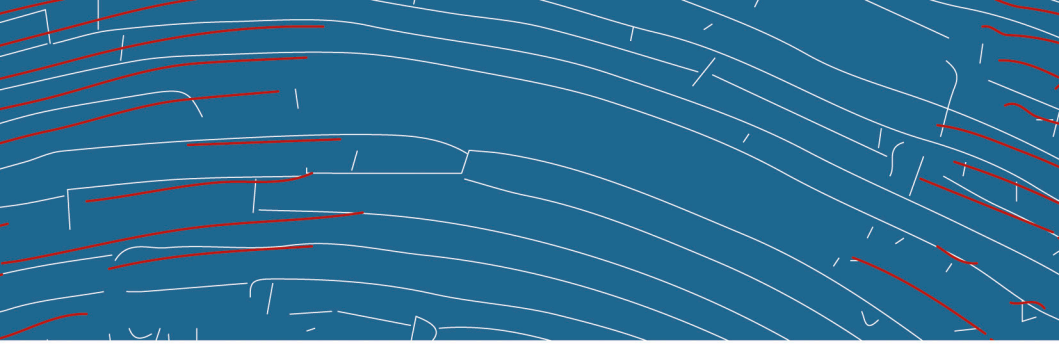

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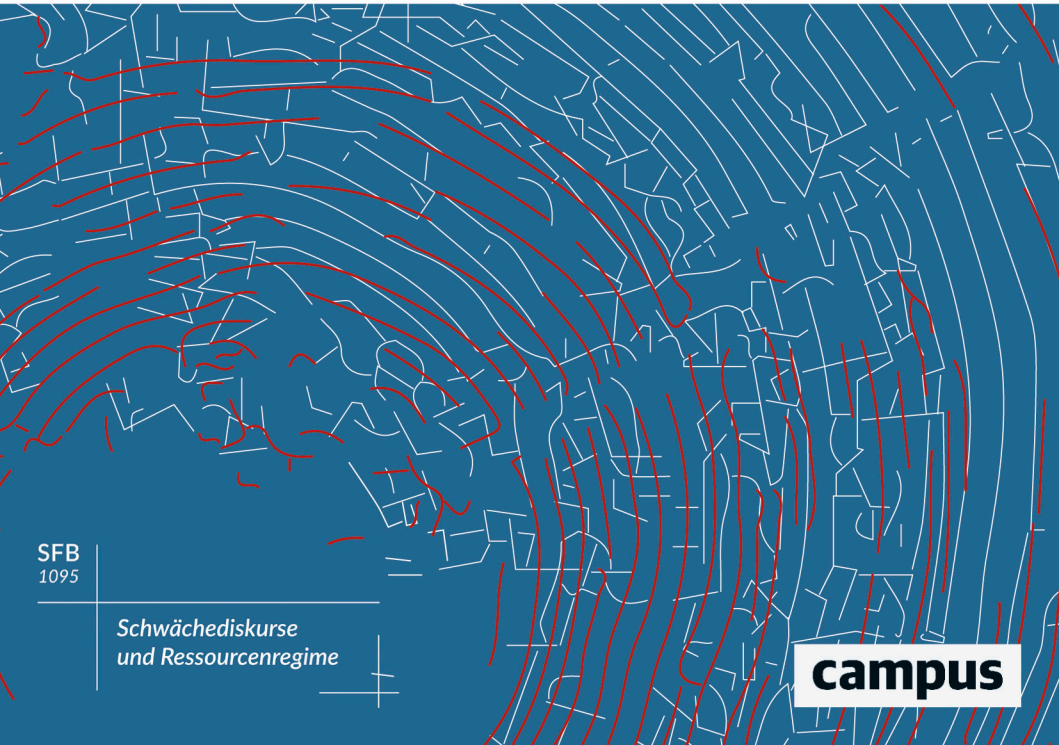
Criminalization, Economics, and the Transformation of the Maritime World (1200 – 1600)



SFB 1095
Schwächediskurse und Ressourcenregime

campus

Discourses of Weakness and Resource Regimes

Edited by Iwo Amelung, Moritz Epple, Hartmut Leppin, and Susanne Schröter

Volume 6

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Merchants, Pirates, and Smugglers

Criminalization, Economics, and the Transformation of the Maritime World (1200–1600)

Campus Verlag
Frankfurt/New York

The Collaborative Research Center 1095 is funded by the German Research Foundation.

