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### Is the Crime of Piracy Obsolete?

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## IS THE CRIME OF PIRACY OBSOLETE?

## I

A FEW years ago it might have been surmised that in America at least a good deal of the old code in respect to piracy had passed from the law in reserve into the law in history. The important cases were nearly all one hundred years old or more. It was commonly supposed that the seas were policed effectively. While Kidd, Bonnet, and Blackbeard were still familiar personages in chromatic fiction, there seemed no great likelihood that their trials would be revived as precedents in the more sober business of administering justice.<sup>1</sup>

There have been recent events, however, which challenge the assumption that the law of piracy is chiefly of historical significance. The country had hardly entered upon the new period of national prohibition when the rum ships descended upon its coasts. Some retailed liquor over the rail outside the three-mile limit. Others rushed it ashore as often as vigilance relaxed. The business was not, to put the matter mildly, an object of the law's most solicitous protection; and it was rumored that enormous profits were being made. There sprang up, in consequence, to prey upon the rum ships, a new breed of buccaneers whose exploits have revived in memory the hardy pirates of old.

Now the "hi-jackers," as these new buccaneers have been called, are robbers of an unusually daring sort. Their highway is the sea, their object plunder. They seize by violence or by putting in fear. As the event has proved, they take human life whenever it seems essential to the accomplishment of their purpose. While their operations are more restricted in scope than were those of the pirates of old, they are animated, it may be assumed, by much the same combination of cupidity and thirst for adventure.

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<sup>1</sup> In an article on the law of piracy, published in 1874, Mr. A. T. Whatley remarked that at that time there seemed "very little occasion for such a law." "Historical Sketch of the Law of Piracy," 3 *LAW MAG. AND REV.* (3d Series), 536, 618, 639.

Are those who engage in so-called "hi-jacking" upon the seas to be regarded as pirates? Would it be appropriate, for example, to indict for piracy those American citizens who recently boarded a Canadian rum ship lying twelve miles or more off the Massachusetts shore, shot the captain and cook, and made off with as much money as they found on board?<sup>2</sup> Deeds of violence are reported currently along either coast.<sup>2a</sup> Is the law of piracy applicable? District attorneys are said to have found the question more difficult than was anticipated. The Department of Justice has given the problem some attention, though to date there has been no satisfactory occasion for proceeding to a precedent. So it seems worth while, at a time when new circumstances have aroused new interest in this neglected subject, to explore briefly the crime of piracy with particular reference to its place and significance in the law of the United States.

## II

There is encountered, at the outset, one characteristic feature of the crime of piracy which makes it uniquely difficult as well as uniquely interesting. It has long been regarded as an international crime as well as a crime by municipal law. As an international crime it is within the jurisdiction of all maritime states wheresoever or by whomsoever committed. Since it is not always

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<sup>2</sup> The J. M. Hankensen case. The incident occurred before the ratification of the recent treaty with Great Britain. It was first called to the author's attention through the courtesy of M. R. Norcop, Esq., of the Department of Justice. For adequate reasons it has never reached the stage of a reported decision.

<sup>2a</sup> Two such incidents have been reported recently, one an attack on a French ship off New York by a party of Americans under a Canadian leader, said to have matched in thrills "the tales of the old Spanish Main," and the other an attack on a liquor-laden vessel later found "adrift and abandoned off the San Juan Islands, sixty miles north of Seattle, with blood-spattered decks and sides." In connection with the latter incident four arrests were said to have been made at Seattle and one at Vancouver, B. C., and it was said that the Attorney General at Vancouver had retained special counsel to prosecute those under arrest. See *The New York Times*, Nov. 28, 1924, p. 1.

It has also been reported that coast guard officials have asked the advice of the Department of Justice on the question of the possibility of dealing with the "hi-jackers" as pirates. See *The New York Sunday World*, Dec. 21, 1924, p. 5.

easy to distinguish satisfactorily between piracy as an international crime and piracy by municipal law, it is sometimes difficult to know whether the jurisdiction is international or exclusively national. Piracy as an international crime, moreover, has been associated in times past with the activities of those bold adventurers who have taken the character of outlaws and plundered all commerce without discrimination. There has been a tendency to assume, in consequence, that only those are true international pirates and the subjects of universal jurisdiction who maraud as the enemies of all mankind.<sup>3</sup> It is evident that there can be no certainty about the application of the law of piracy to modern marauders upon the sea until these questions have been satisfactorily resolved.

By way of approach to these questions it will be well enough to begin with piracy *jure gentium* as it has been traditionally understood in English and American law. Characteristically it has been regarded as an offence of the open seas.<sup>4</sup> Its mode is that of the highwayman, namely, violence or intimidation.<sup>5</sup> Its object is usually plunder.<sup>6</sup> While the definition is not all-inclusive, English and American courts have usually referred to

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<sup>3</sup> See 1 HYDE, INTERNATIONAL LAW, § 232.

<sup>4</sup> See 1 HYDE, *op. cit.*, § 231; 1 OPPENHEIM, INTERNATIONAL LAW, 3 ed., § 277.

<sup>5</sup> "The act of violence need not be consummated: a mere attempt, such as attacking or even chasing a vessel for the purpose of attack, by itself comprises piracy. On the other hand, it is doubtful whether persons cruising in armed vessels with the intention of committing piracies are liable to be treated as pirates before they have committed a single act of violence." 1 OPPENHEIM, *op. cit.*, § 276.

It has been held that the captain's fraudulent conversion of vessel or cargo entrusted to him is not piracy. *The King v. Mason*, 8 Mod. 74 (1723). See also the opinion of Attorney General Wirt, 2 OP. ATTY. GEN. 19 (1825).

<sup>6</sup> "The object of piracy is any public or private vessel, or the persons or the goods thereon, whilst on the open sea. In the regular case of piracy the pirate wants to make booty; it is the cargo of the attacked vessel which is the centre of his interest, and he might free the vessel and the crew after having appropriated the cargo. But he remains a pirate, whether he does so or whether he kills the crew and appropriates the ship, or sinks her. On the other hand, the cargo need not be the object of his act of violence. If he stops a vessel and takes a rich passenger off with the intention of keeping him for the purpose of a high ransom, his act is piracy: it is likewise piracy if he stops a vessel merely to kill a certain person only on board, although he may afterwards free vessel, crew, and cargo." 1 OPPENHEIM, *op. cit.*, § 275.

It has been held that kidnapped negroes who rose in revolt, killed the captain,

piracy by the law of nations as robbery committed upon the high seas.

Charging the jury of an Admiralty Sessions in 1668, Sir Leoline Jenkins said:

"That which is called robbing upon the highway, the same being done upon the water, is called piracy: Now robbery, as 'tis distinguished from thieving or larceny, implies not only the actual taking away of my goods, while I am, as we say, in peace, but also the putting me in fear, by taking them away by force and arms out of my hands, or in my sight and presence; when this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy."<sup>7</sup>

Sir Charles Hedges charged the grand jury in *Dawson's Trial*<sup>8</sup> at the Old Bailey in 1696 that "piracy is only a sea-term for robbery, piracy being a robbery committed within the jurisdiction of the Admiralty." In *Bonnet's Trial*<sup>9</sup> at Charlestown, in 1718, Judge Nicholas Trott declared that "piracy is a robbery committed upon the sea, and a pirate is a sea thief." In *United States v. Smith*,<sup>10</sup> decided by the United States Supreme Court in 1820, Mr. Justice Story remarked that

"whether we advert to writers on the common law, or the maritime law, or the law of nations, we shall find that they universally treat of piracy as an offense against the law of nations, and that its true definition by that law is robbery upon the sea."

