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# SAILING THE WINE-DARK SEA—AN UNFINISHED JOURNEY: SOME VERY PRELIMINARY THOUGHTS ON PIRATES AND OTHER PERNICIOUS PEOPLE

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It was a wonderfully beautiful day, with a slight and varying but reasonably favorable breeze at last: the sun blazed on the various kinds of broom in flower, upon the Rock, upon the cistuses and giant heath, while an uninterrupted stream of migrant birds, honey buzzards, black kites, all the European vultures, storks both black and white, bee eaters, hoopoes and countless hirundines flowed across the sky...<sup>1</sup>

## I. Prologue

At times, when there is considerable debris and dust in the air, the sea will seem to turn a deep red. This is at least one, and probably the most intriguing, meaning<sup>2</sup> of the marvellously descriptive epithet ‘wine-dark sea’, which had already surfaced on the shores of the literary world at the dawn of civilization. Mourning the death of his beloved friend Paroclus, Achilles ‘apart from the pyre he stood... gaz[ed] over the wine-dark sea in pain’,<sup>3</sup> and Odysseus, recalling the death of his comrades in an all-devouring storm, does so in the following words: ‘for Zeus had let drive with a dazzling thunder-bolt at our good ship and riven it in the wine-dark

<sup>1</sup> Opening lines of P O’Brian, *The Hundred Days* (HarperCollins, 1998).

<sup>2</sup> A true scholarly dispute on the issue was triggered by a short correspondence of RH Wright and RED Cattley in (1983) 303 Nature 568, suggesting that due to the practice of ancient Greeks diluting their wine with ‘as much as six or even eight parts of water’ and given the geology of the Peloponnesus (including large formations of marble and limestone), the alkaline character of ground water might ‘have raised the pH enough to change the colour of the wine from red to blue’. Objections to this rather hazardous proposition were raised and alternatives proposed, inter alia, by R Dean (1984) 309 Nature 10, M Pulbrook (1984) 309 Nature 204, M McNamara (1984) 307 Nature 590, and R Rutherford-Dyer (1983) 306 Nature 110, who elaborates brilliantly on the history of this phrase (‘Homer’s Wine-Dark Sea’ (1983) 30 Greece & Rome 125), and himself proposes a meteorological explanation for the phenomenon.

<sup>3</sup> Homer, *Iliad* (Robert Fitzgerald (tr), Oxford’s World Classics, 1998) 23.140.

*Daniel-Erasmus Khan*

unbounded sea'.<sup>4</sup> No doubt, the wine-dark sea is not only a place full of mystery and imagination, of adventurous sensations and the sentiment of the unrivalled beauty of Mediterranean shores and sunsets,<sup>5</sup> closely associated with a profound and somewhat melancholic *joie de vivre*. It entails darker allusions to blood and suffering, too. Indeed, in order to capture an image of the whole range of human emotions, aspirations, and the essentials of human existence as such, merging the concepts of 'wine', 'dark', and 'sea' is a particularly fortunate choice. It is hence not surprising that men and women of letters have frequently made reference to this three-word epithet<sup>6</sup>—among them quite prominently Patrick O'Brian in the sixteenth volume<sup>7</sup> of his masterly tales of the seafaring adventures of Royal Navy Captain Jack Aubrey and his ship's surgeon Stephen Maturin, one of the absolute favourite readings of my teacher and friend Bruno Simma in recent years.

## II. The Sea of Darkness

From time immemorial, the open sea has attracted both great fear and respect as well as the curiosity of the restless, questing mind of courageous men. Pursuing his temerarious vision to reach the promised land in the east by sailing west into a vast *mare incognito* and driven by the 'wish to know the secrets of the world',<sup>8</sup> a man like Christopher Columbus could conquer the 'Sea of Darkness',<sup>9</sup> in blatant disregard of the most serious warnings. In the somewhat dramatic and flowery words of the prominent twelfth century Arab cartographer and geographer Al-Idrisi:<sup>10</sup>

Personne ne sait qui existe au-delà de cette mer, personne n'a pu rien en apprendre de certain, à cause de difficultés qu'opposent à la navigation la profondeur des ténébres,

<sup>4</sup> *The Odyssey of Homer* (TE Lawrence (tr), Oxford University Press, 1991) Book VII, 101.

<sup>5</sup> Obviously playing on Homer's Mediterranean-related epithet 'the wine-dark sea', and in a striking contrast thereto, James Joyce, in the opening chapter of his epic novel *Ulysses* (1922) makes use of the phrase 'the snot-green sea' when Buck Mulligan and Stephen Dedalus proceed to look out over Dublin Bay, and Stephen is reminded of his deceased mother, for whom he is visibly still in mourning.

<sup>6</sup> The title of the series of stories by Leonardo Sciascia about his native Sicily (*The Wine-dark Sea* [original title: *Il mare colore del vino*]) eg. plays to the darker sides of the concept, whereas Thomas Cahill's *Sailing the Wine Dark Sea: Why the Greeks Matter* (Random House, 2004), an elegant introduction to Greek life and thought, uses the phrase instead 'to invoke an air of mystery' (WJ Rayment, 'The Wine Dark Sea' <<http://www.indepthinfo.com/articles/wine-dark-sea.shtml>> accessed 17 October 2010).

<sup>7</sup> P O'Brian, *The Wine-Dark Sea* (HarperCollins, 1993). The whole series amounts to a total of 20 volumes (1969–99). In 2004, an unfinished twenty-first volume was published posthumously (*The Final Unfinished Voyage of Jack Aubrey*).

<sup>8</sup> C Colón [C Columbus], *Libro de las profecías* (1501) Fol 4: '*La mesma arte [of navigation] inclina a quien le prosigue a desear de saber los secretos d'este mundo*' (cited from the 1992 edition, edited, annotated and translated into Spanish by Kay Brigham, at 33).

<sup>9</sup> Designation coined by medieval Arab geographers of the Atlantic Ocean. See, in particular, Mohammed al Idrisi (1100–1165), who, in his *Kitāb nuzhat al-mushtāq fī ikhtirāq al-āfāq* (*A Diversion for the Man Longing to Travel to Far-Off Places*—commonly referred to as the 'Book of Roger', 1154 (see also nn 10 and 11 below)), makes frequent reference to the '*mer ténébreuse*'.

<sup>10</sup> For further information on the man and his epochal work see AS Maqbul, 'Cartography of al-Sharif al-Idrisi' in JB Harley and D Woodward (eds), *The History of Cartography, Vol 2, Book 1, Cartography in the Traditional Islamic and South Asian Societies* (University of Chicago Press, 1992)

*Sailing the Wine-Dark Sea—An Unfinished Journey*

la hauteur des vagues, la fréquence des tempêtes, la multiplicité des animaux monstrueux et la violence des vents.<sup>11</sup>

Mythological water creatures and sea monsters of all kinds have indeed not only been an almost indispensable descriptive tool of map-makers until the advent of modern cartography in the eighteenth century.<sup>12</sup> Accounts by many a sailor of seeing strange creatures while on the high seas persist even to this day.<sup>13</sup> No doubt, seafaring men and (much less) women<sup>14</sup> were exposed to a wide range of deadly risks and dangers, both natural in character and man-made: devastating storms and other meteorological misfortunes claimed lives and values at sea as did navigational errors, diseases, and encounters with hostile naval forces. Finally, a most faithful companion of almost all journeys, at almost all times and almost everywhere in the world,<sup>15</sup> was the fear of sea raids by pirates. No wonder, therefore, that ever since the sea began to serve as a vital space for commercial, political, military, and cultural communication among peoples, securing the safety of sea lanes became a matter of common concern and continues to do so up to the present day.<sup>16</sup> Over time, some of these scourges were erased or at least reduced to

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ch 7, 156 et seq (references to the still rather scarce publications and translations of his epochal work, *ibid*, 158) and (for the broader context) M Tolmacheva, 'The Medieval Arabic Geographers and the Beginnings of Modern Orientalism' (1995) 27 *Intl J Middle East Studies* 141.