ISBN 978-3-593-50979-2 Print
ISBN 978-3-593-44031-6 E-Book (PDF)

Cover design: Campus Verlag GmbH, Frankfurt-on-Main
Typesetting: Campus Verlag GmbH, Frankfurt-on-Main
Printing office and bookbinder: Beltz Grafische Betriebe GmbH, Bad Langensalza
Printed on acid free paper.
Printed in Germany

www.campus.de
www.press.uchicago.edu

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Introduction

Thomas Heebøll-Holm, Philipp Höhn, Gregor Rohmann

The Concept of Maritime Violence in Legal Thinking

On 28 February 1381 Richard II (1367–1400), King of England, issued the following:

"To the mayor and bailiffs of the town of New Sarum. Order to set free William Webbe of Salesbury, imprisoned upon suspicion of piracy or adhering to the king's enemies of France upon information of John king of Castille and Leon and duke of Lancastre, […]; as the king is informed by credible persons that he is a wandering idiot, at times raving mad, so that he could do the said enemies no aid or favour."[1]

William Webbe seems to have taken against his own king, in favour of the French. We would possibly call this high treason, or we would rather point at the premodern political conditions of military service, which did not necessarily refer to national duties of loyalty. We would not call it "piracy", for this category we use to denounce pure criminals. As it seems, the royal court itself did not have a proper legal understanding of the word but used it merely to disqualify opposition to the King, or, even more generally, any form of doing evil at sea, one could say. In fact, the term "piracy" itself does occur in English law for the first time only in 1536.[2]

In 1414, King Henry V (1387–1422), grandson of John of Gaunt, Duke of Lancaster (1340–99), would formulate the first legal definition of violence at sea in English law: According to this, attacks on ships in times of peace or truce are defined as high treason, a breach of safe conduct conjured by the king. The "Statute of Truces" calls perpetrators *"tuers des hommes, robbours,*

1 CCR Richard II, vol. 1, 298; on 24 March 1381 he was released from prison, cf. CCR Richard II, vol. 1, 505.

2 Heebøll-Holm (2019); Dick (2010), 11; but cf. Pitcaithly (2012), 125, who dates this to 1694.

spoillours et offendours", not "pirates".[3] But from now on, "pirates" could best be defined as people fighting against the king's enemies, but at the wrong time—a reflection of the centuries long guerrilla situation between England and its foes in the Atlantic world, and kind of an embryonic stage of the later juxtaposition of "piracy" and "privateering".

If we as historians only had John of Gaunt's (unfortunately lost) complaint as a source, we might consider William Webbe of Salisbury as a pirate. But here we have evidence, that following our usual definition he wasn't. Rather we would call him a traitor. But according to the king's writ he was simply of no danger for the English. This is why he wasn't charged with "piracy".

As scholars such as Janice E. Thomson, Michel Mollat and Alfred J. Rubin have shown, the concept of piracy does not have a clear and undisputed meaning both historically and juridically.[4] Indeed, in fifth century B.C. Aristotle considered piracy a natural activity akin to fishing and hunting, and likewise in the High Middle Ages writers were more likely to consider the terms *pirata* and *piratica* as technical terms for sea-warriors and sea-warfare than as a label that undisputedly marginalized and indeed criminalized the person(s) in question. But the central problem of the perception of maritime violence appears in the tension between what one might call the Augustinian and the Ciceronean paradigm. In the first century B.C., the Roman rhetorician and lawyer Marcus Tullius Cicero famously declared that the pirate through his egotistical and self-serving actions became the enemy of all and effectively an outlaw that should be exterminated by the (Roman) state. In contrast, around 400 A.D. Saint Augustine in *De Civitate Dei* argued that piracy and state-warfare functionally were identical since they both essentially were about collective violence and plunder. The only difference between a pirate and an emperor was the size of their operations, as he said. What mattered to Augustine was whether one acted with justice. While Augustine was not defending piracy, contrary to Cicero he did not *a priori* consider the state good and the pirate evil.[5] In other words, what mattered was the motive, not the action. Cicero's paradigm in contrast allowed for a discourse of marginalisation and criminalisation of piracy, and from the 15th century it became linked to state formation and indeed informed the early

3 PROME, vol. 9, 52–5; Jenks (1992), vol. 2, 612–4; Thomson (1994), 23; Rubin (1998), 49; cf. Heebøll-Holm (in this volume).