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and took possession of the ship on which they were being transported between Cuban ports were not pirates. *United States v. The Schooner Amistad*, 15 Pet. (U. S.) 518, 593 (1841). But cf. Attorney-General of Hong Kong v. Kwok-a-Sing, L. R. 5 P. C. 179 (1873), discussed *infra*, p. 354.

<sup>7</sup> 1 WYNNE, LIFE OF JENKINS, lxxxvi.

<sup>8</sup> 13 How. St. Tr. 451, 454 (1696).

<sup>9</sup> 15 How. St. Tr. 1231, 1234 (1718).

<sup>10</sup> 5 Wheat. (U. S.) 153, 162 (1820). See the note in which are assembled numerous definitions from writers on the civil law, the maritime law, the common law, and the law of nations, all in substantial accord with the definition adopted by Mr. Justice Story. 5 Wheat. (U. S.) at 163-180. See *Davison v. Seal-skins*, 2 Paine, 324, 333 (2d Circ., 1833); *United States v. Baker*, 5 Blatchf. 6, 11-12 (2d Circ., 1861); *Dole v. New England Mutual Marine Insurance Co.*, 2 Cliff. 394, 415-419 (1st Circ., 1864); *The Ambrose Light*, 25 Fed. 408, 416 (S. D. N. Y., 1885). See also *EAST P. C.*, c. 17, § 3; *MOLLOY, DE JURE MARITIMO*, 6 ed., Book I, c. 4, § 1; 2 *WOODDESON, LECTURES*, 422; 1 *KENT COMM.* 171; 1 *RUSSELL, CRIMES*, 9th Am. from 4th Eng. ed., 142.

Since piracy *jure gentium* is a kind of robbery, pirates acquire no rights in the plunder taken and in general transfer no rights to those who purchase from them. *A piratis et latronibus capta dominium non mutant* is the familiar maxim.<sup>11</sup> As regards punishment, the traditional penalty was death. There is no rule obliging nations to exact the supreme penalty, however, and at the present day the municipal laws of some states prescribe a less rigorous punishment.<sup>12</sup>

Pirates are usually robbers, and of all robbers they are peculiarly obnoxious because they maraud upon the open seas, the great highway of all maritime nations. So heinous is the offence considered, so difficult are such offenders to apprehend, and so universal is the interest in their prompt arrest and punishment, that they have long been regarded as outlaws and the enemies of all mankind. They are international criminals. It follows that they may be arrested by the authorized agents of any state and taken in for trial anywhere. The jurisdiction is universal.

Thus the famous Captain Kidd, who was sent out originally to exterminate pirates in the eastern seas, was commissioned to arrest pirates "being either our own subjects, or of any other nations associated with them."<sup>13</sup> Sir Charles Hedges charged the grand jury in *Dawson's Trial* that

"The king of England hath not only an empire and sovereignty over the British seas, but also an undoubted jurisdiction and power, in concurrency with other princes and states, for the punishment of all piracies and robberies at sea, in the most remote parts of the world; so that if any person whatsoever, native or foreigner, Christian or Infidel, Turk or Pagan, with whose country we have no war, with whom we hold trade and correspondence, and are in amity, shall be robbed or spoiled in the Narrow Seas, the Mediterranean, Atlantic, Southern, or any other seas, or the branches thereof, either on this

<sup>11</sup> See Bonnet's Trial, 15 How. St. Tr. 1231, 1236 (1718). See BYNKERSHOEK, *QUAESTIONUM JURIS PUBLICI*, Lib. I, c. 17; 2 WOODDESON, *LECTURES*, 429; 1 KENT *COMM.* 172.

<sup>12</sup> Imprisonment for life has been substituted for the death penalty in the United States. See Act of 1897; 29 STAT. AT L. 487. Transportation or imprisonment has been substituted in Great Britain, except in case of piracy aggravated by assault. See 7 WM. IV. & 1 VICT., c. 88; 5 & 6 VICT., c. 28, § 16.

<sup>13</sup> Kidd's Trial, 14 How. St. Tr. 123, 172 (1701).

or the other side of the line, it is piracy within the limits of your enquiry, and the cognizance of this court."<sup>14</sup>

Other maritime nations have asserted a jurisdiction equally comprehensive.

### III

It may be said, therefore, that English and American courts have conceived of piracy by the law of nations as comprehending typically the case of robbery, and occasionally, if the definition is to be inclusive, the case of other unauthorized acts of violence against persons or property, committed upon the open seas. The jurisdiction to arrest and punish has been regarded as universal.

Piracy by municipal law, on the other hand, comprehends as much or as little as the law-making authority of the particular state may choose to make it, and pirates by municipal law are offenders only against the law of the state concerned. Jurisdiction to arrest and punish must be confined to the particular state, and depends either upon the allegiance of the offender or the locality of the offence as well as upon the nature of the offence committed. It is evident that the same acts may constitute piracy by the law of nations and by municipal law and that there is possibility of confusion between the two.<sup>15</sup>

<sup>14</sup> 13 How. St. Tr. at 455. See *Bonnet's Trial*, 15 How. St. Tr. 1231, 1234 (1718); *The Marianna Flora*, 3 Mason, 116, 120-121 (1st Circ., 1822), *aff'd* in 11 Wheat. (U. S.) 1, 40 (1826); *Dole v. New England Mutual Marine Insurance Co.*, 2 Cliff. 394, 417, 418-419 (1st Circ., 1864). See also *MOLLOY, op. cit.*, Book I, c. 4, § 1; 1 KENT COMM. 172; 1 OPPENHEIM, *op. cit.*, § 278.

<sup>15</sup> See 1 HYDE, *op. cit.*, § 231; 1 OPPENHEIM, *op. cit.*, § 280. "The legislative authority of a state may doubtless enlarge the definition of the crime of piracy, but the state must confine the operation of the new definition to its own citizens and to foreigners on its own vessels." Clifford, J., in *Dole v. New England Mutual Marine Insurance Co.*, 2 Cliff. 394, 417 (1st Circ., 1864).

Similarly, acts not piratical by the law of nations may be declared piracy by treaty. In the opinion just quoted, Mr. Justice Clifford said: "Two states also may agree by treaty to regard as piracy a particular crime which is not so defined in the international code, and the stipulation will be obligatory upon the contracting parties. The effect of such a treaty is in general to give to both the contracting parties jurisdiction over that offence for the trial and punishment of such of the citizens of the two countries as commit the offence, but the operation of such a treaty has no bearing on other nations." 2 Cliff. at 417. See *The Bello Corrunes*, 6 Wheat. (U. S.) 152, 171 (1821). See FED. CRIM. CODE, § 303,

There seems to be little that is indicative of such confusion in the English law prior to American independence. Until the middle of the fourteenth century, it is said, piracy by the law of nations was punished in England at common law as petit treason if committed by a subject and as felony if committed by a foreigner.<sup>16</sup> Certainly it was not punished with satisfactory effect. At the middle of the century it was omitted from a statutory enumeration of the offences constituting treason;<sup>17</sup> and only a few years later, with the first investiture of the Admiral with maritime jurisdiction, it became an offence cognizable in admiralty.<sup>18</sup> In his excellent introduction to *Select Pleas in the Court of Admiralty*,<sup>19</sup> Mr. Reginald G. Marsden has pointed out that it was chiefly because of the difficulties experienced in dealing with pirates that the court of the Lord High Admiral was first created.<sup>20</sup> From 1361 until 1536, it was the usual course to try cases of piracy, both civil and criminal, in the Admiral's court.<sup>21</sup>

The admiralty jurisdiction of piracy cases on the criminal side was handicapped by the civil law rule that a death sentence could not be pronounced without either a confession or direct proof by eye-witnesses,<sup>22</sup> and possibly by common-law jealousy as well.