<sup>11</sup> French translation of the 1154 Arab original by RPA Dozy and MJ de Goeje (1866) 197 [English: 'No one knows what is beyond that sea, nor can they find out, because of many obstacles to navigation posed by profound darkness, high waves, frequent storms, innumerable monsters which people it, and violent winds...'].

<sup>12</sup> One of the finest examples in this respect is the *Carta Marina* of 1539 by Olaus Magnus depicting for the first time the Nordic countries and adjacent waters in a fairly correct manner. Already passed out of public knowledge by 1574, only two copies are known to exist of this masterpiece of cartographic arts, the first of which was retrieved in the Bayerische Staatsbibliothek in Munich in 1886 and is preserved there (cf U Ehrensvärd, *The History of the Nordic Map. From myths to reality* (Numinen Foundation, 2006)). The James Ford Bell Library, University of Minnesota allows for a fascinating virtual tour of the map at <<http://www.lib.umn.edu/apps/bell/map/OLAUS/TOUR/maint.html>> accessed 17 October 2010. See, for a broader context of the whole issue, R Rees, 'Historical Links between Cartography and Art' (1980) 70 *Geographical Rev* 61 and the six essays in D Woodward (ed), *Art and Cartography* (University of Chicago Press, 1987).

<sup>13</sup> In fact, we are still very much ignorant of who and what really inhabits the dark depths of our oceans. A recently finalized 'Census on Marine Life' (2000–10), conducted by a total of 2,700 scientists from all over the world, has identified almost 2 million species. However, an estimated four-fifths of species still remain unknown to science (MJ Costello et al, 'A Census of Marine Biodiversity Knowledge, Resources, and Future Challenges' (2010) 8 *PloS ONE* 1 <<http://www.plosone.org>> accessed 17 October 2010).

<sup>14</sup> See, however, D Cordingly, *Women Sailors and Sailors' Women. An untold maritime history* (Random House, 2001); strikingly enough, a considerable minority of the most pernicious activity at sea, piracy, was conducted by women (see, also, M Rediker, 'When Women Pirates Sailed the Seas' (1993) 17 *Wilson Q* 102).

<sup>15</sup> Quite obviously, reference is made here to the famous dictum by L Henkin: 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time' (*How Nations Behave* (2nd edn, Columbia University Press, 1979) 47).

<sup>16</sup> Early historical records of this common endeavour to fight piracy date back to the second century BC (Rhodian Law); see, with further references, W Graf Vitzthum, 'From the Rhodian Sea Law to UNCLOS III' in H-J Kremer et al (eds), *Tradition und Weltoffenheit des Rechts. Festschrift für Helmut Steinberger* (Springer, 2002) 351 et seq.

*Daniel-Erasmus Khan*

a tolerable risk. Surprisingly though,<sup>17</sup> this is not the case with regard to the phenomenon of maritime piracy, which has terrorized the sea since time immemorial. The number of attacks worldwide having increased more than tenfold in the past two decades,<sup>18</sup> the pirate menace has always constituted a challenge not only for seafaring nations, indiscriminately exposed to the peril of being set upon by these ‘pernicious people’ (Patrick O’Brian). Rather, as long as the oceans have been plied for commerce, it has affected all those who benefit from seafaring—so, virtually the international community as a whole. Hence, from this perspective good reasons may indeed exist for pirates to be labelled ‘*Hostis Humani Generis*’ (enemies of mankind), a concept credited to the Roman lawyer, statesman, and political theorist Marcus Tullius Cicero.<sup>19</sup>

### III. A Thin Red Line

In a much-noticed contribution to the *European Journal of International Law*, Bruno Simma once argued that in the case of Kosovo it was only ‘a thin red line’ which separated NATO’s action from international legality.<sup>20</sup> Coined by William Russell, correspondent for *The Times* during the Crimean War,<sup>21</sup> the expression ‘thin red streak tipped with a line of steel’ soon became popularized into ‘the thin red line’.<sup>22</sup> What Russell described at the occasion of the 1854 battle of Balaklava

<sup>17</sup> The somewhat optimistic 1971 assessment of JHW Verzijl, *International Law in Historical Perspective* (AW Sijthoff, 1971) Vol IV, 248, according to which the question of piracy was ‘still not entirely outdated’ (emphasis added) was thus obviously premature. Voices to this effect were heard as early as 1874, when AT Whatley remarked that at that time there seemed ‘very little occasion for such a law [on piracy]’ (‘Historical Sketch of the Law of Piracy’ (1874) 3 L Magazine and Rev 536). Hence, the concise account of D Puchala on the subject (‘Of Pirates and Terrorists: What Experience and History Teach’ (2005) 26 Contemporary Security Policy 1) comes to the conclusion that ‘[t]he most obvious lesson from the history of piracy’ has to be ‘Piracy has not been eliminated’ (at 22).

<sup>18</sup> International Maritime Organization, Reports on Acts of Piracy and Armed Robbery Against Ships (Annual Report 2009, Ref T2-MSS/2.11.4.1, 29 March 2010) Annex 4.

<sup>19</sup> In a speech prepared for the highly politically charged trial held in Rome in 70 BC against the corrupt and brutal former Governor of Sicilia, Gaius Verres, Cicero had held, inter alia (Actionis in C Verrem Secundae Liber Quartus/ Secondary Orations Against Verres: ‘*Fecisti item ut praedones solent; qui cum hostes communes sint omnium, tamen aliquos sibi instituunt amicos, quibus non modo parcant verum etiam praeda quos augeant...*’ (‘You acted as pirates are accustomed to act, who, though they are the common enemies of all men, still select some friends, whom they not only spare, but even enrich with their booty’). The concept as such has never ceased to exist (see from twentieth century court practice, eg, the Privy Council (*In re Piracy jure gentium* [1934] AC 586) and the famous dictum in *Filartiga v Pena-Iralam*, 630 F 2d 876 (1980): ‘Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind’ and it appears that it is even experiencing a certain renaissance in recent times.

<sup>20</sup> B Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’ (1999) 10 Eur J Intl L 22.

<sup>21</sup> Russell (1820–1907) was not only one of the first war correspondents, but today many consider him one of the most important members of his profession et al. His most enduring professional legacy is indeed his telegraphic dispatches from the Crimea, in which he depicted a most realistic picture of the realities of war.

<sup>22</sup> The 1962 novel by James Jones, *A Thin Red Line*, refers to the Guadalcanal campaign in the Second World War and was adapted for Hollywood motion pictures twice (in 1964 and 1998).