4 Mollat (1972), Mollat (1977), Thomson (1994), Rubin (1998).

5 Heebøll-Holm (2013), 2–9.

development of an international law of the sea. However, this also shows how the use of the labels "pirate" and "piracy" were discursive weapons employed to marginalize competitors and—in the name of protecting the seas—to legitimize one's own expansion of power.[6]

Recent research has demonstrated how maritime violence in the Late Middle Ages was embedded into legal and economic practices.[7] Accordingly, it was not an endemic phenomenon presenting an obstacle to the emerging capitalism. The pirate was not the enemy of all, but maritime authorities increasingly tried to make it so. Why? What was at stake in this particular historical situation, and who had an interest in criminalizing certain rivals by labelling them pirates? These are some of the questions that we investigate in this volume. Crucial in the understanding of the rise of a condemnatory discourse on piracy in late medieval Europe is a focus on the social, economic and legal status of maritime violence. While the formation of territorial states claiming a monopoly on the use of legitimate violence often went hand in hand with the criminalization of rivals as pirates, in most of the cases it was also inextricably linked to the centralization of economic life around a limited set of markets controlled by the said states. States increasingly enforced exclusive access to particular markets for their clients. Violence was used by excluded actors to enforce access to these markets, to divert riches from them or disrupt them. The state reacted by labelling such intruders as smugglers and pirates. Vice versa, rivals contesting the states' control over markets might sometimes term the states' men as "pirates", because their enforcement of exclusive access to the market was deemed illegitimate. The very concepts of piracy and smuggling could thus be invoked by economic actors in their competition for access to markets.

By comparing case studies from the Baltic, the Atlantic and the Mediterranean, we aim to draw a new picture of premodern maritime violence and its embeddedness into social, legal and economic practices. In this volume we have encouraged the contributors to reflect on to what extend "violence" was considered legal or licit, and when and how it became illegal (prohibited by a law) or illicit (not in accordance with moral standards). Accordingly, we do not consider "piracy", "smuggling" or "wrecking" as narrow categories.[8] Rather, as legal thinkers in the 16th century were wont to, we employ a broad

6 Russon (2004), 303–4.

7 Heebøll-Holm (2013); Rohmann (2014); Rohmann (2017b); Cordes and Höhn (2018); 524–6.

8 On wrecking (*ius naufragii*) see: Niitemaa (1956); Backman (2014); 177–8; Johnson (2015).

concept of violence, which includes piracy, smuggling and alternative or extra-legal—but not necessarily physically violent—commercial activities.[9]

Seen from a simplified Rational Choice perspective piracy does not differ from any other type of violent robbery. However, we hold it to be something more technically, economically and historically. For example: A robbery initially involves person A (victim) and person B (the perpetrator). While A is minding his own business, he is approached by B (whom he has never met before). By the use of violence or threats thereof B robs A of his valuables—let's say his money. Here the case is clear. B is obviously a criminal. He has no legitimate motive and he clearly acts solely out of anti-social desire for personal and immediate enrichment. Furthermore, he has recourse to violence, though this violence may be no more sophisticated than the use of his fists. This scenario presupposes of course a civil society with a well-defined delegation of the legitimate use of violence to an authority.

The medieval and early modern acts of maritime violence that this volume treats, are fundamentally different, however. First of all, the violence is used by a crew with specialized talents to sail a ship and to fight on board.[10] Furthermore, they are by definition a group since that's what is needed for a ship to function. As the overtaking of another ship is no easy task, they will be armed with everything from swords and knives to small cannons. When we turn to motive, it turns out that the medieval and early modern maritime world was a small one. People knew each other. This had important implications. The aggrieved party might be commercial rivals who had previously deprived the aggressor or his countrymen of valuables. This would give legitimate course to reprisal (see below). The victim might even owe the aggressor money, but repeatedly have eloped his debtor. Any aggressor could use force to enforce his claims. In short, given that the maritime world at this time was a small one and that competition was fierce, it is very hard to find genuine, innocent victims and obvious criminals like persons A and B from the example above in the sources.