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35 STAT. AT L. 1088, 1147. See also Art. 3 of the Treaty of Feb. 6, 1922, between the United States, Great Britain, France, Italy, and Japan, relative to the use in war of submarines and noxious gases. 3 TREATIES BETWEEN THE UNITED STATES AND OTHER POWERS, 1910-1923, p. 3118.

<sup>16</sup> COKE, INST. III., c. 49; HAWK. P. C., Book I, c. 37, §§ 1, 2. The present writer has not verified the accuracy of this statement. See Marsden's introduction to "Select Pleas in the Court of Admiralty," 6 SELDEN SOC., xli.

<sup>17</sup> See 25 EDW. III., "Declaration what offences shall be adjudged treason," in 1 HALE P. C., c. 12.

<sup>18</sup> See MARSDEN, *op. cit.*, 6 SELDEN SOC., xlii, xlv.

<sup>19</sup> 6 SELDEN SOC., i.

<sup>20</sup> At pp. xiv *et seq.* See E. S. Roscoe, "Mediaeval Piracy and the Lords High Admiral of England," 24 LAW MAG. AND REV. (4th Series), 144.

<sup>21</sup> See MARSDEN, *op. cit.*, 6 SELDEN SOC., xlv.

<sup>22</sup> "Where traytors, pirates, thieves, robbers, murderers and confederates upon the sea, many times escaped unpunished, because the trial of their offences hath heretofore been ordered, judged and determined before the admiral, or his lieutenant or commissary, after the course of the civil laws, the nature whereof is, that before any judgement of death can be given against the offenders, either they must plainly confess their offences (which they will never do without torture or pains) or else their offences be so plainly and directly proved by witness indifferent, such as saw their offences committed, which cannot be gotten but by



In 1536 it was provided by statute<sup>23</sup> that piracies should be tried thereafter pursuant to royal commission directed to the Admiral or his deputy and to three or four other substantial persons designated by the Lord Chancellor. The trials were to be conducted "after the common course of the laws of this realm." Among the commissioners it became the practice to include some of the common-law judges; and by courts of admiralty thus constituted the offence of piracy was thereafter tried. The tribunal was an innovation and the procedure may have been somewhat improved, but the nature of the offence remained unchanged.<sup>24</sup>

There were some famous trials at the Old Bailey under the Statute of Henry VIII.<sup>25</sup> Eventually the difficulties experienced in bringing pirates from remote places to England for trial led to further legislation authorizing trials at sea or in the colonies.<sup>26</sup> The tribunals thus authorized were to be constituted pursuant to royal commission and the trials were to be conducted "accord-

chance at few times, because such offenders commit their offences upon the sea, and at many times murder and kill such persons being in the ship or boat where they commit their offences, which should witness against them in that behalf; and also such as should bear witness be commonly mariners and shipmen, which, because of their often voyages and passages in the seas, depart without long tarrying and protraction of time, to the great costs and charges as well of the King's highness, as such as would pursue such offenders: for reformation whereof, be it enacted. . . ." 28 HEN. VIII., c. 15, Preamble.

<sup>23</sup> 28 HEN. VIII., c. 15, § 1.

<sup>24</sup> "But the 28 Hen. 8 merely altered the mode of trial in the Admiralty Court; and its jurisdiction still continues to rest on the same foundations as it did before that Act. It is regulated by the civil law, *et per consuetudines marinas* grounded on the law of nations, which may possibly give to that Court a jurisdiction that our common law has not." 1 RUSSELL, CRIMES, 9th Am. from 4th Eng. ed., 156. See Bonnet's Trial, 15 How. St. Tr. 1231, 1236 (1718). And see COKE, INST. III., c. 49; HAWK. P. C., Book I, c. 37, § 6; MOLLOY, *op. cit.*, Book I, c. 4, § 25. Thus accessories to piracy, not being named in the statute, remained until 1700 cognizable by the civil law if the offence were committed within admiralty jurisdiction, and by no law if the offence were committed on land. In 1700 another statute made them cognizable according to 28 Hen. VIII., c. 15, the same as principals. 11 & 12 WM. III., c. 7, § 10. See HAWK. P. C., Book I, c. 37, § 7.

<sup>25</sup> See Dawson's Trial, 13 How. St. Tr. 451 (1696); Kidd's Trial, 14 How. St. Tr. 123 (1701).

<sup>26</sup> See 11 & 12 WM. III., c. 7, enacted originally to be in force for seven years, but made perpetual by 6 GEO. I., c. 19, § 3. See Quelch's Trial, 14 How. St. Tr. 1067, 1074 (1704). See also 4 GEO. I., c. 11, § 7; and 8 GEO. I., c. 24, made perpetual by 2 GEO. II., c. 28, § 7.

ing to the civil law, and the methods and rules of the admiralty."<sup>27</sup> So it came about that Captain John Quelch was tried and convicted at Boston<sup>28</sup> and Major Stede Bonnet at Charlestown.<sup>29</sup>

#### IV

In America the development of the law of piracy took a new turn with the achievement of independence and the adoption of the Federal Constitution. The Constitution delegated power to Congress

"To define and punish piracies and felonies committed on the high seas, and offences against the law of nations."<sup>30</sup>

It was apparently contemplated that the federal courts would exercise jurisdiction to punish piracies and that reference to the law of nations would sufficiently define the offence.<sup>31</sup> The framers of the Constitution and of the first Judiciary Act would probably have been surprised had they been told that the federal law of crimes in the United States was to be wholly statutory and that even an offence as ancient and abhorrent as piracy could be a federal offence only as made so by act of Congress.<sup>32</sup> So the event proved, however.<sup>33</sup>

Had Congress anticipated the event, it seems unlikely that the first legislation in respect to piracy would have been so art-

<sup>27</sup> 11 & 12 Wm. III., c. 7, § 4.

<sup>28</sup> Quelch's Trial, 14 How. St. Tr. 1067 (1704).

<sup>29</sup> Bonnet's Trial, 15 How. St. Tr. 1231 (1718).

<sup>30</sup> Art. I, § 8, cl. 10.

<sup>31</sup> Madison, writing in *THE FEDERALIST*, No. 42, said: "The provision of the federal articles on the subject of piracies and felonies, extends no farther than to the establishment of courts for the trial of these offences. The definition of piracies might, perhaps, without inconveniency, be left to the law of nations; though a legislative definition of them is found in most municipal codes. A definition of felonies on the high seas, is evidently requisite."

<sup>32</sup> There is evidence indicating that the Federal Judiciary Act of 1789 was intended to invest United States district and circuit courts with jurisdiction over common-law crimes. See Charles Warren, "New Light on the History of the Federal Judiciary Act of 1789," 37 *HARV. L. REV.* 49, 51, 73, 77.