*Sailing the Wine-Dark Sea—An Unfinished Journey*

was an unorthodox and quite hazardous tactical move by the then commander of the 93rd British Regiment.<sup>23</sup> Sir Colin Campbell ordered his Sutherland Highlanders to receive the Russian cavalry charge with a ‘thin’ line of infantry soldiers wearing the (red) Royal Stewart tartan rather than with the traditional ‘thick’ and immobile square formation. This courageous as well as smart decision proved to be a most fortunate one. And so is Bruno Simma’s figurative use of this very concept: experience and history teach us that the threshold between good and bad, between right and wrong, and between legal and illegal is not as easy to determine as many all too self-confident observers, in particular from the legal professions and the political arena, try to make us believe. This is not only true with respect to the most sensitive and delicate issue of the use of military force in (traditional) inter-State relations,<sup>24</sup> but probably even more so when it comes to the legal assessment of the various manifestations of ‘low-level’ forcible actions. Two episodes may further illustrate this point. Not surprisingly, the first, fictional one is borrowed from the Aubrey-Maturin series.<sup>25</sup>

Heavily damaged by an undersea volcanic eruption somewhere in the infinite vastness of the South Pacific, the American privateer *Franklin*, owned by the French Jean Dutourd, a wealthy philanthropist, was easy prey for Captain Jack Aubrey’s elderly 28-gun frigate *HMS Surprise*. In pursuance of his Rousseauian dream to colonize a South Pacific island, Moahu, and establish there a terrestrial paradise of equality, justice, and little labour, Dutourd had taken several British ships as prizes. After his arrest, Dutourd was brought before Captain Aubrey and handed over to him a complete set of official (ship’s) papers wrapped in sailcloth: ‘Jack looked through them with satisfaction; then frowned and looked though the parcels again.’<sup>26</sup> Thereafter, the following memorable dialogue unfolds:

‘But where is your commission, or letter of marque?’

‘I have no commission or letter of marque, sir,’ replied Dutourd, shaking his head and smiling a bit. ‘I am only a private citizen, not a naval officer. My sole purpose was to found a colony for the benefit of mankind.’

‘No commission, either American or French?’

<sup>23</sup> The tactics of the time for the British Army had the infantry stand four deep to present a rolling volley by line. To receive a cavalry charge they would form into a square to protect themselves as the cavalry charge would easily break a line of infantry. Colonel Colin Campbell was so contemptuous of the Russian Cavalry that he deployed his men into only two lines, not four, to cover more ground and present more firepower per volley and did not form a square.

<sup>24</sup> Indeed, as Bruno Simma somehow predicted, once rather solid red lines are about to disintegrate. Triggered by the 2005 UN World Summit (Outcome Document A/60/L.1, paras 138, 139), we currently witness the emergence of a normative obligation of the international community to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity (‘Responsibility to Protect’) regardless of what was once considered the insurmountable barrier of sovereignty (see also more recently the Report of the Secretary General (A/63/677) and the July 2009 debate in the General Assembly (Official Records of the General Assembly, Sixty-third Session, Plenary Meetings, 96th to 101st meetings, and corrigendum (A/63/PV.96–101); and in His volume, Peters, at 297 et seq and Wilpold, at 462 et seq.

<sup>25</sup> P O’Brian, *The Wine Dark Sea* (16th vol of the series, HarperCollins, 1993) 37 et seq.

<sup>26</sup> *Ibid*, 37.

*Daniel-Erasmus Khan*

‘No, no. It never occurred to me to solicit one. Is it looked upon as a necessary formality?’ ‘Very much so.’

‘I remember having received a letter from the Minister of Marine wishing me every happiness on my voyage; perhaps that would answer?’

‘I am afraid not, sir. Your happiness has included the taking of several prizes, I collect?’

‘Why, yes, sir. You will not think me impertinent if I observe that our countries, alas, are in a state of war.’

‘So I understand. But wars are conducted according to certain forms. They are not wild riots in which anyone may join and seize whatever he can overpower; and I fear that if you can produce nothing better than the recollection of a letter wishing you every happiness you must be hanged as a pirate.’

‘I am concerned to hear it . . .’

The basic message of this wonderful dialogue is still very familiar to us: ‘wars are conducted to certain forms. They are not wild riots . . .’ During the Napoleonic Wars, the historical setting of the Aubrey/Maturin saga, the answer to the question how to treat those who were not able or willing to observe the necessary formalities, was quite simple: they were destined to hang from the yardarm.<sup>27</sup> However, can one really draw a straight line from the alleged ‘proto-terrorist’,<sup>28</sup> unlucky<sup>29</sup> Jean Dutourd, to the precarious legal situation of today’s ‘outlaws’—as has been seriously suggested?<sup>30</sup> The penalty for enemy or illegal combatants and modern pirates may differ, but what else does? Can one really ignore the fundamental changes which have taken place since, both with regard to the position of the individual in the international legal order as well as the appearance in the international arena of a whole number of new actors, who increasingly challenge the State’s claim to exclusivity in times of peace and war alike? And finally, in times of asymmetrical warfare, should it still be for the State alone to decide upon the crucial question of who may lawfully take up arms in order to pursue its political goals—under which circumstances, to which extent, and by which means?

These question marks lead me straight to the second episode, advertised earlier in this paper. The tragic occurrence dates back to early nineteenth-century State practice in America, the Mexican State being—once again—affected by a profound crisis. What we see here is a fine example of how States—in particular under such circumstances—may be tempted to define the thin red line between *de lege artis* warriors and belligerent outlaws not with reference to certain objective criteria but

<sup>27</sup> In the end, Dutourd managed to escape this almost inevitable fate by a spectacular jailbreak.

<sup>28</sup> See K Pavlischek, *Human Rights and Justice in an Age of Terror—An Evangelical Critique of An Evangelical Declaration against Torture, Books & Culture. A Christian Review* (Web Exclusives, September 2007) <<http://www.booksandculture.com/articles/webexclusives/2007/september/ept24a.html>> accessed 17 October 2010. At the time of writing, the author had been working for the rightist Washington-based Ethics and Public Policy Center.

<sup>29</sup> Captain Aubrey instead is nicknamed ‘Lucky Jack’, not least for his knack for capturing valuable prizes—an activity in fact not much different to that pursued by Dutourd; yet on the proper side of the ‘red line’.

<sup>30</sup> Pavlischek, *Human Rights and Justice in an Age of Terror* (n 28).

*Sailing the Wine-Dark Sea—An Unfinished Journey*

quite arbitrarily, giving absolute priority to the national interest. Unfortunately, the then Mexican government did not resist this temptation.

In the mid-1830s, the struggle for dominion over Texas (and Coahuila), torn between Mexican (restorative) claims, American territorial aspirations, and separatist and revolutionary dreams, came to a bloody end. In the rather unclear political and military situation of the day, the then Mexican President General Antonio Lopez de Santa Anna, a most controversial personality (to say the least),<sup>31</sup> took a rather drastic decision: he induced the Mexican Congress to approve on 30 December 1835 the so-called ‘Tornel Decree’.<sup>32</sup> The key provisions of this legislative act read as follows:

... anxious to repress these aggressions which constitute not only an offense to the sovereignty of the Mexican nation, but also to evident violation of international laws as they are generally adopted, has ordered the following decrees to be enforced.

1. Foreigners landing on the coast of the republic or invading its territory by land, armed with the intention of attacking our country, will be deemed pirates and dealt with as such, being citizens of no nation presently at war with the republic, and fighting under no recognized flag.
2. All foreigners who will import either by sea or land, in the places occupied by the rebels, either arms or ammunition of any kind for the use of them, will be deemed pirates and punished as such.<sup>33</sup>

In short: in the absence of an official state of war between Mexico and any other nation—in particular the United States (US)—all those entering Mexican soil with a hostile intent vis-à-vis the Mexican authorities were simply, by virtue of law, branded as pirates. A fairly typical civil war situation with a certain degree of foreign intervention was thus relabelled as a battle between good and evil, between the lawful and the lawless; the latter facing summary execution, as was the customary punishment for pirates at the time.

