Navali: Or, a Treatise of Affaires Maritime and


55 Trivellato, ‘‘Usages and Customs’’, p. 199.


57 For details of editions of printed primary sources, see the bibliography.


60 Quoting Trivellato, ‘‘Usages and Customs’’, p. 194 n.1; Anon, ’T Boeck der Zee-Rechten, Amsterdam, 1594. See also T. van Glins, Aenmerckingen ende Bedenckingen over de Zee-Rechten, Amsterdam: Joost Pluymer, 1665.


62 É. Cleriac, Us et Costumes de la Mer, Bourdeaux: Guillaume Millanges, 1647.

63 Trivellato, ‘‘Amphibious Power’’, p. 925; Trivellato, ‘‘Usages and Customs’’.

64 Trivellato, ‘‘Usages and Customs’’, p. 202; see bibliography.

71 Subrahmanyam, Portuguese Empire, pp. 12–14.
75 Thornton, Cultural History, p. 107.


82 Prange, ‘Trade of No Dishonor’, pp. 1276, 1280.


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94 Previous writers, such as Francis Alphonso de Castro and Ferdinand Vasquez, had touched on some of these subjects but with less impact: T. W. Fulton, *The Sovereignty of the Sea*, London: William Blackwood & Sons, 1911, p. 341.


also wrote on this topic in his *The Sovereignty of the British Seas, Proved by Records, History, and the Municipal Lawes of the Kingdome. Written in the Yeare 1633*; and Gerard Malynes touched upon the issue in *Consuetudo*, ch. 35; Fulton, *Sovereignty*, pp. 358, 364–6.


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113 Lunsford, *Piracy and Privateering*, ch. 5; Lane, *Pillaging the Empire*, p. 4; Pérotin-Dumon, ‘Pirate and Emperor’, p. 38; Sicking, *De Piraat*, pp. 27–8.


123 Benton, ‘New Legal History’, p. 231.


Lane, Pillaging the Empire, p. 165; see also pp. 127, 166–9; Ritchie, Captain Kidd, pp. 143–7; Hanna, Pirate Nests, chs 3–5.

Lane, Pillaging the Empire, p. 167.


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141 Fulton, Sovereignty, section 2, ch. 2.

142 Targa,

141 Fulton,


147 Benton, Search for Sovereignty, p. 112.

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151 Nyman, ‘Outpaced by Events’.


Bibliography


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Borgo, P. B. (1641) *De Dominio Serenissimæ Genuensis Reipublicæ in Mare Ligustico*, Rome.


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Law and the sea


Hagemeier, J. (1669) *De Dominio seu Imperio Maris*, Frankfurt-am-Main.


Law and the sea


Stracca, B. (1556) *Tractatus de Mercatura*, Lyon.

Strauch, J. (1674) *Dissertationes Academicae Quinque; quibus accesserunt adhuc duae aliae*, Jenae.


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Verwer, A. (1711) Nederlants See-Rechten, Amsterdam: Jan Boom. Reprinted Amsterdam, 1716, 1730, 1764.