<sup>33</sup> It was early settled that the United States courts have no common-law jurisdiction in criminal cases. *United States v. Hudson*, 7 *Cranch* (U. S.) 32 (1812); *United States v. Coolidge*, 1 *Wheat.* (U. S.) 415 (1816); *United States v. Britton*, 108 *U. S.* 199 (1883).

lessly drafted as to leave piracy *jure gentium* and piracy by municipal law in the utmost confusion. Five sections in the Federal Crimes Act of 1790 were devoted to the subject. One dealt particularly with attacks by citizens of the United States upon the United States or its citizens on the high seas; another with accessories before the fact of "any murder or robbery, or other piracy aforesaid, upon the seas"; still another with accessories after the fact of "any murder, felony, robbery, or other piracy whatsoever aforesaid"; and a fourth with manslaughter at sea, conspiring, confederating, or trading with pirates, provoking mutiny, and so forth.<sup>34</sup>

The principal provisions with respect to piracy were incorporated in Section 8. And what a jumble this section contained! Three classes of offenders were enumerated: first, "any person or persons" committing upon the sea outside the jurisdiction of any state either murder, robbery, or any other offence which if committed within the body of a county would be punishable with death by the laws of the United States; second, "any captain or mariner" piratically and feloniously running away with his ship, or with goods worth as much as fifty dollars, or voluntarily surrendering his ship to pirates; and third, "any seaman" laying violent hands upon his commander, to prevent him from fighting in defence of ship or cargo, or inciting revolt on the ship. All three classes of offenders were denounced as pirates and felons who should suffer death.<sup>35</sup>

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<sup>34</sup> Act of April 30, 1790, §§ 9, 10, 11, 12; 1 STAT. AT L. 112, 114-115.

<sup>35</sup> The text of § 8 is as follows: "That if any person or persons shall commit upon the high seas, or in any river, haven, basin or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence which if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is apprehended, or into which he may first be brought." 1 STAT. AT L. 113, 114.

"It is obvious that the penman who drafted the section under consideration,

Confusion in the application of such a statute was a foregone consequence. In so far as it might be thought to provide for the punishment of pirates *jure gentium*, it was applicable to the nationals of all countries for acts committed on the ships of any flag. In so far as it made certain acts piratical by the law peculiar to the United States, it could be applicable only to American nationals or on American ships. But who could tell from the text where one left off and the other began? The problem was not likely to be serious so long as the cases presented only offences committed on American vessels.<sup>36</sup> Eventually, however, more troublesome questions were bound to come before the courts.

The first case to reach the Supreme Court was *United States v. Palmer*,<sup>37</sup> decided in 1818. Palmer and Wilson, mariners, late of Boston, and Callaghan, mariner, late of Newburyport, were indicted for piracy under Section 8 of the Act of 1790 in the Circuit Court for the Massachusetts district. The court consisted of Justices Story and Davis. These judges being of different opinions, no fewer than eleven questions were certified to the Supreme Court. The transcript stated no case, and it is impossible to ascertain from the record just what the facts were. The indictment suggested, however, and contemporary reports confirm, that the prisoners were American citizens and that the offence was robbery committed upon a Spanish vessel on the high seas.<sup>38</sup> The Supreme Court gave *inter alia* an opinion upon the meaning of Section 8 as follows:

"that the crime of robbery, committed by a person on the high seas, on board of any ship or vessel belonging exclusively to subjects of a

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acted from an indistinct view of the divisions of his subject. He has blended all crimes punishable under the admiralty jurisdiction in the general term of piracy." Johnson, J., in *United States v. Pirates*, 5 Wheat. (U. S.) 184, 196 (1820).

<sup>36</sup> See *United States v. Tully*, 1 Gall. 247 (1st Circ., 1812); *United States v. Ross*, 1 Gall. 624 (1st Circ., 1813). Cf. *United States v. M'Gill*, 4 Dall. (U. S.) 426 (1806); *United States v. Bevans*, 3 Wheat. (U. S.) 336 (1818). See 16 GREEN BAG 172. See also *United States v. Jones*, 3 Wash. C. C. 209 (3rd Circ., 1813); *United States v. Jones*, 3 Wash. C. C. 228 (3rd Circ., 1814).

<sup>37</sup> 3 Wheat. (U. S.) 610 (1818).

<sup>38</sup> The facts in *United States v. Palmer* are stated as follows in the report of *United States v. Chapels*, 2 Wheeler's Crim. Cas. 205, 206 (Circ. D. Va., 1819): "Palmer and others, citizens of the United States, had gone upon the high seas, entered and robbed the *Industria Raffaelli*, a Spanish ship, of various articles."

foreign state, on persons within a vessel belonging also exclusively to subjects of a foreign state, is not piracy within the true intent and meaning of the act.”<sup>39</sup>

From this opinion it was only natural to infer that the Supreme Court regarded Section 8 as exclusively a statutory definition of piracy by the municipal law of the United States, not including provisions for the trial and punishment in United States courts of pirates by the law of nations.<sup>40</sup>

Thus interpreted, however, the decision in *United States v. Palmer* would have limited much the scope and efficacy of this section. The decision was not well received. That it left the law with respect to piracy more restricted than it had been supposed to be was made evident when Congress promptly enacted a new statute, the Act of March 3, 1819, to supply the omission which the Supreme Court had discovered.<sup>41</sup> Section 5 of the Act of 1819, enacted to be in force until the end of the next session of Congress, provided as follows:

“That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the

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<sup>39</sup> 3 Wheat. (U. S.) at 643. See *United States v. Howard*, 3 Wash. C. C. 340, 344, 345 (3rd Circ., 1818); *United States v. Klintock*, 5 Wheat. (U. S.) 144, 151 (1820).

<sup>40</sup> Kent says: “In the case of the *United States v. Palmer*, it was held, that the act of Congress of 1790 was intended to punish offences against the United States, and not offences against the human race; and that the crime of robbery, committed by a person who was not a citizen of the United States, on the high seas, on board of a ship belonging exclusively to subjects of a foreign state, was not piracy under the act, and was not punishable in the courts of the United States. The offence, in such a case, must, therefore, be left to be punished by the nation under whose flag the vessel sailed, and within whose particular jurisdiction all on board the vessel were.” 1 KENT COMM. 174. It is believed that Kent was mistaken in referring to the case as robbery “by a person who was not a citizen of the United States.” See *supra*, note 38.

<sup>41</sup> See the report of *United States v. Chapels*, 2 Wheeler’s Crim. Cas. 205, 207 (Circ. D. Va., 1819); the remark of Winder, counsel, arguing in *United States v. Klintock*, 5 Wheat. (U. S.) 144, 149 (1820); *United States v. Kessler*, Fed. Cas. No. 15,528, pp. 766, 772 (3rd Circ., 1829). See also 2 WARREN, SUPREME COURT IN UNITED STATES HISTORY, 38.

district into which he or they may be brought, or in which he or they shall be found, be punished with death."<sup>42</sup>

It may be suspected that the Supreme Court was not insensible to criticism of its decision in *United States v. Palmer* and to the prompt action of Congress in meeting that decision's challenge by incorporating Section 5 in the Act of 1819. In any event, in the leading case of *United States v. Smith*,<sup>43</sup> decided in 1820, the Supreme Court held that Section 5 was a constitutional exercise of the power of Congress to define and punish piracies, and that piracy in the law of nations was robbery upon the sea.<sup>44</sup> And in a notable group of cases, decided in the same year, the Court did much to mitigate the effect of the *Palmer* case and to reinject significance into Section 8 of the Act of 1790.

Of the cases constituting this notable group, *United States v. Klintonck*<sup>45</sup> was the first and most important. The case began in an indictment for piracy of a citizen of the United States who had sailed as first lieutenant on a vessel owned without the United States and commissioned by one styling himself Brigadier of the Mexican Republic and Generalissimo of the Floridas. The prisoner was found guilty of seizing a Danish vessel on the high seas. On motion for arrest of judgment, the judges were divided and questions were certified to the Supreme Court. The Supreme Court was of opinion that the commission did not exempt the prisoner from the charge of piracy, that the acts charged were piratical acts, that the prisoner was punishable under Section 8 of the Act of 1790, and that Section 8 extended to "all persons on board all vessels which throw off their national character by cruizing piratically and committing piracy on other vessels."<sup>46</sup> Chief Justice Marshall said:

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<sup>42</sup> 3 STAT. AT L. 510, 513, 514.