Even though the Decree met resistance from many officers of the Mexican army, Santa Anna insisted on various occasions that it be carried out to the letter of the law:<sup>34</sup> ‘you [the addressee] may cause them to be fully executed’, as the Decree’s last line reads. This ‘no quarter policy’ led to a number of mass executions of these ‘perfidious foreigners’,<sup>35</sup> the most barbarous of these acts having entered the history books as the ‘Goliad massacre’. On 20 March 1836, trusting in the written

<sup>31</sup> Santa Anna (1794–1876) is described as an opportunist par excellence who, in his decades-long political and military career, was eager always to be on the winning side, no matter the cost.

<sup>32</sup> Named after José María Tornel y Mendivil (1789–1853), who at the time served as secretary of the army and navy in Santa Anna’s government. Probably his closest collaborator, Tornel himself was driven by an intense dislike and fear of Mexico’s northern neighbour (see RB Winders, *Crisis in the Southwest: The United States, Mexico, and the Struggle over Texas* (Scholarly Resources Inc, 2002) XXIX).

<sup>33</sup> Source: Telegraph and Texas Register, March 12, 1836.

<sup>34</sup> Winders, *Crisis in the Southwest* (n 32) 25.

<sup>35</sup> Letter from Santa Anna of 23 March 1836 in reply to General Urrea’s earlier clemency letter.



*Daniel-Erasmus Khan*

terms, under which they should give up their arms and become prisoners of war ‘at the disposal of the Supreme Mexican Government’, roughly 400 Texans under the command of Colonel James Fannin surrendered to the Mexican General José de Urrea.<sup>36</sup> An additional assurance was given to Fannin that there was no known instance where a prisoner of war, who had trusted to the clemency of the Mexican government, had lost his life. Unfortunately, both Urrea and Fannin erred in thinking that this noble tradition would continue. With reference to the terms of the Tornel Decree, Santa Anna refused to grant the appeal for clemency and almost all prisoners were shot in cold blood at dawn of Palm Sunday, 27 March 1836.<sup>37</sup> Recalling this brutal story is, however, not just an attempt to recapture the attention of the exhausted reader. It is likely to teach us at least two lessons.

First, the volleys of Goliad (together with the fall of Alamo just a couple of days before) were crucial for Mexico losing a war which it had actually already won: branded with a reputation of cruelty, opinion in the US instantaneously turned against Mexico, while the Texan cause experienced a rather unexpected boost. Soon after, with the legendary rallying cry on their lips ‘Remember the Alamo! Remember Goliad!’, the Texas army inflicted a heavy defeat on the Mexican troops in the decisive battle of San Jacinto (21 April 1836). Given the strategic situation at the outset of the battle, this surprising victory paved the way for the (temporary<sup>38</sup>) independence of the Republic of Texas. In view of the ‘rallying effects’<sup>39</sup> of the infamous outlawry of the adversary, one may well call this a self-inflicted defeat. Parallels with current events are intended.<sup>40</sup>

The episode just sketched may spur a second reflection: in a rather different, however probably transferable context, Bruno Simma once remarked, ‘in this area they

<sup>36</sup> Battle of Colero (19–20 March 1836).

<sup>37</sup> For a full account of the dramatic events see, with an extensive bibliography, ‘Goliad Massacre: The Handbook of Texas Online’ <<http://www.tshaonline.org/handbook/online/articles/GG/qeg2.html>> accessed 17 October 2010.

<sup>38</sup> Many expected the new-born Republic of Texas to join the Union immediately, it was but ten years later, in 1845, that Texas was annexed to the US becoming the Union’s 28th state.

<sup>39</sup> The effect is well known and narrated, eg, by Shakespeare in his history play *Henry V* in the context of the battle of Agincourt (25 October 1415). Victory very much uncertain, the king is reported to have rallied his outnumbered troops with the famous motivational words (St Crispin’s Day Speech: Act IV, Scene 3):

This story shall the good man teach his son;  
And Crispin Crispian shall ne’er go by,  
From this day to the ending of the world,  
But we in it shall be remember’d;  
We few, we happy few, we band of brothers . . .

Welded together by such powerful words, France was indeed brought to her knees in this decisive encounter of the Hundred Years’ War. Coincidentally, the 1854 battle of Balaklava, referred to above, occurred on the same calendar date: St Crispin’s day.

<sup>40</sup> At this point, it may fit to recall GWF Hegel’s famous and rather pessimistic dictum: ‘what experience and history teach is this—that peoples and governments never have learned anything from history, or acted on principles deduced from it’ (*The Philosophy of History, Introduction* (J Sibree (tr), Batoche Books, 2001) 19).

*Sailing the Wine-Dark Sea—An Unfinished Journey*

[the States] will always bear a similarity with foxes guarding the chicken'.<sup>41</sup> The Tornel Decree is but one extreme, though anything but rare, example of how the powers to make and interpret the law may be abused if left to the discretion of one interested party alone. It may therefore be legitimate to ask (and question) whether States are indeed still the best definers for rules which no longer only affect their relationship inter se. At times, when the participation of non-State actors in 'armed conflicts'<sup>42</sup> (often enough on a par in terms of military capabilities with their State counterparts) is rather the rule than an exception,<sup>43</sup> we should no longer take it for granted that the ascertainment of the various facets of the legitimacy issue is entrusted to anything but impartial actors. Let us not fool ourselves: States are not interested in a considerable legal upgrading of those who challenge their traditional monopoly on the use of force. Quite the contrary: the more the traditional masters of the international systems feel threatened by non-State actors, the more they are inclined to resort to the radical verdict of outlawry. A common feature of older legal systems, the declaration that somebody, considered a society's outcast, operates outside the community of man and has to be treated accordingly,<sup>44</sup> has never really ceased to exist.<sup>45</sup> However, in view of considerably intensified attempts in recent times to revitalize the concept of outlawry in order to provide an 'adequate' extralegal and extrajudicial answer to the phenomenon of terrorism, the 'Goliad experience' may well serve as a cautionary tale.

It is indeed but a thin, sometimes hardly visible, and arbitrary line which divides the overlapping and intermingling spheres of pirates and privateers,<sup>46</sup> between freedom fighters, insurgents, and terrorists, between 'social' bandits and ordinary criminals, between blood-mongering dictators of (almost) failed States and the hardly less ruthless regime of rebellious leaders of non-recognized territorial enti-

<sup>41</sup> 'International Human Rights and General Human Rights Law: A Comparative Analysis' (1993) IV/2 Collected Courses of the Academy of European Law 168.

<sup>42</sup> Not to be confused with the technical meaning of the terms in the context of humanitarian law (eg Common Arts 2 and 3 of the 1949 Geneva Conventions).

<sup>43</sup> For an in-depth study see I Arreguin-Toft, *How the Weak Win Wars: A Theory of Asymmetric Conflict* (Cambridge University Press, 2005).

<sup>44</sup> The very idea behind the pronouncement *Caput gerat lupinum* in writs of outlawry in Medieval England was to make the victim suffer a form of civil and social death.

<sup>45</sup> From more recent State practice see, eg, the Felons' Apprehension Act 1878 (Act 1612) of 1 November 1878 (Supplement to the 'Victoria Government Gazette' of Friday, 1 November 1878). By virtue of this Act 'to facilitate the tasting or apprehending of persons charged with certain felonies and the punishment of those by whom they are harboured' certain persons were declared 'availing themselves unduly of the protection afforded by law to accused persons before conviction'.