Even in wartime such clear cut distinction was not always possible. Here the subjects of one's enemies were obviously legitimate targets but what about people trading with the enemy? Not infrequently did the capture of a ship from a non-belligerent country start discussion of whether it was neutral or not. Thus, while piracy (i.e. maritime violent capture), is in some regards comparable to common robbery, then due to the circumstances

9 See for instance Rubin (1998).

10 Heebøll-Holm (2013), 16–7.

(motives, political situation etc.), the organization and the equipment required for maritime violence is somewhat more advanced. This places the act somewhere in the grey area between robbery, war and self-help—be it licit or illicit.

So, were merchants and seafarers prone to use force regularly and indiscriminately? Did conflicts escalate automatically in a system which even provided actors with official licenses to take revenge? That would admittedly fit very well to popular perceptions of the "violent", "irrational" Middle Ages. But we have to stress that while people were able to use force, as far as we see they also knew very precisely that in most of the cases it was better to keep the knife in the sheath. True, the potential threat of violence was an everyday phenomenon. But even if an actor was a pirate proper, why should he risk to damage vessel and crew—both his and the opponents—if he wanted to make captures of ships a living? Surely, people were not peaceful. But they were able to calculate their actions very rationally.[11] Emerging maritime law tried to compel seamen to defend their ships against attacks, in vain, as we may presume when looking at the evidence.[12] Physical violence was not condemned by medieval law and custom per se, only the unauthorized use of it. If sources refer to illicit violence, this very often does not mean physical injury, but normative transgressions in general. As legal anthropologists have pointed out, people in societies with weak state structures are indeed disposed to use force as a means of conflict management. But simultaneously, most of these societies do have very complex mechanisms of moderation and control.[13] Affective, irrational outbursts of violence did happen, but they were only exceptional cases, noted very precisely in the sources.

Between Criminalization and Compromise: Maritime Violence in Medieval Legal Pluralism

As a matter of fact, legal history has traditionally distinguished between "piracy" and "privateering". Recently however scholars have come to question this distinction. They pointed out that research has been prone to uncritically

11 Rohmann (2017b), 30–2; Tai (1996), 151–6.
12 Tai (1996), 151–5.
13 Cf. the classical introduction: Roberts (1979), 115–36, 155–67.

adopt the claims of the victorious parties and hence succeeded in labelling the actions of the historical opponents of those as illegal and piratical. Additionally, they demonstrated, that, given the one-sidedness of the evidence, we will never be able to judge historical actors and their doings since we most often simply do not know enough about them.[14] Thus, the terms "pirate" and "piracy" are analytically flawed because of an *a priori* understanding of them as designating criminals and crime, but unreflective use of these terms obscures a deeper analysis of the economic and political practices which shaped and motivated their actions. Therefore, these terms cannot be used out of hand. Rather they must be handled with caution and only after a careful analysis of the historical context in which a particular act of maritime violence happened. In sum: There certainly was violence in the late medieval maritime theatres under scrutiny here, most presumably there even was piracy in the sense of forceful transgression of the coeval rules and customs. In this volume, however, legal anthropology has been employed to avoid a simplistic and binary understanding of violence and the discourse of piracy.

In the Middle Ages, the sea and the littoral were not characterized by an absence of law. Rather these areas were shaped by competing jurisdictions and legal norms.[15] This environment offered a broad set of practices of conflict resolution which the actors in a maritime space employed strategically to further their aims. These included the use of physical violence, but also litigation and arbitration—often in combination. In an area characterized by legal pluralism, all parties in a conflict could and most presumably would employ and manipulate norms and legal language to justify their actions.[16] In legal pluralism, merchants used extrajudicial and judicial strategies complementarily to force their opponents to submit or negotiate. The recourse to violence as threat or practice was only one such strategy.