<sup>43</sup> 5 Wheat. (U. S.) 153 (1820). See the same case in the circuit court, *United States v. Chapels*, Fed. Cas. No. 14,782 (D. Va., 1819).

<sup>44</sup> In *United States v. Pirates*, 5 Wheat. (U. S.) 184, 204 (1820), decided in the same year, the Supreme Court reiterated that "the 5th section of the act of the 3d of March, 1819, furnishes a sufficient definition of piracy, and that it is defined 'robbery on the seas.'"

On probable cause for seizure under the Act of 1819, see *The Marianna Flora*, 11 Wheat. (U. S.) 1 (1826); *The Palmyra*, 12 Wheat. (U. S.) 1 (1827).

<sup>45</sup> 5 Wheat. (U. S.) 144 (1820).

<sup>46</sup> 5 Wheat. (U. S.) at 153.

"Upon the most deliberate reconsideration of that subject, the Court is satisfied, that general piracy, or murder, or robbery, committed in the places described in the 8th section, by persons on board of a vessel not at the time belonging to the subjects of any foreign power, but in possession of a crew acting in defiance of all law, and acknowledging obedience to no government whatever, is within the true meaning of this act, and is punishable in the Courts of the United States. Persons of this description are proper objects of the penal code of all nations; and we think that the general words of the act of Congress applying to all persons whatsoever, though they ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State, ought to be so construed as to comprehend those who acknowledge the authority of no State. Those general terms ought not to be applied to offences committed against the particular sovereignty of a foreign power; but we think they ought to be applied to offences committed against all nations, including the United States, by persons who by common consent are equally amenable to the laws of all nations." <sup>47</sup>

At the same time that *United States v. Klintock* was decided, the Supreme Court had before it several other cases arising on indictments for piratical acts under Section 8 of the Act of 1790. These cases are reported together as *United States v. Pirates*.<sup>48</sup> In one case, *United States v. Bowers and Mathews*, the Supreme Court held again, following *United States v. Klintock*, that Section 8 extended to piracy committed on one foreign vessel by the crew of another foreign vessel which had "assumed the character of pirates, whereby they lost all claim to national character or protection."<sup>49</sup> In another case, *United States v. Furlong*, the prisoner was a British subject indicted for the piratical murder of another British subject on a British ship. His own ship was a United States vessel which had been stolen by captain and crew. He was found guilty. A motion was made in arrest of judgment because, among other reasons, he had not been charged as a citizen of the United States and because the act had not been charged as committed on a United States vessel.

<sup>47</sup> 5 Wheat. (U. S.) at 152. See the remark of Johnson, J., in *United States v. Pirates*, 5 Wheat. (U. S.) 184, 192-193 (1820). And see 1 KENT COMM. 175.

<sup>48</sup> 5 Wheat. (U. S.) 184 (1820).

<sup>49</sup> 5 Wheat. (U. S.) at 205.

The judges of the Circuit Court being divided in opinion, the record was certified to the Supreme Court. The Supreme Court held that the indictment need not charge the prisoner as a citizen of the United States nor the crime as having been committed on board a United States vessel. It was enough to charge it as having been committed from on board a United States vessel by a mariner sailing on board a United States vessel.<sup>50</sup>

It thus appears that the first class of offenders enumerated in Section 8 of the Act of 1790, described as "any person or persons" committing murder, robbery, or other capital offence upon the high seas, might include (1) persons committing the forbidden acts on or from vessels of the United States, (2) persons committing the forbidden acts on or from piratical vessels, and (3) persons assuming the character of pirates and committing the forbidden acts on or from any vessels whatsoever. Section 8 did extend after all, therefore, to piracies *jure gentium*, but only to those piracies *jure gentium*, it seems, in which an intention of universal hostility was manifested by an assumption of the familiar piratical character.

The subsequent history of legislation in the United States with respect to the crime of piracy is of considerable interest and importance. Section 5 of the Act of 1819, as already indicated, had been enacted to be in force only until the end of the next session of Congress.<sup>51</sup> Before the session expired, Congress passed another statute, the Act of May 15, 1820, continuing in force the earlier statute in part and making further provisions for punishing piracy.<sup>52</sup> With respect to Section 5 of the Act of 1819, the new law provided that it should be "continued in force" without limitation as to time "as to all crimes made punishable by the same, and heretofore committed."<sup>53</sup> The provision was phrased in terms of continuation, but the effect was to let Section 5 expire. In lieu of Section 5, the Act

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<sup>50</sup> 5 Wheat. (U. S.) at 203. See *United States v. Holmes*, 5 Wheat. (U. S.) 412 (1820). See also REPORT OF COMMISSION TO REVISE CRIMINAL LAWS OF UNITED STATES, 57th Cong., 1st Sess., Sen. Doc. No. 68, Pt. 2, pp. xxv-xxvii; 1 KENT COMM. 175; 2 MOORE, INTERNATIONAL LAW DIGEST, § 311.

<sup>51</sup> § 6; 3 STAT. AT L. 510, 514.

<sup>52</sup> 3 STAT. AT L. 600.

<sup>53</sup> § 2.



of 1820 provided in Section 3 that robbery upon the high seas or within the ebb and flow of the tide should be piracy punishable with death.<sup>54</sup> Congress had probably intended to supersede Section 8 of the Act of 1790 by Section 5 of the Act of 1819; and clearly the latter enactment was intended to be replaced by Section 3 of the Act of 1820. Nevertheless, each of these three sections was reenacted, with minor textual revisions, in the Revised Statutes of 1874.<sup>55</sup> Indeed, the entire substantive content of the early statutes with respect to piracy reappeared in the Revised Statutes.<sup>56</sup> Revision and rearrangement accomplished minor improvements, but otherwise all the old ambiguities were carefully preserved.

More radical changes were made in the Federal Criminal Code of 1909. That part of Section 8 of the Act of 1790 which had been the source of so much confusion in the early period was finally repealed. Instead of ambiguously denouncing murder, robbery, or other piracies upon the seas, in terms which

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<sup>54</sup> The text of § 3 is as follows: "That, if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate: and, being thereof convicted before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruise or enterprise, or being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate: and on conviction thereof before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death: *Provided*, That nothing in this section contained shall be construed to deprive any particular state of its jurisdiction over such offences, when committed within the body of a county, or authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offence, in a state court."

See *United States v. Kessler*, Fed. Cas. No. 15,528 (3rd Circ., 1829), holding § 3 inapplicable to robbery committed on a foreign vessel.

<sup>55</sup> §§ 5372, 5368, and 5370 respectively. The inclusion of § 5 of the Act of 1819 more than a half century after it had expired is difficult to explain otherwise than as an "accident of revision." See REPORT OF COMMISSION TO REVISE CRIMINAL LAWS, cited *supra*, note 50.

<sup>56</sup> Compare Act of 1790, §§ 8, 9, 10, 11, 12 (1 STAT. AT L. 112) with REV. STAT. §§ 5372, 5383, 5369, 5373, 5323, 5324, 5384. Compare Act of 1819, §§ 1, 2, 3, 4, 5 (3 STAT. AT L. 510) with REV. STAT. §§ 4293, 4294, 4295, 4296, 5368. Compare Act of 1820, §§ 3, 4, 5 (3 STAT. AT L. 600) with REV. STAT. §§ 5370, 5371, 5376, 5375. Compare Act of 1847 (9 STAT. AT L. 175) with REV. STAT. § 5374.

would have made it impossible to distinguish piracy in municipal law and piracy *jure gentium*, Chapter 12 of the Criminal Code begins with the simple rule, first explicitly and unequivocally announced in Section 5 of the Act of 1819, that "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life."<sup>57</sup>

The result is that, at the present day, *United States v. Palmer*,<sup>58</sup> *United States v. Klintock*,<sup>59</sup> and the other cases arising under Section 8 of the Act of 1790, are chiefly of historical significance. The rule now in force derives directly from Section 5 of the Act of 1819. *United States v. Smith*<sup>60</sup> is the leading case in exposition. In the latter case, it may do no harm to repeat, the Supreme Court laid it down in no uncertain terms that it is competent for Congress to define piracy by reference to the law of nations and that "its true definition by that law is robbery upon the sea."