<sup>46</sup> For a brief account of early English practice see G Clark, 'The English Practice with Regard to Reprisals by Private Persons' (1933) 27 *American J Intl L* 693. Interestingly enough, due to the non-ratification by the US of the 1856 Paris Declaration (Respecting Maritime Law) the power of this State to issue Letters of Marque and Reprisal has probably never ceased to exist: see T Cooperstein, 'Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering' (2009) 40 *J Maritime L & Commerce* 221 and there have even been serious suggestions to revive this tool for the anti-piracy campaign off the Somali coast: J Straub, 'Letters of Marque: A Short-Term Solution to an Age Old Problem' (2009) 40 *J Maritime L & Commerce* 261.

*Daniel-Erasmus Khan*

ties, and finally between legal participants in warfare and those who are denied this status. Beyond the textbooks, that is in the real world, to label somebody as falling into one of these (or a number of similar) categories has never really been a clear-cut decision—and even less so in recent times. A whole bunch of factors comes into play, among them quite prominently the time and place of the activity in question, its object and purpose or political, sometimes rather opportunistic, considerations. A high degree of unpredictability and arbitrariness is added by the fact that much depends on who is called upon to decide on which side of the thin red line an alleged perpetrator is to be placed—with all too often virtually fatal consequences. The famous dialogue between Alexander the Great and his pirate prisoner Dionides is but one early example of the inconsistencies in the formulation and the application of the law on the legality of the use of force:

For when that king had asked the man what he meant by keeping hostile possession of the sea, he answered with bold pride, ‘What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor’.<sup>47</sup>

Indeed, playing on exactly this episode, there is certainly some truth in Noam Chomsky’s intrepid and presumably somewhat provocative proposition that what governments term as ‘terrorism’ (or ‘piracy’) on the small scale simply reflects what governments utilize as ‘warfare’ on the large scale. Yet, governments coerce their populations to denounce the former while embracing the latter.<sup>48</sup> To go one step further: under the flag of the doctrine of ‘*raison d’état*’, that is whenever the good of the State (allegedly) so requires, many States still show little reluctance to sacrifice restrictive legal rules on the altar of Machiavellian desires.<sup>49</sup> The ‘figure who exceeds the law as its master and the one who exceeds it as a transgressor . . . bound by an unspoken—and perhaps unspeakable—knowledge about the origins of power’<sup>50</sup> are thus not only deeply rooted in real as well as in intellectual history—Shakespeare’s Henry V being but one, albeit prominent example.<sup>51</sup> Apparently,

<sup>47</sup> Augustine of Hippo, *De Civitate Deo* (The City of God) Book IV, ch 4, 327 (M Dods (tr), 1887). Augustine ‘borrowed’ this anecdote from Cicero, *De re publica* (On the Commonwealth) 3, 14, 24 (54 BC; F Berham (tr), *Cicero’s Political Works* (1841) Vol I, 263). In later times, the pirate anecdote has been a point of reference for numerous authors, such as John of Salisbury, Boccaccio, and Erasmus (for a more detailed account see JM Spencer, ‘Princes, Pirates, and Pigs: Criminalizing Wars of Conquest in Henry V’ (1996) 47 *Shakespeare Q* 160).

<sup>48</sup> N Chomsky, *Pirates and Emperors, Old and New: International Terrorism in the Real World* (rev edn, Pluto Press, 2002). And he concludes: ‘It is only in folk-tales, children’s stories and the journals of intellectual opinion that power is used wisely and well to destroy evil. The real world teaches very different lessons, and it takes willful ignorance to fail to perceive them’ (ibid, 144). In this respect, reference may only be made to another highly disputed study: G Kolko, *Politics of War* (Random House, 1969).

<sup>49</sup> The wording of the September 2002 US National Security Strategy indeed bears striking similarities to century-old patterns of thought: ‘The purpose of our actions will always be to eliminate a specific threat to the United States or our allies and friends. The reasons for our actions will be clear, the force measured, and the cause just.’

<sup>50</sup> C Pye, *The Regal Phantasm: Shakespeare and the Politics of Spectacle* (Routledge, 1990) 133.

<sup>51</sup> Shakespeare’s historical play (circa 1599) is indeed full of allusions to Dionides’ bold

*Sailing the Wine-Dark Sea—An Unfinished Journey*

this kind of tacit complicity is still very much alive today. The leitmotif in international as well as national politics of the royal or—in modern parlance—sovereign prerogative to transcend the law—or at least to make it perfectly suit the ruler’s interests—is thus of enduring timeliness.

Yet, the rather selective ban on the use of force, granting a somewhat privileged position to the ‘terror of the powerful’ (Winston Churchill),<sup>52</sup> becomes even more dubious in times impressed by a ‘spirit of morality’, such as we all pretend to live in under the constitutional umbrella of the Charter of the United Nations (UN).<sup>53</sup> Law, as most of us might probably agree today, ‘cannot be built on law’ (alone) but must be supported by an internal morality validated by external moral attitudes, as Lon Fuller has put it in his seminal reply<sup>54</sup> to HLA Hart’s positivist conception.<sup>55</sup> If, however, the integration of law and morality is the demand of the day, how can one seriously expect actors below the threshold of Statehood to renounce the use of forcible means in order to pursue their objectives, if States do not set a good example in this respect? In concrete terms, what is needed is an intellectual framework for an all-embracing, coherent, and hopefully ‘abolitionist’ approach regarding the use of force as such, no matter who makes use of it and no matter for what purpose. In this respect, the (international) law as it stands at the moment rests obviously on rather shaky ground.

Our uncomfortable feelings are shared by Stephen Maturin, Jack Aubrey’s friend, ship’s surgeon and natural philosopher alike. The following is an excerpt from one of the many conversations between the two men during their epic voyage:

I am coming to believe that laws are the prime cause of unhappiness. . . . There are parallel sets of laws in different keys that have nothing to do with one another and that are even downright contradictory. It seems to me that the greater mass of confusion and distress must arise from these less evident divergencies—the moral law, the civil, military, common laws, the code of honour, custom, the rules of practical life, of civility, of amorous conversation, gallantry, to say nothing of Christianity for those who practice it. All sometimes, indeed generally, at variance; none ever in an entirely harmonious relation to the rest; and a man is perpetually required to choose

comparison and its implications; cf, with further references, Spencer, ‘Princes, Pirates, and Pigs’ (n 47).

<sup>52</sup> ‘The rich and powerful have every right to demand that they be left in peace to enjoy what they have gained, often by violence and terror; the rest can be ignored as long as they suffer in silence, but if they interfere with the lives of those who rule the world by right, the “terrors of the earth” will be visited upon them with righteous wrath, unless power is constrained from within’ (cited by Chomsky, *Pirates and Emperors* (n 48) 17).

<sup>53</sup> On the notion and basic characteristics of this ‘constitutional order’ see B Simma, ‘From Bilateralism to Community Interest in International Law’ (1994) 250 *Recueil des Cours de l’Académie de Droit International* 217, 258, and on the whole concept in more detail, A Paulus, *Die internationale Gemeinschaft im Völkerrecht* (CH Beck, 2001) in particular 285 et seq.

<sup>54</sup> L Fuller, ‘Positivism and Fidelity to Law—A Reply to Professor Hart’ (1958) 71 *Harvard L Rev* 634.