A widespread legal instrument for gaining restitution was reprisal.[17] Reprisal was essentially the recuperation of possessions unjustly held by another person. It was not a practice sanctioned by the laws of the realms of Europe. Rather it was a custom somehow related to *ius gentium* hailing back probably to the early Middle Ages. Its fundamental prerequisite was the fact that governments throughout the Middle Ages were fairly weak and

14 Ford (2018); Tai (2012); Rohmann (2017b), 36–9.

15 Tai (2007); Tai 2012, 838–43; Heebøll-Holm (2013), 161–174.

16 Benton (2002); Benton and Ross (2002); Seinecke (2015); Duve (2017).

17 Tai (1996), 133–56; Beck (2015); Sicking (2017).

accordingly neither could nor would enforce private claims of lost property. Therefore, the custom of reprisal accorded private persons the right to recuperate lost valuables by their own means. While it did not explicitly permit the use of violence, it was not unusual for a reprisal case to involve exactly that because the retainer of the valuables most often contested the rights and justification of the reprisal-taker. The practice of taking reprisals was especially prevalent in the maritime world of medieval Europe partly because no government had the jurisdiction, instruments and sometimes will to enforce the claim, partly because mariners, merchants and fishermen often were hostile to such government interference in a world ruled by its own norms and customs. However, in the later Middle Ages authorities did increasingly interfere in maritime cases in an effort to expand their power (and income), but also encouraged by the merchants who had grown quite wealthy from the expansion of European economy and trade from around 1100 onwards. These merchants increasingly played an active role in government, they distanced themselves from shipmasters and crews and began to perceive violence in the distribution sphere as disruptive instead of functional.

Government intervention eventually resulted in the institutionalization of reprisals in the written form of letters of marque, which seems to have emerged first in the Mediterranean, and adopted by France and England in the 14th century and in Northern Europe in the 15th century. These were letters that permitted the detainer to recuperate the lost valuables from the opponent or any of his fellows, either with government support or by own means. The letter however was not accorded lightly. Only after scrutiny by legal officers of the central government could one obtain a letter which thereby officialised and legitimized the claim. The advantage of the letter of marque compared to the common reprisal was that the holder of the letter was explicitly backed by a government and could rely on it to help enforce its claim.[18] At first glance, the allowance to offend not only the actual opponent but also his compatriots could lead to unregulated escalation of conflicts. But apparently, letters of marque often served to involve the opposite party's authority into arbitration. Accordingly, the holder of the letter often

18 Thomson (1994), 22–4; Rubin (1998), 31–3; Dick (2010), 84–128; Heebøll-Holm (2013), 149–54.

was obliged to keep a fixed term[19] or to obtain a special license from an authority before he realised his claim.[20]

The letter of marque was initially a measure for individual conflict settlement. In war, no license was needed for private persons to assault and plunder the vessels and possession of the enemy of one's prince or government. However, increasingly in the late Middle Ages, governments came to control even these wartime activities more tightly. Eventually a license was needed even for attacking enemies, and thus the letter of marque changed from a peacetime reprisal for the recuperation of lost valuables to a wartime license to private individuals to fit out ships and crews at their own expense and to attack the enemy. By the Early Modern Period, the letter of marque had effectively transformed into a privateering commission. Eventually, this rendered all private persons engaging in war at sea without a license, pirates.

Predictably the legitimacy of reprisals was contested by the current holder of the valuables who most often claimed they had been obtained justly. Thus, the criminalization of maritime violence was inseparable from the claimed rights of particular persons or governments to fight activities of enrichment at sea rendered extra-legal, such as piracy and smuggling. Nevertheless, scholarship on violence at sea has traditionally tended to adopt the narratives of successful actors, be it merchants, city-states, and kingdoms. These narratives revolve around a dichotomy between peaceful merchants who are threatened by predatory noblemen, mariners and coast-dwellers. Accordingly, the latter were often labelled pirates, smugglers and wreckers accordingly. In this volume, Emily Sohmer Tai shows how Genoa and Venice used claims for fighting piracy to control trade and delegitimize rivals in the Mediterranean.[21] The same pattern is apparent in the Baltic and the North Sea where the claim to suppress piracy served to legitimize the predatory operations of the *Hansa*, the Teutonic Order, or the Nordic realms of the Kalmar Union.[22]

Late medieval Northern Europe seems to have been especially characterized by legal pluralism. Since most agents were part of several legal frameworks and legal identities, many 'played the market' and jockeyed for the

19 Tai (1996), 314.

20 Ibid., 249, 261–3.

21 Cf. Tai (in this volume).

22 In 1397, Queen Margrete I of Norway, regent of Denmark and Sweden, founded the union of the three realms under the rule of her adoptee, king Eric of Pomerania. Notwithstanding longer periods of conflict and division, the union would last until 1523; cf. Christiansen (1997); Rock (2016).