## V

So it is that the modern law of piracy in America has been derived principally from the law of nations, by virtue of federal statute, and that the crime of piracy by that law has been commonly defined as robbery upon the sea. Is piratical robbery at sea essentially different from ordinary robbery on land? The classical definitions of piracy indicate that it is not, and suggest strongly that there is a difference only as regards the *locus* of the crime. Yet some reluctance has been manifested about making the definition so comprehensive. It has been suggested that the true international pirate must intend to rob and plunder without discrimination in defiance of all authority.

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<sup>57</sup> FED. CRIM. CODE, § 290. Compare Act of 1790, § 8 (1 STAT. AT L. 112) with REV. STAT. §§ 5372, 5383, 5369, and also with FED. CRIM. CODE, §§ 306, 294 (35 STAT. AT L. 1088). Compare also Act of 1820, § 3 (3 STAT. AT L. 600) with REV. STAT. §§ 5370, 5371, and with FED. CRIM. CODE, § 302. Compare Act of 1790, §§ 9, 10, 11, 12, with FED. CRIM. CODE, §§ 304, 332, 334, 307; and Act of 1847 (9 STAT. AT L. 175) with FED. CRIM. CODE, § 305.

<sup>58</sup> 3 Wheat. (U. S.) 610 (1818). See *supra*, p. 344.

<sup>59</sup> 5 Wheat. (U. S.) 144 (1820). See *supra*, p. 346.

<sup>60</sup> 5 Wheat. (U. S.) 153 (1820). See *supra*, p. 346.

Only those who are *hostes humani generis*, it has been said, are the subjects of universal jurisdiction.

It is of considerable importance that there be no confusion about the significance of the proposition that pirates *jure gentium* are *hostes humani generis*. Is the jurisdiction universal because they are *hostes humani generis*, or are they said to be *hostes humani generis* because the jurisdiction is universal? Does the proposition state a prerequisite or a consequence? Does it describe a constituent element of the offence of piracy or only a reprehensible quality or characteristic which the law attributes to pirates? It is evident that the applicability of the law of piracy to modern marauders on the sea, including the "hi-jackers," for example, may depend much upon the correct answers to these questions.

That *pirata est hostis humani generis* has been asserted many times, but not in a way to suggest so much a constituent element of the offence as an epithet of opprobrium which the offence deserves.<sup>61</sup> Charging the jury in *Kidd's Trial*,<sup>62</sup> Mr. Justice Turton said: "Pirates are called 'Hostes humani generis,' the enemies to all mankind." He did not suggest that they must be enemies of all mankind to be pirates. In *Bonnet's Trial*,<sup>63</sup> Judge Trott remarked: "As to the heinousness or wickedness of the offence, it needs no aggravation, it being evident to the reason of all men. Therefore a pirate is called 'hostis humani generis,' with whom neither faith nor oath is to be kept." The obvious implication was that they are called enemies of all mankind because of the enormity of their offence. "'Hostis humani generis,'" observed Dr. Tindall, "is

<sup>61</sup> See COKE, INST. III., c. 49; 1 WYNNE, LIFE OF JENKINS, lxxxvi; MOLLOY, *op. cit.*, Book I, c. 4, § 1; 1 KENT COMM. 171-172.

<sup>62</sup> 14 How. St. Tr. 123, 212 (1701).

<sup>63</sup> 15 How. St. Tr. 1231, 1235 (1718). Charging a federal grand jury at Boston, October 16, 1861, Judge Sprague said: "Pirates are generally described as sea-robbers. They are deemed *hostes humani generis*, enemies of mankind, warring against the human race. The ocean is the common highway of nations, over which every government has criminal jurisdiction. Pirates are highwaymen of the sea, and all civilized nations have a common interest, and are under a moral obligation, to arrest and suppress them." 2 Sprague, 285, 286 (D. Mass., 1861). Here the suggestion seems to be that pirates are called enemies of mankind because of the universal interest in security upon the common highways of the sea.

neither a definition, or as much as a description of a pirate, but a rhetorical invective to shew the odiousness of that crime."<sup>64</sup>

It seems reasonably clear that English and American courts have used *hostis humani generis* as an invective rather than a definition. In addition to a considerable number of cases in which the accused has been charged with a single depredation and convicted, without proof of more than the usual felonious intent, there have been a number of cases demonstrating even more obviously that universal hostility or the intention to plunder without discrimination is not an element of the offence. There are a few cases, for example, in which seizures made by the naval forces of unrecognized insurgents have been regarded as piratical. Seizures by the duly commissioned agents of a recognized government are not piratical.<sup>65</sup> Neither are seizures made by recognized belligerents in the legitimate prosecution of hostilities.<sup>66</sup> But captures made or attempted by the naval forces of unrecognized insurgents have given the courts greater difficulty, and in a few instances have been denounced as piracy *jure gentium*.<sup>67</sup> Such a conclusion seems erroneous, since insurgents seize for a public political end rather than for private plunder, and it is believed that the conclusion would generally be regarded as erroneous at the present day.<sup>68</sup> It is worth noting, however, that the cases arriving at this conclusion have

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<sup>64</sup> Commenting upon the examination of the civilians by the Cabinet Council of England prior to Golding's Trial, 12 How. St. Tr. 1269, 1271 note (1693).

<sup>65</sup> *Davison v. Seal-skins*, 2 Paine, 324 (2nd Circ., 1833). See 1 OPPENHEIM, *op. cit.*, § 273. But compare J. E. G. de Montmorency, "The Barbary States in International Law," 4 TRANS. GROTIUS SOC. 87; and "Piracy and the Barbary Corsairs," 35 L. QUART. REV. 133; arguing that it is possible to have pirate states in international law.

<sup>66</sup> See Opinion of Attorney General Butler, 3 OP. ATTY. GEN. 120 (1836); *Dole v. Merchants' Mutual Marine Insurance Co.*, 51 Me. 465 (1863); *Dole v. New England Mutual Marine Insurance Co.*, 6 Allen (Mass.) 373 (1863); *Dole v. New England Mutual Marine Insurance Co.*, 2 Cliff. 394 (1st Circ., 1864); *Fifield v. Insurance Co.*, 47 Pa. St. 166 (1864); *The Schooner Chapman*, 4 Sawy. 501 (N. D. Cal., 1864).

<sup>67</sup> See Golding's Trial, 12 How. St. Tr. 1269 (1693); *The Ambrose Light*, 25 Fed. 408 (S. D. N. Y., 1885). See also 32 ALBANY L. J. 65. Cf. *United States v. Hutchings*, 2 Wheeler's Crim. Cas. 543 (Circ. D. Va., 1817).

<sup>68</sup> See 1 HYDE, INTERNATIONAL LAW, § 233; 1 OPPENHEIM, INTERNATIONAL LAW, 3 ed., § 273; WIESSE, LE DROIT INTERNATIONAL APPLIQUÉ AUX GUERRES CIVILES, § 27; 22 MICH. L. REV. 120.

repudiated emphatically the notion that no one is a pirate unless he hoists the skull and crossbones and plunders without discrimination.<sup>69</sup>

More significant, no doubt, are those cases in which the seizure of a single ship by persons having no thought of going on a piratical cruise or in which sporadic acts of violence by mere amateurs in "the grand account" have been denounced as piracy *jure gentium*. Two English extradition cases are of particular interest in this connection.