<sup>55</sup> See, in particular, ‘Positivism and the Separation of Law and Morals’ (1958) 71 *Harvard L Rev* 593. For fascinating insights into how this academic battle found its way into *Post Captain* (2nd vol of the series, HarperCollins, 1972) see A Sulentic, ‘Law and Morality in Patrick O’Brian’s *Post Captain*’ (2003) 34 *J Maritime L & Commerce* 583.

*Daniel-Erasmus Khan*

one rather than another, perhaps . . . its contrary. It is as though our strings were each tuned according to a completely separate system . . .<sup>56</sup>

It is to be hoped that we would not go as far as Maturin in considering the subject to which we have devoted our professional lives, ‘the prime cause of unhappiness’. However, discrepancies, incoherencies, and—above all—injustices in the formulation and application of the law are indeed a prime cause for the failure of a peaceful (political) solution of conflicts, most of which are essentially socio-economic in character. The beating policeman will be of little help for dispute resolution in suburban ghettos, just as Israel’s efforts to ‘bomb away’ the Hamas problem is a costly, yet obviously futile approach. And finally, it is more than doubtful whether force (alone) is an adequate means to combat effectively both terrorism and piracy. As history aptly demonstrates, the latter at least will flourish whenever men (and occasionally) women are motivated to become pirates for economic reasons. Forcible means may curtail lawlessness at sea, for a certain period, in certain regions, and with respect to its intensity. However, they will never succeed in effectively erasing the problem as such.

Assistance for a better understanding of present day problems and (we must hope) their solution sometimes surfaces in the most surprising of seas. In the autumn of 68 BC, the Roman Republic suffered a humiliating blow which bears many similarities to the devastating 9/11 terrorist attacks. Aiming at the very heart of the then only Mediterranean superpower, the ancient Roman port city of Ostia was plundered, set on fire, the Roman fleet destroyed, and several high-ranking State officials (the praetors Sextilius and Bellinus) taken hostage.<sup>57</sup> Whereas the identity of those responsible for this spectacular assault was well known to all, the qualification of their legal and political status was not as clear. In the panicky aftermath of the daring attack, the virtually unequivocal outlawry of the aggressors (‘Cilician Pirates’<sup>58</sup>) was probably an inevitable reflex. However, a more reasoned and balanced view of these ‘pernicious people’—such as that undertaken by the highly influential German historian Theodor Mommsen in the mid-nineteenth century—may arrive at a different and rather surprising assessment. At the time, Mommsen writes, ‘[p]iracy had totally changed its character . . . they formed now a piratical state, with a peculiar esprit de corps, with a solid and very respectable organization, with a home of their own and the germs of symmachy, and doubtless

<sup>56</sup> *Master and Commander* (1st vol of the series, HarperCollins, 1970) 318.

<sup>57</sup> One of the many (rather fragmentary) accounts of the assault is given by Plutarch, *Pompeius vita* 24.8–24.11. See, also, MT Cicero, *De Imperio Cn. Pompei* (66 BC), advocating ‘*Pro lege Manilia*’ which—after the successful anti-piracy campaign—gave Pompey supreme command in the war against Mithridates (33). Cicero’s assessment of the events is, however, everything but impartial; something which is obviously true for virtually all contemporary records from ancient Roman sources.

<sup>58</sup> Cilicia is the name of an ancient territory, the extent of which coincides roughly with the south-eastern coastal area of modern Turkey (to the north and north-east of the island of Cyprus) characterized by rocky headlands with myriads of small sheltered harbours.

*Sailing the Wine-Dark Sea—An Unfinished Journey*

also with a definite political designs'. '[T]he ruined men of all nations', he continues, 'was no longer a gang of robbers who had flocked together, but a compact soldier-state, in which the freemasonry of exile and crime took the place of nationality . . .' And after spending some time on the specific characteristics of this 'settled political entity', he concludes the argument by asking himself whether this State 'was much worse than those of the Italian Oligarchy and the Oriental sultanship, which seemed in the fair way of dividing the world between them'.<sup>59</sup> Mommsen's characterization may not be free of romanticism. However, the case aptly demonstrates that even seemingly clear-cut cases often deserve a second look: at different times, by different people, and, in particular, from a different and probably more impartial angle.<sup>60</sup> And in fact, as more recent studies suggest, the Cilicians might indeed have been a regular enemy and the piracy label thus no more than a rather successful defamation by the efficient and well-oiled Roman propaganda machinery.<sup>61</sup> To label somebody pirate, terrorist, illegal or enemy combatant who simply is at variance with the modalities of conventional warfare, as practised by the 'powerful', may be a tried and tested means to delegitimize the Other.<sup>62</sup> However, the result may not necessarily hold up to a rigorous scrutiny of facts.

In our context, however, the true lesson to be learnt from the Cilician cause—today almost obfuscated by the long shadow of history—is probably the following. Surprisingly enough, after decade-long costly and futile efforts successfully to clear the '*mare nostrum*'<sup>63</sup> of this major menace for the security of shipping as well as of coastal areas,<sup>64</sup> Gnaeus Pompeius Magnus succeeded in eradicating piracy from the Mediterranean in less than three months. To be sure, Pompey had at

<sup>59</sup> *The History of Rome (Book V: The Establishment of the Military Monarchy)* (W Dickson (tr), bibliobazaar, 2008) 54 et seq. See, also with further references, K Feld, *Barbarische Bürger. Die Isarier und das Römische Reich* (De Gruyter, 2005) 198; NK Rauh, 'Who were the Cilician Pirates' in S Swiny, RL Hohlfelder, and HW Swiny (eds), *Res Maritima, Proceedings of the Second International Symposium 'Cities on the Sea'* (Scholars Press, 1997).

<sup>60</sup> It may be recalled that at that time, with respect to the spread of information and its evaluation, Rome held an all-dominant position in the Mediterranean too.

<sup>61</sup> See, eg, A Avidov, 'Were the Cilicians a Nation of Pirates?' (1997) 12 *Mediterranean Historical Rev* 14, who strongly argues in favour of the State-like character of the Cilicians. More sceptical, M Tröster, 'Roman Hegemony and Non-State Violence: A Fresh Look at Pompey's Campaign against the Pirates' (2009) 56 *Greece & Rome* 17 comments: 'there is little to commend modern attempts to characterize and idealize the pirates as champions of political and socio-economic resistance to Roman domination' (with further references to the surprisingly heated debate on the issue).

<sup>62</sup> Something very similar happened, eg, in early modern history, when it came to legally qualifying the violent activities in the western Mediterranean of the Berber people operating from their stronghold on the North African coast. Whereas most writers (eg, Gentili) did not hesitate to categorize them as 'pirates' *stricto sensu*, C Bynkershoek strongly objected, arguing that according to the well-established definition of piracy ('*qui nullius Principis auctoritate, sive mari, sive terra rapiunt*'), those people were not pirates in a technical sense but would rather fall within the category of 'privates' (*Quaestiones Juris Publici* (1737) § 17).

<sup>63</sup> At the latest by 30 BC Roman domination extended from the Iberian Peninsula to Egypt, and *mare nostrum* began to be used in the context of the whole Mediterranean Sea.

<sup>64</sup> On the entire subject see P de Souza, *Piracy in the Graeco-Roman World* (Cambridge University Press, 1999) in particular at 97et seq on the Cilician pirates and Pompey's campaign against them.

*Daniel-Erasmus Khan*

least 270 ships<sup>65</sup> and 120,000 soldiers at his disposal and the warrior-general was vested with almost unlimited power by virtue of the Lex Gabinia,<sup>66</sup> a legislative act which has been considered ‘the beginning of the end of the Roman Republic’.<sup>67</sup> It is an open question whether the ‘war on (pirate) terror’ really ‘fatally subvert[ed] the institution it was supposed to protect’, as Robert Harris suggests.<sup>68</sup> However, once again, should we be careful not to repeat the ruinous errors of our remote ancestors?