most advantageous position. However, elsewhere in Europe competing jurisdictions in legal pluralism came under pressure. In England around 1400, it was people like the Hawley's, members of the ports' urban elites, who provided the kingdom's "naval security". However, since they were highly motivated by the prospects of lucrative profit from their violent practice, they often applied the notion of "enemy" and "colluding with the enemy" rather liberally. This resulted in endemic lawsuits from neutrals which endangered English trade and more importantly the foreign relations of the English king. As such there was nothing new to this, as no northern European government was able to maintain a government fleet. The merchant marine was *de facto* the navy of a realm. If a ruler wanted to extend his force at sea, he had to accommodate them. However, in order to strengthen the grip on their kingdoms and to facilitate war, as soon as during the second half of the 14th century the English and French kings broke with legal pluralism by the strengthening of the courts of admiralty. After 1400, Henry V proceeded by obtaining his own navy and by criminalizing domestic piracy. While these initiatives at first seemed of fleeting importance, they were in fact the start of the process that eventually led to the demise of privatized naval security in the Northern Atlantic.[23]

In the Mediterranean the same process can be observed somewhat earlier. Venice promoted the fiction of an Adriatic *imperium* or *dominium* in the 14th century and accordingly claimed imperial rights here.[24] In the Baltic—with less success though—Lübeck referred frequently to the *Reichsvikariat*, the privilege to persecute perpetrators everywhere in the absence of the emperor. These rights had been bestowed upon that town by Emperor Charles IV in 1374, and Lübeck vigorously attempted to enforce this claim.[25] Fifty kilometres to the west, Hamburg attempted to control the river Elbe. Here the pretension was not only framed by references to imperial rights, but also to papal bulls and the claim to fight pirates, smugglers, and wreckers—while the town's troops themselves in fact forcibly violated their neighbour's rights whenever needed.[26]

In combatting pirates, wreckers and smugglers, canon law and papal bulls seem to have been especially important. Using a papal embargo as a pretext, the Hospitallers established themselves on the islands of Chios and Rhodes,

23 Averkorn (2001), 206–7; Heebøll-Holm (2017).
24 Cf. Christ (in this volume); Mathieu (2007).
25 UBStL 4, 223.
26 Cf. Rohmann (in this volume); Rüther (2017).

from where they could 'police the sea' to the benefit of the Venetians, as these islands served to disrupt the Genoese control of the slave-trading route from the Black Sea to Egypt.[27] While these imperial and papal provisions were claimed to be universal, they were negotiated and implemented regionally. Thus, their application depended on the special political and economic situation in a given maritime theatre. Thus, their application was different in the Western Mediterranean, as Marie Kelleher shows with the Marquet family and the Catalan merchants of Barcelona.[28]

Generally, these legal regimes caused the constant negotiation and renegotiation of the legality of practices at sea. In Flanders, this was the mainstay of diplomatic relations between the Flemish ports, the dukes of Burgundy and foreign merchants.[29] Within these negotiations, the liability for acts of violence became a controversial issue. Especially territorial claims over parts of the sea became crucial. The prime mover here were groups of foreign merchants demanding protection from the princes, thereby causing a territorialisation 'from below'. For example, in 1388, the *Hansa* demanded, that the Duke of Burgundy as Count of Flanders should persecute anyone who robbed a member of the association at land and at sea. If this failed, the Duke should carry out reprisals against anyone from the same political entity as the perpetrator.[30] The legal backing of the claim was the *Hansa* members' application of the legal concept of *Strom*. This entailed that rivers including the littoral, bays and ports were territorial waters of the lord of the land. This idea had become part of the *Hansa* privileges in Flanders in the 1360s, but it remained highly controversial.[31] In England and France, a similar discussion of the competences of the different jurisdictions severely hampered the jurisdiction of the courts of admiralty.[32]

Analytically, such conflicts over legal competences and responsibilities have proven very hard to handle, even in a methodological setting of "legal pluralism". Recently Thomas Duve and Wim Decock have suggested that the term "multi-normativity" might ease the understanding of such conflicts. Multi-normativity explains the omnipresence of conflicting norms in premodern societies by considering, that not only legal concepts, but also moral