In the case of *In re Tivnan*,<sup>70</sup> some persons took ship as passengers in 1863 on an American schooner bound from Matamoros to New York. After the schooner had put out from port, these passengers seized her, put the captain and crew ashore, and disappeared with the ship. There was some evidence which indicated that they might have been acting for the Confederate Government. Three of them were later apprehended in Liver-

<sup>69</sup> In *Dole v. Merchants' Mutual Marine Insurance Co.*, 51 Me. at 468-469, commenting upon the contention that no one is a pirate who is not *hostis humani generis*, Mr. Justice Davis said: "This may, generally, be true in fact. But it by no means follows that such indiscriminate hostility is necessary to constitute the crime of piracy. . . . No one has ever contended that a man could not be convicted of robbery, unless he had a general purpose to rob everybody. Such a rule is no more applicable to robbery on the seas, than on the land. If an act of piracy is proved, it surely would not be a good defence for the pirates, that their purpose was to seize vessels belonging to citizens of one nation only; or even that the piratical enterprise was designed for the taking of only a single ship.

. . . The fact that pirates generally have a wider and more indiscriminate purpose, has given rise to more general terms in describing what *they do*. But we are not aware that any court has ever held an act of robbery, committed on the high seas, not to be piracy; or that any other elements are necessary to constitute the offence." See also the remark of Woodward, C. J., in *Fifield v. Insurance Co.*, 47 Pa. St. 166, 169 (1864).

In *The Ambrose Light*, 25 Fed. 408, 424 (S. D. N. Y., 1885), Judge Brown said: "The 'intention of universal hostility,' in any special sense, is applicable to pirates by profession only; to those who make piracy a business, and live by some approach to indiscriminate plunder, and who in that sense are 'general pirates.' In other words, it is a description of the supposed practice of one class of pirates only; just as the *animus furandi* is descriptive of the particular motive of most piracies. But neither the general intent in the one case, nor the particular and common motive of plunder in the other, is necessary or essential to the offense of piracy itself. And it is manifest that the offense may be as complete, though but a single act be committed or intended, as if such acts were practiced as a business, and indiscriminately on all vessels, to procure a livelihood."

<sup>70</sup> 5 Best & S. 645 (1864).

pool and held for extradition to the United States on a charge of piracy. It was held that they were entitled to be discharged because piracy "committed within the jurisdiction" of either of the high contracting parties, as stipulated in the extradition treaty and the act for giving effect thereto,<sup>71</sup> meant piracy by municipal law and not piracy by the law of nations. The court was clearly of opinion that if these prisoners had committed piracy it was piracy by the law of nations.<sup>72</sup>

In *Attorney-General of Hong Kong v. Kwok-a-Sing*,<sup>73</sup> the Judicial Committee of the Privy Council had occasion to go even further than the Court of Queen's Bench went in the *Tivnan* case. A French vessel had sailed from Macao in China bound for Peru with three hundred and ten Chinese coolie emigrants on board, among them Kwok-a-Sing. While the vessel was on the high seas, Kwok-a-Sing and others killed the captain and several of the crew and compelled the remaining seamen to return with the ship to China. The vessel was beached and abandoned on the Chinese coast. Kwok-a-Sing was later apprehended in Hong Kong, and China requested his extradition; but the Supreme Court of Hong Kong ordered his discharge on the ground that if piracy had been committed it was piracy *jure gentium*, outside the scope of the extradition ordinances and treaties. He was then arrested on the charge of piracy *jure gentium*. A second writ of *habeas corpus* issued and he was again ordered discharged. On appeal to the Judicial Committee, however, this second order was reversed. It was held that there was sufficient evidence to justify trial on the charge of piracy by the law of nations.<sup>74</sup>

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<sup>71</sup> See Treaty of 1824, Art. 10, 1 TREATIES BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1909, p. 655; 6 & 7 VICT., c. 76, § 1.

<sup>72</sup> 5 Best & S. at 677, 680, 684, 685, 689. "Piracy by the law of nations" was enumerated among the extraditable offences in the Extradition Convention of July 12, 1889, between Great Britain and the United States. 1 TREATIES BETWEEN THE UNITED STATES AND OTHER POWERS, 1776-1909, pp. 740, 741. See 1 MOORE, EXTRADITION, §§ 110-113.

<sup>73</sup> L. R. 5 P. C. 179 (1873).

<sup>74</sup> Lord Justice Mellish said: "Now, their Lordships are of opinion that there was before the magistrate sufficient *prima facie* evidence that Kwok-a-Sing had committed an act of piracy *jure gentium* to justify his committal for trial for that offence at Hong Kong. They see no reason to doubt that the charge of Sir Charles Hedges, Judge of the High Court of Admiralty, to the Grand Jury,

In both the above cases it was clearly indicated that the seizure of a single ship by persons having no intention of universal hostility might be piracy by the law of nations. A case of a different sort, but pointing to the same conclusion, is *United States v. Brig Malek Adhel*,<sup>75</sup> in which some curiously amateurish acts of violence in execution of a purpose quite incomprehensible from the record were denounced as piratical acts. The case was a libel for piratical aggressions under the Act of March 3, 1819.<sup>76</sup> The Brig Malek Adhel had sailed from New York for Guaymas on a commercial voyage. The owners neither authorized nor contemplated acts of piracy. Various aggressions were committed on the voyage, however, including the stopping of other vessels with blank shot, or with solid shot if blanks were unheeded, requiring petty services, firing on them if they refused to comply with requests, and, in the case of a Portuguese vessel, taking a jar of sweetmeats, a dog, and twenty dollars in money. The United States Supreme Court affirmed a decree condemning the ship.

Speaking for the Supreme Court, Mr. Justice Story expressed the opinion that the statute was intended to carry the rule of the law of nations into effect, and continued as follows:

"Where the act uses the word 'piratical,' it does so in a general sense; importing that the aggression is unauthorized by the law of nations, hostile in its character, wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power. In short, it means that the act belongs to the class of offences which pirates are in the habit of perpetrating, whether they do it for purposes of plunder, or for purposes of hatred, revenge, or wanton abuse of power. A pirate is deemed, and properly deemed, *hostis humani generis*. But why is he so deemed? Because he commits hostilities upon the subjects and property of *any or all*<sup>77</sup> nations, without any regard to right or duty, or any pretence of public authority. If he wilfully sinks or destroys an innocent merchant ship, without any

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as reported in the case of *Rex v. Dawson*, [13 State Trials 454] and which was made in the presence and with the approval of Chief Justice *Holt*, and several other Common Law Judges, contains a correct exposition of the Law as to what constitutes piracy *jure gentium*." L. R. 5 P. C. at 199. See *supra*, n. 6.

<sup>75</sup> 2 How. (U. S.) 210 (1844).

<sup>76</sup> 3 STAT. AT L. 510, § 4.