Yet, Rome owes the lasting success of this military campaign not to the rather common ingredients of successful warfare: a well-equipped armoury and legal and political measures to allow for as much freedom of action as possible for the belligerents and their leaders. Rome definitively won this war—and not just a battle—by the way it treated its enemies after the din of battle was hushed and the Cilicians had surrendered in great numbers. On the approach eventually adopted by Pompey we are in possession of the following report:

The war was therefore brought to an end and all piracy driven from the sea in less than three months, and besides many other ships, Pompey received in surrender ninety which had brazen beaks. The men themselves, who were more than twenty thousand in number, he did not once think of putting to death; and yet to let them go and suffer them to disperse or band together again, poor, warlike, and numerous as they were, he thought was not well. Reflecting, therefore, that by nature man neither is nor becomes a wild or an unsocial creature, but is transformed by the unnatural practice of vice, whereas he may be softened by new customs and a change of place and life; also that even wild beasts put off their fierce and savage ways when they partake of a gentler mode of life, he determined to transfer the men from the sea to land, and let them have a taste of gentle life by being accustomed to dwell in cities and to till the ground. Some of them, therefore, were received and incorporated into the small and half-deserted cities of Cilicia, which acquired additional territory; and after restoring the city of Soli, which had lately been devastated by Tigranes, the king of Armenia, Pompey settled many there. To most of them, however, he gave as residence Dyme in Achaea, which was then bereft of men and had much good land.<sup>69</sup>

<sup>65</sup> Figure given by Appian (*The Mithridatic Wars*, § 94), whereas Plutarch (*Pompeius*, § 26) reports a naval force of 500 units.

<sup>66</sup> Proposed by the Tribune Aulus Gabinius and adopted regardless of the Senate’s objections, the ‘Lex Gabinia de piratis persequendis’ (67 BC) granted Pompeius extraordinary proconsular powers in any province within 50 miles of the shores of the Mediterranean Sea. Followed soon after, in 66 BC, by the ‘Lex Manilia’, it indeed proved a key document in the decline of the Senate as the ruling power in Rome.

<sup>67</sup> Parallels to current US anti-terror legislation are drawn by R Harris, ‘Pirates of the Mediterranean’, *New York Times* (30 September 2006) <<http://www.nytimes.com/2006/09/30/opinion/30harris.html>> accessed 17 October 2010.

<sup>68</sup> *Ibid.* At this stage, a famous aphorism may be recalled: ‘He who fights with monsters should be careful lest he thereby become a monster. And if thou gaze long into an abyss, the abyss will also gaze into thee’ (F Nietzsche, *Beyond Good and Evil* (H Zimmern (tr), 1886) ch IV, ‘Apophthegms and Interludes’, no 146).

<sup>69</sup> Plutarch, *Pompeius*, § 28. Similar accounts are given by Appian and Cassius Dio (for details see the meticulous analysis by Tröster, ‘Roman Hegemony and Non-State Violence’ (n 61) 24 et seq).

*Sailing the Wine-Dark Sea—An Unfinished Journey*

Distortions for political reasons being one of the most distinctive features of Roman historiography, it is hardly astonishing that reactions to this unusual and surprising ‘humanitarian’ approach ranged from harsh criticism (Plutarch) to lively approval (Cicero).<sup>70</sup> The very complimentary picture painted by Cicero and others of Pompey’s human attitudes may not entirely correspond with reality. However, it is probably unquestionable that Pompey’s vision of turning former enemies into useful citizens tackled the problem at its roots. What the Roman General did was to treat the phenomenon of piracy as what it in fact primarily was—a socio-economic problem. Pompey’s quest for a comprehensive solution, including a long-term plan for the reintegration of the ‘outlaws’, proved to be extremely successful. For the first time in many centuries, the piracy scourge in the Mediterranean was almost<sup>71</sup> completely eradicated, and a huge liability to Roman and Hellenistic sea commerce<sup>72</sup> was brought to a rather unexpectedly speedy end.

Certainly, the way in which Pompey led his campaign against the Cilician pirates cannot serve as an exact blueprint for present-day politicians confronted with similar challenges. However, the story and its main protagonist, Gnaeus Pompeius Magnus—accorded hardly more than a marginal footnote in today’s textbooks on Roman history—may still remind us that for lawyers and politicians alike, taking a fresh look at old problems and their solution may produce surprising results. In a rapidly changing world, a mainstream clinging to deep-seated and habituated legal and political concepts and approaches is instead always in danger of leading to a dead end. In all likelihood, by ruthlessly hanging the roughly 20,000 pirate prisoners, Pompey might have earned the immediate and undivided approval of the Roman people and their representatives. However, recourse to this more traditional and well-established handling of the problem would have been very unlikely to help him win the ‘war on piracy’—an experience which his great rival, Julius Gaius Caesar, underwent just a couple of years before.<sup>73</sup> It is good to know that Bruno Simma would most likely have acted as Pompey did more than 2,000 years ago.

Indeed, Bruno Simma has always advocated breaking new legal ground and exploring new political paths in order to reconcile changing realities with the imperatives of the (international) legal order. He did so, for example, in the immediate aftermath of the Kosovo crisis, when he qualified the NATO bombardments

<sup>70</sup> Tröster, ‘Roman Hegemony and Non-State Violence’ (n 61) 24 et seq.

<sup>71</sup> The pirates remained, however, a (low-level) nuisance to shipping: de Souza, *Piracy in the Graeco-Roman World* (n 64) 176 et seq.

<sup>72</sup> In fact, by that time piracy activities, including the control of an estimated 400 coastal cities, had brought commerce over most of the Mediterranean to a virtual stand-still, affecting in particular Rome’s grain supply from Egypt, something of vital importance for social and political stability in the Republic’s capital.

<sup>73</sup> Caesar’s famous encounter with the Cilician pirates and its merciless aftermath is reported by Plutarch, *Life of Julius Caesar*, ch 2.



*Daniel-Erasmus Khan*

as (just) a ‘venial sin’.<sup>74</sup> In the Roman Catholic tradition, to which Bruno Simma is intimately tied in some sort of love-hate relationship, this lesser, forgivable sin is something which makes the transgressor balance on the very thin line between paradise and hell, eventually offering him the chance to escape eternal damnation.<sup>75</sup> Bruno Simma’s vision of the law is thus certainly no Dantean scenario in the vestibule of hell: ‘All hope abandon ye who enter here.’<sup>76</sup> He is rather convinced that a rigid ‘binary understanding of permission/prohibition’ does not do justice to the present day’s architecture of international law and in fact disregards ‘the great shades of nuance that permeate international law’.<sup>77</sup> No doubt, one of Bruno Simma’s main concerns has always been to avoid international law becoming some sort of Procrustean bed, in which the real world is squeezed into by more or less forcible means.<sup>78</sup>

One of the ever-growing shades obfuscating traditional international law is certainly the appearance in the international arena of the single human being. No longer contenting himself with existence in the carefully fenced backyard of the glittering State, the individual is about to take central stage. We must make sure—and I know Bruno Simma is by my side—that the corpus of human rights is not degraded to a ‘user-friendly’ vocabulary of power, a tool easily misusable and abusable for selective and arbitrary exclusions by individual States as well as by the international (State) community as a whole. We must insist that ‘outlaws’, ‘illegals’, and ‘pernicious’ people of all kind are probably those most in need of protection by international (legal) standards, at any time, in all places, and under all circumstances.