27 Cf. Carr (in this volume), and Dartmann (in this volume).
28 Cf. Kelleher (in this volume).
29 Cf. Lambert (in this volume).
30 Dollinger (2012), 96.
31 Höhn (forthcoming).
32 Heebøll-Holm (2017).

and religious ones had a strong normative impact, which conflicted but also co-existed with legal norms.[33] Accordingly, the justification of maritime violence as an economic and political action was not only legitimized with reference to the law, but also to moral, theological and political arguments. Genoa justified its occupation of Chios and Phokaia with the Turkish threat, while the Hospitallers defended their possession of Rhodes by referring to their duty to the popes as permanent crusaders.[34] In doing so, the conceptualisation of the enemies as pirates (i.e. the enemy of a vaguely defined *bonum commune*) was crucial. In Lübeck chronicles such as the *Chronica novella* by Hermann Korner or Christian van Geren's chronicle of the *Bergenfahrer*, the town was presented as constantly fighting pirates. These were often explicitly connected to named ports and terrestrial powers thereby delegitimizing these rivals' cause. The town itself in contrast was portrayed as a collective defending the interests of the honest *gemen copman*, a collective singular to name the merchants of the town and of the entire *Hansa*.[35] These narratives were mobilised to justify the expansionist policy of governments and town councils by veiling it as a protection of the *bonum commune*, be it against commercial rivals or religious enemies.[36]

Connectivity, Distribution, and Marginalization

Space and place played an important role in the narrative of criminal maritime predation. Generally, the perception of the sea as an uncontrollable zone beyond the power of humans is fundamental for the conceptualisation of maritime violence as a peculiar threat to mankind. But during the later middle ages the seas usually plied by European seafarers was by no means an empty, lawless space.[37] More specifically, thus, these activities were often considered characteristic for and indeed inseparable from certain islands, ports or coastlines of bad repute.[38] From a spatial point of view, piracy often viewed as a marginal space, but this view is only acceptable, if the centres

33 Duve (2017); Decock (2017).
34 Cf. Carr (in this volume); Dartmann (in this volume).
35 Cf. Höhn (in this volume).
36 For the motif of the *bonum commune* see Lecupre-Desjardin and Bruaene (2010).
37 Cf. the recent debate on "thalassocracy": Rüdiger (2012).
38 Cf. Meichsner (in this volume); Dartmann (in this volume); Tai (in this volume); Krey (in this volume).

and distribution routes between them are easy to reach from these marginal places.

In recent research, the concept of "connectivity" has been introduced to describe a particular type of maritime economies. This concept, first presented in Peregrine Horden's and Nicolas Purcell's ground-breaking book on the Mediterranean, *The Corrupting Sea*, presents the sea not as a frontier, but rather as a connector of peoples and cultures through trade, migration, and cultural exchange.[39] Connectivity describes the stability of ties of communication between nodes in a geographical network. Since the term hails from mathematics, it tends to focus on the quantity rather than quality of communications and especially on the frequency of interaction between the nodes in the network.[40] Frequency is especially important as it shows how stable a network is. It maps out the central position of nodes of communication and demonstrates that the success of a given node—typically a port—is dependent on not just ecological and geographical factors, but also human actions. Thus, the success of a given port is not predetermined by nature. Rather it ebbs and flows with the interplay of social, political and cultural factors. Horden and Purcell hence explicitly conceptualize "connectivity" not as a natural fact, but as historically variable.[41] But then they don't focus on how actors create connectivity, but on how they use and perceive it.

To make up for this shortcoming, in this volume we have encouraged the contributors to look for the following in connection with connectivity:

- How did actors exploit and enhance ecological advantages in order to improve the connectivity of a port?
- Which positive incentives did they provide to attract merchants, e.g. privileges, subsidies, and a good reputation?
- What policies did they employ to oust competitors (staple rights, monopolies, etc.?)
- How did they make markets in destination areas accessible?
- By which means were claims enforced (diplomatically, politically, economically, militarily)?

In all these aspects, violence was one of the manifold instruments employed. Others were diplomatic negotiations, economic pressure, or the outlawing of minor competitors by claiming that they broke the norms of interaction

39 Horden and Purcell (2000).
40 Kolditz (2017), 59.
41 Horden and Purcell (2000), 123–72, 392–6.