<sup>77</sup> Italics ours.

other object than to gratify his lawless appetite for mischief, it is just as much a piratical aggression, in the sense of the law of nations, and of the act of Congress, as if he did it solely and exclusively for the sake of plunder, *lucri causa*. The law looks to it as an act of hostility, and being committed by a vessel not commissioned and engaged in lawful warfare, it treats it as the act of a pirate, and of one who is emphatically *hostis humani generis*.”<sup>78</sup>

One other notable case is worthy of special mention as demonstrating that an intention of universal hostility is not a requisite element of the offence of piracy *jure gentium*. An insurrection broke out in 1851 in the Chilean garrison of the convict settlement at Punta Arenas. The insurgents seized a British and also an American vessel lying in port, murdered the masters and owners, plundered the vessels of part at least of their cargoes, and put out to sea. Both vessels were later retaken, together with more than three hundred of the insurrectos, by a British sloop of war. The case of *The Magellan Pirates*<sup>79</sup> arose on a petition, filed on behalf of the British sloop, praying the High Court of Admiralty to determine, pursuant to an act of Parliament of 1850, that certain of the persons captured were pirates, and to ascertain the number thereof so that the usual application for bounty might be made. The court held that the captured insurrectos were pirates within the meaning of the statute.

Dr. Lushington said:

“Now, how am I to determine who are pirates, except by the acts that they have committed? I apprehend that, in the administration of our criminal law, generally speaking, all persons are held to be pirates who are found guilty of piratical acts; and piratical acts are robbery and murder upon the high seas. I do not believe that, even where human life was at stake, our Courts of Common Law ever thought it necessary to extend their inquiries further, if it was clearly proved against the accused that they had committed robbery and murder upon the high seas. In that case they were adjudged to be pirates, and suffered accordingly. Whatever may have been the definition in some of the books . . . it was never, so far as I am able to find, deemed necessary to inquire whether parties so convicted of these crimes had in-

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<sup>78</sup> 2 How. (U. S.) at 232.

<sup>79</sup> 1 Spink, 81 (1853).



tended to rob on the high seas, or to murder on the high seas indiscriminately.”<sup>80</sup>

While the suggestion that pirates must intend to rob or murder indiscriminately cannot be accepted, as Mr. Justice Story, Dr. Lushington, and others have amply demonstrated, it need not follow that every robbery or murder upon the seas is internationally piratical. It is evident that some of our definitions, taken literally, are much too broad. There may be robberies or murders upon the seas which are not appropriate subjects of an international jurisdiction. The distinction may be made with difficulty in some cases. But the difficulty should not be insuperable if it is remembered that piracy *jure gentium*, while it involves grievous wrong to individual rights of person or property and a grave offence against the state most immediately concerned, is primarily and above all an offence against the security of trade or travel upon the international highways of the sea.<sup>81</sup>

The distinction may be made clearer by illustration. If a passenger should be killed during a piratical attack upon a ship at sea, the offence might well be regarded as piratical murder within the jurisdiction of any maritime state. But if one passenger, a national of State A, should kill another passenger, a national of State B, on board a ship of State C, it would seem clear that the offence ought not to be regarded as piratical *jure gentium* and that jurisdiction could properly be taken only by State A or State C. Similarly, if one passenger should rob another passenger on a ship of State C on the high seas, while the offence might conceivably be regarded as piracy *jure gentium* within the definitions commonly approved by English

<sup>80</sup> 1 Spink at 83. See 1 HYDE, *op. cit.*, § 232.

<sup>81</sup> Oppenheim defines piracy *jure gentium* as “every unauthorized act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by the mutinous crew or passengers against their own vessel.” 1 OPPENHEIM, *op. cit.*, § 272. For further definitions and discussion from an international viewpoint, see Gebert, “Die Völkerrechtliche Denationalisierung der Piraterie,” 26 ZEITSCHRIFT FÜR INTERNATIONALES RECHT, 8 *et seq.*; 1 ORTOLAN, DIPLOMATIE DE LA MER, 4 ed., 207 *et seq.*; PERELS, SEERECHT, §§ 16 *et seq.*; 5 PRADIER-FODÉRÉ, TRAITÉ DE DROIT INTERNATIONAL PUBLIC, §§ 2491 *et seq.*; STIEL, DER TATBESTAND DER PIRATERIE NACH GELTENDEM VÖLKERRECHT, *passim*.

and American courts, it would seem more appropriate to regard it as a case of ordinary robbery and leave jurisdiction either to State C or to the state of the offender's allegiance. Moreover, if definitions approved by English and American courts be construed with due regard to the facts presented in the cases in which the definitions were laid down, there need be no difficulty in arriving at this obviously sensible result. The jurisdiction universal may be reserved for those offenders whose hostile attacks upon ships either from without or from within constitute a menace, not only to the interests of a single state, but also to the interest which all maritime states have in the security of shipping upon the highways of the sea.

Whether hostility be particular or universal, therefore, whether the enterprise be undertaken under national ensign, the pirate flag, or no flag at all, those who attack ships upon the high seas without justification or authority to take or destroy property by force or fear or wantonly to arrest or kill may be deemed pirates by the law of nations and by the law of the United States. The "hi-jackers," for example, are no less pirates than the pirates of old. As Mr. Justice Story would have said, they are "emphatically *hostes humani generis*."<sup>82</sup>

## VI

By way of summary, then, it may be said that piracy by the law of nations was punished in England, first at common law, later in admiralty, and still later in special tribunals constituted by royal commission. It was conceived as comprehending characteristically acts of robbery and occasionally other acts of unauthorized violence perpetrated upon the seas. And it was regarded as uniquely the subject of a jurisdiction universal.

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<sup>82</sup> There are substantial reasons why "hi-jackers" and their like should be regarded as pirates. Depredations along the routes of commerce are a menace to all maritime nations. Though first directed against particular individuals or classes of individuals, there is always likelihood that violence will breed violence and that presently the depredators may become less discriminating. In this respect there is a moral in the experience of an earlier day when privateersmen commissioned to make captures of the enemy so often turned pirate and plundered the ships of friendly countries.

This was America's heritage from the laws of England. In America, with the adoption of the Federal Constitution, the enactment of some extraordinarily confusing federal legislation, and the crystallization of the principle that federal criminal jurisdiction is entirely statutory, there was initiated a period in the development of the law of piracy which was curiously fruitless and unsatisfactory. Eventually the whole question was simplified and clarified by the adoption, through legislation—and by the preservation, through an accident of revision—of the principle that piracy by the law of nations is an offence punishable in the federal courts. In this wise the English heritage was eventually restored to its pristine significance.

The pirates infesting English seas in the middle ages were not uniquely picturesque. For the most part they appear to have been ordinary robbers who preferred the sea because of the lack thereon of adequate protection for merchants and their fleets. At a later day, piratical exploits came to be associated with buccaneers who sometimes donned turban, sash, and cutlass, under the skull and crossbones. There has been a good deal of unwarranted romanticism about freebooters of this type, although some of them, no doubt, were real pirates picturesque. However that may be, it was neither garb nor emblem that provoked the law's penalties. Misdeeds were the law's concern. Then as now the law was concerned that ships should be secure from depredation and violence upon the highways of the sea.

Probably it was the association of pirates picturesque with the crime of piracy which inspired the notion that a pirate *jure gentium* is one who declares war on all mankind. Repetition of a metaphorical invective may have helped to make the idea plausible. The peculiar development of the early cases arising under Section 8 of the Act of 1790 probably contributed a specious authority in support of the notion in the United States. So far as the present writer has been able to ascertain, it is nothing more than a notion without support in reason or authority.

The writer began this essay with an inquiry as to the applicability of the law of piracy to "hi-jacking" at sea, yet the interest in "hi-jacking" has been incidental. It is of importance, no doubt, to be able to conclude with a measure of con-

fidence that such "hi-jackers" are pirates, but it is more important to emphasize generally the vitality of the law of piracy. While the occasions for invoking its rules are less frequent now than formerly, it may still be made a potent factor in preventing lawlessness upon the seas. It belongs emphatically to the law in reserve rather than to the law in history.

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