Would it not then be ‘more intellectually satisfying’<sup>79</sup> to explore entirely new legal avenues in order to give full effect to human rights regimes—in cases of necessity even without the consent of the State(s) concerned? In an entirely different context, Bruno Simma has recently expressed his uneasiness with the International

<sup>74</sup> ‘Die Nato-Bomben sind eine lässliche Sünde’, *Süddeutsche Zeitung* (25 March 1999) 5.

<sup>75</sup> In a way, Bruno Simma anticipated here a development which shortly afterwards took central stage on the legal agenda of the international community, namely the concept of a so-called ‘Responsibility to protect’. See most recently, UN Secretary-General, Implementing the ‘Responsibility to Protect’, UN Doc A/63/677 (January 2009) and, for a full account of the whole process, A von Arnould, ‘Souveränität und *Responsibility to Protect*’ (2009) 84 *Friedens-Warte* 11.

<sup>76</sup> Divine Comedy, Canto III, v 9 (‘*Voi ch’entrare, lasciate ogni speranza*’: HF Cary (tr)).

<sup>77</sup> ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion of 22 July 2010) (Declaration of Judge Simma) para 9 <<http://www.icj-cij.org/docket/files/141/15993.pdf>> accessed 17 October 2010.

<sup>78</sup> It seems to me that at least in this respect Bruno Simma is not very far from central features of Max Huber’s sociological approach to international law: ‘International law, like law in general, has the object of assuring the coexistence of different interests which are worthy of legal protection.’ *Island of Palmas Case (Netherlands/USA)*, RIAA II, 870. P Guggenheim, *Lehrbuch des Völkerrechts* (Verlag für Recht und Gesellschaft, 1948) i, 1 even refers to this phrase as some sort of ‘golden rule’ of public international law.

<sup>79</sup> ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion of 22 July 2010) (Declaration of Judge Simma) para 7 <<http://www.icj-cij.org/docket/files/141/15993.pdf>> accessed 17 October 2010.

*Sailing the Wine-Dark Sea—An Unfinished Journey*

Court's approach 'redolent of nineteenth-century positivism, with its excessively deferential approach to State consent'.<sup>80</sup> One may wonder if Bruno Simma is still a positivist *stricto sensu*. But, frankly speaking, I don't care too much!

#### IV. Epilogue: The Love of Wisdom

Boiling down Patrick O'Brian's epic Aubrey/Maturin saga to its very essence, one will inevitably arrive at one of the grand themes not only of the literary world but of human striving of all times and all places: the search of man for himself. Indeed, throughout their adventurous voyage through time and space, Jack Aubrey and Stephen Maturin figure as each other's 'Reverse of the Medal'<sup>81</sup>—both in their contrariness and complementarity. Although designed with utmost care, the many facets of the two major characters are invariably paired, the Miltonic tension between 'L'Allegro' (Jack Aubrey: the man of action) and 'Il Penseroso'<sup>82</sup> (Stephen Maturin: the man of thought) being omnipresent. The two protagonists are torn between rationality and romanticism, between intellectual and worldly appetite, between the fascination for Rousseauian dreams of egalitarianism and the allures of Napoleonic imperialism,<sup>83</sup> between the 'law as it is' (Jack Aubrey: positivism) and the 'law as it ought to be' (Stephen Maturin: morality),<sup>84</sup> and last, but certainly not least, between the demure Sophie Williams and the seducing Diana Villiers, a most charming reference to the amorous constellation in Jane Austen's *Pride and Prejudice*.<sup>85</sup> And finally, what a magnificent literary device to choose as the setting for the protagonists' griefs and follies, their victories and defeats,<sup>86</sup> the highly sophisticated, yet unrivalled complexity of a sailing ship, a most fortunate allegory for human nature and society indeed. However, the most important lesson Patrick O'Brian is teaching us in his subtle artistry is probably the following: our striving ought not to be directed at oversimplifying things or—to remain in sailor's

<sup>80</sup> Ibid, para 8.

<sup>81</sup> Thus the title of the 11th book in the Aubrey/Maturin series (1986).

<sup>82</sup> A famous couple of poems by John Milton (first published 1645), which served as a source of inspiration for many fellow poets as well as painters (William Blake) and composers (Georg Friedrich Handel).

<sup>83</sup> *HMS Surprise* (3rd vol of the series, HarperCollins, 1973).

<sup>84</sup> For an insightful discussion of how one of the greatest intellectual battles in twentieth-century legal philosophy, the Hart-Fuller controversy, has found its way into the 2nd volume of the series see Sulentic, 'Law and Morality' (n 55).

<sup>85</sup> The amorous quadrangle in this acclaimed novel (1813) indeed bears striking similarities to that introduced in *Post Captain* (1972). It is probably correct to view Jane Austen as O'Brian's mentor in narrative technique (K Ringle, 'The Aubrey/Maturin Books as Literature', Key-note Speaker at a Seminar at the Smithsonian Institute, Washington DC, 2000 <[http://www.hmssurprise.org/Ringle\\_on\\_POB.html](http://www.hmssurprise.org/Ringle_on_POB.html)> accessed 17 October 2010, and it may even be correct to assume *Post Captain* in its entirety is a tribute to the great early nineteenth century novelist (1775–1817), see also D King, *Patrick O'Brian: A Life Revealed* (Henry Holt & Co, 2000).

<sup>86</sup> K Ringle, *Washington Post* (2 August 1992) speaks of a literary work which 'ebbs and flows with the timeless tide of character and the human heart'.

*Daniel-Erasmus Khan*

parlance—to transform a Royal Navy’s 74-gun frigate of the Bellona class of Third Rate<sup>87</sup> into some sort of soulless gunboat-like military watercraft. Rather what we are expected to do is accept the complexities of intellectual and physical life, its ebbs and flows. We are not called upon to find the truth (Aletheia: ἀλήθεια), nor, even worse, to pretend to be in possession of it. Instead, the correct direction on the map of our own lives is probably—and that is what Jack Aubrey is reminding us of—the search for wisdom (Sophie: σοφία). It is certainly no mere accident that ‘Sophie’ is a faithful companion of Jack’s life: it is the name of his first ship (the 14-gun brig-rigged sloop *HMS Sophie*) and a woman bearing this name eventually becomes and—despite his amorous tendencies—remains his beloved wife (Sophie Williams). And it is probably not by mere accident that Bruno has not only been a life-long enthusiast of ships of all kind, but that he has been thrilled by just this set of novels, too. Times change but people do not.<sup>88</sup> May this be the case with Bruno as well and may it be granted to him to enjoy a whole lot of ‘wonderfully beautiful day[s], with a slight and varying but reasonably favorable breeze . . .’<sup>89</sup>

<sup>87</sup> In the 17th and 18th volumes (*The Commodore* (1994) and *The Yellow Admiral* (1996)), Jack Aubrey was entrusted with the command over such a warship, the aging *HMS Bellona*, a real Royal Navy ship launched in 1760.

<sup>88</sup> In the final sentence of his influential review in *The New York Times Book Review* (6 January 1991) (‘An Author I’d Walk the Plank For’), Richard Snow (longtime editor of the (recently revived) US magazine *American Heritage*) calls this the ‘most important of all historical lessons’, which O’Brian reminds us of throughout the whole saga.

<sup>89</sup> Reference is made here again (see n 1) to the initial lines of *The Hundred Days*, 19th vol of the series.